Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-006802 09/23/2016

HONORABLE KAREN A. MULLINS
FOR HONORABLE DAWN M. BERGIN

CLERK OF THE COURT
P. Roe/A. Quintana
Deputy

OLD TOWN GROUP INC CHRISTOPHER M MCNICHOL

v.

URBAN GRAPHITE HOLDINGS L L C KELLY MENDOZA

UNDER ADVISEMENT RULING

The Court has considered Defendant's Motion for Summary Judgment, Defendant's Statement of Facts in Support of its Motion [for] Summary Judgment, Plaintiff Old Town Group Inc.'s Response to Defendant's Motion for Summary Judgment, Plaintiff Old Town Group Inc.'s Controverting Statement of Facts and Separate Statement of Facts in Support of Response to Defendant's Motion for Summary Judgment, Defendant's Reply in Support of Motion for Summary Judgment, and the oral argument of counsel.

This action involves a commercial Lease Agreement and Addendum entered into between Plaintiff Old Town and Defendant Urban Graphite. In its Motion, Defendant argues that it is entitled to judgment as a matter of law based on four arguments: (1) the Lease is null and void under A.R.S. §§29-654(A)(2) and 44-101(6); (2) Defendant did not ratify the Lease and Addendum; (3) the Addendum is too vague to be enforced; and (4) Defendant did not breach the Lease or Addendum. The Court considers each argument separately.

Null and Void

Defendant argues that the Lease and Addendum is null and void under A.R.S. §§29-654(A)(2) and 44-101(6). Defendant first relies upon A.R.S. §§29-654(A)(2) in arguing that a limited liability company is not bound by the act of a member if that member had no authority to act for the company and the person with whom he is dealing has knowledge of that fact that the member has no such authority. Here, however, there is nothing in Defendant's Articles of Organization or Operating Agreement that supports Defendant's claim Mr. Aquilina had no authority to act. The Articles of Incorporation merely state that the "[m]anagement of the limited liability company is reserved to the members", and names Mr. Erlandson and Mr. Aquilina as the sole members. *Defendant's Statement of Facts in Support of its Motion [for] Summary Judgment* ("*DSOF*"), Exh. B, pp. 1-2. No language states that both members are required for action on behalf of the LLC. *Id*. The Operating Agreement designates Mr. Erlandson and Mr. Aquilina as the sole members, giving each a 50% interest. *DSOF*, Exh. C, Section 2.1. The Operating Agreement then states that "all matters requiring the consent or approval of the Members under this Agreement [] shall be made or taken by the Manager", yet no Manager is designated under that Agreement. *Id*., Section 5.1. Thus again, there is no language that states that both members are required for action on behalf of the LLC. For these reasons, Defendant has failed to establish as a matter of law that Mr. Aquilina, as one of the two sole members of Urban Graphite, did not have authority to bind Urban Graphite under A.R.S. §29-654(A)(2).

Second, and as an independent reason, there is a dispute of material fact as to whether or not Plaintiff had knowledge of Defendant's claim that Mr. Aquilina had no authority to bind Defendant LLC. Mr. Donnally, who signed the lease on behalf of Plaintiff Old Town, stated in his declaration that from all that he knew, Mr. Aquilina had the authority to sign the Lease on behalf of Defendant Urban Graphite. *Plaintiff Old Town Group Inc.'s Controverting Statement of Facts and Separate Statement of Facts in Support of Response to Defendant's Motion for Summary Judgment* ("*PSOF*"), Exh. 1, ¶5. He further stated that no one ever advised him that anyone other than Mr. Aquilina was needed to grant authority for Urban Graphite to enter into the Lease. *Id*., Exh. 1, ¶7. Indeed, while Mr. Erlandson had stated under oath that he left messages and then spoke to Mr. Donnally personally and informed Mr. Erlandson that Mr. Aquilina did not have the authority to enter into any contracts without Mr. Erlandson's approval, Mr. Donnally denies that such a conversation occurred or that any such messages were left. *Id*., Exh. 1, ¶7; DSOF, ¶9. Thus, an issue of material fact exists as to whether Plaintiff had the knowledge required under A.R.S. §29-654(A)(2) to avoid the binding effect of Mr. Aquilina's signature on the Lease on behalf of Urban Graphite.

Finally, Defendant misconstrues A.R.S. §44-101(6). That statute reads:

> No action shall be brought in any court in the following cases unless the promise or agreement upon which the action is brought, or some memorandum thereof, is in writing

> and signed by the party to be charged, or by some person by him thereunto lawfully authorized:
>
> ***
>
> 6. Upon an agreement for leasing for a longer period than one year, or for the sale of real property or an interest therein. Such agreement, if made by an agent of the party sought to be charged, is invalid unless the authority of the agent is in writing, subscribed by the party sought to be charged.

This statute merely requires that the agreement in issue be in writing and signed by the party to be charged.

There is "no authority of the agent" in issue here. The Lease and Addendum in issue was signed on January 5, 2011 by Mr. Aquilina, "Managing Member" on behalf of Urban Graphite. This satisfies A.R.S. §44-101(6). Defendant relies on *Passey v. Great W. Assocs. II*, 174 Ariz. 420, 42, 850 P.2d 133, 139 (App. 1993), however that case has no application here as it involved an action to bind individual co-tenants who had been, but no longer were, partners to a general partnership. Because the partnership had deeded the underlying property to the individual partners in their individual capacity, the Court held that each individual co-tenant must sign the transaction documents in order to enforce the transaction against each one of them individually. *Id.* Here, however, the facts concern binding an LLC. Mr. Aquilina was not signing as an agent for another party but as a member of the LLC, which is clearly distinguishable from the facts in *Passey*.

Ratification

Defendant next argues that it did not ratify the Lease and the Addendum. As previously stated, the Lease and Addendum were entered into on January 5, 2011. Again relying on A.R.S. §44-101(6), Defendant argues that under *Ceizyk v. Goar Serv. & Supply, Inc*., 21 Ariz.App. 119, 122, 516 P.2d 61, 64 (App. 1973), ratification of an agent's authority to bind a party must be in writing and no such writing exists here. Again, Defendant misunderstands the statute. In *Ceizyk*, a husband signed his wife's name to a sale of real property without having her authorization to do so, in writing or otherwise. Here, however, Mr. Aquilina was not signing as agent, but as a member of that LLC under the authority of A.R.S. §29-654(A)(2), which provides that a member of an LLC may bind the LLC. There was no agent acting on behalf of another party to the transaction and thus no separate ratification is necessary.

Vagueness of Terms

Defendant argues that the option to purchase set forth in Section E of the Addendum to the Lease is too vague to be enforceable as a matter of law. The Court agrees.

Section E of the Addendum reads, in pertinent part:

> The total purchase price for the Building (the "Purchase Price") shall be paid in immediately available funds. The Parties agree that the Purchase Price shall be negotiated from the value of the Building based upon a Commercial Real Estate Appraisal obtained and paid for by Tenant and conducted by a Real Estate Appraiser approved by Landlord and certified by and in good standing with the State of Arizona and prepared in conformity with the current requirements of the Appraisal Foundation as set forth in…

DSOF, Exh. F, Section E.

The Court finds that a material, and indeed critical, term is missing from this provision: the purchase price. The Addendum clearly states that the price "shall be negotiated from the value" based on the appraisal. Thus, the purchase price is not equivalent to the appraised value; rather the appraised value is the starting point of future negotiations.

In *Christmas v. Turkin*, 148 Ariz. 602, 602–03, 716 P.2d 59, 59–60 (App. 1986), the Arizona Court of Appeals found the following option to purchase was indefinite and therefore unenforceable:

> a. Tenant may exercise the option by giving Owner written notice as provided herein on or before March 1, 1985.
>
> b. Total purchase price shall be Ninety Thousand Dollars ($90,000.00), with Twenty Thousand Dollars ($20,000.00) as and for a down payment.
>
> c. The remaining terms of the option to purchase shall be negotiated between Tenant and Owner and memorialized in writing not later than March 1, 1985.

While a purchase price was reflected, the language stating that "the remaining terms…shall be negotiated" was found to be too vague to be enforced, even though the party holding the option tendered the $90,000 purchase price. *Id*. In our case, the purchase price itself was not stated, and there was no clear and certain path to that price. Rather, it was simply subject to negotiation. Thus, the contract is too vague to be enforceable.

Plaintiff argues that "both parties intended for the purchase price to be determined from the value of the Property based upon a commercial real estate appraisal." *Plaintiff Old Town Group Inc.'s Response to Defendant's Motion for Summary Judgment*, 9:22-10:1. In oral argument, Plaintiff's counsel asserted that the appraisal was the purchase price. Thus Plaintiff contends that a material issue of fact exists as to what the parties intended. However intent is not in issue here. The Addendum does not state that the appraisal was the purchase price, but rather that the price "shall be negotiated from the value" and the value is "based on the appraisal". Using the dictates of *Taylor v. State Farm Mutual Automobile Insurance Co.*, 175 Ariz. 148, 854

P.2d 1134 (1993), the Court finds that the term in issue is not reasonably susceptible to the interpretation suggested by Plaintiff. Thus there is not a material issue of intent and further inquiry, through a parol evidence hearing, is not necessary.

For the foregoing reasons, the Court finds that summary judgment is appropriate in favor of Defendant on Plaintiff's claims for Specific Performance and Breach of Contract.

IT IS ORDERED granting Defendant's Motion for Summary Judgment on all of Plaintiff's claims, *i.e.* Specific Performance and Breach of Contract.