SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: COMMERCIAL DIVISION

PRESENT: HON. JENNIFER G. SCHECTER **PART** 54
Justice

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LEONARD MEYERSON, OBIOMA NWOKOLO,

Plaintiffs,

- v -

SAM MINZER, PERSONAL ALARMS SECURITY SYSTEMS, COMPANION EMERGENCY RESPONSE SYSTEM, INC, ALERTUSA EMERGENCY RESPONSE SYSTEMS, LLC,ALERTUSA EMERGENCY RESPONSE ORGANIZATION, INC.,ADVANTAGE EMERGENCY MEDICAL RESPONSE SYSTEMS, LLC,

Defendants.

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INDEX NO. 653730/2019

DECISION AFTER TRIAL

Plaintiff Leonard Meyerson and defendant Sam Minzer are 50-50 owners of defendants Personal Alarms Security Systems, Companion Emergency Response Systems, Inc. (Companion), AlertUSA Emergency Response Systems LLC (AlertUSA LLC), AlertUSA Emergency Response Organization, Inc. (AlertUSA Inc.), and Advantage Emergency Medical Response Systems, LLC (collectively, the Companies). This case concerns repayment of a $200,000 loan made by Meyerson to the Companies and Minzer's accountings of the Companies. A bench trial was held on November 13 and 14, 2023 (Dkts. 432, 433), after which the parties filed post-trial briefs (Dkts. 423, 429, 431). For the reasons that follow, the court: (1) rejects Minzer's contention that Meyerson's interest in the Companies was reduced to 20%; (2) finds that the Companies are liable to repay the balance of Meyerson's loan; (3) surcharges Minzer for amounts the Companies transferred to his daughter-in-law as repayment of a purported loan; and (4) overrules all of Meyerson's other objections to the accountings.

Meyerson's 50% Interest

The court rejects defendants' contention that Meyerson's interest in the Companies was reduced to 20%. This argument was made for the first time at trial based on documents that were not produced in discovery. Minzer testified to the 50-50 ownership at his deposition (*see* Dkt. 432 at 156). Yet, he testified at trial that he provided a document to his prior counsel evidencing an 80-20 ownership split (*see id. at* 158; *but see* Dkt. 59 at 4 [prior counsel arguing that these "cases are about the same business relationship between these two guys that chugged along for almost thirty years without benefit of a single written

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agreement"]). This document was not produced to plaintiffs during discovery. Nor did defendants disclose during discovery or in pretrial proceedings that they were taking the position that Meyerson only had a 20% interest. The court therefore precluded the introduction of this evidence (Dkt. 432 at 94-99, 158; *see* Part Rule 31). It would be extremely prejudicial to permit the introduction of such critical evidence for the first time at trial when it was always in defendants' possession, as withholding it prevented plaintiffs from probing its veracity during discovery (*see Gottwald v Sebert*, 204 AD3d 495 [1st Dept 2022]). That defendants were represented by different counsel during discovery is no excuse and does not mitigate the prejudice to plaintiffs. The court therefore finds based on the admissible evidence that Meyerson owns 50% of the Companies.

The Citibank Loan

Meyerson is entitled to repayment of the balance of the Citibank loan, which was $175,485.69 as of September 18, 2023 (*see* Dkt. 398 at 10). Minzer does not dispute that Meyerson took out a $200,000 loan secured by his personal residence in 2006, that the proceeds were provided to the Companies, and that Minzer initially caused the Companies to make payments on the loan but stopped doing so in 2017. The court credits Meyerson's testimony that there was an express agreement to repay the loan, which is confirmed by the parties' initial course of conduct (*see* Dkt. 397 at 4 ["Minzer told me that the loan would be promptly repaid **by the corporate defendants**"] [emphasis added]). The Companies are liable to Meyerson for the balance of the loan.

Indeed, it is unclear why this claim actually required a trial given defendants' admission that "the understanding was that the Corporate Defendants would repay the Citibank [loan]" (Dkt. 429 at 7). While the court understood that plaintiffs intended to seek recourse in the accounting personally against Minzer, they abandoned that effort based on Meyerson's trial testimony that the agreement was with the Companies and their failure to address Minzer's personal liability in their post-trial briefs.

Plaintiff Obioma Nwokolo, however, has no standing in this action. There is no evidence that she entered into an agreement with defendants regarding the loan. She has no interest in the Companies. While she was affected by the loan since it was secured by her residence, her testimony merely confirmed the existence of an agreement between her husband and the Companies (*see* Dkt. 398 at 2).

The Accountings

Plaintiffs required Minzer to provide extensive and expensive accountings of the Companies and interposed numerous objections to those accountings (*see* Dkt. 364). Minzer's 99-page direct testimony affidavit thoroughly addresses plaintiffs' objections' (Dkt. 378). At the conclusion of trial, after plaintiffs had cross-examined Minzer and his expert witness, the court expressed serious concerns about plaintiffs not

having meaningfully addressed the trial evidence and sought assurances that their post-trial briefs would precisely explain their objections and the surcharges they are seeking (*see* Dkt. 433 at 138 ["if you don't raise it in your post-trial brief, I'm going to assume that even if it's in your earlier objections, that I don't have to rule on it. I'm only going to rule on the objections that you specifically set forth in -- it's a category, you'll give me the category. But it's got to be in your post-trial brief"]). Counsel confirmed he understood. On that basis, the court must presume that the only objections plaintiffs felt were worth pursuing after all of the evidence was submitted were those included in their 10-page post-trial brief (*see* Dkt. 423; *see also* Dkt. 431). In their post-trial briefs plaintiffs never set forth how much recovery was being sought on any of the proposed surcharges (*see* Dkt. 423 at 9 [requesting compensatory damages without specifying any amount]). They also did not state which of the Companies should be paid each of the surcharges.

By contrast, defendants proffered extensive, detailed explanations of the accountings in their trial affidavits and post-trial brief, most of which plaintiffs did not meaningfully refute after trial (*compare* Dkt. 431, *with* Dkt. 429). Thus, while defendants had the burden to account, the court finds that—with one exception addressed below—plaintiffs ultimately have failed to properly support and pursue their objections (*Matter of Kalik*, 117 AD3d 590, 592 [1st Dept 2014] ["The referee correctly found that he abandoned any objections as to which he presented no proof"]; *see Matter of Estate of Schnare*, 191 AD2d 859, 860 [3d Dept 1993] ["the party submitting objections bears the burden of coming forward with evidence to establish that the account is inaccurate or incomplete"]; *see also Schulman v Levy, Sonet & Siegel*, 302 AD2d 321 [1st Dept 2003] ["These objections were not supported by evidence showing, prima facie, that defendant's accounting of these items was inaccurate or incomplete. Accordingly, the burden of coming forward with countervailing evidence never shifted to defendant"]). The court is not in a position "to make a meaningful determination of a surcharge" where a party elects not to retain a rebuttal expert and does not even explain the amounts that should be surcharged or which of the Companies should receive the surcharge (*see Grgurev v Licul*, 2023 WL 4765885, at *2 [Sup Ct, NY County July 26, 2023]). While these issues apply to all of plaintiffs' objections, the court makes one exception and considers the merits of the "Israeli Mortgage Capital Infusion" dispute since the court was (albeit not without difficulty) able to assess the issues notwithstanding the paucity of the discussion in plaintiffs' briefs.

The Israeli Mortgage Capital Infusion

The Israeli Mortgage Capital Infusion was a loan that was supposedly made to the Companies by Minzer's daughter-in-law, Tamar Minzer (Tamar). Minzer claims that he "came to an agreement with his son [and Tamar] ... by which Defendant Minzer would deed them a property which he owned in Israel (the “Israeli Property”) in exchange for [Tamar] taking out a mortgage on the Israeli Property" (Dkt. 429 at 7). Minzer testified that the loan amount "was $181,095 and was received by a wire transfer on or about May 6, 2009" (Dkt. 378 at 20). Minzer claims that most of this loan was not repaid. While

plaintiffs contend that there was never a loan, they do not claim that $181,095 was taken from the Companies.

Nowhere in plaintiffs' briefs do they explain how much money attributable to this loan was transferred to Tamar. Plaintiffs merely ask the court to impose a surcharge for "the money sent by [defendant to Tamar] ... purportedly as loan [payback]" (Dkt. 423 at 6 [cleaned up]). Nor do plaintiffs even bother to provide the court with citations to where the amounts of these transfers may be found in the record. The court is left to assume that these transfers are limited to those addressed in Minzer's direct-testimony affidavit (Dkt. 378 at 20 [$4,000 from AlertUSA LLC], 23-24 [$7,000 from AlertUSA LLC], 73 [$5,500 from AlertUSA Inc.], 75-76 [$6,600 & $2,300 from AlertUSA Inc.], 90 [$1,600 from Companion], 94 [$11,275 from Companion]).

Surcharges totaling $38,275 are warranted because Minzer did not submit credible proof that Tamar ever took out a loan or that $181,095 of the proceeds were provided to the Companies. Minzer did not submit any documentation of the loan or financial records evidencing the Companies' receipt of the proceeds. Rather, he principally relies on a May 6, 2009 entry in the Companies' SedonaOffice ledger (*see* Dkt. 388 at 1). Defendants did not produce a witness that testified to making this entry (*see* Dkt. 431 at 4 ["Mr. Lynn is incompetent to testify to this entry in a business record which not only did he not make" and "he does not know who made the entry"]). Lynn testified that he did not personally input data until 2016 (Dkt. 433 at 83-84). He also did not testify that he had any personal knowledge about who inputted the May 6, 2009 entry. Likewise, Minzer did not provide any clear or credible testimony about this entry and admitted that Lynn had no personal knowledge of the loan since he was not retained until 2010, and he had mistaken and conflicting recollections about which bookkeeper might have made the entry (*see id.* at 67).

Minzer, of course, cannot testify to the veracity of any of the Sedona entries since he had never even "logged into Sedona" until the week before trial (Dkt. 432 at 164). Since Minzer also testified that he "go[es] with whatever Lynn states as far as finances" (*id.* at 188), and did not produce any witness who could testify based on personal knowledge about the Companies' finances when the Israeli loan was supposedly made in 2009, the court does not credit Minzer's testimony about the veracity of the May 6, 2009 Sedona entry. Thus, setting aside the admissibility of the Sedona records, the court declines to credit a business record with this weak of a foundation (*see Briar Hill Apts. Co. v Teperman*, 165 AD2d 519, 522 [1st Dept 1991]).*

* To the extent defendants complain that "plaintiffs are taking issue with respect to documentation regarding the disbursement of the Israeli Mortgage Capital Infusion as they have produced no documentation evidencing the disbursement of the Citibank HEL Capital Infusion" (Dkt. 429 at 16 n 10), as discussed, defendants admitted the existence of the

The court also does not find Minzer's testimony about the loan to be credible based on his demeanor and conflicting accounts. While there was confusion in Minzer's prior testimony about whether the proceeds were from a sale or a loan, more confusingly, somehow the loan proceeds in 2009 totaled $181,095 (Dkt. 378 at 20), yet after years of partial repayments and (presumably accrued interest) the balance in October 2016 was somehow still exactly $181,095 (Dkt. 429 at 8).

In an accounting there is no substitute for actually keeping and producing proper corporate records (*see Polish Am. Resource Corp. v Byrczek*, 270 AD2d 96 [1st Dept 2000] ["While defendant claims that he did not personally make the cash withdrawals and therefore cannot account for them, all 'obscurities and doubt' created by the failure to keep clear and accurate records are to be resolved against him"]; *see also O'Mahony v Whiston*, 224 AD3d 609, 611 [1st Dept 2024]). The evidence supporting the existence of this loan is too suspect to credit. Perhaps a loan was made. But Minzer, as a fiduciary with the duty to account, did not satisfy his burden of substantiating its existence.

The payments to Tamar Minzer were made between 2014 and 2016. Pre-judgment interest will run from reasonable intermediate dates based on when each of the Companies made the transfers (*see Solow Mgt. Corp. v Tanger*, 43 AD3d 691 [1st Dept 2007]). Recovery, of course, belongs to the Companies from which the money was taken (*see Mohinani v Charney*, 208 AD3d 404, 405 [1st Dept 2022]).

Plaintiffs' Remaining Objections

All of plaintiffs' other objections to the accounting are overruled. As discussed, those that were not addressed in plaintiffs' post-trial briefs are waived. The rest of the objections to which plaintiffs allude fare no better. Plaintiffs' briefs lack any meaningful discussion of the issues, fail to provide useful citations to the accounting, objections, or record evidence supporting their positions, or even any indication of how much should be surcharged (*see* Dkt. 423 at 6-7). For instance, plaintiffs object to "the monies sent to his son, Michael Minzer, as salaries for services purportedly rendered by Michael Minzer to the corporate Defendants" because Minzer did "not have any credible evidence backing them" and that "this is simply another avenue which Mr. Minzer used to fleece his business partner" (*id.* at 6). Plaintiffs, however, do not discuss any of the trial evidence supporting these payments, explain why the court should not credit such evidence, or supply the court with the amount paid to his son that should be surcharged (*cf.* Dkt. 429 at 17 ["The establishment of the Israeli call center and payments made to Michael Minzer relating to the operation

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Citibank loan and plaintiffs submitted a bank statement proving its existence and current balance. While Minzer testified that he has a strained relationship with his family in part due to this loan (Dkt. 378 at 21), if he was telling the truth that Tamar took out a loan and that it is still outstanding, he could have attempted to obtain a similar bank statement from either Tamar or the Israeli bank, either consensually or by legal process.

thereof were addressed extensively in Defendant Minzer's Affidavit. As addressed therein, the Alarm Business set up a marketing call center in Israel where Michael Minzer and Tamar Minzer made marketing calls to prospective customers and also received calls from prospective customers pertaining to the purchase of communications equipment and monitoring services with such calls resulting in an appreciable increase in the number of customers"]). Defendants submitted robust trial affidavits with detailed discussions of the accountings and plaintiffs' objections, along with a post-trial brief that comprehensively addresses the evidence. Plaintiffs, in the end, had no meaningful contest to defendants' proof.

The court declines to address the parties' other disputes regarding defendants' expert witness or his credibility, which are academic. As discussed during trial, Lynn had more utility as a fact witness rather than as an expert, as he principally relied on Minzer's detailed testimony and the voluminous accounting records. Plaintiffs' contention that Lynn lacks credibility is no substitute for actually engaging with the ample detail in Minzer's testimony. It was difficult enough parsing the Israeli loan issue based on plaintiffs' briefs. The court declines to make additional findings based on arguments that plaintiffs themselves did not make.

Minzer, however, is not entitled to set off the $38,275 surcharge since he did not submit credible proof or provide credible testimony that he is owed $864,746.13 (or any other amount) by the Companies. Yet, even if Minzer is owed money, the parties did not clearly address whether the Companies have outside creditors that would take priority over payments to insiders (which seems quite possible given Minzer's testimony about the Companies' financial difficulties). Minzer should repay the Companies, which could at least use the money to partially repay the Citibank loan.

The parties' other arguments are unavailing. While the court harbors some skepticism about Minzer's record keeping and the ways in which he operated the Companies, plaintiffs failed to set forth and explain the evidentiary bases for additional surcharges.

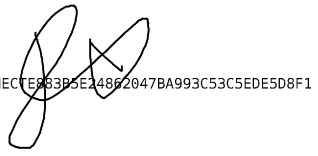
Conclusion

This 2019 case is resolved by ordering repayment of a loan that should never have been disputed in the first place and by imposing a mere $38,275 surcharge after extensive accountings. Surely, there was a better use of the parties' resources. Counsel are implored to help their clients reach a resolution without expending further resources on costly appeals or enforcement.

Accordingly, it is ORDERED that the Clerk is directed to enter judgment (1) in favor of plaintiff Leonard Meyerson and against defendants Personal Alarms Security Systems, Companion Emergency Response Systems, Inc., AlertUSA Emergency Response Systems LLC, AlertUSA Emergency Response Organization, Inc., and Advantage Emergency

Medical Response Systems, LLC, jointly and severally, in the amount of $175,485.69, with 5.125% interest from September 18, 2023 to the date judgment is entered, and thereafter at the same rate; (2) in favor of defendant AlertUSA Emergency Response Systems, LLC and against defendant Sam Minzer in the amount of $11,000, with 9% prejudgment interest from April 30, 2015 to the date judgment is entered; (3) in favor of defendant AlertUSA Emergency Response Organization, Inc. and against defendant Sam Minzer in the amount of $14,400, with 9% prejudgment interest from December 31, 2014 to the date judgment is entered; and (4) in favor of defendant Companion Emergency Response Systems, Inc. and against defendant Sam Minzer in the amount of $12,875, with 9% prejudgment interest from May 31, 2016 to the date judgment is entered.

Plaintiffs shall e-file a proposed judgment to the Clerk consistent with this order.



DATE: 7/5/2024 **JENNIFER G. SCHECTER, JSC**

Check One: [X] **Case Disposed** [ ] **Non-Final Disposition**