

NYSCEF DOC. NO. 67

INDEX NO. 62551/2015  
To commence the statutory time period for appeals as  
of right (RECEIVED NYSCEF) 04/21/2016  
copy of this order, with notice of entry, upon all parties.

Disp   x   Dec      Seq. Nos. 1-2      Type   misc.  

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

**PRESENT: HON. LINDA S. JAMIESON**  
-----X

WILLIAM JACOBS,  
  
Petitioner,

-against-

Index No. 62551/2015

DECISION AND ORDER

CHARLES CARTALEMI and WESTCHESTER  
INDUSTRIAL COMPLEX, LLC,

Defendants.  
  
-----X

The following papers numbered 1 to 8 were read on these  
motions:

<u>Paper</u>	<u>Number</u>
Notice of Petition and Exhibits	1
Memorandum of Law	2
Notice of Motion, Affidavit, Affirmation and Exhibits	3
Memorandum of Law	4
Affidavits and Exhibits in Opposition	5
Memorandum of Law	6
Reply Affidavit and Exhibits	7
Reply Memorandum of Law	8

There is a petition and a motion before the Court in this  
case arising out of the breakup of the parties' business  
relationship. This case, only one of multiple cases before the  
Court involving this situation, arises out of petitioner's desire

to end the parties' fraught relationship. The petition seeks (1) a declaratory judgment declaring that petitioner is entitled to withdraw as the owner of a 20% interest in respondent Westchester Industrial Complex, LLC ("WIC"); and (2) upon his withdrawal, an order finding that he is entitled to be paid, within a reasonable time, the fair value of his interest, plus interest at 9%, without any discount factor. Respondents' motion seeks to (1) dismiss the proceeding or, in the alternative, (2) to convert the special proceeding into an action. In his responsive papers, petitioner seeks to have the petition converted into a motion for summary judgment and then for the Court to grant summary judgment to him.

The Court begins by noting that the first request for relief in the petition has been mooted by respondents' acknowledgment that petitioner's withdrawal was effective. There is thus nothing for the Court to declare.

Turning to the second request for relief, the Court first examines WIC's Operating Agreement. It contains an article entitled "Right of First Refusal." This article has two separate provisions: "Sale of Membership Interest in Absence of Prior Offer," and "Sale of Membership Interest Where Selling Member Receives Prior Offer." There is no dispute that the second provision does not apply here, because petitioner has not received a prior offer to purchase his membership interest. It

is the first provision, "Sale of Membership Interest in Absence of Prior Offer," that gives rise to much controversy.

This provision states, in relevant part, that "In the event that the Selling Member desires to sell his or Membership Interest but has not yet received an offer to purchase same from a bond fide purchaser for value, the Selling Member shall first offer to the other Member or Members the opportunity to purchase the Selling Member's Membership Interest. . . ." It then goes on to state that the non-selling member has 30 days to accept or reject the offer, or make a counteroffer. If the non-selling member makes a counteroffer, then the selling member has 30 days to accept or reject the counteroffer. If the selling member rejects the counteroffer, he then may offer his interest to a third party. Finally, if after 120 days, he has not received any acceptance from a third party, then the cycle commences again, and the selling member has to make a new offer to the non-selling member "as if no prior offer was made to any other Member or Members."

Petitioner argues that this provision does not apply here because he has no desire to **sell** his interest in WIC. Rather, he argues, "the WIC Operating Agreement is absolutely and unequivocally silent on the issue of withdrawal of a member," and that the Right of First Refusal provision "does not apply to the issues now before this Court, and is inapposite to my statutory

right to withdraw and receive fair value." Instead, he claims that Limited Liability Corporation Law § 606 applies. That section provides, in relevant part, that

A member may withdraw . . . at the time or upon the happening of any of the events specified in the operating agreement and in accordance with the operating agreement or unless otherwise provided in the operating agreement. . . . If such consent is not given, and if the operating agreement does not specify the time or the events upon the happening of which a member may withdraw, a member may, unless prohibited by the operating agreement, withdraw upon not less than six months' prior written notice. . . .

Limited Liability Co. Law § 606.<sup>1</sup> A review of this statute shows that it only applies when the operating agreement does not address the issue of withdrawal of a member. Petitioner argues that because the operating agreement "is completely silent on the issue of a member's withdrawal," the statute must govern.

The Court disagrees. While the word "withdrawal" does not appear in the Operating Agreement, a review of the provision entitled "Sale of Membership Interest in Absence of Prior Offer" shows that it does apply here. *Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 13 N.Y.3d 398, 404 (2009) ("The entire contract must be reviewed and particular words should be considered, not as

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<sup>1</sup>This is the previous iteration of the statute, which both parties concede governs WIC.

if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought.”).

It is undeniable that petitioner wishes to sever his relationship with WIC entirely. To do that, he must do two things: withdraw as a member, which he has already done, and dispose of his membership interest (which obviously has some value). Article X plainly provides for the disposal of petitioner's membership interest “in the absence of a prior offer.” There is no question that petitioner does not have a prior offer. He thus must follow the procedures set forth in this provision to dispose of his membership interest.

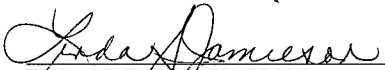
Nothing that petitioner says persuades the Court otherwise. It has long been settled that “The rules of construction of contracts require us to adopt an interpretation which gives meaning to every provision of a contract or, in the negative, no provision of a contract should be left without force and effect.” *Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 46 (1956). Petitioner's interpretation would ignore the provision that covers the situation that has arisen here, where petitioner wishes to

sell/dispose of/be compensated for<sup>2</sup> his membership interest, and he does not have a prior offer from respondents or a third party.

Accordingly, the Court finds that petitioner must follow the procedures set forth in the Operating Agreement, Article X, in order to receive value for his membership interest in WIC. The Court denies the petition in its entirety, and grants respondents' motion to dismiss it. The parties' other litigations remain unaffected by this Decision and Order.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York  
April 21, 2016

  
HON. LINDA S. JAMIESON  
Justice of the Supreme Court

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<sup>2</sup>To the extent that petitioner takes issue with the word "sell," by arguing that he does not wish to sell his membership interest, but instead wishes to "receive fair value" after withdrawal, this a mere semantic distinction without a difference. The fact is that he has a membership interest and wants to be paid therefor upon his withdrawal. That is, by any realistic interpretation, the act of selling.

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