

**Vays v 139 Emerson Place, LLC**

2010 NY Slip Op 30379(U)

February 19, 2010

Supreme Court, New York County

Docket Number: 400833/08

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Ling - Cohan

PART 36

Index Number : 400833/2008  
**VAYS, FRED**  
 VS.  
**139 EMERSON PLACE**  
 SEQUENCE NUMBER : 001  
 SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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

in this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1, 3  
3  
4  
5  
6

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

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

Replying Affidavits 10/1/09 letter from D's counsel

Cross-Motion:  Yes  No interim order dated 10/2/09

Upon the foregoing papers, it is ordered that this motion for summary judgment is decided in accordance with the attached memorandum decision.

(Consolidated for disposition with motion seq 002)

**FILED**  
 FEB 26 2010  
 NEW YORK  
 COUNTY CLERK'S OFFICE

JUDGE DORIS LING-COHAN

Dated: 2/19/10

[Signature]  
 J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

-----X  
FRED VAYS, individually and as a member of  
Sycamore Development Group, LLP and Emerson  
Place, LLC,

Plaintiff,

Index No.: 400833/08  
DECISION/ORDER

-against-

139 EMERSON PLACE, LLC, 970 KENT AVENUE  
ASSOCIATES, LLC, SYCAMORE DEVELOPMENT  
GROUP, LLC, GEORGE DELLAPA, individually and  
as managing member of Sycamore Development  
Group, LLC, ELISSA WINZELBERG, individually  
and as managing member of Sycamore Development  
Group, LLC, CPCR OPPORTUNITIES FUND, LLC,  
CPC RESOURCES, INC., and SYCAMORE KENT  
GROUP, LLC,

Motion Seq. No.: 001 & 002

Defendants.

-----X  
**HON. DORIS LING-COHAN, J.S.C.:**

In this commercial contract action, two groups of defendants move separately for summary judgment to dismiss the complaint (motion sequence numbers 001 and 002, respectively). For the following reasons, motion sequence number 001 is granted in part and denied in part, and motion sequence number 002 is granted.

**BACKGROUND**

The Parties

The individual litigants in this action are plaintiff Fred Vays (Vays), a New York State licensed contractor, and co-defendants George Dellapa (Dellapa) and Elissa Winzelberg (Winzelberg), a New York State licensed attorney and architect, respectively. See Notice of Motion (motion sequence number 001), Dellapa Affirmation, ¶ 4. These three individuals are equal (i.e., 33⅓%) shareholders in corporate co-defendants 139 Emerson Place, LLC (Emerson)

and Sycamore Development Group, LLC (Sycamore), both of which are New York State limited liability corporations. *Id.*, ¶ 2; Hirshowitz Affirmation, ¶ 5; Exhibit E. Vays, Dellapa and Winzelberg formed Emerson and Sycamore in 1999. *Id.*; Dellapa Affirmation, ¶ 2. Emerson was formed to develop, own and operate a residential apartment building located at 139 Emerson Place in the County of Kings, City and state of New York (the Emerson building). *Id.*, ¶¶ 2-4. Their success in developing the Emerson building caused Vays, Dellapa and Winzelberg to form Sycamore for the purpose of engaging in future real estate development projects. *Id.*, ¶ 5. On March 1, 1999, the three executed an operating agreement (the Sycamore operating agreement) that provides, in relevant part, that:

**Article One: Formation**

Section 1.1. Members. Upon the execution of this Agreement, Fred Vays, Elissa Winzelberg and George Dellapa shall be Members of the Company.

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**Article Eight: Management of the Company**

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Section 8.2. Unanimous Consent of the Members. Unless required by law, the following actions shall require the unanimous consent of all Members:

- (i) Acquire or enter into any contract for the purchase of an Interest in a Project:
- (ii) Sell, exchange, convey, trade, surrender, release, abandon or otherwise dispose of all or a substantial part of the assets of the Company, for cash, securities or other property, and upon such terms and conditions as the Members deem advisable, appropriate, or convenient and to be in the best interests of the Company.

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Section 8.5. Fiduciary Duty. All members shall have a fiduciary duty to the Company and to the other Members to act in all matters relating to the Company in good faith. ...

Section 8.6. Breach of Duty. If a Member as determined by a vote of a majority of Members breaches their fiduciary duty or any provision of this Agreement and such breach has not been cured within thirty (30) days after [by] the Member (the "Breaching Member"), then the Company (in addition to all rights and remedies it may have under law or equity) may withhold any Distributions otherwise payable to such Breaching Member until such Breaching Member is in full compliance with the terms and conditions of this Agreement. In addition, the Company may require the Breaching Member to withdraw ("expulsion") from the Company under the terms of Article 10. Such Breaching Member, to the extent permitted

by law, shall be liable for any damages such breach causes the Company.

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**Schedule A**

<u>Member</u>	<u>LLC Interest</u>
Fred Vays	33.33%
Elissa Winzelberg	33.33%
George Dellapa	33.33%

*Id.*; Exhibit E.

In 2001, the opportunity arose to develop another residential apartment building located at 970 Kent Avenue in the County of Kings, City and state of New York (the Kent building). *Id.*; Dellapa Affirmation, ¶ 11. Dellapa and Winzelberg wished to pursue this project, while Vays did not. *Id.*, ¶ 19. Nonetheless, Dellapa and Winzelberg concluded an agreement with co-defendant CPR Opportunities Fund, LLC (CPCR)<sup>1</sup> pursuant to which these entities would form a new limited liability corporation, 970 Kent Avenue Associates, LLC (Kent) to purchase and renovate the Kent building. *Id.*, ¶ 14. The original members of Kent were CPCR, as 75% shareholder, and Sycamore, as 25% shareholder. *Id.*, Exhibit H. On August 7, 2001, however, Dellapa formed another limited liability corporation, Sycamore Kent Group, LLC (Sycamore Kent), and thereafter, on October 18, 2001, Dellapa transferred Sycamore's 25% interest in Kent to Sycamore Kent. *Id.*, ¶¶ 16-17; Exhibits I, J. Vays, nonetheless, objected to Sycamore's involvement and to not being kept informed.

Prior Proceedings

Vays commenced this action on September 19, 2007, by serving a summons and complaint that sets forth causes of action for: 1) an accounting with respect to Emerson and Sycamore (against Dellapa, Winzelberg, Emerson and Sycamore); 2) breach of the Sycamore

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<sup>1</sup> Defendant CPC Resources, Inc. (CPC) is a New York State corporation, and is "a member" of CPCR. *See* Notice of Motion (motion sequence number 002), Kumro Affidavit, ¶ 6.

operating agreement (against Dellapa, Winzelberg and Sycamore); 3) a declaratory judgment (against all defendants); and 4) an accounting with respect to Kent (against Dellapa and Winzelberg). *Id.*; Exhibit A. One group of defendants, comprising Dellapa, Winzelberg, Emerson, Sycamore and Sycamore Kent answered on November 28, 2007. *Id.*; Exhibit B. Another group of defendants, comprising CPR, CPC and Kent, answered on November 20, 2007. *Id.*; Exhibit C. The first group of defendants moved for summary judgment to dismiss the second, third and fourth causes of action (motion sequence number 001). Thereafter, the second group of defendants moved for summary judgment to dismiss the third cause of action (motion sequence number 002).

## DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1<sup>st</sup> Dept 2003). Here, the proponents of the first motion are entitled to a partial summary judgment, and the proponents of the second motion are entitled to summary judgment dismissing the complaint as against them.

### The First Motion

As previously mentioned, the first motion seeks summary judgment dismissing Vays's second, third and fourth causes of action. The second cause of action alleges that Dellapa,

Winzelberg and Sycamore breached the Sycamore operating agreement. The proponent of a breach of contract claim must plead the existence and terms of a valid, binding contract, its breach, and resulting damages. *See e.g. Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435 (1<sup>st</sup> Dept 1988). Here, the complaint specifically alleges that, although the Sycamore operating agreement required Dellapa and Winzelberg to obtain the unanimous consent of all Sycamore's members before involving Sycamore in a development project, Dellapa and Winzelberg failed to obtain Vays' consent when they used Sycamore to acquire an interest in Kent, and that these actions constituted a breach and resulted in damages. *See* Notice of Motion (motion sequence number 001), Exhibit A, ¶¶ 52-59. Vays has presented a copy of the Sycamore operating agreement to support his claim, although he does not seek summary judgment on his breach of contract claim at this juncture. *Id.*; Exhibit E; this makes out a prima facie case of breach of contract.

Defendants nonetheless argue that Vays's breach of contract claim must be dismissed, because "[g]iven the lack of Vays' consent, [Sycamore] never became a lawful member of [Kent]," and, indeed, Sycamore's "brief 2001 involvement in [Kent] was null and void." *See* Memorandum of Law in Support of Motion (motion sequence number 001), at 6-7. To support this argument, defendants cite two trial court decisions, *Overhoff v Scarp, Inc.* (12 Misc 3d 350 [Sup Ct, Erie County 2005]) and *TIC Holdings, LLC v HR Software, Acquisition Group, Inc.* (194 Misc 2d 106 [Sup Ct, NY County 2002], *aff'd* 301 AD2d 414 [1<sup>st</sup> Dept 2003]), that both found that, pursuant to the Limited Liability Corporation Law, any LLC transactions that had been entered into in violation of the LLC's operating agreement were "void *ab initio*." Plaintiff does not address this argument in his opposition papers. The court, however, notes that the Appellate Division, First Department's, affirmance of *TIC Holdings, LLC v HR Software,*

*Acquisition Group, Inc.* specifically found that “[t]he motion court correctly determined that the purported asset transfer ... *was void* because the transfer of a substantial portion of plaintiff’s assets was ... not authorized under plaintiff’s operating agreement or Limited Liability Company Law § 402 (d) [emphasis added].” 301 AD2d at 414-415. Thus, defendants have correctly stated the law. Consequently, because defendants’ purported acquisition of an interest in the Kent building by Sycamore clearly contravened section 8.2 of the Sycamore operating agreement, that transaction was likewise void *ab initio*, as a matter of law. For the same reason, Sycamore’s purported October 18, 2001 transfer of its interest in the Kent building to Sycamore Kent was also void *ab initio*.

However, despite a determination that the above transactions are void *ab initio*, summary judgment of dismissal is not warranted as to the second cause of action for breach of contract as to defendants Dellapa, Winzelberg, Emerson, Sycamore and Sycamore Kent. The Appellate Division, First Department, has specifically held that claims for breaches of an LLC’s operating agreement are legally cognizable, even where the results of such a breach would be a void transaction. *Bischoff v Boar’s Head Provisions Co., Inc.*, 38 AD3d 440 (1<sup>st</sup> Dept 2007); *see also Cesario v Absolute Plus Management, LLC*, 2007 WL 3165066 (Sup Ct, NY County 2007). As previously noted, Vays has presented evidence that adequately supports his breach of contract claim. Accordingly, the branch of defendants’ motion that seeks dismissal of Vays’s second cause of action is denied.

Vays’s third cause of action seeks a judgment “declaring him and Sycamore as a one third (1/3) owner of [the Kent building].” *See* Notice of Motion (motion sequence number 001), Exhibit A, ¶ 79. Declaratory judgment is a discretionary remedy which may be granted “as to the rights and other legal relations of the parties to a justiciable controversy whether or not further

relief is or could be claimed.” CPLR 3001; *see e.g. Jenkins v State of N.Y., Div. of Hous. & Community Renewal*, 264 AD2d 681 (1st Dept 1999). Here, neither party’s memoranda sets forth any legal argument directed at Vays’s declaratory judgment claim. Nonetheless, because, as detailed above, Sycamore’s purported purchase of an interest in the Kent building was an act that was void *ab initio*, as a matter of law, Vays is not entitled to the requested declaratory judgment regarding ownership of the Kent building. Accordingly, that branch of defendants’ motion that seeks summary judgment dismissing Vays’s third cause of action is granted.

Vays’s fourth cause of action is for an accounting from Dellapa and Winzelberg with respect to Kent. *See* Notice of Motion (motion sequence number 001), Exhibit A, ¶ 83. This equitable claim is normally available as of right to a member of an LLC against a managing member. *See e.g. KSI Rockville, LLC v Eichengrun*, 305 AD2d 681 (2d Dept 2003). Here, again, neither party’s brief sets forth any argument regarding this claim. However, because the court has already determined that Sycamore’s purported acquisition of an interest in Kent was void *ab initio*, Vays is not entitled to an accounting as regards Kent, either. Accordingly, the branch of defendants’ motion that seeks summary judgment dismissing Vays’s fourth cause of action is granted.

### The Second Motion

The proponents of the second motion, CPRC, CPC and Kent, are only named as defendants in Vays’s third cause of action for a declaratory judgment. *See* Notice of Motion (motion sequence number 001), Exhibit A, ¶ 79. Because the court has already determined that Vays is not legally entitled to the declaration that he seeks, CPRC, CPC and Kent’s motion for summary judgment to dismiss the complaint as against them (motion sequence number 002) is granted in full.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

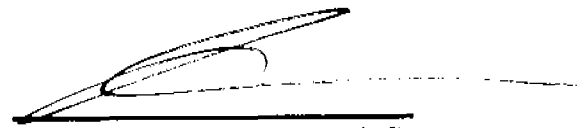
ORDERED that the motion, pursuant to CPLR 3212, of defendants George Dellapa, Elissa Winzelberg, Sycamore Development Group, LLC, Sycamore Kent Group, LLC, and 139 Emerson Place, LLC is granted, solely to the extent that the third and fourth causes of action in the complaint are dismissed as against said defendants, but is otherwise denied; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of defendants 970 Kent Avenue Associates, LLC, CPCR Opportunities Fund, LLC and CPC Resources, Inc. is granted and the complaint is hereby severed and dismissed as against said defendants, and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that within 30 days of entry of this order, defendants 970 Kent Avenue Associates, LLC, CPCR Opportunities Fund, LLC and CPC Resources, Inc., shall serve a copy upon all parties, with notice of entry.

ORDERED that the remainder of the action shall continue.

Dated: New York, New York  
Feb 19, 2010



Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\vaysvemerson.wpd

**FILED**  
FEB 26 2010  
NEW YORK  
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