

**STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE**

**MATTER OF UNIVEST I CORP.,
Derivatively on Behalf of
470 PEARL STREET, LLC,**

Petitioner,

vs.

**COMMERCIAL DIVISION
DECISION AND ORDER
Index No. 2014-811644**

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

Respondents.

BEFORE: HON. TIMOTHY J. WALKER, Presiding Justice

APPEARANCES:

**RUPP BAASE PFALZGRAF,
CUNNINGHAM & COPPOLA LLC**
David R. Pfalzgraf, Jr., Esq.
Matthew D. Miller, Esq.
Attorneys for Petitioner

THE KNOER GROUP, PLLC
Robert E. Knoer, Esq.
Attorneys for Respondents Skydeck Corporation
d/b/a Pay2Park and Buffalo Development Corporation

WALKER, J.

Petitioner Univest I Corp. ("Univest"), derivatively on behalf of 470 Pearl Street, LLC ("470 Pearl"), commenced a summary proceeding pursuant to Article 7 of the Real Property Actions and Proceedings law (RPAPL) to evict a holdover tenant, respondent Skydeck Corporation d/b/a Pay2Park ("Skydeck"). Respondent Buffalo Development

Corporation ("BDC") moves to dismiss the proceeding pursuant to CPLR 3211(a).¹

After due consideration, the Court denies the motion to dismiss and grants the Petition in part.

Background

In 2005, Univest and BDC acquired real property located on Pearl Street in the City of Buffalo, improved by a 142- space parking lot (the "Property"). Univest and BDC formed 470 Pearl , in which each owns a fifty percent membership, and whose sole asset is the Property. Pursuant to the Operating Agreement entered into by the members (the "OA"), BDC serves as the managing member.²

Originally, the parties intended to further develop the Property together. According to Univest's Complaint in a related matter, 470 Pearl was to manage the existing parking lot on the Property until its re-development into a parking complex as detailed in a certain Land Development Agreement executed by the seller of the Property, Univest and BDC in 2005 (*see Univest I Corp., Individually as a member of 470 Pearl Street, LLC and derivatively on behalf of Nominal Defendant 470 Pearl Street, LLC v Buffalo Development Corp, Skydeck Corporation d/b/a PAY2PARK, 470 Pearl Street, LLC, and Mark D. Croce, Individually and as President of BDC*, Index No.

¹ On October 20, 2014, the return date on the petition and the motion to dismiss, BDC's counsel Robert E. Knoer filed a notice of appearance on behalf of Skydeck as well. However, the notice of motion indicates that it is filed on behalf of BDC only.

² Pursuant to the OA, BDC serves under a Management Agreement; that agreement is not in the record of these proceedings, and therefore the Court must assume that the parties deem it irrelevant to the issues at hand.

809598/2014 [hereinafter *Univest One*]). To that end, the parties agreed to a lease of the Property to Skydeck, which runs other lots in the City of Buffalo. Relevant here, non-party Mark D. Croce is both the President of BDC and the Chief Executive Officer of Skydeck (Petition ¶ 13).

Petitioner asserted in *Univest One* that Skydeck pays below-market rent. The OA provides at section 6.02 that:

Any member has the right, without the consent or approval of any other Member ... to cause 470 Pearl to terminate a certain Parking Lease entered into between 470 Pearl and Skydeck Corporation pursuant to the termination provisions of said lease.

(OA § 6.02).

In *Univest One*, this Court denied a preliminary injunction, but granted Univest's motion for a declaratory judgment that Univest had properly terminated Skydeck's leasehold effective July 27, 2014. The Court ordered that, pending further order, Skydeck would pay an increased rental on a monthly basis³ and "otherwise abide by the remaining terms of the lease agreement pending further order of this court" (Petition Ex. G). An order was entered on that ruling on September 28, 2014 (*id.*).

In this proceeding, Petitioner seeks an order pursuant to RPAPL 741, evicting Skydeck as a holdover tenant and, on behalf of 470 Pearl, recovering possession of the Property; requiring the parties to agree to a procedure to secure a replacement tenant; and ordering indemnification of Petitioner (on behalf of 470 Pearl) by Skydeck pursuant to a lease provision for the costs and fees of this proceeding.

³ The increased rental was based upon a proposed lease BDC had proffered to 470 Pearl.

Standard On Motion to Dismiss

On a motion to dismiss a summary proceeding, a respondent may raise any defense under CPLR 3211 (a). It is well-settled that the pleadings must be "afforded a liberal construction, that the facts alleged therein are accepted as true, and that [petitioner] is to be afforded every possible favorable inference in order to determine whether the facts alleged in the complaint 'fit within any cognizable legal theory' (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994])" (*Palladino v CNY Centro, Inc.*, 70 AD3d 1450, 1451 [4th Dept 2010]). Should the motion be denied, the court may on the return date of the petition, "make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised" (CPLR 409 [b]).

Further, pursuant to CPLR 404(a), governing all special proceedings, if a motion to dismiss is denied, "the court **may** permit the respondent to answer, upon such terms as may be just; and unless the order specifies otherwise, such answer shall be served and filed within five days after service of the order with notice of entry; and the petitioner may re-notice the matter for hearing upon two days' notice, or the respondent may re-notice the matter for hearing upon service of the answer upon seven days' notice [emphasis supplied]."

Discussion

BDC asserts that Univest, by commencing this proceeding, is attempting to circumvent the negotiated dispute resolution process in section 9.01 of the OA and usurp BDC's authority as the Manager of 470 Pearl.

Section 9.01(a) provides, in relevant part, as follows:

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

(*Id.*) Within ten (10) days thereafter, the Sponsoring Member must offer to sell its interest to the Dissenting Member, with various consequences thereafter (see OA §§9.01 [a] [i-iv], [b] - [d]).

That section is in part the subject of *Univest One*. In that action, Univest contended that, because BDC tendered to Univest a substitute lease after Univest terminated Skydeck's original lease, BDC placed itself in the position of the "Sponsoring Member", and section 9.01 was triggered. In that action Univest seeks specific performance of BDC's alleged obligation under that section to sell its shares to Univest or to 470 Pearl. The Court notes that, although *Univest One* is primarily a derivative action, that claim (the fourth) is personal to Univest.

Neither Univest, nor Respondents assert that the OA provisions at issue are ambiguous. Absent ambiguity, "it is the responsibility of the court to interpret" the provisions of the parties' contract (*Hartford Acc. & Indem. Co v Wesolowski*, 33 NY2d 169, 172 [1973]; see also *Village of Hamburg v American Ref-Fuel Co of Niagara, L.P.*, 284 AD2d 85, 88 [4th Dept], *lv denied* 97 NY2d 603 [2001]). The clear purpose of OA § 9.01 is to deal with deadlocks of any significance between the members. However, the issue in this proceeding is **not** between the members. Rather, it is between Univest/470 Pearl and Skydeck, the holdover tenant. The fact that a single individual,

Mark Croce, serves as an officer of both BDC and Skydeck (and, according to Petitioner, on information and belief, owns beneficial interests in both entities) does not require the Court to substitute "tenant" for "member" in the OA. Therefore, the Court fails to see how this proceeding, logically following its ruling in *Univest One* that the lease was properly terminated, implicates section 9.01.

BDC contends further that nothing in the Limited Liability Company Law prohibits the parties from limiting the rights of any member to commence a derivative action. However, it has pointed to no language in the OA that eliminates such rights, which - the Court notes - did not firmly exist prior to the Court of Appeals decision in 2008 in *Tzolis v Wolf* (10 NY3d 100, 102 [2008]). The OA was executed in **2005**.

Further, the instant proceeding does not usurp the power of the manager, BDC, under section 6.01 of the OA. Section 6.01 does not vest in the manager sole authority to bring any action in the name of the LLC; rather it operates to impose some limits on the manager's authority to bring certain actions, requiring that the manager first obtain consent from all members.

Many derivative actions are brought by parties who, were they not suing derivatively, would lack the authority to bring actions on behalf of the corporation or LLC. Thus, the demand requirement (*see e.g. Bansback v Zinn*, 1 NY3d 1, 9 [2003]; *see also Gorbroom Associates v Silverstein*, 40 Misc3d 425, 436-437 [Nassau County Dist Ct 2013], *on remand from* 37 Misc3d 141 (A) [App Term 2012] [petitioner shareholder lacked authority to bring direct action on behalf of corporation but court permitted derivative proceeding to evict holdover tenant]).

Demand Futility

Pursuant to Business Corporation Law § 626 (c), a plaintiff shareholder must plead with “particularity that he has attempted to secure the initiation of such action by the board or the reasons for not making such effort.” This pleading requirement was extended under the common-law to derivative actions by members of LLCs (*see Hu v Shen*, 57 AD3d 616, 618 [2d Dept 2008]; *Evans v Perl*, 19 Misc3d 1119 (A), *8-9 [Sup Ct NY County 2008]; *see also Fine v New York Community Bank*, 33 Misc3d 1215 (A), *2 [Sup Ct Queens County 2011]).

As set forth in the seminal case of *Marx v Akers*, “[d]emand is excused because of futility when a complaint alleges with particularity that a majority of the board of directors is interested in the challenged transaction” (88 NY2d 189, 200 [1996], *quoted in Bansbach v Zinn*, 1 NY3d at 9). Here, Petitioner has adequately pleaded the futility of a demand, given that BDC is both the managing member and an affiliate of Skydeck. Mr Croce submitted an affidavit in this proceeding asserting that BDC had specifically negotiated the Skydeck tenancy as a benefit to BDC. These factors, together, are sufficient to render BDC “interested” within the meaning of that term, and the requirement that Petitioner first issue a demand to the managing member is, therefore, excused.

Accordingly, BDC’s motion to dismiss the petition is denied.

Pursuant to CPLR 404(a), the Court has discretion to permit Respondents to answer the Petition, and thereafter re-notice it for final disposition (*see Matter of Dodge’s Trust*, 25 NY2d 273, 286 [1969]). However, the parties have already litigated

these issues in two different cases; the lease was previously declared terminated; and Skydeck submitted no separate papers on this matter to indicate that its position is in any way contrary to BDC's position. Thus, the Court declines to permit Respondents to answer, but instead will determine the summary proceeding (*see Matter of Rochester Urban Renewal Agency*, 110 AD2d 1086, 1087 [4th Dept 1985]).

Entitlement to Eviction

Pursuant to RPAPL 741, a petitioner must “ (1) [s]tate the interest of the petitioner in the premises from which removal is sought; (2) [s]tate the respondent's interest in the premises and [its] relationship to petitioner with regard thereto; (3) [d]escribe the premises from which removal is sought; (4) [s]tate the facts upon which the special proceeding is based; and (5) [s]tate the relief sought” which may include a demand for rent or the fair value of use and occupancy. Here, the Petition adequately alleges all five (5) factors.

Therefore, the Court will issue a warrant to remove Skydeck from possession of the parking lot and an order restoring 470 Pearl to possession of same, within thirty (30) days from service of the instant Decision and Order, together with notice of entry, unless 470 Pearl's members agree to a date beyond said thirty (30) days.

Remaining Relief Sought

Petitioner seeks additional relief: an order requiring the parties to submit a confidential Request for Proposal for a new tenant for the Parking Lot; an order awarding costs and disbursements pursuant to RPAPL 747 (1); indemnification for 470 Pearl from Skydeck under the lease for Petitioner's costs and attorneys' fees, and/or

reasonable attorneys' fees under the OA.

As to the procedure for obtaining a new tenant, that relief is denied, in part because such relief is not authorized in a summary proceeding (see RPAPL 747; see *Allyn v Markowitz*, 83 Misc2d 2560, 252 [County Court 1975] [jurisdiction in Article 7 proceeding is limited]). In a summary proceeding for recovery of real property, relief may include a demand for rent or fair value of use; Petitioner seeks neither here. Finding a new tenant is a business matter for 470 Pearl's members, in the first instance. It is not the Court's role to manage the LLC for the members. That request is therefore denied, as is any request for attorneys' fees under the OA.

Petitioner also seeks indemnification from Skydeck under the Lease for its costs and attorneys' fees in bringing this proceeding (Petition Ex. B ¶ 14). The relevant lease provision requires Skydeck to indemnify 470 Pearl from and against:

all claims of whatever nature against Lessor arising, in any way, from Lessee's use, occupation and control of the Property or the street, alleys, driveways, parking lot and sidewalks adjacent thereto and from any act, omission or negligence of Lessee, its contractors, licensees, agents, servants, employees, invitee or visitors; (b) all damages whatsoever caused to any person or to the Property of any person occurring, during the term in or about the Property; and (c) **any breach, violation, or nonperformance by Lessee of any covenant, warranty, promise, condition or agreement in this Lease set forth and contained [sic] on the part of Lessee to be fulfilled, kept, observed and performed.** This indemnity and hold harmless agreement shall include indemnity from and against any and all liability, fines, suits, demands, costs, fees (including attorney's fees) and expenses of any kind or nature incurred in or in connection with any claim or proceeding brought thereon, and the defense thereof.

(Lease, ¶ 14) (emphasis added). The Court finds no right to indemnification under subsection 14(a) or (b), which relate to liability arising from use of the physical property

by Skydeck, its invitees, and the public. Nor is there right to any such relief under subsection (14) (c), which relates to Skydeck's breach of any obligations under the Lease. Petitioner has failed to indicate how Skydeck breached the Lease. This request is, therefore, denied. However, Petitioner is awarded the costs of this proceeding pursuant to RPAPL 747 (1).

It is, therefore,

ORDERED, that Respondent Buffalo Development Corporation's motion to dismiss is denied; and it is further

ORDERED, that the Petition is granted in part and denied in part; 470 Pearl Street LLC is awarded possession of the real property located at 470 Pearl Street, and Petitioner is awarded costs in connection with this proceeding pursuant to RPAPL 747 (1); and it is further

ORDERED, the Skydeck shall vacate the premises within thirty (30) days from service of the this Decision and Order, together with notice of entry, unless the members of the LLC agree to a later date.

This constitutes the Decision and Order of this Court. Submission of an order by the Parties is not necessary. The mailing of a copy of this Decision and Order by this Court shall not constitute notice of entry.

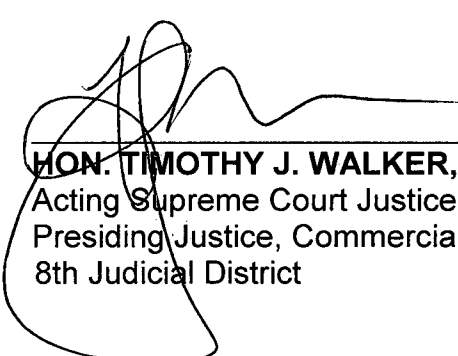
Dated: November 26, 2014
Buffalo, New York

GRANTED

NOV 26 2014

BY

JOHN H. GARBO, JR.
COURT CLERK


HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice
Presiding Justice, Commercial Division
8th Judicial District