

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
MAN CHOI CHIU and 42-52 NORTHERN BLVD., LLC,

Plaintiffs,

- against -

WINSTON CHIU,

Defendant.
-----X

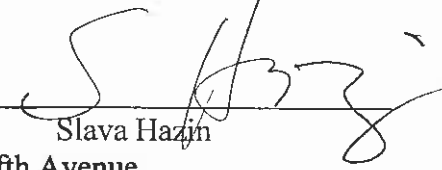
Index No. 21905/07
(Dollard, J.)

NOTICE OF ENTRY

PLEASE TAKE NOTICE, that the within is a true copy of the Order, dated July 7, 2008, of the Honorable James P. Dollard, one of the Justices of the within named Court, which was duly entered in the office of the clerk of the within named Court on July 14, 2008.

Dated: New York, New York
December 8, 2008

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES P. DOLLARD IA Part 5
Justice

	x	Index Number <u>21905</u> 2007
MAN CHOI CHIU, et al.		
- against -		Motion Date <u>June 17,</u> 2008
	x	Motion Cal. Number <u>3</u> Motion Seq. No. <u>7</u>
WINSTON CHIU		

The following papers numbered 1 to 6 read on this motion by plaintiff Man Choi Chiu (MCC) and plaintiff 42-52 Northern Blvd., LLC for an order permitting them to reargue and to renew their opposition to that branch of a prior motion by defendant Winston Chiu (WC) which sought the dismissal of the plaintiffs' second cause of action pursuant to CPLR 3211(a) (7) and on this cross motion by defendant WC for an order permitting him to reargue that branch of his prior motion which sought the dismissal of the plaintiffs' second cause of action pursuant to CPLR 3211(a) (5).

	Papers Numbered	2008 JUL 14 PM 1:35
Notice of Motion - Affidavits - Exhibits.....	1	
Notice of Cross Motion - Affidavits - Exhibits...	2	
Answering Affidavits - Exhibits.....	3	
Memoranda of Law	4-6	

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Upon the foregoing papers it is ordered that: (1) The plaintiffs' motion for an order permitting them to reargue and to renew their opposition to that branch of a prior motion by defendant WC which sought the dismissal of the plaintiffs' second cause of action is granted, but, upon reargument and renewal, the court adheres to its prior determination and (2) the cross motion by defendant WC is denied.

The facts of this case are more fully given in this court's ten page opinion dated March 11, 2008. Briefly, MCC and WC are brothers and adverse parties in three related actions brought in

the New York State Supreme Court, County of Queens: (1) Man Choi Chiu v Winston Chiu (Index No. 21170/02), (2) Man Choi Chiu v Winston Chiu (Index No. 21905/2007) and (3) Winston Chiu v Man Choi Chiu (Index No. 25275/07). MCC and WC are members of 42-52 Northern Blvd., LLC (the LLC) which owns property located at 42-52 Northern Blvd., Queens, New York. In 2002, MCC and the LLC began the first action against WC and the trustees of his trust seeking, inter alia, to set aside as fraudulent a transfer of the property from the LLC made by WC to his trust. After a trial of the first action, which resulted in a judgment, inter alia, setting aside the transfer, WC took an appeal, and the Appellate Division, Second Department, subsequently modified and affirmed the judgment. (Man Choi Chiu v Chiu, 38 AD3d 619.) About five months after the Appellate Division rendered its decision, MCC began this action alleging in substance that 42-52 Northern Blvd. was purchased in 1999 for \$5,450,000 with funds attributable to MCC except for a "contribution" by WC of \$193,854.51. After title closed on 42-52 Northern Blvd., WC allegedly took back his "contribution." MCC's first cause of action, seeks, inter alia, a judgment declaring the extent of WC's ownership interest in the LLC. MCC's second cause of action seeks the expulsion of WC as a member of the company by reason of his fraudulent transfer of the property and his removal as an officer.

On January 8, 2008 defendant WC submitted a motion for an order dismissing the complaint asserted against him pursuant to CPLR 3211(a)(1), (2), (4), (5), and (7). By decision and order dated March 11, 2008, this court, inter alia, granted that branch of WC's motion which sought the dismissal of the second cause of action asserted against him pursuant to CPLR 3211(a)(7). This court stated: "[T]he mere reference to the expulsion of a member in a statute [Limited Liability Company Law § 701] pertaining to the continuing existence of a limited liability company does not amount to a statutory grant of power to the court to order the expulsion of a member. While the Limited Liability Company Law contains a provision for the withdrawal of a member (section 606) and a provision for the judicial dissolution of a limited liability company (section 702), the plaintiff did not correctly cite any statute or case authorizing the judicial expulsion of a member." (Decision dated March 11, 2008, page 9.)

A motion to reargue may be brought where "the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." (Schneider v Solowey, 141 AD2d 813; see, CPLR 2221[d]; Grassel v Albany Med. Ctr. Hosp., 223 AD2d 803; William P. Pahl Equipment Corp. v Kassis, 182 AD2d 22.) Plaintiff MCC did not successfully show that this court made an error in dismissing his second cause of action

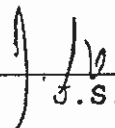
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pursuant to CPLR 3211(a)(7). The mere reference to the expulsion of a member in Limited Liability Company Law § 701 pertaining to the continuing existence of a limited liability company does not necessarily mean that there is an implicit statutory basis for the judicial expulsion of a member; a member can be expelled pursuant to the terms of an operating agreement which can contain "any provisions not inconsistent with law or [the company's] articles of organization." (Limited Liability Company Law § 417[a].)

A motion to renew may be brought where there has been a "change in the law that would change the prior determination ***." (CPLR 2221[e][2]; see, DeRaffele Mfg. Co., Inc. v Kaloakas Management Corp., 48 AD3d 807.) Plaintiff MCC argues that Tzolis v Wolff (10 NY3d 100), decided by the Court of Appeals on February 14, 2008, shortly before this court decided the previous motion, requires a different result. The Court of Appeals stated: "We hold that members of a limited liability company (LLC) may bring derivative suits on the LLC's behalf, even though there are no provisions governing such suits in the Limited Liability Company Law." (Tzolis v Wolff, supra, 102.) Plaintiff MCC argues that Tzolis v Wolff (supra) authorizes this court to devise a remedy such as expulsion even in the absence of express statutory provision for the remedy. However, the Court of Appeals relied on the long common law history of derivative actions in deciding Tzolis v Wolff (supra), but, in the case at bar, plaintiff MCC did not show that there is a common law basis for the expulsion of a member of a limited liability company or even for the expulsion of a partner. On the contrary, "[p]artners have no common law or statutory right to expel or dismiss another partner from the partnership. They may, however, provide in their partnership agreement for expulsion under prescribed conditions which must be strictly applied." (Millet v Slocum, 4 AD2d 528, 532, affd, 5 NY2d 734; see, Gelder Medical Group v Webber, 41 NY2d 680.)

In regard to defendant WC's cross motion, the court notes that it is not necessary to dismiss a cause of action on more than one ground.

Dated: July 7, 2008



J.S.C.

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