ALF Naman Real Estate Advisors, LLC v Capsag Harbor Mgt., LLC
2012 NY Slip Op 32559(U)
October 3, 2012
Supreme Court, New York County
Docket Number: 100868/12
Judge: Donna M. Mills
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SCANNED ON 10/10/2012
[* 1]

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

PRESENT : DONNA M. MILLS PART 58
Justice

ALF NAMAN REAL ESTATE ADVISORS, LLC,

Petitioner,

-v-

CAPSAG HARBOR MANAGEMENT, LLC,
Respondent.

INDEX NO. 100868/12

MOTION DATE ______

MOTION SEQ. NO. (001), 002

MOTION CAL NO. ______

The following papers, numbered 1 to ____ were read on this motion for ________.

FILED
OCT 10 2012
NEW YORK
COUNTY CLERK'S OFFICE

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1, 2, 5
Answering Affidavits– Exhibits	3, 6, 7
Replying Affidavits	4, 8

CROSS-MOTION: ____ YES ✓ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH THE ATTACHED ORDER.

Dated: 10/3/12

J.S.C.
DONNA M. MILLS, J.S.C.

Check one: ✓ FINAL DISPOSITION ____ NON-FINAL DISPOSITION

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

---X

ALF NAMAN REAL ESTATE ADVISORS, LLC,
Petitioner,

Index No.: 100868/12
DECISION/ORDER

-against-

CAPSAG HARBOR MANAGEMENT, LLC,
Respondent.

---X

ALF NAMAN REAL ESTATE ADVISORS, LLC,
Plaintiff,

Index No.: 100867/12
DECISION/ORDER

-against-

CAPE SAG DEVELOPERS, LLC and
CAPSAG HARBOR MANAGEMENT, LLC,
Defendants.

---X

FILED
OCT 10 2012
NEW YORK
COUNTY CLERKS OFFICE

HON. DONNA MILLS, J.S.C.:

In this related special proceeding and action, both of which were commenced pursuant to the Limited Liability Corporation Law (LLCL) and Business Corporation Law (BCL), co-defendants Cape Sag Developers, LLC (Cape Sag Developers) and Capsag Harbor Management, LLC (Capsag) move, first to dismiss the petition in the special proceeding, and then separately for summary judgment to dismiss the complaint in the action (motion sequence numbers 001 and 002, respectively). For the following reasons, both motions are granted.

BACKGROUND

Plaintiff Alf Naman Real Estate Advisors, LLC (ANRE) and defendant Cape Sag Developers, both of which are New York limited liability companies, were also both the sole members of non party Capnam Sag Management, LLC (Capnam Sag), another New York limited liability company. *See* Petition, ¶¶ 3-4. Cape Sag Developers was the managing member of

Capnam Sag. *Id.* ¶ 5.

Defendants allege that, on July 18, 2011, a merger was effected between Capnam Sag and co-defendant Capsag, with Capsag being the surviving corporate entity. *See* Notice of Motion (motion sequence number 001), Wood Affirmation, ¶ 2. Defendants further allege that Cape Sag Developers is now the managing member of Capsag.[1] *Id.*

ANRE also alleges that Cape Sag Developers was the sole member of Sag Development Partners, LLC, another New York limited liability company, that is the record owner of certain real property located at 15 Church St., Sag Harbor, NY (the property), the development rights to which were the object of the aforementioned merger. *See* Petition, ¶ 7. This is not entirely accurate. The January 5, 2006 operating agreement of an entity called "Cape Sag Group, LLC," indicates that it was incorporated on December 14, 2005 and is the "sole member" of Sag Development Partners, LLC. *See* Notice of Motion (motion sequence number 001), Exhibit C. As will be seen, Cape Sag Developers is the sole managing member of Cape Sag Group, LLC (which was, in turn, the sole managing member of Sag Development Partners, LLC).

The "amended and restated limited liability company agreement of Capnam Sag Management, LLC" (the Capnam Sag agreement) recites that Capnam Sag was originally formed by Cape Sag Developers and ANRE on December 13, 2005, that its original limited liability company agreement was executed on January 5, 2006, and that the amended agreement was executed on November 2, 2007. *See* Notice of Motion (motion sequence number 001), Exhibit B. The Capnam Sag agreement also states, in pertinent part, as follows:

> 2. Purpose and Powers.
>
> (a) The purpose of the Company [i.e., Capnam Sag] is to engage in any lawful business that a limited liability company ... may lawfully do ... including, without limitation acting as the

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[1] Cape Sag Developers is itself managed by a corporate entity called Capsag Harbor Group, Inc., which will be referred to in this decision as CHG, Inc. in order to avoid confusion. *See* Notice of Motion (motion sequence number 001), Wood Affirmation, ¶ 1.

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managing member of Cape Sag Group, LLC, a New York limited liability company which is, itself, the 100% Managing Member of Sag Development Partners, LLC, which is the owner of the land and building in Sag Harbor, New York....

(b) In furtherance of the purpose of the Company ... the Company shall have the power and authority to take in its name any and all actions necessary, useful or appropriate in the Managing Member's [i.e., Cape Sag Developers'] discretion to accomplish its purpose ... .

(c) Notwithstanding the provisions of subparagraph (b), so long as any Loan remains outstanding, the Company ... (ii) has not and will not engage in, seek or consent to any dissolution, winding up, liquidation, consolidation, merger, or asset sale (other than a consolidation or merger in a transaction (a "Controlled Transaction") where the surviving entity in the case of either of the foregoing events is an Affiliate of the Company ... .

Id. The preamble to the Capnam Sag agreement further provided that "[a]ll terms the initial letters of which are capitalized and not otherwise defined ... shall have their respective meanings as set forth in the operating agreement of Cape Sag Group, LLC (the Cape Sag agreement)." *Id.*

The January 5, 2006 Cape Sag agreement included the following relevant definitions:

"Affiliate" means, with respect to any Person, ... (b) any entity which controls (i.e., which owns directly, or indirectly, 25% or more of the beneficial interest in or otherwise has the right or power by any means to control), is owned or controlled by or which is under common ownership or control with a Person...

***

"Person" means an individual, corporation, limited liability corporation, partnership, trust or unincorporated organization, or other entity.

See Notice of Motion (motion sequence number 002), Exhibit L.

On July 15, 2011, Cape Sag Developers sent ANRE a document entitled "notice of action in lieu of meeting - notice of merger - notice of dissenters' rights" that detailed Cape Sag

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Developers' decision to merge Capnam Sag with Capsag, and to maintain Capsag as the surviving entity (the Capsag merger notice). *See* Notice of Motion (motion sequence number 001), Exhibit D. The Capsag merger notice stated that:

> Should you choose to dissent [i.e., from the merger plan], upon the Effective date ... you shall not become or continue to be or hold an interest in [Capnam Sag] or in [Capsag] but shall be entitled to receive in cash from [Capsag] the FMV [fair market value] of your Membership Interests...
>
> [Capsag] has already determined that the FMV of [Capnam Sag] is one thousand dollars ($1000.00). Accordingly, your [i.e., ANRE's] Merger Consideration shall be four hundred sixty five dollars and sixty cents ($465.60), which will also be the amount of the Offer.

Id. The Capsag merger notice recited that, should ANRE have any objections to the offer, New York law provided for ANRE to file a "notice of dissent" within 20 days of the date of the Capsag merger notice, or by August 4, 2011. *Id.*

On August 4, 2011, ANRE served a notice of dissent on Cape Sag Developers that objected to the proposed "fair value of [ANRE]'s membership interest and proportionate share in [Capnam Sag]." *See* Notice of Motion (motion sequence number 001), Exhibit F. The Capsag merger notice recited that, pursuant to LLCL § 1005 (a) and (b): 1) Capsag had the option of making ANRE an offer for its shares in Capnam Sag within ten days after receiving ANRE's notice of dissent; or 2) in the event that ANRE rejected the offer, the parties would have 90 days in which to come to an agreement on the FMV of ANRE's membership interest in Capnam Sag (counted from the date of ANRE's notice of dissent). *Id.* The Capsag merger notice also recited that, in the event the parties failed to come to such an agreement, the appraisal procedure set forth in BCL § 623 (h), (i), (j) and (k) would be used. *Id.* These statutes will be discussed *infra*.

On August 12, 2011 (i.e., eight days after receiving the notice of dissent), Capsag sent ANRE a letter that repeated it's offer of $465.60 for ANRE's membership interest in Capnam Sag. *See* Notice of Motion (motion sequence number 001), Exhibit G. On November 7,

2011(i.e., 87 days later), ANRE sent Cape Sag Developers and Capsag a letter rejecting the offer. *Id.*; Exhibit H. Both of these notices appear to have been timely. Defendants also assert that, during the interval between the offer and the rejection, they had notified ANRE that they would permit ANRE to inspect their books and records, but that ANRE never contacted them to arrange an inspection. *Id.*; Wood Affidavit, ¶ 24. They further assert that, on November 30, 2011, they sent ANRE a letter containing a written response to ANRE's earlier document inspection request that annexed copies of all of the requested documents. *Id.*; Exhibit I.

In both of their motions, defendants claim that ANRE failed to commence the instant proceeding and action in a timely fashion. *See* Notice of Motion (motion sequence number 001), Wood Affidavit, ¶ 25. They specifically note that: 1) the 90-day negotiation period expired on November 10, 2011; 2) that BCL § 623 (h) (1) provided for Capsag to commence a special proceeding to determine the value of ANRE's interest in Capnam Sag within 20 days after such expiration date (or by November 30, 2011); 3) that Capsag elected not to commence such a proceeding; 4) that BCL § 623 (h) (2) provided for ANRE to then commence a special proceeding to determine the value of its shares within 30 days after the end of Capsag's option period (or by December 30, 2011); and 5) that ANRE did not commence the instant proceeding and action until January 26, 2012 - i.e., nearly a month later. *Id.*, ¶¶ 25-29. Defendants also note that, on January 23, 2012, they had sent ANRE a letter notifying it that its dissenting shareholder's rights had expired, and had also enclosed a check for $465.60. *Id.*, ¶ 28; Exhibit J.

ANRE's January 26, 2012 petition sets forth causes of action for: 1) an appraisal and determination of the fair market value of its interest in Capnam Sag; and 2) court costs and attorney's fees. *See* Notice of Motion (motion sequence number 001), Exhibit A. ANRE's contemporaneous complaint sets forth causes of action for: 1) breach of contract (i.e., the Capnam Sag operating agreement); 2) a declaratory judgment; and 3) an injunction to unwind and/or rescind the Capsag merger. *See* Notice of Motion (motion sequence number 002), Exhibit A. Defendants filed an answer with affirmative defenses to the complaint on May 25, 2012. *Id.*;

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Exhibit B. Now before the court are defendants' motions to dismiss both the petition (motion sequence number 001) and the complaint (motion sequence number 002).

DISCUSSION

The Motion to Dismiss

When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a), the test "is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." *Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 176 (1st Dept 1998), quoting *Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46, 48 (1st Dept 1990). To this end, the court must accept all of the facts alleged in the complaint as true, and determine whether they fit within any "cognizable legal theory." *See e.g. Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, 303 (2001). However, where the allegations in the complaint consist only of bare legal conclusions, or of factual claims which are inherently incredible or are flatly contradicted by documentary evidence, the foregoing considerations do not apply. *See e.g. Tectrade Intl. Ltd. v Fertilizer Dev. and Inv., B.V.*, 258 AD2d 349 (1st Dept 1999); *Caniglia v Chicago Tribune-N.Y. News Syndicate, Inc.*, 204 AD2d 233 (1st Dept 1994). Here, Capsag argues that both of the causes of action set forth in ANRE's petition should be dismissed because they violated the terms of LLCL § 1005 (a) and (b), and of BCL § 623 (h) (1) and (2), which were incorporated into the Capsag merger notice. *See* Notice of Motion, Wood Affidavit, ¶¶ 25-31. For the following reasons, the court agrees.

LLCL § 1005 states as follows:

(a) Within ten days after the occurrence of an event described in section ten hundred two of this article, the surviving or resulting domestic limited liability company or other business entity shall send to each dissenting former member a written offer to pay in cash the fair value of such former member's membership interest. Payment in cash shall be made to each former member accepting such offer within ten days after notice of such acceptance is received by the surviving

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or resulting domestic limited liability company or other business entity.

(b) If a former member and the surviving or resulting limited liability company or other business entity fail to agree on the price to be paid for the former member's membership interest within ninety days after the surviving or resulting domestic limited liability company or other business entity shall have made the offer provided for in subdivision (a) of this section, or if the domestic limited liability company or surviving domestic limited liability company or other business entity shall fail to make such an offer within the period provided for in subdivision (a) of this section, the procedure provided for in paragraphs (h), (i), (j) and (k) of section six hundred twenty-three of the business corporation law (or any successor provisions or statute) shall apply, as such paragraphs may be amended from time to time.

The pertinent portion of BCL § 623 states as follows:

(h) The following procedure shall apply if the corporation fails to make such offer within such period of fifteen days, or if it makes the offer and any dissenting shareholder or shareholders fail to agree with it within the period of thirty days thereafter upon the price to be paid for their shares:

(1) The corporation shall, within twenty days after the expiration of whichever is applicable of the two periods last mentioned, institute a special proceeding in the supreme court in the judicial district in which the office of the corporation is located to determine the rights of dissenting shareholders and to fix the fair value of their shares. If, in the case of merger or consolidation, the surviving or new corporation is a foreign corporation without an office in this state, such proceeding shall be brought in the county where the office of the domestic corporation, whose shares are to be valued, was located.

(2) If the corporation fails to institute such proceeding within such period of twenty days, any dissenting shareholder may institute such proceeding for the same purpose not later than thirty days after the expiration of such twenty day period. If such proceeding is not instituted within such thirty day period, all

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dissenter's rights shall be lost unless the supreme court, for good cause shown, shall otherwise direct.

As was previously mentioned, both of the foregoing statutes were specifically incorporated into the terms of the Capsag merger notice. As was also previously observed, the documentary evidence herein discloses that Capsag tendered ANRE an offer letter within the ten day time period specified by LLCL § 1005 (a), and that ANRE tendered a rejection letter within the 90 day time period specified by LLCL § 1005 (b). The documentary evidence further discloses that Capsag did *not* institute a special proceeding within 20 days after the expiration of the 90 day rejection period (as authorized by BCL § 623 (h) (1)), and that ANRE did *not* commence the instant special proceeding within thirty days after the expiration of that 20 day period (as authorized by BCL § 623 (h) (2)). The documentary evidence, therefore, supports Capsag's assertion that ANRE's petition is untimely and, thus, subject to being dismissed. ANRE nonetheless raises two arguments in opposition.

First, ANRE argues that its petition was timely, because the preamble language of BCL § 623 (h) refers to a:

> procedure [that] shall apply if the corporation fails to make such offer within such period of fifteen days, or if it makes the offer and any dissenting shareholder or shareholders fail to agree with it within the period of thirty days thereafter upon the price to be paid for their shares.

ANRE contends that, if calculated using the 15 and 30 day periods referred to above, its petition was, in fact, timely. *See* Block Affirmation in Opposition, ¶¶ 7-16. However, this argument neglects two obvious points. Firstly, the 15 and 30 day time periods that are referred to in the preamble section of BCL § 623 (h) refer back to language that is contained in the previous subparagraph - i.e., BCL § 623 (g). Here, the Capsag merger notice specifically incorporates the portion of LLCL § 1005 (b) that states that, in the event no offer is made within ten days of a notice of dissent, or that no agreement on share value is reached within 90 days of a notice of dissent, "the procedure provided for in *paragraphs (h), (i), (j) and (k) of section six hundred*

twenty-three of the business corporation law ... shall apply [emphasis added]." *See* Notice of Motion (motion sequence number 001), Exhibit D. Neither the Capsag merger agreement nor LLCL § 1005 (b) makes any mention of the procedures or the time periods that are set forth in BCL § 623 (g). Thus, the obvious interpretation is that the parties intended not to make use of those procedures or time periods. Secondly, it is equally obvious that BCL § 623 (g) is a provision of the Business Corporation Law, while LLCL § 1005 (b) is a provision of the Limited Liability Corporation Law, and that all of the corporations that are parties to this litigation are limited liability corporations and, thus, subject to the provisions of the latter statute. Therefore, even if the parties had intended otherwise (which is not indicated by the terms of the Capsag merger notice), the governing law would oblige the court to use the 10 and 90-day time periods that Capsag utilized when calculating the timeliness of ANRE's petition, and *not* the additional 15 and 30-day periods that ANRE favors. Accordingly, the court rejects ANRE's timeliness argument.

ANRE also argues, in the alternative, that, should the court determine that its petition is untimely, the court may also excuse such untimeliness pursuant to the portion of BCL § 623 (h) (2) that permits such discretionary excuses "for good cause shown." *See* Block Affirmation in Opposition, ¶¶ 17-26. ANRE specifically argues that the "good cause" that justifies excusal of its untimeliness in this case consists of its "good faith [but incorrect] reading of the interplay between LLCL § 1005 (b) and BCL § 623 (h)." *Id.*, ¶ 19. To support this argument, ANRE cites the 1970 decision by the Appellate Division, Fourth Department, in *Matter of Davis v Adirondack Indus.* (33 AD2d 1100 [4th Dept 1970]) that did, indeed, excuse the untimeliness of a dissenting shareholder's petition in view of the "special circumstances" that obtained in that case, but that did not discuss those "special circumstances" in any detail. The only state court case that followed the *Davis* decision was the Appellate Division, Second Department's, holding in *Matter of Carroll v Seacroft, Ltd.* (141 AD2d 726 [2d Dept 1988]), which did not involve the application of the LLCL. In its reply papers, Capsag cites the more recent decision by the

United States District Court for the Southern District of New York in *Pay TV of Greater New York, Inc. v Gutman* (1989 US Dist LEXIS 5467 [SD NY 1989]), that opined that, in the context of BCL § 623 (h) (2), the term "'[g]ood cause' must necessarily mean that the party asking for relief was in some way prevented from meeting the time limit." While the precedents set by federal case law that interprets New York State statutes are not binding upon New York State courts in every instance, this court believes that the rule enunciated in *Pay TV* is reasonable under these circumstances. ANRE's argument, if accepted, would have this court find "good cause" to excuse the late filing of a proceeding whose untimeliness was occasioned by ANRE's own admitted lack of diligence, rather than by any action by defendants or by circumstances beyond any party's control. Certainly, nothing prevented ANRE from commencing this proceeding much earlier than it did, given its three-to-four-month long awareness that Capsag intended to compensate ANRE with $465.60 for its interest in Capnam Sag. In any case, ANRE has clearly failed to meet its burden of establishing that "good cause" exists to excuse the instant late filing. Therefore, the court rejects ANRE's alternative argument as well. Accordingly, because the documentary evidence had herein demonstrates that ANRE did not commence the instant special proceeding in a timely fashion, BCL § 623 (h) (2) mandates that "all dissenter's rights shall be lost," and the court consequently finds that the motion should be granted, and that ANRE's petition should be dismissed. The remaining arguments set forth in ANRE's opposition to the motion are rendered moot by this finding.

The Summary Judgment Motion

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action.

See e.g. Zuckerman v City of New York, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003). Here, defendants argue that there are no triable issues of fact with respect to any of the three causes of action set forth in ANRE's complaint. For the following reasons, the court agrees.

ANRE's first cause of action alleges that defendants breached the Capnam Sag agreement, in that they allegedly exceeded their contractual authority by bringing about the Capsag merger. Under New York law, "the burden of proving the existence, terms and validity of a contract rests on the party seeking to enforce it." *Eden Temporary Servs., Inc. v House of Excellence Inc.*, 270 AD2d 66, 67 (1st Dept 2000), quoting *Paz v Singer Co.*, 151 AD2d 234, 235 (1st Dept 1989). Further,"'on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and ... circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself'." *Maysek & Moran, Inc. v S.G. Warburg & Co., Inc.*, 284 AD2d 203, 204 (1st Dept 2001), quoting *Lake Constr. & Dev. Corp. v City of New York*, 211 AD2d 514, 515 (1st Dept 1995).

In its complaint, ANRE specifically alleges that the Capnam Sag agreement prohibited Cape Sag from involving Capnam Sag in the Capsag merger. *See* Notice of Motion (motion sequence number 002), Exhibit A (complaint), ¶ 22. In their motion, defendants argue that the terms of the Capnam Sag agreement expressly *permitted* them to pursue the merger. *Id.*; Wood Affirmation, ¶¶ 31-47. Defendants cite subparagraph 2 (c) of the Capnam Sag agreement, which authorized Cape Sag to effect a merger "where the surviving entity ... is an Affiliate of" Capnam Sag; and the sections of the Cape Sag agreement that define a "Person" as a limited liability corporation, and an "Affiliate" as a limited liability corporation: 1) "which owns directly, or indirectly, 25% or more of the beneficial interest in;" or 2) which "is owned or controlled by;" or 3) which is "under common ownership or control with" a limited liability corporation. *Id.*, ¶¶ 32-33; Exhibits E, L. Defendants conclude that, because Capsag is under

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the same degree of "common ownership or control" by Cape Sag as Capnam Sag was, the third condition of a contractually authorized merger was present. *Id.*, ¶ 35. ANRE responds that the foregoing contractual language regarding "common ownership or control" is ambiguous, because "it was ANRE's understanding that ANRE would have an ownership interest in any 'Affiliate' with whom Capnam Sag would be authorized to merge." *See* Plaintiff's Memorandum of Law in Opposition to Motion (motion sequence number 002), at 9-10. ANRE specifically argues that the phrase "common ownership or control" was not included in the definitions section of the Cape Sag agreement, and was, therefore, "susceptible of more than one interpretation" and was, consequently, ambiguous as a matter of law. *Id.*, at 10-11. Defendants reply that there is no ambiguity in the phrase "common ownership or control" - whose plain meaning denotes "parties which have common owners" - and argue that that plain meaning supports their interpretation herein, because both Capnam Sag and Capsag were under the "common ownership or control" of one managing member - i.e., Cape Sag. *See* Defendants' Reply Memorandum of Law, at 17-18. Defendants also note that ANRE has failed to put forth any possible alternate reasonable interpretations of the phrase "common ownership or control" to support its contention that the phrase is ambiguous. *Id.* The court agrees that the phrase "common ownership or control" is not ambiguous, and finds for defendants on this issue.

As the Court of Appeals held in *South Rd. Assoc., LLC v International Bus. Machs. Corp.* (4 NY3d 272, 278 [2005]):

> Whether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous. Further, "extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face [internal citations omitted]."

Here, it is clear that the phrase "common ownership or control" was not used as a term of art in the Cape Sag agreement and that there was, therefore, no need to include it among the list of specially defined terms. It is also self-evident that the plain meaning of this phrase simply

describes one corporate entity (e.g., Capnam Sag or Capsag) that is owned or controlled by another (e.g., Cape Sag) in its capacity as the former entity's managing member. ANRE fails to explain why this interpretation is not reasonable and likewise fails to offer an alternative interpretation that could be deemed to be reasonable. ANRE also certainly fails to explain why its "understanding that ANRE would have an ownership interest in any 'Affiliate' with whom Capnam Sag would be authorized to merge" was a reasonable understanding rather than a wishful one. Thus, the court rejects ANRE's argument, and finds that the Capnam Sag agreement did, in fact, authorize Cape Sag to cause the merger of Capnam Sag with Capsag. Consequently, the court also finds that ANRE's breach of contract claim must fail, as a matter of law, because no breach occurred. Therefore, the court finally finds that the portion of defendants' motion that seeks summary judgment dismissing the first cause of action in ANRE's complaint should be granted.

ANRE's second cause of action seeks a declaratory judgment that Capnam Sag "was prohibited from entering into the merger or, alternatively, that the members of [Capnam Sag] intended that [Capnam Sag] would not engage in any merger ... that would effectively deprive [ANRE] of [its] right to protect [its] significant investment in the Project by participating in the management of the Project." *See* Notice of Motion (motion sequence number 002), Exhibit A (complaint), ¶ 31. Declaratory judgment is a discretionary remedy which may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." CPLR 3001; *see e.g. Jenkins v State of N.Y., Div. of Hous. and Community Renewal*, 264 AD2d 681 (1st Dept 1999). Here, however, the court has already determined that defendants did not breach the Capnam Sag agreement by effectuating the Capsag merger. Thus, ANRE is not entitled to a declaration that that merger was prohibited. With respect to its proposed "alternative" declaration, the court notes that ANRE's opposition papers are completely devoid of any argument to support its claims regarding the parties' alleged "intent." Thus, the court deems that ANRE has abandoned this line of argument. The court also

notes that the Capnam Sag agreement expressly reserves all management decisions to Capnam Sag's managing member - i.e., Cape Sag - and not to ANRE. Thus, there does not appear to be any contractual underpinning to ANRE's argument in any case. Therefore, the court finds that ANRE's second cause of action must fail, as a matter of law, and also finds that the portion of defendants' motion that seeks summary judgment dismissing that cause of action should be granted.

ANRE's final cause of action seeks a preliminary injunction to either rescind or unwind the Capsag merger. *See* Notice of Motion (motion sequence number 002), Exhibit A (complaint), ¶¶ 32-38. Pursuant to CPLR 6301:

> A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

CPLR 6301. The Court of Appeals has held that "[t]he party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839, 840 (2005), citing *Doe v Axelrod*, 73 NY2d 748, 750 (1988). Here, ANRE asserts that "there is a likelihood of success on the merits because the terms of the [Capnam Sag] agreement prohibit [Capnam Sag] from entering into the merger." *See* Notice of Motion (motion sequence number 002), Exhibit A (complaint), ¶ 35. However, as was previously discussed, the court has already determined that the terms of the Capnam Sag agreement clearly authorized defendants to effect the Capsag merger. Therefore, the court finds that ANRE's third cause of action must fail, as a matter of law, and also that the portion of

defendants' motion that seeks dismissal of that cause of action should be granted. Accordingly, the court grants defendants' second motion in full, and awards them summary judgment dismissing ANRE's complaint.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3211, of respondent Capsag Harbor Management, LLC (motion sequence number 001) is granted and the petition bearing Index Number 100868/12 is dismissed in its entirety as against said respondent , with costs and disbursements to said respondent as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said respondent; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of defendants Cape Sag Developers, LLC and Capsag Harbor Management, LLC (motion sequence number 002) is granted and the complaint bearing Index Number 100867/12 is dismissed with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York
October 3 , 2012

FILED
OCT 10 2012
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

Hon. Donna Mills, J.S.C.

DONNA M. MILLS, J.S.C.