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**SHORT FORM ORDER**

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

**PRESENT:**

**HON. IRA B. WARSHAWSKY,**

**Justice.**

**TRIAL/IAS PART 8**

**MICHAEL A. SASSOWER, M.D.,**

**Plaintiff,**

**INDEX NO.: 016716/2008  
MOTION DATE: 04/19/2010  
MOTION SEQUENCE: 004 and 005**

**-against-**

**975 STEWART AVENUE ASSOCIATES, LLC,**

**Defendant.**

The following papers read on this motion:

Notice of Motion, Affidavits & Exhibits Annexed .....	1
Memorandum of Law in Support of Motion for Summary Judgment .....	2
Defendant's Rule 19-a Statement of Material Facts .....	3
Notice of Cross-Motion, Affidavit & Exhibits Annexed .....	4
Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment .....	5
Plaintiff's Rule 19-a Statement of Material Facts .....	6
Defendant's Counter-Statement of Material Facts .....	7
Reply Affidavit of Douglas J. Good in Support of Motion for Summary Judgment and in Opposition to Cross-Motion & Exhibit Annexed .....	8
Defendant's Reply Memorandum of Law in Support of Motion for Summary Judgment and in Opposition to Cross-Motion .....	9
Reply Affidavit of Michael A. Sassower .....	10
Plaintiff's Reply Memorandum of Law .....	11

### **PRELIMINARY STATEMENT**

Defendants move for summary judgment dismissing the complaint and declaring that in valuing defendant's real property to determine the purchase price of plaintiff's membership interest in 975 Stewart Avenue Associates, LLC, the outstanding mortgage balance must be deducted from the market value of the premises. Plaintiff Cross-moves for summary judgment on the cause of action that the mortgage balance should not be deducted from the market value in calculating the value of his membership interest in 975 Stewart Avenue Associates, LLC.

### **BACKGROUND**

Plaintiff is a shareholder in Cardiovascular Medical Associates, P.C. ("CMA"). He terminated his employment by notice dated December 27, 2007, effective June 30, 2008. He was also a member of 975 Stewart Avenue Associates, LLC ("975 Stewart"), the owner of the premises in which CMA operated.

The CMA Operating Agreement required a departing member to offer his interest in 975 Stewart to the remaining shareholders. § 8.5 (c) of the Agreement sets forth the methodology for the determination of the Agreement Price.<sup>1</sup> It states as follows:

The Company and the Offering Member/New Member shall have ten (10) days to appoint a Qualified Appraiser. Upon appointment, both Qualified Appraisers shall each establish the purchase price of the Offered Interests, using the market value approach appraisal methodology, in a written opinion to the Company each such opinion to be delivered within thirty (30) days of the appointment of the latter of appraisers. If the difference between the two (2) appraisals is less than ten (10%) percent, then the valuation of the Offered Interests shall be the average of the appraisals. However, if the difference between the two (2) appraisals is more than ten (10%) percent, then the Qualified Appraisers shall mutually appoint a third Qualified Appraiser whose sole written opinion shall establish the fair market value of the Offered Interests.

On July 1, 2008 Sassower offered his 12.5% membership interest in 975 Stewart to the remaining members. They retained Rogers & Taylor Appraisers, Inc., and plaintiff hired

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<sup>1</sup> Exh. "C" to Motion at p. 14.

Timothy Barnes of Cushman & Wakefield, Inc. to perform appraisals. They exchanged appraisals on August 8, 2008, with Rogers and Taylor estimating a market value of \$6,500,000 and Barnes finding a market value of \$7,800,000. The Agreement called for the hiring of a third appraiser. At the request of defendants, Rogers and Taylor issued an addendum to their report to the effect that the outstanding mortgage on the premises was for \$2,668,750, and the equity portion of the value of the premises was \$4,131,250.

By letter dated August 7, 2008, CMA advised plaintiff's attorney that they were applying a 20% discount to the \$6,800,000 value found by Rogers and Taylor as well as deducting the \$2,668,750 mortgage, producing a value for plaintiff's share of \$346,406.25. This action followed. Defendants subsequently modified their position as to the 20% deduction, but still maintain that the principal amount of the mortgage must be deducted.

The parties subsequently received an appraisal from Andy Albro, who estimated the fair market value as of the 1<sup>st</sup> day of August, 2008 to be \$7,100,000.

### **DISCUSSION**

When language of a contract is unambiguous, there can be no resort to parol evidence to contradict the plain terms of the document. In this case, the Agreement calls for Appraisers to "establish the purchase price of the Offered Interests, using the market value approach appraisal methodology, . . .". The question that this language poses is what is the "purchase price of the Offered Interests", and what is the "market value approach".

The Court has previously opined that there is no such methodology for performing an appraisal entitled the "market value approach". Rather, the purpose of all appraisals, whether based on income capitalization, direct sales comparison, or replacement new less depreciation is, at least preliminarily, to estimate market value. The Court concludes that the role of the Appraisers retained by the parties, or the Appraiser selected by the original two appraisers, is, at a starting point, to determine the market value of the subject property.

This, however, does not conclude their responsibility, because the Agreement calls upon them to establish the "purchase price of the Offered Interests". It appears that the question which should have been asked of the appraisers is "What would a typical buyer pay for an investment of

a 12 ½ % interest in a building with a continuing first mortgage of what was \$2,668,750 at the time of valuation?" This question has never been asked of them.

#### Summary Judgment

When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." (*Quinn v. Krumland*, 179 A.D.2d 448, 449 — 450 [1<sup>st</sup> Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. (*Stillman v. Twentieth Century-Fox Corp.*, 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. (*Moskowitz v. Garlock*, 23 A.D.2d 94 [3d Dept. 1965]); (*Crowley's Milk Co. v. Klein*, 24 A.D.2d 920 [3d Dept. 1965]).

The evidence will be considered in a light most favorable to the opposing party. (*Weill v. Garfield*, 21 A.D.2d 156 [3d Dept. 1964]). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party. (*Tortorello v. Carlin*, 260 A.D.2d 201, 206 [1<sup>st</sup> Dept. 2003]). On a motion to dismiss, the court must " ' accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' ". (*Braddock v. Braddock*, 2009 WL 23307 [N.Y.A.D. 1<sup>st</sup> Dept. 2009]), (citing *Leon v. Martinez*, 84 N.Y.2d 83, 87 — 88 [1994]). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

#### Open Issues of Fact

The first factual question is the market value of the subject as of the valuation date. There have been two appraisals, which, because they differ by more than 10%,

require a third appraisal. This has now been done, and the parties agree to accept \$7,100,000 as the fair market value as of August 1, 2008. Market value, by definition, excludes liens and encumbrances.

*Must the First Mortgage be Deducted before a Determination of the Value of Plaintiff's Share?*

Not surprisingly, defendant has produced statements from the remaining members of 975 Stewart Avenue Associates, LLC, to the effect that they always believed, and have never heard anything to contradict their belief, that the value of a mortgage would be deducted before any payment of a distributive share to a departing member. Plaintiff, in his deposition, has indicated, rather candidly, that not much thought was ever given to the issue, but he does not recall any conversations in which a deduction was discussed at time of execution. Despite what one may regard as a 7 - 1 split, the Court does not believe that this is adequate clarification to avoid the conclusion that there remains a question of fact as to what the parties intended.

*The Role of the Appraiser*

As previously noted, the Court believes that the appropriate question to be asked of an appraiser is to appraise the value of a proportionate share in the real estate subject to a continuing mortgage. This may or may not involve simply deducting the mortgage principal from the estimated fair market value. The value estimate may, for example, treat the mortgage interest payment as an additional expense in valuing the property under the Income Capitalization Approach, which the appraisals to date have not done. It may also consider whether or not the mortgage interest rate is above or below market, which could impact on the valuation process. This involves consideration as to whether a reasonably prudent investor would refinance so as to reduce interest payments if the existing rate is significantly above the currently available rates.

*Conclusion*


It is mathematically clear that distributing a proportionate share of full market value to a departing member will result in a depletion of the equity before the departure of the last members. This is unlikely to have been the intent of the parties. But neither is it clear that the simplistic solution of deducting the mortgage from market value was unquestionably the intention of the parties.

The motion and cross-motion are both denied because of the existence of factual issues which cannot be determined upon the documents submitted.

The parties are directed to appear for a trial on July 13, 2010, at 9:30 A.M. The parties have agreed to rely on their motion submissions as their trial memorandums, and will communicate with respect to the submission of deposition transcripts and accompanying exhibits.

This constitutes the Decision and Order of the Court.

Dated: June 29, 2010

  
J.S.C.

**ENTERED**

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NASSAU COUNTY  
COUNTY CLERK'S OFFICE