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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. IRA B. WARSHAWSKY,**

**Justice.**

**TRIAL/IAS PART 14**

JOSEPH CASAVECCHIA, SR.,

Plaintiff,

INDEX NO.: 008635/2005  
MOTION DATE: 07/31/2006  
MOTION SEQUENCE: 004

-against-

WILLIAM W. MIZRAHI, HILLS OF HEARTLAND,  
LLC and CASA MASON CORP.,

Defendants.

The following papers read on this motion:

Notice of Motion, Affidavit & Exhibits Annexed.....	1
Defendants' Memorandum of Law.....	2
Affidavit in Opposition of William W. Mizrahi & Exhibits Annexed.....	3
Reply Affidavit in Further Support of Joseph Casavecchia, Sr. & Exhibits Annexed.....	4
Plaintiff's Reply Brief.....	5

This motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment for the relief demanded in the complaint is determined as follows.

Plaintiff commenced this action to recover the sum of \$100,000 misappropriated by defendant, and for a declaratory judgment and an injunction regarding plaintiff's right to a distribution of profits earned by the defendant Hills of Heartland, LLC (the Company).

Plaintiff and the individual defendant, Mizrahi, are investors in the Company, with five other shareholders, four of whom each have a small holding. The Operating Agreement was filed on November 20, 1996; defendant Mizrahi is the largest shareholder at 44%, and by oral agreement has handled the financial affairs of the Company.

The LLC is governed by the Operating Agreement of Hills of Heartland, LLC, which provides in pertinent part:

4. PURPOSE. The Company is formed for the purpose of acquiring, owning, operating, developing, constructing buildings of all kinds or nature and selling real estate and engaging in any lawful act or activity for which limited liability companies may be formed under the LLCL and engaging in any and all activities necessary or incidental to the foregoing.

5. MEMBER. The name and the mailing address of the Members are as follows:

<u>NAME</u>	<u>ADDRESS</u>
William W. Mizrahi	9 Borman Avenue Staten Island, N.Y. 10314
Joseph Casavecchia	9 Borman Avenue Staten Island, N.Y. 10314
Joseph G. Casavecchia	9 Borman Avenue Staten Island, N.Y. 10314

6. MANAGEMENT POWERS. The business and affairs of the Company shall be managed by the members by a vote of the members having a majority of interest in the Company. Once a decision has been reached by such vote of a majority in interest of the Members, any Member is authorized to execute any and all documents on behalf of the Company necessary or appropriate in connection with the aforementioned purposes.

9. DISTRIBUTIONS. Distributions shall be made to the Members at the times and in the aggregate amounts determined by a majority in interest of the Members and shall be made in accordance with the same percentages as profits and losses are allocated.

In summary form, plaintiff contends that the Company was formed to build houses on Staten Island on a particular parcel of land, that all planned units have been built and sold and paid for, that there are profits resulting from the construction and sale of the homes, and that pursuant to paragraph 8 of the Operating Agreement “the Company’s profit and losses shall be allocated to the Members in accordance with the percentages of their ownership in the Company.” Plaintiff states that defendant has not distributed the profits except for a small amount, and has instead made an interest free, unsecured, guaranteed or collateralized loan to another building venture, Casa Mason, which plaintiff has been frozen out of. Plaintiff seeks a return of \$100,000 that was quasi distributed, an order enjoining defendant from exercising sole control over the assets of the Company, and an order directing the distribution of net assets to the shareholders.

Plaintiff has made out a prima facie case for the relief demanded. The titular “distribution” of \$100,000 does not constitute a distribution of the cash reserves of the Company. As the burden then shifts to defendant to raise a triable issue of fact, see, Zuckerman v City of New York, 49 N.Y.2d 557, 562, the burden falls upon defendant to show the existence of a viable issue establishing a conversion of plaintiff’s \$100,000 and a complete dominion and control and failure to distribute the profits of the Company. It is incumbent upon a party opposing summary judgment to raise triable issues of fact based upon more than mere conclusory or unsupported assertions. See Sun Yau Ko v Lincoln Savings Bank, 99 A.D.2d 943, *aff’d*, 62 N.Y.2d p38 (1984) citing to Zuckerman v City of New York

The issue that emerges for determination is whether a reading of ¶ 8, together with ¶¶ 4, 6 and 9 leads to the conclusion that profits of the Hills of Heartland venture should be allocated and distributed to the shareholders so that they have the right to control their use. See e.g. LLCL§ 507, Interim Distributions.

Defendant Mizrahi responds in the negative and unequivocally states “[a]ll affairs of the Hills of Heartland were conducted in accordance with the provisions of the Limited Liability Corporation Law and/or by means of it’s operating agreement.” The crux of his argument is that the Company was founded to build houses and lend money, and that is what it is doing in retaining the assets of the Company and lending such assets to another venture to build anew and

sell. He adds that distributions and loans are made in strict accordance with “our past adopted practices and business policies for the last 30 years.”

Defendant bootstraps section 202(f) & (c) of the LLC on to the Hills of Heartland Operating Agreement to support the claim that the purpose of the Company was to build and to lend money. He unfolds a rather convoluted claim that plaintiff was interested in the Company lending money rather than distributing it when the Company acquired a parcel of land on which it has now completed development but which had to be bought because plaintiff lost it. He claims that plaintiff’s son in law and son, although united in interest with plaintiff, are not credible while claiming at the same time that he and the four small shareholders agree to lend the money to a new venture. It should be noted that there is no affidavit attesting to that fact. His profound ending is that the process of lending retained money rather making a distribution to investors is a sage and efficacious way of doing new business with old money. True if you are the majority owner. Finally he superimposes on to the Operating Agreement LLCL § 407 to justify decision making by a ‘supermajority’ without holding a meeting, i.e. in violation of ¶ 6, or reducing it to a majority. See also LLCL § 412(a)..

The role of the court is issue finding not issue determination in dispositive motions such as this. Stillman v Twentieth Century Fox, 3 N.Y.2d 395 (1981). The only dispute in the arguments of the parties - albeit a critical one - is whether the Company was formed to lend money.

Despite thoroughly and carefully searching the record the court can find no evidence that it was. Defendant’s assertion is unsupported by evidentiary proof in admissible form and appears to be a conclusory, self serving statement. Bish v Cetta, 155 A.D.2d 495 (2d Dept 1989). He testified that the Company had not made any loan. He admitted in the answer that it was formed to build homes. While it is conceivable that it could build homes and lend money out of profits so generated, that plan of operating would have to be approved by all the investors in the venture as they are the lawful beneficiaries of the success of any LLC. LLCL Article V Even in the case of a hybrid partnership-corporation venture as is this LLC, the liability of the investors is limited while the right to assets after creditors claims is complete. Add to this the absence of any proof that the members have voted to loan money to Casa Mason, and the fact

that defendant Mizrahi is the only investor in the Company who is actively involved in Casa Mason, the proposal of being an unsecured, unguaranteed, interest free lender to a Mizrahi entity appears to be a bountiful bonanza to only defendant.

On the basis of the foregoing, it is ORDERED that plaintiff is granted summary judgment on the complaint. An inquest shall be held before the Hon. Thomas Dana to determine the amount of profits available for distribution.

Dated: August 23, 2006

  
J.S.C.

**ENTERED**  
AUG 30 2006  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE