

**245 E. 19th St. Assoc., LLC v Mayer**

2005 NY Slip Op 30364(U)

October 14, 2005

Supreme Court, New York County

Docket Number: 101523/05

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD  
Justice

PART 35

W5 E. 1904 So. Assoc. LLC

INDEX NO. 101523/05

MOTION DATE 9/27/05

MOTION SEQ. NO. 04

MOTION CAL. NO. \_\_\_\_\_

- v -  
Andrew Mangel

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED


Cross-Motion:  Yes  No

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

*accordance with the annexed Memorandum  
Decision and Judgment.*

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 10/14/05

[Signature]  
J.S.C.

**HON. CAROL EDMEAD**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

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

\_\_\_\_\_<sup>x</sup>  
245 EAST 19<sup>th</sup> STREET ASSOCIATES, LLC, and  
IN RE APPLICATION OF HARPER MANAGEMENT  
CO., LLC,

Plaintiffs,

Index No. 101523/05

-against-

ANDREW MAYER, MIRIAM K.  
ROTHENBERG, HANNAH D. WASSERMAN,  
SIMON OSNOS, individually and as Personal  
Representative under the Will of Berna Osnos a/k/a  
Berna Lee Osnos, Deceased, NOAH OSNOS,  
individually and as Personal Representative of the  
Estate of Berna Osnos a/k/a Berna Lee Osnos,  
Deceased, EDWARD D. KORN, individually and  
as Trustee of Trusts created under the Will of  
Robert Korn, Deceased, and as Executor of the  
Estate of Edith Korn, Deceased, Robert B. Korn,  
individually, and as Trustee of Trusts created under  
the Will of Robert Korn, Deceased, WILLIAM A.  
KORN, individually, and as Executor of the Estate  
of Robert Korn, Deceased, and as Trustee of Trusts  
created under the Will of Robert Korn, Deceased,  
HARPER MANAGEMENT, CO., LLC and  
WEIDRO CORP. a/k/a WIEDRO INC.

MEMORANDUM  
DECISION AND  
JUDGMENT

Sequence 004

Defendants.

\_\_\_\_\_<sup>x</sup>  
HON. CAROL R. EDMEAD, J.S.C.

In this action arising from a 1964 tenancy in common agreement (the "TIC Agreement"),  
plaintiff 245 East 19<sup>th</sup> Street Associates LLC ("245") moves by order to show cause for summary  
judgment (CPLR 3212), on its first and third causes of action, seeking the following:

- (1) a declaration that in accordance with paragraph "Sixteenth: (a)" of the TIC Agreement,  
that 66 2/3% percent or more of the tenants in common holding an interest in the Property (defined

*infra* page 4) have elected to sell, or contract to sell the Property in accordance with the terms of the Purchase and Sale Agreement (defined *infra* at pages 5-6), and that defendants Wiedro Corp. a/k/a Wiedro Inc. (“Wiedro”), Edward D. Korn (“Edward Korn”), individually and as Trustee of Trusts created under the Will of Robert Korn, Deceased, and as Executor of the Estate of Edith Korn, Deceased, Robert B. Korn, individually, and as Trustee of Trusts created under the Will of Robert Korn, Deceased, William A. Korn, individually, and as Executor of the Estate of Robert Korn, Deceased, and as Trustee of Trusts created under the Will of Robert Korn, Deceased (the “Korns”), shall execute any and all documents that will be required in order to effectuate and complete the sale, transfer, assignment and contract of sale in accordance with the terms of the Purchase and Sale Agreement;

(2) injunctive relief compelling the Korns and Wiedro to execute any and all documents that will be required in order to effectuate and complete the sale, transfer, assignment and contract of sale in accordance with the terms of the Purchase and Sale Agreement between 245 and defendants Andrew Mayer, Miriam K. Rothenberg, Hannah D. Wasserman, Simon Osnos, individually and as Personal Representative under the Will of Berna Osnos a/k/a Berna Lee Osnos, Deceased, Noah Osnos, individually and as Personal Representative of the Estate of Berna Osnos a/k/a Berna Lee Osnos, Deceased (the “Stipulating Defendants”), as Sellers and 245 East 19<sup>th</sup> Street Acquisition, LLC, (“Purchaser”)<sup>1</sup>;

(3) a declaration that in the event the Korns and Wiedro refuse to execute any and all documents that are required to effectuate and complete the sale, transfer, assignment and contract

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<sup>1</sup> The Purchase and Sale Agreement is being held in escrow pursuant to a Consent and Escrow Agreement among the parties to the Purchase and Sale Agreement.

of sale in accordance with the terms of the Purchase and Sale Agreement within 48 hours of the presentation of such documents to counsel for the Korns and Wiedro, then the Korns and Wiedro are deemed to have executed any and all documents that will be required in order to effectuate and complete the sale, transfer, assignment and contract of sale in accordance with the terms of the Purchase and Sale Agreement, and 245 is authorized to execute any and all such documents on behalf of the Korns and Wiedro, and directing the New York Register's Office, for New York County, to accept the documents so executed and record them;

(4) an order enjoining the Korns and Wiedro from interfering with the sale of the Property in accordance with the terms of the Purchase and Sale Agreement;

(5) an order enjoining the Korns and Wiedro from initiating an arbitration unauthorized by the other members of the tenancy in common;

(6) a declaration that the tenancy in common interest in the Property held by Wiedro (which corporation has been dissolved and is no longer in existence) has, by Wiedro's shareholder's acts and/or operation of law, been transferred to Robert Korn (Deceased) and Edith Korn (Deceased);<sup>2</sup> and

(7) an award to 245 of such further equitable, injunctive and other relief as the Court deems appropriate, including but not limited to any and all damages sustained by 245 as a result of the delay resulting from the Korns and Wiedro's interference with the sale of the Property as well as an award of 245's attorneys' fees and disbursements and all other costs and expenses of this action.

Defendant Edward Korn, individually and as Trustee of Trusts created under the Will of

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<sup>2</sup> This point has been conceded in the opposition papers of Edward Korn (see footnote 2, on page 3 in cross-moving affidavit of Edward Korn).

Robert Korn (Deceased), and as Executor of the Estate of Edith Korn (Deceased), and on behalf of Wiedro Corp., a/k/a Wiedro Inc. (the "Korn defendants") cross moves for summary judgment (CPLR 3212) on his first counterclaim for a declaration that he properly exercised the right of first refusal set forth in paragraph 11 of the TIC Agreement ("paragraph 11").

#### Factual Background

On May 15, 1964, eight parties entered into the TIC Agreement concerning the property located at 339-349 Second Avenue, in Gramercy Park, New York.<sup>3</sup> As a result of a 1991 contract of sale between Kerry Mayer, Wallace Perlman, as Executor of the Estate of Clara W. Mayer, Hannah D. Wasserman, Nathaniel I. Durlach, Peter Durlach and David Durlach, as Sellers and 245, 245 acquired certain interests in the Property. The real property records reflect the present owners of the Property and their respective tenant in common ("TIC") ownership interest therein as follows:

245:	46 2/3%
Miriam K. Rothenberg	13 1/3%
Hannah D. Wasserman	1 2/3%
Simon Osnos and Noah Osnos, as Personal Representatives of the Estate of Berna Osnos	13 1/3%
Andrew Mayer	13 1/3%
Weidro	11 2/3%

It is uncontested that upon the dissolution of Wiedro, the interest in the Property held by Weidro was transferred by its shareholders and/or by operation of law in equal parts to the

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<sup>3</sup> The eight parties are as follows: (1) Clara W. Mayer, individually, (2) Clara W. Mayer, Charles Mayer and Albert Mayer as trustees for the benefit of Kerry Mayer, (3) Clara W. Mayer, Charles Mayer and Albert Mayer as trustees for the benefit of Stella Mayer, (4) Hannah D. Wasserman, (5) Nathaniel I. Durlach, (6) 89 Christopher Street Corp., (7) Wiedro, and (8) The Gramercy Square Corporation.

shareholders, Edith Korn and Robert Korn, both deceased. Accordingly, the Estate of Edith Korn currently holds 5 5/6% interest in the Property. Further, the Estate of Robert Korn transferred its 5 5/6% interest in the Property to trusts created under Robert Korn's Will. As such, the present owners of the Property and their respective tenant in common ownership interests in the Property are:

245	46 2/3%
Miriam K. Rothenberg	13 1/3%
Hannah D. Wasserman	1 2/3%
Simon Osnos and Noah Osnos, as Personal Representatives of the Estate of Berna Osnos	13 1/3%
Andrew Mayer	13 1/3%
Edward D. Korn, as Executor of the Estate of Edith Korn, Deceased	5 5/6%
Edward D. Korn, Robert B. Korn and William A. Korn as Trustees of Trusts created under the Will of Robert Korn, Deceased	5 5/6%

#### Motion for Summary Judgment

According to 245, 245 and the Stipulating Defendants collectively own a super-majority of 88 1/3% interest in the Property. 245 owns the largest percentage interest (46 2/3%) and the Korn defendants collectively own a minority 11 2/3% interest in the Property. 245 also asserts that the plain language of paragraph 16 (a) of the TIC Agreement (or "paragraph 16 (a)") requires all tenants in common to execute all documents necessary to complete the sale of the Property where 66 2/3% elect to sell such Property.

On July 14, 2005, 245 and the Stipulating Defendants executed a Purchase and Sale

Agreement, wherein they agreed to sell and transfer the entire Property in accordance with the terms therein.<sup>3</sup> Since 245 and the Stipulating Defendants own a super-majority of 88 1/3% interest in the Property, and have agreed to sell the entire Property to 245 Acquisition, LLC (the "Purchaser"), paragraph 16 (a) requires that all of the tenants in common, including the Korn defendants, "execute any and all documents that will be required in order to effectuate and complete the sale, assignment, transfer, mortgage or contract of sale" in accordance the Purchase and Sale Agreement. However, in breach of paragraph 16 (a) the Korn defendants have refused to execute the necessary documents.

Furthermore, the Korn defendants are in breach of their fiduciary duty to the other tenants in common and in violation the Court's instruction regarding discovery. On or about July 13, 2005, Edward Korn served discovery demands on Harper Management Co., LLC ("Harper") despite the Court's statements in conferences that no discovery on other issues would be permitted. Also, on August 2, 2005, Edward Korn sent a letter to 245 and the Stipulating Defendants, attempting to tender a down payment check with his offer to purchase the interests being sold herein, and claiming that he has a right of first refusal to purchase such interests. Again, on August 8, 2005, Edward Korn and William A. Korn served a deposition notice on 245.

245 maintains that contrary to the assertions by the Korn defendants, paragraph 16 (a) does not grant to a dissenting TIC member a right of first refusal to acquire the entire Property to which the defendant claims to be entitled. Paragraph 11, which grants the right of first refusal in certain situations, applies to the transfer or sale by one member of the TIC of his or its "interest in the tenancy in common," and does not encompass the situation in this case where a super-majority of

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<sup>3</sup> 245 and the Stipulating Defendants also executed a Stipulation of Settlement and Partial Discontinuance of Causes of Action ("Stipulation").

the parties to the TIC Agreement has agreed to sell the Property in its entirety. Any other interpretation renders paragraph 16 (a) meaningless.

Therefore, since 245's interpretation of the TIC Agreement is reasonable, consistent with its plain meaning, and gives effect to all of its terms, plaintiff is entitled to summary judgment as requested.

Additionally, 245 is entitled to specific performance and declaratory relief. 245 has established that the Korn defendants are in breach of the TIC Agreement, has set forth the parties who became parties to the TIC Agreement, that consideration was given, and that a valid contract exists between the parties. 245, as well as the Stipulating Defendants, have substantially performed its remaining obligations under paragraph 16 (a). Further, the Korn defendants are able to perform their obligations, but have refused to do so. 245 continues to be damaged by said defendants, and such damages cannot be measured by money damages.

Further, 245 and the Stipulating Defendants seek an immediate sale of the Property since any delay in the sale of the Property risks a retrenchment in the current real estate market and may seriously injure the members of the tenancy in common, and 245 has no adequate remedy at law.

245 further contends that the Korn defendants are liable under paragraph Seventh of the TIC Agreement for expenses and attorneys' fees incurred by 245 as a result of the delay caused by their violation of the Agreement and their interference with the sale of the Property.

#### Cross-Motion

In response, the Korn defendants cross move for an order granting defendant Edward Korn summary judgment on his first counterclaim and declaring that he properly exercised his right of first refusal in paragraph 11, and directing that the co-tenancy interests be sold to him.

According to the Korn defendants, 245 seeks to compel Edward Korn to sell his co-tenancy interests to the Purchaser, who is related to and shares offices with 245 and not an arms-length third party. Under the usual rules of contract interpretation, the TIC Agreement must be read to require 245 and the Stipulating Defendants to offer their co-tenancy interests to Edward Korn before contracting to sell those interests to Purchaser. At oral argument, Edward Korn claimed that this is not a sale of the Property as a whole, but this is really the sale of individual interests, subject to the right of first refusal provisions of paragraph 11. The Korn defendants point out that paragraph 11 provides very detailed procedures for implementing this right of first refusal, which were not followed.

Although 245 and the Stipulating Defendants failed to extend the offer as required, once the Purchase Agreement became final and part of the court record, Edward Korn elected to treat the Purchase Agreement as the required offer and accepted such offer in writing and by tendering the check. However, 245 rejected Edward Korn's offer, erroneously arguing that Edward Korn's interest is subordinate to 245's right of first refusal on the transfers out of the Trust and/or Estate controlled by Edward Korn. According to the Korn defendants, however, 245 has no right of first refusal as to Edward Korn's interests.<sup>5</sup>

Because the interests available for sale can and should be distributed pursuant to paragraph

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<sup>5</sup> The Korn defendants reject 245's claim of a right of first refusal for four reasons: (1) since none of the deeds purport to make the "preemptive" right of first refusal a right that runs with the land, 245, a mere purchaser of a portion of the Property, is not an identified party nor an "heir, successor or assign" to the TIC Agreement so as to be eligible to be an offeree under paragraph 11; (2) since the right of first refusal is not expressly included within the scope of paragraph 11, and the original parties intended to maintain family ownership for as long as possible, such right was not intended to include testamentary transfers; a contrary interpretation would violate the Rules Against Perpetuity; (3) Edward Korn has not offered his co-tenancy interests for sale; and (4) since Edward Korn's parents' tenancy-in-common interests are titled in Wiedro, they may be devised pursuant to 16 (b) of the TIC Agreement to their heirs.

11, it is argued that Edward Korn cannot be compelled to sell his interests pursuant to paragraph 16 (a). Further, if the proposed sale was a *bona fide* sale for fair value, 245 and the Stipulating Defendants should not have any preference as to whether the Korn defendants purchase their interests. The only explanation for 245's objection is that 245 (or its Principals) expect to receive additional compensation when the Purchaser assigns its rights to a third-party for the actual market value. As the sale is not one of arms-length, the Court should not permit such an inequitable result.

Additionally, Edward Korn cannot be required to sell his co-tenancy interests to Purchaser, because paragraph 16 (a) only mandates that a co-tenant execute the documents necessary to allow the selling co-tenants to sell their own interests.

In any event, 245 has not sustained its burden for summary relief given that its interpretation creates a result inconsistent with the intent of paragraph 11, which requires each other tenant in common to be provided with the opportunity to purchase the seller's interest before it is sold to a non-party. When the TIC Agreement, specifically paragraphs 11, 12, 13, 14, 15, and 18, is read as a whole, 245's interpretation is inconsistent with the intent to protect the minority interests. Further, discovery has not been completed to enable the Court to determine the meaning paragraphs 11 and 16.

Furthermore, 245 is not entitled to recover its attorneys' fees because there has been no violation of the TIC Agreement.

In reply, 245 claims that it is a successor and assign of the original members of the TIC Agreement and enjoys the right to enforce its terms against the Korn defendants. Paragraph 23 of the TIC Agreement states that the terms, covenants, and conditions, shall be binding and inure to the benefit of the parties and their successor and assigns. Therefore, 245 points out, if Edward Korn

claims that 245 is not a party to the TIC Agreement, then almost none of the defendants, who obtained their interests through later transfers, can claim to be a party to the TIC Agreement.

Also, by use of the word “property” in paragraph 16 as opposed to the term “individual interests,” paragraph 16 was intended to refer to the sale of the entire property and not to the sale of an individual tenant in common interest. The TIC Agreement refers to “interests” in paragraph 11, when one member seeks to sell his or her interest to a third party. As paragraph 16 applies to a sale of the “real property,” it does not grant a right of first refusal to a minority TIC member to acquire the entire property. When a super-majority elects to sell the Property, no one has the right of first refusal.

245 also points out that the Stipulation expressly states that the parties thereto consent to the sale of the Property as required by “Article Sixteenth of the TIC Agreement.”

Further, the report by the Korn defendants’ appraiser lacks merit, in that it purports to value the entire Property, unencumbered by the Ground Lease, including the building on the Property, which the TIC will not control until 2022.

### Analysis

To obtain summary judgment, the plaintiff must make a *prima facie* showing of entitlement to judgment as a matter of law on its cause of action, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR § 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinde*r, 307 AD2d 230, 762 NYS2d 386 [1<sup>st</sup> Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1<sup>st</sup> Dept 2002]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary

judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so ( CPLR §3212 [b]; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York*, *supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1<sup>st</sup> Dept 2003]).

Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1<sup>st</sup> Dept 1998]).

With respect to the TIC Agreement at issue, the Court must interpret such contract "to avoid inconsistencies and to give meaning to all of its terms" (*Barrow v Lawrence United Corp.*, 146 AD2d 15, 18), remaining "consistent[ ] with the over-all manifest purpose of the ... agreement." The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent (*see Slatt . Slatt*, 64 NY2d 966, 967, 488 NYS2d 645, *rearg denied* 65 NY2d 785, 492 NYS2d 1026 [1985]). "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v Del Col*, 79 NY2d 1016, 1018, 584 NYS2d 424 [1992]). Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*see, e.g. R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32, 744 NYS2d 358, *rearg denied* 98 NY2d 693, 747 NYS2d 411 [2002]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]).

Furthermore, 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" (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355, 413 NYS2d 352 [1978], *rearg denied* 46 NY2d 940, 415 NYS2d 1027 [1979]). Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity (*see, e.g. Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514, 520, 640 NYS2d 472 [1996]; *First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630, 638, 290 NYS2d 721, *rearg denied* 22 NY2d 827, 292 NYS2d 1031 [1968]).

Ultimately, the aim is a practical interpretation of the language employed so that there be a realization of the parties' "reasonable expectations" (*see Sutton v East River Sav. Bank*, 55 NY2d 550, 555, 450 NYS2d 460 [1982]).

The determination of 245's motion involves interpretation of paragraphs 11 and 16 (a) of the TIC Agreements, which read, in pertinent part as follows:

"ELEVENTH: (a) That each Party shall not sell, assign, transfer, pledge, encumber, or in any other way, dispose of all or any part of the interest he or it may now or hereafter hold in the tenancy-in-common, nor shall his or its such interest be transferable until he or it shall first have offered for sale the whole of his or its interest in the tenancy-in-common, to such other Parties as may be, at such time, Parties in this tenancy-in-common and parties to this agreement, such offer to be made severally and not jointly and in parts bearing the same proportion and ratios, one to the other, as the ratio of the holdings shall at that time exist, however, excluding the holdings of the offeror; but if, at such time, only one of them shall remain as a party and party to this agreement, then the entire interest held or owned by the offeror in the tenancy-in-common shall be offered for sale as an indivisible unit to such remaining party.

\* \* \* \* \*

SIXTEENTH: (a) That this property shall not be sold, assigned, transferred, mortgaged or contracted to sell, assign, transfer or mortgage without first obtaining the consent in writing of the holders of the interest or interests equal to not less than sixty-six and two thirds (66 2/3%) per cent of the entire interest in the real property at that time. It is expressly understood and agreed by and between the parties hereto that in the event that the holders of sixty-six and two-thirds (66-2/3%) per cent or more of the interest in the real property elect to sell, assign, transfer, mortgage, or contract to sell, the said real property, it shall become mandatory upon the other parties to execute any and all documents that will be required in order to effectuate and complete the sale, assignment, transfer, mortgage or contract of sale.

(b) That the Sixth, Seventh and Eighth Parties expressly covenant and agree that as long as said parties or their successors or assigns are parties to this agreement, that they or their successors and assigns shall take no steps of any nature whatsoever, directly or indirectly, to avoid the prohibition of the terms, covenants and conditions herein contained by a transfer of their respective shares. However, nothing herein contained shall prohibit the transfer of said respective shares to the members of the immediate family or families of the persons now in control of a majority of the stock in each of the respective corporation. The corporate holders reserve the right to dissolve and/or transfer to their stockholders their respective interest in the tenancy-in-common without the consent of the other parties hereto.

The distinction between transfer of an "interest" and transfer of the "Property," is the crux of the distinction between paragraph 11 and paragraph 16 (a) of the TIC Agreement. Transfer of an "interest" with the right of first refusal to other members of the TIC fosters the continued unanimity of the TIC. It affords the other members of the TIC the opportunity to keep the TIC intact. However, when the TIC majority (of at least 66 2/3%) chooses to transfer the entire res, the concern for TIC unanimity evaporates. Thus, in this latter situation, there is no need to offer first refusal rights to the minority group members. Recognizing the distinct meaning and effect of a transfer of an "interest" and a transfer of the "Property" harmonizes paragraphs 11 and 16 (a) of the TIC Agreement.

The two paragraphs 11 and 16 (a) are designed to deal with two separate types of transactions. Paragraph 11 addresses an individual's attempt to transfer his individual interest in the TIC, and affords a right of first refusal to the other members of the TIC in order to preserve

continuity of the ownership in that event. Paragraph 16 (a) addresses the transfer of the collective entire res. Paragraph 11 begins by stating “That *each Party* shall not sell, assign, transfer, pledge, encumber, or in any other way, dispose of all or any part of *the interest he or it may now or hereafter hold*” and proceeds to place a restriction upon the sale, transfer, assignment, or other disposition of such parties’ individual “interest” by granting a right of first refusal to the remaining members of the TIC (emphasis added). Paragraph 16, on the other hand, begins by stating that “this *property* shall not be sold, assigned, transferred . . . or contracted to sell, assign, transfer or mortgage without first obtaining the consent in writing of the holders of the interest or interests equal to [and] not less than sixty-six and two thirds (66 2/3%) per cent of the *entire interest in the real property at that time*” (emphasis added). Paragraph 16 deals with the disposition of “this property” when holders of at least 66 2/3% of the TIC consent to dispose of the “property.”

In the instant case, now that 88 1/3% of the TIC members - a clear super-majority - have agreed to sell the Property in accordance with paragraph 16 (a) of the TIC Agreement to 245 East 19<sup>th</sup> Street, an acquisition LLC, it is “mandatory” that all of the members of the TIC execute the contract of sale and all of the documents that are required to effectuate the sale.

The Korn defendants’ contention that 245 is not a party to the TIC Agreement is wholly without merit. Paragraph “Twenty-third” of the TIC Agreement provides that its terms and conditions are binding upon and inure to the benefit of the parties thereto and their “successors and assigns.” Pursuant to a contract of sale dated December 5, 1991, as amended, 245 obtained the respective ownership interests in the Property of Kerry Mayer, Wallace Perlman (as Executor of the Estate of Clara W. Mayer), Hannah D. Wasserman, Nathaniel I. Durlach, Hansi Durlach, and David Durlach (Exh. D. to the Reply Affidavit). The deeds dated April 3, 1992, transferring these TIC

interests to 245 pursuant to the contract of sale indicate that 245 obtained their “undivided right, title and interest” to the Property, directly from, *inter alia*, the original parties to the TIC Agreement: Kerry Mayer, Clara W. Mayer, Hannah D. Wasserman and Nathaniel I. Durlach. Accordingly, 245 is a successor and assign of the original parties to the TIC Agreement and can enforce all of its terms.

The Korn defendants’ cross-motion for summary judgment on his first counterclaim and declaring that he properly exercised his right of first refusal in paragraph 11 of the TIC Agreement, and directing that the co-tenancy interests be sold to him lacks merit. The right of first refusal contained in paragraph 11 does not come into effect under the circumstances herein, where holders of at least 66 2/3% of the TIC consent to dispose of the Property as a whole. Further, there is no requirement that the Property be sold to Edward Korn when such sale is made in accordance with paragraph 16.

Further, whether the Purchaser is related to and shares offices with 245 and not an arms-length third party has no bearing in this proceeding. The TIC Agreement places no restriction as to the party to whom the Property may be sold, so long as the holders of at least 66 2/3% of the TIC consent to the disposition of the Property.

Contrary to Edward Korn’s contention, paragraph 16 (a) mandates that the Korn defendants execute all of the documents necessary to allow 245 and the Stipulating Defendants to sell the Property. Paragraph 16 requires his execution of “*any and all* documents that will be required in order to *effectuate* and *complete* the sale, assignment, transfer, mortgage or contract of sale” (Emphasis added). Such inclusive, unconditional and unlimited language is elastic enough to encompass each and every document necessary for the completion of the sale of the Property to the Purchaser.

Further, paragraphs 11, 12, 13, 14, 15, 16, and 18, when read as a whole, do not support the contention that the original parties intended to protect the minority interests.

Given that 245 has established its compliance and performance with the terms of the TIC Agreement, that it is willing to perform any remaining obligations under the Agreement, that the Korn defendants are able to perform their obligation of simply executing the necessary obligations, and that 245 has no adequate remedy at law, specific performance is warranted.

On the third cause of action, the movants seek a declaration that the Korn defendants are responsible to the plaintiff for its damages in having to make this motion should there be damages as a result of the delay in the sale because of their refusal to cooperate and to sign the contract as the provision of Article 16 mandates that they do. Although the Court denies the cross-motion by the Korn defendants, and finds that 245 is entitled to specific performance, it cannot be said that the Korn defendant have violated the TIC Agreement. Not only would it be “ineloquent” to award legal fees, it would also be unwarranted.

Based on the foregoing, it is hereby

ORDERED that 245's motion for summary judgment and specific performance is granted solely to the extent that it is hereby

ORDERED and DECLARED and ADJUDGED that in accordance with paragraph “Sixteenth: (a)” of the TIC Agreement, that 66 2/3% percent or more of the tenants in common holding an interest in the Property have elected to sell, or contract to sell the Property in accordance with the terms of the Purchase and Sale Agreement, and that defendants Wiedro Corp. a/k/a Wiedro Inc. (“Weidro”), Edward D. Korn, individually and as Trustee of Trusts created under the Will of Robert Korn, Deceased, and as Executor of the Estate of Edith Korn, Deceased, Robert B. Korn,

individually, and as Trustee of Trusts created under the Will of Robert Korn, Deceased, William A. Korn, individually, and as Executor of the Estate of Robert Korn, Deceased, and as Trustee of Trusts created under the Will of Robert Korn, Deceased, (the "Korns") shall execute any and all documents that will be required in order to effectuate and complete the sale, transfer, assignment and contract of sale in accordance with the terms of the Purchase and Sale Agreement; and it is further

ORDERED and ADJUDGED that the Korns and Wiedro shall to execute any and all documents that will be required in order to effectuate and complete the sale, transfer, assignment and contract of sale in accordance with the terms of the Purchase and Sale Agreement between 245 and defendants Andrew Mayer, Miriam K. Rothenberg, Hannah D. Wasserman, Simon Osnos, individually and as Personal Representative under the Will of Berna Osnos a/k/a Berna Lee Osnos, Deceased, Noah Osnos, individually and as Personal Representative of the Estate of Berna Osnos a/k/a Berna Lee Osnos, Deceased, as Sellers and 245 East 19<sup>th</sup> Street Acquisition, LLC; and it is further

ORDERED and DECLARED and ADJUDGED that in the event the Korns and Wiedro refuse to execute any and all documents that are required to effectuate and complete the sale, transfer, assignment and contract of sale in accordance with the terms of the Purchase and Sale Agreement within 48 hours of the presentation of such documents to counsel for the Korns and Wiedro, then the Korns and Wiedro are deemed to have executed any and all documents that will be required in order to effectuate and complete the sale, transfer, assignment and contract of sale in accordance with the terms of the Purchase and Sale Agreement, and 245 is authorized to execute any and all such documents on behalf of the Korns and Wiedro, and directing the New York Register's Office, for New York County, to accept the documents so executed and record them; and it is further

ORDERED that the Korns and Wiedro are enjoined from interfering with the sale of the Property in accordance with the terms of the Purchase and Sale Agreement; and it is further

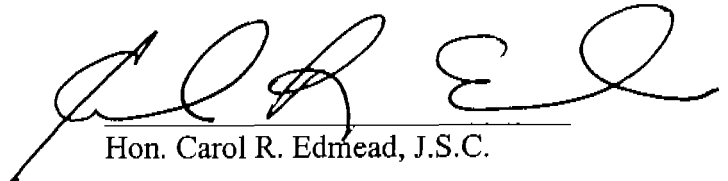
ORDERED that the Korns and Wiedro are enjoined from initiating an arbitration unauthorized by the other members of the tenancy in common; and it is further

ORDERED and DECLARED and ADJUDGED that the tenancy in common interest in the Property held by Wiedro has been transferred to Robert Korn (Deceased) and Edith Korn (Deceased); and it is further

ORDERED that 245 shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and judgment of the Court.

Dated: **OCT 14 2005**

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