IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

JONATHAN NADAV	:	March Term, 2011
Plaintiff—Counterclaim Defendant	:	Case No. 03536
v.	:	
AMIT AZOULAY	:	Commerce Program
Defendant—Counterclaim Plaintiff	:	

DOCKETED
JUN 26 2013
C. HART
CIVIL ADMINISTRATION

ORDER

And Now, this 26th day of June, 2013, after trial held on August 13-15 and 17, 2012, in consideration of the record which includes the parties' proposed findings-of-fact and conclusions-of-law, the respective responses thereto, and in accordance with the Findings-of-Fact and Conclusions-of-Law issued contemporaneously herewith, **Judgment** is entered as follows: for defendant, counterclaim plaintiff Amit Azoulay in the amount of $15,377.00, and for plaintiff, counterclaim defendant Jonathan Nadav, in the amount of $31,375.93. The parties shall distribute all assets of Olwidas, LLC according to the formula supplied by the court in its Findings-of-Fact and Conclusions of Law.

BY THE COURT,

Albert John Snite, Jr.

ALBERT JOHN SNITE, JR. J.

Olwidas, Llc Vs Azoulay-WSJDE

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FINDINGS-OF-FACT

1. Plaintiff, counterclaim defendant, Jonathan Nadav ("Nadav,") is an individual residing in Pennsylvania.

2. Defendant, counterclaim plaintiff, Amit Azoulay ("Azoulay,") is an individual residing in Philadelphia, Pennsylvania.

3. In June 2005, Nadav and Azoulay formed Olwidas, LLC, ("Olwidas,") a Pennsylvania limited liability company.

4. On February 6, 2006, Nadav and Azoulay adopted an "Operating Agreement" on behalf of Olwidas. The Operating Agreement recited, *inter alia*, that the purpose of Olwidas was "the acquisition, construction and sale of [real] property."[1]

5. Pursuant to the Operating Agreement, Nadav and Azoulay are respectively 66.6% and 33.3% owners of Olwidas.[2] Both Nadav and Azoulay have 50—50 voting rights in all the affairs of Olwidas.[3] Under the Operating Agreement, "any decision, determination,

[1] Operating Agreement of Olwidas, LLC dated February 6, 2006, Trial Exhibit P1, ¶ 3—Purpose, p. 4.
[2] Id. at Annex A.
[3] Id., ¶¶ 16(b), 16(e)(2).

or other action to be made or taken by the Members shall be made or taken by a Majority Vote."[4]

6. Olwidas acquired real property located at 8614 Thomas Mill Terrace, in Philadelphia, Pennsylvania (the "Thomas Mill Property.")

7. To finance the development of the Thomas Mill Property, Nadav borrowed funds in his name and placed the funds in the account of Olwidas.

8. Nadav obtained the loan in his name to take advantage of better terms than would have been available to Olwidas.[5] Accordingly, the Thomas Mill Property was titled in the name of Nadav only because he was solely responsible for repayment of the obligation thereon.[6]

9. Azoulay managed development of the Thomas Mill Property and acted as contractor and builder thereof.

10. The Thomas Mill Property was developed for residential use.

11. On March 24, 2011, Azoulay, as president of Olwidas, entered into an agreement for the sale of the Thomas Mill Property for $ 1 million. Nadav, as holder of 50% of the voting rights in Olwidas, refused to ratify the sale.[7]

12. On March 31, 2011, at the instigation of Nadav, Olwidas filed an original complaint against Azoulay. In the complaint, Olwidas asserted that Azoulay had breached his fiduciary duties to Nadav by failing to provide an accounting of expenses, and by converting funds of Olwidas for personal use.[8]

13. On April 6, 2011, Azoulay filed a joinder complaint against Nadav. In the joinder

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[4] Id. ¶ 16(a).
[5] Admission of Azoulay, Notes of testimony dated August 17, 2012, pp. 49:13—16.
[6] Id. p. 52:9—12.
[7] See Order-and-Opinion dated August 2, 2011, issued by the Honorable Mark I. Bernstein upon Azoulay's petition for injunctive relief seeking to compel Nadav to ratify sale of the Property, control no. 11040610.
[8] See generally Complaint filed on March 31, 2011, ¶¶ 15—37.

complaint, Azoulay asserted that Nadav had breached his fiduciary duty to Azoulay by failing to ratify sale of the Property, and by failing to repay loans borrowed from Olwidas.[9]

14. On April 6, 2011, Azoulay filed a petition for preliminary injunctive relief. The petition sought to compel Nadav to ratify the sale of the Thomas Mill Property.

15. A hearing was held upon Azoulay's petition for injunctive relief. At the hearing, Nadav indicated that the selling price of $1 million was inadequate. Nadav also stated that he was willing to personally pay all costs to maintain the Thomas Mill Property until it could be sold for a more attractive price.

16. After the hearing, this court issued an Order-and-Opinion which denied Azoulay's petition. However, this court ordered Nadav to pay "all maintenance costs" for the Thomas Mill Property since these costs resulted from Nadav's "refusal to agree to the sale."[10]

17. On June 28, 2011, Azoulay filed a praecipe to index *lis pendens* against the Property.

18. On July 26, 2011, Azoulay filed a motion for leave to withdraw counterclaim and to amend joinder complaint. The court denied this motion and simultaneously granted Nadav's cross-motion for leave to file a new complaint and to substitute Nadav for Olwidas as plaintiff.[11]

19. On August 2, 2011, this court dismissed the joinder complaint of Azoulay after Nadav had filed preliminary objections thereto.

20. On September 21, 2011, Nadav filed a new complaint in which he replaced Olwidas as plaintiff. This complaint essentially averred the same facts, and asserted the same

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[9] See generally joinder complaint of Azoulay filed on April 6, 2011, ¶¶ 9—19.
[10] See Order-and-Opinion dated August 2, 2011, control no. 11040610.
[11] See Order dated 13 September 2011, control no. 11072939.

claims, as contained in the complaint originally filed by Olwidas.

21. On October 14, 2011, Azoulay filed an answer with new matter and counterclaim against Nadav. In the counterclaim, Azoulay asserted against Nadav a number of claims of which only three survive: breach of oral contract (pertaining to alleged un-repaid loans made by Olwidas to Nadav at Count II,) breach of fiduciary duty (pertaining to Nadav's alleged misuse of funds owned by Olwidas at Count III,) and breach of fiduciary duty of care (pertaining to Nadav's alleged failure to maintain the Thomas Mill Property in satisfactory conditions pending sale thereof at Count IV.)[12]

22. On February 27, 2012, Nadav entered into an agreement for the sale of the Thomas Mill Property. Pursuant to this agreement, Nadav accepted the offer of $1 million representing the same amount he rejected when, in March 2011, Azoulay had obtained a buyer for the same property.[13]

23. On April 12, 2012, Nadav filed an emergency motion to strike the *lis pendens* previously filed by Azoulay.

24. On April 18, 2012, a conference was held upon the emergency motion to strike *lis pendens*. At the conference, it was discovered that buyer would not consummate purchase of the Thomas Mill Property unless Olwidas provided certain repairs thereon.

25. On May 21, 2012, Nadav and Azoulay filed their respective motions for summary judgment. The court denied both motions.[14]

26. On May 30, 2012, this court issued an Order striking *lis pendens*. The Order also instructed Nadav to contract for the necessary repairs and to be solely responsible for

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[12] See Azoulay's Proposed Findings-of-Fact and Conclusions-of-Law in support of counterclaims, at ¶¶ 21—22 (withdrawing Counts V—VIII.)

[13] See Standard Agreement For The Sale of Real Estate, attached as Exhibit C to Nadav's emergency motion to strike *lis pendens*.

[14] Order denying motion for partial summary judgment of Nadav and motion for summary judgment of Azoulay, dated July 2, 2012, control nos. 12052681, 12052736.

the first $5,000 in repair expenses, in accordance with an agreement made by the parties during a conference held in chambers. Furthermore, the Order instructed Nadav and Azoulay to execute all documents necessary to complete the sale of the Thomas Mill Property, and reaffirmed this court's earlier Order, dated April 20, 2012, which had approved the parties' joint decision to place proceeds from the sale thereof into an escrow account until resolution of the action.

27. The Thomas Mill Property was sold on June 18, 2012. Currently Olwidas owns no other real estate.

28. On August 3, 2012, Nadav filed a motion to amend the complaint. In the motion, Nadav sought to recover additional costs stemming from discovery of hitherto unknown construction defects. This court denied the motion to amend the complaint, but allowed Nadav to include in his existing complaint any "damages sought in his motion."[15]

29. A non-jury trial in this action was held between August 13-15, 2012, and on August 17, 2012. At trial, Nadav sought to prove that Azoulay had breached the Operating Agreement and his fiduciary duties to Nadav, and had converted funds of Olwidas for personal use. Nadav sought to prove the claims above by showing that Azoulay performed his duties as developer and builder in an un-workmanlike manner, and improperly paid himself a salary and management fees throughout development of the Thomas Mill Property. Conversely, Azoulay sought to prove that he developed the Thomas Mill Property in a workmanlike manner, and properly collected a salary and management fees under the terms of oral contracts with Nadav. In addition, Azoulay sought to prove that Nadav had breached his fiduciary duties by failing to repay certain

[15] Order dated August 20, 2012. See also, Notes of testimony, August 13, 2012, Colloquy, 54: 10—15.

funds which Nadav allegedly had borrowed from Olwidas.

DEVELOPMENT OF REAL PROPERTY OWNED BY OLWIDAS

30. At trial, defendant Azoulay credibly testified that he and Nadav entered into a number of oral contracts. Under the terms of an oral contract, Azoulay agreed to perform the work of developer, contractor and builder, through Olwidas, upon the Thomas Mill Property and upon two other properties owned exclusively by Nadav: the "Korisa Drive Property" and the "3900 Buck Road Property."[16]

31. Azoulay credibly testified that pursuant to the oral agreements, he was entitled to receive payment through Olwidas in the amount of 15% of construction costs for the Thomas Mill, Korisa Drive and 3900 Buck Road properties.[17]

32. Azoulay testified and produced evidence that that the construction costs to develop the Thomas Mill, Korisa Drive and 3900 Buck Road properties amounted to $1,546,727.00.[18]

33. Pursuant to the oral contracts between Azoulay and Nadav, Azoulay earned management fees of $232,009.00, representing 15% of construction costs of $1,546,727.00 for the Thomas Mill, Korisa Drive and 3900 Buck Road properties.[19] The court accepts the figure of $232,009.00 as representing Azoulay's earned management fees for his work upon the three properties above.

34. Azoulay credibly testified that he received payment in the amount of $216,632.00 for

[16] Nadav asserts in his proposed Findings-of-Fact and Conclusions-of-Law that the "alleged" oral contracts between Nadav and Azoulay are impermissible under the terms of the Operating Agreement which states that an amendment thereto "must be in writing." See Nadav's proposed Findings-of-Fact and Conclusions-of-Law, ¶ 8, (citing the Operating Agreement, ¶ 22(e)). The court rejects Nadav's premise that an oral contract aimed at securing the work of a construction manager amounts to an amendment to the Operating Agreement, merely because the construction manager happens to be a member of Olwidas and a signatory to the Operating Agreement thereof.

[17] Notes of testimony dated August 13, 2012, at 78:8—9; Notes of testimony dated August 17, 2012, at 88:22—25, 89:1—11.

[18] Defendant Azoulay's Trial Exhibit Binder 1, Exhibit D—4, Table 2.

[19] Id. See also Notes of testimony dated August 17, 2012, p. 89:2—19.

his construction management work on the three properties.[20] The difference between what Azoulay earned ($232,009.00) and what he actually received ($216,632.00), amounts to $15,377.00.

35. Azoulay also testified that the work upon the Korisa and 3900 Buck Road properties was "essentially" financed by Olwidas. [21] Azoulay further stated that in exchange for financing provided by Olwidas, Nadav agreed to pay Olwidas a 20% fee. Azoulay also testified that Nadav failed to pay the balance of $3,041.00 for "hard construction costs paid [by Olwidas] on behalf of the Korisa Property."[22] The court rejects this portion Azoulay's testimony as non credible and finds the evidence thereof insufficient to determine whether or not Olwidas actually provided funds to Nadav to finance construction of the Korisa Drive and 3900 Buck Road properties.

36. At trial, Nadav presented the expert testimony of William Thomas Barron ("Barron.")

37. Barron credibly testified that he holds a bachelor of science in civil and urban engineering from the University of Pennsylvania, has been in the construction trade for over thirty (30) years as a manager of large and small, private and public construction projects, and has been involved in their design. [23]

38. Barron testified that he visited the Thomas Mill Property before it was sold. He stated that as he "walked out on the exterior deck where the tile had been installed, [he] could feel that the underlayment was spongy."[24]

39. Nadav also presented evidence and testimony from Paul Boutcher, a builder and contractor who was hired by Nadav to repair a number of construction defects at the

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[20] Notes of Testimony dated August 17, 2012, pp. 92:22—25, 93:1—11.
[21] Id. p. 91:15—19.
[22] Notes of testimony dated August 17, 2012, p. 114:8—11; Azoulay's Proposed Findings-of-Fact and Conclusions-of-law in support of counterclaim, ¶ 98.
[23] Notes of testimony dated August 15, 2012, pp. 6-10.
[24] Id. p. 20:14—17.

Thomas Mill Property prior to the sale thereof.

40. Boutcher credibly testified that he performed repair work on the roof, on the flagstone located at the front of the Thomas Mill Property, and on two inside doors.[25] In addition, Boutcher fixed cracked sections of drywall, repainted almost the entire house, rebuilt a patio, repaired cracked stucco and reconstructed the "spongy" deck which had also been observed by expert witness Barron.[26]

41. The Settlement Statement (HUD—1) prepared for the sale of the Thomas Mill Property shows that the repair work performed by Boutcher amounted to $52,111.00 and this entire amount was paid by Olwidas before sale of the Thomas Mill Property.[27] The court accepts the amount of $52,111.00 as the cost borne by Olwidas to complete sale of the Thomas Mill Property.

LOAN ALLEGEDLY ADVANCED BY OLWIDAS TO NADAV

42. At trial, Azoulay testified that he and Nadav entered into an agreement pursuant to which Nadav received from Olwidas, on October 10, 2008, a loan in the amount of "$100,000 for personal needs," drawn from the company's line of credit.[28] Azoulay contended that Nadav owed Olwidas the unpaid $100,000 plus interest accrued thereon.[29]

43. Nadav rebutted Azoulay and testified that he took the $100,000 from Olwidas not for personal use, but to repay a mortgage loan which had been obtained personally by Nadav to fund development of the Thomas Mill Property on behalf of Olwidas.[30] The court finds Nadav's testimony credible.

[25] Notes of testimony dated August 14, 2012, pp. 10—11.
[26] Id., pp. 12—50.
[27] Settlement Statement (HUD—1), Plaintiff Nadav's Trial Exhibit P—2.
[28] Notes of testimony dated August 13, 2012, pp. 215:25, 216—217:1—15.
[29] See counterclaim of Azoulay, Count II—breach of contract.
[30] Notes of testimony dated August 14, 2012, pp. 88:19—89:15.

FINDINGS OF LAW

44. In Pennsylvania, when

> determining the weight to be attached to the testimony of a witness[,] it is proper to consider his appearance, general bearing, conduct on the stand, demeanor, manner of testifying, such as candor or frankness, or the clearness of his statement, and even the intonation of his voice.[31]

45. In this case Azoulay specifically testified at trial that Olwidas funded construction of the Korisa Drive Property in exchange for a 20% fee payable to Olwidas by Nadav. The court found non-credible this specific testimony from Azoulay, and any claims by Azoulay based on such testimony must fail.

46. In Pennsylvania,

> [t]o successfully maintain a cause of action for breach of contract the plaintiff must establish:
> (1) the existence of a contract, including its essential terms,
> (2) a breach of a duty imposed by the contract, and
> (3) resultant damages.[32]
>
> There is no need to allege any degree of negligence, as negligence is irrelevant to a contract action, unless the alleged breach is based on a contractual duty to provide professional skills consistent with those expected in a given field.[33]

47. Under the terms of the oral contract for construction work at the Thomas Mill Property, Azoulay had a duty to provide professional skills consistent with his role as a construction manager and builder.

48. Since the Thomas Mill Property had construction defects, this court finds that Azoulay breached his contractual duty to Olwidas to provide professional skills consistent with those expected in the construction field.

49. The repairs occasioned by Azoulay's breach amounted to $52,111.00, as shown on the

[31] Danovitz v. Portnoy, 399 Pa. 599, 605, 161 A.2d 146, 149 (1960).
[32] Hart v. Arnold, 2005 Pa. Super 884 A.2d 316, 332 (Pa. Super. 2005).
[33] McShea v. City of Philadelphia, 606 Pa. 88, 97, 995 A.2d 334, 340 (2010).

Settlement Sheet HUD—1 form, lines 1306, 1307.[34] However, by agreement of the parties at a conference held in chambers, and pursuant to an Order of this court dated May 30, 2012, Nadav is personally responsible for the first $5,000 of the $52,111.00 expended to repair the Thomas Mill Property prior to sale. Thus, the net difference between the two amounts is $47,111.00.

50. The court finds that Azoulay is entitled to collect the unpaid balance of construction management fees earned for his work on the Thomas Mill, Korisa Drive and 3900 Buck Road properties, in the amount of $15.377.00.

51. All proceeds obtained from the sale of the Thomas Mill Property shall be distributed to Nadav and Azoulay according to the scheme provided below. As of the date of these Findings-of-Fact and Conclusions-of-Law, the actual amount of proceeds from the sale of the Thomas Mill Property continues to grow due to accruing interest. **Therefore, the court offers the fictional amount of $500,000.00 as an exemplar which shall be substituted with the actual proceeds, as available on the date of distribution**:

- $500,000.00 - $15,377.00[35] = $484,623.00[36];
- $484,623.00 x .666 [37] = $322,758.92.[38];
- $484,629.00 -$322,758.92 = $161,870.08.[39];
- Debit Azoulay in the amount of $31,375.93 and credit Nadav by the same amount;[40]

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[34] Plaintiff Nadav's Trial Exhibits, P—2.
[35] This amount represents the unpaid balance of Azoulay's earned construction management fees. This amount is creditable to Azoulay before distribution.
[36] This amount would represent distributable proceeds.
[37] This figure represents the share in Olwidas owned by Nadav, as per Annex A to the Operating Agreement.
[38] This figure, creditable to Nadav, represents his pre-distribution share, to be adjusted when actual proceeds are known.
[39] This figure, creditable to Azoulay, represents his pre-distribution share in Olwidas, to be adjusted when actual proceeds are known. This figure, simply, is the difference between the court's fictional distributable proceeds and the 66.6% share in Olwidas owned by Nadav.

- Thus:

Nadav	
Fictional pre-distribution share	322,758.92
Credit	31,375.93
Fictional Total (A)	354,134.85

Azoulay	
Fictional pre-distribution share	161,864.08
Debit	31,375.93
Credit	15,377.00
Fictional Total (B)	145,865.15

- A + B = $500,000.00.

BY THE COURT,

ALBERT JOHN SNITE, JR., J.

[40] This figure was obtained as follows: $52,111.00 (owed by Azoulay to Olwidas for defective construction work) **minus** the first $5,000.00 (the sole responsibility of Nadav). The difference, $47,111.00, is then multiplied by .666. The product, $31,375.93 is to be credited solely to Nadav as the 66.6% owner of Olwidas.