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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 9

MICHAEL A. SASSOWER, M.D.,

Plaintiff,

INDEX NO.: 016716/2008
MOTION DATE: 05/20/2009
MOTION SEQUENCE: 002 and 003

-against-

975 STEWART AVENUE ASSOCIATES, LLC,

Defendant.

The following papers read on this motion:

Notice of Motion, Affidavit & Exhibits Annexed 1
Memorandum of Law in Support of Defendant 975 Stewart Avenue Associates, LLC's Motion to Dismiss the Complaint 2
Notice of Cross-Motion, Affirmation, Affidavit & Exhibits Annexed 3
Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss 4
Reply Affidavit of Jeffrey M. Schlossberg & Exhibits Annexed 5
Reply Affirmation of Stuart Berg & Exhibits Annexed 6

PRELIMINARY STATEMENT

Defendant moves under Sequence # 2 to dismiss the complaint for failure to state a cause of action. Motion Sequence # 3 on behalf of the Plaintiff seeks an order compelling the Defendants to comply with the Preliminary Conference Order of February 3, 2009, and a stipulation between the parties dated September 19, 2008.

BACKGROUND

Plaintiff, Michael A. Sassower, M.D. ("Sassower") was a physician and shareholder of Cardiovascular Medical Associates, P.C. ("CMA"). By notice dated December 27, 2007, he

terminated his employment, effective June 30, 2008. In addition to being a shareholder of CMA, he was a member of 975 Stewart Avenue Associates, LLC ("975 Stewart"), the owner of the premises in which CMA carried on its medical practice.

The CMA Operating Agreement[1] provided that upon departure from the practice, the shareholder was required to offer his membership interest in 975 Stewart to the remaining shareholders. Depending upon whether the departure was a "lifetime transfer" or a "termination of employment", the relinquishment of interest in 975 Stewart was governed by either § 8.2 or § 8.3 of the Agreement. If pursuant to § 8.2, the departing member was to receive the Agreement Price less a 20% discount. If pursuant to § 8.3, based on disability, retirement, termination or death, the departing member was to receive his share of the Agreement Price without any discount.[2]

The Agreement sets forth the process for determining the Agreement Price: [3]

> The Company and the Offering Member/New Member shall have ten (10) days to appoint a Qualified Appraiser. Upon appointment, both Qualified Appraisers shall each establish the purchase price of the Offered Interests, using the market value approach appraisal methodology, in a written opinion to the Company each such opinion to be delivered within thirty (30) days of the appointment of the latter of appraisers. If the difference between the two (2) appraisals is less than ten (10%) percent, then the valuation of the Offered Interests shall be the average of the appraisals. However, if the difference between the two (2) appraisals is more than ten (10%) percent, then the Qualified Appraisers shall mutually appoint a third Qualified Appraiser whose sole written opinion shall establish the fair market value of the Offered Interests.

Sassower's offer of his 12.5% membership interest in 975 Stewart was dated July 1, 2008. The remaining members had 60 days to purchase all, but not less than all, of the interest. In the event not all of the remaining members agreed to the purchase, the remaining members had an additional 30 day option within which to purchase the offered interests in the proportion the

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[1] Exh. "B" to Motion and Exh. "A" to Cross-Motion.

[2] *Id.* at § 8.5 (a) and (b).

[3] *Id.* at (c).

membership interest of each participating member bears to the total interest of all the participating members. If fewer than all of the offered interests are purchased by participating members, the balance is to be purchased by the Company at the Agreement Price and upon the Agreement Terms. [4]

In response to the offer, 975 Stewart retained Rogers & Taylor Appraisers, Inc., and Sassower selected Timothy Barnes, of Cushman & Wakefield, Inc. The appraisals were exchanged on August 8, 2009 with Barnes finding a market value of $7,800,000, reflecting a $962,500 value for Sassowers 12 ½% share. Rogers and Taylor, on the other hand, found a market value of $6,800,000, producing a value for Sassower's share of $850,000. The difference being greater than 10%, the parties were, according to the operating agreement, to secure the services of a third appraiser.

Shortly before the exchange of appraisals, 975 Stewart forwarded to Sassower an amendment to the Rogers & Taylor report, in which he stated that "[i]t is the understanding of this appraiser that there is an outstanding mortgage balance on the property in the amount of $2,668,750.00. At the request of the client, we have deducted the mortgage balance from the final value to arrive at an equity position value.

The equity position value as of the date of valuation, July 8, 2008, is:

FOUR MILLION ONE HUNDRED THIRTY ONE THOUSAND TWO HUNDRED FIFTY DOLLARS ($4,131,250.00)."[5]

By correspondence dated August 7, 2008 CMA, over the signature of one Marty Fink, advised counsel for Plaintiff that they were applying a 20% discount to the $6,800,000 value found by Rogers and Taylor, and deducting the $2,668,750 mortgage balance, producing a value of $346,406.25 for Sassower's share.[6]

On or about September 5, 2008 the Plaintiff commenced this action in which he sought a

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[4] *Id.* at §§ 8.2 and 8.3.

[5] Exh. "F" to Verified Complaint (Exh. "A" to Motion).

[6] Exh "G" to Exh. "A" to Motion.

declaration that the mortgage balance should not be deducted from the appraised market value in determining the Agreement Price. On September 19, 2008 the parties stipulated to the appointment of a third appraiser in accordance with the Operating Agreement. On the same date 975 Stewart scheduled a closing date for September 29, 2008. The Plaintiff objected on September 25, 2008, on the ground that a closing could not be scheduled until the parties arrived at a value of his share.

The Defendant moved for summary judgment dismissing the complaint. By Order dated December 3, 2008, this Court determined that a resolution of the differing opinions as to the value upon which the Sassower share was to be calculated was unclear from the record before it, and, at this initial stage of the proceeding, a conclusion on the issue was not appropriate. The motion was denied. The parties appeared for a Preliminary Conference on February 3, 2009, at which time they outlined a discovery schedule.

By letter dated January 21, 2009, counsel for 975 Stewart related to the Court the methodology utilized by both appraisers, and contended that both of them were in error in failing to deduct from their estimate of value the principal balance of the existing mortgage. They further opined that no third appraiser was required since the appraisers should have valued the property using the subject lease, with a net operating income of $442,500, as opposed to the estimated net operating income of $460,397.35 determined by Rogers and Tayor, or $544,935 by Barnes. They further claim that this would produce values which are within 10% of one another and would be averaged to arrive at a value of the premises of $6,462,953.10. It is upon this basis that the Defendant justifies its failure to participate in the retention of the third appraiser selected by the two original appraisers.

By document dated March 6, 2009, six of the remaining members of 975 Stewart executed a document whereby they agreed to the dissolution of the company pursuant to §§ 5.9 (g) and 5.10 of the Operating Agreement.[7] § 5.9 requires a vote of 75% of all outstanding Membership interests. § 5.10 provides that "(a)ny action required or permitted to be taken at a meeting of the Members of the Company may be taken without a meeting, without prior notice,

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[7] Exh. "B" to Motion and Exh. "A" to Cross-Motion.

and without a vote, if consents , in writing, setting forth the action so taken, are signed by the Members holding Membership Interests representing not less than the minimum number of votes that would be necessary to take such action at a meeting at which all of the Members entitled to vote thereon were present and voted."

By virtue of this action, the Defendant contends that the efforts by Plaintiff to enforce his rights under Article 8 of the Operating Agreement are now moot.

DISCUSSION

The Plaintiff's motion to compel compliance with the Preliminary Conference Order dated February 3, 2009 and the Stipulation dated September 19, 2009 is granted. The Defendant's motion to dismiss the complaint is denied.

At the heart of this matter is the interpretation of the Operating Agreement. Members of a limited liability company are obligated to adopt a written operating agreement containing provisions consistent with law or its articles of organization ". . . relating to (i) the business of the limited liability company, (ii) the conduct of its affairs and (iii) the rights, powers, preferences, limitations or responsibilities of its members, employees or agents, as the case may be."[8] The members of 975 Stewart did so in March, 2005.

Article 8 deals with the transfer of a members interest. The guiding principle is that membership was limited to persons who were shareholders of CMA.[9] Whether the offered transfer is a "Voluntary Lifetime Transfer"[10] or triggered by a "Disability, Termination or Retirement", [11] the departing Member is required to offer his membership interests to the remaining members, who then have 60 days within which to elect to buy all, but not less than all, of the offered interests. If any remaining members choose not to exercise their option, the other remaining members have an additional 30 days within which to purchase the offered interests on a pro rata basis. If any portion of the offered interests are not purchased by the remaining members,

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[8] Limited Liability Company Law § 417 (a).

[9] Exh. "B" to Motion and "C" to Cross-Motion § 8.1.

[10] *Id.* at § 8.2.

[11] *Id.* at § 8.3.

the Company (975 Stewart) will purchase them at the Agreement Price. As previously noted, there is a 20% discount from value.[12]

Sassower, in accordance with the above provisions of the Operating Agreement, offered his membership interest to the remaining members, and they accepted the offer by proceeding to select an appraiser. The only remaining issue is the determination of the value of Sassower's membership interest, and whether or not it is subject to the 20% discount associated with a Voluntary Lifetime Transfer. Unfortunately, this term is not defined in the agreement, and how it is distinguishable from a transfer on retirement is unclear, and requires clarification. As a general matter, however, ambiguities in an operating agreement for a limited liability company must be construed against the drafter.[13]

In arriving at an Agreement Price pursuant to the operating agreement, it is the language of that document which will determine the issue. Unfortunately, it is less than crystal clear, but in the Court's opinion, the sought after number is fair market value. Throughout Article 8, the agreement references the "market value approach methodology." This is not an appraisal methodology, but a defined value to be arrived at by one of the three traditional appraisal approaches, namely, direct sales comparison, income capitalization, or replacement cost. For a building of the type owned by 975 Stewart, the most appropriate approach is the direct income capitalization approach, upon which both appraisers apparently relied.

Market value is "(t)he most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under duress."[14] The deduction of the outstanding mortgage on the property from the estimate of fair market value does not produce market value, but rather equity

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[12] *Id.* at § 8.5 (a).

[13] *KSI Rockville, LLC v. Eichengrun,* 305 A.D.3d 681 (2d Dept. 2003).

[14] The Appraisal of Real Estate, Appraisal Institute (Twelfth Ed. 2001).

position value.[15]

To the extent that the Court of Appeals has determined that a net lease on subject premises must be considered by appraisers in determining market value, the facts in that case are significantly distinguishable from those in this action.[16] The issue in *936 Second Avenue* was the calculation of the net rental for the first 10 years of a second 20-year renewal term. The Court stated that " ' (w)hen the language of the lease so dictates, appraisals must take into consideration all restrictions- including current zoning regulations-ane encombrances on the land, as well as the lease term' "[17] The lease provided that the annual net rental would be 7% of the value of the demised premises. Because the existing lease did not preclude its consideration, the Court concluded that it should be considered for the purpose of setting rent for a renewal lease term.[18]

The difference is that the existing lease was a long-term obligation negotiated at arm's length, as opposed to the lease between 975 Stewart and CMA, in which 8 of the 9 parties are identical. It would be inappropriate to rely upon this lease to determine market value.[19] There is a good practical reason for not considering it. Certainly, if CMA decided to relocate and sell the property to a third party, they would sell free and clear of the existing lease and the arm's length purchaser would be free to impose market rent on his prospective tenants.

From an economic standpoint, the Plaintiff is not seeking a windfall, as alleged by Defendant. As the holder of a 12 ½ % membership interest in 975 Stewart, he is, according to the language of the agreement, entitled to the return of his investment upon departure. Whether or not he is subject to a 20% reduction is as yet unclear. Upon his departure, those purchasing his share, will increase their own interest. Assuming the remaining 7 members elect to purchase, each of

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[15] July 22, 2008 Correspondence of 975 Stewart Avenue Appraiser attached as Exh. "F" to Exh. "A" to Motion to Dismiss.

[16] *936 Second Avenue L.P. v. Second Corporate Development,* 10 N.Y.3d 628 (2008).

[17] *Id.* at 631. (Internal citations omitted).

[18] *Id.* at 633.

[19] *See* affidavit of Timothy Barnes annexed to Cross-Motion.

their shares will increase from 12.5% to 14.28%, an increase of 14%. Were they to receive such an increase in their individual share of the property without payment of fair compensation, it would be they who would benefit from a windfall.

The Defendant has made its election to purchase the 12 ½% interest of Plaintiff. The motion to compel them to complete the process by paying their 50% share of the fee for the third appraiser, is granted. The motion to dismiss the complaint as moot because of the agreement of 75% of the members of 975 Stewart to dissolve is denied.

In so claiming, the Defendant relies primarily on that portion of the agreement which provides as follows:

> In the event that the Remaining Members decide not to purchase the Offered Interests but elect instead to dissolve the Company, then none of the Offered Interests shall be purchased, and the Company shall be dissolved and its business and assets liquidated. Such liquidation and dissolution shall be prosecuted by the Remaining Members with all reasonable speed and the distributions of the assets of the company shall be made as promptly as possible in accordance with the rights of creditors and the Members of the Company.[20]

By the time the Defendant elected to dissolve, some eight months expired from the date of Plaintiff's tender of his resignation. In the interim, they elected to purchase the Plaintiff's membership interest, exchanged appraisals, and agreed on the selection of a third appraiser made by the original appraisers. The term within which they were to decide upon their response is not open-ended. It explicitly states in both ¶¶ 8.2 and 8.3 that the remaining members have 60 days within which to purchase all of the departing member's interest, or 90 days to purchase a portion, with the balance to be acquired by the company, at the Agreement price. The resolution to dissolve was well beyond this time, executed on March 6, 2009.[21]

While the remaining members had an option to dissolve in response to the Plaintiff's offer of his membership interest, they did not do so within the parameters of

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[20] Exh. "B" to Motion and "A" to Cross-Motion at ¶ 8.6 (b).

[21] Exh. "C" to Motion.

¶¶ 8.2 and 8.3. Contracts, whenever possible, must be read in pari materia. The procedures for the Assignment, Sale or Transfer, and the alternative to dissolve the company are all contained in Article 8. Reading ¶ 8.6 (b) as somehow divorced from the balance of the article would frustrate the specific provisions relating to the departure of a member and the transfer of his interest. In the opinion of the Court, the Defendant cannot opt to buy out the Plaintiff, then, when unhappy with the outcome of that decision, choose to dissolve the entity.

Defendant is directed to forward their 50% share of the appraisal fee to the selected third appraiser. The parties are directed to appear for a factual hearing on the 26th day of October, 2009, at 9:30 A.M., on the issue of whether the transfer is pursuant to ¶ 8.2 or ¶ 8.3, and whether the market value is subject to a 20% discount as set forth in ¶ 8.5 (a).

This constitutes the Decision and Order of the Court.

Dated: August 14, 2009

J.S.C.

ENTERED
AUG 19 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE