Magid v Magid
2017 NY Slip Op 32603(U)
December 12, 2017
Supreme Court, New York County
Docket Number: 653440/2015
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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MARC MAGID, MM13 REALTY, LLC,
RICHARD MAGID, R13 REALTY, LLC,
HAROLD MAGID, EMJULI REALTY, LLC,
ABRAHAM AND SALLY MAGID FAMILY
PARTNERSHIP, L.P., and MAGID FAMILY 13 LLC,

Plaintiffs,

Index No.: 653440/2015

-against-

Mot. Seq. Nos. 002, 004

LAWRENCE MAGID, MAGID HOLDINGS, LLC,
and 110 EAST 13TH STREET ASSOCIATES,

Defendants.

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EILEEEN BRANSTEN, J.S.C.:

On motion sequence No. 002, plaintiffs Marc Magid (M. Magid), MM13 Realty, LLC, Richard Magid (R. Magid), R13 Realty LLC, Harold Magid (H. Magid), Emjuli Realty, LLC, Abraham and Sally Magid Family Partnership, L.P. (the Partnership), and Magid Family Realty 13 LLC move, pursuant to CPLR 3212, for summary judgment on their first cause of action for judicial dissolution, pursuant to Partnership Law § 63, of nominal defendant 110 East 13th Street Associates (110 East). On motion sequence No. 004, defendants Lawrence Magid (L. Magid) and Magid Holdings, LLC move, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' amended complaint in its entirety.

Motion sequence Nos. 002 and 004 are hereby consolidated for disposition.

BACKGROUND[1]

110 East was formed as a general partnership as of March 19, 1981. *Plaintiffs' Rule 19-a statement,* ¶ 1. 110 East was formed to manage the building located at 110 East 13th Street (the Premises), a six-story rental property that is 110 East's sole asset. *Id.*, ¶¶ 2-4. Originally, the two sole managing partners were Abraham Magid (A. Magid), the father of L. Magid, M. Magid, R. Magid and H. Magid, and Norman Roberts (Roberts), while L. Magid was a non-managing partner. *Id.*, ¶ 5. As of May 1991, by way of a third amendment to the partnership agreement (110 East Agreement), L. Magid was made the third managing partner. *Id.*, ¶ 8.

Over the years, Abraham transferred various amounts of his interest in 110 East to his sons, L. Magid, M. Magid, and R. Magid (*see, e.g.* Fried Affirm., Exhibit 4), and, as of December 31, 2000, transferred his remaining interest in the Premises to a Partnership, an entity, formed by Abraham and his wife Sally Magid (S. Magid), that replaced Abraham as managing partner. *Plaintiffs' Rule 19-a statement,* ¶ 10. On October 31, 2004, a Trust established by Roberts transferred his own 45% interest in 110 East to L. Magid, H. Magid, R. Magid, and M. Magid, in varying percentages. *Fried Affirm., Exhibit 6.* Currently, 110 East is owned by the Partnership, of which S. Magid is the

[1] Except where otherwise noted, the parties have admitted to the following cited facts contained in their respective Rule 19-a statements of material facts (Rules for Comm Div of the Supreme Ct [22 NYCRR] § 202.70 [g], Rule 19-a).

general partner *(Plaintiffs' Rule 19-a statement,* ¶ 10), and the four Magid brothers. Pursuant to the seventh amendment to the 110 East Agreement, M. Magid was made the third managing partner, along with L. Magid and the Partnership. *Id.*, ¶ 9. Each partner's interest is held by a separate single-purpose limited liability company (LLC). *Id.*, ¶¶ 12, 13. The ownership structure is as follows:

> "Magid Holdings LLC ([L. Magid, managing member]): 39.5%
>
> R13 Realty LLC ([R. Magid]): 21.25%
>
> MM13 Realty LLC ([M. Magid, managing member]): 21.25%
>
> Emjuli Realty LLC ([H. Magid]): 3%
>
> Magid Family 13 LLC ([The Partnership, managing member]): 15%"

Id., ¶ 14. Each owner is also the sole member of the respective LLC. *Id.*, ¶ 14. L. Magid, through his entity MAM Services (MAM), also serves as property manager for the Premises. *Id.*, ¶ 16.

The 110 East Agreement provides that 110 East shall continue until November 30, 2030, except upon mutual written consent of the partners, upon the sale of all or substantially all of the real estate owned by 110 East, or upon other specified events. *Fried Affirm., Exhibit 4 at* ¶ 3.1. The consent of all of the managing partners is required to sell the Premises, and to "enter into any agreement the effect of which shall be a burden on [110 East or its property]". *Id.*, ¶ 8.1. The third amendment to the 110 East Agreement provides that, notwithstanding the foregoing requirements, any one of the

managing partners may borrow money on behalf of 110 East, secured by means of a mortgage on the Premises, assignments of rents, or other form of collateral related to the Premises, without the consent of the rest of the members. *Fried Affirm., Exhibit 4, at* ¶ 2. The partners may not receive any compensation for services rendered to 110 East, save for profit allocations. *110 East Agreement,* ¶ 11.1. Finally, the managing partners may hire outside vendors that they "in their sole judgment, shall deem advisable in the operation and management of the business of [110 East]". *Id.*, ¶ 11.3.

To the extent that the events leading up to this lawsuit are uncontested, they are briefly set forth as follows: On May 25, 2015, M. Magid emailed the other partners to tell them that he had received a $25,000,000 offer for the Premises. *L. Magid Affidavit, Exhibit 9.* Plaintiffs wished to sell the Premises, and defendants do not. Indeed, L. Magid testified at his deposition that he did not then, and does not now, have any interest in selling his interest in the Premises. *Fried Affirm., Exhibit 8 at 143:7-143:15.* Accordingly, L. Magid refused to consent to a sale, which he asserts is his right as a managing partner. *Id. at 187:5-12, 210:15-19*; *L. Magid Affidvait,* ¶¶ 26, 29. M. Magid asserts that L. Magid has threatened litigation if the other partners attempt to sell the building. *M. Magid Affidavit,* ¶¶ 2, 13-16; L. Magid denies any threats of litigation. *Defendants' response to Plaintiffs' Rule 19-a statement,* ¶ 32.[2]

[2] Plaintiffs argue that L. Magid had previously received other offers to sell the building (L. Magid Deposition at 123:9-124:19), which he did not pass on to his partners (*id.* at 130:4-16). It

On June 8, 2015, M. Magid called a meeting of the partners to discuss whether MAM, and by extension L. Magid, should be removed as property manager for the Premises. *Fried Affirm., Exhibit 10.* Ultimately, all of the partners except L. Magid voted to remove MAM as property manager. *Fried Affirm., Exhibit 11 and 13.* L. Magid, believing that his consent was required for this removal, told the remaining partners that the meeting had been improperly convened, and that he (L. Magid) would resort to court intervention if the partners attempted to oust him. *L. Magid Affidavit,* ¶ 54.

Shortly thereafter, M. Magid proposed that 110 East should refinance its mortgage on the Premises. *Fried Affirm., Exhibit 14.* It is noted that the 110 East Agreement provides, and L. Magid's testimony confirms, that any individual managing partner may encumber the Premises. *Fried Affirm., Exhibit 4 at ¶ 2; Exhibit 7 – L. Magid Deposition Testimony at 23:6-27:10.* Nonetheless, L. Magid, through counsel, wrote to M. Magid and informed him that, though he (M. Magid) had the right to refinance the mortgage, L. Magid believed it would not benefit the partnership financially, and therefore, he (L. Magid) would sue M. Magid for waste and breach of fiduciary duty if he went through with the refinancing. *Fried Affirm., Exhibit 14.*

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should be noted that L. Magid also testified that he forwarded the formal offers he received to his partners (*id.* at 124:20-128:19), and that M. Magid also received offers to buy the building at the same time (*id.* at 130:18-131:8).

Currently, there is some level of acrimony and dysfunction among the parties (*M. Magid Affidavit,* ¶¶ 2-3*; R. Magid Affidavit,* ¶¶ 2-5*; H. Magid Affidavit,* ¶¶ 2, 10-1*)*, though they do not agree on how badly the relationship among the partners has deteriorated (L. Magid Affidavit, ¶ 76). Beginning either with the death of Abraham, the family patriarch (M. Magid Affidavit, ¶ 3; R. Magid Affidavit, ¶ 3; S. Magid Affidavit, ¶ 10-11), or with L. Magid's refusal to consent to a sale of the building. (L. Magid, ¶ 49), the parties have, allegedly, been unable to engage with each other in a civil manner. *E.g. M. Magid Affidavit,* ¶ 8*; H. Magid Affidavit,* ¶ 9. The documented instances of such incivility include acrimonious email exchanges between the brothers, between S. Magid and L. Magid, and between the parties and various individuals. *Fried Affirm., Exhibit 9; L. Magid Affidavit, Exhibit 13.* Verbal altercations also occurred between the brothers, with involvement of the parties' counsel, during the pendency of the instant case. *Fried Affirm., Exhibit 16 at 66:6-74:15; Exhibit 17 at 72:6-74:24, 190:9-23, 251:19-257:25.* H. Magid avers that there was a physical altercation between him and L. Magid at M. Magid's deposition (*H. Magid Affidavit,* ¶ 9), though L. Magid denies this. *L. Magid Affidavit,* ¶ 86 n 6.

The court has previously been compelled, because of such behavior, to enjoin the parties from communicating with each other, except through counsel. *NYSCEF Doc. No. 54, at 8-10.* Moreover, the parties have been involved in other litigation in Westchester

and Nassau counties, although, as with almost every other factual issue, the parties differ as to how many other lawsuits they have brought against each other. *M. Magid Affidavit,* ¶¶ 7, 11*; H. Magid Affidavit,* ¶ 7*; L. Magid Affidavit,* ¶ 49. Despite all of this, L. Magid argues that the day to day business of the partnership continues uninterrupted, the building remains competently managed, and 110 East has been very profitable, even during the pendency of this action. L. Magid *Affidavit*, ¶ 67-68, 73-74, 78-79, 82. Plaintiffs counter that numerous issues have gone unaddressed, including New York City Department of Buildings violations and necessary repairs to the Premises. *M. Magid Reply Affidavit,* ¶ 18 *and Exhibit 26.*

DISCUSSION

It is well-understood that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established the absence of any material issues of fact, requiring judgment as a matter of law. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012) (citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986)). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

When deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 (2007). However, mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 N.Y.2d at 562; *see also Ellen v. Lauer*, 210 A.D.2d 87, 90 (1st Dep't 1994) ("[it] is not enough that the party opposing summary judgment insinuate that there might be some question with respect to a material fact in the case. Rather, it is imperative that the party demonstrate, by evidence in admissible form, that an issue of fact exists ...") (citations omitted).

A. Judicial Dissolution (First Cause of Action)

On their first cause of action, plaintiffs seek an Order dissolving 110 East, and giving plaintiffs the right to wind up 110 East by selling the Premises and conducting a final accounting and distribution of the partnership assets. *Amended Complaint*, ¶¶ 68-71. Plaintiffs argue that the persistent acrimony and irreconcilable differences between plaintiffs and defendants make it impossible to carry on the business of the partnership. In particular, plaintiffs argue that L. Magid's threat to commence litigation in response to actions proposed by the rest of the partners has functionally deadlocked the partnership, and his refusal to consent to a sale, L. Magid's refusal to submit to a vote of the partnership to remove him as property manager, and his refusal to maximize the money-

making potential of the Premises all warrant dissolution. In addition, plaintiffs point out that L. Magid has commenced related litigation against M. Magid and H. Magid, and that the partners have not spoken in person in more than a year and are incapable of communicating, except through counsel, to the point where the court ordered the parties not to speak to each other directly.

In opposition, and in support of their own motion for summary judgment dismissing the cause of action for judicial dissolution, defendants argue that L. Magid has the right to withhold his consent to selling the building pursuant to ¶ 8.1 of the 110 East Agreement. Moreover, defendants claim that, because the parties are not divided 50/50 in terms of ownership of 110 East, there can be no actual deadlock. Further, defendants assert that the reports of acrimony and dysfunction are largely manufactured by plaintiffs to justify a dissolution and thereby get around L. Magid's refusal to sell. In this regard, defendants argue that 110 East has remained profitable, and that the parties have been able to continue to operate the partnership in all respects, save for the issues of a potential sale and the removal of L. Magid, through MAM, as property manager of the Premises. Defendants argue that L. Magid's status as property manager is not a breach of the 110 East Agreement. Finally, defendants claim that L. Magid will be financially harmed by a dissolution, as a forced sale of the Premises will not return market value to the partners.

Partnership Law § 63 provides that the court may order the dissolution of a partnership where "a partner willfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him," or where "[o]ther circumstances render a dissolution equitable". *Partnership Law §§ 63 [1] [d], [f].*[3] Where the partners are deadlocked, and the partnership is consequently unable to make any decisions, it is equitable to dissolve the partnership. *Seligson v Russo*, 16 AD3d 253, 253 (1st Dept 2005); *Krulwich v Posner*, 291 AD2d 301, 302 (1st Dept 2002). "No one can be forced to continue as a partner against his will". *Napoli v Domnitch*, 18 AD2d 707, 708 (2d Dept 1962), *affd* 14 NY2d 508 (1964). As the Appellate Division, First Department has said when discussing the related area of the duties of shareholders in a closely held corporation:

> "The law exacts a high degree of fidelity and good faith in dealings between partners in the conduct of the affairs of the partnership. The same obligations are likewise applicable to shareholders in a close corporation. However, where a deadlock exists to the extent that dissension becomes the order of the day, the impasse may effectively destroy the loyalty and good faith expected of such stockholders in their dealings with each other. The inevitable result is the downfall of the business. In such a case, dissolution affords to the court an appropriate remedy to judicially direct

[3] Defendants argue that Partnership Law § 63 does not apply, as the 110 East Agreement provides a provision for dissolution of the partnership. They do not, however, cite any authority for this argument.

Additionally, Plaintiffs' amended complaint cites Partnership Law § 63 [1] [c] rather than [d], however from the context and plain wording of plaintiffs' allegations, it is clear that this is a mere scrivener's error (CPLR 2001; *Albilia v Hillcrest Gen. Hosp.*, 124 AD2d 499, 500 [1st Dept 1986]).

> what in actuality is obvious to all, that the deadlock and dissension have effectively destroyed the orderly functioning of the corporation."

Matter of T.J. Ronan Paint Corp., 98 AD2d 413, 421–22 (1st Dept 1984). The reason for such dissension is irrelevant; the only issue is whether the relationship between the partners is irretrievably dysfunctional. *Seligson*, 16 AD3d at 253. "Given its extreme nature, judicial dissolution is a limited remedy that [courts grant] sparingly". *Matter of 1545 Ocean Ave., LLC*, 72 AD3d 121, 129–30 (2d Dept 2010) (internal quotation marks and citations omitted).

At the outset, the court notes that defendants do not accurately identify the requirements to show a deadlock. While the cases cited by plaintiffs have largely concerned partnerships where the competing owners or ownership groups each held 50% of the partnership (*e.g. Seligson*, 16 AD3d at 253; *Matter of T.J. Ronan Paint Corp.*, 98 AD2d at 414), defendants do not point to any authority stating that a 50/50 division is necessary for the court to find that a partnership is irretrievably deadlocked. Indeed, it is seemingly disingenuous for L. Magid to argue that the partnership is not deadlocked on, at the very least, the issues of refinancing, a sale of the Premises, and the removal of L. Magid as property manager, when L. Magid has responded to his partners' proposals related to those issues with threats of litigation. *M. Magid Affidavit*, ¶¶ 2, 13-16; *L. Magid Affidavit*, ¶ 54; *Exhibit 12; Fried Affirm., Exhibit 14*. Nor have defendants shown that 110 East's continued profitability and day-to-day operations necessarily defeat plaintiffs' claim.

This Court notes, contrary to defendants' argument, it has already had to intervene in this action to order the parties not to communicate with each other, except through counsel. *NYSCEF Doc. No. 54,* at 8-10. It is not at all clear that 110 East would continue to function in absence of this directive. Further, whether or not the dissension has impacted or will impact 110 East's or any partner's finances is irrelevant to whether dissolution is warranted. *Matter of Neville v Martin*, 29 AD3d 444, 445 (1st Dept 2006) ("That the dissension had no appreciable impact on the firm's profitability was not a sufficient ground for the petition's denial"); *see also Krulwich*, 291 AD2d at 303 (a partner "may not compel the partnership to structure the transaction to accommodate his peculiar tax situation").

L. Magid argues that his status as property manager and his refusal to consent to a sale of the Premises are both protected by the 110 East Agreement, and, thus, cannot be the basis of a deadlock. However, the 110 East Agreement does not require the consent of all managing partners to terminate a contract with an outside entity, such as the property manager; though it does require such consent to enter into a contract in the first place. *110 East Agreement,* ¶ 8.1.

The 110 East Agreement also provides that the consent of all managing partners is required to sell the Premises. *Id.* Plaintiffs argue the consent provision is ambiguous

because it was not modified after the number of managing partners was increased from two to three, and refers to "both managing partners". *Id.* Despite that, "provisions in a contract are not ambiguous merely because the parties interpret them differently". *Mount Vernon Fire Ins. Co. v. Creative Hous.*, 88 NY2d 347, 352 (1996). Plaintiffs have failed to offer any evidence that, at the time the 110 East Agreement was amended to add L. Magid as the third managing partner, or at any time since, the partners intended that the requirement that all managing partners consent to certain major decisions be changed to allow such decisions to be made by two of the three. Plaintiffs' reference to L. Magid's deposition testimony, as to what he believed the language of the 110 East Agreement and its amendments meant, is irrelevant, as the 110 East Agreement includes a merger clause, which provides that the agreement "may not be changed, modified, waived, or discharged, in whole or in part, unless in writing and signed by all the partners herein". *110 East Agreement,* ¶ 22.1. Therefore, its terms are to be read as plainly stated in the Agreement.

Ultimately, a decision on this cause of action requires credibility judgments of the kind that are inappropriate on a motion for summary judgment. *Ferrante*, 90 NY2d at 631. It is clear that, despite defendants' efforts to downplay it, significant acrimony and dissension exists among the partners. Such dissension is further amplified by the fact that, unlike many partnerships, 110 East is a family partnership, with all of its attendant personal factors. Moreover, the alleged complaints regarding the management of the

building are intertwined with the broader partnership disputes, as L. Magid also serves as property manager.[4] Yet, dissension and animosity, by themselves, are not enough; the discord must raise "an irreconcilable barrier to the continued functioning and prosperity of the [partnership]". *Matter of T.J. Ronan Paint Corp.*, 98 AD2d at 421.

Here, the parties have raised issues of fact as to the level of dysfunction caused by their personal animosity, and whether such dysfunction impacts the management of the Premises and 110 East's ability to function. L. Magid Affidavit, ¶ 67-68, 73-74, 78-79, 82; M. Magid Reply Affidavit, ¶ 18; Exhibit 26. Under these circumstances, summary judgment is not appropriate for either side. *Hellenic Am. Educ. Found. v Trustees of Athens Coll. in Greece*, 116 AD3d 453, 454 (1st Dept 2014) ("sharp disputes of fact over the misfeasance and existence of deadlock preclude the granting of summary judgment to either side").

Accordingly, both plaintiffs' motion for summary judgment on their first cause of action for judicial dissolution, and that branch of defendants' motion for summary judgment dismissing the first cause of action, are denied.

[4] L. Magid does not deny that MAM is simply a "doing business as" name, or d/b/a, and that he is its only employee (L. Magid Deposition at 69-70).

B. Breach of Fiduciary Duty (Second Cause of Action)

On their second cause of action, plaintiffs allege that L. Magid breached his fiduciary duty to plaintiffs by "misallocating partnership funds in order to pay himself an annual management fee"; failing to tell the other partners about offers he received for the Premises; and unilaterally refusing to sell the building unless plaintiffs agreed to several concessions. Amended complaint, ¶¶ 78-81. L. Magid argues that his right to withhold consent to a sale is governed by the 110 East Agreement and, thus, may not be the basis of a tort claim, such as breach of fiduciary duty. In opposition, plaintiffs assert that L. Magid's breaches of his fiduciary duty go beyond what is set forth in the 110 East Agreement, and that there are issues of fact with regard to those breaches that cannot be resolved on this motion.

"To establish a breach of fiduciary duty, the movant must prove the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct". *Pokoik v Pokoik*, 115 AD3d 428, 429 (1st Dept 2014). "A fiduciary relationship arises between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation". *Roni LLC v Arfa*, 18 NY3d 846, 848 (2011) (internal quotation marks and citation omitted). For example, "[a] partner has a fiduciary obligation to the other partners" in a partnership. *Drucker v Mige Assoc. II*, 225 AD2d 427, 428 (1st Dept 1996). "A cause of

action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand". *William Kaufman Org. v Graham & James*, 269 AD2d 171, 173 (1st Dept 2000). Moreover, a cause of action for breach of fiduciary duty may not be plead where there is "a formal written agreement covering the precise subject matter of the alleged fiduciary duty". *Pane v Citibank, N.A.*, 19 AD3d 278, 279 (1st Dept 2005).

Here, plaintiffs' arguments that L. Magid breached his fiduciary duty to them by refusing to consent to a sale of the building and by paying himself a management fee, are matters covered by the 110 East Agreement. 110 East Agreement, ¶¶ 8.1, 11.1, 11.3. Accordingly, these alleged breaches cannot be the basis for plaintiffs' claim. *Pane*, 19 AD3d at 279. Moreover, the claim regarding L. Magid/MAM's management fee is duplicative of the breach of contract claim (third cause of action) (*compare* amended complaint ¶ 78 *with* ¶ 90), and is thus improper. *William Kaufman Org.*, 269 AD2d at 173. With respect to L. Magid's purported failure to inform his partners of offers to buy the building, plaintiffs fail to controvert L. Magid's testimony that he forwarded to his partners the formal offer he received, and that any other offers were not bona fide. *L. Magid Deposition at 123:9-128:19*. Moreover, any argument that plaintiffs were harmed by L. Magid's failure to inform them of offers to buy the building is entirely speculative, and plaintiffs provide no evidence for damages they may have suffered as a result. E.g. *One Times Sq. Assoc. v Calmenson*, 292 AD2d 174, 174 (1st Dept 2002) ("Assuming further that defendants again breached a fiduciary duty it owed to plaintiffs by failing to

disclose the potential business opportunity . . ., such breach is based on unsupported speculation concerning future events that are insufficient as a matter of law to show any damages").

Accordingly, that branch of defendants' motion for summary judgment dismissing the second cause of action for breach of fiduciary duty is granted.

C. Breach of Contract (Third Cause of Action)

On their third cause of action, plaintiffs allege that L. Magid breached the partnership agreement by "allocating partnership funds to himself in the form of an annual management fee". *Amended Complaint,* ¶ 90. L. Magid argues that payment of a management fee to MAM for serving as property manager is permitted pursuant to the 110 East Agreement, and has been authorized by the managing partners since the inception of the partnership. In opposition, plaintiffs argue that two of the three managing partners, as well as the owners of a majority of the partnership, have objected to said payments, which they claim are in violation of the 110 East Agreement's prohibition on partners receiving additional compensation for services to the partnership. Moreover, plaintiffs argue that L. Magid cannot avoid the application of this provision simply by acting as MAM, a d/b/a of which he is the sole employee.

Breach of contract requires proof of "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages". *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dept 2010)). The plaintiff must establish "the essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated". *Matter of Sud v Sud*, 211 AD2d 423, 424 (1st Dept 1995).

Here, L. Magid's position as property manager potentially implicates several provisions of the 110 East Agreement. First, the agreement provides that the partners are not entitled to compensation for service to 110 East. *110 East Agreement, ¶ 11.1.* The purposes of 110 East include "[m]anaging . . . and otherwise exercising complete control over the [Premises]," and "[s]uch other activities incident or appropriate to the foregoing". *Id.*, ¶ 4.1 [b], [c]. The managing partners may collectively employ "such persons, firms or corporations as they, in their sole judgment, shall deem advisable in the operation and management of the building," (*id.*, ¶ 11.3), and the consent of all of the managing partners is required to enter into an agreement with such an entity. *Id.*, ¶ 8.1 [d].

Taken together, these provisions suggest that it is improper for L. Magid to receive a fee for managing the property. To argue otherwise would render the 110 East Agreement's prohibition on partners earning extra compensation for service to the partnership meaningless. In interpreting an agreement, a court should not read it in a way that renders any provision or clause meaningless *E.g. Warner v Kaplan*, 71 AD3d 1, 5 (1st Dept 2009). L. Magid's argument, that he may avoid the application of paragraph 11.1 by acting through MAM, is specious. Moreover, as set forth above, and contrary to L. Magid's interpretation, the 110 East Agreement does not require the consent of all managing partners to terminate an agreement with an outside service provider, such as MAM.

L. Magid's argument, that MAM has served as property manager since the 110 East's formation in 1981, does raise a question of fact as to whether plaintiffs have waived any retroactive claim for damages during the time that they were aware that L. Magid was drawing a management fee through MAM and did not voice any objection. *E.g. Long Is. Light. Co. v American Re-Ins. Co.*, 123 AD3d 402, 403 (1st Dept 2014) ("Waiver is the voluntary relinquishment of a known right and must be predicated upon knowledge of the facts upon which the existence of the right depends"). The record does not reflect that plaintiffs raised an objection to L. Magid's position, through MAM, as property manager until 2015. As of July 9, 2015, however, plaintiffs, holders of 60.5%

of the partnership, had voted to terminate *110 East's Agreement with MAM. Fried Affirm., Exhibits 11 and 13*. Thus, at a minimum, it appears that it was a breach of the 110 East Agreement for L. Magid to continue to draw a management fee subsequent to that vote, and such breach is sufficient to deny the motion.

Accordingly, that branch of defendants' motion for summary judgment to dismiss the third cause of action for breach of contract is denied.

Accordingly, it is hereby,

ORDERED that the motion of plaintiffs Marc Magid, MM13 Realty, LLC, Richard Magid, R13 Realty, LLC, Harold Magid, Emjuli Realty, LLC, Abraham and Sally Magid Family Partnership, L.P., and Magid Family 13 LLC (Motion Sequence No. 002), for summary judgment on their first cause of action for judicial dissolution is DENIED; and it is further

ORDERED that the motion of defendants Lawrence Magid and Magid Holdings, LLC, for summary judgment dismissing the amended complaint (Motion Sequence No. 004), is DENIED with respect to the first cause of action for judicial dissolution and third cause of action for breach of contract, but GRANTED with respect to the second cause of action for breach of fiduciary duty; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 442, 60 Centre Street, on January 23, 2018, at 11:30 AM.

December 12, 2017

ENTER:

HON. EILEEN BRANSTEN, J.S.C.