SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Index Number : 108147/2010
SSM REALTY GROUP, LLC
vs.
20SHERMAN ASSOCIATES,
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 1/13/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of plaintiff's motion for an order striking the defendants' affirmative defenses and answer is granted, except as to defendants' 8th, 9th, and 10th affirmative defenses, and the 1st through 7th affirmative defenses are hereby severed and dismissed; and it is further

ORDERED that the branch of plaintiff's motion for an order declaring that Article 9.5 of the Operating Agreement is "null and void" is denied; and it is further

ORDERED that plaintiff's requests for a judicial declaration that plaintiff be deemed the manager of the LLC is denied; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 3/2/12

_____, J.S.C.
HON. CAROL EDMEAD

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

SSM REALTY GROUP, LLC,

Index No. 108147/2010

Plaintiff,

-against-

DECISION/ORDER

20 SHERMAN ASSOCIATES, LLC, LEMLE & WOLFF, INC., FRANK J. ANELANTE, JR., AND MARILYN HOCHBERG,

Defendants.

----------X

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this declaratory judgment action, plaintiff, SSM Realty Group, LLC ("plaintiff") moves to strike the answer and affirmative defenses of defendants, 20 Sherman Associates, LLC (the "LLC"), Lemle & Wolff, Inc. ("L&W"), Frank J. Anelante, Jr. ("Anelante") and Marilyn Hochberg ("Hochberg") (collectively, "defendants") and for a declaration that Article 9.5 of the subject Operating Agreement is null and void. Plaintiff also requests a judicial declaration that plaintiff be deemed the manager of the LLC.

Factual Background[1]

This action centers around a 40-unit building located at 20 Sherman Avenue, New York, New York (the "building"). Milton Miller, deceased, d/b/a 20 Sherman, purchased the building at a foreclosure sale in 1982. It is uncontested that L&W became and is currently the managing agent for the Building.

In September 1997, "20 Sherman Associates" was converted to the LLC. Also, in 1997, Miller passed away, naming his son, Steven Miller ("Steven"), a principal of plaintiff, and

[1] The Factual Background is taken in large part from plaintiff's moving papers.

Miller's wife, Selma Miller ("Mrs. Miller"), as executors of Miller's estate. According to the plaintiff, plaintiff is the successor in interest to the Miller Estate.

Thereafter, in September 2007, Mrs. Miller, on behalf of Miller's estate, along with Anelante, Steinman, and Hochberg, executed the Operating Agreement for the LLC,[2] which gave the Estate of Miller 75% of the LLC and Anelante, Steinman, and Hochberg[3] the remaining 25% of the LLC. The LLC provides that L&W "shall" manage the LLC (Article 5.1). Article 5.1 provides: "The Members acknowledge that one or more of the Members might, from time to time, have an interest in the Manager, and waive any claims arising from the conflict of interest which might thereby exist." L&W then entered into a "lucrative" exclusive management agreement with the LLC. Analante signed the management agreement on behalf of the LLC and L&W.

Seven years later, in June 2002, the Estate of Miller deeded the Building to the LLC. Defendants admit that the deed was prepared by defendants' counsel.

On January 28, 2010, plaintiff requested an annual meeting to vote to amend the Operating Agreement to provide for management of the LLC by plaintiff. No meeting was scheduled, and Steven thereafter demanded that an annual meeting of the members be held on an emergency basis, noting that the LLC had failed to hold an annual meeting in many years, in

[2] While plaintiff claims that the Operating Agreement was prepared by L&W and its counsel, Altschul and Altschul, defendants maintain that it was drafted by the law firm of Christy & Viener, Esqs. Defendants also maintain that the Miller family was represented by Fred G. Daniels, Esq., who reviewed the Operating Agreement.

[3] The Operating Agreement was signed by Hochberg on behalf of the Estate of Howard Hochberg and by Arthur B. Steinman, whose then 8.34% interest was transferred to Analante, who now holds 16.67% of the LLC.

contravention of Article 4.1.[4]

L&W scheduled an annual meeting for May 4, 2010, where the parties agreed, at L&W's request, to conduct the meeting using Robert's Rules of Order ("Robert's Rules").

Plaintiff, as holder of 75% interest in the LLC, voted for the passage of a Resolution to remove L&W as manager. However, L&W refused to put the Resolution to a vote, claiming that the Robert's Rules required a "second" in order to hold a vote on the Resolution.

When it became certain that defendants would not participate in continuing the meeting and holding a vote on management, plaintiff left, and this action ensued.

In support of summary judgment, plaintiff argues that there is no requirement of a "second" by Robert's Rules, which expressly provides that motions "need not be seconded in a small board or a committee." The purpose of a "Second" is to prevent time from being wasted on motions that have no possibility of passage. And, a "Second" is not needed where, as here, the chair "is certain that a motion meets with wide approval, but members are slow in seconding it." Such rule is not intended to thwart the will of a majority interest. Indeed, since the Operating Agreement provides that the "Manager . . . shall attend each meeting . . .unless expressly requested not to do so," plaintiff has a right to exclude L&W from the annual meeting. An "affirmative vote of the Members holding a majority of all interests entitled to vote" Inasmuch as plaintiff holds a 75% interest in the LLC, plaintiff requests a judicial declaration that plaintiff be deemed the manager of the LLC.

Plaintiff also seeks a judicial declaration that Article 9.5, an anti-dissolution provision, is

[4] Plaintiff also allegedly initiated arbitration proceedings, but attempts to mediate the issues between the parties failed.

void and unenforceable as against public policy. Article 9.5 provides that each Member "irrevocably waives any such right to petition for dissolution of the Company under the Act . . . ." Article 701(a)(3) of the New York Limited Liability Company Law (the "LLC Law") provides for the dissolution of an LLC, and caselaw holds that anti-dissolution provisions should not be enforced as violative of public policy.

Furthermore, plaintiff argues that defendants' affirmative defenses of (1) failure to state a cause of action, (2) culpable conduct of the plaintiff, (3) laches, (4) adequate remedy at law, (5) unclean hands, (6) waiver, (7) assumption of risk, (8) lack of ripeness, (9) barred by arbitration, and (10) there is no final determination by arbitration, lack merit, are inapplicable to the facts of this action, or fall outside of the scope of arbitration.

In opposition, defendants argue that "in order to ensure" that L&W was "not oppressed" by the Miller majority, the Operating Agreement gave L&W certain protections, such as providing for L&W to be the property manager for as long that the Building was owned by the LLC.

Article 5.1 was designed to insulate Anelante and L&W from conflict of interest claims and to shield Anelante's oppressive conduct as a minority member of the LLC. It was the understanding the parties that L&W would manage the property unless removed for cause for malfeasance pursuant to the Operating Agreement. The LLC Law 413(b) permits the manager to hold the office for an unlimited term unless succeeded by another manager or the manager resigns. The parties never intended for the "majority" to manage the Building, and plaintiff set forth no facts requiring the termination of L&W as the manager of the Building.

Defendants point out that the Operating Agreement provides that a dissolution can only

be accomplished upon the unanimous vote of the LLC members (Article 8.1), and that the right of members to petition for a dissolution is limited by Article 9.5. Plaintiff's request for dissolution is unsupported by the LLC Law and the Operating Agreement.

Further, the case cited by plaintiff involves a corporation, not an LLC, and is inapplicable. And, in the event the Court holds that the anti-dissolution provision is held to be void, Article 8.1 requires unanimity of members for the dissolution of the LLC, which is permitted by the LLC Law. Thus, plaintiff is not entitled to summary judgment.

In reply, plaintiff argues that a quorum (50%) was present as the meeting, and the resolution passed by virtue of plaintiff's 75% interest in the membership.

The LLC Law does not permit a manager to hold office without limitation, as suggested by defendants. There is nothing in LLC Law 314(b) or the Operating Agreement that prohibits the majority voting interest from amending the Operating Agreement. Defendants failed to cite any section of the Operating Agreement that precludes the amendment thereof by a majority interest. And, Article 8.1 cited to by defendants relates to a voluntary dissolution; it does not preclude a member's right to seek a judicial dissolution, which preclusion the law abhors in any case. Finally, that the case cited involves a corporation is of no moment.

Discussion

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], *quoting Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise

a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

"Declaratory judgments are a means to establish the respective legal rights of the parties to a justiciable controversy" (*Thome v. Alexander & Louisa Calder Foundation*, 70 A.D.3d 88, 890 N.Y.S.2d 16 [1st Dept. 2009] *citing* CPLR 3001; *see generally* 43 N.Y. Jur.2d Declaratory Judgments §§ 4, 22)). "The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations" (*Thome v. Alexander & Louisa Calder Foundation*, *supra* at 98, *citing James v. Alderton Dock Yards*, 256 N.Y. 298, 305, 176 N.E. 401 [1931]; see Siegel, N.Y. Prac. § 436, at 738 [4th ed.]). "While fact issues certainly may be addressed and resolved in the context of a declaratory judgment action, the point and the purpose of the relief is to declare the respective legal rights of the parties based on a given set of facts, not to declare findings of fact" (*Thome v. Alexander & Louisa Calder Foundation*, supra at 99-100, (internal citations omitted). It is used to "resolve a relatively unique dispute where the plaintiff is 'unable to find among the traditional kinds of action one that will enable her to bring it to court'" (*Thome v. Alexander & Louisa Calder Foundation*, *supra* at 100, *citing* Siegel, N.Y. Prac. § 437, at 742).

At the outset, it is noted that this is not an action for dissolution of the LLC, and that the plaintiff has not sought any such relief in its motion. Instead, plaintiff's action is for declaratory judgment concerning plaintiff's appointment as the new manager of the Building and concerning the validity of a certain clause in the Operating Agreement.

Plaintiff has failed to establish that under the undisputed facts, it is entitled to a declaration that plaintiff is duly elected manager of the LLC.

When "parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms." (*PL Diamond LLC v. Becker-Paramount LLC*, 16 Misc.3d 1105(A), 841 N.Y.S.2d 828 [Sup. Ct., New York County 2007] *citing South Road Assocs., LLC v. Int'l Bus. Machines Corp.*, 4 NY3d 272, 277 [2005]). In interpreting a contract, the intent of the parties governs. A contract should be construed so as to give full meaning and effect to all its provisions. Words and phrases are given their plain meaning. Rather than rewrite an unambiguous agreement a court should enforce the plain meaning of that agreement. Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law, and the case is ripe for summary judgment" (*PL Diamond LLC v. Becker-Paramount LLC, supra, citing American Express Bank, Ltd. v. Uniroyal, Inc.*, 164 A.D.2d 275, 277 [1st Dept 1990], lv. denied 77 N.Y.2d 807 [1991]).

At the annual meeting on May 4, 2010, a quorum of 50% was present as required by Article 4.4 of the Operating Agreement.[5] Plaintiff, holding a 75% membership interest, voted to pass a resolution to remove L&W as property manager of the Building. No "Second" is required under the Robert's Rules of Order, which the plaintiff and L&W agreed to apply to the meeting. However, the removal of the manager, L&W is subject to Article 5.3, entitled "Removal; Filling of Vacancies." Article 5.3 provides:

> The Manager may be removed for intentional misconduct hereunder or a knowing violation of law which causes material damage to the assets of the Company (and by which the Manager personally gained a financial profit to which he was legally entitled.) Any vacancy occurring as a result of such removal from office shall be filled as set forth in Section 5.2.

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[5] Article 4.4 provides:
Quorum of Members. Members holding at least 50% of the Interests . . . entitled to vote at a meeting of the Members . . . shall constitute a quorum at such meeting . . . .

While L&W does not have an unfettered right to manage the LLC (or the Building), plaintiff failed to establish as a matter of law, that L&W was removed "for intentional misconduct hereunder or a knowing violation of law which causes material damage to the assets of the Company (and by which the Manager personally gained a financial profit to which he was legally entitled.)" Therefore, given that Article 5.3, as it exists, governs the terms under which L&W may be removed, and plaintiff has failed to establish that the conditions therein have been satisfied, plaintiff is not entitled to a declaration that plaintiff is the property manager.

Turning to the validity of Article 9.5, this article provides:

> No Right to Petition for Dissolution. The Members agree that irreparable harm would be done to the business and goodwill of the Company if any Member were to bring an action under the Act for the judicial dissolution of the Company. Accordingly, each Member, in his capacity as such, hereby irrevocably waives any such right to petition for dissolution of the Company under the Act, and all similar rights under other applicable law, *except to the extent such relief may be sought by the Company itself as authorized by the Members in accordance with this Agreement.* (Emphasis added).

It has been held that a "provision in a shareholders agreement which purports to prohibit judicial dissolution of a corporation violates public policy as expressed by the Legislature and under the common law" (*Schimel v. Berkun*, 264 A.D.2d 725, 696 N.Y.S.2d 49 [2d Dept. 1999] *citing, Matter of Validation Review Assocs.*, 223 A.D.2d 134, 137, 646 N.Y.S.2d 149). That this case involves a shareholder of a corporation does not render this case inapplicable *(Tzolis v. Wolff*, 39 A.D.3d 138, 829 N.Y.S.2d 488 [1st Dept 2007] ("The Limited Liability Company Law is a hybrid of the corporate and limited partnership forms, offering the tax benefits and operating flexibility of a limited partnership with the limited liability protection a corporation provides. While corporate shareholders and limited partners are specifically entitled by statute to bring derivative suits on behalf of their respective corporate and partnership entities, those rights were

recognized at common law long before the Legislature codified them")).

However, plaintiff failed to establish that the anti-dissolution clause at issue constitutes a complete or absolute bar to a judicial dissolution as in the case of *Schimel v. Berkun*, cited by plaintiff. In *Schimel v. Berkun*, the anti-dissolution clause had the effect of "vitiat[ing] the parties' statutory right to seek a judicial dissolution" "regardless of whether, *inter alia*, the corporation is paralyzed by deadlock or dissension to the detriment of its shareholders, or one or both of the parties are guilty of illegal, fraudulent, or oppressive conduct toward the other." Article 9.5 in the parties' Operating Agreement, however, expressly permits a petition for dissolution by the LLC to the extent the Members authorize such a petition. Unlike the voluntary dissolution provision of Article 8.1 which requires an unanimous vote of the members, no such unanimous vote is required by Article 9.5, or by voting in favor of filing a petition for judicial dissolution at an annual meeting. In this regard, in accordance with the Operating Agreement Article 4.1, the Members at an annual meeting, may "transact such business as may properly be brought before the meeting," which may include voting for a dissolution and voting to authorize a petition for dissolution, provided a quorum is present. It also appears that Article 4.6, entitled "Action without a Meeting" would permit same, provided all of the protocols therein are satisfied. Therefore, it cannot be said, as a matter of law, that Article 9.5 is against public policy under the Second Department caselaw cited. Therefore, plaintiff is not entitled to a declaration that Article 9.5 is void and unenforceable, at this juncture.

However, plaintiff established entitlement to dismissal of defendants' affirmative defenses of failure to state a cause of action, culpable conduct of the plaintiff, laches, adequate remedy at law, unclean hands, waiver, assumption of risk, lack of ripeness, and there is no final

determination by arbitration. Defendants failed to expressly address any of these affirmative defenses and did not oppose dismissal of same. In any event, these defenses lack merit or are factually inapplicable. Although plaintiff failed to submit sufficient evidence to warrant summary judgment, plaintiff has stated a cause of action for a declaration that plaintiff be deemed the property manager by virtue of the vote taken at the May 4, 2010 annual meeting. Defendants failed to submit any evidence to support their claims of unclean hands. Further, the defenses based on culpable conduct of the plaintiff and assumption of risk have no application to this declaratory judgment action. Nor is there any showing that plaintiff waived its right to seek the relief sought.

However, plaintiff failed to meet its burden of showing that the arbitration clause does not apply. The broad arbitration clause found in Article 9.9 of the Operating Agreement provides:

> Arbitration. Any controversy or claim arising out of or relating to this Agreement shall be finally resolved by arbitration pursuant to the Commercial Arbitration Rules of the American Arbitration Association. . . .

"When faced with a broad arbitration clause, which creates "a presumption of arbitrability" . . . a court merely determines whether there is "a reasonable relationship between the subject matter of the dispute and the general subject matter of the underlying contract" ((*In re Domansky*, 2 A.D.3d 132, 770 N.Y.S.2d 288 [1st Dept. 2003] *citing Matter of Nationwide Gen. Ins. Co. v. Investors Ins. Co. of Am.*, 37 N.Y.2d 91, 96, 371 N.Y.S.2d 463, 332 N.E.2d 333) (internal citations omitted).

Plaintiff failed to show that the issues raised herein, *i.e.*, the legality and effectiveness of the vote taken at the May 2010 annual meeting, the alleged misapplication by L&W of Robert's

Rules, and the validity of Article 9.5 bear no reasonable relationship to the Operating Agreement at issue. Thus, as to the 8th, 9th, and 10th affirmative defenses relating to the arbitration clause in the Operating Agreement, such defenses have not been shown to lack merit as a matter of law.

Based on the foregoing, it is hereby

ORDERED that the branch of plaintiff's motion for an order striking the defendants' affirmative defenses and answer is granted, except as to defendants' 8th, 9th, and 10th affirmative defenses, and the 1st through 7th affirmative defenses are hereby severed and dismissed; and it is further

ORDERED that the branch of plaintiff's motion for an order declaring that Article 9.5 of the Operating Agreement is "null and void" is denied; and it is further

ORDERED that plaintiff's requests for a judicial declaration that plaintiff be deemed the manager of the LLC is denied; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: March 2, 2012

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD