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At an IAS Term, Part Comm-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30th day of December, 2013.

PRESENT:

HON. DAVID I. SCHMIDT,

Justice.

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HOWARD MINTZ AND SUSAN MINTZ-BELLO, AS CO-TRUSTEES OF THE MAX MINTZ QTIP TRUST, AND SUSAN MINTZ-BELLO, AS TRUSTEE OF THE SUSAN MINTZ-BELLO GRANTOR RETAINED ANNUITY TRUST DATED SEPTEMBER 24, 2012 (THE "MINTZ TRUSTS"), INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF ASTORIA HOLDING CORP.,

Plaintiffs,

- against -

Index No. 502127/13

ROCHELLE PAZER, DINA BASSEN, LISA PAZER AND ASTORIA HOLDING CORP.,

Defendants.

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The following e-filed papers numbered 1 to 82 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	20-43 51-64, 66
Opposing Affidavits (Affirmations)	67-69
Reply Affidavits (Affirmations)	77-81
Memoranda of Law	44 65, 70, 76
Transcript of Oral Argument	82

Upon the foregoing papers, in this action by plaintiffs Howard Mintz (Howard) and Susan Mintz-Bello (Susan) (collectively, the Mintzes), as Co-Trustees of the Max Mintz QTIP Trust, and Susan Mintz-Bello, as Trustee of the Susan Mintz-Bello Grantor Retained Annuity Trust dated September 23, 2012 (the Mintz Trusts), individually and derivatively on behalf of Astoria Holding Corp. (Astoria), against defendant-counterclaim plaintiff Rochelle Pazer (Pazer) and defendants Dina Bassen (Dina), Lisa Pazer, and Astoria (collectively, the Pazers), the Mintz Trusts move, by order to show cause, for an order granting them partial summary judgment in their favor on the fourteenth, fifteenth, sixteenth, and seventeenth causes of action of their complaint, and dismissing, with prejudice, Pazer's first and second counterclaims. Pazer cross-moves for an order, pursuant to CPLR 3212, granting her partial summary judgment in her favor on her first counterclaim, and denying the Mintz Trusts' motion for partial summary judgment.

BACKGROUND

Astoria is a closely held corporation located in Brooklyn, New York. It is a family business that was founded and originally owned by both Max Mintz (Max), who owned 48% of its shares (the Mintz shares), and Louis Lisa Mintz (Louis), who owned approximately 52% of its shares (the Pazer shares). Max was the father of Howard and Susan (who are brother and sister), and Louis was Pazer's father and Max's cousin. Notwithstanding the slight disparity in Max and Louis' equity ownership, they shared 50/50 voting power. This arrangement was memorialized in a November 26, 1990 letter agreement and a December

31, 1990 letter agreement (collectively, the 1990 Agreement), which provided that the Mintz shares and the Pazer shares would "have equal voting rights (i.e., each of [them] shall have a 50% vote) in all matters concerning Astoria."

Astoria's sole significant asset is Georgetowne Shopping Center (the Center), which is located on Ralph Avenue, in Brooklyn, New York, and is comprised of approximately 140,000 square feet of leased and leasable commercial real estate. Until February 2012, Astoria also owned a company called New Chalet, Inc. (New Chalet), which, in turn, owned a residential development in Lake Mohegan, New York. In addition, Max and Louis previously owned a third company, Avenue K Corp. (Avenue K).

Max owned the Mintz shares, was the president and a director of Astoria, and managed the day-to-day affairs of Astoria and the Center until his death in 2003. At that time, the Mintz Shares passed into the Mintz Trusts for the lifetime benefit of Max's wife, Hilda, and of Howard and Susan as residual beneficiaries. Following Hilda's death in February 2011, Howard and Susan became the trustees and sole beneficiaries of the Mintz Trusts. The Mintz shares in the Max Mintz Credit Shelter Trust were subsequently duly assigned to the Susan Mintz-Bello Grantor Retainer Annuity Trust dated September 24, 2012, of which Susan is the trustee. Based on the 1990 Agreement, when Max died, Pazer became the president of Astoria and assumed the management of the Center. The Mintz Trusts and Pazer also succeeded to Max and Louis' interests in Avenue K.

Between 2003 and 2011, sharp differences and conflicts arose between the Mintz Trusts and Pazer concerning the parties' respective rights in Astoria and its direction, management, and operation. This led to Pazer's commencement, on May 20, 2011, of an action to dissolve Astoria and Avenue K (*Pazer v Astoria Holding Corp.*, Sup Ct, Kings County, index No. 11631/11) (the 2011 dissolution action). The Mintz Trusts, in their answer, agreed that they and Pazer were hopelessly deadlocked, and that Astoria and Avenue K should be dissolved. Following extensive court supervised negotiation, Pazer and the Mintz Trusts reached a settlement of the 2011 dissolution action by their entry into virtually identical Shareholders' Agreements for Astoria and Avenue K, which are both dated July 31, 2011.

Section 1.2 of the Shareholders' Agreement states that the percentage interest of ownership of Astoria of each shareholder is set forth in Exhibit A, which is annexed to such Agreement. Exhibit A to the Shareholders' Agreement lists the shareholders and their ownership interests as: Pazer with a 52.0317% interest, and the two Mintz Trusts, one with a 5.7707% interest, and the other with a 42.1976% interest.

Section 1.3 of the Shareholders' Agreement provides that Pazer and her transferees (the Pazer Group) and the Mintz Trusts and their transferees (the Mintz Group) shall be deemed to each have a 50% voting interest in Astoria. Section 2.1.1 of the Shareholders' Agreement states that the initial directors appointed by the Pazer Group are Pazer and Dina,

and section 2.1.2 of the Shareholders' Agreement states that the initial directors appointed by the Mintz Group are Howard and Susan.

The Shareholders' Agreement provided for a procedure to be followed in the event that a shareholder desired to sell his or her shares. This procedure is set forth in section 8.2 of the Shareholders' Agreement, entitled "Right of First Offer," which, as pertaining to such a sale, provides, in pertinent part, as follows:

> "If a Shareholder (a 'Selling Shareholder') desires to sell all or any portion of his or her shares (an 'Intention to Sell'), then other Shareholders shall have an option to purchase all (but not less than all) of such Offered Shares (the 'Offered Shares') at the Purchase Price and on the terms and conditions hereinafter defined (the 'Option').
>
> "(a) The Selling Shareholder shall deliver a written notice (the 'Notice') to the other Shareholders of his or her Intention to Sell, offering to sell the Offered Shares to the other Shareholders. The other Shareholders may elect by written notice (the 'Purchase Notice') to the Selling Shareholder delivered within thirty (30) calendar days after receipt of the Notice to purchase all or any portion of the Offered Shares ('Purchase Election') . . ."

The Shareholders' Agreement, in order to avoid further litigation between Pazer and the Mintz Trusts, also set forth a detailed multi-step process to be followed in the event of a future deadlock among the board of directors of Astoria. This process is set forth in section 4.8 of the Shareholders' Agreement, entitled "Deadlock." Section 4.8.1 provides as follows:

> "If the Directors have failed for any reason to approve a Major Decision by the Approval Deadline (a 'Disputed Matter'), the Directors of such Board shall negotiate in good-faith for a period of thirty (30) days following such Approval Deadline to

> reach a unanimous decision regarding the Disputed Matter through face-to-face meetings and/or conference calls. Upon the expiration of such thirty (30) day period, unless the Directors have unanimously consented in writing to a course of action with respect to the Disputed Matter, a 'Deadlock' shall be deemed to have occurred."

Section 4.8.2 of the Shareholders' Agreement sets forth that upon the occurrence of a deadlock, the directors are required to arrange for a telephonic or in-person conference with the court to resolve the deadlock in mediation to be held within five days thereafter or as soon as possible for the court. In order to avoid the dissolution of Astoria, the Shareholders' Agreement includes buy-out procedures to terminate co-ownership of the Mintz Trusts and Pazer in the event that the deadlock among the directors representing the Mintz Group and the Pazer Group could not be resolved in mediation.

Section 4.8.3 of the Shareholders' Agreement provides as follows:

> "If the Directors cannot resolve the Deadlock pursuant to Section 4.8.2, then the Right of First Offer in accordance with Section 8.2 hereof shall apply in accordance with the procedure set forth in the last sentence of Section 8.2 (a). If neither shareholder elects to purchase the Shares of the other in accordance with such procedure, then the respective corporation shall diligently take steps to sell its assets (for the best price obtainable, after reasonable marketing), to wind up its affairs and dissolve, and distribute the net sales proceeds to the shareholders pro rata in accordance with their then Percentage Interest(s) in the respective corporation (subject to section 8.2 hereof). If a sale of the relevant assets has not occurred pursuant to this Section 4.8.3 within five (5) months of the Deadlock first arising, then the Shareholders irrevocably agree to stipulate to (and in no way oppose) a court appointment of an independent receiver for the respective corporation to implement its dissolution (immediately upon the request of the Mintz

> Group or the Pazer Group), including marketing and sale of all assets, winding up of affairs, and dissolution of the respective corporation(s) in the year that the sale of its primary real estate asset occurs, if reasonably possible. This Agreement may be specifically enforced in court by either the Mintz Group or the Pazer Group in any action seeking appointment of such receiver. In the event of any Deadlock, the provisions of Sections 4.8.1, 4.8.2 and 4.8.3 shall prevail and control over any contrary provisions of this Agreement."

The last sentence of section 8.2 of the Shareholders' Agreement provides as follows:

> "In addition, if any Deadlock exists which has not been resolved pursuant to section 4.8.2 hereof, then either the Mintz Group or the Pazer Group shall have the right to give the other Shareholder Group a Purchase Notice as to all of the Shares owned by the other Shareholder Group within ten (10) business days after such failure to resolve, in which event the Shareholders shall proceed under section 8.2 (b), (c) and (d) below."

Section 8.2 (b) provides:

> "(b) If any Purchasing Shareholders deliver Purchase Notice(s) to purchase some or all of the Offered Shares, then those elections to purchase shall be irrevocable, regardless of the amount of the Purchase Price later determined for the Offered Shares pursuant to subsection (c) below. Both the Selling Shareholder and the purchasing Shareholders shall be irrevocably obligated to sell and buy the Offered Shares at the Purchase Price specified below, regardless of what that Purchase Price is determined to be, and failure to either sell or buy the Offered Shares at the Purchase Price shall be a breach of contract allowing for full breach of contract monetary damages and/or the remedy of specific performance by the non-breaching party(ies)."

Section 8.2 (c), in pertinent part, provides that "[t]he Purchase Price shall be determined as follows:

"(i) If pursuant to the foregoing the Offering Shareholder timely receives from the other Shareholders written notice(s) electing to purchase all of the Offered Shares, then within ten (10) days thereafter, each of the Purchasing Shareholders (acting collectively) and the Selling Shareholder shall select a Qualified Appraiser. Each Qualified Appraiser shall determine the final and binding Purchase Price for the Offered Shares, which shall be equal to the appraised fair market value of all assets of [Astoria] . . . less all of [its] liabilities, multiplied by a fraction, the numerator of which is the number of Offered Shares, and the denominator of which is the total number of voting shares issued and outstanding for [Astoria] (collectively, the "Determinations'). If the higher Determination varies by 10% or less from the lower Determination, the Purchase Price will be the average of the two Determinations. If the Determinations vary by more than 10%, within thirty (30) days after delivery of the Determinations, the Qualified Appraiser selected by the Selling Shareholder and the Qualified Appraiser selected by the Purchasing Shareholders shall appoint a mutually acceptable Qualified Appraiser who shall be empowered only to select which of the two Determinations is the closest to such third Qualified Appraiser's Determination, which whichever such Determination is selected shall be final, binding and conclusive on the Shareholders as to the Purchase Price of the Offered Shares (and the third Qualified Appraiser may not select any Purchase Price other than selecting which of the first two Determinations is closest to the . . . third Qualified Appraiser's Determination) . . ."

Section 8.2 (d) provides:

"If all of the Offered Shares are not agreed to be purchased and then purchased as described in this Article, then the Selling Shareholder shall be free to consummate the sale of all or any portion of the Offered Shares to any Person at any price and terms within twelve (12) months of the date of the completion of the appraisal process set forth herein, and there shall be no further preferential right of any Shareholder(s) to buy any such previously Offered Shares under this section 8.2 otherwise during such twelve (12) month period, and this section 8.2 shall

be automatically thereupon deemed null, void and deleted from this Agreement as to any and all such previously Offered Shares. If the Selling Shareholder does not sell the Offered Shares to any Person during such twelve (12) month period, the Option shall once again apply with regard to any subsequent attempt to transfer the Shares."

Section 11.1, entitled "Notice," provides as follows:

"Any notice or demand which, under the provisions of this Agreement or otherwise, must or may be given or made by any party hereto, shall be in writing and shall be given or made by either (i) hand delivery, (ii) recognized overnight delivery courier service, (iii) mailing the same by postage prepaid certified mail, return receipt request or (iv) facsimile transmissions as follows: [i]f to Pazer[, then at her address w]ith a copy to [her attorneys, or i]f to the [Mintz] Trusts[, to the Mintzes at their respective addresses w]ith a copy to [their attorney]."

Section 11.5 of the Shareholders' Agreement, entitled "Construction," provides:

"Each Shareholder acknowledges and agrees that they have had the benefit of their own independent legal counsel in connection with the negotiation and drafting of this Agreement. This Agreement shall be construed without regard to or aid of any presumption, rule or canon requiring construction against the party drawing this Agreement."

Section 11.9 of the Shareholders' Agreement, entitled "Amendments," provides:

"This Agreement shall not be altered, amended, changed, waived, terminated or otherwise modified in any respect or particular unless the same shall be in writing and signed by all of the Shareholders who own Shares on the date of such amendment."

Section 11.10 of the Shareholders' Agreement, entitled "Entire Agreement," in pertinent part, provides:

> "This Agreement, the Bylaws of [Astoria] and the Certificate of Incorporation of [Astoria] constitute the entire agreement of the Shareholders, and supersedes all prior written and oral agreements, understandings and negotiations by or among the Shareholders or [Astoria] and/or other prior shareholders of [Astoria] . . ."

On May 25, 2012, following the declaration of a deadlock of the directors of Avenue K, after three conferences were held before the court in an unsuccessful attempt to resolve the parties' deadlock through mediation, Pazer sent a Purchase Notice, pursuant to section 8.2 (a) of Avenue K's Shareholders' Agreement (which, as noted above, was virtually identical to Astoria's Shareholders' Agreement), of her intent to purchase all of the shares in Avenue K owned by the Mintz Trusts predicated upon the parties' failure to resolve a deadlock with respect to major decisions facing that company. By an e-mail dated June 8, 2012, the Mintz' California attorney, Alan Guttenberg, Esq., initially informed Pazer's attorney (as further discussed below) that, contrary to Pazer's attorney's interpretation of section 8.2 (a) (who interpreted this section as only permitting the shareholder who first served a Purchase Notice to purchase the other shareholder's shares), he interpreted this section as also permitting the Mintz Trusts to be simultaneously permitted to serve a Purchase Notice to buy Pazer's shares in Avenue K, and that since the Shareholders' Agreement did not address what would happen if this occurred, that the fair result would be that the shareholder group offering the highest purchase price would get to buy out the other group or, alternatively, that neither shareholder group could exercise its purchase right and the company would have to sell its assets on the open market and liquidate. The Mintz

Trusts, however, subsequently, decided not to seek to purchase Pazer's assets in Avenue K. Pazer's attorney, in a June 11, 2012 e-mail, while continuing to dispute that the Mintz Trusts could have elected to seek to purchase Pazer's shares in Avenue K, acknowledged that since the Mintz Trusts elected not to seek to purchase these shares in Avenue K, this issue was rendered moot. Thereafter, Pazer bought all of the Mintz Trusts' shares in Avenue K.

Disputes among Pazer and the Mintzes also arose with respect to Astoria. On August 27, 2012, Pazer sent an e-mail to the Mintzes, which stated as follows:

> "It appears that we're at a deadlock on a number of things. We can follow the procedure set forth in our Shareholders' Agreement or expedite that process by agreeing to sell [the Center] now and retaining a mutually acceptable broker to market and sell the property. Of course, if you're prepared to buy me out let me know and we can retain appraisers and proceed that way. Please let me know your thoughts. Suffice it to say, I disagree with your position with respect to distributions particularly since you have advised that repairs of approximately $850,000 are required and will more fully respond to your recent e-mail on the subject if you are not prepared to either sell the property or buy my interest in it. Thanks for your consideration of this proposal."

By an e-mail dated August 29, 2012, Howard responded to Pazer, stating that he and Susan were "definitely prepared to and desire[d] to buy [her] out of Astoria . . . and proceed to retain appraisers and determine the valuation/buyout price under the Astoria Shareholders' Agreement." Howard, in this e-mail, further stated that he "accept[ed Pazer's] offer . . . to sell [them her] shares under the Shareholders' Agreement due to Deadlock, and to proceed with the appraisal process to determine the purchase price under the Shareholders'

Agreement section 8.2." In addition, Howard, in this e-mail, stated that his and Susan's attorney advised them that they all "should address certain procedures otherwise provided by [the] Shareholders' Agreement regarding such 'Deadlock buyout,'" and that he was, therefore, attaching a "Waiver and Acknowledgment Agreement for [all of them] to sign," in order to "formalize[her] agreement to sell [them her] Astoria shares, and [their] election and agreement to buy them under the Shareholders' Agreement" and to "waive[] the procedures that would otherwise apply to [their] acknowledged and agreed 'Deadlocks.'" Howard stated, in this e-mail, that he "hope[d Pazer's] offer [w]as sincere, and if so, [he and Susan] ask[ed] that Pazer and Dina . . . sign, date and return the attached Waiver and Acknowledgment to [them] within two business days."

The attached Waiver and Acknowledgment Agreement stated, among other things, that Pazer, individually and as a shareholder and director of Astoria, and Dina, as a director of Astoria, agreed that a deadlock existed under section 4.8.1 of the Shareholders' Agreement, that they irrevocably waived all requirements and conditions to the Mintzes, as Shareholders under the Shareholders' Agreement, to exercising their Right of First Offer under section 4.8.3 of the Shareholders' Agreement and delivering a valid and enforceable 'Purchase Notice to Pazer under section 8.2 (a), including any requirement to conduct a mediation under section 4.8.2. It further stated that "[e]xecution and delivery of this Waiver and Acknowledgment by all signatories below shall conclusively and irrevocably be deemed [the] Mintz[es'] delivery, and Pazer's receipt and acceptance, of a valid and enforceable . .

. Purchase Notice [by the Mintzes] to buy all shares of Astoria owned by Pazer, under the last sentence of . . . section 8.2 (a) [of the Shareholders' Agreement], and Pazer waives any right to deliver [to the] Mintz[es] a Purchase Notice as to Astoria shares owned by [the] Mintz[es] by reason of the existing 'Deadlock.'"

Pazer's attorney responded to Howard's August 29, 2012 e-mail in a telephone conversation with the Mintzes' attorney on that day by stating that it was not Pazer's intent to sell her shares in Astoria under the terms and conditions proposed by the Mintzes. He explained to the Mintzes' attorney that Pazer would allow the Mintzes to buy her shares in Astoria on the express conditions that the transaction close by the end of the year 2012, that the Mintzes provide sufficient proof of their ability to pay the purchase price for her shares, and that the Pazers and the Mintzes exchange general releases.

By an e-mail and first class mail letter dated September 7, 2012, the Mintzes' attorney advised Pazer's attorney that the Mintzes considered Pazer's August 27, 2012 e-mail as an offer to sell her Astoria shares to the Mintz Trusts and that they had accepted that offer on August 29, 2012. The Mintzes' attorney asserted that the Mintzes were not required by the Shareholders' Agreement to close by December 31, 2012 or to have a "time is of the essence" agreement, that they were not required by the Shareholders' Agreement to show proof of their ability to pay the purchase price for her shares, and that there was no basis for Pazer's demand for a general release from them as a condition of the sale. By an e-mail and a letter by regular mail dated September 10, 2012, Pazer's attorney responded to the Mintzes'

attorney that no purchase agreement existed between their respective clients, that the draft waiver that her clients had forwarded was not signed by Pazer and was unacceptable, and that Pazer would be pleased to discuss a sale with the Mintzes predicated on the terms that were raised.

By a letter to the court dated September 11, 2012, the Pazers sought mediation in this matter pursuant to section 4.8.2 of the Shareholders' Agreement on various issues, including repairs to the Center, shareholder distribution payments by the Mintzes, and e-mails sent by Alan Guttenberg, Esq. to Astoria's bank, Credit Agricole, which they asserted, were causing serious damage to Astoria's relationship with the bank and the potential for it to call Astoria's mortgage. By a letter to the court dated September 13, 2012, the Mintzes responded that there was already a binding offer and acceptance for the purchase and sale of Pazer's shares in Astoria, but that if the court deemed mediation to be appropriate, they had no objection to attending such mediation. In addition, the Mintzes raised numerous additional "Deadlock issues," including Pazer's refusal to address or remedy defective and deteriorating conditions at the Center, which were causing damages to Astoria, and the failure to adopt any annual budget for 2011 or 2012 and to approve reserves and distributions.

The mediation was held before the court on September 27, 2012. The mediation was unsuccessful, and a deadlock was declared. The Mintz Trusts, at the conclusion of the mediation on September 27, 2012, served a Purchase Notice on Pazer, pursuant to sections

4.8.3 and 8.2 (a) of the Shareholders' Agreement, electing to purchase all of the shares in Astoria owned by the Pazer Group predicated on the parties' failure to resolve a deadlock with respect to major decisions facing Astoria. The Purchase Notice advised Pazer to select her qualified appraiser within 10 days after her receipt of such notice in accordance with the provisions of the Shareholders' Agreement and to advise them of her selection. Thereafter, Pazer decided to serve her own Purchase Notice to purchase the Mintz Trusts' shares in Astoria, and she served her Purchase Notice on October 4, 2012, seven days after the Mintz Trusts' had already served their Purchase Notice.

On April 25, 2013, the Mintz Trusts e-filed the instant action against the Pazers, alleging seventeen causes of action in their complaint, which consists of 89 pages. The Mintz Trusts' complaint alleges that Pazer breached the Shareholders' Agreement and her fiduciary duty as manager of Astoria by, among other things, refusing to distribute and/or cause Astoria to distribute dividends to the shareholders in accordance with the Shareholders' Agreement, failing to provide the board of directors with a competent draft annual budget, and allowing the Center to fall into structural repair. The Mintz Trusts' complaint further alleges that following the declaration of multiple deadlocks, Pazer became irrevocably obligated to sell her shares in Astoria to them. The Mintz Trusts' complaint seeks money damages, and declaratory and injunctive relief. On June 24, 2013, the Pazers e-filed a 181-page answer, interposing 12 counterclaims against the Mintz Trusts, alleging, among other things, a claim seeking a declaratory judgment concerning the shareholders' purchase rights,

a claim seeking injunctive relief, and derivative claims seeking damages, on behalf of Astoria, for breach of fiduciary duty, breach of the Shareholders' Agreement, tortious interference with contract, waste of corporate assets, and conversion.

The Mintz Trusts' fourteenth cause of action seeks a judgment declaring that: (a) Pazer, by her August 27, 2012 e-mail, offered to sell all of the Pazer shares to them at a price determined through the appraisal process as prescribed in the Shareholders' Agreement, (b) they, by their August 29, 2012 e-mail, accepted Pazer's offer, and (c) Pazer is contractually obligated to sell all of the Pazer shares to them at a price determined through the appraisal process as prescribed in the Shareholders' Agreement. The Mintz Trusts' fifteenth cause of action seeks a judgment declaring that: (a) Pazer's August 27, 2012 e-mail constituted a Notice of Intention to Sell under the Shareholders' Agreement, (b) their August 29, 2012 e-mail constituted a Purchase Notice under the Shareholders' Agreement, (c) by delivering the aforementioned Purchase Notice to Pazer and all notice parties under the Shareholders' Agreement on August 29, 2012, they properly exercised their Right of First Offer under the Shareholders' Agreement, and (d) Pazer became irrevocably obligated as of August 29, 2012 to sell all of the Pazer shares to them at a price to be determined by the appraisal process prescribed in the Shareholders' Agreement.

The Mintz Trusts' sixteenth cause of action seeks a judgment declaring that: (a) they properly exercised their Right of First Offer to purchase the Pazer shares following the failure of the directors to resolve the deadlock by delivering the September 27, 2012

Purchase Notice to Pazer and all notice parties, (b) Pazer became irrevocably obligated as of September 27, 2012 to sell the Pazer shares to them at the price to be determined by the appraisal process prescribed by the Shareholders' Agreement, (c) the service by them of the September 27, 2012 Purchase Notice preempted and precluded Pazer from exercising any option she may have had under the Shareholders' Agreement to purchase the shares following the failure of the directors to resolve deadlocks or otherwise, (d) Pazer's October 5, 2012 notice purporting to elect to purchase their shares was void and of no force and effect, and (e) under no circumstances is there any obligation to sell Astoria and its assets on the open market or otherwise. The Mintz Trusts' seventeenth cause of action seeks a judgment directing Pazer to specifically perform her obligation to sell all of the Pazer shares to them at the price to be determined through the appraisal process prescribed in the Shareholders' Agreement, and, as part of such specific performance, to submit to and complete the appraisal process prescribed by the Shareholders' Agreement by a date certain, to be determined by the court.

Pazer's first counterclaim alleges an individual claim by her against the Mintz Trusts for a declaratory judgment concerning the shareholders' purchase rights under section 8.2 of the Shareholders' Agreement. Pazer alleges that there is a justiciable controversy as to whether both parties are allowed to submit Purchase Notices in the event of a failed mediation, and if so, how to determine the ultimate buyer and seller of the parties' respective interests in Astoria, and that this requires the intervention of the court to declare the rights

of the parties. Pazer seeks a declaratory judgment declaring that the intention of the parties as reflected in the Shareholders' Agreement was to give either the Mintz Group or the Pazer Group the right to buy the other one out by giving a Purchase Notice within 10 business days of a failed mediation and not to favor either shareholder group regardless of who acted first in giving a Purchase Notice. She requests the court to declare that where both shareholder groups exercise their purchase rights, either the shareholder group offering the highest purchase price through a bidding process "wins" and gets to buy the other group out, or that neither shareholder group may exercise its purchase rights and, that, instead, Astoria must sell its property on the open market. second counterclaim. She asserts that she submitted a valid Purchase Notice under the Shareholders' Agreement to purchase the shares of the Mintz Trusts, despite the fact that she submitted such Purchase Notice after the Mintz Trusts submitted their Purchase Notice, and that, therefore, the court should direct either a bidding process to determine which shareholder group is entitled to buy out the other group, or alternatively, a sale of Astoria's assets on the open market.

Pazer's second counterclaim seeks an injunction enjoining the Mintz Trusts from continuing the current appraisal process since she is disputing that the Mintz Trusts have the right to buy out her shares based upon the fact that they served the first Purchase Notice. She, as previously noted, requests, instead, that the court should fashion a remedy, whereby a bidding process takes place and Astoria is awarded to the highest bidder, or that Astoria must, instead, sell its assets to an outside entity on the open market.

On July 16, 2013, the Mintz Trusts e-filed their instant motion, which seeks partial summary judgment in their favor on the fourteenth, fifteenth, sixteenth, and seventeenth causes of action of their complaint, and dismissing Pazer's first and second counterclaims. On August 20, 2013, Pazer e-filed her cross motion for partial summary judgment in her favor on her first counterclaim. On September 30, 2013, the court held oral argument of the motion and cross motion.

DISCUSSION

The Fourteenth and Fifteenth Causes of Action

The Mintz Trusts' fourteenth and fifteenth causes of action are predicated on the August 27, 2012 e-mail delivered by Pazer to them. They contend that this e-mail constituted a written offer to sell all of the Pazer shares to them at a price determined through the process prescribed by the Shareholders' Agreement, and that, on August 29, 2012, they delivered a written acceptance of Pazer's offer. They set forth, in their fourteenth cause of action, that this offer and acceptance created a binding contractual obligation on the part of Pazer to sell them her shares.

The Mintz Trusts maintain, in their fifteenth cause of action, that the August 27, 2012 e-mail from Pazer constituted a Notice of Intention to Sell all of the Pazer shares within the meaning of section 8.2 of the Shareholders' Agreement, and that this triggered their Right of First Offer. They argue that the August 29, 2012 constituted a Purchase Notice under

section 8.2 of the Shareholders' Agreement, and that Pazer became irrevocably obligated to sell all of her shares to them on August 29, 2012.

In opposition, the Pazers argue the August 27, 2012 e-mail was only a non-binding, exploratory invitation to offer her shares and was not a binding offer to sell her shares in Astoria. She asserts that this e-mail was indefinite as to its material terms since it was vague as to how the shares would be priced and that she did not specifically reference the appraisal process of the Shareholders' Agreement in this e-mail. She further asserts that this e-mail did not set forth a time frame for completing any proposed transaction.

Pazer additionally argues that the August 27, 2012 e-mail was not a formal notice as defined by the Shareholders' Agreement since it was not served in accordance with section 11.1 of the Shareholders' Agreement, which (as noted above) contained specific service requirements. She further argues that the Mintzes' own communication reveals that they did not view her August 27, 2012 e-mail as a binding offer since the Mintzes' August 29, 2012 e-mail stated that they "hope[d her] offer . . . [wa]s sincere," and if so, that she and Dina should sign a Waiver and Acknowledgment Agreement. She contends that this Waiver and Acknowledgment Agreement constituted a counteroffer, at best, which she never signed or accepted.

"To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (*Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*,

93 NY2d 585, 589 [1999], *rearg denied* 93 NY2d 1042 [1999]). "In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look . . . to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds" (*Minelli Constr. Co., Inc. v Volmar Constr., Inc.*, 82 AD3d 720, 721 [2d Dept 2011] [internal quotation marks omitted]). A purported offer must evidence the offering party's intent to be bound, and in the absence of such an intent, a purported offer is nothing more than a non-binding invitation to a future agreement (*see Id.* at 721-722; *Thome v Alexander & Louisa Calder Found.*,70 AD3d 88, 104 [1st Dept 2010], *lv denied* 15 NY3d 703 [2010]).

Here, a perusal of Pazer's August 27, 2012 e-mail indicates a lack of the definiteness and certainty that are required of an offer. Indeed, its exploratory nature is indicated by her request for the Mintzes' thoughts, rather than for their acceptance of an offer, thereby indicating that she was inviting further discussions on how they would proceed. The lack of Pazer's intention that her August 27, 2012 e-mail was to constitute a formal notice to sell her shares pursuant to section 8.2 (a) of the Shareholders' Agreement is further evidenced by her lack of service of this e-mail in accordance with section 11.1 of the Shareholders' Agreement. While the Mintz Trusts argue that other business communications were sent by e-mail, a notice pursuant to section 8.2 (a) of the Shareholders' Agreement required a greater degree of formality than a mere ordinary business communication (*see D. A. D. Rest. v*

Anthony Operating Corp., 139 AD2d 485, 486 [2d Dept 1988], *appeal denied* 72 NY2d 806 [1988]).

Furthermore, Howard's August 29, 2012 e-mail in response to Pazer's August 27, 2012 e-mail (as noted above) stated that he "hope[d]" her offer was sincere, indicating that he did not believe it to be binding, and he demanded that Pazer and Dina (who was not involved in the sending of Pazer's e-mail) return and sign the Waiver and Acknowledgment Agreement within two business days "if" her offer was sincere. This was effectively a counteroffer, with additional terms and an additional party, which also acknowledged the need for further formalization and agreement of terms. Thus, even if Pazer's informal, exploratory e-mail were construed as an offer, in order for a binding agreement to exist, Pazer and Dina would have had to have executed and returned Howard's Waiver and Acknowledgment Agreement, which they did not do.

Consequently, the court finds that the parties evinced that Pazer's August 27, 2012 e-mail itself was not binding, and that it, along with the Mintz Trusts' August 29, 2012 e-mail, constituted merely an "'agreement to agree,'" which is unenforceable (*Matter of El-Roh Realty Corp.*, 74 AD3d 1796,1800-1801 [4th Dept 2010]; *see also Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109 [1981]; *Uniland Partnership of Del. L.P. v Blue Cross of W. N.Y. Inc.*, 27 AD3d 1131, 1132 [4th Dept 2006], *rearg denied* 27 AD3d 1131 [4th Dept 2006], *lv denied* 7 NY3d 713 [2006]). Summary judgment in favor of the Mintz Trusts on their fourteenth and fifteenth causes of action must, therefore, be denied

since it must be declared that these e-mails did not result in a binding contract or an exercise of the Right of First Offer pursuant to section 8.2 of the Shareholders' Agreement.

The Sixteenth and Seventeenth Causes of Action and the First and Second Counterclaims

As noted above, the Mintz Trusts' sixteenth cause of action seeks a declaratory judgment that Pazer must sell her shares in Astoria to them based upon their September 27, 2012 Purchase Notice, and their seventeenth cause of action seeks specific performance of this sale. They argue that following the declaration of deadlock after the unsuccessful mediation, this Purchase Notice rendered Pazer irrevocably obligated to sell them her shares pursuant to section 8.2 of the Shareholders' Agreement.

The Pazers, in opposition to the Mintz Trusts' motion and in support of their cross motion, argue that this court should interpret and construe section 8.2 of the Shareholders' Agreement as allowing them to also serve a Purchase Notice. They argue that the term "either" in section 8.2 of the Shareholders' Agreement means that both they and the Mintz Trusts had the right to serve a Purchase Notice within 10 days after an unsuccessful mediation.

The Pazers also rely upon the legal interpretation of section 8.2 of the Shareholders' Agreement by the Mintz Trusts' prior attorney, Mr. Guttenberg, Esq., and argue that the Mintz Trusts should be estopped from contending that Pazer could not serve a competing Purchase Notice. They contend that, as previously suggested by Mr. Guttenberg, Esq., in his June 8, 2012 e-mail, the court should fashion an equitable remedy, providing for a bidding

war, with the highest bidder winning the right to purchase the other shareholder's shares in Astoria, or, alternatively, that the shareholders should both be forced to sell their shares to an outsider.

In addressing these contentions, the court notes that "the sound rule in the construction of contracts [is] that where the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language" (*R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32 [2002], *rearg denied* 98 NY2d 693 [2002] [internal quotation marks omitted]). Under well-established rules of contract interpretation, "'when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms'" (*Signature Realty, Inc. v Tallman*, 2 NY3d 810, 811 [2004], quoting *R/S Assoc.*, 98 NY3d at 32; *see also Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013]; *South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 277 [2005]; *Reiss v Financial Performance Corp.*, 97 NY2d 195, 198 [2001], *W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]; *Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978], *rearg denied* 46 NY2d 940 [1979]). This rule must be applied "with even greater force in commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople" (*Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 7 [1st Dept 2012]; *see also Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]; *R/S Assoc.*, 98 NY2d at 32; *Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995]; *Bovis Lend Lease [LMB], Inc. v Lower Manhattan Dev. Corp.*, 108 AD3d 135, 145 [1st Dept 2013]; *Riverside S. Planning*

Corp. v CRP/Extell Riverside, L.P., 60 AD3d 61, 67 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). In such cases, "'courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include'" (*Vermont Teddy Bear Co.*, 1 NY3d at 475, quoting *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 72 [1978]).

The existence of ambiguity is determined by examining the "'entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed,'" with the wording viewed "'in the light of the obligation as a whole and the intention of the parties as manifested thereby'" (*Kass v Kass*, 91 NY2d 554, 566 [1998], quoting *Atwater & Co. v Panama R.R. Co.*, 246 NY 519, 524 [1927]) , and "read in the context of the entire agreement" (*W.W.W. Assoc.*, 77 NY2d at 163; *see also Banco Espírito Santo, S.A. v Concessionária Do Rodoanel Oeste S.A.*,100 AD3d 100, 106 [1st Dept 2012]; *Riverside S. Planning Corp.*, 60 AD3d at 67).

""An omission or mistake in a contract does not constitute an ambiguity [and] . . . the question of whether an ambiguity exists must be ascertained from the face of an agreement without regard to extrinsic evidence'" (*Reiss*, 97 NY2d at 199, quoting *Schmidt v Magnetic Head Corp.*, 97 AD2d 151, 157 [2d Dept 1983]). "'[E]xtrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous on its face'" (*W.W.W. Assoc.*, 77 NY2d at 163, quoting *Intercontinental Planning v Daystrom, Inc.*, 24 NY2d 372, 379 [1969], *rearg denied* 25 NY2d 959 [1969]).

"Even where a contingency has been omitted, [courts] will not necessarily imply a term since '"courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing"'"(*Reiss*, 97 NY2d at 199, quoting *Schmidt*, 97 AD2d at 157, quoting *Morlee Sales Corp. v Manufacturers Trust Co.*, 9 NY2d 16, 19 [1961]; *see also Ashwood Capital, Inc.*, 99 AD3d at 7). Courts are concerned "with what the parties intended, but only to the extent that they evidenced what they intended by what they wrote" (*Rodolitz v Neptune Paper Prods.*, 22 NY2d 383, 387 [1968] [internal quotation marks omitted]). Thus, rather than assess evidence regarding what was in the parties' minds at the time of the agreement, a court must first look to the agreement itself.

"[W]hen the terms of a written contract are clear and unambiguous, the intent of the parties must be found therein" (*Bianco v Bianco*, 36 AD3d 490, 491 [1st Dept 2007] [internal quotation marks omitted]). "'The best evidence of what parties to a written agreement intend is what they say in their writing'" (*Schron*, 20 NY3d at 436, quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]).

Here, the primary question is whether the Shareholders' Agreement is ambiguous. Specifically, the court must determine whether section 8.2 of the Shareholders' Agreement is "reasonably or fairly susceptible of different interpretations or may have two or more different meanings" (*New York City Off-Track Betting Corp. v Safe Factory Outlet, Inc.*, 28 AD3d 175, 177 [1st Dept 2006] [internal quotation marks omitted]). "Whether a contractual

term is ambiguous must be determined by the court as a matter of law, looking solely to the plain language used by the parties within the four corners of the contract to discern its meaning and not to extrinsic sources" (*Ashwood Capital, Inc.*, 99 AD3d at 7-8; *see also Kass*, 91 NY2d at 566). "Unless the court finds ambiguity, the rules governing the interpretation of ambiguous contracts do not come into play" (*R/S Assoc.*, 98 NY2d at 33; *see also Matter of Wallace*, 86 NY2d at 548 [1995]; *Breed*, 46 NY2d at 355). Thus, when interpreting an unambiguous contract term "[e]vidence outside the four corners of the document . . . is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc.*, 77 NY2d at 162). "'[E]xtrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face'" (*id.* at 163, quoting *Intercontinental Planning*, 24 NY2d at 379; *see also R/S Assoc.*, 98 NY2d at 33; *Reiss*, 97 NY2d at 199).

A contract is unambiguous if "on its face [it] is reasonably susceptible of only one meaning" (*Greenfield*, 98 NY2d at 570). "Parol evidence cannot be used to create an ambiguity where the words of the parties' agreement are otherwise clear and unambiguous" (*Banco Espírito Santo, S.A.*, 100 AD3d at 106; *see also Innophos, Inc. v Rhodia, S.A.*, 38 AD3d 368, 369 [1st Dept 2007], *affd* 10 NY3d 25 [2008]). Conversely, "[a] contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings" (*Banco Espírito Santo, S.A.*,100 AD3d at 106, quoting *New York City Off-Track Betting Corp.*, 28 AD3d at 177 [internal

quotation marks omitted]). "Whether a contract is ambiguous presents a question of law for resolution by the court" (*Banco Espírito Santo, S.A.*, 100 AD3d at 107; *see also Kass*, 91 NY2d at 566).

In interpreting the terms of the Shareholders' Agreement, the court notes that "the ordinary and natural meaning of the agreement's words are dispositive" (*Banco Espírito Santo, S.A.*, 100 AD3d at 107). "Words and phrases used in an agreement must be given their plain meaning, and it is common practice for courts to refer to the dictionary in determining plain meaning" (*Bianco*, 36 AD3d at 491; *see also DDS Partners v Celenza*, 6 AD3d 347, 348 [1st Dept 2004]; *Mazzola v County of Suffolk*, 143 AD2d 734, 735 [2d Dept 1988]).

Here (as set forth above), the operative language of section 8.2 of the Shareholders' Agreement provides that if any Deadlock exists which has not been resolved pursuant to Section 4.8.2 hereof, then ***either*** the Mintz Group ***or*** the Pazer Group shall have the right to give the other Shareholder Group a Purchase Notice as to all of the Shares owned by the other Shareholder Group within ten (10) business days after such failure to resolve, in which event the Shareholders shall proceed under section 8.2 (b), (c), and (d) below" (emphasis added). The word "or" is "a disjunctive particle indicating an alternative and it often connects a series of words or propositions presenting a choice of either" (*Colbert v International Sec. Bur.*,79 AD2d 448, 463 [2d Dept 1981], *appeal denied* 53 NY2d 608 [1981]). The Oxford University Press dictionary defines "either" as being "used before the

first of two . . . alternatives specified (the other being introduced by 'or')." The Merriam Webster dictionary defines the correlative conjunction "either . . . or," as "an unavoidable choice or exclusive division between only two alternatives." Since the meaning of "either" is clear and unambiguous, extrinsic evidence may not be considered (*see South Rd. Assoc., LLC*, 4 NY3d at 278).

Thus, in examining the plain language of the Shareholders' Agreement, the court finds that the use of the grammatical construct "either . . . or" and the singular "a Purchase Notice" in the last sentence of section 8.2 (a) of the Shareholders' Agreement denotes that only one of the shareholder groups could effectively serve a Purchase Notice for the other's shares, and thereby, exercise the singular Right of First Offer. Therefore, using the plain, natural and ordinary meaning of the actual words of section 8.2 of the Shareholders' Agreement, such language "either . . or" only permits the construction that either one shareholder group or the other shareholder group may effectively exercise the right to purchase the shares of the other shareholder group after failed mediation following deadlock, and that this occurs by delivering the first Purchase Notice exercising the Right of First Offer. If it had been intended that both shareholder groups were permitted to serve Purchase Notices after failed mediation, as contended by Pazer, this section would have had to have provided that ***both*** the Mintz Group and the Pazer Group shall have the right to give each other Purchase Notices as to all of the Shares owned by the other shareholder group. Section 8.2 (a) of the Shareholders' Agreement, however, fails to contain this language.

Pazer fails to substantiate her contention that "either . . . or" means "both." Notably, when the parties meant to say "both" in the Shareholders' Agreement, they used the words "and" "and/or," "both . . and," and "each of . . and," such as in section 1.3 (a), section 2.1, section 4.4 (d), section 4.4 (h), section 4.6, and section 4.8.2. Indeed, in section 8.2 (b) of the Shareholders' Agreement, the parties referred to "both" the Selling Shareholder and the purchasing Shareholders" as being irrevocably obligated to sell and buy the Offered Shares, and in section 8.2 (c) (i), they used the terms "each" and the term "and" with respect to "each" of the Purchasing Shareholders "and" the Selling Shareholder selecting a Qualified Appraiser. Thus, where the parties intended to refer to 'both" or "each" of the shareholder groups, they expressly used such terms, and the absence of these terms and the use of the terms "either" and "or" evince the absence of an intention to permit both or each of the shareholder groups to serve purchase notices following a deadlock.

Pazers=, in support of her argument that the section 8.2 of the Shareholders' Agreement permits her to also serve a Purchase Notice, relies upon the fact that the Shareholders' Agreement, in section 8.2, refers to "Purchasing Shareholders" in the plural and also refers to "elections to purchase" in the plural. In this regard, the court notes that the Shareholders' Agreement provides that Pazer and the Mintz Trusts are the sole shareholders, with each being a "Shareholder." Notably, Exhibit A of the Shareholders' Agreement (as noted above) lists each of the two Mintz Trusts separately as Shareholders, and each of them could have served a separate Purchase Notice to Pazer. Section 1.3 of the

Shareholders' Agreement also contemplates that Pazer and the Mintz Trusts could have transferees, and, thus, that there existed the potential for future additional shareholders other than Pazer and the Mintz Trusts.

Further undermining Pazer's argument is the fact that section 8.2 (b) and (c) also apply to the first part of section 8.1 of the Shareholders' Agreement, which creates the Right of First Offer that is triggered by a Notice of Intention to Sell, and which requires the Selling Shareholder to deliver a written notice of the "other Shareholders" of his or her Intention to Sell." Thus, the plural references to "Purchasing Shareholders" and "Purchase Notice(s)" in section 8.2 refer to where there are potentially multiple shareholders responding to a Notice to Sell from another shareholder. In such a case, the Shareholders' Agreement provides that multiple shareholders may have the right to participate, as Purchasing Shareholders, in the purchase of offered shares pro rata in accordance with their share ownership. In contrast, the last sentence of section 8.2 (a) of the Shareholders' Agreement, which specifically only pertains to when any deadlock exists which has not been resolved pursuant to section 4.8.2, provides for the service of "***a*** Purchase Notice," using the singular term "a."

Significantly, while section 8.2 (b) of the Shareholders' Agreement refers to "Purchasing Shareholders," it refers to only one "Selling Shareholder," and not to Selling Shareholders. If the intent were to permit both Pazer and the Mintz Trusts to serve Purchase Notices following deadlock after mediation, this reference would have had to have been to

"Selling Shareholders" in the plural since both shareholder groups could be both Purchasing Shareholders and Selling Shareholders. Furthermore, section 8.2 (a) of the Shareholder Agreement provides a mechanism to address the possibility of Purchasing Shareholders oversubscribing in response to a Notice of Intention to Sell, i.e., "[i]f the other Shareholders (viewed collectively) elect to purchase more than all the Offered Shares, then they shall proceed to purchase all the Offered shares, pro rata based upon the ratio of the purchasing Shareholder' respective Percentage Interests to the total of all purchasing Shareholders' respective Percentage Interests." However, a mechanism to address the possibility of dueling Purchase Notices after a deadlock following mediation is conspicuously absent, indicating the lack of an intent to permit them.

Pazer nevertheless argues, however, that the Shareholders' Agreement should be construed as providing that both shareholder groups can serve a Purchase Notice, and that, in order to provide a mechanism for what to do when this occurs, the shares in Astoria should be sold by the shareholder group which offers the highest bid, or the shares should be sold on the open market. They note that the shares to an outsider would be a similar result as that which would be obtained in a dissolution action. Such a result, however, which is not set forth or contemplated by the Shareholders' Agreement, would require that the court rewrite the Shareholders' Agreement to include terms not set forth therein. Indeed, the Shareholders' Agreement explicitly manifests the parties' intent to avoid dissolution in the event of unresolvable deadlock, as expressed by section 4.8.3, which provides that "[i]in the event of

any deadlock, the provisions of Sections 4.8.1, 4.8.2, and 4.8.3 shall prevail and control over any contrary provisions of this Agreement." Indeed, the very purpose of these provisions was to avert judicial dissolution by providing an elaborate self-executing mechanism to resolve any future deadlock through a buy-out by one of the shareholder groups and to permit the sale of the shares of Astoria to an outsider only if neither shareholder group elected to exercise its right to buy out the other. Pazer's interpretation of section 8.2 would subvert the very purpose of these provisions.

Pazer's "mere assertion . . . that contract language means something other than what is clear when read in conjunction with the whole contract is not enough to create an ambiguity" (*New York City Off-Track Betting Corp.*, 28 AD3d at 177). As set forth above, section 11.5 of the Shareholders' Agreement provided that each shareholder had the benefit of his or her own legal counsel in connection with negotiating and drafting such Agreement. If Pazer and the Mintz Trusts, as commercially sophisticated and counseled parties, had intended their agreement to provide for a bidding war in the event that both of these shareholder groups sought to send Purchase Notices and buy the shares of the other shareholder group, they could easily have expressed this intent in the language of the Shareholders' Agreement. The mere fact that the Shareholders' Agreement does not address the contingency of both Pazer and the Mintz Trusts desiring to purchase each other's shares does not, by itself, create an ambiguity. This contingency "could have been foreseen and guarded against by the manner in which the transaction was structured" (*Thompson v*

McQueeney, 56 AD3d 1254, 1258 [4th Dept 2008]). The parties omitted this contingency from the Shareholders' Agreement, and it is not for the court to "imply a term where the circumstances surrounding the formation of the contract indicate that the parties, when the contract was made, [could] have foreseen the contingency at issue and the agreement can be enforced according to its terms" (*Reiss*, 97 NY2d at 199; *see also Thompson*, 56 AD3d at 1258).

Furthermore, section 11.9 of the Shareholders' Agreement did not permit the Shareholders' Agreement to be modified except in a writing signed by all of the Shareholders. In addition, as noted above, section 11.10 of the Shareholders' Agreement contained a merger clause, which specified that the agreement constituted the "entire agreement of the Shareholders, and supersede[d] all . . . understandings and negotiations by or among the Shareholders." Thus, regardless of any subjective understanding of the parties when drafting the Shareholders' Agreement, the moment such written Shareholders' Agreement became fully executed by both shareholder groups, Pazer could not rely on any understanding that was not included in the mutually executed written document. The no-oral modification provision and the broad merger clause contained in these sections, as a matter of law, bar any claim based on an alleged intent that the parties failed to express in writing (*see Ashwood Capital, Inc.*, 99 AD3d at 9; *Torres v D'Alesso*, 80 AD3d 46, 56-57 [1st Dept 2010]; *Cornhusker Farms v Hunts Point Coop. Mkt.*, 2 AD3d 201, 203-204 [1st Dept 2003]). To add terms directing a bidding war or the sale to a third party in the event that both parties

sought to serve Purchase Notices would impermissibly alter the writing in violation of the parol evidence rule (*see Schron*, 20 NY3d at 436). If the parties intended that this should occur, they easily could have included a provision to that effect (*Id.* at 437).

The Pazers' construction of section 8.2 of the Shareholders' Agreement artificially distorts the plain meaning of its terms to arrive at an unnatural meaning of the words "either" and "or" which would eviscerate the very purpose of the entry into the Shareholders' Agreement. If both parties could serve a Purchase Notice, this would render this provision without any meaning, force, or effect since it would not resolve which party would be entitled to purchase the shares of the other. While Pazer asserts that a bidding war should be held, the Shareholders' Agreement does not direct this, and to require this would add to, and rewrite the terms of the Shareholders' Agreement. The court will not judicially insert a new term, which the parties could have but did not include (*see Vermont Teddy Bear Co.*, 1 NY3d at 474).

An agreement "'must be interpreted so as to give effect to, not nullify, its general or primary purpose'" (*Matter of El-Roh Realty Corp.*, 74 AD3d at 1799, quoting *Town of Eden v American Ref-Fuel Co. of Niagara,* 284 AD2d 85, 89 [4th Dept 2001], *lv denied* 97 NY2d 603 [2001]). It has been repeatedly stated that an interpretation of an agreement should not be adopted which would render a provision thereof meaningless and without force and effect (*see Reape v New York News*, 122 AD2d 29, 31 [2d Dept 1986], *appeal denied* 68 NY2d 610 [1986], *rearg denied* 69 NY2d 707 [1986]). Thus, the court finds that the unambiguous terms

of the Shareholders' Agreement are not reasonably or fairly susceptible of an interpretation providing that both shareholder groups could serve valid Purchase Notices, but, rather, finds that the Shareholders' Agreement provides that only one shareholder group may exercise the Right of First Offer.

Pazer additionally argues, however, that the Mintz Trusts should be estopped from asserting that their submission of the first Purchase Notice eliminated her right to also submit a Purchase Notice. She relies upon the June 8, 2012 e-mail from Mr. Guttenberg, Esq., who was the primary drafter of the Shareholders' Agreement for both Avenue K and Astoria, in which, in the context of a Purchase Notice having been served by Pazer to purchase the Mintz Trusts' shares in Avenue K, he argued that under section 8.2 (b) of the Shareholders' Agreement, the Mintz Trusts also had the right to serve a Purchase Notice to purchase Pazer's shares. Specifically, Mr. Guttenberg, Esq. stated as follows:

> "Under the express language of section 8.2 (a), EITHER one of the Mintz Group or the Pazer Group can elect to buy the other group's shares by giving a 'Purchase Notice' within the stated 10 business days. Pazer had made her irrevocable election to buy the Mintz shares, and Mintz still has the full 10 business days to make its irrevocable election to buy the Pazer shares. There is absolutely NO language to support an interpretation that the 'first' group to give a Purchase Notice somehow deprives the other group of its valuable rights to buy the other group out, nor is any such interpretation reasonable or consistent with the intention of the parties under the Shareholders' Agreement. The intention was obviously to give EACH group purchase rights, and to treat the parties equally as to purchase rights, and NOT favor one shareholder group over the other. An interpretation of the 'first notice wins' would deprive the other group of its purchase right (without any such language in the

agreement), would certainly not withstand judicial scrutiny, would reward the Pazer Group for its obvious 'sabotage' of the Avenue K mediation process and preplanned delivery of a Purchase Notice based thereon, and would result in an unseemly and untoward race to kill the mediation and deliver the 'first notice' . . .

"The clear language of the Shareholders' Agreement and intention of the parties was to give EITHER group the right to buy the other one out, by giving a Purchase Notice within 10 business days, and NOT to favor either shareholder group over the other, regardless who acts first. Thus the Mintz Group has until June 11 to deliver its irrevocable election to buy all the Pazer Group shares, whether or not the Pazer Group has also given a Purchase Notice. While the Agreement is not exactly clear on what happens if both groups exercise their valuable purchase rights, we believe the fair result under the Shareholders' Agreements in such event would be:

"(1) the shareholder group offering the highest purchase price through its Qualified Appraiser 'wins' and gets to buy the other group out (i.e., whoever values the asset more highly prevails . . .); or

"(2) If both shareholder groups elect to buy, neither shareholder group may exercise its purchase right (since the Agreement does not expressly address what happens when both sides elect to buy), and instead the Company must sell its assets on the open market and liquidate.

"We have consulted with multiple NY attorneys regarding this contract interpretation issue, including Mintz NY litigation counsel, and they confirm the foregoing 2 results as the most likely results in Court under the applicable Shareholders' Agreement 'shareholder Purchase Notice' provisions, given the absence of any 'first to act wins' language and other relevant factors. There is no reason a Court would interpret the agreement to 'reward' the low bidder, just because it acted first. Doubtless, you have a contrary and erroneous legal view, that

> will fail in court, as have and would your other inexplicable and unsupportable legal positions . . .
>
> "Obviously, the same 'shareholder Purchase Notice provisions' apply to both Avenue K and Astoria in the event of failed mediation after Deadlock, and the current Mintz intention is certainly to buy all the Pazer Group's shares in Astoria which is also in Deadlock . . ."

Pazer argues that she reasonably relied upon these representations made by Mr. Guttenberg, Esq. on the Mintzes' behalf. She claims that prior to the September 27, 2012 mediation session, she had prepared a Purchase Notice to submit at the close of the mediation if it proved unsuccessful, but, relying on Mr. Guttenberg, Esq.'s legal stance with respect to section 8.2 (a) of the Shareholders' Agreement, she decided prior to the mediation that she would deliberate with her daughters over the course of the 10 business days following the mediation to decide whether she wished to submit her Purchase Notice. She asserts that based upon Mr. Guttenberg, Esq.'s June 8, 2012 e-mail, she would have served her Purchase Notice at the same time that the Mintzes served their Purchase Notice in an attempt to serve the first notice.

Pazer's argument must be rejected. Since the court finds that the Shareholders' Agreement is unambiguous, such extrinsic evidence cannot be used to vary or alter its terms, and Mr. Guttenberg, Esq.'s subjective legal interpretation as to the meaning of the Shareholders' Agreement or how he believed it would be fair to construe it, cannot be used to change its terms (*see W.W.W. Assoc.*, 77 NY2d at 162).

Moreover, in order for estoppel to exist, three elements are necessary: "'(1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than and inconsistent with, those which the party subsequently seeks to assert; (2) intention, or at least expectation, that such conduct will be acted upon by the other party; (3) and, in some situations, knowledge, actual or constructive, of the real facts" (*BWA Corp. v Alltrans Express U.S.A.*,112 AD2d 850, 853 [1st Dept 1985] [internal quotation marks omitted]). "The party asserting estoppel must show with respect to himself [or herself]: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in [his or her] position (*id.* [internal quotation marks omitted]; *see also River Seafoods, Inc. v JPMorgan Chase Bank*, 19 AD3d 120, 122 [1st Dept 2005], *lv granted* 5 NY3d 715 [2005], *appeal withdrawn* 6 NY3d 751 [2005]). Thus, "[e]quitable estoppel requires clear and convincing proof that the party against whom estoppel is directed misrepresented or concealed material facts, with knowledge of the real facts, and with the intention that the other party act in reliance upon the disingenuous conduct and that the party seeking to invoke estoppel detrimentally relied on that conduct in excusable ignorance of the true facts" (*Central Fed. Sav. v Laurels Sullivan County Estates Corp.*,145 AD2d 1, 6 [3d Dept 1989], *appeal dismissed* 74 NY2d 944 [1989], *appeal denied* 76 NY2d 704 [1990]).

Here, there was no misrepresentation of fact by the Mintzes or Mr. Guttenberg, Esq. The mere fact that the Mintzes' prior attorney advocated a legal position, on their behalf,

does not create a basis to estop them from now assuming a contrary legal position, particularly since the Mintzes did not pursue this legal position nor benefit from this legal argument, as they elected not to purchase Pazer's shares in Avenue K. Moreover, Mr. Guttenberg, Esq.'s statements cannot be a basis for equitable estoppel because they were legal arguments regarding the interpretation of contractual provisions in the Shareholders' Agreement, and "to constitute an [equitable] estoppel, the representation relied upon must be one of fact and not of law" (*Pizitz Dry Goods Co. v New York Hamilton Corp.*, 228 App Div 325, 327 [1st Dept 1930]; *see also Central Fed. Sav.*, 145 AD2d at 6).

Furthermore, Pazer and her attorney, who were equally aware of the actual language of the Shareholders' Agreement, could not have relied upon their adversary's legal interpretation of section 8.2. Indeed, the lack of reliance upon Mr. Guttenberg, Esq.'s legal argument or any change in position by Pazer based upon Mr. Guttentberg, Esq.'s June 8, 2012 e-mail is demonstrated by Pazer's attorney's June 11, 2012 e-mail, which followed Mr. Gutttenberg, Esq.'s e-mail, and stated that the Pazers continued to dispute that the Mintzes could have elected to serve a Purchase Notice to purchase their shares. Thus, Pazer's attorney continued to maintain his earlier legal position, which had been set forth in a May 31, 2012 e-mail by him, wherein he stated that "[w]e [Pazer] do not read the Shareholders' Agreement to afford the Mintz Group an opportunity to purchase the Pazer's stock . . . [Pazer] exercised her right to purchase the Mintz Group shares [and under section] 8.2 (b) that election became irrevocable and a process started to determine the price that would be paid."

Therefore, inasmuch as the court finds that the unambiguous terms of the Shareholders' Agreement dictate that only the first Purchase Notice served following the deadlock and unsuccessful mediation was to be valid and effective, and since it is undisputed that the Mintz Trusts served the first Purchase Notice on September 27, 2012, they are entitled to a declaration that Pazer was irrevocably obligated as of September 27, 2012 to sell the Pazer shares to them. Consequently, the Mintz Trusts are entitled to summary judgment in their favor on their sixteenth cause of action, and Pazer's first counterclaim must be dismissed and her cross motion for summary judgment in her favor on that counterclaim must be denied.

As to the Mintz Trusts' seventeenth cause of action for specific performance, Pazer argues that summary judgment in favor of the Mintz Trusts must be denied on this claim because the Mintz Trusts have not demonstrated that they are ready, willing, and able to perform the purchase of the Pazer shares, and to pay the purchase price for them. To the extent that this cause of action seeks a judgment directing Pazer to specifically perform her obligation to sell all of the Pazer shares to the Mintz Trusts at the price determined through the appraisal process prescribed in the Shareholders' Agreement, it is premature since the purchase price has not yet been determined through the appraisal process. However, the Mintz Trusts are entitled to summary judgment in their favor to the extent that this cause of action seeks a judgment directing that Pazer must submit to and complete the appraisal process prescribed by the Shareholders' Agreement within the time frame set forth in such

Agreement (i.e., Pazer must select a Qualified Appraiser within 10 days following the service upon her of this decision and order, and proceed thereafter as set forth in the Shareholders' Agreement), as well as to summary judgment dismissing Pazer's second counterclaim, which seeks to enjoin this appraisal process.

CONCLUSION

Accordingly, the Mintz Trusts' motion is granted insofar as it seeks partial summary judgment: (1) in their favor on their sixteenth cause of action, (2) in their favor on their seventeenth cause of action (to the extent that the Pazers are directed to submit to and complete the appraisal process prescribed by the Shareholders' Agreement), (3) dismissing Pazer's first counterclaim and finding and declaring that Pazer is not entitled to the declaration sought by her, and (4) dismissing Pazer's second counterclaim for injunctive relief. The Mintz Trusts' motion is denied insofar as it seeks partial summary judgment in their favor on their thirteenth and fourteenth causes of action. Pazer's cross motion for partial summary judgment in her favor on her first counterclaim is denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. DAVID I. SCHMIDT

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