DISPO

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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AURIGA CAPITAL CORPORATION, PAUL ROONEY, JR., GREENSCAPE, LTD., ROBERT TRENT JONES II, INC., IVAN M. BENJAMIN JR., HAKAN SOKMENSUER, DON KYLE, GLENN MORSE and BILL HARTNETT,

Plaintiff,

-against -

WILLIAM A. GATZ, GATZ PROPERTIES, LLC and "JOHN DOE" #1 THROUGH "JOHN DOE" #3 inclusive, the names of the last three Defendants being fictitious, said Defendants' true names being unknown to the Plaintiffs, it being thereby intended to designate individual persons, partnerships, corporations, or other entities, having engaged in the unlawful conduct described in the Complaint,

Defendants,

- and -

PECONIC BAY GOLF, LLC,

Nominal Defendants.

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DECISION/ORDER

Index No. 4901/05

Motion Date: 10/14/05

LaCAVA, J.

The following papers numbered 1 to 10 were considered in connection with this motion by plaintiff for an ORDER granting a permanent injunction and appointing a temporary receiver, and defendant's cross-motion to dismiss pursuant to CPLR §3211:

PAPERS	NUMBERED
ORDER TO SHOW CAUSE/AFFIDAVIT/EXHIBITS	1

MEMORANDUM OF LAW	2
CROSS MOTION/AFFIDAVIT/EXHIBITS	3
MEMORANDUM OF LAW	4
AFFIDAVIT IN SUPPORT	5
FIRST AMENDED VERIFIED COMPLAIN/EXHIBIT	6
REPLY MEMORANDUM OF LAW	7
REPLY AFFIDAVIT/EXHIBITS	8
REPLY MEMORANDUM OF LAW	9
SUPPLEMENTAL SUMMONS/COMPLAINT/EXHIBIT	10

This is a contract action involving the Peconic Bay Golf LLC (the Company), the Peconic Bay Golf Course (the Course), and Gatz Properties LLC. The Company, a limited liability company organized and operated under the laws of the state of Delaware, was formed for the purpose of constructing and operating a golf course on land owned in Suffolk County, New York, by Gatz Properties. Plaintiff Auriga Capital Corporation, and the individual plaintiffs (hereinafter collectively "Auriga") are minority shareholders in the Company; defendants William A. Gatz and Garz Properties LLC (collectively hereinafter Gatz) are majority shareholders. Gatz Properties, which serves as the manager for the Company, leased the Course grounds from the Company in 1998, and in turn sublet it to American Golf Corporation (AGC)to operate the Course.

Plaintiffs bring the instant action, and have moved by Order to Show Cause, seeking to permanently enjoin Gatz from further management of the Course, and its substitution by appointment of a temporary receiver as manager. Plaintiffs assert, *inter alia*, that Gatz will do irreparable harm to the Course and the Company by termination of the current sublease with AGC to operate the Course. The minority shareholders fear termination of the lease by AGC as a result of Gatz' 2004 notice to AGC that it was in violation of a term of the sublease. Gatz opposes the motion, asserting that it has acted and is acting in the Company's best interests, and cross- moves to dismiss, asserting, *inter alia*, that the Company is governed, in its Limited Liability Company Agreement (the Agreement), exclusively by Delaware law and thus the instant action must be brought, if anywhere, in the Court of Chancery of the State of Delaware.

As defendants note, and plaintiffs in essence concede, the Agreement, §30, provides

> This agreement shall be governed by, and construed under, the laws of the State of Delaware (without regard to conflict of laws principles), all rights and remedies being governed by said laws.

As the Court stated in *Boss v. American Express*, 15 A.D.3d 306,

307 (1st Dept. 2005), "it is the well-settled policy of the courts of this State to enforce contractual provisions for choice of law."
(*See also* Limited Liability Company Law § 801, which provides

> Subject to the constitution of this state: (a) the laws of the jurisdiction under which a foreign limited liability company is formed govern its organization and internal affairs....)

Clearly, then, application for an Order terminating Gatz' management of the Company must be governed under the Agreement, and in light of the laws of the State of Delaware as the choice of law under the Agreement. The Delaware Limited Liability Company Act, §18-110, provides

> (a) Upon application of any member or manager, the Court of Chancery may hear and determine the validity of any admission, election, appointment, removal or resignation of a manager of a limited liability company, and the right of any person to become or continue to be a manager of a limited liability company, and, in case the right to serve as a manager is claimed by more than 1 person, may determine the person or persons entitled to serve as managers; and to that end make such order or decree in any such case as may be just and proper, with power to enforce the production of any books, papers and records of the limited liability company relating to the issue.

The Delaware Limited Liability Company Act, §18-402, in turn provides that

> Subject to §18-602 of this title [relating to the resignation of a manager], a manager shall cease to be a manager as provided in a limited liability company agreement.

The Agreement, §7 (b), provides that removal of the manager requires majority approval of the members of the Company. Clearly, then, the sole method of removal provided for in the statute is by a vote of a majority of the shareholders. (*See* also *Caproc Manager, Inc and Caproc LLC v. The Policemen's and Firemen's Retirement System of the City of Pontiac*, 2005 WL 937613 [Del. Ch. 2005]). Plaintiff does not anywhere contest that a majority of the shareholders of the Company have voted to remove Gatz as manager.

Plaintiff's application, however, as correctly pointed-out by defendant, has another fatal flaw. The aforementioned Delaware Limited Liability Company Act, § 18-110, provides for jurisdiction to hear an application relating to the membership of a Delaware Limited Liability Company in the Delaware Court of Chancery. The Agreement's reference to Delaware law as controlling, then, has the effect of a forum selection clause,

designating the Delaware Court of Chancery as the forum for all actions relating to the removal of the manager. § 18-110 has in fact been held to vest sole jurisdiction regarding applications involving the removal of Limited Liability Company managers of Delaware Limited Liability Companies (absent clear language in the agreement to the contrary) in the Delaware Court of Chancery, and that a forum selection clause strips a court of subject matter jurisdiction over a dispute. (*See Elf Altochem North America v. Jaffari*, 727 A.2d 286 [Del. Sup. Ct 1999]). Consequently, under the Agreement, and pursuant to Delaware law, sole jurisdiction to hear an action relating to the removal of Gatz as manager of the Company is in the Delaware Court of Chancery. Pursuant to CPLR § 327 and 3211 (a) 2, therefore, the instant matter must be dismissed.

Upon the foregoing papers, it is

ORDERED, that the plaintiff's motion for a permanent injunction and a temporary receiver is denied; and, it is further

ORDERED, that the defendant's cross-motion to dismiss is granted.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
December 21 , 2005

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HON. JOHN R. LA CAVA, J.S.C.

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