To Be Argued By:
Alan D. Singer
Time Requested: 15 Minutes

New York Supreme Court

APPELLATE DIVISION — SECOND DEPARTMENT

Docket No.
2022-00095

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

Plaintiffs-Respondents,

against

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

Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

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PRELIMINARY STATEMENT

This is an appeal from a decision and order entered on January 3, 2022 (Hon. Robert Berliner, J.S.C.) in the Rockland County Clerk's office denying Appellants' Motion to Dismiss the complaint and for an Order dissolving TZ Vista, LLC and granting Respondents' cross-motion for summary judgment ordering the transfer of certain Real Property to TZ Vista, LLC from William Helmer.

QUESTIONS PRESENTED

1. Whether the Court below erred in failing to order dissolution of TZ Vista, LC.

The Trial Court answered this in the negative.

2. Whether the Trial Court erred in ordering the transfer of certain real property to TZ Vista, LLC.

The Court below answered this question in the negative.

STATEMENT OF FACTS

This case revolves around disputes among the owners of a New York Limited Liability Company which has become so severe as to render the Company incapable of operating as intended.

The facts surrounding the existence of the disputes are not in doubt and are simply stated. In 2015 Drazen Cackovic, Julia Khmout and William Helmer formed a Limited Liability Company known as TZ Vista, LLC, in which Helmer was a 50% owner, Cackovic a 30% owner and Khomut a 20% owner. Helmer and

Cackovic were to be joint Managers, with all decisions being made jointly (R.55-59, 84).[1] The LLC was formed to own and manage an office building in Nyack, N.Y. and to develop various parcels of land along the Hudson River in Nyack for a townhouse and mid-rise condominium project. As the allegations in the complaint (R.24-41), the answer (R.108-115) and the reply affidavit of William Helmer (R.193-196) clearly show, the operating agreement among the parties was not adhered to by Cackovic, who acted as though he were the sole Member of the LLC. Respondents' answer to the motion for dissolution was to allege a litany of complaints against Helmer's actions (R.167-180), all of which clearly demonstrate a totally dysfunctional company, incapable of operating in any organized and amicable manner.

The obvious hostility between Helmer and Cackovic, as demonstrated by the charges and counter-charges contained in this Record and the statement by Mr. Helmer that he would not, under any circumstances construct the development for which the LLC was formed with Cackovic as a partner (R.194) clearly form the basis for a judicial dissolution. Additionally, as the affirmation of Alan D. Singer, attorney for the Appellants, clearly states confirmed by an e-mail from Cackovic's attorney (R.191, 192, 212), Helmer attempted to sell his interest in accordance with the terms of the operating agreement, but Cackovic refused to purchase. Article 8.5

[1] References are to pages of the Record on Appeal.

of the Operating Agreement (R.72-73) provides that in the event the members cannot agree a member may make an offer to sell his interests which would either be accepted or deemed an offer to sell by the receiving member. That is the only method of resolution in the operating agreement. Such an offer mad made by Helmer in 2020, and originally accepted, but Cackovic subsequently reneged on that agreement while his attorney was drafting a formal contract.

It is Appellants' contention on this Appeal that the undeniable schism between the parties and refusal of Cackovic to either purchase or sell his interest leaves defendants with no alternative but judicial dissolution. The Trial Court, however, ruled that there existed no grounds for dissolution because of a lack of documentary evidence (R.13). We submit said ruling to be erroneous.

CROSS-MOTION

In addition to the motion to dismiss filed by Defendant-Appellants, Plaintiff-Respondents made a cross-motion for an Order directing the sale of certain real property. Mr. Helmer is the owner of a certain parcel of land referred to by the parties as the "Foot of Main" property, which is contiguous to property owned by the LLC. It was the original intention of the parties that the parcels would eventually be combined and developed as one project (R. 24, 27). Mr. Helmer was to be in charge of construction and Mr. Cackovic responsible for the architectural drawings and plans (R. 6, 0-61). For that purpose, Article 9 of the Operating

Agreement (R.74-78) provided that Cackovic would have an option to require the transfer of the Foot of Main property to the LLC for no immediate consideration. Payment would be made as Phases of the projected development were completed.

Mr. Helmer has stated in no uncertain terms that the proposed development would not be undertaken by him with Cackovic as a partner (R. 194). Therefore, we contend, there is no reason for any transfer of property, the payment of which may never occur since the development is in doubt. Moreover, we contend that it is one thing to transfer the property for no consideration while the transferor is in charge of construction and is a 50% owner of the entire development. It is quite another should the development never be undertaken or is constructed by someone else. Furthermore, the price agreed upon to be eventually paid for the Foot of Main property may well be below market, as the original concept was for Helmer to share in the profits of the entire development project inclusive of the value of the Foot of Main property as well (R. 196). It is quite another should the project be sold to a third party, abandoned or otherwise compromised.

The Court below granted the cross-motion and ordered the land transferred, claiming, again, a lack of documentary evidence that the original purpose of the transfer has been frustrated (R. 15). We contend said finding to be erroneous and the Order improper.

ARGUMENT

POINT I

THE COURT BELOW ERRED IN ITS DENIAL OF THE JUDICIAL DISSOLUTION OF TZ VISTA LLC

A. The Management of the Entity is Unwilling to Permit the Stated Purpose of the Entity

Defendant Helmer sought a judicial dissolution of TZ Vista, LLC. The Court erroneously denied that relief.

The underlying theme throughout the pendency of this action has been one of acrimonious distaste and dissatisfaction among the owners of the TZ Vista, LLC entity. Pursuant to the Limited Liability Company Law of the State of New York Section 702, "[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." Additionally, the caselaw provides that when considering dissolution, LLCL § 702 requires that the Court first evaluate the operating agreement of the company and determine whether it is "reasonably practicable" for the company to continue to carry on its business in conformity with the operating agreement. *See Matter of Dissolution of 1545 Ocean Ave., LLC*, 72 A.D.3d 121, 128 (2d Dep't 2010). Further, the courts have explained that the member seeking

dissolution must establish 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. *Id.* at 131.

In determining whether a limited liability company can be dissolved, the Courts have provided that

> [t]o demonstrate entitlement to dissolution, the member seeking such relief 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.

Long Is. Med. & Gastroenterology Assoc., P.C. v. Mocha Realty Assoc., LLC, 191 A.D.3d 857, 863 (2d Dep't 2021).

In the underlying decision, the trial court found that the movant failed to sufficiently establish its burden to require a judicial dissolution. The court further found that although William Helmer, an owner of the entity in question submitted an affidavit, there was insufficient documentary support evidencing that the owners of TZ Vista, LLC would be unwilling to permit the stated purpose of the entity. *See generally* (R. 13). However, it is in this analysis that the Court erred in its determination.

As established in the Statement of Facts section of this brief (*See* supra), William Helmer is a 50% owner of the TZ vista, LLC entity. TZ Vista, LLC was formed for the purpose of developing parcels of land along the Hudson River in Nyack for a townhouse and mid-rise condominium project (R. 19, 27, 51).[2] As part of the development of the property, Drazen Cackovic and Julia Khmout – collectively as joint 50% owners of the entity – were to provide architectural and engineering services while William Helmer would provide the management of the construction activity (R. 28). Both aspects of the development process are significantly adversely affected when the members of the entity providing the services are at odds with one another. Further, the entity is seized where the two sides of the ownership (Helmer as a 50% owner and managing member and Cackovic as a 30% owner and managing member) are at odds with one another.

In the present case, it is clear that the management of the LLC is unwilling and unable to reasonably permit or promote the purpose of the entity to be realized; and that continuing the entity is thus financially unfeasible. Critically, as stated above, the purpose of the LLC was to develop the land in question for the construction and sale of condominium units. (R. 19, 27, 51). However, at this

[2] The Operating Agreement Section 2.3 provides that "[t]he purposes for which this Company has been formed and the powers which it may exercise, all being in furtherance and not in limitation of the general powers conferred upon limited liability companies in the State of New York, are solely to engage in the following business; (a) To purchase the Properties; (b) To develop the Properties; (c) To manage the Properties; (d) To sell, lease, and mortgage the Properties or portions thereof; and (e) To carry on any business reasonably related to the business described in section 2.3(a). (b), (c) and/or (d) hereof, except as prohibited by law."

point, the relationship between the two managing members of the LLC has completely and irreparably deteriorated. The vitriol between the members is evidenced by the record. First, in his affidavit in support of the motion William Helmer states that "this company has become totally dysfunctional and the parties can hardly even speak with one another. . . . There is no way that the parties can ever jointly work together to develop the land, and this has been recognized by both sides." (R. 19). In the responsive Affidavit of Drazen Cackovic in opposition, Mr. Cackovic accuses Mr. Helmer of self-dealing, "willfully and maliciously engag[ing] in a pattern of conduct aimed at delaying the progress of the TZ Vista Project, . . . and lining his own pockets." (R. 174). Thereafter, in the affidavit in reply, Mr. Helmer states that Mr. Cackovic's affidavit is "replete with lies and misrepresentations" and evidences the "degree of distrust and animosity" existing between Mr. Cackovic and Mr. Helmer (R. 193).

The anger between the parties was not contained solely to the affidavits but permeated through the visit to TZ Vista, LLC by Marc Schreck, CPA when he was tasked with evaluating the accounting practices of TZ Vista, LLC. Mr. Schreck, in a letter addressed to Mr. Helmer found that, "Carrie Helmer, a person of knowledge of the entity's operations, was explicitly denied the right to accompany [Mr. Schreck] on this visit. Although [Mr. Helmer] represented that [Carrie Helmer] is an agent of yours, the other members have continually denied her

access to information, much critical to the operation of the Company." (R. 202). During his evaluation, Mr. Schreck found that there was a breach of the computer system of TZ Vista, LLC. Regarding the security breach, Mr. Schreck found that, "at no time at the time of the occurrence [was Mr. Helmer], the other managing member of this entity, informed of the event. At no time were you, the other managing member of the entity, afforded the ability to take appropriate action to protect important sensitive information." (R. 202). Finally, and most critical to the relationship between Mr. Helmer and Mr. Cackovic, Mr. Schreck found the following:

> Thus, you were left with no other alternative but to attempt to deal with the other managing member of the Company. To which you have been stymied at every request for information on ongoing operational matters, denied every opportunity to timely examine and verify accounting and other financial information and denied the ability to discuss banking matters with the financial institution utilized by the Company. As we have previously discussed continually through the years, the management arrangement with your partner was untenable and simply did not work. (R. 203).

It is clear from the evaluation of Mr. Schreck as a third-party Certified Public Accountant that the business relationship between Mr. Helmer and Mr. Cackovic was unsustainable and was negatively affecting the ability of TZ Vista LLC to be operated properly. Mr. Cackovic states as much in his affidavit. *See generally* (R. 167-179).

As evidenced by the above, there is distrust, lack of confidence in the other's ability to make rational business decisions, malcontent, and a general sense of distaste which exists between two of the owners of TZ Vista, LLC. The stated purpose of the entity being the development of the land and construction of residential condominium units, with Mr. Cackovic providing the engineering and architectural services and Mr. Helmer providing the construction services, is at risk when the two managing members are not speaking except through adverse affidavits. The individuals inability to properly communicate without overt aggression or inform one another when major issues arise for the entity is a severe deterrent to the proper running of a limited liability company.

Moreover, maintaining the LLC while the parties cannot progress the stated purpose of the LLC is financially unfeasible for the managing members. Specifically, the parties continue to pay real estate taxes and other operating expenses on the property with no avenue through which to develop it. This has led to a financial burden which is borne by the parties and will continue to accrue unless this Court intervenes and dissolves the LLC. For these reasons, the Court should invoke LLCL § 702 and judicial dissolve the LLC as doing so is in the best interests of the entity and the managing members.

The Operating Agreement provides only one method for the parties to resolve such differences: a buy-out by one party of the other managing member's

interest (*See* Operating Agreement, Article 8, R. 69-74). As pointed out above, and in Mr. Singer's Affidavit (R. 190-192), Mr. Helmer had made an offer to sell his interests and it was accepted in an e-mail from Mr. Cackovic's attorney, who said he would draft a formal agreement (R. 212). Mr. Cackovic then reneged on that agreement while the contract was being drafted. This, effectively, leaves Mr. Helmer with no alternative but to seek dissolution as the only means of terminating this toxic relationship. Plaintiff would not follow through on the offer from him to purchase and refuses to offer to sell, as required by the terms of Article 8 (a classic "put/call" where refusal to accept an offer of sale results in a corresponding offer to sell under the same terms).

By reason therefore, common sense and equity dictate that a judicial dissolution of the LLC be ordered. The refusal of the Court below to do so is clearly error, for which a reversal is in order.

POINT II

THE COURT BELOW ERRED IN ORDERING THE TRANSFER OF THE FOOT OF MAIN PROPERTY

A. The Court Misinterpreted the Operating Agreement

So far as relevant here, the Operating Agreement for TZ Vista provides a mechanism for Cackovic to obtain the transfer of property contiguous to land owned by the LLC owned by Mr. Helmer to the LLC. This property is known .as the "Foot of Main" or "Parcel 7" property (R. 27, 28). It is not disputed that

Cackovic made a demand for the transfer and Helmer has refused. To the Court below this was the end of the story and it ordered the property to be transferred (*See* decision R. 15).

However, that was not the end of the inquiry. The Operating Agreement, in paragraph 2.3 (b) states that the one of the purposes of the company is to develop the property (R. 51). The right to have the property transferred is not, as believed by the Court below and advanced by Plaintiff, an unfettered right, or option. It is to be exercised when determined that "it is advisable for the Company to become the owner of Parcel 7 in furtherance of the Company advancing the development of any portion of the Properties…." (Par. 9.2, R. 74-75).

Here, as Mr. Helmer pointed out (R. 195-196), there is and was no valid reason to demand the transfer. The architectural plans, for which Cackovic was responsible, were not completed, so no building permit could be obtained. Helmer, the designated developer of the property (Operating Agreement, Par.4.5(B), R. 60-61), has stated unequivocally that he will not undertake that task given the current dysfunction of the LLC (R. 194). Therefore, there is no Construction Manager ready to commence operations, and without Mr. Helmer's personal guaranty of any building loan, no financing is available for construction.

In short, it cannot be argued that the transfer of property would further any development of the land. As such, there is no current right for Cackovic to exercise

the option set forth in the agreement. Indeed, as stated in Mr. Helmer's affidavit (R. 196) the only reason for the demand for transfer of the property was for Mr. Cackovic to obtain a windfall profit on the sale of the LLC properties, since the value set for Parcel 7 was below market value (calculated as being over $855,000.00 less than market value, R. 196). Those terms were acceptable so long as Mr. Helmer would be in charge of construction and would receive 50% of the profits from the development. However, if the property were to be sold following the transfer, or developed by a third party, that profit on an asset previously owned exclusively by Helmer would become a windfall to someone else.

B. Since the Purpose of the Transfer was Frustrated it was an error to order it

Mr. Helmer has stated in no uncertain terms that he will not manage the construction of the proposed project (R. 194), meaning the project will not be developed by this LLC. Since the only purpose for the transfer of the Foot of Main property was to advance the development of the project, its purpose is no longer capable of being realized and the forced transfer of the property is inappropriate.

Pursuant to the Restatement (Second) of Contracts § 265, "*a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary."* Further, the

Courts have provided that, "the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense. *See Crown IT Servs., Inc. v. Koval-Olsen,* 11 A.D.3d 263, 265, 782 N.Y.S.2d 708, 711 (1st Dep't 2004) *citing* Restatement Second, Contracts § 265; see also *Structure Tone, Inc v. Universal Services Group,* 87 A.D.3d 909,912 (1st Dept, 2011) and cases cited therein.

Furthermore, Mr. Cackovic does not intend to actually pay for this transfer. Under the terms of the operating agreement, Paragraph 6.1(b), payment was anticipated to be made in stages, as each stage of the development was completed and sold (R. 63-65). If there is to be no such development, there might never be any payment for this land.

The Court below made two critical errors in its decision. The first was to state that there was no documentary evidence that the purpose of the LLC was frustrated. Clearly, the statement by Mr. Helmer that he would never act as Construction Manager for the project, as contemplated by the operating agreement, is proof enough on that point. Without his so performing the project cannot move forward. Indeed, as stated in Point I, above, this LLC should be dissolved, and the assets sold. For that purpose, there is no need to transfer the Foot of Main property, as it could be sold as part of the sale and fair market value received by Mr. Helmer.

The second error was a finding that there was no support for defendants' statement of the purpose of the transfer (R. 15). However, as stated above, paragraph 9.2 of the operating agreement stated the purpose: "in furtherance of the …development" (R. 74-75) and the purpose is also stated in paragraph 2.3 (b) R. 51) and in naming Mr. Helmer as the Construction Manager (Paragraph 4.5(b), R. 60-61).

For these reasons the decision ordering the transfer of the Foot of Main property to the LLC should be reversed.

CONCLUSION

For the reasons set forth above, the Order appealed from should reversed, together with such other, further and different relief as this Court deems just and proper in the circumstances.

Dated: White Plains, New York
June 28, 2022

Respectfully Submitted,

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