IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MICHAEL ABDELNOUR	)	**CASE NO. CV 10 740639**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	**JOURNAL ENTRY**
	)	
THOMAS B. McGOWAN, IV, *et al.*	)	
	)	
Defendants.	)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

On November 4, 2010, Michael Abdelnour filed his complaint asserting causes of action for an accounting, breach of fiduciary duty, breach of contract, and declaratory judgment. The defendants counterclaimed for unjust enrichment and fraud.

Before trial, the complaint against defendant Thomas B. McGowan, IV was dismissed on motion and the counterclaim for fraud was voluntarily dismissed. A bench trial began on September 22, 2011. During trial, the parties informed the court that the claim for an accounting had been settled, leaving for decision the plaintiff's complaint against defendants IDC Falls Pointe, LLC and Ironwood Development Company, LLC and the counterclaim for unjust enrichment.

Trial ended on October 3, 2011, and this entry follows.

FINDINGS OF FACT

Michael Abdelnour formed Fallspointe Commons, LLC in 2005. He and Steve Sokol, who is not a party or witness in this lawsuit, were its two members, each with a 50% interest. The limited liability company was formed to build and lease a three-story office building at

10833 Pearl Road in Strongsville. Upon its formation, Fallspointe Commons, LLC had a single asset: the land at 10833 Pearl Road. The land was acquired by Fallspointe from Abdelnour, who bought it with borrowed money in contemplation of the project.

To construct the building, Fallspointe entered into a December 7, 2005, contract with general contractor B.A.C.M., Inc. The essence of the contract is that Fallspointe would pay $1,312,562 for the building and B.A.C.M. would substantially complete construction within 180 days. To pay for the land and building, Fallspointe obtained a $2,000,000 construction loan from First Place Bank.

The construction loan was secured by a mortgage on the property and by personal guarantees from Abdelnour and Sokol.

Because of a delay in getting the loan, the project fell behind schedule almost from the start. Soon, Sokol was approaching bankruptcy and he withdrew from the limited liability company, leaving Abdelnour as the sole member, although Sokol's personal guaranty remained in effect. By the latter part of 2006, Abdelnour was casting about for another partner and his loan officer at First Place Bank, Eric Diamond, mentioned the project to Alan Ritchie, the chief executive officer of defendant Ironwood Development Company, LLC.

Ironwood Development Company was a two-member limited liability company. Defendant Thomas B. McGowan, IV held a 75% membership interest[1] and Alan Ritchie owned the remaining 25%.[2] (Since then, Ritchie's interest has been transferred to Davis Realty Investments, LLC, owned by Brett Davis, who succeeded Ritchie at Ironwood.) In investigating whether to become involved in the Falls Pointe project, Ritchie learned that Fallspointe Commons, LLC was in what Ritchie considered a technical default on the

[1] Through his solely-owned LLC, Raptor Holdings.
[2] Through his separate solely-owned LLC.

construction loan (although the bank had not explicitly declared an event of default, it had stopped releasing funds under the loan) and that the general contractor and sub-contractors were asserting mechanics' liens totaling about $356,000. Nevertheless, Ironwood decided to undertake partnership in the project. To accomplish that, IDC Falls Pointe, LLC was created.

IDC Falls Pointe was a new limited liability company formed January 1, 2007.[3] It was owned 75% by Ironwood and 25% by Abdelnour, and Ironwood was designated as the managing member. For Abdelnour's part of the transaction, Fallspointe Commons, LLC deeded the property to IDC Falls Pointe, LLC. For their part of the transaction, Ironwood's members each gave $1,000,000 personal guarantees on the construction loan. It was those additional guarantees that caused First Place Bank to resume funding the construction. For additional financing, the new limited liability company obtained a $200,000 line of credit from First Place Bank that was secured by another piece of real estate owned by Nour Properties, LLC (a company solely owned by Abdelnour) and by guarantees of Ritchie, Abdelnour, and IDC Falls Pointe, LLC individually.

Although, as a practical matter, IDC Falls Pointe, LLC took the property subject to the mortgage given by Fallspointe Commons, LLC to First Place Bank and the mechanics' liens incurred on Fallspointe Commons, LLC's obligations, McGowan and Ritchie both testified that IDC Falls Pointe, LLC did not assume Fallspointe Commons, LLC's liabilities. In particular, IDC Falls Pointe, LLC did not assume any of Fallspointe Commons, LLC's contractual obligations to B.A.C.M. or any of the other construction contractors or sub-contractors. Abdelnour disagrees and testified that it was understood that the new limited liability company was responsible for any unpaid bills.

The operating agreement includes the following specific provisions:

[3] The operating agreement was not executed until later, but all parties agree it was effective January 1, 2007.

OPERATING AGREEMENT

OF

IDC FALLS POINTE, LLC

THIS OPERATING AGREEMENT ("Agreement") is entered into as of the 1st day of January, 2007, by and between **IRONWOOD DEVELOPMENT COMPANY, LLC**, an Ohio limited liability company ("Iron") and **MICHAEL ABDELNOUR** ("Abdelnour") . . .

***

2.2 Additional Capital Contributions. No Member shall be liable to make an additional contribution to capital, unless agreed to by the Members.

2.3 Loans to Company. If requested by the Manager, any Member may make or cause to be made a loan to the Company which loan shall bear interest either at an agreed rate or at a rate which is one percent (1%) above the Base Lending Rate . . .

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4.1 Capital Accounts. A "Capital Account" shall be maintained for each Member . . .

***

6.1 Manager.

(a) . . . The Members hereby appoint Ironwood Development

***

6.2 Authority of Manager.

(a) . . ., the Manager shall have all power and authority to manage, and direct the management of, the business and affairs of the Company. Approval by or action taken by the Manager in accordance with this Agreement shall constitute approval or action by the Company and shall be binding on each Member.

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6.3 Powers of the Manager.

(a) The Manager shall have the power to conduct, manage, and control both the ordinary business of the Company and extraordinary transactions including, without limitation, the power to:

(i) execute purchase agreements, leases, loan documents, guarantees, operating agreements and other contracts or instruments for or on behalf of the Company consistent with its purpose;

***

(v) pay any and all Company Expenses;

***

6.4 Standard of Care.

***

(b) Neither any Member . . ., nor any Manager . . ., shall be liable for damages to the Company or any Member with respect to claims relating to his conduct . . ., except, . . . to the extent that it is proved by clear and convincing evidence (i) that his or its conduct was not taken (A) in good faith, (B) in a manner reasonably believed to be in or not opposed to the best interests of the Company, or (C) with the care that an ordinarily prudent person in a like position would use under similar circumstances; . . .

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6.6 Limitations on the Rights of the Members. Subject to the provisions of this Agreement . . ., no Member shall have the right to take any part whatsoever in the management and control of the ordinary business of the Company, . . .

***

11.3 Entire Agreement. This Agreement contains the entire understanding between the parties and supersedes any prior understanding and agreements between them respecting the within subject matter. There are no agreements, arrangements or understandings, oral or written, between and among the parties hereto relating to the subject matter of this Agreement which are not set forth or expressly referred to herein.

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Once IDC Falls Pointe, LLC came into existence with Ironwood as its managing member, its primary goals were to resume and complete construction and to remove the mechanics' liens. These ends were connected: to resume construction, it was necessary to persuade some of the liening contractors to come back to work despite not having been paid for prior work, but in order to pay the contractors, funds on the construction loan were needed and would only be released if the liens were removed or additional security given. At this point, all the liened amounts were obligations of Fallspointe Commons, LLC and any other amounts owed for work done before January 1, 2007, were also Fallspointe Commons, LLC's responsibility.

Although new contractors could have been retained to complete construction, it was more economical to use, where possible, the contractors who had already worked on the project since they were most familiar with the project.

Accordingly, Abdelnour and Ritchie had discussions about what old bills should be paid to induce contractors to continue working and Ritchie began efforts to reduce or eliminate the liens by negotiation. The liens were ultimately settled, but not until 2010. In the meantime, Ritchie, with Abdelnour's input, tried to decide which of Fallspointe Commons, LLC's sub-contractors to placate and which to ignore. Toward that end, on April 4, 2007, Ritchie authorized a draw request to First Place Bank from the construction loan to cover, among others, the following expenses:

Total Comfort HVAC	$ 6,000
Jakobsky Plumbing	$ 7,100
Meyers Fire Protection	$ 6,560
ARJ Roofing	$10,000
Total	$29,660

All of these expenses represent payment to contractors for work done in 2006 for Fallspointe Commons, LLC.

The evidence also showed that in late 2006 and early 2007, Abdelnour paid those four bills (shown in bold) and others as follows:

Date Paid	Amount	Contractor	Description	Exhibit Reference
12/5/2006	$3,005.06	Chicago Title	Building permit	
12/29/2006	$10,000	RFC	Owner's rep. fee Dec. 2007	78-8, 78-12/ K
2/6/2007	$54,414.76	North Coast Paving	Asphalt lot 12/12/2006	78-7, 78-11, 78-16/ L
2/6/2007	$55,000	*Maintenance*[4] *Unlimited*	Site clearing; Excavation	78-3
2/6/2007	$7,100	**Jakobsky Plumbing**		78-4
2/6/2007	$6,560	**Meyers Fire Protection**	Sprinkler installation 11/20/2006	78-6, 78-15/ M
2/6/2007	$6,000	**Total Comfort HVAC**	Curb installation 11/19/2006	78-5, 78-19/ N
2/7/2007	$2,780.17	Cuyahoga County Treasurer	Taxes First half 2006	78-2, 78-10, 78-13/ P
2/7/2007	$1,355.85	Thomas Brick[5] Company	1,386 bricks 11/24/2006	78-1, 78-14/ O
2/27/2007	$1,510.55	Natural gas bill		
2/27/2007	$99	Sheriff's service	Notice to B.A.C.M. to commence suit	
3/2/2007	$20,000	Chicago Title	Tenant improvement to RFC	78-9/ Q

[4] Maintenance Unlimited is a contractor owed money for work done for Fallspointe Commons, LLC that IDC Falls Pointe, LLC hoped would do some future work on the property.
[5] Thomas Brick Company was one of the liening contractors.

1/2007	$10,000	**Andy Russo/ARJ**	
3/1/2007	$1,800	84 Lumber	Windows
2/29/2007	$60	Cuyahoga County Recorder	
(?)	$656	Windows	
(?)	$1,506.25	David A. Fegen, Esq.	Legal work for Falls Pointe, LLC
Total:	$181,847.58		

It is these payments that are the subject of the plaintiff's declaratory judgment cause of action. Abdelnour claims that the money he used to pay these expenses was money loaned to IDC Falls Pointe, LLC and he is asking the court to declare that his payments were loans and that the limited liability company is obligated to repay Abdelnour, with interest, as member loans under Section 2.3 of the operating agreement.

Around the same time – late winter and into the spring – the new limited liability company was incurring other unanticipated expenses that had to be covered by the members because the original two million dollar loan was proving insufficient and the new $200,000 line of credit was still being negotiated. For example, through March 26, 2007, Ironwood made loans to IDC Falls Pointe for ongoing expenses in the total amount of $66,095. Written evidence that these payments were loans from Ironwood or related entities to IDC Falls Pointe, LLC is an open-ended promissory note by IDC Falls Pointe, LLC in favor of Ironwood and McGowan and Company, Inc. (a corporation controlled by defendant McGowan).

Abdelnour testified that although the promissory note was executed effective January 26, 2007, it was never produced to him until just a few days before trial. Moreover, it was signed only by McGowan as a representative of both payees and the maker. But even if the

promissory note is ignored as not credible, the evidence doesn't support a finding that Abdelnour's and Ironwood's payments were both made without written loan agreements and should both be treated by IDC Falls Pointe as loans to be repaid because Ironwood's contributions went to pay ongoing obligations of IDC Falls Pointe and Abdelnour's payments were made for the past obligations of Fallspointe Commons, LLC.

The $200,000 line of credit was eventually obtained on April 13, 2007. It is around then that Abdelnour claims Ironwood first breached its fiduciary duty to him as a co-member. On April 16, Ritchie, as the manager of IDC Falls Pointe, LLC, repaid Ironwood for its contributions to date with a check for $66,095 from the line of credit proceeds. No payment was made to Abdelnour for the bills he had personally paid. Additionally, Abdelnour claims that Ironwood deliberately failed to notify him that its payments were being booked as loans and his were not.

Ritchie left IDC Falls Pointe and Ironwood in mid-2007 and was replaced by Brett Davis. On August 29, 2007, Davis sent an email to Abdelnour listing the paid equity of the partners to that point as $116,106.85 from Ironwood[6] and $180,020.97 from Abdelnour. Abdelnour points to this as an acknowledgment that his payments were loans to IDC Falls Pointe, LLC just like Ironwood's but, in doing so, Abdelnour ignores the parenthetical notation "Mike to confirm this amount" next to the figure shown as his equity. Davis testified that he included $180,020.97 as Abdelnour's "equity" in the email only because Abdelnour had claimed it but not because Davis agreed that the claim was accurate. Not only that, but according to Davis, the real purpose of the email was to demonstrate how much capital the members were going to have to contribute to complete the project. The next written communication in evidence supports Davis's position.

[6] Including amounts paid by IDC Brunswick, another limited liability company owned by Ironwood.

On January 11, 2008, Davis sent Abdelnour an email attaching IDC Falls Pointe LLC's financial statements. The balance sheet as of November 30, 2007, shows current liabilities to Ironwood and IDC Brunswick of $206,225.48. By contrast, there are no liabilities due to Abdelnour. Moreover, the total of all capital contributions is listed as zero. If Davis, for IDC Falls Pointe, LLC, regarded Abdelnour's payment as an obligation either loans or capital contributions to be repaid, they would have been included on the balance sheet. Yet there is no evidence that Abdelnour protested the absence of his claimed contributions from the balance sheet.

Shortly after the balance sheet email, on January 30, 2008, Davis wrote to Abdelnour demanding a capital contribution of $131,673.42 and threatening to dilute Abdelnour's ownership interest to zero if no capital was contributed. That letter is important for two reasons. First, it reiterates that Ironwood deemed Abdelnour's capital account as zero and gives the reason as follows:

> Since the inception of the Company, IDC has funded $255,501.74 into the Company. You provided us with a list of expenditures (included in Attachment 2) totaling $210,080.97. These expenditures were made prior to formation of IDC Falls Pointe (1/1/07), were not contractual obligations of IDC Falls Pointe, LLC and/or were not authorized by IDC Falls Pointe nor its Manager Ironwood Development. As a result, your capital account balance is currently $0.00.

Second, Abdelnour cites the correspondence as further evidence of Ironwood's breach of fiduciary duty by demanding that he contribute capital or face dilution of his ownership interest even though the operating agreement, at Section 2.2, did not allow for dilution of ownership.

Indeed, Ritchie testified that Abdelnour negotiated the non-dilution provision, and Ritchie and Davis agreed that such a provision in a li
agreement is extremely unusual: so unusual that Davis was oblivious to its inclusion in this contract until it was later pointed out to him. But Ritchie also testified that, in exchange for the

non-dilution provision, Ironwood and Abdelnour agreed that each member would begin with a capital balance of zero and that Abdelnour would remain liable, through Fallspointe Commons, LLC, for all expenses incurred before 2007.

So, although Abdelnour relies on the non-dilution clause to support his claim that Ironwood breached a fiduciary duty owed to him by demanding a capital contribution, that same provision's favorability to him, as a minority member, is evidence that defeats proof of his loan claim.

Abdelnour never replied to the late January capital call. Davis, still unaware of the non-dilution provision, then wrote to the plaintiff on February 22, 2008, that "in light of your diluted ownership in IDC Falls Pointe, LLC," Ironwood would be willing to remove Abdelnour as a guarantor on the loan and to release the collateral he pledged on the line of credit. This communication, besides being another piece of evidence to support Abdelnour's breach of fiduciary duty claim, demonstrates Ironwood's inability to get Abdelnour to contribute to cover obligations of IDC Falls Pointe, LLC that were in excess of the available credit.

That inability persisted. Ironwood continued to put money into IDC Falls Pointe to cover operating expenses while Abdelnour contributed nothing, even as Davis again (incorrectly) notified him, on May 6, 2008, that his ownership had been diluted to zero. Around the same time, Ironwood stopped making payments on the line of credit secured by , a fact that Abdelnour regards as more evidence that Ironwood was trying to squeeze him out in breach of its fiduciary duty. Of course, Davis sees it differently: since the company had an operating deficit, he would have kept making payments on the line of credit if the plaintiff had paid in capital.

By the summer of 2008, the members' relationship was strained to the point that they began to consider a settlement that would entail Abdelnour transferring his membership interest to Ironwood in exchange for the approximately $180,000 he regarded as having contributed to the company. Until then, according to Davis, Abdelnour had "never said the word loan" but instead referred to his payments as equity.

Eventually, at Abdelnour's request, McGowan communicated directly with him about settlement and a resolution was reached. The parties decided that Abdelnour would transfer his ownership interest in IDC Falls Pointe to Ironwood in exchange for: $90,000; a release of his personal guarantees on the construction loan and line of credit; and a release of the collateral he used to secure the line of credit. However, the deal would be void if the releases were not obtained within 45 days. They were not and Abdelnour ultimately rescinded the agreement and returned a $90,000 check uncashed, even though Ironwood had procured a release of Abdelnour's personal guaranty on the construction loan at the cost of an additional $1,000,000 in personal guarantees by McGowan and Davis.

The pre-settlement status quo continued into 2010 with Ironwood still managing IDC Falls Pointe and contributing money as needed to cover operating deficits, and Abdelnour focused on his other properties and declining renewed requests for capital contributions while still trying to get credit for the payments he made to cover Fallspointe Commons, LLC's expenses. McGowan testified that the first time Abdelnour ever characterized his payments as loans was in a June 7, 2010, email from Abdelnour's counsel to Ironwood's attorney, over three years after the supposed loan was made and after having received numerous financial statements and K-

loans or capital contributions.

Just before this lawsuit was filed, McGowan formed Fairview Acquisitions, LLC to buy for $70,000 from First Place Bank the note securing the $200,000 line of credit. Adelnour is still personally liable on the line of credit and his real estate still stands as security for the line. Because McGowan, in the form of Fairview Acquisitions, is in control of whether, when, and how to collect on that debt, Abdelnour offers the purchase of the line of credit as additional evidence that Ironwood breached its fiduciary duty to him.

CONCLUSIONS OF LAW

The Plaintiff's Complaint

1. Breach of Fiduciary Duty.

A fiduciary relationship has been defined as a relationship in which special confidence and trust is reposed in the integrity and fidelity of another, and there is a resulting position of superiority or influence acquired by virtue of this special trust.[7] In Ohio, a partnership creates a fiduciary relationship and the partners owe a fiduciary duty to each other.[8] Because the law of partnerships is similar to that of close corporations, the Ohio Supreme Court has held that controlling shareholders in a close corporation owe a fiduciary duty to minority shareholders.[9] The same reasoning applies in the context of a limited liability company, a relationship that closely resembles a partnership.[10]

The duty owed in a fiduciary relationship is to exercise the utmost good faith and honesty in all dealings and transactions related to the company.[11] A claim for breach of a fiduciary duty is essentially a claim for negligence that involves a higher standard of care.[12] To

[7] *Ed Schery & Sons, Inc. v. Soc. Natl. Bank* (1996), 75 Ohio St.3d 433, 442.
[8] *Arpad. v. First MSP Corp.* (1994), 68 Ohio St.3d 453, at syllabus 2.
[9] *Crosby v. Beam* (1989), 47 Ohio St.3d 105, 108.
[10] See, *e.g.*, *Fornshell v. Roetzel & Andress*, 2009-Ohio-2728, Cuyahoga Cty. App. Nos. 92132 & 92161, ¶51.
[11] *Blair v. McDonagh*, 177 Ohio App.3d 262, 2008-Ohio-3698, ¶16.
[12] *McConnell v. Hunt Sports Ent.* (1999), 132 Ohio App.3d 657, 687.

recover on a claim for breach of fiduciary duty, a plaintiff must prove the existence of the duty, its breach, and damages proximately caused by the breach.[13] Since a breach of fiduciary duty is akin to an intentional tort, proof by clear and convincing evidence is required.

In closing argument, Abdelnour summarized the various conduct by Ritchie, Davis, and McGowan on behalf of the managing member, Ironwood, as all intended to "squeeze him out." Yet everyone agrees that he was not squeezed out and, to this day, still owns a 25% membership interest in IDC Falls Pointe, LLC. Accordingly, and putting aside the question of whether the conduct complained about amounts to a breach of fiduciary duty, Abdelnour did not prove any damages caused by a breach of fiduciary duty. As for the assertion that his damages for breach of fiduciary duty include the approximately $181,000 he spent, the evidence shows that almost all of that expense was incurred before the end of February, 2007, well before Ironwood began to "squeeze out" Abdelnour.

2. Declaratory Judgment.

Abdelnour has asked this court to declare that the $181,847.58 he spent is a loan to IDC Falls Pointe, LLC that the company is obligated to repay. The plaintiff's payments are alleged to be loans made under Section 2.3 of the operating agreement. That section provides that a member may loan the company money "if requested by the manager." As a result, although the plaintiff fashioned this claim as a cause of action for declaratory judgment, in order to receive a judgment, Abdelnour must show that he and IDC Falls Pointe, LLC entered into a loan agreement.

A loan of money to be repaid is a contract and, like any other contract, it cannot exist without a meeting of the minds, express or implied. In this case there is no express contract: Ritchie denied that he ever agreed, for Ironwood, that Abdelnour's payment of old Fallspointe

[13] *Id.*

Commons, LLC obligations would be considered a loan to IDC Falls Pointe, LLC. Moreover, Abdelnour produced no other evidence showing an express loan.

To decide whether an implied loan agreement existed requires taking into account all of the evidence but, in particular, the facts that would tend to suggest that Ironwood, as co-member, and IDC Falls Pointe, LLC as a separate entity would have anything to gain by construing the payments as loans, since they would not be expected to act against their interest by assuming an obligation for no reason.

Abdelnour bought the property with borrowed money and paid back that loan with proceeds from the construction loan, *i.e.* more borrowed money. The property was mortgaged to secure the construction loan. By late December, 2006, the property was additionally encumbered by mechanics' liens. To that point, Abdelnour had not invested a cent of his own money, although the potential for personal liability existed by virtue of his guaranty of the construction loan. Any unpaid bills were obligations of Fallspointe Commons, LLC, not Abdelnour.

IDC Falls Pointe, LLC was then formed. Both members agreed to start out with capital contributions of zero. The limited liability company had one asset – the heavily liened property – purchased from Fallspointe Commons, LLC by way of new personal guarantees from Ritchie and McGowan. By contributing the property to the new limited liability company, Abdelnour incurred no present detriment because the project was destined to fail without a new partner, but he did sacrifice a percentage of possible future profits. But as compensation, he received the benefit of a non-dilution provision that would allow him to never pay anything yet still collect 25% of any profits.

Once the new limited liability company was formed, there was no benefit to it – or, for that matter, to Abdelnour personally – in paying many of the bills incurred by Fallspointe Commons, LLC. The exceptions were payments to contractors whose continued cooperation would make the project's completion more economical and which could be bought by paying them for work done for Fallspointe Commons, LLC. Payments fitting that description include only the total of $29,660 to Total Comfort HVAC, Jakobsky Plumbing, Meyers Fire Protection, and ARJ Roofing. More evidence that these payments would benefit IDC Falls Pointe, LLC is the April, 2007, construction loan draw authorized by Ritchie and admitted into evidence as plaintiff's Exhibit 68. Another benefit to IDC Falls Pointe, LLC is that these contractors waived their liens. All of this evidence supports a conclusion that IDC Falls Pointe, LLC implicitly agreed to assume these obligations.

The only other payment that benefited IDC Falls Pointe, LLC, to the extent that it must have been an implied loan to the company, is the March 2, 2007, check for $20,000 to RFC Contracting.[14] That money covered the cost of a build-out to make the premises usable by the primary tenant Chicago Title. This expenditure was necessary to begin to generate revenue in the form of rent from Chicago Title, so a meeting of the minds between Abdelnour and IDC Falls Pointe, LLC to treat this as a loan to the company can be inferred.

No similar inferences can be drawn for the balance of Abdelnour's payments, especially in the absence of any written agreement that IDC Falls Pointe, LLC was assuming Falls Pointe Commons, LLC's obligations.

[14] Plaintiff's Exhibit 78-

3. Accounting and Breach of Contract.

The claim for an accounting at count one of the complaint has been resolved by stipulation. To the extent that the managing member's obligation to provide an accounting is continuing, then a failure to do so in the future can be litigated in the future.

The claim for breach of contract at count three of the complaint is redundant of the claim for breach of fiduciary duty, so separate findings of fact and conclusions of law on that count are not necessary.

The Defendants' Counterclaim for Unjust Enrichment

To prove a claim of unjust enrichment, a plaintiff must show: that he conferred a benefit on the defendant; that the defendant has knowledge of the benefit; and that the defendant's retention of the benefit would be unjust under the circumstances.

Ironwood and McGowan claim to have conferred a benefit on Abdelnour by procuring First Place Bank's release of Abdelnour's personal guaranty of the construction loan. They claim it would be unjust under the circumstances for Abdelnour to retain that benefit without some form of payment because Abdelnour rescinded the settlement agreement only after the defendants obtained the bank's release. But the evidence shows that the settlement agreement was made effective May 15, 2009.[15] By then, the bank's covenant not to sue Abdelnour was over three months old, having been procured by Ironwood and McGowan on February 1, 2009. By agreeing in May that the settlement would be void if they did not get Abdelnour released from the line of credit within 45 days,[16] Ironwood and McGowan risked having given the February release on the construction loan for nothing. This is exactly what happened, and it is

[15] Defendants' Exhibit I and the check copy attached to defendants' Exhibit DD.
[16]

not unjust to let Ironwood and McGowan bear the burden of their known risk coming to pass, even if the result is a benefit to Abdelnour that he didn't pay for.

JUDGMENT

Consistent with the foregoing findings of fact and conclusions of law outlined above, the court enters judgment as follows:

1. In favor of the defendants on the plaintiff's claim for breach of fiduciary duty;

2. In favor of the defendants on count three of the plaintiff's complaint for breach of contract;

3. That count one of the complaint (for an accounting) be marked as settled and dismissed;

4. In favor of the plaintiff on the defendants' counterclaim for unjust enrichment; and

5. On count four of the complaint (for declaratory judgment) the court finds that the members of IDC Falls Pointe, LLC agreed that payments by Abdelnour totaling $49,660 were loans to IDC Falls Pointe, LLC. The court further finds that by the terms of the loan and the operating agreement, the defendant is obligated to enter on its financial statements as a debt of IDC Falls Pointe, LLC, a loan from Abdelnour in the amount of $49,660, and that interest on the loan (from February 6, 2007 on principal of $29,660, and from March 2, 2007 on the remaining principal of $20,000) is to be booked and paid on the same terms as Ironwood's loans to IDC Falls Pointe, LLC.

The defendants are ordered to pay court costs.

IT IS SO ORDERED:

_____ Date: _____

SERVICE

A copy of this Journal Entry was sent by e mail, this 31st day of January, 2012, to the following:

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