

## A. FACTUAL BACKGROUND OF BEVERWYCK

Beverwyck Abstract, LLC is a New York State limited liability company which operates pursuant to a written signed Operating Agreement. [R87-108] Beverwyck Abstract, LLC was formed by the filing of Articles of Organization with the New York Department of State Department of State on March 31, 2000. [R90] On about April 1, 2000, the original members of Beverwyck Abstract LLC executed a written operating agreement that defined and controlled the operations of Beverwyck Abstract LLC. [R90] The original members of Beverwyck Abstract LLC were Thomas Herkenham, Douglas Engels, and Peter C. Staniels. [R90] On May 31, 2001, Thomas Herkenham withdrew in writing as a member of Beverwyck Abstract LLC. [R90] As part of his withdrawal, Herkenham executed a written Withdrawal of Managing Member document and executed an Assignment of his membership interest. [R114] As of May 31, 2001, and following Herkenham's withdrawal, the members of Beverwyck Abstract LLC were thus Douglas Engels and Peter C. Staniels. [R87-108]

On June 1, 2001, Douglas Engels and Peter C. Staniels executed an Amended Operating Agreement, which set forth the terms of the relationship between members Engels and Staniels (the Appellants). [R87-108] The original Operating Agreement had been created by attorney Thomas Herkenham, Esq. at the time of the April 1, 2000 creation of Beverwyck Abstract, LLC, and the June 2001 Amended Operating Agreement continued the terms of that agreement as modified by Appellants Douglas Engels and Peter C. Staniels. Section 10.13 of the Amended Operating Agreement reads as follows:

*10.13 Entire Agreement. This operating agreement sets forth all the promises, agreements, conditions and understandings between the parties respecting the subject matter hereof and supersedes all prior negotiations, conversations, discussions, correspondence, memorandum and agreements between the parties concerning such subject matter.*

[R106]

The agreement sets forth the methodology for the members to amend the agreement, stating as follows:

*10.04 Amendments. No amendment or modification of this operating agreement shall be effective except upon unanimous written consent of the Members.*

[R106]

Gateway Title Agency, LLC (“Gateway”) is a limited liability company. [R283] Gateway writes title insurance policies on real estate properties. [R283] Prior to 2001, Elizabeth Wade, a Gateway principal, began representing at real estate closings as a lawyer, only, Alumni Funding [R285], a mortgage company owned by Appellants Douglas Engels and Peter C. Staniels. [R230] Appellant Engels contacted Elizabeth Wade, knowing that Ms. Wade engaged in real estate title work as well as legal work. [R228] Appellant Engels suggested to Wade a “fee-splitting” arrangement whereby Staniels and Engels could receive portions of the title fees charged by Gateway for Alumni closings, which Ms. Wade told Engels was not legal and which she declined. [R229] Approximately one year later, both Appellants Engels and Staniels approached Ms. Wade again, and after discussions, Engels, Staniels and Gateway agreed to join together as an independent title insurance company under the name of Appellant Beverwyck Abstract, LLC. [R285]

Appellants Staniels and Engels jointly owned one hundred (100%) percent of Beverwyck prior to the discussions with Gateway, and agreed to transfer to Gateway a forty-nine percent (49%) interest in Beverwyck. [R109-110] To create ownership rights in Gateway, both Appellants Engels and Staniels in writing assigned percentages of their respective Beverwyck ownership interest to Respondent Gateway. [R109-110] On September 1, 2001, Appellant Douglas Engels, for consideration, “unconditionally and irrevocably assign(ed) and transfer(ed) to” Respondent Gateway Abstract Co., LLC a “two and two-tenths percent (2.2%) Class A Membership Interest and a twenty-two and three-tenths percent (22.3%) Class B Membership Interest” of Beverwyck Abstract, LLC. [R110] Simultaneously, Appellant Peter C. Staniels also “unconditionally and irrevocably assigned and transferred” to Respondent Gateway Abstract Co., LLC an additional and corresponding “two and two-tenths percent (2.2%) Class A

Membership Interest and a twenty-two and three-tenths percent (22.3%) Class B Membership Interest” of Appellant Beverwyck Abstract, LLC. [R109] The two assignments read, in pertinent part:

*Transferee [Gateway Abstract Co., LLC] is entitled to share in profits and losses of the Company [Beverwyck Abstract, LLC] commencing with September 1, 2001, (the “Starting Date”).*

There is no termination date set forth in the assignment. [R109-110]

In the execution of the September 1, 2001 assignments of right, Gateway Abstract Co., LLC became bound by the terms of the Amended Operating Agreement and entitled to the benefits contained therein. [R87-110] Appellants’ brief acknowledges that the owners owed a fiduciary duty to one another. [Beverwyck appellate brief at page 7]<sup>1</sup>

The business plan for Appellant Beverwyck was that Appellants Engels and Staniels - who owned mortgage company Alumni Funding - would encourage the Alumni loan originators to send the title work to Appellant Beverwyck. [R286] Both Appellants Staniels and Engels were also to obtain other sources of title work for Beverwyck. [R163-164] Appellant Beverwyck would then utilize Respondent Gateway to do the title work. [R185] The fees generated from the title work would belong to Appellant Beverwyck, and distributed among the Beverwyck company owners Staniels, Engels and Gateway. [R230]

Gateway began performing real estate title work for Appellant Beverwyck, and developed good relations with the Alumni mortgage originators who sent the title work to Beverwyck. [R291] The number of closings pending at any one time at Beverwyck being processed through Gateway was thirty to forty. [R293] Gateway doubled its title business and added staff and space to handle the flow of real estate title work. [R287; 294; 299]

In early 2002, to assist in the work and address quality assurance issues, Elizabeth Wade of Gateway hired another attorney, Thomas Herkenham, who had been an original Beverwyck owner. [R293] The day that Herkenham was to report to work, Elizabeth Wade

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<sup>1</sup> Salm v. Feldstein, 20 A.D.3d 469 (2<sup>nd</sup> Dept., 2005).

received a call from Herkenham telling her that Appellants Engels and Staniels had hired Herkenham to work for Appellant Beverwyck, and that Herkenham would now research real estate titles for Appellant Beverwyck rather than send them to Gateway. [R295; 297] The hiring of Herkenham had no effect upon Appellant Beverwyck's legal status or the ownership interests of Appellants Staniels, Engels or Respondent Gateway in Beverwyck.

A meeting involving Appellant Engels and Elizabeth Wade was held on February 17, 2002 at which time there was a discussion about the Beverwyck title work being done by Herkenham [R297], but there was no discussion that involved either Appellants or Gateway selling their ownership interests in Beverwyck:

*Q: Was there ever a conversation in which you were present and the topic of Gateway's ownership interest in Beverwyck was discussed?*

*Wade: No.*

*Q: At any point in time did you agree with Mr. Staniels to give him half of Gateway's interest in Beverwyck for nothing?*

*Wade: No.*

*Q: And did you ever have such a conversation with Mr. Engels?*

*Wade: No.*

[R297] There was no withdrawal of any member, no discussion to liquidate the company, and no agreement that the relationship among Appellants Staniels, Engels and Respondent Gateway in Appellant Beverwyck would be terminated. [R245; 270] Appellants Staniels and Engels began negotiating with Respondent Gateway to attempt to acquire Respondent Gateway's ownership in Beverwyck while Beverwyck continued to operate. [R269; 311] Respondent Gateway refused to transfer its ownership interest in Beverwyck or withdraw as an owner though requested to do so by Appellants Staniels and Engels [R312], and instead Appellant Beverwyck continued operations and all parties continued their ownership positions.

**B. WRITTEN TERMS TO WITHDRAW FROM BEVERWYCK**

Article VIII of the Beverwyck Operating Agreement details the terms of by which a member may assign their ownership shares or withdraw as a member of the company. Section 8.01 sets forth a specific procedure for an assignment of ownership rights, reading as follows:

*8.01 Assignment Generally. Except as provided in Sections 8.02, 8.03 and 8.04 of this Operating Agreement, each Member hereby covenants and agrees that he will not sell, assign, transfer, mortgage, pledge, encumber, hypothecate or otherwise dispose of all or any part of his interest in the Company to any person, firm, corporation, trust or other entity without first offering in writing to sell such interest to the Company.*

[R101]

Section 8.04(a) allows for the purchase of certain membership interest pursuant to a fair market valuation procedure upon an occurrence of a list of five possible "option event(s)" at Section 8.04(a). [R102]

Lastly, Section 8.07 sets forth the procedure by and whereby a member may resign from Beverwyck upon compliance with a specific procedure, which reads as follows:

*8.07 Resignation. Any Member may elect to resign from the Company and to sell his or her entire interest in the Company to the Company at any time by serving written notice of such election upon the Company. Such notice shall set forth the date upon which resignation shall become effective, which shall be not less than sixty (60) days and not more than ninety (90) days from the date of such notice. The purchase price for a Resigning Member's interest in the Company shall be One Dollar (\$1.00).*

[R104 (emphasis supplied)]

Appellant Engels testified that he knew of the Operating Agreement provisions to withdraw from Beverwyck:

*Q: And at that time, at the time that [Herkenham] withdrew, you knew and you were aware that it was required to execute a written agreement for a member of Beverwyck to withdraw their ownership interest, right?*

*Engels: Possibly. I think that -- my recollection of that was that Tom indicated he needed to do this because he was the managing*

*member. I don't know if that has any bearing on it or not, but that was the way that was drafted.*

*Q: You understood it needed to be in writing?*

*Engels: Yes.*

*Q: And it was not effective until such time as it was in writing, right?*

*Engels: Sure.*

[R194 (emphasis supplied)]

Neither of the Appellants complied with Section 8.07 notice of withdrawal from Beverwyck either specifically or generally. There is also no allegation in the petition nor any facts to support that any of the Section 8.07 Withdrawal procedures were undertaken by Respondent Gateway at any time. That is, no Beverwyck member - Engels, Staniels or Gateway - sent a §8.07 Notice of Withdrawal from the company as is required by the Articles of the Amended Operating Agreement in order to effect a membership - and thereby ownership - withdrawal. [R104]

#### C. APPELLANTS' PETITION TO DISSOLVE BEVERWYCK ABSTRACT, LLC

Instead of attempting to withdraw, Appellants took the deliberate and strategic step of attempting to dissolve Appellant Beverwyck. Article IX sets forth the means for dissolution and termination of Beverwyck Abstract LLC. [R116-127] The Appellants sought application of Article IX Section 9.01 which reads as follows:

*9.01 Events of Dissolution. The company shall be dissolved upon the first to occur of the following:*

*(c) The entry of a decree of judicial dissolution of the company is provided in the act.*

[R104]

The Appellants in the original special proceeding asserted four causes of action for dissolution: first, dissolution on grounds of internal dissension; second, dissolution on grounds of irreconcilable conflict; third, breach of fiduciary duty by improperly withholding moneys from title closings, and: fourth, dissolution effective retroactively as of April 1, 2003 on grounds of

estoppel. [R116-127] Respondent Gateway filed and served its answer to the petition for dissolution. [R129-132] Gateway appeared in its capacity as the 49% owner and member of Beverwyck. [R130]

A bench trial was held before Justice Thomas Spargo on March 23 and 28, 2005 at which testimony was adduced. [R5] At the close of proof, the special proceeding concluded in a judgment of dissolution by stipulation on the record. [R329-330] The Appellants had alleged in the petition a theory of "estoppel" in attempting to have the court declare the date of dissolution as April 1, 2003. [R116-127] Justice Spargo declined to rule on the Appellants' demand for dissolution retroactive to April 1, 2003, based on their asserted theory of estoppel, stating as follows:

*THE COURT: I think respectfully that's a question for another day. The court respectfully declines to exercise any authority it has on your estoppel theory. I think were the estoppel theory to be exercised, I think it would be exercised at the next step of this process, if there is a next step of the process. That is, I think it would be premature of me to entertain an estoppel theory at this juncture.*

[R337(emphasis supplied)]. The Court then executed a dissolution order which was dated May 26, 2005 and filed on June 3, 2005. [R41-42]

#### IV. Accounting Process

Thereafter, the Appellants and Respondent began an accounting process. Justice Richard Platkin had been assigned the case, and supervised the accounting. [R3] During the process, there was discovery and an agreed-upon exchange of expert accounting reports. [R47-64] The Appellants sought to have the effective date of the dissolution set as February 17, 2003 [R7], and claimed sole ownership of income that was earned by Beverwyck from February 17, 2003 through May 26, 2005, the date of Justice Spargo's order of dissolution. [R125-126] Respondent Gateway asserted that the effective date for dissolution was the date set by Justice Spargo which was May 26, 2005. [R40]

The Appellants filed a motion in limine requesting that Justice Platkin make a determination of the date of dissolution of Beverwyck as February 17, 2003. [R3] The parties

stipulated that Justice Platkin would make findings of fact based upon the record before him and make credibility determinations from the trial transcripts although he had not presided over the original trial. [R4; 7]

Justice Platkin found that during 2003, the parties had disagreement on the speed of title work being conducted by Respondent Gateway, and that the principals had met on February 17, 2003. [R6] Justice Platkin found as the finder of fact:

On February 17, 2003 Engels, Staniels and Wade met to discuss their options. The result was an oral understanding that Wade and Gateway would no longer accept title work from Beverwyck. Engels and Staniels then sent Wade draft forms for her to execute assigning Gateway's interest in Beverwyck back to Engels and Staniels effective April 1, 2003. Wade did not sign these documents.

[R4]

The trial court found that "[t]he Limited Liability Company is a creature of statute", and "the members have great latitude to chart their own course with their operating agreements". [R8] Justice Platkin cited to the written Operating Agreement of Beverwyck which "spells out unequivocally the circumstances under which the LLC will be dissolved", and that [s]ince the members had bound themselves by the terms of their operating agreement , the mere cessation of referrals from Alumni Funding to Beverwyck or the bare assertion by petitioners that the company was no longer in existence was insufficient to dissolve the LLC or to relieve petitioners of their fiduciary duties to the organization." [R8] The trial court then found that "the dissolution of Beverwyck Abstract, LLC is determined as May 26, 2005". [R9]

## LEGAL ARGUMENT

### POINT I

**THE APPELLANTS' FIDUCIARY DUTY TO BEVERWYCK  
CONTINUED UNTIL EITHER SECTION 8.07  
WITHDRAWAL BY MEMBERS FROM BEVERWYCK OR  
ITS DISSOLUTION IN ACCORDANCE WITH LAW**

This is a contract law case, and nothing more. The parties entered a contract (Operating Agreement) that created a business entity - Beverwyck Abstract LLC - and the parties agreed to comply with and be bound by the terms of their written agreement. The Operating Agreement has provisions for a member to withdraw (Section 8.07) as an owner, and provisions for the dissolution of the LLC. [R104] Appellants ask the Court to put the written Operating Agreement to the side, and apply non-contract principles to conclude that Appellants or Respondent Gateway terminated their business association with Beverwyck in February 2003. [R22] Appellants contend - asking application of Partnership Law - that when one or more partners declares their intent to withdraw from the partnership, his fiduciary duty ceases. [R15] They argue "once a partner disassociates with the partnership, the remaining partners no longer owe the disassociating partner a fiduciary duty". [R15] As a result, Appellants seek to have the May 26, 2005 dissolution made effective in February 17, 2003.

Appellants assert that their fiduciary duty ends with an "expression" of withdrawal [R16-17] and rely upon Morris v. Crawford, 304 A.D.2d 1018 (3<sup>rd</sup> Dept., 2003). However, the trial court found as fact that neither Appellants nor Respondent Gateway issued a Section 8.07 notice of intent to withdraw in accordance with the provisions of the Operating Agreement, and none withdrew prior to the dissolution proceeding culminating in the dissolution order. [R8]

This court's analysis does not turn on concepts like application of Partnership Law versus Limited Liability Company law. Rather, whether cast as either, the Third Department has made clear that partners may agree in writing how they effect a withdrawal from ownership:

The rights and obligations of parties to a **partnership** may be fixed by agreement (*see, Silverman v Caplin*, 150 AD2d 673, 674, *appeal dismissed* 74 NY2d 793), and where the terms are unambiguous, the intent of the parties must be ascertained in accordance with the language of the agreement (*see, Heller v Heller*, 216 AD2d 355, 356; *Teal v Place*, 85 AD2d 788, 789-790). Paragraph 9 of the **partnership** agreement provides that: "In the event any partner wishes to **withdraw from the partnership** for any reason other than death, he shall notify the remaining partners, in writing, and the remaining partners within fifteen (15) days from receipt of said **notice** shall make an offer to purchase the equity of the partner wishing to **withdraw**. If such offer is unacceptable to

the partner wishing to **withdraw**, he shall be bound to purchase the equities of the remaining partnrs [*sic*] upon the same terms and conditions as the offer made to him."

Estate of Gardner v. Carson, 271 A.D.2d 721 (2000).

Neither Appellants nor Gateway ever acted in accordance with the written terms of the Operating Agreement to withdraw from Beverwyck, which is the exact basis the Third Department ruled in Morris. The Morris court recited the facts as follows:

*Defendant testified that he and Morris agreed to a May 15, 1992 start date for the separation of the Hudson office, which testimony Supreme Court plainly was free to credit. The record further reflects that defendant filed a certificate on or about May 22, 1992 indicating that he was doing business as Crawford & Associates, as well as a certificate of withdrawal dated July 10, 1992, wherein defendant indicated that he withdrew from Morris Associates effective May 15, 1992. Additionally, a secretary in the Hudson office testified that between May 15, 1992 and June 15, 1992, she answered the telephone in the Hudson office as "Crawford & Associates."*

*See* Morris, 304 AD2d at 1020 (emphasis added). That is, the Morris written agreement allowed a party to issue a written withdrawal - which was done in Morris - and then terminated the fiduciary duty upon compliance with the parties' agreement for written withdrawal.

In the present case, Respondent Gateway specifically declined an invitation by Appellants to withdraw from the ownership of Beverwyck, and Appellants strategically decided not to withdraw themselves. [R312] Instead, Appellants took over the operations of Beverwyck including the staff, leasehold property, computers, and contacts, and distributed all the revenues to Appellants Engels and Staniels. [R183] None of the parties issued a Section 8.07 withdrawal notice to form a new company. The Beverwyck Operating Agreement allowed Appellants to withdraw upon compliance with very clear requirements:

*8.07 Resignation. Any Member may elect to resign from the Company and to sell his or her entire interest in the Company to the Company at any time by serving written notice of such election upon the Company. Such notice shall set forth the date upon which resignation shall become effective, which shall be not less than sixty (60) days and not more than ninety (90) days from the date of such notice. The purchase price for a Resigning Member's interest in the Company shall be One Dollar (\$1.00).*

[R104 (emphasis supplied)] But, neither Appellant sought to withdraw under the agreement. Instead, Appellants tried first to convince Gateway to sell them Gateway's interest in the company. [R317] Petitioners sent a proposed written assignment of Gateway's ownership share to Appellants - for no consideration - which, if executed, would have given Appellants sole ownership of Beverwyck with no further fiduciary duty to Respondent Gateway. [R317] But, Gateway refused to execute the written assignment of ownership to Appellants. [R312] As found by Justice Platkin, "Engels and Staniels then sent Wade draft forms for her to execute assigning Gateway's interest in Beverwyck back to Engels and Staniels effective April 1, 2003. Wade did not sign these documents". [R6] Appellants now assert that the termination of Gateway's interest had actually already occurred on February 17, 2003, six(6) weeks earlier.(R16) The facts show that Respondent Gateway and Appellants tried to negotiate a withdrawal which never materialized. [R312] When Appellants could not successfully negotiate Respondent gateway's buyout, Appellants simply asserted control of Beverwyck and then began a dissolution proceeding. [R116-127]

Appellants' reliance on cases such as Wynne v. Gruber, 237 A.D.2d 284 [2<sup>nd</sup> Dept., 1997], In re Silverberg [Schwartz], 81 A.D.2d 640 [2<sup>nd</sup> Dept., 1981], and Dunay v. Ladenburg, Thalmann, 170 A.D.2d 335 [1<sup>st</sup> Dept., 1991] is entirely misplaced because each case concerns at-will partnerships having their own fact-specific events leading to dissolution under the Partnership Law. None involve Limited Liability Companies with express written contract provisions in an Operating Agreement governing dissolution as exist in this case.

"It is a long-settled principle in New York law that partners are allowed to agree among themselves how their partnership will be governed, and that §40 is a default provision only applicable absent such an agreement (see Lanier v Bowdoin, 282 N.Y. 32, 38, 24 N.E.2d 732 [1939]; Corr v Hoffman, 256 N.Y. 254, 272, 176 N.E. 383 [1931]; Urban Archaeology Ltd. v Dencorp Invs., Inc., 12 A.D.3d 96, 102-103, 783 N.Y.S.2d 330 [2004]; Rodman v Reid & Priest, 167 A.D.2d 310, 310-311, 562 N.Y.S.2d 55 [1990], lv dismissed 77 N.Y.2d 874, 571 N.E.2d 86,

568 N.Y.S.2d 916 [1991]).” The parties agreed in the Operating Agreement how a member would withdraw, and the “default provision” caselaw for partnership has no application.

Appellants’ analysis is also not aided by Madison Hudson Assocs., LLC v. Neumann, 8 Misc.2d 10251, even though the plaintiff was an LLC because, in that case, the alleged withdrawal event concerned an alleged *oral joint venture*. The court framed the issue as follows: “Plaintiffs allege that Madison Equities and the Neumann Group orally agreed to form a joint venture (“Joint Venture”) to jointly pursue the development of the hotel.” The court described the ensuing relationship as follows:

*The Neumann Group formed Hudson Green, LLC (“Hudson Green”) in April of 1999, as a single-purpose entity for the development of the hotel, and Madison Equities thereafter formed plaintiff Madison Hudson Associates, LLC (“Madison Hudson”), to hold its 15% membership interest in Hudson Green that it eventually acquired.[fn3] The remaining 85% interest in Hudson Green was held by the managing members, the Neumann Group.*

The court noted that “Plaintiffs and the Neumann Group began negotiations for a buyout of the latter’s interest in Hudson Green, resulting in *three letter agreements executed in mid to late 2000* which contemplated the terms of Madison Hudson’s potential buyout of the Neumann Group’s interest.” (Emphasis supplied.) The court gave an exhaustive review of the facts, documents and testimony after which it stated: “The record before the court indicates that the Neumann Group and plaintiffs intended the enforceability of these terms to end upon the Neumann Group’s sale of the Lease \*\*\* [and] plaintiffs have otherwise failed to demonstrate factual evidence sufficient to overcome substantial contradictory evidence that the Neumann Group intended to withdraw from the joint venture, signifying an end to the enforceability of these terms.”

Setting aside for the moment whether withdrawal from an alleged oral joint venture has any bearing at all on the issue in this case, Appellants merely beg, rather than answer, the question of whether either Respondent Gateway or Appellants agreed to withdraw from Beverwyck. Unlike Madison Hudson, Appellants have made no showing of Gateway’s Section

8.07 notice to withdraw -- much less three executed letter agreements -- to support the termination of Appellants' fiduciary duty not to usurp the business opportunity.

## CONCLUSION

The trial court correctly held that Beverwyck was dissolved on May 26, 2005. Prior to dissolution, no member executed the Section 8.07 contractual rights to withdraw from the company which governs their relationship. The owners continued with fiduciary duties to Beverwyck until dissolution, and there is no lawful basis to create an artificial dissolution date distinct from that set in the Court's dissolution order. Accordingly, the Appellants' appeal should be denied together with an award of costs and disbursements.

Dated: April 21, 2008

Yours, etc.,

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