SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 3

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PL DIAMOND LLC,

Index No. 602405/2005

Plaintiff,

-against-

BECKER-PARAMOUNT LLC, PARAMOUNT DIAMOND HOLDINGS LLC, CENTURY-PARAMOUNT LLC, PARAMOUNT-DIAMOND LLC, BECKER-PARAMOUNT CENTURY JV LLC and JOHN DOE LLC 1-10

DECISION and ORDER

Defendants.

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KARLA MOSKOWITZ, J:

The court consolidates for disposition motion sequence number 005 in this action with motion sequence number 003 in the related special proceeding. (*Paramount Diamond Holdings, LLC v PL Diamond LLC*, Index No. 602946/05).

Plaintiff/respondent PL Diamond LLC ("PL") moves (sequence number 005), pursuant to CPLR 3212, for partial summary judgment in its favor on the second cause of action in the complaint. Defendants Century Paramount LLC ("Century/Northstar"), Paramount Diamond Holdings LLC ("Holdings") and Paramount Diamond LLC ("Diamond") (collectively the "Paramount defendants") cross move and Becker-Paramount LLC and Becker-Paramount Century JV LLC (collectively the "Becker/Hard Rock defendants") cross move for partial summary judgment dismissing the second cause of action. PL also cross moves to amend the complaint.

By separate motion, PL moves pursuant to CPLR 3212 to dismiss the petition in the special proceeding (sequence number 003). Holdings cross moves for summary judgment on the

petition.

OVERVIEW

This case involves a complicated transaction to transfer the ownership of the Paramount Hotel ("the hotel" or "the Paramount"). On July 7, 2004, Century/Northstar, the entity that owned the hotel, sold or contributed its interest to Becker-Paramount Fee LLC (the "July 7 transaction"). The parties to the July 7 transaction structured the deal through a contribution agreement to defer taxes with both sides contributing to a new entity, Becker-Paramount Century JV LLC (the "JV"). Pursuant to the contribution agreement, Century/Northstar retained a ten percent (10%) interest in the hotel and also retained certain rights regarding when and how the new owner could sell or otherwise dispose of the hotel. Upon closing, Becker-Paramount Fee LLC obtained the deed to the hotel, and Becker-Paramount LLC (not to be confused with Becker-Paramount *Fee* LLC) and the JV took control of the day-to-day management of the hotel.

In 1998, when Century/Northstar purchased the hotel, PL and Holdings formed Diamond for the sole purpose of leasing the event space in the basement of the hotel known as the "Diamond Horseshoe." Diamond did, in fact, enter into a ninety-nine year lease for the Diamond Horseshoe, and the Diamond, LLC Operating Agreement ("Operating Agreement") required Holdings, as managing partner, to obtain PL's consent before Diamond could assign the lease for the Diamond Horseshoe unless the assignment occurred with the sale of the hotel.

In connection with the July 7 transaction, Diamond assigned the lease to the JV without PL's consent. PL takes the position, in the second cause of action in the complaint, that, because the transaction was a contribution, not a sale, PL should have received notice and given its consent before Diamond assigned the lease to the JV. PL demands specific performance of

Section 13 of the Operating Agreement that requires Holdings to obtain PL's consent.

In the petition, Holdings takes the position that the transfer of ownership of the hotel was a sale and seeks to enforce the provision in the Operating Agreement that requires PL to participate in an appraisal of the value of PL's share of the lease.

STATEMENT OF FACTS

The facts, as related here, are from the complaint, the petition, the affidavits and the Statements of Undisputed Facts that the parties have submitted.

As stated earlier, in February 1998, PL and Holdings entered into the Operating Agreement that authorized Diamond to lease the Diamond Horseshoe. Section 13 of the Operating Agreement appointed Holdings as the managing member with broad powers to operate the business. However, to protect PL's interests in the revenue from a sublease, Section 13 of the Operating Agreement defines the assignment of the Diamond Horseshoe lease as a "Major Act" and requires PL to consent to an assignment unless the assignment was in connection with the sale of the hotel:

> [Holdings] shall be the sole Member to have the power to do any and all acts, except for a Major Act, necessary, convenient or incidental to or for the furtherance of the purposes described herein. A Major Act shall mean any . . . termination, assignment, conveyance, pledge, encumbrance, sale or other transfer of the Lease (other than an assignment of the Lease in connection with the sale of the Paramount Hotel) . . . . A Major Act requires the unanimous consent of all members.

As the Operating Agreement contemplated, Century/Northstar, as landlord, and Diamond, as tenant, entered into a ninety-nine (99) year lease for the Diamond Horseshoe. Diamond never sublet the space, and it earned revenue of only $100,000 per year in vacancy payments. (Lease

Section 12 and Schedule A). The Diamond Horseshoe was a Cabaret before World War II, but it had not been used for over fifty (50) years and was virtually untenantable.

On April 5, 2004, Century/Northstar entered into a contribution agreement with Becker/Hard Rock, pursuant to which Century/Northstar contributed ninety percent (90%) of its interest in the hotel to a limited liability company that JV wholly owned. Thereafter, Century/Northstar and Becker/Hard Rock formally entered into the Becker-Paramount Century JV LLC, and the transfer of the hotel's ownership closed on July 7, 2004.

Century/Northstar and Becker/Hard Rock had originally structured the transfer of ownership of the hotel as a "purchase and sale" for $125,000,000. However, for tax reasons, Century/Northstar asked Becker/Hard Rock to restructure the transaction as a Contribution Agreement pursuant to which Century/Northstar retained a ten percent (10%) interest in the new entity that owned the hotel. Century/Northstar transferred ninety percent (90%) of its interest in the hotel to a Becker/Hard Rock related entity, and, in consideration, that entity assumed Century/Northstar's debt obligation and other liabilities totaling $126,500,000. Pursuant to the JV Agreement, the Becker/Hard Rock defendants received full management control of the hotel and Century/Northstar received the following rights:

> a) the right to require the JV to maintain at least $65,000,000 of mortgage debt on the hotel.
>
> b) the right to prevent the JV from voluntarily selling, disposing of or otherwise transferring the hotel in a taxable transaction.
>
> c) the right to prevent the JV from transferring any direct or indirect interest in the hotel if the transfer would result in a material amount of gain or income to Century.
>
> d) the right to prevent the JV from making a distribution of hotel property to any member of the JV. . . if the transaction would result in Century realizing a material amount of income.

> e) the right to prevent Becker from transferring any direct or indirect interest in the JV without requiring the purchaser to maintain the required minimum debt and to comply with the JV's obligations to Century.
>
> f) the right to prevent Becker from assigning its interest without obtaining the prior written consent of Century unless Becker assigns its interest in the JV to an entity it controls or in which it owns an economic interest.

Century/Northstar is also the beneficiary of a $25,000,000 indemnification agreement in which the JV agreed to indemnify Century/Northstar if JV took any action that would affect Century/Northstar's tax deferral. Century/Northstar's right to participate in any profits in the hotel is subordinate to Becker receiving an agreed-upon return.

On July 7, 2004, Diamond assigned the lease for the Diamond Horseshoe to the JV. On the same day, Century/Northstar, as landlord, and the JV, as assignee, agreed to terminate the lease. Century/Northstar did not consent to the assignment or termination of the lease.

Section 12(a)(iv) of the Operating Agreement sets forth the mechanism the parties should employ to evaluate the amount of money the parties will receive in the event Diamond assigns the lease in connection with the sale of the hotel. That section states:

> that portion of the purchase price received that shall be Capital Events Proceeds[1] shall be determined by an independent appraiser in accordance with the same procedures as are set forth with respect to the determination of Annual Fair Market Rental Value in Section 17 hereof.

Section 17 of the Operating Agreement sets forth the appraisal process under the

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[1] The Operating Agreement defines Capital Events Proceeds as "the net proceeds (after payment of the outstanding principal balance of any loans [from either a member or a third party]) of any payment received by [Diamond] in connection with (i) a sale of all or substantially all of [Diamond's] assets."

Operating Agreement. In relevant part, Section 17(b) states that in the event of a dispute regarding the Annual Fair Market Rental Value:

> [t]he members shall submit said dispute to an independent appraiser reasonably acceptable to the members, or if the Members cannot agree, each Member shall designate an independent appraiser acceptable to it for determination of such dispute.

Because the parties could not agree on the amount of money due to PL, Holdings invoked the appraisal procedure. PL now refuses to participate in an appraisal and seeks to have the parties rescind the assignment of the Diamond Horseshoe lease.

PROCEDURAL HISTORY

PL commenced this action in July 2005. On August 15, 2005, the defendants moved to dismiss the complaint. That same day, Holdings commenced a special proceeding, *Paramount Diamond Holdings LLC v PL Diamond LLC,* Index No. 602946/05 (the "related action"), to compel PL to participate in an appraisal proceeding pursuant to Section 12(a)(iv) of the Operating Agreement.

On September 19, 2005, PL filed its amended complaint. To the extent relevant to this motion, the complaint alleges that Diamond (at Holdings and Century/Northstar's insistence) purported to assign the lease to the JV in connection with a transaction that was not a sale of the hotel. The complaint further alleges that, because the transaction was not a sale within the meaning of the Operating Agreement, Diamond was required to obtain PL's consent to the assignment and that, by assigning the lease without PL's consent, Diamond breached the Operating Agreement.

On September 22, 2005, PL filed a motion to dismiss the petition in the special

proceeding, or, in the alternative, to stay the special proceeding, or, in the alternative, for leave to conduct discovery and to strike certain allegations from the petition.

On October 11, 2005, defendants filed a motion to dismiss PL's first cause of action for declaratory relief and its second cause of action that seeks specific performance of that section of the Operating Agreement that requires Diamond to obtain PL's consent to an assignment of the Diamond Horseshoe lease.

On November 17, 2005, this court heard oral argument on defendants' motion to dismiss and PL's motion to dismiss the petition and issued an order: (1) granting defendants' motion to dismiss the first cause of action as duplicative of the second cause of action; (2) denying defendants' motion to dismiss the second cause of action; (3) reserving decision on PL's motion to dismiss the petition; and (4) ordering that discovery proceed on the issue of whether the contribution was a sale. (11/17/05 Trans., pp. 30-31). The parties completed discovery on November 29, 2006, and these motions for summary judgment followed.

ARGUMENTS

A. PL's argument in support of partial summary judgment in its favor on the second cause of action and in support of its motion to dismiss the petition and the cross motion to amend the pleadings.

PL maintains that the contribution was not a sale of the hotel and that the doctrine of quasi estoppel prevents the defendants from adopting a position in court–that the transfer was a sale–that is contrary to a position it adopted on its tax return–that the transfer was a contribution. PL points out that, because Century/Northstar reported the transfer on its tax return as a contribution, not a sale, the IRS deferred certain taxes and that those defendants are estopped from now taking the position that the transaction was a sale. Moreover, PL avers that Century/Northstar's retention of a ten percent (10%) interest in the hotel and its retention of

certain rights are further indicia that the transfer was not a sale. PL also claims that, pursuant to the Operating Agreement, Century/Northstar could only "sell" the hotel by transferring all of its ownership interest to a new entity.

PL also argues that this court must deny the Paramount defendants' summary judgment motion, pursuant to CPLR 3212(f), because PL has not had an opportunity for complete discovery on the issue of the New York State Tax Authority's treatment of the transaction as a sale.

In support of its cross motion to amend and supplement the pleadings, PL contends that discovery has shown that PL has additional grounds for its breach of fiduciary duty cause of action against Holdings (fifth cause of action) and that it also has grounds to state claims for aiding and abetting a breach of fiduciary duty against the Becker/Hard Rock defendants.

B. The Paramount Defendants' argument in support of their cross motion for summary judgment and in opposition to PL's motion for summary judgment dismissing the petition and PL's cross motion to amend the complaint.

The Paramount defendants argue that, pursuant to New York Law, Century/Northstar sold the hotel to the JV because Century/Northstar transferred the deed to the Becker/Hard Rock defendants and relinquished control of the hotel. They contend that the elements of "control" that PL refers to merely represent Century's efforts to protect the tax benefits it achieved in connection with the transaction. They also contend that PL's principal, Phillip Pilevsky, who had been a previous owner of the hotel, acknowledged that in 1998 he sold his interest in the hotel to Century/Northstar pursuant to a contribution agreement.

The Paramount defendants argue that estoppel is inapplicable here because defendants have not taken inconsistent factual positions on their tax return and in court. They state that they have always taken the position that, as a matter of New York Law, the Paramount transaction is a

sale and that PL has misinterpreted the term "sale," as section 12(a)(iv) of the Operating Agreement uses the term.

In addition, they argue that, even if the court finds that the transfer of the hotel was not a sale, there is a question of fact as to whether PL consented to the assignment and termination of the lease by participating in the appraisal process from April through July 2004.

C. The Becker/Hard Rock defendants' argument in support of summary judgment and in opposition to PL's motion for partial summary judgment and the cross motion to amend the complaint.

The Becker/Hard Rock defendants contend that the second cause of action, though styled as a claim for specific performance, is in actuality a claim for recision of the lease assignment and that PL does not have standing to seek recision because it is not a party to or privy to the assignment. In addition, these defendants claim that, even if PL does have standing, the court must dismiss the recision claim because recision is not available where, as here, plaintiff has an adequate remedy at law in the form of money damages. Moreover, they claim that laches bar the recision claim because PL delayed commencing this action for almost one year and during that time the Becker/Hard Rock defendants invested millions of dollars in the property.

Becker/Hard Rock defendants claim that, even if PL could seek recision, the contribution constituted a sale under New York Law, and, thus, the Operating Agreement did not require Holdings to obtain PL's consent prior to the assignment of the lease.

DISCUSSION

A. Summary Judgment

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v Prospect Hospital,* 68 N.Y.2d 320, 324

[1986]; *Zuckerman v City of New York,* 49 N.Y.2d 557, 562 [1980]).

To defeat a motion for summary judgment, the opposing party must show facts sufficient to require trial of any issue of fact. (CPLR 3212[b]). Thus, when the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so. (*Vermette v Kenworth Truck Co.*, 68 N.Y.2d 714 [1986]; *Zuckerman v City of New York,* supra at 560). Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient. (*Alvord and Swift v Steward M. Muller Constr. Co.,* 46 N.Y.2d 276 [1978]; *Fried v Bower & Gardner,* 46 N.Y.2d 765 [1978]).

"In cases of contract interpretation, it is well settled that when parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms." *(South Road Assocs., LLC v Int'l Bus. Machines Corp.*, 4 N.Y.3d 272, 277 [2005] [citation omitted]). "This principal is particularly important in the context of real property transactions, where commercial certainty is a paramount concern, and where the instrument was negotiated between sophisticated, counseled business people negotiating at arms length." (*Id.* [citation omitted]).

The well-established law of contract interpretation requires that:

> In interpreting a contract, the intent of the parties governs. A contract should be construed so as to give full meaning and effect to all its provisions. Words and phrases are given their plain meaning. Rather than rewrite an unambiguous agreement a court should enforce the plain meaning of that agreement. Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law, and the case is ripe for summary judgment.

(*American Express Bank, Ltd. v Uniroyal, Inc.*, 164 A.D.2d 275, 277 [1st Dept 1990], *lv. denied* 77 N.Y.2d 807 [1991] [internal citations omitted]).

B. The Transaction was a Sale of the Paramount Hotel

The court holds, as a matter of law, that the transaction was a sale of the Paramount Hotel. Section 13 of the Operating Agreement requires Holdings to obtain PL's consent to an assignment of the Diamond Horseshoe lease, "other than an assignment of the lease in connection with the sale of the Paramount Hotel. . . ." Although the Operating Agreement does not define the term "sale," the ordinary meaning of the term is "the transfer of property or title for money or other consideration." (*Anthracite Capital, Inc. v MP-555 West Fifth Mezzanine, LLC*, 2005 WL 1155418, *7 [S.D.N.Y 2005]) [applying New York law]).

Moreover, as this court recently held:

> Black's Law Dictionary defines "Sale" as '[t]he transfer of property or title for a price.'. . . [T]he common meaning of [this] term[] is broad and encompasses various types of transactions (*See Paddington Partners v. Bouchard*, 730 F. Supp. 1241, 1244 (S.D.N.Y. 1990) (applying New York law)(finding word "sale" in additional payment provision is broad and includes merger)). This interpretation is in accordance with the definition of sale under New York's Uniform Commercial Code. Section 2-106 of the Uniform Commercial Code defines "sale" broadly as the passing of title between buyer and seller for a price. (UCC § 2-106).

(*Gotham Partners, L.P. v High Riv. Ltd. Partnership*, Index No. 602582/04 at 7-8 [Sup. Ct. N.Y. County 2005], *aff'd* 33 A.D.3d 453 [1st Dept. 2006]).

In this case, Century/Northstar transferred title to the real property of the Paramount Hotel to a Becker/Hard Rock related entity, and, in consideration, Becker/Hard Rock assumed Century/Northstar's debt in the amount of $126,500,000. In addition, at the closing, Century/Northstar and Becker/Hard Rock entered into a General Assignment and Assumption

agreement in which Century/Northstar assigned various "contract rights, warranties, guaranties, development rights, names, goodwill and other intangible property that pertain to [the Paramount Hotel] to Becker/Hard Rock." Although Century/Northstar retained a ten percent subordinated interest to certain inchoate profits through its participation in the JV, Century/Northstar did not retain any control over the management or operation of the Paramount.

PL's contention that the transaction was not a sale because a contribution agreement structured the transaction ignores the well-settled principal that the substance rather than the form of a transaction is controlling "and the emphasis should be on economic reality." (*United Housing Foundation v Forman,* 421 U.S. 837, 848 [1975] [holding that the fact that the federal securities laws defined securities as including stock was not dispositive of whether the sale of stock in a cooperative apartment should be considered the sale of a security]; *see also International Trade Assoc. v Rensselear Polytechnic Institute,* 936 F.2d. 744 [2d Cir. 1991] [courts look to "the economic substance of the transaction and not its form]; *801 South Fulton Ave. Corp. v Burton Radin,* 138 A.D.2d 561 [2d Dept 1988]).

In *Plaza Operating Partners Ltd. v Maison Mendessolle, Ltd. (*144 Misc. 2d 696, 699 [Civ. Ct. N.Y.County 1989]), a case involving the right to cancel a retail store lease upon the sale of the Plaza Hotel, the store tenant argued that there had been no sale of the hotel because the same landlord remained owner after the transaction at issue closed. In that case the court found that the transaction amounted to a sale of the hotel stating:

> In our sophisticated economy transactions are usually shaped to maximize tax benefits, avoid transactional and filing fees and provide for ease and flexibility of management and operation. Before deciding rights and obligations the economic realities of the transaction must be analyzed to understand the underlying purpose and goal. Only then can the court affix the label from which the

rights and obligations flow.

> A formal closing was held on July 21, 1988 where deeds were transferred. The sellers and purchasers were completely separate and unrelated with different economic interests and goals. A consideration of hundreds of millions of dollars was paid to obtain ownership of the Hotel Plaza and there is no suggestion that the transfer was tailored to trigger the lease termination clause. . . .
>
> In economic terms and in common parlance, this was a sale.

Here, immediately after the July 7 transaction, Century/Northstar informed its hotel personnel that it had sold the hotel and Becker/Hard Rock was taking over the management. Century/Northstar also notified retail tenants of the sale in a notice that stated:

> This is to notify you that today, the referenced property has been transferred by [Century/Northstar] ("Seller") to Becker-Paramount Fee LLC ("Purchaser"). As of the date hereof, Seller's interest in your lease has been assigned to Purchaser, and Purchaser has assumed the obligations as landlord under your lease. . . .

Moreover, section 8.4 of the JV agreement states, in pertinent part:

> No participation by Century in the Management of the Company. Century shall have no right or authority to participate in any way in the management or affairs of the [JV], including, but not limited to, the making of any decisions relating to the Assets or The [Paramount], ... Century may not and shall not transact any business for or on behalf of the [JV] . . . . Century expressly covenants and agrees that it will not attempt to participate in, influence or interfere with the taking of any action by Managing Member and/or any Officer on behalf of the company.

In this case, Century/Northstar: 1) transferred ninety percent of its interest in the hotel to the JV for $126,500,000; 2) transferred the deed to the JV; 3) paid transfer taxes; 4) executed a transfer tax return; 5) executed an Assignment and Assumption agreement pursuant to which it assigned various contract rights, warranties, guaranties, development rights, names, goodwill and

other intangible property that pertained to the hotel to a Becker/Hard Rock related entity; and 6) pursuant to the JV agreement, agreed to have no role in the management of the hotel. Thus, here, as in *Plaza Operating Partners, Ltd.*, the transaction, both in common parlance and in economic terms, was a sale of the Paramount Hotel.

In addition, in determining the true nature of a transaction, courts will often consider whether the "seller" retained control of the operation or the premises after the transaction closed. For instance, in *New York Tile Wholesale Corp. v Thomas Fatato Realty Corp.* (13 A.D.3d 425, 428 [2d Dept 2004]), the court found that the subject transaction was "not the equivalent of an outright 'sale' of the property to a third party in an arm's length transaction, since [defendant], both before and after the restructuring, maintained either ownership of, or a controlling interest in, the property." (*Cf, Plaza Operating Partners Ltd., supra.*; *Colonie Motors, Inc. v Heritage Corp. of New York,* 61 A.D.2d 1105 [3rd Dept 1978] [conveyance of an undivided one-half interest in leased property recognized as a sale for purposes of tenant's right of first refusal]).

Pl.'s argument that Century/Northstar retained significant control over the hotel is without merit. The control that Century/Northstar transferred to Becker/Hard Rock was not the mere equivalent to the transfer of control that occurs when a hotel owner enters into a management agreement by which it divests itself of day-to-day control of the hotel's operation but retains ownership. In those instances, the owner retains the right to revoke the managing agent's control. Here, Century/Northstar transferred the deed and divested itself of all its rights to control the hotel, including the right to revoke Becker/Hard Rock's right to manage the hotel. (*See e. g. Bianco v Furia,* 41 Misc. 2d 292 [Sup. Ct. Queens County 1963]).

In addition, the parties negotiated the contractual prohibitions in sections 9.1 through 9.4 of the Contribution Agreement to protect Century/Northstar as those prohibitions merely limit

Becker/Hard Rock from taking certain actions that would trigger a capital gain for Century/Northstar. However, the provisions did not allow Century/Northstar to exercise any control over the hotel. Moreover, if the Becker/Hard Rock defendants violated the contractual limitations, Century/Northstar's only remedy was damages in an amount equal to the lost tax benefits. Accordingly, the transaction involving the Paramount Hotel was a sale. There are insufficient indicia of ownership to raise any issue of fact concerning Century/Northstar's retention of an ownership interest in the property.

C. The Doctrine of Quasi Estoppel is Inapplicable

The doctrine of "quasi estoppel" or "estoppel against inconsistent positions" is grounded in the doctrine of judicial estoppel. Judicial estoppel prevents a party from asserting a factual issue in a legal proceeding that is contrary to a position that a party took in a prior legal proceeding. (*Bates v Long Island Railroad*, 997 F. 2d 1028 [2d Cir. 1993], *cert. denied* 510 U.S. 992 [1993]). The doctrine of quasi estoppel prevents a party from adopting a position in court that is contrary to what the party previously stated in a "quasi-judicial" or administrative proceeding. Courts in this state have found that quasi estoppel bars an individual from adopting a factual position in court that is contrary to a position he or she previously took on his or her tax return. For instance, in *Zemel v. Horowitz* (2006 WL 516798, *5 [Sup. Ct. N.Y. County 2006]), that PL cites, the court held that plaintiffs were estopped from asserting, in the legal proceeding, that they sold securities in order to loan the proceeds to the defendant when, on their tax return, they reported that they short sold the securities. *In Naghavi v New York Life Ins. Co.* (260 A.D.2d 252 [1st Dept 1999]), the court applied the doctrine of quasi estoppel to prevent plaintiff from arguing in the litigation that his income was greater than the amount he declared on his tax return. (*See also Ginor v Landesburg,* 1998 WL 514304 [2d Cir. 1998] [plaintiff cannot argue

note cancelable at will when reported as genuine debt obligation on tax return]; *Meyer v Ins. Co. Of America,* 1998 WL 709854 [S.D.N.Y. 1998] [plaintiff estopped from claiming she was entitled to disability because she could not work when she reported, on her tax return, that she was employed ful- time]).

However, the doctrine of quasi estoppel does not apply if a party asserts that the same facts have different legal effects or consequences in different settings. In *Excelsior 57th Corp. v Kern* (218 A.D.2d 528, 529-530 [1st Dept 1995]), the First Department reversed the lower court's application of judicial estoppel and explained:

> The submission of a legal argument is of a different character than an inconsistent framing of one's factual pleadings, and therefore not a basis of judicial estoppel. The doctrine rests upon the principle that a litigant should not be permitted . . . to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise. (Quotations and internal citations omitted).

Here, Century/Northstar and Becker/Hard Rock have always taken the position that they structured the sale of the Paramount hotel as a contribution to defer taxes in order to maximize the money Century/Northstar earned and to minimize the amount of money that Becker/Hard Rock paid but that, as a matter of New York law, the transaction was a sale. Thus, even though, pursuant to the Internal Revenue Code, the transaction, as structured, may have constituted a contribution, it meets the definition of "sale" under New York law as a transfer of title for money or other consideration.

It is also well-settled that parties to a transaction may structure that transaction in a manner that will minimize the tax consequences and that such structuring does not change the essential nature of the transaction. Indeed, in *Frank Lyon Co. v United States* (435 U.S. 561, 580

[1978]), the United States Supreme Court stated:

> The fact that favorable tax consequences were taken into account by [taxpayer] on entering into the transaction is no reason for disallowing those consequences. We cannot ignore the reality that the tax laws affect the shape of nearly every business transaction. (Footnote omitted).

(*See also Yosha v Commissioner*, 861 F.2d 494, 497 [7th Cir. 1988] ["There is no rule against taking advantage of opportunities created by Congress or the Treasury Department for beating taxes."]).

Indeed, it is undisputed that in 1998, Phillip Pilevsky, PL's principal, transferred his ownership interest in the hotel to Century/Northstar pursuant to a similar contribution agreement and, according to Mr. Pilevsky, that transfer was a sale:

> I was a former owner of the Paramount Hotel. In 1998, I agreed to sell my interest. As part of the consideration for that sale, PL Diamond, of which I am the sole member, was provided with an interest in a 99-year lease (the "Lease") to the premises (the "Premises") located in the Paramount hotel in Times Square, Manhattan.

(Pilevsky, 10/27/05 Aff, Para. 2 [1/31/07 Weiner Aff., Ex. 7]).

No one should construe this decision as the court taking a position on whether the transaction at issue was actually a sale for federal tax purposes. Indeed, New York State now takes the position that the Paramount Hotel transaction was a "sale" and that Century/Northstar must pay retail sales tax on the July 7 transaction.

D. The Operating Agreement is not Ambiguous

Section 13 of the Operating Agreement states, in unequivocal terms, that Holdings is not required to obtain PL's consent if Holdings assigns the Diamond Horseshoe lease in connection with the "sale" of the hotel. Therefore, because the court finds that the July 7 transaction

constituted a sale of the hotel, the unambiguous terms of the Operating Agreement did not require Holdings to obtain PL's consent prior to assigning the lease, and, because the transaction constituted a sale, Section 12(a)(iv) required PL to participate in the appraisal process to determine "Capital Event Proceeds." [2]

PL's argument that the court must consider the language of the Ian Schrager Hotels Operating Agreement ("Schrager Agreement") when interpreting the Diamond Horseshoe Operating Agreement is without merit. Although the parties to both agreements may have structured them at the same time, the agreements are not between the same parties and nothing in either the Schrager Agreement or the Diamond Horseshoe Operating Agreement references the other agreement. Nor does one agreement define its terms by the other agreement. (*See DSS Partners, LLC v Celenza*, 6 A.D.3rd 347 [1st Dept. 2004]). Accordingly, the court will not consider the language in the Schrager Agreement when interpreting the contract at issue in this litigation. (*See Transammonia, Inc. v Enron Capital & Trade Resources Corp.*, 278 A.D.2d 152, 153 [1st Dept 2000]).

Finally, PL's "cross-motion" to amend the complaint is denied. Amendment is futile because each proposed claim relies on the theory that the underlying transaction was not a sale. However, even if the proposed amendments were not futile, it is impermissible to move via cross motion against another cross motion. As PL's motion to amend appears to be a cross motion to either one of the defendant's cross motions to PL's initial motion for partial summary judgment, the motion is impermissible. (*See, e.g., Rizz Management Inc. v. Kemper Ins. Co.*, 4 Misc3d

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[2] It is undisputed that Holdings and PL structured Paragraph 13 of the Operating Agreement to protect PL's economic interests in the lease by requiring PL to consent to the assignment of the lease in connection with "Major Acts" without hindering Century/Northstar's ability to sell the Hotel. (Scheetz Aff. Paras. 31-32)

1005 [Civ. Ct., Queens Cty. 2004]).

CONCLUSION

For the foregoing reasons the court grants the Paramount defendants and the Becker defendants summary judgment and denies PL's motions in their entirety. There are simply no material issues of fact on this record to change the conclusion that the underlying transaction at issue here was anything other than a sale of the Paramount hotel. Because I find as a matter of law that the transaction is a sale, there are no issues of fact to prevent an immediate appraisal under section 12(a)(iv) of the Operating Agreement as Holdings has requested in its petition in *Paramount Diamond Holdings, LLC v PL Diamond LLC*, Index No. 602946/05. Therefore, the court grants Holdings' cross motion for summary judgment on the petition as well.

Accordingly, it is

ORDERED THAT the motion of PL Diamond LLC for partial summary judgment in its favor on its second cause of action for specific performance is denied; and it is further

ORDERED THAT the cross motion of the Paramount defendants to dismiss the second cause of action for specific performance is granted; and it is further

ORDERED THAT the cross motion of the Becker/Hard Rock defendants to dismiss the second cause of action for specific performance is granted; and it is further

ORDERED THAT PL Diamond LLC's cross motion to amend the complaint is denied; and it is further

ORDERED THAT PL Diamond LLC's request for additional discovery is denied as moot; and it is further

ORDERED THAT the motion of PL Diamond LLC to dismiss the petition in *Paramount*

Diamond Holdings, LLC v PL Diamond LLC, Index No. 602946/05 is denied; and it is further

ORDERED THAT the cross motion of Paramount Diamond Holdings LLC for summary judgment on the petition in *Paramount Diamond Holdings, LLC v PL Diamond LLC*, Index No. 602946/05 is granted and the parties in *Paramount Diamond Holdings, LLC v PL Diamond LLC*, Index No. 602946/05 shall commence the independent appraisal process pursuant to section 12(a)(iv) of the Operating Agreement; and it is further

ORDERED THAT Paramount Diamond Holdings LLC Holdings is directed to settle a judgment in its favor in *Paramount Diamond Holdings, LLC v PL Diamond LLC*, Index No. 602946/05.

Date: June 6th, 2007

J.S.C