

DOCKET NO. FST-CV-155014808-S)	SUPERIOR COURT
)	
WILLIAM A. LOMAS)	J. D. OF STAMFORD/NORWALK
)	
v.)	AT STAMFORD
)	
PARTNER WEALTH MANAGEMENT, LLC)	
ET AL.)	SEPTEMBER 16, 2015

**BRIEF IN OPPOSITION TO
PLAINTIFF'S APPLICATION FOR PREJUDGMENT REMEDY**

Defendants Partner Wealth Management, LLC (“PWM”), Kevin G. Burns, James Pratt-Heaney and William Loftus (the “Individual Defendants” and, together with PWM, “the Defendants”) submit this Brief in Opposition to Plaintiff’s Application for a Prejudgment Remedy.

Preliminary Statement

A Prejudgment Remedy is available to Plaintiff under Connecticut General Statute §52-278a if this Court concludes that there is probable cause that Plaintiff will obtain a judgment in the amount of the prejudgment remedy he seeks, taking into account any defenses, counterclaims or set-offs of the Defendants. This Court has broad discretion to determine whether probable cause exists on the Plaintiff’s claims. *See TES Franchising, LLC v. Feldman*, 286 Conn. 132, 136-38 (2008) (“[i]n its determination of probable cause, the trial court is vested with broad discretion which is not to be overruled in the absence of clear error”). While Defendants recognize that the probable cause standard is less than a preponderance of evidence, the Court

must predicate the award of a prejudgment remedy on a “bona fide belief in the existence of the facts essential under the law for the action.” *Id.* Plaintiff cannot establish a bona fide belief in the existence of the facts essential under the law for either his breach of contract claim against the Defendants or his breach of fiduciary duty claim against the Individual Defendants.^{1/}

Factual Background

The facts underlying plaintiff’s breach of contract claim and breach of fiduciary duty claim can be succinctly stated as follows:

The Plaintiff and the Individual Members entered into the Partner Wealth Management LLC Limited Liability Company Agreement dated November 30, 2009 (the “Original Operating Agreement”). On October 13, 2014, Plaintiff notified PWM and the Individual Defendants that he was withdrawing as a member of PWM effective January 13, 2015. At all relevant times prior to January 13, 2015, each of the Plaintiff and the Individual Members owned a 25% membership interest in PWM and held one seat on PWM’s four member Management Committee. Effective January 1, 2015, the Individual Defendants approved amending and restating the Original Operating Agreement (the “Restated Operating Agreement”). Plaintiff did not approve of the amendment.

^{1/} Plaintiff’s remaining claims for an accounting under common law and Connecticut General Statute §52-404 and for a declaratory judgment pursuant to Connecticut General Statute §52-29 request non-monetary relief and, accordingly, are claims on which his request for a prejudgment remedy are not predicated.

Section 8.5 of the Original Operating Agreement and Section 7.3 of the Restated Operating Agreement required Plaintiff to sell and PWM to purchase Plaintiff's 25% membership interest following his withdrawal. The purchase price for his 25% membership interest under the Original Operating Agreement was \$4,159,791.25. Among other provisions of the Original Operating Agreement, the Restated Operating Agreement amended the way the value of each of the members' membership interest was calculated. Accordingly, the purchase price for Plaintiff's 25% membership interest under the Restated Operating Agreement is \$3,156,543.95. Plaintiff is claiming the difference between the two prices, \$1,003,247.30.

Both Section 8.7(b) of the Original Operating Agreement and Section 7.6(d) of the Restated Operating Agreement permit PWM or the Individual Defendants to pay the purchase price to Plaintiff in five equal, annual installments, with interest. There is a 1% difference in the interest rate payable on the unpaid portion of the purchase price: 6% under the Original Operating Agreement; and 5% under the Restated Operating Agreement. This difference in interest is approximately \$113,000 over the course of the five years.

Both Section 8.7(a) of the Original Operating Agreement and Section 7.6(a) of the Restated Operating Agreement state that the closing of the purchase of Plaintiff's membership interest "shall occur on the earlier of (i) that date when the Management Committee has determined that the withdrawing Member has substantially completed the transition of his or her clients to remaining Members, or (ii) the date which is (1) one year from the date of notice of

such Member's withdrawal." The Management Committee, in good faith, has not determined that Plaintiff has completed the transition of his clients to the remaining Members.² Accordingly, the first installment is due under both agreements (if at all) on the first anniversary of Plaintiff's notice of withdrawal, October 13, 2015, a date which has yet to pass.^{3/}

Argument

I. Plaintiff Cannot Establish the "Fact Essential Under the Law" to Meet the Probable Cause Standard

The "facts essential under the law" for Plaintiff to succeed on his monetary claims are whether the amendment of the Original Operating Agreement with the Restated Operating Agreement breached the terms of the Original Operating Agreement and whether the act of amending the Original Operating Agreement breached a fiduciary duty owed to him. These essential facts do not exist.

Article VII of the Original Operating Agreement, which governs amendments to the agreement, states that "[t]he Management Committee may, with the approval of Members holding at least sixty-five percent (65%) of the Percentage Interests, amend any provision of this Agreement." The amendment authority of the Original Operating Agreement is not ambiguous -- any three of the four members had the unlimited power to permit the Management Committee to

² The Defendants are also actively looking into whether the Plaintiff steered clients away from PWM in breach of the Operating Agreement.

^{3/} Although Plaintiff asserts in his Complaint that Section 7.6(a) of the Restated Operating Agreement amends the Original Operating Agreement on the timing of the first payment, Section 8.7(a) of the Original Operating Agreement included the identical language. No amendment to this provision was made.

amend the Original Operating Agreement. At the time of the amendment, Plaintiff remained a member of PWM. There is no time limitation on when the amendment can be made, including any provision that the Agreement cannot be amended after one member gives notice of his withdrawal. An exercise of a right specifically provided under a written contract to which the Plaintiff is a party is, by definition, not a breach of contract. The three Individual Defendants holding 75% of PWM's percentage interest approved the amendment and the Plaintiff holding 25% of PWM's percentage interest did not. Accordingly, under the terms of the Original Operating Agreement, the Restated Operating Agreement was adopted.

Plaintiff further asserts in his Complaint that even if the Defendants had the right to amend the Original Operating Agreement, the Original Operating Agreement "expressly provided that they could not do so if the amendment would adversely affect any member." Plaintiff misstates the terms of the Original Operating Agreement. Article VII of the Operating Agreement states that "[t]he Management Committee may, *without* the consent of any of the Members, *amend any provision of this Agreement in any way that would not have an adverse effect on any Member*" (emphasis added). Article VII goes on, however, to state that "[t]he Management Committee may, *with* the approval of Members holding at least sixty-five percent (65%) of the Percentage Interests, amend any provision of this Agreement." (emphasis added).

The inclusion of this second amendment procedure, which includes no restrictions on the right to amend the Original Operating Agreement, contravenes Plaintiff's hoped for restriction

on the amendment right adversely to the rights of any member. Connecticut law requires that this Court interpret the operating agreement so that every clause is given meaning and effect. *See, e.g., Ingalls v. Roger Smith Hotels Group*, 143 Conn 1, 5-6 (1955) (“contract must be construed as a whole in such a manner as to give effect to every provision, if reasonably possible”). The only reason the Plaintiff and the Individual Defendants included the second amendment procedure in Article VII was to govern the situation in which the amendment *has an adverse effect on one or more of the members* and specifically authorized 65% of the members to adopt the amendment anyway. The amendment procedure simply recognizes that 100% of the members might not always agree on a change to the operating agreement, and in that event, the members agreed that no member would have the power to prevent an amendment supported by the other three members.

Any other interpretation of the clause that would restrict the right of the members holding 65% of PWM’s membership interest to amend the Original Operating Agreement if the amendment adversely affected any member would render the second procedure redundant of the first clause and therefore meaningless. While Plaintiff would like this Court to imply a limitation on the members’ power to amend the Original Operating Agreement, the agreement contains no such limitation and one cannot be conjured. “[A]n unexpressed intent is of no significance. The controlling factor is the intent expressed in the [contract], not the intent which the parties may have had or which the court believes they ought to have had.” *Id.*

Contrary to Plaintiff's contention that the Individual Defendants singled Plaintiff out for adverse treatment in amending the Original Operating Agreement, the Restated Operating Agreement did not single out any member, including Plaintiff, for adverse treatment. The change in the valuation of the members' membership interest adopted in the Restated Operating Agreement affected all four members adversely by lowering the multiple applied in the valuation to a significant portion of the Management Fee. Under the Original Operating Agreement, the multiple was five times the entire Management Fee. The Restated Operating Agreement divided the Management Fee into two portions for purposes of calculating the repurchase price of the members' membership interest: (i) a base portion equal to PWM's Management Fee paid in 2013, plus 20% of the annual increase in the Management Fee in 2014 and each following year, which is allocated equally among the four members; and (ii) a performance portion equal to 80% of the annual increase in the Management Fee for 2014 and each following year, which is allocated among the members unequally based on which members are responsible for the increased fees. The Restated Operating Agreement reduced the multiple applied to the base portion of the Management Fee from five times to four times, and added to 25% of the result of the forgoing calculation an amount equal to six times the performance portion of the Management Fee paid to the applicable member in the prior year. This change in the valuation of the members' membership interests in the Restated Operating Agreement followed from the unanimous decision of the members (including Plaintiff) earlier in 2014 to change the

compensation structure to pay 80% of future year over year increases in the Management Fee to the member responsible for the increased fees.

For two further reasons, Plaintiff cannot establish probable cause for his breach of fiduciary duty claim against the Individual Defendants.

First, while neither the Connecticut Supreme Court nor any Appellate Court has specifically addressed the issue, the Connecticut Superior Court sitting in Stamford has concluded that the members of a LLC do not owe a fiduciary duty of loyalty or care to the other members. *See Kasper v. Valluzzo*, 2011 Conn. Super. LEXIS 3245 (Dec. 23, 2011) (“[t]he court rejects the plaintiff’s claim that a member of a LLC owes a fiduciary duty to another member”) (copy attached). Thus, in approving the amendment and restatement of the Original Operating Agreement with the Restated Operating Agreement, each of the Individual Defendants and the Plaintiff was entitled to vote his self-interest without regard to any duty owed to the interests of his fellow members.

Second, even if this Court concluded a fiduciary duty might exist among the members of PWM, there is no evidence that any of the four members of PWM was in a position of owing the other members a fiduciary duty. The Connecticut Supreme Court has found that a fiduciary relationship is characterized by a “unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other.” *See Dunham v. Dunham*, 204 Conn. 322 (1987) *overruled in part by Santopietro v.*

New Haven, 239 Conn. 207 (1996). None of the members of PWM has the type of relationship with or influence over the other members from which a fiduciary relationship might arise. Each member had an equal vote with each of the other members both as a member of the Management Committee and as a member of the LLC. None of the members had the ability to exercise control over the direction of PWM in any matter without the agreement of at least two of the remaining three members (since any vote of the Management Committee requires more than 50% of the Committee to approve).

In short, Plaintiff's claim elevates voting in a vote specifically authorized by a LLC operating agreement to a breach of a fiduciary duty by those members voting in the majority against the members voting in the minority. This result is preposterous, resulting in a de facto requirement that all matters be decided in an LLC by a unanimous vote of the members in every Connecticut LLC, regardless of the terms set forth in that company's operating agreement.

II. Plaintiff's Need for a Preliminary Remedy Is Limited

If this Court concludes that probable cause does exist against PWM and that a prejudgment remedy is appropriate, the Court should limit the remedy to \$1,116,000. This amount is the difference between the repurchase price of Plaintiff's membership interest under the Original Operating Agreement and the repurchase price under the Restated Operating Agreement, plus the differential of approximately \$113,000 to account for the 1% difference in the interest rate. Further, as described below, PWM is accruing month to month the funds

BERCHEM, MOSES
& DEVLIN, P.C.
COUNSELORS AT LAW
75 BROAD STREET
MILFORD, CONNECTICUT

06460

JURIS NUMBER

22801

(203) 783-1200

necessary to pay Plaintiff the purchase price due to Plaintiff under the Restated Operating Agreement when due. PWM and the Individual Defendants are willing to increase the accrual rate to include the difference in purchase price sought by Plaintiff in this action.

Both Section 8.7(c) of the Original Operating Agreement and Section 7.6(a) of the Restated Operating Agreement permit PWM to pay the purchase price to Plaintiff in five equal, annual installments, with the first payment due on the first anniversary of Plaintiff's October 13, 2014 notice of withdrawal. Consistent with this obligation and subject to a complete reservation of rights, PWM has been accruing the \$631,309 payable in the first installment at the rate of \$52,609 of principle per month and will continue to accrue principle and interest during the five year period over which the annual installments are payable. As stated above, Defendants are willing to increase the accrual amounts by \$18,600 of principle per month, plus an additional amount for the interest differential, so as to provide Plaintiff security in the incremental increase in the repurchase price for his membership interest in the unlikely event that he succeeds in this action.

Providing Plaintiff additional security for the amounts that PWM is already accruing or the increased amount it is willing to accrue, but are not yet due and payable to him under either the Original Operating Agreement or the Restated Operating Agreement puts him in a better position than he is otherwise entitled by contract. A prejudgment remedy provides security for

the claims Plaintiff has (i.e., a right to a payment stream over five years); it is not intended to put a plaintiff in a better position by providing rights under a contract that he does not have.

Further, there is no basis to award a Prejudgment Remedy against both PWM and each of the Individual Defendants. The damage award sought by Plaintiff is limited to the difference in the repurchase price of his membership interest in PWM under the Original Operating Agreement and the Restated Operating Agreement. He has not alleged in his support for his application that any different or alternative damages would be available to him from the Individual Defendants. Accordingly, if PWM is ordered to provide a prejudgment remedy, Plaintiff will have had the entirety of his contested, potential award protected.

BERCHEM, MOSES

& DEVLIN, P.C.

COUNSELORS AT LAW

75 BROAD STREET

MILFORD, CONNECTICUT

06460

JURIS NUMBER

22801

(203) 783-1200

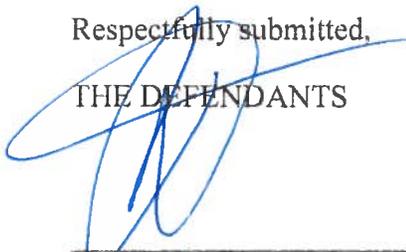
CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that this Court deny Plaintiff's application for a prejudgment remedy or otherwise limit the amount of the prejudgment remedy to \$1,116,000 and permit Defendants to accrue this amount month to month at the additional rate of \$18,600 per month, plus accruing interest, over the time payments would otherwise be due to Plaintiff.

Dated: September 16, 2015

Respectfully submitted,

THE DEFENDANTS



Richard J. Buturla, Esq.
Mark J. Kovack, Esq.
BERCHEM, MOSES & DEVLIN, P.C.
75 Broad Street
Milford, CT 06460

David R. Lagasse
MINTZ LEVIN COHN FERRIS GLOVSKY &
POPEO P.C.
666 Third Avenue
New York, NY 10017

Attorneys for Defendants,
Partner Wealth Management, LLC
Kevin G. Burns
James Pratt-Heaney
William P. Loftus

BERCHEM, MOSES
& DEVLIN, P.C.
COUNSELORS AT LAW
75 BROAD STREET
MILFORD, CONNECTICUT
06460
—
JURIS NUMBER
22801
—
(203) 783-1200

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September 2015, I caused the foregoing Brief in Opposition to Plaintiff's Application for a Prejudgment Remedy to be served via electronic mail on counsel as follows:

Thomas J. Rechen
McCarter & English, LLP
City Place I, 185 Asylum Street
Hartford, CT 06103
trechen@mccarter.com



Richard J. Buturla

BERCHEM, MOSES

& DEVLIN, P.C.

COUNSELORS AT LAW

75 BROAD STREET

MILFORD, CONNECTICUT

06460

JURIS NUMBER

22801

(203) 783-1200



Cynthia Kasper v. John V. Valluzzo et al.

FSTCV075004383S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF STAMFORD-NORWALK AT STAMFORD

2011 Conn. Super. LEXIS 3245

December 23, 2011, Decided
December 23, 2011, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

CASE SUMMARY:

OVERVIEW: Although defendant, as manager of an LLC, violated his duty of good faith under *Conn. Gen. Stat. § 34-141* by engaging in self-dealing contrary to the terms of the LLC's operating agreement, plaintiff, an LLC member, was not entitled to recover individually because the four monetary claims raised by plaintiff were not individual damages sustained by plaintiff, rather the claims were more attributable to a derivative suit, and plaintiff lacked standing to bring the claims individually.

OUTCOME: Judgment for defendant.

LexisNexis(R) Headnotes

Business & Corporate Law > Limited Liability Companies > General Overview

[HN1] Limited liability companies are hybrid entities that combine desirable characteristics of corporations, limited partnerships, and general partnerships. They are entitled to partnership status for federal income tax purposes under certain circumstances, which permits limited liability company members to avoid double taxation, i.e., taxation of the entity as well as taxation of the members' incomes. Moreover, members, unlike partners in general

partnerships, may have limited liability, such that members who are involved in managing the limited liability company may avoid becoming personally liable for its debts and obligations.

Business & Corporate Law > Limited Liability Companies > Formation

Business & Corporate Law > Limited Liability Companies > Members & Other Constituents

[HN2] A limited liability company is a distinct legal entity whose existence is separate from its members. A limited liability company has the power to sue or be sued in its own name, *Conn. Gen. Stat. §§ 34-124(b)* and *34-186*, or may be a party to an action through a suit brought in its name by a member. *Conn. Gen. Stat. § 34-187*.

Governments > Fiduciary Responsibilities

[HN3] The Connecticut Supreme Court has chosen to maintain an imprecise definition of what constitutes a fiduciary relationship in order to ensure that the concept remains adaptable to new situations. Consequently, under Connecticut law, a fiduciary or confidential relationship is broadly defined as a relationship that is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other. The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him.

Business & Corporate Law > General Partnerships > Management Duties & Liabilities > Fiduciary Responsibilities > General Overview

Business & Corporate Law > Limited Liability Companies > Members & Other Constituents

[HN4] Partners owe a fiduciary duty to other partners. Some Connecticut trial courts have held that like a partner in a partnership, a member of a limited liability company (LLC) has a fiduciary duty to other members. However, the Superior Court of Connecticut, Judicial District of Stamford-Norwalk at Stamford has found that the appellate case law does not support the conclusion that a LLC member is similar to a partner in a partnership.

Business & Corporate Law > Limited Liability Companies > Members & Other Constituents

[HN5] The Uniform Limited Liability Corporation Act (ULLCA) provides that members of a member-managed limited liability company owe a fiduciary duty of loyalty and care to the company and its other members. Connecticut has not adopted the ULLCA.

Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities

[HN6] The Uniform Limited Liability Corporation Act states that a manager in a manager-managed limited liability company owes a fiduciary duty to the members.

Business & Corporate Law > Corporations > Directors & Officers > Management Duties & Liabilities > Fiduciary Responsibilities > General Overview

Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities

[HN7] A manager of a limited liability company (LLC) is the equivalent of an officer of a stock corporation. An officer and director occupies a fiduciary relationship to the corporation and to its stockholders.

Business & Corporate Law > General Partnerships > Management Duties & Liabilities > Fiduciary Responsibilities > General Overview

[HN8] The managing partner of a partnership owes a fiduciary duty to the partnership and each partner. General partners owe a fiduciary duty to limited partners.

Business & Corporate Law > Corporations > General Overview

Business & Corporate Law > Limited Liability Companies > General Overview

[HN9] If there is no statute to the contrary, a limited liability company is controlled by general corporate law.

Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities

[HN10] On its face *Conn. Gen. Stat. § 34-141* imposes a duty of good faith, not a fiduciary duty. There is no statute stating whether or not the manager of a limited liability company (LLC) owes a fiduciary duty to the LLC and the other members. *Conn. Gen. Stat. §§ 34-140 through 34-144*. The Superior Court of Connecticut, Judicial District of Stamford-Norwalk at Stamford has found that a manager of a manager-managed LLC owes a fiduciary duty to the LLC and its members.

Evidence > Procedural Considerations > Burdens of Proof > Burden Shifting

Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof

Governments > Fiduciary Responsibilities

[HN11] Because fiduciary relationships are imbued with the utmost trust, the parties are bound to act honestly, and with the finest and undivided loyalty to the trust, not merely with that standard of honor required of men dealing at arm's length and the workaday world, but with a punctilio of honor the most sensitive. Because the superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him, once a plaintiff has established a fiduciary duty, the burden then shifts to the defendant fiduciary to prove fair dealing by clear and convincing evidence.

Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities

Business & Corporate Law > Limited Liability Companies > Members & Other Constituents

Evidence > Procedural Considerations > Burdens of Proof > Burden Shifting

Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof

[HN12] *Conn. Gen. Stat. § 34-141* states that a member or manager shall discharge his duties under the operating agreement, in good faith, with the care an ordinary prudent person in a like position would exercise under similar circumstances, and in the manner he reasonably believes to be in the best interests of the limited liability company. By its plain language, this is a duty of good faith. It does not rise to the level of a fiduciary duty. There is no Connecticut appellate authority stating that the good faith provision of § 34-141 amounts to proof of a fiduciary duty. There is no shifting of the burden of proof to the fiduciary to prove fair dealing by clear and

convincing evidence in a breach of good faith claim. *Section 34-141* sets forth a duty of good faith, which is not the same as the duty of a fiduciary, which goes beyond good faith.

Contracts Law > Breach > Causes of Action > General Overview

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

[HN13] An action for breach of the covenant of good faith and fair dealing requires proof of three essential elements: (1) that the plaintiff and the defendant were parties to a contract under which the plaintiff reasonably expected to receive certain benefits; (2) that the defendant engaged in conduct that injured the plaintiff's right to receive benefits it reasonably expected to receive under the contract; and (3) that when committing the acts by which it injured the plaintiff's right to receive under the contract, the defendant was acting in bad faith. In order to prevail on a claim of bad faith it is necessary for the complaint to allege a specific act that was performed purposely and with a sinister intent.

Contracts Law > Breach > Causes of Action > General Overview

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

[HN14] In the context of an action for breach of the covenant of good faith and fair dealing, bad faith has been defined in Connecticut jurisprudence in various ways. Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Bad faith means more than mere negligence; it involves a dishonest purpose. Bad faith may be overt or may consist of inaction, and it may include evasion of the spirit of the bargain.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

[HN15] Good faith and fair dealing mean an attitude or state of mind denoting honesty of purpose, freedom from intention to defraud and being faithful to one's duty or obligation. The definition of good faith requires not only honesty in fact but also observance of reasonable expectations of the contracting parties as they presumably intended.

Civil Procedure > Remedies > Damages > General Overview

Evidence > Procedural Considerations > Burdens of Proof > Allocation

[HN16] The plaintiff has the burden of proving the extent of the damages suffered. Although the plaintiff need not provide such proof with mathematical exactitude, the plaintiff must nevertheless provide sufficient evidence for the trier to make a fair and reasonable estimate. The determination of damages is a matter for the trier of fact.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Real Property Law > Landlord & Tenant > Tenancies > Tenancies at Sufferance

[HN17] A nontenant occupier is obligated to pay a fair amount for the use and occupancy of the premises even though there is no rental agreement. A court can make a finding of reasonable use and occupancy.

Civil Procedure > Judicial Officers > Judges > Discretion

Civil Procedure > Remedies > Injunctions > General Overview

[HN18] A request for injunctive relief is addressed to the discretion of the court.

Civil Procedure > Parties > Self-Representation > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > General Overview

[HN19] A self-represented non-attorney party to litigation cannot obtain an award of attorney fees.

Civil Procedure > Remedies > Costs & Attorney Fees > Costs > General Overview

Governments > Courts > Clerks of Court

[HN20] Connecticut's procedures do not permit trial courts to directly award taxable costs. The plaintiff, if successful, is entitled to a taxation of costs pursuant to *Conn. Gen. Prac. Book, R. Super. Ct. § 18-5*. In the first instance the successful plaintiff must submit a claim of costs to the clerk for taxation. Parties are entitled to request a hearing before the Clerk of the Superior Court on the taxation of costs. After the Clerk enters a taxation of costs, only then can the trial court consider costs. Either party may move the judicial authority for a review of the taxation by the clerk by filing a motion for review of taxation of costs within twenty days of the issuance of the notice of taxation by the clerk. *§ 18-5(b)*. Even then

court costs can only be taxed under statutory authority such as *Conn. Gen. Stat. §§ 52-257, 52-260*.

Business & Corporate Law > Limited Liability Companies > General Overview

Civil Procedure > Remedies > Damages > Punitive Damages

[HN21] *Conn. Gen. Stat. § 34-141* does not provide a punitive damage award.

Civil Procedure > Remedies > Damages > Punitive Damages

[HN22] Common-law punitive damages under Connecticut law is limited to the cost of litigation, i.e., attorneys fees.

Civil Procedure > Remedies > Judgment Interest > General Overview

Evidence > Judicial Notice > General Overview

[HN23] A court can award interest for the wrongful detention of money. The date upon which the wrongful detention began must be determined in order to establish the date from which interest should be calculated. Finally, the court must determine a rate of interest. Connecticut has not established a statutory rate of interest. *Conn. Gen. Stat. § 37-3a* caps interest at no more than 10 percent. The court may take judicial notice of a rate of interest. Under *§ 37-3a* that judicially noticed interest rate may not exceed ten percent. A court must give the parties an opportunity to be heard on the appropriate rate of interest.

Civil Procedure > Equity > General Overview

Civil Procedure > Judicial Officers > Judges > Discretion

Civil Procedure > Remedies > Equitable Accountings > General Overview

[HN24] An action for an accounting calls for the application of equitable principles. In an equitable proceeding, a trial court may examine all relevant factors to ensure that complete justice is done. The determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court.

Civil Procedure > Remedies > Equitable Accountings > Elements

[HN25] To support an action of accounting, one of several conditions must exist. There must be a fiduciary relationship, or the existence of mutual and/or compli-

cated accounts, or a need of discovery, or some other special ground of equitable jurisdiction such as fraud.

Business & Corporate Law > Corporations > General Overview

Business & Corporate Law > Limited Liability Companies > General Overview

Governments > Legislation > Statutory Remedies & Rights

[HN26] Corporate statutes are applicable to limited liability companies (LLC), even though LLC is not mentioned in the statutes as long as they do not conflict with the LLC statutes.

Business & Corporate Law > Corporations > Governing Documents & Procedures > Records & Inspection Rights > Inspection Rights > Shareholders

Governments > Legislation > Interpretation

[HN27] Statutes providing for inspection by shareholders should be liberally construed in favor of the shareholders.

Civil Procedure > Remedies > Equitable Accountings > General Overview

[HN28] *Conn. Gen. Stat. § 52-401 et seq.* primarily consider the procedures to be followed after a trial court has determined that an accounting is due. A trial court has the general equitable authority to enter orders for inspection of records and inventory of assets. In addition, *Conn. Gen. Stat. § 52-401* provides that in any judgment or decree for an accounting, the court shall determine the terms and principles upon which such accounting shall be held.

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Property Distribution > Characterization > Nonmarital Property

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Property Distribution > Classification > Gifts

[HN29] *Fla. Stat. § 61.075(5)(b)(2)* excludes noninter-spousal gifts as marital assets.

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Property Distribution > Characterization > Nonmarital Property
Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Property Distribution > Classification > Gifts

[HN30] See *Fla. Stat. § 61.075(6)(b)(2)*.

Civil Procedure > Trials > General Overview
Family Law > Marital Termination & Spousal Support
> Dissolution & Divorce > General Overview

[HN31] Connecticut law permits litigation between former spouses over a jointly held asset.

Torts > Procedure > Statutes of Limitations > General Overview

[HN32] See *Conn. Gen. Stat. § 52-577*.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > Burdens of Proof

[HN33] The failure to set forth facts in a special defense is fatal.

Business & Corporate Law > Corporations > Governing Documents & Procedures > Records & Inspection Rights > General Overview

Civil Procedure > Remedies > Equitable Accountings > General Overview

Torts > Business Torts > General Overview

[HN34] An accounting is not a tort. Inspection of books and records is not a tort.

Civil Procedure > Remedies > Equitable Accountings > Partnerships

Governments > Legislation > Statutes of Limitations > Time Limitations

[HN35] An accounting of real estate is subject to its own statutes of limitation for disputes of co-owner of real estate. *cgs § 52-580*.

Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities

Business & Corporate Law > Limited Liability Companies > Members & Other Constituents

[HN36] See *Conn. Gen. Stat. § 34-141*.

Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities

Business & Corporate Law > Limited Liability Companies > Members & Other Constituents

Contracts Law > Breach > General Overview

Torts > Negligence > Standards of Care > General Overview

[HN37] A violation of *Conn. Gen. Stat. § 34-141* requires a breach of a limited liability company's operating agreement and thus contains elements of a breach of contract. The statutory violation also applies the standard of care of an ordinary person in a like position would exercise under similar circumstances. This contains elements of a negligence claim.

Governments > Legislation > Statutes of Limitations > Time Limitations

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

Torts > Procedure > Statutes of Limitations > General Overview

[HN38] A claim of breach of fiduciary duty has been classified as a general tort. Breach of fiduciary duty is a tort action governed by the three year statute of limitations contained within *Conn. Gen. Stat. § 52-577*.

Business & Corporate Law > Agency Relationships > Ratification > Scope

[HN39] Ratification is defined as the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account. Ratification requires acceptance of the results of the act with an intent to ratify, and with full knowledge of all the material circumstances.

Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Derivative Actions > General Overview

Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Direct Actions

Business & Corporate Law > Limited Liability Companies > Members & Other Constituents

[HN40] The general rules relating to shareholders derivative lawsuits in a stock corporation are applicable to a limited liability company. In order for a shareholder to bring a direct or personal action against the corporation or other shareholders, that shareholder must show an injury that is separate and distinct from that suffered by any other shareholder or by the corporation. A shareholder--even the sole shareholder--does not have standing to assert a claim alleging wrongs to the corporation.

JUDGES: [*1] Hon. Kevin Tierney, Judge Trial Referee.

OPINION BY: Kevin Tierney

OPINION

MEMORANDUM OF DECISION

At first blush this civil lawsuit appears to be a continuation of a Florida marriage dissolution action between the individual parties that went to judgment on January 30, 2009.

Actually in this civil complaint the plaintiff is seeking money damages for distributions from an LLC and other relief relating to Valluzzo Realty Associates, LLC, a Connecticut LLC. This case, and its companion case involving a Connecticut real estate partnership, was tried to the court over twenty-seven days. The plaintiff's operative complaint is the original four-count complaint dated June 7, 2007. The first count is breach of fiduciary duty against the defendant, John V. Valluzzo, as manager of Valluzzo Realty Associates, LLC. The second count seeks an accounting. The third count is breach of the LLC's Operating Agreement. The final count is breach of the statutory duty under *Gen. Stat. §34-141* against John V. Valluzzo in that he failed to discharge his duties as member and manager in good faith. The plaintiff seeks injunctive relief, monetary damages, an accounting, access to the LLC's books and records and other relief. The two [*2] defendants, both represented by the same counsel, filed an Amended Answer and Special Defenses dated February 18, 2010 (#143.00). Both defendants have asserted six Special Defenses; (1) The individual parties as husband and wife are involved in a dissolution of marriage action in Palm Beach County, Florida and "If it is found, in the Florida matrimonial proceeding, that the Plaintiff has no viable legal interest in the Defendant, VALLUZZO REALTY ASSOCIATES, LLC, then she has no standing to make the claims contained in the Complaint"; (2) Because the Florida dissolution of marriage proceedings are still pending, "It is impossible to determine damages, if any, to the Plaintiff, as long as her ownership interest in the Defendant, VALLUZZO REALTY ASSOCIATES, LLC, is under dispute"; (3) The First Count breach of fiduciary duty, the Second Count accounting and the Fourth Count breach of statutory duty are barred by the statute of limitations, *Gen. Stat. §52-577*; (4) "As to the Plaintiff's Third Count, there is no valid contract between the parties due to the lack of consideration"; (5) "If the acts as alleged in Plaintiff's complaint did occur the Plaintiff ratified those acts"; and (6) "The [*3] Plaintiff fails to state a cause of action upon which injunctive relief may be granted." The plaintiff filed in effect a general denial as to each of these six Special Defenses. In addition the defendants claim that the plaintiff has no standing to make individual claims against the LLC and such claim, if viable, must only be raised in a derivative action. The defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction dated August 21, 2010 (#253.00) was heard during the trial and

has been decided in a separate Memorandum of Decision of even date herewith. The issue of standing will be discussed in a later portion of this Memorandum of Decision.

The court finds the following facts and legal conclusions.

The plaintiff, Cynthia Kasper, and the defendant, John V. Valluzzo, were married on November 4, 1993 in Westport, Connecticut. There are no children issue of the marriage. The defendant, John V. Valluzzo, has three children by a prior marriage, all of whom are adults: David Valluzzo, Carla Hurtado and Joan Mazzella. None of these three children are parties in either this instant lawsuit or the companion lawsuit, *Cynthia Kasper v. G&J Partnership and John V. Valluzzo, Superior Court, judicial district of Stamford/Norwalk at Stamford, Docket Number FST CV 07-5004956 S, 2011 Conn. Super. LEXIS 3244*. [*4] Both lawsuits were consolidated for trial and the evidence at trial will be considered in both lawsuits (#220.86).

At issue in both lawsuits are three parcels of Connecticut real property. All three were formerly owned by George P. Valluzzo, the father of John V. Valluzzo. George P. Valluzzo owned and operated a precision metal parts business. In 1943 that business was located at North Street, Danbury, Connecticut and then at Taylor Street, Danbury, Connecticut. In the early 1950s the business was moved to 1 Sugar Hollow Road Danbury, Connecticut a property now owned by G&J Partners that is the subject of the companion lawsuit. Later George P. Valluzzo purchased two separate adjacent parcels at 125 Park Avenue and 127 Park Avenue, Danbury, Connecticut in order to house a division of his precision metal parts business. He built a manufacturing building at 125 Park Avenue. In 1988 the business moved to Bethel, Connecticut and vacated both Danbury locations. George P. Valluzzo died on November 14, 2002. The precision metal parts business is no longer in existence.

The manufacturing building located [*5] at 1 Sugar Hollow Road, Danbury was torn down and a new building was constructed meeting the specifications of the then and current tenant, Pier 1 Imports, (U.S.) Inc. Ex. 9, Ex. 11, Ex. 12. The new retail building is 10,000 square feet on a 1.198-acre parcel of land adjacent to the Danbury Fair Mall. Ex. 64. 1 Sugar Hollow Road, Danbury is currently owned by G&J Partners. Ex. 75, Ex. 83. Further facts regarding the 1 Sugar Hollow Road property will be discussed in the Memorandum of Decision in the companion case of even date herewith.

127 Park Avenue, Danbury, Connecticut is a .498-acre parcel with a one-story building occupied by a restaurant/lounge, the only tenant on that parcel. Immediately next door is 125 Park Avenue. 125 and 127 Park Ave-

nue share a common entrance and exit. 125 Park Avenue, Danbury, Connecticut is .87-acre parcel with a two-story building. The entire building is occupied by one tenant, the Military Museum of Southern New England, Inc. (MMSNE). MMSNE pays no rent. Between 1956 and 1962 George P. Valluzzo purchased both Park Avenue properties, one with the existing restaurant and the second with a rental house. In 1970 George P. Valluzzo demolished the house and [*6] built a one-story machine shop at 125 Park Avenue. He ran his precision metal parts business both at that location as well as at 1 Sugar Hollow Road. In 1988 the entire manufacturing business was moved to Bethel, Connecticut vacating both the Sugar Hollow Road and Park Avenue locations. Eventually the buildings housing the business at both Danbury locations were demolished.

In 1984 John V. Valluzzo created MMSNE, a Connecticut non-stock corporation with *IRS 501(c)(3)* tax-free status. In 1995 the existing building at 125 Park Avenue was converted to a two-story building so that MMSNE could occupy both floors. In the original 1994 lease between George P. Valluzzo and MMSNE rent was paid by MMSNE to George P. Valluzzo. George P. Valluzzo would then donate the rent back to MMSNE. Valluzzo Realty Associates, LLC was formed on January 2, 2000. Ex. 45. Title to 125-127 Park Avenue, Danbury was conveyed to the LLC. Ex. 79. Since that conveyance the defendant, Valluzzo Realty Associates, LLC, has been the record title owner of the real property at 125-127 Park Avenue, Danbury, Connecticut. This is verified by the title searches in evidence. Ex. 65 and 66. MMSNE did not pay rent after George [*7] P. Valluzzo's November 14, 2002 death but paid for the utilities as well as certain structural repairs. The tax returns verify that no rent was paid by MMSNE. 2003, Form 8825, line 2, Ex. 40; 2004, Form 8825, line 2, Ex. 41. No cash payments have been made by MMSNE to the current owners of the property, the defendant, Valluzzo Realty Associates, LLC, after 2002.

The Operating Agreement of Valluzzo Realty Associates, LLC was executed on January 2, 2000 by the following members: George Valluzzo, John V. Valluzzo, Cynthia Kasper Valluzzo, David Valluzzo, Carla Ann Hurtado and Joan Valluzzo. Ex. 45. The first paragraph of the Operating Agreement names the plaintiff as a member and Schedule B lists the plaintiff's "Percentage Membership Interest" as "15%." Cynthia Kasper Valluzzo is the plaintiff, Cynthia Kasper. At issue in both the Florida dissolution and in this trial is whether or not Cynthia Kasper is the owner of a 15% membership interest in Valluzzo Realty Associates, LLC. After consideration of all of the evidence and the pertinent law, the court finds that the plaintiff has owned consistently since January 2, 2002 a 15% membership interest in Valluzzo

Realty Associates, LLC. This [*8] finding is supported by the following facts.

(1) The Operating Agreement of the LLC dated January 2, 2000, names the plaintiff as a 15% member. Ex. 45, Schedule B.

(2) The Operating Agreement in paragraph 6(a) states: "JOHN V. VALLUZZO shall act as Manager until his resignation, death or incapacity. If JOHN V. VALLUZZO cannot act as Manager, CYNTHIA KASPER VALLUZZO shall act as successor manager."

(3) The Federal income tax returns and K-1s filed by the LLC since 2002 show Cynthia Kasper as the owner of a 15% membership interest in the LLC. Ex. 39-44, Ex. 70 and 71. The 2000 and 2001 LLC tax returns were not in evidence. The 2002 LLC tax return shows that Cynthia Kasper owned a 15% membership interest on January 1, 2002.

(4) The above LLC Federal tax returns were signed by John V. Valluzzo.

(5) The Florida matrimonial proceedings found that Cynthia Kasper was a 15% owner of the LLC, although the Florida trial court misidentified various entities. Ex. 95.

(6) John V. Valluzzo admitted in testimony in this trial that the plaintiff was a member of the LLC.

(7) The defendants' counsel conceded at oral argument on the last trial date that the plaintiff was a 15% member of the LLC, despite the [*9] fact that John V. Valluzzo contested her 15% ownership in the LLC in the Florida dissolution action as well as for twenty-six of the twenty-seven days of trial in this Connecticut lawsuit.

The First Count alleges that John V. Valluzzo, as the manager of and a member of Valluzzo Realty Associates, LLC, breached his fiduciary duty to the plaintiff, Cynthia Kasper.

As a preliminary matter, a review of some general principles governing limited liability companies is warranted.[HN1] [Limited liability companies] are hybrid entities that combine desirable characteristics of corporations, limited partnerships, and general partnerships. [They] are entitled to partnership status for federal income tax purposes under certain circumstances, which permits [limited liability company] members to avoid double taxation, i.e., taxation of the entity as well as taxation of the members' incomes .

. . . Moreover . . . members, unlike partners in general partnerships, may have limited liability, such that . . . members who are involved in managing the [limited liability company] may avoid becoming personally liable for its debts and obligations." (Internal quotation marks omitted.) *Weber v. U.S. Sterling Securities, Inc.*, 282 Conn. 722, 729, 924 A.2d 816 (2007). [*10] [HN2] "A limited liability company is a distinct legal entity whose existence is separate from its members . . . A limited liability company has the power to sue or be sued in its own name; see *General Statutes* §§34-124(b) and 34-186; or may be a party to an action through a suit brought in its name by a member. See *General Statutes* §34-187." (Citation omitted.) *Wasko v. Farley*, 108 Conn.App. 156, 170, 947 A.2d 978 (2008).

David Caron Chrysler Motors, LLC v. Goodhall's, Inc., 122 Conn.App. 149, 159, 997 A.2d 647 (2010).

The plaintiff did not furnish any legal authority that a member of an LLC owes a fiduciary duty to the LLC itself or another LLC member.

[HN3] Our Supreme Court has chosen to maintain an imprecise definition of what constitutes a fiduciary relationship in order to ensure that the concept remains adaptable to new situations. See *Alaimo v. Royer*, 188 Conn. 36, 41, 448 A.2d 207 (1982) (our Supreme Court has "specifically refused to define a fiduciary relationship in precise detail and in such a manner as to exclude new situations, choosing instead to leave the bars down for situations in which there is a justifiable trust confided on one side and a resulting superiority and influence on the other" [*11] [internal quotation marks omitted]). Consequently, under Connecticut law, a fiduciary or confidential relationship is broadly defined as a relationship that is "characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other . . . The superior position of the fiduciary or dominant party affords him great opportunity for abuse

of the confidence reposed in him." (Citations omitted.) *Dunham v. Dunham*, 204 Conn. 303, 322, 528 A.2d 1123 (1987), overruled in part by *Santopietro v. New Haven*, 239 Conn. 207, 213 n.8, 682 A.2d 106 (1996).

Ahern v. Kappalumakkel, 97 Conn.App. 189, 194, 903 A.2d 266 (2006).

[HN4] Partners owe a fiduciary duty to other partners. *Konover Development Corp. v. Zeller*, 228 Conn. 206, 226, 635 A.2d 798 (1994); *Oakhill Associates v. D'Amato*, 228 Conn. 723, 727, 638 A.2d 31 (1994). Some trial courts have held that like a partner in a partnership, a member of an LLC has a fiduciary duty to other members. *Ruotolo v. Ruotolo*, Superior Court, judicial district of New Haven, Docket Number CV 09-5026804 S, 2009 Conn. Super. LEXIS 3502 (December 29, 2009, Jones, J.) (managing member of LLC has a fiduciary duty to the LLC and [*12] the other individual members); *Wilcox v. Schmidt*, Superior Court judicial district of Windham at Putnam, Docket Number WWM CV 04-4001126 S, 2010 Conn. Super. LEXIS 1407 (June 3, 2010, Swords, J.); *Yavarone v. Jim Moroni's Oil Service, LLC*, Superior Court, judicial district of Middlesex at Middletown, Docket Number CV 03-0102318 S, 2005 Conn. Super. LEXIS 543 (February 18, 2005, Aurigemma, J.). The court finds that the appellate case law does not support conclusions recited in these cases that a LLC member is similar to a partner in a partnership.

[HN5] The Uniform Limited Liability Corporation Act (ULLCA) provides that members of a member-managed LLC owe a fiduciary duty of loyalty and care to the company and its other members. Connecticut has not adopted the ULLCA. Valluzzo Realty Associates, LLC is a manager-managed LLC, not a member-managed LLC. Ex. 45, paragraph 6(a).

The court rejects the plaintiff's claim that a member of a LLC owes a fiduciary duty to another member.

[HN6] The ULLCA states that a manager in a manager-managed LLC owes a fiduciary duty to the members. [HN7] A manager of an LLC is the equivalent of an officer of a stock corporation. "An officer and director occupies a fiduciary relationship to the corporation and to its stockholders." *Pacelli Brothers Transportation, Inc. v. Pacelli*, 189 Conn. 401, 407, 456 A.2d 325 (1983). [*13] [HN8] The managing partner of a partnership owes a fiduciary duty to the partnership and each partner. *Gorelick v. Montanaro*, 119 Conn.App. 785, 806-07, 990 A.2d 371 (2010). General partners owe a fiduciary duty to limited partners. *Konover Development Corp. v. Zeller*, *supra*, 228 Conn. 230. [HN9] If there is no statute

to the contrary, an LLC is controlled by general corporate law. *Litchfield Asset Management Corporation v. Howell*, 70 Conn.App. 133, 147, 799 A.2d 298 (2002); *Sturm v. Harb Development, LLC*, 298 Conn. 124, 131, fn.7, 2 A.3d 859 (2010). [HN10] On its face *Gen. Stat. §34-141* imposes a duty of good faith, not a fiduciary duty. There is no statute stating whether or not the manager of an LLC owes a fiduciary duty to the LLC and the other members. *Gen. Stat. §§34-140 through 34-144*. The court finds that a manager of a manager-managed LLC owes a fiduciary duty to the LLC and its members.

A fiduciary relationship is characterized by a "unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other." *Dunham v. Dunham, supra*, 204 Conn. 322. [HN11] Because fiduciary relationships are imbued with the utmost trust, the parties are bound [*14] to "act honestly, and with the finest and undivided loyalty to the trust, not merely with that standard of honor required of men dealing at arm's length and the workaday world, but with a punctilio of honor the most sensitive. *Konover Development Corp. v. Zeller, supra*, 228 Conn. 220. Because the superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him once a plaintiff has established a fiduciary duty, the burden then shifts to the defendant fiduciary to prove fair dealing by clear and convincing evidence. *Id.* 229; *Dunham v. Dunham, supra*, 204 Conn. 322-23.

The plaintiff has proven that the defendant, John V. Valluzzo, as the LLC manager, has a fiduciary duty to the plaintiff, the LLC itself and the other LLC members. She has proven that he took management fees starting when their marriage was deteriorating four years into the LLC's existence in contravention of the Operating Agreement, that he made substantial charitable donations to MMSNE, his creation and "hobby" as described by the Florida dissolution of marriage trial judge, in contravention of the Operating Agreement or formal approval by the LLC members. He [*15] chose on behalf of MMSNE not to pay rent to the LLC. By permitting MMSNE not to pay rent, the income from the restaurant that would have been available to pay out in cash distributions to the LLC members, had to be devoted to other LLC expenses, thus preventing any cash distributions being made by the LLC, ever. These actions by John V. Valluzzo were breaches of his fiduciary duty. These are acts of self-dealing, "a participation in a transaction that benefits oneself instead of another who is owed a fiduciary duty." *Charter Oak Lending Corp., LLC v. August*, 127 Conn.App. 428, 442, fn.9, 14 A.3d 449 (2011). The plaintiff has sustained her burden of proof that John V.

Valluzzo, as manager of the LLC, breached his fiduciary duty to the plaintiff.

John V. Valluzzo only testified when called as a witness for the plaintiff. He admitted in a pleading dated November 19, 2010 (#271.00) that he was going to testify and offer other witnesses and exhibits on his behalf. John V. Valluzzo rested his case without calling a single witness. He failed to prove fair dealing by clear and convincing evidence as to the four monetary claims made by the plaintiff as well as to the accounting and access to the LLC's books [*16] and records claims.

The Third Count claims a breach of contract. The contract at issue is the Operating Agreement. Ex. 45. The management fees paid, charitable donations taken, the failure to permit access to the LLCs books and records, and failure to pay cash distributions to the LLC members are violations of the terms of the Operating Agreement. The Operating Agreement was executed by Cynthia Kasper and John V. Valluzzo. The court will discuss the failure of consideration Fourth Special Defense later in this Memorandum of Decision. The plaintiff has sustained her burden of proof that John V. Valluzzo breached the Operating Agreement.

The Fourth Count alleges breach of a statutory duty under *Gen. Stat. §34-141(a)*: [HN12] "A member or manager shall discharge his duties under . . . the operating agreement, in good faith, with the care an ordinary prudent person in a like position would exercise under similar circumstances, and in the manner he reasonably believes to be in the best interests of the limited liability company." By its plain language this is a duty of good faith. It does not rise to the level of a fiduciary duty. A few cases cite *Gen. Stat. §34-141* for the proposition: "like a partner [*17] in a partnership, a member of a limited liability company has a fiduciary duty to the other members." *The Zanker Group, LLC v. Summerville at Litchfield Hills, LLC, Superior Court, judicial district of New Haven at New Haven, Docket Number CV 04-4015238 S, 2005 Conn. Super. LEXIS 2850 (October 24, 2005, Munro, J.)*. Despite these trial court decisions, there is no appellate authority stating that the good faith provision of *Gen. Stat. §34-141* amounts to proof of a fiduciary duty. Thus the plaintiff's breach of statutory duty must be analyzed in terms of a breach of good faith. There is no shifting of the burden of proof to the fiduciary to prove fair dealing by clear and convincing evidence in a breach of good faith claim. *General Statutes §34-141* sets forth a duty of good faith, which is not the same as the duty of a fiduciary, which goes beyond good faith. *Calpitano v. Rotundo, Superior Court, judicial district of New Britain at New Britain, Docket Number CV 11-6008972 S (August 3, 2011, Swienton, J.) [52 Conn. L. Rptr. 464, 2011 Conn. Super. LEXIS 1894]*.

[HN13] "An action for breach of the covenant of good faith and fair dealing requires proof of three essential elements: (1) that the plaintiff and the defendant were parties to a contract under which [*18] the plaintiff reasonably expected to receive certain benefits; (2) that the defendant engaged in conduct that injured the plaintiff's right to receive benefits it reasonably expected to receive under the contract; and (3) that when committing the acts by which it injured the plaintiff's right to receive under the contract, the defendant was acting in bad faith." *First Service Williams Connecticut, LLC v. Gubner*, Superior Court, judicial district of Stamford/Norwalk at Stamford, Docket Number FST CV 10-6002996 S, 2011 Conn. Super. LEXIS 2480 (September 27, 2011, Brazzel-Massaro, J.).

In order to prevail on a claim of bad faith it is necessary for the complaint to allege a specific act that was performed purposely and with a sinister intent. *Id.*

[HN14] Bad faith has been defined in our jurisprudence in various ways. Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive . . . Bad faith means more than mere negligence; it involves a dishonest purpose . . . [B]ad faith may be overt or may consist [*19] of inaction, and it may include evasion of the spirit of the bargain . . .

(Internal quotation marks omitted.) *Brennan Associates v. OBGYN Speciality Group, P.C.*, 127 Conn. App. 746, 759-60, 15 A.3d 1094, cert. denied, 301 Conn. 917, 21 A.3d 463 (2011).

[HN15] Good faith and fair dealing mean an attitude or state of mind denoting honesty of purpose, freedom from intention to defraud and being faithful to one's duty or obligation. *Buckman v. People Express, Inc.*, 205 Conn. 166, 171, 530 A.2d 596 (1987). The definition [of good faith] requires not only honesty in fact but also observance of reasonable expectations of the contracting parties as they presumably intended. *Verrastro v. Middlesex Ins. Co.*, 207 Conn. 179, 190, 540 A.2d 693 (1988).

The court has examined John V. Valluzzo's self-dealing in regards to the management fees, charitable contributions made by the LLC, no rent being paid by

MMSNE, and failure to furnish access to the LLC's books and records under the good faith standard of a reasonable manager of an LLC. Much of those actions took place in the context of a deteriorating marriage. Despite the overwhelming evidence to the contrary, he has contested her ownership in both entities throughout the Florida dissolution trial continuing in [*20] the appeal and throughout most of this trial. The court finds that the plaintiff has sustained her burden of proof that John V. Valluzzo as manager of the LLC has violated his duty of good faith under *Gen. Stat. §34-141* to the plaintiff in regards to the four monetary claims and access to the LLC's books and records.

The plaintiff is claiming monetary damages as against both defendants in this LLC lawsuit in the total sum of \$147,461.10, each based on her 15% membership interest in the LLC. That sum is broken down into four separate claims: (1) \$3,802.50 representing improper management fees paid to John V. Valluzzo; (2) \$8,764.50 for improper charitable contributions made to MMSNE; (3) \$15,981.60 for her 15% portion of the undistributed rent from the restaurant at 127 Park Avenue; and (4) \$118,912.50 for her 15% of the use and occupancy owed by MMSNE for its occupancy of the land and the two-story building at 125 Park Avenue, Danbury, Connecticut for the years 2000 through 2009. The court will discuss each of these monetary claims separately.

(1) \$3,802.50 is the claim for Cynthia Kasper's 15% of the LLC management fees paid to John V. Valluzzo. Valluzzo Realty Associates, LLC was formed [*21] on January 2, 2000. There were six original members of the LLC all of whom signed the twenty-eight-page Operating Agreement. Ex. 45. Those original members were George Valluzzo, his son and the defendant, John V. Valluzzo, Cynthia Kasper Valluzzo a/k/a Cynthia Kasper, the plaintiff in this instant lawsuit, David Valluzzo, Carla Ann Hurtado a/k/a Carla Hurtado, and Joan Valluzzo n/k/a Joan Mazzella, the three children of John V. Valluzzo from a previous marriage. The first WHEREAS clause states that George Valluzzo formed this limited liability company operating under the name of Valluzzo Realty Associates, LLC. The second WHEREAS clause states that the LLC "has been formed for the principal purpose of owning and leasing real property located on Park Avenue in Danbury, Connecticut." The third WHEREAS clause states that George Valluzzo gifted 60% of his interests in the LLC to members of his family. Schedule B notes the following LLC membership percentages as of January 2, 2000; George Valluzzo 40%; John V. Valluzzo 15%; Cynthia Kasper Valluzzo 15%; and David Valluzzo, Carla Ann Hurtado and Joan Valluzzo each 10%. The fourth WHEREAS clause provides that "the Company shall be managed [*22] by a Manager designated herein."

Paragraph 6 of the Operating Agreement is three pages in length and is entitled *Management*. Paragraph 6(a) states; "The overall management and control of the business and affairs of the Company shall be vested in the Manager (the 'Manager'). JOHN V. VALLUZZO shall act as Manager until his resignation, death or incapacity. If JOHN V. VALLUZZO cannot act as Manager, CYNTHIA KASPER VALLUZZO shall act as successor Manager." Paragraph 6(d) states: "The Manager shall be entitled to reasonable compensation for services rendered to the Company, as may be agreed upon from time to time by vote of Members holding a majority of the Membership Interests in the Company. The Company shall reimburse the Manager for all reasonable expenses incurred by him on behalf of the Company." The Operating Agreement did not designate any dollar amount or percentage of rent as reasonable compensation for the manager's services. No document was submitted during the trial to indicate that the members had voted for a rate of compensation for the manager during the years through 2009. The federal income tax returns of Valluzzo Realty Associates, LLC for the years 2002 through 2009 were [*23] offered in evidence. Ex. 39-44, 70, and 71. An examination of those eight income tax returns reveals that John V. Valluzzo did not take a management fee for the years 2002 and 2003. No management fees are contained within Ex. 39 and 40, the tax returns for those two years. The LLC tax returns for 2000 and 2001 were not in evidence.

Cynthia Kasper and John V. Valluzzo started to have marital problems in 2004. The Florida dissolution action was commenced March 10, 2006. For the first time in 2004 the LLC paid a management fee. The management fee was paid to the defendant, John V. Valluzzo, in the amount of \$6,750. Ex. 41 and Ex. 97. Thereafter the following management fees were paid to the defendant, John V. Valluzzo, by the LLC: 2005 \$3,600, Ex. 42; 2006 \$3,600, Ex. 43; 2007 \$3,600, Ex. 44; 2008 \$3,900, Ex. 70; and 2009 \$3,300, Ex. 71. These management fees total \$24,750. The 2008 LLC tax return in Schedule M-1 and Statement 7 indicates management fees of \$300 for "Expenses Recorded on Books Not Deducted in Return." Ex. 70. The 2009 LLC tax return in Schedule M-1 Statement 9 indicates management fees of \$300 for "Expenses Recorded on Books Not Deducted in Return." Ex. 71. The 2009 LLC [*24] tax return in Schedule L Statement 6 indicates "Management Fees Payable of \$300." Ex. 71. The court finds that each of these two \$300 sums mentioned in the 2008 and 2009 LLC tax returns were additional management fees paid by the LLC to John V. Valluzzo. That brings the total of management fees paid by the LLC to John V. Valluzzo from 2004 through and including 2009 to \$25,350. Of that \$25,350 sum Cynthia Kasper is claiming 15% or the sum of \$3,802.50.

The court finds that the plaintiff has proven that John V. Valluzzo received \$25,350 management fees from the LLC for the years 2004 through 2009, that no meeting of the LLC had ever occurred up through 2009 other than the execution of the Operating Agreement, that the members did not vote for any dollar or percentage amount of management fees up through 2009, the Operating Agreement does not contain a dollar or percentage amount for management fees up, and the Operating Agreement was never amended. The court finds John V. Valluzzo was not entitled to collect management fees for the years 2004 through and including 2009. The court finds that John V. Valluzzo was entitled to be reimbursed "for all reasonable expenses incurred by him on [*25] behalf of the Company." Ex. 45, paragraph 6(d). There was no proof of any "reasonable expenses incurred" by John V. Valluzzo on behalf of the LLC while he was managing the LLC. The court finds that "reasonable expenses incurred" are out of pocket costs such as telephone, postage and expenses actually paid by the Manager and does not include "reasonable compensation for services rendered." The court finds "reasonable expenses incurred" does not include management fees. The court finds that the plaintiff's 15% share of the \$25,350 management fees is \$3,802.50.

The defendants are claiming that their six Special Defenses and the plaintiff's lack of standing as raised in the defendant's August 21, 2010 Motion to Dismiss (#253.00) prevent Cynthia Kasper from making this monetary claim. The court will discuss these defenses later in this Memorandum of Decision.

(2) \$8,764.50 is the claim for Cynthia Kasper's 15% of the charitable contributions made by the LLC to MMSNE. John V. Valluzzo formed MMSNE as a non-profit non-stock corporation in 1984. It has tax-exempt status under *IRS Code Section 501(c)(3)*. He is the founder, chief officer and day to day operator of MMSNE.

The MMSNE has occupied [*26] the 125 Park Avenue building and land since 1995. There is no provision in the Operating Agreement authorizing the LLC to make any charitable contributions, let alone to MMSNE. There was no evidence of any LLC meetings prior to 2010 authorizing such charitable contributions. No LLC minutes were offered in evidence for that period of time. The plaintiff's claim of improper charitable contributions by the LLC to MMSNE is in addition to the imputed rent and/or use and occupancy monetary claim based on the money MMSNE should have been paying to the LLC as the owners of the land and building. The plaintiff is claiming that from 2002 through and including 2009 based upon the aforementioned LLC income tax returns for those years, the following charitable contributions were made to MMSNE; 2002 \$37,430, Ex. 39, Schedule

K, Statement 3; 2005 \$6,000, Ex. 42, Schedule K, Statement 3; 2006 \$5,000, Ex. 43, Schedule K, Statement 3; and 2009, \$10,000 Ex. 71, Schedule K, Statement 3. These charitable contributions shown on the LLC income tax returns in evidence total \$58,430 and as a result the plaintiff claims she is entitled to 15%; \$8,764.50. This court has examined the aforementioned income tax [*27] returns for the LLC from 2002 to 2009. These LLC tax returns verify the fact that charitable contributions are reflected therein made by the LLC to MMSNE in the total amount of \$58,430. The plaintiff has sustained her burden of proof. Unless one of the defenses raised by the defendants is applicable, the plaintiff is entitled to \$8,764.50 for inappropriate charitable contributions made by the LLC to MMSNE. The court will discuss these defenses in a separate portion of this Memorandum of Decision.

(3) \$15,981.60 is the claim for Cynthia Kasper's 15% share of rents paid by the restaurant at 127 Park Avenue for the years 2002 through 2009, years in which the plaintiff received no cash distributions from the LLC. This claim is also based upon the aforementioned income tax returns filed by the LLC for the years 2002 through 2009. There were no LLC income tax returns in evidence for 2000 and 2001. At oral argument on July 13, 2011 the plaintiff limited this restaurant rent claim to the years 2002 through and including 2009. She was no longer claiming net restaurant rent for the years 2000 and 2001 in the amount of \$6,900 as she testified to on May 19, 2011.

The court finds that the restaurant/lounge [*28] paid rent to the LLC each year from 2002 through 2009. That rent is shown in each of the LLC tax returns in Form 8825. Expenses relating to the restaurant property are also shown on Form 8825. For the year 2002 the gross rents were \$72,248. In 2002, MMSNE paid rent to the LLC. The LLC made a charitable donation to MMSNE of \$37,430 in 2002. The court finds that this \$37,430 charitable contributions was the same amount as MMSNE paid rent to the LLC in 2002, which rent was donated back to MMSNE by the LLC. Thus the restaurant's gross rent paid for 2002 was \$72,248 less \$37,430 or \$34,818. Ex. 39. The restaurant paid gross rents thereafter to the LLC: 2003, \$39,600; 2004 \$36,300; 2005 \$40,628; 2006 \$36,300; 2007 \$42,900, 2008 \$41,050 and 2009 \$41,400. Ex. 40-44, 70 and 71. Thus the restaurant paid rent to the LLC for 2002 through and including 2009 the sum of \$315,608. From these gross rents the LLC had to pay the following expenses: insurance, professional fees, interest, real estate taxes, repairs, utilities, and bank fees. Each of these expenses are contained in Form 8825 for the LLC's 2002 through 2009 tax returns. These expenses must be deducted from the gross restaurant rent to get [*29] the net rental income of the LLC

attributable to the restaurant. It is noted that the management fees paid by the LLC to John V. Valluzzo have been included as expenses incurred by the LLC in the Form 8825 totals for 2004 through 2009. These management fees must be deleted from the expenses since the plaintiff is making a separate claim for the \$25,350 management fees. The charitable deductions made by the LLC to MMSNE were not deducted on Form 8825.

The plaintiff claims that the net restaurant income after deducting usual expenses excluding the management fees claim is \$106,544 for the eight years 2002 through and including 2009. She is claiming 15% as monetary damages, being the sum of \$15,981.60. In arriving at the \$106,544 the plaintiff apparently totaled the line 21 figures from each Form 8825. Line 21 of Form 8825 is entitled "Net income (loss) from rental real estate activities." The court has added all line 21 figures from Form 8825 and subtracted \$970 on line 21 for 2004 and the result is exactly \$106,544. The plaintiff did not subtract the \$37,430 for the portion of the 2002 rent paid by MMSNE from the income side. The plaintiff did not subtract from the expense side the \$25,350 [*30] management fees for which she is making a separate monetary claim. Both the \$32,430 MMSNE 2002 rent and \$25,350 management fees must be taken into account in order to obtain a true "Net income (loss) from rental real estate activities" attributable only to the restaurant at 127 Park Avenue. The court has done those calculations. Thus the gross rent of \$315,608 for the years 2002 through and including 2009 is reduced by \$37,430, the rent MMSNE paid in 2002, resulting in a gross restaurant rent for those eight years of \$278,178. The expenses for those eight years must be reduced by the \$25,350 management fees that are included in Form 8825 but represent a separate monetary claim made by the plaintiff in this lawsuit. The expenses are shown on line 18 in Form 8825 and they total \$243,882. These expenses must be reduced by the management fees paid and the result is \$218,532 ($\$243,882 - \$25,350 = \$218,532$). Thus the gross restaurant rent of \$278,178 must be reduced by the \$218,532 expenses to get the net restaurant rents for these eight years. The total is \$59,646 ($\$278,178 - \$218,532 = \$59,646$).

No cash distributions were ever paid to Cynthia Kasper by the LLC from January 2, 2000, when [*31] the LLC was formed, to the date of trial. The court finds that the plaintiff is entitled to a 15% distribution of the net rents received by the LLC from the restaurant for the years 2002 through 2009. Those net restaurant rents are \$59,646. This 15% is \$8,946.90. The plaintiff is entitled to \$8,946.90 as damages unless one or more of the defenses are applicable, which defenses will be discussed later in this Memorandum of Decision.

(4) \$118,912.50 is the claim for Cynthia Kasper's 15% of the imputed use and occupancy that should have been paid by MMSNE for the land and building it occupies at 125 Park Avenue, Danbury, Connecticut for the years 2000 through and including 2009. Occupancy payments were made by MMSNE prior to 2008. The 2002 occupancy payment made by MMSNE to the LLC was donated back to MMSNE in 2002. Ex. 39, line 8, statement 3. Prior to 2002 other occupancy payments made by MMSNE may have been donated back to MMSNE by Valluzzo Realty Associates, LLC. The income tax returns for the years 2003 through 2009 show that no occupancy payments were made to the LLC by MMSNE despite the fact that the museum has been consistently occupying and using the land, building and premises [*32] at 125 Park Avenue for its museum purposes for those years. George V. Valluzzo died on November 14, 2002. The parties stipulated, despite the facts appearing in the LLC income tax returns in evidence, that MMSNE paid \$39,600 to the LLC for each of the years 2002, 2003 and 2004. See 2004 MMSNE tax return. Ex. 5.

The plaintiff's claim for imputed use and occupancy is based on the square footage of the museum building and the actual rent paid by the adjacent restaurant per square foot. John V. Valluzzo testified about the square footage and rent of the restaurant building and the square footage and use of the museum. A professional real estate appraisal was in evidence. The plaintiff claims that the imputed MMSNE use and occupancy payments for each year should have been \$79,275. Times the ten years from 2000 through and including 2009, the total is \$792,750. The plaintiff claims that her 15% share is \$118,912.50.

[HN16] "The plaintiff has the burden of proving the extent of the damages suffered . . . Although the plaintiff need not provide such proof with [m]athematical exactitude . . . the plaintiff must nevertheless provide sufficient evidence for the trier to make a fair and reasonable estimate [*33] . . . As we have stated previously, the determination of damages is a matter for the trier of fact . . ." *Willow Springs Condominium Assn., Inc. v. Seventh BRT Development Corp.*, 245 Conn. 1, 65, 717 A.2d 77 (1998).

The defendants had two real estate appraisals for 125-127 Park Avenue done on January 31, 2008 and for each parcel. Ex. 65 and 66. The appraiser testified and the redacted appraisal reports were placed in evidence. The rents paid by the restaurant were in evidence. The restaurant at 127 Park Avenue is a 2,336 square foot single-story building. Ex. 82, Ex. 66. The appraisal deleted references to comparable square footage rents for other property in the Danbury area. Ex. 66 did note that the rental for the restaurant from December 1, 2002 through

November 30, 2007 was \$3,300 per month, \$39,600 per year. This is generally consistent with the LLC's income tax returns for those years. Using the 2,336 square footage, that \$39,600 amount calculates to \$16.95 per square foot per year. The plaintiff used this \$16.95 per square foot for the entire period from January 2000 through and including December 2009. The appraisal report contained no rent for 2000, 2001 and the first 11 months of 2002. [*34] The court notes that the actual rent from December 1, 2007 through all of 2009 was \$18.49 per square foot per year. Ex. 66, page 21. At trial John V. Valluzzo testified that the current restaurant rent is \$43,200 per year. This is exactly \$18.49 per square foot per year.

The land and museum building at 125 Park Avenue was also appraised and the appraiser testified. The appraisal in redacted form was in evidence. Ex. 65. The MMSNE building was measured at 11,325 square feet. Ex. 82, Ex. 65. There was no breakdown between the first and second floors. The photos in evidence indicate each floor is approximately the same size. Ex. 6, Ex. 7. Mr. Valluzzo so testified. The court finds that each floor is 5,662 square feet. The appraiser's opinion as to the comparable property rents was redacted. Ex. 65, page 25. Since MMSNE was not paying rent, no actual rent numbers were contained in this appraisal. Somehow the plaintiff has used \$79,275 as the annual use and occupancy for 2000 to 2009. The plaintiff used \$79,275 as the annual use and occupancy divided by the 11,325 square feet, and determined that the use and occupancy would be exactly \$7.00 per square foot per year. There is no evidence [*35] before this court justifying \$7.00 per square foot per year. There is no support in the evidence for an annual use and occupancy of \$79,275 for 125 Park Avenue. The court notes that the appraisal states: "It is presently involved in a lease agreement with the MMSNE, a non profit organization." Ex. 65. No such lease was presented at trial nor otherwise testified to.

The plaintiff testified on direct that she intended to use the square footage rental rate of the restaurant and apply that square footage rental rate to the MMSNE building's square footage. That monetary claim has support in the evidence and in the unredacted portions of the two real estate appraisals. The \$7.00 per square foot has no support in the evidence. The court notes that the square footage rent for the 1 Sugar Hollow Road, Danbury, Connecticut rental property was \$31.69 per square foot per year. Ex. 64.

The appraisal described the MMSNE building as being two stories and indicates that the primary museum use is on the first floor. Zoning permits for full use of the entire second floor for museum display has not been obtained. The first floor of the two-story building is totally devoted to museum purposes with lobby, [*36] lavato-

ries, gift store and public museum display areas. Storage of museum equipment, offices, research library, repair and facilities for maintenance of the museum and its collection are on the second floor. There is no elevator. There is a partial basement of approximately 700 square feet with no basement windows. The land in front of and to the side of the building is occupied by public access, employee parking and a display area for various military vehicles and armaments including tanks and artillery pieces.

The court will not allocate any use and occupancy for the 700 square foot basement.

Since the second floor has no zoning permit, is used for non-public areas, offices, and storage area and is not serviced by an elevator, the court will calculate the fair use and occupancy of the second floor at half the rate for the first floor. Although the restaurant at 127 Park Avenue was paying \$18.49 per square foot rent after December 1, 2007, the court finds that the use of the \$16.95 per square foot rent fairly states the fair market rent for the entire period of January 2000 until December 31, 2009 for the first floor at 125 Park Avenue. The higher rent at \$18.49 after December 1, 2002 [*37] should offset the presumably lower rent for 2000 and 2001, thus establishing \$16.95 as the average net per square foot. At \$16.95 times 5,662 square feet the court finds the fair market use and occupancy for the first floor of 125 Park Avenue is \$95,970 per year. The fair market use and occupancy of the second floor is one-half: \$47,985 per year. The use and occupancy for the entire premises is \$143,955 per year. For the ten years from January 1, 2000 until December 31, 2009 the total use and occupancy is \$1,439,550.

Since there was no agreement there can be no rent. *Welk v. Bidwell*, 136 Conn. 603, 608, 73 A.2d 295 (1950); *Bushell Plaza Development Corp. v. Fazzano*, 38 Conn. Supp. 683, 685, 460 A.2d 1311 (1983). [HN17] A nontenant occupier is obligated to pay a fair amount for the use and occupancy of the premises even though there is no rental agreement. *Lonergan v. Connecticut Food Store, Inc.*, 168 Conn. 122, 131, 357 A.2d 910 (1975). The court can make a finding of reasonable use and occupancy. *Id.*, 132.

The parties have stipulated that MMSNE paid \$39,600 to the LLC for 2002 and \$39,600 for each of the years 2003 and 2004. These three sums must be subtracted from the \$1,439,550 leaving the sum of \$1,320,750.

Therefore the total fair [*38] market value of the use and occupancy of 125 Park Avenue for the years 2000 through and including 2009 is \$1,320,750 (\$1,439,550 - \$118,800 = \$1,320,750). The plaintiff's 15% share is \$198,113. This figure does not take in consideration any landlord expenses attributable to 125 Park

Avenue. MMSNE is exempt from Danbury real estate taxes and pays its own utilities. There was no evidence of the LLC's direct costs for 125 Park Avenue. The appraiser used 10% of the annual gross rents for reserves for "Vacancy and Rent Loss" and 5% of the annual gross rents for "Structural Repairs/Reserves for Replacements." Ex. 65, page 25-26. The court finds this 15% to be a reasonable estimate of the landlord's expenses for 125 Park Avenue. This 15% reduces the plaintiff's \$198,113 share to \$168,396. If the entire second floor use and occupancy is computed using \$16.95 per square foot, the plaintiff's 15% partnership share in the MMSNE use and occupancy would increase to \$224,528.

Unless one of the defenses raised by the defendants is applicable, the plaintiff is entitled to \$168,480 in her Claims for Relief 3. Compensatory Damages for the MMSNE's use and occupancy not paid for the years 2000 through [*39] 2009.

The plaintiff requests in her June 7, 2007 Claims for Relief. "1. Removal of Defendant John V. Valluzzo as manager of Defendant Valluzzo Realty Associates, LLC, and appointment of plaintiff Cynthia Kasper as successor manager." The plaintiff has furnished no legal authority for the court to enter such an order. The LLC Operating Agreement states that John V. Valluzzo shall act as manager until his resignation, death or incapacity. Ex. 45, paragraph 6(a). There is no evidence that he has resigned. He was alive and well throughout the trial. He testified and there was no evidence that he was incapacitated in any fashion.

John V. Valluzzo engaged in self-dealing with the LLC in contradiction of the terms of the Operating Agreement, by paying himself a management fee, collecting no rent for MMSNE, the non-profit corporation that he formed, developed and operated, deducting certain charitable contributions from the LLC to MMSNE without formal LLC approval and not distributing the net restaurant rents to the LLC members. These activities could cause monetary damages but removal as a manager is not the appropriate remedy. The court declines to remove John V. Valluzzo as manager of the [*40] LLC.

The court finds the issues on Claims for Relief 1, for the defendants.

Plaintiff's Claims for Relief requested; "4. A temporary and permanent injunction prohibiting charitable contributions from Defendant Valluzzo Realty Associates, LLC to the Military Museum of Southern New England, Inc." The court has already found that these charitable contributions were not appropriate and that the plaintiff has sustained her burden of proof. The plaintiff's complaint fails to allege an inadequate remedy of law or irreparable injury. *Pequonnock Yacht Club, Inc. v. Bridgeport*, 259 Conn. 592, 598-99, 790 A.2d 1178 (2002).

Monetary damages are an appropriate remedy, if the plaintiff has standing. The plaintiff has failed to prove an inadequate remedy of law and irreparable injury. *Walton v. New Hartford*, 223 Conn. 155, 165, 612 A.2d 1153 (1992). The complaint has not been verified as required by *Gen. Stat. §52-471(b)*. [HN18] A request for injunctive relief is addressed to the discretion of the court. *Wehrhane v. Peyton*, 134 Conn. 486, 498, 58 A.2d 698 (1948). The court will exercise its discretion in denying the plaintiff's injunctive relief. For all of the above reasons, the court denies the application for a temporary and permanent injunction [*41] prohibiting charitable contributions from the defendant, Valluzzo Realty Associates, LLC, to the Military Museum Southern New England, Inc.

The court finds the issues on Claims for Relief 4, for the defendants.

This finding is in no way approval by the court of future donations being made either to the Military Museum of Southern New England, Inc., or to any other entity without meeting the appropriate procedural requirements by the LLC, its members, Connecticut law and/or the Operating Agreement.

Plaintiff is requesting in her Claims for Relief "5. Attorneys Fees and Costs." At the trial the plaintiff represented herself. She is not an attorney. [HN19] A self-represented non-attorney party to litigation cannot obtain an award of attorney fees. *Lev v. Lev*, 10 Conn. App. 570, 575-76, 524 A.2d 674 (1987); *Jones v. Ippoliti*, 52 Conn.App. 199, 212, 727 A.2d 713 (1999). The writ, summons and complaint and the initial pleadings in both this lawsuit and the partnership lawsuit were filed on behalf of the plaintiff by her then counsel of record. No attorney's bills or contemporaneous time records from that law firm were submitted in evidence. There was no evidence of the hourly rate, reasonableness of the attorneys fees, or contemporaneous [*42] time records from the attorneys. No doubt Cynthia Kasper incurred and paid fees to her attorney. The court disallows the claim for attorneys fees. *Smith v. Snyder*, 267 Conn. 456, 477, 479, 839 A.2d 589 (2004).

She makes an independent damage claim for "costs." In support of that claim, she cites statutory and Practice Book authority for court costs. She submitted a twenty-four-page affidavit of costs totaling \$39,818.89. Ex. 102. [HN20] Our procedures do not permit trial courts to directly award taxable costs. The plaintiff, if she is successful in this litigation, is entitled to a taxation of costs pursuant to P.B. §18-5. In the first instance the successful plaintiff must submit a claim of costs to the clerk for taxation. Parties are entitled to request a hearing before the Clerk of the Superior Court on the taxation of costs. After the Clerk enters a taxation of costs, only then can

the trial court consider costs. "Either party may move the judicial authority for a review of the taxation by the clerk by filing a motion for review of taxation of costs within twenty days of the issuance of the notice of taxation by the clerk." P.B. §18-5(b). Even then court costs can only be taxed under statutory authority [*43] such as *Gen. Stat. §§52-257, 52-260*. *Levesque v. Bristol Hospital, Inc.*, 286 Conn. 234, 263, 943 A.2d 430 (2002); *Boczer v. Sella*, 113 Conn.App. 339, 343, 966 A.2d 326 (2009). The plaintiff has failed to follow the proper procedures for the determination of court costs. The court therefore leaves the issues of taxation of court costs to the clerk in the first instance under P.B. §18-5 including but not limited to any witness fees under *Gen. Stat. §52-260(g)*, accounting experts, transcript fees, copying costs, marshal fees, maps, photographs, certified copies, title search fees, West Law access, legal treatises and mileage for witnesses.

The plaintiff is claiming \$39,818.89 as a monetary award of damages consistent with her Affidavit of Costs. Ex. 102. She is claiming as damages all her out of pocket costs that have been incurred by her for trial including her transportation to and from Florida by car, to and from Florida by air, to and from Florida by Amtrak overnight train using her car on the train, her lodging during the Florida travel, her lodging in Stamford on trial dates, food, office supplies, computer software, "The Act of Cross Examination" by Frances Wellman, postage, Fed Ex., court transcripts, title [*44] searches, legal research on West Law, copying costs, certified copies of affidavits and marshal fees. The plaintiff claims that these sums should be awarded to her by reason of the fact that they are "costs" incurred by her. The court reminded her during trial that she must refer to a statute, practice book rule and/or case law that permits such a damage claim. The court referred her to *Gen. Stat. §§52-257, 52-260* and the limitation of taxable costs imposed by case law. *Levesque v. Bristol Hospital, supra*, 286 Conn. 263. No statutory authority or case law was provided at trial authorizing this court to award expenses incurred by a self-represented litigant for travel to and from court along with incidental expenses mentioned in Ex. 102 as an element of damages. *Scottsdale v. Underwriters at Lloyds of London, Superior Court, judicial district of New Haven at New Haven, Docket Number CV 06-4022710 S (February 8, 2010, Berdon, J.T.R.)* [49 Conn. L. Rptr. 293, 2010 Conn. Super. LEXIS 275].

The court finds the issues for the defendants on the plaintiff's \$39,818.89 as a damage claim.

The plaintiff shall be permitted to claim court costs pursuant to the procedures set forth in P.B. §18-5 and thus this court's rejection [*45] of the plaintiff's \$39,818.89 damage claim is entered without prejudice to the plaintiff, as the successful litigant, to seek a taxation

of costs consistent with statutory authority and Practice Book procedure.

The plaintiff is requesting in her Claims for Relief, "6. Punitive damages." The plaintiff has cited no statute that permits punitive damages. The only statute cited in her complaint, [HN21] *Gen. Stat. §34-141*, does not provide a punitive damage award. The plaintiff is therefore left to [HN22] common-law punitive damages, which under Connecticut law is limited to the cost of litigation, i.e., attorneys fees. *Waterbury Petroleum Products, Inc. v. Canaan Oil & Fuel Co.*, 193 Conn. 208, 236, 477 A.2d 988 (1984). The plaintiff has not offered "a statement of the fees requested and a description of services rendered" in support of a claim of attorney fees for common-law punitive damages. *Smith v. Synder*, *supra*, 267 Conn. at 479.

The court finds the issues on the plaintiff's Claims for Relief 6 for the defendants.

The plaintiff is requesting in her Claims for Relief, "7. Interest." [HN23] The court can award interest for the wrongful detention of money. *Blakeslee Arpaia Chapman, Inc. v. El Constructors, Inc.*, 239 Conn. 708, 735, 687 A.2d 506 (1997). [*46] See discussion of this element in *Sosin v. Sosin*, 300 Conn. 205, 226-35, 14 A.3d 307 (2011). In addition the date upon which the wrongful detention began must be determined in order to establish the date from which interest should be calculated. *LaSalla v. Doctor's Associates, Inc.*, 278 Conn. 578, 597-98, 898 A.2d 803 (2006). Finally, the court must determine a rate of interest. Connecticut has not established a statutory rate of interest. *Gen. Stat. §37-3a* caps interest at no more than 10%. *Sears Roebuck & Company v. Board of Tax Review*, 241 Conn. 749, 763, 699 A.2d 81 (1997). The court may take judicial notice of a rate of interest. *Moore v. Moore*, 173 Conn. 120, 123, 376 A.2d 1085 (1977). Under *Gen. Stat. §37-3a* that judicially noticed interest rate may not exceed ten (10%) percent. The court must give the parties an opportunity to be heard on the appropriate rate of interest. *Izard v. Izard*, 88 Conn.App. 506, 509-10, 869 A.2d 1278 (2005). No hearing has yet been held on the appropriate rate of interest.

There are four monetary claims being made by the plaintiff that she has proven, subject to the issue of standing to make such individual claims and the applicability of the special defenses. Each of these monetary claims was calculated using numbers [*47] for events that occurred in some cases over ten years ago. Most of the figures were obtained from income tax returns. There was no evidence of the exact date those payments were made, just the year they were made. Therefore, the court finds that the four monetary claims were wrongfully withheld from the plaintiff on June 7, 2007, the date of the com-

plaint. The court takes judicial notice that savings bank interest rates are below 1% per annum, credit card interest rates are over 18% per annum and first mortgages on residential real estate are regularly offered at 5% or even less. The court exercises its discretion and hereby selects a prejudgment interest rate of 6.0%. In the event that any party disagrees with the selected rate of interest of 6.0% that party may file a Motion to Reargue. The court will then assign the matter for an evidentiary hearing. The parties are directed to the Federal Reserve website for review of the Historical Date H.15 Selected Interest Rates at www.federalreserve.gov/releases/h15/data.htm for whatever assistance is contained in the myriad of financial instruments referenced therein.

The court will calculate the 6.0% interest in this Memorandum of Decision [*48] if it determines that the plaintiff has standing to make these four monetary claims and none of the special defenses are applicable.

The plaintiff is requesting in her Claim for Relief "8. Such other and further relief as the court deems equitable." The plaintiff made no such claim in oral argument nor offered any evidence at trial supporting this claim. The plaintiff has abandoned this claim.

The court finds the issues on the plaintiff's Claims for Relief 8 for the defendants.

The plaintiff is requesting in her Claims for Relief: "2. A full accounting of all activities of Defendant Valuzzo Realty Associates, LLC for the period of January 2, 2000 to the present." She has not been permitted to examine and copy various books and records of the LLC despite making a timely demand before commencing this litigation. She has received on a timely basis copies of her K-1s. She did not receive a complete copy of the LLC's income tax returns until this litigation was commenced. In support of this accounting claim she cites Paragraph 12 of the LLC Operating Agreement:

12. Books of account; Reports:

(a.) The Company shall keep proper and complete books of account in accordance with good accounting [*49] practice. Interest, taxes and other carrying charges shall be treated as deductible items for federal income tax purposes to the extent legally permissible. As soon as practicable, but not more than 120 days after the end of each fiscal year, each Member shall be furnished with a copy of the balance sheet and profit and loss statement of the Company for such year and a statement of distributions and allocations pursuant to Section 7 during in or respect of such year, and the amount

thereof reportable for federal and state income tax purposes. The Manager shall keep all other Company records and documents required to be kept by the Act.

(b.) The Manager shall furnish such other reports as he in his judgment shall deem to be appropriate to advise the Members as to the operations of the Company.

(c.) On least five business days' written notice to the Company, any Member may examine, inspect, audit at his or her own expense, the Company's books, records, accounts and assets (including bank balances and physical properties), either in person or through a certified public accountant, engineer, appraiser or other qualified professionals.

(d.) The Manager shall, for each fiscal year, timely file [*50] on behalf of the Company a United States partnership income tax returns and any state and local partnership income tax returns as may be required by law.

[HN24] "An action for an accounting calls for the application of equitable principles." *Travis v. St. John*, 176 Conn. 69, 74, 404 A.2d 885 (1978). "In an equitable proceeding, the trial court may examine all relevant factors to ensure that complete justice is done . . . The determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court." (Internal quotation marks omitted.) *First National Bank of Chicago v. Maynard*, 75 Conn.App. 355, 358, 815 A.2d 1244 cert. denied, 263 Conn. 914, 821 A.2d 768 (2003). [HN25] "To support an action of accounting, one of several conditions must exist. There must be a fiduciary relationship, or the existence of mutual and/or complicated accounts, or a need of discovery, or some other special ground of equitable jurisdiction such as fraud." *Mankert v. Elmatco Products, Inc.*, 84 Conn.App. 456, 460, 854 A.2d 766, cert. denied, 271 Conn. 925, 859 A.2d 580 (2004).

The plaintiff claims that she did not receive the documents referred to in Paragraph 12 of the Operating Agreement. She claims that she has not been provided [*51] with access to or copies of the documents required to be kept by an LLC. *Gen. Stat. §34-144*. Plaintiff has also cited statutes relating to stock corporations permitting access to corporate books and records. [HN26] Corporate statutes are applicable to LLCs, even though LLC is not mentioned in the statutes as long as they do not conflict with the LLC statutes. *Wasko v. Farley*, 108

Conn.App. 156, 170, 947 A.2d 978 (2008); Newlands v. NRT Associates, LLC, Superior Court, judicial district of Fairfield at Bridgeport, Docket Number CV 08-4027098 S (March 25, 2010, Tyma, J.) [49 Conn. L. Rptr. 557, 2010 Conn. Super. LEXIS 772].

Plaintiff has not cited nor alluded to *Gen. Stat. §52-402 et seq.* authorizing the court to appoint "three disinterested persons to take the account." She has not cited any of the accounting statutes in Chapter 907. It appears that the plaintiff's request for relief is an accounting of a more informal nature. The court finds that the plaintiff was not permitted access to the books and records of the LLC after demand. This lack of access was further exacerbated by the fact that the parties were engaging in a hotly contested lengthy Florida dissolution of marriage. The defendant, John V. Valluzzo, breached his fiduciary [*52] duty to the plaintiff by not permitting access to the LLC's books and records. The other members of the LLC, the three children of John V. Valluzzo were not parties in that marital dispute. The plaintiff has proven that she alone has been "injured" by her lack of access to the LLC's books and records and thus has standing to sue for an accounting. *Newlands v. NRT Associates, LLC, Superior Court, judicial district of Fairfield at Bridgeport, Docket Number CV 08-4027098 S, 2010 Conn. Super. LEXIS 772 (March 25, 2010, Tyma, J.)*, reference. The court incorporates by reference the findings, law and legal conclusions contained in its Memorandum of Decision Re: Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction dated August 21, 2010 (#253.00) of even date herewith.

The court finds that the business of the LLC is a small enterprise. There are two pieces of real property that share a common access and shared parking lot. The first at 127 Park Avenue, Danbury, Connecticut is improved by a one-story restaurant that makes twelve payments of rent per year. The landlord's expenses for managing the restaurant property are minimal, involving two real estate tax payments per year, insurance, repairs, utilities, [*53] and maintenance. There was no evidence of any extraordinary expenses incurred by the landlord for the restaurant property. That fact is supported by the LLC's income tax returns in evidence. The second at 125 Park Avenue, Danbury, Connecticut is improved by a two-story building occupied by MMSNE. The museum is exempt from real estate taxes. MMSNE currently pays no rent and pays for its utilities. The landlord's expenses for 125 Park Avenue are minimal. Ex. 5. It appears that the total bank deposits made by the LLC annually for both properties would be less than two per month. The checks written by the landlord for both properties would be a few dozen per year. The court finds that it would not be an onerous endeavor for the LLC to provide access to various books and records of the LLC and their support-

ing documents. There was no evidence that providing access to the LLC's books and records and their supporting documents would be burdensome or expensive to the LLC, the two individual parties, nor the three members of the LLC that are not part of this litigation. [HN27] "Statutes providing for inspection by shareholders should be liberally construed in favor of the shareholders." *Pagett v. Westport Precision, Inc.*, 82 Conn.App. 526, 531, 845 A.2d 455 (2004).

The [*54] court finds that the plaintiff, by requesting an accounting in her Claim for Relief 2, did not intend to request a formal accounting as set forth by *Gen. Stat. §52-401, et seq.* That statute is a codification of the common-law right of an accounting. *Zuch v. Connecticut Bank & Trust Co.*, 5 Conn.App. 457, 460-61, 500 A.2d 565 (1985). [HN28] These statutes primarily consider the procedures to be followed after a trial court has determined that an accounting is due. The Superior Court has the general equitable authority to enter orders for inspection of records and inventory of assets. *Episcopal Church in the Diocese of Connecticut v. Gauss*, 302 Conn. 408, 453, 28 A.3d 302 (2011). In addition the statute provides: "In any judgment or decree for an accounting, the court shall determine the terms and principles upon which such accounting shall be held." *Gen. Stat. §52-401*. The court will enter an order based on the court's equitable authority. *Celentano v. The Oaks Condominium, Association, Superior Court, judicial district of Waterbury at Waterbury Complex Civil Litigation, Docket Number X01 CV 94 0159297 S*, 2001 Conn. Super. LEXIS 106 (January 11, 2001, Hodgson, J.); *Rosetti v. Amenta, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket Number CV 95-0705787 S*, 1997 Conn. Super. LEXIS 2177 (August 8, 1997, Satter, J.). [*55]

The court finds the issues for the plaintiff on Claim for Relief 2.

The court now considers each of the six Special Defenses filed by the two defendants.

Before dealing with each of the six Special Defenses, a discussion of the Florida matrimonial litigation is necessary. The first two Special Defenses are based on the Florida dissolution of marriage action commenced March 10, 2006. (#143.00).

Only a small portion of the filings in the Florida dissolution marriage action was presented to this court. The trial record of the Florida dissolution of marriage action was nothing less than massive. The case is entitled "Cynthia Kasper Petitioner/Wife and John Valluzzo Respondent/Husband." Docket Number DR 06-2932 FC, Family Division, Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. Both parties were represented by counsel. The dissolution was tried to a conclusion with trial dates of May 27, May 29 and June

2, 2008 before the Hon. Catherine M. Brunson, Circuit Court Judge. Additional evidence was permitted on the husband's motion, which evidentiary hearing took place on August 18, 2008.

The parties [*56] appeared before the Florida court for a status conference hearing on November 19, 2008. A copy of the transcript of that status conference hearing before the Hon. Catherine M. Brunson is marked as an exhibit in this case. Ex. 94. Another status conference occurred on January 26, 2009. There was no documentation of this status conference. The November 19, 2008 status conference was the Florida trial court's attempt to obtain the assistance of both counsel in preparing an equitable distribution schedule pursuant to Florida matrimonial procedures. At the beginning of the status conference the court stated: "So I'm hoping if I give you what my rulings are going to be that you'll be able to, working together with your experts, prepare a schedule to be attached to the final judgment once it's completed." Judge Brunson then proceeded to find: "I've concluded that the non-marital assets for the Wife are the assets that she brought into the marriage." The court then found that "the Wife is entitled to those assets." "I've also concluded that the Wife's interest in G&J Partners and Valluzzo Realty were in fact a gift and that is non-marital." Judge Brunson then stated: "For the Husband I've [*57] concluded that G&J Partners is also non-marital. Valluzzo Realty is non-marital. The gifts that he received from his father, likewise, are non-marital. The note from the sale of DCG is also a non-marital asset for him." The court continued to outline the various property orders concerning wine collections, books, antiques, the Palm Beach, Florida house, the New Canaan, Connecticut house, liabilities, periodic alimony and other matters. The husband's attorney then inquired of the Judge Brunson: "What happened to the interest in the partnerships because we've asked for injunctive relief?" The court stated its findings: "I'm denying the requests for injunctive relief and allowing her to continue to proceed in Connecticut if that's what she chooses to do and you-all have not resolved it." The husband's attorney also inquired: "Oh, valuations of the entities, Valluzzo Realty Associates, LLC and G&J Partnerships." The court states: "Mr. Briscoe's finding on the valuations of her interest and the date of the valuation for all of this would be the first day of trial, May 27, 2008." This question by John V. Valluzzo's Florida trial lawyer is a judicial admission that the two business entities [*58] at issue were Valluzzo Realty Associates, LLC & G&J Partners. The entire status conference took five minutes and it concluded after that last comment.

On January 30, 2009 the court signed the Amended Final Judgment for Dissolution of Marriage in Case No. DR 06-2932 FC, a fifteen-page document. Ex. 95. The

first seven pages are numbered in consecutive order with Judge Brunson's signature at the bottom of page six. Page seven consists of the names and addresses of the two attorneys of record. An additional eight pages are attached and they list various assets. Each page has a number of columns listing asset description, dates, dollar amounts, etc. These eight pages are respectively entitled: "Cash Balance Summary Page Two," "Brokerage Account Summary," "Closely Held Investment Summary," "Retirement Account Summary," "Real Property Summary," "Life Insurance Summary," "Note Receivable Summary" and "Credit Card Summary." These eight pages of summaries are the "equitable distribution schedule" prepared by counsel as requested by Judge Brunson at the November 19, 2008 status conference. These eight pages are part of the Amended Final Judgment for Dissolution of Marriage signed by Judge Brunson [*59] on January 30, 2009. The fifteen-page Amended Final Judgment for Dissolution of Marriage contains on the first page a recording number executed by the Clerk and Comptroller for Palm Beach County and the last page contains a certification of the true and attested copy of the document dated May 14, 2009 signed by the Clerk of Circuit Court Palm Beach County, Florida.

The first seven pages of the Amended Final Judgment for Dissolution of Marriage contains seventeen numbered paragraphs, which outline various claims made by the parties and the factual and legal findings made by Judge Brunson. Pages five and six contains sixteen lettered paragraphs, A through R, which are the orders of the court. Ex. 95. The Amended Final Judgment for Dissolution of Marriage contains information concerning the Connecticut investment real property, the entities that own that Connecticut real property and the prosecution of the two Connecticut lawsuits related to these entities. Three Connecticut lawsuits that were pending during the time of the May and June 2008 trial, were disclosed to the Florida trial court and known to the Florida trial court.

Paragraph 10 of the findings states: "The evidence was undisputed [*60] that the Husband's father transferred a 25% interest in G&J Partners, LLC, and a 15% interest in Valluzzo Realty Associates, LLP, as a gift to the Wife. The Husband asserts that these gifts are marital and subject to equitable distribution. However, [HN29] §61.075(5)(b)(2) *Florida Statutes*, excludes noninterspousal gifts as marital assets. Hence, the gifts are not subject to equitable distribution and will remain the Wife's separate property. The husband shall make shareholder distributions as required." This court consulted the current version of the Florida statutes and found that non-marital language for noninterspousal gifts is referenced as follows: [HN30] "Assets acquired separately by

either party noninterspousal gift, bequest, devise or descent and assets acquired in exchange for such assets." §61.075(6)(b)(2) *Fla. Stat.* Paragraph 14(a) of the findings states: "The Husband spent considerable money during the marriage on his hobby renovating and making purchases for the Military Museum of Southern New England located in Danbury, Connecticut." Paragraph 15 of the findings states: "The Husband asserted a claim for injunctive relief to preclude the Wife from litigating two independent lawsuits [*61] in Connecticut against Connecticut corporations in which both parties have interests. The Husband filed a motion to stay that litigation based upon the pending dissolution of marriage action. The Connecticut Court denied the Husband's motion to stay. The Husband has failed to present sufficient evidence to support the issuance of an injunction in this case. Hence, the request for injunctive relief is denied."

The court finds from an examination of Connecticut court records that there were three lawsuits that had been commenced by Cynthia Kasper. The first is the instant LLC lawsuit against John V. Valluzzo and Valluzzo Realty Associates, LLC, Docket Number FST CV 07-5004383 S returnable to the judicial district of Stamford/Norwalk at Stamford on July 10, 2007. The second is the companion partnership lawsuit entitled *Cynthia Kasper v. G&J Partnership and John V. Valluzzo* returnable to the Superior Court, judicial district of Stamford/Norwalk at Stamford on September 28, 2007 Docket Number FST CV 07-5004956 S. The third is a lawsuit entitled *Cynthia Kasper v. Military Museum of Southern New England, Inc.* returnable to the Superior Court, judicial district of Danbury at Danbury on June 12, 2007, Docket Number DBD CV 07-5002656 S. [*62]

At the time of the Florida dissolution trial these three lawsuits were pending in Connecticut. The MMSNE lawsuit, the third named lawsuit, was the subject of the January 30, 2009 order of the Florida dissolution court as follows: "The distribution of the Military Museum of Southern New England Note in the amount of \$161,692.00 including interest (through March 31, 2008) shall be awarded to the Husband thereby eliminating the Wife's claim of dissipations as to the museum only. The Wife shall withdraw the action filed against the museum in the State of Connecticut." Ex. 95, paragraph C. That MMSNE lawsuit Docket Number DBD CV 07-5002656 S, was withdrawn by Cynthia Kasper on November 30, 2009 in pleading #111.00. That left the two Connecticut lawsuits pending; the two that were tried before this court.

The Florida court specifically ordered that the plaintiff may continue the other two pending civil claims in Connecticut. "I'm denying the requests for injunctive relief and allowing her to continue to proceed in Connecticut if that's what she chooses to do and you-all have

not resolved it." Ex. 94. "Hence, the request for injunctive relief is [*63] denied." Ex. 95. Paragraph H. This ruling is consistent with [HN31] Connecticut law that permits litigation between former spouses over a jointly held asset. *169 Olive Street, LLC v. D'Urso, Superior Court, judicial district of New Haven at New Haven, Docket Number CV 09-5029796 S (July 23, 2010, Wilson, J.) [50 Conn. L. Rptr. 394, 2010 Conn. Super. LEXIS 1949]*.

In the lettered order section of the Amended Final Judgment for Dissolution of Marriage the Florida court entered the following orders: "D. The Wife is awarded as her non-marital property, the gift of the 25% shareholder interest in G&J Partners LLC and the 15% shareholder interest in Valluzzo Realty Associates LLC. The Wife shall continue to be a partner in both businesses." "E. The Husband is awarded, as his non-marital property, all of his interest in G&J Partners LLC and Valluzzo Realty LLC." "H. The Husband's request for an injunction prohibiting the Wife from pursuing her causes of action in the Connecticut Courts is denied." and "R. The Court retains jurisdiction of this action and the parties for the purpose of entering further orders as may be necessary."

As of the filing of the February 18, 2010 First Special Defense and Second Special Defense (#143.00) [*64] relating to the Florida dissolution action, the defendant, John V. Valluzzo, knew of the January 30, 2009 findings and orders of the Florida court. Based upon representations made by the parties in open court, both parties have filed appeals and cross-appeals from the January 30, 2009 Florida judgment, which appeals are currently pending.

Certain of the Florida dissolution papers were attached to certain pleadings in the LLC and partnership cases. During this trial this court discussed the accuracy of the entity description in the Florida dissolution judgment. Apparently that discussion pointed out to the parties for the first time the inconsistent descriptions for the various partnership and LLC entities concerning the Danbury, Connecticut real property in the Florida Amended Final Judgment for Dissolution of Marriage and in documents filed in the trial before this court. As a result both parties filed motions in the Florida trial and Appellate Courts to address these inconsistencies. This court insisted that title searches be furnished in evidence in this trial so that accurate title information for all real properties be before this court. The parties have offered in evidence before [*65] this court maps, deeds, easements and three separate title searches for 1 Sugar Hollow Road, Danbury, Connecticut, 125 Park Avenue, Danbury, Connecticut and 127 Park Avenue, Danbury, Connecticut. Exs. 83, 84, and 85. No party has disputed the accuracy of the deeds and other documents furnished pursuant to these three title searches. This court finds

that it has sufficient information to determine the correct names of the real estate entities and the title to the parcels of real estate involved in these two lawsuits.

The court finds that the real property at 125 and 127 Park Avenue, Danbury, Connecticut are two adjacent parcels. These two parcels are shown in a survey entitled "Map Prepared for Realty Associates, Danbury, Connecticut" dated September 30, 1987 recorded in the Danbury Land Records as Map #8758. Ex. 82. Ex. 82 shows that Parcel A is .498 acres with a building. The lot fronts on Park Avenue. Immediately adjacent and to the rear of Parcel A is Parcel B. Parcel B is .87 acres and containing a larger building located somewhat to the rear. Parcel B also fronts on Park Avenue. Parcel A and Parcel B are adjacent to each other on Park Avenue.

On November 30, 1999 125 and 127 Park Avenue, Danbury, Connecticut were owned by George P. Valluzzo, doing business as Realty Associates. On November 30, 1999 George P. Valluzzo d/b/a Realty Associates by a quit-claim deed conveyed all his right, title and interest in Parcel A and Parcel B, the entire property shown on Map 8758, to Valluzzo Realty Associates, LLC, a Connecticut limited liability company. Ex. 79. The title to 125-127 Park Avenue, Danbury, Connecticut has continuously remained in the name of Valluzzo Realty Associates, LLC since November 30, 1999 to the date of trial. Ex. 65, Ex. 66. Valluzzo Realty Associates, LLC was formed and on January 2, 2000 an Operating Agreement was executed by George Valluzzo, John V. Valluzzo, Cynthia Kasper Valluzzo, David Valluzzo, Carla Ann Hurtado and Joan Valluzzo. Ex. 45. Based upon those two documents, the quit-claim deed and the Operating Agreement, the court finds that the proper legal name for the entity that owns 125-127 Park Avenue, Danbury, Connecticut is Valluzzo Realty Associates, LLC and that this LLC has owned the real property at 125-127 Park Avenue, Danbury, Connecticut consistently since November 30, 1999 through the date of this trial and throughout the Florida [*67] dissolution action. This finding is consistent with the eight income tax returns filed by the LLC, from 2002 through 2009, all filed in the name of Valluzzo Realty Associates, LLC. Ex. 39-44, Ex. 70, 71. This finding is supported by the two title searches in evidence for 125 Park Avenue and 127 Park Avenue. Ex. 84, 85. All of the above documents refer to the LLC by the same name, Valluzzo Realty Associates, LLC.

The court does not have copies of any of the documents or exhibits filed in the Florida dissolution action nor copies of any dissolution financial affidavits which describe those entities. This court has no knowledge if the title search information was presented to the Florida court. In the November 19, 2008 transcript of the Florida status conference, Judge Brunson refers to one entity as

"Valluzzo Realty." "I've also concluded that the Wife's interest in G&J Partners and Valluzzo Realty were in fact a gift and that is non-marital." "For the Husband I've concluded that G&J Partners is also non-marital. Valluzzo Realty is non-marital." Ex. 94. The reference to the entity as "Valluzzo Realty" is incomplete and if intended to be a complete description of the entity is in error. [*68] The Florida court's reference to "G&J Partners" is correct.

Thereafter the Amended Final Judgment for Dissolution of Marriage was drafted. An error in the description of the LLC entity appears in the paragraph 10 findings. The entity was referred to as "a 15% interest in Valluzzo Realty Associates, LLP as a gift to the wife." This court has no evidence of any Limited Liability Partnership or LLP. It has heard no evidence and seen no documents concerning any entity known as Valluzzo Realty Associates, LLP. The documents in the Danbury Land Records contain no reference to Valluzzo Realty Associates, LLP. None of the income tax returns reference Valluzzo Realty Associates, LLP. This court concludes that the LLP reference is a typographical error made in the Amended Final Judgment for Dissolution of Marriage and that the trial judge in paragraph 10 intended to make a finding that "a 15% interest in Valluzzo Realty Associates, LLC, as a gift to the Wife."

The third reference to Valluzzo Realty is indirectly contained in paragraph 15 of the findings: "The Husband asserted a claim for injunctive relief to preclude the Wife from litigating two independent lawsuits in Connecticut against Connecticut [*69] corporations in which both parties have interests." There is no evidence that there was any Connecticut corporation in which any party had an interest other than the Military Museum of Southern New England, Inc. There is no evidence that the wife ever had any ownership interest in the Military Museum of Southern New England, Inc. Two entities in which both parties had an interest are those two entities that own real property in Danbury, Connecticut; the partnership and the LLC, neither of which can be classified as a corporation. The Florida trial judge in paragraph 10 makes a finding that Valluzzo Realty is an LLP and in paragraph 15 makes a finding that Valluzzo Realty is a corporation. In fact it is neither. It is a limited liability company. The court finds that the "Connecticut corporations" finding is a typographical error made in the Amended Final Judgment for Dissolution of Marriage and that the trial judge in paragraph 15 intended to make a finding that the instant two lawsuits tried before this court may proceed in Connecticut thus denying the husband's request for an injunction staying these two pending Connecticut lawsuits.

In the Order portion of the Amended Final Judgment [*70] for Dissolution of Marriage the trial court entered

the following order: "D. The Wife is awarded, as her non-marital property, the gift of the 25% shareholder interest in G&J Partners LLC and the 15% shareholder interest in Valluzzo Realty Associates, LLC. The Wife shall continue to be a partner in both businesses." To some extent this order is correct and to another extent the order is incorrect. The wife is not a partner in the LLC. She is not a shareholder in the LLC. She is a member in the LLC. The trial judge did correctly identify the entity Valluzzo Realty Associates, LLC, in order D. The court finds that "partner in both business" and "shareholder interest" are typographical errors and that the Florida trial court intended to order that the wife is awarded "the 15% membership interest in Valluzzo Realty Associates, LLC" and that "the wife shall continue to be a member in the LLC and a partner in the partnership."

The Florida trial court incorrectly described the partnership entity, as "G&J Partners LLC" This same error occurs in paragraph 10 of the findings. In actual fact G&J is a partnership and not an LLC. This clerical error is also repeated in order E: "The Husband is awarded, [*71] as his non-marital property, all of his interest in G&J Partners LLC and Valluzzo Realty LLC." This same typographical error in describing "G&J Partners LLC" in order D was repeated in order E. It may be that the Florida trial court had an unexecuted copy of a document that referred to G and J as an LLC. This court finds that the LLC reference to G&J Partners LLC is a typographical error and the Florida trial court intended to award the parties their respective percentage interests in the partnership that owns the property at 1 Sugar Hollow Road, Danbury, Connecticut.

This court notes that the Florida trial court described "Valluzzo Realty Associates LLC" in order D and described an entity in order E as "Valluzzo Realty LLC." The court finds that the order E is a typographical error and the Florida trial court intended to and actually did award the percentages as stated in Valluzzo Realty Associates, LLC to the husband, despite the misdescription of the LLC in order E. The court finds that there is no "Valluzzo Realty LLC" entity.

The court has found in the companion partnership litigation that the record title owner of 1 Sugar Hollow Road, Danbury, Connecticut is "G&J Partners" and [*72] the record title to 1 Sugar Hollow Road has remained in the name of G&J Partners since July 21, 1994 to the date of trial. This is confirmed by the George P. Valluzzo to G&J Partners quit-claim deed dated July 21, 1994, Ex. 75, the title search, Ex. 64, the title insurance policy, Ex. 83, and the Partnership Agreement dated January 1, 1993, Ex. 14. The title insurance policy for the \$1,375,842 first mortgage on 1 Sugar Hollow Road issued by First American Title Insurance Company in paragraph 2 states: "The estate or interest referred to herein

is at Date of Policy vested in: G and J Partners a/k/a G&J Partners." Ex. 28. The title search revealed that G&J Partners also has as an asset a \$255,528 mortgage dated August 21, 1998 on 127 Park Avenue, Danbury, Connecticut that has not been released. "Open End Mortgage and Security Agreement in Volume 1230 Page 102 from George P. Valluzzo to G&J Partners in the amount of \$255,528.00 recorded August 21, 1998." Ex. 85. If no payments have been made on that mortgage, the amount due of principal and accrued interest could be \$500,000. No further evidence on this \$255,528 mortgage was offered.

The only difference between the Partnership Agreement [*73] and the quit-claim deed is the use of the word "and" spelled out separating the letter G and the letter J, whereas the quit-claim deed uses the ampersand separating those two letters. The character ampersand is a symbol for the word "and." It means the same as "and." The word is derived from English and Latin: "and per se and" meaning and, the symbol which by itself is and. Webster's Online Dictionary defines ampersand as "a punctuation mark (&) used to represent conjunction (and)." No Connecticut case discusses the character ampersand. Florida has placed no significance to the use or non-use of the character ampersand. *State of Florida v. Garay et al.*, 797 So.2d 591, 592 (2001). This is the same result in New York. "The nominal difference is that the 'old' company used an ampersand ('&') in its name and the 'new' company used the word 'and' spelled out." *State of New York v. New York Movers Tariff Bureau, Inc. et al.*, 48 Misc.2d 225, 269, fn.7, 264 N.Y.S.2d 931 (1965). This court finds that the interchanging use of "and" spelled out and the character ampersand (&) is a distinction without a difference. Both can be used interchangeably. The court finds that the name of the partnership remains the same [*74] whether it is denoted as "G&J Partners" or "G and J Partners."

The court finds that the correct name of the partnership is "G&J Partners a/k/a G and J Partners." The lawyer who prepared the financing documents for the current first mortgage on the partnership owned real estate at 1 Sugar Hollow Road, Danbury, Connecticut used the correct name of the partnership. John V. Valluzzo signed these documents designating "G&J Partners a/k/a G and J Partners" as the correct name as the duly authorized partner: loan commitment, Ex. 8; \$1,375,842 mortgage note, Ex. 23; Allonge, Ex. 24, Individual Guarantee, Ex. 27 and the Title Insurance Policy, Ex. 28. These documents all use the correct name of the partnership: "G & J Partners a/k/a G and J Partners."

The court now turns to the eight-page "equitable distribution schedule" prepared by the attorneys to the page entitled: "Closely Held Investment Summary." On the column entitled "Investments," the first entity is de-

scribed as "G&J Partners." The court finds that this is the correct description of the entity that owns 1 Sugar Hollow Road, Danbury, Connecticut. G&J Partners is in conformity with the deed, Ex. 75, and the Partnership Agreement, Ex. [*75] 14. The word "and" spelled out and the ampersand are the same word. "G&J Partners" appears twice in the "equitable dissolution schedule;" the first listed at a 25% interest for Cynthia Kasper and the second listed at a 51% interest for John V. Valluzzo. These are the correct percentage partnership interests in "G&J Partners" for both individual parties. The third listed investment is entitled; "Valluzzo Realty Assoc LLC." Due to the narrowness of the column space on this page, this court is not standing on ceremony and concludes that the word "Assoc" is "Associates" spelled out. Due to insufficient line space the common abbreviation of "Assoc" is used. The elimination of a comma before LLC and the lack of a period after Assoc is of no significance and does not misdescribe the LLC entity. This court finds that the description in the "Closely Held Investment Summary" page is an accurate description of the LLC entity with its full name and its proper description as an LLC. The percentage in the third listed investment is John V. Valluzzo's 55% membership share in the LLC. The fourth listed investment is Cynthia Kasper's 15% membership share in the LLC. These two are the correct percentages [*76] membership interests in Valluzzo Realty Associates, LLC for both individual parties. The court finds that the "equitable distribution schedule" portion of the Amended Final Judgment for Dissolution of Marriage accurately describes the nature of both entities, the percentage ownership of both entities and the correct name of each entity as found in the recorded deeds, the Partnership Agreement and the Operating Agreement.

The court notes that the G&J Partners Partnership Agreement dated January 1, 1993 was located during this trial in the files of Cohen & Wolf, a Bridgeport, Connecticut law firm, and offered in evidence. Ex. 14. Ex. 14 was not available to be offered at the Florida trial and this was not known to the trial judge. This could explain one or more of the typographical errors. In any event the record title to 1 Sugar Hollow Road, Danbury, Connecticut since 1994 has been in the name of "G&J Partners." This court has no knowledge whether any deeds for any of the Danbury, Connecticut real estate were in evidence in the Florida dissolution action.

Despite these typographical errors, the Amended Final Judgment for Dissolution of Marriage can be rightly understood, when the Florida [*77] typographical errors are corrected. They will be consistent with the following findings by this court.

This court makes the following findings: (1) Cynthia Valluzzo owns a 15% membership interest in Valluzzo

Realty Associates, LLC; (2) The Florida trial court declared that 15% to be non-marital property; (3) Cynthia Valluzzo owns a 25% partnership interest in G&J Partners a/k/a G and J Partners; (4) The Florida trial court declared that 25% to be non-marital property; (5) John V. Valluzzo owns a 55% membership interest in Valluzzo Realty Associates, LLC; (6) The Florida trial court declared that 55% to be non-marital property; (7) John V. Valluzzo owns a 51% interest in G&J Partners a/k/a G and J Partners; (8) The Florida trial court declared that 51% to be non-marital property; (9) Cynthia Kasper's 15% membership interest in Valluzzo Realty Associates, Inc. came from a gift to her; (10) Cynthia Kasper 25% partnership interest in G&J Partners a/k/a G and J Partners came from a gift to her; (11) Cynthia Kasper has no further claim against MMSNE; (12) Cynthia Kasper must withdraw the lawsuit filed by her against MMSNE in the Superior Court in the State of Connecticut; (13) Cynthia Kasper [*78] is permitted to continue to litigate her claims against John V. Valluzzo and Valluzzo Realty Associates, LLC in this instant lawsuit; (14) Cynthia Kasper is permitted to litigate her claims against John V. Valluzzo and G&J Partners a/k/a G and J Partners in the companion lawsuit; (15) The Florida injunction preventing Cynthia Kasper from continuing the two above Connecticut lawsuits is terminated effective January 30, 2009; (16) G&J Partners is also known as G and J Partners; (17) G&J Partners a/k/a G and J Partners has been the record title owner of 1 Sugar Hollow Road, Danbury, Connecticut since July 21, 1994 to the date of trial; (18) Valluzzo Realty Associates, LLC has been the record title owner of 125-127 Park Avenue, Danbury, Connecticut since November 30, 1999 to the date of trial; (19) G & J Partners, G and J Partners and G&J Partners a/k/a G and J Partners are all the same entity and can be used interchangeably.

The First Special Defense is in three paragraphs and states: "1. The Plaintiff in the above entitled action filed an action for dissolution of marriage against the Defendant, JOHN V. VALLUZZO, on or about March 10, 2006 in the Circuit Court of 15th Judicial Circuit [*79] in and for Palm Beach County, Florida. 2. Pursuant to that proceeding, the Plaintiff's ownership interest in the Defendant, VALLUZZO REALTY ASSOCIATES, LLC., is disputed. 3. If it is found, in the Florida matrimonial proceeding, that the Plaintiff has no viable legal interest in the Defendant, VALLUZZO REALTY ASSOCIATES, LLC, then she has no standing to make the claims contained in the Complaint."

The First Special Defense is conditional by stating: "If it is found, in the Florida matrimonial proceeding, that the Plaintiff has no viable legal interest in the Defendant VALLUZZO REALTY ASSOCIATES, LLC, then she has no standing to make the claims contained in

the Complaint." The Florida trial court has found that Cynthia Kasper has a 15% membership interest in Valluzzo Realty Associates, LLC and that she is permitted to continue to litigate this Connecticut lawsuit for monetary damages and other claims for relief. Ex. 94, Ex. 95. This court has, independent of the Florida dissolution decision, found that Cynthia Kasper has a 15% membership interest in Valluzzo Realty Associates, LLC.

The court finds the issues on the First Special Defense for the plaintiff, Cynthia Kasper.

The Second Special [*80] Defense is also related to the Florida dissolution action. It is in three paragraphs as follows: "1. The Plaintiff in the above entitled action filed an action for dissolution of marriage against the Defendant, JOHN V. VALLUZZO, on or about March 10, 2006 in the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida. 2. Pursuant to that proceeding, the Plaintiff's ownership interest in the Defendant, VALLUZZO REALTY ASSOCIATES, LLC is disputed. 3. It is impossible to determine damages, if any, to the Plaintiff, as long as her ownership interest in the Defendant, VALLUZZO REALTY ASSOCIATES, LLC is under dispute." By this Second Special Defense the two defendants are claiming that the typographical errors were not typographical errors by the Florida trial judge and in fact were an award of interest in various entities that do not exist. The two individual parties were in dispute over two legal entities in the Florida dissolution of marriage action; one entity that owned 1 Sugar Hollow Road, Danbury, Connecticut and the second entity that owned 125-127 Park Avenue, Danbury, Connecticut. Both real properties had substantial value and were improved with buildings [*81] occupied by rent paying tenants. This court heard no testimony nor read any documents that related to the following entities; G&J Partners, LLC, Valluzzo Realty Associates LLP, Valluzzo Realty LLC, a corporation containing the words G&J Partners, a corporation containing the words Valluzzo Realty, or a corporation containing the words Valluzzo Realty Associates. The court heard evidence that the only business entities in dispute in the Florida dissolution of marriage action owned real property in Danbury, Connecticut and were the subject of Cynthia Kasper's pending Connecticut lawsuits. Throughout this trial the defendants disputed Cynthia Kasper's ownership interests in both entities.

The defendants are apparently claiming that the Florida trial court awarded Cynthia Kasper a 15% interest in "Valluzzo Realty Associates, LLP," and a 25% interest in "G&J Partners LLC" non-existent entities that have no recorded title or interest in real estate in Danbury, Connecticut. The defendants are apparently claiming that the parties disputed those facts and litigated day after day after day in the Circuit Court in Palm Beach

County over two non-existent entities. If in fact, the defendants are [*82] claiming that the plaintiff is bound by the typographical error in finding paragraph 10 awarding her a 15% interest in "Valluzzo Realty Associates, LLP," then the defendants must agree that John V. Valluzzo was awarded in Order paragraph E his interest in "Valluzzo Realty, LLC" and no interest in Valluzzo Realty Associates, LLC. So too he was awarded in Order paragraph E his interest in "G & J Partners LLC" and no interest in G & J Partners a/k/a G and J Partners. Following the defendants' logic if the Florida typographical errors are not corrected and the literal reading becomes the Florida court order, John V. Valluzzo was awarded whatever interest he had in two entities that probably do not exist and no interest in entities that own valuable income producing real estate in Danbury, Connecticut. Taking the Florida orders literally, there is a missing 51% interest in Valluzzo Realty Associates, LLC and a missing 55% interest in G&J Partners a/k/a G and J Partners. These missing shares of 51% and 55% are up in the air. Maybe this Connecticut court should invite the parties to open the evidence in this trial so this court can consider dividing up that missing 51% among the LLC members [*83] other than John V. Valluzzo and the missing 55% among the partnership partners other than John V. Valluzzo. The defendants' literal reading of the Florida trial court orders can be given no weight. This court has litigated Cynthia Kasper's interest in these two entities and has independently concluded that she is the owner of 15% membership interest in Valluzzo Realty Associates, Inc. and she is the owner of a 25% partnership interest in G&J Partners a/k/a G and J Partners. The court finds that the plaintiff's ownership interests are no longer in dispute.

The court finds the issues on the Second Special Defense for the plaintiff, Cynthia Kasper.

The Third Special Defense states: "As to Plaintiff's First, Second and Fourth Counts the Plaintiff's claim is barred by the statute of limitations as set forth in §52-577 of the Connecticut General Statutes." That statute of limitations states: [HN32] "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of." *Gen. Stat. §52-577*. This statute is commonly known as the general tort statute of limitations. The Third Special Defense although citing statutory authority fails to set forth the [*84] underlying facts supporting the claim. [HN33] The failure to set forth facts in a special defense is fatal. *Fidelity Bank v. Krenisky*, 72 Conn.App. 700, 705, 807 A.2d 968, cert. denied, 262 Conn. 915, 811 A.2d 1291 (2002); *Morneau v. State, Superior Court, judicial district of New Britain of New Britain, Docket Number HHB CV 09-5013995 S*, 2011 Conn. Super. LEXIS 2743 (October 24, 2011, Pittman, J.).

The Second Count seeks an accounting and inspection of books and records. [HN34] An accounting is not a tort. Inspection of books and records is not a tort. [HN35] An accounting of real estate is subject to its own statutes of limitation for disputes of co-owner of real estate. *Gen. Stat. §52-580*. That statute has not been plead. *P.B. §10-3(a)*. Thus *Gen. Stat. §52-580* cannot be considered by this court.

The Fourth Count alleges a breach of statutory duty. *Gen. Stat. §34-141* states: [HN36] "A member or manager shall discharge his duties under *section 34-140* and the operating agreement, in good faith, with the care an ordinary prudent person in a like position would exercise under similar circumstances, and in a manner he reasonably believes to be the best interests of the limited liability company, and shall not liable for any action taken as a member or manager, or any failure [*85] to take such action, if he performs such duties in compliance with the provisions of this section." [HN37] A violation of *Gen. Stat. §34-141* requires a breach of the Operating Agreement and thus contains elements of a breach of contract. The defendants have not pled the two breach of contract statutes of limitation, *Gen. Stat. §§52-576, 52-581*. The statutory violation also applies the standard of care of "an ordinary person in a like position would exercise under similar circumstances." This contains elements of a negligence claim. The negligence statute of limitations is *Gen. Stat. §52-584*, not the general tort statute of limitations of *Gen. Stat. §52-577*. The defendants have furnished no legal authority that a member or manager's breach of his duty under *Gen. Stat. §34-141* is covered by the general tort statute of limitations.

The First Count alleges a breach of fiduciary duty. [HN38] A claim of breach of fiduciary duty has been classified as a general tort. *Ahern v. Kappalumakkel*, *supra*, 97 Conn.App. 192. "Breach of fiduciary duty is a tort action governed by the three year statute of limitations contained within *General Statutes §52-577*." *Id.*, 192, *fn.3*. Although *Gen. Stat. §52-577*, the general [*86] tort statute of limitations, is applicable to breach of a fiduciary duty claim and the statute number has been pled, the failure to state independent facts in Third Special Defense is fatal to the Special Defense. *Fidelity Bank v. Krenisky*, *supra*, 72 Conn.App. 705.

Regardless of that dispositive finding, the court will discuss the applicability of the Statute of Limitations to the plaintiff's breach of fiduciary duty claim. In essence the plaintiff's lawsuit claims that John V. Valluzzo, as the LLC manager, failed to furnish to the plaintiff cash distributions of her 15% membership interest in the LLC. Whether or not the plaintiff owned a 15% membership interest in the LLC was hotly disputed in the Florida contested dissolution of marriage action. That issue was not resolved until January 30, 2009, when the Florida trial

court entered the following order: "The Wife is awarded, as her non-marital property, the gift of . . . the 15% shareholder interest in Valluzzo Realty Associates LLC." Ex. 95, Order D. This lawsuit was commenced on June 7, 2007, after the Florida dissolution of marriage action was filed, but well before the January 30, 2009 Florida dissolution judgment. In addition [*87] the plaintiff's 15% membership interest in the LLC was hotly contested throughout twenty-six of the twenty-seven days of this trial. The defendants again and again asserted that the plaintiff had no ownership or membership interest in the LLC. The court finds that the plaintiff's 15% membership interest in the LLC was confirmed by the Florida dissolution decree. Ex. 95. This court further finds, from facts independent of the Florida Amended Final Judgment for Dissolution of Marriage, that the plaintiff owns a 15% membership interest in the LLC from its January 2, 2000 inception and to trial. The plaintiff would not have been able to properly commence or later maintain this lawsuit until her ownership interests in the LLC was established. The court finds that *Gen. Stat. §52-577* does not bar this lawsuit for breach of fiduciary duty since this lawsuit was commenced in June 2007 prior to the finding by either the Florida or Connecticut court confirming the plaintiff's 15% membership interest in Valluzzo Realty Associates, LLC.

For all the reasons stated, the court finds the issues on the Third Special Defense for the plaintiff, Cynthia Kasper.

The Fourth Special Defense states: "As to Plaintiff's [*88] Third Count, there is no valid contract between the parties due to the lack of consideration." The contract that the plaintiff has pled in the First Count of the complaint, has been incorporated in the Third Count for breach of contract. It is the January 2, 2000 LLC Operating Agreement. Ex. 45. The Operating Agreement created Valluzzo Realty Associates, LLC and was executed by each of the six named members including the two individual parties in this litigation. The joint signature of each member contained in that Operating Agreement, the mutual promises arising thereof and issuance of the respective membership interests to each of the six LLC members is sufficient consideration. *Gordon v. Indusco Management Corporation*, 164 Conn. 262, 267-68, 320 A.2d 811 (1973); *Fairfield County Bariatrics and Surgical Associates, PC v. Ehrlich*, Superior Court, judicial district of Fairfield at Bridgeport, Docket Number FBT CV 10-50291046 S, 2010 Conn. Super. LEXIS 568 (March 8, 2010, Levin, J.). The court finds that there is valid consideration for the Operating Agreement. The plaintiff is entitled to enforce the Operating Agreement as against the two named defendants.

The court finds the issues on the Fourth Special Defense for the plaintiff, [*89] Cynthia Kasper.

The Fifth Special Defense states: "If the acts as alleged in Plaintiff's complaint did occur, the Plaintiff ratified those acts." The defendants are claiming that the plaintiff's ratification occurred twice: (1) by Cynthia Kasper not disagreeing with the payment of the management fees to John V. Valluzzo by the LLC, and (2) by her acceptance of cash distributions without any objection. The defendants did not pursue any defenses of waiver or estoppel, just ratification as contained in the Fifth Special Defense. Since there was no evidence that the plaintiff ever received a cash distribution from the LLC, the second ratification claim has no basis in the evidence. The management fees were not listed in Cynthia Kasper's K-1s. The LLC tax returns did show management fees. She did not receive complete income tax returns that showed the management fees until this litigation commenced. She had no opportunity to verify that any LLC management fee was taken by John V. Valluzzo until this lawsuit was instituted. All through this litigation John V. Valluzzo contested her ownership of a 15% membership interest in Valluzzo Realty Associates, LLC.

[HN39] "Ratification is defined as the affirmance [*90] by a person of a prior act which did not bind him but which was done or professedly done on his account. . . . Ratification requires acceptance of the results of the act with an intent to ratify, and with full knowledge of all the material circumstances." *Russell v. Dean Witter Reynolds, Inc.*, 200 Conn. 172, 185, 510 A.2d 972 (1986). The court finds that the defendants have failed to prove the elements of ratification.

The issues on the Fifth Special Defense are found for the plaintiff, Cynthia Kasper.

The Sixth Special Defense states: "The plaintiff fails to state a cause of action upon which injunctive relief may be granted." The plaintiff is requesting injunctive relief to prevent charitable contributions to be made by Valluzzo Realty Associates, LLC to MMSNE. The court has already rejected the plaintiff's injunctive relief on the grounds of failing to plead the necessary elements, failing to prove the necessary elements of injunctive relief and failing to submit a verified complaint. There is no need for the court to rule on the Sixth Special Defense since these issues have already been found in favor of the defendants.

Not as a special defense, but filed in a separate Motion to Dismiss for Lack [*91] of Subject Matter Jurisdiction dated August 21, 2010 (#253.00), the defendants claim that the plaintiff lacks standing to bring this lawsuit in her individual capacity. The court has issued a Memorandum of Decision on that Motion to Dismiss of even date herewith. [HN40] The general rules relating to shareholders derivative lawsuits in a stock corporation

are applicable to a LLC. *Wasko v. Farley, supra*, 108 Conn.App. 170. "In order for a shareholder to bring a direct or personal action against the corporation or other shareholders, that shareholder must show an injury that is separate and distinct from that suffered by any other shareholder or by the corporation . . . A shareholder--even the sole shareholder--does not have standing to assert a claim alleging wrongs to the corporation." *May v. Coffey*, 291 Conn. 106, 115, 967 A.2d 495 (2009).

Throughout the trial of this case, this court advised the plaintiff in open court that the defendants would move to dismiss the plaintiff's monetary damage claims unless the plaintiff can show that she suffered these monetary losses in a manner distinct, separate and apart from those sustained by the LLC or any of the other members. The four monetary damage claims are: [*92] (1) inappropriate charitable deductions, (2) management fees charged in violation of the Operating Agreement and without a vote of the members, (3) restaurant rent received by the LLC but not distributed for ten years, and (4) use and occupancy not being received from the Military Museum of Southern New England, Inc. for a period of ten years. Cynthia Kasper has totaled those monetary damage claims and took 15% thereof for her monetary claim. Just by doing those calculations the plaintiff has conceded that these four monetary claims would be equally suffered by the other LLC members in their respective percentage ownership. Thus the three children of John V. Valluzzo would be entitled to a 10% distribution of those monetary damage claims if they brought an individual action and John V. Valluzzo himself would be entitled to a 55% monetary damage claim against the LLC. The court has examined in detail each of the supporting documents in regard to the monetary claims, has examined each of the factual circumstances and finds each of the four monetary claims are more attributable to a derivative suit. The plaintiff judicially admitted that fact by alleging in paragraph 21 of her June 7, [*93] 2007 complaint: "The actions of defendant John V. Valluzzo, as member and manager of Valluzzo Realty, were detrimental to Valluzzo Realty . . ." The court finds that these four monetary claims are not individual damages sustained by Cynthia Kasper separate and apart from any monetary damages sustained by any other four members of the LLC or by the LLC itself. The court therefore finds that the plaintiff has no standing to bring these four monetary damage claims even though this court has found that she has proven both the liability and damage portions of these claims. *Smith v. Snyder*, 267 Conn. 456, 462, 839 A.2d 589 (2004).

The court finds that the issues on those four monetary claims must be found for the defendants. Therefore, the court finds the issues on the First Count, Third Count

and Fourth Count for the defendants based on the plaintiff's lack of standing.

The court finds that the accounting and access to the LLC's books and records claims in the Second Count are distinct, separate and apart from either the LLC itself or any of its members. They are damages that have been sustained by Cynthia Kasper alone and by her alone. There is no proof that any other member was deprived of access to [*94] the LLC's books and records. The court finds that an order of an equitable accounting and access to the LLC's books and records are distinct damage claims that Cynthia Kasper alone has suffered. This court finds that she has standing to bring an accounting claim and seek an order of access to the LLC's books and records. Based on the balancing of the equities and the fact that an inspection, access and production order may eliminate future litigation between these parties, an accounting and access order is appropriate. Counsel for the defendants admitted that the plaintiff has the right to inspect the books and records of the LLC in oral argument.

The issues on the Second Count are found for the plaintiff, Cynthia Kasper, against both John V. Valluzzo and Valluzzo Realty Associates, LLC.

The court will enter an equitable order requiring access to and copies of the LLC's books and records. The plaintiff has not claimed relief for events prior to the institution of this lawsuit. This equitable order will only address matters on and after January 1, 2010. This court has adjudicated the monetary damage claims for events through December 31, 2009.

The court orders that the defendant, Valluzzo [*95] Realty Associates, LLC, and defendant, John V. Valluzzo, individually, as a member and as manager of Valluzzo Realty Associates, LLC, jointly and severally, furnish to the plaintiff, Cynthia Kasper, and/or her designated agents and representatives the following under the following conditions:

1. Access to the books and records of the LLC including but not limited to those contained in the January 2, 2000 Operating Agreement and *Gen. Stat. §34-144* in the manner set forth therein.

2. The provision of a copy of the member's K-1 and the LLC's Federal Form 1065 shall not suffice as full and complete compliance with Order 1.

3. Either party may move for a modification and/or clarification of the above orders. Any such motion shall be specific as to the type and nature of the modification requested and shall be served on the other party in the manner of postjudgment motions.

4. The court shall retain jurisdiction over the implementation and/or modification of these access orders. *Episcopal Church in the Diocese of Connecticut v. Gauss, supra*, 302 Conn. 454.

5. The above orders are final appealable judgments despite the court's retention of jurisdiction.

The clerk will tax costs against both defendants. [*96] A separate order of taxation of costs has entered in the companion partnership lawsuit.

BY THE COURT

Hon. Kevin Tierney

Judge Trial Referee

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