NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

DAVID FERRARO and JOHN SEDOR, (by and through his Attorney-In-Fact, Doug Tanchak), individually and derivatively on behalf of JLJ&J PROFESSIONAL SERVICES, LLC and JLJ&J MANAGEMENT, LLC, D. FERRARO CONTRACTING LLC, and FERRARO SEAMLESS GUTTERS,

Plaintiffs,

v.

ALFRED V. FERRARO, PATRICIA FERRARO, KEVIN CURRAN, JOHN AND JANE DOES 1-10; and XYZ ENTITIES 1-10,

Defendants

-and-

JLJ&J PROFESSIONAL SERVICES, LLC and JLJ&J MANAGEMENT, LLC,

Nominal Defendants.

PATRICIA FERRARO AND ALFRED FERRARO,

Defendants/Counterclaimants,

v.

JOHN SEDOR, DAVID FERRARO and KEVIN CURRAN, IRENE TANCHAK on Behalf of the ESTATE OF WAY TANCHAK, TANCHAK CONSTRUCTION CORPORATION, ABC CORP.,

Counterclaim Defendants

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : MORRIS COUNTY

DOCKET NO. MRS-L-2592-19

CIVIL ACTION – CBLP

OPINION

Argued: August 12, 2022

Decided: August 12, 2022

Kathryn Schwartzstein, Esq. of Smith+Schwartzstein LLC, attorneys for defendants/counterclaimants, Alfred V. Ferraro and Patricia Ferraro.

Kevin Curran, Esq., *pro se* defendant/counterclaim defendant.

I. BACKGROUND INFORMATION

This matter comes before the Court by application of Kathryn Schwartzstein, Esq. on behalf of defendants/counterclaimants Alfred and Patricia Ferraro ("Majority Members") on a motion for summary judgment. Opposition and a cross-motion for summary judgment and for party substitution has been submitted by defendant Kevin Curran, Esq., *pro se*.[1]

Majority Members formed JLJ&J Management & Consulting LLC in 2007 with the purpose of opening a day care facility. JLJ&J Management & Consulting LLC entered into an agreement with the franchise Kids R. Kids International Inc. ("KRK") in 2007 to become a franchisee. Majority Members were unable to begin construction on the day care center for several years due to issues, including lack of funds. JLJ&J Management & Consulting LLC was later dissolved, and the Majority Members created JLJ&J Management LLC in 2014 and JLJ& Professional Services, LLC in 2015 (collectively, "the LLCs") to oversee the day care center project. Majority Members allege that they made capital contributions which totaled $335,744 which does not include short term loans or personal loans made by Patricia Ferraro.

Wayne Tanchak, owner of Tanchak Construction Corporation ("TCC"), contacted Majority Members in 2010 through a realtor to collaborate on funding and developing the Property located at 217 Changebridge Road, Montville, New Jersey ("the Property"). In 2015, Tanchak told

[1] Kevin Curran, John Sedor, and David Ferraro are referred to throughout as "Minority Members."

Majority Members that John Sedor, his uncle, was interested in investing $250,000 into the LLCs for the construction of the day care center. Sedor's financial condition and proof of assets were added to the mortgage application to the bank for the mortgage on the Property.

Majority Members contend that the seller of the Property, Nazim Hassam, was required to sign a subordination agreement to the first mortgage in the form of a second mortgage in the amount of $978,000 with a term of twenty-five years. In the first quarter of 2015 Yadkin Bank issued a commitment supplying the required funds to acquire and develop the Property. Tanchak, through TCC, also supplied the proposed cost of development for the Property. TCC's total initial cost of construction was estimated to be $2,511,000, which Majority Members contend is inaccurate. Majority Members further contend that they relied on the inaccurate estimate of TCC to draft their business plans and make the necessary financial arrangements, to their detriment and the detriment of the LLCs.

Tanchak acted as Sedor's attorney-in-fact to represent his interest in the LLCs. Sedor agreed to 13.08% equity in each of the LLCs for an initial capital contribution of $250,000. David Ferraro ("David") was given a 20% membership interest as well as his sweat equity in overseeing the project as superintendent, though he never paid anything towards this capital contribution.

At some point over the course of construction, Tanchak purchased the second mortgage from Hassam. The Majority Members allege that thereafter, Tanchak took $73,500 of Sedor's initial capital contribution of $250,000 for himself. They further allege that they required Tanchak to obtain a signed notarized loan agreement between himself and Sedor to evidence that Sedor was aware of the transaction. As a result of the reduction in Sedor's planned capital contribution of $250,000 to $176,500, revised purchase agreements were signed among the parties in 2016 reducing Sedor's equity in each LLC to 10.59% from the initially proposed 13.08%. As of 2016,

the Majority Members had 69.41% membership interest, David had a 20% interest, and Sedor had a 10.59% interest.

Tanchak eventually advised the Majority Members that he could no longer act as general contractor on the day care center construction. Majority Members allege that they hired RJS Construction Corp. ("RJS") thereafter. They contend that their SBA loan closed on March 18, 2016 and the first disbursement was made on March 23, 2016. Majority Members allege that as soon as work began by the subcontractors on the Property, Tanchak became habitually absent from the job site despite being retained as a project manager for the Property and being paid $10,000 per month. Majority Members allege that in the fall of 2016 RJS advised them that the cost of the project was getting out of control and that it was apparent that Tanchak and TCC never intended to fulfil their contractual obligations. Majority Members contend that Tanchak and TCC failed to comply with contract terms, which ultimately led to their termination on December 28, 2016.

Majority Members allege that pursuant to his sweat equity obligation, David was supposed to assist with construction to ensure it was being done properly in his capacity as superintendent. However, he demanded payment for his role as superintendent. In total, David was paid approximately $160,000 and Tanchak was paid approximately $100,000.

There was a shortage of funds to construct the day care center, and construction stalled in February 2017 through the Summer of 2017, during which time no work was done to construct the day care center. Invoices for RJS and its subcontractors were delinquent, causing RJS to threaten to withdraw from the construction project. On August 7, 2017, Kevin Curran agreed to make a capital contribution in exchange for 10% equity in the LLCs equally. Majority Members held 63.53% interest, David held 15.88% interest, Sedor held 10.59% interest, and Curran held 10% interest. Thereafter, Curran filed an order to show cause on October 17, 2017 on behalf of the

LLCs alleging breach of the loan agreements between the LLCs and Hassam. The order to show cause was denied. Curran refiled an order to show cause on November 15, 2017.

Ultimately, the LLCs settled. Majority Members agreed to give Curran additional equity in compensation for his attorneys' fees and the mortgage payments he made. After a successful loan modification in January of 2018, Majority Members completed construction, opened, and fulfilled their managerial roles for the day care center. Patricia Ferraro was contributing additional funds, interest free, without gaining additional equity. Majority Members contend that none of the Minority Members have made any contribution to the day-to-day operations of the day care center since it opened. During 2019, the day care center was in arrears with real estate taxes and the franchise fees.

Sedor filed his complaint on December 9, 2019, David filed his complaint on February 5, 2020, and Curran filed his crossclaim on April 21, 2020. On December 10, 2019, by way of order to show cause, the Court ordered Majority Members to provide documentation, which they provided. These documents included bank statements, mortgage statements, tax documents, tuition statements, enrollment information, receipts, franchise agreements, and loan applications. Majority Members produced an expert report detailing their capital contributions, expenses and debts of the LLC, and a break even analysis. They contend that Minority Members have not produced an expert or any evidence to refute their expert report. They further submit that since this original matter was filed in December 2019, all the franchise fees that were in arrears in the amount of approximately $88,054.14 were reduced to $75,000 and were paid on January 31, 2022 and therefore, there are no franchise fees in arrears.

Sedor passed away on November 20, 2021. After Sedor passed away, his counsel was relieved. Majority Members contend that since then, no other counsel has entered an appearance

on behalf of Sedor's estate. In addition, Sedor's estate never entered an appearance in this matter. They further contend that Sedor's estate failed to comply with the Court's January 8, 2021 order, and it failed to comply with the Court's May 18, 2021 order requiring Doug Tanchak, the executor of Sedor's estate, to file a letter about the status of the case. Majority Members further contend that the estate has not attempted to otherwise litigate this case in any way.

Majority Members originally moved for summary judgment on all Minority Members' claims, including those of David. They have since withdrawn their motion for summary judgment as it relates to David's claims. The Court addresses the remaining claims below.

II. STANDARD OF REVIEW

Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). The trial court's "function is not . . . to weigh the evidence and determine the truth . . . but to determine whether there is a genuine issue for trial." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. at 520 (1995) (*quoting* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). The trial judge must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. When the facts present "a single, unavoidable resolution" and the evidence "is so one-sided that one party must prevail as a matter of law," then a trial court should grant summary judgment. Id.

III. ANALYSIS

A. Sedor's Claims

Majority Members argue that their motion must be granted as to all claims by Sedor, as his estate is not represented and has abandoned his case, and therefore his membership interest must be disassociated from the companies with his voting rights dissolved, leaving the Majority Members with four votes and David with one. Majority Members argue that Sedor's claims must be dismissed for lack of prosecution and because the Sedor Estate is not represented by counsel and has abandoned Sedor's case. They submit that the Sedor Estate failed to comply with the Court's January 8, 2021 order, and it failed to comply with the Court's May 18, 2021 order requiring Doug Tanchak to file a letter about the status of the Sedor Estate. Majority Members argue that since Doug Tanchak cannot represent the estate pro se, it is unrepresented, and dismissal is appropriate for that reason alone. In addition, they contend that the Sedor Estate has not attempted to otherwise litigate the case in any event. Majority Members submit that although Doug Tanchak has occasionally responded to emails concerning deposition dates and times, he has in no other way attempted to prosecute this matter, or presented any extenuating circumstances precluding the estate from retaining an attorney. Majority Members argue that given the substantial time that has elapsed in this matter (17 months), and the lack of prosecution by the estate, summary judgment should be granted in their favor and default entered against Sedor's estate dismissing all his claims with prejudice.

Curran brings a motion for party substitution under R. 4:43-1(b), or alternatively seeks a declaration that Sedor's estate is not an indispensable party under R. 4:28-1. Curran contends that the Court's January 8, 2021 order permitted the substitution of the Estate of John Sedor for Sedor, individually, pursuant to R. 4:34-1(b) within thirty days after the appointment of an executor.

Curran submits that Doug Tanchak has since been appointed executor, more than thirty days ago. Curran contends that Doug Tanchak has indicated that the estate lacks money to retain counsel and that he does not plan to substitute the estate as a party, choosing instead not to continue participating in the litigation. Curran further contends that much of Sedor's complaint overlaps with the claims of David and Curran against Majority Members, rendering the estate less than indispensable in pursuing the associated relief. Curran also alleges that the contractual interpretations of the operating agreements that Sedor originally claimed substantially overlap the contractual interpretations pursued by David and/or Curran, and therefore, the areas of non-overlap have become moot upon Sedor's death and Sedor's resulting dissociation pursuant to statute. Curran submits that the question is whether the estate is an indispensable party under R. 4:28-1 for purposes of said contractual interpretation. Curran submits that if the Court agrees that the estate is not an indispensable party under R. 4:28-1, the Court is requested to declare the estate not to be an indispensable party, but rather, a non-indispensable party not needing to be substituted under the analysis applicable to joinder of a party under R. 4:28-1. Curran further submits that in the alternative, if the Court determines the estate is an indispensable party, the Court is requested to order the substitution of the estate for Sedor as a party under R. 4:34-1(b).

In their opposition to Curran's motions, Majority Members argue that Sedor's estate is not an indispensable party and should not be joined in this matter. They allege that Sedor's estate has not entered an appearance or petitioned the Court to be joined to this matter, or filed opposition to Majority Members' motion for summary judgment. They further allege that the relief sought in their motion does not negatively impact Curran, the only other party to file a motion or opposition in this matter, nor does it make the estate an essential party. Majority Members argue that all of the matters regarding contractual interpretation of the operating agreements can be decided by the

Court without any input from the estate. They submit that Sedor died and his estate has abandoned the case, and as such his claims should be dismissed. Majority Members further argue that the absence of an indispensable party does not deprive the court of jurisdiction to adjudicate the issues among those who were joined, and the abandonment of the case is a separate and distinct issue from a party being deemed indispensable.

Rule 1:13-7 provides:

> Whenever an action has been pending for four months or, if a general equity action, for two months, without a required proceeding having been taken therein as hereafter defined in subsection (b), the court shall issue written notice to the plaintiff advising that the action as to any or all defendants will be dismissed without prejudice 60 days following the date of the notice or 30 days thereafter in general equity cases unless, within said period, action specified in subsection (c) is taken. If no such action is taken, the court shall enter an order of dismissal without prejudice as to any named defendant and shall furnish the plaintiff with a copy thereof.

R. 1:13-7.

More than two months have passed since the Court ordered Doug Tanchak to file letters regarding the status of the case. Moreover, Doug Tanchak has failed to attempt to prosecute this matter on behalf of the estate in any way. Tellingly, the Sedor Estate has never entered an appearance in this matter or substituted for Sedor in these proceedings. Accordingly, the Court finds that Sedor and the Sedor Estate have abandoned their claims and Majority Members' motion for summary judgment as to all Sedor's claims is granted.

B. Sedor's Shares

Majority Members next argue that Sedor's death rendered him a disassociated member and dissolved his voting shares. They contend that since the operating agreements among the members do not have any language that specifically addresses membership interest in the event of death, the membership interest must be treated according to N.J.S.A. 42:2B-1. Majority Members contend

that Sedor's voting rights cease to exist, leaving them with four votes and David with one. They submit that per the operating agreement, Patricia Ferraro has two votes, Alfred Ferraro has two votes, and David has one vote. They allege that Curran does not have the right to vote, and as such, they request that the Court find as a matter of law that Sedor is disassociated, his voting rights are gone, and that the current voting rights are the Majority Members four and David one.

Since the operating agreements are silent on membership interest in the event of death, the NJ RULLCA controls. N.J.S.A. 42:2C-46(f) states that a person is dissociated as a member from a limited liability company when the person dies. N.J.S.A. 42:2C-46(f). Thus, upon Sedor's death, he became dissociated. N.J.S.A. 42:2C-47(a)(1) provides that when a person is dissociated as a member of a limited liability company, the person's rights to participate as a member in the management and conduct of the company's activities, including any voting rights, terminates. N.J.S.A. 42:2C-47(a)(1). Therefore, upon Sedor's death, his voting rights terminated, thereby ceasing to exist. The operating agreements did not provide for transfer of voting rights in any manner upon dissociation.

The operating agreement for JLJ&J Management LLC provides as follows:

> Only the following persons or entitles may be Members: a) Alfred v. Ferraro Founder and initial Managing Member, his successor or assigns, Patricia A. Ferraro, Founder and initial Managing Member her successor or assigns, David P. Ferraro, Member his successor or assigns and John Sedor, Member his successor or assigns.

Exhibit 5, Section 3.1 General. The agreement further provides:

> All Members of the Company shall have the right to vote on any matter which, pursuant to the Act or this Agreement, Members are entitled to vote. Each Member will have ONE (1) vote. Each Founder will have an additional one (1) vote. TWO (2) additional votes will be added for all major financial decisions to be made. These people or positions will be held by third parties i.e. an accountant and financial professional such as a banker. Majority vote will prevail in all situations.

Exhibit 5, Section 3.2 Voting Right. The operating agreement for JLJ&J Professional Services, LLC provides:

> All members of the Company shall have the right to vote on any matter which, pursuant to the Act or this Agreement, Members are entitled to vote. Each Member will have ONE (1) vote. Each Founder will have an additional vote. TWO (2) additional votes will be added for all major financial decisions to be made. These people or positions will be held by third parties i.e. an accountant and financial professional such as a banker. Majority vote will prevail in all situations. (Major financial decisions occur when a single purchase is $5,000 or more or the transaction involves installments totaling more than $5,000.)
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> * * *
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> No member may sell equity to more than ONE (1) person or entity. Furthermore, if a founder decides to sell, their extra "Founder" voting rights go to the surviving initial members, ½ of the votes to David P Ferraro and ½ of the votes to John Sedor.

Exhibit 5, Section 3.2 Voting Right.

Curran purchased shares in JLJ&J Management LLC from Alfred Ferraro and Patricia Ferraro. Curran purchased shares from JLJ&J Professional Services, LLC from David. *See* Exhibits 17, 20. Therefore, Curran is a member of both LLCs and entitled to one vote in each. Moreover, pursuant to the terms of JLJ&J Management LLC, since David and Majority Members are all founders, they are each entitled to two votes, allocating the voting rights for JLJ&J Management LLC as follows: Alfred Ferraro: two, Patricia Ferraro: two, David Ferraro: two, Kevin Curran: one. Further, pursuant to the terms of the JLJ&J Professional Services, LLC agreement, upon David's sale of part of his share to Curran, his extra "Founder" voting rights would go to Sedor. As previously established, Sedor's death rendered him dissociated, and his voting rights terminated. Accordingly, the voting rights for JLJ&J Professional Services, LLC are as follows: Alfred Ferraro: two, Patricia Ferraro: two, David Ferraro: one, Kevin Curran: one. The Court, therefore, declines to establish the voting rights as Majority Members two, David one, as requested by Majority Members.

C. Curran's Claims

In opposing Majority Members' motion for summary judgment, Curran argues that his response to Majority Members' statement of material facts deconstructs and dissembles the factual contentions and purported evidence on which they rely. Curran submits that Majority Members' factual contentions and legal theories are speculative and disputed, and cannot support any summary judgment in favor of them. He argues that Majority Members' motion should be denied.

i. Fraud

Majority Members argue that all Curran's fraud claims must be dismissed because he cannot prove fraud as a matter of law. They contend that there is no evidence of fraud or that Curran has suffered any harm or damage. They further contend that Curran cannot successfully allege any misrepresentation of a present or past fact, nor can he allege any damages resulting therefrom. Majority Members argue that the fraud claims necessarily rely on allegations of financial malfeasance by the Majority Members, but they have provided a detailed forensic expert accountant report prepared by Wiss & Company, LLP. Majority Members submit that extensive discovery has taken place in this matter for approximately two and a half years, and the Curran has not produced any expert reports, or any other evidence, to refute the Wiss report from which disproved both elements of the minority member's claims. Majority Members allege that the Wiss report provided a detailed forensic accounting of the companies and specifically found no malfeasance of any kind. They further argue that even without the Wiss report, there is still no evidence of fraud.

A plaintiff asserting a claim for fraud or misrepresentation must demonstrate: (1) a material misrepresentation by the defendant of a presently existing fact or past fact, (2) knowledge or belief

by the defendant of its falsity, (3) an intent that the plaintiff rely on the statement, (4) reasonable reliance by the plaintiff, and (5) resulting damages to the plaintiff. Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 175 (2006). Fraud is not presumed and must be proven through clear and convincing evidence. Stochastic Decisions, Inc. v. DiDomenico, 236 N.J. Super. 388, 395 (App. Div. 1989). Fraud based on concealment of information may be actionable if the defendant was under a duty to disclose the information withheld. United Jersey Bank v. Kensey, 306 N.J. Super. 540, 551 (App. Div. 1997). Fraud of course is never presumed; it must be clearly and convincingly proven.

Albright v. Burns, 206 N.J. Super. 625, 636 (Super. Ct. App. Div. 1986)

R. 4:5-8(a) requires that plaintiffs, when pleading fraud or misrepresentation, plead with particularity. If a fraud pleading does not include the required specificity, the pleader is ordinarily afforded an opportunity to amend the complaint in lieu of dismissal. *See* Rebish v. Great Gorge, 224 N.J. Super. 619 (App. Div. 1988). While the complaint is searched in depth and with great liberality a pleading cannot be devoid of the essential elements of the cause of action. Id. at 627.

With respect to fraud, the complaints allege that the Majority Members made false and fraudulent representations to Minority Members with the intent to defraud and deceive Minority Members and with the intent to induce them to act in a manner alleged and/or refrain from acting in a manner alleged. They further allege that at the time Majority Members made the promises, they had no intention of performing or honoring them. The complaints allege that Majority Members omitted that they were making certain sham payments to their children, missing mortgage payments and other obligations, and otherwise using the LLCs' funds personally. The complaints further allege that Minority Members reasonably relied on these promises and have been damaged as a result. Majority Members provided a Forensic Accounting Analysis Letter (the Wiss report) regarding monies contributed and disbursed from the LLCs either directly or

indirectly. The letter was based on financial data including accounting records, bank statements, cancelled checks, deposit slips, operating agreements, payroll reports and more. The Wiss report concluded that the advances and repayments to members, capital contributions, management fees to members, payroll to related parties, reimbursements to members and liabilities to members were correctly stated. *See* Exhibit 25. While Curran makes arguments based on speculation and assumptions, he does not point to any evidence supporting the alleged fraud claims. Accordingly, Majority Members' motion for summary judgment as to Curran's fraud claims is granted.

ii. Breach of Fiduciary Duty

Next, Majority Members argue that Curran cannot prove any breach of fiduciary duty by the Majority Members, as there is no genuine issue of material fact that the Majority Members have successfully upheld their fiduciary duties by managing the company during Covid and providing accurate financial accounting, such that summary judgment is warranted. They contend that when all their actions are viewed as a whole, there is no genuine issue of material fact that they have acted in the best interest of the companies at all times. Majority Members contend that to date, they have paid off many of the accounts payable from the construction project, paid off the franchise fees that were in arrears, brought student enrollment up to the most they can accommodate in the building at this time, returned to pre-pandemic highs, and are on a positive business trajectory. Majority Members argue that they are therefore entitled to summary judgment regarding breach of fiduciary duty.

"The essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position." McKelvey v. Pierce, 173 N.J. 26, 57 (2002). "A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matter within the scope of their relationship." Id. The

fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care. F.G. v. MacDonell, 150 N.J. 550 (1997).

Traditional fiduciary relationships include those between trustee and beneficiary, insurer and insured, guardian and ward, agent and principal, attorney and client, corporate director and shareholder, and the members of a partnership. Pickett v. Lloyd's (A Syndicate of Underwriting Members), 131 N.J. 457, 467 (1993). R. 4:5-8(a) requires allegations of misrepresentation and breach of trust to be pleaded with particulars of the wrong, with dates and items if necessary. However, malice, intent, knowledge, and other conditions of the mind may be alleged generally. R. 4:5-8(a).

The complaints allege that Majority Members owed a fiduciary duty to all of the members of the LLCs by virtue of their relationship of managers of the companies. They further allege that the intentional actions and grossly negligent and wasteful conduct on the part of Majority Members constitute a breach of their duties of care and loyalty, and that these actions justify the award of punitive damages. Majority Members have refuted these allegations by evidencing that they have paid off many of the accounts payable from the construction project, paid off the franchise fees that were in arrears, brought student enrollment up to the most they can accommodate in the building at this time, returned to pre-pandemic highs, and are on a positive business trajectory. These contentions are supported by the Wiss report. Further, Curran has not submitted any evidence to refute Majority Members' arguments. Accordingly, Majority Members' motion for summary judgment as to Curran's breach of fiduciary duty claim is granted.

iii. Breach of Contract

The Majority Members further argue that Curran cannot prove that Majority Members breached the operating agreement, or that they suffered any harm as a result of the alleged breach. Majority Members submit that the only alleged breaches of the operating agreements relate to making financial decisions above the threshold amount of $5,000. They argue that even assuming such approval was required the Court may overlook such minor infractions and view the overall decisions and actions of Majority Members in light of the business judgment rule. Further, Majority Members argue that on certain decisions crucial to the business, including the retention of PPP funds, they were forced to act without the vote of the other members. Majority Members contend that Curran can cite to no injury to them or the companies that resulted from the financial decisions of Majority Members.

To establish a breach of contract claim, a plaintiff has the burden to demonstrate that: 1) the parties entered into a valid contract; 2) the defendant failed to perform his obligations under the contract; 3) that the plaintiff sustained damages as a result. Murphy v. Implicito, 392 N.J. Super. 245, 265 (App. Div. 2007).

"The interpretation of a contract is ordinarily a legal question for the court and may be decided on summary judgment unless 'there is uncertainty, ambiguity or the need for parol evidence in aid of interpretation . . . .'" Celanese Ltd. v. Essex Cty. Imp. Auth., 404 N.J. Super. 514, 528 (App. Div. 2009) (quoting Great Atl. & Pac. Tea Co. v. Checchio, 335 N.J. Super. 495, 502 (App. Div. 2000)); *see also* Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 92 (App. Div. 2001) (The interpretation of the terms of a contract are decided by the court as a matter of law unless the meaning is both unclear and dependent on conflicting testimony). If "the terms . . . are clear and unambiguous, there is no room for construction and the court must enforce those

terms as written." Watson v. City of E. Orange, 175 N.J. 442, 447 (2003); *accord* Impink ex rel. Baldi v. Reynes, 396 N.J. Super. 553, 560 (App. Div. 2007). "Consistent with established case law, [the court] cannot make for sellers a better or more sensible contract than the one they made for themselves." Kotkin v. Aronson, 175 N.J. 453, 455 (2003)(holding that the seller did not qualify for the radon clause and that the presence of radon gas was an insufficient basis to cancel the contract).

Regarding breach of contract, the complaints allege that while Majority Members were entrusted with money and Property giving rise to a duty to account, they failed to maintain books and records and to allow Minority Members access to the books and records as permitted by the operating agreements. They further allege that Majority Members breached the operating agreements by precluding Minority Members from participating in management of the companies, failing to acknowledge the transfer of their founders' votes, failing to provide Sedor with notice of the decision to sell equity, and hiring their son. The complaint does not identify any damages that were sustained by Curran as a result of Majority Members' alleged actions. Further, at the summary judgment stage, Curran has failed to provide any evidence of damages suffered by him as a result of an alleged breach of contract. This is Curran's opportunity to lay the proofs bare and he has failed to provide any evidence refuting Majority Members' arguments. Curran further alleges that pursuant to the operating agreements, Majority Members were obligated to hold annual in-person member meetings, and specifically vote on major financial decisions. He alleges that their failure to do so constituted breach of the operating agreements. Majority Members contend there were frequent meetings during the course of construction, and that Majority Members either held or attempted to hold telephonic member meetings on numerous occasions. Further, they allege that Curran misrepresents the terms of the operating agreements with regards to meeting

requirements, and that regardless, Curran fails to present evidence that any of the alleged actions of Majority Members in this respect were severe enough to rise to the level needed to hold them liable. The Court finds that Majority Members' failure to hold in-person meetings did not violate the operating agreements. Section 3.5 of the operating agreements specifically allows for meetings by conference telephone or similar communications equipment. Exhibit 5.

The Court further notes that at oral argument, Curran referenced a dispute over whether the percentage of tax that should be used for equity ownership is that in the statutory definition as evidence of breach of the operating agreement by Majority Members. The Court finds that this is not evidence of fraud or breach of contract, but merely a disagreement between the parties as to the proper method for tax filings. The Majority Members retained Wiss to review past tax filings and to complete future tax filings on behalf of the LLCs. There was no information presented to the contrary indicating that Wiss or any of the taxing agencies found any problems with prior tax filings.

Additionally, the Court notes that Curran alleges a breach of the JLJ&J Professional Services, LLC agreement at Section 3.2 dealing with voting rights and major financial decisions, alleging that Majority Members collectively have made many major financial decisions since November 6, 2019, without any required votes in accordance with the operating agreements. The Court finds that while Curran's allegations would amount to a technical violation of the agreement, he has failed to establish any damages that occurred as a result of that violation. Accordingly, Majority Members' motion for summary judgment as to Curran's breach of contract claim is granted.

iv. Breach of Duty of Good Faith and Fair Dealing

Next, Majority Members argue that Curran's count for breach of the implied covenant of good faith and fair dealing must be dismissed as there are no genuine issues of material fact that Majority Members acted in good faith. They contend that Curran has provided no documentary evidence, expert reports, or testimony which provides bad motive on the part of Majority Members. Majority Members argue that since Curran has provided no evidence of bad faith or motive, nor has he provided any proof of harm, his claim for a breach of the implied covenant of good faith and fair dealing should be dismissed with prejudice.

A breach of covenant of good faith and fair dealing may be found "even though the conduct failed to violate any of the express terms of the contract agreed to by the parties." Sons of Thunder v. Borden, Inc., 148 N.J. 396, 423 (1997). Accordingly, a party "may breach the implied covenant of good faith and fair dealing in performing its obligations," even when complying with the contract's agreed upon terms. Id. at 422. However, this implied covenant cannot supersede a contract's express terms. Id. at 419; Wade v. Kessler Inst., 172 N.J. 327, 341 (2002). Under New Jersey law, the covenant of good faith and fair dealing is "applied in three general ways." Seidenberg v. Summit Bank, 348 N.J. Super. 243, 257 (App. Div. 2002).

> First, the covenant permits the inclusion of terms and conditions which have not been expressly set forth in the written contract . . . Second, the covenant has been utilized to allow redress for the bad faith performance of an agreement even when the defendant has not breached any express term . . . And third, the covenant has been held, in more recent cases, to permit inquiry into a party's exercise of discretion expressly granted by a contract's terms.

Id.

The complaints allege that Majority Members have manipulated the finances of the LLCs so that they could circumvent the LLCs' obligation to pay Sedor profits, and that as a result,

Minority Members have suffered monetary damages. The Court finds that based on the findings of the Wiss report and the actions by Majority Members, and the lack of any proofs from Curran, no reasonable jury could conclude that Majority Members acted in bad faith. Accordingly, Majority Members' motion for summary judgment as to Curran's breach of the duty of good faith and fair dealing claim is granted.

v. Unjust Enrichment

Majority Members argue that there is no genuine issue of material fact that Majority Members have not been unjustly enriched such that the Curran's unjust enrichment claim must be dismissed. They contend that Curran cannot show that the Majority Members have received a benefit. Majority Members allege that they have put sweat equity and additional money into the LLCs, to their detriment. Majority Members further allege that Patricia Ferraro has made loans to the LLCs interest free and contributed her own money to finish construction, and that the payments that the Minority Members categorize as disbursements are not in fact disbursements, but repayments of the short-term loans or payments of the reduced management salary to which the Majority Members are entitled per the operating agreement. Majority Members contend that they have acted in conformance with the operating agreements and have only paid themselves half of the management salaries to which they are entitled because the day care center has not yet reached profitability. Majority Members submit that regardless, Curran cannot demonstrate that the Majority Members obtained any undue benefit sufficient for an allegation of unjust enrichment purely based on the fact that Curran challenge the Wiss report. The Wiss report allegedly found that Majority Members have not been unjustly enriched as any payments made to them have been accounted for or contractually permitted under the operating agreement.

Unjust enrichment is based on the equitable principle that "a person shall not be allowed to enrich himself unjustly at the expense of another." Goldsmith v. Camden Cnty. Surrogate's Office, 408 N.J. Super. 376, 382 (App. Div. 2009). "The unjust enrichment doctrine requires that plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights." VRG Corp. v. GKN Realty Corp., 135 N.J. 539 (1994). To establish unjust enrichment, "... in addition to the expectation of a plaintiff for payment of services rendered from a defendant, the counterpart of the rule requires that there must be an objective expectation by defendant to pay plaintiff." Insulation Contracting & Supply v. Kravco, Inc., 209 N.J. Super. 367, 377 (App. Div. 1986). As stated in Avery v. Sielcken-Schwarz, 5 N.J. Super. 195, 200 (App. Div. 1949), "[a] defendant is obliged to pay for services rendered to him by the plaintiff if the circumstances are such that plaintiff reasonably expected defendant to compensate him and if a reasonable man, in the defendant's position, would know that the plaintiff was doing the work in confidence that defendant would pay him. The absence of these factors brings an opposite result".

The complaints allege that Majority Members were unjustly enriched by the benefits they received and that this injured Minority Members. Based on the Wiss report and Majority Members' contentions that they have contributed additional sweat equity to the LLCs, made interest-free loans, and acted in accordance with the operating agreements, and Curran's failure to submit evidence to refute these contentions, the Court finds that there is no genuine issue of material fact as to whether Majority Members were unjustly enriched. Accordingly, Majority Members' motion for summary judgment as to Curran's for unjust enrichment is granted.

vi. Conversion

Majority Members argue that Curran's conversion claim must be dismissed. They contend that Curran cannot point to any converted funds, and that the Wiss report specifically found that no such conversion took place.

"Conversion [is] defined as 'an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.'" LaPlace v. Briere, 404 N.J. Super. 585, 595 (App. Div.) (quoting Barco Auto Leasing Corp. v. Holt, 228 N.J. Super. 77, 83 (App. Div. 1988)), certif. denied 199 N.J. 133 (2009). "Conversion is an intentional tort in that the defendant must have intended to exercise a dominion or control over the goods which is in fact inconsistent with the plaintiff's rights." LaPlace, 404 N.J. Super. at 595 (quotations omitted).

However, conversion does not require intent or knowledge of wrongfulness by the defendant but only "the wrongful exercise of dominion and control over Property owned by another inconsistent with the owners' rights." Id. (*quoting* Sun Coast Merch. Corp. v. Myron Corp., 393 N.J. Super. 55, 84 (App. Div. 2007), certif. denied, 194 N.J. 270 (2008)). The law has long recognized that "[t]o constitute a conversion of goods, there must be some repudiation by the defendant of the owner's right, or some exercise of dominion over them by him inconsistent with such right . . ." LaPlace, 404 N.J. Super. at 596.

To prove a cause of action for conversion, Plaintiff must demonstrate that it possesses a right in the chattel. Id., *see also* Baron v. Peoples Nat'l Bank, 9 N.J. 249, 256 (1952).

The complaints allege that Majority Members have diverted and misappropriated payments from the LLCs which they are not entitled to retain, and that they are in wrongful possession of

payments. The findings of the Wiss report previously discussed herein refute these allegations. Curran has failed to refute the findings of the Wiss report. The Court therefore finds that no reasonable jury could conclude that Majority Members converted funds. Accordingly, Majority Members' motion for summary judgment as to Curran's conversion claim is granted.

vii. Dissolution/Dissociation

Majority Members argue that Curran's count for dissolution/dissociation must be dismissed, as Curran cannot meet the high bar necessary to expel the Majority Members. Majority Members submit that they have taken measures, often at their own detriment, to keep the LLCs afloat, and that there is no fraudulent activity by the managing members, no misappropriation of funds, no breach of contract, no breach of fiduciary duty, and no oppressive actions. Majority Members further contend that dissent among the members is not sufficient to allow for dissolution of the companies.

N.J.S.A. 42:2C-48(a)(5) provides that a limited liability company is dissolved, and its activities shall be would up, upon the occurrence of any of the following:

> (5) on application by a member, the entry by the Superior Court of an order dissolving the company on the grounds that the managers or those members in control of the company:
>
> > (a) have acted, are acting, or will act in a manner that is illegal or fraudulent; or
> >
> > (b) have acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant.

N.J.S.A. 42:2C-48(a)(5). N.J.S.A. 42:2C-46(e) provides that a person is dissociated as a member from a limited liability company when

> e. On application by the company, the person is expelled as a member by judicial order because the person:

> (1) has engaged, or is engaging, in wrongful conduct that has adversely and materially affected, or will adversely and materially affect, the company's activities;
>
> (2) has willfully or persistently committed, or is willfully and persistently committing, a material breach of the operating agreement or the person's duties or obligations under section 39 of this act; or
>
> (3) has engaged, or is engaging, in conduct relating to the company's activities which makes it not reasonably practicable to carry on the activities with the person as a member;

N.J.S.A. 42:2C-46(e). The complaints allege that Majority Members' wrongful and fraudulent conduct has affected and will continue to affect the business adversely and materially, and that Majority Members' conduct is harmful directly to Minority Members. Based on the above analysis, the Court has determined that no reasonable jury could conclude that Majority Members have engaged in any conduct sufficient to involuntarily dissolve the LLCs or dissociate Majority Members. The evidence presented with the Majority Members' motion demonstrates that despite disagreements among the members, they were able to make KRK successful even with the Covid-19 restrictions. Accordingly, Majority Members' motion for summary judgment as to these claims is granted.

The Court notes that Majority Members seek a determination that Curran is dissociated from the LLCs and that his votes and equity are returned to the LLCs. The Court finds that Majority Members have not set forth any arguments or provided a sufficient basis for this relief to be granted. Majority Members' request for Curran to be disassociated is therefore denied.

viii. Curran's Additional Claims/Cross-Motion

Majority Members submit that Curran's eleventh count for breach of contract and fraudulent inducement must be dismissed, as it is duplicative of counts already alleged in his pleading and entirely based around the potential that Sedor is successful in his claims against

Curran. Majority Members allege that Sedor has abandoned prosecuting all claims in this matter and therefore this count must be dismissed.

The third count in Curran's complaint pleads breach of contract. The ninth count of Curran's complaint pleads fraud in the inducement. Curran's eleventh count pleads in the alternative, breach of contract and fraudulent inducement. The Court has granted summary judgment on Curran's breach of contract and fraud claims. Accordingly, Curran's duplicative eleventh count is dismissed.

Next, Majority Members argue that Curran's thirteenth count for civil conspiracy must be dismissed, as these claims have been disproven by the Wiss report. They contend that Curran alleged that Majority Members committed civil conspiracy by not using SBA construction loan funds for construction and by dispersing construction funds as disbursements to Sedor, but Curran has no proof of these allegations, as Majority Members have provided all the construction records that they have on file. Majority Members further contend that Curran claims that personal payments were made to Majority Members constituting a civil conspiracy, but all such payments have been accounted for in the Wiss report. They also argue that the Wiss report refutes Curran's allegation that the Majority Members did not make the capital contributions they claimed to have made.

A civil conspiracy is "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 177-178 (2005). A person may be held liable if he or she understands the general objectives of the scheme, accepts the objectives, and agrees, either explicitly or implicitly, to do his or her part to further them. Id.

The substance of the claim is the underlying wrong, and the plaintiff need not provide direct evidence of an agreement between the conspirators. Morgan v. Union County Bd. of Chosen Freeholders, 268 N.J. Super. 337, 364-65 (App. Div. 1993). The relevant inquiry is whether a jury could infer that the alleged conspirators had a "meeting of the minds" and had an understanding to achieve the conspiracy's objectives. Id.

Curran's complaint alleges that Majority Members, Tanchak, and TCC committed civil conspiracy by engaging in activities including agreeing with a common purpose to commit an unlawful act, agreeing and/or cooperating to effectuate the mischaracterization of investment funds as construction expenses, when in reality the funds were disbursed as returns of Sedor's capital contributions, agreeing to effectuate the payments of Majority Members and their family members that were characterized as business expenses, when in reality the payments were for personal use, and more. As previously stated, the Court finds that allegations of this nature have been disproven by the Wiss report. Further, other than his speculative assertions, Curran has not submitted any evidence to refute the findings of the Wiss report. Accordingly, Majority Members' motion for summary judgment regarding Curran's civil conspiracy claim is granted.

Curran seeks partial summary judgment on his counterclaims and cross-claims for appointment of a provisional manager or custodian, declaratory judgment, breach of contract, breach of duty of good faith and fair dealing, and dissolution/dissociation. He contends that his motion for partial summary judgment seeks non-monetary, equitable relief, while leaving for trial the prospects of ascertaining and determining monetary damages in conjunction with the counts not included in the motion for partial summary judgment. Curran submits that his motion does not seek summary judgment on the remaining counts in his counterclaim and cross-claim as each of these remaining counts is fact-specific for which genuine issues of material fact exist.

Majority Members next argue that Curran provides no legal or factual support for his motion for summary judgment and as such the motion should be denied. Regarding Curran's claim for a provisional manager, Majority Members submit that the Court has already ruled on this, and since the, there have been no other support which would make such an appointment necessary at this time, and as such it should be denied.

N.J.S.A. 42:2C-48(b) provides:

> (b) In a proceeding brought under paragraph (4) or (5) of subsection a. of this section, the court may order or a party may seek a remedy other than dissolution, including, but not limited to, the appointment of a custodian or one or more provisional managers. The court shall appoint a custodian or one or more provisional managers if it appears to the court that such an appointment may be in the best interests of the limited liability company and its members.

N.J.S.A. 42:2C-48(b). The Court preliminarily notes that Curran's request for the appointment of a provisional manager was denied in the Court's December 10, 2019 order. Moreover, based on the above analysis regarding the findings of the Wiss report and the conduct of Majority Members, the Court does not find that appointment of a provisional manager is in the best interests of the LLCs. Accordingly, Curran's cross-motion for summary judgment on this claim is denied.

Next, Majority Members argue that Curran's motion as it relates to his claim for declaratory judgment must be denied. They submit that the Court already ruled on this claim in Curran's prior order to show cause, and that Curran has provided no justification as to why such relief should be granted now. Majority Members submit that this case has already been litigated for over two and a half years, discovery has taken place, and now seeking a declaratory judgment is untimely and unnecessary.

The Declaratory Judgment Act provides "relief from uncertainty and insecurity with respect to rights, status, and other legal relations." N.J.S.A. 2A:16-51. This mechanism was

designed to "end uncertainty about the legal rights and duties of the parties to litigation in controversies which have not yet reached the stage at which the parties seek a coercive remedy." New Jersey Ass'n for Retarded Citizens v. Department of Human Services, 89 N.J. 234, 242 (1982). "For the Act to apply, an actual controversy between the parties is required." Id. at 241. As such, "'where the issue is moot, declaratory judgment will not lie because of the absence of an actual controversy.'" Stop & Shop Supermarket Co., LLC v. Cty. of Bergen, 450 N.J. Super. 286, 294 (App. Div. 2017) (*quoting* Pressler & Verniero, Current N.J. Court Rules, comment 1.2 on R. 4:42-3 (2017)). The Declaratory Judgment Act "is a remedial device designed to expedite the definitive establishment of private rights and duties and thereby forestall the emergence of costly and cumbersome trial proceedings." Hartford Acci. & Indem. Co. v. Selected Risks Indem. Co., 65 N.J. Super. 328, 331 (App. Div. 1961).

Curran's complaint alleges that at least one clear controversy exists as to the parties' respective rights, liabilities, and duties under the operating agreements and RULLCA. Curran's complaint raises concerns regarding the transfer of founder votes. The Court previously determined that upon Sedor's death and dissociation, his voting rights ceased to exist. Accordingly, no controversy exists as to the parties' respective rights, and Curran's cross-motion for summary judgment on this claim is therefore denied.

Majority Members further argue that Curran's motion for breach of contract against Majority Members must be denied. They contend that Curran's motion raises no new factual or legal issues on this count, but groups it into the other counts for which he is seeking summary judgment. They further contend that Curran does not set forth any facts in his argument section, and the ones in his statement of material facts misstate or misinterpret the law, and fail to point to damages.

As previously stated, Majority Members' motion for summary judgment as to all Minority Members' claims for breach of contract are granted. Curran's cross-motion for summary judgment on this claim is denied.

Count seven of Curran's complaint requests an equitable accounting. The Court notes that this claim was addressed by the Court's December 10, 2019 order, which provided that books and records of the LLCs shall be made available for inspection. The order further provided that the parties were to fully cooperate with each other and with any financial or accounting professionals designated by them. This order applied to Curran. Accordingly, count seven of Curran's complaint is dismissed.

IV. CONCLUSION

For the foregoing reasons, Sedor's and Curran's complaints as they relate to Majority Members are dismissed in their entirety.