FILED: APPELLATE DIVISION - 1ST DEPT 10/04/2021 05:32 PM 2021-02511
NYSCEF DOC. NO. 6 RECEIVED NYSCEF: 10/04/2021

To Be Argued By:
SEAN M. KEMP
Time Requested: 15 Minutes

New York County Clerk's Index No. 652857/16

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

FAVOURITE LIMITED, CLAUDIO GATELLI, GRAZIANO SGHEDONI, ALBERTO BRENTEGANI, SIRIO SRL, OILE SRL, UPPER EAST SIDE SUITES LLC,

Plaintiffs-Respondents,

—against—

BENEDETTO CICO, CARLA CICO,

Defendants-Appellants,

151 EAST HOUSTON ACQUISITION LLC,

Defendant.

CASE NO. 2021-02511

BRIEF FOR DEFENDANTS-APPELLANTS

EDWARD TOPTANI
TOPTANI LAW OFFICES
375 Pearl Street, Suite 1410
New York, New York 10038
(212) 699-8930
edward@toptanilaw.com

Attorneys for Defendant-Appellant Benedetto Cico

SEAN M. KEMP
MARVIN KEMP, PLLC
P.O. Box 494
44 West Market Street
Rhinebeck, New York 12572
(845) 418-5853
sean@marvinkemp.com

Attorneys for Defendant-Appellant Carla Cico

REPRODUCED ON RECYCLED PAPER

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

QUESTIONS PRESENTED.. 1

PRELIMINARY STATEMENT 2

RELEVANT FACTUAL BACKGROUND 4

a. Decision and Order by the First Department Dismissing Respondents' Action 4

b. Appellants' Answers with Counterclaims.. 5

c. Respondents' Motion to Dismiss Appellants' Counterclaims... 6

d. Respondents' Motion for Leave to File a Third Amended Complaint 7

e. The Trial Court's Decision and Order.. 9

LEGAL STANDARDS 11

a. Legal Standard Under CPLR 3025(b) 11

b. Legal Standard Under CPLR 3211(a)(7).. 11

c. Legal Standard Under CPLR 3211(a)(1).. 12

ARGUMENT 12

POINT I:
THE TRIAL COURT SHOULD NOT HAVE GRANTED RESPONDENTS LEAVE TO FILE A THIRD AMENDED COMPLAINT BECAUSE THERE WAS NO PLEADING BEFORE THE COURT TO AMEND.. 12

POINT II:
RESPONDENTS SHOULD NOT HAVE BEEN GRANTED LEAVE TO FILE AN AMENDED COMPLAINT SINCE THE PROPOSED PLEADING WAS NOT AUTHORIZED AND IS, THEREFORE, PALPABLY INSUFFICIENT AND DEVOID OF MERIT 16

a. The Company's Members did not Authorize Claudio Gatelli to Sign the Certificates of Revival........ 16

b. The Second Amended Complaint Resolution Could Not Authorize the Filing of a Third Amended Complaint Because It Was Not Adopted By a Majority in Interest........ 18

POINT III:
THE TRIAL COURT SHOULD NOT HAVE DISMISSED APPELLANTS' COUNTERCLAIMS AS THEY STATED VALID CAUSES OF ACTION AND WERE SUPPORTED BY MERITORIOUS ALLEGATIONS 21

a. Appellants Set Forth Valid Claims Against UESS and Individual Respondents for Breach of the Company's Operating Agreement 21

b. Appellants Set Forth Valid Claims for Declaratory Relief........ 22

c. The Trial Court's Reliance on Its Holding That the Company Was Transmogrified from a Manager-Managed LLC to a Member-Managed LLC to Dismiss Appellants' Counterclaims is Improper........ 23

CONCLUSION........ 25

TABLE OF AUTHORITIES

PAGE(S)

Cases

Absalom-Absalom Trust f/k/a Anne Deane 2013 Revocable Trust v. Saint Gervais LLC, C.A. No. 2018-0452-TMR (Del. Ch. June 27, 2019) 19

Allianz Underwriters Ins. Co. v. Landmark Ins. Co., 13 A.D.3d 172 (1st Dep't 2004) 11, 21

Amaranth LLC v. National Australian Bank Limited, 40 A.D.3d 279 (1st Dep't 2007) 13

Anne Deane 2013 Revocable Trust v. Saint Gervais LLC, C.A. No. 2018-0452 (Del. Ch. June 27, 2019) 19

Art Capital Bermuda Ltd. v. Bank of N.T. Butterfield & Son Ltd., 169 A.D.3d 426 (1st Dep't 2019) 14, 15

Chiacchia & Feming LLP v. Guerra, 309 A.D.2d 1213, 1214, rearg. and lv. to app. den., 2 A.D.3d 1491 (4th Dep't 2003) 13

DiGiorgio v. 1109-1113 Manhattan Avenue Partners LLC, 102 A.D.3d 725 (2d Dep't 2013) 22

Dorce v. Gluck, 140 A.D.3d 1111 (2d Dep't 2016) 11, 16

Eighth Ave. Garage Corp. v. H.K.L. Realty Corp., 60 A.D.3d 404 (1st Dep't 2009) 11

Favourite Ltd. v. Cico, 181 A.D.3d 426 (1st Dept 2020) 9

Fox Paine & Co., LLC v. Houston Cas. Co., 153 A.D.3d 673 (2d Dep't 2017) 12

Friedman v. Connecticut Gen. Life Ins. Co., 30 A.D.3d 349 (1st Dep't 2006), aff'd as modified 9 N.Y.3d 105 (2007) 24

PAGE(S)

Guggenheimer v. Ginzburg,
43 N.Y.2d 268 (1977) 21

Kazakhstan Inv. Fund v. Manolovici,
2 A.D.3d 249 (1st Dep't 2003) 13

Leon v. Martinez,
84 N.Y.2d 83 (1994) 12

Maitland v. Trojan Elec. Mach. Co.,
65 N.Y.2d 614 (1985) 14

Panagoulopoulos v. Ortiz,
143 A.D.3d 792 (2d Dep't 2016) 13

Sivin-Tobin Associates, LLC v. Akin Gump Strauss Hauer & Feld LLP,
68 A.D.3d 616 (1st Dep't 2009) 24

Skillgames v. Brody,
1 A.D.3d 247 (1st Dep't 2003) 12

Springwell v. Sanluis Corporation, S.A.,
81 A.D.3d 557 (1st Dep't 2011) 13

Tanner v. Stack,
176 A.D.3d 429 (1st Dep't 2019) 13

Thome v. Alexander & Louisa Calder Found.,
70 A.D.3d 88 (1st Dep't 2009) 22

Tri-Terminal Corp. v. CITC Indus., Inc.,
78 A.D.2d 609 (1st Dep't 1980) 14, 15

U.S. Legal Support, Inc. v. Eldad Prime, LLC,
125 A.D.3d 486 (1st Dep't 2015) 14

VLIW Tech., L.L.C. v. Hewlett-Packard Co.,
840 A2d 606 (DE Sup Ct 2003) 21

PAGE(S)

Statutes

Delaware Limited Liability Company Law §18-211 8

Delaware Limited Liability Company Law §18-702(a) 18

Delaware Limited Liability Company Law §18-1109 8

Delaware Limited Liability Company Law §18-1109(a) 4, 7, 17

New York Business Corporation Law §1312 14

Rules

CPLR 205 15

CPLR 205(a) 15

CPLR 3025 7

CPLR 3025(b) 11, 13

CPLR 3211(a)(1) 6, 12

CPLR 3211(a)(7) .... *passim*

Regulations

N.Y.S. Executive Order 202.8 15

Defendants-Appellants Carla Cico and Benedetto Cico (hereinafter sometimes collectively referred to as "Appellants") submit this Memorandum of Law in support of the appeal of a Decision and Order by the Hon. Jennifer G. Schecter, J.S.C. dated June 8, 2021 (the "Decision and Order") in the Supreme Court of the State of New York, County of New York – Commercial Division (the "Trial Court"), which granted Plaintiffs-Respondents' ("Respondents") leave to file a third amended complaint and dismissed Appellants' counterclaims. Appellants respectfully request that this Court reverse the Decision and Order of the Trial Court, reinstate their counterclaims, and dismiss Respondents' Third Amended Complaint.

QUESTIONS PRESENTED

1) Did the Trial Court err when it granted Respondents leave to file a Third Amended Complaint after the First Department dismissed their Second Amended Complaint because Respondent Upper East Side Suites, LLC lacked standing or capacity to sue?

   Answer: Yes.

2) Did the Trial Court err when it dismissed every counterclaim asserted by Appellants?

   Answer: Yes

PRELIMINARY STATEMENT

By Notice of Motion dated September 3, 2021, Appellant requested leave to enlarge the record on this appeal to include briefs filed with this Court in connection with prior appeals in the above-entitled action, under Appellate Division Case Nos. 2018-5365 and 2019-5580 (the "Prior Appeals"), so that issues fully briefed but not previously determined on those appeals can be addressed in this appeal. See, Motion #3007. Respondents did not oppose that motion.

On March 3, 2020, this Court issued a Decision and Order dismissing Respondents' action in its entirety after it found that Respondent Upper East Side Suites, LLC (the "Company") did not have standing or capacity to sue. In reaching this conclusion, it stopped short of addressing two issues raised in the Prior Appeals that warrant the dismissal of Respondents' action. The first issue relates to Respondents' failure to properly vacate their willful default under the terms of an earlier order by the Trial Court that led to the dismissal of the Company's claims. The second issue relates to Respondents' lack of authority to prosecute this action.

It is indisputable that, pursuant to the terms of the Company's Operating Agreement, the Company is a manager-managed limited liability company, and no manager has been duly appointed by the members to manage the affairs of the Company. Any attempt by Respondents and the Trial Court to unilaterally treat

the Company as a member-managed limited liability company due to an alleged inability to appoint a manager is in derogation of the express terms of the Company's Operating Agreement and Delaware limited liability company law. Accordingly, the Company has not been properly authorized to maintain this action and it should be dismissed.

Respondents' action should also be dismissed because the Trial Court erred when it granted Respondents leave to file a Third Amended Complaint. First, the Trial Court should not have granted Respondents' leave to file a Third Amended Complaint because, after the First Department dismissed this action, there was no pleading pending before the Trial Court that could be amended. Second, the Trial Court should not have granted Respondents leave to file a Third Amended Complaint since any proposed amended pleading was palpably insufficient and devoid of merit due to the Company's failure to properly authorize the filing of, among other things, a Third Amended Complaint.

Finally, the Decision and Order should be reversed because the Trial Court erred when it completely disregarded the legal standard of review under CPLR 3211(a)(7) and dismissed Appellants' counterclaims.

For all the reasons set forth below, the Trial Court's Decision and Order should be reversed. Appellants' counterclaims should be reinstated, and Respondents' action should be dismissed.

RELEVANT FACTUAL BACKGROUND

This case has somewhat of a tortured factual and procedural history which this Court previously encountered in connection with its consideration of the Prior Appeals.[1] A concise statement of the relevant factual background relating to this appeal follows.

a. Decision and Order by the First Department Dismissing Respondents' Action

By Decision and Order dated March 3, 2020, the First Department dismissed Respondents' claims in their entirety after finding that the Company lacked capacity or standing to sue because purported member Sirio Srl lacked authority to obtain a Certificate of Revival for the Company, and that such action was undertaken in breach of the Company's Operating Agreement. (R. 292-294)[2] This Court held in relevant part that:

> . . .[T]he action should be **dismissed on the ground that the Company lacks capacity or standing to sue because plaintiff Sirio SRL lacked authority to obtain a certificate of revival**. Initially, the Company was not dissolved pursuant to section 18-801(a) of the Act. Rather, its certificate of formation was cancelled pursuant to section 18-104(d) due to its failure to designate a new registered agent within 30 days after its old one resigned. Therefore, the Company could, in theory, be revived under section 18-1109(a). However, plaintiff Sirio SRL, which obtained the certificate of revival on April 19, 2018 as a member of the Company, lacked authority to act on behalf of the company. The Company's operating agreement states, "No Member as a Member shall have the right to bind the Company in

[1] For a full recitation of the factual background Appellants respectfully refer this Court to the briefs submitted by Appellants in connection with Appellate Division Case Nos. 2018-5365 and 2019-5580.

[2] References preceded by "R." are to pages of the Record of Appeal.

dealings with third parties. No Member is an agent of the Company solely by virtue of being a member and no Member has authority to act for the Company solely." **Even if the Company has become a member-managed LLC, which we are not deciding, the record contains no decision by more than 50% of the members to revive the Company before April 19, 2018.** Plaintiffs rely on the vote to authorize the prosecution of the instant action but that vote was taken between May 31 and June 30, 2018.

> "After [a] certificate of cancellation has been filed, suits generally may not be brought by . . . an LLC" (*Matthew v. Laudamiel*, 2012 WL 605589, *21, 2012 Del Ch LEXIS 38, *77-78 [Feb. 21, 2012, C.A. No. 5957-VCN]). Thus, the Company may not sue as a direct plaintiff, and the members thereof may not bring derivative claims on its behalf. **Since plaintiffs lack standing or capacity, this action should dismissed** (see *e.g. Otto v. Otto*, 110 AD3d 620 [1st Dept 2013]). (emphasis added). (R. 293-294)

The First Department did not grant Respondents leave to file an amended complaint and it did not give them an opportunity to cure the defect that gave rise to their lack of standing or capacity to sue. It simply dismissed Respondents' action in its entirety.[3]

b. Appellants' Answers with Counterclaims

Appellant Carla Cico filed her First Amended Answer with Counterclaims on July 18, 2019, in response to Respondents' Second Amended Complaint. (R. 50-72)

Appellant Benedetto Cico filed his Verified First Amended Answer and Affirmative Defenses, and Counterclaims to Second Amended Complaint on July 18, 2019. (R. 164-224)

---

[3] Respondents subsequently moved before the First Department for leave to reargue or, in the alternative, for leave to appeal to the Court of Appeals. By Decision and Order dated August 13, 2020, this Court denied this motion. (R. 295) Respondents did not request leave to file an amended complaint in connection with this motion.

In their answers, Appellants set forth legally cognizable counterclaims supported by detailed meritorious allegations relating to Respondents' breach of the Company's Operating Agreement and seek monetary damages and/or declaratory relief.[4] After the First Department issued its Decision and Order dated March 3, 2020, and dismissed Respondents' action, the only pleadings pending before the Trial Court were Appellants' respective Answers with Counterclaims.

c. Respondents' Motion to Dismiss Appellants' Counterclaims

By Notices of Motion dated November 13, 2020, Respondents moved before the Trial Court for orders pursuant to CPLR 3211(a)(1) and (7) dismissing Appellants' counterclaims. (R. 11-12 and R. 236-237)

Appellants submitted opposition to these motions and asserted, among other things, that Respondents' motion to dismiss should be denied because Appellants set forth legally cognizable claims supported by meritorious allegations that satisfy New York's liberal pleading standard on a motion to dismiss. (R. 241-265 and R. 266-268) Appellants also disputed any notion that the Company had been transformed into a member managed entity or that the Trial Court's holding in this regard could be deemed a determination on the merits that could constitute law of the case.

---

[4] Appellant Carla Cico withdrew her Fourth Counterclaim for tortious interference of business relationships in her opposition papers to Respondents' motion to dismiss. (R. 274) Similarly, Benedetto Cico withdrew his Eleventh Counterclaim, which set forth a claim for tortious interference with prospective business advantage., in his opposition papers to Respondents' motion to dismiss. (R. 263)

d. Respondents' Motion for Leave to File a Third Amended Complaint

While Respondents' motions to dismiss were pending before the Trial Court, they attempted to breathe new life into their previously dismissed action. By Notice of Motion dated January 8, 2021, Respondents moved before the Trial Court for an order pursuant to CPLR 3025 granting them leave to file a Third Amended Complaint. (R. 342-343) In support of this motion, Respondents incorrectly claimed that they should be permitted to file a Third Amended Complaint because the Company was properly revived under section 18-1109(a) of the Delaware limited liability company law. Respondents, however, failed to offer any evidence that the revival of the Company was duly authorized by its manager, let alone its members. Instead, they annexed copies of two filings that were filed with the Delaware Secretary of State in violation of the express terms of the Operating Agreement.

The first filing was a Certificate of Correction of the Certificate of Revival of Upper East Side Suites, LLC signed by Claudio Gatelli and filed with the Delaware Secretary of State on December 11, 2020 at 1:48 PM. (R. 352-353) Pursuant to this filing, the previous Certificate of Revival filed by Sirio Srl on April 19, 2018, (the same certificate that this Court held Sirio Srl lacked authority to obtain) was "an inaccurate record of the action therein referred to in that it was filed by the signatory to the Certificate of Revival prior to its authorization by the

Company." (R. 353) This certificate expressly stated that it was executed by an "authorized person pursuant to Section 18-211 of the Act". (R. 353)

The second filing was a State of Delaware Certificate of Revival of a Delaware Limited Liability Company Pursuant to Title 6, Sec., 18-1109. (R. 354-355) This was also signed by Claudio Gatelli and filed with the Delaware Secretary of State on December 11, 2020 at 1:50 PM, and it stated that it was "being filed by one or more persons authorized to Execute and file the Certificate of Revival." (R. 355)

Respondents did not produce any evidence that the Company duly authorized Claudio Gatelli to file either certificate (collectively the "Corrective Certificates")[5]. Instead, Respondents relied solely on a "resolution" dated June 30, 2018, which purportedly authorized the filing of the Second Amended Complaint (the "Second Amended Complaint Resolution"), as granting Mr. Gatelli authority to sign these certificates. However, the Second Amended Complaint Resolution only authorized the Company to file the Second Amended Complaint. It did not authorize the filing of the Corrective Certificates or a Third Amended Complaint and does not make any reference to Claudio Gatelli. (R. 461-484)[6] Even if it is assumed that, as

---

[5] Mr. Gatelli never submitted an affidavit describing the circumstances surrounding his unilateral action on behalf of the Company, including whether Respondents' attorneys prepared and paid for such filings.

[6] To be clear, Respondents also unsuccessfully argued to the First Department that the Second Amended Complaint Resolution also authorized Sirio Srl to unilaterally act on behalf of the Company.

Respondents and the Trial Court have maintained, the Company is now a member managed company, which it is not, Mr. Gatelli was not authorized to file the Corrective Certificates and the Company was not authorized to file a Third Amended Complaint in the absence of an affirmative vote by a majority in interest.

e. The Trial Court's Decision and Order

By Decision and Order dated June 8, 2021, the Trial Court granted Respondents leave to file a Third Amended Complaint even though there was no pleading pending before the court that could be amended and Respondents failed to offer any evidence that the defect in standing/capacity to sue had been properly cured. (R. 6-8) Despite the complete absence of a resolution duly authorizing the Company or any of its members to file the Corrective Certificates or the Third Amended Complaint, the Trial Court incorrectly held that the "record now contains a 'decision by more than 50% of the members to revive the Company' made 'between May 31 and June 30, 2018," which was prior to the December 2020 filing of a certificate of revival (Dkts. 432, 433; *see* Favourite Ltd. v. Cico, 181 A.D.3d 426, 427 [1st Dept 2020]). Thus, there is no reason not to recognize the Delaware Secretary of State's acceptance of the certificates of correction and revival." (R. 7)

In the same Decision and Order, the Trial Court also disregarded the liberal pleading standard typically afforded claims on a motion to dismiss, and summarily dismissed Appellants' counterclaims. In doing so, the Trial Court held that "the bulk

of the [the counterclaims] are predicated on plaintiffs allegedly taking unauthorized action on behalf of the Company in violation of the operating agreement. Plaintiffs, however, were permitted to do so (*see* Dkt. 345 at 3-4)". (R. 7)

This citation is to the Trial Court's Decision and Order dated June 17, 2019, wherein it held as follows:

> It is undisputed that the Operating Agreement provides, in section 5.1, that the Company is to be managed by its Managers and that the Managers have authority to bring litigation on behalf of the Company (*see* Dkt. 287 at 13-15). However, since the Cico were removed as Managers, replacements have not been appointed because approval of 75% of the membership interests is required under section 5.14 (*see id*. at 18-19). That has not occurred because the Cicos own more than 25% of the Company and they have not (nor are they incentivized to) vote to authorized new Managers who could take remedial action against them (*see* Dkt. 313 at 7). The Cicos suggest that the Company is essentially paralyzed. That cannot be".
> (R. 125)

As set forth above, Appellants appealed this determination in the Prior Appeals and this issue is critical to the proper disposition of this matter. Accordingly, Appellants respectfully request that this Court address this unresolved issue in connection with this appeal.

For all the reasons set forth above and below, the Decision and Order should be reversed. Appellants' counterclaims should be reinstated, and Respondents Third Amended Complaint should be dismissed in its entirety.

LEGAL STANDARDS

a. Legal Standard Under CPLR 3025(b)

Generally, a motion for leave to file an amended pleading pursuant to CPLR 3025(b) should be freely granted provided there is no prejudice to the nonmoving party. Eighth Ave. Garage Corp. v. H.K.L. Realty Corp., 60 A.D.3d 404, 405 (1st Dep't 2009). Additionally, leave to file an amended pleading will not be granted where the "proposed amendments [are] palpably insufficient or patently devoid of merit". Dorce v. Gluck, 140 A.D.3d 1111, 1112-1113 (2d Dep't 2016).

b. Legal Standard Under CPLR 3211(a)(7)

"It is well settled that on a motion to dismiss a complaint for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true." Allianz Underwriters Ins. Co. v. Landmark Ins. Co.,13 A.D.3d 172 (1st Dep't 2004). "The sole criterion on a motion to dismiss 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 a motion for dismissal will fail'." Id. citing Guggenheimer v. Ginzburg, 43 NY2d 268, 275 (1977). Thus, "[t]he court is not authorized to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action."

Skillgames v. Brody, 1 A.D.3d 247, 250 (1st Dep't 2003); citing Guggenheimer v. Ginzburg, 43 NY2d 268, 275 (1977).

c. Legal Standard Under CPLR 3211(a)(1)

"Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v. Martinez, 84 N.Y.2d 83, 88 (1994). "In order to qualify as documentary evidence, it must be unambiguous, authentic, and undeniable". Fox Paine & Co., LLC v. Houston Cas. Co., 153 A.D.3d 673, 677-678 (2d Dep't 2017). Here, Respondents failed to produce any documentary evidence in support of their motion to dismiss Appellants' Counterclaims that conclusively established a defense as a matter of law.

Based on these legal standards, the Trial Court erred when it granted Respondents leave to file a Third Amended Complaint and dismissed Appellants' counterclaims. The Decision and Order should be reversed.

ARGUMENT

POINT I:
THE TRIAL COURT SHOULD NOT HAVE GRANTED RESPONDENTS LEAVE TO FILE A THIRD AMENDED COMPLAINT BECAUSE THERE WAS NO PLEADING BEFORE THE COURT TO AMEND

Although the grant of leave to amend a pleading rests with the discretion of the trial court and is usually freely given, where "a pleading has already been stricken or dismissed leave to file an amended pleading shall be denied as there is

no pleading before the court to be amended." Tanner v. Stack, 176 A.D.3d 429 (1st Dep't 2019); Panagoulopoulos v. Ortiz, 143 A.D.3d 792 (2d Dep't 2016); Amaranth LLC v. National Australian Bank Limited, 40 A.D.3d 279 (1st Dep't 2007); Kazakhstan Inv. Fund v. Manolovici, 2 A.D.3d 249, 250 (1st Dep't 2003).

Here, there is no dispute that by Decision and Order dated March 3, 2020, the First Department dismissed Respondents' action without granting Respondents leave to file an amended complaint on behalf of the Company. (R. 292-294) Thus, at the time that Respondents moved for leave to amend under CPLR 3025(b), there was no pleading before Trial Court that could be amended. Accordingly, the Trial Court erred when it granted Respondents' leave to file a Third Amended Complaint.

The Trial Court incorrectly held that Respondents' motion for leave to amend was proper because their "claims were dismissed without prejudice due to lack of capacity and this action was never disposed." (R. 6) Whether Respondents' action was dismissed with or without prejudice is immaterial for the purposes of their motion for leave to amend. Here, the only relevant difference between a dismissal "with prejudice" and a dismissal "without prejudice" is that claims asserted in a complaint that has been dismissed "without prejudice" can be refiled in a second action after a new index number is purchased. Springwell v. Sanluis Corporation, S.A., 81 A.D.3d 557 (1st Dep't 2011) (plaintiff commenced new action after standing issue allegedly cured); Chiacchia & Feming LLP v.

Guerra, 309 A.D.2d 1213, 1214, rearg. and lv. to app. den., 2 A.D.3d 1491 (4th Dep't 2003); *see also*, Maitland v. Trojan Elec. Mach. Co., 65 N.Y.2d 614 (1985). There are no exceptions to this rule.

The Trial Court's reliance on U.S. Legal Support, Inc. v. Eldad Prime, LLC, 125 A.D.3d 486, 488 (1st Dep't 2015), Tri-Terminal Corp. v. CITC Indus., Inc., 78 A.D.2d 609 (1st Dep't 1980), and Art Capital Bermuda Ltd. v. Bank of N.T. Butterfield & Son Ltd., 169 A.D.3d 426, 428 (1st Dep't 2019) is misplaced as those cases are easily distinguishable from the case at hand.

For example, U.S. Legal Support, Inc. v. Eldad Prime, LLC, 125 A.D.3d 486, 488 (1st Dep't 2015), did not involve Delaware limited liability company law and it did not involve a party seeking leave to file an amended pleading after its complaint had been dismissed. Instead, this case involved a plaintiff allegedly curing its capacity to sue under New York Business Corporation law §1312 while its complaint was still pending before the court.

Similarly, Tri-Terminal Corp. v. CITC Indus., Inc. 78 A.D.2d 609 (1st Dep't 1980) is distinguishable from the case at hand because in that case the First Department modified an earlier order from an "outright dismissal to a conditional dismissal enabling plaintiff to cure the defect by obtaining the requisite authority prior to trial". Here, the First Department dismissed Respondents' action outright. It did not issue a conditional dismissal and the Trial Court did not have any

authority to amend the First Department's Decision and Order dated March 3, 2020, to make it a conditional dismissal.

Moreover, in Tri-Terminal Corp. v. CITC Indus., Inc., the First Department cautioned that its holding raised "grave issues" relating to whether issues of capacity/authority to sue under New York Business Corporation law could be "circumvented because of the fortuitous circumstance that a defendant confronted with a lawsuit in a New York court . . .chose to assert a counterclaim."

Finally, Art Capital Bermuda Ltd. v. Bank of N.T. Butterfield & Son Ltd., 169 A.D.3d 426, 428 (1st Dep't 2019), is distinguishable from the case at hand because it did not involve a dismissal for lack of capacity/authority to sue and it did not involve a motion for leave to amend after the underlying pleading had been dismissed in its entirety.

Based on the foregoing, should Respondents wish to prosecute the Company's dismissed claims against the Appellants, then they must do so under a new index number and any such claims asserted will be subject to the applicable statute of limitations as it will have been filed more than six months since the dismissal on March 3, 2020. See, CPLR 205.

The Trial Court suggests in a footnote that a "new action would have been timely pursuant to CPLR 205(a) and Executive Order 202.8", but that is incorrect. Here, as argued by Appellants in the Prior Appeals, Respondents' action was

dismissed when they failed to comply with the Trial Court's Decision and Order dated February 21, 2018. Accordingly, a new action would not be timely.

POINT II: RESPONDENTS SHOULD NOT HAVE BEEN GRANTED LEAVE TO FILE AN AMENDED COMPLAINT SINCE THE PROPOSED PLEADING WAS NOT AUTHORIZED AND IS, THEREFORE, PALPABLY INSUFFICIENT AND DEVOID OF MERIT

It is well settled that leave to file an amended pleading will be freely given unless the "proposed amendments [are] palpably insufficient or patently devoid of merit". Dorce v. Gluck, 140 A.D.3d 1111, 1112-1113 (2d Dep't 2016). Here, the Third Amended Complaint was palpably insufficient and devoid of merit because Respondents never cured the infirmities relating to the Company's standing or authority to sue. The actions taken by Claudio Gatelli that allegedly cured these issues were unauthorized and in violation of the Operating Agreement. Accordingly, the Trial Court erred when it granted Respondents leave to file a Third Amended Complaint.

a. The Company's Members did not Authorize Claudio Gatelli to Sign the Certificates of Revival

For the purpose of rendering its Decision and Order dated March 3, 2020, this Court assumed that the Company was a member managed entity and held that Respondents lacked standing or capacity to sue because "the record contains no decision by more than 50% of the members to revive the Company before April 19, 2018". (R. 294) Here, the Trial Court should not have granted Respondents

leave to file an amended complaint because the record still does not contain any evidence of a decision by more than 50% of the members to revive the Company.

Respondents mistakenly assume that refiling a second – albeit defective – Certificate of Revival for the Company after the vote to authorize the filing of the Second Amended Complaint cures its lack of standing and capacity to sue. It does not. The Second Amended Complaint Resolution did not authorize Claudio Gatelli to file a Certificate of Revival or a Certificate of Correction, and it did not authorize the filing of a Third Amended Complaint or any related motions. Accordingly, those Company members who consented to the Second Amended Complaint Resolution did not authorize the unlawful conduct by Claudio Gatelli or the filing of a Third Amended Complaint.

The Trial Court erred when it held that the Company was revived under Delaware limited liability company law §18-1109(a). As set forth above, that is not possible because there is no evidence of a decision by more than 50% of the members to revive the Company. Claudio Gatelli's representation on the Corrective Certificates that he was authorized to execute and file same on behalf of the Company is false and a violation of Delaware Limited Liability Company Law §18-1109(a).

Without a proper vote by the Company's members authorizing the filing of the Corrective Certificates and a Third Amended Complaint, Respondents lack standing

and/or capacity to sue and the Third Amended Complaint is rendered palpably insufficient and devoid of merit. Accordingly, the Decision and Order should be reversed, and Respondents Third Amended Complaint should be dismissed.

b. The Second Amended Complaint Resolution Could Not Authorize the Filing of a Third Amended Complaint Because It Was Not Adopted By a Majority in Interest

Even if it is assumed that the Company is member-managed, which it is not, and the Second Amended Complaint Resolution could be construed as authorizing Claudio Gatelli's unlawful conduct and the filing of a Third Amended Complaint, which it does not, that resolution was nevertheless ineffective because it was never adopted by a majority in interest.

In connection with their motion to file a Second Amended Complaint, Respondents submitted a chart that included a calculation of member votes to argue that a majority in interest of the Company members approved the Second Amended Complaint Resolution with fifty-one (51%) of membership interests. (R. 485-488) Based on this chart an entity named Sirio Trust Alpha, not Sirio Srl, is the owner of 11.84% membership interest in the Company. However, a review of the Second Amended Complaint Resolution indicates that Sirio Srl, which is not a member of the Company, signed the Second Amended Complaint Resolution. R. 484.

Any suggestion by Respondents that Sirio Trust Alpha assigned its membership interest to Sirio Srl must be rejected. Under Section 18-702(a) of the

Act, "[a] limited liability company interest is assignable in whole or in part except as provided in a limited liability company operating agreement." Section 7.1 of the Operating Agreement requires the consent of all Company members before a membership interest may be assigned. Failure to comply renders the purported assignment void *ab initio*.

Here, there was no such assignment alleged nor is there any record evidence to support such a theory. It is well settled under Delaware limited liability company law that transfers of membership interest in violation of a limited liability company's operating agreement is void, not voidable, and renders common law and equitable defenses useless. Absalom-Absalom Trust f/k/a Anne Deane 2013 Revocable Trust v. Saint Gervais LLC, C.A. No. 2018-0452-TMR (Del. Ch. June 27, 2019). Accordingly, the vote by Sirio Srl in support of the Second Amended Complaint Resolution should not have been counted. Once that vote is deducted from the total vote count, only 39.16% of the Company's membership interests consented to the Second Amended Complaint Resolution and the resolution is rendered a nullity.

Similarly, the vote by Aiebus S.A. should not have been counted in support of the Second Amended Complaint Resolution. Aiebus S.A. is a member of the Company with an ownership interest of 7.89%. Pursuant to a sworn declaration from Giorgio Scardoni, the principal of Aiebus SA, dated May 15, 2020, he never executed a consent in favor of that resolution. (R. 489-490) Once Aiebus S.A.'s

vote is deducted, the total vote in favor of the Second Amended Complaint Resolution is further reduced to 31.27 percent. (R. 486)

Finally, the vote by a member named Anchor International Holdings Limited, an alleged owner of 3.95% interest of the Company, should also not be counted in favor of the Second Amended Complaint Resolution. (R. 486) Based on publicly available information, Anchor International Holdings Limited was dissolved on November 28, 2017. (R. 491-494) The vote for the Second Amended Complaint Resolution took place in June 2018. Therefore, Anchor International Holdings Limited did not exist at the time of the vote and any vote on its behalf is invalid and should not have been counted. Once Anchor International Holdings Limited's vote is deducted, the total vote in favor of the Second Amended Complaint Resolution is further reduced to 27.32 percent.

In light of the foregoing, the Second Amended Complaint Resolution could not have authorized the filings by Mr. Gatelli or the filing of a Third Amended Complaint because it was not approved by a majority in interest of the Company's members. The Second Amended Complaint Resolution is a nullity and incapable of authorizing the Company to take any action. Accordingly, Respondents lack standing and/or capacity to sue and the Third Amended Complaint is rendered palpably insufficient and devoid of merit. The Decision and Order should be reversed, and the Third Amended Complaint should be dismissed.

POINT III:
THE TRIAL COURT SHOULD NOT HAVE DISMISSED APPELLANTS' COUNTERCLAIMS AS THEY STATED VALID CAUSES OF ACTION AND WERE SUPPORTED BY MERITORIOUS ALLEGATIONS

The Trial Court's dismissal of Appellants' counterclaims was improper. On a motion to dismiss under CPLR 3211(a)(7), a court must accept as true the facts alleged in the pleading and draw all reasonable inferences in favor of the nonmoving party. Allianz Underwriters Ins. Co. v. Landmark Ins. Co.,13 A.D.3d 172 (1st Dep't 2004). The only issue on a motion to dismiss under CPLR 3211(a)(7) 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 a motion for dismissal will fail". Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977). Here, Appellants easily satisfy this standard and set forth legally cognizable counterclaims for breach of contract and declaratory relief. The Decision and Order should be reversed, and Appellants' counterclaims should be reinstated.

a. Appellants Set Forth Valid Claims Against UESS and Individual Respondents for Breach of the Company's Operating Agreement

In order to state a claim for breach of contract under Delaware law, a party must allege the existence of the contract; breach of an obligation imposed by that contract; and resultant damage to the nonbreaching party. VLIW Tech., L.L.C. v. Hewlett-Packard Co., 840 A2d 606, 612 (DE Sup Ct 2003).

Here, a plain reading of Appellants' Counterclaims reveals that they forth well pled breach of contract claims against Respondents and they should not be dismissed under CPLR 3211(a)(7). Appellant Carla Cicos First, Second, Sixth and Seventh Counterclaims (R. 57-71) as well as Appellant Benedetto Cicos First, Second, Fourth, Sixth, Eighth, and Twelfth Counterclaims (R. 193-221), each allege with specificity breaches of the Operating Agreement by the Company and/or the individual Respondents and allege that they suffered damages as a direct and proximate result of those breaches. Accordingly, that portion of the Decision and Order that dismissed Appellants' counterclaims for breach of the Operating Agreement should be reversed.

b. Appellants Set Forth Valid Claims for Declaratory Relief

Likewise, Appellants set forth valid claims for declaratory relief. It is well settled that "a motion to dismiss the complaint in an action for a declaratory judgment 'presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration'." DiGiorgio v. 1109-1113 Manhattan Avenue Partners LLC, 102 A.D.3d 725 (2d Dep't 2013). "Declaratory judgments are a means to establish respective legal rights of the parties to a justiciable controversy." Thome v. Alexander & Louisa Calder Found., 70 A.D.3d 88, 99 (1st Dep't 2009). Under Delaware law a claim for declaratory relief can be sought if a party can show four factors:

> (1)It must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; (4) the issue involved in the controversy must be ripe for judicial determination. XI Specialty Ins. Co. v. WMI Liquidating Tr., 93 A.3d 1208, 1216-17 (Del. 2014) *quoting* Stroud v. Milliken Enters., Inc., 552 A.2d 476, 479-480 (Del. 1989).

Here, again, a plain reading of Appellant Carla Cico's Third and Fifth Counterclaims (R. 64-68) and Appellant Benedetto Cico's Fifth, Seventh, and Ninth Counterclaims (R. 200-215), leaves little doubt that these four elements are satisfied, and a justiciable controversy exists between the parties with respect to the operation and management of the Company and whether the individual Respondents acted in violation of the terms of the Operating Agreement. Accordingly, that portion of the Decision and Order which dismissed Appellants' counterclaims for declaratory relief should be reversed.

c. The Trial Court's Reliance on Its Holding That the Company Was Transmogrified from a Manager-Managed LLC to a Member-Managed LLC to Dismiss Appellants' Counterclaims is Improper

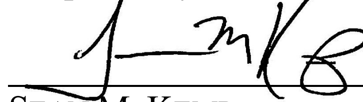
Any suggestion by the Trial Court that Appellants' Counterclaims should be dismissed, as a matter of law, based its prior holding that the Company was transformed from a manager-managed limited liability company to a member-managed limited liability company is improper and disregards the standard of review under CPLR 3211(a)(7).

The Trial Court's holding that the Company could be deemed a manager managed company was not a judicial determination on the merits that can constitute law of the case because it was a ruling on a motion to dismiss. Sivin-Tobin Associates, LLC v. Akin Gump Strauss Hauer & Feld LLP, 68 A.D.3d 616 (1st Dep't 2009); Friedman v. Connecticut Gen. Life Ins. Co., 30 A.D.3d 349, 349-350 (1st Dep't 2006), affd as modified 9 N.Y.3d 105 (2007). In other words, in making this determination the Trial Court was simply examining the sufficiency of Respondents' pleading. It was not examining the sufficiency of the evidence underlying the pleading or examining the merits of the claims made by Respondents. Accordingly, this determination is not law of the case, and the Trial Court should not have relied on it to dismiss Appellants' counterclaims that allege Respondents breached the Operating Agreement by attempting to operate the Company without properly appointing a manager.

CONCLUSION

The Trial Court erred when it granted Respondents leave to file a Third Amended Complaint and dismissed Appellants' Counterclaims. The terms of the Company's Operating Agreement should not be disregarded. The Company is a manager-managed limited liability company and Respondents' failure to operate the Company in a manner consistent with its Operating Agreement is fatal to their action. For all the reasons set forth above and in the Prior Appeals, Appellants respectfully request that this Court reverse the Trial Court's Decision and Order.

Respectfully submitted,



SEAN M. KEMP
MARVIN KEMP, PLLC
P.O. Box 494
44 West Market Street
Rhinebeck, New York 12572
(845) 418-5853
sean@marvinkemp.com

Attorneys for Defendant-Appellant Carla Cico

EDWARD TOPTANI
TOPTANI LAW OFFICES
375 Pearl Street, Suite 1410
New York, New York 10038
(212) 699-8930
edward@toptanilaw.com

Attorneys for Defendant-Appellant Benedetto Cico

PRINTING SPECIFICATION STATEMENT

This computer generated brief was prepared using a proportionally spaced typeface.

Name of typeface: Times New Roman

Point size: 14 Points

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, printing specification statement, or any authorized addendum is 5,830.

STATEMENT PURSUANT TO CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

FAVOURITE LIMITED, CLAUDIO GATELLI, GRAZIANO SGHEDONI, ALBERTO BRENTEGANI, SIRIO SRL, OILE SRL, UPPER EAST SIDE SUITES LLC,
Plaintiffs-Respondents,

—against—

BENEDETTO CICO, CARLA CICO,
Defendants-Appellants,

151 EAST HOUSTON ACQUISITION LLC,
Defendants.

New York County Clerk's Index No. 652857/16

Appellate Division Case No. 2021-02511

1. The index number of the case is 652857/16.
2. The full names of the original parties are as set forth above. There has been no change in the parties.
3. The action was commenced in Supreme Court, New York County.
4. The action was commenced on May 27, 2016 by service of summons and complaint; the answers of Defendants were served on June 28, 2019.
5. The nature and object of the action is breach of contract.
6. This appeal is from a decision and order of the Honorable Jennifer G. Schecter, entered in favor of Plaintiffs, against Defendants on June 8, 2021 which granted Plaintiffs' motion for leave to file a third amended complaint and also granted Plaintiffs' motion to dismiss the counterclaims of Defendants Benedetto Cico and Carla Cico.
7. The appeal is on a full reproduced joint record.