SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ROBERT M. LEVINE, AS TRUSTEE OF THE MARION LEVINE REVOCABLE TRUST, Petitioner, -against- SEVEN PINES ASSOCIATES LIMITED PARTNERSHIP, Respondent.	Index No. 151958/2014 Motion Seq. No. 004

SEVEN PINES ASSOCIATES LIMITED PARTNERSHIP'S MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S APPLICATION FOR PRETRIAL DISCLOSURE

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Respondent Seven Pines Associates Limited Partnership ("Seven Pines" or "Respondent"), submits this memorandum of law in opposition to the motion submitted by petitioner Robert M. Levine, as trustee of the Marion Levine Revocable Trust ("Petitioner" or "Levine"), for discovery in this special proceeding pursuant to CPLR 408 and N.Y. Business Corporation Law § 623(h)(4). As shown below, the Court should deny Petitioner's motion because Petitioner has not and cannot show any special or unusual circumstances that would justify discovery in this summary proceeding involving the valuation of a single building located in Yonkers, New York.

PRELIMINARY STATEMENT

This matter involves a special proceeding commenced pursuant to CPLR Article 4 by Petitioner, a limited partner, to fix the value of his limited partnership interest in Seven Pines, a single purpose entity whose sole asset is a 304-unit apartment building located at 1 Glenwood Avenue, Yonkers, New York 10701 (the "Building"). As explained by Professor Siegel in his treatise on New York Practice, the purpose of Article 4 is to facilitate the speedy resolution of such matters based on the submissions of the parties and without the need for discovery:

> Each party furnishes to the court all papers it has served in the proceeding. Any papers needed for the determination but not already in the court's possession are to be furnished by the petitioner. If the respondent has a needed paper, the petitioner can require its production at the hearing by including with the petition a demand to that effect…. If no triable issues are raised and the papers before the court are adequate for determination, the court is required to make the determination summarily.

Siegel, *New York Practice* § 556 (5th Ed. 2011); *see also Port of New York Authority v. 62 Cortlandt St. Realty Co.*, 18 N.Y.2d 250, 255, 273 N.Y.S.2d 337, 340 (1966) (where "there are no substantial questions of fact" after submission of the petition and opposition papers, the Court is required to decide the matter based on such submissions and without the need for discovery or trial).

Consistent with the above-described procedure, it is well-established that the proponent of discovery in an Article 4 proceeding has a heavy burden to show that special circumstances exist that would justify departing from the presumption that discovery will not be permitted. Here, far from involving any complex issues or special circumstances that would justify allowing the wide ranging-discovery sought by Petitioner, this case involves the straightforward valuation of a single purpose partnership entity whose sole asset is the Building in Yonkers. More fully, on or about October of 2013, Halpern-Stillman Development Company, Seven Pines' general partner ("General Partner"), decided to pursue a merger with Seven Pines Holdings Merger Sub LLC (the "Merger"), the surviving entity of which would be a re-structured Seven Pines. Under the terms of the Merger, the limited partners of Seven Pines were given the option of either (i) making a contribution of $10,000 and acquiring a limited partner interest in the re-organized and surviving Seven Pines entity, or (ii) receiving compensation equivalent to $650,000 per limited partnership unit interest (the "Unit Interests"). The $650,000 valuation per Unit Interest was derived from Seven Pines' December 31, 2012 financial statements (the "2012 Financials"). Although Petitioner was offered $325,000 for his interest in Seven Pines (the "Levine Interest"), based on Petitioner's ownership of a 50% share of a single Unit Interest (the "Limited Partnership Offer"), Petitioner now baldly claims in the Petition that he is entitled to receive $1,573,000 for the Levine Interest without having submitted a single shred of evidence in support of that self-serving, overinflated valuation figure.

Petitioner's discovery motion should be denied because Petitioner already has in his possession all of the financial information required to calculate a valuation of the Levine Interest.

Indeed, Petitioner himself admits in his April 25, 2014 affidavit (Parrott Aff. Exh. 1),[1] that he has been provided with the following documents:

- The spreadsheet prepared by Respondent setting forth the calculation of the value of the Levine Interest (¶ 6);
- The 2013 year-end financial statements reflecting the financial performance and rental revenue of the Building, as well as monthly financials for January and February 2014 (¶ 11);
- Vacancy reports for the Building (¶ 11);
- A prior appraisal of the Building prepared by third-party lender Signature Bank in 2012 (the "2012 Appraisal") (¶ 6);
- A complete list of the limited partners of Respondent (¶ 6);
- An appraisal of the Building containing a valuation as of the date of the Merger's authorization (and the Merger) at Respondent's request by BCS Valuations Inc. ("BCS"); and
- A rent roll for the Building created as of January 2014 (Petition ¶ 30 (Reitzas Aff. Exh. A)).[2]

Here, having already received all of the documents required to conduct an appraisal of the Building and a valuation of the Levine Interest, it was incumbent on Petitioner under CPLR 409(b) to submit appraisal evidence to the Court to establish a factual basis for Petitioner's claim that Respondent's $325,000 offer for the Levine Interest was not reasonable. However, rather than submitting any competent valuation evidence, Petitioner chose to file an unsworn petition without any supporting affidavits, and a reply affidavit attested to by Petitioner that contained only self-serving and inadmissible statements as to valuation without any supporting appraisal to justify its position (moreover, the reply affidavit is itself inadmissible because it was executed

[1] References to the "Parrott Aff." are to the affirmation of Matthew D. Parrott, dated June 20, 2014, and the exhibits attached thereto.

[2] References to the "Reitzas Aff." are to the Affirmation of Joshua T. Reitzas in Support of Petitioner's Application for Pretrial Disclosure, dated May 30, 2014, and the exhibits attached thereto.

outside of the State of New York and was submitted without Certificate of Conformity under CPLR 2309(c)). Under these facts, Petitioner's motion should be denied because it has utterly failed to demonstrate any special circumstances that would justify permitting the wide-ranging discovery being sought and, under the applicable Court of Appeals precedent referenced above, the Court is required to make its valuation determination summarily. Nor did Petitioner give notice in his Petition that he needed any discovery to determine these simple valuation issues, which is a precondition to obtaining any such discovery under CPLR 409(a).

Finally, as more fully explained below, Petitioner's discovery motion should be denied for the further reason that no discovery is necessary to determine the two primary disputed issues on the valuation of the Levine Interest, including (i) the interpretation and effect of the contractual waterfall provision governing the payout to Petitioner, which provides on its face for a 55% to 45% split for non-cash flow distributions, and not the 95% to 5% split apparently sought by Petitioner[3]; and (ii) the selection of an appropriate capitalization rate for use in valuing the Building, which is already the subject of the appraisal evidence submitted by Respondent and is likewise addressed in Petitioner's reply affidavit. These are legal issues that can and should be decided by the Court without the need for discovery or a hearing.

BACKGROUND FACTS

I. The Merger

On November 12, 2013, Seven Pines notified all limited partners that 77.7778 percent of the limited partnership units of Seven Pines had approved the Merger, pursuant to which Seven Pines would merge with a Seven Pines Holdings Merger Sub LLC with the resulting entity being

[3] The amount sought by Petitioner is actually equivalent to 100% of his interest in the partnership. There is no provision in the partnership agreement, however, that provides any support for this flagrantly overreaching request. *See* pp. 7-9, *infra.*

a re-structured Seven Pines (Reitzas Aff. Exh. B). Limited partners could either retain their interests in the re-structured Seven Pines upon a $10,000 contribution or receive compensation equivalent to $650,000 per unit (*id*.). By letter dated December 6, 2013, Petitioner dissented to the Merger (Reitzas Aff. Exh. D). The Merger was consummated on January 8, 2014, and by letter dated January 24, 2014, Seven Pines again offered Petitioner $325,000 for his half-unit interest in Seven Pines (*see* Petition (Reitzas Aff. Exh. A, ¶¶ 23 and 25)).

Petitioner never accepted the offer. Instead, Petitioner commenced this special proceeding by filing the instant Petition dated March 4, 2014 (Reitzas Aff. Exh. A). Notably, Petitioner was the sole dissenting limited partner.

II. The Petition

In its unsworn Petition, Petitioner baldly asked the Court to set the value of the Levine Interest as of January 8, 2014,[4] at $1,573,000 (Reitzas Aff. Exh. A, p. 8). However, Petitioner did not provide any admissible appraisal evidence in support of his request and instead submitted: (i) an inadmissible third-party appraisal of the Building prepared by a banking institution in 2012 which lacks any foundational basis for submission herein (Reitzas Aff. Exh. G); (ii) the valuation of the Levine Interest performed by Seven Pines in November of 2013, which determined such value to be $325,000 (Reitzas Aff. Exh. H); (iii) a letter dated Dec. 6, 2013, wherein Levine dissented to the Merger but did not provide any alternative value of the Levine interest (Reitzas Aff. Exh. D); and (iv) a letter dated Dec. 10, 2013, in which Levine

[4] Levine's valuation date is incorrect pursuant to N.Y. B.C.L. § 623(h)(4), (*see also Appleton Acquisition, LLC v. Nat'l Housing P'ship*, 10 N.Y.3d 250, 257, 856 N.Y.S.2d 522, 527-28 (2008)), as explained in Seven Pines Limited Partnership's Memorandum of Law in Opposition to the Petition, dated April 18, 2014 (the "Seven Pines Opp. Brief" (Reitzas Aff. Exh. I), pp. 9-10). Rather, the valuation should be dated as of November 11, 2013, because that was "the day prior to the merger's authorization date." *Appleton Acquisition,* LLC, 10 N.Y.3d at 257, 856 N.Y.S.2d at 527-28.

asked about a certain cash reserve, reiterated his dissent to the Merger, and again failed to provide an alternative value for the Levine Interest (Reitzas Aff. Exh. E). No affidavits or additional supporting papers were submitted with the Petition, other than the reply affidavit of Petitioner, sworn to on April 25, 2014, which only contains a single, self-serving paragraph addressing Petitioner's valuation methodology in conclusory fashion and unsupported by any admissible evidence.[5] Moreover, Petitioner failed to provide any independent valuation appraisal to support his claim that he is entitled to a valuation for the Levine Interest greater than the $325,000 offered by Respondent.

Seven Pines, in response, submitted an answer denying that Levine was entitled to the relief sought in the Petition and asserting that the value of the Levine Interest should be fixed at $324,611 (Parrott Aff. Exh. 3 p. 7). In support of Seven Pines' valuation, Seven Pines submitted an appraisal of the Building by an independent appraiser (the "BCS Appraisal"), which showed that the value of the sole asset of the partnership was $20,873,891 as of November 11, 2013, and that the value was $21,129,369 as of January 8, 2014 (Reitzas Aff. Exh. J, p. 62 and Exh. A).[6] Further, Seven Pines submitted an affidavit (Parrott Aff. Exh. 2), that attached numerous documents supporting its valuation of the Building and the Levine Interest, including: (i) Seven Pines Associates Amended and Restated Agreement of Limited Partnership (originally and as amended time to time, the "Partnership Agreement") (Parrott Aff. Exh. 4); (ii) the 2012 Financials (Parrott Aff. Exh. 5); (iii) Seven Pines Associates Financial Statements December 31, 2013 (the "2013 Financials") (Reitzas Aff. Exh. K (at attachment)); (iii) a summary sheet

[5] Moreover, the reply affidavit is inadmissible and improper because it was executed outside of the State of New York and is not accompanied by a Certificate of Conformity under CPLR 2309(c).

[6] Attached to the Reitzas Aff. are documents submitted by Seven Pines in support of its opposition to the Petition, including exhibits I, J, and K (at attachment).

identifying discrepancies between the 2012 Appraisal and the 2012 Financials (Parrott Aff. Exh. 6); (iv) rent rolls from November of 2013 and January of 2014 (Parrott Aff. Exhs. 7 and 8); (v) relevant tax bills for the Building (Parrott Aff. Exh. 9); and (vi) a spreadsheet showing how the $324,611 value of the Levine Interest was derived from the relevant financial statements and the valuation of the Building by BCS (Parrott Aff. Exh. 10). Petitioner, having already received the foregoing documents, clearly possesses all of the information needed to make his case and does not need any discovery.

A comparison of the submissions by Petitioner and Respondent confirms that the difference in valuation -- *i.e.*, $324,611 as determined by Respondent and $1,573,000 as determined by Petitioner -- results primarily from Petitioner's erroneous claim that he is entitled to a payout based on a waterfall provision that is inapplicable to this matter (*see* Affidavit of Robert Levine, sworn to April 25, 2014 (the "Levine Aff.") ¶ 13 (Parrott Aff. Exh. 1)). This assertion is contradicted by the express language of the Partnership Agreement (*see* Parrott Aff. Exh. 4). As explained in the Seven Pines Opp. Brief, Section 10.2(C) of the Partnership Agreement clearly provides that distributions "other than Cash Flow such as from … a sale or disposition of any or all of the Property, or from any other transaction the proceeds of which do not constitute Cash Flow," would be paid, after the payment of certain obligations, "fifty-five percent (55%) to the Limited Partners, forty percent (40%) to the Managing General Partner, and five percent (5%) to [a then general partner]" (Parrott Aff. Exh. 4 pp. 50-51) (emphasis added). Similarly, Section 10.3 of the Partnership Agreement, titled "Distributions Upon Dissolution," provides for a 55% distribution to the limited partners after a dissolution and reorganization, such as the Merger at issue here (*id.* pp. 51-52). Based on these provisions, Petitioner was entitled to a 95 percent of partnership distributions only if those distributions were derived from

the partnership's cash flow, which is not the case with respect to the payments made as a result of the Merger. (*Id*. at Section 10.2(A).) Indeed, because the language of the Partnership Agreement is clear and unambiguous that Petitioner is only entitled to a 55% split in connection with the Merger, the Court should rule that Respondent's construction of the language is correct as a matter of law and without the need for any discovery. *Excel Graphics Tech., Inc. v. CFG/AGSCB 75 Ninth Ave., L.L.C.*, 1 A.D.3d 65, 69, 767 N.Y.S.2d 99, 102 (1st Dep't 2003) ("A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.") (citation and quotation marks omitted), *lv. dismissed* 2 N.Y.3d 794, 781 N.Y.S.2d 292 (2004). This is a purely legal issue of contract interpretation for which discovery of extrinsic evidence outside the four corners of the Partnership Agreement is simply unnecessary.

Petitioner utterly fails to address this critical issue in any of the papers he has submitted to the Court. Rather, Petitioner baldly contends in his Reply in Support of Request to Set a Date for a Special Proceeding, dated April 28, 2014 (the "Levine Reply Brief" (Reitzas Aff. Exh. F)), that Section 10.2(C) "does not apply" to the Merger because the Merger was an "interested-party transaction" (*id.* p. 12 n. 3). Petitioner cites no language in Section 10.2(C), or any other section of the Partnership Agreement, to support this self-serving and unsupportable interpretation. Petitioner "decline[d] to debate [this issue] in [his] reply" because there is no basis for this construction of the Partnership Agreement (*see id*.), and Petitioner's refusal to even address the matter flies in the face of CPLR 409(a), which requires the Petitioner to provide the Court with all papers "necessary to the consideration of the questions involved." As discussed above, a special proceeding "is analogous to a motion and is designed to go to hearing and determination promptly." Siegel, *New York Practice*, § 554. Thus, Petitioner was obligated to set forth the

basis for his assertion that he was entitled to a distribution equivalent to 4.165% of the total value of the Partnership, despite the clear language of Section 10.2(C). Petitioner's inability to do so conclusively demonstrates that the Court should apply the distribution percentage set forth in Section 10.2(C) to the fair value of the Levine Interest, which would, on its own, cut Petitioner's demand from $1,573,000 to $865,150 (*i.e.*, 55% of the demand amount). Indeed, even assuming that the Building was worth $37,000,000, as Petitioner contends (without support from any appraisal or expert analysis), the application of the correct contractual provision reduces the actual value of the Levine Interest (after adjusting for other assets and liabilities such as pre-paid rent and the return of security deposits, as shown in Seven Pines' valuation spreadsheet (Parrott Aff. Exh. 10), to $601,779. In any event, discovery is not necessary or permitted on the narrow question of contract interpretation.

Second, Petitioner has failed to submit any credible evidence to support his contention regarding the capitalization rate (the "cap rate") that should be used to determine the value of the Building (*see* Memorandum of Law in Support of Application for Pretrial Disclosure Pursuant to New York Business Corporations Law § 623(h)(4) and New York Civil Practice Law and Rules 408, dated May 30, 201, the "Levine Discovery Brief," pp. 7-8). Here, the only competent and admissible evidence before the Court regarding the proper cap rate is contained in the BCS Appraisal. Petitioner contends that the cap rate should be 4.9% solely because that rate was used by Seven Pines to calculate the Limited Partnership Offer (*see* Levine Discovery Brief p. 8; Parrott Aff. Exh. 1 ¶ 13), despite the fact that Petitioner has conceded that Seven Pines is not an expert appraiser (Reitzas Aff. Exh. F, p. 12), and despite the fact that Petitioner contends in his Petition that the Limited Partnership Offer was faulty (Reitzas Aff. Exh. A ¶ 40). In contrast, Seven Pines bases its valuation of the Levine Interest on the 6.75% cap rate used by an appraisal

expert, BCS (Parrott Aff. Exh. 10). BCS explains in its report that the 6.75% rate it used was derived from input from mortgage brokers and real estate brokers, as well as from an assessment of real estate market conditions and a review of cap rates related to the sales of similar properties (Reitzas Aff. Exh. J pp. 61-62). Indeed, the BCS Appraisal describes the similarities of these properties to the Building, including one property that was, like the Building, a former participant in the Mitchell Lama prior to its sale (*id*). There is no reason to believe that the 6.75% rate is unreliable. Indeed, the 2012 Appraisal, on which Petitioner elsewhere appears to rely (*see* Petition (Reitzas Aff. Exh. A) ¶ 40), used a cap rate of 7.5% when determining the value of the building, a rate that would resulted in a lower valuation of the Building than BCS's 6.75% rate (Reitzas Aff. Exh. G, p. 39). Accordingly, the only reliable evidence submitted to the Court shows that the proper cap rate is 6.75%, and that this rate is in fact a conservative metric compared to other rates used by expert appraisers regarding the very same property. Since Petitioner has failed to submit any evidentiary basis for his use of the lower cap rate, there is no material disputed issue of fact to be decided on this issue and the Court should accept the valuation proposed by Respondent without any further discovery.

The application of the 6.75% cap rate substantial impairs Petitioner's valuation. Indeed, even if Petitioner's estimate of the Building's net operating income as $1,840,000 is correct[7] (despite its being inflated by rent rolls dated from after the Merger (Levine Aff. ¶ 13 (Parrott Aff. Exh. 1)), being unsupported by any reference to the record (*id.*), and being the product of a non-expert), the application of the 6.75% cap rate reduces the value of the Building from $37,551,020 (*see* Levine Aff. ¶ 13 (Parrott Aff. Exh. 1), by $10,291,761, to $27,259,259. Further, by

[7] Seven Pines does not admit to such a value. Indeed, the BCS Appraisal, which was performed according to the guidelines and standards of the Uniform Standards of Professional Appraisal Practice, concluded that the net operating income of the Building as of the appropriate valuation date was $1,408,988 (Reitzas Aff. Exh. J. p. 59).

applying the correct distribution percentage of 55% (*see* pp. 7-9, *supra*), the value of the Levine Interest would be $434,360 (after appropriate adjustments as shown in Parrott Aff. Exh. 10), even if Petitioner's inflated income value were used.

On June 2, 2014, Levine filed the instant motion, setting a return date of June 18, 2014, and directing Respondent to provide answering papers by June 16, 2014 despite having failed to request discovery in his Petition as he was required to do (*see* Notice of Motion, Doc. No. 73). The Court scheduled oral argument on the motion for July 17, 2014, and a hearing was set for July 17.

ARGUMENT

A. Petitioner Fails to Meet the Applicable Standard for Obtaining Disclosure in the Instant Special Proceeding.

CPLR 408 provides the relevant standard for permissible discovery in special proceedings, such as the instant matter, and specifically requires "[l]eave of court" before discovery can proceed. Contrary to Levine's representations, the materiality test set forth in CPLR 3101 is not the governing standard here.[8] Rather, in case after case interpreting CPLR

[8] None of the cases cited by Petitioner, which espouse broad-ranging discovery under CPLR 3101, involve proceedings under Article 4 or N.Y. Business Corporation Law § 623. *See Sinosky v. Sinosky*, 26 A.D.3d 874, 875, 809 N.Y.S.2d 743, 744 (4th Dep't 2006) (plaintiff sought discovery under CPLR 3101 in action for divorce); *Melworm v. Encompass Indem. Co*., 112 A.D.3d 794, 795, 977 N.Y.S.2d 321, 322 (2d Dep't 2013) (plaintiff sought discovery in breach of insurance contract action under CPLR 3101); *Twenty Four Hour Fuel Oil Corp. v. Hunter Ambulance Inc*., 226 A.D.2d 175, 175-76, 640 N.Y.S.2d 114 (1st Dep't 1996) (defendant sought disclosure under CPLR 3101 in action involving fuel contracts); *Mann ex rel. Akst v. Cooper Tire Co.*, 33 A.D.3d 24, 37, 816 N.Y.S.2d 45, 57 (1st Dep't 2006) (plaintiff sought disclosure under CPLR 3101 in product liability and breach of warranty action); *Yoshida v. Hsueh-Chih Chin*, 111 A.D.3d 704, 705-06, 974 N.Y.S.2d 580, 582-83 (2d Dep't 2013) (defendant sought disclosure under CPLR 3101 in medical malpractice action). The fact that the instant proceeding involves an appraisal of a partnership interest under N.Y. Business Corporation Law § 623 is inconsequential. Courts have applied the limited-discovery approach to disputes regarding, or arising from, special proceedings involving shareholder appraisals. *See In re Kaufmann, Alsberg & Co.*, 15 A.D.2d 468, 222 N.Y.S.2d 305, 307 (1st Dep't 1961) (holding that "the appraisal proceeding is to be kept within reasonable bounds with the view of

408, courts have expressly held that "[i]n special proceedings, discovery is deemed presumptively antithetical to its purpose," *Bethlehem Baptist Church v. Trey Whitfield School*, No. 2002–787 K C., 2003 WL 21511332, at *1 (Sup. Ct. App. Term May 29, 2003) (denying application for discovery) (citation and quotation marks omitted), and that a party seeking discovery must show "ample need" for the disclosure it seeks, *Neighborhood P'ship Housing Dev. Fund Corp. v. Okolie*, No. 2001–1142 K.C., 2003 WL 1923731, at *1 (Sup. Ct. App. Term Jan. 24, 2003) (denying discovery where, among other things, applicant "did not demonstrate that the issues were novel or complex"). Indeed, "[a] party seeking discovery in a proceeding brought pursuant to Article 4 of the CPLR carries a heavy burden to justify its use, as it is generally discouraged in special proceedings," and "[b]ecause of the expedited nature of special proceedings, [a party seeking discovery] must demonstrate special or unusual circumstances which would justify permitting discovery." *People v. Condor Pontiac, Cadillac, Buick & GMC Trucks, Inc*., Index Nos. 02–1020, 19–02–0497, 2003 WL 21649689, at *4 (Sup. Ct. N.Y. County July 2, 2003). Courts will consider "(1) whether the petitioner has asserted facts to establish a cause of action; (2) whether a need to determine information directly related to the cause of action has been demonstrated; (3) whether the requested disclosure is carefully tailored so as to clarify the disputed facts; (4) whether any prejudice will result; and (5) whether the court can fashion or condition its order to diminish or alleviate any resulting prejudice." *Rice v. Belfiore*, No. 10274/06, 2007 WL 813335, at *9 (Sup. Ct. Westchester County Mar. 19, 2007) (citation and quotation marks omitted).

'avoiding all unnecessary expense and burden upon the parties'" and limiting scope of discovery); *In re Shore*, 109 A.D.2d 842, 843, 486 N.Y.S.2d 368, 369 (2d Dep't 1985) (denying discovery related to attorney's fees and expert fees in special proceeding brought under Business Corporation Law § 623, and observing that discretionary disclosure under Article 4 "was intended to preserve the summary nature of a special proceeding").

Here, Petitioner does not come close to demonstrating that "special or unusual circumstances" or the other relevant factors that would justify the wide-ranging discovery being sought. Indeed, far from involving any complex issues or special circumstances to justify any departure from the normal rule, this case involves the straightforward valuation of a single purpose partnership entity whose sole asset is the Building in Yonkers. Moreover, Levine has not "carefully tailored" his request in any meaningful way, as he seeks "written discovery and limited factual depositions on the issues relevant to its claim for fair value, in particular the 2012 Appraisal, [Seven Pines'] formula for fair value determined in 2013 in connection with the merger, and the BCS Appraisal" (Levine Discovery Brief p. 9). Levine does not identify which "issues" will be subject to his "written discovery," nor has he submitted drafts of the written discovery demands he intends to propound on Seven Pines. *See Bethlehem Baptist Church*, 2003 WL 21511332, at *1, *supra* (denying disclosure motion after reviewing applicant's "'palpably overbroad' [discovery] demands").

In any event, there is no question that Seven Pines will be prejudiced by Petitioner's proposed fishing expedition, especially since it has already proffered substantial documentation regarding its valuation of the Levine Interest (*see* Parrott Aff. Exhs. 2, 4-10; Reitzas Aff. Exh. K (at attachment), including an expert valuation of the Building (*see* Reitzas Aff. Exh. J). The Court should determine whether the value of Petitioner's half-limited-partnership interest can be derived from these documents before compelling Seven Pines to produce more documents and information. Indeed, the cost associated with discovery is one of the principal reasons that constraints are imposed under Article 4. *See In re Protect the Adirondacks! Inc.*, 38 Misc. 3d 1235(A), 2013 WL 1189216, at *3 (Sup. Ct. Albany County Mar. 19, 2013) (denying application for discovery based on, among other things, the "significant costs associated with such an effort"

and "the effect of diverting" respondents' employees from their primary tasks). Last, as discussed further in Section B, *infra*, Levine has utterly failed to raise any question of fact regarding the value of the Levine Interest under the applicable evidentiary standards. Accordingly, Levine's failure to meet – or even address – the relevant standard obtaining discovery in the instant special proceeding compels denial of Petitioner's motion.

Finally, Petitioner's discovery motion must be denied for the further reason that Petitioner failed to give notice in his Petition that he needed any discovery to determine these simple valuation issues, which is a precondition to obtaining any such discovery under CPLR 409(a). More fully, "[w]here such papers [needed by the Court to make a determination] are in the possession of an adverse party, they shall be produced by such party at the hearing *on notice served with the petition*." CPLR 409(a) (emphasis added). No such notice was served with the Petition (*see* Reitzas Aff. Exh. A), thus Petitioner is not entitled to demand these papers now.

B. Petitioner Failed to Raise Material Questions of Fact that Necessitate Discovery.

The Levine Discovery Request should also be denied because Petitioner has failed to raise material questions of fact that would warrant the imposition of discovery here. "The standards of summary judgment applied to actions should also be applied by the court to proceedings governed by CPLR 409 (subd. (b))." *Port of New York Authority v. 62 Cortlandt St. Realty Co*., 18 N.Y.2d at 255, 273 N.Y.S.2d at 340, *supra*. Where, as here, "there are no substantial questions of fact in the case," a special proceeding is ripe for summary disposition. *Id*.

As discussed above, Petitioner has submitted only an unsworn Petition, attaching a stale and inadmissible third-party appraisal of the Building, calculations that support the value set forth in the Limited Partnership Offer, and certain letters that do not offer calculations – much

less support – for Petitioner's request that the Court set the value of the Levine Interest as of January 8, 2014, at $1,573,000 (Reitzas Aff. Exhs. A, D, E, G, and H). Seven Pines, in response, submitted an answer and supporting affidavits refuting that Petitioner was entitled to the relief he sought, demonstrated that the value of the Levine Limited Interest should be fixed at $324,611, and provided the expert BCS Appraisal that showed that the value of the sole asset of the partnership was $20,873,891 as of November 11, 2013, and that the value was $21,129,369 as of January 8, 2014 (*see* Reitzas Aff. Exhs. I and J (at p. 62 and Exh. A); Parrott Aff. Exhs. 2-10).

Based on these submissions, Seven Pines has conclusively shown that the value of the Levine Interest is $324,611 (the "BCS Levine Value"), and supported this showing with substantial admissible and unrebutted evidence. In contrast, Petitioner has submitted unsworn allegations, irrelevant and inadmissible documents, and argumentative documents consisting of rank surmise. As discussed at length above (and not repeated here), there are no questions of material fact regarding the two most critical valuation issues: the appropriate cap rate for determining the value of the Building (*i.e.*, 6.75%), and the distribution provision in the Partnership Agreement that governs the instant transaction (*i.e.* Section 10(C)). *See* pp. 7 to 11, *supra*. Accordingly, Petitioner cannot show any basis for allowing the discovery he has requested.

1. Petitioner Fails to Raise Genuine Questions of Fact About the BCS Levine Value that Could Warrant Discovery.

Petitioner attempts to support his request for discovery by raising spurious questions about the 2012 Appraisal, the Limited Partnership Offer, and the BCS Appraisal (Levine Discovery Brief pp. 5-8). None of Petitioner's contentions raise any genuine issue regarding the

accuracy of the BCS Levine Value, nor do they support Petitioner's request for needless disclosure.

First, Petitioner's request to seek discovery from Seven Pines regarding the 2012 Appraisal should be rejected. Petitioner continues to mischaracterize Seven Pines' role regarding this third-party appraisal, stating that Seven Pines "accepted" and "used" the 2012 Appraisal to obtain financing (Levine Discovery Brief p. 5).[9] As explained in Seven Pines Opp. Brief, Signature Bank commissioned the 2012 Appraisal, and the bank "used" it to extend a loan to Seven Pines secured by a mortgage on the Building (Reitzas Aff. Exh. I p. 14). Petitioner identifies no opportunity Seven Pines had to "accept" the 2012 Appraisal, nor any reason Seven Pines might have had to reject it. Petitioner mistakenly contends that discovery is necessary because he is not "required to take [Seven Pines] at its word" that the 2012 Appraisal is "riddled with errors" (Levine Discovery Brief pp. 5-6). Such discovery is not necessary because Seven Pines has already submitted documents showing that the relevant figures contained in the 2012 Appraisal do not match the actual values from the 2012 Financials (Parrott Aff. Exh. 6). Thus, Petitioner need not "take Seven Pines at its word"; Petitioner need only compare the values contained in the 2012 Appraisal (Reitzas Aff. Exh. G), with those identified in the 2012 Financials (Parrott Aff. Exh. 5). No other disclosure is needed or warranted.

Petitioner's critique of the Limited Partnership Offer is also meritless (*see* Levine Discovery Brief pp. 6-7). Petitioner's supposed confusion regarding the $825,000 net income figure used in the Limited Partnership Offer does not arise from the withholding of any information on the part of Seven Pines; rather, it stems from Petitioner's apparent inability to

[9] Petitioner has belatedly recognized, after falsely pleading that Seven Pines' General Partner "commissioned" the appraisal (Reitzas Aff. Exh. A, ¶ 8), that the 2012 Appraisal was actually commissioned by Signature Bank (Reitzas Aff. Exh. F, p. 9).

comprehend Seven Pines' straightforward representation that this figure was determined by subtracting total income as identified in the 2012 Financials from total expenses as shown in that document (Parrott Aff. Exh. 2 ¶ 9), citing 2012 Financials (Parrott Aff. Exh. 5), and explaining the calculation). Again, no further discovery is required. Additionally, Petitioner's questions regarding Seven Pines' use of a 6.75 percent capitalization rate for the BCS Interest Value can be easily resolved by consulting the BCS Appraisal, which explains on pages 61 and 62 that this rate was determined by looking at historical rates and calculating the applicable rate based on certain factors, such as investor caution and the decline in mortgage interest rates (Reitzas Aff. Exh. J). All of this information is readily available in documents already submitted by Seven Pines.

Last, Petitioner's purported bewilderment regarding Seven Pines' use of the BCS Appraisal (Levine Discovery Brief pp. 7-8), is absurd. Seven Pines commissioned the BCS Appraisal in order to provide this Court with an expert appraiser's valuation of the Building as of November 11, 2013 (and January 8, 2014), so that the Court could fix the fair value of the Levine Interest as Petitioner has requested (*see* Petition (Reitzas Aff. Exh. A), p. 1 (Petitioner seeking to have the Court "fix the fair value of his partnership interest")).[10] The only other appraisal, the 2012 Appraisal, was stale and, as shown by Seven Pines, riddled with errors. Indeed, the salient issue here is not Seven Pines' decision to submit expert evidence on the value of the Building as of the relevant date, but Petitioner's decision not to submit his own valuation

[10] Petitioner's questions regarding the documents consulted by BCS, the means of its valuation, and the scope of its assignment, are all answered in the BCA Valuation itself. (*See* Reitzas Aff. Exh. J at pp. 23-25 (purpose, intended use, and scope of appraisal), 45-63 (valuation process, income capitalization approach, and final value estimate); 41, 47-59 (referencing tax and financial statement relied upon), and Exhs. B-D (relevant rent rolls and financial data). Indeed, it appears that Petitioner has foregone reading the BCS Appraisal so that he can ask for discovery about it.

of the Building while expecting the Court to determine the fair value of his half-limited-partnership interest. (*See id.*)[11]

Regardless, Petitioner's criticisms of the BCS Appraisal are erroneous and do not justify the imposition of costly and needless discovery in this summary proceeding. Petitioner's questions concerning the 6.75 capitalization rate are answered in the BCS Appraisal (*see* Reitzas Aff. Exh. J at pp. 61-62). Indeed, the 6.75% capitalization rate is well supported with market extracted data illustrated on page 61 of that appraisal. Levine's assertion that BCS miscalculated the Building's net operating income is erroneous. As explained in the BCS Appraisal, BCS determined the relevant income values based on an analysis of the historical income and expenses for the Building for 2011 through 2013 (Reitzas Aff. Exh. J pp. 47 - 55), and actually derived a projected net income for the Building of $1,408,988 (*id*. p. 59), which is *26% higher* than the $1,116,794 in net operational income set forth in the 2013 Financials (*id.* p. 59 and Reitzas Aff. Exh. K at p. 7 of income statement).

Petitioner's contention that the BCS Appraisal is based on an improper sales comparison analysis is equally baseless. The BCS Appraisal expressly states that "the Sales Comparison Approach was not utilized," because, among other things, "[t]he subject is somewhat unique as it is one of the larger buildings in the immediate area and it has a variety of tenant classes (some of which are section 8 and some of which have rents determined by a settlement after the building came out of the Mitchell Lama program)." (Reitzas Aff. Exh. J p. 63.) Petitioner's assertion

[11] Petitioner cites two cases where the respective courts rendered their decisions in appraisal disputes after evidentiary hearings and the consideration of witness testimony (Levine Discovery Brief p. 3). Of course, the fact that the petitioners' submissions in those cases may have raised questions of material fact does not mean that Levine has done so here. Indeed, the petitioners *In re Carolina Gardens Inc. v. Menowitz*, No. 112637/93, 1996 WL 34573714, at *2 (Sup. Ct. N.Y. County Jan. 26, 1996), and *In re Friedman v. Beway Realty Corp.*, 87 N.Y.2d 161, 165, 638 N.Y.S.2d 399, 401 (1995), apparently submitted appraisals and expert opinions in support of their requests for relief. Petitioner has not done so here.

that the BCS Appraisal used an inflated vacancy rate is not supported by any reference to the record and is simply wrong. The BCS Appraisal identified 24 vacant units based on the November rent roll, (with 21 identified in January (Reitzas Aff. Exh. J p. 55 and Exhibit A)), which yields an effective vacancy rate of 9 to 10 percent based on a conservative 2 percent adjustment for non-paying tenants (an adjustment commonly used when appraising residential buildings) (Reitzas Aff. Exh. J p. 55).[12] Further, speculation about rent increases following the anticipated discontinuance of "HUD status" of the Building is pure conjecture, which cannot be considered in a valuation proceeding. *See In re Estate of Mandelbaum v. Five Ivy Corp*., 72 A.D.3d 574, 574-75, 898 N.Y.S.2d 844 (1st Dep't 2010) (denying request for production of documents created after "the close of business on the day prior to the shareholders' authorization date").[13] Last, Levine's contention that Seven Pines "has not presented a single argument or piece of evidence to explain the deficiencies in the BCS Appraisal" (Levine Discovery Brief p. 8), makes no sense. Seven Pines did not have the opportunity to address these so-called "deficiencies" until the instant submission, in which, as shown above, it has demonstrated that Levine's criticisms of the BCS Appraisal are entirely fatuous and should be disregarded.

2. Petitioner Has Failed to Submit Any Admissible Evidence in Support of His Request for Relief.

The discovery motion should also be rejected because Petitioner has not submitted any admissible evidence in support of his request for relief (*i.e.* a valuation of the Levine Interest at $1,573,000), and thus no disclosure is required to dispose of this matter. As discussed above,

[12] Indeed, the 2012 Appraisal assumed a 12.5% vacancy and non-collection rate to account for "reductions in potential gross income due to space being unleased for a period of time, or uncollectible rents due," and advised that such an allowance "is typically included in an appraisal of income-producing property" (Reitzas Aff. Exh. G p. 34).

[13] Petitioner apparently basis his valuation on a rent roll from February, 2014 (Parrott Aff Exh. 1 ¶ 13), which is impermissible. *See In re Estate of Mandelbaum*, 72 A.D.3d at 574-75, 898 N.Y.S.2d at 844, *supra*.

"[t]he standards of summary judgment applied to actions should also be applied by the court to proceedings governed by CPLR 409 (subd. (b))." *Port of New York Authority*, 18 N.Y.2d at 255, 273 N.Y.S.2d at 340, *supra*; *People, ex rel. Cuomo v. City Model & Talent Dev.*, *Inc*., 29 Misc. 3d 1205(A), 2010 WL 3892246, at *3 (Sup. Ct. Suffolk County Sept. 28, 2010) (same).[14] Accordingly, where a petitioner has not submitted admissible evidence sufficient to support its *prima facie* case, dismissal with prejudice is warranted. *City Model & Talent Dev.*, *Inc*., 2010 WL 3892246, *supra*, is instructive. There, the petitioner sought to hold the respondent business liable for allegedly misleading certain customers, but the petitioner improperly attached a number of unsworn customer complaints to its petition in support of its request for relief. *Id.* at *3. The petitioner later attached sworn versions of these customer complaints to its reply papers, but the court ruled that petitioner's belated attempt to establish its *prima facie* case was "insufficient," as "a movant may not remedy basic deficiencies in its *prima facie* showing by submitting evidence in reply." *Id*. *See also Johnston v. Continental Broker-Dealer Corp*., 287 A.D.2d 546, 731 N.Y.S.2d 666 (2d Dep't 2001) (arguments raised for the first time on reply "need not be addressed").

Levine's failure to submit *any* admissible evidence with his Petition is fatal to his request for relief.[15] As discussed above, and in the Seven Pines Opp. Brief (Reitzas Aff. Exh. I p. 2),

[14] Petitioner implies that Seven Pines has misconstrued Article 4 by advising that this special proceeding "should be dealt with summarily, without discovery and without a hearing" (Levine Discovery Brief p. 3). Of course, Petitioner is the one who is mistaken, as numerous authorities, such as those cited above, have explained that "[s]pecial proceedings resemble motions pursuant to CPLR 3212 in that they often result in summary determinations." Weinstein, Korn & Miller, *New York Civil Practice*: CPLR ¶ 401.03 (David L. Ferstendig ed., LexisNexis Matthew Bender 2d Ed.) (hereafter "Weinstein, Korn & Miller"). "If no triable issues are raised and the papers before the court are adequate for a determination, the court is required to make the determination summarily." Siegel, *New York Practice* § 556 (5th Ed. 2011).

[15] Petitioner seeks to excuse this indisputable failure by asserting that the Court is "charged with" determining the fair value of the Levine Interest (Levine Discovery Brief p. 4). Petitioner cites

Levine submitted only an unsworn Petition containing conclusory allegations, a third-party appraisal that does not provide any calculation of the Levine Interest (the 2012 Appraisal), Seven Pines' calculation of the Limited Partnership Offer, and correspondence between Levine and Seven Pines concerning Levine's dissent to the Merger (*see* Reitzas Aff. Exhs. A, D, E, G, H). None of these documents even contains a calculation of the $1,573,000 value Levine seeks here, much less admissible support for it. While Levine sought to remedy this defect by submitting certain documents along with his reply (*see* Levine Aff. (Parrott Aff. Exhs. 1 and 1; Reitzas Aff. Exh. K), these documents (and the belated sworn statement) cannot be considered as part of Petitioner's *prima facie* case as a matter of law. *See People, ex rel. Cuomo v. City Model & Talent Dev.*, *Inc*., 2010 WL 3892246, at *3, *supra*. Moreover, even if they were considered, they are insufficient to create any material issue of fact.

Accordingly, as Petitioner has failed to submit any admissible evidence to support his requested relief, Petitioner cannot raise any issues of fact with regard to the well-founded BCS Levine Value and the Court should grant the relief requested in Seven Pines' Answer on the fully-submitted papers, with no further discovery needed.[16]

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no authority, however, for his dubious proposition that Petitioner need not submit admissible evidence in support of his request for relief because the Court is required to determine fair value. While Seven Pines does not dispute that, pursuant to Business Corporation Law § 623(h)(4), the Court can consider "all … relevant factors," such authorization does not obviate the rules of evidence or relieve Petitioner of his responsibility to properly submit the evidence he wants the Court to consider.

[16] In the alternative, the Court should limit the scope of Petitioner's discovery to the submission of his own appraisal of the Building (*see* Levine Discovery Brief p. 8). As discussed above, Petitioner has access to all of the information he needs, as the BCS Appraisal attached the key documents it relied on as exhibits. Of course, as Petitioner's appraisal should have been attached to his Petition, and this omission means Seven Pines lacked the opportunity to comment on its findings, the Court should permit Seven Pines to submit a response to any appraisal submitted now by Petitioner.

C. Petitioner's Motion is Premature.

Finally, the Court should not entertain Petitioner's motion to compel discovery because Petitioner's attempt to have its discovery motion considered separately from the Petition is improper. CPLR 406 governs motions brought in a special proceeding and specifically states that "[m]otions in a special proceeding, made before the time at which the petition is noticed to be heard, shall be noticed to be heard at that time." This is to ensure that these motions are "heard at the hearing on the petition." CPLR 406, Legislative Studies and Reports. The reasons for this rule are obvious. In order for courts to rule on discovery motions brought under CPLR 408, they must "examine each question for review raised by the petitioner, determine the alleged basis for the petitioner's complaint, the answers of the respondents and the basis of the decision complained of in determining whether there are any factual issues requiring a trial which would warrant a grant of a pre-trial discovery. It is because of problems such as this that Rule 406 *prescribes that motions in a special proceeding be noticed at the time the petition is noticed to be heard*." *Arnot-Ogden Memorial Hosp. v. Blue Cross of Cent. New York, Inc*., 122 Misc. 2d 639, 641, 471 N.Y.S.2d 979, 981 (Sup. Ct. Chemung County 1984) (also observing that discovery motions brought on before the hearing date subvert the "expeditious nature" of a special proceeding) (emphasis added). Accordingly, discovery motions in special proceedings that are brought on before the hearing date will be deemed "premature." *Id. See also* Weinstein, Korn & Miller, CPLR ¶ 406; *c.f. Rice*, 2007 WL 813335, *supra*, at *9 (assessing merits of motion for discovery and petition at same time and denying both).

Here, Petitioner served his motion on June 2, 2014. However, Petitioner's notice of motion (Doc. No. 73), did not comply with CPLR 406, and instead set the return date for the discovery motion as June 18, 2014 (which would only be permissible under the inapplicable

terms of CPLR 2214(b)) (*id.*).[17] Pursuant to the dictates of CPLR 406, however, the discovery motion can only be noticed on a hearing date for the Petition at that time, which the Court has yet to determine. The arguments contained in Levine Discovery Brief demonstrate that the ostensible June 18 return date is improper. In support of Petitioner's request for Discovery, Petitioner attempts to espouse the value of the Building as estimated in the 2012 Appraisal (Levine Discovery Brief pp. 5-6), to discredit the values and calculations used in the merger consolidation offer to other limited partners (*id.* pp. 6-7), and to critique the valuation of the Building as set forth in the BCS Appraisal (*id.* pp. 7-8). These are the very same issues raised in the Petition (Reitzas Aff. Exh. A (¶¶ 9, 40) and Exh. G), Seven Pines' Answer and brief in opposition to the Petition (*see* Reitzas Aff. Exh. I pp. 10-15)), and Petitioner's reply (*see* Reitzas Aff. Exh F pp. 9-14). In sum, Petitioner has asked the Court to rule on the merits of the Petition in order to dispose of a *pre*-hearing motion regarding the Petition. This is improper under Rule 406 and under the case law and should not be permitted.

[17] The return date was later adjourned by stipulation, but not to the same date as the hearing on the Petition. Respondent's time to file opposition papers and Petitioner's time to file a reply were also extended.

CONCLUSION

For all of the above reasons, Seven Pines respectfully requests that the Court deny with prejudice Petitioner's defective and deficient discovery motion and grant Seven Pines the relief requested in its Answer.

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