

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS
Justice

IA Part 4

MUFFED SIAD and AHMAD ZAHRIYEH, x
individually and derivatively as members of
and on behalf of 639 4th AVENUE LLC,

Plaintiffs,

- against

SANDEEP TULI, SONU ARORA AND
639 4TH AVENUE, LLC,

Defendants.

Index
Number 4970 2009

Motion
Date July 21, 2009

Motion
Cal. Number 29

Motion Seq. No. 1

_____ x

The following papers numbered 1 to 18 read on this motion by Sandeep Tuli, Sonu Arora and 639 4th Avenue, LLC (639 4th), for summary judgment with respect to their First Affirmative Defense, Set-Off and Counterclaim; and for summary judgment on the Third Cause of Action; and cross motion by Mufeed Siad and Ahmad Zahriyeh, individually, for summary judgment on their third cause of action for declaratory judgment and to dismiss the First Affirmative Defense, Set-Off and Counterclaim.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-7
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Answering Affidavits - Exhibits.....	12-16
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Upon the foregoing papers it is ordered that the motion and cross motion are denied.

In this action for breach of fiduciary duty and declaratory judgment, plaintiffs seek, inter alia, a declaration from the court that Krishma Arora (Krishma) was not properly designated as a manager of the 639 4th, and therefore is not a manager of the same. As a result of the ongoing dispute over whether Krishma is a manager, as well as Tuli's breaches of his fiduciary duty to 639 4th, Zahriyeh and Siad commenced this action on March 4, 2009. The complaint sets forth three causes of action. The first cause of action is derivatively against Tuli for breach of his fiduciary duty toward 639 4th. The claim alleges, in part, that Tuli failed to advise or warn 639 4th with respect to the damages that it would incur and has incurred as a result of Consort's malfeasance, misfeasance and conduct, or to take any action to enable 639 4th to protect its interests with respect to the Project. The second cause of action is by Zahriyeh and Siad individually against Tuli for breach of his fiduciary duty to them and for his failure to protect the value of their interest in 639 4th. The third cause of action is for a declaratory judgment that Krishma is not a manager of 639 4th. Defendants move for summary judgment in their favor on their counterclaim that Krishma was properly designated a manager of the company and for summary judgment in their favor dismissing the third cause of action. Plaintiffs oppose the motion and cross-move for summary judgment in their favor on their third cause of action for declaratory judgment and to dismiss the affirmative defense, setoff and counterclaims of defendants.

Facts

639 4th was formed in or around June 2004. The primary business of 639 4th was to convert an existing garage located at the premises known as 639 4th Avenue, Brooklyn, New York, into an eleven story residential building containing forty-four residential units with ground level commercial space in the Gowanus section of Brooklyn (the project). The residential spaces were to be sold as condominiums. 639 4th entered into a construction contract dated on or around January 30, 2006, with Consort Contracting, Inc. (Consort), to act as general contractor on the project. The president of Consort is Balkrishna Tuli (Bill Tuli), Sandeep Tuli's father.

Mufeed Siad, Ahmad Zahriyeh, Sandeep Tuli (Tuli) and Gurdeep Singh were the initial members. The four of them were also the initial managers. In connection with the formation of 639 4th, the initial members entered into an operating agreement (the Operating Agreement), dated June 15, 2004. Article 4.8 of the Operating Agreement provides as follows:

Any manager may resign at any time by giving written notice to the company. The resignation of any Manager shall take effect upon receipt of such notice or at any later time specified in such notice ... The resignation of a Manager who is also a Member shall not affect the Manager's rights as a Member and shall not constitute a withdrawal of a Member. In the event a Manager shall resign he shall have the exclusive right to designate a

successor Manager and the Members hereto agree to vote their Membership Interests in support of said successor.

In or around June 2008, relations between Singh, Tuli and Bill Tuli deteriorated to the point that Singh wanted to sell his membership interest in 639 4th. Singh entered into an agreement to sell his membership interest to Tuli. At the closing, Singh resigned from all of his offices at 639 4th. Singh also signed a power of attorney in favor of Arora, who is also the son-in-law of Bill Tuli. Arora was never a manager or a member of 639 4th. Plaintiffs submit that the power of attorney was executed for the purpose of consummating the transaction and in particular to deal with post-closing issues that might arise. Singh was moving to India immediately after the sale and there was a concern that if post-closing issues arose, he would not be available to address them. Furthermore, the power of attorney does not mention anything about designating anyone as a manager. It provides, in part, that it grants Arora "the power of attorney to act on behalf of the undersigned and in his stead with respect to all matters and transactions relating and/or referring to 639 4th Avenue LLC from the date hereof". Notably, at that time, Singh had resigned from and sold his interest in 639 4th.

Article 4.9 of the Operating Agreement permits the removal of any manager by the vote or written consent of all of the Membership Interests, except for the Membership Interest of the manager being removed. Singh was now no longer a member or manager as he had sold his interest. The three remaining members were Zahriyeh, Tuli and Siad. Zahriyeh and Siad decided to remove Tuli as a manager, and on August 27, 2008, Zahriyeh and Siad duly removed Tuli as a manager. They advised him of this action by letter dated August 27, 2008.

In December 2008, after further disputes amongst the members, which were exacerbated by Consort's breaches of and failure to perform under the construction agreement, Arora claimed, for the first time, that he had previously designated his wife, Krishma, as manager to replace Singh. Krishma is the daughter of Bill Tuli and sister of Sandeep Tuli, the previously removed manager. Krishma claimed, in a letter dated December 3, 2008, that Arora had designated her as manager pursuant to Singh's power of attorney.

In response, Zahriyeh and Siad wrote a letter to Krishma dated December 4, 2008, stating that "there is a serious legal issue as to Mr. Singh's right to designate anyone as a Manager. The foregoing notwithstanding, please provide us with any and all documentation in your possession which demonstrates that Mr. Singh designated you as a Manager." In response, Krishma produced, for the first time, a "Notice of Designation" (the Notice) which reads as follows:

The undersigned hereby designates KRISHMA ARORA as successor Manager of 639 4th Avenue LLC for Gurdeep Singh, which such designation is effective from the date of the

resignation of the undersigned.

Dated 6-17-08

/s/ Gurdeep Singh
Gurdeep Singh
By Sonu S. Arora
His Attorney in fact

It appears Sonu Arora was relying upon section 4.8 of the Operating Agreement to permit him to designate his wife as a manager, using the power of attorney which Singh gave him.

Plaintiffs point out that the alleged Notice of Designation is dated June 17, 2008, some six months earlier and, until December 3, 2008, neither Siad nor Zahriyeh had any knowledge of Krishma having been designated as a manager. Plaintiffs submit that it strains credulity, that Krishma would not reveal that she was a designated a manager of the company before December 2008 and in that alleged capacity did not object to the removal of her brother, Tuli.

Plaintiffs further believe that as the relationship between Zahriyeh and Siad, on the one hand, and the Tuli camp, on the other hand, deteriorated, Arora misused the power of attorney given to him by Singh for other purposes, to designate his wife as a manager; and that Arora back-dated the designation to the date of the sale by Singh of his interest.

As a result of the ongoing dispute over whether Krishma is a manager, as well as Tuli's breaches of his fiduciary duty to 639 4th, Zahriyeh and Siad commenced this action on March 4, 2009. The complaint sets forth three causes of action. The first cause of action is derivatively against Tuli for breach of his fiduciary duty toward 639 4th. The claim alleges, in part, that Tuli failed to advise or warn 639 4th with respect to the damages that it would incur and has incurred as a result of Consort's malfeasance, misfeasance and conduct, or to take any action to enable 639 4th to protect its interests with respect to the Project. The second cause of action is by Zahriyeh and Siad individually against Tuli for breach of his fiduciary duty to them and for his failure to protect the value of their interest in 639 4th. The third cause of action is for a declaratory judgment that Krishma is not a manager of 639 4th.

Defendants answered the complaint on or about April 23, 2009, and interposed seven counterclaims. The first counterclaim is for a declaratory judgment that Krishma is a manager of 639 4th. The remaining counterclaims are for a declaratory judgment that Tuli is still a manager (second counterclaim), for breach of fiduciary duty (third through sixth counterclaims), and for a judgment that Zahriyeh and Siad should not benefit from any judgment that is rendered in the name of 639 4th. Plaintiffs served a reply on or about May 12, 2009.

Discussion

The complaint basically seeks a judicial determination as to whether the terms of the Operating Agreement of the limited liability corporation clearly authorized the designation of a new manager to the corporation and whether defendants acted properly in their actions in allegedly designating a new manager. By its amended answer defendants in effect admit plaintiff's allegation that a dispute arose between them concerning the proper designation of a replacement manager. A determination of this issue, therefore, may properly be sought by an action for a declaratory judgment, the very purpose of which is to stabilize and to remove uncertainty from legal relations (*James v Alderton Dock Yards Ltd.*, 256 NY 298 [1931]; *Fidelity & Columbia Trust Co. v Levin*, 128 Misc 838, *affd* 221 App Div 786 [1927], *affd* 248 NY 551 [1928]).

Whether an agreement is ambiguous or not is a question of law to be resolved by the courts (*see W.W.W. Assocs. v Giancontieri*, 77 NY2d 157 [1990]). The agreement should be read as a whole to determine its purpose and intent, and it should be construed to give effect and meaning to all provisions (*id.*; *see also American Express Bank Ltd. v Uniroyal, Inc.*, 164 AD2d 275 [1990], *appeal denied* 77 NY2d 807 [1991]). Words and phrases are given their plain meaning (*American Express Bank Ltd. v Uniroyal, Inc.*, *supra*). "Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought" (*William C. Atwater & Co. v Panama Railroad Co.*, 246 NY 519, 524 [1927]).

In determining whether an agreement is ambiguous, the inquiry is whether "the agreement on its face is reasonably susceptible of more than one interpretation [,] ... [and a] party seeking summary judgment has the burden of establishing that the construction it favors is the only construction which can fairly be placed thereon" (*Kibler v Gillard Constr., Inc.*, 53 AD3d 1040, 1042 [2008] [quotations omitted]). A contract is unambiguous if the language it uses has a "definite and precise meaning unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569-70 [2002], quoting *Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]). If the contract is reasonably susceptible of more than one interpretation, summary judgment is inappropriate (*NFL Enterprises LLC v Comcast Cable Communications*, 51 AD3d 52, 58 [2008]; *see W.W.W. Assocs. v Giancontieri*, 77 NY2d 157 [1990]; *see also Nagel v Nagel*, 52 AD3d 258 [2008] [contract ambiguous where more than one reasonable interpretation]; *LoFrisco v Winston & Strawn LLP*, 42 AD3d 304 [2007]; *American Express Bank Ltd. v Uniroyal, Inc.*, 164 AD2d at 277 [triable issue where necessary to refer to extrinsic facts to determine parties' intent]).

Here the movants and cross-movants have failed to meet their burden of establishing that their respective construction is the only reasonable one that can fairly be placed on the

Operating Agreement. Each party's interpretation finds some support in the contract language; thus, there is a triable issue as to what the parties intended. Where, as here, interpretation of contract terms or provisions are susceptible to at least two reasonable interpretations, and intent must be gleaned from disputed evidence or from inferences outside the written words, it becomes an issue of fact that must be resolved by trial (*Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878 [1985]).

Furthermore, a contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties (*see Superb General Contracting Co. v City of New York*, 39 AD3d 204 [2007]; *In re Lipper Holdings, LLC.*, 1 AD3d 170 [2003]). While not settled, it does not appear commercially reasonable that the parties to the Operating Agreement would intend to allow a disgruntled manager who was selling all of his membership interest and resigning as a manager altogether, to directly choose, much less indirectly choose through a power of attorney, a manager of the company whose decisions would bind the company *in futuro* long after that manager has given up all of his economic interest in the company. Thus, while not conclusive, it would appear reasonable that the power conferred on the outgoing manager to name a successor exist only if that manager retains his membership interest in the company once he resigns as a manager. Nevertheless the document does not clearly establish the intent of the parties or the proper construction of the Operating Agreement.

Accordingly, the motion and cross motion for summary judgment are denied.

Dated: September 23, 2009

J.S.C.