SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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U-TREND NEW YORK INVESTMENT L.P., individually and derivatively on behalf of Nominal Defendant Hospitality Suite International, S.A. and its wholly-owned subsidiary US Suite Corp.,

Plaintiff,

Index No. 652082/2014

- against -

US SUITE LLC, AURA INVESTMENTS LTD., and 440 WEST 41ST LLC,

Defendants,

and

HOSPITALITY SUITE INTERNATIONAL, S.A. and US SUITE CORP.,

Nominal Defendants.

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Hon. C. E. Ramos, J.S.C.:

In motion sequence 042, defendant Aura Investments Ltd. (Aura) moves for summary judgment dismissing plaintiff U-Trend New York Investment L.P. (U-Trend) complaint (2014 Complaint), and for an accounting. U-Trend cross-moves for partial summary judgment in the amount of $1,998,711.31 on its breach of contract claim.

Previously, this Court denied Aura's motion except for that portion which sought dismissal of the fiduciary duty claim, which the Court reserved for decision (Tr. Sept. 14, 2017, p. 56, 14-

15). The Court also reserved decision on U-Trend's cross motion for partial summary judgment (Tr. Sept. 14, 2017, p. 80).

For the reasons set forth below, Aura's motion for summary judgment and U-Trend's cross-motion for partial summary judgment are denied.

Background

a. The Parties

U-Trend is a partnership formed under the laws of the British Virgin Islands, comprised of approximately 200 Israeli limited partners (Partnership) (2014 Complaint, ¶ 1). U-Trend's general partner is Manhattan Building Project N.Y. Management Ltd. (2014 Complaint, ¶ 1). U-Trend owns fifty percent of the shares in nominal defendant Hospitality Suite International N.A. (HSI). Non-party Tomer Shohat (Shohat) is a director of HSI, and is also a director of non-party Suite Corp. (2015 Complaint, ¶ 1).[1]

Defendant 440 West 41st LLC (Minority Member) holds a thirty percent membership interest in defendant US Suite LLC (US Suite). Non-party Benzion Suky (Suky) is also a part-owner of the Minority Member.

HSI was formed under the laws of Luxembourg and holds 100% of the shares of nominal defendant US Suite Corp. (Suite Corp.),

[1] The 2015 action (2015 Action) entitled U-Trend New York Investment L.P. Individually and Derivatively on behalf of Nominal Defendant Hospitality Suite International, S.A. and its wholly owned subsidiary US Suite Corp. v Aura Investment Ltd. et al., index no 650498/2015, was commenced on February 19, 2015 (2015 Complaint).

a wholly owned subsidiary of HSI (2014 Complaint, ¶ 5). Suite Corp. holds seventy percent of the managing membership interest in defendant US Suite (2014 Complaint, ¶ 6).

In 2009, non-party Naftali Mendelovich (Mendelovich) formed U-Trend to manage the property located at 440 West 41st Street, in New York, New York (the "Property"), which had operated under the name "Metro Apartments" as an extended stay hotel (Complaint, ¶¶ 10, 12). The Property was a mixed-use building, with nine commercial units, ten rent stabilized apartments, and 59 short-term apartments (2014 Complaint, ¶¶ 13-14).

In late 2009, HSI and the Minority Member created a Delaware special purpose vehicle, US Suite, a Delaware corporation, to purchase the Property (Aura's St. of Mat. Facts, ¶ 10). US Suite is the borrower and mortgagor under the mortgage loan (Property Loan) in the original principal amount of $10,000,000 (Berman Aff., Ex. 22).

b. **Aura and U-Trend's Partnership**

On December 7, 2009, Aura and U-Trend Ltd. entered into a founders agreement (Founders Agreement), wherein Aura and U-Trend agreed to become joint 50-50 shareholders of HSI. Under the Founders Agreement, Aura and U-Trend were entitled to appoint the same number of directors (NYSCEF Doc. No. 76). However, in January 2010, the Founders Agreement was purportedly amended to provide that HSI's board shall consist of five members, three of

whom would be appointed by Aura and two by U-Trend (Founders Agreement Amendment) (Aura's St. of Mat. Facts, ¶ 5). The validity of the Founders Agreement Amendment is disputed in this action.

U-Trend owns 50% of HSI directly, and the remaining 50% is held by Aura through its wholly-owned subsidiary Hospitality Resort International SA (HRI). As a result, U-Trend and Aura both own half of the 70% majority of US Suite, while the Minority Member owns the remaining 30% (2014 Complaint, ¶ 27).

According to an agreement dated February 24, 2014 (Operating Agreement), US Suite, which owns the deed to the Property, has two members: Suite Corp. and Minority Member (2014 Complaint, ¶¶ 21-22). As set forth in Exhibit A to the Operating Agreement, Suite Corp. owns a 70% percent stake in US Suite and the Minority Member owns a 30% percent interest (2014 Complaint, ¶¶ 23). Pursuant to the Operating Agreement, Suite Corp. is US Suite's Managing Member.

The Operating Agreement prohibits the Minority Member from managing the Property (Aura's St. of Mat. Facts, ¶ 12). The Operating Agreement also provides that neither Aura nor U-Trend alone have authority to receive compensation or to enter into agreements involving the Property (*Id.*).

c. **The Default of the Property Loan**

In order to acquire the Property, U-Trend alleged that it extended two loans to HSI amounting to $10.5 million. U-Trend advanced the first loan (First Property Loan) of $8.5 million in multiple installments over time, directly to US Suite (2014 Complaint, ¶ 29). U-Trend also advanced a $2 million loan (Second Property Loan) by HSI through Suite Corp., to US Suite in exchange for Suite Corp.'s 70% managing member interest in US Suite under the Operating Agreement (2014 Complaint, ¶¶ 32-33).

In November 2011, Aura filed for bankruptcy under section 350 of the Israeli Companies Law (2014 Complaint, ¶ 34). As a result, in May 2012, a new owner acquired a controlling interest in Aura (2014 Complaint, ¶ 35).

Pursuant to an order from Israel's Central District Court dated April 22, 2012, Manhattan Building Project N.Y. Management Ltd. (Replacement General Partner) became U-Trend's General Partner (2014 Complaint, ¶ 35). Around this time, U-Trend appointed Shohat as HSI's director, and in February 2013, U-Trend appointed Shohat as a director and officer of Suite Corp. (2014 Complaint, ¶ 36).

U-Trend alleges that at the HSI level, Aura and U-Trend have been hopelessly deadlocked, and HSI ceased functioning (2014 Complaint, ¶¶ 48, 57). As HSI's wholly owned subsidiary, Suite Corp. suffers from the same management deadlock as HSI, and in turn, Suite LLC, which is managed by Suite Corp., its 70%

managing member, is no longer being managed effectively (2014 Complaint, ¶¶ 61-63).

d. The Purported Mismanagement of the Property

In Spring 2012, U-Trend became aware that Suky, who had been managing the Property, ceased making mortgage payments on behalf of US Suite for the Property Loan (2014 Complaint, ¶ 66).

On May 21, 2012, Shohat traveled to New York to visit the Property and meet with Suky, during which Shohat and Suky confirmed, in writing, that US Suite would repay the Property Loan and that Suky would be more transparent regarding his management of the Property (Management Agreement) (Complaint, ¶¶ 72, 73). Pursuant to the Management Agreement, Suky also assured Shohat that he would prepare a detailed business plan laying out the future operation of the Property and US Suite's repayment of principal and interest on the $8.5 million partnership loan (Complaint, ¶ 71).

Around the time of Shohat's visit, Suky granted Shohat access to the books, records, and QuickBooks data of the Property (Aura's St. of Mat. Facts, ¶ 34). Aura alleges that it also requested access to the same books and records, yet did not receive access until after June 2013 (*Id.*).

Over the next year, Shohat visited the Property numerous times, and became increasingly worried about Suky's management of the Property. Aura represents that during these visits, Shohat

helped operate and manage the Property without notifying Aura (Aura's St. of Mat. Facts, ¶¶ 48-49; Shohat Dep. 719:3-711:18).

On May 23, 2012, Counsel for U-Trend, via written correspondence, purported to terminate Aura's management rights over the Property (Aura's St. of Mat. Facts, ¶ 39). Counsel for U-Trend also sent two more termination letters on June 19 and July 5, of 2012.

U-Trend alleges that Suky was not only mismanaging the Property but was also committing multiple acts of wrongdoing, including taking an excessive and unauthorized monthly management fee of $35,000, which he paid to himself without obtaining approval. Suky even orchestrated that the management fees be paid in a manner that evaded income taxation, causing US Suite's affiliate, US Suite Management LLC (Management LLC) to pay Suky, his brother, and his family's expenses directly, and requiring US Suite to execute a promissory note for the assumption of liability to repay Suky's personal debt.

U-Trend also alleges that Suky purportedly bribed the leader of the Israeli Federal Bureau of Intelligence (FBI) by offering him free lodging at the Property (Complaint, ¶ 126). Other purported acts of criminal activity and mismanagement include Suky's direction that customers pay him directly and in cash for lodging and causing $200,000 of funds belonging to US Suite Management LLC to be improperly transferred to a trust account at

the law firm of Barrata & Barrata & Aidala LLP (Barrata Firm) to pay his legal bills (Complaint, ¶ 132).

Aura represents that in December 2012, U-Trend and Aura discussed the importance of precluding Suky from the day-to-day management of the Property. Thereafter, HSI's board agreed to provide Shohat with formal authority to manage the Property's daily operations until a third-party manager could be appointed (Aura's St. of Mat. Facts, ¶ 55).

On February 14, 2013, in response to discovering that Suky unilaterally withdrew funds from Management LLC, U-Trend instructed Management LLC's principal bank, TD Bank, to not honor any transactions effectuated by Suky for the Property's accounts (Complaint, ¶ 155).

On June 6, 2013, U-Trend's counsel wrote to the Minority Member's counsel acknowledging that Suky had been mismanaging the Property and that the Minority Member is "solely responsible" for "any damage caused" (Aura's St. of Mat Facts, Ex. 25).

E. Commencement of Litigation among the Minority Member, Shohat, Aura, and U-Trend

In early 2014, the Property's mortgage lender, New York Community Bank (Lender), became aware that Suite Corp. was in violation of the mortgage agreement provision prohibiting secondary financing absent the Lender's written consent (*Id.*, ¶ 69).

On March 20, 2014, the Lender sent US Suite a notice of default (Notice of Default), providing US Suite with thirty days to cure the alleged defaults (2014 Complaint, ¶ 37).

On April 2, 2014, U-Trend commenced a lawsuit in Israel against Aura and its current and prior directors seeking a declaration that U-Trend loaned $10,200,000 as part of the Property's initial acquisition financing (Aura's St. of Mat. Facts, ¶ 68).

On July 9, 2014, U-Trend commenced this [2014] Action, which was brought derivatively and for the benefit of HSI and Suite Corp., its wholly owned subsidiary. In the 2014 Action, U-Trend alleges that these entities were injured as a result of Aura, US Suite, and the Minority Members' breaches of fiduciary duties, waste of corporate assets, and unjust enrichment.

On July 10, 2014, HSI's directors unanimously consented to allow Abtan to negotiate a sale of the Property (Aura's St. of Mat. Facts, ¶ 73). Abtan presented HSI's board with an offer from Salim Assa (Assa) to purchase the Hotel for $24 million (*Id.*, ¶ 74).

In July 2014, U-Trend sought the appointment of a receiver, which this Court denied (*Id.*, ¶ 85). On July 18, 2014, the parties appeared in Court and ultimately reached a preliminary settlement agreement to sell the Property to Assa, contingent on the approval of U-Trend's limited partners (*Id.*, ¶ 79). Pursuant

to the settlement, U-Trend was to receive $12 million of the proceeds from the sale, Aura was to receive $2.7 million, and the Minority Member was to receive $2.3 million, with the remainder of the proceeds going to the Lender (*Id.*, ¶ 80).

On January 25, 2015, U-Trend commenced an additional lawsuit in Israel against the current directors of HSI, Atrakchi, Kleiner, and Abtan, alleging breach of fiduciary duties owed to HSI and US Suite (*Id.*, ¶ 68).

On February 18, 2015, U-Trend filed the 2015 Action against Aura and the Aura directors of HSI arising out of their withholding of approval for the sale of the Property (*Id.*, ¶ 68).

On February 23, 2015, this Court signed the sale and disposition order, ordering the sale of the Property to Assa for over $27 million (*Id.*, at 86).

Thereafter, U-Trend sought a determination from this Court that the $10,182,823 that was being held in an escrow account from the sale proceeds of the Property belonged to U-Trend as loans that U-Trend previously extended to Suite LLC and HSI. After an evidentiary hearing, this Court granted the motion to the extent of summary judgment in U-Trend's favor, but stayed release of the funds to permit the parties to seek appellate review (NYSCEF Doc. No. 1324).

Discussion

On a motion for summary judgment, the movant bears the initial burden of making a prima facie entitlement to judgment as a matter of law, without the need for a trial (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Should the proponent fail to make such a showing, the motion must be denied, "regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

a. Aura's motion for summary judgment

The sole issue that this Court reserved for decision on Aura's motion for summary judgment is whether U-Trend can maintain a derivative cause of action for breach of fiduciary duty against Aura. Aura asserts that, as a 50% shareholder of HSI, U-Trend had the right – like Aura – to appoint directors to HSI's Board, but U-Trend failed to name them as defendants in this action. Aura argues that U-Trend's derivative claim for breach of fiduciary duty is thus defective because a derivative claim in this context is designed to benefit both Aura and U-Trend, as shareholders of HSI. Further, the only director of HSI involved in this action – Shohat – was appointed by U-Trend. As a director of HSI, Shohat owes a fiduciary duty to both Aura and U-Trend but is suing Aura in a claim designed to apparently benefit one shareholder of HSI (U-Trend) at the expense of another (Aura).

Aura argues that under *Abrams v Donati*, 66 NY2d 951, 953 (1985), it is abundantly clear that one 50% shareholder cannot maintain a cause of action for breach of fiduciary duty derivatively against another 50% shareholder, unless such claim falls into the narrow exception of oppression in a close corporation context. According to Aura, this principle is inapplicable here, as HSI does not qualify as a close corporation.

In opposition, U-Trend argues that its claim is proper because Aura was the sole entity responsible for managing the Property. U-Trend maintains that as a controlling shareholder in a close corporation, Aura owed a fiduciary duty to U-Trend relating to its operation and management of HSI, Suite Corp., (HSI's wholly owned subsidiary), and Suite Corp.'s controlling interest in US Suite. Thus, the alleged breaches of fiduciary duty resulted in harm to HSI and Suite Corp., the two entities Aura controlled, derivatively harming U-Trend, who is a shareholder in those entities. U-Trend cites to *Cohen v Beneficial Indus. Loan Corp.*, 337 US 541 (1949), in support of its proposition that a derivative plaintiff need not represent all of a corporation's shareholders, and instead can represent all shareholders who are similarly situated.

Where "there are only two stockholders each with a 50% share, an action cannot be maintained in the name of the

corporation by one stockholder against another with an equal interest and degree of control over corporate affairs" (*Executive Leasing Co., Inc. v Leder*, 191 AD2d 199 [1st Dept 1993]). The proper remedy in such circumstance is a shareholder's derivative action (*Id.*). Thus, if it is ultimately determined that Aura and U-Trend both had equal control of HSI, U-Trend's derivative claim, in the name of HSI without naming any HSI directors as defendants, would render its claim non-viable.

It is undisputed that, under the Founders Agreement, U-Trend and Aura were intended to have an equal interest in HSI (Berman Aff., Ex. 3, ¶ 1). However, an issue of fact exists as to whether Aura and HSI had an equal degree of control over HSI's corporate affairs, which can only be determined at trial.

In addition, a triable issue remains as to whether Aura held itself out as a controlling shareholder of HSI or whether U-Trend and Aura were deadlocked. Because the issues of whether Aura actually exercised domination and day-to-day control of HSI beyond managerial authority over U-Trend's objections cannot be determined on the record before the Court, they must be tried.

The Founders Agreement states that "Aura shall bear the responsibility and the authority to manage the Joint Company's ongoing business" (*Id.*). The Founders Agreement also provides that "Aura shall be responsible, and shall execute all management and operations related to and/or pursuant to this agreement,

including managing the Project Company, subject to the Board's decisions" (*Id.*, ¶ 1.3).

It is unclear whether the Founders Agreement Amendment, drafted and signed on January 20, 2010, afforded Aura greater control over HSI.[1] U-Trend and Shohat dispute the legality of the Founders Agreement Amendment. Thus, there is also an issue of fact as to its validity, and its effect, if any, on the distribution of control between Aura and U-Trend.[2]

Moreover, the minutes from a meeting of HSI's shareholders dated July 4, 2012 (July 4 Meeting), purportedly effectuated Aura's appointment as director of HSI (Berman Aff., Ex. 8). However, Aura contends that it was appointed as a temporary director, only serving until specific individuals were identified and appointed. A trial will shed light on the impact of the July 4 Meeting, and whether it, in fact, led to Aura stepping in as HSI's director.

b. **U-Trend's Cross-Motion for Summary Judgment on its breach of contract claim for default interest on the mortgage**

U-Trend argues that it is entitled to summary judgment on its direct and derivative claim that Aura's failure to abide by

[1] As discussed *supra*, the Founders Agreement Amendment provided "the Company's board of directors shall include up to five members, out of which Aura has the right to appoint up to three directors and U-Trend has the right to appoint up to two directors, and in any case it is agreed that at any time Aura's representatives shall be the majority in the Company's board of directors" (Berman Aff., Ex. 5).

[2] When questioned at his deposition regarding his understanding of the lawsuit in Israel, Shohat replied "[o]ne to declare that the amendment to the…founder's agreement, is either canceled because we canceled it once or is invalid" (Berman Aff., Ex. 9, p. 349-50).

its contractual commitments to manage the property led to the accrual of default interest on the Property Loan in the amount of $1,998,711.31.

U-Trend further maintains that as a result of Aura's control and management of HSI, it was expressly obligated to manage the Property and to arrange for the refinancing or repayment of the Property Loan. In support of its cross-motion, U-Trend relies on the fact that it alerted Aura in October 2014 that Suky had stopped making mortgage payments on the Property Loan in May 2014, sought Aura's assistance to remove Suky, and even had the financial ability to pay off the Property Loan. Nonetheless, U-Trend alleges that Aura ignored these requests.

In opposition, Aura argues that U-Trend and Suky, not Aura, were responsible for the daily control of the Property and its business accounts, and therefore, are liable for the default.

In support of its motion, U-Trend cites to Section 1.1 of the Founders Agreement, which states that "Aura shall bear the responsibility and the authority to manage the Joint Company's ongoing business" (Berman Aff., Ex. 3, § 1.1). In response to the evidence submitted by U-Trend, Aura submits excerpts from Shohat's deposition transcript in an attempt to demonstrate that U-Trend, and not Aura, controlled the Property's bank accounts and was responsible for all outgoing monthly payments on the Property's behalf (Shohat Tr., May 11, 2016, 696:13-697:8,

706:25-707:10, 710:3-711:18). Such conflicting evidence warrants the denial of summary judgment (*Griffin v Cerabona*, 103 AD3d 420 [1st Dept 2013]).

The record presents triable issues of fact as to whether Aura was in control of the Property and its bank accounts, and therefore, whether its inaction led to the default of the Property Loan. U-Trend has failed to make a prima facie showing of entitlement to judgment as a matter of law as to Aura's liability on its default interest claim at this time (*see Pirrelli v Long Is. R.R.*, 226 AD2d 166 [1st Dept 1996]).

Accordingly, it is

ORDERED that Aura's motion for summary judgment is denied in its entirety and U-Trend's cross-motion for partial summary judgment is denied in its entirety, and this matter shall proceed to trial on December 11, 2017.

Dated: November 9, 2017

ENTER:

J.S.C.

CHARLES E. RAMOS