To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT : STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. ROBERT M. BERLINER, J.S.C.

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TZ VISTA LLC, DCAK-MSA ARCHITECTURE & ENGINEERING, PC, DRAZEN CACKOVIC, and JULIA KHOMUT,

Plaintiffs,

-against-

WILLIAM HELMER, FOOT OF MAIN, LLC, and HELMER CRONIN CONSTRUCTION, INC.,

Defendants.

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DECISION AND ORDER

Index No.: 030313/2020

Motion Sequences #1 and #2

The following papers, filed on NYSCEF, were read on (1) Defendants' motion to dismiss the Complaint and for partial summary judgment on their counterclaims and (2) Plaintiffs' cross-motion for partial summary judgment on its breach of contract cause of action and a judgment directing specific performance against Defendants:

Notice of Motion/Affidavit in Support/Exhibits(A-G)/Memorandum of Law in Support.....NYSCEF Doc. Nos. 13-22
Notice of Cross-Motion/Memorandum of Law in Opposition to Motion and in Support of Cross-Motion/Statement of Material Facts/Affidavit in Opposition/Exhibits(1-3)..... 24-30
Affirmation in Reply and in Opposition to Cross-Motion/Affidavit in Reply and in Opposition to Cross-Motion/Exhibits(A-D)/Reply Memorandum of Law 32-38
Reply Memorandum of Law.....39

Upon the foregoing papers, it is ORDERED that these motions are disposed of as follows:

This action arises out of disputes of the Operating Agreement for TZ Vista LLC, which contains an option to purchase real property from Defendant Foot of Main, LLC. The Complaint alleges the following: on or about January 13, 2015, Plaintiff Drazen Cackovic, Plaintiff Julia Khomut, and Defendant William Helmer executed an Operating Agreement, in which they became

members of Plaintiff TZ Vista ("the Operating Agreement"). Plaintiff Cackovic and Defendant Helmer are managing members, while Plaintiff Julia Khomut is a member. They formed Plaintiff TZ Vista to purchase, develop, manage, sell, lease, and mortgage certain real properties located along the Hudson River in Nyack, New York for the TZ Vista Project ("TZ Vista Project"). In the Operating Agreement, the members agreed that Defendant Helmer's construction company, Defendant Helmer Cronin Construction, Inc., provide the construction management services. Meanwhile, they agreed that Plaintiff DCAK-MSA Architecture & Engineering, PC ("Plaintiff DCAK-MSA") would provide the architectural and engineering services. Plaintiff DCAK-MSA is Plaintiffs Cackovic and Khomut's company. Plaintiffs Cackovic and Khomut diligently performed all their duties under the Operating Agreement. Plaintiff DCAK-MSA performed its architectural and engineering services for Plaintiff TZ Vista. Meanwhile, Defendant Helmer failed to perform his obligations under the Operating Agreement. Defendant Helmer's failures to diligently perform his obligations have caused delays, including the possible expiration of the government approvals prior to completing work to be done, thereby causing Plaintiffs' loss of these approvals.

Also, the Operating Agreement contained an option to purchase, which gave Plaintiff Cackovic the irrevocable right to require Plaintiff TZ Vista to purchase a parcel of real property, Parcel 7, Tax ID No. 66.39-1-2 ("Parcel 7"), from Defendant Foot of Main, LLC, on or before January 13, 2020. Defendant William Helmer is the sole member and manager of Foot of Main, LLC. The Operating Agreement contains details of the calculation and schedule of payments for Parcel 7. It also states that, "transfer of ownership will occur at such time as [Plaintiff Cackovic] determines that it is advisable for [Plaintiff TZ Vista] to become the owner of [the Parcel] in furtherance of [Plaintiff TZ Vista] advancing the development of any portion of the Properties . . ." Operating Agreement § 9.2. After Plaintiff Cackovic's exercised his decision to purchase Parcel 7, Defendant Helmer continuously refused to transfer the Parcel to Plaintiff TZ Vista in accordance with the terms of the Operating Agreement.

Based upon the foregoing, Plaintiffs allege six causes of actions against Defendants: (1) breach of contract, in which they seek specific performance of the transfer of Parcel 7 from Defendants Helmer and Foot of Main; (2) breach of fiduciary duty against Defendant Helmer arising from his fiduciary duties owed to Plaintiffs TZ Vista, Cackovic, and Khomut; (3)

conversion against Defendants Helmer and Foot of Main for wrongfully exercising a right of ownership and dominion over Parcel 7; (4) prima facie tort against all Defendants; (5) quantum meruit against all Defendants; and (5) unjust enrichment against all Defendants.

Defendants filed an Answer, which included twelve affirmative defenses and seven counterclaims. Their Answer alleges that Defendant Cackovic refused to abide by the terms of the Operating Agreement, such as making unilateral decisions and unauthorized payments without the consent of managing member Defendant Helmer. It further alleges that because of Defendant Cackovic's actions, Plaintiff TZ Vista should be dissolved "as it has become impossible for the Managers to agree or to operate the business as designed and as provided in the operating agreement and the parties have reached an impasse which cannot be resolved." Answer ¶ 33. Therefore, Defendants counterclaims sound in: (1) judicial dissolution of Plaintiff TZ Vista; (2) an accounting for Plaintiff TZ Vista; (3) disgorgement; (4) breach of contract; (5) unjust enrichment; (6) breach of fiduciary duty; and (7) attorney's fees.

Now before the Court are: (1) Defendants' motion to dismiss the Complaint or, in the alternative, grant summary judgment on the counterclaims for judicial dissolution and an accounting; and (2) Plaintiffs' cross-motion for summary judgment on its breach of contract claim and specific performance of the Operating Agreement. First, the Court will address Defendants' application.

I. Defendants' Motion to Dismiss the Complaint and for Partial Summary Judgment

In support of their motion to dismiss, Defendants argue that the Complaint should be dismissed because Plaintiff TZ Vista is not a proper plaintiff in this action. Specifically, they argue that Plaintiff Cackovic has a 30% ownership interest in the limited liability company, Plaintiff Julia Kohmut has a 20% ownership interest, and Defendant Helmer has a 50% ownership interest. Pursuant to the Operating Agreement, the managing members must consent with respect to decisions of the management, conduct, and operation of the business. Furthermore, Plaintiffs Cackovic and Khomut's ownership interests equal 50%. As a result, according to Defendants, they do not have the requisite authority to bring this action on behalf of Plaintiff TZ Vista. Furthermore, they allege that the procedural requirements for bringing a derivative action have not been satisfied

because a pre-suit demand has not been made to the majority of the members and the Complaint fails to allege that such a pre-suit demand was made or would be futile.

In opposition and in support of their cross-motion, Plaintiffs argue that the Complaint sufficiently alleges that any pre-suit demand would have been futile as it alleges Defendant Helmer's own self-interest in the transaction of Parcel 7. Therefore, according to Plaintiffs, this derivative action brought on behalf of Plaintiff TZ Vista is proper. Furthermore, they argue that even if TZ Vista is an improper Plaintiff, that does not warrant dismissal of the Complaint in its entirety. Moreover, Plaintiffs argue that Defendants failed to set forth arguments for their entitlement to summary judgment for judicial dissolution and an accounting. They argue that Defendant Helmer, along with the other members, explicitly waived judicial partition in the Operating Agreement and that he failed to abide by the Operating Agreement to resolve member disagreements.

In reply, Defendants argue that judicial dissolution is required here because the management of Plaintiff TZ Vista is unwilling and unable to reasonably permit or promote the purpose of the entity and that continuing the entity is financially unfeasible.

In determining a motion to dismiss pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Integrated Const. Services, Inc. v Scottsdale Ins. Co.*, 82 AD3d 1160, 1162 [2d Dept 2011][internal citations and quotes omitted]; *see also Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]. "Whether a plaintiff can ultimately establish its allegations is not part of the calculus." *Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]. "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate." *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Matter of Chet's Garage, Inc. v Village of Goshen*, 161 AD3d 727, 731 [2d Dept 2018].

Meanwhile, "[a] motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim. [I]f the court does not find [their] submissions 'documentary', it will have to deny the motion." *Fontanetta v Doe*, 73 AD3d 78, 83-84 [2d Dept 2010][internal citations omitted].

> "In order for evidence submitted under a CPLR 3211(a)(1) motion to qualify as documentary evidence, it must be unambiguous, authentic, and undeniable. [J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case. At the same time, [n]either affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)(1)."

Cives Corp. v George A. Fuller Co., Inc., 97 AD3d 713, 714 [2d Dept 2012]. "In opposition to a motion pursuant to CPLR 3211(a), a plaintiff may submit affidavits to preserve inartfully pleaded, but potentially meritorious claims." *Matter of Koegel*, 160 AD3d 11, 21 [2d Dept 2018], *lv to appeal dismissed*, 32 NY3d 948 [2018].

New York's Limited Liability Company Law is silent as to a member's right to file a derivative action on behalf of the limited liability company. However, courts of this state have recognized and thereby created such a right for LLC members:

> "Thanks to judicial fiat, LLC members now enjoy the right to bring a derivative suit. And because created by the courts, this right is unfettered by the prudential safeguards against abuse that the Legislature has adopted when opting to authorize this remedy in other contexts (see Business Corporation Law §§ 626, 627; Partnership Law §§ 115-a, 115-b)." *Tzolis v Wolff*, 10 NY3d 100, 121 [2008].

"In the years since *Tzolis* was decided, courts have looked to New York statutory and common law on partnerships and corporations in determining certain questions arising in the LLC context." *LNYC Loft, LLC v Hudson Opportunity Fund I, LLC*, 154 AD3d 109, 113 [1st Dept 2017]. Like corporations, "[a] pre-suit demand is similarly required in a derivative action involving a limited liability company." *Najjar Group, LLC v West 56th Hotel LLC*, 110 AD3d 638, 639 [1st Dept 2013]. However, a pre-suit demand is not required where the plaintiff alleges the futility thereof with sufficient particularity in the Complaint. *See Segal v. Cooper*, 49 AD3d 467, 856 [1st Dept 2008]. For derivative actions in corporations,

> "The plaintiff may satisfy this standard by alleging with particularity (1) that a majority of the board of directors is interested in the challenged transaction; or (2) that the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances; or (3) that the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors (see Marx v Akers, 88 NY2d 189, 200-201, 666 NE2d 1034, 644 NYS2d 121 [1996])." *Mason-Mahon v Flint*, 166 AD3d 754, 758 [2d Dept 2018].

"[I]t is well established that a demand will be excused where the alleged wrongdoers control or comprise a majority of the directors." *Barr v Wackman*, 36 NY2d 371, 379 [1975].

Here, the Court finds that to the extent that Plaintiffs Cackovic and Khomut sue derivatively on behalf of the LLC, they have sufficiently plead demand futility due to Defendant Helmer's coequal membership interest of the LLC and his self-interest in the challenged transaction for the transfer and sale of Parcel 7. *See Jones v Voskresenskaya*, 125 AD3d 532, 533 [1st Dept 2015]. Therefore, they properly brought this derivative action on behalf of Plaintiff TZ Vista. The Court finds Defendants' allegations to the contrary are without any merit.

Pursuant to section 702 of New York's LLC Law, "[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." The member seeking dissolution bears the burden in establishing, "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 Ave., LLC*, 72 AD3d 121, 131 [2d Dept 2010].

The Court finds that Defendants failed to establish their prima facie burden for summary judgment for judicial dissolution and an accounting of the LLC. Defendant Helmer's affidavit is fraught with allegations supporting judicial dissolution without any documentary support. His affidavit and the submissions in connection with Defendants' application inadequately support summary judgment in their favor. Therefore, the Court denies his motion for summary judgment.

Next, the Court determines whether to grant Plaintiffs' motion for summary judgment on its breach of contract cause of action.

II. Plaintiffs' Motion for Summary Judgment on Their Breach of Contract Cause of Action

Plaintiffs request the Court to grant them summary judgment on their breach of contract claim and for a judgment directing specific performance upon Defendants Helmer and Foot of Main to transfer Parcel 7 to Plaintiff TZ Vista. They argue that the Operating Agreement is unambiguous as to the option to purchase Parcel 7, that Plaintiff Cackovic had notified Defendants Helmer and Foot of Main that it was exercising its option to purchase, that Defendants Helmer and Foot of Main refuses to transfer Parcel 7, and that Plaintiff TZ Vista is willing and able to perform its obligations with respect to the transfer of Parcel 7. In opposition, Defendants Helmer and Foot of Main LLC argue that the purpose of the TZ Vista Project has been frustrated and, thus, there is no reason to transfer Parcel 7 to Plaintiff TZ Vista. They further argue that the transfer of Parcel 7 would result in a windfall to Plaintiffs because they will have no payment obligation as the purchase price is based upon the development and sale of Parcel 7.

"Ordinarily, option agreements create only unilateral obligations upon the seller to hold a sale offer open for the duration of the option." *Toroy Realty Corp. v Ronka Realty Corp.*, 113 AD2d 882, 882-83 [2d Dept 1985]. "Once an optionee gives notice of intent to exercise the option in accordance with the agreement, the unilateral option agreement ripens into a fully enforceable bilateral contract." *Jarecki v Shung Moo Louie*, 95 NY2d 665, 668 [2001][internal citations and quotation marks omitted]. "[I]n order for there to be an enforceable contract for the sale of land upon which an action for specific performance can be based, an optionee must exercise an option in accordance with its terms, within the time and the manner specified in the option." *IPE Asset Mgt., LLC v Fairview Block & Supply Corp.*, 123 AD3d 883, 885 [2d Dept 2014]. "Contract language which is clear and unambiguous must be enforced according to its terms." *Manzi Homes, Inc. v Mooney*, 29 AD3d 748, 749 [2d Dept 2006]. "A purchaser moving for summary judgment on a cause of action for specific performance of a real estate contract must demonstrate that he or she was ready, willing, and able to perform the contract." *Kaygreen Realty Co., LLC v IG Second Generation Partners, L.P.*, 78 AD3d 1010, 1015 [2d Dept 2010]. "[T]he doctrine [of frustration

of performance] offers a defense against enforcement of a contract when the reasons for performing the contract cease to exist due to an unforeseeable event which destroys the reasons for performing the contract." *Structure Tone, Inc. v Universal Servs. Group, Ltd.*, 87 AD3d 909, 912 [1st Dept 2011]. "The doctrine of frustration of purpose does not apply unless the frustration is substantial. It is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss." *Rockland Dev. Assoc. v Richlou Auto Body*, 173 AD2d 690, 691 [2d Dept 1991].

Here, the Operating Agreement provided Plaintiff TZ Vista with the option to purchase Parcel 7 from Defendant Foot of Main on or before January 2020. It set forth that Plaintiff Cackovic had the "irrevocable right to require [Plaintiff TZ Vista] to purchase Parcel 7 . . ." Meanwhile, it stated that: "in such event, Foot of Main, LLC agrees to immediately transfer Parcel 7 to the [TZ Vista, LLC] . . ." Operating Agreement ¶ 9.1. Indeed, on August 8, 2019, Plaintiff Cackovic notified Defendant Helmer in writing of his decision to require Plaintiff TZ Vista, LLC to purchase Parcel 7, thereby creating an enforceable contract for the sale of Parcel 7. The Operating Agreement is clear and unambiguous, such that Defendant Foot of Main, LLC is obligated to transfer Parcel 7 to Plaintiff TZ Vista, LLC upon Plaintiff Cackovic's notification. Additionally, it is undisputed that Defendant Foot of Main, LLC, through Defendant Helmer, has and continues to refuse to complete such transfer. Defendant Helmer argues that the Court should not grant specific performance of this provision of the Operating Agreement because the purpose of the transfer has been frustrated because the planned construction of Parcel 7 will not be completed. He further contends that the purchase price of Parcel 7 will be calculated much lower than expected, constituting "highway robbery." However, these blanket allegations without any documentary support fail to raise a triable issue of material fact. Specifically, he fails to provide any support that the purpose of the transfer of Parcel 7, or the Operating Agreement in its entirety, has now been frustrated. Rather, he simply states that there have been disputes between the members of Plaintiff TZ Vista, LLC, culminating in his decision to not complete construction for the TZ Vista Project. Additionally, his argument that the purchase price of Parcel 7 will be lower than expected is insufficient for the doctrine of frustration of purpose. *See Rockland Dev. Assoc.*, 173 AD2d at 691. Based upon the foregoing, the Court finds that Plaintiffs have carried their prima

facie burden entitlement to summary judgment on their breach of contract cause of action and for a judgment directing specific performance against Defendants Helmer and Foot of Main to transfer the Parcel.

Based upon the foregoing, it is

ORDERED that Defendants' motion to dismiss and for partial summary judgment is denied; and it is further

ORDERED that Plaintiffs' cross-motion for partial summary judgment is granted and that they submit a proposed order and judgment to that effect; and it is further

ORDERED that the parties are hereby advised that a virtual status conference is scheduled for **January 18, 2022 at 3:30 pm.**

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York
January 3, 2022

ENTER

HON. ROBERT M. BERLINER, J.S.C.

To:

Counsel of record via NYSCEF