Katsikoumbas v Katsikoumbas
2024 NY Slip Op 35315(U)
January 18, 2024
Supreme Court, Bronx County
Docket Number: Index No. 805347/2022E
Judge: Fidel E. Gomez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX
---X
JOHN KATSIKOUMBAS, STEFANOS KATSIKOUMBAS AND MARIA KATSIKOUMBAS,
Plaintiffs,

-against-

DECISION AND ORDER

Index No. 805347/2022E

CHRISTINA KATSIKOUMBAS AND EPIROS, LLC,
Defendants.
---X

Plaintiffs move for summary judgment, pursuant to CPLR § 3212, for an Order directing the sale of a commercial building located at 189-193 West 231st Street, Bronx, New York 10463 (the Building), in accordance with the terms of an LLC agreement dated March 16, 2010 (the Member Agreement) .

Defendants cross-move for summary judgment, pursuant to CPLR § 3212, dismissing the complaint and granting their first, second and third counterclaims for declaratory judgment.

For the reasons set forth hereinafter, plaintiffs' motion is denied, and defendants' cross-motion is granted, in part.

BACKGROUND

The verified complaint (the complaint) in the instant action alleges causes of action for declaratory judgment, specific performance and injunctive relief. Specifically, the complaint alleges as follows: Plaintiffs (the Minority Party) collectively hold a 49 % interest as members of defendant Epiros, LLC (the LLC). Defendant Christina Katsikoumbas (Christina or the Majority Party) holds a 51% interest in the LLC. The LLC was formed pursuant to Articles of Organization dated November 13, 2006. On November 27, 2006, the sole founding member and manager, nonparty Dimitrios Katsikoumbas entered into an Operating Agreement with the LLC. Thereafter, on March 16, 2010, Dimitrios entered into the Member Agreement with the Minority Party wherein he transferred a 49% interest in the LLC to his niece and nephews, plaintiffs Maria Katsougrakis (Maria), John Katsikoumbas (John) and Stefanos Katsikoumbas (Stefano). Upon Dimitrios' death, his wife Christina inherited Dimitrios' 51% interest in the LLC, and she is the managing member of the LLC. The LLC's only asset is the Building. The Member Agreement contemplates a 66% member vote/consent for all matters that materially modify or amend a lease in the Building. The Member Agreement was prepared this way so that issues impacting income would be decided by a 66% vote. Leases are the LLC's only source of income. Paragraph 3 of the Member Agreement provides, *inter alia,* that no "lease can be signed unless all parties have been notified in advance and consent is given by a 66% vote by the members" and that "the LLC cannot mortgage its building, or lease a vacant store to a tenant selling food, without the written consent of 66% of all the members." The members established course of conduct is consistent with the foregoing provisions. The Member Agreement also provides a specific procedure for the sale of the Building. In this regard, Section 3(b) provides a framework where either the Minority Party or the Majority Party may offer to sell the Building to the other party. The offeree then has 30 days to respond. During this time, the parties are required to negotiate. If the parties cannot agree on a price and terms within 30 days, the Building must be sold in accordance with the procedures set forth in Section 3(b). By letter dated August 2, 2021, the Minority Party exercised their rights under Section 3(b) by offering to either purchase the Majority Party's interest for $9 million or sell the Minority Party's interest for $8.75 million. Also in that letter, the Minority Party demanded that the Majority Party take actions concerning lease matters consistent with the voting mechanism set forth in the Member Agreement. In response, the Majority Party repudiated her obligations under Section 3(b) and failed to perform her obligations under the Member Agreement. Instead, the Majority Party has asserted that the Minority Party cannot force the sale of the Building under Section 3(b). Although the parties exchanged communications after August 2, 2021, they failed to agree on a sale price and terms within 30 days of the Minority Party's offer of $8.75 million for the sale of the Minority Party's interest in the LLC. Since the parties have not agreed on a price and terms within 30 days, the Building must be sold in the manner set forth in Section 3(b). Under the terms of Section 3(b), the defendants are obligated to sell the Building. The Minority Party has performed all obligations under the Member Agreement and Operating Agreement. Defendants have failed and refused to perform their obligations concerning Section 3(b), which constitutes a breach of defendants' obligations under the Member Agreement. The Minority Party is ready, willing and able to perform all of its obligations under the Member Agreement. Therefore, the Minority Party is entitled to a judgment compelling defendants to specifically perform their obligations under Section 3(b), including selling the Building. The Minority Party is also entitled to an order enjoining defendants from entering into a new lease for space in the Building and/or a lease that materially modifies or amends an existing lease in the Building without first obtaining 66% membership vote/consent for same.

In their verified answer, defendants assert five counterclaims: (1) declaratory judgment that dissolution of the LLC cannot be effectuated unilaterally; (2) declaratory judgment that the Majority Party has complete authority to operate all of the affairs of the LLC; (3) declaratory judgment that the 66% vote restriction with respect to lease agreements no longer applies; (4) declaratory judgment that Phillips Lytle and Fansburg be disqualified as counsel; and (5) sanctions against plaintiffs pursuant to Rule 130-1.1 for frivolous filings.

* * * * * * * *

In support of their motion, plaintiffs submitted, *inter alia,* John's affidavit wherein he reiterates the allegations in the complaint, which he verified, and, in addition, states as follows: The Member Agreement clearly contemplates a 66% member vote/consent for all leases or lease modifications requiring execution. The parties' established course of conduct is consistent with the Member Agreement in this regard. For example, in 2014 there was a vote relative to a lease modification for the restaurant in the Building operated by Stefanos. In September 2020, there were votes on a wide range of matters including whether to pursue litigation against New York City to reduce certain taxes, collecting rent from certain tenants of the Building, making repairs to the basement of the Building, and hiring a real estate broker. In October 2020, after the Majority Party received quotes regarding making repairs to the basement of the Building, she sought approval from the Minority Party because of the higher estimated costs. Recently, however, the Majority Party has negotiated leases with tenants without membership approval, refused any obligation to put any modifications to a vote, and otherwise cut out the Minority Party from any and all modifications and changes to current terms of leases and future terms of leases. Due to the Majority Party's refusal to comply with the Member Agreement, at this point, the parties are at an impasse regarding certain operations of managing the Building, and the business relationship has been irreparably damaged.

In opposition to plaintiffs' motion and in support of defendants' cross-motion for summary judgment, defendants submitted, *inter alia,* Christina's affidavit[1] wherein she states as follows: When her husband Dimitrios died, she inherited his 51% interest in, and became the managing member of, the LLC. At that time, none of the plaintiffs offered assistance or guidance in managing the LLC. Rather, they pressured her to sell the Building. None of the individual plaintiffs have had any authority to act on behalf of the LLC. During the Coved-19 pandemic, the owner of the restaurant at the Building contacted her to try to work out a deal that would allow the business to survive. Christina believed that it would not benefit the LLC to take a hardline approach, which would lead to the loss of a longstanding tenant who was trying to do right by both his business and his landlord. However, plaintiffs took a hardline approach and would not agree to any deal with this tenant. John pressured her and told her that she lacked authority to take action without plaintiffs' consent. Thereafter, she retained an attorney who sent notice to the LLC members for a meeting on July 8, 2021. The meeting was held telephonically and during the meeting John took the position that the Minority Party had the right to veto everything. The call was ended abruptly by plaintiffs. After the meeting and in response to the Minority Party's assertions therein, she had her attorney send a Notice of Decision pursuant to New York Limited Liability Law § 407(a) which she attached to her affidavit. In the Notice, she

[1]To the extent that Christina's affidavit contains statements regarding Dimitrios' intent with respect to any of the agreements, said statements are based on inadmissible hearsay and have not been considered by the Court. Also, those statements, and statements regarding the meaning of certain terms of the Member Agreement based on conversations she had with the agreement's drafting attorney, constitute parol evidence which can only be considered upon a finding that an agreement, or any part thereof, is ambiguous (*W.W.W. Assoc. v Giancontieri,* 77 NY2d 157, 162 (1990). Inasmuch as the Court does not find any ambiguity in the relevant contract provisions, such parol evidence may not be considered.

advised the members of the LLC that as the 51% shareholder she has "RESOLVED" that : (1) the managing member shall enter into and negotiate terms to settle any arrears with tenants pursuant to the Operating Agreement and the Member Agreement; (2) such negotiations with tenants to handle arrears are within the Majority Party's rights and interests under the Operating Agreement and Member Agreement; (3) circumstances surrounding the Coved-19 pandemic and the moratorium on evictions as well as the business interests of the LLC will guide the negotiations with tenants; (4) the Minority Party lacks the legal authority to prevent the LLC from resolving any issues related to tenant arrears; (5) the negotiations in question are with existing tenants, therefore, the handling of issues of arrears and negotiations with them do not trigger the enhanced voting requirements under the Operating Agreement and Member Agreement; and (6) the minority members cannot continue to cause a stalemate on such issues and further delays in resolving the issues shall only serve to damage the LLC.

In addition, Christina states that plaintiffs' valuation of approximately $18 million for the Building exceeds the property's actual value by at least $11 million. She has always maintained that she would be interested in purchasing the Minority Party's interest in the LLC for a fair price. Therefore, there has never been nor will there ever be confusion amongst the parties as to who is buying and who is selling its interest in the LLC. In January 2022, plaintiffs claimed to have had an appraisal prepared for the Building but refused to provide it to her unless she agreed not to share it with other appraisal companies. A few months later, she retained a certified real estate appraiser who appraised the Building at a value that she expected, which was "far off" of plaintiffs' valuation. There are no valid claims against her individually as she has only acted as managing member and majority member of the LLC. The only course of conduct in this case is plaintiffs' "ability to do everything they can" to "sabotage the LLC and force the sale of its sole asset."

In opposition to defendants' cross-motion, plaintiffs submitted Maria's affidavit wherein she states as follows: On or about April 3, 2020, she exchanged text messages with Christina regarding the management of the LLC. During this text exchange, Christina stated that one of the tenants of the Building asked "to pay 50/100 every month until this situation (Covid) is finished," and Maria told Christina that she had to talk to her partners about that. On May 31, 2020, Maria again exchanged text messages with Christina regarding the management of the LLC. Those text exchanges, which Maria incorporated into her affidavit, essentially concern a reduction of rent for Dale restaurant wherein Christina expresses that the rent should be reduced by 50% for the months of April, May and June in response to Maria's representation that the Minority Party wanted the rent reduction to apply for the month of April only. Those texts, Maria avers, evince that Christina recognized that in order to make decisions regarding leases she needed greater than a simple majority vote. Maria attached to her affidavit what she alleges is a copy of those texts.

STANDARD OF REVIEW

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds*; *Ortiz v City of New York,* 67 AD3d 21, 25 [1st Dept 2009]). Notably, the court can consider otherwise inadmissible evidence, when the opponent fails to object to its admissibility and instead relies on the same (*Niagara Frontier Tr. Metro Sys. v County of Erie,* 212 AD2d 1027, 1028 [4th Dept 1995]), or when the opponent fails to object to the admission of such evidence (*Bank of New York Mellon v Gordon,* 171 AD3d 197, 202 [2d Dept 2019] ["However, as a general matter, a court should not examine the admissibility of evidence submitted in support of a motion for summary judgment unless the nonmoving party has specifically raised that issue in its opposition to the motion."]; *see Greene v Kevin D.*

Greene, LLC, 188 AD3d 1012, 1013 [2d Dept 2020]; *Rosenblatt v St. George Health and Racquetball Assoc., LLC,* f119 AD3d 45, 55 [2d Dept 2014] ["Thus, the Supreme Court erred when it, sua sponte, determined that the plaintiff's deposition transcript was inadmissible because of the lace of a certification and, as a result, concluded that Eastern Athletic had failed to meet its prima facie burden."]). The latter is premised on the well settled principal that a court ought not raise arguments never raised by the parties themselves (*Misicki v Caradonna,* 12 NY3d 511, 519 [2009] ["We are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made."]).

Once a movant meets its initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals,

> [t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing summary judgment' in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial on any issue of fact.' Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case

(*Friends of Animals v Associated Fur Manufacturers, Inc.,* 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, s/he must proffer an excuse for failing to submit evidence in admissible form (*Johnson v Phillips,* 261 AD2d 269, 270 [1st Dept 1999]).

When deciding a summary judgment motion the role of the court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]),

> [s]upreme court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial

(s*ee also Yaziciyan v Blancato,* 267 AD2d 152, 152 (1st Dept 1999]; *Perez v Bronx Park Associates,* 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the court's function when determining a motion for summary judgment is issue finding, not issue determination (*Sillman v Twentieth Century Fox Film Corp.,* 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos,* 46 NY2d 223, 231 [1978]), When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson,* 8 NY2d 8, 12 [1960]).

CONTRACT LAW

It has long been held that absent a violation of law or some transgression of public policy, people are free to enter into contracts, making whatever agreement they wish, no matter how unwise they may seem to others (*Rowe v Great Atlantic & Pacific Tea Company*, 46 NY2d 62, 67-68 [1978]). Consequently, when a contract dispute arises, it is the court's role to enforce the agreement rather than reform it (*Grace v Nappa*, 46 NY2d 560, 565 [1979]). In order to enforce the agreement, the court must construe it in accordance with the intent of the parties, the best evidence of which being the very contract itself and the terms contained therein (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). It is well settled that "when the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms" (*Vermont Teddy Bear v 583 Madison Realty Company*, 1 NY3d 470, 475 [2004] [internal quotation marks omitted]). Moreover, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield* at 569). Accordingly, courts should refrain from interpreting agreements in a manner which implies something not specifically included by the parties, and courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing (*Vermont Teddy Bear, Inc.* at 475). This approach serves to preserve "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses [and] infirmity of memory" (*Wallace v 600 Partners Co.,* 86 NY2d 543, 548 [1995] [internal quotation marks omitted]).

"It is for the court to determine as a matter of law whether a written agreement is ambiguous by looking within the four corners of the document and the circumstances under which it was executed, and only if an ambiguity exists may extrinsic evidence be considered" (*Red-Kap Sales, Inc. v Northern Lights Energy Prods., Inc.,* 94 A.D.3d 1281, 1281-1282 [3rd Dept 2012]). A contract is ambiguous when on its face it is reasonably susceptible of more than one interpretation (*Chimart Assoc. v Paul,* 66 N.Y.2d 570, 573 [1986]). "And in deciding whether an agreement is ambiguous courts should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in light of the obligation as a whole and intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of the words should be sought" (*Kass v Kass,* 91 NY2d 554, 566 [1998][internal quotation marks omitted]).

Further, "[a] corporate officer who executes a contract acting as an agent for a disclosed principal is not liable for a breach of the contract unless it clearly appears that he or she intended to bind himself or herself personally" (*GMS Batching, Inc. v TADCO Constr. Corp.,* 120 AD3d 549, 552 [2nd Dept 2014][internal quotation marks omitted]). There must be "clear and explicit evidence of the agent's intention to substitute or superadd his or her personal liability for, or to, that of his or her principal" (*id.* at 552 [internal quotation marks omitted]). Likewise, "[a] member of a limited liability company cannot be held liable for the company's obligations by virtue of his or her status as a member thereof" (*Board of Mgrs. of Fifth Ave. Condominium v Continental Residential Holdings LLC,* 149 AD3d 472 [1st Dept 2017][internal quotation marks omitted]).

DISCUSSION

In support of their motion, plaintiffs contend that under the circumstances herein the terms of the Member Agreement mandate that the Building be sold. In their memorandum of law in support of the motion, plaintiffs contend that Section 3(b) of the Member Agreement sets forth a clear and unambiguous framework for when a party seeks to sell its interest in the LLC (NY St Cts Elec Filing [NYSCEF] Doc No. 46 at 9). Yet, in the very next sentence plaintiffs, through counsel, state: "Although it may appear unclear at first blush," and, thereafter, plaintiffs set forth their interpretation of what is required under that section to effectuate the sale of the Building (*id.*). Alternatively, plaintiffs contend that even if the contract is ambiguous, the Court should still order that the Building be sold pursuant to Section 3(b) to avoid an absurd result. Plaintiffs argue that adopting the Majority Party's interpretation of that section "can shackle the Minority Party from ever selling their interest in Epiros simply by the Majority Party agreeing either never to sell her interest or never purchase the Minority Party's interest.

In opposition to the motion and in support of their cross-motion, defendants contend that neither the "buyout language" nor the voting requirements set forth in Section 3(b) are ambiguous. Defendants aver that the sale of the Building would be required only where both parties intend to sell their interest but cannot agree on the price. This portion of Section 3(b) is not triggered here, defendants assert, because Christina never expressed any intent to sell her interest in the LLC. Defendants also assert that the Minority Party's interpretation would create an unconscionable contract because, under their interpretation, a member who wants to keep their shares can be forced into a buyout so long as the other member offers to sell its shares for an astronomical price and also offers to buy the holdout-member's shares. Defendants aver that this is "riskless for [the] member seeking the buyout because the other member will not pay the unfair price and will not sell its shares," which, defendants assert, is tantamount to no choice at all for the holdout-member. Defendants also aver that because a rent concession is not a new lease to be signed, such action requires only a simple majority vote rather than a 66% vote as plaintiffs contend. Defendants further aver that the requirement of a 66% vote for the LLC to enter into leases for a vacant store selling food set forth in Section 3(b) is unconscionable. This is so, defendants contend, because "having the ability [to determine] whether a tenant can lease a vacant store if they are selling food is a term so unreasonably favorable to the Minority Party that it has emboldened them to claim operational control and management of Epiros." According to defendants, this provision only applied when Stefanos operated a restaurant at the Building so that there would be no competing restaurants at the Building. Defendants contend that the protections concerning competing businesses became moot when Stefanos sold the restaurant to another business.

Defendants also contend that, under the business judgment rule, the managing member's decisions on behalf of the LLC may not be challenged, and that plaintiffs lack standing to bring this action in their individual capacity because their claims are derivative of the LLC's and, therefore, should have been brought in a derivative action. Defendants further contend that Christina may not be sued individually because her actions were taken as a managing member of the LLC.

In opposition to the cross-motion and in further support of their motion, plaintiffs contend, *inter alia,* that a rent reduction is a modification of a lease which requires a 66% vote of the members under the unambiguous terms set forth in Section 3(b). Plaintiffs also contend that Christina's affidavit should not be considered because it consists of inadmissible hearsay and testimony of her deceased husband, Dimitrios, which is barred by the Dead Man's Statute. Plaintiffs aver that the requirement of a 66% vote prior to entering into a lease of vacant property to a business selling food is not unconscionable because it is not unreasonable. Plaintiffs assert that if the defendants intended to have this clause dissolve upon Stefanos' sale of his business, they could have included such a restriction in the Member Agreement, which they did not do. Plaintiffs contend that they are not objecting to the Majority Party's business judgment, but rather, to her usurpation of control that she lacks under the Member Agreement. Plaintiffs aver that they have standing to enforce their rights under the Member Agreement, and that they are not asserting that the LLC has been harmed, but rather, that the members have been harmed in their individual capacity because they have been unable to sell their interests in the LLC. Plaintiffs further aver that, even if the defendants' position is correct, plaintiffs have already pleaded the necessary components of a derivative action, and the Court has the authority to allow correction of this mistake pursuant to CPLR § 2001.

* * * * * * * *

The Member Agreement provides, *inter alia,* that the terms of the Operating Agreement are incorporated therein and that if there are any inconsistencies between the agreement and any terms in the Operating Agreement, the terms of the Member Agreement supercede those of the Operating Agreement. The Operating Agreement, under which Dimitrios was the sole member of the LLC, includes a provision under which a member may sell its interest to a third party. However, as set forth below, the Member Agreement expressly states that if either the Majority Party or the Minority Party wishes to sell its interest in the LLC, an offer to sell can only be made to the other party. Section 3 of the Member Agreement states

> 3) Each of the parties hereto agrees to take whatever steps are necessary to effectuate by appropriate resolution or otherwise, the following:
>
> a. All checks, notes, bills of exchange and other instruments for the payment of money or evidence of indebtedness shall require the signature of one of the members. No construction in an amount exceeding $20,000.00, or lease can be signed unless all parties have been notified in advance and consent is given by a 66% vote by the members.
>
> b. In order to constitute a quorum for the transaction of any business of any specified item of business members with at least 50% interest shall be required to be present; and in order to constitute a quorum for the transaction of any business. A majority of the interest in the LLC of the members shall be required to transact any and all business, or of any specified item of business of the LLC. However, notwithstanding anything herein, the LLC cannot mortgage its building, or lease a vacant store to a tenant selling food, without the written consent of 66%

> of all the members. Furthermore, all parties herein agree that the real estate property owned by the LLC cannot be sold within eight years from the signing of this agreement unless there is unanimous agreement by all members of the LLC. Furthermore, if during the eight year period, or thereafter, if [sic] John, Ste[f]anos or Maria wish to sell their interest to each other, or form an LLC they can do so without the necessity of obtaining majority approval. If Dimitrios desires to transfer his interest in the LLC during the eight year period, he may do so only to members of the immediate family.
>
> After the expiration of the initial (8) year restriction on sale, if either the majority party (Dimitrios) or minority party (John, Ste[f]anos, and Maria[)], wishes to sells [sic] its interest in the LLC, such offer to sell shall be made only to the other party. If the party to whom the offer is made does not, within 30 days, accept the offer to purchase, and both parties cannot agree as to who should buy the interest of the other and cannot agree upon a price, then, all parties agree to sell the building to a third party, after an appraisal is done by two independent appraisers chosen by their accountant or their lawyer at the time the decision to sell is made. If a valid bona fide offer is made by a third party which is not less than $250,000.00 than the lowest independent appraisal, then, the building either has to be sold to the third party or the party to whom the offer was first made to sell at the same terms as those offered by the third party should that party choose to purchase the building. Should the party to whom this offer is made not accept to purchase the building within 30 days from when the offer is made, and agree[s] to close within six months, then the building will be sold to the third party. The purchasing LLC member shall have ten business days after having received the third party's offer in writing to decide in writing whether to purchase the entire interest of the LLC. With the same terms as the third party. If that party does not exercise this option, than the building must be sold to the third party. With respect to third parties, the offer to sell shall be open for 90 days so that the best offer made during that time shall serve as the price to be paid for the building.

As previously discussed, it is well settled that "when the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms" (*Vermont Teddy Bear v 583 Madison Realty Company*, 1 NY3d 470, 475 [2004] [internal quotation marks omitted]). Moreover, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield* at 569). Accordingly, courts should refrain from interpreting agreements in a manner which implies something not specifically included by the parties, and courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing (*Vermont Teddy Bear, Inc.* at 475). This approach serves to preserve "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses [and] infirmity of memory" (*Wallace v 600 Partners Co.,* 86 NY2d 543, 548 [1995] [internal quotation marks omitted]).

"It is for the court to determine as a matter of law whether a written agreement is ambiguous by looking within the four corners of the document and the circumstances under which it was executed, and only if an ambiguity exists may extrinsic evidence be considered" (*Red-Kap Sales, Inc. v Northern Lights Energy Prods., Inc.,* 94 A.D.3d 1281, 1281-1282 [3rd Dept 2012]). A contract is ambiguous when on its face it is reasonably susceptible of more than one interpretation (*Chimart Assoc. v Paul,* 66 N.Y.2d 570, 573 [1986]). "And in deciding whether an agreement is ambiguous courts should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in light of the obligation as a whole and intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of the words should be sought" (*Kass v Kass,* 91 NY2d 554, 566 [1998][internal quotation marks omitted]).

The Court finds no ambiguity in the language of Section 3(b). As such, it must be interpreted based upon the plain meaning of its terms. Significantly, the conditions relating to the sale of the Building are set forth in the conjunctive, and, therefore, each one must be satisfied in order to force a sale of the Building. Contrary to plaintiffs' contention, there are three distinct conditions precedent to the mandatory sale of the Building: (1) that the party to whom an offer to sell an interest in the LLC does not, within 30 days, accept the offer; (2) that both parties cannot agree as to who should buy the interest of the other; and (3) that the parties cannot agree on a price. By its plain terms, condition (2) contemplates a situation wherein both the Majority

Party and the Minority Party desire to sell their interests but cannot agree as to which party will buy the interest of the other. Indeed, if both parties wish to sell their interest in the LLC, it makes sense to liquidate the sole asset of the LLC and distribute the profits from the sale to the members based on their respective interests in the LLC. Notably, in her affidavit, Christina states that she does not wish to sell her interest in the LLC, that she is willing to purchase the Majority Party's interest in the LLC at a fair price, and that she has obtained an appraisal for the valuation of the Building in contemplation of purchasing the Minority Party's interest. Thus, here, where the record evinces that there is no mutual agreement to sell the building, plaintiffs fail to establish prima facie entitlement to summary judgment on their causes of action for declaratory judgment and specific performance. Indeed, while pursuant to CPLR § 3001, "the Supreme Court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy," where a party fails to establish entitlement to summary judgment, a declaratory judgment is unwarranted (*County of Monroe v Clough Harbour & Assoc., LLP,* 154 AD3d 1281, 1282 [4th Dept 2017] ["We conclude that the court properly denied plaintiffs' motion for summary judgment seeking the requested declaration. Contrary to plaintiffs' contention, the indemnification provision at issue is triggered only in the event of a finding of an intentional or negligent act by defendant and, on this record, plaintiffs have failed to show either one as a matter of law."]; *cf. Booston LLC v 35 West Realty Co., LLC,* 213 AD3d 553 [1st Dept 2023] ["The Court correctly granted the declaratory relief sought by plaintiff and denied defendant's motion for a contrary declaration. As the court found, the undefined term 'single limit,' as used in Article 9 of the rider to the parties' lease agreement is ambiguous, and any ambiguity must be construed against defendant landlord, since an interpretation in defendant's favor would impose an additional burden on plaintiff tenant that was not clearly stated in the lease."]). Here, plaintiffs have failed to establish that the terms of the Member Agreement relating to selling the building require a sale and, thus, the declaration sought is denied.

For the same reason, plaintiffs fail to establish entitlement to an order mandating specific performance because such relief required proof that plaintiffs substantially performed their contractual obligations and were ready, willing and able to fulfill their remaining obligations, that defendant[s] [were] able but unwilling to convey the property and that there is no adequate remedy at law" (*Ouimet v Fitzsimmons,* 68 AD3d 1507, 1508 [3d Dept 2009]; *see Alba v Kaufmann,* 27 AD3d 816, 818 [3d Dept 2006]. Here, of course, where the contract between the parties does not, as urged, require the sale of the building, such relief must be denied.

Nor do plaintiffs establish that the merger agreement is unconscionable. A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made, i.e., some showing of absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party (*Gillman v Chase Manhattan Bank,* 73 NY2d 1, 10 [1988]; *Matter of State of New York v Avco Fin. Serv.,* 50 NY2d 383, 389-390 [1980]. Here, it appears that the Minority Party made no capital contribution in exchange for their 49% interest in the LLC. Further, all that is required of the Minority Party under the Member Agreement is that they "assist Dimitrios in the management of the LLC." Significantly, the Minority Party does not allege that their obligations under the Member Agreement are onerous or unfair. And, that they cannot force the Majority Party to sell the Building against her wishes is not unreasonable. The Court also notes that the Minority Party has been receiving rental profits from the Building for over ten years.

Defendants' cross-motion seeking dismissal of the complaint is granted. The causes of action for declaratory judgment and specific performance are dismissed for the reasons that the Court denied plaintiffs' motion. Moreover, plaintiffs' cause of action for injunctive relief must be dismissed because there is no independent cause of action for injunctive relief (*Men Women N.Y. Model Mgt., Inc. v Elite Model Mgt.-N.Y. LLC,* 183 AD3d 501, 502 [1st Dept 2020]). Injunctive relief is to be sought in a motion, not as a separate cause of action in the complaint. (*Giambrone v Arnone, Lowth, Wilson, Leibowitz, Adriano & Greco,* 197 AD3d 459, 462 [2d Dept 2021]). Notably, plaintiffs have not moved for injunctive relief. Defendants' cross-motion seeking a declaratory judgment is denied. The Court finds that certain language set forth in Section 3(a), pertaining to the voting/consent requirements for leases, is subject to varying interpretations. Specifically, the language "[n]o construction in an amount exceeding

$20,000.00, or lease can be signed unless all parties have been notified in advance and consent is given by a 66% vote by the members" may be reasonably interpreted to apply to new leases only. However, it may also be reasonably interpreted to apply to new leases, lease renewals, and modifications of existing leases, such as reductions in rent. Notably, neither of the parties assert that lease modifications and/or lease renewals need not be in a writing signed by a member. "Where . . . a contract is ambiguous, a court may determine that the contract terms are, in fact, congruent with the parties' consistent course of conduct, even where another interpretation is possible under the contract terms" (*Matter of Bank of New York Mellon,* 202 AD3d 465, 466 [1st Dept 2022] citing *Carthage Tissue Paper Mills v Village of Carthage,* 200 NY1, 14 [1910] and *City of New York v New York City Ry. Co.,* 193 NY 543, 548 [1908]). Here, in her affidavit, Christina states that she attempted to get approval from the Minority Party but they would not agree to her proposed rent reduction for the restaurant at the Building. In his affidavit, John states that the parties understood that a 66% vote was required for modifying leases and attached to his affidavit an email which indicates that, during a telephone call in September 2020, Christina, John, Stefanos and Maria discussed and agreed to a reduction in rent for a tenant in the Building. Also, in her affidavit, Maria stated that via text messages, she and Christina discussed a proposed rent reduction for the restaurant tenant in the building. This is consistent with Christina's statement that the Minority Party would not agree to her proposed rent reduction for this tenant. Given the foregoing, it appears that Christina's past practice has been to seek approval of the Minority Party for rent reductions. It was not until July 2021, when the Minority Party rejected her proposal to reduce the rent for the restaurant tenant, that Christina declared that, as managing member, she had authority to negotiate terms to settle rental arrears and that the 66% vote requirement was not triggered.

In addition, defendants' assertion that the requirement set forth in Section 3(b), that written consent of 66% of the members of the LLC is required to enter into a lease of a vacant store to a tenant selling food no longer applies is without merit. First, the pertinent language is not ambiguous and, therefore, the consideration of parol evidence, such as Christina's affidavit, is not permissible. The Member Agreement contains no language to indicate that the foregoing requirement was not meant to apply after Stefanos sold his restaurant business. As plaintiffs note, if said provision was intended to “dissolve” after Stefanos sold his business, the parties could have so indicated in the Member Agreement. Significantly, Section 3(b) limits the prohibition on the sale of the building without unanimous consent to a period of eight years. A similar provision could have been included with respect to the leasing of Stefanos’ restaurant space after he vacated the space, but it was not. Nor is it unconscionable to require a 66% member vote before the LLC can enter into a lease of a vacant store to a tenant selling food. Defendants’ argument that Stefanos is somehow profiting from this provision at the Majority Party’s expense is not supported by the record.

Based on the foregoing course of conduct and a reasonable interpretation of Section 3(a), the Court finds that a 66% membership vote is required under the Member Agreement for the LLC to enter into leases, lease renewals and lease modifications, including rent reductions for existing tenants.[2]

Accordingly, defendants’ cross-motion seeking a declaratory judgment that the Majority Party retains full and complete authority to operate all affairs of the LLC, including anything relating to tenancies and/or lease agreements of the Building, and that the 66% voting restriction contained within Section 3(b) of the Member Agreement no longer applies for tenancies in the building, and that it only applies to new mortgages and leasing vacant commercial space to a

[2]Defendants’ argument that the managing member’s decisions on behalf of the LLC may not be challenged under the business judgment rule is inapposite. Here, the Minority Party is not challenging the decisions made by the Majority Party, but rather, they are challenging her authority under the Operating Agreement and Member Agreement to make those decisions.

tenant for the purpose of selling food, is denied,[3] and defendants' second and third counterclaims are dismissed.

Defendants' first counterclaim, "Declaratory Judgment That Dissolution of the LLC Cannot Be Effectuated Unilaterally," seeks a declaratory judgment that (1) the Minority Party does not have a right to dissolve the LLC unilaterally and (2) the provisions of the forced sale clause have not been and cannot be met without the Majority Party's willingness to dispose of its interest in the LLC. Both (1) and (2) are premised on allegations that the Minority Party has attempted to force the sale of the Building, the LLC's sole asset, and that the forced sale of the Building would amount to a *de facto* dissolution of the LLC. Given the Court's finding that the Minority Party may not force a sale under the circumstances herein, including that the Majority Party does not wish to sell her interest in the LLC, the issues undergirding defendants' first counterclaim are moot.

Given that all of plaintiffs' claims have been dismissed, the Court need not reach defendants' arguments that plaintiffs lack standing to assert their claims and that plaintiffs' claims against Christina, individually, should be dismissed.[4]

This constitutes the Decision and Order of this Court.

Dated: January 18, 2024 Hon.

FIDEL E. GOMEZ, J.S.C.

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[3]The Court notes that defendants' argument in their moving papers that the 66% voting restriction no longer applies to the lease of vacant space for the selling of food is inconsistent with the relief sought in defendants' counterclaim. For example, on page 12 of their memorandum of law defendants state that "the 66% vote for a vacant store selling food should be deemed unconscionable and Defendants Count III of the Counterclaim should be granted." However, their third counterclaim seeks a declaratory judgment that "the 66% voting restriction contained within Section 3(b) of the Member Agreement no longer applies to tenancies in the Building and that it only applies to new mortgages and leasing vacant commercial space to a tenant for the purposes of selling food."

[4]Defendants also assert that the plaintiffs attorney should be dismissed because he sent a letter to Christina and not her attorney. However, the record evinces that Christina's attorney made no representation to plaintiffs' attorney that his firm represented both the LLC and Christina until after that letter was sent. As such, this argument lacks merit.