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Concord Dev. Co. LLC v Amedore Concord, LLC
2018 NY Slip Op 51330(U)
Decided on August 21, 2018
Supreme Court, Albany County
Platkin, J.
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Decided on August 21, 2018

Supreme Court, Albany County

Concord Development Co. LLC, Plaintiff,

against

Amedore Concord, LLC; Amedore Land Developers LLC; and George Amedore, Sr., in his official and individual capacity, Defendants.

5402-15

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Richard M. Platkin, J.

Defendant Amedore Concord, LLC ("Amedore Concord") is the product of a joint venture between plaintiff Concord Development Co. LLC ("Concord") and defendant Amedore Land Developers LLC ("ALD"). In a joint venture agreement dated October 28, 2005 (*see* Ex. 14 ["JV Agreement"]), Concord and ALD agreed to jointly develop and market a certain parcel of land in the Town of Glenville, Schenectady County ("Parcel") on which Concord held a purchase option.

As called for in the JV Agreement, Concord and ALD formed Amedore Concord, a limited liability company, in or about June 2008. Pursuant to an Operating Agreement dated July 30, 2008 (*see* Ex. 15), Concord and ALD were designated as members of the new company, and their respective principals, Christopher J. Myers and defendant George Amedore, Sr., were named as managers.

After Concord encountered problems in obtaining the full financing needed to acquire the Parcel, the parties executed an Addendum to the JV Agreement on February 27, 2009 (*see* Ex. 16 ["Addendum"]), which provided for ALD to contribute additional funds. The Addendum also set forth various scenarios for the venture going forward, depending on whether and when Concord obtained commercial financing.

In or about September 2015, ALD removed Myers as a manager of Amedore Concord and reduced the number of managers from two to one, leaving Amedore Concord managed solely by ALD's representative, George Amedore, Sr. In February 2016, Amedore Concord sold the Parcel to 127 Maple Ave, LLC, an entity associated with ALD, for $880,000.

Concord commenced this action via an Order to Show Cause ("OTSC") dated November 13, 2015, alleging, in essence, that ALD improperly had excluded it from the management and affairs of Amedore Concord. By the same OTSC, Concord sought a preliminary injunction restraining defendants from selling, transferring, developing or altering the Parcel. In a Decision & Order dated January 21, 2016, the Court denied the application for preliminary injunctive relief, finding that Concord had failed to demonstrate a likelihood of success in establishing that its capital contribution to the joint venture had been misstated or miscalculated or that the actions complained of by Concord otherwise violated the parties' agreements.

ALD and its affiliates thereafter developed the Parcel into Yates Farm, a 44-unit condominium development. Meanwhile, the parties engaged in extensive fact discovery and eventually cross-moved for summary judgment. In a Decision & Order dated September 11, 2017 ("SJ Decision"), the Court referred determination of the parties' capital accounts to a referee and granted certain declaratory relief with respect to actions of ALD challenged by Concord.[FN1]

With respect to the remaining cause of action for breach of contract,[FN2] the Court determined that, "[a]part from the allegations regarding the sale of the Parcel, . . . Concord's claim . . . is either duplicative of the declaratory judgment claim or lacking in merit" (SJ Decision, p. 15). As to the sale of the Parcel, the Court determined:

> Neither side has demonstrated its entitlement to summary judgment as to the part of the contractual claim alleging that defendants breached the Operating Agreement by selling the Parcel to an ALD-related entity for less than fair consideration. As stated above, ALD had the authority to sell the Parcel if it held two-thirds of all

> membership interests, and [*2]the parties previously had authorized the sale of the Parcel to a third party. Thus, Concord's only legitimate claim of bad faith concerns the sale price of the Parcel, which defendants concede is a factual issue for trial. And while Concord's expert . . . states that ALD's representative should have secured third-party evidence with respect to the fairness of the transaction, Concord does not possess a viable claim for damages absent proof that the terms of the transaction were unfair. In the absence of such proof, the issue of liability must be determined at trial.

A plenary trial on the contractual claim was held before the Court on May 9 and 10, 2018. The Court heard the testimony of four witnesses: Christopher Myers, who is Concord's principal; Paul Amedore, the chief financial officer of ALD and other Amedore companies; Zachary Smith, a real estate appraiser retained to offer opinion testimony on behalf of Concord concerning the fair value of the Parcel at the time of the related-party sale; and W. Douglas Alvey, a real estate appraiser who offered opinion testimony on behalf of defendants. The Court also received 33 exhibits into evidence, all on stipulation or without objection.

Post-trial submissions were received on July 16, 2018, and reply briefs were submitted on July 30, 2018. Based upon the credible testimony and evidence adduced at the trial, the Court hereby makes the following findings of fact and conclusions of law.

A. Breach of Contract

On its breach of contract claim, Concord bears the ultimate burden of establishing the existence of a valid contract, plaintiff's performance pursuant to the contract, and defendants' breach of their obligations under the contract (*see Clearmont Prop., LLC v Eisner*, 58 AD3d 1052, 1055 [3d Dept 2009]). Here, Concord alleges that defendants' sale of the Parcel to an Amedore entity for less than fair market value constitutes a breach of the covenant of good faith and fair dealing implicit in all contracts (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). Concord also argues that the same conduct constitutes a violation of Section 4.5 of the Operating Agreement, which requires the joint venture's managers to act in good faith and in a manner they reasonably believe to be in the best interests of Amedore Concord.

Even crediting Paul Amedore's testimony and assuming his subjective good faith in assigning an $880,000 price to the Parcel, the Court finds that defendants breached the covenant of good faith and fair dealing by selling the Parcel to a related entity for less than fair consideration. In this regard, the record shows that little or no diligence was conducted

prior to the less-than-arm's-length sale, and defendants did not obtain an independent appraisal of the Parcel. Moreover, while Amedore did obtain pricing information about three comparable parcels from a real estate appraiser, the value that ALD chose to assign to the Parcel, $20,000 per lot, is considerably lower than any of the comparables (*see* Trial Tr., pp. 288-294).

Moreover, both appraisers agree that the market value of the Parcel on the date of the related-party sale was substantially in excess of the value assigned by defendants. In particular, defendants' own appraiser opined that the price per lot for comparable properties as of the valuation date was $25,909 (*see* Ex. 2, pp. 2, 41), which is almost 30% greater than the sale price of the Parcel.

Finally, as interested parties to the transaction, defendants had a special obligation to ensure the fairness of the sale to the joint venture. And given the interested nature of the [*3]transaction, no deference is due to defendants' business judgment.

Based on the foregoing, the Court finds that defendants breached the obligation of good faith and fair dealing, as well as the express covenant of Section 4.5 of the Operating Agreement,[FN3] in selling the Parcel to a related party for less than fair consideration.

B. Damages

Plaintiff seeks to recover monetary damages for the foregoing breach of contract. Specifically, plaintiff claims to have been damaged in the amount of one-half of the difference between the fair value of the Parcel on the date of the sale and the $880,000 contract price. For the reasons that follow, the Court concludes that Concord has failed to establish that it has sustained any monetary damages proximately caused by defendants' breach.

Where corporate property is sold for less than fair value in an interested transaction, it is the corporation that suffers the injury. As the Delaware Chancery Court has stated: "Sale of corporate assets to [an interested party] for an unfair price states perhaps the quintessential derivative claim" (*In re Straight Path Communs. Inc.*, 2017 WL 5565264, *4, 2017 Del Ch LEXIS 810, *8 [Del Ch, Nov. 20, 2017]; *see also Stavroulakis v Pelakanos*, 58 Misc 3d 1221[A], 2018 NY Slip Op 50180[U], *11 n 24 [Sup Ct, NY County 2018]). It is the corporation that loses the difference between the consideration paid by the corporate insider

for the asset and the fair value of the asset at the time of sale (*see O'Neill v Warburg, Pincus & Co.*, 39 AD3d 281, 281-282 [1st Dept 2006]).

In contrast, the shareholders of the corporation ordinarily do not suffer any direct pecuniary loss as the result of an interested transaction. A shareholder's loss of the future distributions that it would have received had the corporate property been sold for its fair value is entirely derivative of the harm sustained by the corporation and would be fully remedied if the corporation were made whole. Thus, for example, in reversing the award of money damages to an individual shareholder alleging the conversion of corporate property, the Appellate Division, First Department explained: "The conversion . . . 'resulted in a corporate injury because it deprived [the corporation] of those [funds].' The injury to [plaintiff] was real but only derivative; therefore the funds should have been awarded to the corporation" (*Paradiso & DiMenna v DiMenna*, 232 AD2d 257, 258 [1st Dept 1996], quoting *Glenn v Hoteltron Sys.*, 74 NY2d 386, 392 [1989]; *see e.g. Sakow v Waldman*, 124 AD3d 860, 862 [2d Dept 2016]; *Wolf v Rand*, 258 AD2d 401, 403 [1st Dept 1999]).

The Court sees no basis for departing from these well settled principles here. Having failed to receive fair consideration for the Parcel, Amedore Concord possesses a right of action against defendants, a claim that Concord could have sought to advance derivatively under Business Corporation Law § 626.

But plaintiff's claim here is a direct claim, not a derivative claim. Concord sues for damages that it allegedly sustained in its own right. Under the Operating Agreement, however, Concord does not have a right to receive distributions or obtain the return of its capital absent a liquidation of the company (*see* Ex. 15, §§ 7.2, 7.5 & 10.2). Thus, Concord has not yet [*4]sustained any monetary loss traceable to defendants' breach of contract.

The only form of monetary damage alleged by Concord is a diminution in its expected distributions upon the liquidation of Amedore Concord. However, "[f]or a wrong against the corporation[,] a shareholder has no individual cause of action," even where the shareholder "loses the value of [the] investment" (*Abrams v Donati*, 66 NY2d 951, 953 [1985]). Rather, any future right of Concord to receive distributions or obtain the return of its capital is limited to the relief available in a dissolution proceeding, but this is not such a proceeding. Moreover, if the Court were to award damages in the manner sought by Concord, it would, in effect, be according Concord the right to a priority distribution of capital that is not authorized by the parties' agreements.

Contrary to Concord's contention, the issue is not whether defendants waived any objection to its standing to maintain a derivative claim by failing to move on such defense or preserving the defense in their answer (*see* CPLR 3211 [e]). As the proponent of the contractual claim, plaintiff has the burden of proving its claimed damages (*see Haber v Gutmann*, 64 AD3d 1106, 1108 [3d Dept 2009], *lv denied* 13 NY3d 711 [2009]). Here, the "liquidation damages" requested by Concord is not an appropriate or legally permissible measure of damages, and Concord has otherwise failed to establish that it sustained any monetary damages in its own right.

That said, "nominal damages are always available in breach of contract actions," as all of the elements necessary to maintain a lawsuit and obtain relief in court" are "present at the time of an alleged breach" (*Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993] [internal quotation marks, brackets and citations omitted]). Further, issuance of a declaratory judgment that will guide a future dissolution proceeding by fixing the fair value of the Parcel at the time of the related-party sale will accord Concord complete relief.

For all of the foregoing reasons, the Court finds that Concord has failed to demonstrate its entitlement to anything more than a nominal award of monetary damages.[FN4]

C. Value of the Parcel

At trial, Concord submitted the appraisal report of the Hafner Valuation Group, Inc. (*see* Ex. 1) and the testimony of Zachary Smith, a certified real estate appraiser, in support of the contention that the Parcel had a fair value of $1,600,000 as of February 29, 2016, the date of the related-party sale. Defendants, in turn, submitted the report of Integrated Valuations, LLC (*see* Ex. 2) and the testimony of appraiser W. Douglas Alvey in support of a valuation of $1,140,000.

Both appraisers valued the Parcel as an approved but unimproved parcel to be developed into 44 condominium residences (*see* Ex. 1., p. 2; Ex. 2, p. 34). Both appraisers also determined the fair value of the Parcel by reference to the sales comparison approach. As articulated by Concord's expert, this approach "is based on the premise that a buyer would pay no more for a specific property than the cost of obtaining a property with the same quality, utility, and perceived benefits of ownership. It is based on the [economic] principles of supply and demand, balance, substitution and externalities" (Ex. 1, p. 35; *see* Ex. 2, p. 34).

However, after determining the fair value of the Parcel by reference to the sales of comparable properties, Concord's appraiser added an additional $190,000, representing a [*5]contribution made by Amedore Concord to the County of Schenectady for the improvement of the intersection leading into the Parcel and for improvements to the municipal storm water drainage system adjacent to the Parcel (*see* Ex. 1, p. 48). This issue is discussed below, but for purpose of examining the appraisers' comparable sales, the Court will rely upon the $1,410,000 market value determined by Concord's expert using the sales comparison approach prior to application of the $190,000 adjustment for off-site municipal improvements.

Concord's appraiser relies upon four properties that are said to be comparable to the Parcel. However, Plaintiff's Sale No.3 is based on confidential information (*see id*., p. 45). As a result, there is no way to test or assess the reliability of the information reported to the Court. For that reason, the Court declines to accord any weight to Plaintiff's Sale #3. The Court also declines to assign any weight to Plaintiff's Sale # 4 on the ground that the sale is not reasonably comparable to the subject Parcel. In particular, Plaintiff's Sale # 4 concerns a development of only six units that has not yet received subdivision approval (*see id*., pp. 38, 47). The Court does find Plaintiff's Sales #1 (Delmar Pointe) and # 2 (Consaul Gardens) to be reasonably comparable and will rely upon these sales.

Defendants' appraiser bases his opinion of value on five sales that are said to be comparable to the Parcel, including one in common with Concord's appraiser (Delmar Pointe). However, the Court declines to consider Defendants' Sale #2 on the ground that it is not reasonably comparable. In particular, the sale concerns a small subdivision of only five units (*see* Ex. 2, pp. 38-39). The Court also declines to consider Defendants' Sale #5 because its poor location and topography give rise to substantial adjustments, and the unadjusted price of the parcel is itself an outlier (*see id*., pp. 38, 40). The Court therefore will rely upon Defendants' Sales #1 (Russell Road), #3 (Delmar Pointe) and #4 (Round Lake).

1. Delmar Pointe (Plaintiff's Sale #1 and Defendants' Sale # 3)

Concord's appraiser opined that Delmar Pointe, the approved but unimproved site of a 46-unit condominium, had an adjusted price per unit ("PPU") of $34,484 (*see* Ex. 1, p. 37). **[FN5]** This figure was determined by adjusting the $34,000 PPU for intervening market conditions from the date of the sale through February 29, 2016 and then applying two

offsetting adjustments: a -10% adjustment to reflect the superior location of Delmar Pointe and a +10% adjustment to reflect its greater density (units per acre).

In contrast, defendants' appraiser opined that Delmar Pointe has an adjusted PPU of $24,921. He reached this conclusion by first taking a -15% adjustment for the property's condominium status and then applying an additional net adjustment of -15%, which was allocated as follows: -10% for superior location; +5% for inferior zoning; -5% for density; and -5% for the presence of railroad tracks and a historic cemetery adjacent to Yates Farm.

The Court does not find the density adjustment applied by Concord's appraiser to be warranted, inasmuch as the expert's opinion appears to have been affected by a factual error. Specifically, in determining the density of Yates Farm, the appraiser assumed that the Parcel consisted of 11.35 acres based on information taken from SalesWeb, an online compilation of sales data collected by New York State (*see* Ex. 1, p. 12). However, the deed conveying the Parcel out of the joint venture describes a parcel of 7.201 acres (*see id*., p. 66), as does the tax [*6]map identification number referenced on SalesWeb (*see id*., p. 15). Further, Concord's expert did not rely upon the total acreage conveyed in the comparable sales, but instead applied his own subjective assessment of "usable" acreage (Trial Tr., pp. 98-99). Under the circumstances, the Court declines to apply a density adjustment here.

Further, the Court finds, consistent with the opinions of defendants' appraiser, that a negative adjustment is warranted due to the presence of a railroad track and historic cemetery adjacent to Yates Farm. The Court does not require scholarly literature to be convinced that a residence near active railroad tracks and a cemetery is inherently less valuable to a reasonable purchaser than a residence without these non-amenities. However, given that there is no rail crossing in the immediate vicinity of Yates Farm and the cemetery is inactive, the Court will reduce the adjustment to -2.5% because there is no evidence that the use and enjoyment of the Yates Farms condominiums would be affected to any substantial degree.

Similarly, the Court finds that a modest negative adjustment is warranted due to the fact that Yates Farm is a condominium. The Court found credible the expert opinion of defendants' appraiser that many purchasers wish to own some land in their own right.[FN6] However, the -15% adjustment applied by defendants seems excessive, particularly in the absence of any hard data supporting the adjustment. Accordingly, the Court will reduce this adjustment to -5%.

Applying the foregoing adjustments, the Court determines that the adjusted PPU for Delmar Pointe is $28,665, which yields a total value for Yates Farm of about $1.33 million.

2. Country Gardens (Plaintiff's Sale #2)

Concord's appraiser opines that this property, the approved site of a 52-unit condominium development, had an adjusted PPU of $28,619. This figure is based on a sale price of $1.35 million, and the only adjustment applied is a +5% adjustment reflecting the comparable's inferior density.

At trial, defendants questioned the sale price of this property, arguing that the public records show payment of only $1.1 million. However, Concord's appraiser testified that he was advised by the seller that an additional $250,000 in consideration had been received as an incentive payment (*see* Trial Tr., pp. 142-145).[FN7]

Given that the density of Country Gardens does not differ substantially from Yates Farm (as corrected with the proper acreage), the Court declines to apply a density adjustment. Further, a -2.5% adjustment is warranted due to the presence of the railroad line and cemetery. Thus, the adjusted PPU is $26,575, which yields a total value for Yates Farm of approximately $1.17 million. Exclusion of the $250,000 incentive payment would reduce the PPU to about $21,850, which would translate to a value of about $960,000 for Yates Farm.

3. Russell Road (Defendants' Sale #1)

This is a 52-unit condominium townhouse project valued by defendants' appraiser. After adjusting for intervening market conditions, the expert applied a -20% adjustment, reflecting:

10% for superior location; -5% for superior topography; and -5% for the railroad tracks and cemetery. After reducing the railroad/cemetery adjustment to -2.5% (*see supra*), the adjusted PPU is $29,251, which yields a total value for Yates Farm of about $1.29 million.

4. Round Lake (Defendants' Sale #4)

This parcel is approved for 40 residential building lots of 0.5 acres each. After adjusting for market conditions and -15% for lack of fee simple ownership, defendants' appraiser applied an additional -20% adjustment, comprising: -10% for superior location; -5% for

superior topography; +5% for inferior zoning; -5% for inferior density; and -5% for the railroad and cemetery.

While Concord questions whether Round Lake is a location superior to the Town of Glenville, the Court found credible the testimony of defendants' appraiser that the development's relative proximity to Global Foundries and the Malta area is superior to the location of Yates Farm (*see* Trial Tr., p. 197). Under the circumstances, a -10% location adjustment is warranted. However, given the proximity of the site to the Northway (*see id*., p. 247), the Court will not apply an adjustment for the rail line and cemetery, inasmuch as the two adjustments would offset one another. Finally, given that the property is approved for single family homes, the Court believes that an increase of the condominium adjustment to -10% is warranted here.

As so adjusted, the PPU is $31,099, yielding a total value for Yates Farm of about $1.37 million.

5. Conclusions

In determining the fair value of Yates Farm using the sales comparison method, the Court exercises its discretion to rely primarily on Delmar Pointe, Russell Road and Round Lake (*see generally Matter of CNG Transmission Corp. [Green]*, 273 AD2d 726, 728 [3d Dept 2000]; *Crimswal Realty Corp. v State of New York*, 27 AD2d 350, 353 [3d Dept 1967], *lv denied* 20 NY2d 646 [1967]). The Court finds these properties all to be reasonably comparable. While Country Gardens also appears to be reasonably comparable, the absence of documentation establishing the full sales price and the terms and conditions of any incentive payments leaves the Court reticent to accord it any significant weight. Further, there is a clear center of gravity provided by the Delmar Pointe, Russell Road and Round Lake properties, which are valued at $1.33 million, $1.29 and $1.37 million, respectively, whereas Country Gardens appears to be an outlier, even with the alleged incentive payment.

Based principally on the adjusted values of Delmar Pointe, Russell Road and Round Lake properties, the Court finds and determines that the fair value of the Yates Farm property as of February 29, 2016 was $1,300,000.

D. The $190,000

As a condition of obtaining site plan approval for the Parcel, the Town of Glenville required "[t]he approval of the Schenectady County Highway and Engineering Department for necessary traffic and drainage issues" (Ex. 3 [1]). Concord reached agreement with the County of Schenectady ("County") in August 2008 (*see* Ex. 9), and it entered into a County Highway Construction Agreement on April 8, 2009 (*see* Ex. 5 ["Contribution Agreement"]).

The Contribution Agreement recites "the need for County highway improvements . . . at the intersection [leading into Yates Farm]" and the need for storm water drainage improvements to convey runoff and stream water from the development underneath the County highway (*id*., pp. 1-2). Relatedly, the Contribution Agreement indicates that the County already had a federally-funded highway reconstruction project in the works for the highway adjacent to Yates Farm (Maple Avenue) (*see id*., p. 2).

Concord therefore agreed to provide the sum of $150,000 as a contribution toward the County's design and construction of a traffic signal (*see id*., art 1) and an additional $40,000 "contribution toward the County design and construction of storm water drainage at the County highway in the vicinity of the development site" (*id*., art 2). Upon the satisfaction of these conditions, the County agreed to issue a Highway Work Permit to allow for highway access to the new subdivision (*see id*., art 6).

The Contribution Agreement required these contributions to be paid to the County by August 1, 2009 (*see* Ex. 5, arts 1 & 2), but the record shows that this payment still was outstanding as of March 20, 2012 (*see* Ex. 6). However, ALD eventually paid the $190,000 to the County sometime in late 2015, so as to prevent the Parcel's site plan approval from expiring.

It is the opinion of Concord and its appraiser that the fair value of the Parcel obtained from application of the sales comparison approach should be increased by $190,000. They assert that the work funded by the $190,000 contribution was part of the costs of developing the Parcel and represents value added to any purchaser of the Parcel.

The Court does not find this argument to be persuasive. Both appraisers valued the Parcel by comparison to other approved but unimproved development sites, and the contributions made to the County pursuant to the Contribution Agreement were conditions of obtaining site plan approval and the Highway Work Permit. Absent satisfaction of such conditions, the Parcel would not have been an approved building site, and, therefore, would

not be comparable to the properties relied upon by the appraisers. Moreover, all of the relevant traffic and drainage improvements occurred off-site and were part of a larger municipal reconstruction project.

In addition, plaintiff offers no credible reason to believe that a reasonable purchaser would pay a $190,000 premium for contributions made to a municipality for off-site improvements to municipal infrastructure, where other comparable properties that were also approved for development could be purchased without the payment of such a premium. Indeed, this argument by Concord's expert runs afoul of what he testified to be the fundamental premise underlying the sales comparison approach: "a buyer would pay no more for a specific property than the cost of obtaining a property with the same quality, utility, and perceived benefits of ownership" (Ex. 1, p. 35). As stated above, all of the other comparable properties relied upon by the Court were fully approved for development, so any contributions needed to obtain those approvals necessarily were factored into the sales prices relied upon by the appraisers.[FN8]

For all of the foregoing reasons, the Court finds that Concord has failed to establish a [*7]credible basis for inflating the market value obtained from the sales comparison approach with the $190,000 that was paid to the County for improvements to municipal infrastructure that were necessary to obtain approval of the subdivision.

E. Interest

Concord requests pre-award interest. At trial, Paul Amedore admitted that the $880,000 sales price had not yet been paid to Amedore Concord (*see* Trial Tr., pp. 341-344).

Given that Amedore Concord had the right to the receive the sale proceeds on February 29, 2016 and it has been deprived of the use of these funds since such date, it is appropriate that ALD be responsible for reasonable interest from such date.[FN9] Such interest belongs, however, to Amedore Concord, not Concord (*see supra*).

CONCLUSION

Based on the foregoing,[FN10] it is

ADJUDGED and DECLARED that the fair value of the Parcel on February 29, 2016 was $1,300,000; and it is further

ADJUDGED and DECLARED that ALD shall be responsible for reasonable interest on such sum from February 29, 2016; and it is further

ORDERED that the foregoing declarations shall be applied in and guide any dissolution of Amedore Concord; and finally it is

ADJUDGED and DECLARED that: (a) ALD was entitled to remove Myers as a manager of Amedore Concord pursuant to section 4.9 of the Operating Agreement; (b) ALD was entitled to reduce the number of managers of Amedore Concord from two to one pursuant to section 4.2 of the Operating Agreement; and (c) the sale of the Parcel was authorized under section 3.6 of the Operating Agreement.

This constitutes the Decision, Order & Judgment of the Court, the original of which is being transmitted to counsel for Concord for filing and service. The signing of this Decision, Order & Judgment shall not constitute entry or filing under CPLR 2220, and counsel is not relieved from the applicable provisions of that section respecting filing, entry and Notice of Entry. Further, the parties shall retrieve their original paper exhibits from the Supreme Court Clerk within **twenty (20) days**; otherwise, they will be discarded.

Dated: August 21, 2018

Albany, New York

RICHARD M. PLATKIN

A.J.S.C.

Footnotes

Footnote 1: By Order of Reference dated February 8, 2018, the matter of the capital accounts was referred to Hon. David R. Homer for determination. In a Decision of Referee, dated June 20, 2018, Judge Homer determined that Concord made capital contributions of $191,595.39 (25.9%) and that ALD made capital contributions of $547,888.31 (74.1%).

Footnote 2: Concord's causes of action sounding in breach of the implied covenant of good faith and quasi-contract were dismissed as redundant of the express contractual claim.

Footnote 3: It is apparent that ALD's self-dealing was knowing and intentional and, therefore, not protected by the Operating Agreement's safe harbor for misconduct that is neither grossly negligent nor willful (*see* Ex. 15, § 4.5).

Footnote 4: In view of the conclusion that Concord is not entitled to recover its "liquidation damages," the Court has no occasion to address the issues concerning the alleged $275,000 loan.

Footnote 5: Both experts agreed on the propriety of using the PPU metric.

Footnote 6: In a condominium, the purchaser owns a fee simple interest in the interior premises of the unit, together with an undivided interest to the common areas, which is held in common with all of the other unit owners (*see Matter of William B. May Co. v Department of Health of City of NY*, 123 Misc 2d 1010, 1011 [Sup Ct, Queens County 1984]; 1 NY Law & Practice of Real Property § 15:6 [2d ed 2018]).

Footnote 7: Contrary to defendants' suggestion, the appraiser did not testify that this $250,000 incentive payment was confidential.

Footnote 8: Defendants' Sale # 5, which the Court did not rely upon, plainly is distinguishable, inasmuch as the appraiser needed to back out the value of on-site improvements so as to value the land in an approved but unimproved condition, consistent with the Parcel's condition on the date of sale and the other comparable properties relied upon by the appraisers.

Footnote 9: Neither side has proposed an interest rate, and the Court believes that statutory interest would be excessive under these facts and circumstances.

Footnote 10: The Court has considered the parties' remaining arguments and contentions, but finds them unavailing or unnecessary to reach in light of the disposition ordered herein.

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