

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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DAVID J. MACE,	Plaintiff,	:	
	- against -	:	Index No. 68644/2015
NICHOLAS TUNICK,		:	
NICHOLAS TUNICK as Trustee		:	
for THE IRREVOCABLE TRUST FOR THE		:	<u>NOTICE OF ENTRY</u>
BENEFIT OF NICHOLAS TUNICK, NICHOLAS		:	
TUNICK , ORIGINAL TRUSTEE, UNDER		:	
AGREEMENT, DATED NOVEMBER 27, 2012,		:	
and PEDANI REALTY SERVICES, LLC,		:	
	Defendants.	:	

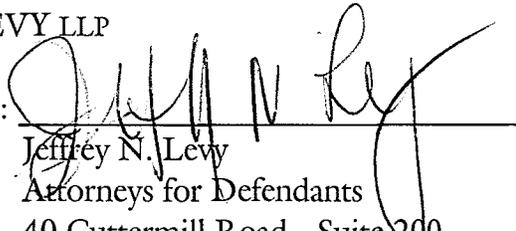
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Sir:

Please take notice that the within is a true copy of a Post-Trial Decision of the Honorable Alan D. Scheinkman, dated December 28, 2017 and duly entered in the within action in the office of the Clerk of Westchester County on December 28, 2017.

Dated: Great Neck, New York
January 2, 2018

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To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
COMMERCIAL DIVISION**

**Present: HON. ALAN D. SCHEINKMAN,
Justice.**

-----X
DAVID J. MACE,

Plaintiff,

Index No. 68644/2015

-against-

**POST-TRIAL
DECISION**

NICHOLAS TUNICK, NICHOLAS TUNICK AS TRUSTEE
FOR THE BENEFIT OF NICHOLAS TUNICK UNDER
AGREEMENT, DATED NOVEMBER 27, 2012,
AND PEDANI REALTY SERVICES, LLC,

Defendants.
-----X

Scheinkman, J:

This action was initiated by the filing of a Summons and Complaint on October 26, 2015. In the First Cause of Action, which is the sole remaining cause of action, Plaintiff David J. Mace ("Plaintiff" or "Mace") seeks the dissolution of Pedani Realty Services, LLC ("Pedani"). Mace holds 20% of Pedani. Dissolution is opposed by Defendant Nicholas Tunick ("Nicholas Tunick" or "Defendant"), who as an individual holds 20% of Pedani and who as the beneficiary of a trust (the "Tunick Trust") holds 60% of Pedani.

This Court, by Decision dated May 23, 2016, granted Defendant's motion to dismiss the First Cause of Action but the Appellate Division, Second Department, by Decision and Order dated August 16, 2017, reversed and denied the dismissal motion. The relevant portion of the appellate decision states as follows:

Here, the plaintiff alleged in the complaint that Pedani was formed for the purpose of acquiring title to and managing property to serve as Ceres' headquarters, and that it became impossible to fulfill that purpose once Ceres relocated to a different property, not owned by Pedani. Contrary to the defendants' contention and the Supreme Court's conclusion, the defendants did not show, through the operating agreement or any other evidence, that the material fact alleged by the plaintiff regarding Pedani's purpose "is not a fact at all" and that "no significant dispute exists regarding it"... In this respect, the operating agreement did not set forth any particular

purpose for Pedani. The court's determination that Pedani's purpose was simply to acquire and manage property constituted an impermissible factual finding.

Moreover, the defendants were not entitled to dismissal of the first cause of action under CPLR 3211(a)(1). Neither the operating agreement nor the leases of the property to Ceres and, upon Ceres' relocation, a third party, utterly refuted the plaintiff's allegation as to Pedani's purpose so as to conclusively establish a defense as a matter of law to the plaintiff's dissolution cause of action.... (*Mace v Tunick*, 153 AD2d 689, 690 [2d Dept 2017] [citations omitted]).

Following the Appellate Division decision, the parties engaged in discovery and the matter came on for trial on November 14, 2017. On December 15, 2017, the parties submitted their post-hearing memoranda, in lieu of closing arguments, and also submitted a copy of the transcript. The matter was fully submitted as of that date.

RELEVANT FACTS

A. *The Stipulated Facts*

On November 9, 2017, in anticipation of trial, counsel for the parties entered into an Agreed Upon Statement of Facts. These facts include the following:

Pedani was formed on July 9, 2007. At the time of its formation, Pedani was owned 60% by Peter Tunick, 20% by Nicholas Tunick and 20% by Mace. At the time Pedani was formed, the same three individuals owned Ceres Chemical Co. ("Ceres"), with the ownership percentages being: Peter Tunick – 70%; Nicholas Tunick – 10% and David Mace – 20%.¹

On September 26, 2007, Pedani purchased real estate located on Westchester Avenue in Pound Ridge. The property contained a house which was converted to an office and an additional building. The house is designated as "26" Westchester Avenue and the additional building is designated as "28" Westchester Avenue. Prior to this purchase, the three principals looked at other properties. (Going forward in this Decision, the Court refers to the entire premises as the "Property").

Ceres executed a lease dated September 28, 2007 to occupy 26

¹It was further stipulated that at some point Mace had an additional 10% profit participation in Ceres.

Westchester Avenue. Ceres executed a second lease to occupy 28 Westchester Avenue as of June 1, 2009. These leases were extended through December 31, 2012 by a signed lease renewal.

In or about December 2012, ownership of Pedani changed, with the Trust owning 60%, Nicholas Tunick owning 20% and Mace owning 20%.

In October 2013, Mace retired and sold his interest in Ceres to Ceres, with Nicholas Tunick becoming the sole shareholder of Ceres. Mace maintained his interest in Pedani.

After the expiration of the written leases to Ceres, Ceres stayed over and paid the building expenses until May 2014 when Ceres vacated the Property.

The Property was leased to Joseph S. Lovering by lease dated June 9, 2015 and Lovering is in occupancy of the Property.

Nicholas Tunick is the managing member and controls 80% of Pedani.

B. The Zoning Records

As part of Plaintiff's case, Plaintiffs offered, and the Court received (over defense objection), certified records from the Town of Pound Ridge. One record is a commercial site plan application form. This form was signed by the prior owner of the Property, Mae Peterson, on July 8, 2017 but was signed much earlier, on May 7, 2007, by Peter Tunick "c/o Ceres Chemical Co." The form requested that the applicant was seeking to change the zoning from mixed use to office use.

According to certified minutes of the Pound Ridge Planning Board's meeting of May 31, 2017, Peter Tunick appeared at the meeting and identified himself as being in contract for the Property. In the course of the discussion on the proposed change, Peter Tunick stated that the contract with Ms. Peterson was contingent on Planning Board approval for the office use.

According to the records, the matter was again discussed by the Planning Board on June 28, 2017. At that time, Peter Tunick explained that they needed only 7 parking spaces but had listed 13 on the plan in order to comply with town requirements. The Chair of the meeting indicated that the Board could waive the parking requirement and require only 7 spaces and, if a need for more parking arose in the future, the Building Inspector could require that more parking spaces be provided.

On July 26, 2017, the Board adopted a resolution approving the change to office only use subject to stated modifications and conditions.

At the trial, two witnesses testified – Mace and Nicholas Tunick.

C. *The Testimony of David Mace*

Mace testified that Ceres was originally founded in the early 1970s and primarily represented chemical factories that imported pharmaceutical ingredients, such as hydrocortisone, into the United States. Mace went to work for Ceres as a sales representative in 1993, at which time Ceres had its offices on Mamaroneck Avenue in White Plains. When Mace started with Ceres, Peter Tunick was Vice President and owned 20% of the stock.

In late 2001 or early 2002, Nathan Froot, who owned 80% of Ceres, decided to retire and he sold his stock to Peter Tunick. Peter Tunick then sold 20% of Ceres to Mace.

According to Mace, over the years Ceres had its offices in various locations in leased space in the White Plains area; in 2003 or 2004, Ceres moved to 84 Business Park Drive, Armonk.

Mace had told Froot should he “buy your own place and stop paying all this rent”. Froot had no interest. After Froot was bought out by Peter Turnick, Mace re-visited the subject with Peter Tunick, who was then the President of Ceres. Mace was then in his mid-60s and had no interest in owning real estate. Nevertheless, he went looking for office space for Ceres with both Peter and Nicholas Tunick.

Mace learned of the Property in early 2007. Ceres moved in to the property in the late Fall 2007. According to Mace, a lot of work needed to be done on the building, referring to the building at 26 Westchester Avenue. However, Mace acknowledged on cross-examination that he never looked at the building until after it had been purchased.

Mace testified that the purchase price was approximately \$1,220,000. Mace provided \$150,000 out of his own funds by check. The balance of his percentage portion of the purchase price, between \$60,000 and \$90,000, was paid by Ceres. The stockholders in Ceres had their equity in Ceres reduced by the contribution Ceres made toward the principals' respective obligations towards the purchase price.

Mace testified that the two Tunicks set the rent to be paid by Ceres to Pedani and that the rent was above market; it was higher than the previous space in Armonk.

According to Mace, the previous owner of the Property lived in the house on the Property and used the other building on the Property, 28 Westchester Avenue, as an antique store. The building known as 28 Westchester Avenue was described by Mace as a barn with heat and air conditioning but no other facilities. Ceres used the barn as an attic, for storage.

On cross-examination, Mace testified that he attempted to rent out the barn building to a third party. He recalled that there was someone who wanted to use it to store motorcycles and that he believed that Nicholas Tunick had spoken with someone who was an artist.

D. *The Testimony of Peter Tunick*

Peter Tunick testified that he began with Ceres in 1983 as a salesperson and eventually he became the President. In 2006 or 2007, he began looking for property. He testified that he and the other principals of Pedani looked at a property in Mount Kisco that had 7 or 8 units with garages in the back that had several tenants. They also looked at property in Armonk that had about six units, of which 4 were leased to others. They made an offer on the Armonk property but it was rejected by the seller. They also looked at two restaurant properties, one in Pound Ridge and one in Mount Kisco, that had office space on the second floor.

According to Peter Tunick, after the subject property was acquired, the parties made several attempts to rent out the 28 Westchester Avenue portion of the Property but were unsuccessful.²

On cross-examination, Peter Tunick acknowledged that he, Mace and Nicholas Tunick signed the contract with Peterson in their personal capacities. At the time he signed the contract, it was his intention to change the use of the Property so that Ceres could move its offices there. He also testified that Ceres made unsuccessful attempts to lease out the barn and that Ceres used the barn building for storage of file cabinets, folders and boxes.

Peter Tunick conceded that the rent charged to Ceres was higher than market rent.

Additional facts, drawn from the documents received in evidence, will be adduced as relevant to the resolution of the controversy.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

LLCL § 702 provides for judicial dissolution of a limited liability company as follows:

On application by or for a member, the supreme court in the judicial district in which the office of the limited liability company is located may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement.

The governing legal standard has been established by the Appellate Division, Second Department, in this very case as follows:

²Peter Tunick testified that after the Property was acquired he continued looking for other properties for investment purposes and did not include Mace in that search.

In order to demonstrate entitlement to dissolution of a limited liability company, the member seeking such relief "must establish, in the context of the terms of the operating agreement or articles of incorporation, that (1) the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or (2) continuing the entity is financially unfeasible" (*Mace v Tunick*, 153 AD2d 689, 690 [2d Dept 2017], quoting *Matter of 1545 Ocean Ave., LLC*, 72 A.D.3d 121, 131, [2d Dept. 2010] and citing Limited Liability Company Law § 702).

Mace invokes only the first of the two grounds for dissolution – that, in the context of the Operating Agreement the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of Pedani to be realized or achieved. Mace does not claim that continuing Pedani is financially unfeasible. The Court notes that the lease of the Property to Joseph S. Lovering, which is for three years, is set to expire on June 14, 2018.

It is also useful to note the real nature of the dispute between Mace and Peter Tunick. Mace wants to liquidate his interest in the Property; Tunick does not wish to sell the Property and apparently has no interest in buying Mace out and the Operating Agreement states that no member has the right to require partition of company property or to compel any sale of company assets (Section 3.3).

Turning to the dissolution issue, Pedani has no particular stated purpose. Rather, Section 2.1 of the Operation Agreement contains broad, boiler-plate language that the purpose of the Company is to conduct any lawful business for which a limited liability company may be organized and to do all things necessary or useful in such regard. Defendant argues that because Pedani's stated purpose is to do any possible lawful business, and Pedani is doing business, it is impossible for Mace to show that Tunick is preventing the broad stated purpose from being achieved.

Plaintiff argues that parol evidence is admissible to either identify the real purpose of Pedani or clarify the ambiguity in the Operating Agreement as to the purpose of Pedani. Defendant objects to this and points to the merger clause in the Operating Agreement:

SECTION 13.2 This Agreement contains a complete statement of all of the arrangements among the parties with respect to the Company and cannot be changed or terminated orally or in any manner other than by a written agreement executed by all of the Members. There are no representations, agreements, arrangements or understandings, oral or written, between or among

the parties relating to the subject matter of this Agreement which are not fully expressed in this Agreement.

As the Second Department has recently expressed:

A written agreement that is complete, clear, and unambiguous on its face must be enforced to give effect to the meaning of its terms and the reasonable expectations of the parties, and the court should determine the intent of the parties from within the four corners of the contract without looking to extrinsic evidence to create ambiguities The parol evidence rule generally operates to preclude evidence of a prior or contemporaneous communication during negotiations of an agreement that contradicts, varies, or explains a written agreement which is clear and unambiguous in its terms and expresses the parties' entire agreement and intentions (*Hoeg Corp v Peebles Corp.*, 153 AD3d 607, 608 [2d Dept 2017] [citations omitted]).

In addition, the Appellate Division has further stated, also recently:

'The construction and interpretation of an unambiguous written contract is an issue of law within the province of the court, as is the inquiry of whether the writing is ambiguous in the first instance. If the language is free from ambiguity, its meaning may be determined as a matter of law on the basis of the writing alone without resort to extrinsic evidence' ... "Where a contract is ambiguous, extrinsic evidence may be considered to determine the parties' intent" "When interpreting a contract, the construction arrived at should give fair meaning to all of the language employed by the parties, to reach a practical interpretation of the parties' expressions so that their reasonable expectations will be realized' " (*Yarom v Poliform S.P.A.*, 153 AD3d 760, 761 [2d Dept 2017]).

In this case, the Operating Agreement of Pedani is a complete, integrated writing that expresses the parties' entire agreement and intentions. Section 2.1, in stating the purpose of Pedani, is not ambiguous. It is crystal clear. Pedani "is to conduct any lawful business for which limited liability companies may be organized and to do all things necessary or useful in connection with the foregoing". While this language defines the corporate purpose to be as broad as is lawful, it is not ambiguous. It plainly means exactly what it says: Pedani's purpose is to conduct any lawful business that may be conducted by a limited liability company. Any testimony from Mace, or any one else, to the effect that the "real" purpose of Pedani was limited to buying real estate and only holding it for so long as Ceres is in occupancy would be contradictory to the expressed written statement of purpose in the Operating Agreement that all parties, including Mace, freely signed.

Hence, the Court is required to conclude that Mace's claim for dissolution must fail, given (1) the broad purpose language in the Operating Agreement; (2) the inadmissibility

of parol evidence to alter or vary or contradict that language; and (3) the existence of an extant lease from Pedani for the Property, which runs until June 14, 2018. Since it is lawful for a limited liability company to own and lease out property, and the Property is in fact owned by Pedani and is currently leased out, it cannot be said that Peter Tunick, as the manager of Pedani, is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved.

In its Decision on the motion to dismiss, this Court observed that giving effect to the broad purpose clause may operate to preclude judicial dissolution on every occasion in which such common, boiler-plate purpose language is used in an Operating Agreement. Indeed, such broad language may be invoked in Operating Agreements, not because the company lacks a specific purpose, but to avoid the use of restrictive, focused language that could end up hamstringing company operations or preventing necessary shifts in business strategy or focus in order to accommodate changed conditions. While some drafters and parties may prefer to have specific, limiting language, other drafters and parties may prefer, and the law permits them, to leave the corporate purpose entirely open-ended. The parties to an Operating Agreement are free, of course, to state both a specific purpose and also provide that, notwithstanding the statement of a specific purpose, the entity may engage in any lawful activity. The parties are also free to provide for dissolution, either by defining the specific stated purpose (with management's refusal to promote that purpose being a ground for dissolution) or by providing for the circumstances under which dissolution would obtain in the Operating Agreement.

Here, the parties did provide for the circumstances under which Pedani could be terminated or dissolved. For one, the Operating Agreement requires that Pedani be "terminated" in the event any Member withdraws, resigns or is expelled from the Company.³ Reading Article X (Dissolution) together with Article II (Organization – the Article which contains the purpose clause), it would scarcely make sense for the parties to have intended to state a specific purpose for Pedani, such that failure to promote it would lead to dissolution, as that would lead to dissolution for a ground other than one the parties agreed to.

In short, the Court is convinced that the absence of a statement of a particular purpose for Pedani was deliberate and intentional and the Court is not inclined to read such a purpose into the Operating Agreement and thus re-write the Agreement for the benefit of one party.

In deciding the motion to dismiss, the Court ruled that it would not give determinative effect to the purpose clause as written and that it would consider extrinsic

³While Article IX is entitled "Admission and Withdrawal of a Member", nothing in that article deals expressly with withdrawal or, for that matter, with retirement. The Article does provide that a member can transfer his interest with consent of the other members. Failing such consent, the transfer may still occur. While the transferee does not become a member, the transferee becomes entitled to receive the share of profits, losses, cash flow or other income and the return of contributions which the transferor would otherwise be entitled to. There does not seem to be any reason why Mace could not resort to this provision to sell his interest to a third person.

evidence – the deed to the Property into Pedani – to aid the construction of the Operating Agreement. Acting on that premise, this Court construed the documentary evidence (*i.e.*, the Operating Agreement and the deed to the property into Pedani) together to mean that the initial purpose of Pedani was to acquire title to, and manage, the subject property. The Appellate Division, however, construed this construction to be a “factual finding” which was impermissible to make on a motion to dismiss. This Court now concludes that it would be improper to find that Pedani’s purpose was other (*i.e.*, more narrow) than that stated in the Operating Agreement. Because this Court’s prior determination was reversed, it is no longer of any precedential value and, in any event, the law of the case doctrine does not apply where a trial court changes its own ruling, as opposed to the ruling of another judge of coordinate jurisdiction (*see Commercial Tenant Services, Inc. v Northern Leasing Systems, Inc.*, 131 AD3d 895 [1st Dept 2015]).

In any event, even assuming that it was proper to read the purpose clause more narrowly than it is written, the Court, now having had the benefit of the evidence, the stipulated facts, and the testimony of the parties, finds as fact that the purpose of Pedani was to acquire title to, and manage, the Property, primarily so that Ceres would rent it for its offices but not exclusively for that purpose. Further, the Court cannot – and does not – find that the purpose of Pedani was only to hold the property only for so long as Ceres was in occupancy.

Mace testified, and the Court accepts this testimony as credible, that after Mace and the Tunicks acquired Ceres from Froot, they sought out properties to acquire for the purpose of use as offices for Ceres. This testimony was confirmed by Peter Tunick.

The contract from Peterson to Mace and the two Tunicks, dated July 22, 2007, contains a contingency clause which provides that the contract was contingent on the purchaser obtaining municipal approve to change the use of the premises from mixed use to office. The Planning Board documents show that Peter Tunick, on May 31, 2007, described to the Planning Board the business that would occupy the subject premises – a “sales/marketing business development company that concentrates on selling pharmaceutical ingredients” which had been “in business since the late 1970’s”. While the minutes do not reflect the name of the business, from the description and from the absence of any evidence as to the parties’ involvement in any other business enterprise, that business could only be Ceres.

Pedani was formed after the three principals had already entered into a contract to buy the Property. Pedani was formed on July 9, 2007 and, by deed dated September 26, 2007, Pedani took title to the Property. Hence, the contemporaneous documents, read together with the Operating Agreement, and the testimony of the parties indicate that the parties intended to use Pedani as a vehicle to acquire title to, and manage, the Property. Furthermore, on September 28, 2007, two days after taking title to the Property, Pedani leased 26 Westchester Avenue to Ceres. Thus, it may be fairly said that the parties intended for Pedani to be a vehicle to acquire title to, manage and lease 26 Westchester Avenue, with the lease to such portion of the Property to be granted to Ceres.

On the other hand, the Court accepts the testimony of Peter Tunick, which is confirmed by the testimony of Mace on cross-examination, that the parties attempted to lease 28 Westchester Avenue to a third party. This testimony is consistent with the testimony that

the parties, when locating for real estate to acquire, were considering properties that were suitable for Ceres' occupancy as well as for renting out to third parties. The fact that the parties were not successful in renting out 28 Westchester Avenue does not negate the fact that the parties intended to lease out that portion of the Property. Since the parties intended to lease out a portion of the property, it cannot be said that they intended that the entire Property would be used exclusively as Ceres' headquarters.

Thus, even giving Plaintiff the benefit of reading into the Operating Agreement the specific purpose for Pedani to acquire, maintain and operate the Property, and to lease out 26 Westchester Avenue to Ceres, it cannot be said that Ceres' departure from 26 Westchester Avenue defeats the parties' purpose because the parties' purpose included the renting out of 28 Westchester Avenue.

As noted by the Appellate Division in its decision, Plaintiff alleged that Ceres relocated to a different property, not owned by Pedani. This allegation was not established. Rather, the parties stipulated that Ceres vacated the Property in May 2014, without specifying where, if any place, Ceres went or the circumstances under which Ceres vacated.

The Court also notes that in June 2015 Pedani leased 26 Westchester Avenue to Joseph S. Lovering for a term of three years. Mace did not claim, or prove, that he was unaware of this lease nor did he claim that he objected to it. The absence of such claim and the absence of such evidence is telling. This action was commenced in October 26, 2015. At no point has Mace claimed that the giving of the lease to Lovering was *ultra vires*. The Court accepts, as a matter of fact, that Pedani could and did continue to manage the Property after Ceres' vacated 26 Westchester Avenue. Pedani was authorized to retain title to the Property and to continue to manage its assets, notwithstanding Ceres' departure.

Finally, there is no evidence at all that Peter Tunick, as the management of Pedani, was unable or unwilling to reasonably permit or promote the purposes of Pedani.

Even assuming that as the person with the controlling interest in Ceres, he caused Ceres to vacate, there is no evidence that he did so unreasonably. As noted, there is no evidence as to why Ceres vacated. And there is no evidence that Peter Tunick failed to take reasonable steps to seek replacement tenants.

As previously stated, the real object of the dissolution claim is to achieve for Mace what he cannot achieve under the Operating Agreement. Under Section 3.3, no member has the right to require partition of any Company Property or to compel the sale of the Company's assets. Rather, a sale of Pedani's interest in any property requires the consent of a majority interest of the Members, although Mace could still effectively transfer his interest to a third party even if there was no consent. The transferee would still receive the economic benefits that would flow to Mace, the transferee would just not become a member (§ 5.5).

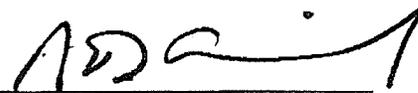
CONCLUSION

For these reasons, the Court concludes that Plaintiff has failed to establish his First Cause of Action and this action should, therefore be dismissed. Defendant may enter an appropriate Judgment.

The foregoing constitutes the Decision of this Court and its Findings of Fact and Conclusions of Law pursuant to CPLR 4213(b).

Dated: White Plains, New York
December 28, 2017

ENTER:



Alan D. Scheinkman
Justice of the Supreme Court

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