

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

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EMIL LLC, directly and derivatively,  
on behalf of 10839 ASSOCIATES

Plaintiff,

- against -

BARRY J. JACOBSON, LARRY A. WOHL,  
JOSEPH P. DAY REALTY CORP., and  
ROSENBERG & CHESNOV CPA'S LLP,

Defendants,

- and -

10839 ASSOCIATES and  
108 WEST 39TH STREET ASSOCIATES,

Nominal Defendants. :  
-----X

EMIL LLC, directly and derivatively  
on behalf of 2 WEST 45<sup>TH</sup> STREET LLC,  
OLYMPIC BUILDING ASSOCIATES,  
and 50 COURT STREET ASSOCIATES,

Plaintiff,

- against -

BARRY J. JACOBSON, LARRY A. WOHL,  
and JOSEPH P. DAY REALTY CORP.,

Defendants,

- and -

2 WEST 45<sup>TH</sup> STREET LLC,  
OLYMPIC BUILDING ASSOCIATES,  
and 50 COURT STREET ASSOCIATES,

Nominal Defendants. :  
-----X

Index No. 651281/2017

IAS Part 61  
(Ostrager, J.)

Motion Seq. No. 8

IAS Part 61  
(Ostrager, J.)

Index No. 655091/2017

-----X Index No. 650267/2018

EMIL LLC, directly and derivatively :  
on behalf of 10839 ASSOCIATES, :  
: :  
Plaintiff, :  
: :  
- against - :  
: :  
BARRY J. JACOBSON and LARRY A. WOHL, :  
: :  
Defendants, :  
: :  
- and - :  
: :  
10839 ASSOCIATES and :  
108 WEST 39TH STREET ASSOCIATES, :  
: :  
Nominal Defendants. :  
-----X

**DEFENDANTS’ RESPONSE TO PLAINTIFF’S RULE 19-A STATEMENT  
IN SUPPORT OF ORDER TO SHOW CAUSE FOR PARTIAL SUMMARY JUDGMENT**

Pursuant to Commercial Division Rule 19-A(b), defendants Barry J. Jacobson (“Jacobson”), Larry A. Wohl (“Wohl”), and Joseph P. Day Realty Corp. (“JPD Realty”) (collectively, “Defendants”) respond to the Rule 19-A Statement of Material Facts, dated June 12, 2019, submitted by plaintiff Emil LLC (“Emil” or “Plaintiff”) in support of its order to show cause seeking partial summary judgment on its accounting claims, as follows:

**A. The Entities**

1. Plaintiff’s Civil Actions involve four entities established to hold real estate interests in four buildings in New York: (1) 10839 Associates (“10839”), (2) 2 West 45th Street LLC (“2W45”); (3) Olympic Building Associates (“Olympic”); and (4) 50 Court Street Associates (“50 Court”). 10839, 2W45, Olympic and 50 Court are collectively the “Entities” and the real properties they own are collectively the “Properties.”

RESPONSE: Admit.

**B. Emil's Interest in the Entities**

2. The late Arthur D. Emil was a partner in 10839, Olympic, and 50 Court and was a joint venturer in the predecessor to 2W45. Affidavit of David Emil (Emil Aff.) ¶ 3.

**RESPONSE:** Admit.

3. Arthur D. Emil died in 2010. *Id.*

**RESPONSE:** Admit.

4. Emil LLC (“Emil”) is a Delaware LLC that was formed after Arthur D. Emil’s death to hold the real property investments in his estate (the “Estate”), including those at issue in the Civil Actions. *Id.*

**RESPONSE:** Deny knowledge or information sufficient to form a belief as to the truth of the statement and aver that the limited liability company agreement of Emil LLC states that it was formed to “enable the Members to participate in investments they might not be able to make individually” and to “serve as a mechanism to make transfers [of] Company assets.” (Lerner Aff. Ex. J, ¶ 3).

5. The Estate transferred its interests in 10839 to Emil. Ex. 28.

**RESPONSE:** Deny.

Plaintiff has not produced the documents by which the transfer was purportedly effectuated. (Lerner Aff. ¶6). Instead Plaintiff relies, as support, on letters between representatives of Plaintiff and the Estate “confirming” the transfer. (Lerner Aff. Ex. E). These letters were written in May 2017, after Plaintiff had commenced litigation between the parties and after Defendants had served their first discovery request. (Lerner Aff. ¶6). These letters recite that confirmation of the transfer was documented in April 2014, but “we are not able to locate evidence of this after having moved twice in the interim.” (Lerner Aff. Ex. E).

Plaintiff has not taken the steps required by the 10839 Partnership Agreement to become a partner of 10839. The 10839 Partnership Agreement requires, *inter alia*, that a party seeking to

become a partner of 10839 execute a writing agreeing to be bound by the 10839 Partnership Agreement (Lerner Aff. Ex. A, §14.02(a)). Plaintiff has not signed any such writing. (Jacobson Aff. ¶8).

Further, any transfer of that interest from the Estate to Emil is in violation of the right of first refusal held by the partnership and the managing partners. (Lerner Aff. Ex. A, §14.02(b)). Per the right of first refusal, the Estate could not have transferred its partnership interest to Emil without first offering it to the partnership and its managing partners, which it did not do. (Jacobson Aff. ¶ 9). Even if the 10839 Partnership Agreement could be read to permit such transfer, on the ground that the interest was going to immediate family members of Arthur Emil, there is a question of material fact as to whether the transfer to a limited liability company was intended to circumvent the right of first refusal. The use of a limited liability company as an intermediary to acquire an interest in 10839, as opposed to transferring the interest directly to the Residuary Marital Trust, which is allegedly the sole member of Emil LLC, is the first step in a mechanism that would permit the Residuary Marital Trust to indirectly sell its interest in 10839 to a third party outside of Arthur Emil's immediate family. This would be accomplished by selling an interest in Emil LLC in circumvention of the agreement's right of first refusal.

As the process set forth in the 10839 Partnership Agreement to become a partner is not complete, Defendants retain their contractual right to withhold their consent to Plaintiff's admission as a partner. (Lerner Aff. Ex. A, §14.02(a)). Such consent could be withheld, reasonably and/or in good faith, on the basis of wrongful acts committed by Plaintiff's president and manager, David Emil. Plaintiff has recently falsely claimed in these litigations without a shred of supporting evidence that the managing and/or general partners of the Entities "paid millions of dollars to contractors for work that was never performed." (ECF No. 168 at p. 1

(Index No. 655091/17), *see also* Pl. Mem. at 6 and 17-18). Defendants have also recently learned through discovery that David Emil levied the same unfounded accusation in communications with other members of the Entities. (Jacobson Aff, ¶11.) The injuries that such an accusation can cause to 10839 and to its reputation is obvious. Plaintiff has also refused to extend the partnership term for Olympic, which hampers that entity's ability to refinance its mortgage thus injuring the partnership and its partners. Thus, even if Plaintiff were to decide to sign a writing agreeing to be bound by the 10839 Partnership Agreement, the managing partners of 10839 are well within their rights to refuse Plaintiff's admission as a partner as a result of these bad acts.

6. The Estate transferred its interests in Olympic to Emil. Ex. 33.

**RESPONSE:** Deny.

Plaintiff has not produced the documents by which the transfer was purportedly effectuated. (Lerner Aff. ¶6.) Instead Plaintiff relies, as support, on letters between representatives of Plaintiff "confirming" the transfer. (Lerner Aff. Ex. E). These letters were written in June 2017, after Plaintiff had commenced litigation between the parties and after Defendants had served their first discovery request. (Lerner Aff. ¶6). These letters recite that confirmation of the transfer was documented in April 2014, but "we are not able to locate evidence of this after having moved twice in the interim." (Lerner Aff. Ex. E).

Plaintiff has not taken the steps required by the Amendment to and Restatement of Agreement and Articles of Limited Partnership of Olympic Building Associates (the "Olympic LP Agreement") to become a partner of Olympic. The Olympic LP Agreement requires, *inter alia*, that a party seeking to become a partner of Olympic execute a writing agreeing to be bound by the Olympic LP Agreement. (Lerner Aff. Ex. B, Art. IX(A)(2)). Plaintiff has not signed any

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