Hamilton Heights Cluster Assoc., L.P. v Urban Green Mgt., Inc.
2015 NY Slip Op 31209(U)
July 8, 2015
Supreme Court, New York County
Docket Number: 653038/2014
Judge: Shirley Werner Kornreich
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SHIRLEY WERNER KORNREICH
J.S.C.

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

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HAMILTON HEIGHTS CLUSTER ASSOCIATES, L.P., PLEASANT AVENUE ASSOCIATES, L.P., FAM PLEASANT AVENUE LLC, AFF-PSA BRONX 9-D, INC, and TAF ALEXANDER AVE., INC.,

Plaintiffs,

-against-

URBAN GREEN MANAGEMENT, INC. and ERIC ANDERSON,

Defendants.

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DECISION & ORDER

Index No. 653038/2014

SHIRLEY WERNER KORNREICH, J.

This action involves a dispute between individuals who together have invested in commercial properties. In Motion Sequence 003, defendants move to compel plaintiffs to 1) refund all fees that were paid to its counsel in connection with this action; 2) appoint a receiver to manage the properties; 3) dismiss the action for lack of legal capacity to sue pursuant to CPLR 3211(a)(3); and 4) enjoin plaintiffs from entering into any contracts to sell or encumber the properties owned by the plaintiff entities. For the reasons that follow, the motion is granted in part and denied in part.

In Motion Sequence 004, West Harlem Group Assistance, Inc. (Stockholder), West Harlem Heights Cluster, Inc. (New GP-1)., and WHGA Hamilton Heights Cluster, Inc.(GP-1, with New GP-1, collectively with GP-1 and Stockholder, interveners), move to: 1) intervene; 2) dismiss the complaint insofar as it asserts claims on behalf of plaintiff Hamilton Heights Cluster Associates, LP (the Partnership) on the ground that the Partnership did not have authority to bring it; and 3) disqualify plaintiffs' counsel, Tendy Law LLC (Tendy), from representing the Partnership and its limited partner, claimed by the proposed interveners to be A & F HHC

Equities, LLC (New LP). They also seek to file a proposed complaint requesting 1) a declaratory judgment declaring that an unsigned amendment to the Partnership agreement (Unsigned Amendment) was not effective; 2) a declaratory judgment declaring that the purported removal of New GP-1 as one entity comprising the general partner is void; 3) an injunction restraining plaintiffs from acting on behalf of the Partnership without the general partner's consent; and 4) an accounting of the Partnership by the New LP. [Doc 129][1] For the reasons stated below, the motion is granted, except for Stockholder's motion to intervene and the motion to restrain plaintiffs from acting for the Partnership, which is denied as moot.

I. Background

James Fendt is the individual spearheading plaintiffs' lawsuit. Defendant Eric Anderson and Fendt have been business associates for more than twenty years. They invested in 13 buildings (the Properties) that are owned by the plaintiff entities and are the subject of this litigation. The interveners (Stockholder, GP-1 and New GP-1) appear to be unrelated to either Anderson or Fendt.

Anderson is the sole owner of the former managing agent, defendant Urban Green Management, Inc. (Urban Green). Urban Green managed the Properties from 2005 through September 2014, when Fendt ousted Urban Green and put in place a new manager, Safeguard Realty Management, Inc. (Safeguard). Prior to 2005, Fendt managed the properties. The authority to remove Urban Green and replace it with Safeguard is challenged by both motions. Anderson blames Urban Green's former employees, Abreu and Rosado, for many of Fendt's complaints. Abreu and Rosado now work for Safeguard.

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[1] References to "Doc" filed by a number refer to documents filed in this action in the New York State Courts Electronic Filing System.

According to Fendt, he was told by Abreu and Rosado that Anderson was misusing his management authority, charging excessive fees and diverting Partnership assets for the use of his personal business ventures. Anderson argues that Abreu and Rosado were Fendt's employees when Fendt managed the Properties prior to 2005, at which time there was an unpaid water bill on one of the Properties. Water bills on the Properties continued to go unpaid under Urban Green's management. Anderson claims that Abreu and Rosado failed to pay them and that they told him that Fendt wanted to sell the Properties. Moreover, Anderson alleges that a building superintendent saw Abreu and Rosado moving boxes of documents out of Urban Green's office; Anderson found a receipt for 22 bankers' boxes that recently had been purchased by them.

The amended complaint alleges claims for 1) breach of fiduciary duty against Anderson; 2) aiding and abetting such breach against Urban Green; 3) fraudulent conveyance (based upon misappropriation of money and property for personal gain and taking excessive management fees); 4) conversion of money in bank accounts and rent from the Properties; 5) fraud (based upon diversion of funds and excessive management fees covered up with false bookkeeping); and 6) unjust enrichment. The relief sought by the amended complaint is: an injunction restraining defendants from managing the Properties; freezing the bank accounts that Urban Green controlled but belong to plaintiffs; directing defendants to give the money in those accounts to Safeguard; an accounting; ejectment from space in one building allegedly misappropriated by Urban Green; damages; punitive damages and attorneys' fees. Defendants answered but asserted no counterclaims. All of the alleged harm was suffered by the plaintiff-entities, and they would be the beneficiaries of any recovery.

The plaintiffs, all New York entities, are the Partnership, another limited partnership, two corporations, and a limited liability company, all of whom bring the action in their own names. Plaintiffs now claim that the actions were validly authorized by those in control of plaintiffs.

At the outset of the litigation, plaintiffs moved by order to show cause for a preliminary injunction. The motion was granted on default, although the court expressed reservations on the record about the authority of plaintiffs to bring the action based on the proof presented and the fact that it was not brought as a derivative action. However, based on the unopposed record, the court enjoined Anderson and Urban Green from interfering with Safeguard's management of the Properties, the plaintiff entities, the tenants and the collection of rent; ordered defendants to close plaintiffs' bank accounts, to transfer the money in them to Safeguard and to return rents collected but not paid to the plaintiff entities; and ordered Urban Green to vacate space at 340 Pleasant Ave., which is owned by one of the plaintiffs. Doc 39, 10/20/14 Order.

Water bills for the Partnership Properties had not been paid for approximately ten years, while managed by Urban Green, and there are water bill arrears owed by two other plaintiffs. Over $370,000 is owed and continues to accrue interest and late fees. Doc 54.[2] Plaintiffs contended that the $2.3 million mortgage on the 5 Properties owned by the Partnership came due on January 1, 2015. Doc 54. Plaintiffs claimed that the lender granted a temporary extension, but made resolution of the water bills a condition of refinancing. Doc 54. Further, plaintiffs alleged that DEP might waive past interest and late fees if there were a judicial finding of misfeasance by parties no longer in control of management. Docs 54 & 72. The parties,

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[2] Fendt contends that Abreu and Rosado, while working for Urban Green, entered into payment agreements with the City's Department of Environmental Preservation (DEP), but failed to comply with them.

therefore, agreed to, and the court ordered, a reference to a Special Referee to hear and determine whether Urban Green and Anderson were responsible for the non-payment. However, the parties disputed the scope of the reference, defendants revoked their consent, and the court vacated the reference. Doc 106.

II. Discussion

A. Legal Standards for Motion to Dismiss

On a motion to dismiss, the facts alleged in the complaint are accepted as true and the plaintiff is entitled to the benefit of every favorable inference. *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 (1976); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 (1st Dept 2005). The plaintiff may submit affidavits to remedy defects in the complaint and to preserve inartfully pleaded, but potentially meritorious claims and such additional submissions also will be given their most favorable intendment. *Rovello, supra.* Where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion should be denied unless "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law [citation omitted]." *Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 (2002); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

B. Plaintiff Hamilton Heights Cluster Associates, LP

The first named plaintiff, the Partnership Hamilton Heights Cluster Associates, LP, a New York limited partnership, is governed by a signed, limited partnership agreement dated October 1, 1999 (the Agreement). Doc 87, Ex A-1 to Hayes' Affirmation. The Partnership owns 5 buildings in Manhattan.

The Agreement states that there is a general partner composed of two corporations -- WHGA Hamilton Heights Cluster, Inc. (GP-1), and A & F Hamilton Heights Cluster, Inc. (GP-2,

together with GP-1, the GPs), which own 67% and 32% of the Partnership, respectively. An affidavit submitted by Stockholder says in a footnote that Anderson and Fendt each own 50% of GP-2. Doc 111, p 8, fn 3. The record does not contain the names of GP-2's directors.

The sole limited partner named in the Agreement is A & F Equities, LLC (LP), which owns 1%. Neither general partner nor the LP is named in this action, but GP-1 seeks to intervene.[3]

The Agreement states that the GPs "shall have equal rights in the management of the partnership business except as otherwise ***agreed in writing by the partners***" [emphasis added] and states that they "shall agree on a managing agent other than West Harlem Group Associates, Inc." It additionally provides that the LP "may assign his [sic] interest in the partnership, and the assignee shall have the right to become a substituted limited partner and entitled to all the rights of the assignor if all the partners (except the assignor) consent thereto." Otherwise, the assignee is "only entitled to the share of the profits to which his assignor would be entitled." No assignment of the LP's interest to a New LP is in the record. As the Agreement is silent on the rights of the LP, it does not have the right to manage the Partnership. Revised Limited Partnership Act (RLPA) §121-303.

The LP's operating agreement, dated January 1, 2000, says that its Managing Members are Anderson and Fendt, who have the power to manage the LP. Doc 32. Section 9.2(c) of the LP's operating agreement prohibits its Managing Members from bringing or defending a lawsuit

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[3] For the first time in his reply affirmation, the attorney for the interveners says that the interverners' moving affirmation and affidavit ***mistakenly*** said that GP-1 was moving to intervene. Doc 180, fn 1. Even if this were true, the court would *sua sponte* add GP-1 as a party because its interest in the Partnership will be affected by the declaratory judgment the interveners seek concerning the validity of the Unsigned Amendment to the Agreement. CPLR 1001. See Part B of the Discussion below.

without the consent of a majority of its members. Thus, the LP could not authorize this action on behalf of the Partnership without the consent of both Anderson and Fendt. Moreover, the LP's operating agreement cannot be amended without the Managing Members' joint consent, unless either 1) a majority of the members agree by vote at a meeting, or 2) all members agree in writing, neither of which occurred.

In addition, Fendt indisputably has had no interest in the LP since 2005. In an undated agreement (Fendt Aff, Ex A, Doc 155) called Dissolution of Business Partnership of Eric Anderson & James Fendt (Dissolution K), Fendt conveyed his 38% interest in the LP to Anderson. On March 1, 2005, Fendt, Anderson and two other members of the LP, Mike Nickolai and Tom Farrell, signed a Withdrawal Agreement (Withdrawal K), which says that Fendt withdrew from and gave up ALL EQUITY in and RESIGNED AS MANAGER of the LP. Doc 156. Mike Nicolai also gave up his 4% interest in the LP in the Withdrawal K, leaving Anderson with 76% ownership in the LP. *Id.* Consequently, Fendt and Nicolai had no interest in, or power over, the LP as of 2005.

The documents plaintiffs relied on to bring the action on behalf of the Partnership are two purported September 10, 2014 resolutions of the LP [Doc 37] and the Unsigned Amendment, an ***unsigned*** First Amended and Restated Limited Partnership Agreement [Doc 158]. The two resolutions relating to the LP state that the signatories are the majority of the members of the LP, "the sole limited partner" of the Partnership. The resolutions recite that the LP must have unanimous consent of its Managing Members to act, but that Anderson would refuse because he was being accused of wrongdoing, so the other Managing Member, Fendt, could act without him. The resolutions purport, *inter alia*, to remove Urban Green and replace it with Safeguard, remove Anderson as "General Partner", and authorize this action.

The resolutions are not binding on the LP. They are signed by Fendt, Nikolai and two other members of the LP, Colleen Bonnicklewis and James Huang who collectively owned 13%. Compare Docs 32 & 37. As noted earlier, Fendt and Nikolai, however, were no longer members of the LP in 2014. Nor was Fendt its Managing Member. Neither the majority of the remaining members nor the remaining Managing Member agreed to the resolution to bring the suit.

Nor is the action authorized by the Unsigned Amendment since there is no written agreement of the partners approving it. Then too, even if it were effective, it would not have empowered the LP or the new limited partner it named to bring the action. Schedule A, p A-5, of the Unsigned Amendment names the general partners as New GP-1, whose interest was 0.051% (reduced from GP-1's 67%), and GP-2, whose interest was reduced from 32% to 0.049%. The LP's name is changed to A & F HHC Equities, LLC (New LP), and its interest in the LP allegedly was increased to 99.99% from 1%. Changes in percentages for taxes and distributions required written consent of the GPs under the Agreement and RLPA §121-110(c). Further, even were the Unsigned Amendment viable, its §9.02 provides that the New LP may remove New GP-1, GP-2 and the managing agent for various acts of malfeasance and nonfeasance, subject to notice and a cure period for some of the grounds for removal. No proof of notice is in the record.

Plaintiffs contend that on May 7, 2015, by written consent of the New LP as "the sole limited partner" of the Partnership, Fendt removed New GP-1 as general partner, claiming the right to do so on the basis of the Unsigned Amendment. Doc 125. As previously noted, Fendt contradictorily claimed in the resolution authorizing the action that the LP was the sole limited partner. Subsequently, Tendy, plaintiffs' attorney, purported to send a redemption check for the interest of New GP-1, pursuant to the Unsigned Amendment, which the interveners rejected. Doc 126. A substitution of a general partner in the Agreement should have been memorialized

in a duly filed amendment to the certificate of limited partnership. RLPA, §§ 121-202 (withdrawal of general partner requires amendment) & 121-402 (withdrawal includes ceasing to be general partner).[4]

Moreover, the Unsigned Amendment, even if it applied, would not permit the New LP to authorize a suit for the Partnership. In the Unsigned Amendment, New GP-1 and GP-2 have the right to manage and transact business. §§ 5.01 & 5.03, pp 15-16. The New LP is prohibited from doing those things. §6.01, p 25. Fendt's affidavit says that the New LP, was created on December 24, 2004, and the LP's interest in the Partnership was transferred to the New LP. In support, he points to the Withdrawal and Dissolution Ks, which do not say that and are dated 2005. He also says that the New LP has no operating agreement and operated pursuant to the original LP's operating agreement. Fendt Aff, ¶6. If that were so, a majority of the members was required to approve an action, and if the members were the same, a majority did not authorize this action.

The proposed interveners have submitted the affidavit of Donald C. Notice, who says that he is the Executive Director of the sole shareholder of New GP-1, Stockholder. He avers that Stockholder gave the Partnership the 5 buildings that comprise its only assets, which are worth $20 million. Notice avers that the Properties were refinanced in 2004, at which time the Partnership substituted New GP-1 for GP-1 and New LP for the LP. He denies that GP-1, New

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[4] In their memorandum of law, plaintiffs say that on December 24, 2004, before the Withdrawal K was signed in March 2005, the LP assigned its interest in the Partnership to the New LP. Doc 163, p 3. The New LP is listed on Exhibit A of the Withdrawal K as an entity not affected by it. No sworn statement or document supports the claim that the LP's interest in the Partnership was assigned to the New LP prior to Fendt's withdrawal. While affidavits and evidence may be used to preserve inartfully pleaded claims, a memorandum of law is neither. *R. H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316 (1st Dept 1989).

GP-1 or its Stockholder agreed to the Unsigned Amendment or that they would have agreed to reduce their percentages of ownership after contributing all of the Partnership's assets. He further avers that they would not have agreed to a clause permitting their removal by the New LP.

Copies of K-1s issued by the Partnership from 2003 through 2013 are in the record. Docs 80 & 90, In 2003, before the refinancing, an entity called WHGA Hamilton Heights Cluster Assoc. (there is no indication of what type of entity this is), which is not named in the Agreement or the Unsigned Amendment, was issued a K-1, which stated that it was a general partner who owned 67%.[5] Notice says that the entity named in the K-1 is non-existent. All of the other K-1s were issued to the same non-existent entity, but in 2004, after the refinancing, the K-1 stated that it was a general partner owning 0.51%, as stated in the Unsigned Amendment. The K-1s for the subsequent years list the entity as owning 0.51%, but state it is a limited partner. Notice contends that because the Partnership generated no income, he overlooked the reduced percentage and the wrong name on the K-1s until 2014, when he was contacted by plaintiffs' attorney, Tendy.

Notice presents evidence that on October 3, 2014, New GP-1 was notified that Urban Green had been removed and was asked to sign a resolution authorizing this action on behalf of the Partnership. Notice Affidavit, ¶¶ 18 & 19 & Exs D & E, Docs 111, 115 & 116. Notice says that New GP-1 refused to sign the resolution authorizing the action, asked for documentation of authority, which was not provided by Tendy, and continued to dispute that the action was properly authorized. The action was filed on October 7, 2014. Notice submits an undated email, which he says he received on May 4, 2015. In the email, Fendt states that he loaned the

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[5] WHGA Hamilton Heights Cluster, Inc., GP-1, owned 67% of the Partnership.

Partnership money to finance the litigation with a revolving line of credit with "very low interest ...." Doc 123.

In reply, the proposed interveners present documents, signed by Anderson and Notice at the end of 2004, relating to a bank loan for the Partnership. The documents reflect that New GP-1 held itself out as one of the GPs and the New LP held itself out as the sole limited partner. According to the loan documents, Anderson, as President of GP-2 and on behalf of the New LP, and Notice, on behalf of New GP-1, accepted, and acknowledged under oath, a loan commitment from New York Community Bank in the amount of $2,750,000 (Loan). Doc 181. New GP-1's board of directors, allegedly composed of Notice, as its President, and four other named individuals as well as Stockholder, unanimously adopted resolutions to accept the Loan for the Partnership, empower New GP-1 to deliver a mortgage on the Properties and empower its President to execute and deliver other required documents to the bank. *Id.* The Mortgage Note is signed and acknowledged under oath by Anderson and Notice on behalf of New GP-1 and GP-2, as is the mortgage. *Id.* Clearly, New GP-1 and New LP held themselves out ***to the bank*** as general and limited partners of the Partnership. The Loan documents do not reflect the percentage ownership of any of the entities.

Plaintiffs contend that the parties acted in accordance with the Unsigned Amendment, as evidenced by the K-1s to which GP-1 failed to object. However, acceptance of the K-1s does not change the fact that the Unsigned Amendment could not have authorized this action by the LP based on its purported resolutions. Nor do the K-1s prove conclusively that the Unsigned Amendment is binding because K-1s cannot substitute for a written, signed agreement of the partners. Moreover, the K-1s name a non-existent entity.

To summarize, the documentary evidence belies plaintiffs' claim that they control the Partnership's management, or that they validly removed New GP-1. Further, there is no formal documentation demonstrating the GPs' written agreement to the Unsigned Amendment. The resolutions of the LP signed by Fendt are not enforceable because he had previously renounced his interests and positions in that entity, as had one of the other signatories, Nicolai. Finally, Fendt has claimed that the LP and the New LP are the sole limited partner in taking actions at issue here.[6] Both statements cannot be true.

B. Motions to Intervene, Dismiss Action on behalf of Partnership & Disqualify

Three entities are moving to intervene: 1) Stockholder; 2) New GP-1; and 3) GP-1. Plaintiffs oppose intervention of GP-1 and New GP-1 because they were dissolved for non-payment of taxes in 2002 and 2011, respectively, and because plaintiffs claim to have ousted New GP-1 from the Partnership. Notice replies that New GP-1 has filed for reinstatement and that, if necessary, GP-1 could too.

Intervention is permitted as of right "when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment." CPLR 1012. Here, it is clear that the Partnership would have been bound by the judgment. The declaratory judgment sought will determine if the Unsigned Amendment was effective, which would affect GP-1 and GP-2. GP-1 had, and may still have, a 67% interest in the Partnership.

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[6] Fendt is trying to have it both ways by relying on resolutions of the LP and the Unsigned Amendment. He simultaneously relies on the authority of the LP named in the Agreement to pass the resolutions and uses provisions of the Unsigned Amendment, thereby allegedly giving the New LP powers to remove New GP-1 and Urban Green. The LP, however, did not have these powers under the Agreement. Documentary evidence shows that Fendt claimed that both the LP and the New LP are the sole limited partner of the Partnership. He presents no assignment of the LP's rights to the New LP.

New GP-1 may have 0.51% and signed the note and mortgage for the now defaulted Loan. Both would be bound by any determination regarding whether the Partnership was wronged by defendants. They have a right to assert that the action was not authorized and to protect their interest in the Partnership. *276-8 Pizza Corp. v Free*, 118 AD3d 591, 592 (1st Dept 2014)(party with interest in corporation suing without authorization may intervene as of right). Moreover, the interests of GP-1 and/or New GP-1 are not adequately represented by defendants, whose actions allegedly included a variety of misdeeds that were not in the Partnership's interest. Then too, Fendt and Tendy are not adequate representatives of GP-1 and New GP-1, as they rely on the purported removal of New GP-1 and the disputed, Unsigned Amendment that allegedly reduced the moving interveners' interest to less than 1%. Thus, GP-1 and New GP-1 have a right to intervene. But, it is not necessary for Stockholder to intervene, as the entity it owns, New GP-1, is intervening and represents Stockholder's interest. Nor is it necessary to reach permissive intervention, pursuant to CPLR 1013.

GP-1 and New GP-1, although dissolved, may prosecute the claims they seek to assert because the relief they request will preserve and marshal their general partnership interest, which is an asset. Tax Law §203-a provides that a corporation may be dissolved for non-payment of taxes. Business Corporation Law (BCL) §1009 provides that BCL §1006 applies to corporations dissolved under 203-a of the Tax Law. BCL §1006(a) provides that, after dissolution, a corporation retains a limited de jure existence solely for the purpose of winding up its affairs, including the right to sue or be sued. After dissolution under the Tax Law, a corporation retains capacity to bring suit for the purpose of winding up, but new business is prohibited. *Lorisa Capital Corp. v Gallo*, 119 AD2d 99, 110 (2d Dept 1986), citing Tax Law § 203-a [10]; and Business Corporation Law §§ 1009 & 1006.

Winding up includes marshalling of assets and demanding an accounting. *Silberfeld v Swiss Bank Corp.*, 273 AD 686, 688 (1st Dept1948) (partner winding up authorized to collect its assets and demand accounting). A suit to preserve GP-1 or New GP-1's interest in the Partnership would be in the nature of marshalling its assets. They are demanding an accounting, also part of winding up. The claims to declare the Unsigned Amendment void and to invalidate New GP-1's removal as a general partner seek to preserve corporate assets, as are the claims seeking to prevent unauthorized actions by the Partnership.

The motions by defendants and the interveners to dismiss the action insofar as it is on behalf of the Partnership are granted because documentary evidence proves that there was no authority to bring the action on its behalf. *Sterling Industries, Inc. v Ball Bearing Pen Corp.*, 298 NY 483 (1948). The action was not authorized by the GPs, as required in the Agreement or the Unsigned Amendment, and the LP's resolutions were invalid. When asked, the interveners refused to approve the Partnership's prosecution of this action. Consequently, the action cannot be sanctioned and should be dismissed.

Nonetheless, the court grants leave to GP-2 to bring an action on behalf of the Partnership. Stockholder admits that Fendt owns 50% of GP-2, which is a corporation, and the record is silent concerning its directors. Doc 111, p 8, fn 3. The Partnership Agreement says that the general partners "have equal rights in the management of the partnership business." Thus, if Fendt is a shareholder of the general partner GP-2, he may bring a derivative action after making demand upon the board of directors or alleging demand futility in the complaint. BCL §626(c) (demand for a corporation to bring suit should be made on directors and complaint must "set forth with particularity" efforts by plaintiff shareholder to secure initiation of action by

corporation's board or reasons for not making such effort – demand futility); *Barr v Wackman*, 36 NY2d 371, 378 (1975).[7]

The court *sua sponte* adds the LP and GP-2 as defendants in the interveners' action. CPLR 1001 permits the court to add a party that ought to be joined if complete relief is to be accorded between the existing parties. The court may add such a party *sua sponte*. *Matter of Lezette*, 35 NY2d 272, 282 (1974). Here, as the LP and GP-2 have (or had) an interest in the Partnership, they should be parties to any action that issues a declaratory judgment as to whether the Unsigned Amendment is operative. The judgment will affect ownership of the Partnership and in what percentages. Further, the interveners seek an accounting from the limited partner, and the LP is the limited partner in the signed Agreement.

Finally, the court grants the motion to disqualify Tendy. Tendy cannot represent the Partnership, since the LP that she represents brought the action without authority and GP-1 and/or New GP-1, whose consent was needed, refused to give it. The interests Fendt claimed through the LP conflict with GP-1 and New GP-1, so Tendy cannot represent the Partnership. *Greene v Greene*, 47 NY2d 447, 451 (1979) ("attorneys historically have been strictly forbidden from placing themselves in a position where they must advance, or even appear to advance, conflicting interests"). The court notes that Tendy denies that she represents the New LP.

C. AFF-PSA Bronx 9-D, Inc.

The action is dismissed insofar as it is brought on behalf of AFF-PSA. Plaintiffs do not demonstrate that they had authority to bring the suit on behalf of AFF-PSA. AFF-PSA is a

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[7] *See generally, Yudell v Gilbert*, 99 AD3d 108, 113 (1st Dept 2012) ("A plaintiff asserting a derivative claim seeks to recover for injury to the business entity.").

corporation that owns 4 buildings in the Bronx. Fendt claims that AFF-PSA has five shareholders. He says that he and Anderson each own 45% of the shares and that there are 3 other shareholders. Fendt claims that one of the three, Linda Schwartz, authorized him to bring the suit on behalf of AFF-PSA, but he does not say what percentage she owns. Hayes' affidavit says Linda Schwartz owns 2.5%, which would have been a total of 47.5% for Fendt and Linda Schwartz.[8]

The resolution allegedly authorizing this suit was presented for the first time on these motions, i.e., the court was not presented with it on plaintiffs' motion for the preliminary injunction. Only Fendt and Linda Schwartz signed it. Fendt's affidavit attaches the corporation's by-laws, which say that the directors are responsible for control and management, the President is subject to the authority of the board and the President has the powers and duties "usually vested" in the President of a corporation. Doc 160. Further, the by-laws provide that a consent without a meeting of shareholders must be unanimous, but the resolution allegedly authorizing the suit was signed by only two of the five. *Id.* Finally, on May 21, 2015, Andrew Schwartz wrote a letter to Tendy saying that he did not think the litigation was in his family's best interest. Doc 153. Thus, there is no demonstrated authority for the suit on behalf of AFF-PSA.

However, Fendt is given leave to assert a shareholder's derivative claim. The amended complaint alleges neither demand nor demand futility with respect to the directors of AFF-PSA. BCL 626(c); *supra*; *Barr v Wackman*, *supra*. Accordingly, the motion to dismiss the action brought on behalf of AFF-PSA is granted and leave to amend is granted to Fendt to assert a shareholder derivative claim on its behalf.

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[8] No affidavit from Ms. Schwartz is submitted, although her signature purportedly is on the authorization.

D. TAF Alexander Avenue, Inc., Pleasant Avenue Associates, LP, & FAM Pleasant Avenue, LLC

Fendt says that TAF Alexander Avenue, Inc. (TAF), a corporation, and Pleasant Avenue Associates, LP (PAA), a limited partnership, are owned 50/50 by himself and Anderson. In his affidavit, Anderson agrees.

Defendants' motion to dismiss the action insofar as it is on behalf of TAF is granted, as the record does not establish that TAF's directors authorized the action. *Sterling Industries, Inc. v Ball Bearing Pen Corp.*, 298 NY 483 (1948). Fendt's affidavit says that TAF's by-laws give him and Anderson "equal control" of TAF. Doc 154. On that basis, he says he had a right to bring suit and to remove Urban Green. TAF's by-laws say that shareholder action by vote at a meeting must be approved by a majority; shareholder action by written consent must be unanimous; and action by the directors requires majority approval. Doc 99. Fendt does not name TAF's directors. Doc 154. Anderson's affidavit says that he and Fendt "each served as directors and officers." Doc 93. It is not clear whether that means that Anderson and Fendt were TAF's only directors when the action was brought, or whether there were other directors at that time. Nor is a shareholder derivative claim plead: neither demand on TAF's directors nor demand futility is alleged. BCL 626(c). The action against TAF is dismissed, with leave to replead a derivative claim.

The motion to dismiss the action brought on behalf of PAA also is granted, with leave to replead a derivative claim in accordance with the RLPA §121-1002; *see also E. Daskal Corp. v New City Ventures LP-1*, 225 AD2d 653, 654 (2d Dept 1996) (where limited partner lacked standing to commence suit for limited partnership, limited partner could bring derivative action where complaint alleged demand on general partner and refusal). RLPA §121-1002 authorizes a limited partner to bring an action in the right of a limited partnership, if all general partners with

authority to do so have refused, or would likely refuse; those facts must be set forth in the complaint. *Id.*

Documentary evidence demonstrates that PAA did not authorize this suit. Its limited partnership agreement, as amended, demonstrates that its sole general partner is A F & F Community Builders, Inc. (A F& F), whose President is Anderson. Doc 100.[9] Anderson's affidavit says that he and Fendt "jointly operated" A F& F. Doc 93. Fendt is a limited partner, as is Anderson and Fendt's brother, John. Doc 100. The limited partnership agreement vests management in the general partner and the limited partners have no right to manage the business. Doc 100, §11.1. Nothing in the record discloses the names of the directors of A F & F, and neither its certificate of incorporation nor its corporate by-laws are in the record. While Fendt says he is the "Managing Member" of PAA, that claim is refuted by PAA's limited partnership agreement, which names A F & F as the Managing General Partner. Doc 100, §11.3(f) The court grants leave to Fendt to replead a derivative claim as a limited partner of PAA.

The motion to dismiss the action on behalf of FAM Pleasant Avenue, LLC (FAM) is granted with leave to Fendt to assert a derivative claim as a member. The amended complaint alleges that, by resolution, a majority of FAM's members authorized Urban Green's removal as managing agent and Anderson's removal as managing member. It does not plead that the majority authorized the action. Fendt's affidavit says nothing about FAM. Anderson says that he and Fendt each own 38%, although Fendt clams to own 45%. Two FAM resolutions were submitted in support of the motion for a preliminary injunction. Doc 10. They recite that they are signed by a majority of FAM's members, Fendt, Nikolai, Bonnicklewis and Huang. They purportedly, removed Urban Green, gave Fendt signature authority and the power to replace

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[9] A second general partner withdrew long ago. Doc 100.

Urban Green, and authorized this litigation. In the absence of the operating agreement, the court cannot determine whether a majority of FAM's members signed the resolution, or whether FAM's management is controlled by a majority of its members, as opposed to delegated to managing members.

However, a derivative claim on behalf of a limited liability company (LLC) may be brought by a member, who alleges demand or demand futility. *Tzolis v Wolff*, 10 NY3d 100 (2008) (member of LLC may bring derivative claim); *Najjar Group LLC v West 56th Hotel LLC*, 110 AD3d 638, 639 (1st Dept 2013) (pre-suit demand required in LLC derivative action). Here, the amended complaint alleges neither demand nor demand futility with respect to FAM. Fendt is granted leave to assert a derivative claim as a member of FAM.

E. Appointment of Receiver to Manage the Properties & Enjoin Actions on behalf of Plaintiffs

CPLR 6401 provides that a person with an interest in property which is the subject of an action in the Supreme Court may move for the appointment of a temporary receiver "where there is danger that the property will be removed from the state, or lost, materially injured or destroyed." *Accord, Vardaris Tech, Inc. v Paleros, Inc.*, 49 AD3d 631 (2d Dept 2008); *Dolgoff v Projectavision, Inc.*, 235 AD2d 311 (1st Dept 1997) (must show danger of irreparable loss and damage to property). A receivership pending trial is a conservation and preservation remedy resting in the sound discretion of the court. *Hahn v Wylie*, 54 AD2d 622 (1st Dept 1976). A receiver is proper where the applicant makes a clear evidentiary showing of the necessity for the conservation of property and the protection of the interests of the litigant. *Schachner v Sikowitz*, 94 AD2d 709 (2d Dept 1983). The court has discretion to continue a receivership after final judgment. CPLR 6401(c). Hence, although the court is dismissing the action against the

Partnership with leave to replead, it may appoint the receiver requested by a person interested while the action is pending and authorize the receiver to proceed after dismissal.

Here, the mortgage on the Partnership Properties needs to be refinanced and the water bills need to be paid. Docs 53 through 69 (Water Bills). The Water Bills reflect that FAM and PAA also have arrears. Docs 68 & 69. The parties are at loggerheads and cannot agree on management of plaintiffs by Safeguard. Safeguard, employs Abreu and Rosado, who Anderson distrusts and blames for not paying the Water Bills. To protect Anderson, who has an interest in the LP and GP-2, Safeguard should not manage the Properties, even though the court is dismissing the action against the Partnership. The court, therefore, exercises its discretion to appoint a temporary receiver for the Properties and empowers him to employ a new managing agent. Defendants' motion to enjoin "plaintiffs" from acting for the Properties is denied as moot in light of the appointment of a Temporary Receiver and new managing agent. A separate order appointing a temporary receiver and empowering him to employ a managing agent is signed herewith.

F. Return of Legal Fees Paid by Plaintiffs to Tendy

There is no showing that the plaintiff entities paid Tendy. Fendt's letter stated that he loaned the money to finance the litigation. If the Temporary Receiver finds that loans or fees were incurred without proper authorization by plaintiffs, he is empowered to rectify the matter. In addition, the interveners can challenge such payments or loans as part of the Partnership accounting. Accordingly, it is

ORDERED that Motion Sequence 003 by defendants is granted to the extent that: 1) the action on behalf of Hamilton Heights Cluster Associates, LP (Partnership), Pleasant Avenue Associates, LP (PAA), FAM Pleasant Avenue LLC (FAM), AFF-PSA Bronx 9-D, Inc. (AFF-

PSA), and TAF Alexander Ave., Inc. (TAF), is dismissed; and 2) a temporary receiver is appointed; and the motion is otherwise denied; and it is further

ORDERED that Motion Sequence 004 by West Harlem Group Assistance, Inc. (Stockholder), West Harlem Heights Cluster, Inc. (New GP-1), and WHGA Hamilton Heights Cluster, Inc.(GP-1), is granted to the extent that: 1) the action on behalf of the Partnership is dismissed; 2) GP-1 and New GP-1 are granted leave to intervene and to assert the claims in their proposed complaint; and 3) the Tendy Law Office LLC (Tendy) is disqualified from representing the Partnership; and the motion is otherwise denied; and it is further

ORDERED that A & F Hamilton Heights Cluster, Inc., is given leave to serve a derivative claim on behalf of the Partnership, within 20 days after service on plaintiffs of a copy of this order with notice of entry; and James Fendt is given leave, within 20 days after service on plaintiffs of a copy of this order with notice of entry, to serve a second amended complaint asserting derivative claims AFF-PSA, TAF, FAM, and PAA; and it is further

ORDERED that the parties shall call chambers with all attorneys on the line after the service of the second amended complaint or the time to serve it expires, whichever is sooner, to discuss amendment of the caption and the deadline to file an accounting; and it is further

ORDERED that the oral argument of these motions scheduled for July 10, 2015, is canceled.

Dated: July 8, 2015

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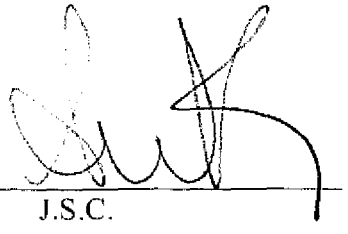

J.S.C.