To be Argued by:
BRUCE H. WIENER
(Time Requested: 15 Minutes)

New York Supreme Court
Appellate Division – Second Department

Docket Nos.:
2008-04694
2008-11628

MAN CHOI CHIU and 45-52 NORTHERN BLVD., LLC,

Plaintiffs-Appellants,

– against –

WINSTON CHIU,

Defendant-Respondent.

BRIEF OF PLAINTIFFS-APPELLANTS

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Queens County Clerk's Index No. 21905/07

STATEMENT PURSUANT TO CPLR 5531

New York Supreme Court

Appellate Division – Second Department

MAN CHOI CHIU and 45-52 NORTHERN BLVD., LLC,

Plaintiffs-Appellants,

– against –

WINSTON CHIU,

Defendant-Respondent.

1. The index number of this action in the Court below is 21905/07.

2. The full names of the original parties are as set forth above. There has been no change in the parties.

3. This action was commenced in the Supreme Court, Queens County.

4. This action was commenced on August 31, 2007, by the filing of a Summons and Verified Complaint. Subsequent to the trial court's granting, in part, of defendant Winston Chiu's ("Winston") motion to dismiss the Verified Complaint, on or about May 12, 2008, Winston served an Answer to Verified Complaint, dated May 12, 2008. Thereafter, on June 16, 2008, Winston commenced a third-party action by the filing of a Third-Party Summons, dated June 11, 2008, and an Amended Answer to Verified Complaint, Counterclaims and Verified Third-Party Complaint, dated May 30, 2008.

5. The nature and object of this action is: (i) a judgment declaring the respective ownership rights and interests of the parties in plaintiff 42-52 Northern Blvd., LLC ("LLC"), and directing Winston ("Winston") to account in connection with his alleged interest in and to the LLC; and (ii) the ouster and removal of Winston as a member of the LLC based upon, among other things, his misconduct and breaches of fiduciary duty with respect to the LLC.

6. This appeal is from the Order and Memorandum Decision of the Honorable James P. Dollard, dated March 11, 2008, and entered on March 17, 2008, in the office of the Clerk of Queens County (the "March 2008 Order"). The March 2008 Order granted, in part, Winston's motion to dismiss: (i) the first cause of action to the extent that it sought a judgment determining that Winston has, at best, a "nominal" ownership interest in the LLC; and (ii) the second cause of action seeking Winston's "ouster" and removal as a purported member of the LLC.

   This appeal is also from a different Order of the Honorable James P. Dollard, dated July 7, 2008, and entered on July 14, 2008, in the office of the Clerk of Queens County (the "July 2008 Order"). The July 2008 Order granted plaintiffs' motion seeking leave to renew and/or reargue so much of the trial court's March 2008 Order, which granted Winston's motion to dismiss plaintiffs' second cause of action for "ouster," and upon reargument and renewal adhered to its prior determination.

7. This appeal is on a full reproduced record.

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PRELIMINARY STATEMENT

When fiduciaries are faithless to their trust, the victims must not be left wholly without a remedy.[1]

Ubi jus ibi remedium[2]

This action concerns Man Choi Chiu's effort to resolve a bitter dispute between himself and Winston Chiu, his older brother, as to the ownership of a limited liability company, whose sole asset is a valuable commercial building located in Long Island City, New York. After a non-jury trial, held in 2005, the trial court adjudicated that Winston Chiu had fraudulently conveyed the subject property to a trust established by, and for the benefit of, Winton Chiu and his family.

On Winston Chiu's prior appeal, this Court: (i) affirmed the trial court's Order insofar as it had determined that Winston had fraudulently conveyed the subject property and awarded, in favor of Man Choi and the limited liability company, the reasonable attorneys' fees and costs incurred in their successful prosecution of the action; and (ii) modified the trial court's Order to the extent that it had granted a post-trial motion to conform the pleading to the proof at trial and held that Winston Chiu was never a member of the company and that, by reason of

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[1] Tzolis v. Wolff, 10 N.Y.3d 100, 855 N.Y.S.2d 6 (2008).

[2] "Where there is a right, there is a remedy." Black's Law Dictionary, at p. 1363 (5th ed. 1979). Stated otherwise, "there is no wrong without a remedy." See National Tradesmen's Bank v. Wetmore, 124 N.Y. 241, 251 (1891).

his fraudulent acts and self-dealing, he should be precluded, in any event, from having any interest, involvement or participation in the affairs of the company.

Subsequent to the prior appeal, Man Choi and the company commenced this action against Winston Chiu, seeking to: (i) determine the parties' respective legal and ownership interests in the company (and for Winston Chiu to "account" for his purported interest); and (ii) "oust" and remove Winston Chiu from the company, to the extent that he is determined to be a member, by reason of his unconscionable conduct and breaches of fiduciary duty, including the adjudicated fraudulent conveyance of the company's multi-million dollar property to his personal trust.

This appeal concerns Winston Chiu's *pre-answer* motion to dismiss plaintiffs' verified complaint. By Order and Memorandum Decision, dated March 11, 2008, the court below (Dollard, J.) granted, in part, and denied, in part, Winston Chiu's motion to dismiss plaintiffs' complaint. The lower court dismissed the first cause of action to the extent that plaintiffs sought a determination that Winston Chiu is, at most, a "nominal member" of the company and the second cause of action seeking his "ouster."

Thereafter, plaintiffs moved for leave to renew and/or reargue the lower court's dismissal of the "ouster" cause of action. By Order, dated July 7, 2008, the court granted the motion for leave to renew and/or reargue, but adhered to its prior determination dismissing the "ouster" cause of action.

This appeal is limited to the dismissal of plaintiffs' second cause of action seeking Winston's "ouster" as a purported member of the company. As demonstrated here, the court below should not have dismissed such claim for two (2) fundamental reasons.

First, the applicable statute, the New York Limited Liability Company Law, *expressly* refers to the "expulsion" of members (and the "removal or replacement" of managers) of a limited liability company. Such express references in the statute itself can only mean that the remedy of expulsion is, and must be, available to companies, as here, that happen not to have an operating agreement providing for expulsion of members and that have been victimized by faithless fiduciaries such as Winston Chiu.

Second, even in the absence of an express provision in the statute, pursuant to the Court of Appeals' recent, groundbreaking decision in Tzolis v. Wolff, 10 N.Y.3d 100, 855 N.Y.S.2d 6 (2008), the statute should be broadly construed so as to permit courts of equity to "devise" remedies for wrongs, even (and perhaps, especially) when the statute itself does not expressly provide such remedies. To do otherwise would give rogue members of a company, such as Winston Chiu, a license to literally "steal" the company's valuable property and deny the company its most potent weapon against wrongdoers.

Moreover, to the extent that the complaint sufficiently pleads that Winston had breached his fiduciary obligations to Man Choi and the company, courts have broad discretion in fashioning remedies to fit the particular circumstances of the case, including ousting or discharging faithless fiduciaries. Thus, the "ouster" claim should be reinstated independent of any rights that Man Choi and the company may have to oust Winston under the Limited Liability Company Law.

Accordingly, on this appeal, the two (2) Orders of the court below should be modified to the extent of denying Winston Chiu's motion to dismiss plaintiffs' second cause of action seeking Winston Chiu's "ouster" as a purported member of the company.

QUESTION PRESENTED

Question No. 1: Can a rogue, purported member of a New York limited liability company, who was previously adjudicated to have fraudulently conveyed, to his personal trust, a valuable parcel of real property belonging to the company, be "ousted" and removed from the company, notwithstanding that the company does not have an operating agreement that expressly provides for the ouster of its members?

Answer: The court below answered this question in the negative, leaving limited liability companies, without an operating agreement expressly providing for the ouster of members, at the mercy of faithless fiduciaries.

STATEMENT OF FACTS

The facts relevant to this appeal are succinctly set forth in the two (2) Orders of the court below (Dollard, J.) now on appeal: (i) the Order and Memorandum Decision, dated March 11, 2008 (the "March 2008 Order") (R. 5-14), which granted, in part, and denied, in part, the motion of Winston Chiu ("Winston") to dismiss the Verified Complaint, dated August 30, 2007 (the "Complaint") of plaintiffs Man Choi Chiu ("Man Choi") and 42-52 Northern Blvd., LLC (the "LLC") (collectively, the "Plaintiffs"); and (ii) the Order, dated July 7, 2008 (R. 16-18), which granted Plaintiffs' motion seeking leave to renew and/or reargue the March 2008 Order, but adhered to the prior determination.[3]

Man Choi and his older brother, Winston, are parties to three (3) separate litigations that were brought in the Supreme Court, Queens County, all of which involve the LLC, whose sole property is a valuable commercial building located at 42-52 Northern Boulevard in Long Island City, New York (the "Property") (R. 5, 16-17).

A. *The Fraudulent Conveyance Action*

In August 2002, Man Choi and the LLC commenced an action against Winston and the trustees of his trust, seeking to set aside a fraudulent conveyance of the LLC's multi-million dollar Property (R. 5, 17). This action, entitled Man

[3] References "R. ___." are to the Record on Appeal.

Choi Chiu v. Winston Chiu (Index No. 21170/02) is hereinafter referred to as the "Fraudulent Conveyance Action."

i. *The Formation of the LLC and the Purchase of the Property by the LLC*

By way of background, Man Choi formed the LLC on or about May 13, 1999 for the express purpose of acquiring the Property, a large-scale, industrial property located in Long Island City, New York (R. 56). Man Choi intended to utilize the Property in connection with his various restaurant supply businesses, in which Winston was not involved (R. 56).

As noted by the court below in the March 2008 Order appealed herein, the Company purchased the Property for $5,450,000 "with funds attributable to [Man Choi] except for a 'contribution' by [Winston Chiu] of $193,854.51" (R. 7). Man Choi funded the down payment pursuant to the contract of sale, in the amount of $535,000, from the proceeds of a refinancing of certain commercial condominium units located on Bond Street in Manhattan, and owned by Man Choi (R. 56).

The contract of sale for the Property was assigned to the LLC before the closing, which was held on September 8, 1999 (R. 56). Man Choi paid most of the purchase price (totaling in excess of $1.8 million), using monies derived from the refinancing of his Bond Street properties. Thus, in addition to the deposit of $535,000, Man Choi contributed a further $1,272,566.30, and the LLC obtained a mortgage from Eastbank, N.A. ("Eastbank") in the amount of $3,500,000 (R. 56-

57). As of the closing, the combined payments by, or attributable to, Man Choi and his entities totaled $5,307,566.30 of the total $5,450,000 purchase price (R. 57).

Subsequent to the closing, all mortgage payments have been exclusively made with funds provided by Man Choi and his other businesses (R. 57). In addition, Man Choi (and entities under his ownership and control) paid another approximately $2,500,000 in renovation costs to the Property, and also made principal and interest payments on the mortgage for the Property in excess of $4,000,000 on behalf of the LLC, all of which were made timely and without default, and paid all of the real estate taxes, insurance and maintenance costs for the Property, to date (R. 57).

Thus, to date, Man Choi's total financial investment in the Property exceeds $10,000,000 (R. 57).

ii. *Winston's Purported "Contributions" Toward the Purchase of the Property*

By contrast, the purported "contributions" made by Winston toward the purchase of the Property were done solely to obtain a tax benefit for himself. Moreover, Winston never relinquished control over his funds and unilaterally took back *all* of his funds after the closing.

Thus, as set forth in the March 2008 Order, Winston imposed on his younger brother to participate in the transaction and made a purported "contribution"

totaling $193,854.51 toward the purchase price "solely for the purpose of obtaining a tax benefit from the sale of another property that he and his wife owned" (in California, where they reside) (R. 7).

Indeed, as the trial court had previously determined in the Fraudulent Conveyance Action, "[e]very act [Winston] performed was done, not to benefit his brother or the LLC, but for his personal gain" (R. 68-69) (emphasis added). Thus, the trial court had previously found that Winston Chiu had simply "washed" monies through the LLC solely for Winston "to gain a tax advantage" in the form of a "like-kind exchange" pursuant to Internal Revenue Code § 1031 (R. 7, 69).[4]

Hence, the sole purpose of the transaction, from Winston's standpoint, was to defer the payment of capital gains tax on the profits, in the sum of $193,854.51, from the sale of an unrelated California property owned by Winston Chiu and his wife, Mary Chiu (R. 69). None of the funds, including the $193,854.51 that Winston admittedly retrieved after the closing, were ever actually invested in, or realized by, the Company in the first instance.

[4] As the trial court previously found, in addition to the $193,854.51 that Winston provided toward the purchase price of the Property (which funds he later took back after the closing), Winston also deposited the sum of $60,000 in an account at Eastbank purportedly in order to establish a "credit reference." Such funds "were withdrawn by defendant not long after they were deposited" (R. 69). In addition, Winston "cycled" through a certificate of deposit account at Eastbank, in the amount of $290,652.72, after the closing on the Property in order to obtain another tax benefit on the sale of a second California property (R. 69). Thus, as the trial court had previously found, "*all* funds 'contributed' by [Winston] were re-paid to him almost immediately after the 'wash-cycle' was completed" (R. 69) (emphasis added).

At the closing, as required to support Winston Chiu's "1031 like-kind exchange" and defer the payment of capital gains taxes, Winston Chiu and his wife were temporarily designated as assignees of the LLC's contract of sale for the Property, and took momentary and wholly token title to the Property, as individuals, before immediately deeding the Property to the LLC, thereby completing the closing with the seller (R. 58, 167-169, 170-172).

Subsequent to the closing, Winston Chiu has never been asked to contribute, and has not voluntarily or otherwise contributed or provided services, to the LLC, nor has he contributed to the renovation, maintenance, financing or carrying costs of the Property, either financially or otherwise (R. 58).

iii. *Winston's Fraudulent Transfer of the Property*

In or about April 2001, Winston, falsely holding himself out to be the "sole member" of the LLC, fraudulently and unlawfully transferred title to the Property from the LLC to Godbless WMSC Living Trust (the "Trust"), a trust established by and for the benefit of Winston and his family (R. 6, 58, 69, 173-176).

Winston intentionally concealed this fraudulent transfer of title. Indeed, Man Choi, did not discover the fraudulent transfer until a year later, and only after a notice was received from the New York City Department of Taxation and Finance addressed to the Trust as "owner" of the Property (R. 58-59, 70).

In August 2002, Man Choi and the LLC commenced the Fraudulent Conveyance Action against Winston and the trustees of the Trust in the Supreme Court, Queens County, seeking to cancel the deed and set aside the unlawful conveyance of the Property (R. 7-8, 158-166).

iv. *The Trial of the Fraudulent Conveyance Action*

A six (6) day bench trial in the Fraudulent Conveyance Action was held in July and August 2005 (R. 67). As set forth in the Decision and Order, dated November 18, 2005 (R. 67-82), the trial court (Blackburne, J.) found that the "testimony of Winston Chiu was unbelievable and self-serving" and that everything that Winston had done was for his own "personal gain" (R. 68-69).

As previously noted, the trial court found that "all funds 'contributed' by defendant," including the $193,854.51 toward the purchase price of the Property, "were re-paid to him almost immediately after the 'wash cycle' was completed" (R. 69).

In addition, the trial court found that "defendant claimed certain losses on his personal income tax return based on alleged income and expenses accrued to his account as member of the LLC, notwithstanding that he neither received income nor paid any expenses of the LLC" (R. 69).

The trial court held that Winston had "fraudulently transferred title" to the Property to his personal Trust, without "permission or authority to do so," without

notifying the LLC or its organizing member, and without paying "any consideration to the LLC for the transfer" (R. 69-70).

The trial court also rejected Winston's allegation that he was either the "sole" member of the LLC, or should be awarded an interest in the LLC of somewhere "between 25% to 44%," finding that Winston "had no ownership interest in the premises and he was never a member of the LLC" (R. 71-75). Thus, after the close of evidence, the trial court granted Plaintiffs' post-trial motion for leave to amend the complaint (so as to conform the pleadings to the evidence adduced at trial), to declare that, at best, Winston was a "nominal member" of the LLC, with a capital account of no more than four (4%) percent (R. 77-78).

The trial court also held that, due to Winston's "fraudulent acts and self-dealing," Winston should forfeit any benefit from his purported "contribution" to the LLC, including any "interest" on the $193,854.51 that he withdrew from the LLC shortly after the closing (R. 79).

The trial court also found that Winston "can be barred from any future involvement in the LLC without judicial dissolution of the LLC" (R. 79). The trial court noted that even if an application had been made to dissolve the LLC, such application "would have been denied as evidence has proven that it is reasonably practicable to carry on business, in conformity with the Articles of Organization, even if it were found Winston Chiu was a member who needed to be expelled by

the Court. (*See* Limited Liability Company Law Section 702 and *Spires v. Casterlane*, 4 Misc. 3d 428)" (R. 79-80) (emphasis added).

Thus, the trial court entered an Order precluding Winston and his co-defendants "from [having] any financial involvement; participation; management; membership; rights; privileges; interest; or emoluments of membership in [the LLC] and the premises known as 42-52 Northern Blvd" (R. 81). In addition, the trial court awarded, in favor of Man Choi and the LLC, the "reasonable costs and attorney's fees incurred in successfully prosecuting this action" (R. 81).

B. ***Winston's Prior Appeal to this Court***

On Winston's appeal from the November 18, 2005 Order, this Court, by Decision and Order, dated March 13, 2007, affirmed the trial court's determination insofar as the trial court had determined that Winston had fraudulently transferred the Property to a trust controlled by him and his co-defendants and awarded attorneys' fees and costs in favor of Man Choi and the LLC for their successful prosecution of the action (R. 64-66).[5]

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[5] See Man Choi Chiu v. Chiu, 38 A.D.3d 619, 832 N.Y.S.2d 89 (2d Dep't 2007). Winston sought leave to reargue and/or leave to appeal to the Court of Appeals specifically with respect to the issue of the award of legal fees, which was denied by the May 23, 2007 Decision and Order on Motion of this Court. In April 2008, the Court below (McDonald, J.) entered a judgment in favor of Man Choi and the LLC in the amount of $257,415.58 (with interest thereon) pursuant to an award made by Order, dated December 14, 2007 (R. 459-465). Winston filed an appeal with respect to the judgment and sought, from this Court, a stay of the enforcement of the judgment pending appeal. In May 2008, this Court denied Winston's motion for a stay. Winston's appeal, and Man Choi's and the LLC's cross-appeal, from the judgment are pending before this Court under App. Div. Docket No. 2008-04349.

This Court modified the trial court's Order to the extent of vacating the granting of Man Choi's and the LLC's *post-trial* motion to amend the pleadings to conform to the proof submitted at trial (and the resulting finding of the trial court with respect to the ownership of the Company) (R. 64-66).

Notably, this Court's March 13, 2007 Decision and Order did *not* establish the respective interests of the parties in the LLC, but rather left such issue to be resolved in future litigation between the parties.

C. *Man Choi's and the LLC's New Action*

Following this Court's March 13, 2007 Decision and Order, on or about August 30, 2007, Man Choi and the LLC commenced a new action, among other things, to determine Winston's interest, if any, in the LLC (R. 7, 54-63).

Plaintiffs' Complaint asserted two (2) causes of action against Winston (R. 54-63). The first cause of action sought a judgment declaring the parties' respective legal and ownership rights to, and interests in, the LLC, and in the event that Winston is determined to have an interest in and to the LLC, that he should be ordered and directed "to account" for his purported interest (R. 60).

The second cause of action sought Winston's "ouster" and removal as a purported member of the LLC based upon his adjudicated misconduct and breaches of fiduciary duty, including his fraudulent conveyance of the Property to his personal trust (R. 61).

The Complaint set forth that by reason of Winston's intentional, unconscionable and inequitable actions, undertaken "in the utmost of bad faith and in breach of his fiduciary duties to the LLC and Man Choi Chiu," the "LLC will only be able to continue to function, and the LLC's and Man Choi Chiu's interests will best be served, by Winston Chiu's ouster and removal as a member and/or officer thereof" (R. 61).

D. *Winston's "Duplicative" Action*

Several months after the commencement of this action, on or about October 10, 2008, Winston commenced, in the Supreme Court, Queens County, his own largely "duplicative" action, also seeking as its main relief the adjudication of the parties' respective ownership interests in the LLC (R. 107-127).[6]

Based on his deliberate misreading of this Court's prior March 13, 2007 Decision and Order, which Winston had claimed "held" that "he has *at least* a twenty-five percent interest in the LLC" (italics in the original), Winston's action sought a determination of his purported interest in the LLC "greater than the twenty-five percent" that he claimed he already owned (R. 109).[7]

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[6] Winston Choi v. Man Choi Chiu *et al.* (Index No. 25275/07) (Flaherty, J.).

[7] Man Choi and the LLC moved to dismiss Winston's declaratory judgment action based upon the existence of the "prior pending action," commenced by them, involving the very same parties and underlying events, and on other grounds such as failure to state a cause of action. Man Choi's and the LLC's appeal from the lower court's granting, in part, and denying, in part, of their motion to dismiss Winston's complaint is the subject of a separate appeal pending before this Court under App. Div. Docket No. 2008-10602.

E. *Winston's Motion to Dismiss Plaintiffs' Complaint*

By Notice of Motion, dated November 16, 2007 (R. 19-20), Winston filed a pre-answer motion to dismiss Plaintiffs' Complaint on various grounds. These grounds included failure to state a cause of action, the existence of a purported "prior pending action" between the same parties (Winston's subsequently-commenced action) (R. 107-127) and so-called "documentary evidence," i.e., this Court's March 13, 2007 Decision and Order (R. 64-66) and the LLC's tax returns (R. 83-106), which Winston claimed established that he had, *at least*, a twenty five (25%) percent interest in the LLC.

F. *The March 2008 Order*

By the March 2008 Order, the court below granted, in part, and denied, in part, Winston's motion to dismiss the Complaint (R. 5-14).

With respect to the first cause of action of the complaint, the court below granted the motion to dismiss only to the extent that it sought a judgment declaring "that Winston has, at best, a nominal financial interest or ownership interest in and to the LLC" (R. 8).[8]

[8] Notably, the court below outright rejected Winston's assertion that this Court, on the prior appeal, had allegedly "held" that Winston had, *at least*, a twenty five (25%) percent interest in the LLC, noting that Winston's own appellate attorney had previously acknowledged that the "precise amount of the parties' interest in the LLC had yet to be determined and must await further litigation" (R. 10).

The court below rejected Winston's assertion that the first cause of action should be dismissed on the basis of so-called "documentary evidence" (this Court's prior decision and the LLC's tax returns for 1999 and 2000). On the contrary, the court held that such documents did not definitively dispose of Plaintiffs' claim to determine the parties' precise interest in the LLC and, thus, denied Winston's motion to dismiss the first cause of action in its entirety (R. 10-11).[9]

The court, however, dismissed the second cause of action, finding that nothing in the New York Limited Liability Company Law ("LLCL"), or in any case cited by Plaintiffs, expressly authorized the judicial expulsion of a member (R. 13). The court stated that the "mere reference" in Section 701 of the LLCL "to the expulsion of a member ... does not amount to a statutory grant of power to the court to order the expulsion of a member" (R. 13). The court further noted that while the "expulsion of a member can be provided for in the company's operating agreement" citing LLCL § 417, here it had not been "shown that the parties entered into an operating agreement with such a clause" (R. 13).

The court below denied the remainder of Winston's motion to dismiss the Complaint (R. 14).

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[9] The court below also denied Winston's motion based on his assertion that his subsequently-commenced action constituted a "prior pending action," finding that Plaintiffs' instant action (under Index No. 21905/07) was commenced before Winston's action under Index No. 25275/07 (R. 11-12).

G. *Plaintiffs' Motion Seeking Leave to Renew and/or Reargue the March 2008 Order*

Subsequently, by Notice of Motion, dated May 14, 2008, Plaintiffs moved for leave to renew and/or reargue the March 2008 Order (R. 466-467).

Plaintiffs sought "reargument" based upon the lower court's apparent misreading of Section 701 of the LLCL, which, because it expressly refers to the "expulsion" of members, must provide that such remedy is available to limited liability companies (R. 469-470).

In addition, Plaintiffs sought "renewal" based upon the Court of Appeals' recent decision in Tzolis v. Wolff, 10 N.Y.3d 100, 855 N.Y.S.2d 6 (2008), which was decided *after* Winston's motion had already been submitted for decision and was not briefed by either party. Plaintiffs contended that Tzolis compelled courts to broadly construe the remedies available under the LLCL, and that courts must "devise" a remedy even in the absence of an express statutory provision for the remedy (R. 470-471).[10]

[10] By Notice of Cross-Motion, dated May 29, 2008 (R. 488-489), Winston cross-moved for leave to reargue his prior motion to dismiss the Complaint based upon the lower court's alleged failure to dismiss the second cause of action also on grounds of *res judicata* and/or collateral estoppel.

H. *The July 2008 Order*

By the July 2008 Order, the court below granted Plaintiffs' motion for leave to renew and/or reargue, but adhered to its prior determination (R. 16-18).

The court reiterated its prior determination that the "mere reference to the expulsion of a member in Limited Liability Company Law § 701 pertaining to the continuing existence of a limited liability company does not necessarily mean that there is an implicit statutory basis for the judicial expulsion of a member" (R. 18). The court also noted that, pursuant to Section 417(a) of the LLCL, a member may be expelled pursuant to the terms of an operating agreement that provides for expulsion (R. 18).

With respect to Plaintiffs' motion for renewal, which was based upon a "change in the law that would change the prior determination," the court below rejected Plaintiffs' argument that Tzolis compelled a different result (R. 18). While noting that the Court of Appeals, in Tzolis, held that members of a limited liability company may bring derivative suits on the company's behalf, even though there are no express provisions governing such suits in the LLCL, the court refused to apply the holding of Tzolis to the instant case (R. 18).

Thus, the court distinguished Tzolis on the basis that, there, the Court of Appeals "relied on the long common law history of derivative actions," while, as here, there is no "common law basis for the expulsion of a member of a limited

liability company or even for the expulsion of a partner" (R. 18). The court noted that, on the contrary, partners have no common law or statutory right to expel or dismiss another partner except as provided for in their partnership agreement (R. 18).[11]

Plaintiffs filed timely notices of appeal from both the March 2008 Order (R. 2-3) and the July 2008 Order (R. 15).

[11] The court below denied Winston's cross-motion for leave to reargue, noting that "it is not necessary to dismiss a cause of action on more than one ground" (R. 18).

ARGUMENT

THE COURT BELOW ERRED IN DISMISSING PLAINTIFFS' SECOND CAUSE OF ACTION SEEKING THE "OUSTER" AND REMOVAL OF WINSTON CHIU FROM THE COMPANY

The court below erred in dismissing Plaintiffs' second cause of action seeking the "ouster" and removal of Winston Chiu, a purported member of the LLC, merely because the Company does not have an operating agreement that expressly provides for the ouster of members who have breached their fiduciary duties and committed other wrongs.

The lower court's decision should be modified, because it is contrary to both the express provisions of the New York Limited Liability Company Law ("LLCL") then in effect,[12] and the Court of Appeals' recent, landmark decision in Tzolis v. Wolff, 10 N.Y.3d 100, 855 N.Y.S.2d 6 (2008).

A. *The LLCL Expressly Provides for the Expulsion of Members*

In the first instance, the applicable Section 701 of the LLCL *expressly* refers to the "expulsion" of a member of a limited liability company (which can be accomplished without having to "dissolve" the entity, as Winston has demanded in order to coerce Man Choi to "buy-out" his purported interest in the Company for a windfall far in excess of his ostensible "contribution" to the Company).

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[12] The Company was formed in March 1999 and does not have an "operating agreement" (R. 13, 365). The LLCL was substantially amended in 1999 and the amendments became effective on August 31, 1999 (see McKinney's Cons. Laws of NY, Book 32A, Limited Liability Company Law §701). Thus, the pre-amendment version of the LLCL is applicable here.

Before it was later amended, Section 701 of the LLCL provided that an LLC is dissolved, and its affairs shall be wound up, upon the first to occur of the following: . . . (d) the bankruptcy, death, dissolution, expulsion, incapacity or withdrawal of any member . . . unless within one hundred eighty [180] days after such event the LLC is continued either: (1) by the vote or written consent of the percentage in interests of the members or class or classes or group or groups of members stated in the operating agreement; or (2) if no such percentage is specified in the operating agreement, by the vote or written consent of a majority in interest of all of the remaining members . . ." (emphasis added).[13]

Thus, the applicable version of the LLCL clearly contemplates not only the expulsion of a member of a limited liability company, but also provides for the continued operation of the company *after* expulsion, provided that a majority voted for, or consented to, the expulsion. Indeed, the lower court evidently acknowledged as much in its March 2008 Order, noting that Section 701 of the LLCL expressly refers to the expulsion of a member (R. 13). The court also noted that pursuant to Section 417 of the LLCL, the expulsion of a member could be provided for in a company's operating agreement (R. 13, 18).

[13] It should be noted that under the current version of Section 701 of the LLCL, the presumption is in favor of continuing the company after the "expulsion" of a member. Thus, unless the operating agreement provides otherwise, events such as the death, resignation or expulsion of a member shall not cause the company to be dissolved, unless a vote is taken by a majority of the members to dissolve the company.

Contrary to the trial court's interpretation of the statute, finding that Section 701 of the LLCL did not "amount to a statutory grant of power to the court to order the expulsion of a member" (R. 13), the express reference to such remedy must necessarily mean that the remedy of expulsion is, and must be, available to companies that have been victimized by faithless fiduciaries, as is indisputably the case here with respect to Winston's unconscionable and fraudulent conduct.

That the statute expressly refers to, or permits, the "expulsion" or "removal" of members and managers of a limited liability company in three (3) different sections—Sections 701, 414 and 417 of the LLCL,[14] demonstrates the Legislature's intent to provide such a remedy to limited liability companies.

As this Court recently stated in Stinton v. Robin's Wood, Inc., 45 A.D.3d 203, 842 N.Y.S.2d 477, 482 (2d Dep't 2007), leave to appeal denied, 10 N.Y.3d 708, 842 N.Y.S.2d 477 (2008), it is well-established that Courts "must apply the terms of a statute as written (Schultz v. Harrison Radiator Div. Gen. Motors Corp., 90 N.Y.2d at 320, 660 N.Y.S.2d. 685)." Thus, as this Court previously noted in

[14] Although not mentioned by the court below, Section 414 of the LLCL expressly provides for the "removal or replacement of managers" of a limited liability company. That provision reads as follows, "Except as provided in the operating agreement, any or all managers of a limited liability company may be removed or replaced with or without cause by a vote of a majority in interest of the members entitled to vote thereon." See Ross v. Nelson, 54 A.D.3d 258, 861 N.Y.S.2d 670 (1st Dep't 2008) (member-manager of a limited liability company removed even though the operating agreement lacked a specific provision for the removal of a member-manager; court looked to the "default" provisions of Section 414 of the LLCL, which expressly permits the removal of a manager by a majority vote of other members).

Ryder v. City of New York, 32 A.D.3d 836, 837, 821 N.Y.S.2d 227, 228 (2d Dep't 2006), leave to appeal denied, 8 N.Y.3d 896, 832 N.Y.S.2d 899 (2007):

> The court's function in interpreting a statute is to attempt to effectuate the intent of the Legislature, and where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" (internal quotation marks and citations omitted).

See, also, People by Whalen v. Woman's Christian Association, 56 A.D.2d 101, 104, 392 N.Y.S.2d 93, 95 (3d Dep't 1977) (it is "incumbent upon the courts to give effect to legislation as written, and not as they or others might think it should be written").

The fact that the Company does not have an operating agreement does not, and should not, bar Plaintiffs from seeking to oust Winston based upon his adjudicated misconduct, including his self-dealing and fraudulent conduct.

Rather, in the context of a limited liability company, "when there is no Operating Agreement, or such agreement does not address certain subjects, then the entity is bound by the minimum requirements set forth in the [LLCL] . . . These statutory default provisions of the [LLCL] become the 'Operating Agreement' of the limited liability company," and these provisions expressly allow for expulsion of a member. See Spires v. Casterline, 4 Misc.3d 428, 778 N.Y.S.2d 259, 265-266 (Sup. Ct., Monroe Co. 2006); LLCL § 701.

As such, the LLCL expressly authorizes limited liability companies to oust and remove faithless fiduciaries, such as Winston.

B. *Under the Court of Appeals' Mandate in Tzolis, Courts of Equity Must "Devise" Remedies Even in the Absence of an Express Statutory Provision*

Even in the absence of an express provision in the LLCL permitting the "ouster" of members, the Court of Appeals' recent decision in Tzolis v. Wolff, *supra*, mandates courts of equity to "devise" remedies for wrongs, including ouster of faithless members of limited liability companies.

In Tzolis, the issue was whether "derivative" actions on behalf of limited liability companies are permitted notwithstanding "the Legislature's decision, when the [LLCL] was enacted in 1994, to omit all reference to such suits." Tzolis, 10 N.Y.3d at 103. After due consideration, the Court of Appeals held that this apparent omission, without an express ban in the enacted statute, does *not* imply that such actions are prohibited as a matter of law. Id.

Here, it is indisputable that the LLCL does not expressly prohibit the expulsion of members. On the contrary, and significantly, the LLCL expressly provides for the expulsion of a member and the continued existence of the company after the expulsion of one of its members. See LLCL § 701.

Thus, in light of Tzolis, the court below should not have dismissed Plaintiffs' ouster claim merely because there is no operating agreement for the

Company containing such provision and because it may appear that the LLCL does not prescribe the precise remedies available against disloyal and dishonest members such as Winston.

Notably, the Court of Appeals' decision in Tzolis was informed by, and relied heavily upon, early common law decisions on the importance of courts providing a judicial remedy for a breach of fiduciary duty. Specifically, in the context of permitting derivative actions on behalf of limited liability companies, the Court pointed to Chancellor Walworth, a distinguished New York jurist, who in 1832 applied the concept of derivative suits to corporations "because he thought it essential for shareholders to have recourse when those in control of a corporation betrayed their duty." See Tzolis, at 103 (citing Robinson v. Smith, 3 Paige Ch 222 [1832]).

The Court continued, citing with approval another distinguished jurist, Lord Hardwicke, as stating:

> I will never determine that a court of equity cannot lay hold of every such breach of trust. I will never determine that frauds of this kind are out of the reach of courts of law or equity; for an intolerable grievance would follow from such a determination.

Id., at 104 (emphasis added) (citing Charitable Corp. v. Sutton, 2 Atk 400, 406 [Ch 1742]).

The Court of Appeals further explained that "we continue to heed the realization that influenced Chancellor Walworth in 1832, and Lord Hardwicke 90 years earlier: [w]hen fiduciaries are faithless to their trust, the victims must not be left wholly without a remedy" lest an "intolerable grievance" be permitted. Id.

Indeed, the Court declared that "[t]o hold that there is no remedy when corporate fiduciaries use corporate assets to enrich themselves was unacceptable in 1742 and 1832, and it is still unacceptable today." Id.

The principle that courts of equity have broad powers to remedy perceived wrongs is beyond dispute. Thus, in National Tradesmen's Bank v. Wetmore, 124 N.Y. 241, 251 (1891), the Court of Appeals long ago declared that courts of equity should follow the maxim that "there is no wrong without a remedy," and that "while that maxim is not absolutely true, it expresses a principle, and it is for that rather than precedent that courts will seek in considering whether any or what remedy may be had in the administration of justice."

Likewise, in Von Au v. Magenheimer, 126 A.D. 257, 110 N.Y.S. 629 (2d Dep't 1908), this Court applied the maxim "ubi jus ibi remedium" to find a "remedy" for shareholders who were harmed by the fraud and deceit committed by the directors of a corporation.

In fashioning a remedy, the Court of Appeals in Tzolis went still further, holding that, despite the LLCL's apparent silence on the issue of derivative suits—

indeed, in a draft version of the bill the entire article (Article IX of the LLCL) pertaining to the right of members to bring derivative actions was intentionally deleted—"since the Legislature obviously did not intend to give corporate fiduciaries a license to steal, a substitute remedy must be devised." Id., at 105 (emphasis added).

In the instant action, it would likewise be an "intolerable grievance" to permit Winston to remain as a member of the Company, despite having fraudulently transferred its sole asset (a multi-million dollar commercial building), and despite his ongoing efforts to coerce a windfall "buy out" of his purported interest in the Company by forcing Plaintiffs to incur substantial legal fees to fend off Winston's repetitive and vexatious litigation tactics. Indeed, the original trial court's decision (R. 79-80) had recognized that it had the power to order that Winston be "expelled," but there was no need for the court to exercise such power because of its finding (which was subsequently modified by this Court on appeal) that Winston was never an actual member of the Company.[15]

[15] Given Winston's misreading of this Court's decision on the prior appeal, it is anticipated that Winston may seek to argue that this Court previously "held" that the remedy of "ouster" is not available to the Company. However, in modifying the trial court's Order to the extent that the court had granted a *post-trial* motion to amend the complaint (to add an entirely new cause of action seeking a declaration that Winston was merely a "nominal" member, who could be expelled from the Company upon the payment to him of the value of his minimal capital account), this Court did not make any determinations concerning whether the Company may seek to have Winston ousted. Rather, this Court merely determined that the "post-trial application" was improvidently granted (R. 65).

Thus, Plaintiffs must have legal recourse against Winston for his flagrant misconduct and breaches of fiduciary duty, including (and especially) the right to oust and remove him from the Company, so that he does not jeopardize the ability of the Company "to continue to function" (R. 61).

Applying the stated reasoning of the Court of Appeals in Tzolis, "it could hardly be argued that the mere absence of authorizing language in the [LLCL] bars the courts from entertaining" claims for the ouster of members of a limited liability company. Id. at 105. On the contrary, the Court of Appeal's ruling in Tzolis is based, in part, on the absence of any expressed intent on the part of the Legislature to *bar* such actions in the context of limited liability companies. See Tzolis, at 106-107.

Here, unlike in the case of derivative suits, the Legislature made no such conscious "deletion" from the statute with respect to the expulsion of members, as LLCL § 701 expressly refers to the "expulsion" of members (and LLCL § 414 to the expulsion of "managers"). Thus, under Tzolis, a limited liability company must, and does, have the right to expel a dishonest and disloyal member, even in the absence of an operating agreement provision expressly providing for expulsion, lest the courts sanction or condone a "license to steal." Id., at 105.

Moreover, if Plaintiffs were barred from seeking to oust Winston merely because the Company does not have an operating agreement expressly providing

for such remedy, then all limited liability companies in New York that may unfortunately find themselves in this particular situation would be deprived of the very remedy they need the most when encountered by a mendacious member. Such conduct would also have the grave (and potentially perverse) consequence of providing an *incentive* for member misconduct in such companies without an operating agreement expressly providing for expulsion.

Indeed, the lower court's Orders on appeal here, if they are permitted to stand, have the clear and unintended effect of *encouraging* a disloyal and dishonest member of a limited liability company (without an operating agreement expressly containing an expulsion provision) to engage in self-dealing, fraud, and other misconduct, all the while secure in the knowledge that his or her interest in the company cannot be divested.

Because the statute itself refers to the expulsion of a member, Plaintiffs respectfully submit that, in the absence of an express prohibition to the contrary in the statute, Plaintiffs should be permitted to assert their claim seeking Winston's expulsion from the Company. Courts should not imply or "read into" the statute any limitation or bar on the remedy of expulsion of members that the Legislature itself elected not to enact, but should simply apply the statute as written. See Stinton, *supra*.

This Court should also reject the lower court's attempt to distinguish Tzolis from the instant case on the basis that here, unlike in Tzolis, there is no "common law basis for the expulsion of a partner" (R. 18). While courts, *in the past*, have permitted expulsion of partners where the partnership agreement so provides,[16] the over-arching principle set forth in Tzolis now requires courts, in the exercise of their equity powers, to take a much broader view and devise "remedies" for wrongs even in the absence of an express statutory provision for such relief.

That the Court of Appeal's decision in Tzolis was based, in part, on the long history of derivative actions in corporate law (along with the absence of legislative intent to do away with such right of action as it relates to limited liability companies), it does not follow that *both* of these elements must be present before a court will recognize a "right" that is not expressly set forth in the statute. The mandate of Tzolis, which is consistent with well-settled equity principles, is that courts of equity must "devise" a remedy where rights have been violated. See National Tradesmen's, *supra*; Von Au, *supra*.

The remedy of expulsion must be available even to limited liability companies that do not have an operating agreement. Indeed, Tzolis is in accord with a prior, well-settled line of authority, in the Second Department, holding that

[16] See Millet v. Slocum, 4 A.D.2d 528, 167 N.Y.S.2d 136 (4th Dep't 1957) (noting that partners have no common-law or statutory right to expel or dismiss another partner from the partnership), aff'd, 5 N.Y.2d 734, 177 N.Y.S.2d 716 (1958); Gelder Medical Group v. Webber, 41 N.Y.2d 680, 394 N.Y.S.2d 867 (1977), both of which were cited by the court below (R. 18).

Courts have broad discretion in fashioning relief to fit the particular circumstances of the case. See, e.g., Friedman v. Dalmazio, 228 A.D.2d 549, 644 N.Y.S.2d 548 (2d Dep't 1996) (holding that the trial court properly terminated defendants from acting as the managing agent for the limited partnership by reason of their breach of fiduciary duty), leave to appeal denied, 88 N.Y.2d 815, 651 N.Y.S.2d 17 (1996); Homburger v. Levitin, 130 A.D.2d 715, 515 N.Y.S.2d 825 (2d Dep't 1987) (trial court properly exercised its discretion in fashioning the remedy of removing a general partner in order to preserve the partnership's valuable leasehold interest), appeal denied, 70 N.Y.2d 795, 522 N.Y.S.2d 112 (1987).

Critically, "[i]n the granting of equitable relief, the court may mold its relief to accord with the exigencies of the case." Newman v. Sherbar Development Co., 47 A.D.2d 648, 364 N.Y.S.2d 20, 21 (2d Dep't 1975) (emphasis added), appeal denied, 37 N.Y.2d 705, 374 N.Y.S.2d 1026 (1975).

Thus, in Drucker v. Mige Associates II, 225 A.D.2d 427, 429, 639 N.Y.S.2d 365, 367 (1st Dep't 1996), leave to appeal denied, 88 N.Y.2d 807, 647 N.Y.S.2d 164 (1996), the Court, following precisely the reasoning later employed (and thereby validated) by the Court of Appeals in Tzolis, found that, in the event of a partner's breach of his fiduciary duty to the partnership, the "court may take remedial action such as discharging a partner...." (emphasis added).

Moreover, as is the case here, the Court in Drucker held that "the interests of the partnership would be best served by [the partner's] removal as a general manager and the equities here dictate that such removal be without past, present and future compensation." Id.

Lastly, to the extent that the Complaint sufficiently pleads that Winston had breached his fiduciary duty obligations to Man Choi and the company by reason of his adjudicated fraudulent conveyance of the Property to his personal trust and other misconduct, the above authorities make it clear that courts have broad discretion in fashioning remedies to fit the particular circumstances of the case. See, e.g., Friedman, *supra*; Homburger, *supra*; Newman, *supra*. Indisputably, such "remedies" include the right to oust or remove a faithless fiduciary. See Drucker, *supra*. Thus, Plaintiffs' "ouster" claim should be reinstated independent of any rights that Plaintiffs' may have to oust Winston under the LLCL.

Simply put, the Company should not be deprived of its most potent weapon, lest Winston Chiu take the absence of such remedy as a "license" to literally "steal" the Company's prized asset and breach his fiduciary obligations with impunity.

Accordingly, the trial court's Orders should be modified so as to deny Winston's motion to dismiss Plaintiffs' second cause of action seeking Winston's

"ouster" and removal from the Company. Such remedy should remain available to Plaintiffs.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that this Court enter an Order modifying the trial court's March 11, 2008 and July 7, 2008 Orders, to the extent of denying Winston Chiu's motion to dismiss Plaintiffs' second cause of action seeking Winston Chiu's "ouster" and removal from the Company, and granting such other and further relief as this Court deems just and proper, including costs and disbursements.

Dated: New York, New York
January 12, 2009

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