

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

OSSCO PROPERTIES, LTD.)	CASE NO. CV 10 733590
)	
Plaintiff,)	JUDGE JOHN P. O'DONNELL
)	
vs.)	<u>JOURNAL ENTRY</u>
)	
UNITED COMMERCIAL PROPERTY GROUP, LLC.)	
)	
Defendant.)	

John P. O'Donnell, J.:

Plaintiff Ossco Properties, LTD filed this lawsuit on August 5, 2010. The complaint is not couched as a particular cause of action, but it is one for breach of contract because it alleges that the plaintiff loaned money to defendant United Commercial Property Group, LLC that has not been paid back. The case was tried to the court on March 31, 2011, and this entry follows.

Witnesses at trial were: Jerome T. Osborne III, a member of Ossco; Timothy Posar, Ossco's treasurer; and Mark Escaja, the co-managing member of UCPG. Plaintiff's Exhibits 1-12, 14, 15, and 18, and defendant's Exhibits A through E were admitted into evidence.

UCPG is a two-member limited liability company incorporated in 2004 and established by an operating agreement made in 2005. Mark Escaja and Ossco Properties, LTD, are the two members. In turn, Jerome T. Osborne III is the managing member of Ossco. The operating agreement includes the following provisions relevant to this lawsuit:

OPERATING AGREEMENT

RECITALS:

G. **Purpose of Business.** . . ., the Company’s primary purpose shall be to own, hold, develop and operate real property.

I. MEMBERS, CONTRIBUTIONS AND INTERESTS

A. **Initial Members.** ***

Name and Address Contribution Ownership Interest

Mark P. Escaja \$100.00 50%
[Address]

Ossco Properties, LTD \$100.00 50%
Jerome T. Osborne, III
[Address]

G. **Operating Expenses.** . . ., Ossco Properties, LTD shall be obligated to loan up to a maximum of Seven Hundred Fifty Thousand Dollars (\$750,000.00) to the Company. All such loans made by Ossco Properties, LTD shall be repayable by the Company to the Ossco Properties, LTD with interest at the Prime Rate plus One percent (P+1%). Included in Ossco Properties, LTD’s obligation to provide loans to the Company, the Company shall reimburse Mark P. Escaja for the Refundable Deposits advanced pursuant to the Exhibit “B”, . . .

II. ALLOCATIONS OF PROFITS AND LOSSES

B. **Allocation of Net Profits and Net Losses.** The net profit or net loss of the Company for a fiscal year will be allocated among the Members in proportion to their Ownership Interests. . .

III. DISTRIBUTIONS

- C. **Draws.** Mark P. Escaja, or his nominee shall receive a Management Fee each month in the amount of Ten Thousand Dollars (\$10,000.00), payable on the 1st day of each month beginning October 1, 2005. This fee shall be payable for a period of 12 months and may be extended at the discretion of the co-managing members of the Company.
- D. **Future Distributions.** Distributions from the Company shall be made as follows:
- i. First, the payment of all loans from financial institutions or Members.
 - ii. Second, to the Members in accordance with their percentage interest.

IV. ADMINISTRATION OF COMPANY BUSINESS

- A. **Management.** All Members have the right to participate in the management and conduct of the Company's business and shall elect a Managing Member(s). The initial Managing Members shall be Mark P. Escaja and Ossco Properties, LTD by Jerome T. Osborne, III, its Managing Member. . .
- B. **Actions by Members.** Except as otherwise provided in this Agreement, all decisions requiring action of the Members or relating to the business or affairs of the Company will be decided by the affirmative vote or consent of Members holding a majority of the Ownership Interests. . .
- C. **Approval of Other Members Required.** . . ., no Member has authority to do any of the following without the prior written consent or vote of other Members:

- iv. To incur indebtedness by the Company other than in the ordinary course of business;
- v. To authorize a transaction involving an actual or potential conflict of interest between a Member and the Company;

D. **Managing Member(s).** The Managing Member(s) shall be responsible for the day-to-day management of the Company.

XII. MISCELLANEOUS PROVISIONS

A. **Amendment.** The Members may amend or repeal all or part of this agreement by unanimous written agreement. This agreement may not be amended or repealed by oral agreement of the Members.

G. **Governing Law.** This agreement will be governed by the law of the State of Ohio.

Escaja ran UCPG out of an office near his home in Solon. The company had no regular source of revenue. Instead, the company hoped to make money by buying land and then selling it at a profit to a big-box retailer (*e.g.*, Wal-Mart) who would build a store on the property. Escaja's day-to-day work involved traveling to and inspecting real property, meeting with possible sellers and buyers, entertaining clients, investigating title, and other related activities. As he incurred expenses, he would submit the bills to Ossco for payment or reimbursement. Ossco also paid Escaja's \$10,000 per month management fee described in Section III.C of the operating agreement to United Commercial Investment Corporation, a separate limited liability company. Escaja is the only member of UCIC.

For Ossco's part, it operated from an office in Mentor. Ossco would receive Escaja's requests for payment or reimbursement of expenses and took these requests as Escaja's approval that the bills were business expenses of UCPG and not some other entity. Ossco opened a bank account in UCPG's name at Lake National Bank in Mentor. That account was first funded in October, 2005, when Ossco deposited a total of \$77,500. Thereafter, Ossco would deposit

money into the account as needed to cover the expenses incurred by Escaja. These deposits – plus a few deposits made directly by Osborne and a credit for telecommunications service that Ossco obtained to benefit UCPG by forgiving rent owed to Ossco by the telecommunications provider – comprised the loan that Ossco was obligated to make to UCPG under Section I.G of the operating agreement. Ultimately, Ossco loaned UCPG in this fashion a total of \$769,707.17 through March 5, 2010. Ossco calculated the interest owed on that loan, through July 31, 2010, at \$144,095.34.

UCPG concedes that a large portion of the money that Ossco paid into UCPG as a loan was used to cover the ordinary expenses of the company and is owing to Ossco. However, UCPG argues that it is entitled to several deductions from the principal amount for expenses of other entities that were paid by the loan, and that UCPG’s debt should be offset by a debt owed to it by Green Madison, LLC.

Plaintiff’s trial Exhibits 10 and 11 and defendant’s trial Exhibit D are UCPG’s consolidated statements for 2006 through 2008. The statements show all of UCPG’s debits and credits for those years, with a line-by-line listing describing each expense paid, with the far left column showing the property to which each individual expense was attributed. UCPG argues that Ossco paid bills of entities other than UCPG in the total amount of \$116,713.47 as follows:

Shoppes at Diamond Center	\$79,429.07
Toledo	\$21,816.00
UC Mentor	\$14,652.24
UC Ventures	\$ 816.16

UCPG claims that the Shoppes at Diamond Center and Toledo were potential land deals that were being pursued by other Escaja entities so UCPG shouldn’t have paid expenses incurred for these deals. However, Ossco offered credible evidence that it paid these bills upon Escaja’s request. Each bill went through Escaja or his office staff to Ossco for payment. If Escaja

thought they were UCPG expenses at the time they were incurred, it is not credible now to say he was wrong. The same goes for the expenses that Escaja now claims were actually the responsibility of UC Mentor and UC Ventures.

UCPG also argues that Escaja's \$10,000 per month management fee – a total of \$65,000 was paid – was never intended to come from Ossco's loan. But that assertion is at odds with the evidence: the company had no income except Ossco's loan, so where else would the fee come from?

The defendant also disputes a loan of \$43,500 that was used for an interest payment that Ossco made to itself for \$26,700 in December, 2008. The defendant claims that it was not an ordinary operating expense that a co-managing member could make on its own, but was either extraordinary, or involved a conflict of interest, so that unanimous member consent under Section IV.C was necessary before making the payment. Yet the payment was a bookkeeping transaction as much as anything else: the money was paid in and then right out, reducing UCPG's ultimate liability on the loan by the amount of the payment. If Ossco hadn't paid itself the \$26,700 interest, its claim in this case would be greater by that amount, so there is no net change in UCPG's debt.

Finally, UCPG alleges it is entitled to a \$636,903.89 offset of its liability to Ossco because it is owed that amount by Green Madison, LLC. UCPG was a party to a contract with the Green family to buy some land the family owned in Madison. UCPG assigned its interest in that contract to Green Madison, LLC, an entity created for the purpose of acquiring UCPG's interest. In exchange, Green Madison agreed to pay UCPG an assignment fee of \$636,903.89. Green Madison never paid that fee. But Ossco is not a member of Green Madison and, although Osborne may be connected to Green Madison in some fashion, there is no evidence justifying

piercing the corporate veil to make Osborne, much less Ossco, liable for Green Madison's debt. UCPG is not entitled to the setoff.

Having considered all of the evidence and arguments, the court finds in favor of the plaintiff Ossco Properties, LTD., and against the defendant United Commercial Properties Group, LLC, in the principal amount of \$769,707.17, accrued interest of \$144,095.34 through July 31, 2010, with annual interest on the principal amount only at the prime rate plus one per cent beginning July 31, 2010, and court costs.

IT IS SO ORDERED:

JUDGE JOHN P. O'DONNELL

Date: _____

SERVICE

A copy of this Journal Entry was sent by e-mail, this 14th day of April, 2011, to the following:

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JUDGE JOHN P. O'DONNELL