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SHORT FORM ORDER

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

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

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THOMAS HOEY, JR. and WENDY HOEY, by
assignment,

Plaintiffs,

-against-

HILARY BECKER, 1 SOUTH FOREST AVE, LLC, AND T &
H REALTY LLC, and JANE DOE #1 THROUGH #10,

Defendants.
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TRIAL/IAS PART 15
Index No.: 606476/15
Submission Date: 02/26/16
Motion Sequence: 001, 002

**DECISION & ORDER
XXX**

Papers Numbered

<i>Sequence #001</i>	
Notice of Motion, Affirmation & Exhibits	1
<i>Sequence #002</i>	
Notice of Cross Motion & Opposition	2
Affirmation in Opposition to Cross Motion & Exhibits	3
Reply Affirmation in Support of Cross Motion & in Opposition to motion	4

Upon the foregoing papers, motion (seq. no. 1) by the attorney for the defendants for an order dismissing this action is granted. Cross-motion (seq. no. 2) by the attorneys for the plaintiff for a declaratory judgment granting an audit/accounting and distribution of any profits and dissolution of 1 South Forest Avenue, LLC and T&H Realty, LLC with legal fees is denied.

Plaintiff Thomas Hoey, Jr. (Hoey) and defendant Hilary Becker (Becker) each own a fifty (50) percent share in 1 South Forest Avenue, LLC and T&H Realty LLC, (the LLC's).

The complaint sets forth three (3) causes of action: Partition (first); Accounting (second); and Assignment (third).

Initially, a co-owner of an LLC cannot maintain a cause of action for partition in his

individual capacity. New York Limited Liability Company Law §601 provides that “A membership interest in the limited liability company is personal property. A member has no interest in specific property of the limited liability company” (*see also, In re 11 East 36th, LLC*, 2015 Bankr. LEXIS 277, 2015 WL 397799, 85 UCC Rep. Serv. 2d 668, 668 Bkrcty [SDNY 2015] (Debtor 11 East 36th, LLC “does not have any interest in the property that belongs to its subsidiary”); *Sealy v Clifton, LLC*, 68 AD3d 846) (“Since the properties in question are owned by Clifton [LLC], the plaintiff [co-owner of the LLC] cannot maintain a cause of action for partition in his individual capacity.”). Therefore, the first cause of action sounding in partition is dismissed (*see also Lifton v DiBlasi*, 179 AD2d 994; *General Prop Corp. v Diamond*, 29 AD2d 173, 176).

With regards to plaintiff’s second cause of action seeking an accounting, “Members of a limited liability company may seek an equitable accounting under common law” (*Gottlieb v Northriver Trading Co., LLC*, 58 AD3d 550, 551; *see also East Quogue Jet, LLC v East Quogue Members, LLC et al.* 50 AD3d 1089,1091). However, plaintiff has failed to allege that a proper demand for an accounting was made by Hoey and denied by defendants. Thus, the second cause of action for an accounting is dismissed (*see Walsh v Wwebnet*, 116 AD3d 845; *NAB Const. Corp. v New York City Paper Mill*, 265 AD2d 312).

Turning to plaintiff’s third cause of action which seeks an assignment of plaintiff Thomas Hoey, Jr.’s interest to Wendy Hoey *nunc pro tunc* from March 30, 2013 to the present, same must be dismissed. Contrary to the bald, conclusory allegation in the verified complaint “that Thomas Hoey Jr., assigned his interest in said properties to his wife, plaintiff Wendy Hoey, by an assignment of shares on or about November 30, 2013, and by way of a Legal Separation Agreement, Wendy Hoey is a 50% shareholder in both 1 South Forest Ave., LLC., and T&H Realty, LLC.” (Complaint, ¶13), the Operating Agreement of T&H Realty, LLC and the Operating Agreement of 1 South Forest Avenue, LLC both require in Paragraph 10.3 that: “All of the other members shall have consented to in writing to the transfer and substitution, which consent may be arbitrarily withheld by any such member.” Becker has not given his approval for the assignment to Ms. Hoey. Parties may move for judgment dismissing one or more causes against them on a defense founded on documentary evidence. To succeed on a motion to dismiss pursuant to CPLR §3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim” (*Manfro v McGivney*, 11 AD3d 662; *see Leon v Martinez*, 84 NY2d 83, 87-88; *Jorjill Holding Ltd. v Grieco Associates, Inc.*, 6 AD3d 500; *see Arnav Industries, Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner LLP*, 96 NY2d 300, 303). The Operating Agreements establish that Hoey cannot assign his interest in either LLC without the consent of Becker, refuting the plaintiff’s factual allegations, thereby conclusively establishing a defense as a matter of law (*see Limited Liability Company Law §603(a)(1)*; also *Bartfield v RMTS Assoc, LLC*, 11 AD3d 386; and NY Juris 2d. Vol 16, Business Relationships §2268).

The Court notes that although the caption lists “Wendy Hoey, by Assignment” as plaintiff, the Operating Agreements preclude her from being an assignee of Hoey without the consent of Becker. Moreover, the verified complaint only contains a verification by Thomas

Hoey, Jr. sworn to on September 22, 2015.

Since the complaint is dismissed in its entirety, the Court did not reach the remaining issues raised in the cross-motion.

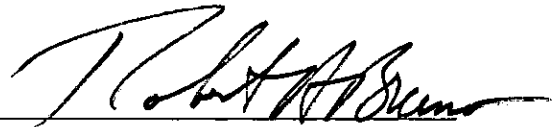
All proceedings under Index No. 606476/15 are terminated.

All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

Dated: March 23, 2016
Mineola, New York

ENTER:



Hon. Robert A. Bruno, J.S.C.
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ENTERED

MAR 25 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE