STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

In the Matter of the Application of BRADFORD C. SWETT, individually and as a Member holding a 50 Percent Interest of Factors Walk, LLC,

Petitioner,

DECISION AND ORDER

Index #2005-10260

For the Judicial Supervision of the Winding up of FACTORS WALK, LLC, a New York Limited Liability Company, pursuant to New York Limited Liability Company Law §703(a).

Factors Walk, LLC is a limited liability company comprised of members Bradford Swett and W. Curtis Barnes, each of whom holds a fifty percent interest. Factors Walk was formed on March 6, 2002 to develop and sell real estate for the benefit of its members. It is alleged that Barnes contributed the subdivided land to the LLC, whereas Swett contributed a willingness to provide financing. See Affidavit of W. Curtis Barnes dated October 13, 2005, ¶9. Swett and Barnes signed an Operating Agreement for Factors Walk on July 17, 2002. Factors Walk is the owner of approximately 75 acres of real estate in the Town of West Bloomfield, which has been partially developed and subdivided. Swett, the petitioner herein, commenced this action and made the instant application before the court pursuant to New

York LLC Law §703(a) for an order granting judicial supervision of the winding up of Factors Walk LLC, appointing a receiver or liquidating trustee in furtherance of the same, and granting such other and further relief as is necessary to ensure the orderly and expeditious winding up of the company. Although Barnes is not a named party in this action, he appears as one of only two members of Factors Walk and the only person with standing to oppose Swett's application. See Verified Answer, ¶1. The Operating Agreement vests the management of the LLC in the members (Operating Agreement, §4.1), and further provides:

> The members shall be responsible for conducting and managing all aspects of the Company's business and are empowered to and may act for and bind the Company in all Company matters....

Id. at §4.2. Barnes responds to the Petition as a member of the LLC.

Swett's application arises based upon his allegations that the members, he and Barnes, have engaged in disputes since the formation of the LLC and that the continuation of these disputes "have resulted in an inability to continue the operation of the LLC in a manner based upon agreement and consent of the Members." Petition, ¶8. Accordingly, Swett determined to dissolve the LCC on September 13, 2005 pursuant to Section 10.1(b) of the Operating Agreement and gave Barnes notice of the same. Id. at ¶10. Swett alleges that dissolution of the LLC is necessary

because the members have been unable to agree on business matters for more than two years, and judicial supervision is necessary to ensure that Barnes does not take actions harmful to the interests of Swett or the LLC. Swett alleges that Barnes has taken several actions contrary to the interests of Swett and the LLC over the past two years, including preventing proceeds from lot closing from being deposited into the LLC's accounts for several weeks, making employment decisions about engineers retained by the LLC without authority and without notifying Swett, failing to keep Swett informed of LLC business issues, failing to communicate with LLC attorneys in connection with business matters, preventing Swett from participating in the operational managements of the LLC, withdrawing funds from an LLC account without authority and notice to Swett, and making slanderous statements against Swett. Id. at ¶14(A-L).

Swett's petition also references an arbitration proceeding entered into by Swett and Barnes. Id. at 9. While Swett's petition dated September 14, 2005 states that the arbitration proceeding is "presently pending" (id.), the Affidavit of Barnes submitted in opposition to Swett's application offers more details on the arbitration and attaches as Exhibit A a copy of the decision of the arbitrator dated August 19, 2005, issued weeks before the petition for dissolution was signed by Swett. The court is uncertain why the depiction of the arbitration

proceeding in Swett's petition neglected to mention that an award had been made in Barnes' favor and instead insinuated that no decision had yet been rendered and that it is still "pending."

Barnes' affidavit reveals that the arbitration proceeding was commenced by him in October 2003, seeking to restore his rightful membership interest and counsel fees. See Barnes Affidavit, ¶11. Barnes alleges that Swett took a controlling interest away from him, precluded him from managing the company, and deprived him of access to the books and records of the business. Id. at 10. Barnes further alleges that Swett managed the business without his input for the two years preceding the arbitration decision in August 2005. Id. Barnes states that "Swett's period of management was notably unsuccessful" and was marked by neglect and mismanagement. Id. at ¶13. The arbitrator decided in favor of Barnes and awarded Barnes over $25,000.00 in attorneys' fees and disbursements. See Barnes Affidavit, Exhibit A. Each member presently retains a fifty percent interest in the LLC.

Following the arbitrator's decision on August 19, 2005 and before Swett petitioned the court for dissolution, Barnes' counsel emailed Swett's counsel and informed him that Barnes intended to invoke Article 9, Section 9.3(e) of the Operating Agreement, calling for Swett to submit to a medical examination. Section 9.3(e) states:

> The term Disabled shall mean and a person shall be considered Disabled when he is unable to participate in the business of the Company because of physical or mental impairment, and such condition has continued for at least 180 days. In the event of dispute as to the existence of Disability, a Member or Designated Person shall submit to examination by two physicians, one selected by the person whose Disability is in question and the other selected by the other Member(s). If the two physicians agree, their decision shall be binding and final. If the two physicians disagree, they shall select a third physician, whose determination shall be final and binding. If the physicians determine with reasonable medical certainty before the end of the 180-day period that a person is unable to participate in the business of the Company because of physical or mental impairment and is unlikely to recover within the remainder of such period, the person shall be considered Disabled upon such determination.

Barnes alleges that Swett has acted in an irrational manner and that his conduct has been and continues to be obsessive and destructive. Barnes followed up on his attorney's email via written correspondence to Swett dated September 10, 2005 in which he formally requested that Swett undergo a medical examination pursuant to Section 9.3(e). Swett has disputed his obligation to undergo the mental analysis set forth in Section 9.3(e). See Petition, ¶14(L); Barnes Affidavit, Exhibit E, at 1, ¶2. Barnes alleges that a determination as to Swett's mental state must be made before dissolution is permitted, as dissolution would not be appropriate if Swett suffered from a mental deficiency when he

made said application. See Barnes Affidavit, ¶16.

Although Barnes' attorney attempted to have the Section 9.3(e) dispute heard by the arbitrator, the arbitrator issued a letter to both sides dated September 29, 2005 stating that the request was outside the arbitrator's scope of limited retained jurisdiction under the August 19, 2005 award. The August 19, 2005 award stated at Paragraph E:

> Pursuant to stipulation of counsel for both parties, I hereby RETAIN JURISDICTION in this matter solely as to Respondent's potential demand, following rendering of this Award, for further hearings on the previously bifurcated contingent counterclaim by Respondent, should the Respondent allege that this Award is less favorable to Respondent than would have been the terms of a purported August 6, 2004 settlement agreement between the parties purportedly breached by Claimant. Any such further hearings shall be a continuation of the current proceedings, but such continuation shall not occur unless Respondent advises the American Arbitration Association, in writing and on or before September 30, 2005, that Respondent is requesting such further hearings....

Based upon this reasoning, the arbitrator declined to hear the parties' dispute over whether Swett must undergo a Section 9.3(e) examination. It is undisputed that Swett has not undergone any mental examinations under Section 9.3(e) and that he has not been deemed disabled by a medical professional as a result of examinations occurring under that section.

Between the time Barnes requested the Section 9.3(e)

examination in written correspondence dated September 10, 2005, and the arbitrator's declination letter dated September 29, 2005, Swett commenced the instant action and moved by order to show cause to wind up the LLC. The case comes before the court with the foregoing history and in that posture.

ARBITRATION

At the outset, the court notes that Barnes has not moved to compel arbitration of the Section 9.3(e) examination issue, although his papers indicate that this issue must be referred to arbitration. Article 11, Section 11.7 of the Operating Agreement relating to arbitration states:

> Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Swett's and Barnes' dispute over whether Swett must submit to a Section 9.3(e) examination falls within the Operating Agreement's arbitration clause, as it is a controversy arising out of Section 9.3(e) of the Agreement. To this end, Barnes attempted to submit the dispute the same arbitrator who had determined the previous arbitrable controversy between the parties, but that request was rightfully denied as the arbitrator's limited retained jurisdiction did not extend to the application of Section 9.3(e).

There is no indication that Barnes then proceeded to submit the dispute to arbitration pursuant to the Commercial Arbitration Rules of the American Arbitration Association. No application to compel arbitration is before the court, and there is no evidence that Barnes has commenced a proceeding with AAA for the arbitration of the Section 9.3(e) dispute. In fact, counsel for Barnes indicated at oral argument that no such application to AAA has been made.

The issue therefore arises as to whether Barnes involvement in the instant proceeding has caused a waiver of his right to arbitrate. In determining whether a party has waived his right to arbitrate, a court must assess the facts of the case presented and discern whether "'the defendant's actions are consistent with an assertion of the right to arbitrate.'" Spatz v. Ridge Lea Assoc., LLC, 309 A.D.2d 1248 (4th Dept. 2003), *quoting* DeSapio v. Kohlmeyer, 35 N.Y.2d 402 (1974). See also Zack Assocs., Inc. v. Setauket Fire Dist., 12 A.D.3d 439 (2d Dept. 2004); Les Construction Beauce-Atlas, Inc. v. Tocci Bldg. Corp. of New York, Inc., 294 A.D.2d 409 (2d Dept. 2002). The right to arbitrate is "not absolute" and can be "waived depending on the degree of prior Court participation." Utica First Ins. Co. v. Republican Franklin Ins. Co., 2 Misc.3d 1008(A) (N.Y Dist.Ct. Suffolk Co. 2004). See also Naroor v. Gondal, 17 A.D.3d 142 (1st Dept. 2005); Zack Assocs., 12 A.D.3d at 439; Flynn v. Labor Ready, Inc., 6

A.D.3d 492 (2d Dept. 2004); Lieberman v. Wachsman, 1 Misc.3d 910(A) (S.Ct. Nassau Co. 2004). Compare Hart v. Tri-State Consumer, Inc., 18 A.D.3d 610 (2d Dept. 2005); Cambridge v. Allen, 9 Misc.3d 1124(A) (N.Y. City Civ.Ct. 2005). A defendant will be deemed to have waived arbitration where the court finds that there was "an intention to waive arbitration." Utica First Ins. Co., 2 Misc.3d 1008(A), *citing* DeSapio v. Kohlmeyer, 35 N.Y.2d 402 (1974) and In re Zimmerman, 236 N.Y. 15 (1923). See also Lodal, 309 A.D.2d at 634; Greater Miami Baseball Club Ltd. Partnership v. Nat'l League of Professional Baseball Clubs, 193 A.D.2d 513 (1st Dept. 1993); Riggi v. Wade Lupe Constr. Co., Inc., 176 A.D.2d 1177 (3d Dept. 1991).

Here, Barnes has waived the right to arbitrate. Although he raises arbitration as a defense in his answer to the petition, a step which has been deemed to favor a finding that a party did not waive the right (Les Construction, 294 A.D.2d 409), Barnes has not taken steps to proceed with arbitration, nor has he moved to compel arbitration or stay the pending proceeding. See Verified Answer, ¶10. The waiver of his right to arbitrate is also indicated by his submission of papers and activity in this action. See e.g., Zack Assoc., Inc., 12 A.D.3d at 439; Dembitzer v. Chera, 305 A.D.2d 531 (2d Dept. 2003); Lieberman, 1 Misc.3d at *3-4. Moreover, Barnes' Verified Answer to the Petition states a counterclaim seeking the same relief as he states should be

sought in arbitration. See Cunningham v. Horning Constr., 309 A.D.2d 1187 (4th Dept. 2003) (finding that defendant waived his right to arbitrate where it asserted a cross claim seeking the same relief it sought in arbitration); Poledar Realty, Inc. v. Christ, 171 A.D.2d 603,605 (1st Dept. 1991) (finding that right to arbitrate was waived where party "affirmatively assert[ed] their rights in a judicial forum"); Flynn v. Labor Ready, Inc., 193 Misc.2d 721 (Sup. Ct. Kings Co. 2002) (defendant may waive the right to arbitrate where a counterclaim is interposed). The court notes that at least one Appellate Division has determined that interposition of a counterclaim did not warrant a finding that a defendant waived the right to arbitrate. See Les Construction, 294 A.D.2d at 410. In Les Construction, however, the court was presented with a defendant who not only raised arbitration as an affirmative defense but also moved the court for arbitration-related relief (i.e., to compel arbitration). Id. Barnes has not moved to compel arbitration or to stay the present action, in contrast to the procedural posture usually presented to courts facing issues similar to those presented herein. See e.g., Spatz, 309 A.D.2d 1248; Les Construction, 294 A.D.2d 409; Ruttura & Sons Constr. Co., Inc. v. J. Petrocelli Constr., Co., 257 A.D.2d 614 (2d Dept. 1999); Braun Equip. Co. Inc. v. Meli Borelli Assocs., 220 A.D.2d 311 (1st Dept. 1995). Barnes has waived his right to arbitrate, and the court will not

sua sponte stay the pending action or compel arbitration of any claims herein.

The Operating Agreement also contains a jurisdiction clause stating the following at Section 11.13:

> Any litigation concerning this Agreement of its formation, validity, interpretation or effect shall, unless the parties otherwise agree, be tried exclusively in a federal or state court located in Monroe Court, New York and the parties hereby irrevocably consent to the personal jurisdiction of such courts.

Given the waiver of the arbitration provision, the parties are properly before the court pursuant to Section 11.13 which authorizes litigation of disputes such as those presented herein before the Supreme Court, Monroe County.

Section 9.3(e)

Despite Barnes' failure to move to compel arbitration or to commence arbitration proceedings with AAA, the court notes that Barnes has made a demand upon Swett pursuant to Section 9.3(e), and the evidence indicates that Swett is not willing to comply with that demand. No specific motion has been brought before the court as to the enforceability of Section 9.3(e). In his order to show cause, Swett requests "such other and further relief as is necessary and proper to ensure an orderly and expeditious winding up of the Company." A general relief clause allows a court to grant such other relief as it deems appropriate in the circumstance of the pending dissolution proceeding, without

having to act *sua sponte*. See e.g., Northside Studios, Inc. v. Treccagnoli, 262 A.D.2d 469 (2d Dept. 1999). While the court notes that petitioner's order to show cause contains a relief clause seeking relief of a general nature, that request is tailored to request general relief that would "ensure an orderly and expeditious winding up of the Company." An order of the court requiring the implementation of the provisions of Section 9.3(e) would not fit within the general relief clause stated by petitioner, as it would delay and complicate the winding up process. Moreover, as noted above, Barnes has not made a motion to the court with respect to Section 9.3(e). The court's remaining option to require the parties to comply with Section 9.3(e) would be to order that compliance *sua sponte*. For the reasons that follow, the court declines to require the parties to submit to the provisions of Section 9.3(e) *sua sponte*.

The principles of contract interpretation are well-settled and oft-stated:

> Clear and unambiguous terms should be understood in their plain, ordinary, popular and non-technical meaning. Where the language is plain and unambiguous, extrinsic circumstances should not be considered to determine the intention of the parties.

Lopez v. Fernandito's Antique, Ltd., 305 A.D.2d 218, 219 (1st Dept. 2003). See also Computer Assoc. International, Inc. v. U.S. Balloon Manuf. Co., Inc., 10 A.D.3d 699 (2nd Dept. 2004); Crossmar, Inc. v. Portfolioscope, Inc., 307 A.D.2d 843 (1st Dept.

2003). Thus, "[t]he best evidence of what parties to written agreement intend is what they say in their writing." Slamow v. Del Col, 79 N.Y.2d 1016, 1018 (1992). In interpreting a contract, "a court should 'avoid an interpretation that would leave contractual clauses meaningless.'" 150 Broadway N.Y. Assoc., L.P. v. Brodner, 14 A.D.3d 1,6 (1st Dept. 2004), *citing* Excel Graphics Tech., Inc. v. CFG/AGSCB 75 Ninth Avenue, LLC, 1 A.D.3d 65 (1st Dept. 2003). The provisions for a mental examination made in Section 9.3(e) are clear and unambiguous. Swett and Barnes agreed in the Operating Agreement to submit to an examination "[i]n the event of dispute as to the existence of Disability...." Operating Agreement, §9.3(e).

Despite this clear language, however, the court disagrees with Barnes' interpretation of Section 9.3(e) and consequently opts not to *sua sponte* require the parties to comply with the provisions of Section 9.3(e).[1] Whereas Barnes alleges that Section 9.3(e) provides that any determination of disability would be retrospective and would somehow negate any business actions taken by Swett during the 180 days disability period, the context of the clear language of Section 9.3(e) dictates to the contrary. It defies both logic and the language implemented in Section 9.3(e) to state that physicians would be able to assess

[1] As noted previously, Barnes has not cross moved or made any other application to the court to force petitioner's compliance with Section 9.3(e).

Swett and, assuming a mental disability was found, determine that said disability had been in existence for 180 days previous, or any other period of time prior to the time the physicians examined him. Rather, a simple reading of Section 9.3(e) reveals that a disability will only be found where physicians observe that a disability exists and continues "for at least 180 days." This explains the last portion of Section 9.3(e), which states:

> If the physicians determine with reasonable medical certainty before the end of the 180-day period that a person is unable to participate in the business of the Company because of physical or mental impairment and is unlikely to recover within the remainder of such period, the person shall be considered Disabled upon such determination.

This last sentence highlights that it is only where the physicians determine "with reasonable medical certainty" prior to the expiration of the 180 day period that a member is disabled that the member will be "considered Disabled upon such determination." Well-settled New York law states that a court will "construe a contract so as to give meaning to all of its language and avoid an interpretation that effectively renders meaningless a part of the contract." Helmsley-Spear, Inc. v. New York Blood Center, 257 A.D.2d 64,69 (1st Dept. 1999). See also 150 Broadway N.Y. Assocs., L.P. v. Bodner, 14 A.D.3d 1 (1st Dept. 2004); Polner v. Monchik Realty Co., 9 Misc.3d 755 (Sup.Ct. Kings Co. 2005); BFP 245 Park Co., LLC v. GMAC Commercial Mortgage Corp., 6 Misc.3d 1003(A) (Sup.Ct. N.Y.Co. 2004). Given the plain

meaning of the last sentence of Section 9.3(e), it follows that a member will be ultimately determined to be disabled only where such disability has been observed to have continued "for at least 180 days." A contrary interpretation of Section 9.3(e) would render the last sentence of the section containing a physician's ability to make such a disability determination prior to the end of the 180 day period meaningless. Barnes' strained interpretation alleges that the physicians will assess Swett and decide whether he has *already been disabled for at least 180 days.* This interpretation is not supported by the language of Section 9.3(e) or common sense.

Swett has not been deemed disabled by examinations conducted pursuant to Section 9.3(e). Moreover, a plain reading of Section 9.3(e) reveals that even if those examinations took place at this point in time, any future determination of disability would not work to retrospectively negate any business actions taken by Swett at the time he petitioned for dissolution of the LLC. Rather, as discussed below, Swett had both the membership interest and voting rights to determine to dissolve the LLC on September 14, 2005, when he signed the verified petition. Consequently, the only effect compelling examinations pursuant to Section 9.3(e) would have at this juncture would be to forestall the inevitable dissolution and wreak havoc on decision making within this troubles LLC. As such, the court declines to *sua*

sponte order compliance with Section 9.3(e).

Dissolution

New York's LLC law provides that dissolution occurs upon "the happening of events specified in the operating agreement...." N.Y. LLCL §701(a)(2). Petitioner claims that such a happening has occurred here, as he, a fifty percent member of the LLC with a right to vote, determined to dissolve the LLC pursuant to Section 10.1(b) of the Operating Agreement. There is no dispute that he is a fifty percent member of the LLC. Likewise, although Barnes alleges that Swett is not a member who has the right to vote, as he is required to be in Section 10.1(b), the court notes that no determination as to Swett's alleged disability was made as of the date of the petition for dissolution. As discussed above, Swett's status with the LLC and right to vote are affected only upon a determination of disability. No portion or provision of Section 9.3(e) allows for a retrospective application of a determination of disability. Consequently, as Swett was both a fifty percent member and a member holding a right to vote as of the date of his petition, he validly caused the dissolution of the LLC on that date. See N.Y. LLCL §701("A limited liability company is dissolved and its affairs shall be wound up upon the first to occur of the following... the happening of events specified in the operating agreement....").

to Section 10.1(b), the issue remaining is the winding up of Factors Walk.

To facilitate the winding up process of this Factors Walk, comprised of members who have demonstrated their inability to get along for an extended period of time, petitioner seeks the court's assistance pursuant to LLC law Section 703(a). Section 703(a) states:

> In the event of a dissolution of a limited liability company, except for a dissolution pursuant to section seven hundred two of this article, unless otherwise provided in the operating agreement, the members may wind up the limited liability company's affairs. Upon cause shown, the supreme court in the judicial district in which the office of the limited liability company is located may wind up the limited liability company's affairs upon application of any member, or his or her legal representative or assignee, and in connection therewith may appoint a receiver or liquidating trustee.

Cause for judicial supervision of the winding up of Factors Walk has been amply demonstrated herein by both Swett and Barnes. It is apparent from the papers presented and the argument proffered by counsel at oral argument that neither member of this LLC trusts the other, and the facts that the members have spent the last two years in arbitration proceedings over the control and conduct of the LLC lends further support to the finding that Swett and Barnes would be unable to wind up the affairs of Factors Walk on their own. As such, petitioner's application for

judicial supervision of the winding up of Factors Walk, LLC is granted.

Swett also seeks the appointment of a receiver of liquidating trustee, as contemplated by LLCL §703(a). "'The drastic remedy of the appointment of a receiver is to be invoked only where necessary for the protection of the parties.'" In re Armienti, 309 A.D.2d 659,661 (1st Dept. 2003), *quoting* DiBona v. General Rayfin Ltd., 45 A.D.2d 696 (1st Dept. 1974). Receivership is appropriate "where the moving party has made a clear evidentiary showing of the necessity of conserving the property and protecting that party's interests." Kristensen v. Charleston Square, Inc., 273 A.D.2d 312 (2d Dept. 2000). The appointment of a receiver in the instant case is warranted. Swett and Barnes have demonstrated an inability to function as business members of the LLC and their continued struggles with one another will hinder and delay the expeditious winding up of Factors Walk. Petitioner's application for the appointment of a receiver is granted. Gallo & Iacovangelo LLP (Anthony C. Lee, Esq., of counsel) is appointed receiver. The receiver will be entitled to commissions as provided for in CPLR §8004.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: November 22, 2005