STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

UNIVEST I CORP., derivatively on behalf of
470 PEARL STREET, LLC,

Petitioners,

Index No. 811644/2014

v.

SKYDECK CORPORATION d/b/a PAY2PARK,
BUFFALO DEVELOPMENT CORPORATION, and
Nominal Respondent 470 PEARL STREET, LLC

Respondents.

MEMORANDUM OF LAW IN SUPPORT TO RESPONDENT'S MOTION TO DISMISS VERIFIED PETITION

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PRELIMINARY STATEMENT

Petitioner, Univest I Corp. ("Univest" or Petitioner) brought a Petition pursuant to Article 7 of the Real Property Actions and Proceedings Law (RPAPL) derivatively in the name of 470 Pearl Street, LLC for an order awarding:

1. Possession of the subject commercial real property to 470 Pearl Street, LLC;
2. The issuance of a warrant to remove respondent Skydeck Parking Corporation d/b/a Pay2Park ("Skydeck") from possession of the property;
3. An order requiring respondent Buffalo Development Corporation ("BDC") to engage in an RFP process.

Respondent Buffalo Development Corporation brings this Motion pursuant to CPLR 3211(a)(1) to dismiss the proceeding based on documentary evidence:

> *"R 3211. Motion to dismiss*
>
> *(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:*
>
> *1. a defense is founded upon documentary evidence; ....."*
>
> N.Y. CVP. LAW § 3211

Buffalo Development Corporation asks that the court dismiss the Petition based on the terms of the parties Operating Agreement. The Operating Agreement establishes that the parties contemplated and agreed that litigation in the name of the LLC can only be commenced upon the members consent. The parties are free to contract away the derivative rights otherwise available under BCL § 626 as applied by the courts to limited liability companies. The Petition is a breach of the contact entered by the parties.

As set forth in the Affirmation of Robert E. Knoer and the Affidavit of Mark D. Croce with exhibits attached thereto and the Memorandum of Law filed in support, it is respectfully submitted that the Verified Petition should be dismissed pursuant to CPLR 3211(a)(1) on the basis that the Operating Agreement, as a binding contract between the parties, prohibits unilateral legal action by one member. A hearing should be set to establish appropriate attorney's fees and cost to be awarded to Respondent Buffalo Development Corporation.

STATEMENT OF FACTS

When 470 Pearl Street was organized in 2005 the parties, through counsel, negotiated certain rights and obligations related to the management and operation of the LLC. To memorialize their agreement they entered an Operating Agreement. (Exhibit E to the Petition) Buffalo Development Corporation was established as the Manager of 470 Pearl Street, LLC with certain rights of decision making (*Operating Agreement Section 6.05).* However some decisions require consent of both parties including the institution of litigation such as Univest has commenced here. Univest had no rights of management other than the right to terminate the Skydeck lease and the right to withhold consent to certain enumerated actions requiring consent.

THE MEMBERS OF 470 PEARL, LLC AGREED TO A MANDATORY DISPUTE RESOLUTION PROCESS

Petitioner Univest I Corp., as a member of 470 Pearl Street, LLC and a signatory to the Operating Agreement, is bound by all terms of the Operating Agreement. There were many terms that were in discussion and desired by one or both of the members. Univest insisted that an affiliated company, Uniland Construction Corporation, be identified as the constructor of any development.

Notwithstanding the provisions of this section 6.08, 470 Pearl shall enter into a Construction Management Agreement with Uniland Construction Corporation to be the construction manager for the project. Uniland Construction Corporation will receive a fee of 5% for all work performed under the Construction Management Agreement. This fee includes the cost of the construction manager and internal overhead, but does not include the cost of any general conditions, on site superintendents, or personnel dedicated to the Project. The terms of the Construction Management Agreement other than as stated herein will be negotiated between Uniland Construction Corporation and 470 Pearl.

Operating Agreement Section 6.08

In turn, Buffalo Development Corporation was named Manager and Skydeck Corporation the tenant of 470 Pearl Street pending the anticipated development in lieu of compensation.

Article VI
Management and Operation of Business

Section 6.01 Management.

(a) Company management is vested in Buffalo Development Corporation (hereinafter the "Manager"). Pursuant to Section 408 of the Limited Liability Company Law, no formal meeting or written consent of the Manager is required to make decisions or to take actions on 470 Pearl's behalf.

Operating Agreement Section 6.01

Section 6.05 Compensation of the Manager.

The Manager may be compensated for services as 470 Pearl's Manager by a payment approved by the Members.

The Manager is authorized by the Members to enter into a lease with Skydeck Corporation to lease the Property in the form as attached hereto as Exhibit B (the "Parking Lease"). As long as such lease is in place the Manager shall only be compensated by reimbursement of actual expenses incurred in the management of the Project.

Operating Agreement Section 6.05

The Members could have established a member managed entity or chosen a third party as manager. They did not. They negotiated an Operating Agreement that established Buffalo

Development Corporation as the Manager. The status quo was established and the LLC operated for nearly 10 years without incident.

The Members agreed that the Operating Agreement would supersede any other provision of the Limited Liability Company Law as far as allowed.

Section 2.01 Formation; Admission.

470 Pearl was formed as a limited liability company under the provisions of the Limited Liability Company Law by the filing on December 27, 2004 of the Articles of Organization with the Secretary of State of the State of New York. Each of the Members listed on Schedule I of this Agreement has been admitted to 470 Pearl as a Member. The rights and liabilities of the Members are as provided in the Limited Liability Company Law, except as is otherwise expressly provided in this Agreement.

Operating Agreement Section 2.01

The Operating Agreement expressly set forth the process by which disputes would be resolved. Persons and companies are free to, and in fact encouraged to, choose alternative methods to litigation as a means of resolving disputes.

THE MEMBERS' DISPUTE

Univest requested that the tenancy of 470 Pearl Street be the subject of an RFP. Buffalo Development Corporation requested information as to the terms of the RFP (Exhibit C to the Petition) and proposed that Skydeck be given an opportunity to match any proposals. Univest refused to provide specific proposed terms and rejected the suggestion that Skydeck be given a right of first refusal as to any lease. The two 50/50 equity interest members were at odds and a dispute was brewing. The two members could not reach agreement on this issue involving the operation of the LLC pending development of the real property.

The Operating Agreement sets forth a single and mandatory path for resolving disputes as to the management of the LLC. The dispute resolution process was not a "boilerplate" part of a standard operating agreement.

The mandatory dispute resolution provision of Article IX of the Operating Agreement was negotiated between the parties as an important part of the consideration each gave to the other in reaching agreement on the final terms of the Operating Agreement. The dispute resolution process was as much a part of the negotiated consideration as Univest right to designate its affiliate Uniland Construction Corporation as the constructer and Buffalo Development Corporations right to be the Manager. The "derivative" action brought by Univest is in violation of the agreed to terms of the Operating Agreement including management and the dispute resolution process.

THE MEMBERS' CHOSEN DISPUTE RESOLUTION PROCESS ARTICLE IX

The Members of 470 Pearl, LLC were both sophisticated entities with multiple business interest, represented by seasoned counsel. They both knew that sometimes business partnerships do not work out. They especially realized the difficulty of dispute resolution in a 50/50 equity entity. Both parties had been in litigation in the past and understood the expense and unpredictability of a court resolution of business disputes. Neither party is a "minority" member. They are equal owners of the LLC. The final version of the Dispute Resolution Process provided for a set rate of return to the departing member.

Article IX
Transfers of Membership Interests

Section 9.01 Reciprocal Purchase Obligation.

(a) In the event that the Members do not unanimously agree on all issues relating to the operation and development of the Property (the "Decision"), the Member or Members seeking agreement on the Decision (the "Sponsoring Member") shall request in writing that the dissenting member or members (the "Dissenting Member"), agree to the decision within thirty (30) days after the Dissenting Member receives the request. If the Dissenting Member rejects the request within thirty (30) days after receipt of the request, or fails to respond within thirty (30) days of receipt of the request a deadlock shall be deemed to exist.

If a deadlock occurs, the Sponsoring Member must within ten (10) days:

(i) Withdraw the request for consent to the Decision, or

(ii) Be obligated to sell to the Dissenting Member, at the Dissenting Member's sole discretion, the Membership Interest of the Sponsoring Member at a price equal to the Sponsoring Member's cost into the Project plus an annual rate of return of 8% (the "Purchase Price"). The Sponsoring Member shall be obligated to sell its Membership Interest to the Dissenting Member for the Purchase Price.

(iii) In the event that the Dissenting Member chooses not to purchase the Sponsoring Member's Membership Interest, then the Sponsoring Member shall purchase the Dissenting Member's Membership Interest at a price equal to the Dissenting Member's cost into the Project plus an annual rate of return of 8% (the "Purchase Price"). The Dissenting Member shall be obligated to sell its Membership Interest to the Sponsor Member for the Purchase Price.

(b) If the Sponsoring Member fails to complete the purchase of the Dissenting Member's Membership Interest in an amount equal to the Purchase Price within sixty (60) days after the Dissenting Member states their choice not to purchase the Sponsor Member's membership interest, the Dissenting Member may purchase the Sponsoring Member's Membership Interest at a price equal to the Sponsoring Member's cost into the Project. If the Dissenting Member fails to exercise its right to purchase the Sponsoring Member's Membership Interest in accordance with the foregoing, the

Decision with respect to which a deadlock has been deemed to exist will be deemed to be resolved in favor of the Dissenting Member.

(c) Unless the parties otherwise agree, any sale pursuant to section 9.01 shall take place within 120 days after the Sponsor or Dissenting Member shall notify the other that they will be exercising a right to purchase pursuant to this Section 9.01. The purchaser shall pay the purchase price to the seller in wired federal funds or cashier's or certified bank checks drawn on or by any national bank located in New York. The purchaser shall execute and deliver to the seller a document (in form and substance reasonably satisfactory to the seller) indemnifying the seller from and against any and all personal liabilities and obligations with respect to the debt of the Company. The purchaser and seller shall cause any loans made by the seller to the Company, or by the Company to the seller, together with interest accrued thereon, to be repaid. On due performance by the purchaser, the seller shall execute and deliver all deeds, assignments, and other instruments as may be reasonably required to vest in the purchaser or in the purchaser's nominee or assignee, the seller's entire Membership Interest, free and clear of all liens and encumbrances.

(d) Except as expressly set forth herein, no sale pursuant to this Section 9.01 shall relieve the Seller or Purchaser from any duty or obligation owed to the Company or the other Members which accrued prior to the date of the sale or shall constitute a waiver or release of claims with respect thereto.

Operating Agreement Section 9.01

The dispute resolution process is not an alternative. It is an absolute, mandatory pathway for dispute resolution if the parties are unable to work out any details related to the operation or development of the property. The provision uses absolute terms: "shall", "must" and "obligated".

The Operating Agreement is an integrated contract between the parties and should be enforced according to its unambiguous terms. The derivative Petition is a violation of the negotiated dispute resolution process and should be dismissed.

INDEMNIFICATION OF BUFFALO DEVELOPMENT CORPORATION

Section 6.09 of the Operating Agreement provides for the indemnification of Buffalo Development Corporation for any fees and expenses incurred in defending against the claims of Univest I Corp. The Operating Agreement at Section 14.07 provides that where any provision of the Operating Agreement is successfully asserted as a defense to litigation, the prevailing party is

entitled to recover attorney's fees. Buffalo Development Corporation is entitled to recover all fees and expenses of defending this litigation from Univest I Corp.

ARGUMENT

I. AN OPERATING AGREEMENT IS A CONTRACT AND SHOULD BE ENFORCED AS SUCH

Contract interpretation is a question of law, appropriate for resolution on summary judgment (*National Union Fire Ins. Co. of Pittsburgh, Pa. v. Robert Christopher Assocs., 257 A.D.2d 1, 691 N.Y.S.2d 35 [1st Dept 1999*]). Summary judgment on a breach of contract action should be granted where, as here, the terms of the contract are clear and unambiguous (*Modell's N.Y. Inc. v. Noodle Kidoodle, Inc., 242 A.D.2d 248, 662 N.Y.S.2d 24 [1st Dept 1997*]; *Lake Constr. & Dev. Corp. v. City of New York*, 211 A.D.2d 514, 621 N.Y.S.2d 337 [1st Dept 1995]). *JPMorgan Chase Bank, N.A. v. Controladora Comercial Mexicana* S.A.B. DE C.V., 29 Misc. 3d 1227(A), 1227A (N.Y. Misc. 2010).

Courts interpreting an operating agreement will apply general contract principles (see *In re Matco-Norca, Inc.*, 802 N.Y.S.2d 707, 708-709 [2d Dept 2005] [interpreting shareholder agreement]:

> "It is the primary rule of construction of contracts that when the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and the parties' reasonable expectations"' (Weisberger v Goldstein, 242 A.D.2d 622, 623, 662 N.Y.S.2d 544 [1997], quoting Slamow v Delcol, 174 A.D.2d 725, 571 N.Y.S.2d 335 [1991], affd 79 N.Y.S.2d 1016, 594 NE2d 918, 584 N.Y.S.2d 424 [1991]; see W.W.W. Assoc. v Giancontieri, 77 N.Y.S.2d 157, 163, 566 NE2d 639, 565 N.Y.S.2d 440 [1990]; Mazzola v County of Suffolk, 143 A.D.2d 734, 735, 533 N.Y.S.2d 297 [1988]). Further, a court may not write into a

> contract conditions the parties did not insert by adding or excising terms under the guise of construction, nor may it construe the language in such a way as would distort the contract's apparent meaning (see Tikotzky v City of New York, 286 A.D.2d 493, 729 N.Y.S.2d 525 [2001]; Slamow v Delcol, supra at 727; Tantleff v Truscelli, 110 A.D.2d 240, 244, 493 N.Y.S.2d 979 [1985], affd 69 N.Y.S.2d 769, 505 NE2d 623, 513 N.Y.S.2d 113 [1987]). The words and the phrases used in an agreement must be given their plain meaning so as to define the rights of the parties (see Laba v Carey, 29 N.Y.S.2d 302, 308, 277 NE2d 641, 327 N.Y.S.2d 613 [1971]; Levine v Shell Oil Co., 28 N.Y.S.2d 205, 212-213, 269 NE2d 799, 321 N.Y.S.2d 81 [1971]).
>
> *In re Matco-Norca, Inc.,* 22 A.D.3d 495, 496 (N.Y.S. App. Div. 2005)

See also: *Switzer v. 1236 Restaurant LLC*, 2008 N.Y. Misc. LEXIS 10719 at 6-7 [S. Ct. N.Y. Co. 2008]; *Petrakis v. Rose*, 2006 N.Y. Misc. LEXIS 2173 at7-8 [S. Ct. Nassau Co. 2006]). A comprehensive, well-drafted operating agreement reflecting the parties' entire understanding is binding on the parties, and will be enforced according to its terms (see generally, LLCL §§ 4.01, et seq.; *In re Penepent Corp.*, 96 N.Y.S.2d 186, 192 [2011];

The court in *Penepent* reinforced that "[a]s a general rule, courts must enforce shareholder agreements according to their terms (see, *Gallagher v. Lambert*, 74 N.Y.S.2d 562, 567 (1989)). Such agreements avoid costly, lengthy litigation (see, *Allen v. Biltmore Tissue Corp.*, 2 N.Y.S.2d 534, 542-543, 161 N.Y.S.2d 418, 141 NE2d 812 (1957) and promote "reliance, predictability and definitiveness" in relationships among shareholders in close corporations (*Gallagher v. Lambert*, supra). *Id.* See also *Ahmed v. Fulton St. Bros. Realty, LLC*, 68 N.Y.S.2d 523, 525 [2d Dept 2013]; *Verderber v Commander Enters. Centereach, LLC*, 925 N.Y.S.2d 142, 144 [2d Dept 2011]).

An Operating Agreement is for all purposes the equivalent of a shareholder agreement. The analysis is the same. The Fourth Department has held in interpreting an Operating Agreement that that "It is well settled that a "written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v. Philles Records*, 98 N.Y.S.2d 562, 569, 780 NE2d 166, 750 N.Y.S.2d 565 [2002]; see *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.S.2d 157, 162, 566 NE2d 639, 565 N.Y.S.2d 440 [1990])." *Davies v. Jerry*, 966 N.Y.S.2d 797, 798 [4th Dept. 2013].

> "The question of whether a contract is ambiguous is a question of law for the court (*Argento v. Argento*, 304 A.D.2d 684, 758 N.Y.S.2d 166 [2003]). If the contract is unambiguous the court must give "a practical interpretation to the language employed and the parties' reasonable expectations" (*Matter of Matco-Norca, Inc.*, 22 AD3d 495, 496, 802 N.Y.S.2d 707 [2005 of Matco-Norca, Inc., 22 AD3d 495, 496, 802 N.Y.S.2d 707 [2005] [internal quotation omitted]; see *Maury v. Maury*, 7 AD3d 585, 776 N.Y.S.2d 489 [2004])."
>
> *Greenberg v. Greenberg*, 37 A.D.3d 410, 411 (N.Y. S. App. Div. 2d Dep't 2007)

The parties here agreed and contemplated that any litigation would require both members consent. That intention should be honored and this proceeding dismissed.

II. BUFFALO DEVELOPMENT CORPORATION HAS THE AUTHORITY AS MANAGER TO MAINTAIN THE STATUS QUO.

The Operating Agreement vests "[c]ompany management" in BDC (Operating Agreement, § 6.02 [a]). Company management is statutorily vested in the Manager subject to any limitations in the Operating Agreement (*id.* at § 408 [a]), and this Operating Agreement "omits any language granting management powers to [Univest]" (*Kalikow v Shalik*, 2014 N.Y.S. Misc. LEXIS 1685 [S. Ct. Nassau Co. 2014]). "The plain, unambiguous language of the

[Operating Agreement], when read as a whole, delegates to [BDC] the sole right to manage the [LLC]," including the right to decide whether or not to take action to remove Skydeck "with no reservation for [Univest] to approve or disapprove of that decision" (*LaSalle Hotel Lessee, Inc. v Marriott Hotel Servs., Inc.*, 816 N.Y.S.2d 347, 348 [1st Dept 2006], *rearg denied*, 2006 N.Y.S. App. Div. LEXIS 9859).

A. Management of 470 Pearl Street, LLC.

As Manager, BDC is responsible for "[c]ompany management" and "holds office until the earliest to occur of his resignation, removal for cause, withdrawal from [the LLC], disability or death" (Id. at §§ 6.01 [a], 6.03). "Cause" is defined as a failure to perform material obligations set forth in the OA or the Limited Liability Company Law or to cure the defect, "an act of fraud, theft or dishonesty" against the LLC, or a felony conviction (Id. at § 6.04).

The proceeding, disguised as an Article 7 request to recover possession of real property, is in reality an attempt by Univest to have the court intervene in the internal affairs of the LLC and provide them with powers that were not granted in the Operating Agreement. The relief requested shows the true nature of this request for court intervention:

> **WHEREFORE**, petitioner, Univest I Corp., derivatively on behalf of 470 Pearl Street, LLC, respectfully requests an Order of this Court granting this petition and awarding possession of the Parking Lot to the LLC; granting this petition and issuing a warrant to remove Skydeck from possession of the Parking Lot; granting this petition and ordering the parties to submit a confidential Request for Proposal for a new tenant for the Parking Lot; together with such other and further relief as the Court deems just and proper, including all costs and disbursements pursuant to RPAPL § 747(1), and all reasonable attorneys' fees.

Univest is not simply asking that the LLC be granted possession of the real property. Univest is asking the court to weigh in on their side in a two way business dispute between equal partners. The court already ruled on the termination of the lease with Skydeck. Univest now requests that the court go further and: "Order the parties to submit a confidential Request for Proposal for a new tenant for the Parking Lot". That is not the purpose of a derivative action. Univest coats the proceeding in a very transparent glaze of allegations as to a breach of fiduciary responsibilities, etc. Buffalo Development Corporations disagreement with Univest as to the proper operation of the limited Liability company is not a breach of any fiduciary obligations. It is a business disagreement pure and simple.

Luckily, the Members planned for this day. Unfortunately, Univest does not like the plan anymore. In forming the LLC, Univest and Buffalo Development Corporation negotiated a process for the resolution of disputes (Operating Agreement Section 9.01). Both parties, being sophisticated businesses, recognized that any 50/50 partnership might result in an intractable disagreement. This proceeding by Univest is an attempt override Buffalo Development Corporation's management rights and to avoid the negotiated for dispute resolution process. Univest seeks to carve out a pathway by which they, as a 50% member, can get leverage over Buffalo Development Corporation, the other 50% member.

The Operating Agreement is an indivisible integrated whole. Univest cannot pick and choose the parts it wants to keep and the parts it no longer likes. Univest should be made to fulfill all of the unambiguous negotiated obligations of the Operating Agreement.

III. UNIVEST CANNOT MAINTAIN THIS DERIVATIVE SPECIAL PROCEEDING.

It is settled that a limited liability company may bring a derivate suit (*Tzolis v. Wolff,* 10 N.Y.3d 100, 102, 855 N.Y.S. 6 (2008)). It is also been held that summary proceedings may be an appropriate process for a shareholder to recover possession of real property from a holdover tenant on behalf of a corporate entity. *See Gorbrook Associates v. Silverstein,* 40 Misc.3d 425,965 N.Y.S.2d 851 (Dist. Ct. Nassau Co. 2013).

However this Petition overlooks one critical fact present in this case: The parties agreed as a matter of contract that any litigation in the name of the LLC must be commenced by the Manager after getting the consent of the other Member. Shareholders and Members of an LLC are free to agree that certain rights otherwise available under law will only be exercised in compliance with the parties' contract. In those circumstances the court should uphold the freely negotiated obligations and rights of the parties unless they are against public policy or otherwise void or voidable.

IV. THE VERIFIED PETITION FAILS TO SET FORTH ANOTHER CRUCIAL ELEMENT IN THE STATUS OF THE PARTIES – THE COURT HAS ALREADY RULED ON THIS MATTER.

A verified petition to recover possession of real property must (1) state the interest of the petitioner in the real property; (2) state the respondent's interest in the real property;(3) describe the real property sufficiently; (4) state the facts on which the proceeding is initiated; and (5) state the relief sought by the petitioners. See RPAPL §741 (McKinney's 1965).

Petitioner acknowledges that "[R]espondent Skydeck is a former party to the now-terminated Lease Agreement but remains in possession of the Parking Lot pending further order of this Court". See Petition 126-28. It is not the possession of the property that is in issue here –

it is what the Members should do now since the Skydeck lease has been terminated. That is a business decision to be addressed to the internal operations and governance of the LLC. The operation of the LLC is governed by the Operating Agreement, not Article 7.

V. RPAPL 747(1) REQUIRES FEES BE AWARDED TO THE SUCCESSFUL PARTY.

A successful party in an Article 7 proceeding is entitled as a matter of law to recover their costs.

> *"§ 747. Judgment*
>
> *1. The court shall direct that a final judgment be entered determining the rights of the parties. The judgment shall award to the successful party the costs of the special proceeding."*
>
> NY CLS RPAPL § 747

CONCLUSION

For all the reasons mentioned herein, it respectfully is submitted that an order should enter dismissing the petition in its entirety and awarding reasonable attorney's fees to Buffalo Development Corporation under section 14.07 of the Operating Agreement, the amount of which to be determined at a separate hearing; together with such other and further relief as the Court deems just and proper, including all costs and disbursements pursuant to RPAPL § 747(1), and all reasonable attorneys' fees.

Dated: October 16, 2014
Buffalo, New York

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