IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

JACK SPECTOR, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	Case No. 413074-V
vs.	:	
	:	
ELLIOT LIFFMAN, *et al.*,	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

This case was tried before the court on February 13, 15, and 16, 2017. After hearing closing arguments, the court took the case under advisement. The parties thereafter submitted post-trial briefs.

The court has determined that the strict foreclosure on the plaintiffs' collateral under Section 9-620 of the Maryland Uniform Commercial Code was effective and divested the plaintiffs of their membership interest in Realty Capital Company II, LLC ("RCC II"). The court has also determined that the plaintiffs' other claims for relief should be denied, because the plaintiffs have failed to carry their burden of proof. A declaratory judgment will be entered in the defendants' favor, and counsel are instructed to submit a proposed declaratory judgment within ten days.

Findings of Fact

The plaintiffs, Jack Spector and Roslyn Spector owned, as tenants by the entirety, a majority interest in RCC II and RCC Asset Management Company, LLC ("RCCAMC"). RCC II is a commercial real estate firm that sponsored investments in syndicated real estate ventures. RCCAMC provided services to the ventures sponsored by RCC II. Each limited liability company has separate operating agreements.

Defendant, Elliot Liffman owned a minority interest in both entities, until the strict foreclosure proceeding, which is at the heart of this lawsuit, was effectuated.

The dispute among the parties goes back at least to September 2005, when Liffman first discovered that Jack Spector had taken money—which he was not owed—out of RCC II's bank accounts, and was using a company credit card to pay for a multitude of personal items. Liffman discovered additional defalcations by Jack Spector in 2007 and 2010. In January 2010, for example, Liffman discovered that Jack Spector had written checks made payable to RCC II from one of the venture's bank accounts, and then endorsed and deposited these checks into Spector's personal bank accounts. Liffman then secured a third-party audit, and also conducted a personal audit, of Spector's misuse of entity funds. This review showed that Spector had taken hundreds of thousands of dollars from RCC II and the venture companies from 2004 through 2010. Liffman and company counsel held a meeting with Spector in April 2010, at which time they outlined their findings. Spector denied any misuse of funds and "declared war" on Liffman.

One of the reasons that Jack Spector stole money from RCC II was that he and his wife had a substantial unpaid federal tax liability. In order to pay this liability, the Spectors decided to take out a personal loan from Congressional Bank. The bank wanted collateral, so Spector asked RCC II to consent to a pledge of his personal economic interests in RCC II to secure the Congressional loan. RCC II's consent was necessary because the Operating Agreement prohibits transfers of ownership interests without the prior written consent of the management committee.

On October 22, 2007, at the Spectors' request, RCC II executed a consent authorizing Jack and Roslyn Spector to secure their personal loan from Congressional Bank by pledging "to the Lender Spector's economic interest in RCC (*i.e.*, all of Spector's rights and interests in and to distributions of cash and property from RCC)" (the "Pledge.").[1] Also at the Spectors' request, counsel for RCC II prepared an opinion letter for Congressional Bank confirming that the Spectors were authorized to pledge their economic interests in order to obtain the personal loan.

As noted above, after his acts of theft were uncovered, Jack Spector nonetheless refused to re-pay RCC II for the funds he had taken for his personal use. As a consequence, RCC II and Liffman sued Jack and Roslyn Spector in November 2010. On January 10, 2011, this court entered a preliminary injunction which, among other things, precluded Jack Spector from taking part in the management of the entities. This injunction was broadened on June 16, 2011, after a two-day evidentiary hearing, to completely exclude Jack Spector from the management of any of the venture companies.[2]

Jack Spector was indicted by a State grand jury on December 29, 2011, for eight counts of felony theft. On July 20, 2012, Spector pleaded guilty to one count of felony theft and for taking $108,500.00 from one of the limited liability companies. Spector was sentenced on October 17, 2012, to a period of incarceration of 12 years, with all but 18 months of the sentence suspended.

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[1] Defendants' Trial Exhibit 14.

[2] Section 4A-402(d) of the Corps. & Assn's Article provides that "[a] court may enforce an operating agreement by injunction or by granting such other relief which the court in its discretion determines to be fair and appropriate in the circumstances."

The Spectors fell behind in their loan payments, and on December 13, 2011, Congressional Bank issued a default notice. On December 23, 2012, Congressional granted the Spectors an extension, and gave them until January 10, 2012 to cure the default. In granting that extension, the bank advised: "You agree and consent that the $350,000 Note may be sold or assign[ed] to any third party."[3] Jack Spector replied: "I acknowledge that the Bank may sell or assign the $350,000 note to any third party after the extension period."[4]

On January 19, 2012, Liffman met with representatives of Congressional Bank, who offered to sell the Spector note. Liffman declined to purchase the Note, believing at that time that the only collateral that secured the loan was the Spectors' own economic interests in RCC II. Congressional Bank did not tell Liffman that, in October 2007, Jack Spector had actually pledged all of RCC II's assets in support of the personal loan. On February 14, 2012, Congressional Bank advised Jack Spector that Liffman had declined to buy the loan.[5]

On February 24, 2012, Congressional Bank notified RCC II and the Spectors of its intent to dispose of all of the collateral that secured the Spectors' personal loan. Attached to the notice were two, not one, UCC financing statements. The first financing statement listed the debtors as Jack and Roslyn Spector. The second financing statement, however, listed RCC II as the debtor and showed a pledge of all of RCC II's assets in

[3] Plaintiffs' Trial Exhibit 31.

[4] *Id.*

[5] Defendants' Trial Exhibit 4.

support of the personal loan that Congressional Bank made to Jack and Roslyn Spector.[6] This second pledge was memorialized in a Commercial Security Agreement signed by Jack Spector, purportedly in his capacity as an officer of RCC II.[7] This second pledge was also countersigned by both Jack and Roslyn Spector as the borrowers.[8]

The court finds it was at this time, February 24, 2012, that Liffman first learned that Jack and Roslyn Spector had pledged all of RCC II's assets to back their personal loan from Congressional Bank.[9] The court also finds that both Jack and Roslyn Spector executed this second pledge knowingly and without authority to do so, and gave it to Congressional Bank in order to induce the bank to grant them a personal loan.

When RCC II learned that Jack Spector had purported to pledge all of RCC II's assets in support of his personal loan, the entity immediately objected and reminded Congressional Bank that Jack Spector had been removed from management by this court and had no authority to pledge the entity's assets.[10] Congressional Bank's response of March 5, 2012, was threatening and unapologetic.[11] The bank's position was, essentially, that the pledge says what it says. As a consequence, and in order to protect RCC II's assets and the financial interests of the investors in RCC II's portfolio from collection

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[6] Defendants' Trial Exhibit 1.

[7] Defendants' Trial Exhibit 9.

[8] Plaintiffs' Trial Exhibit 8.

[9] By letter dated March 21, 2012, an attorney for the Spectors wrote to counsel for Chick Row Ventures, LLC ("Chick Row"), an estate planning entity formed by Mr. Liffman in January 2012, and stated: "The accusation that it was Jack Spector who pledged all of RCC's assets are (sic) total[ly] unfounded and untrue." Defendants' Trial Exhibit 10. This statement by the Spectors' counsel is not correct.

[10] Defendants' Trial Exhibit 8.

[11] Defendants' Trial Exhibit 9.

actions by Congressional Bank, Liffman decided to purchase the Spectors' loan from Congressional Bank. So as to not further put at risk the interests of his venture partners, the court finds that Liffman decided to put his own credit at risk, and to purchase the Note through Chick Row.[12]

By an endorsement dated March 22, 2012, Congressional Bank transferred its interest in the Spectors' loan to Chick Row.[13] On March 26, 2012, counsel for Chick Row wrote to the Spectors informing them that Chick Row had purchased their loan from Congressional Bank.[14] The notice expressly advised that all payments due under the loan were now to be made to Chick Row, and not to Congressional Bank. This notice of transfer was sent both by regular mail and by e-mail and was, the court finds, in fact received by the Spectors in March 2012. The Spectors, the court finds, did not make any payments on the loan after it was transferred by Congressional to Chick Row. The court also finds that the Spectors never objected to the sale of the loan by Congressional to Chick Row. Finally, the court finds that neither Jack nor Roslyn Spector ever notified Chick Row of any change of address, as required by the Commercial Security Agreement they signed on October 30, 2007, which was part of the loan sold to Chick Row by Congressional.[15]

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[12] Plaintiffs' Trial Exhibit 7.

[13] Plaintiffs' Trial Exhibit 16.

[14] Plaintiffs' Trial Exhibit 8.

[15] Plaintiffs' Trial Exhibit 2. In the Commercial Security Agreement, the Spectors expressly agreed to notify the lender in writing and in advance of any change in a principal residence. The document specifically says: "No change in Grantor's name or principal residence will take effect until after lender has received notice." *Id.* It also provides: "For notice purposes, Grantor agrees to keep Lender informed at all times of Grantor's current address. Unless otherwise provided or required by law, if there is more than one Grantor, any notice given by Lender to any Grantor is deemed to be notice given to all Grantors."

After a three-day trial in July 2013, the court found Jack Spector to be liable for fraud, found both Jack and Roslyn Spector liable for breach of contract, and found a conspiracy between the Spectors to commit fraud. Jack Spector was found by this court to have acted with malice and, as a result, punitive damages were awarded. On October 28, 2013, this court entered both a Declaratory Judgment and a Permanent Injunction against the Spectors. A monetary judgment of over $597,000 ultimately was awarded, plus post-judgment interest and costs. In addition, this court denied the Spectors' request for a set-off of allegedly unpaid compensation, holding that his partners were not obligated "to write checks to him while they were down over $470,000." These decisions were affirmed on direct appeal.[16] The Spectors never paid this judgment.

Pertinent to this case, on November 24, 2012, Chick Row sent to Jack and Roslyn Spector, separately by first class and certified mail, a proposal to accept collateral under Section 9-620 of the Maryland Uniform Commercial Code.[17] The proposal was contained in a letter addressed to Jack and Roslyn Spector at their home address in Potomac, Maryland. This was, and remains, the principal residence of the Spectors.

The top of the letter states in all capital letters: "PROPOSAL TO ACCEPT COLLATERAL IN FULL SATISFACTION OF THE OBLIGATION IT SECURES." The reference line of the letter states: "Loan in the original maximum principal amount of $350,000 made October 30, 2007 by Congressional Bank to Jack E. Spector and Roslyn K. Spector, transferred on March 22, 2012 to Chick Row Ventures, LLC ('Chick Row') by Congressional Bank (as amended, the 'Loan')." The letter went on to state that

[16] *Spector v. Realty Capital Company II, L.L.C.*, No. 2178 (September Term, 2013) (December 2, 2015).

[17] Plaintiffs' Trial Exhibit 12.

the Spectors' obligations under the "Loan is secured by the collateral described on UCC Financing Statements recorded in the financing records of the Maryland State Department of Assessments and Taxation as File No. 181323947 and File No. 181375479 (the 'Collateral')."

The letter reiterates that: "*Chick Row proposes to accept the Collateral in full satisfaction of your obligations under the Loan. This proposal is made pursuant to Section 9-620 of the Commercial Law Article of the Annotated Code of Maryland.*"[18]

Critically, Roslyn Spector admitted that she received the strict foreclosure notice sent to her by first class mail and gave a copy of it to the attorney who represented both her and Jack Spector in the civil fraud case.[19] Jack Spector, who was incarcerated at the time, testified at trial that he never receive the notice, and was not told about it by his wife or his lawyer. The court disbelieves this testimony and finds that Jack Spector knew of the strict foreclosure proposal during the twenty day window. The court finds that despite knowing of Chick Row's proposal to accept collateral in full satisfaction of their loan obligations, neither Jack nor Roslyn Spector ever responded to the proposal.

On December 20, 2012, Chick Row filed a transfer statement under Section 9-619 of the Maryland Uniform Commercial Code.[20] The transfer statement gave notice to the world that on December 15, 2012, Chick Row had accepted the collateral, originally pledged by the Spectors to Congressional Bank, under Section 9-622 of the Maryland

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[18] Emphasis added.

[19] Defendants' Trial Exhibit 5. The court finds that a copy of the strict foreclosure sent by Chick Row to Roslyn Spector was found in the files of plaintiffs' counsel and produced to the defendants during discovery in this case.

[20] Plaintiffs Trial Exhibit 21.

Uniform Commercial Code. In other words, Chick Row publically disclosed that it had foreclosed on all of the Spectors' rights and title in interest in RCC II under Section 9-620 of the Commercial Law Article.[21]

Conclusions of Law

Strict Foreclosure

Under Section 9-620 of the Commercial Law Article, a secured party may accept a debtor's collateral in full satisfaction of the obligation it secures if the secured party "[s]ends to the debtor after default a proposal that is unconditional . . . to accept collateral in full satisfaction of the obligation it secures; and . . . . [d]oes not receive a notification of objection authenticated by the debtor within 20 days after the proposal is sent."[22] This process is commonly known under commercial law as strict foreclosure. It is "a procedure by which the secured party acquires the debtor's interest in the collateral without the need for a sale or other disposition."[23] This provision of the Commercial Law Article "reflects the belief that strict foreclosure should be encouraged and often will produce better results than a disposition for all concerned."[24]

Counsel have not brought to the court's attention any reported decisions by Maryland's appellate courts that have interpreted the current strict foreclosure section of

[21] The court credits Liffman's trial testimony that RCC II did not make, and economically was not in a position to make, distributions in 2016 or 2015, or earlier years.

[22] MD. COMM. LAW ART. § 9-620(c)(2).

[23] *Id.* at Comment 2.

[24] *Id.*

the Commercial Law Article.[25] As a consequence, the court will be guided by the plain language of the statute, the Official Comments to Maryland's version of the Uniform Commercial Code,[26] and decisions from other jurisdictions.

The plaintiffs first contend that Chick Row's proposal was defective because it was not an unconditional proposal to accept collateral in full satisfaction of the debt. In support of this thesis, they point to language immediately before the signature line of the November 24, 2012, letter which says: "Nothing contained herein shall be deemed to be a waiver of any of Chick Row's rights and remedies at law or in equity, all of which Chick Row expressly reserves." According to the plaintiffs, this language made the November 2012 proposal "not unconditional." The court disagrees.

It is true that none of the model Uniform Commercial Code forms contain language similar to the ultimate sentence in Chick Row's proposal. And it may be that the "better practice" is to not include such language in a strict foreclosure notice. However, a party in the Spectors' position could not reasonably interpret Chick Row's proposal, which twice expressly stated that it would accept the collateral in full satisfaction of the debt, to be subject to any conditions. In other words, the proposal was plainly unconditional. The Spectors have not cited any pertinent cases that suggest a contrary result. Based on the evidence presented at trial, the court finds that the Spectors knew full well what Chick Row proposed—the release of their debt in full in

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[25] *Harris v. Bower*, 266 Md. 579, 587-88 (1972), discusses the predecessor statute (§9-505(2)), but only in passing. In that case, the Court of Appeals held that the secured party did not intend to retain the collateral in satisfaction of the debt but, instead, could pursue a deficiency judgment. The holding of *Harris*, which centers on the commercial reasonableness of the sale of the collateral, is discussed in *Ruden v. Citizens Bank & Trust Co.*, 99 Md. App. 605, 628-633 (1994).

[26] *See* Lisa Sparks, *The Regression of "Good Faith" In Maryland Commercial Law*, 47 U. BALT. L.F. 17 (2016) (discussing the Maryland Uniform Commercial Code since its adoption in 1963).

exchange for their collateral. They were neither confused nor confounded by the last sentence of the proposal.[27] They elected, simply, to do nothing despite the obvious import of the proposal and their own deliberate inaction.[28]

The plaintiffs' next contention is that Chick Row did not act in good faith in sending the strict foreclosure notice because it was not sent to Jack Spector at his place of incarceration, the Montgomery County Correctional Facility in Boyds, Maryland. The court disagrees. First, under the loan documents, it was Jack Spector's obligation to keep the lender advised of his "residence," not the other way around. Second, the court finds that Jack Spector had actual notice of the proposal in sufficient time to lodge an objection, had he wanted to do so. Roslyn Spector also had actual notice, but similarly took no action.[29] They cannot now be heard to complain that they did not receive proper or adequate notice.

The Spectors' final complaint is that Chick Row did not act in good faith because the value of the collateral far exceeded the value of the debt. The legal basis for this contention rests on Comment 11 to that section which discusses the role of good faith in strict foreclosure proceedings. The Comment first notes that Section 1-304 imposes an

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[27] A reasonable interpretation of this last sentence is that Chick Row was making sure that, if the Spectors objected to its retention of the collateral, it was in no worse position than before it sent the letter.

[28] The Spectors also complain that Chick Row has failed to return to them the original note. Even assuming that Chick Row did not comply with Section 12-1024(b) of the Commercial Law Article in this regard, the court fails to see analytically how such failure would invalidate an otherwise proper strict foreclosure under Section 9-620.

[29] As noted earlier, the attorney in this civil case for both Spectors got a copy of the proposal from Roslyn Spector, shortly after she received it by regular mail from Chick Row. The proposals that were sent to the Spectors by certified mail were returned by the postal service as "unclaimed."

obligation of good faith in every transaction,[30] and that this obligation cannot be disclaimed by contract.[31] The Comment goes on to state that "a proposal made under this section in bad faith would not be effective."[32] The Comment continues: "For example, a secured party's proposal to accept marketable securities worth $1,000 in full satisfaction of indebtedness in the amount of $100, *made in the hopes that the debtor might inadvertently fail to object, would be made in bad faith.*"[33]

There are several problems with this argument in this case. First, the court already has found that Chick Row made the strict foreclosure proposal in subjective good faith. This is not a case in which the secured party hoped that the debtors might inadvertently fail to object. Notice was sent to the debtors separately, and by two forms of delivery. The debtors and their attorney all actually received notice, yet failed to act.

Second, the court also found that the proposal was made for the express purpose of protecting RCC II and its venture partners from harm caused by the Spectors pledging RCC II's collateral without the permission or authority to do so. Had Jack and Roslyn Spector not pledged property that was not theirs to pledge in the first place, there would have been no occasion for Chick Row to have bought the loan to prevent the assets of RCC II from being forfeited to Congressional Bank.

Third, the plaintiffs' windfall argument lacks substantive merit. A high collateral to debt ratio, without more, has not been held to be a sufficient basis to invalidate a strict

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[30] "Every contract or duty within the Maryland Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement." Md. Comm. Law Art. § 1-304.

[31] Md. Comm. Law Art. § 1-302(b).

[32] Md. Comm. Law Art. § 1-9-620, Comment 11.

[33] Emphasis added.

foreclosure by those courts that have considered the question.[34] In this case, the court is not persuaded that Chick Row acted in bad faith simply because the value of the collateral exceeded the value of the debt. The plaintiffs have paid nothing towards the debt since at least December 2011. The plaintiff paid nothing to Chick Row after it acquired the debt from Congressional. In this court's view, it rings hollow for the Spectors to cry foul when they are the ones who defaulted on the loan, they are the ones who pledged collateral that did not belong to them, and they have made no efforts to address the debt in any constructive way.

Finally, the plaintiffs have failed to persuade the court as to the fair value or fair market value of the collateral that was forfeited under Section 9-620. It is true that a plaintiff needs to prove harm or damages only to a reasonable certainty.[35] But the court is not persuaded in this case that the plaintiffs have established to any reasonable degree the value of the collateral which they lost. And, even if the debt-to-collateral ratio in this case were close to 9:1 or 10:1, the court does not find in any event that Chick Row acted in bad faith within the meaning of Comment 11 to Section 9-620.

Breach of Fiduciary Duty

The plaintiffs contend that Liffman and Chick Row breached a duty owed to them by taking the assignment of the Note from Congressional Bank and, thereafter, by attempting to use the strict foreclosure provisions of the Maryland Uniform Commercial Code. The court disagrees. The fundamental problem with this argument is that when

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[34] *See, e.g., McDonald v. Yarchenko*, 2013 WL 3809512 (D. Ore. 2013); *Blakely v. Tri-County Financial Group*, 2010 WL 1286856 (E.D. Ill. 2010); *Eddy v. Glen Devore Personal Trust*, 131 Wash. App. 1015 (2006).

[35] *See Sloan v. Stanley G. House & Assoc.*, 311 Md. 36, 41 (1987).

Chick Row took the assignment, and then sent the plaintiffs the strict foreclosure notice, the "plaintiffs stood in no different position than if the bank had kept the note itself and had sent plaintiffs a [Section 9-620] notice itself."[36] Congressional Bank could have sold the note to any third party, not just Chick Row, and that third party could have acted exactly as Chick Row did in this case. The Spectors are not legally entitled to have the bank sell the note to a "friendly" buyer, as Jack Spector suggested in his trial testimony. The lending documents are clear that Congressional Bank had the right to assign the Note. Jack Spector admitted as much in his e-mails to the bank. "Just as the bank itself, had it not sold the [Spector Note], could have proposed to retain the collateral on default, so could any buyer or assignee of [Congressional Bank] have done so. That the assignee happened to be [Chick Row] and not some other party did not affect plaintiffs' rights and obligations in the event that the assignee gave plaintiffs notice under [Section 9-620]."[37]

Under Maryland law, the relationship between a bank and its customer is ordinarily contractual in nature, and "is not fiduciary in nature."[38] Absent "special circumstances," which are not present in this case, the Court of Appeals has been disinclined to "transmute the contractual relationship between Borrowers and [Lenders] into a fiduciary relationship."[39] When Chick Row purchased the Note it assumed the status of a creditor, and stood in the same relation to the Spectors as did Congressional Bank. Chick Row's rights and obligations towards the Spectors with respect to the loan

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[36] *Harris v. Key Bank National Association*, 193 F. Supp. 2d 707, 714 (W.D.N.Y. 2002).

[37] *Id.* at 715.

[38] *Polek v. J.P. Morgan Chase Bank, N.A.*, 424 Md. 333, 366 (2012).

[39] *Windesheim v. Larocca*, 443 Md. 312, 339 (2015).

obligation, just like those of Congressional Bank, were defined by the lending documents and the Maryland Uniform Commercial Code. Like any creditor, Chick Row was entitled to consider its own interests and, because the Spectors' loan clearly was in default, to move against the collateral.[40] In short, the parties' rights and obligations vis-à-vis the loan, and the collateral securing the loan, were contractual in nature and not based on some free-floating notion of fiduciary duty.[41] The court concludes, based on the evidence presented at trial, that the plaintiffs have not proven any breach of fiduciary duty.

The Remaining Claims for Relief

The plaintiffs' Second Amended Complaint alleges a number of other claims for relief, which largely grow out of the facts discussed above. They can be disposed of without an extended discussion.

"Conversion is an intentional tort, consisting of two elements, a physical act combined with a certain state of mind."[42] In light of the court's ruling on strict foreclosure, the claim for conversion necessarily fails for want of proof on both elements. The plaintiffs have failed to prove any fraud, constructive or otherwise, with respect to either RCCAMC or RCC II, by any degree of evidence, much less evidence that was clear and convincing.[43] As a consequence, those claims for relief are denied.

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[40] *Layne v. Bank One Kentucky, N.A.*, 395 F.3d 271, 281-82 (6th Cir. 2005).

[41] *Kann v. Kann*, 344 Md. 689, 713 (1997).

[42] *Darcars Motors of Silver Spring, Inc. v. Borzym*, 379 Md. 249, 261 (2004).

[43] *Hoffman v. Stamper*, 385 Md. 1 (2005).

Similarly, there has been no proof of any underlying tortious act by any of the defendants. As the Court of Appeals has noted, a "[c]onspiracy is not a separate tort capable of independently sustaining an award of damages in the absence of other tortious injury to the plaintiff.[44] As a consequence, the plaintiffs' civil conspiracy claims fail for lack of proof.

Finally, the plaintiffs claim that Liffman breached the RCCAMC Operating Agreement by effectively dissolving the company and not paying distributions to the Spectors. The court credits Liffman's testimony as to the reasons why RCCAMC has ceased to function, and why no distributions from the entity either have been made or are due and owing.

Conclusion

The plaintiffs requests for relief are denied and judgment shall be entered in favor of the defendants. Counsel shall submit a proposed form of declaratory judgment, within ten (10) days. It is so ordered this 29th day of March 2017.

Ronald B. Rubin, Judge

[44] *Alleco Inc. v. Harry & Jeanette Weinberg Foundation, Inc.*, 340 Md. 176, 189 (1995).