

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IAS PART 4

Justice

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PETER TRIANTAFELLIU, individually and as a
Member of 23-15 ASTORIA BOULEVARD
REALTY LLC, a New York Limited Liability
Company and as a Member of AB BUILDING
MANAGEMENT, LLC, a New York Limited
Liability Company,

Plaintiff(s),

-against-

GEORGE MILTIADOUS, KONSTANTINOS
TSIVADES, ELISA VET TZOUMAKA,
ATHANASIOS TSIVADES, ROSEMARIE
TZIVADES, MITSU REALTY LLC, and ELIT
GREEN BUILDERS CORP.

Defendant(s).

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No.: 701414/2018

Motion

Dated: May 15, 2018

Motion

Cal. No.: 17

Motion

Seq. No.: 1

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The following papers numbered 1 - 7 read on this motion by defendants to dismiss the first cause of action of the complaint (which seeks judicial dissolution of 23-15 Astoria Boulevard Realty LLC [“Astoria LLC”], and AB Building Management LLC [“AB Building”]); to dismiss the second cause of action (breach of fiduciary duty/self-dealing); to dismiss the third cause of action for conversion; to dismiss the fourth cause of action for unjust enrichment, pursuant to CPLR §3212; for a counter-declaration upon the fifth cause of action that defendants both own and are entitled to a 50% ownership interest in Astoria LLC pursuant to written agreement of the parties; and for sanctions against plaintiffs (not their counsel), pursuant to 22 NYCRR Part 130, for frivolous conduct.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits.....	1-4
Answering Affidavits - Exhibits	5-6
Reply Affidavits.....	7

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiffs in this action for, *inter alia*, judicial dissolution of a limited liability corporation seek damages based upon defendants' alleged conduct in diverting corporate funds for personal gain and allegedly failing to invest at least \$2.4 million in order to earn their 50% interest in Astoria LLC. The complaint alleges the following: that in or about October 2011, Astoria LLC was formed, at which time Peter Triantafellou ("plaintiff") owned 100% of the interest therein. In or about April 2012, by Assignment and Assumption Agreement, plaintiff transferred ten percent (10%) of his interest in Astoria LLC to Mitsi Realty, and maintained the remaining 90% interest in Astoria LLC. This Assignment and Assumption Agreement was executed on behalf of Mitsi Realty by George Miltiadous, improperly sued herein as George Miltiadous ("Miltiadous") and Konstantinos Tsivadis, improperly sued herein as Konstantinos Tsivadis ("Konstantinos").

Pursuant to Article III of the Astoria LLC Operating Agreement, the purpose of Astoria LLC was to: "own, develop and manage a thirty-two (32) to thirty-six (36) unit rental apartment building (the "Project"), on certain property located at 23-15 and 23-19 Astoria Boulevard, Astoria, New York ("premises"), and to engage in any and all business activities permitted under the laws of the State of New York". By Purchase and Development Agreement dated March 3, 2012 ("Purchase and Development Agreement"), Astoria LLC, plaintiff, Miltiadous and Konstantinos agreed to develop the premises. The Purchase and Development Agreement afforded Miltiadous and Konstantinos the ability to own fifty (50%) of Astoria LLC if they performed work with a value of \$2,400,000 into the Project, as provided in sections 7.02 and 12.02 thereof. Section 9.01 of the Purchase and Development Agreement required the work of defendants Miltiadous and Konstantinos to be done in nine (9) increments, and the membership interest of Miltiadous and Konstantinos would increase incrementally also.

Miltiadous and Konstantinos retained Elit Green, a company owned by Elisavet Tzoumaka, to perform all or part of the Project. Mitsi Realty was formed on or about March 16, 2012, with Miltiadous and Konstantinos as its members. By Assignment and Assumption Agreement dated January 1, 2013, Miltiadous and Konstantinos transferred their respective fifty percent interests in Mitsi Realty to Elisavet Tzoumaka and Rosemarie Tzivades ("Rosemarie"). By Assignment and Assumption Agreement dated September 2, 2014, Rosemarie purportedly transferred her 50% interest in Mitsi Realty to Athanasios Tsidades, improperly sued herein as Athanasios Tsidades ("Athanasios"). In either April or September 2014, the membership interests of Miltiadous and Konstantinos pursuant to the Purchase and Development Agreement were transferred to Elisavet and Athanasios. On or about September 2014, the Operating Agreement for Mitsi Realty was amended to add all defendants as members thereof. By Assignment of Developers' Interest dated September 19, 2014, plaintiff and all defendants transferred all rights, title and interest from Miltiadous and

Konstantinos to Mitsi Realty. Subsequently, plaintiff contends, Miltiadous and Konstantinos misrepresented that they performed work valuing at least \$2,400,000. Based on said misrepresentations, Miltiadous and Konstantinos allegedly induced plaintiff to enter into an Assignment and Assumption Agreement (the "Assignment and Assumption Agreement"), whereby plaintiff was required to transfer forty percent (40%) of plaintiff's ownership interest in Astoria LLC to Mitsi Realty, and not to Miltiadous and Konstantinos. The Assignment and Assumption Agreement was dated November 5, 2015. Also on November 5, 2015, plaintiff and all defendants, now as members of Mitsi Realty, executed a Memorandum of Understanding (the "Memorandum of Understanding"), whereby once again plaintiff reaffirmed the fifty percent (50%) ownership interest of Miltiadous and Konstantinos. Plaintiff alleges that this too was based upon the misrepresentations of Miltiadous and Konstantinos that they had indeed performed work valued at \$2,400,000. Paragraph 4[a] of the Memorandum of Understanding provides that the parties reaffirm plaintiff's rights to "audit, review and inspect all books, records, checking accounts and invoices to establish the actual cost for construction of [the Project]".

The third agreement, dated November 5, 2015, was the "First Amendment to Limited Liability Company Operating Agreement of 23-15 Astoria Boulevard Realty LLC" (the "First Amendment"), which once again acknowledged that plaintiff and Mitsi Realty each owned fifty percent (50%) interest in Astoria LLC. Plaintiff alleges that this too was based upon defendants' misrepresentations.

On or about April 27, 2015, Athanasios, Elisavet and plaintiff formed AB Building and executed an Operating Agreement therefor. The purpose of AB Building was generally to manage the Premises.

Astoria LLC (as executed by plaintiff), and Mitsi Realty (as executed by Elisavet and Athanasios) executed a Survival Agreement dated August 18, 2016, which *inter alia*, included a provision that plaintiff "shall have the right to inspect and receive copies of any and all invoices and statements related to the hard and soft costs for the construction of [the Premises]".

Plaintiff alleges that defendants failed to invest \$2,400,000 into the Project, and that defendants improperly made payments from at least Astoria LLC and AB Building to themselves without plaintiff's approval. Plaintiff also alleges that defendants failed to perform the work for the Project and seek incremental ownership interests pursuant to the terms of the Purchase and Development Agreement. Plaintiff alleges that defendants failed to ask for the increased ownership interest until they ran out of money and desired another loan. Plaintiff further alleges that defendants have refused to provide documentation to plaintiff relating to the Project and refused to provide certain tax returns for at least Astoria

LLC and AB Building. Plaintiff submits that defendants wrongfully took deductions for tax purposes for several years, as they do not and did not maintain a fifty percent (50%) ownership interest in Astoria LLC and AB Building. Moreover, plaintiff alleges that defendants have wrongfully misappropriated not less than five hundred thousand dollars (\$500,000), from at least Astoria LLC and AB Building.

The complaint further alleges that defendants Miltiadous and Konstantinos have refused to provide financial documents to plaintiff; refused to allow plaintiff access to certain bank accounts and funds; refused to provide plaintiff with access to any of the AB Building escrow accounts where tenants' security deposits are kept; and that defendants caused plaintiff to become liable for at least one construction loan that was allegedly procured under false pretenses.

Plaintiffs commenced the instant action seeking, inter alia, judicial dissolution of Astoria LLC and AB Building. Defendants filed the instant motion seeking summary dismissal of several causes of action alleged in the complaint, as well as for sanctions against plaintiff (and not plaintiff's counsel). Plaintiffs oppose the motion.

Discussion

1. **Dissolution:**

The branch of the motion which is to dismiss the first cause of action for judicial dissolution of 23-15 Astoria and AB Building, is granted.

Limited Liability companies in New York are creatures of a statute known as the Limited Liability Company Law ("LLCL"). Such companies are defined as "an unincorporated organization of one or more persons having limited liability ... other than a partnership or trust" (LLCL 102(m)). Pursuant to LLCL §203(d), "[a] limited liability company is formed at the time of the filing of the initial articles of organization with the department of state or at any later time specified in the articles of organization ... This filing of the articles of organization shall, in the absence of actual fraud, be conclusive evidence of the formation of the limited liability company as of the time of filing or effective date if later ... A limited liability company formed under this chapter shall be a separate legal entity, the existence of which as a separate legal entity shall continue until the cancellation of the limited liability company's article of organization."

LLCL §417 mandates that the members of a limited liability company adopt an operation agreement which is defined in LLCL §102(u) as "any written agreement of the members concerning the business of a limited liability company and the conduct of its affairs." LLCL §417(a) mandates that the operating agreement contain "provisions not

inconsistent with law ... relating to (i) the business of the limited liability company, (ii) the conduct of its affairs and (iii) the rights, powers, preferences, limitations or responsibilities of its members [and] managers.” Notwithstanding the mandate of LLCL §417, the absence of an operating agreement does not render company action void or voidable but simply subjects it to governance by the default provisions of the LLCL (*see In re Eight of Swords, LLC*, 96 AD3d 839 [2012]).

Article 7 of the Limited Liability Company Law governs dissolution of a company. LLCL §701 provides that where dissolution is addressed in the operating agreement, dissolution occurs, first, upon the latest date on which the company is to dissolve under the terms of the articles of organization or operating agreement, or upon the happening of an event set forth therein or upon the entry of a decree of judicial dissolution pursuant to LLCL §702 (*see* LLCL §701). LLCL §702 governs judicial dissolution and provides as follows: “[o]n 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” (LLCL §702). Where an operating agreement does not address certain topics, appellate case authorities have instructed that a limited liability company is bound by the “default” requirements set forth in the LLCL (*see, In re 1545 Ocean Ave., LLC*, 72 AD3d 121 [2010]). Accordingly, where there is no operating agreement, or where one exists but does not provide for dissolution, the provisions of LLCL §702 alone, control, the company's dissolution (*see, id.; Natanel v Cohen*, 43 Misc3d 1217 [Sup.Ct. Kings County 2014]; *see, also In re the Sieni v Jamsfab, LLC*, 2013 WL 3713604 [Sup Ct. Suffolk County 2013]).

In *1545 Ocean Avenue, LLC, supra*, the Appellate Division, Second Department examined the proper interpretation to be accorded the statutory standard “not reasonably practicable”. As no New York cases had interpreted the statutory standard (*but see Seligson v. Russo*, 16 AD3d 253 [2005] interpreting the same language in Partnership Law §63(1)(d)), relying on the decision of the Delaware Chancery Court in *Red Sail Easter Ltd. Partners, LP v Radio City Music Hall Products, Inc* (1992 WL 251380, 5–6[1992]), the Court noted that mere disagreements between partners regarding accounting are insufficient to warrant dissolution (*1545 Ocean* at 128). Rejecting the applicability of the more flexible statutory standards for judicial dissolution of both corporations and partnerships, the Court cited *Matter of Horning v Horning Construction, LLC* (12 Misc3d 402, 413 [2006]), in which, in the absence of an operating agreement, the court dismissed the petition for dissolution brought primarily to provide an exit-strategy for the disenchanted member, holding that LLCL §702 establishes a “more stringent” standard *In re 1545 Ocean Ave., LLC.*, (72 AD3d at 127). Rejecting petitioner's claim that dissolution was warranted by the parties' deadlock, in *1545 Ocean*, the Appellate Division, Second Department expressly held: “for dissolution

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