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Bich v Bich
2023 NY Slip Op 50303(U) [78 Misc 3d 1220(A)]
Decided on April 6, 2023
Supreme Court, New York County
Lebovits, J.
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Decided on April 6, 2023

Supreme Court, New York County

Veronique Bich, Plaintiff,

against

Bruno Bich, Defendant.

Index No. 652092/2020

Glenn Agre Bergman & Fuentes LLP, New York, NY (Michael Paul Bowen of counsel), and Mosberg Sharma Stambleck Gross LLP, New York, NY (Heidi Harris of counsel), for plaintiff.

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Charish Law Group P.C., New York, NY (Michael A. Charish of counsel), for intervenors.

Gerald Lebovits, J.

This action, and the current motions, arises from an ongoing pitched battle among a husband, his ex-wife, and their grown children for ownership and control of assets and property worth many millions of dollars.

Plaintiff, Veronique Bich, is the ex-wife of defendant, the late Bruno Bich, who, during his lifetime, was the chairman and CEO of BIC (maker of pens, lighters, and more). While Ms. Bich and Mr. Bich were married, they entered into a postnuptial agreement in 2008 to allocate between them marital property —hundreds of thousands of shares of stock, luxury apartments and other real estate on two continents, fine art, a sailboat, and so on—upon the occurrence of specified "operative events," such as a formal separation. In 2020, Ms. Bich brought this action, alleging that an operative event had occurred under the agreement in August 2017 but that Mr. [*2]Bich was refusing to divvy up the property as promised.[FN1] Mr. Bich disputed that an operative event had occurred in 2017. He also argued that it was Ms. Bich who was failing to meet her obligations under their agreement.

On motion sequence 003 in this action, Ms. Bich moved, and Mr. Bich cross-moved, for partial summary judgment to enforce various provisions of the postnuptial agreement. One of those provisions, ¶ 19 (f), concerned Grenelle LLC, a Delaware limited-liability company created to own and manage at least 20 million dollars of Société Bic stock and an apartment in Paris. The four members of Grenelle were Mr. Bich and the couple's adult children (Gonzalve, Charles, and Guillaume Bich). Before ruling on the parties' requests for summary judgment, this court granted the Bich Children's request (mot seq 004) for leave to intervene and to submit briefing on issues related to Grenelle.

Mr. Bich died in 2021, while motion sequences 003 and 004 were pending. The couple's three children, Gonzalve Bich, Charles Bich, and Guillaume Bich, acting in their capacities as personal representatives of Mr. Bich's Estate, were substituted into the action as defendants (collectively, the Estate). (NYSCEF No. 129.)

In resolving motion sequence 003, this court held that an operative event had occurred in August 2017 (as Ms. Bich contended), but that many of the parties' ensuing property-allocation disagreements between the parties would require a trial. (*See Bich v Bich*, 2022 NY Slip Op 50079[U], at *4-7 [Sup Ct, NY County Feb. 9, 2022].)

Several of the parties' disagreements on motion sequence 003 concerned ¶¶ 19 (f) and 23 of the postnuptial agreement. Those provisions address (i) Mr. Bich's 98.98% interest in Grenelle; (ii) his resulting beneficial ownership of that share of Grenelle's assets (400,000 shares of Société Bic and the Paris apartment); and (iii) approximately ï¿½7.78 million in debt that Grenelle owed as of November 2007, having incurred that "Grenelle Debt" to buy the Paris

apartment. (*See* NYSCEF No. 158 at 15 ¶ 19 [f], 22 ¶ 23.) This court held under ¶ 19 (f) that the Estate was required to transfer Mr. Bich's 98.98% interest in Grenelle to Ms. Bich.

With respect to the Grenelle Debt, ¶ 23 of the postnuptial agreement made Ms. Bich responsible for that debt. (*See id.* at 22 ï¿½ 23.) Mr. Bich argued that he had fully paid off the Grenelle Debt, and therefore that Ms. Bich was required to reimburse him the entire ï¿½7.78 million in debt that had existed as of November 2007. This court rejected that argument. Instead, this court concluded, Ms. Bich's obligations with respect to the Grenelle Debt arose in August 2017 upon the occurrence of the operative event, not in May 2008 upon execution of the postnuptial agreement. (*See Bich*, 2022 NY Slip Op 50079[U], at *5.) As of August 2017, only ï¿½1.3 million or so remained of the Grenelle Debt; and disputed issues of fact existed about whether Mr. Bich had repaid that smaller sum from his own funds or from Grenelle income. (*See [*3]id.*) This court therefore denied Mr. Bich's cross-motion for summary judgment with respect to the Grenelle Debt.

After this court issued its February 2022 order, the parties engaged in extended settlement negotiations that proved unsuccessful. This court must therefore continue its efforts to provide a judicial resolution to this acrimonious—and high-stakes—family fight.

Now before the court are several motions arising from its February 2022 order. On motion sequence 009, the Estate moves to reargue this court's conclusion that Ms. Bich became responsible for the Grenelle Debt in August 2017 rather than in May 2008 (and in turn that the court's conclusion that Ms. Bich was not required to reimburse the millions of Euros of debt Mr. Bich paid down between those two dates). On motion sequence 010, the Bich Children also move to reargue, asking this court to clarify that the February 2022 order did not hold that Ms. Bich is entitled to direct, rather than beneficial, ownership of Grenelle's assets.

On motion sequence 011, the Estate moves for an order of attachment against Ms. Bich's assets and property located in New York State.

After this court granted leave to intervene to the Bich Children (*Bich*, 2022 NY Slip Op 50079[U], at *3), Ms. Bich asserted counterclaims to their intervenor complaint. In those counterclaims, Ms. Bich alleges that under ¶ 19 (f) of the postnuptial agreement, and this court's February 2022 order, she is entitled to a 98.98% membership interest in Grenelle and has power to appoint and remove Grenelle's managing director. The Estate and the Bich Children contend, on the other hand, that ¶ 19 (f) of the postnuptial agreement does not make Ms. Bich the 98.98% (and thus controlling) member of Grenelle, but instead confers on her only an *economic* interest in Grenelle's profits, losses, and distributions. They also argue that ¶ 19 (f) does not entitle Ms. Bich to receive Mr. Bich's authority to appoint and remove Grenelle's managing director. On motion sequence 012, the Bich Children move to dismiss Ms. Bich's counterclaims. On motion sequence 013, Ms. Bich moves for partial summary judgment on one of those counterclaims. She also seeks on that motion an order of contempt against the Estate for refusing to transfer to her Mr. Bich's membership interest in Grenelle and his appointment/removal power.

Motion sequences 009, 010, 011, 012, and 013 are consolidated for disposition. On motion sequence 009, leave to reargue is granted, and on reargument this court adheres to its original decision that Ms. Bich's obligations with respect to the Grenelle Debt arose in August 2017, not in May 2008. On motion sequence 010, leave to reargue is granted, and this court provides clarification of its February 2022 order. Motion sequence 011 is denied. On motion sequences 012 and 013, this court concludes that the Estate and the Bich Children are correct that ¶ 19 (f) did not require the Estate to transfer either Mr. Bich's membership interest in Grenelle or his authority to appoint/remove Grenelle's managing director. Motion sequence 012 is therefore granted, and motion sequence 013 is therefore denied.

DISCUSSION

[*4]I. The Estate's Motion to Reargue with Respect to the Grenelle Debt (Mot Seq 009)

On motion sequence 009, the Estate moves to reargue this court's conclusion that Ms. Bich could be responsible, at most, for repaying the ï¿½1.3 million in Grenelle Debt remaining as of August 2017, not the ï¿½7.78 million in debt that existed in May 2008. (*See Bich*, 2022 NY Slip Op 50079[U], at *5.)

A motion for leave to reargue under CPLR 2221 (d) may be granted upon a showing "that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." (*William P. Pahl Equip. Corp. v. Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [internal quotation marks omitted].) Leave to reargue is not warranted merely to "afford the unsuccessful party successive opportunities to . . . present arguments different from those originally asserted." (*Id.*)

Ms. Bich contends that leave to reargue must be denied because the Estate did not previously put before the court the interpretive argument on which it now relies. (*See* NYSCEF No. 184 at 4-5.) This contention is unpersuasive.

Ms. Bich is correct that the Estate initially cast its contentions in terms of Ms. Bich's putative obligation to pay the full ï¿½7.78 million Grenelle Debt as a condition precedent to the transfer to her of Mr. Bich's 98% interest in Grenelle, whenever that transfer might occur. (*See* NYSCEF No. 65 at 24-25.) The Estate now makes a somewhat different argument: That the postnuptial agreement required Ms. Bich to take on the Grenelle Debt 30 days after the May 2008 execution of the agreement, while waiting to receive Mr. Bich's interest in Grenelle until the operative event occurred in August 2017. (*See* NYSCEF No. 156 at 4-8.) At the same time, though, this court's ruling with respect to the Grenelle Debt emphasized the timing of when Ms. Bich's obligation to pay that debt arose. (*See Bich*, 2022 NY Slip Op 50079[U], at *5.) The Estate's current motion thus permissibly responds to this court's own interpretation of the agreement in its decision.

In light of the sums at issue, and the complexity of the disputed provisions of the postnuptial agreement, this court concludes that the Estate's interpretive challenge to this court's prior ruling warrants leave to reargue. On reargument, this court adheres to its original decision.

Paragraph 19 of the agreement provides that "[i]t is the intention of the parties that upon the occurrence of an Operative Event that all marital property shall be divided equally between them." (NYSCEF No. 158 at 14 ¶ 19.) Following an operative event, therefore, "the parties shall divide marital property, which each shall thereafter hold as his or her respective separate property, as follows. . . ." (*Id.*) Paragraph 19 (f) of the agreement provides that Ms. Bich shall receive Mr. Bich's "98.983798% interest in Grenelle, LLC, subject to the then outstanding indebtedness described in paragraph 23, which shall be transferred to her within thirty (30) days of the execution of this Agreement, as a result of which, the Wife shall thereafter have exclusive right to the Paris Apartment. . . ." (*Id.* at 15 ¶ 19 [f].) Paragraph 23 provides that as of November 16, 2007, "there was outstanding indebtedness owed to UBS" of which "ï¿½7,776,894.85 . . . is characterized as the 'Grenelle Debt,' which is attributable to the acquisition of the Paris [*5]Apartment." (*Id.* at 22 ¶ 23.) Ms. Bich "shall be solely responsible for the payment of the 'Grenelle Debt,' and further shall indemnify and hold the Husband harmless from all expenses and liabilities arising therefrom, including reasonable counsel fees." (*Id.*)

These terms of the postnuptial agreement are less clearly drafted than they might have been. As a result, neither party's argument about their meaning is fully satisfying.

For example, there is some force to the Estate's argument on this motion that the "which shall be transferred" clause of ¶ 19 (f) appears most naturally to refer only to the immediately preceding clause about indebtedness, not also to the earlier clause describing Mr. Bich's 98% interest in Grenelle. On the other hand, as this court already held, on the Estate's reading, Ms. Bich would become immediately responsible in 2008 for ï¿½7.78 million in Grenelle debt, while not receiving a corresponding interest in Grenelle unless and until an operative event occurred at some unspecified future date.[FN2] (*See Bich*, 2022 NY Slip Op 50079[U], at *5.)

Conversely, Ms. Bich has contended that *both* the Grenelle interest and the Grenelle debt were to be transferred in 2008. But the beginning of ¶ 19 provides that the property-division provisions of that paragraph, including 19 (f), shall occur "following the occurrence of an Operative Event." (NYSCEF No. 158 at 14 ¶ 19.) Similarly, ¶ 19 (f) includes a condition that the property at issue in that subparagraph be "still owned by either party at the time of the occurrence of an Operative Event."[FN3] (*Id.* at 15 ¶ 19 [f].) These provisions suggest that the transfer of Mr. Bich's Grenelle interest was required to occur in August 2017 upon the occurrence of the operative event), not June 2008 (30 days after execution of the agreement).

All that said, ¶ 19 is not the only relevant provision of the postnuptial agreement. Paragraph *16* states clearly that the paragraphs that follow it, through ¶ 32, inclusive, "shall only be effective upon the occurrence of an Operative Event, until which time the following provisions *shall be without force or effect*." (*Id.* at 12 ¶ 16 [emphasis added].) In other words, the transfer provisions of ¶ 19, the definition of "Grenelle debt" in ¶ 23, and the indemnification language in ¶ 23 became effective only in 2017—not, as the Estate's argument requires, 2008.

Reading ¶ 16 as rendering ¶¶ 19 and 23 as without force and effect until 2017 has the disadvantage that in substance it strikes the "shall be transferred" language in ¶ 19 (f) from the parties' contract—ordinarily an interpretive faux pas. Yet effectively reading this language out of the agreement flows directly from the conflicting terms of ¶ 16 and those of ¶ 19 (f), which this court may not wish away. Nor does this court agree with the Estate's suggestion that the conflict here may be resolved by resort to the interpretive canon that any inconsistency between a specific provision of a contract and a general provision should be resolved in favor of the specific one. (NYSCEF No. 156 at 8-9.) Paragraph 16 is only "general" in the sense that it applies its specific instruction to a number of contractual provisions, not just one. It would be very odd to treat Term A of a contract as legally effective in a particular circumstance in the face of Term B's express directive to refrain from doing so. The Estate provides no example of a case in which a court approved of doing so.

Further, as the Estate itself acknowledges, conflicting contractual provisions should be harmonized, with each accorded effect, only if it is *reasonably possible* to do so. (NYSCEF No. 156 at 9, quoting *Isaacs v Westchester Wood Works, Inc.*, 279 AD2d 184, 185 [1st Dept 2000].) The Estate's own account of how ¶¶ 16 and 19 (f) should be understood to interact shows that fully harmonizing these two terms of the postnuptial agreement is not reasonably possible.

The Estate claims that the Grenelle debt, as fixed in ¶ 23, was transferred from Mr. Bich to Ms. Bich under ¶ 19 (f) "at a specific point in time—within 30 days of executing the Agreement—even though [Mr. Bich] could not enforce the Debt until later," and that Mr. Bich could not "enforce the Debt to which [Ms. Bich's] Grenelle Interest is *subject* until the Grenelle Interest became transferable under the" agreement." (NYSCEF No. 156 at 8 [emphasis in original].) But ¶ 16 does not merely bar enforcement of ¶ 19 until the occurrence of an operative event. Rather, it provides, expressly, that ¶ 19 (and other terms) do not go into effect at all until the operative event. In other words, the Grenelle debt could not have been transferred in 2008, because the language providing for transfer was, at that time, a nullity. The Estate's position would instead require one in August 2017 to treat the Grenelle debt as having been *retroactively* transferred to Ms. Bich, thereby also making her retroactively responsible under ¶¶ 19 (f) and 23 for Mr. Bich's paying down approximately ï¿½6 million of that debt between May 2008 and August 2017. One cannot reasonably interpret the parties' postnuptial agreement as (implicitly) operating in this peculiar manner.

In short, upon considering the parties' submissions on reargument, this court adheres to its original conclusion that Ms. Bich could be responsible for, at most, only the ï¿½1.3 million of Grenelle debt outstanding at the time of the operative event, with the ultimate determination of responsibility for that sum to be reserved for the factfinder. (*See Bich*, 2022 NY Slip Op [*6]50079[U], at *5.)

II. The Bich Children's Motion to Reargue with Respect to Grenelle's Assets (Mot Seq 010)

In its February 2022 order, this court held that Ms. Bich was entitled to 589,624 Société Bic shares under ¶ 19 (g) of the parties' postnuptial agreement, which calls for Ms. Bich to receive 50% of the shares held by Mr. Bich or the parties, subject to conditions set out in ¶ 20.[FN4] (NYSCEF No. 158 at 15.) In determining that shares figure, this court followed ¶ 20's directive to take into account the 400,000 Société Bic shares owned by Grenelle. (*See* NYSCEF No. 158 at 17.) In particular, given the transfer to Ms. Bich of Mr. Bich's approximately 98% interest in Grenelle (discussed above), this court deemed 395,935 of Grenelle's 400,000 Société Bic shares to be part of Ms. Bich's share allocation for purposes of the 50-50 share split. (*See id.* ¶ 20; *Bich*, 2022 NY Slip Op 50079[U], at *4-5.)

On motion sequence 010, the Bich Children, intervenors in this action, move for reargument. In effect, intervenors ask this court to clarify the section of the February 22 order that discusses the Société Bic share allocation between Mr. Bich and Ms. Bich. (*See* NYSCEF No. 170 at 6-8.) Intervenors express concern that this discussion might have inadvertently suggested that Ms. Bich is entitled to direct ownership of the 395,935 shares now owned by Grenelle, as distinct from beneficial ownership of those shares through her 98.98% interest in Grenelle.

Ms. Bich's opposition to the motion does not contend that she is, in fact, entitled to direct ownership of the 395,935 shares in question. To the contrary, Ms. Bich states that it is as an "unremarkable and undisputed fact" that "Grenelle holds the Grenelle Bic[] shares." (NYSCEF No. 193 at 3.) Instead, she argues that because ownership of the Grenelle Bic shares "was not something any of the parties argued over before" and because "nothing in the [February 2022] [o]rder decided that issue" (*id.*), the motion is unnecessary, and instead is a stalking horse for a different set of arguments about the nature of Ms. Bich's Grenelle membership interest (*id.* at 4).

On considering this court's February 2022 order in light of the intervenors' concerns , this court agrees with intervenors that the order could be read, contrary to the court's intent, as holding that Ms. Bich is entitled under the postnuptial agreement to direct ownership of 395,935 Société Bic shares held by Grenelle. Leave to reargue is granted. On reargument, this court takes this opportunity to clarify that the February 2022 order does not award direct ownership of the Grenelle Bic shares to Ms. Bich. Nor does it rule that Grenelle is required to transfer to her direct ownership of those shares.

This court does not, however, address on this motion intervenors' additional arguments [*7]about the nature of Ms. Bich's membership interest in Grenelle (or the extent of the rights that accompany that interest). Those issues were not considered or decided in the February 2022 order. Instead, they have since been raised in the parties' additional motion practice. These issues are discussed below in this court's rulings on motion sequences 012 and 013.

III. Mr. Bich's Attachment Motion (Mot Seq 011)

On motion sequence 011, the Estate moves under CPLR 6201 and 6210 for an order of attachment against Ms. Bich's assets and property located in New York State.[FN5] The motion is denied. The Estate relies on the fact that Ms. Bich had listed for sale her principal asset in the state (a New York City luxury apartment). But a party's actual or imminent removal of property from the jurisdiction "is not grounds for attachment" absent a further showing that the party did so "with the requisite intent to either defraud [the party's] creditors or frustrate a potential money judgment." (*Halse v Hussain*, 193 AD3d 1140, 1142 [3d Dept 2021] [internal quotation marks omitted].) The Estate's limited evidence in support of that showing, consisting largely of a single email sent to Mr. Bich by Ms. Bich in 2020 (*see* NYSCEF No. 204), does not do more than "rais[e] mere suspicions of an intent to defraud" (if that). (*Shisgal v Brown*, 3 AD3d 434, 434 [1st Dept 2004].) That is not sufficient to warrant the drastic remedy of prejudgment attachment.

IV. The Bich Children's Motion to Dismiss Ms. Bich's Counterclaims to the Intervenor Complaint, and Ms. Bich's Motion for Partial Summary Judgment on Her Counterclaim and for Contempt (Mot Seqs 012 and 013)

As discussed above, this court's February 2022 order permitted the Bich Children to intervene in this action to vindicate their interests relating to Grenelle as members of the LLC. (*See Bich*, 2022 NY Slip Op 50079[U], at *3.) Ms. Bich raised several counterclaims to the intervenor complaint based on her allegation that she is a 98.98% member of Grenelle. On motion sequence 012, the Bich Children move to dismiss Ms. Bich's counterclaims. On motion sequence 013, Ms. Bich moves for summary judgment on her first counterclaim, seeking a declaration that she is the majority member of Grenelle and has the sole right and authority to appoint and remove Grenelle's managing director.

Relatedly, the February 2022 order directed the Estate to transfer to Ms. Bich "the entirety of his 98.983798% interest in Grenelle." (*Id.* at *8.) Following entry of that order, the Estate, acting through the Bich Children, executed a transfer-and-assignment instrument. That instrument stated that it reflected a transfer only of Mr. Bich's right to a share of profits, losses, [*8]and distributions from Grenelle—not his right, as a member of Grenelle, to vote on LLC-related matters, receive information about the LLC's business activities and inspect the LLC's books, and so on. (*See* NYSCEF No. 217 at 1 [assignment instrument]; *see also* NYSCEF No. 223 at 9 § 6.4 [operating agreement provision discussing rights of Grenelle members].) Ms. Bich also moves on motion sequence 013 to hold the Estate in contempt for refusing to transfer Mr. Bich's membership interest in Grenelle.

Because motion sequences 012 and 013 turn largely on the same issue—the nature of the interest in Grenelle to which Ms. Bich is entitled to receive under the postnuptial agreement—the court addresses them together. This court agrees with the Estate and the Bich Children that the postnuptial agreement does not itself require, or provide for, the transfer of Mr. Bich's membership interest in Grenelle, or the other management-related authority that Mr. Bich held under the Grenelle operating agreement.

The Bich Children's motion to dismiss Ms. Bich's intervention-counterclaims is granted. Ms. Bich's motion for partial summary judgment and for contempt is denied.

A. The nature of the "interest" in Grenelle that must be transferred under ¶ 19 (f) of the postnuptial agreement

Paragraph 19 (f) of the postnuptial agreement provides that upon the occurrence of an operative event, "the Wife shall receive the Husband's 98.983798% interest in Grenelle, LLC." (NYSCEF No. 158 at 15.) The agreement does not, however, specify what that interest consists of. This court's February 2022 order directing transfer of "the entirety of" that interest did not determine that question, either.[FN6] (*See Bich*, 2022 NY Slip Op 50079[U], at *8.)

The question thus becomes what "interest" means for purposes of ¶ 19 (f). Ms. Bich suggests that the "plain meaning of the term 'interest' in this context, which term is unqualified and unrestricted," is Mr. Bich's "ownership and power/control over Grenelle." (NYSCEF No. 239 at 10.) This court disagrees.

1. The definition of "interest" in the Grenelle operating agreement

Grenelle is organized under the Delaware Limited Liability Company Act. (*See* NYSCEF No. 223 at 1.) Its operating agreement provides that the agreement "shall be governed by and be construed in accordance with the laws of the State of Delaware." (*Id.* at 13 § 9.8.)

Because Grenelle is an LLC, Mr. Bich's "98.983798% interest in Grenelle" derives from, and is governed by, the terms of Grenelle's operating agreement. (*See Elf Atochem N. Am., Inc. v Jaffari*, 727 A2d 286, 290-291 [Del 1999] [explaining that Delaware's Limited Liability Company Act "permits members" of an LLC "to engage in private ordering with substantial freedom of contract to govern their relationship" through the LLC's operating agreement].) Ms. Bich's counsel had a copy of the Grenelle operating agreement when they negotiated the terms of the postnuptial agreement with Mr. Bich's counsel in 2008. (*See* NYSCEF No. 158 at 3 ¶ 2 [recital in postnuptial agreement]; *see also* NYSCEF No. 239 at 11 [acknowledging this point].)

The operating agreement defines "interest" in solely economic terms: A "[p]erson's share of the profits and losses of the Company and a [p]erson's right to receive distributions of the Company's assets in accordance with the provisions of this Agreement and the [Delaware LLC] Act." (NYSCEF No. 223 at 2.) If an interest, as defined above, is transferred, the recipient of that interest is a "[t]ransferee." (*Id.*) As Ms. Bich concedes, transferees may not be admitted as new *members* of Grenelle absent the managing director's written consent, and lack the rights of members.[FN7] (*Id.* at 8-9 §§ 6.3, 6.4; NYSCEF No. 239 at 10.) As Ms. Bich also concedes, the operating agreement provides that "Bruno Bich," specifically—not the holder of his economic or membership interest in Grenelle—has authority to appoint, remove, and replace Grenelle's managing director. (*Id.* at 6 § 3.1 [f] [block capitalization omitted]; NYSCEF No. 239 at 10.)

The operating agreement thus runs counter in two respects to Ms. Bich's position that "interest" in ¶ 19 (f) of the postnuptial agreement "refers to the entirety of [Mr. Bich's] 'interest' in Grenelle as a whole, without "differentiat[ing] or qualify[ing] that interest." (NYSCEF No. 239 at 10.) *First*, the unadorned term "interest," as used in the operating agreement, means only an economic interest in Grenelle's profits, losses, and distributions—not also membership. *Second*, Mr. Bich could not have transferred his "membership interest with the right to appoint, remove and replace the Managing Director" (*id.*) consistent with the operating agreement, because membership and authority over the managing director were not his to transfer unilaterally in the first place.

2. Whether to interpret "interest" in the parties' postnuptial agreement in light of the Grenelle operating agreement's definition of "interest"

Ms. Bich argues that "nothing in the Postnuptial Agreement . . . refers to or incorporates the written terms of the Operating Agreement," and that the postnuptial agreement should therefore be interpreted in isolation, having (assertedly) superseded the operating agreement. (*Id.* at 11-12.) But Ms. Bich does not provide any non-operating-agreement source—beyond, that is, her own say-so—for a definition of the capacious term "interest." And the Appellate Division, [*9]First Department, held in *MFB Realty LLC v Eichner* that whether a contract stating that it assigns an interest in an LLC has the effect of transferring membership in the LLC, or only an economic interest in the LLC, depends on the terms and conditions of the underlying LLC operating agreement. (*See MFB Realty LLC v Eichner*, 2016 NY Slip Op 31242[U], at *2, 4 [Sup Ct, NY County June 24, 2016], *affd* 161 AD3d 661, 661 [1st Dept 2018].)

Put differently, Ms. Bich's position is that the default understanding of "interest" in the postnuptial agreement is that it necessarily incorporates both an economic and a membership interest in Grenelle, and therefore that "had the parties intended for Ms. Bich to be only a 'Transferee' as defined in the earlier Operating Agreement, they could have (and would have) made that explicit in the later, superseding marital agreement." (NYSCEF No. 238 at 12.) This court concludes that the default interpretive presumption runs the other way—especially (but not only) because of the First Department's decision in *Eichner*. That is, "interest" in the postnuptial agreement should be understood as carrying the same meaning as in the operating agreement unless otherwise defined, which it was not. And here, as in *Eichner*, absent the requisite consent to admitting a transferee as a new member, the transfer itself did not convey with it membership status. (*See* 161 AD3d at 661.)

A further reason to reject Ms. Bich's read-it-in-isolation approach to interpreting ¶ 19 (f) is that she and the Estate would not be the only parties affected by a reading of the postnuptial agreement that disregards—indeed, undermines—relevant provisions of the Grenelle operating agreement. The Bich Children were and are members of Grenelle. Their rights would be affected were the postnuptial agreement understood to supersede the transferee/membership provisions of the operating agreement. But, as Ms. Bich acknowledges, the postnuptial agreement does not mention the operating agreement. Even assuming it could be appropriate to interpret an agreement between A and B as, in effect, amending the terms of a separate contract among A, C, D, and E, one would

expect express language to that effect. None is present here. This consideration has added force because Delaware corporate law adheres to the principle that "'it is far more tolerable to have to suffer a new passive co-investor one did not choose than to endure a new co-manager without consent.'"[FN8] (*Estate of Calderwood v ACE Grp. Intl. LLC*, 157 AD3d 190, 196 [1st Dept 2017], quoting *Milford Power Co., LLC v. PDC Milford Power, LLC*, 866 A.2d 738, 760 [Del Ch 2004].)

Ms. Bich contends that control over the management of Grenelle, including the power to appoint and remove Grenelle's managing director, necessarily follows from the transfer to Ms. Bich of Mr. Bich's economic interest in Grenelle. (NYSCEF No. 238 at 12-13; NYSCEF No. 239 at 10.) She bases this contention on her view that the managing director, and the "Intervenors as 1% owners of Grenelle who are in league with . . . the Managing Director . . . can [*10]deprive Ms. Bich of the [Paris] apartment and any dividends or other benefit of the Grenelle BIC shares." (NYSCEF No. 12.)

Ms. Bich's argument that this court should interpret the postnuptial agreement to avoid this asserted inequity has force. But it suffers from fatal interpretive and practical difficulties. At bottom, this court concludes that the postnuptial agreement, as drafted and agreed to by Mr. Bich and Ms. Bich, cannot reasonably be read in the way that Ms. Bich would prefer.

Contracts must be interpreted based on the parties' intentions, considered in light of the surrounding circumstances, as they exist *at drafting*, not years later. (*See S & S Media, Inc. v Vango Media, Inc.*, 84 AD2d 356, 359-360 [1st Dept 1982].) When the postnuptial agreement was drafted and executed in 2008, *Ms. Bich herself* was Grenelle's managing director. At that time, therefore, the possibility that tension could result from Ms. Bich's holding a 98.98% economic interest in Grenelle yet lacking management authority was, at most, hypothetical—either because Ms. Bich, as managing director, could have consented to her membership in Grenelle upon the transfer to her of the 98.98% economic interest in the LLC, or because Ms. Bich, as managing director, would have respected her own rights as holder of that 98.98% economic interest.

To be sure, it is conceivable that the parties might, in 2008, have intended to forestall the contingent possibility of an economic-interest/management-authority tension through assigning broader meaning to "interest" in the postnuptial agreement than in the Grenelle operating agreement (or the default provisions of the Delaware LLC Act).[FN9] That is, it is possible that the parties drafted the agreement with an eye toward ensuring that an operative event would lead to Ms. Bich's receiving not only an economic interest in Grenelle, but also corresponding voting/management authority. But whether or not the parties could in theory have done so, Ms. Bich provides no reason to think they *did* draft the postnuptial agreement with that intent.

If, instead, the parties simply failed to anticipate this contingency, it would be inappropriate for this court now to "distort the meaning" of the parties' chosen language and "thereby make a new contract for the parties under the guise of interpreting the writing." (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001] [internal quotation marks omitted].) That principle has particular applicability here, in construing a lengthy agreement that was carefully negotiated by sophisticated, specialist counsel.[FN10] (*See Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 72 [1978].)

For that matter, Ms. Bich continued (with only brief exceptions) to serve as Grenelle's managing director until March 2020, shortly before this action began. Thus, for more than two-and-a-half years after she triggered the operative event in August 2017, Ms. Bich remained in a [*11]position to give the necessary consent, as managing director, to transform an economic interest in Grenelle into a membership interest, were the interest to be transferred to her. But Ms. Bich does not contend that she attempted to obtain the transfer of the Grenelle interest during that period—or that it would have been legally or practically infeasible for her to have done so. Ms. Bich's apparent lack of action to protect her rights with respect to Grenelle further calls into question her argument that the only fair course is to interpret the 2008 postnuptial agreement in light of circumstances that did not exist until March 2020 at the earliest. That is, if the inequity to which Ms. Bich now objects came to pass at least in part due to Ms. Bich's own (in)action in protecting her rights after the operative event, it is unclear why this court should adopt a strained interpretation of the parties' intent in 2008 to avoid that inequity.

This court must instead construe ¶ 19 (f) of the postnuptial agreement as it is written. In doing so, this court concludes that the only reasonable reading of that provision is that it did not require Mr. Bich, upon the happening of an operative event, to make Ms. Bich a member of Grenelle, or to give to her his power to appoint and remove Grenelle's managing director.[FN11] Ms. Bich emphasizes that "a contract must be enforced so as to give the parties their benefit of the bargain *as set forth in the agreement*." (NYSCEF No. 239 at 12 [emphasis added].) That is true. But the bargain set forth in ¶ 19 (f) of the postnuptial agreement—as drafted to be mutually acceptable to two sophisticated parties—is not as Ms. Bich would have it.

B. How ¶ 19 (f)'s definition of "interest" should affect motion sequences 012 and 013

The next question is how to resolve the various requests for relief on motion sequences 012 and 013 in light of this court's conclusion about the proper interpretation of "interest" in ¶ 19 (f) of the postnuptial agreement.

1. Motion sequence 012

On motion sequence 012, the Bich Children seek to dismiss Ms. Bich's four counterclaims to their intervenor-complaint. The motion is granted.

Resolving the request to dismiss the first counterclaim is straightforward: That counterclaim seeks a declaration that Ms. Bich is the majority member of Grenelle with management authority over the LLC and its property, including the power to appoint and remove [*12]the managing director. (NYSCEF No. 218 at 10 ¶ 15.) This court has concluded, as set forth above, that Ms. Bich did not become a member of Grenelle under the postnuptial agreement, does not

have management authority, and was not entitled to receive Mr. Bich's appointment/removal power over the managing director. The branch of the Bich Children's motion seeking dismissal of the first counterclaim is granted.[FN12]

Similarly, the third and fourth counterclaims rest on allegations that the Estate acted improperly in failing to transfer Mr. Bich's membership in Grenelle, and his appointment/removal power, to Ms. Bich; and by transferring that appointment/removal power to the Bich Children, instead. (*See id.* at 11 ¶ 24, 12 ¶ 28.) Given this court's conclusion that Mr. Bich was not obligated under the postnuptial agreement to make those transfers to Ms. Bich, these counterclaims fail.

Determining whether to dismiss the second counterclaim, for a permanent injunction, entails more discussion. To the extent that this counterclaim seeks an injunction preventing the Bich Children from interfering with Ms. Bich's (putative) membership interest in Grenelle and appointment/removal power over the managing director (*see id.* at 11 ¶ 20), the counterclaim is subject to dismissal for the reasons already provided.

This counterclaim, though, could potentially be read as also requesting injunctive relief against interference with Ms. Bich's *economic* interest in Grenelle (*i.e.*, her right to income, dividends, profit distributions, and the like), and her related right under ¶ 19 (f) to use the Paris apartment that Grenelle owns. (*See id.* at 10 ¶¶ 14-17.) Injunctive relief of that sort would not be foreclosed by the conclusions about ¶ 19 (f) set forth above. As drafted, though, Ms. Bich's vague and somewhat conclusory allegations about wrongful interference with her economic interest in Grenelle (and her use of Grenelle-owned property) are insufficient to state a cause of action for a permanent injunction.[FN13] (*See Swartz v Swartz*, 145 AD3d 818, 829 [2d Dept 2016] [describing elements of permanent-injunction claim].) The second counterclaim as currently [*13]pleaded is subject to dismissal, as well.[FN14]

2. Motion sequence 013

On motion sequence 013, Ms. Bich moves for contempt against the Estate and for summary judgment on her fourth counterclaim against the Bich Children. (*See* NYSCEF No. 249 [order to show cause]; NYSCEF No. 238 at 9 [memorandum of law].) The motion is denied.

Ms. Bich's contempt request, as she articulates it in her motion papers, is based on the Estate's failure or refusal to transfer to her (i) Mr. Bich's membership interest in Grenelle and (ii) his authority to appoint and remove Grenelle's managing director. (*See* NYSCEF No. 238 at 8-13.) As already discussed, this court disagrees with Ms. Bich's position that the Estate was required to effect either transfer. No failure to comply with a court order, no basis for contempt.

Ms. Bich also asks this court to grant her summary judgment on her fourth counterclaim against the Bich Children. But that counterclaim depends on the argument that Mr. Bich was required to transfer his appointment/removal power as a corollary of his obligation to transfer his membership interest. This court has already rejected the argument that Mr. Bich was obliged to transfer his membership interest. And, as noted above, Mr. Bich's authority under Grenelle's operating agreement to appoint or remove the managing director was not based on his status as a member of Grenelle, but was personal to *him*, in particular. (*See* NYSCEF No. 223 at 6 ¶ 3.1 [f].) Even if this court had accepted Ms. Bich's argument about the nature of the Grenelle interest, it still would not necessarily follow that Mr. Bich was obligated also to transfer his appointment/removal power.

Ms. Bich's motion for contempt and for partial summary judgment is denied. Given this decision's resolution of the parties' disagreement about what Grenelle interest must be transferred, the court assumes that the necessary transfer will now occur promptly.[FN15]

Accordingly, for the foregoing reasons, it is

ORDERED that the Estate's motion for leave to reargue this court's order entered February 10, 2022 (mot seq 009), is granted, and on reargument this court adheres to the ruling in that order that is the subject of the motion; and it is further

ORDERED that the Bich Children's motion for leave to reargue this court's February 10, [*14]2022, order (mot seq 010), is granted, and on reargument this court clarifies the ruling in that order that is the subject of the motion; and it is further

ORDERED that the Estate's motion for an order of attachment (mot seq 011) is denied; and it is further

ORDERED that the Bich Children's motion to dismiss Ms. Bich's counterclaims to the intervenor complaint (mot seq 012) is granted; and it is further

ORDERED that Ms. Bich's motion for partial summary judgment on her intervenor-counterclaims, and for an order of contempt (mot seq 013) is denied; and it is further

ORDERED that all parties shall appear before this court for a virtual status conference on May 1, 2023.

4/6/2023

Footnotes

Footnote 1: Ms. Bich separately sued in this court for divorce. This court (Michael Katz, J.) entered a divorce judgment in January 2021. That judgment

provided that the parties' postnuptial agreement survived as a separate, enforceable contract.

Footnote 2: One might conceivably connect the clause of ¶ 19 (f) calling for the transfer of the Grenelle Debt to Ms. Bich with the ensuing language that "as a result of which, the Wife shall thereafter have exclusive right to the Paris Apartment," purchased using funds borrowed by Grenelle. (NYSCEF No. 158 at 15 ¶ 19 [f].) But Mr. Bich averred in support of his cross-motion that he understood "exclusive right" to oust only *his* rights to the Paris apartment—*i.e.*, that he viewed this language in ¶ 19 (f) as not affecting the rights of the parties' *children*, as "members of the [Grenelle] LLC," to "use the Paris Apartment without restriction from its acquisition until earlier" in 2020. (NYSCEF No. 66 at 4 ¶ 19.)

Footnote 3: Ms. Bich suggests that "marital agreements typically include such provisions requiring an immediate transfer of an item during the marriage that is not enforceable until a condition precedent is met." (NYSCEF No. 184 at 9.) But the decision she attaches to support this suggestion does not include an example of this kind of provision. (*See* NYSCEF No. 82 at 31-40 [reproducing decision].) That ruling does not involve an agreement providing for an "immediate transfer." Rather, it addresses a contractual obligation under which one spouse was required to make a payment to the other *within 18 months* of the beginning of the marriage, enforceable starting at the 18-month-mark. (*See id.* at 33.) The delay in enforceability under that agreement arose from the nature of the payment obligation—*i.e.*, the obligation accrued for breach-of-contract/enforcement purposes only when the 18-month payment period expired. (*See id.* at 33, 39.) The structure of that agreement thus differs from Ms. Bich's proposed interpretation of the postnuptial agreement as providing for a fixed-but-not-yet-enforceable transfer obligation.

Footnote 4: This court directed the Estate to turn over the 589,624 shares to Ms. Bich, making up any share shortfall through a cash payment based on an agreed-upon share price. (*See Bich*, 2022 NY Slip Op 50079[U], at *5.)

Footnote 5: The Estate previously sought on this motion an interim order of attachment "to the extent of $30,271,232." (NYSCEF No. 277 at 2.) This court denied the request for an interim order on the ground that the Estate had "not shown that [Ms. Bich] has, or is about to, move assets outside the jurisdiction of this court so as to warrant the drastic relief of an interim attachment of 30 million dollars." (*Id.* at 3.)

Footnote 6: Ms. Bich suggests that the February 2022 order's reference to the "entirety" of the Grenelle interest reflected this court's view that Ms. Bich was entitled to both Mr. Bich's economic *and* membership interests in Grenelle. (*See* NYSCEF No. 239 at 11.) But this court's order held only that Mr. Bich was required to transfer all the interest in Grenelle addressed by ¶ 19 (f) of the postnuptial agreement. It did not also resolve what that interest consisted of.

Footnote 7: Grenelle's members at the time of its organization were Mr. Bich and the Bich Children. (*See* NYSCEF No. 223 at 15.) The operating agreement does provide that a Grenelle member who transferred all his interest in the LLC would thereby lose his membership status. (NYSCEF No. 223 at 8 § 6.1.) But that is different from the member's transferee's *gaining* membership.

Footnote 8: For this same reason, this court is not persuaded by Ms. Bich's contention that one cannot reasonably interpret ¶ 19 (f) as providing that Ms. Bich would hold a 98% economic interest in Grenelle but not be able to run the LLC. (*See Estate of Calderwood*, 157 AD3d at 196-197 [rejecting argument that it would be "absurd" for the holder of a majority economic interest in an LLC to lack the right to participate in and vote on LLC decisionmaking].)

Footnote 9:*See* 6 Del C § 18-702 (b) (setting default rules for when an assignee/transferee of an interest in an LLC may become a member of the LLC).

Footnote 10: The terms of the postnuptial agreement are 31 pages long (plus two signature pages and six pages of attachments and exhibits). (*See* NYSCEF No. 158.)

Footnote 11: Ms. Bich asserts that "[w]ere Bruno still alive, this Court could have ordered him to direct the company Managing Director, upon pain of removal, to consent to Ms. Bich's membership," and also to document that Ms. Bich, "as the almost 99% owner, has full power to remove and appoint the company Managing Director." (NYSCEF No. 238 at 3.) Ms. Bich does not, however, identify the authority (whether contractual, equitable, or otherwise) by which this court could have acted as she proposes. Nor may this court now turn back the clock to before Mr. Bich's death.

Footnote 12: The Bich Children also argue in their memorandum of law that this court should declare in their favor that Ms. Bich lacks a membership interest in, and management authority over, Grenelle. (NYSCEF No. 221 at 17.) But the Bich Children did not move for that relief. Because this is a CPLR 3211 motion to dismiss claims on the pleadings, not a CPLR 3212 motion for summary judgment, this court lacks authority to grant judgment to a nonmoving party.

Footnote 13: In her reply memorandum of law on motion sequence 013, Ms. Bich states that during briefing on the motion, Grenelle received dividends from its Bic shares that were then not distributed to Ms. Bich in proportion to her economic interest. (*See* NYSCEF No. 272 at 4, 6.) Ms. Bich has not, however, provided proof in admissible form of that contention. Nor is it clear on the arguments and record before this court whether the asserted absence of any such dividend-related distribution would stem from a decision by Grenelle's managing director to withhold payment to Ms. Bich notwithstanding her interest in the LLC—or instead because no interest has yet been transferred to Ms. Bich due to the dispute about the nature of that interest now before this court.

Footnote 14: This court expresses no opinion on the merits of a permanent-injunction claim based on different or more detailed allegations—or, indeed, any other claim that Ms. Bich might assert against the Estate or the Bich Children relating to Grenelle or Grenelle property.

Footnote 15: Ms. Bich has not raised—and this court does not address—a claim for any distributions made by Grenelle between entry of this court's prior order on February 10, 2022, and the forthcoming effective date of the transfer to Ms. Bich of the 98.98% economic interest in Grenelle.

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