

SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 10

MICHAEL A. SASSOWER, M.D.,

Plaintiff,

**INDEX NO.: 016716/2008
MOTION DATE: 11/12/2008
MOTION SEQUENCE: 001**

-against-

975 STEWART AVENUE ASSOCIATES, LLC,

Defendant.

The following papers read on this motion:

Notice of Motion, Affidavit & Exhibits Annexed	1
Commercial Division Affirmation of Jeffrey M. Schlossberg	2
Affirmation in Opposition of Stuart Berg & Exhibits Annexed	3
Plaintiff's Memorandum of Law in Opposition to Motion to Dismiss	4
Reply Affidavit of Jeffrey M. Schlossberg	5
Defendant's Reply Memorandum of Law	6

This motion by defendant, 975 Stewart Avenue Associates, LLC, (the Company), for an order pursuant to CPLR 3211(a) and (7) dismissing the complaint, is denied.

Plaintiff, a retiring member of the Company, brought this action to obtain a declaratory judgment that the contractual price, set in Section 8.5(b) and (c) of the parties Operating Agreement, to be paid for his 12.5% share in the Company should not be reduced by the outstanding Principal balance on the mortgage encumbering the real property owned by the Company.

A separate dispute over whether the value of plaintiff's interest should be subject to a twenty percent (20%) deduction has been resolved by the parties.

Plaintiff is a physician who practiced as a shareholder of Cardiovascular Medical Associates, P.C., until he resigned effective June 30, 2008. The Company is the fee owner of that certain real property situate at 975 Stewart Avenue, and the Medical Practice is the only tenant of that property. Seemingly all the doctors who are part of the Medical Practice are also members of the Company.

The Operating Agreement provides at section 8.3 that a retiring member shall offer to sell his membership interest to the Remaining Members for the "Agreement Price." Section 8.5(b) of the Operating Agreement states: "the Agreement Price for the Offered Interests shall be determined by Qualified Appraisers, in accordance with the procedure set forth below in subsection (c), utilizing the market value approach appraisal methodology to value the Premises"

The meaning of "market value approach" underlies the dispute in this lawsuit. Defendant assumes the position that it is the appraised value of the Property minus the mortgage, or the equity in the building. (The actual difference is \$2,668,750.00.)

Plaintiff claims that it is the value of his Membership Interest which he offers for sale, and that the outstanding mortgage should not be deducted from the value of the Property. Plaintiff argues that the value of his "Offered Interest," is not the same as the value of the Property. Section 8 of the Operating Agreement states that the Members do not want outsiders to their medical practice to have a Membership Interest in the Company, and, therefore, any Member who wishes to make a lifetime transfer of his or her interest, or to retire, must give notice to the other Members that they have the right to acquire his or her Membership Interest, which is then designated the "Offered Interest." See Operating Agreement, section 8.1

The criterion for dismissal on a CPLR 3211(a)(7) motion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law. Guggenheimer v

Ginzberg, 43 N.Y.2d 268 (1977).

In reviewing a motion to dismiss pursuant to CPLR 3211(a)(7) the court must afford the pleadings a liberal construction, and the complaint will be construed in the light most favorable to plaintiffs (see generally Leon v Martinez, 84 N.Y.2d 83; Guggenheimer v Ginzburg, 43 N.Y.2d 268; Rovello v Orfino Realty Co., 40 N.Y.2d 633.) Plaintiff's allegations must be taken as true, Pietropaoli Trucking v Nationwide Mutual Insurance Co., 100 A.D.2d 680 (3d Dept 1984), the only duty of the court being to review the allegations stated in the complaint, take them as true and resolve all reasonable inferences in favor of plaintiff. Cron v Hargro Fabrics, Inc., 91 N.Y.2d 362, 366 (1998).

A dismissal for documentary evidence goes beyond accepting the facts as alleged in the complaint as true, or according plaintiffs the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory, (Leon v Martinez, 84 NY 83, 87-88 (1994) and treats facts that are flatly contradicted by documentary evidence as not presumed true or accorded reasonable inferences. Morgenthau v Bank of N.Y. 305 A.D.2d 74 (1st Dept 2003).

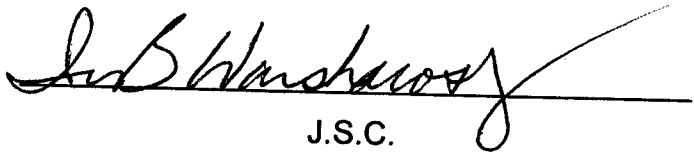
A review of the Operating Agreement shows that the differing positions of the parties stem from a writing that is not clear on it's face. They differ over the valuation methodology for plaintiff's interest in the Company which he is obliged to sell to the other members. The intent of the parties when assenting to using a "market value approach methodology" in the Operating Agreement in March of 2005 is not susceptible to only one interpretation. Certain doctors, of which plaintiff was one, in their capacity as both shareholders of a professional corporation and members of a limited liability company which owned the premises out of which the professional corporation operated, did not unequivocally set down in words their intent that the only value of the limited liability company was the real property to which it was titled.

At this procedural stage of the action, the Court determines only that plaintiff has stated a cause of action for a declaratory judgment which is not resolved by the documentary evidence and accordingly defendant's motion is denied.

A Preliminary Conference (see NYCRR 202.12) shall be held on January 28, 2009, at 9:30 A.M., before the undersigned in the Supreme Court of Nassau County.

Counsel for all parties are reminded that this matter has been assigned to the Commercial Division of the Supreme Court of Nassau County and the parties are directed to follow the Rules of this Division.

Dated: December 3, 2008


J.S.C.

ENTERED

DEC 05 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**