

APPENDIX

Appendix A, Order of the Massachusetts Supreme Judicial Court Denying the Petition for Reconsideration of the Application for Further Appellate Review, July 31, 2018

Supreme Judicial Court for the Commonwealth of Massachusetts

John Adams Courthouse

One Pemberton Square, Suite 1400, Boston, Massachusetts 02108-1724

RE: No. FAR-26024

NIKOLAOS J. PATERAKIS

vs.

ANDREW C. NAJDA & others

NOTICE OF DOCKET ENTRY

Please take note that on July 31, 2018, the following entry was made on the docket of the above-referenced case:

DENIAL of petition to reconsider denial of FAR application.

Francis V. Kenneally, Clerk

Dated: July 31, 2018

Appendix B, Order of the Massachusetts Supreme Judicial Court Denying the Application for Further Appellate Review, June 29, 2018

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT OF MASSACHUSETTS

ORDER

It is hereby Ordered, that the following application for Further Appellate Review be denied:

FAR-26024

NIKOLAOS J. PATERAKIS

vs.

ANDREW C. NAJDA ET AL

A.C. No. 2016-P-1068

By the Court,
Maura A. Looney
Assistant Clerk

Entered June 29, 2018.

Appendix C, Memorandum and Order of the Massachusetts Appeals Court, March 21, 2018

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See *Chace v. Curran*, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

16-P-1068

NIKOLAOS J. PATERAKIS

vs.

ANDREW C. NAJDA & another.¹

MEMORANDUM AND ORDER PURSUANT TO RULE
1:28

The defendants, Charles Najda and Andrew Najda (the Najdas), appeal from a judgment entered on a jury verdict that found them liable to the plaintiff for breach of contract, breach of fiduciary duty, and negligent misrepresentation. The Najdas also appeal from the denial of their motion for judgment notwithstanding the verdict. We affirm.

¹ Charles E. Najda.

Viewing the evidence in the light most favorable to the plaintiff, the jury could have found the following. Nikolaos Paterakis heard about the Najdas through a mutual acquaintance, Rosa Nader, after he told Nader that he was interested in finding new business opportunities. The Najdas proposed that they form a hedge fund management company, and wooed Paterakis by showing him the expensive house in Concord in which they resided, and by representing that Charles Najda had developed an effective financial trading algorithm. The Najdas, however, never intended to run a legitimate business, planning instead to live a lavish lifestyle fueled by Paterakis's investment. The algorithm also did not work as well as was claimed. After negotiations, the parties signed a "Formation Agreement." Paterakis agreed to invest \$500,000 in the business, with \$150,000 to be used for salaries, \$50,000 for expenses, and \$300,000 for trading, in order to develop a track record utilizing the trading algorithm. The parties also executed a "Business Plan," which provided further details, and organized their business, Monument Street Capital Management LLC (MSCM), which they registered in Anguilla. Paterakis invested his \$500,000 on October 7, 2010.

MSCM was not successful. Its book of accounts shows that, between December of 2010 and March of 2012, it had total inflows of slightly under \$550,000 -- which includes Paterakis's \$500,000 investment -- and expenditures of around \$620,000. These expenditures were for a combination of salary payments to Andrew Najda and "firm expenses." By the time the present action was filed a year after Paterakis's initial investment, MSCM's bank balance was around \$23,000. Under Paterakis's theory, this rapid decline in MSCM's value

resulted from the Najdas' wrongful use of corporate assets for their personal benefit, which they had intended to do from the beginning.

Discussion. We address each of the Najdas' arguments in turn.

Their strongest argument, which ultimately fails, is that the breach of fiduciary duty claim was incorrectly brought as a direct action when it should have been brought derivatively. In this case, Paterakis's breach of fiduciary duty claim is essentially that the Najdas wrongfully diverted MSCM's funds for their personal use. Under standard corporate law principles, claims that managers harmed the corporation must be brought derivatively. See *Schaeffer v. Cohen, Rosenthal, Price, Mirkin, Jennings & Berg, P.C.*, 405 Mass. 506, 513 (1989). Breach of fiduciary claims may be brought in a direct action only if "[i]t would be difficult for the plaintiff . . . to establish breach of fiduciary duty owed to the corporation." *Bessette v. Bessette*, 385 Mass. 806, 809 (1982), quoting from *Donahue v. Rodd Electrotape Co.*, 367 Mass. 578, 589 n.14 (1975). Here, Paterakis would have had no trouble establishing that the Najdas, if they wrongfully took almost all of MSCM's assets for their own personal use, breached a fiduciary duty owed to MSCM.

Assuming without deciding that the same principles apply with equal force to this closely-held limited liability company in which there are only three members -- two of whom were the managers of the company and are the defendants -- and that therefore the breach of fiduciary duty claim should have been brought deriva-

tively, the Najdas have shown no prejudice from the error. The jury were instructed that, if Paterakis were to prevail on his breach of fiduciary duty claim, his recovery would be equal to "his proportionate share of the moneys [that] . . . the party against whom the claim is brought diverted to himself or others improperly." In other words, the judge instructed the jury to divide by three any amount they found the Najdas wrongfully took, each party being a one-third owner of MSCM, and distribute that one-third to Paterakis. The Najdas argue that if this had been brought as a derivative claim, damages (presumably three times the amount of the \$77,000 which was awarded to Paterakis on this claim) would go to MSCM, the assets of which could only be distributed pro rata to members upon dissolution after first paying creditors. But, because the method of calculating damages used by the jury instructions leaves the Najdas with at least the same amount of money that they would have had under a derivative action, they can claim no prejudice.

Contrary to the Najdas' argument, the breach of contract claim was properly brought directly because the contract was between the parties as individuals and antedated the creation of MSCM. See *Tracy v. Curtis*, 10 Mass. App. Ct. 10, 25 (1980) (shareholders may bring direct claims against managers in their individual capacities when claims do not derive from corporate relationship and damages are sought against managers in their individual capacities).

The Najdas next claim that there was insufficient evidence to establish damages. This claim is not meritorious. If the Najdas wrongfully took MSCM's funds for their own use, it is immaterial whether MSCM grew in

value. Thus, it was not necessary to determine the final value of MSCM in order to award damages. Even if it were, there is evidence that, when the action was filed, MSCM had cash on hand of about \$23,000, which gave the jury some sense of its value.

The Najdas also argue that there was no breach of contract or fiduciary duty before MSCM was formed. As there was no requirement that these breaches occur before the formation of the company, and the jury were not instructed that there was any such requirement, this claim is without merit.

Next, the Najdas argue that the damages awards were duplicative. The jury awarded damages as follows: \$116,000 for breach of contract, \$50,000 for negligent misrepresentations, and \$77,000 for breach of fiduciary duty.² A court must uphold a damages award against a challenge of duplication "if, by any line of reasoning, the jury might have made a correct assessment of damages." *Simon v. Solomon*, 385 Mass. 91, 107 (1982). The \$116,000 breach of contract damages, as the Najdas contend, could have represented Paterakis's one-third share of his investment into the trading account, plus what was earned on it. Although it is possible that the \$50,000 negligent misrepresentation award included part of this amount, this inference is not "inescapabl[e]," *id.* at 108, particularly in light of the \$77,000 in breach of fiduciary duty damages, and in light of the Formation Agreement's

² The jury found Andrew Najda and Charles Najda separately liable on the negligent misrepresentation and breach of fiduciary duty claims, i.e., each was liable for \$25,000 on the negligent misrepresentation claim and for \$38,500 on the breach of fiduciary duty claim. After the verdicts were rendered, the jury were polled and stated that their intention was to make separate awards in those amounts.

specific allocation of \$50,000 to nonsalary expenses. In addition, since the jury could have made a total award of over \$300,000, we cannot conclude that the substantially smaller overall award "inescapably" resulted from the duplication of damages.³

The Najdas next argue that there was insufficient evidence of negligent misrepresentation. We disagree. To the extent they argue that one cannot negligently misrepresent a present intention of future conduct, the law is (as the Najdas acknowledge) to the contrary. See *Cumis Ins. Soc., Inc. v. B.J.'s Wholesale Club, Inc.*, 455 Mass. 458, 474 (2009). In any event, the jury need not have relied on any statements made by the defendants about future conduct. The jury could have relied upon statements that the Najdas would abide by the Formation Agreement and the Business Plan, or that the trading algorithm had been tested and was working well. There was evidence that Paterakis's reliance on those statements was reasonable.⁴

The Najdas further argue that the jury should have been instructed to supply two purportedly missing terms from the Formation Agreement: (1) how long the \$200,000 allocated for expenses was supposed to last,

³ The related claim that the jury should have been instructed that they could not award duplicative damages falls with the substantive claim on duplicative damages. Even if not giving the instruction were a preserved claim of error, it was prejudicial only if the jury nonetheless did award such damages.

⁴ For the same reason, to the extent the Najdas claim that there cannot be a negligent misrepresentation about a company that does not exist, and to the extent that claim is preserved, even assuming there is some such rule, something we need not address, it is without merit.

and (2) who had the authority to allocate MSCM's resources for its operating needs. See *President & Fellows of Harvard College v. Peco Energy Co.*, 57 Mass. App. Ct. 888, 896 (2003) (when essential term is missing, court must supply one that is reasonable in the circumstances). The first missing term is not an essential term for purposes of this case because, so long as the funds in the trading account were not supposed to be used for salaries and expenses, it is immaterial how long the \$200,000 expense account was supposed to last. As to the second missing term, it is clear that the managers -- that is, the Najdas -- had the authority to allocate resources for MSCM's operating needs. The jury verdict indicates that they did not do so lawfully.

Even assuming that the Najdas' next argument is preserved -- that the agreement creating MSCM superseded the Formation Agreement with respect to the managers' powers -- it is without merit. Whatever the powers of the managers were under the MSCM agreement, the Najdas were nevertheless bound to comply with the terms of the earlier contract, the Formation Agreement.

The claim that the jury should not have been told that the plaintiff lost all his money was not preserved in the motion for judgment notwithstanding the verdict. In any event, in the instruction to which the Najdas point, the judge was simply describing to the jury what the plaintiff alleged, not instructing the jury that it was true.

The Najdas further argue that repeated testimony concerning their house in Concord should not have been allowed on grounds that its probative value was substantially outweighed by undue prejudice. Even assuming that this issue was preserved for our review, there was

no error. It is undisputed that the Najdas operated the business from the Concord house; the plaintiff was thus entitled to elicit evidence as to its value, its furnishings, and as to expenditures made by the Najdas on the house during the period of the plaintiff's involvement with the business. In any event, the Najdas objected at trial only once to any of this testimony. That single mention of the house was not unduly prejudicial.

Finally, the Najdas argue that they were unable to put on a proper defense because they were diverted by what they describe as "misconduct": the plaintiff claiming that the trading account investment was not an investment in the company, that Andrew Najda's wife had an operational role with MSCM and made representations to the plaintiff, and that MSCM was never properly formed. However, the Najdas point to no evidence that supports their characterization of these acts as misconduct, nor do they point to any evidence that these assertions diverted their attention from actually defending the case.⁵

Judgment affirmed.

⁵ To the extent they are not addressed in our decision, we decline to consider the following arguments because they were not properly preserved below or are raised for the first time on appeal: that the plaintiff repackaged a contract claim as a tort claim; that, under the agreement that formed MSCM, there was no liability for breach of fiduciary duty; that the finding of liability and judgment for breach of fiduciary duty should be vacated because the managers had a legitimate business purpose; that Anguillan law should have been applied under the internal affairs doctrine; that the judge erred in instructing the jury that the Formation Agreement was the operative agreement; and that it was integrated.

Order denying motion for
judgment notwithstanding
the verdict affirmed.

By the Court (Green, C.J., Ru-
bin & Kinder, JJ.⁶),

s/ Joseph F. Stanton

Clerk

Entered: March 21, 2018.

⁶ The panelists are listed in order of seniority.

Appendix D, Order of the Massachusetts Superior
Court Denying the Motion for Judgment Notwithstanding
the Verdict or, Alternatively, a New Trial, Decem-
ber 8, 2015

CLERK'S NOTICE

DOCKET NUMBER

1181CV03620

Trial Court of Massachusetts

The Superior Court

CASE NAME:

Nikolaos J. Paterakis vs. Andrew c. Najda et al

You are hereby notified that on 12/09/2015 the following
entry was made on the above referenced docket: En-
dorsement on Motion for Judgment Notwithstanding the
Verdict or, Alternatively, a New Trial (#54.0): DENIED

After hearing, and review of my notes and memory
of the testimony, no party having submitted a transcript
of the trial, Defendants Andrew Najda and Charles Naj-
da's Motion for Judgment Notwithstanding the Verdict
or, Alternatively, a New Trial (Docket #54) is DENIED.
The evidence was sufficient to support the jury's verdict
for plaintiff on the breach of contract, breach of fiduciary
duty, and negligent misrepresentation counts when
viewing the evidence in the light most favorable to the
plaintiff. *D'Annolfo v. Stoneham Hous. Auth.*, 375 Mass.
650, 657 (1978). The jury did not have to believe the Naj-
das' version of events. While I cannot say with certainty
how the jury calculated the damages it awarded, that is
frequently the case in a jury trial. Here, there was a rea-
sonable basis in the evidence for the jury to have
awarded the damages it did, including based on breach
of the agreement and duties prior to the formation of the
LLC. I cannot set aside the jury's verdict as against the
clear weight of the evidence. (Peter B. Krupp, Justice)
Dated 12/8/15 and copies mailed 12/9/15

Appendix E, Memorandum of Decision and Order for
Entry of Judgment of the Massachusetts Superior
Court, September 29, 2015

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, ss. SUPERIOR COURT
CIVIL ACTION
No. 11-3620-D

NIKOLAOS J. PATERAKIS
Plaintiff

vs.

ANDREW C. NAJDA, & others¹
Defendants

MEMORANDUM OF DECISION ON CLAIMS UNDER
G.L. c. 93A AND FOR DISSOLUTION AND AC-
COUNTING, AND ORDER FOR ENTRY OF JUDG-
MENT

This case was tried to a jury on August 12-19, 2015 on plaintiffs claims for breach of contract, quantum meruit, breach of fiduciary duty, and fraudulent and negligent misrepresentation; defendants Andrew and Charles Najda's counterclaims for breach of contract and breach of fiduciary duty; and defendant Renee Najda's counterclaim for abuse of process. Because there is no right to a jury trial on a claim under G.L. c. 93A, *Nei v. Burley*, 388 Mass. 307, 311-315 (1983), before trial I indicated I would reserve the 93A claim (Count VII), but would look to the jury's verdict as it might inform my decision. See *Acushnet Fed. Credit Union v. Roderick*, 26 Mass. App. Ct. 604, 606-608 (1988). The matter is before me on that claim and on plaintiffs equitable claims for wind-up and

¹ Charles E. Najda, Renee A. Najda, and Monument Street Capital Management, LLC.

dissolution of Monument Street Capital Management, LLC ("the LLC") (Count IX) and an accounting regarding the LLC (Count VIII).

At trial, the jury found that both Andrew and Charles Najda breached their contract, breached their fiduciary duties, and engaged in negligent misrepresentation. The jury found that plaintiff had not proven his claims of fraudulent misrepresentation and that defendants had not proven their counterclaims.² The breach of fiduciary duties by Andrew and Charles Najda arose out of their relationship with plaintiff in connection with the signing of the Formation Agreement and the operation of the LLC, a close corporation. As such, that conduct arose in a context in which G.L. c. 93A is inapplicable. See *Szalla v. Locke*, 421 Mass. 448, 451-452 (1995).

As for the pre-formation representations, I credit the jury's verdict that they were negligently and not intentionally false. They do not rise to the level of unfair and deceptive trade practices. Similarly, I credit the jury's verdict against plaintiff regarding his misrepresentation claims against Renee A. Najda. In addition, plaintiff did not prove by a preponderance of the credible evidence that Ms. Najda engaged in trade or commerce.

As for Count IX, which seeks dissolution of the LLC, this court lacks subject matter jurisdiction to dissolve the LLC. The LLC was formed under the Anguilla Limited Liability Company Act, Revised Statutes of Anguilla 2002, Chapter 6.³ Section 24 of the Limited Liability Company Agreement of Monument Street Capital

² At the conclusion of plaintiff's case, I directed a verdict for defendants on plaintiff's quantum meruit claim.

³ No party has provided a copy of this foreign law, or suggested that

Management LLC, which was admitted at trial as Exhibit 15, makes clear that it is "governed by, and construed under, the laws of Anguilla." As a limited liability company formed under the laws of Anguilla, the applicable Massachusetts statute considers it a "[foreign limited liability company" as defined in G.L. c. 156C, § 2(4), as to which the court does not have jurisdiction to issue a dissolution order under G.L. c. 156C, § 44. Section 44 does not authorize the Superior Court to dissolve a foreign limited liability company, but only to "decree dissolution" of a "limited liability company," which is defined in G.L. c. 156C, § 2(5) to include only an "unincorporated organization formed under this" Chapter 156C.⁴ See *Hayat v. Al-Mazeedi*, 28 Mass. L. Rep. 243, 2011 Mass. Super. LEXIS 73 at *16 (Jan. 11, 2011) (Billings, J.) (Superior Court "lacks jurisdiction to wind up the global affairs of a foreign corporation").

Without the power to order dissolution, and without any agreement of the parties to affect a dissolution, I may be powerless to order an accounting. A partner's right to an accounting generally accrues upon dissolution of the partnership. See *DiCarlo v. Lattuca*, 60 Mass. App. Ct. 344, 347 (2004) ("right to an accounting accrues upon

it authorizes any state court in the United States to dissolve an Anguilla limited liability company.

⁴ See *Raynes v. Sharp*, 238 Mass. 20, 24 (1921) (corporation's "winding up and dissolution . . . can only take place under proper proceedings in the courts of its own domicile"); *Richardson v. Clinton Wall Trunk Mfg. Co.*, 181 Mass. 580, 582 (1902) ("The rule is well established in this Commonwealth that ordinarily our courts will decline jurisdiction in matters which pertain to the interior life and conduct of a corporation as a creature of a foreign State, and which particularly involve a knowledge and application of the statutes of that State, and which often require for their proper adjustment full jurisdiction of the corporation and of its members for different purposes.").

the partnership's dissolution"); *Loan Modification Group, Inc. v. Reed*, 694 F.3d 145, 151-152 (1st Cir. 2012) (discussing partner's "right to an account of his interest" upon dissolution of partnership under Massachusetts law). Even if I had the power to order an accounting, I would not do so in this instance. The parties have engaged in extensive discovery. The plaintiff has virtually all of the documents relating to the monies that have flowed into and out of the LLC. An accounting at this time, absent the dissolution of the LLC, would be wasteful, time-consuming, expensive and unnecessary.

ORDER

Judgment shall enter for defendants on Counts VII, VIII and IX of the Complaint. In accordance with the jury's verdict, judgment shall enter for plaintiff Nikolas Paterakis (a) against defendants Andrew C. Najda and Charles E. Najda, jointly and severally, in the amount of \$116,000, with interest thereon at the statutory rate from the date of filing; plus costs pursuant to Mass. R. Civ. P. 54(d); (b) against defendant Andrew C. Najda individually for an additional \$63,500, with interest thereon at the statutory rate from the date of filing; (c) against defendant Charles E. Najda individually for an additional \$63,500, with interest thereon at the statutory rate from the date of filing; (d) for defendant Renee A. Najda on plaintiff's claims against her; and (e) against defendants on their counterclaims.

s/ Peter B. Krupp

Dated: September 29, 2015

Peter B. Krupp

Justice of the Superior
Court

Appendix F, Order of the Massachusetts Superior Court
Denying Plaintiff's Motion for Real Estate Attachment
and for a Preliminary Injunction, January 30, 2012

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, ss. SUPERIOR COURT
CIVIL ACTION
No. 2011-03620-D

NIKOLAOS J. PATERAKIS
Plaintiff

vs.

ANDREW C. NAJDA, & others
Defendants

ORDER ON PLAINTIFF'S MOTION FOR REAL ES-
TATE ATTACHMENT AND FOR A PRELIMINARY
INJUNCTION

Plaintiff's motion for real estate attachment on property located at 71 Flint Road, Concord, MA is hereby DENIED, inasmuch as plaintiff has not shown a reasonable likelihood of success on the merits on the record before the court.

Plaintiff's motion for preliminary injunction is hereby DENIED, inasmuch as plaintiff has not shown a reasonable likelihood of success on the merits on the record before the court, and there has also been an insufficient showing of irreparable harm should an injunction not be granted.

SO ORDERED,

Date: January 30, 2012 s/ Maynard M. Kirpalani
Maynard M. Kirpalani
Associate Justice