SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4606-19
A-4626-19

SKS HOLDINGS LLC, MOSHAEL STRAUS, HERBERT SEIF, and MJS FAMILY INVESTMENTS LLC,

Plaintiffs-Appellants,

v.

BENNETT KAPLAN,

Defendant/Third-Party Plaintiff-Respondent,

and

IZIK TOURJEMAN,

Defendant-Respondent,

and

LARGE FORMAT LTD., YAEL KAPLAN, DAVID KAPLAN, MIRI KAPLAN, LAHAV FUND II, L.P., and O.G. BIKURIM LTD.,

Defendants,

v.

BRIAN HAIMM,

Third-Party Defendant.

Argued October 12, 2022 – Decided May 5, 2023

Before Judges Sumners and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-6124-17.

Israel Jack Atkin and Michael P. Bowen (Glenn Agre Bergman & Fuentes, LLP) of the New York bar, admitted pro hac vice, argued the cause for appellants SKS Holdings LLC, Moshael Straus, and MJS Family Investments LLC (Kasowitz Benson Torres LLP, and Michael P. Bowen, attorneys; Israel Jack Atkin and Michael P. Bowen, on the briefs).

R. James Kravitz argued the cause for appellant Herbert Seif (Fox Rothschild LLP, attorneys; R. James Kravitz, of counsel and on the briefs).

Brian J. Malloy argued the cause for respondent Bennett Kaplan (Wilentz, Goldman & Spitzer, PA, attorneys; Brian J. Molloy and Willard C. Shih, of counsel and on the brief; Daniel A. Cozzi, on the brief).

Aurora Cassirer argued the cause for respondent Izik Tourjeman (Troutman Pepper Hamilton Sanders LLP, attorneys; Aurora Cassirer and Daniel E. Gorman, on the brief).

PER CURIAM

This appeal involves a dispute between United States and Israeli citizens and their businesses related to the entertainment industry. SKS Holdings LLC, a New Jersey company, its two managing members Moshael Straus and Herbert Seif, and MJS Family Investments LLC, a New Jersey-based family-owned holding controlled by Straus, (collectively plaintiffs) sued Bennett Kaplan, a founding member of SKS, and Izik Tourjeman, an Israeli resident (collectively defendants).[1] The suit alleged, among other things, fraudulent inducement and breach of fiduciary duty by Kaplan, aided and abetted by Tourjeman, and civil conspiracy by both, related to the development and operation of movie theatres in Israel by GlobusMax, Ltd., an Israeli movie theatre company. Plaintiffs also sought the injunctive remedy of judicial dissolution of GlobusMax and the equitable remedy of accounting.

Kaplan counterclaimed against Straus and Seif and filed a third-party complaint against Brian Haimm. As to Straus and Seif, Kaplan alleged breach of fiduciary duty; fraud and equitable fraud; and breach of contract. As to Straus, Seif, and Haimm, Kaplan alleged: defamation and false light torts;

[1] Plaintiffs also filed an amended complaint against Large Format Ltd., Yael Kaplan, David Kaplan, and Miri Kaplan, but later dismissed the claims against them through a consent order.

tortious interference with Kaplan's employment contract; civil conspiracy to participate in intentional torts; intentional infliction of emotional distress; and invasion of privacy in violation of Israeli law.

At the close of discovery, Kaplan and Tourjeman moved for summary judgment. Plaintiffs cross-moved for summary judgment, and third-party defendant Haimm moved for summary judgment. The motion court issued orders and a written decision, granting Tourjeman and Kaplan summary judgment, denying plaintiffs summary judgment, and granting Haimm summary judgment.[2]

Plaintiffs' two appeals were consolidated. For the reasons that follow, we affirm the orders dismissing plaintiffs' claims against Tourjeman and dismissing

[2] Kaplan did not appeal dismissal of the claims against Haimm, who is not participating in this appeal. As to Kaplan's counterclaims against plaintiffs, though no party raises this issue, the record is vague and even contradictory. Kaplan abandoned the breach of fiduciary duty claim, and the motion court granted plaintiffs summary judgment on the fraud counts; implicitly, the court also granted summary judgment on the defamation, false light, and intentional infliction of emotional distress claims, respectively. However, the court did not explicitly or implicitly grant plaintiffs summary judgment on Kaplan's four other counterclaims: tortious interference with contract; civil conspiracy to participate in intentional torts; breach of contract; and invasion of privacy. Indeed, in its written decision discussing choice of law, the court expressly held "plaintiffs are not entitled to summary judgment as a matter of law," and denied plaintiffs' summary judgment motion.

SKS's claim of breach of fiduciary duty against Kaplan. We reverse the order dismissing plaintiffs' claims of fraudulent inducement and civil conspiracy against Kaplan, as well as the orders dismissing Straus's and Sief's claim of breach of fiduciary duty against Kaplan. In addition, we reverse the order dismissing plaintiffs' claims seeking judicial dissolution of SKS and remand to the motion court for findings of fact or conclusions of law.[3]

I.

SKS was formed in April 2003, as a closely held, three member LLC under the laws of Delaware, with its principal place of business in New Jersey. Straus, Kaplan, and Seif were SKS's founding members. Straus and Seif, New Jersey residents and managing members, made initial capital contributions of $3,650,000, with each owning a 37.5% interest in SKS. Kaplan, an Israeli resident and non-managing member, held a 25% ownership interest in SKS.

SKS was established as a holding company and investment vehicle for operating GlobusMax, an Israeli company, whose principal business was to own

[3] Plaintiffs have raised no arguments on appeal with respect to the dismissal of the claim for the equitable remedy of accounting, nor for the claims against the Lahav entities, therefore those claims are deemed waived. See State v. Amboy Nat'l Bank, 447 N.J. Super. 142, 148 n.1 (App. Div. 2016) (issue not presented in party's merits brief "deemed waived").

and operate movie and IMAX theatres in Israel. Kaplan, a founding member of GlobusMax, served as its president, CEO, and, periodically, as Chairman of the Board of Directors, managing its day-to-day operations. Yoram Globus owned a 50% interest in GlobusMax and served as the Chairman of the Board from 2007 to 2015. Straus and Seif also served on GlobusMax's Board, contributing capital to GlobusMax and loaning the company money through SKS.

In 2007, GlobusMax entered into a "consulting agreement" with Large Format Ltd., a shareholder in GlobusMax, and solely owned by Kaplan and incorporated in the British Virgin Islands. Under the consulting agreement, which was governed by Israeli law, Kaplan provided GlobusMax with financial and managerial consulting services, including: making recommendations with respect to entering into new ventures; providing financial and managerial advice; and consulting to promote the company's business interests, as mutually agreed upon between the parties.

In June 2014, SKS purchased Globus's shares in GlobusMax, as well as additional movie theatre complexes. Straus and Seif admitted they knew about the buyout and the new acquisitions orchestrated by Kaplan but question that Kaplan "had carte blanch" to arrange it.

In March 2015, Seif, Straus, and Kaplan executed an "Amended and Restated LLC Agreement of SKS Holdings, LLC" (the Agreement). The Agreement provided that SKS's registered agent and office were in Delaware, and that it "SHALL BE GOVERNED BY, AND CONSTRUED UNDER . . . DELAWARE [LAW], WITH ALL RIGHTS AND REMEDIES BEING GOVERNED BY SAID LAWS." SKS members had only "such rights and powers" granted under the Agreement and had no "authority to bind, to act for, to sign for, or to assume any obligation or responsibility on behalf of, any other Member or the Company," other than as "expressly and specifically provided" in the agreement.

As SKS managers, Straus and Seif had the power to conduct "the business and affairs of the Company," and "to do any and all acts that may be necessary or convenient," including, among other things, to conduct business and carry on operations "in any foreign country, which may be necessary, convenient, or incidental to the accomplishment of the purpose of the Company."

At this time, Kaplan also hired Tourjeman as a GlobusMax employee. According to Tourjeman, he was hired to work part-time as a co-chairman at a monthly salary, plus expenses and a 5% equity interest in GlobusMax. Tourjeman deposed that he believed his role was to restructure GlobusMax's

debt and "to launch and to start processes, not to actually perform them and carry them out." However, Seif and Straus claim Kaplan did not tell them that Tourjeman was hired to act as "Co-Chairman," nor did they approve Tourjeman's compensation package.

At all relevant times, Tourjeman lived and worked in Israel. He never conducted business in or traveled to New Jersey, nor did he contact Seif and Straus in New Jersey. His rare contacts with Seif and Straus occurred in Israel involving brief "small talk" at GlobusMax's office.

From 2015 to 2016, GlobusMax, through Kaplan's efforts, obtained multiple loans from Amitech Real Estate Management and Development Ltd., a company Tourjeman had a business relationship with, and O.G. Bikurim Ltd., an alter ego of defendant Lahav Fund II, L.P. Straus and Seif disagree with Kaplan's representations that they were aware of these loans. Kaplan admitted there were no formal in-person board meetings with respect to the loans but claimed he obtained approval from Straus and Seif in telephone conference calls.

Our review of the record reveals at least eleven promissory notes issued by GlobusMax to SKS between December 13, 2016 and May 30, 2017. The principal amounts on those notes add up to just over $18 million. There is another document in Hebrew that, based on the context and non-Hebrew text,

appears to be a loan agreement for an additional $1.4 million between GlobusMax and MJS. Interspersed between the promissory notes issued by GlobusMax to SKS are promissory notes issued by SKS to Straus, Seif, and MJS. The principal amounts on those notes correspond to the amounts on the notes issued by GlobusMax. Each of the promissory notes unequivocally provides for a loan, stating that the promised payment is in exchange "for value received." The notes also provide for the applicable interest rate—6% per annum for most of the loans—as well as the calculation of interest and timing of payment. The notes specifically refer to GlobusMax as the "Borrower." Plaintiffs contend these loans were made based on Kaplan's and Tourjeman's misrepresentations about GlobusMax's financial condition.

In 2017, Seif and Straus, concerned about GlobusMax's financial status, sent Haimm, an accountant, to Israel to review the company's financial records. Seif and Straus asserted they "later learned that the 2015 and 2016 financial statements were false," because, among other things, the reports "omitted millions of dollars' worth of unrecorded GlobusMax checks" issued by Kaplan and Tourjeman. Seif testified that he had not been made aware of "other improvident self-dealing transactions," including Kaplan's use of checks issued

to GlobusMax to draw funds "for immediate cash for Kaplan's own personal purposes."

In March 2017, Haimm learned of additional unrecorded liabilities weakening GlobusMax's financial position, including millions of dollars of checks, signed by Kaplan, that had been provided to Amitech as collateral for purported loans to SKS, with "an exorbitant amount of interest."[4] Haimm's findings were confirmed by GlobusMax's outside audit firm, Deloitte, which discovered handwritten checks in very significant amounts to third parties who were allegedly related to the company's shareholders. These transactions were not disclosed at the time of the audit, so they were left out of the company's financial statements, requiring notification to recipients not to rely on the statements.

Around this time, plaintiffs, at Deloitte's insistence, retained Bar Lev Associates, a forensic accounting firm, to conduct a review of GlobusMax's

[4] Seif and Straus also contend they were unaware that GlobusMax was involved in "check cleaning." According to Tourjeman, this was a common financial practice in Israel where a debtor gives a check to a bank or insurance company in exchange for a loan provided against that check in that amount, minus a commission, and then the debtor can transfer the "cleaned" checks to a third-party creditor. The bank or insurance company holding the check would then charge an interest fee. The interest rate on those loans was sixty percent, with a monthly five percent late payment obligation.

finances, culminating in a report (Bar Lev Report). At deposition, Straus followed counsel's advice not to respond to questions related to Kaplan's alleged breach of fiduciary duty—which he learned from the Bar Lev Report—because of attorney-client privilege.).

Stroz Friedberg, an accounting firm retained by counsel for SKS, Straus, and MJS, prepared a report (the Friedberg Report) regarding its "forensic accounting investigation into possible financial irregularities," and "review and analysis of the documented actions" by defendants, including whether they "misappropriated funds," "executed unauthorized loans," "falsified business records," "pledged company interests," or "engaged in related-party transactions." Friedberg was "not retained to conduct, and did not perform, an audit of the books and records of SKS or GlobusMax," but rather "a forensic accounting into the company records available . . . to determine whether, based on the company records . . . any indication of possible wrongdoing exists."

The Friedberg Report—submitted by plaintiffs in opposition to Kaplan's summary judgment motion—concluded Kaplan and Tourjeman had entered into fourteen loans on behalf of SKS and GlobusMax without authorization and in violation of SKS's articles of association. The report further concluded that the effect of Kaplan's failure to record the "numerous unauthorized loans for and on

behalf of SKS and GlobusMax . . . . was to conceal the existence of these loan liabilities and assets . . . and to obscure the true financial position, activities, and performance of GlobusMax." Kaplan placed the loan proceeds "in unassociated financial accounts with obfuscated names and, . . . recorded the associated interest payment[s] as payments for questionable services." The report detailed the improprieties, including: "unusually high annualized interest rates;" mislabeling of transactions; failing to record as loan liabilities and interest expenses; and improper recording related to the loans. The report found Kaplan had failed to reimburse GlobusMax for personal expenses incurred in excess of the amount due under his consulting agreement with GlobusMax.

II.

Summary Judgment to Kaplan

In granting summary judgment to Kaplan—thereby dismissing plaintiffs' claims for fraudulent inducement, breach of fiduciary duty, and judicial dissolution—the motion court judge applied Israeli law, not New Jersey law, under the "internal affairs doctrine" because "Kaplan was acting in his capacity as a director of GlobusMax, an Israeli corporation." The court determined

plaintiffs lacked standing to pursue individual claims of loss and could only assert their claims in the form of a derivative action. [5]

Our summary judgment standard is well-settled and straight forward. We conduct a de novo review of an order granting a summary judgment motion, Gilbert v. Stewart, 247 N.J. 421, 442 (2021), applying "the same standard as the trial court," State v. Perini Corp., 221 N.J. 412, 425 (2015). In considering a summary judgment motion, "both trial and appellate courts must view the facts in the light most favorable to the non-moving party," which in this appeal are plaintiffs. Bauer v. Nesbitt, 198 N.J. 601, 604 n.1 (2009). Summary judgment is proper if the record demonstrates "no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment . . . as a matter of law." Burnett v. Gloucester Cnty. Bd. of Chosen Freeholders, 409 N.J. Super. 219, 228 (App. Div. 2009) (quoting R. 4:46-2(c)). Issues of law are subject to the de novo standard of review, and the trial court's determination of such issues is accorded no deference. Kaye v. Rosefielde, 223 N.J. 218, 229 (2015).

[5] The motion court did not address this issue as to Tourjeman's motion for summary judgment because it found, as discussed below in Section III, that the court lacked personal jurisdiction over Tourjeman and dismissed plaintiffs' claims due to forum non conveniens.

In addressing the summary judgment motions, the motion court applied Israeli law. As to Kaplan's motion seeking dismissal of plaintiffs' claims for fraudulent inducement and breach of fiduciary duty the court applied the "internal affairs doctrine" in assessing the governing choice of law. Under that doctrine, the court found "Kaplan was acting in his capacity as a director of GlobusMax, an Israeli corporation," and thus "Israeli law applies." As to plaintiffs' motions seeking dismissal of Kaplan's counterclaims for breach of fiduciary duty, defamation, and tortious interference, among other claims, the court conducted a choice of law analysis, also finding Israeli law controlled.

With respect to step one of the choice-of-law test, the court found a conflict of law because defendants asserted only that Israeli law denied plaintiffs standing, while plaintiffs argued they had standing under New Jersey law. Under step two, the court determined Israel had "most significant interest" because Kaplan was "an Israeli resident, the alleged causes of action occurred in Israel," and, during the events at issue, he "was acting in his capacity as a director of GlobusMax, an Israeli corporation." The court further found "Israel has the predominant interest in resolving the issues in the [c]omplaint." We disagree with the court's findings.

Although not addressed by the parties or the motion court, our state has a specific statutory choice of law provision applicable to LLCs. Under New Jersey's Revised Uniform Limited Liability Company Act (RULLCA), N.J.S.A. 42:2C-1 to -94, "[t]he law of the state or other jurisdiction under which a foreign limited liability company is formed governs: (1) the internal affairs of the company; and (2) the liability of a member as member and a manager as manager for the debts, obligations, or other liabilities of the company." N.J.S.A. 42:2C-57. Thus, "[u]nder New Jersey's choice-of-law rules, the law of the state of incorporation governs internal corporate affairs." Fagin v. Gilmartin, 432 F.3d 276, 282 (3d Cir. 2005) (citing Brotherton v. Celotex Corp., 202 N.J. Super. 148, 154 n.1 (Ch. Div. 1985)).

Here, the parties' operating agreement stated Delaware law governed their disputes. Thus, Delaware law would seem to apply. Yet, in another context, our Supreme Court has adopted the Restatement (Second) of Conflict of L.: Law of the State Chosen by the Parties § 187 (Am. L. Inst. 1971), ruling that the law of the state chosen by the parties in a contract will apply, unless, among other things, "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice." Instructional Sys., Inc. v. Comput. Curriculum Corp., 130 N.J. 324, 341 (1992).

Because the parties' transactions have no connection to Delaware, that state's laws should not apply.

Considering Israeli and New Jersey law, plaintiffs would not have standing under either jurisdiction to bring a direct action against either SKS as a member of the LLC or GlobusMax as a shareholder or director. See § 194, Companies Law, 5759-1999, LSI 44 119 (1999), (Isr.); Strasenburgh v. Straubmuller, 146 N.J. 527, 550 (1996) (as a matter of corporate law, suits by shareholders to redress injuries to the corporation, which secondarily harm all shareholders, must be pursued as derivative actions on behalf of the corporation); Delray Holding, LLC v. Sofia Design & Dev. at S. Brunswick, LLC, 439 N.J. Super. 502, 510 (App. Div. 2015) ("Shareholders in a corporation may only sue individually when they suffer a 'special injury,' as distinct from injuries suffered by all shareholders."). Thus, because there is no indication of an actual conflict in the substance of the potentially applicable laws, there is no choice-of-law issue to be resolved, and New Jersey, as the forum state, applies its own law. See In re Accutane Litig., 235 N.J. 229, 254 (2018).

A. Fraudulent Inducement and Breach of Fiduciary Duty Claims

1. Derivative vs. Direct Claims

The motion court granted summary judgment dismissal of plaintiffs' fraudulent inducement and breach of fiduciary duty claims because they lacked standing to pursue individual claims of loss and could only assert their claims in the form of a derivative action. The court stated:

> The . . . [p]laintiffs in the instant case are SKS, an LLC that is the majority shareholder of GlobusMax; Straus and Seif, are simply individuals who are managing members of SKS and directors of GlobusMax . . . . Plaintiffs' claims are not based on harms done by Kaplan directly to the [p]laintiffs, but rather harm done by Kaplan against GlobusMax.
>
> Each of the allegations of misconduct impacts all of the company's shareholders equally. SKS is the majority shareholder in GlobusMax, but it is not the sole shareholder. Plaintiffs testified that their damages were based on losses sustained as a result of their investment in GlobusMax. Plaintiffs' claims are not direct claims for which they can recover individual damages. The claims are derivative claims that belong to GlobusMax, an Israeli formed and based company.

We disagree with the court's ruling. Plaintiffs' infusion of funds to GlobusMax were not investments that they could only pursue as derivative claims against Kaplan and Tourjeman through a shareholder action by GlobusMax. We suspect the court misconstrued plaintiffs' claims due to plaintiffs' imprecise terminology in describing the cash advances they made to GlobusMax. Plaintiffs' complaint uses the term "invest" and informal language like "pour" to describe the advances. On the other hand, they described the

transfers as loans in other documents presented to the court. Yet, when cross-referencing the description of the loans, they again use the term "invest." It appears plaintiffs use "invest" in the general sense of advancing money to obtain a long-term gain, a definition encompassing these loans.

Plaintiffs argued before the court that "this whole case is about" the $20 million they gave GlobusMax. Kaplan argued the claims were derivative because plaintiffs deposed that their damage was the "[l]oss of [their] investment" and their "investment in [GlobusMax] is worth less now." However, as noted, plaintiffs referred to the loans as investments and specifically sought recovery of the loans in this suit. Plaintiffs' complaint alleges fraudulent inducement "to invest $20 million for the purported benefit of their company SKS and its main asset GlobusMax." In their "prayer for relief," they seek "compensatory damages in an amount to be determined at trial, but not less than $20 million, plus interest and costs." The $20 million directly relates to the promissory notes GlobusMax issued to plaintiffs in return for their cash advances, which included interest rates as repayment terms.

Plaintiffs allege Kaplan misrepresented the financial stability of GlobusMax to induce them to loan $20 million to the company. These misdeeds were against plaintiffs, not against GlobusMax. Plaintiffs' claims are not based

on money invested into GlobusMax that did not generate a financial return but on loans they made due to Kaplan's fraudulent representations, which were not repaid due to his misappropriation. Accordingly, we vacate the summary judgment order dismissing plaintiffs' claims of fraudulent inducement against Kaplan.

As for the breach of fiduciary duty claims against Kaplan, only Straus and Seif can pursue these. SKS's operating agreement does not expressly provide that its members owe fiduciary duties to SKS. Rather, it provides that "[t]he Members shall not have any liability for the obligations or liabilities of the Company except to the extent provided in the [Delaware Limited Liability] Act." Although not addressed by the parties or the court, under both New Jersey law, N.J.S.A. 42:2C-39(i)(2), and Delaware law, Feeley v. NHAOCG, LLC, 62 A.3d 649, 661 (Del. Ch. 2012), managers of manager-managed LLCs owe the traditional fiduciary duties owed by directors and controlling shareholders in a corporation, but members do not.

Under SKS's operating agreement, Straus and Seif were designated managers with the responsibility of managing the company's business and affairs. As a manager-managed company, the investing, contracting, and hiring decisions of SKS, among other things, fell under the authority of Straus and Seif.

In his singular role as a member, Kaplan owed SKS no fiduciary duty of loyalty or care; thus, the court properly granted Kaplan summary judgment dismissing SKS's claims for breach of those duties. Therefore, Kaplan was correctly granted summary judgment dismissal of SKS's breach of fiduciary duty claim.

2. Privilege Assertion

The motion court held that Kaplan was entitled to summary judgment on all claims regarding his misuse of GlobusMax's funds, finding that:

> Kaplan is accused of using company funds for personal expenses. Plaintiffs base these allegations on information contained in the [Bar Lev] Report. Plaintiffs also assert that the facts surrounding this conclusion are privileged. Plaintiffs cannot hide behind privilege as a reason to refuse to grant [Kaplan] access to the factual allegations supporting [p]laintiffs' claim. For this reason, all claims regarding Kaplan's misuse of GlobusMax's funds are dismissed.

As the court found, "[a] party may not abuse a privilege, including the attorney-client privilege, by asserting a claim or defense and then refusing to provide the information underlying that claim or defense based on the privilege." Payton v. N.J. Tpk. Auth., 148 N.J. 524, 553 (1997). See United Jersey Bank v. Wolosoff, 196 N.J. Super. 553, 567 (App. Div. 1984) (noting the "inherent inequity in permitting plaintiff to use the privilege as a sword rather than a shield").

On appeal, plaintiffs contend the court's holding—that, without the privileged report, there was a lack of a factual basis for their claims—ignored record evidence showing defendants omitted and concealed material information from plaintiffs and falsified SKS documents. Absent finding such a discovery violation, plaintiffs argue, there was no basis for the "extreme sanction" of dismissal. To the extent the court determined the Bar Lev Report was essential, it should have ordered its production through discovery, rather than dismiss the claims entirely. Ultimately, the failure to disclose the Bar Lev Report was immaterial because the Friedberg Report contained the same underlying financial data.

Kaplan agrees with plaintiffs with respect to the immateriality of the Bar Lev Report in the context of the summary judgment dismissal but views the remainder of the record differently. In Kaplan's view, the Bar Lev Report was "irrelevant" and a "cover" plaintiffs were using "to avoid providing Kaplan with evidence to support their claims," which lacked factual support. Plaintiffs refused to answer deposition questions or otherwise provide discovery concerning the factual bases for several of their complaint allegations, he argues, including: Kaplan and Tourjeman converted millions of dollars of GlobusMax funds for their own personal benefit, or for the benefit of Kaplan's shell

companies or family; Kaplan failed to record certain checks in GlobusMax's books and records; plaintiffs received inaccurate financial projections from Kaplan; and Kaplan knew an EBITDA[6] of 50 million New Israeli Shekels was unachievable in 2017. These were among many other allegations for which plaintiffs asserted privilege at their deposition. As to the Friedberg Report, Kaplan alleges it was "a mere advocacy piece masquerading as an investigative report," and that it was premised on information protected from disclosure through privilege.

The court's dismissal of plaintiffs' claims against Kaplan based on plaintiffs' invocation of "privilege as a reason to refuse to grant the Defendant access to the factual allegations" underlying those claims stands in stark tension with the court's ruling two years earlier, denying Kaplan's motion to compel discovery. In that order, the court explained the motion had been "[d]enied as plaintiff's counsel represent[ed] they are in full compliance with their discovery obligations and the report of their forensic accountant is privileged." (Emphasis added). That motion to compel was decided prior to plaintiffs' depositions, at which each of them repeatedly invoked attorney-client privilege when asked

[6] EBITDA is a financial acronym meaning "earnings before interest, taxes, depreciation and amortization." Marina Dist. Dev. Co. v. City of Atlantic City, 27 N.J. Tax 469, 487 (2013).

questions regarding the factual bases for their claims. After that, defendants neither moved for reconsideration of the motion to compel nor cross-appealed the order denying the motion to compel here.

The court rules contemplate that a dismissal based on discovery misconduct will flow only from a party's "fail[ure] to obey an order to provide or permit discovery." R. 4:23-2(b). The case law similarly directs that courts should only engage in the "ultimate sanction" of dismissal for a breach of discovery rules "sparingly" and only following a failure to comply with a discovery order that either went "to the very foundation of the cause of action," or was "deliberate and contumacious." Abtrax Pharms. v. Elkins-Sinn, 139 N.J. 499, 514 (1995) (citations and quotations omitted). Courts must consider "[t]he extent of the prejudice caused by discovery violations and the ability to redress that prejudice" when a court weighs discovery violation sanctions. Id. at 521.

Here, there was no discovery order compelling disclosure with which plaintiffs failed to comply. In fact, the only pertinent order shielded the material at issue from discovery. The court, in dismissing plaintiffs' cause of action, did not engage in any inquiry as to whether defendants were prejudiced by plaintiffs' judicially sanctioned withholding of discovery. Because the judge's ruling was apparently grounded in a "misunderstanding or misapplication of the law," it is

not subject to deference. Cap. Health Sys. v. Horizon Healthcare Servs., 230 N.J. 73, 80 (2017).

The court did not state alternative grounds for granting summary judgment as to the claims against Kaplan. Indeed, after describing what the court referred to as an "abuse of privilege," the court explicitly stated "[f]or this reason, all claims regarding Kaplan's misuse of GlobusMax's funds are dismissed." (Emphasis added). Accordingly, the court made no findings of fact or conclusions of law concerning "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Our review of the record indicates there is sufficient evidence of genuine dispute of material fact regarding plaintiffs' contention that defendants omitted and concealed from them material information and falsified SKS documents to survive Kaplan's motion for summary judgment.

B. Judicial Dissolution

Plaintiffs' complaint sought injunctive relief to judicially dissolve SKS. This claim need not be pursued by a derivative action. Both SKS's operating

agreement and statutory law provide that an action for judicial dissolution may be maintained by a member as a direct claim. The operating agreement provides,

> The Company shall dissolve, and its affairs shall be wound up, upon the first to occur of the following: (a) the written consent of each of the Members; (b) the death, retirement, resignation,[7] expulsion, dissolution, or bankruptcy of any Member in the Company if, within 90 days of any such event, the Members owning in the aggregate more than 50% of the interest in the Company vote to dissolve the Company; or (c) the entry of a decree of judicial dissolution under [Del. Code Ann. tit. 6, § 18-802].

The motion court, however, did not address, much less conduct a choice of law analysis on the judicial dissolution claim. Under the first step of New Jersey's choice of law analysis, there is no conflict in the laws of Delaware and New Jersey regarding the ability of an LLC member to seek judicial dissolution. Therefore, New Jersey law, as the forum state, governs. See Rowe v. Hoffman-La Roche, Inc., 189 N.J. 615, 621 (2007).

Delaware law provides that "[o]n application by or for a member . . . the Court of Chancery may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement." Del. Code Ann. tit. 6, § 18-802

[7] However, paragraph sixteen of the operating agreement specifies in clear terms that "[a] Member may not resign from the Company."

(2022). New Jersey law is almost identical in that RULLCA provides that "[a] limited liability company is dissolved, and its activities shall be wound up, upon the occurrence of," among other things, "application by a member, the entry by the Superior Court of an order dissolving the company on the grounds that . . . it is not reasonably practicable to carry on the company's activities in conformity with one or both of the certificate of formation and the operating agreement." N.J.S.A. 42:2C-48(a)(4)(b).

Although Kaplan purportedly resigned, there was no dissolution vote by plaintiffs. In their complaint, plaintiffs allege that "Kaplan's disregard for his contractual and fiduciary obligations . . . and his egregious and improper conduct have rendered it impracticable to carry on the business of SKS in accordance with the express terms of the SKS Operating Agreement." In his answer, Kaplan simply denied the allegations, and he does not address this claim on appeal.

The motion court granted Kaplan summary judgment on this claim without making any findings of fact or conclusions of law as required under Rules 1:7-4(a) and 4:46-2(c). The failure requires a remand as to disposition of this claim. See Allstate Ins. Co. v. Fisher, 408 N.J. Super. 289, 303 (App. Div. 2009).

III.

Summary Judgment to Tourjeman

A. Jurisdiction

The motion court dismissed plaintiffs' claims against Tourjeman[8] because, as an Israeli citizen, he lacked sufficient minimum contacts with New Jersey to invoke general or specific personal jurisdiction over him. We disagree with plaintiffs' contention that the court erred.

Rule 4:4-4(b)(1) allows for the exercise of personal jurisdiction over nonresident defendants "consistent with due process of law." That is, our courts' jurisdictional reach over nonresidents extends as far as federal standards of due process allow. See Reliance Nat'l Ins. Co. in Liquidation v. Dana Transp., Inc., 376 N.J. Super. 537, 543 (App. Div. 2005). The federal standard permits the exertion of personal jurisdiction over a nonresident that had "minimum contacts" with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). In "some circumstances," minimum contacts may be established by "the combined effect of several contacts with the state, no one of which is sufficient." Zahl v.

[8] Kaplan did not raise or join any lack of personal jurisdiction argument.

Eastland, 465 N.J. Super. 79, 98 (App. Div. 2020) (quoting Bayway Refin. Co. v. State Utils., Inc., 333 N.J. Super. 420, 433 (App. Div. 2000)).

"When a defendant asserts lack of personal jurisdiction, 'the plaintiff bears the burden of demonstrating that the defendant's contacts with the forum state are sufficient to confer personal jurisdiction on the court.'" Jacobs v. Walt Disney World Co., 309 N.J. Super. 443, 454 (App. Div. 1998) (quoting Giangola v. Walt Disney World Co., 753 F. Supp. 148, 154 (D.N.J. 1990)). The defendant can meet this burden by showing the court exercised either general or specific personal jurisdiction. Id. at 452.

General jurisdiction may be obtained where a defendant's contacts with the forum state are "continuous and substantial," regardless of where the cause of action arose. Wilson v. Paradise Vill. Beach Resort & Spa, 395 N.J. Super. 520, 527 (App. Div. 2007) (quoting Charles Gendler & Co. v. Telecom Equip. Corp., 102 N.J. 460, 472 (1986)). "Specific jurisdiction is established when a defendant's acts within the forum-state give rise to the cause of action." Jacobs, 309 N.J. Super. at 452. In the context of specific jurisdiction, we consider "the relationship among the defendant, the forum, and the litigation." Blakey v. Cont'l Airlines., Inc., 164 N.J. 38, 67 (2000) (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)). "The standard for determining adequacy is lower when

jurisdiction is 'specific' . . . than when it is 'general' . . . ." Pressler & Verniero, Current N.J. Court Rules, cmt. 3.1.1 on R. 4:4-4 (2022); see Jacobs, 309 N.J. Super. at 453 ("the plaintiff seeking to overcome the challenge to general jurisdiction must show substantially more than mere minimum contacts to establish this form of personal jurisdiction," and is required to show that the contacts are continuous and substantial) (quoting Giangola, 753 F. Supp. at 154).

"Appellate review of a ruling on jurisdiction is plenary because the question of jurisdiction is a question of law." Rippon v. Smigel, 449 N.J. Super. 344, 358 (App. Div. 2017). Appellate courts "review de novo the legal aspects of personal jurisdiction," but "will not disturb a trial court's factual findings concerning jurisdiction if they are supported by substantial credible evidence." Pullen v. Galloway, 461 N.J. Super. 587, 596 (App. Div. 2019).

In explaining its dismissal of claims against Tourjeman, the court stated:

> [It] lacks general jurisdiction over [d]efendant Tourjeman. Tourjeman does not have continuous and systematic contacts in New Jersey to be "at home" in the forum. Fairfax Fin. Holdings Ltd. [v. S.A.C. Cap. Mgmt., LLC], 450 N.J. Super. [1,] 68 [(App. Div. 2017)]. In their [c]omplaint, [p]aintiffs allege that Tourjeman "conducts business in New Jersey" and "directly targeted" [p]laintiffs who reside in New Jersey. However[,] [p]laintiffs failed to put forth facts that show Tourjeman ever visited New Jersey, ever corresponded with the [p]laintiffs, or conducted business in New Jersey. This [c]ourt cannot impose

> jurisdiction on a [d]efendant who has not purposely availed himself of benefits in the forum state. Plaintiff has failed to prove that [d]efendant had undertaken such conduct.
>
> . . . .
>
> For a [p]laintiff to prove general jurisdiction, they must show that [d]efendant had contacts with New Jersey that are "so continuous and substantial as to justify subjecting the defendant to the jurisdiction." Patel [v. Karnavati Am., LLC], 437 N.J. Super [415,] 425 [(App. Div. 2014)] (quoting Baanyan [Software Servs., Inc. v. Kuncha], 433 N.J. Super [466,] 474 (App. Div. 2013)). In the instant case, [p]laintiffs have failed to show that Tourjeman had any contacts with New Jersey, and certainly not continuous and substantial ones.
>
> . . . Straus confirmed at his deposition that he never spoke with Tourjeman in New Jersey, never e-mailed or spoke with Tourjeman on the phone, and never had direct or indirect communications with respect to GlobusMax. Seif also testified that he had never discussed substantial business matters with Tourjeman, that Tourjeman had never induced Seif to loan money to GlobusMax, and that Tourjeman never lied to him.
>
> . . . Plaintiffs have not shown that Tourjeman "purposely availed" himself of the benefits of doing business in New Jersey. Plaintiffs have failed to satisfy their burden of establishing Tourjeman's continuous and systematic contacts with New Jersey.

Plaintiffs contend the motion court erred in not explicitly addressing the issue of specific jurisdiction in its analysis. They concede there is no evidence

Tourjeman traveled to New Jersey, or he "personally" sent an allegedly fraudulent 2015 financial statement regarding GlobusMax. Rather, they argue the court had specific jurisdiction over Tourjeman because he prepared and signed the falsified financial statement, eventually leading to the dissemination of the information to plaintiffs in New Jersey. Plaintiffs also argue Tourjeman discussed GlobusMax's finances with Straus and Seif and knew that they, as major investors, would rely on the statement and suffer harm as a result.

Citing Blakey, 164 N.J. at 46, and Div. of Inv. ex rel. McCormac v. Qwest Commc'n Int'l, Inc., 387 N.J. Super. 487, 502 (App. Div. 2006), plaintiffs contend the record, including Tourjeman's admissions, demonstrated that he knowingly "participated in creating fraudulent financial statements, [which he signed,] that were sent to [plaintiffs in] New Jersey." They further argue "the New Jersey contacts of Tourjeman's co-conspirator, Kaplan, may be imputed to Tourjeman precisely because . . . Tourjeman knew of and supported Kaplan's communication of misleading financial information to the New Jersey-based investors."

While plaintiffs are correct that the court did not explicitly mention specific jurisdiction in its decision, it impliedly considered it by ruling that plaintiffs failed to meet their burden of showing Tourjeman purposely availed

himself of the benefits of New Jersey, and they did not show he had either visited New Jersey or corresponded with plaintiffs. Finding a lack of purposeful availment, as well as a lack of minimum contacts, is equivalent to finding no specific jurisdiction. See Lebel v. Everglades Marina, Inc., 115 N.J. 317, 323 (1989). It is undisputed that Tourjeman neither traveled to New Jersey nor directed business to the state on behalf of GlobusMax. There is no evidence proffered by plaintiffs that Tourjeman contributed to the financial reports regarding GlobusMax that were sent to plaintiffs in New Jersey or that he directed anyone to send that information to New Jersey.

Blakey and Qwest are inapposite to Tourjeman's situation. In Blakey, the Court held the defendants would be subject to personal jurisdiction on the plaintiff's New Jersey's Law Against Discrimination hostile work environment claims if the record showed the non-resident defendants "published defamatory electronic messages" about the plaintiff on their company's "electronic bulletin board," knowing "the messages would be published in New Jersey." 164 N.J. at 46.

In Qwest, the New Jersey Department of Treasury, Division of Investment (NJT), commenced an action "to recover damages allegedly sustained as a consequence of a civil conspiracy to induce investments in stock issued by

Qwest Communications International, Inc. through a series of fraudulent misrepresentations." 387 N.J. Super. at 493. Our court determined "NJT's claims were based on its assertion that it was injured as a consequence of intentionally false statements about the financial health of Qwest disseminated in [New Jersey] and upon which NJT relied in investing public funds." Id. at 499. Thus, "[u]nder all of the circumstances, we cannot conclude that NJT failed to present evidence and reasonable inferences adequate to raise a factual issue on whether each of the individual defendants contributed to the dissemination of false information to NJT with the intention or expectation of causing harm to NJT as a recipient investor." Id. at 504-05.

This case is more like Fairfax, in which the New Jersey plaintiffs asserted the non-resident entity defendants "engaged in a racketeering enterprise that caused [them] billions of dollars in damages." 450 N.J. Super. at 16. Our court, upon examining the record, determined that any "communications by these defendants toward entities or persons in New Jersey" were so few in number and "so inconsequential as to justify rejection of the argument that the court was authorized to exercise specific jurisdiction over these defendants." Id. at 72.

While GlobusMax sent financial statements to plaintiffs, there is no evidence that Tourjeman was responsible for preparing those documents or that

he knew they would have a particular effect in New Jersey. He testified he was not "running the books" at GlobusMax in any respect, since he was operating at a higher management level, restructuring debt and securing financing. Once he learned about the unrecorded checks, he notified the auditors. Tourjeman further testified that the only substantive conversation he had about GlobusMax with Straus or Seif was in February 2017, when he discussed financing options for GlobusMax with them in Kaplan's presence in Tourjeman's Israel office.

Focusing on the relationship between "defendant, the forum, and the litigation," Lebel, 115 N.J. at 323, the claims against Tourjeman, essentially, allege that as an Israeli resident, he breached a fiduciary duty he owed to the American shareholders of GlobusMax, an Israeli business enterprise operating entirely outside the United States, arising from a series of financial transactions between GlobusMax and other Israeli entities and persons. Tourjeman's very brief contacts with our state were "more akin to random, fortuitous contacts, rather than a purposeful availment of the benefits and privileges of New Jersey law, and hence are likewise insufficient to establish specific jurisdiction." Baanyan, 433 N.J. Super. at 478. Hence, we are convinced the motion court correctly decided New Jersey lacked jurisdiction to adjudicate plaintiffs' claims against Tourjeman based upon a lack of minimum contacts.

Because we conclude plaintiffs failed to establish the requisite minimum contacts, we need not address the second step of the jurisdictional inquiry: whether it would offend "traditional notions of fair play and substantial justice." Egg Harbor Care Ctr. v. Scheraldi, 455 N.J. Super. 343, 355 (App. Div. 2018) (quoting Int'l Shoe, 326 U.S. at 316). That said, it would be an injustice to allow plaintiffs—New Jersey residents, a New Jersey holding company, and a Delaware corporation—to compel Tourjeman, an Israeli citizen and Co-Chairman of GlobusMax, an Israeli company, to defend against a New Jersey lawsuit, when he worked in Israel, and never lived in, worked in, or visited New Jersey.

B. Forum Non Conveniens

Based on our conclusion that New Jersey courts do not have general or specific jurisdiction over Tourjeman, it is unnecessary to address plaintiffs' contention that the motion court abused its discretion by granting Tourjeman summary judgment on forum non conveniens grounds.[9] However, for the sake of completeness, we address the forum non conveniens ruling, finding the court did not abuse its discretion.

[9] Kaplan did not raise or join any forum non conveniens argument.

"Ordinarily, a plaintiff's choice of forum will be honored by a court that has jurisdiction over a case." Yousef v. Gen. Dynamics Corp., 205 N.J. 543, 557 (2011). However, "under the doctrine of forum non conveniens, a court using its equitable power can decline to exercise jurisdiction over a defendant if that defendant can demonstrate that the plaintiff's choice of forum is 'demonstrably inappropriate.'" Id. at 548 (quoting Kurzke v. Nissan Motor Corp. in U.S.A., 164 N.J. 159, 171-72 (2000)). "[A] court decline[s] jurisdiction whenever the ends of justice indicate a trial in the forum selected by the plaintiff would be inappropriate." Kurzke, 164 N.J. at 164 (quoting D'Agostino v. Johnson & Johnson, Inc., 225 N.J. Super. 250, 259 (App. Div. 1988). "The doctrine is equitable in nature and, therefore, decisions concerning its application ordinarily are left to the sound discretion of the trial court." Id. at 165.

We disagree with plaintiffs that the court's analysis was "patently erroneous," because "[a]ll of the relevant evidence" was already "gathered and is available within this forum." At the end of discovery, Tourjeman was "unable to show that there is some insurmountable burden in gathering needed evidence sufficient to justify forum non [conveniens] dismissal." In addition, we reject plaintiffs' contention that their claims against Tourjeman went beyond

"mismanagement that occurred in Israel," because Tourjeman aided and abetted Kaplan's breach of fiduciary duty "communicated into New Jersey to the New Jersey-based SKS plaintiffs."

Israel is an adequate alternative forum to adjudicate the dispute, Varo v. Owens-Illinois, Inc., 400 N.J. Super. 508, 519 (App. Div. 2008), and the public and private interest factors, Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947), weigh in favor adjudicating the claims against Tourjeman in that country. The motion court therefore did not abuse its discretion in considering the public and private factors.

We have no doubts about the court's reasoning:

> Plaintiffs have failed to show that Tourjeman, who is a citizen and resident of Israel, should be subject to jurisdiction in New Jersey. All of the work Tourjeman performed on behalf of GlobusMax was done in Israel. Most of the evidence and witnesses are located in Israel. GlobusMax filed for the Israeli equivalent of bankruptcy on or about June 13, 2017. The allegations consist of mismanagement that occurred in Israel. The documentary evidence, most of the necessary witnesses and the underlying activities are predominantly located outside of New Jersey.

We further add that the only contact between Straus and Tourjeman in this country took place after Tourjeman was terminated from GlobusMax.[10] Moreover, the dispute is subject to the Israeli equivalent of a bankruptcy proceeding involving both GlobusMax and SKS. Under no apparent analysis are the issues pertinent to this litigation considered "localized" to New Jersey. Yousef, 205 N.J. at 558.

IV.

In conclusion, we affirm summary judgment dismissal of the entirety of plaintiffs' claims against Tourjeman; affirm summary judgment dismissal of SKS's claim of breach of fiduciary duty against Kaplan; reverse summary judgment dismissal of plaintiffs' claims of fraudulent inducement and civil conspiracy against Kaplan; reverse summary judgment dismissal of Straus's and Sief's claim of breach of fiduciary duty against Kaplan; reverse summary judgment dismissal of plaintiffs' claims seeking judicial dissolution of SKS; and remand to the motion court to make findings of fact or conclusions of law as required under Rules 1:7-4(a) and 4:46-2(c).

[10] Tourjeman was even deposed remotely from Tel Aviv because he was not well enough to travel to the United States.

Affirmed in part, reversed in part, and reversed and remanded in part. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION