IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

PARK CHARLES OFFICE ASSOCIATES LLC :
and :
GALLOWS MANAGER LLC :
Plaintiffs, :
v. : Case No. 462653-V
[2021 MDBT 2]
QUEENS MANOR GARDENS LLC :
and :
CATHY S. BERNARD :
Defendants. :

Attorneys and Law Firms:

Alexia Kent McClure, Esq., Deanna L. Peters, Esq., Stein Sperling Bennett De Jong Driscoll PC, Rockville, MD, counsel for the plaintiffs.

Scott H. Marder, Esq., Sima G. Fried, Esq., Thomas & Libowitz, P.A., Baltimore, MD, counsel for defendants.

MEMORANDUM AND ORDER

This case came before the court for a six-day bench trial from February 22, 2021 to March 1, 2021. The parties thereafter submitted post-trial briefs on April 16, 2021.

Procedural Background

Plaintiff Park Charles Office Associates LLC ("PCOA LLC") is a limited liability company organized under the laws of Maryland, with its principal place of business in Baltimore, Maryland.[1] Plaintiff Gallows Manager LLC is the Manager of PCOA LLC and owns a 0.5% membership interest in PCOA LLC.

Plaintiff Gallows Manager LLC is a limited liability company organized under the laws of Delaware, with its principal place of business in Vienna, Virginia.[2] The Gallows Corporation, a Delaware corporation, is the sole member of Plaintiff Gallows Manager LLC.[3] Until his death in 2017, David Hillman was the president of The Gallows Corporation.[4] After his death, his wife, Suzanne Hillman, became, and still serves as, the president of The Gallows Corporation.[5]

Defendant Queens Manor Gardens LLC ("QMG LLC") is a limited liability company organized under the laws of Maryland, with its current principal place of business in Riverdale, Maryland.[6] QMG LLC owns a 99.5% membership interest in PCOA LLC. Defendant Cathy Bernard is the Managing Member of QMG LLC and owns an 86.71% interest in QMG LLC. David Cohn ("Mr. Cohn") owns a 9.17% membership interest in QMG LLC, Stanley Goldstein

---

[1] Plaintiffs' Trial Exhibit 12 at PX 12-1.

[2] Docket Entry No. 42 – Amended Complaint for Damages and Related Equitable Relief at p.4.

[3] Plaintiffs' Trial Exhibit 16 at PX 16-9.

[4] Defendants' Trial Exhibit 119 at p. 3-4.

[5] Defendants' Trial Exhibit 119 at p. 3-4.

[6] Plaintiffs' Trial Exhibit 111 at PX 111-1.

owns a 3.10% membership interest in QMG LLC, and Cohn Partners owns a 0.92% membership interest in QMG LLC. [7]

In 1997, QMG LLC was formed to run Queens Manor Gardens Apartments. In 2003, QMG LLC sold Queens Manor Gardens Apartments for $14 million and completed a Section 1031 exchange[8] in which it took a 100% membership interest in a CVS in Phoenix, Arizona, a 100% membership interest in Beaver Road Woodworking LLC ("Beaver Road"), and a 100% membership interest in PCOA LLC.

PCOA LLC was formed to run the office portion of the real estate located at 218 North Charles Street, Baltimore, Maryland 21201 known as "Park Charles" (the "Park Charles Building"). Non-party Park Charles Apartments Associates LLC runs the apartment portion of the Park Charles Building. The office portion represents 40% of the Park Charles Building and the apartment portion represents the remaining 60%.

Section 4.2 of the PCOA LLC Operating Agreement outlines a Members' obligation to make additional capital contributions to the LLC. Section 4.2 states, in pertinent part:

> 4.2 Additional Capital Contributions. In addition to the initial Capital Contributions set forth in Section 4.1 above, each Member shall be obligated to, and hereby covenants and agrees to, contribute to the capital of the Company (and to receive appropriate credit to his, her or their Capital Account therefore), his her or their pro rata share (as determined by reference to such Member's interest in the Company) of any and all costs and expenses incurred by the Company in connection with the business and purpose of the Company.

Section 5.1 of the PCOA LLC Operating Agreement sets forth the Manager's responsibilities related to the management of the LLC. Section 5.1 states, in pertinent part:

---

[7] Defendants' Trial Exhibit 94 at p. TS 001784.

[8] 26 U.S.C. § 1031. IRC Section 1031 allows the seller of investment property to postpone paying taxes on the gain if they reinvest the proceeds in similar property as part of a qualifying like-kind exchange.

5.1 Management.

***

5.1.2 General Powers. The Manager (on behalf of the Company and its Members) shall in every respect, as set forth below, have full and complete responsibility for the management of the Company's business.

5.1.2.1 All decisions of the management of the business, affairs and assets of the Company shall be made by the Manager. The Manager (acting as herein required on behalf of the Company and its Members) shall have the full and entire right, power and authority in the management of the Company's business to do any and all acts and things necessary, proper, convenient, or advisable to effectuate the purposes of the Company.

***

5.1.2.4 The Manager is hereby authorized (on behalf of the Company) to enter into a management agreement with Southern Management Corporation, to manage the Property at a starting annual fee not to exceed six percent (6%) of the gross income of the Property.

Southern Management Corporation began managing the Park Charles Building in 2007. Article VIII of the Management Agreement discusses advancing funds associated with managing the building. Article VIII states, in pertinent part:

Article VIII

Manager Not Obligated to Advance Funds; Other Obligations

Manager shall not be obligated to advance any of its own funds to or for the account of Owner unless Owner shall have furnished Manager with funds necessary for the discharge thereof after ten (10) days notice to Owner. However, if Manager shall have advanced any funds in payment of an expense permitted under this Agreement in connection with the maintenance and operating of the Premises, Owner shall promptly reimburse Manager therefore including interest calculated at the Wachovia Bank Prime Rate plus 3/4%, as quoted from time to time.

In 2011 and 2012, on behalf of Southern Management Corporation, David Hillman made cash calls to the "Partners in Park Charles."[9] PCOA LLC paid 40% of both cash calls.

---

[9] Defendants' Trial Exhibit 4 at p. "Plaintiffs 000053" and "Plaintiffs 000054."

On December 20, 2012, Cathy Bernard signed an "Assignment Agreement" that conveyed a 0.5% membership interest in PCOA LLC to Gallows Manager LLC.[10] The PCOA LLC Operating Agreement was amended to reflect this assignment (the "First Amendment") on December 20, 2012.[11]

David Hillman issued additional cash calls on November 17, 2014, May 21, 2015, June 18, 2015, September 24, 2015, October 26, 2015, and November 27, 2015.[12] PCOA LLC paid 40% of each of these cash calls.

In July of 2015, Cathy Bernard bought a combined 15.6% membership interest (the "Lublin Interest") in QMG LLC from Members that had inherited their membership interest from a deceased family member. On October 13, 2010, Cathy Bernard signed a document, on behalf of Queens Manor Management Corporation, the Managing Member of QMG LLC, in her capacity as the president of Queens Manor Management Corporation, approving the transfer of Shirley Lublin's 15.6% interest to two of her family members.[13] On July 31, 2015, in connection with buying the Lublin Interest, Cathy Bernard signed a document entitled "Settlement Agreement and General Release" both "Individually" and on behalf of Queens Manor Gardens LLC under the "Title" of "Managing Member of Queens Manor Gardens, LLC."[14]

At trial, when asked why she bought the Lublin Interest, Cathy Bernard testified, in pertinent part:

---

[10] Plaintiffs' Trial Exhibit 15 at PX 15-1 through PX 15-2.

[11] Plaintiffs' Trial Exhibit 16.

[12] Plaintiffs' Trial Exhibit 75 at PX 75-1 through PX 75-5.

[13] Defendants' Exhibit 8 at p. QM000808.

[14] Defendants' Exhibit 9 at p. QM000834.

Q. Okay. And you have used the reference "real estate people," though, haven't you?
A. These are people that were partners that inherited it from their deceased family members.
Q. But the member that – I'm sorry. Go ahead.
A. No, no. I mean, I had to deal with who were the partners at the time. They were not real estate people.[15]
***
A. Okay. This was five years ago, and every time there was a cash call, it was a problem. And most of the time, I had to make it up. The reason I bought them out was, frankly, I didn't want to go through this several times a year that we got cash calls, so I tried to clean it up.[16]
***
We made all the cash calls for Queens Manor until 2015. And this was before that. We made them, meaning me, through the LLC. There's no doubt that all the cash calls were made until 2018. So I'm sorry if I don't understand why we're going through something in 2015 when these people are not partners anymore.[17]

In October 2015, another Member of QMG sold its 7.73% membership interest in Queens Manor Gardens LLC to Cathy Bernard.[18] On October 20, 2015, Cathy Bernard signed a document entitled "Purchase Agreement and General Release" both "Individually" and on behalf of Queens Manor Gardens LLC under the "Title" of "Managing Member of Queens Manor Gardens, LLC."[19]

On November 3, 2015, Cathy Bernard signed a check for $140,000 made payable to "Southern Mgt" with a memo line that read "Cash Call." This check was drawn on her personal bank account at Bank of America.[20]

---

[15] Trial Transcript (Cathy Bernard) at p. 616.

[16] Trial Transcript (Cathy Bernard) at p. 624.

[17] Trial Transcript (Cathy Bernard) at p. 624.

[18] Defendants' Trial Exhibit 10 at p. QM000887.

[19] Defendants' Trial Exhibit 10 at p. QM 000893 and QM000895.

[20] Plaintiffs' Trial Exhibit 99 at PX 99-1.

After receiving the 2015 cash calls, Mr. Cohn called David Hillman. At trial, Mr. Cohn testified that he told David Hillman that QMG LLC had "quite a few investors that couldn't afford to pay these cash calls anymore," [21] and that if the parties could not find a way to work it out "it was probably time for [David Hillman] to think of a solution that might end this relationship and this deal."[22] Mr. Cohn testified further that, in response, David Hillman told him that "you will not have to worry about cash calls until – any further in this deal, and we are due to refinance it in 2022. And we will work out that specific balance, whatever it is. After the refinance, you'll pay me back, and that will take care of it."[23] Mr. Cohn further testified that he called Cathy Bernard for approval of this arrangement and that she agreed to it.[24] Finally, Mr. Cohn testified that, before this interaction, he and David Hillman had settled unpaid cash calls in a similar way between 1999 and 2000 and that, based on David Hillman's willingness to make that deal, "from then on, I considered him a very special person because his word was his bond, and, you know, I did a lot of deals with him after that, and he was the kind of guy that if he told you he was going to do something, you could rest your bottom dollar on it."[25]

In April of 2017, QMG LLC sold the CVS in Arizona.[26] The proceeds from that sale were deposited into QMG LLC's bank account at BB&T.[27] Cathy Bernard wrote distribution

---

[21] Trial Transcript (David Cohn) p. 897-898.

[22] Trial Transcript (David Cohn) p. 897-898.

[23] Trial Transcript (David Cohn) p. 899.

[24] Trial Transcript (David Cohn) p. 899.

[25] Trial Transcript (David Cohn) p. 899.

[26] Trial Transcript (Cathy Bernard) at p. 642-646.

[27] Plaintiffs' Trial Exhibit 100 at PX 100-1.

checks to the Members of QMG LLC based on their pro rata ownership interests.[28] Specifically, Cathy Bernard wrote herself a check for $681,578.83, David Cohn a check for $72,315.02, Stanley Goldstein a check for $24,446.72, and Cohn Partners a check for $7,255.15.[29]

In December of 2017, David Hillman passed away. Upon his death, his wife, Suzanne D. Hillman, became the president of The Gallows Corporation.[30]

On June 21, 2018, Suzanne Hillman issued a memo to "Park Charles Investors" that stated, in pertinent part: "At this point in time, Park Charles has a cash operating deficit and we will need to make capital contributions to cover it. As a result, it is necessary to make a cash call of $1,400,000 now with an expectation of an additional cash call before year end."[31] This time, to cover 40% of the cash call, PCOA LLC owed $560,000.[32] Specifically, Gallows Manager, LLC owed $2,800 and Queens Manor Gardens LLC owed $557,200.[33] Suzanne Hillman sent a follow up memo for this amount on September 6, 2018.[34]

At trial, Cathy Bernard and Mr. Cohn both testified that, after the June 2018 cash call, they tried to contact Suzanne Hillman.[35] They both testified that Suzanne Hillman refused to take

---

[28] Plaintiffs' Trial Exhibit 100 at PX 100-1.

[29] Plaintiffs' Trial Exhibit 100 at PX 100-1.

[30] Defendants' Exhibit 119 at p. 3-4.

[31] Plaintiffs' Trial Exhibit 1 at PX 1-1.

[32] Plaintiffs' Trial Exhibit 1 at PX 1-3.

[33] Plaintiffs' Trial Exhibit 2 at PX 2-1.

[34] Plaintiffs' Trial Exhibit 2 at PX 2-1.

[35] Trial Transcript (David Cohn) at p. 900-902; Trial Transcript (Cathy Bernard) at p. 737-740.

their telephone calls.[36] Cathy Bernard also testified that, after having made four investments with Southern Management Corporation over the course of 17 years, she was not happy that Southern Management Corporation ignored her inquiries following the June 2018 cash call.[37] Cathy Bernard also testified that, after being ignored by Southern Management Corporation, she and Mr. Cohn decided that "there was not an upside to this building" and that "we had to stop the bleeding, from our perspective. It was a business decision."[38] QMG LLC refused to make the June 2018 capital contribution.

On July 17, 2018, an interested buyer sent a Letter of Intent to buy Beaver Road from QMG LLC for $6 million.[39] When asked if the deal closed, Cathy Bernard testified that, as part of the sales process, a Phase I environmental study was done and that, as a result of the negative report prepared after the completion of the Phase I study, the sale did not close.[40] Cathy Bernard testified that QMG LLC thereafter distributed Beaver Road directly to its Members. [41] Regarding the close proximity of the Beaver Road distribution and the June 2018 cash call, Cathy Bernard testified that QMG LLC had been trying to sell Beaver Road for years prior to June of 2018.[42]

---

[36] Trial Transcript (David Cohn) at p. 900-902; Trial Transcript (Cathy Bernard) at p. 737-740.

[37] Trial Transcript (David Cohn) at p. 900-902; Trial Transcript (Cathy Bernard) at p. 737-740.

[38] Trial Transcript (Cathy Bernard) at p. 744-745.

[39] Plaintiffs' Trial Exhibit 103 at PX 103-1.

[40] Trial Transcript (Cathy Bernard) at p. 714-715.

[41] Plaintiffs' Trial Exhibit 108 at PX 108-1; Trial Transcript (Cathy Bernard) at p. 603-606.

[42] Trial Transcript (Cathy Bernard) at p. 593.

On November 9, 2018, PCOA LLC, through counsel, sent QMG LLC a letter demanding that QMG LLC pay $557,200 in order to satisfy its obligation under the Operating Agreement.[43] On November 16, 2018, QMG LLC responded, through counsel, that the reason for its failure to make the June 2018 cash call was "simply that Queens Manor has made a financial, business and investment decision to stop throwing money into a bottomless pit with respect to a bad investment."[44] QMG LLC also pointed out that, since acquiring its 40% stake in the Park Charles Building, "Queens Manor has made additional capital contributions of $2,160,000, or approximately 1.5 times its original investment."[45] In that same letter, QMG LLC also stated that, when it received the June 21, 2018 letter requesting payment, QMG LLC "had received no correspondence from Park Charles since David Hillman's death. Certainly, it was incumbent upon Southern Management to inform investors in the project that these capital contributions would be requested and that the investors would have more than 40 days to arrange for funding."[46]

On February 15, 2019, Frank Glorioso, the Chief Financial Officer of Southern Management Corporation, issued a cash call for an additional $1,140,000 to cover the building's operating deficit.[47] The memo stated that "Gallows Corporation" [meaning Gallows Manager LLC] owed $2,280 and that QMG LLC owed $453,720.[48]

---

[43] Plaintiffs' Trial Exhibit 9 at PX 9-1.

[44] Plaintiffs' Trial Exhibit 10 at PX 10-1.

[45] Plaintiffs' Trial Exhibit 10 at PX 10-1.

[46] Plaintiffs' Trial Exhibit 10 at PX 10-1.

[47] Plaintiffs' Trial Exhibit 3 at PX 3-1.

[48] Plaintiffs' Trial Exhibit 3 at PX 3-1.

On September 23, 2019, Frank Glorioso issued an additional cash call and sent a memo requesting a capital contribution of $2.2 million in addition to the $1.14 million requested in February of 2019.[49] The memo stated that, as a whole, PCOA LLC owed $880,000.[50]

As reflected in a September 28, 2020 memo from Gallows Manager, LLC to Queens Manor Gardens, LLC, between 2018 and 2020, Southern Management Corporation requested $2,208,900 in capital contributions from QMG LLC. [51] To date, QMG LLC has not paid any of these cash calls.

Discussion[52]

Count I – Breach of Contract – Damages

(Park Charles Office Associates LLC Against Queens Manor Gardens LLC and Cathy S. Bernard as Alter Ego)

Plaintiff PCOA LLC contends that Defendant QMG LLC breached the Operating Agreement by refusing to make capital contributions starting in June of 2018. Plaintiff PCOA LLC also claims that Cathy Bernard used QMG LLC as her alter ego and seeks to hold her personally liable for the outstanding capital contributions by piercing the corporate veil.

Defendant QMG LLC argues that Plaintiff PCOA LLC was not permitted to make the cash calls it made in June of 2018, or any of the cash calls it has made since, because those cash

---

[49] Plaintiffs' Trial Exhibit 4 at PX 4-1.

[50] Plaintiffs' Trial Exhibit 4 at PX 4-2.

[51] Plaintiffs' Trial Exhibit 5 at PX 5-1.

[52] In the Amended Complaint for Damages and Related Equitable Relief, PCOA LLC claimed, in various places including the entirety of Count II, that QMG LLC and Cathy Bernard engaged in fraud. For the reasons stated on the record, this court dismissed all of PCOA LLC's claims related to fraud.

calls included expenses not contemplated by the Operating Agreement. Defendant QMG LLC also argues that Plaintiff PCOA LLC breached the Operating Agreement by executing the First Amendment without obtaining QMG LLC's consent and signature.

Breach of Contract

"Maryland adheres to the principle of the objective interpretation of contracts." *Cochran v. Norkunas*, 398 Md. 1, 16 (2007). "If the language of a contract is unambiguous, we give effect to its plain meaning and do not contemplate what the parties may have subjectively intended by certain terms at the time of formation." *Norkunas*, 398 Md. at 16. "Under the objective theory of contracts, we look at what a reasonably prudent person in the same position would have understood as to the meaning of the agreement." *Norkunas*, 398 Md. at 17.

In addition, "one may waive the breach of the contract and later be bound by his election." *National School Studios, Inc. v. Meadley*, 211 Md. 116, 131 (1956). "He who is silent when he ought to have spoken, will not be heard to speak when he ought to be silent." *National School Studios*, 211 Md. at 131. The Court of Appeals also has held that "a party may also waive a condition precedent after a breach by failing to assert its remedies for that breach," and that "a party's inaction or silence is relevant, especially when that party is silent in response to a breach." *Hovnanian Land Inv. Group, LLC v. Annapolis Towne Ctr. at Parole, LLC*, 421 Md. 94, 123 (2011).

Here, the court concludes that a reasonably prudent person in the same position as the Members of QMG LLC, that is, an experienced real estate investor, would have easily understood the capital contribution requirements of the Operating Agreement. In addition, the memos accompanying the cash calls made by David Hillman, which stated that Southern Management Corporation intended to use the capital contributions to cover expenses, are nearly

identical to the expense items identified by Suzanne Hillman and Frank Glorioso in the memos accompanying their cash calls. By making the capital contributions requested by David Hillman from 2011 to 2015, QMG LLC waived its ability to claim that the capital contributions requested by Suzanne Hillman and Frank Glorioso were not allowed under the Operating Agreement.

The court also concludes that, after Cathy Bernard signed the Assignment Agreement, QMG LLC knew or should have known about the contents of the First Amendment to the Operating Agreement. In failing to request a copy of the First Amendment until 2016, QMG LLC also waived its right to claim that PCOA LLC breached the Operating Agreement by executing the First Amendment without its consent and signature.

In sum, the court concludes that the Operating Agreement and the First Amendment were both fully enforceable contracts and that, by failing to make the capital contribution requested in June of 2018, QMG LLC breached the contract.

The Alter Ego Doctrine

Under Maryland corporate law, even "where there is no allegation of fraud, evidence or finding of fraud, the corporate veil may be disregarded nonetheless and personal liability established upon proof of a paramount equity." *Schlossberg v. Bell Builders Remodeling, Inc.*, 441 Md. 671, 672 (2015). "The analysis of the common factors considered by our courts when addressing whether a complaint or set of facts are sufficient to pierce the veil of a single corporation are delineated in *Hildreth*." *Schlossberg*, 441 Md. at 671 (citing *Hildreth v. Tidewater Equip. Co., Inc.*, 378 Md. 724, 838 (2003)).

In *Hildreth*, 378 Md. at 734, the Court of Appeals listed the following factors used to determine if the corporate entity should be disregarded:

> First. Where the corporation is used as a mere shield for the perpetration of a fraud, the courts will disregard the fiction of separate corporate entity.

> Second. The courts may consider a corporation as unencumbered by the fiction of corporate entity and deal with substance rather than form as though the corporation did not exist, in order to prevent evasion of legal obligations.
>
> Third. Where the stockholders themselves, or a parent corporation owning the stock of a subsidiary corporation, fail to observe the corporate entity, operating the business or dealing with the corporation's property as if it were their own, the courts will also disregard the corporate entity for the protection of third persons.

The third scenario is also known as the "alter ego" doctrine. *Hildreth*, 378 Md. at 735. The alter ego doctrine has been applied "where the corporate entity has been used as a subterfuge and to observe it would work an injustice," the rationale being that "if the shareholders or the corporations themselves disregard the proper formalities of a corporation, then the law will do likewise as necessary to protect individual and corporate creditors." *Hildreth*, 378 Md. at 735 (quoting 1 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41.10 at 574-76 (1999 Rev. Vol.)). Courts will apply the doctrine when the plaintiff shows (1) "complete domination, not only of the finances, but of policy and business practice in respect to the transaction so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own," (2) that "such control was used by the defendant to commit fraud or wrong, to perpetrate the violation of the statutory or other positive legal duty, or dishonest and unjust act in contravention of the plaintiff's legal rights," and (3) "that such control and breach of duty proximately caused the injury or unjust loss." *Hildreth*, 378 Md. at 735. "Because piercing the corporate veil is founded on equity, 'when no fraud is shown, the plaintiff must show that an inequitable result, involving fundamental unfairness, will result from a failure to disregard the corporate form.'" *Hildreth*, 378 Md. at 735.

The factors commonly considered by courts in determining whether to apply the doctrine to corporations include (1) "whether the corporation is inadequately capitalized, fails to observe

corporate formalities, fails to issue stock or pay dividends, or operates without a profit," (2) "whether there is commingling of corporate and personal assets," (3) "whether there are non-functioning officers or directors," (4) "whether the corporation is insolvent at the time of the transaction," and (5) "the absence of corporate records." *Hildreth*, 378 Md. at 735.

LLCs vs. Corporations

Commentators have noted that "courts regularly pierce the veil in LLCs and other of the new limited liability business forms. The usual (and usually uncontroversial) approach is to apply the traditional common law rules from corporate law often without any acknowledgement or discussion that the issue would be different in an LLC than a corporation."[53] 2 F. HODGE O'NEAL AND ROBERT B. THOMPSON, O'NEAL & THOMPSON'S CLOSE CORPORATIONS AND LLCS: LAW AND PRACTICE § 8:28 (Rev. 3d ed. November 2020 update). "Indeed, some courts seem oblivious to any difference between a corporation and an LLC."[54] O'NEAL & THOMPSON'S

---

[53] *See In re Griffith v. SSC Pueblo Belmont Operation Co. LLC*, 2016 CO 60M, 381 P.3d 308, 313 n.2 (Colo. 2016), as modified on denial of reh'g, (Oct. 17, 2016) ("The case law governing corporate veil piercing applies to disregarding the LLC form as well."); *Florence Cement Co. v. Vettraino*, 292 Mich. App. 461, 807 N.W.2d 917, 922 (2011) ("The rules regarding piercing a corporate veil are applicable in determining whether to pierce the corporate veil of a limited liability company."); *McCarthy v. Wani Venture, A.S.*, 251 S.W.3d 573, 590 (Tex. App. Houston 1st Dist. 2007) (collecting cases where courts have applied corporations principles to decide LLC piercing cases and applying Texas law to uphold piercing of an LLC where the owners had used multiple LLCs to perpetrate fraud); *Smith v. Teel*, 2008 OK CIV APP 7, 175 P.3d 960 (Div. 1 2007) (following analogous precedent from Oklahoma corporate law and refusing to hold members of LLC liable for allegations that the dance club owned by the LLC served a visibly intoxicated woman who then got in a car accident that killed plaintiff's wife); *Bonner v. Brunson*, 262 Ga. App. 521, 585 S.E.2d 917 (2003) (Court notes that piercing principles in LLC "just as" in corporation.); *Hodge v. Strong Built Intern., LLC*, 159 So. 3d 1159, 1163, Prod. Liab. Rep. (CCH) P 19570 (La. Ct. App. 3d Cir. 2015) (doctrine of piercing the corporate veil applies to LLCs as well as corporations).

[54] *See, e.g., New England National LLC v. Kabro of East Lyme*, 2000 WL 254590 (Conn. Super. Ct. 2000); *GMAC Commer. Mortg. Corp. v. Gleichman*, 84 F. Supp. 2d 127, 140 (D. Me. 1999) (complaint alleged Greyrock Tower LLC as a limited liability corporation organized and existing under the laws of Maine); *Weber v. U.S. Sterling Securities, Inc.*, 282 Conn. 722, 924 A.2d 816, 824 (2007) (LLC is treated under Delaware law for liability purposes like a

CLOSE CORPORATIONS AND LLCS: LAW AND PRACTICE § 8.28 (Rev. 3d ed. November 2020 update).

This is not one of those courts. There are differences, and those differences matter. The corporate formalities basis for veil piercing is largely inapplicable to limited liability companies. The Maryland Limited Liability Act does not prescribe the formalities usually associated with corporations. Indeed, one of the key advantages of using the LLC form of entity is precisely to avoid the burdens of such formalities.

The Court of Appeals has held that "with regard to the failure to adhere to corporate formalities, the alter ego doctrine must…take account of close corporation laws, which commonly allow close corporations to elect not to have a board of directors and to have the corporation run directly by the stockholders." *Schlossberg*, 441 Md. at 671 (citing *Hildreth*, 378 Md. at 736 n.2)(internal quotation marks omitted). Commentators have noted that the term "close corporation" "is often used to distinguish and set apart the corporation with only a few shareholders from the 'public-issue' or publicly held corporation." O'NEAL & THOMPSON'S CLOSE CORPORATIONS AND LLCS: LAW AND PRACTICE § 1:3 (Rev. 3d ed. November 2020 update). Commentators have also noted that LLCs are a form of business "that provides an alternative to the corporation as a practical means to organize a closely held business." O'NEAL & THOMPSON'S CLOSE CORPORATIONS AND LLCS: LAW AND PRACTICE § 1:9 (Rev. 3d ed. November 2020 Update). Given the similarities in the structure and purpose of the two types of entities, this court concludes that the Court of Appeals holding in *Schlossberg* that alter ego analyses must account for close corporation laws also requires alter ego analyses to account for

---

corporation); *Great Neck Plaza, L.P. v. Le Peep Restaurants, LLC*, 37 P.3d 485 (Colo. App. 2001) (record supports the court's decision to disregard the corporate fiction of an LLC).

those business attributes contemplated by the Maryland Limited Liability Company Act. Consequently, this court agrees with the courts and commentators that recognize that there are differences between corporations and LLCs and that take those differences into account in deciding whether to pierce the veil in cases involving LLCs. *See Sedgwick Properties Development Corp. v. Hinds.*, 456 P.3d 64 (Colo. App. 2019).

The heart of any limited liability company is the operating agreement. Md. Code Ann., Corps. & Ass'ns § 4A-402. The operating agreement ordinarily controls all matters relating to internal governance, financial matters, and the rights of the members of the entity. Under Maryland's Limited Liability Company Act, the State's policy "is to give the maximum effect to the principles of freedom of contract and to the enforceability of operating agreements." Md. Code Ann., Corps. & Ass'ns §4A-102(a).[55] As is the case in Delaware, Maryland generally adheres to freedom of contract principles when interpreting operating agreements. *Wasserman v. Kay*, 197 Md. App. 586, 616 (2011); *see Elf Atochem North America, Inc. v. Jaffari*, 727 A.2d 286, 291-92 (Del. 1999). Under most circumstances, ordinary principles of contract interpretation apply, and the court looks to the operating agreement of the entity to both determine rights and obligations and whether any default duties have been modified. *See Fisk Ventures, LLC v. Segal*, 2008 WL 1961156, at *1 (Del. Ch. May 7, 2008)(observing that "[c]ontractual language defines the scope, structure, and personality of limited liability companies").

---

[55] This provision is nearly identical to the corresponding section of the Delaware limited liability company statute. 6 Del. C. § 18-1101(b). *See* M. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 DEL. J. CORP. L. (2007). As a consequence, Delaware cases can be persuasive authority in this context. *Oliveira v. Sugarman*, 226 Md. App. 524, 538 n.10 (2016), *aff'd*, 451 Md. 208 (2017).

Here, this court does not find a paramount equity. Cathy Bernard was not misusing or abusing QMG LLC in any fashion. All parties elected to operate their businesses using this form of special entity and understood its requirements and limitations. QMG LLC fulfilled its contractual obligations to the plaintiffs for many years, failing to do so in 2018 only after market conditions made the investment financially untenable. *See Serio v. Baystate Properties, LLC*, 209 Md. App. 545, 568-69 (2013).

Cathy Bernard, the court finds, is not the alter-ego of QMG LLC. To the contrary, QMG LLC was and continues to be a bona fide and commercially reasonable business in which its Members work together to find and make real estate investments. From 2011 until 2015, when David Hillman made cash calls on behalf of PCOA LLC, Cathy Bernard obtained the funds needed to pay those cash calls from the Members according to their pro rata ownership interests in the entity. In 2015, David Cohn talked to David Hillman on behalf of the QMG LLC Members who were having trouble paying increasing cash calls and reached an understanding with him that there would be no more cash calls until 2022. When the 2015 cash calls became too expensive for investors who were not "real estate people," Cathy Bernard bought out their interests in QMG LLC. In 2017, when QMG LLC sold the CVS in Arizona, Cathy Bernard distributed the proceeds to the LLC's Members according to their pro rata ownership interests. In 2018, after a potential sale of Beaver Road fell through due to the results of an environmental study, the Members of QMG LLC decided to distribute Beaver Road to the Members of QMG LLC according to their pro rata ownership interests.

The court finds that moving money into and out of the LLC in this manner was not improper. Instead, it was reasonable business behavior that was contemplated by the Operating Agreement. Consequently, the fact that Cathy Bernard paid part of a 2015 cash call with a check

from her own personal account instead of with a check from QMG LLC's bank account is of no moment. Relatedly, while the signature blocks on the QMG LLC deal documents, when properly prepared, look slightly different now than they did between 1997 until 2018, the reality is that Cathy Bernard's role at QMG LLC has never changed. Consequently, the fact that the signature blocks on some of her deal documents were prepared imprecisely before she became the Managing Member of QMG LLC, as opposed to the president of the Managing Member of QMG LLC, also is of no import in this case.

Count II – Breach of Contract – Md. Code Ann., Corps. & Ass'ns, § 4A-402(d)(1)

(Park Charles Office Associates LLC Against Queens Manor Gardens LLC)

Plaintiff PCOA argues that the Operating Agreement is a valid contract, that QMG LLC breached, and will continue to breach, that contract, and that the breach has harmed, and will continue to harm, PCOA LLC by leaving it without the money it needs to operate the Park Charles building and to repay the loan contemplated by the Frist Amendment. Citing Section 4A-402(d)(1) of the Corporations & Associations Article, Plaintiff Park Charles Office Associates LLC argues that it is "neither fair nor appropriate" to allow Queens Manor Gardens LLC to continue to enjoy the tax benefits associated with owning the Park Charles Building because it has breached, and plans to continue to breach, the Operating Agreement. Plaintiff PCOA LLC requests that this court "enter judgment expelling Defendant Queens Manor Gardens, LLC as a member of Plaintiff Park Charles Office Associates LLC."

Regarding the enforcement of a partnership agreement and the expulsion of a partner from a partnership, the Maryland Revised Uniform Partnership Act states, in pertinent part:

> A partner is dissociated from a partnership upon the occurrence of any of the following events:
>
> ***

> (5) On application by the partnership or another partner, the partner's expulsion by judicial determination because
>
> (i) The partner engaged in wrongful conduct that adversely and materially affected the partnership business;
>
> (ii) The partner willfully or persistently committed a material breach of the partnership agreement of a duty owed to the partnership or the other partners under 9A-404 of this title; or
>
> (iii) The partner engaged in conduct relating to the partnership business which makes it not reasonably practicable to carry on the business in partnership with the partner.

Md. Code Ann., Corps. & Ass'ns § 9A-601(5).

In contrast, regarding the enforcement of the provisions of an operating agreement, the Maryland Limited Liability Company Act states that "[a] court may enforce an operating agreement by injunction or by granting such other relief which the court in its discretion determines to be fair and appropriate in the circumstances." Md. Code Ann., Corps. & Ass'ns, § 4A-402(d)(1).

Regarding the obligations of a limited liability company member to make required capital contributions, Maryland's Limited Liability Company Act states, in pertinent part:

> (a)(1) Unless otherwise agreed, a member is obligated to the limited liability company to perform any promises set forth in the articles of organization or operating agreement to contribute cash or property or to perform services, even if the member is unable to perform because of death, disability, or other reason.

Md. Code Ann., Corp. & Ass'ns § 4A-502(a)(1).

Regarding the remedies available in the event a limited liability company member fails to make a required capital contribution, Maryland's Limited Liability Company Act states, in pertinent part:

Remedies

(c)(1) *An operating agreement may provide* that a member who fails to make any capital contribution or other payment that the member is required to make shall be subject to specified remedies for, or specified consequences of, the failure.

(2) The remedy or consequence may take the form of:

(i) Reduction of the defaulting member's membership interest in the limited liability company;

(ii) Subordination of the defaulting member's membership interest in the limited liability company to that of the nondefaulting members;

(iii) A forced sale of the defaulting member's membership interest in the limited liability company;

(iv) Forfeiture of the defaulting member's membership interest in the limited liability company;

(v) A loan by the nondefaulting members of the amount necessary to meet the commitment;

(vi) A determination of the value of the member's membership interest in the limited liability company by appraisal or by formula and redemption and sale of the defaulting member's membership interest in the limited liability company at that value; or

(vii) Any other remedy or consequences.

Md. Code Ann., Corp. & Ass'ns § 4A-502(c)(1)-(2)(i)-(vii)(emphasis added).

These sections of the Maryland Limited Liability Company Act are almost identical to the sections of the Delaware Limited Liability Company Act that govern the enforcement of the provisions of an operating agreement and the remedies available in the event that a limited liability company member fails to make a required capital contribution.

Regarding the enforcement of the provisions of an operating agreement, Delaware's Limited Liability Company Act states, in pertinent part:

(a) Except as provided in a limited liability company agreement, a member is obligated to a limited liability company to perform any promise to contribute cash

> or property or to perform services, even if the member is unable to perform because of death, disability or any other reason.

6 Del. C. § 18-502.

Regarding the remedies available in the event a limited liability company member fails to make a required capital contribution, Delaware's Limited Liability Company Act states, in pertinent part:

> (c) A limited liability company agreement may provide that the interest of any member who fails to make any contribution that the member is obligated to make shall be subject to specified penalties for, or specified consequences of, such failure. Such penalty or consequence may take the form of reducing or eliminating the defaulting member's proportionate interest in a limited liability company, subordinating the member's limited liability company interest to that of nondefaulting members, a forced sale of that limited liability company interest, forfeiture of the defaulting member's limited liability company interest, the lending by other members of the amount necessary to meet the defaulting member's commitment, a fixing of the value of the defaulting member's limited liability company interest by appraisal or by formula and redemption or sale of the limited liability company interest at such value, or other penalty or consequence.

6 Del. C. § 18-502.

In *Grove v. Brown*, 2013 WL 4041495 (Del. Ch. Aug. 8, 2013), the Delaware Court of Chancery considered the remedy available to members of an LLC governed by an Operating Agreement that was silent on the consequences of failing to make capital contributions. In that case, four individuals started a home health care agency, Heartfelt Home Health, LLC. *Id.* at *1. Regarding capital contributions, the Operating Agreement stated, in pertinent part:

> [t]he Members initially shall contribute a total of $40,000 to the Company capital. The description and each individual portion of this initial contribution are as follows:

Hubert E. Brown, Jr.	$10,000	25%
Melba E. Brown	$10,000	25%
Larry E. Grove	$10,000	25%
Mary Marlene Grove	$10,000	25%

Id. at *6. The Operating Agreement also provided that the profits and losses were to be divided among the members in proportion to each member's relative capital interest in the company.

The parties began to dispute ownership of the LLC when they discovered that some of the parties had failed to contribute the $10,000 initial capital contribution required by the Operating Agreement. *Id.* at *1. Vice Chancellor Glasscock found "that these terms are unambiguous and that the Operating Agreement therefore provides that each of the four members was – and is today – an equal 25% owner of Heartfelt." *Id.* at *6. He also found that "nothing in the Operating Agreement indicates that the allocation of relative ownership interests was contingent on the Members' actions post-signing," and that while "the Operating Agreement imposes an obligation on the members to provide capital to Heartfelt, the Operating Agreement does not provide that one member's failure to do so divests that member of his or her share of the company." *Id.* at *6. After making these findings, Vice Chancellor Glasscock noted that, under Delaware's Limited Liability Company Act, "the parties certainly could have written their Operating Agreement to make a member's interest in the LLC contingent on providing the appropriate capital contribution" but found that Heartfelt Home Health, LLC's Operating Agreement failed to provide such a remedy. *Id.* at *7.

In *Vinton v. Grayson*, 189 A.3d 695 (De. Super. Ct. 2018), the Superior Court of Delaware considered the remedy available to members of an LLC governed by an Operating Agreement that specifically provided for the allocation of membership interests of members that failed to contribute to cash calls. In that case, five individuals formed Route 9 Associates LLC ("Route 9"). *Id.* at 697. Regarding capital contributions, the Operating Agreement stated, in pertinent part:

[Section 4.2 – Additional Capital Contributions]

In the event that the Company requires funds in addition to the Capital Contributions set forth in Section 4.1 [upon the formation of the Company], the Members agree to make additional Capital Contributions from time to time in accordance with their Units as a percentage interest in the Company.

***

In the event a Member fails to make the Capital Contribution within the time frame of the First Notice, a second notice (the "Second Notice") shall be sent to the Member who has failed to contribute (the "Non-Contributing Member"). If the Non-Contributing Member fails to make the required Capital Contribution within forty-five (45) days following the First Notice, the Non-Contributing Member shall be deemed to have automatically, immediately and irrevocably, without further notice or action, transferred fifty percent (50%) of the Non-Contributing Member's Units to the Members who have made their (but not the Non-Contributing Member's) respective Capital Contributions (the Contributing Members["]). The Units of the Non-Contributing Members so transferred shall be allocated among the Contributing Members in accordance with their respective Units as a percentage interest in the Company and the records of the Company shall be adjusted by the Contributing Members to reflect this transfer.

***

[Section 8.10]

No Member shall be personally liable for the expenses, liabilities, debts, or obligations of the Company except as provided in the Act

***

[Section 12 – Miscellaneous]

The rights and remedies provided by this Agreement are given in addition to any other rights and remedies any Member may have by law, statute, ordinance or otherwise.

Id. at 698, 703.

The "Non-Contributing Member," Grayson, contended that the Route 9 Plaintiffs failed to state a claim because he "had no obligation under either the Route 9 Agreement or the [Delaware] LLC Act to meet the capital call." *Id.* at 701-702. The Route 9 Plaintiffs argued that, under the Operating Agreement, Grayson was obligated to meet the capital call and that the

Operating Agreement preserved their right to pursue a breach-of-contract claim against Grayson. *Id.* at 702.The Superior Court of Delaware denied Grayson's motion to dismiss because it concluded that Route 9's Operating Agreement was "properly read to have imposed personal liability upon Route 9's individual members for failure to make additional capital contributions for the ongoing venture." *Id.* at 705.

Here, the court concludes that the Operating Agreement did not include any provisions that provided for divesting a member's interest if that member failed to make a requested capital contribution. Like the Members in *Grove,* the parties were free to do so but failed to include such a remedy in the Operating Agreement. The court declines to rewrite the Operating Agreement to insert a material term that the parties failed to include in their own contract.

<u>Count IV – Oppression</u>

(Gallows Manager LLC Against Queens Manor Gardens LLC)

Gallows Manager LLC claims that QMG LLC has engaged in oppressive conduct against it. Specifically, Gallows Manager LLC contends that QMG LLC has denied Gallows Manager LLC its reasonable expectations of receiving capital contributions. Gallows Manager LLC also contends that "Defendant QMG engaged in oppressive conduct motivated by its personal interest to transfer to Plaintiff's the risk of defaulting on loans subject to the Refinancing, and to retain for itself the funds that would be needed to pay off the loan secured by the Real Property." Gallows Manager LLC asks this court, as a remedy, to enter judgment expelling QMG LLC as a member of PCOA LLC.

This court has previously concluded that under Maryland law, a court of equity has available to it, in addition to common law injunctive powers, the same panoply of remedies and options it would have if the defendant were a corporation, rather than an alternative entity like a

limited liability company. *See Bontempo v. Lare*, 444 Md. 344, 368-70, 119 A.3d 791 (2015)(holding that Maryland courts are not limited to the statutory remedy of dissolution when devising a remedy for stockholder oppression). The reasons are at least two-fold. First, the terms of an operating agreement may be enforced by a court of equity by injunction or other remedy under the statute. Second, although Maryland's appellate courts have not spoken directly to this question, leading commentators have endorsed the notion that courts of equity may apply close corporation-type oppression remedies to limited liability companies even absent an express grant of statutory authority. *See, e.g.*, 2 F. HODGE O'NEAL AND ROBERT B. THOMPSON, O'NEAL & THOMPSON'S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS § 7:24 (May 2021 update); D. Kleinberger & C. Bishop, *The Next Generation: The Revised Uniform Limited Liability Company Act*, 62 Bus. LAW. 515, 535-39 (2007).

In this context, however, the purpose of any remedy for oppression is largely to protect the expectations of the members of the LLC, as they appear in the parties' contract – the Operating Agreement. The court should not re-write an Operating Agreement, under the judicial guise of safeguarding it, or restructure the parties' economic arrangements under the banner of oppression in a manner to which they, themselves, did not so agree.

This is not simply the application of a "do-nothing" approach. A Maryland limited liability company is largely a creature of contract, designed to afford the maximum amount of freedom, private ordering, business flexibility and predictability to the parties involved. Md. Code Ann., Corps. & Ass'ns §4A-102(a). It is this flexibility that gives these unique entities their allure. After-the-fact, judge created protections create uncertainty, particularly among sophisticated investors who have chosen this form of governance. The statute allowed the plaintiff to include in the operating agreement the remedy it now seeks. The parties chose not to

do so. The court declines to add a material term to the parties' contract. Except in rare instances, this court will not invoke general equitable principles to override the parties' intent, as expressed in the plain language of the operating agreement.

In this case, QMG LLC has never been the Manager of PCOA. QMG LLC never controlled the entity under the Operating Agreement, or otherwise. The Operating Agreement could have, but did not, include expulsion or disassociation as a remedy for the failure to make capital calls. The parties, therefore, had no expectation that a Member could be expelled or disassociated for failing to make a capital call. The failure to fulfill a contractual promise, without more, under these circumstances simply does not amount to oppression and the court declines to engraft that remedy onto the parties' expressed expectations.

Conclusion

For the foregoing reasons, Plaintiff PCOA is entitled to judgment for breach of contract against QMG LLC but is entitled to no other relief. Plaintiff Gallows Manager LLC is likewise entitled to no other relief. Counsel are directed to submit a proposed judgment order for entry under Md. Rule 2-601, consistent with this decision, within ten days.

May 24, 2021

Ronald B. Rubin, Judge