

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS  
Justice

IA Part 2

MAN CHOI CHIU and 42-52 NORTHERN  
BLVD.,LLC,

Plaintiffs,

-against-

WINSTON CHIU,

Defendant

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WINSTON CHIU,

Counterclaim Plaintiff/Third Party Plaintiff,

-against-

MAN CHOI CHIU,

Counterclaim Defendant/Third Party Defendant

-and-

HELEN CHIU and THERESA CHIU,  
Nominal Counterclaim Defendants,

-and-

42-52 NORTHERN BLVD., LLC,  
Nominal Counterclaim Defendant.

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WINSTON CHIU,

Plaintiff,

-against-

MAN CHOI CHIU and NORTHERN  
BLVD., LLC,

Defendants.  
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Action #1

Index No. 21905/07

Motion Date 10/26/12

Motion Cal. No. 1

Motion Seq. No. 22

Action # 2

Index No. 25275/07

The following papers numbered 1 to 7 read on this motion by plaintiff Man Choi Chiu (MCC) for an order pursuant to CPLR 4404(b) and 5019(a) modifying a decision of this court dated August 30, 2012 rendered after a trial to the extent of correcting a purported “computational error” in the net asset value of 42-52 Northern Boulevard, LLC and on this cross motion by defendant Winston Chiu (WC) for an order, inter alia, modifying the post-trial decision of this court to the extent of finding that the net asset value of 42-52 Northern Boulevard, LLC was \$11,659,867 as of February 9, 2008

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits.....	1
Notice of Cross Motion - Affidavits - Exhibits.....	2-5
Answering Affidavits - Exhibits.....	
Reply Affidavits.....	6-7

Upon the foregoing papers it is ordered that the motion and cross motion are denied.

### I. Introduction

Having received a post-trial decision of this court, the parties in this case are attempting to use it to alter the net asset value of 42-52 Northern Boulevard, LLC and hence the buy-out amount due WC. They go in opposite directions. MCC seeks to have these sums reduced, and WC, not surprisingly, seeks to have these sums increased.

There were two cases pending before the court: (1) *Man Choi Chiu and 42-52 Northern Boulevard, LLC v. Winston Chiu* (Index No. 21905/07) (the MCC action) and (2) *Winston Chiu v. Man Choi Chiu and 42-52 Northern Boulevard, LLC* (Index No. 25275/07) (the WC action).

The joint trial of these actions occurred on October, 25, 26, 27, 28, and 31, 2011; November 1, 2, 3, 28, and 29, 2011; December 2, 2011; February 2, 3, 6, and 7, 2012; March 14, 20, 21, 22, 28, and 30, 2012; and April 3, 2012.

After the trial, this court rendered its twenty-one page decision dated August 30, 2012.

### II. MCC’s Motion

CPLR 5019, “Validity and correction of judgment or order; amendment of docket.” permits the court to cure a judgment or order affected by a “mistake, defect or irregularity.” MCC’s reliance on CPLR 5019 is misplaced because his motion does not involve a mere “clerical” or “mathematical” error. ( *See, Fleming v. Sarva*, 15 Misc3d 892.) “Clerical

mistakes may be corrected; substantive ones may not.” ( *Fleming v. Sarva*, 15 Misc3d 892, 895; *Greenstein v. Greenstein*, 65 AD3d 607.) MCC’s motion involves, inter alia, the interpretation of evidence received at the trial, e.g., whether alleged liabilities are truly current liabilities.

CPLR 4404, “Post-trial motion for judgment and new trial,” provides in relevant part: “ (b) Motion after trial where jury not required. After a trial not triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside its decision or any judgment entered thereon. It may make new findings of fact or conclusions of law, with or without taking additional testimony, render a new decision and direct entry of judgment, or it may order a new trial of a cause of action or separable issue.” Whether to modify a post-trial decision pursuant to CPLR 4404(b) is a matter which rests in the sound discretion of the court. ( *See, In re Ramsey H.*, 99 AD3d 1040; *Pratt on Behalf of Rebecca T. v. Schryver*, 103 AD2d 1016.) Under the circumstances of this case, MCC is not entitled to relief pursuant to CPLR 4404(b).

Briefly, the plaintiff, Man Choi Chiu (MCC) , claims that in 1999, in order to assist his older brother, the defendant, Winston Chiu (WC), in deferring the payment of federal taxes owed on the sale of California property, he allowed his brother to participate in the purchase of property located at 42-52 Northern Blvd., Long Island City, New York ( the NB property). According to MCC, at no time did he intend that his brother have any real interest in a limited liability company formed to hold the property. MCC asserts that the tax returns, corporate resolutions, opinion letters, guarantees, etc. were all created to give the illusion of ownership without any real benefit in order to assist his brother in deferring the payment of federal taxes on the sale of the California property. On the other hand, WC alleges that his interest in the NB property was real, that tax planning was not his motive, and that a compensable interest in the amount of at least 25% was created.

In its decision dated August 30, 2012, the court wrote in relevant part: “MCC should be credited with a capital contribution in the sum of \$1,233,014 for money spent on renovations made before February 9, 2008. His total capital contributions made as of February 9, 2008 amounted to \$1,814,576.90 (\$581,562.93 + \$1,233,014). WC’s total capital contribution made as of February 9, 2008 amounted to \$193,854.41. The total capital contribution made by the members as of February 9, 2008 amounted to \$2,008,431.30, and MCC contributed 90% of this sum and WC contributed 10% (rounded off). \*\*\*¶ As of February 9, 2008, WC’s appraisal expert (Salmon) valued the NB property at \$13,500,000, and MCC’s appraisal expert ( Haims) valued the property at \$13,700,000. After making determinations about the liabilities of the LLC, WC’s valuation expert ( Mercer) concluded that the LLC had a net asset value of \$10, 427,000, and MCC’s valuation expert ( Nelson) concluded that the LLC had a net asset value of \$10,449,739. (Surprisingly, WC, who is seeking the buy-out, produced experts who arrived at the lower figure.) Nelson offered the more credible testimony about MCC’s capital contributions for improvements ( they were not

loans), and the court adopts his net asset valuation of \$10,449,739. \*\*\* ¶ Based on all of the foregoing, the court finds that the LLC had a fair value of \$10,449,739 as of February 9, 2008. The court further finds that the fair value of WC's interest in the LLC as of February 9, 2008 amounted to \$1,044,974. ( 10% x \$10,449,739.) In the event of a buy-out, WC would be entitled to the sum of \$1,044,974 plus statutory interest from the valuation date. (*See, In re Superior Vending, LLC*, 71 AD3d 1153; *Blake v. Blake Agency, Inc.*, 107 AD2d 139 [“Special Term erred by not awarding interest on its award of the ‘fair value’ of petitioner's shares.”].) \*\*\* ¶ In regard to the MCC action: MCC is entitled to judgment on the first cause of action declaring that WC had a 10% interest in the LLC as of February 9, 2008. The first cause of action is otherwise dismissed. The counterclaims and the third party complaint are dismissed. ¶ In regard to the WC action: WC is entitled to judgment on the first cause of action declaring that he had a 10% interest in the LLC as of February 9, 2008. WC is entitled to judgment on his second cause of action to the extent that (1) the court declares that he validly withdrew as a member of the LLC effective February 9, 2008 and (2) the court directs MCC to purchase WC's interest in the LLC by the payment of \$1,044,974 plus statutory interest from February 9, 2008 within ninety days of the service upon MCC of a copy of the judgment to be entered hereon.. WC is entitled to judgment on the third cause of action to the extent that the LLC will be dissolved if MCC fails to complete the buy out as directed herein. The remaining causes of action are dismissed.”

MCC asserts that the court made a “computational error” in the total amount of \$1,366,780 in LLC liabilities in its calculations by (a) not including \$1,142,000 in funds derived from 1-9 Bond Street which were used to purchase the property because this was debt and not a capital contribution, (b) not using the figure \$1,149,920 ( a difference of \$7,920) as the amount derived from 1-9 Bond Street, (c) not including the sum of \$186,152 in debt owed to Win Restaurant Supplies, a company owned by MCC, and (d) not including the sum of \$30,708 as a debt owed to Win Restaurant Equipment & Supply Corp., another company controlled by MCC. By attempting to raise the amount of debt owed by the LLC, MCC hopes to reduce the net asset value of the LCC from \$10,449,739 to \$9,082,959 and to thereafter reduce the “buy out” value of WC's 10% interest f rom \$1,044,974 to \$908,296. ( a difference of \$136,678).

At the trial and in the post-trial memoranda the court was given a choice between the valuation opinions of the two expert witnesses offered by the parties. The court was given just two net asset values. As the court wrote in its August 30, 2012 decision: “After making determinations about the liabilities of the LLC, WC's valuation expert ( Mercer) concluded that the LLC had a net asset value of \$10, 427,000, and MCC's valuation expert ( Nelson) concluded that the LLC had a net asset value of \$10,449,739.” The opinions were close, and the court adopted the valuation offered by MCC's expert. MCC may not be heard to complain now that the valuation offered by his own expert was too high. The time to point out that the net asset value arrived at by his own expert was subject to variations depending on how certain infusions of MCC were interpreted was at the trial or, at the very

latest, in the post-trial memoranda. Moreover, there are issues pertaining to whether the alleged additional liabilities not taken into account by the court are truly current liabilities and not, for example, rents or expenses paid by MCC and/or his companies. It appears from the record that infusions made by MCC or his companies were treated as payment of rents or expenses. The conflicting affidavits of the valuation experts submitted on this post-trial motion do not provide a basis for the court to modify its decision.

### III. WC's Cross Motion

WC seeks to have the net asset value of the LLC increased from \$10,427,000 to \$11,659,867 and to have his ownership percentage increased from 10% to 13%. This would increase his buy-out amount from \$1,044,974 to \$1,515,782, a difference of \$470,808 (excluding interest).

WC argues that this court's decision of August 30, 2012 which determines which funds infused into the LLC by MCC were contributions and which were loans affects the calculation of the LLC's net asset value. The points raised by Mercer, WC's expert, in his post trial affidavit, should have been raised at the trial or at the very latest in the post-trial memoranda submitted by the parties. WC's attorney can hardly claim to be surprised by this. As WC's attorney admits on this motion: "Neither Mr. Mercer nor Mr. Nelson considered the NAV to be independent of the question of whether money used to alter the property was considered as a contribution of Man Choi \*\*\*." (Affirmation of Jonathan Mazer dated October 26, 2012, p6.) WC's expert did not offer at the trial differing net asset values of the LLC depending on how MCC's infusions were viewed, and his attempt to do so by way of a post trial affidavit comes too late. The court will not redetermine at this post trial stage the net asset value of the LLC based on the clashing post trial affidavits of the parties' valuation experts. The court will not resolve anew the issue of which party's valuation method is the more reliable. Recalculation of the net asset value is not simply a matter of changing figures used for contributions; recalculation also involves questions of interpretation of evidence and valuation methodology as can be seen from Nelson's attempt to use this court's decision to decrease the net asset value and Mercer's attempt to use the same decision to increase the net asset value. The court will not reopen the trial, which has already been lengthy, to permit further cross examination of the expert witnesses concerning, e.g., methodology, "foregone cash," rent, and , whether alleged liabilities are truly current liabilities.

Dated: January 9 , 2013

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J.S.C.