

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

UNIVEST I CORP., derivatively on behalf
of 470 PEARL STREET, LLC,

Petitioner,

v.

Index No.:

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

Pursuant to Article 4 of the CPLR
and Article 7 of the RPAPL

Respondents.

**MEMORANDUM OF LAW IN SUPPORT
OF VERIFIED PETITION TO RECOVER
POSSESSION OF COMMERCIAL REAL PROPERTY**

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CUNNINGHAM & COPPOLA LLC**
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PRELIMINARY STATEMENT

Petitioner, Univest I Corp. (“Univest”), derivatively on behalf of 470 Pearl Street, LLC (“470 Pearl Street” or “the LLC”) (collectively the “Petitioner”), respectfully submits this memorandum of law in support of its petition for an order awarding possession of the subject commercial real property to the 470 Pearl Street; the issuance of a warrant to remove respondent Skydeck Parking Corporation d/b/a Pay2Park (“Skydeck”) from possession of the property; an order requiring respondent Buffalo Development Corporation (“BDC”) to engage in an RFP process; and for such other and further relief as the Court deems just and proper. For the reasons set forth herein and in the contemporaneously-filed Verified Petition and Affirmation of Matthew D. Miller, Esq., it respectfully is submitted the Verified Petition should be granted.

STATEMENT OF FACTS

The relevant history and factual background are set forth fully in the contemporaneously-filed Verified Petition, sworn to on October __, 2014 (the “Petition”), and the Affirmation of Matthew D. Miller, Esq., sworn to on October 2, 2014, to which this Court respectfully is referred. The facts will only be restated herein to the extent necessary.

ARGUMENT

SKYDECK SHOULD BE REMOVED AS A HOLDOVER TENANT.

1. Univest Has Standing to Maintain This Derivative Special Proceeding.

It is beyond question that a member of a limited liability company may bring a derivate suit. *Tzolis v. Wolff*, 10 N.Y.3d 100, 102, 855 N.Y.S. 6 (2008) (stating that “members of

a limited liability company (LLC) may bring derivate suits on the LLC's behalf, even though there are no such provisions governing such suits in the Limited Liability Company Law"); *see also Bischoff v. Boar's Head Provisions Co. Inc.*, 38 A.D.3d 440, 834 N.Y.S.2d 22 (1st Dep't 2007). Moreover, courts have held that derivate summary proceedings may be maintained by a shareholder on behalf of a corporate entity in order to recover possession of real property from a holdover tenant. *See Gorbroom Associates v. Silverstein*, 40 Misc.3d 425, 965 N.Y.S.2d 851 (Dist. Ct. Nassau Co. 2013) (summary holdover proceeding to recover possession of real property may properly be maintained by shareholder in derivative action).

2. A Demand Upon BDC, as Manager of 470 Pearl Street, to Initiate a Summary Eviction Proceeding Would Have Been Futile.

A demand to 470 Pearl Street's manager, BDC, to initiate this summary proceeding to evict its holdover tenant, Skydeck, would have been futile in this case insofar as Mark D. Croce is both the President of BDC and the Chief Executive Officer of Skydeck, the former lessee and now holdover tenant in possession of the Parking Lot – 470 Pearl Street's sole asset. *See* Petition, ¶ 13.

In a special proceeding such as this, the petitioner is "obligated to set forth in the complaint (petition) with particularity of his efforts to secure the initiation of the summary proceeding by the board of directors or set forth in the complaint the reasons for not making such a demand." *Gorbroom Associates v. Silverstein*, 965 N.Y.S.2d at 857; *see also* N.Y. Bus. Corp. Law § 626(c) (McKinney 1963). Before commencing a derivative suit on behalf of an LLC, courts have required members to make a demand upon the manager of the LLC, or at least set

forth sufficient facts in the pleading showing that a demand would have been futile. *See Tzolis v. Wolff*, 10 N.Y.3d 100; *See Evans v. Perl*, 19 Misc.3d 1119(A), 862 N.Y.S.2d 814 (Sup. Ct., New York Co. 2008) (holding demand requirement for corporations applicable to LLCs).

However, a member of an LLC is relieved or excused of the demand requirement if it is futile. *Bansbach v Zinn*, 1 N.Y.3d 1, 9, 769 N.Y.S.2d 175 (2003). Courts have held that a demand on a board of a company is futile if (1) a majority of the directors are interested in the transaction; (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction; or (3) the directors failed to exercise business judgment in approving the transaction. *Id.*; *see also Marx v. Akers*, 88 N.Y.2d 189, 1039, 644 N.Y.S.2d 121 (1996); *Hu v. Shen*, 57 A.D.3d 616, 870 N.Y.S.2d 373 (2d Dept. 2008).

Here, a demand on 470 Pearl Street would be futile because its managing member, BDC has as its president the same interested individual as Skydeck has as its Chief Executive Officer – Mark D. Croce. *See* Petition, ¶ 13. Croce signed the Lease Agreement on behalf of 470 Pearl Street and Skydeck (*see* Exhibit B, p. 9), and his significant interest in both entities and self-dealing related to them prevents him from properly being able to respond to a demand upon 470 Pearl Street. Accordingly, Univest is relieved of the demand requirement because BDC, Croce, and Skydeck are all interested in the transaction. *Bansbach v Zinn*, 1 N.Y.3d at 9; *Malkinzon v. Koronsky*, 56 A.D.3d 734; 868 N.Y.S.2d 123 (2d Dep’t 2008).

Insofar as a demand upon 470 Pearl Street would be served upon its managing member, BDC (Croce), BDC is unable to make impartial decisions regarding the service of any termination notice, 3-day notice, or other notice to quit that may otherwise be required under the New York Real Property Action and Proceeding Law. Moreover, Skydeck has full knowledge of a related proceeding currently pending before the Hon. Timothy J. Walker in Erie County Supreme Court, captioned *Univest I Corp. et al v. Buffalo Development Corp. et al.* (Index No. 809598/2014) through counsel and through Mr. Croce's dual capacities as CEO of Skydeck and President of BDC.

Therefore, for the reasons set forth herein, in the Petition, and in the affirmation of Matthew D. Miller, Esq., it respectfully is submitted that Univest has standing to maintain this summary proceeding and that a demand upon 470 Pearl Street, or BDC as the manager of 470 Pearl Street, would have been futile.

3. The Verified Petition Sets Forth All the Required Items of Real Property Actions and Proceedings Law §741.

A verified petition to recover possession of real property must (1) state the interest of the petitioner in the real property; (2) state the respondent's interest in the real property; (3) describe the real property sufficiently; (4) state the facts on which the proceeding is initiated; and (5) state the relief sought by the petitioners. *See* RPAPL §741 (McKinney's 1965). The contemporaneously-filed verified petition satisfies each and every statutory requirement.

First, it is undisputed that the petitioner is a 50% member of 470 Pearl Street, which is the title owner of the Parking Lot. *See* Petition, ¶2. Therefore, the petitioner has a beneficial interest in the Parking Lot, and a beneficial interest has been recognized as sufficient for a derivative suit. *See Bernfeld v. Kurilenko* 91 A.D.3d 893, 937 N.Y.S.2d 314 (2d Dep’t 2012) (shareholder’s transferee has beneficial interest in corporation sufficient for derivative suit); *Shui Kam Chan v. Louis*, 303 A.D.2d 151, 756 N.Y.S.2d 534 (1st Dep’t 2003) (administratrix has beneficial interest in decedent’s shares sufficient to bring derivative suit); *Neary v. Burns*, 44 Misc.3d 280, 982 N.Y.S.2d 868 (holder of a beneficial interest in an LLC has standing to bring a derivative action on behalf of the LLC).

Second, respondent Skydeck is a former party to the now-terminated Lease Agreement but remains in possession of the Parking Lot pending further order of this Court. *See* Petition, ¶¶26-28. On January 31, 2005, Skydeck took possession of the Parking Lot under a Lease Agreement with 470 Pearl Street, and has been in continuous possession of the Parking Lot since that date. *See* Petition, ¶¶20, 27. The Lease Agreement was properly terminated on May 27, 2014 by petitioner Univest, effective July 27, 2014. The same was confirmed by this Court on September 26, 2014. *See* Petition ¶26. Skydeck is now a holdover tenant. *See* Petition, ¶¶27-28.

Third, the petition sufficiently has described, and it is undisputed, that the Parking Lot is a commercial parking lot located at 470 Pearl Street, Buffalo, New York. *See* Petition, ¶2, Exhibit. A.

Fourth, On May 27, 2014, Univest properly terminated the Lease Agreement, an action which was confirmed by the Hon. Timothy J. Walker, J.C.C. in an Order dated September 26, 2014. *See* Petition, ¶¶23, 26. Skydeck has been operating the Parking Lot continuously since January 31, 2005, at substantially below market rates. *See* Petition ¶¶20, 27. This special proceeding has been commenced to recover possession of the Parking Lot for the LLC by removing Skydeck so that a new market rate tenant can be obtained for the benefit of the LLC and its members. Pursuant to RPAPL § 741(4), a petition must be specific as to facts upon which the special proceeding is based, and must be sufficiently adequate to advise a tenant in order to allow it to frame a defense. *See Black Veterans for Social Justice Inc. v. Killeen*, 2007 N.Y. Misc. LEXIS 982, (Civ. Ct., New York Co. 2007). The facts upon which the proceeding is initiated are more fully and sufficiently stated in the Petition, to which the Court respectfully is referred. Moreover, it should be noted that respondents here have more than adequate facts and notice upon which to frame a defense by virtue of Mark D. Croce's dual relationship with BDC and Skydeck, as well as the identical nature of the parties hereto and the parties to the already-pending litigation captioned *Univest I Corp. v. Buffalo Development Corporation et al.* (Index No. 809598/2014).

Fifth, the petitioner plainly and succinctly set forth the relief sought in the Petition. *See* Petition, ¶39. Again, however, petitioner respectfully requests an Order of this Court granting this petition and awarding possession of the Parking Lot to the LLC; granting this petition and issuing a warrant to remove Skydeck from possession of the Parking Lot; granting

this petition and ordering the parties to submit a Request for Proposal for a new tenant for the Parking Lot, which RFP process that be overseen by the Court; together with such other and further relief as the Court deems just and proper, including all costs and disbursements pursuant to RPAPL § 747(1), and all reasonable attorneys' fees. Inasmuch as this action is brought derivatively on behalf of 470 Pearl Street, the economic benefit of this proceeding belongs to 470 Pearl Street, the owner of the Parking Lot, and not to BDC, Skydeck, or anyone else. It is meant ultimately to benefit the LLC by obtaining a reasonable market rate tenant for the Parking lot. This easily can and should be accomplished via a Request for Proposal process, the benefit of which will be to the LLC and shared equally by all the members of the company, not just the petitioner individually. *See Hilpert v. Yarmosh*, 77 A.D.2d 615, 430 N.Y.S.2d 112 (2d Dep't 1980); *see also* BCL §626(e); *Glenn v. Hoteltron Systems, Inc.*, 74 N.Y.2d 386, 547 N.Y.S.2d 816 (1989).

Therefore, for the reasons set forth above and in the affirmation of Matthew D. Miller, Esq., it respectfully is submitted that all of the statutory requirements of RPAPL §741 have been fully satisfied and that the petition should be granted in all respects.

4. A Seamless Transition to a New Tenant Easily Can Be Accomplished Without Harm to the LLC, Its Members, or the Public.

To date, respondents have tried to impress upon the Court that if Skydeck is removed the Parking Lot will lay fallow, that costs will be incurred by the LLC, and/or the public will be harmed by the loss of 142 parking spaces that are critical to the downtown Buffalo

entertainment and theatre districts. However, petitioner's proposal for a confidential, sealed RFP process resolves each and every one of those concerns and is a fair and reasonable process designed to maximize the benefit to the LLC and its members. *See* Exhibit I. An RFP process is virtually certain to provide a substantial economic benefit to the LLC and its members, all the while keeping the Parking Lot open and available to the public during the process. If the Court is inclined to grant the petition and remove Skydeck as a holdover tenant, petitioner will not displace Skydeck from the Parking Lot until after the RFP process plays out and a new tenant is identified, ready, willing and able to step in and operate the lot. A confidential RFP process is fair to all involved, and will bear out exactly what the market rental rate is for a property such as the Parking Lot in this location. In the interest of the independence and sanctity of the RFP process, any such process should be overseen by the Court, or by an independent accounting or law firm agreed upon by the parties. All bids should be provided sealed. The top two bidders can be notified to resubmit their best and final bid and a winner will thereafter be determined. BDC's previous requests for a right of first refusal to any bid is not acceptable, and will not benefit the LLC. In fact, any such right of first refusal that is infused into this process will only work to chill the bidding process and ultimately be a detriment to the LLC.

Finally, the public will not be harmed in any way if the Court grants this petition and fashions some form of relief consistent with petitioner's request. No parking spaces will be eliminated and the Parking Lot will not lay fallow. Even when/if a new tenant is identified and takes possession, the alleged impossibility of a competitor operating the Parking Lot simply is a red herring. The Parking Lot very simply can be operated by any other tenant, just as Skydeck is

doing so now. No additional curb cuts will be necessary and Skydeck still will maintain access to its adjacent lots from Pearl and Franklin Streets. BDC's concern that a new tenant will create difficulties for the operation of Skydeck is not and should not be a concern to the LLC – it is only a concern to Mark Croce and Skydeck.

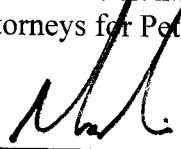
CONCLUSION

For all the reasons mentioned herein, it respectfully is submitted that an order should enter granting this petition in its entirety and awarding possession of the Parking Lot to the LLC; granting this petition and issuing a warrant to remove Skydeck from possession of the Parking Lot; granting this petition and ordering the parties to submit a Request for Proposal for a new tenant for the Parking Lot; together with such other and further relief as the Court deems just and proper, including all costs and disbursements pursuant to RPAPL § 747(1), and all reasonable attorneys' fees.

Dated: October 3, 2014
Buffalo, New York

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