SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

JOSEPH E. VERDERBER, JUDITH VERDERBER and VERBENCO LLC,

Plaintiffs,

INDEX NO.: 007691/2009
MOTION DATE: 05/24/2010
MOTION SEQUENCE: 007, 008 and 009

-against-

COMMANDER ENTERPRISES CENTEREACH, LLC, COMMANDER ENTERPRISES, LLC, BENCO, LLC, PEMBROKE PROPERTIES, LLC, LEONARD SHAPIRO and JOSEPH G. SHAPIRO,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed 1
Notice of Motion, Affirmation & Exhibits Annexed 2
Notice of Cross-Motion, Affirmation & Exhibits Annexed 3
Affirmation of Austin Graff in Opposition to Defendants' Motion to Quash & Exhibits Annexed 4
Affirmation of Austin Graff in Opposition to Defendants' Motion to Reargue & Exhibits Annexed 5
Reply Affirmation of Matthew F. Didora in Further Support of Defendants' Motion to Reargue and in Opposition to Cross-Motion & Exhibits Annexed 6

This motion by the defendant Benco, LLC for an order pursuant to CPLR 2304 quashing the subpoena duces tecum served by the plaintiffs on non-party Peter, Friedman & Co, LLP on January 27, 2010 is granted.

This motion by the defendants Commander Enterprises Centereach, LLC ("CEC"), Commander Enterprises, LLC, Benco, LLC, Pembroke Properties, LLC, Leonard Shapiro and Joseph G. Shapiro for an order pursuant to CPLR 2221(d) granting it reargument of this court's order dated January 22, 2010 and upon reargument, vacating so much of that order as: (1) held that Joseph and Judith Verderber withdrew from CEC in 2008, and (2) struck Article VII of CEC's Operating Agreement which set forth a buy-out formula for the membership interest in CEC and substituting therefor findings: (1) that Joseph and Judith Verderbers' interest in CEC terminated in January 2009 when they transferred their interest to the plaintiff Verbenco, LLP, and (2) that the buy-out price for their interest in CEC is to be determined pursuant to the formula set forth in Article VII of CEC's Operating Agreement is granted as provided herein.

This motion by the plaintiffs Joseph E. Verderber, Judith Verderber and Verbenco, LLC, for an order pursuant to Section 509 of the Limited Liability Company Law granting them summary judgment against defendants in the amount of $1,144,928.00 is denied.

The facts underlying this action which were set forth in this court's Orders and Decisions dated October 15, 2009 and January 22, 2010 will be repeated here only to the extent necessary.

CEC owns an office building in Centereach, New York. Combined, the plaintiffs Joseph and Judith Verderber hold a 20% membership interest in CEC and the defendant Benco, LLC holds the other 80%.

In January 2008, the Verderbers offered to sell their interest in CEC to Benco, LLC which agreed via Joseph Shapiro to purchase it but only at the price set forth in Article VII of CEC's Operating Agreement. The Verderbers rejected that proposal. A sales price was never agreed upon and no sale or transfer of the Verderbers' interest in CEC occurred until January 2009, when the Verderbers transferred their interest in CEC to a limited family partnership, Verbenco, LLC. Shortly thereafter, the Verderbers and Verbenco, LLC brought this action seeking a declaration as to which Operating Agreement governs CEC as well as a declaration that assuming that the 2000 Operating Agreement applies, the transfer restrictions contained therein are unenforceable because they unreasonably restrict the alienation of their interests.

In its Order and Decision dated October 15, 2009, this court found, *inter alia*, that the 2000 Operating Agreement governed the CEC. Nevertheless, in its January 22, 2010 Order and

Decision, this court found that the Verderbers' offer to sell their interest in CEC coupled with Benco LLC's acceptance in 2008 constituted a withdrawal by the Verderbers from CEC, thereby terminating their interest in it and thereby setting the valuation date for their interest. As for the buy-out price, this court struck the formula set forth in CEC's Operating Agreement finding that the Verderbers sought to make an *inter vivos* transfer and that "there [was] no apparent purpose for the restriction on alienation other than to limit the amount which [the Verderbers] may receive for their investment and grant the controlling member a windfall." Thus, this court held that "[i]n these circumstances, the restriction on alienation is unreasonable." This court declared that the Verderbers are entitled to the fair market value of their interest.

The defendants seek to reargue so much of this court's January 22, 2010 order as found that the Verderbers' membership interest in CEC terminated in January 2008 and declared the buy-out formula set forth in CEC's Operating Agreement unreasonable and inapplicable. They further seek a declaration that pursuant to CEC's 2000 Operating Agreement, the Verderbers' membership interest in CEC terminated in 2009 when they transferred it to Verbenco, LLC and that pursuant to the Operating Agreement, their interest must be sold to Benco, LLC in accordance with the buy-out formula set forth in CEC's Operating Agreement.

To obtain reargument, the movant must establish that the court misapprehended or overlooked something. Hoffmann v Debello-Teheney, 27 AD3d 743 (2nd Dept. 2006). Reargument does not lie absent such a showing. Goldman v Rio, 20 Misc. 3d 1131(A) (Supreme Court Nassau Co. 2008), aff'd. in part, dism. in part, 62 AD3d 834 (2nd Dept. 2009), citing Barrett v Jeannot, 18 AD3d 679 (2nd Dept. 2005). A motion for reargument pursuant to CPLR 2221(d)(2) must be "based on matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but [may] not include matters of fact not offered on the prior motion." Cruz v Masada Auto Sales, Ltd., 41 AD3d 417 (2nd Dept. 2007), citing CPLR 2221(d)(2); Pryor v Commonwealth Land Title Ins. Co., 17 AD3d 434, 435 (2nd Dept. 2005); see also, Giovaniello v Carolina Wholesale Office Mach. Co., Inc., 29 AD3d 737 (2nd Dept. 2006). And, reargument may not be obtained based upon "a new theory of liability not previously advanced. . . ." Frisenda v X Large Enterprises, Inc., 280 AD2d 514, 515 (2nd Dept. 2001).

Section 8 of Article VII of CEC's Operating Agreement provides:

> In the event any of the members desire to give, sell, assign, pledge, hypothecate, exchange or otherwise transfer to another, all or any part of its Membership Interest in this Company, such entire interest **must be** sold, assigned, pledged, hypothecated, exchanged or otherwise transferred to Benco, LLC. (emphasis added).

Sections 1 and 2 of Article VII of CEC's Operating Agreement provides:

> 1. That upon the death, bankruptcy, dissolution, explusion, incapacity or withdrawal of any member or the occurrence of any other event that terminates the continued membership of any member, the interest of that member shall be deemed to have been offered for sale to Benco, LLC.
>
> 2. Benco, LLC shall be deemed to accept such offer of the sale of the interest of the deceased member

Section 4 of Article VII of CEC's Operating Agreement sets forth the buy-out formula as follows:

> The purchase price/buy out rate shall be determined by multiplying the Net Operating Income (hereinafter NOI) by 8.80, and deducting the present mortgage balance. Such purchase price/buy out shall be paid over a term of five (5) years in equal monthly installments. NOI shall be defined as gross revenues less operating expenses, real estate taxes, utilities, repairs, improvements, and management fees.

The Verderbers' interest in CEC was not transferred or sold in January 2008. In fact, the Verderbers continued to exercise their membership rights, i.e., they obtained access to CEC's books and records and more importantly, received profit distributions. They in fact transferred their membership interest in CEC to Verbenco LLC in 2009, which constituted a termination of their interest under CEC's Operating Agreement. That they are the sole owners of Verbenco LLC is irrelevant. In fact, since Verbenco LLC is not a party to the Operating Agreement, the Verderbers' transfer of their interest in Benco LLC to Verbenco LLC nullified all of the protections afforded Benco LLC by Operating Agreement. Indeed, to permit that transfer to stand would be in direct dereliction of the parties' Operating Agreement. The Verderbers' transfer of their interest in CEC to another entity triggered its mandatory sale to Benco LLC pursuant to

Section 8 of Article VII of CEC's Operating Agreement as well as an offer to and an acceptance by Benco LLC pursuant to Sections 1 and 2 of Article 7 of CEC's Operating Agreement at the rate set forth in Section 4 of Article 7 of that Agreement.

As for the price, the formula set forth in the CEC's Operating Agreement applies.

When the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms. Henrich v Phazar Antenna Corp., 33 AD3d 864 (2nd Dept. 2006); see also, South Road Associates, LLC v Intern. Business Machines Corp., 4 NY3d 272, 277 (2005); WWW Associates, Inc. v Giacontieri, 77 NY2d 157, 162 (1990). The interpretation of an unambiguous contract provision is a matter for the court. Greenfield v Philles Records, Inc., supra; WWW Assoc., Inc. v Giacontieri, supra. A contract will be interpreted in accordance with the intent of the parties as expressed in the language of the agreement. Greenfield v Philles Records Inc., 98 NY2d 562, 569 (2002). The best evidence of what parties to a written agreement intend is what they say in their writing. Greenfield v Phillies Records, Inc., supra at p. 569, quoting Slamow v Del Col, 79 NY2d 1016, 1018 (1992). "[A] court 'should not, under the guise of contract interpretation, "imply a term which the parties themselves failed to insert" or otherwise rewrite the contract.' " Aivaliotis v Continental Broker-Dealer Corp., 30 AD3d 446, 447 (2nd Dept. 2006), quoting Lui v Park Ridge at Terryville Ass'n., Inc., 196 AD2d 579 (2nd Dept. 1993), quoting Mitchell v Mitchell, 82 AD2d 849 (2nd Dept. 1981). "As a general rule, courts must enforce shareholder agreements according to their terms. Such agreements avoid costly, lengthy litigation and promote 'reliance, predictability and definitiveness in relationships among shareholders in close corporations.' " Dissolution of In re Dissolution of Penepent Corp., Inc., 96 NY2d 186, 192 (2001), quoting Gallagher v Lambert, 74 NY2d 562, 567 (1989), rearg den., 75 NY2d 866 (1990); and citing Gallagher v Lambert, supra; Allen v Biltmore Tissue Corp., 2 NY2d 534, 542-543 (1957).

"When [a] restraint imposed effectuates a lawful purpose, is reasonable, and is in accord with public policy, it is enforceable." Levey v Saphies, 54 AD2d 959 (2nd Dept. 1976), app den., 41 NY2d 805 (1977), citing Rafe v Hindlin, 29 AD2d 481 (2nd Dept. 1968), aff'd., 23 NY2d 759 (1968); Allen v Biltmore Tissue Corp., supra; Penthouse Properties. v 1158 Fifth Ave., 256 App.Div. 685 (1st Dept. 1939). Restrictions which entirely prevent the alienation of a party's

interest have been found to be unreasonable; however, agreed upon restrictions which limit both the party to whom a transfer may be made as well as the amount to be paid have not. See, Allen v Biltmore Tissue Corp., supra; In re El-roh Realty Corp., 48 AD3d 1190 (4th Dept. 2008; Matter of Gusman, 178 AD2d 597 (2nd Dept. 1991), lv den., 80 NY2d 753 (1992); Doninger v Rye Psychiatric Hosp. Center, Inc., 122 AD2d 873 (2nd Dept. 1986), app den., 68 NY2d 611 (1986); Levey v Saphier, supra,; Vardanyan v Close-Up International, Inc., 315 Fed. Appx. 315 (2nd Cir. 2009).

"[O]wnership of property cannot exist in one person and the right of alienation in another . . . 'the right of transfer is a right of property, and if another has the arbitrary power to forbid a transfer of property by the owners, that amounts to annihilation of property.' " Penthouse Properties v 1158 Fifth Ave., supra, quoting Fisher v Bush, 35 Hun. 641, citing DePeyster v Michael, 6 NY 467, 493 (1852). "[W]hat the law condemns is, not *a* **restriction** on transfer. . . but an effective prohibition against transferability itself (emphasis added)." Allen v Biltmore Tissue Corp., supra, at p. 542. Restrictions which "do not represent an 'effective *prohibition* against transferability' [but] merely limit the group to whom the shares may be transferred" are reasonable. Matter of Gusman, supra, at p. 598, quoting Allen v Biltmore Tissue Corp., supra, at p. 542. It is "a situation in which an individual has the arbitrary power to forbid a transfer of [property] which amounts to an 'annihilation of property.' " Matter of Gusman, supra, at p. 598, quoting Allen v Biltmore Tissue Corp., supra, at p. 542. "Unreasonableness" or "unfairness" of the price specified in an agreement is irrelevant. Allen v Biltmore Tissue Corp., supra, at p. 542-543. As the court stated in Allen v Biltmore Tissue Corp. (supra, at p. 543 citing Palmer v Chamberlin, 191 F.2d 532 (5th Cir. 1951), rehrg den., 191 F2d 589 [1951]), "the validity of the restriction on transfer does not rest on any abstract notion of intrinsic fairness of price. To be invalid, more than mere disparity between option price and current value of the [property] must be shown." Permitting unreasonable or unfair prices to defeat an agreement limiting transferability

> "would permit, indeed, would encourage, expensive litigation in every case where the price specified in the restriction, or the formula for fixing the price, was other than a recognized and easily ascertainable fair market value. This would destroy part of the

> social utility of the first option type of restriction which, when imposed, is intended to operate *in futuro* and must, therefore, include some formula for future determination of the option price."

Allen v Biltmore Tissue Corp., supra, at p. 542-543.

In Levey v Saphier (supra), the Second Department upheld a restriction that afforded the defendant the option to purchase plaintiff's stock at the price it was purchased at for ten years and in fact entirely prohibited the plaintiffs from selling, pledging, hypothecating or disposing of it for that time period thereby reserving the stock for the defendants' option. In fact, unlike here, the plaintiff in Levey v Saphier could not even force a purchase by the defendant. In Vardanyan v Close-Up International (supra) the court upheld a restriction that prohibited a shareholder from transferring his stock without the other two shareholders' written consent, despite the fact that neither a price or time limit was specified nor was there anything to prevent the two shareholders from unreasonably withholding their consent. Because the two shareholders were required to take all necessary steps to find a reasonable buyer, the agreement was not read to forbid a transfer that would render it unenforceable.

The Operating Agreement here is not an absolute prohibition against the Verderbers' transfer of their interest. While it limits the purchaser to Benco LLC it mandates Benco LLC's purchase of the Verderbers' interest and specifies the price. The Operating Agreement therefore does not constitute an unreasonable restraint on alienation of property.

The Verderbers reliance on Palmer v Chamberlin, supra, is misplaced. Missouri law applied, not New York law. And, the buy-out agreement was found to be enforceable. Nothing in that decision alters the conclusions reached here.

Reargument of this court's January 22, 2010 Decision and Order is granted. Upon reargument, this court declares that Verderbers' January 2009 transfer of their interest in CEC terminated their interest in CEC, thereby establishing the valuation date of their interest. This court further declares that Benco LLC is contractually obliged to purchase Verderbers' interest at a price calculated pursuant to Section 4 of Article VII of the parties' Operating Agreement.

The Verderbers' motion for judgment pursuant to the Limited Liability Company Law is

denied as moot.

The defendants' motion to quash the subpoena duces tecum served on Peter, Friedman & Co, LLP is granted. The information sought appears not to be material and necessary because Peter, Friedman and Co. was paid long after the Verderbers' interest in CEC terminated. That Benco as a member and indeed the overwhelming majority interest holder in CEC owed the Verderbers a fiduciary duty (McGuire Children, LLC v Huntress, 24 Misc3d 1202[A] [Supreme Court Erie County 2009], citing Out of Box Promotions, LLC v Koschitzki, 55 AD3d 575, 578 [2nd Dept. 2008]; Nathanson v Nathanson, 20 AD3d 403, 404 [2nd Dept. 2005]; Lio v Mingyi Zhong, 21 Misc3d 1107[a] [Supreme Court New York County 2008]; In re Dil Eliedermans, LLC, 325 BR 101 [Bankruptcy Court SDNY 2005]; Willoughby Rehabilitation and Health Care Ctr., LLC v Webster, 13 Misc3d 1230[A] [Supreme Court New York County 2006], aff'd. 46 AD3d 801 [2nd Dept. 2007]; Berman v Sugo, LLC, 580 FSupp2d 191, 204 (SDNY 2008); Kim v Ferdinand Capital LLC, 19 Misc3d 1107[A] [Supreme Court New York County 2008]), does not necessarily entitle the Verderbers to the discovery sought since that duty expired when the Verderbers' interest in CEC terminated. See, Dubbs v Stribling & Associates, 96 NY2d 337 (2001); Midcourt Builders Corp. v Eagen, 36 AD2d 90 (4th Dept. 1971), aff'd. 31 NY2d 728 (1972).

McGuire Children, LLC v Huntress, supra, relied upon by Verderbers is distinguishable. The court extended the parties' fiduciary duties beyond an agreement to the essential terms of a buy-out because "there was no enforceable or definitive termination of [their] relationship until the actual closing approximately five months later." In the interim, the parties' carried on their relationship as members and the managing member continued to fulfill that roll. In contrast, here, pursuant to the Operating Agreement, the Verderbers' membership interest clearly terminated when they transferred their interest to Verbenco, LLC.

Verderbers' reliance on Blue Chip Emerald, LLC v Allied Partners, Inc. (299 AD3d 278 [1st Dept. 2002]), is similarly unavailing. The defendant member owed the plaintiff member a fiduciary duty before the buy-out agreement was reached and in that case, unlike here, there was a question as to whether the defendant fraudulently procured a waiver by the plaintiff in connection with their buy-out agreement.

In any event, assuming, *arguendo*, that the Verderbers are entitled to discovery of how defendants' expert's opinion was paid, the Verderbers have not established "that the disclosure sought cannot be obtained from sources other than the non-party." Kooper v Kooper, __ AD2d __, 2010 WL 1912142 (2nd Dept. 2010); see also, Moran v McCarthy, Safrath & Carbone, P.C., 31 AD3d 725, 726 (2nd Dept. 2006), lv dism., 8 NY3d 969 (2006); Tannenbaum v Tannenbaum, 8 AD3d 360 (2nd Dept. 2004).

Dated: June 22, 2010

J.S.C.