SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 651439/2010
VALIQUETTE, STEVEN J.
vs
BL PARTNERS, LLC
Sequence Number : 002
DISMISS ACTION

INDEX NO. 651439/10 E
MOTION DATE 05/13/11
MOTION SEQ. NO. 002
MOTION CAL. NO.
Motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... 19 - 39
Answering Affidavits — Exhibits
Replying Affidavits

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

Dated: 08/3/11

JUSTICE SHIRLEY WERNER KORNREICH
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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STEVEN J. VALIQUETTE,

Plaintiff,

-against-

Index No. 651439/2010
DECISION & ORDER

BL PARTNERS, LLC, GREGORY E. BURNS, and BLUE LINE ADVISORS, INC.

Defendants.

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KORNREICH, SHIRLEY WERNER, J.:

This action arises out of the Operating Agreement of BL Partners, LLC (BL Partners or the Company) (the Operating Agreement). Under the Operating Agreement, plaintiff Steven J. Valiquette was a "Preferred Member." Under the same agreement, defendant Blue Line Advisors Inc. (BL Advisors) was BL Partners' Manager. Defendant Gregory E. Burns is the sole shareholder and president of BL Advisors.

In the Amended Complaint, plaintiff alleges that, on January 23, 2009, it exercised a "Put Option" under the Operating Agreement, which entitled him to a buy-back of his preferred interest in BL Partners for a price of $627,200. Plaintiff further alleges that he was paid $79,783 on that date with $547,417 still due and owing. He asserts claims for: (1) breach of contract against BL Partners (the first cause of action); (2) breach of fiduciary duty against BL Advisors and Burns (respectively the second and fourth causes of action); and (3) tortious interference against Burns (the third cause of action). BL Advisors and Burns move to dismiss the breach of fiduciary duty and tortious interference claims (the second, third, and forth causes of action). Valiquette opposes and cross-moves for partial summary judgment against BL Partners on the

breach of contract claim (the first cause of action).[1] BL Partners opposes.

I. Background

On November 12, 2006, BL Advisors, Valiquette and others who are not parties to this action, entered into the Operating Agreement "for the purpose of forming BL Partners." *See* Valiquette Aff. Exh. 1. BL Partners' purpose was "acquiring a supermajority of the capital stock in Quadrivius, Inc. [Quadrivius], . . . and supervising and controlling the management and operations of Quadrivius and its subsidiaries, including . . . Pittsburgh Logistics System [PLS]. *Id.* § 1.2. PLS is a shipping logistics company.

Under the Operating Agreement, and in return for his contribution of capital, Valiquette acquired both a Common and a Preferred Interest in BL Partners. *See* Amended Compl. ¶ 6; Valiquette Aff. Exh. 1, Exh. A. Specifically, he acquired 7.5% of the Common Interest and 71.42857% of the Preferred Interest in BL Partners. *See* Amended Compl. ¶ 6. BL Advisors, which served as Manager of BL Partners at all relevant times, originally acquired 85.625% of the Common Interest, which was, as of April 2007, allegedly increased to 90.0326%. *See* Amended Compl. ¶ 7. Plaintiff alleges that at all relevant times, Burns owned 100% of the capital stock of BL Advisors and that as of September 14, 2007, BL Advisors assigned its entire Common Interest in BL Partners to Burns. *See* Amended Compl. ¶ 7.

Section 5 of the Operating Agreement addresses distributions to Members. *See* Valiquette Aff. Exh. 1. It provides that "[c]ash available in the Company [BL Partners] from all sources shall be used to first pay fees and expenses of the Company." *Id.* § 5.1. Distributions

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[1] The motion jacket actually contains two separate motions. However, although not technically a cross motion (*see* CPLR 2215), on oral argument it was agreed that Valiquette's motion would be treated as such.

from the Company, [in turn,] shall be made on a quarterly basis and shall be distributed to Members in proportion to their respective Percentage Interests . . . ." *Id.* "Except as specifically provided [in the Operating Agreement], no Member shall have priority over other Members, whether for the return of his Capital Contribution or with respect to any other Distribution . . ." *Id.* § 5.4. Further "[n]o distributions shall be made in violation of the provisions of subdivision (a) of Section 508 of the [New York Limited Liability Company] Law . . . .[the NY LLC Law]" *Id.* § 5.3.

Subdivision (a) of Section 508 of NY LLC Law provides that:

> [a] limited liability company [LLC] shall not make a distribution to a member to the extent that, at the time of the distribution, after giving effect to the distribution, all liabilities of the limited liability company, other than liabilities to members on account of their membership interests and liabilities for which recourse of creditors is limited to specified property of the limited liability company, exceed the fair market value of the assets of the limited liability company, except that the fair market value of property that is subject to a liability for which the recourse of creditors is limited shall be included in the assets of the limited liability company only to the extent that the fair value of such property exceeds such liability.

NY LLC Law § 508(a).

As to BL Partners' liabilities, the Operating Agreement granted BL Advisors, as Manager, certain "***powers***[2] exercisable only upon approval vote of the Majority in Interest."[3] [emphasis supplied] *See* Valiquette Aff. Exh. 1 § 3.3. These powers include the power "[t]o

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[2] The Operating Agreement contains separate sections addressing the "Duties and Obligations of Manager" the "Rights, Authority and Powers of the Manager." *See* Valiquette Aff. Exh. 1 §§ 3.2 (Duties and Obligations), 3.3 (Rights, Authority and Powers).

[3] The Operating Agreement defines "Majority in Interest" as "Member(s) whose aggregate interest constitute more than Fifty Percent (50%) of the Interest of the Members in the Company according to their stated Percentage Interest in Exhibit A." *See* Valiquette Aff. Exh. 1 § 1.6(h).

establish ***reserve accounts*** reasonable in amount, to provide for any contingent or unforseen liabilities or obligations of the Company, and to invest the funds held in such reserve accounts in such investments or non-interest bearing accounts as they shall see fit in their prudent business judgment and to apply such reserves for the benefit of the Company." [emphasis supplied] *See* Valiquette Aff. Exh. 1 § 3.3(e).

The Operating Agreement contained a provision limiting the liability of the Manager to the Company which provides:

> [t]o the extent permitted by law, a Manager shall have no liability to the Company or to any Member for any loss suffered by the Company which arises out of any action or inaction of the Manager, if the Manager in good faith, determined that such course of conduct was in the best interest of the Company, such course of conduct did not constitute intentional wrongdoing or fraud on the part of the Manager, and such course of conduct was not in willful disregard of the terms and conditions of this Agreement. [the Limited Liability Provision]

See Valiquette Aff. Exh. 1 § 3.6.

Valiquette, in turn, had a ***put option*** under the Operating Agreement "exercisable no less than sixty (60) days before [the] third anniversary of the date [of the Operating Agreement, November 12, 2006] . . . to sell to [BL Partners], and to cause [BL Partners] to purchase [from him], all of [Valiquette's] Preferred Interest in [BL Partners] for an aggregate purchase price equal to ***the then*** Liquidation Preference for such Preferred Interest." [emphasis supplied] *See* Valiquette Aff. Exh. 1 § 13.3(a). Section 13.1 of the Operating Agreement addresses "Liquidation Preference." *See* Valiquette Aff. Exh. 1. It provides that:

> [i]n the event of any liquidation, dissolution or winding up of [BL Partners] . . . prior and in preference to any distribution of any of the assets or funds of [BL Partners] to the Members, each Preferred Member shall be entitled to be paid out of the assets of [BL Partners] ***available for distribution to its Members*** an amount equal to the product of $700,000.00 multiplied by the Preferred Percentage Interest represented by such Preferred Member's Preferred Interests, plus all

> dividends unpaid on such Preferred Interests up to the date of distribution of the assets of [BL Partners] (the "Liquidation Preference"). [emphasis supplied]

See Valiquette Aff. Exh. 1 § 13.1.

So long as BL Advisors served as Manager of BL Partners, it was entitled to a Management Fee in the amount of 20% of BL Partner's profit "on the date such profit is realized." *See* Valiquette Aff. Exh. 1 § 3.1(c). "For the purposes of this clause, the profit shall be realized when Company Interests Owned by the Members are exchanged for cash, other securities, or any other form of compensation." *Id.* Further, "[f]or the purposes of [the same] clause, 'profit' shall mean all amounts received by the Company (less Company expenses) in excess of the aggregate amount paid by all of the Members for the purchase or acquisition of the Interests." *Id.*

In 2007 and 2008, Quadrivius made distributions of about $6,700,000 to BL Partners, which, in turn, made a distributions to its Members on January 2, 2008 and on July 17, 2008. Valiquette received, respectively, distributions of $115,393 and $442,862 on these dates.

On January 7, 2009, plaintiff notified BL Partners by letter of his intention to exercise his put option on January 23, 2009 (the Put Date). *See* Valiquette Aff. Exh. 3 at 1. In the same letter, plaintiff indicated that he was entitled to receive $627,200 on the Put Date in exchange for his Preferred Interest. *Id.* BL Advisors, as Manager, through its president, Burns, responded to plaintiff's letter on January 20, 2009. *See* Valiquette Aff. Exh. 4. In that letter Burns wrote in relevant part:

> (1) The Company's current cash and cash equivalents total $88,647.67. . . .
>
> (2) The Company has distributed its share of [PLS's] dividends to its Members and indeed, your [Valiquette's] share has totaled $558,254, or nearly 83% of your total investment made a short 2 years ago. While we cannot guarantee the

performance of PLS's operations, we expect that PLS will continue to make annual dividends and we are diligently working to grow PLS. . . .

(3) You [Valiquette] have calculated the Liquidation Preference for your Preferred Interest to be $627,200, but do not appear to have taken into account our 20% Management Fee into account. Applying such Management Fee, in accordance with Section 3.1(c) of the Operating Agreement, we calculate the Liquidation Preference of your Preferred Interest (net of management fees) to be $524,909. . . .

(4) Subject to your [Valuquette's] confirmation, the Company is prepared to give effect to the full exercise of your put option and on January 23, 2009 pay you in cash $79,783, which represents 90% of the Company's current cash and cash equivalent balance. The Company will pay you the remaining amount of $445,126 within 24 hours of receiving its next cash dividend from PLS and Quadrivius, Inc., expected on or before December 8, 2009. Such redemption payment shall be made in preference to and have priority over, the distribution of dividends to other Members.

See Valiquette Aff. Exh. 4 at 1-2.

Plaintiff contends that the Operating Agreement does not require or allow a Management Fee to be charged against the put option price. *See* Amend Compl. ¶ 18. Plaintiff admits, however, that he was paid $79,783 on the Put Date leaving, according to plaintiff, $547,417 still due and owing. *See* Amend. Compl. ¶ 19. This allegation is the basis for plaintiff's breach of contract claim against BL Partners (the first cause of action). *See* Amend. Compl. ¶¶ 20-23 .

Plaintiff also asserts breach of fiduciary duty claims against BL Advisors and Burns (respectively the second and fourth causes of action). According to plaintiff, BL Advisors breached its fiduciary duties as Manager by reason of:

(1) deliberately handling and/or mismanaging [BL Partners'] finances so as to prevent Plaintiff from receiving the consideration due for the exercise of his Put Option;

(2) using the Bulk of the 2008 Distribution for its own benefit and the benefit of Burns;

(3) asserting that the Put Option Price is subject to a 20% Management Fee

without any basis in the Agreement for such reduction;

(4) withholding from Plaintiff information concerning the business and financial affairs of [BL Partners] and its investments, following plaintiff's refusal to accede to its demands surrounding the exercise of the Put Option. . . .

See Amend. Compl. ¶ 35.

The breach of fiduciary duty claim against Burns is premised on his status as a majority member of BL Partners and party in control of the Manager, BL Advisors. *See* Amend. Compl. ¶ 43. According to plaintiff, Burns breached his fiduciary duties "by exercising his control over [BL Advisors] and causing it to manage [BL Partners'] finances so as to unfairly and improperly elevate his personal interests over the interests of [BL Partners'] minority members, including Plaintiff." *See* Amend. Compl. ¶ 44.

Plaintiff finally asserts a tortious interference with contract claim against Burns based on the same conduct (the third cause of action). *See* Amend. Compl. ¶¶ 35-41. According to plaintiff, "Burns intentionally caused [BL Advisors] as [BL Partners'] manager to make the 2008 Distribution so as to deplete [BL Partners'] assets and render it incapable of performing its obligation under Section 13.3 of the [Operating] Agreement to pay Plaintiff the consideration duly owned to him for his valid exercise of the Put Option. *See* Amend. Compl. ¶ 39. Plaintiff contends that "[i]n doing so, Burns acted beyond the scope of his legitimate duties as President of [BL Advisors] and interfered with the [Operating] Agreement for his own personal gain." *See* Amend. Compl. ¶ 40.

II. Discussion

A. Defendants' Motion to Dismiss

On a motion to dismiss, the court must accept the facts as alleged in the complaint as true,

accord plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Morone v Morone,* 50 NY2d 481, 484 (1980); *Rovello v Orofino Realty Co.,* 40 NY2d 633, 634 (1976); *Skillgames, L.L.C. v Brody,* 1 AD3d 247, 250 (1st Dept 2003). CPLR 3026 mandates that "[p]leadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced." "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Rovello,* 40 NY2d at 636. In assessing the motion, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. *Rovello* , 40 NY2d at 635-36. When the moving party submits affidavits or other documentary evidence in support of its motion, dismissal under CPLR 3211 is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v Martinez,* 84 NY2d 83, 88 (1994).

However, under CPLR 3016(b) "[w]here a cause of action is based upon breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." The pleading standard of CPLR 3016(b) applies to a claim for breach of fiduciary duty. *See Peacock v Herald Square Loft Corp.*,67 AD3d 442, 442-43 (1st Dept 2009).

1. Breach of Fiduciary Duty Claims Against BL Partners and Burns

"A manager [of a Limited Liability Company (LLC)]shall perform his or her duties as a manager . . . in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances." NY LLC Law § 409(a). Further, a managing member owes fiduciary duties to the other members of an LLC. *See Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038, 1039 (2d Dept 2009). Conduct, however, may not be "deemed a

breach of fiduciary duty given a formal written agreement covering the precise subject matter of the alleged fiduciary duty, and no showing that defendant was seeking to advance its or a third party's interests over plaintiff's." [citations omitted] *Pane v Citibank*, N.A., 19 AD3d 278,279 (1st Dept 2005). Where "defendants establish[], as a matter of law, [that the Manager's] conduct . . . was consistent with his obligations under the operating agreement," a breach of fiduciary duty claim against the Manager will not lie. *East Quogue Jet, LLC v East Quogue Members*, LLC, 50 AD3d 1089, 1091 (2d Dept 2008); *see also Nemec v Shrader*, 991 A2d 1120, 1128 (Del 2010) ("A party does not act in bad faith by relying on contract provisions for which that party bargained where doing so simply limits advantages to another party.").

Further, "[t]he operating agreement [of an LLC] may set forth a provision eliminating or limiting the personal liability of managers to the limited liability company . . . for damages for any breach of duty in such capacity, provided that no such provision shall eliminate or limit . . . the liability of any manager if a judgment or other final adjudication adverse to him or her establishes that his or her acts or omissions were in ***bad faith*** or involved ***intentional misconduct*** or ***a knowing violation of law*** . . . ." [emphasis supplied] NY LLC Law § 417(a)(1).

BL Partners argues that plaintiff's allegations either lack the specificity required to adequately state a claim for breach of fiduciary duty under CPLR 3016(b) or give rise to liability eliminated by the Limited Liability Provision of Section 3.6 of the Operating Agreement. As discussed, the allegations supporting plaintiff's breach of fiduciary duty claim against BL Advisors are the following:

> (1) deliberately handling and/or mismanaging [BL Partners'] finances so as to prevent Plaintiff from receiving the consideration due for the exercise of his Put Option;

(2) using the Bulk of the 2008 Distribution for its own benefit and the benefit of Burns;

(3) asserting that the Put Option Price is subject to a 20% Management Fee without any basis in the Agreement for such reduction;

(4) withholding from Plaintiff information concerning the business and financial affairs of [BL Partners] and its investments, following plaintiff's refusal to accede to its demands surrounding the exercise of the Put Option. . . .

See Amend. Compl. ¶ 35.

With respect to the first allegation, the court initially notes that the consideration due plaintiff upon the exercise of his put option was not a sum certain. It was "***the then*** Liquidation Preference for such Preferred Interest." [emphasis supplied] *See* Valiquette Aff. Exh. 1 § 13.3(a). "[T]he then Liquidation Preference" due to Valiquette, in turn, was limited to the assets of BL Partners "***available for distribution to its Members***." [emphasis supplied] *See* Valiquette Aff. Exh. 1 § 13.1. Stated differently, if the ***maximum*** Liquidation Preference Valiquette could receive – as calculated in Section 13.1 – exceeded BL Partner's assets ***available*** for distribution to Members, the amount due to Valiquette upon the exercise of the put option would be limited to the assets available.

Moreover, under the Operating Agreement, BL Advisors had the restricted ***power*** to set certain reserves for contingent liabilities, including plaintiff's put option, but ***not the duty*** to do so. *See* Valiquette Aff. Exh. 1 § 3.3(e). And, since the amount due to plaintiff upon the exercise of his option was not a sum certain, BL Advisors did not have a duty to reserve for plaintiff a certain amount, absent a contractual provision requiring such reserve. No such provision exists in the Operating Agreement.

In addition, the allegation of mismanagement or deliberate mishandling of BL Partner's

finances is not adequately specific for the purposes of CPLR 3016(b). *See Peacock*,67 AD3d at 442-43. According to plaintiff he "does *not* contend that [BL Advisors] or Burns breached . . . their fiduciary duties by allowing BL Partners to make the distributions [of 2008]." [emphasis in the original] *See* Plaintiff's MOL, at 14. Plaintiff, however, does not identify what transactions, if any, constitute the "mismanagement" and "deliberate [mis]handling."

Also, the second allegation accusing Burns and BL Advisors of "using the bulk of the 2008 Distribution" for their own benefit, is without merit. Since plaintiff "does *not* contend that [BL Advisors] or Burns breached . . . their fiduciary duties by allowing BL Partners to make the distributions [of 2008]," then any wrongful conduct underlying the second allegation must be limited to the way in which the distributions were timed or allocated to the Members of BL Partners. This "precise subject matter," however, is covered by the Operating Agreement. *See* Valiquette Aff. Exh.1, § 5; *Pane*, 19 AD3d at 279. Plaintiff does not specify whether and how the allocation and/or timing of the distributions violated the Operating Agreement. *See* CPLR 3016(b); *Peacock*, 67 AD3d at 442-43. Even if he did, his breach of fiduciary duty claim would duplicate his breach of contract claim. *See Pane*, 19 AD3d at 279. If the allocations, in turn, "w[ere] consistent with [the Manager's] obligations under the [O]perating [A]greement," a breach of fiduciary duty claim against the Manager would not lie. *See East Quogue Jet,* 50 AD3d at 1091. Similarly, plaintiff's third allegation – BL Advisors' claim to a 20% Management Fee – is a claim covered by the Operating Agreement and thus not actionable as a breach of fiduciary duty.

Finally, the fourth allegation – withholding business information from plaintiff – concerns conduct following plaintiff's exercise of his put option. As plaintiff's counsel admitted

during oral argument, at that time the relationship between BL Advisors and plaintiff was that of a manager of a company to one of its creditors. Transcript at 25:19-22 ("[T]he minute, effective January 23, 2009, he [Valiquette] exercised his put option, he was no longer a preferred member. He is now a creditor."). BL Advisors owed no fiduciary duties to Valiquette as a creditor and, thus, breached no duty to him. *See AJW Partners LLC v Itronics Inc.*, 68 AD3d 567, 568 (1st Dept 2009) ("there can be no fiduciary obligation in a contractual arm's length relationship between a debtor and note-holding creditor"). For these reasons, plaintiff's claim for breach of fiduciary duty against BL Advisors is dismissed.

Plaintiff's breach of fiduciary duty claim against Burns also is dismissed. Burns' fiduciary ***duties*** are premised on his status as a majority member of BL Partners and party in control of the Manager, BL Advisors. The factual underpinning of Burns' alleged ***breach*** of these duties is BL Advisors' conduct. *See* Amend. Compl. ¶ 44 (Burns breached his fiduciary duties "by exercising his control over [BL Advisors] and causing it to manage [BL Partner's] finances so as to unfairly and improperly elevate his personal interests over the interests of BL's minority members, including Plaintiff."). Since the allegations regarding BL Advisors' conduct are insufficient to state a claim for breach of fiduciary duty against BL Advisors, they are insufficient to state a breach of fiduciary duty claim against Burns.

2. Tortious Interference Claim Against Burns

"The tort of intentional interference with contractual relations is comprised of four elements: (1) the existence of a contract, enforceable by the plaintiff, (2) the defendant's knowledge of the existence of that contract, (3) the intentional procurement by the defendant of the breach of the contract, and (4) resultant damages to the plaintiff." *Joan Hansen & Co., Inc. v*

Everlast World's Boxing Headquarters Corp., 296 AD2d 109, 111 (1st Dept 2002); *Hoag v Chancellor, Inc.*, 246 AD2d 224, 228 (1st Dept 1998). The third and fourth elements are at issue here.

Interference with a contract which is merely negligent or incidental to a lawful purpose is not actionable, though interference carried out with mixed motives can be. *Alvord & Swift v Muller Constr. Co.*, 46 NY2d 276 (1978); *Hoag*, 246 AD2d at 229-230. Moreover, "officers, directors or employees of a corporation do not become liable to one who has contracted with the corporation for inducing the corporation to breach its contract ***merely because they have made decisions and taken actions that resulted in the corporation's breaching its contract.***" [emphasis supplied] [citations omitted] *Stern v H. DiMarzo, Inc.*, 77 AD3d 730, 731 (2d Dept 2010). Generally, what must be shown is that the breach was induced by "***predatory acts, self-dealing or other tortious conduct.***" [emphasis supplied] *Automatic Findings, Inc. v Miller*, 232 AD2d 245, 245 (1st Dept 1996); *Stern*, 77 AD3d at 731.

Plaintiff alleges that "Burns intentionally caused [BL Advisors], as [BL Partners'] manager, to make the 2008 Distribution[s] so as to deplete [BL Partners'] assets and render it incapable of performing its obligation under Section 13.3 of the [Operating] Agreement to pay Plaintiff the consideration duly owed to him for his valid exercise of the Put Option." *See* Amend. Compl. ¶ 39. Plaintiff contends that "[i]n doing so, Burns acted beyond the scope of his legitimate duties as President of [BL Advisors] and interfered with the [Operating] Agreement for his own personal gain." *See* Amend. Compl. ¶ 40.

Defendants' motion to dismiss the tortious interference claims against Burns is granted. Any benefits that Burns received directly or indirectly from the 2008 distributions were in his

capacity as a Common Interest holder of BL Partners and/or BL Advisors and contemplated by the Operating Agreement. BL Advisors, which Burns allegedly controlled, had the restricted ***power*** to set certain reserves for contingent liabilities, including plaintiff's put option, but ***not the duty*** to do so. *See* Valiquette Aff. Exh. 1 § 3.3(e). Hence, even if Burns directed BL Advisors not to set such reserves, this would at most show that Burns "made decisions and [took] actions that resulted in [BL Partners] breaching its contract [with plaintiff]." *See Stern*, 77 AD3d at 731. Such showing, in turn, is insufficient to sustain a claim for tortious interference. *Id.* In sum, plaintiff's allegations, even if true, would not show that BL Partners' alleged breach was induced by "predatory acts, self-dealing or other tortious conduct." *Automatic Findings*, 232 AD2d at 245; *Stern,* 77 AD3d at 731.

B. Plaintiff's Cross-Motion for Partial Summary Judgment

A motion for summary judgment is granted only if no material issues of fact exist. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The moving party must make a *prima facie* showing that there are no material issues of fact to be tried. *Id.* at 324. Failure to make such a showing requires denial of the summary judgment motion, regardless of the sufficiency of the opposing party's evidence. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993); *see also Bray v Rosas*, 29 AD3d 422 (1st Dept 2006). However, once the movant meets the initial burden, the party opposing the motion must establish, through admissible evidence, that there are disputed material issues of fact to be resolved at a trial. CPLR 3212(b); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). The court examines the evidence submitted by the parties in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192 (1st Dept 1997). The motion must be denied if any doubt exists as to a material issue of fact. *Rotuba*

Extruders, Inc. v Ceppos, 46 NY2d 223, 231 (1978).

Plaintiff moves for summary judgment on its claim that BL Partners breached the Operating Agreement by failing to pay him $445,126 that is allegedly currently due and owing to him. In an action for breach of contract plaintiff must prove: (1) the existence of a valid contract; (2) plaintiff's performance of his obligations thereunder; (3) defendant's failure to perform; and (4) damages. *Morris v 702 East Fifth Street HDFC*, 46 AD3d 478, 479 (1st Dept 2007) (*citing Furia v Furia*, 116 AD2d 694, 695 (2d Dept 1986)). The elements at issue here are BL Partners' performance and damages. Plaintiff argues that documentary evidence shows that "BL Partners owes Valiquette no less than $524,909 under the [Operating] Agreement and BL Partners breached the Agreement by failing to pay Valiquette $445,126 currently owed to him." *See* Plaintiff's MOL at 2-3.

Plaintiff fails to make a *prima facie* case. As discussed above [II(A)(1), *ibid*], the consideration due plaintiff for the exercise of his put option was not a sum certain. It was "***the then*** Liquidation Preference for such Preferred Interest." [emphasis supplied] *See* Valiquette Aff. Exh. 1 § 13.3(a). "[T]he then Liquidation Preference" due to plaintiff, in turn, was limited to the assets of BL Partners "***available for distribution to its Members***." [emphasis supplied] *See* Valiquette Aff. Exh. 1 § 13.1. If the assets available for distribution to Members were below $445,126, the amount allegedly due to plaintiff upon the exercise of the put option would be limited to the lesser amount of available assets. Plaintiff fails to make a *prima facie* showing that the BL partners had $445,126 "available for distribution to its Members" on January 23, 2009. Consequently, plaintiff fails to make a *prima facie* showing that BL Partners breached the Operating Agreement by failing to pay him $445,126 on January 23, 2009. Accordingly, it is

ORDERED that Gregory E. Burns and Blue Line Advisors, Inc.'s motion for an order dismissing the second, third, and fourth causes of action is granted; and it is further

ORDERED that Steven J. Valiquette's cross motion for partial summary judgment against BL Partners, LLC is denied.

Dated: August 3, 2011

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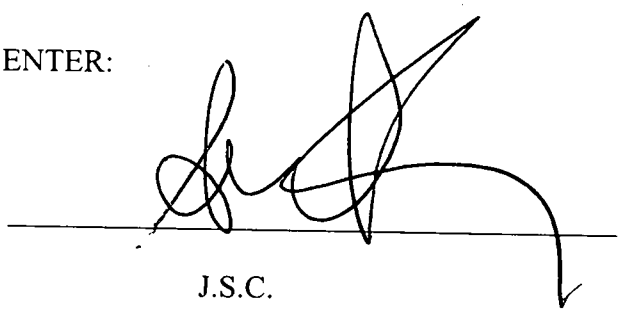

J.S.C.