

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBORAH EDELMAN
SPECIAL REFEREE

PART 802

Justice

Index Number : 650025/2016
ADVANCED 23, LLC
vs.
CHAMBERS HOUSE PARTNERS, LLC
SEQUENCE NUMBER : 005
HEAR AND REPORT

E-FILE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

reference is resolved in accordance with the accompanying report and recommendations.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: October 5, 2018

[Signature] J.S.G.

- 1. CHECK ONE: [] CASE DISPOSED [x] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [] GRANTED [] DENIED [] GRANTED IN PART [] OTHER
3. CHECK IF APPROPRIATE: [] SETTLE ORDER [] SUBMIT ORDER
[] DO NOT POST [] FIDUCIARY APPOINTMENT [] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 80R-----X
ADVANCED 23, LLC, DAVID SHUSTERMAN,

Petitioners,

Index No. 650025/2016

-against-

CHAMBERS HOUSE PARTNERS, LLC,
ANITA MARGRILL, HERBERT MARGRILL,**Referee Report and
Recommendation**Respondents.
-----X**TO THE HONORABLE SALIANN SCARPULLA, PART 39:**

By Decision and Order dated December 15, 2017 (the “December 15, 2017 Order”), the Honorable Saliann Scarpulla referred to the Special Referee Part, for a referee to hear and report, the issue of whether the individual Petitioner, David Shusterman “breached his duties and obligations under the Operating Agreement to force dissolution.” 12/15/17 Order, at 12. *See also* at NYSCEF Doc. No. 83.

The reference was assigned to me on March 5, 2018, and a pre-hearing conference was held on that date. Petitioners were represented by Seth L. Marcus, Esq., of the Law Offices of Seth L. Marcus. Respondents were represented by Bruce H. Lederman, Esq., of D’Agostino, Levine, Landsman & Lederman, LLP.

A settlement conference was held on March 8, 2018. No settlement was reached and the matter proceeded to the hearing. The parties filed post-hearing briefs on a timely basis. There was a delay with receipt of the transcript of one of the hearing days, which was sent on June 12, 2018, fully submitting the matter before me.

BACKGROUND

Familiarity with the December 15, 2017 Order, and the facts set forth therein, are presumed. Briefly, this is a special proceeding, seeking, *inter alia*, a judicial decree dissolving respondent Chambers House Partners, LLC (“Chambers House”), pursuant to NY Limited Liability Company Law § 702 and directing that its real property (“the Building”) be sold and that Chambers House be liquidated. The Building contains four residential units and one commercial unit on the ground floor. 12/15/17 Order, at 2.

The proceeding was commenced by David Shusterman and Advanced 23, LLC (“Advanced 23”), which is an entity wholly owned by David Shusterman. *Id.*, at 1-2. The Amended and Restated Operating Agreement of Chambers House Partners LLC (the “Operating Agreement”) was signed by David Shusterman, as Manager and Sole Member of Advanced 23. Resp Exh E. The other two members of Chambers House, and signatories to the Operating Agreement, are Herbert and Anita Margrill. Advanced 23 owns 50% of Chambers House, Herbert Margrill owns 25%, and Anita Margrill owns 25%. 12/15/17 Order, at 2. Of the four residential units, David Shusterman resides in the unit on the fifth floor, and Herbert and Anita Margrill reside in the unit on the second floor.

Justice Scarpulla issued the December 15, 2017 Order, finding that the Respondents’ allegations regarding David Shusterman’s conduct raise triable issues of fact, that precluded summary judgment for Petitioners. *Id.*, at 11. These allegations included any ineffectiveness in the management and operations of Chambers House being due to David Shusterman’s intentional acts to force dissolution and gain control of the Building. *Id.* Justice Scarpulla therefore directed an evidentiary hearing be conducted to determine whether Shusterman breached his duties and

obligations under the Operating Agreement to force dissolution, *Id.*, at 12.

This reference followed.

THE HEARING

The hearing was held over three days. Both counsel made opening statements. Transcript of hearing day 1 (“Tr1”), at 4-10. On the first day of the hearing, respondent Anita Margrill testified. On the second day of the hearing, Maurice Reichman, Esq., who was former counsel to respondents Anita Margrill and Herbert Margrill testified. On the third day of the hearing, petitioner David Shusterman testified, and respondents Anita Margrill and Herbert Margrill were each recalled. Both counsel made closing statements. Transcript of hearing day 3 (“Tr3”), at 148-53.

Respondents entered exhibits A-YY into evidence. Petitioners entered exhibits 1-13 into evidence. Of these, Respondents’ Exhibit E (“Resp Exh E”) is the Operating Agreement.

DISCUSSION

Question as to Scope

On February 10, 2016, the parties entered into a Stipulation regarding the running of Chambers House, that was So Ordered by Justice Scarpulla. NYSCEF Doc. No. 89 (the “Stipulation”). See also at Resp Exh EE.

At the pre-hearing conference, counsel addressed differing opinions with regard to the scope of this reference, given the Stipulation. I informed counsel that what would be most useful was case law regarding a corporate governing document, and a later filed order. Although

similar facts are always helpful, an example of a different but still possibly analogous case might be a contractual provision regarding access to books and records in the context of a discovery order. Counsel submitted a joint letter, addressing their arguments further. NYSCEF Doc. No. 88. However, neither counsel found/addressed any case law on the issue requested. *Id. See also* Tr1, at 3.

Petitioners argued that following the commencement of litigation, David Shusterman could no longer breach the Operating Agreement because Chambers House was no longer being run pursuant to the Operating Agreement, but rather by the Stipulation that was So Ordered by Justice Scarpulla. NYSCEF Doc. No. 88, at 2-3. Petitioners further argued that the Stipulation was specific that the remedy for its breach was a motion for contempt. *Id.*, at 3.

Respondents argued that this reference requires consideration of David Shusterman's state of mind and motive. They argued that nothing in the Order of Reference limits finding a breach of duties and obligations to acts prior to filing this matter. *Id.*, at 4. They avered that following the filing of the Petition, David Shusterman engaged in actions that violated both the express and implied provisions of the Operating Agreement, and that those are within the scope of this reference. *Id.* They further contended that, even if the reference is limited to breaches of duties and obligations prior to the commencement of this matter, subsequent evidence of similar acts is admissible to establish motive and intent. *Id.*, at 5. They also argued that nothing in the Stipulation states that it superseded and replaced provisions of the Operating Agreement. *Id.*

The issue of the scope of the reference, or the scope of the evidence that could be presented in the reference, was held in abeyance. Tr1, at 3. I permitted testimony and evidence that related to the issue in its totality, to be preserved on the record. *Id.*, at 4. The parties had the

opportunity to put in further argument or case law at a later date. *Id.*, at 3. In the post-hearing submissions, no further case law was provided. *See generally*, Pet Br; Resp Br.

It is my report and recommendation that events that took place following the filing of the Petition be considered. At minimum, “other similar acts” will be admitted if it tends to “establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan; or (5) identity.” *Matter of Brandon*, 55 NY2d 206, 211 [1982]. *See also Atari, Inc. v Carlyle Trading Corp.*, 2012 NY Misc Lexis 6177, *16-17 [N.Y. County, June 21, 2012] [J. Schweitzer] [citing *Matter of Brandon*, and finding material of other past history may be admissible to “negate the existence of an innocent state of mind” and support its allegations of bad faith].

For reference, the Petition in this case is dated January 4, 2016, and efiled January 5, 2016. NYSCEF Doc. No. 1.

Credibility

This reference involves varying degrees of recollection and disparate views of the same events. As such, credibility is of particular importance. To that end, I assess each of the testifying witnesses below. *Herman v. Gill*, 61 AD3d 433, 433 [1st Dep’t 2009] [holding that the role of the referee includes resolving matters of credibility]. *See also Winopa Intl. Ltd. v. Woori Am. Bank*, 59 AD3d 203, 203 [1st Dep’t 2009] [referee best positioned to weigh evidence and make credibility determinations]; *Anderson v. Weinroth*, 48 AD3d 121, 133 [1st Dep’t 2007] [same].

It is appropriate to look at motives in evaluating credibility. *Gass v. Gass*, 42 AD3d 393, 394 [1st Dep't 2007]. Petitioner David Shusterman, and respondents Herbert and Anita Margrill all have an interest in this matter. All three live in Chambers House, own membership interest in same, and have an interest in maintaining control over same. As such, each party witness had a significant incentive to tailor their testimony to accentuate any helpful facts and avoid harmful ones.

David Shusterman often appeared not credible. He made multiple statements, some addressed below, that simply were not believable. He appeared over-rehearsed. At times he appeared unable to make eye-contact, and his words very often did not match his body language.

Herbert Margrill appeared largely truthful. I cannot fully credit his testimony, however, because he also was the individual most likely to confuse certain items or events.¹ He testified under cross-examination that he is taking multiple medications, including Aricept for dementia. Tr2, at 183-84. He further testified that he has some problems remembering things. *Id.*, at 184.

Anita Margrill appeared largely credible. She appeared to be emotional at times, but was direct and clear.

There were times when Anita and Herbert Margrill appeared to be conferring with each

¹ For example, Herbert Margrill testified that David Shusterman never yelled at him but has a tendency to bully. Transcript of hearing day 2 ("Tr2"), at 186. He was shown the deposition transcript from approximately a year and a half before, where he testified that he wouldn't accept being bullied by David Shusterman. *Id.*, at 187. He was also shown the errata sheet from that, where it was changed to he wouldn't have accepted that in his younger days, but at 91 was not as vigorous as he used to be. *Id.* He further testified that the handwriting on the errata sheet was not his. *Id.*

However, it was also the case that David Shusterman would struggle with dates, for events years before. For example, he struggled to remember when he wrote a note to Herbert Margrill, thinking it was July of 2014 or 2015. Tr3, at 30-31. This did not appear unusual or problematic to me.

other, either verbally or non verbally, during their respective testimony. Tr1, at 118; Tr2, at 181-83. This is noted as wholly improper. However, when this occurred, it was open and without any attempt to keep such communication private. Additionally, although a formal process, the hearing occurred with the witnesses and counsel physically seated around a conference table. When such communications occurred, it appeared to be a couple, who had been married for a long time, instinctually turning to each other. In this, I disagree with Petitioner's position that Anita Margrill attempted to improperly influence the record. *See* Pet Br at 10.

Having viewed all the testimony and demeanor at the hearing, Maurice Reichman was unquestionably the most credible of the witnesses who testified. He also had the least interest in the outcome of the hearing. He testified that he had never represented the Margrills in any other capacity other than regarding Chambers House and David Shusterman. Tr2, at 134. Moreover, nothing in his demeanor and or conduct at the hearing caused me any concern about the veracity of his testimony. He came across as forthright and direct. However, his was the most limited testimony.

Despite the above, each portion of the testimony, from each witness, had to be evaluated for credibility. This is addressed, in conjunction with specifics of their testimony, below.

Breaches

Meetings

The Operating Agreement obligates the Managers to "meet with the other Manager no less than once per month to review management and operation matters or as may be needed to address an emergency impacting the physical or financial condition of the Building or any

imminent danger to person or property.” Resp Exh E, § 4.1(d). Herbert Margrill and David Shusterman are the Managers of Chambers House. *Id.*, at § 4.1(b)

Herbert Margrill testified that, from the time David Shusterman purchased shares of Chambers House until the time the lawsuit started, there were not regular monthly meetings. Tr2, at 168. He further stated that he himself would have liked and was available for regular monthly meetings. *Id.* He was highly credible in this testimony.

I also credit Herbert Margrill’s testimony that he almost never saw David Shusterman in the hallway and when they saw each other, they did not discuss building issues. He testified that was why, in July of 2014, he started to put requests in writing and sent David Shusterman notes. Tr2, at 169, 192. *See* Resp Exh J. He testified that David Shusterman would very rarely answer the notes. He explained that they never agreed communication via notes would be the procedure, it simply became the procedure, and that David Shusterman never objected to it. Tr2, at 192. He testified that David Shusterman’s lack of meetings with him over a period of years was the basis of his belief that David Shusterman was trying to “get rid” of them. *Id.*, at 179. He stated that David Shusterman only ever set up one meeting with him. *Id.*, at 169. Again, in this, Herbert Margrill was very credible.

David Shusterman testified that he participated in management meetings with Herbert Margrill. Tr3, at 25. He answered that, prior to October 2016, he had monthly meetings with Herbert Margrill. *Id.*, at 84. He testified that they would meet in the hall, or would call each other. *Id.*, at 25. He stated that if Herbert Margrill asked for a meeting, there would be one. He testified that it would be in person or over the phone or through his assistant at his office. *Id.*, at 26. David Shusterman testified that there were times he had difficulty obtaining a meeting with

Herbert Margrill. He explained that this occurred, either when Herbert Margrill wanted Anita Margrill to be there and they needed to wait for her return from San Francisco, where she lived part time, or because Herbert Margrill was not feeling well. *Id.*, at 27.

I report that I found David Shusterman completely lacking in credibility when discussing meetings. I note that even if David Shusterman had misspoken or misheard the year in the question, as can happen, and had intended to say October of 2015, or early 2016, he would still not have appeared as a credible witness on this issue. He presented information in this area in a condescending and, at times, practiced manner.

I report and recommend that David Shusterman breached his duties and obligations under the Operating Agreement, as to § 4.1(d). However, I do not report and recommend that this was done, generally, to force dissolution. I report that I find it more likely that David Shusterman breached this obligation out of a lack of concern for holding the meetings or a lack of respect for what those meetings meant to Herbert Margrill.

Mortgage

The specific meetings, or attempts at meetings, regarding the mortgage are an important exception. There is no dispute that a meeting was held on October 16, 2015. However, the witnesses sharply disagree on surrounding events.

Anita Margrill testified that she thought the mortgage on the building was coming due in early December 2015. She explained that at the time the mortgage was coming due, she and Herbert Margrill wanted to take out additional money. Tr1, at 67. Anita Margrill testified that HSBC offered them a nine-month extension of the mortgage. *Id.*, at 66, 71.

She emailed David Shusterman on July 9, 2015, to remind him of that and to ask that he bring Chase Banks's mortgage proposal to a meeting. Resp Exh M. She said it took about a month to get David Shusterman to agree to come to a meeting, but he said he'd come with several proposals. Tr1, at 56. Anita Margrill stated that she prepared an email, dated September 24, 2015, with nine suggested talking points for the meeting. Pet Exh 1; Tr1, at 104.

Anita Margrill testified that she and Herbert Margrill had a personal lawyer at the meeting, Maurice Reichman, and invited David Shusterman to bring one as well. Tr1, at 61. She stated that David Shusterman was late for the meeting. Resp Exh 64. She testified that, at the meeting, David Shusterman said he had not brought the information regarding refinancing the mortgage, and said something to the effect that he could not give them the contact information for the person with whom he dealt at Chase Bank. Tr1, at 65. She testified that Maurice Reichman asked David Shusterman if he could get the material to them in a week or two, and David Shusterman got up and started to walk out. *Id.* She said she wondered what precipitated it, and that Maurice Reichman and David Shusterman started to shout at each other, about there being litigation. *Id.* She stated that she asked David Shusterman if his attorney was the same person she had known from before, and he replied no and stormed out. *Id.*

Anita Margrill testified that, even after that meeting, she still expected that David Shusterman was going to cooperate in refinancing the mortgage. *Id.*, at 69. On October 20, 2015, the Margrills sent a letter to David Shusterman, asking about the several mortgage proposals David Shusterman had referenced. Resp Exh R. Anita Margrill testified that the Margrills met with HSBC, and were told by HSBC that David Shusterman had already informed HSBC that there would be no extension of the mortgage. Tr1, at 72. HSBC forwarded to them

an email from David Shusterman, dated October 23, 2015, wherein he stated “There will be no mortgage extension for Chambers House Partners. Mortgage will be paid off as the note indicates. No changes are to be made.” Resp Exh S.

Anita Margrill was largely credible during her testimony on these points. Petitioner’s counsel, on cross-examination, elicited testimony from her that her handwritten notes at the meeting (Pet Exh 3; Tr1, at 123) are not identical and have certain inconsistencies with Minutes of the meeting that she created thereafter. Tr1, at 125-27; Resp Exh Q. This was not problematic. She testified that her notes formed the basis for the Minutes of the meeting that were created. Tr1, at 123. Further, it is not unusual for notes taken in live time, particularly during an emotional or heated meeting to differ from a more formal draft created thereafter. Cross-examination also pointed out certain inconsistencies between her notes and an affidavit she signed. *Id.*, at 128-29; Pet Exh 4. She did not dispute those. Tr1, at 128-29. I report that I found Anita Margrill’s testimony regarding the mortgage, the meetings for same, and the end result to appear to be honest and direct. I did not find her memory to appear to be perfect. Although I did find her memory to be largely consistent, where it as not, she was open and clear and showed no signs of trying to hide anything.

Herbert Margrill also testified about the October 16, 2015 meeting. He explained that he would have wanted to extend the mortgage they had at the time, with HSBC, if it was on good terms. Tr2, at 178. He stated that before the meeting, David Shusterman had not told him that he wanted to pay off the mortgage. *Id.*, at 177. He testified that David Shusterman did not say anything about taking out a large mortgage at the meeting. Tr3, at 147. Herbert Margrill stated that after Maurice Reichman asked David Shusterman about any mortgage offers from Chase

Bank, David Shusterman just got up and walked out. Tr2, at 178. Herbert Margrill's testimony in this area was credible. It was not highly detailed, but appeared honest and candid.

Maurice Reichman testified he had been admitted to the bar in March 7, 1957. He said that he had been asked if he could help the Margrills, by an architect he himself had used and represented, and whom the Margrills had used as an architect. *Id.*, at 135. Maurice Reichman explained that when he was advising the Margrills as to what the Operating Agreement permits and does not permit, it was as their personal lawyer and he was providing them an interpretation that would help them achieve their goals. *Id.*, at 148. He testified that about a week or so prior to the meeting, Anita Margrill had circulated talking points. *Id.*, at 136, 145. Pet Exh 1. He said that he was under the impression she had given David Shusterman a copy of it before the meeting, and that at the meeting she offered him a copy and David Shusterman said he did not need it. Tr2, at 136.

Maurice Reichman testified that he remembers the meeting clearly "because this was the most unusual meeting I could ever remember." *Id.*, at 137. He testified that, on the subject of the mortgage, David Shusterman said he had not brought his material from Chase Bank with him, and when Maurice Reichman asked David Shusterman for the name of his banker, David Shusterman said he'd give it to him later. *Id.*, at 138. Maurice Reichman asked him when, and could he do it by November 15, and then "what happened was the most bizarre thing I ever saw."

Id. Maurice Reichman testified that David Shusterman

just looked at me, didn't say a word, looked at me, he got up from his chair, and he turned to go to the door. And I said, You know the mortgage is coming up in six weeks. What happens if the Margrills can't pay it because I didn't think they had any money when I agreed to take it. So he said, Well, they're just going to have to sell their

place. I said, You know you are going to start a lawsuit here, to enforce your guarantee, you're going to start it. He turned to me, he said, Well, so what? And he went to the door.

Id.

I report that I found Maurice Reichman to be highly credible when discussing this meeting. He was candid and forthright. He was clear as to what he remembered and what he knew and did not know. For example, he testified that he had not looked at Anita Margrill's handwritten notes of the meeting but he received the typed minutes and those minutes did, to the best of his recollection, comport with what took place at the meeting. Tr2, at 155; Pet Exh 3; Resp Exh Q. Further, he is no longer counsel to the Margrills, and has no personal interest in the outcome of this dispute. Most significantly, he came across as honest and sincere.

David Shusterman also testified about the mortgage and the meeting on October 16, 2015. He explained that he wanted to get the most leverage out of the building as they could on a mortgage, and discussed that with Herbert Margrill. Tr3, at 45. He stated that he wanted at least a two million dollar mortgage, if not more. *Id.*, at 45. At another point, he referenced the possibility of a three million dollar mortgage. *Id.*, at 120. He said he would have liked to get a four million dollar mortgage, but did not know if he could get one. *Id.*, at 129. David Shusterman testified that he discussed taking out funds, through the mortgage, to invest in other properties. *Id.*, at 119. He said that the maximum that Herbert Margrill wanted was a one million dollar mortgage. *Id.*, at 45. He testified that he was not angry that the Margrills did not want to take out the maximum amount of mortgage. He testified "There's no anger in me." *Id.*, at 133.

Prior to the meeting, the Margrills sent David Shusterman an email, dated August 15,

2015, informing him that they were now represented by Maurice Reichman. Resp Exh N. The email also listed five points, in which they stated David Shusterman was in default/breach of their agreements. *Id.* David Shusterman testified that, prior to this email, none of the items listed had been raised with him before. Tr3, at 47.

He stated, at the October 16, 2015 meeting, when the topic of the mortgage was brought up, and they disagreed about the amount, "all of a sudden - - I think Reichman said - - or Anita said we will sue you." *Id.*, at 52. David Shusterman testified that he said, if you're going to threaten to sue me, the meeting is over. He testified, *inter alia*, that he said "I have to get back in contact with you guys and I'm going to wait for the lawsuit to come. As soon as you serve me I will have a response." *Id.*, at 53. He stated that he then said the meeting was over and left. *Id.* He explained that he did not want to be in the meeting alone without a lawyer and being threatened with an action. *Id.* He said that he doesn't recall Maurice Reichman asking about what would happen if the Margrills could not pay off the mortgage. *Id.*, at 129-30. He said that was never discussed. *Id.*, at 130. He testified that he would not have said that they will have to sell their place. *Id.*, at 130-31. He stated that it was his understanding that if there is a dissolution, and the Margrills did not buy the building, they would have to move out. *Id.*, at 132. He testified that he was not seeking dissolution to force them to move out, that "It has nothing to do with that. So that we don't have to work together." *Id.*

David Shusterman further testified that he had not communicated with the Margrills regarding the possible extension of the existing mortgage before replying to the HSBC office. He said he did not do so because at the meeting, instead of discussing issues like this, they threatened to sue him. *Id.*, at 57.

I report that I did not find David Shusterman to be credible when testifying in these areas. I report that I found his demeanor shifted between smug and vindictive. Additionally, I report that I further found his testimony to appear overly rehearsed.

On this issue, I report that I found David Shusterman to have breached duties and obligations of the Operating Agreement.

First, I found that, at minimum, it was not credible that there were monthly meetings being held between the July 9, 2015 email from Anita Margrill to David Shusterman, that referenced the mortgage being due, and the October 16, 2015 meeting. See Resp Exh M. As such, David Shusterman's testimony that there were substantive monthly meetings, was not credible. See Tr3, at 84. 25-26. Accordingly, I report and recommend that David Shusterman be found to have breached the provision in the Operating Agreement that requires meetings at least monthly. Resp Exh E, § 4.1(d).

Secondly, the stated purpose of Chambers House is defined as:

Business Purpose. The purpose of the Company shall be to own and operate the building known and located at 154 Chambers Street, New York, New York 10013 (the "Building"); to provide a residence for its Members; and to conduct any lawful business as the Members may from time to time determine. The land and the Building are referred to herein collectively as the "Property."

Resp Exh E, § 2.3. The purpose of the entity is not to get the maximum amount of money out of the building, for personal or other investment purposes. In addition to the general covenant of

good faith and fair dealing in all contracts,² the Operating Agreement explicitly provides: “Duties of the Manager: (a) The Managers shall perform their management duties in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances.” *Id.*, at § 4.2. I report finding Maurice Reichman credible, when he testified that David Shusterman responded to a question regarding if the Margrills cannot pay off the mortgage in full, that “they’re just going to have to sell their place.” Tr2, at 138. I thus report and recommend finding that this sentiment demonstrates that David Shusterman was acting in breach of his duties of good faith and ordinary care to preserve and support the stated business purpose of Chambers House.

Thirdly, there is no question that increases in financing can only be undertaken by a unanimous vote of the Members. *Id.*, §§ 12.1, 3.10(h). I do not report or recommend that David Shusterman’s refusal to refinance to the mortgage at the lower amount sought by the Margrills was a breach of this provision. However, the Operating Agreement is clear on what is to occur when there is an inability to reach a unanimous agreement.

Open Matters.

(a) If the Members are unable to reach agreement upon any particular matter required to be determined by the Members unanimously under this Agreement, a Member may request, by delivery of written notice to the other Member, that such Members

² “This covenant embraces a pledge that ‘neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.’ While duties of good faith and fair dealing do not imply obligations ‘inconsistent with other terms of the contractual relationship,’ they do encompass ‘any premisses which a reasonable person in the position of the promisee would be justified in understanding were included.’ *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2 144, 153 [2002]. Where a contract has within it “discretion, this pledge included a promise not to act arbitrarily or irrationally in exercising that discretion.” *Dalton v. Educational Testing Serv.*, 87 NY2d 384, 389 [1995].

hold one or more informal meetings in an effort to discuss and resolve such open matter. Such meetings shall be held promptly (but in any event within ten days) following delivery of such a notice.

(b) If the procedure specified in Section 3.11(a) has not led to a satisfactory resolution of an open matter, the action or transaction proposed to be taken shall not be taken, unless and until agreement to do so has been reached. If the failure to take such action or to consummate such transaction will, in the opinion of either Member, materially hinder the conduct of the Company's business, the open matter shall be resolved by arbitration as set forth in Section 11.11 [sic].³

Resp Exh E, § 3.11. David Shusterman did none of those things. He did not set up or attend another meeting. *See* Resp Exh R. He unilaterally informed HSBC that there would be no mortgage extension. *See* Rep Exh S. Nor did he seek to address this matter via arbitration. Instead, after the Margrills were in fact able to pay off their half of the outstanding mortgage, he sought to dissolve Chambers House. These are additional breaches of the Operating Agreement.

I report and recommend finding that David Shusterman was, at some point prior to the October 16, 2015 meeting, trying to push the Margrills out of the Building. I, therefore, report and recommend that David Shusterman committed the above breaches of the Operating Agreement to attempt to force dissolution of Chambers House.

Garbage/Sanitation

Respondents appear to have argued that David Shusterman was in breach of the covenant of good faith by not cooperating with sanitation regulations, and by not keeping the building free of debris and garbage. Resp Br at 9. Petitioners' contend that the Operating Agreement is silent

³ The arbitration provision of the Operating Agreement is § 13.11.

as to garbage. Pet Br at 7-9.⁴

Briefly, Anita Margrill testified that there was a constant stream of garbage and that David Shusterman would “just dump his cardboard boxes in the entryway.” Tr1, at 37. She said that she had told him many times not to leave his garbage/cardboard boxes in the area between the outer and inner doors, where the mailboxes are. *Id.*, at 38-39. *See also* Resp Exh M. She stated that the building received multiple violations for improperly packaged garbage, because of David Shusterman. Tr1, at 38; Resp Exh G. On cross-examination, however, Anita Margrill looked at the sanitation tickets and agreed that multiple tickets were prior to David Shusterman moving in, around March of 2014. Tr1, at 99.

Herbert Margrill testified that there was a board in the lobby that specified the days and times for putting out garbage, such as Wednesday night for Thursday pickup. Tr2, at 174. He stated that he knew there were cardboard boxes that belonged to David Shusterman that were creating problems, because there were times Herbert Margrill took those cardboard out, and would see the labels on them. *Id.*, at 176.

David Shusterman testified that he would bring garbage downstairs from the fifth floor, and leave it in the lobby area, until he returned home, as it could only be placed outside for pickup after 6pm. Tr3, at 40. He said that the commercial tenant, on the ground floor of the Building, was the main culprit with regard to the tickets, as they were putting trash outside before the permitted 6pm time. *Id.*, at 43.

⁴ Indeed, they argued that the “idea that this garbage issue could constitute a breach of the Operating Agreement significant enough to justify the Margrills’ theft of funds is laughable.” Pet Br at 7-8.

Following the testimony at the hearing, and crediting Respondents' testimony, however, I report and recommend that the issue of garbage disposal, by itself, did not rise to the level of David Shusterman breaching the Operating Agreement, even under the general provision regarding good faith. *See* Resp Exh E, § 4.2.

Assault/Harassment

However, it is in the context of the ongoing dispute regarding the garbage that the issue of the alleged assault by David Shusterman on Anita Margrill emerged.

Anita Margrill testified that on one occasion, she moved materials that David Shusterman had brought down, back upstairs to his apartment on the fifth floor. Tr3, at 141-42. She stated that what she moved was empty cardboard boxes. *Id.* She testified that this was around July 2015. She testified that she left it in front of his apartment, knocked on his door, and his girlfriend looked out. She said that she told his girlfriend that it was David Shusterman's garbage, and his girlfriend called him. She testified that she spoke to David Shusterman, on the phone that his girlfriend handed to her, and he called her a "retard" and that she had no right to be on his floor and to get out. Tr1, at 39; Tr3, at 142-43. Anita Margrill stated that later, around midnight, she heard noise outside of her apartment, she opened the door, and found that David Shusterman had brought the boxes downstairs and dumped them in front of the Margrill's door on the second floor. Tr1, at 39. She said that she gathered up the boxes and started to follow him upstairs, and he took one of the boxes and hit her over the head with it. *Id.*, at 40. She said that, by this time, Herbert Margrill was up and saw it. *Id.* She further stated that the incident occurred on the stairway between the fourth and fifth floor. *Id.*, at 109.

Anita Margrill testified that, at the time, she shouted at David Shusterman that she was going to call the police, and that he told her to go ahead. *Id.*, at 40. She stated that she called 311 that evening, asking what to do, and was instructed to go to a police precinct. *Id.* She said that she did so a day or two later, and the officer told her that the event was a harassment, and wrote it up as an act of harassment. *Id.*, at 40. Nothing further happened with the report. *Id.*, at 41.

Anita Margrill testified that, thereafter, David Shusterman sent her an email, dated July 8, 2015, telling her not to terrorize his guests. Resp Exh YY. The email further stated that if she came to his apartment unannounced again and banged on the door, he would will call the police and get a restraining order against her. *Id.*

Anita Margrill was largely credible during her testimony on this issue. Upon seeing a copy of the police report, which was not moved into evidence, she testified that it was filed July 15, 2015 and that the date of occurrence on same was July 10, 2015. Tr1, at 110. These dates are inconsistent with the email he sent her on July 8, 2015, but not significantly. I report and recommend that Anita Margrill was credible in testifying about what happened, but was not precise about the date. I do not find this dispositive. She remembered waiting to report the event. Tr1, at 110. Seeing the report appeared to refresh her recollection regarding the number of days. She was direct and candid about the change in her answer upon seeing the document to refresh her recollection.

Herbert Margrill testified that he observed Shusterman throwing cardboard at Anita Margrill, and hitting her with it. Tr2, at 173. He stated that he was starting to walk up to the third floor, from the second floor, when he saw this. *Id.* On cross-examination, however,

Herbert Margrill said that this event took place on the fourth floor, and that it takes him about ten minutes to walk up a single flight of stairs between the floors. *Id.*, at 191-92. He further testified that he'd spoken about this with Anita Margrill at least five or six times. *Id.*, at 195.

Herbert Margrill was not a credible witness in this area. He was, understandably, emotional on this issue. He appeared wholly sincere and earnest in his testimony. However, it is unlikely that he moved fast enough to see this himself, unless the event occurred on a lower floor. Further, the descriptions he heard regarding same from his wife may have influenced his memory. Notwithstanding, he was direct and clear about having spoken about it several times with his wife, and was in no way appearing to hide or downplay that fact.

David Shusterman testified that he recalled Anita Margrill bringing garbage back upstairs to his apartment three or four times. Tr3, at 99-100. He said that one day he came back and it wasn't where he had left it. The garbage he had brought down in the morning was outside his apartment and was smelly and filthy. *Id.*, at 40-41. David Shusterman testified that this happened on or around July 10, 2015. *Id.*, at 41.

David Shusterman testified that his girlfriend, Samin Gorji, had not opened the door to Anita Margrill because she was terrified. *Id.*, at 35, 93. He stated that "I don't think a terrified woman is going to open the door to a raging psychopath. I don't even know if it was Anita. It was just a crazy person screaming." *Id.*, at 93. He explained that on that day his girlfriend did not even open the door, so he did not speak to Anita Margrill on the phone nor did he call her a retard. *Id.*, at 94-95.

David Shusterman testified that when he returned home, he put the garbage in front of Anita Margrill's door. *Id.*, at 41. He testified that he then heard "a crazy old woman" running

from behind him, screaming, cursing and threatening him. *Id.*, at 42. He testified that it “was basically an attack.” *Id.* He said that he started running up the stairs to get into his apartment because he “was pretty terrified.” *Id.* He stated that Anita Margrill threw garbage and boxes back up on his landing. He said that he was not aware of Anita Margrill being struck by a box and he did not hit her with a box. *Id.*, at 42, 102-03. As to him hitting her with a box or a piece of cardboard, he testified that it “Never, never happened. Complete fabrication.” *Id.*, at 102-03. David Shusterman explained that his girlfriend witnessed this. *Id.*, at 43. He testified that, at the time, his “girlfriend was on the landing trying to get into the apartment opening the door because there was a crazy woman running up the stairs following.” *Id.*, at 103.

He testified to the July 8, 2015 email, which had the subject line of “Stop harassing my guests! It will not be tolerated.” *Id.*, at 93-94; Resp Exh YY. He explained that he had “no need to speak with Anita on the cellphone. I wanted to send a message that was pretty broad. I think pretty self-explanatory. So the message was do not terrorize my guests. I think that was a good message.” Tr3, at 93-94. He said he sent the email because his girlfriend literally told him she was shaking, that she received very threatening provocations from outside the apartment. *Id.*, at 38. He stated that the email was not demeaning to anyone. David Shusterman testified that “I think that is a good rule to follow, to be nice to other people.” *Id.*, at 98, referencing Resp Exh YY.

David Shusterman also sent an email to Anita Margrill, dated July 10, 2015, about garbage. Pet Exh 11; Tr3; at 39-40.

Do not put trash outside my apartment!! Why are you moving trash upstairs?? Trash should be put outside for sanitation to pick up! Once you touch garbage from downstairs it becomes your

garbage!! You are creating a fire hazzard by moving garbage upstairs and creating unsanitary conditions in our hall. This will not be tolerated!
I will have my lawyer contact you or your lawyer to proceed.
David

Pet Exh 11.

I report and recommend finding that David Shusterman was lacking in credibility throughout his testimony on this issue. In the first instance, David Shusterman is significantly larger and younger than Anita Margrill. The idea of him being physically terrified of her strains credulity. Further, his physical demeanor while testifying on this issue alternated between posturing and evasive. At no point did his testimony appear candid.

I note that David Shusterman also appeared to have some confusion, or lack of clarity, regarding the date of this occurrence. He referred to it as on or around July 10, 2015, but addressed substance of the email he sent thereafter as the one dated July 8, not the July 10, 2015 email. I did not consider this in any way dispositive of his credibility.

At one point, David Shusterman was asked about an email to him from a tenant, Larisa Cherby, dated December 18, 2015. Tr3 103-09; Resp Exh DD. In it, the tenant wrote that

With all due respect, after witnessing the physical altercation where you screamed and physically hit Anita Margrill, I do not feel safe or comfortable with you coming by the apartment to collect rent. I would feel more comfortable to keep all physical interaction limited with either Herbert or Anita Margrill.

Resp Exh DD; Tr3, at 104. David Shusterman stated that this tenant brought this up not in July but in December, when there was pending litigation, and the tenant was not paying her rent. He stated that "someone informed Lorissa [sic] what to say and, therefore, Lorissa [sic] stopped paying the rent." Tr3, at 106. "I'm just saying it is convenient that now she's bringing this up,

during the time of the litigation; when before this litigation she's never had this recollection before and only when she wants to not pay rent does she bring this up." *Id.*, at 108. In Petitioners' post-hearing brief, this email was called hearsay,⁵ and counsel notes that this tenant was not called as a witness. Pet Br at 8-9. In fact, Petitioners argued the "rule is well established that counsel may comment on the failure of the adverse party to call a witness who is under his control and whose testimony he could be expected to produce if it were favorable to him," Pet Br at 9 n3, citing *Seligson, Morris & Neusburger v. Fairbanks Whitney Corp.*, 22 AD2d 625,630 [1st Dep't 1965]; *See also DeVaul v. Carigo Inc.*, 138 AD2d 669 [2d Dep't 1988].

However, this email need not be relied upon at all. There is an argument to be made regarding a negative inference where a witness is not called. But this argument is much more compelling, applied to David Shusterman's girlfriend, rather than to a former tenant who now lives elsewhere. *See also* Resp Br at 8. I thus report and recommend that if any negative inference is drawn from the failure to call a witness at the hearing, that inference should be taken against David Schusterman. *People v Savinon*, 100 NY2d 192 [2003]; *Matter of Tyler R.*, 100 AD3d 527, 528 [1st Dep't 2012] [appropriate for the trial court to draw adverse inference due to the party's failure to call witness who could have supported the his testimony].

At bottom, this issue becomes one of credibility. In this, I report that I find Anita Margrill significantly more credible than David Shusterman. She was credible that he hit her with cardboard. He was not credible when he testified that he did not, and that he was afraid of her and trying to run away. I report and recommend that he did strike Anita Margrill, a co-Member of Chambers House, with cardboard. I further report and recommend that this is a

⁵ The issue of hearsay was not raised at the hearing. Tr3, at 104-08; 136-37.

breach of the Operating Agreement's explicit duty of a Manager to perform their management duties in good faith. Resp Exh E, § 4.2. Although this provision does not include language regarding civility and a lack of violence or threats of same⁶, that surely falls under the general language of "good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances." *Id.*

However, I do not report and recommend a finding that David Shusterman's striking of Anita Margrill was done in order to force dissolution. I report and recommend that this was likely done in anger and without prior planning.

Distributions

The Operating Agreement provides for monthly and year end distributions, made out to each Member in the proportion of the interest held by such Member. Resp Exh E, § 7.1.

Respondents argued that after commencing this proceeding, David Shusterman refused to agree to annual distributions to Herbert Margrill, to force a dissolution by creating economic pressure. Resp Br at 13. They argued that David Shusterman's refusal to allow distributions, to keep a reserve of \$250,000 is inconsistent with Shusterman's insistence on paying off the mortgage. *Id.* Petitioners argued, as addressed above, that nothing that occurred after the filing of the Petition is relevant. NYSCEF Doc. No. 88; Pet Br at 12.

⁶ The Operating Agreement does address the removal of a Manager. It provides, *inter alia*, "Removal for Cause: A Manager may be removed only for intentional misconduct hereunder or a knowing violation of law which causes material damage to the assets of the Company." Resp Exh E, § 4.3. This provision was not addressed at the hearing.

Anita Margrill testified that Justice Scarpulla was involved in directing the payment of the distributions that were paid following the commencement of this action. Tr1 at 82-83; Resp Exh FF. Her testimony on this topic was limited but clear and credible.

Herbert Margrill testified that before the October 16, 2015 meeting, he and David Shusterman were each receiving monthly distribution checks. Tr2, at 179. He explained that he used those funds, as well as the annual distribution, to support himself. *Id.* His testimony on this was clear and credible.

David Shusterman testified that prior to the Margrills opening a separate account for Chambers House, there were monthly and year-end distributions. Tr3, at 31-32. When asked about the distributions not being paid at the end of 2015, David Shusterman stated that he had not refused to make a distribution, he had wanted to have a meeting to discuss it. *Id.*, at 115. He was asked if he had intended to starve Herbert Margrill out of the building and if that was why he did not want to approve a distribution. *Id.* David Shusterman said that was "Completely not true." *Id.* See also *Id.*, at 67-68. He further testified that the reason to not make year-end distributions since 2015 was to keep a reserve in case a major repair was needed and that, because of the current proceeding, it would be hard to get extra money into the account for those kinds of repairs. *Id.*, at 134. See also Resp Exh JJ.

David Shusterman was not credible when testifying about his reasons for not wanting to make the distributions. He appeared argumentative and inconsistent.

I, therefore, report and recommend that David Shusterman breached the Operating Agreement by not agreeing to reasonable distributions. I note that this reference need not report on what distributions at the "reasonable discretion" of the Managers would have been. Perhaps

distributions similar to those in years past would have been reasonable; perhaps not. Perhaps even half of what had previously been agreed to would have been reasonable; perhaps not. However, no distributions, without court intervention, is clearly unreasonable. Further, I report and recommend that David Shusterman breached this provision of the Operating Agreement to force dissolution of Chambers House.

Active Management

The Operating Agreement provides that the “Members acknowledge that it is a material obligation of this Agreement, that the Company’s business be ‘actively managed’ on an equal basis by Herbert and Shusterman.” Resp Exh E, § 4.1(d). It is from within this provision that the requirement to meet monthly comes. *Id.* Indeed,

the term ‘actively managed’ shall mean that each Manager is available for management responsibilities in New York, at the Building, and shall meet with the other Manager no less than once per month to review management operation matters or as may be needed to address an emergency impacting the physical or financial condition of the Building or any imminent danger to person or property.

Id.

There is also language within this provision that if one Manager declines to serve as Manager or fulfill the duties of same, the remaining Manager shall be entitled to receive a management fee of 3% of the gross annual rental income. *Id.* Respondents sought this fee, arguing that David Shusterman did not meet the standards of active management, and that the 3% should go to Herbert Margrill. See, e.g., Tr1, at 102-03; Resp Exh N. See also Tr2, at 196.

Respondents also cite to difficulty getting checks co-signed by David Shusterman. Tr1, at 102-03; Tr2, at 180; Resp Exh N.

I report and recommend that, other than as addressed separately above, particularly with regard to meetings, Respondents did not establish or delineate breaches of this provision. *See generally*, Resp Br. Such items as difficulty in getting checks signed is subsumed in David Shusterman's breach of the obligation to meet. To the extent it, or similar working issues, is separate from the obligation to meet, there was no set process in place. Overall, the management of Chambers House was informal. That is not inherently problematic. However, absent a set agreement for conducting such tasks, I report and recommend finding no further breaches of this provision than already addressed above.

Filing the Petition

As addressed above, the purpose of Chambers House is, *inter alia*, to provide a residence for its members. Resp Exh E, § 2.3. Further, the Operating Agreement is clear that Chambers House can only be dissolved by unanimous determination of the Members to do so. *Id.*, at § 10.1. Any controversy or claim arising out of or relating to this agreement, in excess of \$25,000, is subject to arbitration before the American Arbitration Association, under the Commercial Arbitration Rules. *Id.*, at § 13.11. Although certain of the disputes above do not lend themselves to easy dollar values, all parties agree that Chambers House is worth millions. As such, any controversy that might result in the dissolution of Chambers House is one in excess of \$25,000. Further, the explicit language of the Operating Agreement is that if the Members are unable to reach agreement on matters that require unanimity, there is a process of notice, meeting and, if

not successfully resolved, sending the dispute to arbitration. *Id.*, at § 3.11. Despite this, Shusterman filed the instant Petition, rather than seeking an arbitration.

This is of particular import. Under the explicit terms of the Operating Agreement, officers or agents may be appointed to perform such duties as may be assigned by the members or the Managers. *Id.*, at § 4.10(a). No such duties can be delegated to a non-Member or third party without the consent of the other Manager. *Id.* Therefore, if one or both Managers are currently, or at another time, unable to do the work to manage Chambers House - - or are unable to work together - - the appointment of one or more officers or agents would be consistent with the Operating Agreement and the stated business purpose of Chambers House. If the Members are unable to unanimously appoint such officers or agents, this issue could be referred to arbitration. This could allow the company to continue to operate in furtherance of its stated business purpose.

I report explicitly that no party raised this issue:

When I directed David Shusterman to the provision regarding the appointment of officers or agents, he testified that he had not discussed this provision with the Margrills. Tr3, at 138-39. He stated that he himself had not explored this provision. *Id.*, at 139. He testified that he likes to actively manage his buildings, to “try to get better value for the building. So this doesn’t really make a lot of sense in terms of what I’m trying to get done. So this looks like it is just someone who has - - you’re going to pay them to just manage the building. But that doesn’t necessarily lead to the best, you know, investment outcome.” *Id.*, at 140.

David Shusterman appeared credible when he testified on this point. He seemed genuinely surprised by my questions. *Id.*, at 137-40. He also appeared credible when he stated

that the Margrills had also never raised the possibility of appointing an officer under this provision. *Id.*, at 140.

Although maximizing investment outcomes is surely a good and reasonable goal, it is not in the Business Purposes of the Operating Agreement, while providing a residence for its members is explicitly provided. Resp Exh E, § 2.3. As such, I report and recommend that David Shusterman breached the Operating Agreement's provisions that require that a determination to dissolve be unanimous, the requirement to go to arbitration for any controversy or claim arising out of or relating to this agreement, in excess of \$25,000, as well as the provision that sets forth the multistage process when Members are unable to reach agreement on matters that require unanimity. *Id.*, at § 10.1, § 13.11, § 3.11.

I further report and recommend finding that David Shusterman breached these provisions to force dissolution. I do not find that he considered this method to enable Chambers House to continue its stated purpose, and rejected it. However, he took no notice of the plain language of these provisions, and actively sought to unilaterally dissolve Chambers House, despite clear language to the contrary in the Operating Agreement.

I have considered the parties other arguments, and report and recommend that they be found unavailing.⁷

⁷ For example, and perhaps most notably, Petitioners addressed alleged wrongdoing by the Margrills. *See, e.g.*, NYSCEF Doc. No. 88, at 2; Tr1, at 9-10; Pet Br at 1, 3-7. Petitioners were welcome to do so, if they so desired, to fully complete the record and to provide context. However, this reference was limited to the question of whether David Shusterman breached his duties and obligations under the Operating Agreement to force dissolution. In this report, I am limited to the scope of the reference. *BDP Int'l Fin. Corp. v. Castillo*, 55 AD3d 451, 452 [1st Dept 2008]; *Matter of AMC Computer Corp.*, 38 AD3d 402, 403 [1st Dept 2007].

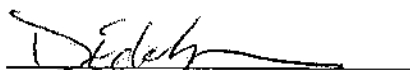
CONCLUSION

I hereby report my findings as indicated above, and recommend that the honorable court, upon submission of this report and a motion pursuant to CPLR 4403, confirm the report with respect to its findings. The parties have been sent a copy of this report (by e-filing). In accordance with CPLR 4403 and 22 NYCRR 202.44(a), following the filing of the report and notice to each party of the filing of the report, Plaintiff shall move to confirm or reject all or part of the report within fifteen (15) days after notice of the filing of the report. If Plaintiff fails to do so, then Defendants shall so move within thirty (30) days after notice is given. (*See Gould v Venus Bridal Gown and Accessories Corp.*, 148 Misc2d 589 [Sup Ct NY County 1990]).

If neither side files a motion, I report and recommend that the court *sua sponte* confirm the findings set forth above.

Dated: October 5, 2018

Respectfully Submitted:


Deborah E. Edelman
Special Referee