Deerin v Ocean Rich Foods, LLC
2015 NY Slip Op 32746(U)
February 6, 2015
Supreme Court, Nassau County
Docket Number: 600536-2014
Judge: Timothy S. Driscoll
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ORIGINAL

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

---x
PATRICIA DEERIN as Executor of the Estate of Douglas Deerin,

Plaintiff,

-against-

OCEAN RICH FOODS, LLC, a/k/a OCEAN EDGE FOODS, RICHARD MARINO, and DEAN BERMAN,

Defendants.
---x

TRIAL/IAS PART: 14
NASSAU COUNTY

Index No. 600536-2014
Motion Seq. Nos. 2 & 3
Submission Date: 12/15/14

Papers Read on these motions:

Notice of Motion, Affirmation in Support and Exhibits................x
Affirmation in Opposition and Exhibit..x
Reply Affirmation...x
Notice of Cross Motion, Affirmation in Support/Opposition,
Affidavits in Opposition, Affirmation,
Affidavit of C. Young and Exhibits..x
Affirmation in Reply/Opposition and Exhibits.............................x
Reply Affirmation...x
Affirmation, Exhibit Affidavits in Support and Attachment........x

This matter is before the court on 1) the motion filed by Defendants Ocean Rich Foods, LLC d/b/a Ocean Edge Foods ("Company"), Richard Marino ("Marino") and Dean Berman ("Berman") ("Defendants") on May 8, 2014, and 2) the cross motion filed by Plaintiff Patricia Deerin as Executor of the Estate of Douglas Deerin ("Plaintiff") on October 28, 2014, both of which were submitted December 15, 2014. By prior Order ("Prior Order") dated August 6, 2014 (Ex. A to Ryan 9/4/14 Aff.), the Court 1) advised counsel for the parties that the Court intends to treat Defendants' motion as one for summary judgment; 2) reserved decision on Defendants'

motion; 3) directed Defendants to submit, on or before September 5, 2014, whatever evidentiary materials are required for the court to render a proper summary judgment determination; 4) directed Plaintiff to submit her opposition papers on or before October 10, 2014; and 5) directed Defendants to submit their reply papers on or before October 31, 2014. Pursuant to the Prior Order, Defendants submitted an Affirmation and Affidavits in Support. Subsequent to the issuance of the Prior Order, Plaintiff filed a cross motion in which she seeks leave to amend the Amended Complaint and disqualification of counsel for Defendants, which includes Plaintiff's supplemental opposition to Defendants' motion.

For the reasons set forth below, the Court 1) grants Defendants' motion to the extent that the Court dismisses the first, second, third, fourth, fifth, sixth, and eighth causes of action in the Amended Complaint; and 2) denies Plaintiff's cross motion in its entirety. The Court reminds counsel for the parties of their required appearance before the Court for a Preliminary Conference on February 25, 2015 at 9:30 a.m. on the remaining cause of action in the Amended Complaint.

BACKGROUND

A. Relief Sought

Defendants Ocean Rich Foods, LLC d/b/a Ocean Edge Foods ("Company"), Richard Marino ("Marino") and Dean Berman ("Berman") ("Defendants") initially moved for an Order, pursuant to CPLR §§ 3211(a)(1) and 3211(a)(7), dismissing the complaint as against Defendants. Pursuant to the Prior Order, the Court converted that motion to a motion for summary judgment.

Plaintiff Patricia Deerin as Executor of the Estate of Douglas Deerin ("Plaintiff") opposes the motion and cross moves for an Order 1) pursuant to CPLR § 3025 granting Plaintiff leave to amend her complaint and file her proposed Further Amended Verified Complaint ("Proposed SAC") (Ex. A to Aff. in Supp./Opp.); and 2) disqualifying John E. Ryan, Esq. ("Ryan") and the law firm of Ryan Brennan & Donnelly, LLP ("Ryan Firm") from representing Defendants.

B. The Parties' History

The parties' history is outlined in the Prior Order and in a prior decision ("Prior Decision") of the Court dated March 21, 2014 (Ex. E to Ryan Aff. in Supp.) and the Court incorporates the Prior Decision and Prior Order by reference as if set forth in full herein. In the Prior Decision, the Court denied Plaintiff's prior motion for injunctive relief.

As noted in the Prior Order, the Amended Complaint alleges as follows:

Marino, Berman and Douglas Deerin ("Deerin" or "Deceased") were all members of the Company until Deerin's death on January 28, 2013, at which time Deerin's estate ("Estate") became the owner of his interest. Marino, Berman and the Estate each currently own 1/3 of the Company.

Plaintiff alleges that in January 2009, Marino, Berman and Deerin entered into a Cross-Purchase Agreement ("Agreement") which states that life insurance policies had been taken out in the amount of $1.5 million on the lives of each of the three members of the Company, and that "The Company shall be the sole owner of the policies purchased by and issued to it" (Am. Compl. at ¶ 9). The Agreement specifies that the Company was the owner and beneficiary of John Hancock Policy No. 81 602 369 in the amount of $1.5, insuring the life of Deerin ("Policy"). The Agreement provides that, upon the death of a member, "The Company shall pay such life insurance proceeds to the legal representative of the deceased Member as part payment or payment in full, as the case may be, on account of the purchase price of the interest of the deceased Member" (Am. Compl. at ¶ 11).

The Amended Complaint contains eight (8) causes of action: 1) Marino and Berman breached the Agreement by refusing to pay the life insurance proceeds to Deerin's Estate in exchange for its membership interest in the Company, 2) Marino and Berman breached their fiduciary duty to Deerin and, upon his death, to Deerin's Estate by failing to distribute the life insurance proceeds to the Estate; 3) Marino and Berman breached the implied covenant of good faith and fair dealing by failing to distribute the life insurance proceeds to the Estate; 4) Marino and Berman, parties to the Agreement, are liable for tortious interference with contract by failing to distribute the life insurance proceeds to the Estate; 5) pursuant to New York Limited Liability Company Law ("LLCL") § 509, Plaintiff should receive the fair market value of 1/3 of the Company, as determined by an independent appraiser; 6) Plaintiff seeks dissolution of the Company, pursuant to LLCL § 702, on the grounds that it is financially unfeasible to continue the operations of the Company; 7) Plaintiff, as the representative of the Estate, seeks an accounting of the Company; and 8) Defendants have been unjustly enriched in the sum of $1,500,000 which was to be paid out to Plaintiff as representative of the Estate.

In opposition to Plaintiff's prior motion for injunctive relief, Defendants provided a copy of the Policy to which the Amended Complaint refers, which is dated January 28, 2008, one year before the alleged Agreement and five years before the death of Deerin on January 28, 2013. The Policy, which is a "key person" policy, provides that the Company is the "owner" and sole beneficiary of the Policy. Defendants submit that it is undisputed that the Company took out the Policy with John Hancock Life Insurance Company of New York, Policy Number 81602369, on Deerin's life, payable in the amount of $1,500,000, with an issue date of May 28, 2008 which names the Company as owner and sole beneficiary. Defendants contend that, approximately eight (8) months after the procurement of the Policy, a draft of the Agreement was generated and, thereafter, not signed by any members of the Company, including the Deceased. The Agreement, in addition to being unsigned, is also undated, and Plaintiff does not allege that any of the parties negotiated or executed the Agreement. Defendants have advised the Court that on June 5, 2013, Defendants provided Plaintiff with a complete copy of their financial statements for the year ending December 31, 2012. Defendants do not object to Plaintiff's request for an accounting and previously advised the Court that they will provide another copy of the accounting information to Plaintiff if required.

In his affirmation in opposition to Defendants' motion to dismiss dated June 23, 2014, counsel for Plaintiff ("Plaintiff's Counsel") affirms that Plaintiff served a subpoena duces tecum on Marc Levy ("Levy") (Ex. A to Haber Aff. in Opp.), the insurance broker who obtained the Policy for the Deceased which had not yet been answered as of the date of counsel's affirmation. That subpoena contained a return date of June 28, 2014.

Pursuant to the Prior Order, Defendants submitted Affidavits in Support of Defendants Berman and Marino dated September 2, 2014. Berman affirms that he is a member of the Company which Defendants Marino and Berman, and the Deceased (collectively "Members"), formed in 2006. Each of the Members had a 1/3 membership in the Company. After forming the Company, various forms of insurance were acquired including health, liability, marine cargo, warehouse and "key man" life insurance policies. One of the policies acquired was the Policy which insured the Decedent's life and named the Company as the owner and sole beneficiary. In early 2009, the Agreement and related documents were presented to the Members. The

Members rejected, and did not sign, the Agreement or any of the documents related to it. No other Agreements were ever proposed to, or signed by, any of the Members.

Marino reaffirms the truth of Berman's affidavit with respect to the Policy and the members' rejection of the Agreement. Marino affirms that Defendants previously provided the Deceased's Estate with a copy of the Company's audited financial statements for the period ending December 31, 2012. Marino provides a copy of those financial statements, as well as a copy of the Company's financial statement for the period ending December 31, 2013.

In opposition to Defendants' motion, Patricia Deerin ("Patricia") affirms that she is the widow of the Deceased, who passed away on January 28, 2013, and the executor of his Estate. Patricia affirms that she does not have access to the Company's books and records, including the Company's operating agreement and other organizational records, other than the unsigned Agreement. Patricia affirms that when the Members were forming the Company, Deerin explained to her that the Members had agreed that the Company would purchase life insurance with the agreement that the Company would use the proceeds to buy out a Member's interest upon his death. Deerin advised Patricia that all of the Members agreed that they did not want a deceased Member's surviving family involved with the Company.

Patricia affirms that in February of 2013, she found the Agreement with the personal life insurance policy in which she was the beneficiary. Patricia spoke with her insurance agent Ronald Bushwell who advised her that the policy in the Agreement "was a good policy with a death benefit of $1,500,000" (Patricia Aff. in Opp. at ¶ 6(E)). In the fall of 2013, Patricia met with Marino and Berman who initially offered her $112,000 for Deerin's interest in the Company and subsequently raised that offer to $270,000. The Agreement provides that the minimum value of a Member's interest shall be $1,500,000. The Company has not paid any distributions to the Estate following Deerin's death and discontinued Patricia's health insurance immediately following Deerin's death.

Patricia affirms that Ryan and the Ryan Firm represented Deerin when the Company was formed and she "think[s] that representation continued through" Deerin's death (Patricia Aff. in Opp. at ¶ J). Patricia provides a a copy of an invoice ("Invoice") from the Ryan Firm, addressed to Berman and Deerin and dated November 1, 2006 (Ex. 3 to Patricia Aff. in Opp.).

In further opposition to Defendants' motion, Brian Deerin ("Brian") affirms that he is Deerin's son and also does not have access to the Company's records, other than the unsigned Agreement. Brian affirms that several months prior to Deerin's death, Deerin advised Brian that Patricia could expect the proceeds from two life insurance policies, one of which was owned by Patricia and the other of which was owned by the Company. On June 14, 2013, Brian spoke with Levy, an insurance agent, who advised Brian that he created a cross-purchase agreement for the Members and confirmed that the Members' intent, with respect to the Agreement, was to buy out the interests of a Member's surviving spouse in the event of the Member's death.

In his affirmation dated October 23, 2014, Plaintiff's Counsel affirms that he spoke with Levy who advised Plaintiff's Counsel that Levy was involved in obtaining the life insurance policies on the Members, still works with the two remaining Members and would not sign an affidavit unless required to do so. Plaintiff's Counsel affirms that Levy advised him that he would testify under oath that the Members' intent was to use the life insurance proceeds to buy out the family of a deceased Member. Plaintiff's Counsel served Levy with a Judicial Subpoena Duces Tecum ("Subpoena") and Levy, in response, produced certain documents ("Subpoenaed Documents") (Ex. 5 to Haber Aff.). Plaintiff's Counsel affirms that he also spoke with Michael Eng ("Eng), in-house counsel for Metropolitan Life, who advised Plaintiff's Counsel that there exist emails in addition to the Subpoenaed Documents but they were not immediately available. Plaintiff provides a September 29, 2014 email from Eng to Plaintiff's Counsel (Ex. 6 to Haber Aff.) advising Plaintiff's Counsel that Eng should have the results of the search for deleted emails that week and would speak with Levy about deposition dates.

Plaintiff also provides an affidavit of Christopher W. Young ("Young") who affirms that he is certified by the National Association of Certified Valuators and Analysts as a company valuation expert. Young affirms that he was retained by Plaintiff to determine the fair value of Plaintiff's interest in the Company as of December 31, 2013 and to determine the proceeds of the Company that were distributed to the Members following Deerin's death "to determine whether [the Company] distributed the proceeds equally among its members" (Young Aff. at ¶ 5). Young provides his opinion that, based on his review of certain documents, with a reasonable degree of business valuation certainty, the fair value of the Company cannot be determined from the Financial Statements for 2012 and 2013 (Ex. 10 to Young Aff.), and with a reasonable degree of accounting certainty, the distributions to members cannot be determined from those Financial

Statements.

In support of Plaintiff's motion to disqualify Ryan and the Ryan Firm, Plaintiff provides a copy of a January 19, 2009 email that referred to the Agreement (*see* Ex. 5 to Haber Aff.) and a June 23, 2014 letter from Ryan to Plaintiff's Counsel (*id.* at Ex. 6). In that letter, Ryan advised Plaintiff's Counsel, *inter alia*, "I have represented [the Company] on prior matters. No conflict of interest exists. I will not withdraw as [the Company's] counsel."

The Proposed SAC contains the following seven (7) causes of action: 1) breach of an agreement entered into by the Members pursuant to which it was agreed *inter alia* that, upon a Member's death, the Member's interest in the Company would be sold to the Company for fair value and that the fair value of each Member's interest in the Company would be at least $1,500,000, 2) breach of the Agreement, 3) a request for specific performance compelling Defendants to use the proceeds from the Policy to purchase Deerin's interest, 4) an allegation that there were unequal distributions from the Company, 5) unjust enrichment, 6) a cause of action pursuant to Section 509 of the LLCL in which Plaintiff alleges that she was entitled to be paid fair value for her membership interest in the Company within a reasonable amount of time from the date she withdrew and is entitled to interest at the legal rate on the fair value from date of withdrawal, and 7) a request for an accounting and valuation of the Company.

In opposition to Plaintiff's motion, Ryan affirms that he has represented the Company in various past matters but has never represented Deerin in connection with anything involving the other Members. Prior to the formation of the Company, Ryan represented Berman and Deerin in their separation from an entity called Harbor Seafood, Inc. ("Harbor Seafood"), to which reference is made on the November 1, 2006 Ryan Invoice on which Plaintiff relies. Ryan affirms that, following his representation of Deerin in connection with his separation from Harbor Seafood, he never represented Deerin again in any legal matters. Thus, Ryan submits, the matters regarding which he represented Deerin in the past are "entirely unrelated" to the matter now before the Court (Ryan Aff. in Reply/Opp. at ¶ 16) and there is no basis for disqualification. Ryan submits that Plaintiff's assertions in support of disqualification are speculative, and confirm that there is no basis for her motion.

C. <u>The Parties' Positions</u>

The parties' positions with respect to Defendants' initial motion to dismiss are set forth in the Prior Order, which the Court incorporates by reference. In the Prior Order, the Court advised

the parties that it would treat Defendants' motion as one for summary judgment. Subsequent to the Prior Order, Plaintiff filed her cross motion. The parties' positions with respect to Defendants' motion, which is now one for summary judgment, and Plaintiff's cross motion, are set forth below.

With respect to Plaintiff's cross motion to disqualify Ryan and the Ryan Firm, Plaintiff submits that the Court should disqualify Ryan and the Ryan Firm because they previously represented Deerin and that representation continued through the period when the Company was formed until Deerin died. In making that assertion, Plaintiff refers to paragraph 6J of Patricia's affidavit in which Patricia affirms that Ryan and the Ryan Firm represented Deerin when the Company was formed and "I think that representation continued through" Deerin's death. Patricia also makes reference to an Invoice from Ryan dated in November of 2006. Plaintiff also relies on a 2009 email from the Ryan Firm which made reference to the unsigned Agreement and to a June 23, 2014 letter from Ryan to Plaintiff's Counsel in which Ryan concedes that he represented the Company in prior matters but also states, in no uncertain terms, that there is no conflict and he will not withdraw from this action.

Defendants oppose Plaintiff's cross motion to disqualify Ryan and the Ryan Firm submitting that there is no basis for disqualification. Defendants note, preliminarily, that motions to disqualify are generally disfavored in light of the policy favoring a party's right to representation by counsel of its choice. Defendants submit, further, that 1) disqualification of Defendants' counsel would create a substantial hardship on Defendants in light of the fact that Defendants' counsel has represented Defendants from the outset of this action and made numerous appearances on Defendants' behalf and in consideration of the fact that Plaintiff, who has known of Ryan's representation of Defendants since the outset of this action, waited to file her cross motion until the Court's issuance of the Prior Order; and 2) there is no basis for disqualification because Ryan's prior representation of the Company and Deerin is not substantially related to the matter now before the Court.

Defendants submit that Plaintiff has failed to raise a triable issue of material fact and that dismissal of the Complaint is appropriate. Defendants contend that all of Plaintiff's causes of action grounded in contract law are completely lacking in merit because Defendants have established that the Agreement never existed. The only enforceable contract is the Policy which is unambiguous and names the Company as its owner and sole beneficiary. Defendants note that

many of the affidavits submitted by Plaintiff contain inadmissible hearsay that the Court cannot consider in evaluating Defendants' motion. Moreover, Defendants contend, any discovery that may be conducted in the future will not alter the fact that the Members never entered into the Agreement on which Plaintiff relies in support of her claims.

Plaintiff submits that, to the extent that Defendants seek relief with respect to Plaintiff's second, third, fourth and fifth causes of action in the Amended Complaint, Defendants' motion is "moot as plaintiff is agreeable to withdrawing these causes of action and is seeking leave to serve an amended complaint which abandons them" (Nelson Aff. in Supp./Opp. at ¶ 15). Plaintiff's counsel advises the Court that he asked Ryan to withdraw Defendants' motion but that request was denied.

Plaintiff submits that the Court should deny Defendants' motion 1) pursuant to CPLR § 3212(f) because facts essential to oppose the motion may exist but cannot be stated until Plaintiff has had the opportunity to conduct discovery; and 2) because Defendants have not demonstrated their entitlement to judgment as a matter of law. Plaintiff argues that she does not have access to the Company's books and records, and submits that the affidavits of Patricia, Brian, Young and Plaintiff's Counsel establish that facts essential to justify opposition to Defendants' motion may exist. Plaintiff's Counsel advises the Court that he requested from Ryan certain Company documents that the Company is required to provide but Ryan declined to provide the requested records, referring to correspondence from October 2014 (Exs. I, J and K to Nelson Aff. in Supp./Opp.).[1] Plaintiff submits that she should be given the opportunity to obtain discovery including, but not limited to, documents concerning the Members' agreement that resulted in the purchase of the Policy and depositions of Berman and Marino regarding the Members' agreement to purchase life insurance and the distributions of Company assets following a Member's death.

Plaintiff also contends that Defendants have not established their entitlement to judgment as a matter of law arguing, *inter alia*, that 1) without conceding that the Agreement was never

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[1] The Court notes that in Ryan's letter dated June 23, 2014, on which Plaintiff relies in support of her cross motion to disqualify, Ryan agreed to "disclosure of any estate planning documentation relative to [the Company] for its members. I object to the release of any documents relating to the personal financial planning of my clients or their families." Thus, the record supports the conclusion that Defendants have been amenable to providing Plaintiff with records to which they believe she is entitled.

signed, there may be other writings which establish its enforceability; 2) it is "possible" (Nelson Aff. in Supp./Opp. at ¶ 30) that the Members "may have agreed" (*id.*) to the provisions in the Agreement relating to the purchase and use of the life insurance and rejected the Agreement for other reasons; 3) the representation of Defendants' counsel that Plaintiff did not accept Defendants' offers of the fair value of Deerin's membership interest in the Company is insufficient to defeat the fifth cause of action, asserted pursuant to LLCL § 509, because Defendants do not state the amount that was offered; and 4) with respect to the cause of action seeking an accounting, Defendants have not established that they made required payments and/or distributions to Plaintiff.

Plaintiff asks the Court to permit her to file her Proposed SAC which, she submits, "abandons" (Nelson Aff. in Supp.Opp. at ¶ 8) the second cause of action in the Amended Complaint for breach of fiduciary duty related to the failure of the Company to purchase Plaintiff's interest, the third cause of action for breach of the implied covenant of good faith and fair dealing, the fourth cause of action for tortious interference with contract and the sixth cause of action seeking judicial dissolution of the Company. Plaintiff submits that, because the causes of action in the Proposed SAC concern the same transactions referred to in the Amended Complaint, because Defendants have not yet served an answer, and because no discovery has taken place, Defendants would not be prejudiced by the proposed amendment.

Defendants oppose Plaintiff's motion to amend submitting that the fact remains that the Agreement on which Plaintiff relies is unsigned and was never entered into by the Members. Defendants submit, further, that Plaintiff has not, and cannot, provide any evidence that the Agreement was agreed to, or signed by, any party in this action. Moreover, the Policy is unambiguous in that it clearly names the Company as the sole owner and beneficiary and, therefore, parol evidence is inadmissible to alter or add a provision to the Policy. Thus, all of Plaintiff's causes of action based in contract law are not viable.

Defendants submit, further, that Plaintiff has misrepresented the alleged changes to her causes of action in her opposition papers. Defendants note that counsel for Plaintiff affirms that the Proposed SAC "abandons the plaintiff's Second Cause of Action for breach of fiduciary duty related to the failure of Ocean Rich to purchase the plaintiff's interest" (Nelson Aff. in Supp./Opp. at ¶ 8). The Proposed SAC, however, alleges that "Marino and Berman have breached their fiduciary to plaintiff" (Proposed SAC at ¶ 79). Defendants submit that Plaintiff

"does not actually intend to abandon any cause of action, but merely seeks leave to reword and rephrase her previously and fatally defective claims in an attempt to generate so-called "evidence" in support for her meritless causes of action" (Ryan Aff. in Reply/Opp. at ¶ 18; underlining and quotation marks in original).

With respect to Plaintiff's proposed cause of action pursuant to LLC § 509, Defendants advise the Court that they do not object to Plaintiff's right to be paid fair valuation for Deerin's shares of the Company, but do object to the payment of interest. Defendants advise the Court that, following Deerin's death, Defendants offered Plaintiff a settlement amount in excess of Deerin's actual one-third ownership interest in the Company at the time of his death, and also offered to settle certain outstanding individual debts of Deerin that he incurred prior to his death. Plaintiff rejected that offer and, instead, filed this action. Thus, Defendants submit, the Court should reject Plaintiff's request for any interest in excess of the fair value of the Deceased's interest at the time of his death.

With respect to Plaintiff's proposed cause of action for an accounting, Defendants affirm that they provided Plaintiff with a complete copy of the Company's certified financial statements for the year ended December 31, 2012, and provided Plaintiff with a complete copy of the Company's certified financial statements for the year ended December 31, 2013. Defendants reiterate that they do not object to Plaintiff's request for an accounting and will provide "yet another copy" (Ryan Aff. in Reply/Opp. at ¶ 31) of the accounting information to Plaintiff if required.

RULING OF THE COURT

A. Summary Judgment

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68

N.Y.2d 320, 324 (1986). Mere conclusions or unsubstantiated allegations will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

Pursuant to CPLR §3212(f), should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

B. Disqualification of Counsel

A party's valued right to be represented in ongoing litigation by counsel of its own choosing should not be abridged, absent a clear showing that disqualification is warranted. *Horn v. Municipal Information Services, Inc.*, 282 A.D.2d 712 (2d Dept. 2001), citing *Olmoz v. Town of Fishkill*, 258 A.D.2d 447 (2d Dept. 1999); *Feeley v. Midas Props*., 199 A.D.2d 238 (2d Dept. 1993). Accordingly, the movant has the burden of establishing grounds for the disqualification of Defendant's counsel. *Tekni-Plex, Inc. v. Meyner and Landis*, 89 N.Y.2d 123, 131 (1996), *rearg. den.*. 89 N.Y.2d 917 (1996); *Solow v. W.R. Grace Co.*, 83 N.Y.2d 303, 308 (1994); *see also, S & S Hotel Ventures, Ltd. Partnership v. 777 S. H. Corp.*, 69 N.Y.2d 437, 445 (1987). A party seeking disqualification of opposing counsel must establish that 1) there is a prior attorney-client relationship between the moving party and opposing counsel; 2) the matters involved in both representations are substantially related; and 3) the interests of the current client and former client are materially adverse. *M.A.C. Duff, Inc. v. ASMAC, LLC*, 61 A.D.3d 828 (2d Dept. 2009) citing *Tekni-Plex, Inc. v. Meyner and Landis,* 89 N.Y.2d at 131; *Calandriello v. Calandriello*, 32 A.D.3d 450, 451 (2d Dept. 2006); *Columbus Constr. Co., Inc. v. Petrillo Bldrs. Supply Corp.*, 20 A.D.3d 383 (2d Dept. 2005).

When the moving party can demonstrate each of these factors, an irrebuttable presumption of disqualification follows. *Pellegrino v. Oppenheimer & Co., Inc.*, 49 A.D.3d 94, 98 (1st Dept. 2008), citing *Tekni-Plex, Inc. v. Meyner and Landis,* 89 N.Y.2d at 131. Conversely, the movant's failure to make the requisite showing as to each of the criteria means that no such presumption arises. *Pellegrino v. Oppenheimer & Co., Inc.,* 49 A.D.3d at 98, citing *Kassis v. Teacher's Ins. & Annuity Assn.*, 93 N.Y.2d 611, 617 (1995); *Tekni-Plex, Inc. v. Meyner and Landis*, 89 N.Y.2d at 132.

C. Relevant Contract Principles

A contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. *Obstfeld v. Thermo Niton Analyzers, LLC*, 112 A.D.3d 895, 897 (2d Dept. 2013). Consequently, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. *Id.*, citing *MHR Capital Partners LLP v. Presstek, Inc.*, 12 N.Y.3d 640, 645 (2009), quoting *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002). A contract is ambiguous if the terms are reasonably susceptible of more than one interpretation. *Obstfeld v. Thermo Niton Analyzers, LLC*, 112 A.D.3d at 897, quoting *Chimart Assoc. v. Paul*, 66 N.Y.2d 570, 573 (1986). Whether a contract is ambiguous is a question of law to be resolved by the court. *Obstfeld v. Thermo Niton Analyzers, LLC*, 112 A.D.3d at 897 citing, *inter alia*, *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990). Where a contract is ambiguous, extrinsic evidence may be considered to determine the parties' intent. *Obstfeld v. Thermo Niton Analyzers, LLC*, 112 A.D.3d at 897, citing *Greenfield v. Philles Records*, 98 N.Y.2d at 569.

D. Unjust Enrichment

The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice. Generally, courts will determine whether 1) a benefit has been conferred on defendant under mistake of fact or law; 2) the benefit still remains with the defendant; and 3) the defendant's conduct was tortious or fraudulent. *Paramount Film Distributing Corp. v. New York*, 30 N.Y.2d 415, 421 (1972). Plaintiff may not maintain an action for unjust enrichment where the matter in dispute is governed by an express contract. *Scavenger, Inc. v. Interactive Software Corp.*, 289 A.D.2d 58 (1st Dept. 2001).

E. Dissolution of LLC

LLCL § 702, titled "Judicial dissolution," provides as follows:

> On application by or for a member, the supreme court in the judicial district in which the office of the limited liability company is located may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement. A certified copy of the order of dissolution shall be filed by the applicant with the department of state within thirty days of its issuance.

For dissolution of an LLC pursuant to LLCL § 702, the petitioning member must establish, in the context of the terms of the operating agreement or articles of incorporation, that 1) the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved; or 2) continuing the entity is financially unfeasible. *Matter of 1545 Ocean Avenue, LLC v. Ocean Suffolk Properties, LLC*, 72 A.D.3d 121, 131 (2d Dept. 2010).

F. Leave to Amend

Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit. *Aurora Loan Services, LLC v. Thomas*, 70 A.D.3d 986, 987 (2d Dept. 2010), citing CPLR § 3025(b); *Lucido v. Mancuso*, 49 A.D.3d 220, 222 (2d Dept. 2008).

G. Application of these Principles to the Instant Action

The Court denies Plaintiff's application for the disqualification of Ryan and the Ryan Firm as counsel for Defendants. Although there is concededly a prior attorney-client relationship between Ryan/the Ryan Firm and Deerin, Plaintiff has not established that the matters involved in both representations are substantially related. Plaintiff's submissions do not establish the required relationship between the prior matters and the matter now before the Court and, accordingly, there is no basis for disqualification.

The Court grants Defendants' motion for dismissal, which the Court has converted to one for summary judgment, with respect to the first, second, third, fourth, fifth, sixth, and eighth causes of action in the Amended Complaint. The Court concludes that the Policy is an unambiguous contract that clearly names the Company as the sole owner and beneficiary and, therefore, parol evidence is inadmissible to alter or add a provision to the Policy. In light of that determination, the first through fourth causes of action in the Amended Complaint are not viable. The Court also concludes that further discovery is not warranted because none of the non-hearsay submissions before the Court support the conclusion that the Members signed or agreed to be bound by the unsigned Agreement. The Court dismisses the fifth cause of action asserted pursuant to LLCL § 509, in which Plaintiff seeks the fair market value of 1/3 of the Company, in light of the unrefuted May 6, 2014 affirmation of counsel for Defendants that Plaintiff has not accepted Defendants' offers for the fair value of Deerin's membership interest in the Company

and that Defendants had "done everything possible" (Ryan Aff. in Supp. at ¶ 19) to provide Plaintiff with her membership interest in a reasonable time but those offers had been rejected. Young's affirmation does not salvage this cause of action because he provides no information regarding the specific offer made by Defendants and the appropriateness of that offer. The Court dismisses the sixth cause of action, seeking dissolution pursuant to LLCL § 702, because Plaintiff has not established that cause for such dissolution exists. The Court dismisses the eighth cause of action, alleging unjust enrichment, because the Policy is a contract that governs the parties' dispute.

In light of Defendants' agreement to provide Plaintiff with an accounting of the Company, the Court declines to dismiss the seventh cause of action. The Court notes, however, that Defendants have represented that they have provided Plaintiff with financial statements of the Company and would anticipate that counsel for the parties may resolve this remaining cause of action prior to the Preliminary Conference scheduled by the Court.

The Court denies Plaintiff's motion for leave to amend. The Proposed SAC, like the Amended Complaint, alleges that the Members entered into the Agreement and seeks relief based on that Agreement. In light of the Court's determination that the Policy is an unambiguous contract that entitles Defendants to dismissal of the Amended Complaint, the Court concludes that the Proposed SAC is devoid of merit and that the requested amendment should not be permitted.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Preliminary Conference on the remaining cause of action on February 25, 2015 at 9:30 a.m.

ENTER

DATED: Mineola, NY
February 6, 2015

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
FEB 20 2015
NASSAU COUNTY
COUNTY CLERK'S OFFICE