SUPREME COURT : NEW YORK COUNTY
COMMERCIAL DIVISION : PART 48

MICHAEL L. NELSEN and IVAN G. GOODSTEIN, as the MANAGERS of MARINER'S COVE SITE B ASSOCIATES, MARINER'S COVE SITE J ASSOCIATES, and MARINER'S COVE SITE K ASSOCIATES, the latter three entities being New York general partnerships,

Plaintiffs,

-against-

HOWARD P. MILSTEIN,

Defendant.

Index No. 651726/2015
(Oing, J.)

Motion Seq. No. 1

REPLY AFFIRMATION OF ADAM B. GILBERT IN FURTHER SUPPORT OF PLAINTIFFS' APPLICATION

ADAM B. GILBERT, an attorney duly licensed to practice law in the courts of the State of New York, affirms the following under the penalties of perjury:

1. On May 19, 2015, the Court narrowly framed the issue to be determined now: "*It's a fight right now as to who is the managing member*" (5.19.15 Tr., p.15, l. 19-20) and, further, "*I'm going to hear the arguments on the 28th and I'll decide the motion on the 28th*...." (Tr., p. 20, l. 4-5).[1]

2. The bulk of Defendant's submission has little to do with the specific question posed. To the contrary, Defendant's submission is riddled with historical information (and inaccuracies) and other irrelevancies and distractions. The fact that the largest part of the submission consists of three repeat copies of Defendant's two-page CV, together with a reprint from a dinner journal (for 78 pages in total), speaks volumes about what this case is <u>not about</u>. *See* Def. Ex. A. The question is whether Milstein has been appropriately removed – not whether he is well-educated, well-connected or well-meaning.

[1] The May 19, 2015 transcript appears as Def. Ex. F. The return date was subsequently moved to May 29.

3. Defendant regrettably takes various positions that serve to confuse rather than clarify the actual facts. Thus, the Court is told that (1) Plaintiffs, fundamentally, are bound by an amorphous oral agreement and not by the Partnership Agreement; (2) Plaintiffs seek a "fire sale" of the unsold units (which represent 350 units and over 300,000 square feet of salable space); (3) Plaintiffs wrongly rejected Defendant's offer to purchase their partnership interests – when, in fact, that offer was illusory at best; and, finally, (4) Wells Fargo has yet to consent to a change in Manager – knowing full well that, with the upcoming maturity date of June 24, 2015, Wells Fargo has no need to consent. It is to these matters that this affirmation now turns.

The Partnership Agreement Unquestionably Binds Defendant

4. Milstein makes repeated assertions that he is now acting pursuant to an oral agreement of which the Partnership Agreement forms but a part. See Milstein Aff., ¶¶ 5, 8. Per Defendant, he was empowered to act as manager in perpetuity – and could only be terminated "upon either of two stated events: the venture ceasing to be cumulatively profitable or Mr. Milstein's death or physical incapacity." (Def. Mem., p. 15). This, of course, flies in the face of what is expressly stated in the written Partnership Agreement, namely, that Milstein could be "changed by a majority in interest of the Partners" (Partnership Agreement, Pl. Ex. 1, p. 2 at Section 2(b)).

5. The Partnership Agreement is a fully-integrated agreement incapable of being modified by parol evidence. The Partnership Agreement recites that:

- It is a "confirmatory" Agreement of Partnership (p. 1);
- It was made by the Partners to "set forth their agreement in writing concerning the ownership and operation of the Properties and the Partnership" (p. 1);

- "Except as specifically to the contrary set forth **in this Agreement**, the Partnerships and the relationship between Partners shall operate and be governed by the Partnership Law of the State of New York." (p. 2)(emphasis added); and
- The Partnership Agreement "may only be changed or modified by an Agreement, in writing, signed by all of the Partners." (p. 4 at 7(d)).

Where, as here, the Partnership Agreement was executed to memorialize the parties' agreement, with the directive that anything not addressed by the parties "in this Agreement" would be resolved by reference to the partnership law, it is unquestionably an integrated writing.

6. Moreover, it remains **the controlling document** between the parties. Defendant's opposition makes passing references to an "option agreement," whereby Milstein might (but was under no obligation to) acquire the interests of the 60% of the Partners. Milstein Aff., ¶¶ 11-12. Yet Defendant knowingly omits that Option Agreement – <u>which was drafted by Stroock, his counsel</u>. Why? Because it contains a fatal admission – now binding upon Defendant.

7. I attach hereto the Option Agreement and its referenced documents. See Pl. Ex. 3. In that Option Agreement, Defendant states, in the first two recitals, as follows:

> Whereas, the parties hereto have been partners since October 1984 in three New York general partnerships....(collectively, the "Mariner's Cove Partnerships"); and
>
> Whereas, **the partners hereto have most recently confirmed their partnership by Agreement of Partnership dated June 17, 2010, a copy of which is annexed hereto as Exhibit A**..." (emphasis added).

Defendant, through his long-time counsel, thus recognizes the obvious, namely, that the Partnership Agreement is, in fact, the dispositive document governing the relationship of the

Partners to each other. There are no references to previous documents, subsequent documents, amendments, or otherwise. It is the June 17, 2010 Agreement that controls.

8. Nor, moreover, can Defendant truly urge (as he does) that the so-called "Written Consent" constitutes an amendment to the Partnership Agreement. Milstein Aff., ¶ 9. It is entitled "Written Consent" – not amendment to Agreement of Partnership – because that it what it was: the consent of the Partners to have Milstein sign on behalf of the Partnerships. The preparer of the Option Agreement never speaks of the "Agreement of Partnership, as amended" – in fact, Defendant never once refers to the "Written Consent." The very same thing can be said for its draft "Agreement of Purchase and Sale of Partnership Interests" – which Defendant did place before the Court without its necessary context – which references the Agreement of Partnership but nothing else. See Def. Ex. E, p. 1. The "Written Consent" was exactly what it purported to be – a consent authorizing Milstein to sign loan documents on behalf of the Partnerships, including certain limited personal guaranties for which the Partners agreed to indemnify him.

9. Nor did the Written Consent expand or limit those rights contained within the Agreement of Partnership. The Written Consent specifically provides for the removal of Milstein by the majority – a right already set forth in the Agreement of Partnership. Moreover, in the Wells Fargo Loan Agreement, which Defendant also omits from his exhibits, the lender is provided with the ability to declare a default upon the happening of "any material management or organizational change in Borrower (including the removal of Howard Milstein as a managing partner with control without the Bank's consent, which consent shall not be unreasonably withheld.)" See Wells Fargo Loan Agreement, Pl. Ex. 4 hereto, at p. 15 (9.1(i)). The consent reaffirms rights (but not the obligations) of the bank upon a change in management – without

expanding or limiting the rights of the Partners under the Agreement of Partnership. Conversely, the Loan Agreement recognizes that the majority may act precisely as it has done here.

<u>The So-called Desire for a "Fire Sale"</u>

10. Throughout the opposition papers, there is the suggestion that Plaintiffs want to conduct a "fire sale" of the approximately 350 unsold units. *E.g.*, Moerdler Aff. ¶ 3. This is patently false.

11. The three Plaintiff Partnerships were created in 1984 to lease land from Battery Park City Authority; construct residential apartment buildings; and, thereafter, **sell** units as residential condominium units. Given the downturn in the market following the market crash in 1987, it made sense to rent, rather than sell, while the market recovered. But it is now 2015. Some 350 residential units are still rented. Alternatively stated, 350 units, aggregating over 300,000 square feet of space, remain unsold since their completion back in the late 1980s.

12. Milstein acknowledges that units can and should be sold in the ordinary course of Partnerships' business. Although relegated to a footnote in his affidavit, Milstein says that the Partnership Agreement "also contemplated the sale, in the ordinary course of the Partnerships' business, of individual unsold condominium units at premium prices with capital gains tax treatment." Milstein Aff., fn. 4. A single unit was last sold in 2009 (at the bottom of the market and, I am informed, to a BCPA insider). Even though Wells Fargo gave its express consent to the sale of units in the Loan Agreement (Pl. Ex. 4, pp. 3-5), Milstein studiously avoided doing so. Not one single unit has been sold during the five-year pendency of the loan.

13. The facts in the Verified Complaint have been proven. The express will of the 60% has been thwarted by Milstein – who has refused to sell units in the ordinary course of business. A predominant purpose of removing Milstein was to permit the majority of the

Partners to manage the Partnerships in such a way that the "for sale" condominium units – created in the 1980's – can be sold in a programmatic way. Nothing about Plaintiffs' Verified Complaint suggests anything about a fire sale or the "forced liquidation" of units. The change in management is to ensure that the Partners controlling 60% of the partnership interests can capitalize on condominium pricing in a market that – per a variety of publications – may be topping out.

The So-Called Offer to Purchase the Partnership Interests of the 60% Partners

14. Defendant posits that his acquisition of the partnership interests of the 60% would be a salutary solution to the ills of the Partnerships. Milstein Aff., ¶¶ 11-12. Despite the rhetoric, Defendant has never signaled that he is, in fact, a true buyer. To the contrary, his so-called "offer" was and remains illusory.

15. Defendant placed before the Court a portion of what he presented to his Partners – unfairly implying to this Court that he was prepared to execute and deliver a purchase and sale agreement. (See Def. Ex. E.) As noted, the actual "offer" is appended hereto as Plaintiffs' Exhibit 3, including the missing "Option Agreement," the draft contract, and the exhibits referenced therein. It bears repeating that the Option Agreement and associated documents were drafted by Stroock – the very firm acting for Milstein here.

16. In the world of commerce, people pay for options. Where, as here, Defendant purports to be a serious buyer, he should provide meaningful assurances that the option will be exercised and the sale completed. Milstein provides none of these. Defendant wanted a free look – with the absolute right to say "not interested" at the end of the option period. As the Court will see, there was no cash payment for the option. See Pl. Ex. 3, p. 1. Nor did the option provide for any other consideration that would go to Plaintiffs upon a failure to exercise.

17. Nor, moreover, was the sales price somehow "inflated," as Milstein suggests. Def. Mem., p. 3. In 2013, in a materially weaker market than today, the 60% Partners wrote to Milstein, seeking his consent to a sale of all of the units at $800 per foot. Milstein's response was "I am not a seller." See email exchange with Milstein dated March 13, 2013 – Pl. Ex. 5. And, why should he be a seller? Contrary to repeated claims of doing work without compensation, Milstein has been handsomely rewarded by the management fees that his wholly owned management company collects, together with the additional fees received for leasing, construction, and advertising. See Verified Complaint at ¶¶ 53-56. Indeed, in calendar 2014 alone, Milstein took out $1,762,266 from the Partnerships in various fees. See the "Related Party Transaction" footnotes appearing in the audited financial statements for each of the three Partnerships for the year ended December 31, 2014, reproduced here as a composite exhibit as Pl. Ex. 6.

18. From 2013 to 2015, residential condo pricing skyrocketed all over Manhattan, Battery Park included. Despite this fact, the 60% was prepared – in 2015 – to sell to Milstein at that same, 2013, unadjusted $800 per foot number. One would be hard pressed to state that this is an "inflated" valuation.

19. Finally, it is simply wrong to suggest that Milstein believed his free option had been agreed upon by Plaintiffs. Def. Mem., p. 9. The way one signals assent to a written agreement is through execution and delivery – none of which occurred here. To the contrary, Milstein was promptly informed that his option agreement was illusory, and that Plaintiffs had no interest in pursuing it.

Wells Fargo Has Not Declared a Default,
Nor Consented to the New Manager

20. As noted above, the central document governing the relationship between Wells Fargo and the Partnerships is the Loan Agreement dated June 24, 2010 (Pl. Ex. 4). Again, that agreement was not placed before the Court by Defendant.

21. To be sure, Plaintiffs did make a request of Wells Fargo to consent to their replacement of Milstein. This was done, pursuant to the Loan Agreement, to provide Plaintiffs with the greatest flexibility in dealing with Wells. (Separately, Plaintiffs also notified Wells that the 60% would not consent to an extension the existing loan absent recognition as the new Manager).

22. Contrary to Defendant's position, these writing were not done to fulfill some condition set forth in the "Written Consent." Wells Fargo is not a party to the "Written Consent." It is a party to the Loan Agreement. And when counsel for Wells Fargo, Steven Koppel, responded to the Plaintiffs' request for approval of the new Manager, Koppel referenced only the Loan Agreement – nothing more. Def. Ex. G.

23. Subsequent to receipt of his letter, I spoke with Mr. Koppel. I was told that, given the June 24, 2015 maturity date of the loan, there is little commercial necessity for the bank to act at all. Moreover, and no doubt for the same reasons, the bank has not declared the loan to be in default – since, by its terms, it matures in 27 days.

24. The Loan Agreement does not preclude the majority of the Partners from removing Milstein. To the contrary, it contemplates that removal may occur, and provides the lender with the right – not the obligation – to accelerate. Given the maturity of the loan on June 24, this is obviously a right that the lender sees no reason to pursue.

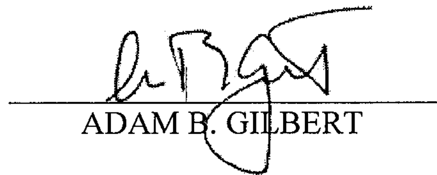
Conclusion

26. In the accompanying memorandum, we address the "legal" issues raised by Defendant, and demonstrate, as a matter of law, that:

- The Partnership Agreement (Pl. Ex. 1) is a fully-integrated writing incapable of being modified by parol evidence (answering Def. Mem. at pp. 12-13);
- The "Written Consent" (Def. Ex. B) does not "amend" the Partnership Agreement and thereby deprive the majority of Partners from exercising their ability to remove Milstein under the Partnership Agreement (answering Def. Mem at pp. 8, 14-15);
- The so-called condition in the "Written Consent" does **not** render the removal of Milstein ineffective. To the contrary, at most, it might give Defendant a right to claim a breach of the consent – for which there would be no harm given the necessity to pay-off the Wells Fargo loan on June 24, 2015 (answering Def. Mem. at pp. 11-12);
- Wells Fargo is not a "necessary party" to this action. It is only a party to the Loan Agreement. It can independently determine whether to pursue any rights thereunder, without regard to this Court's determination (answering Def. Mem. at p. 12); and, finally,
- Milstein was duly removed by the action of the majority under the Partnership Agreement without the need for a superfluous "vote" of the Partners (answering Def. Mem. at p. 14).

27. For all of the reasons set forth herein and in the accompanying memorandum, we urge the Court to conclude that Milstein has been duly removed, such that the named Managers, representing the majority of the partnership interests, can, finally, fulfill the goal of the Partnerships – the sale of its remaining condominium units in the ordinary course of the Partnerships' business.

New York, New York
May 28, 2015



ADAM B. GILBERT