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Delaware LLCs in New York Real Estate Transactions, Part 2: Choice of Forum

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In her second installment of her four-part series on Delaware LLCs in New York real estate transactions Adrienne Koch examines how careful forum selection—whether Delaware or New York—for dispute resolution under an LLC's operating agreement can significantly impact litigation outcomes, building on Part 1's discussion of entity choice considerations.

This article is the second in a four-part series that examines issues surrounding the use of Delaware Limited Liability Companies (LLCs) for real estate transactions in New York. The [first article](#) discussed some of the general factors that should be taken into account in choosing that entity form for such transactions.

This second article will review considerations in choosing a forum for the resolution of disputes arising under the operating agreement of a Delaware LLC that is formed for the purpose of a New York real estate transaction.

The Issue: Delaware Entity; New York Transaction

First a step back to explain the issue. As detailed in the first article in this series, parties who choose to use a Delaware LLC generally do so in order to gain the benefit of certain favorable aspects of Delaware law. To accomplish this, the LLC's operating agreement should specify that disputes arising under it are governed by Delaware law. But that does not necessarily mean that such disputes must be brought in the courts of Delaware—and to avoid confusion, the agreement should separately specify the forum for such disputes. If the entity's purpose is to engage in a New York real estate transaction, there may be competing factors to consider in determining whether to specify New York or Delaware.

Some Considerations

The case for selecting Delaware as the forum for such disputes is straightforward: Delaware courts are presumably best situated to apply Delaware law. They are also famously well-suited to resolving business disputes. In some instances, this may end the inquiry and point firmly to Delaware as the forum of choice for the resolution of any disputes arising under the LLC agreement—especially if the LLC owns or operates real estate projects in more than one state (such that there is not one clear alternative to Delaware). But if the LLC operates only in New York, there may be good reasons to select New York as the forum for any litigation arising under its operating agreement.

One such reason is that a dispute arising under the operating agreement of an LLC that is engaged in real estate activities in New York may implicate claims that are external to that agreement and are governed by New York law.

For example, the LLC may have agreements with third parties (such as employees, vendors, construction managers, or lenders) that are centered in New York rather than in Delaware. Those agreements may specify that New York law applies to them and may contain a New York forum selection clause. But even in the absence of such a contractual specification, the third party may not be amenable to suit in Delaware.

If a Delaware LLC is likely to have such relationships, they should be considered in deciding whether to provide that disputes under its operating agreement must be litigated in Delaware. Such a provision could entail a risk that a set of interrelated disputes—some arising under the operating agreement and others arising under the LLC’s arrangements with third parties who cannot be forced to litigate in Delaware—may have to be litigated in two different courts. If the operating agreement instead selects New York as the forum for resolving disputes arising under it, all of the disputes can be litigated together.

New York courts regularly address such interrelated disputes. See, e.g., *Madison Sullivan Partners LLC v. PMG Sullivan Street LLC*, 2018 WL 372223 (Sup. Ct. N.Y. Cty. Jan. 11, 2018) (addressing claims arising under operating agreement of Delaware LLC and claims arising under construction management agreement with New York entity), *aff’d*, 173 A.D.3d 437 (1st Dept. 2019); *accord Freedom Holding, Inc. v. Haart*, 76 Misc.3d 746 (Sup. Ct. N.Y. Cty. 2022) (addressing claims relating to the “internal affairs” of a Delaware LLC and claims related to its (New York) contractual dealings with one or more others).

Disputes between or among members of an LLC that develops or operates property in New York might also require an analysis of the members’ conduct in light of governing laws and regulations that are complex, local, and unlikely to be regularly encountered by courts outside of New York. See, e.g., *BLS Holdco, LLC v. Kushner Companies, LLC*, 2024 WL 399933 (Sup. Ct. N.Y. Cty. Feb. 1, 2024) (dispute among members of Delaware LLC involving claims of breach of fiduciary duty based on allegation that one member misrepresented or concealed the impact of New York’s Rent Stabilization Law on the parties’ project), modified on reargument, 2024 WL 3860284 (Sup. Ct. N.Y. Cty. Aug. 13, 2024).

Delaware courts may not be well-suited to analyzing the interplay between such New York laws and regulations (on the one hand) and the Delaware-governed duties of members (on the other).

New York courts, in contrast, are accustomed to applying Delaware law where the parties’ contract specifies that Delaware law governs. See, e.g., *Behler v. Tao*, ___ N.Y.3d ___, 2025 WL 477888, *3 (N.Y. Feb. 13, 2025) (comprehensively applying Delaware law to an LLC agreement that specified that “Delaware law governs its interpretation and reach”).

Importantly, they do so even when Delaware law differs from New York law. See, e.g., *Khan v. Garg*, 235 A.D.3d 537, 538 (1st Dept. 2025). And they are adept at dealing with the interplay between issues that are contractually governed by Delaware law and issues external to the

contract that are subject to New York law. See, e.g., *Panattoni Development Co., Inc. v. Scout Fund 1-A, LP*, 154 A.D.3d 555 (1st Dept. 2017).

Another issue to consider is whether the LLC agreement gives members potential rights against the property itself—such as, for example, a right to purchase under certain circumstances. If a member were to sue in New York to enforce such a right, it could file a notice of pendency against the property and thereby place its claim in the chain of title.

This device is only available in the narrow class of cases where a judgment would “affect the title to, incumbrance of, or the possession, use or enjoyment of, real property” (see CPLR 6501); disputes over ownership interests in an LLC do not qualify, even if the LLC itself owns real property. See *Renfro v. Herrald*, 206 A.D.3d 1573 (4th Dept. 2022). But if the LLC agreement gives a member an actual interest in the property (such as a right to purchase), a suit to enforce that right could support a notice of pendency. See *Vanderbilt Brookland, LLC v. Vanderbilt Myrtle, Inc.*, 147 A.D.3d 1106 (2d Dept. 2017).

To file a notice of pendency in New York, however, a party must have an action pending in a state or federal court within New York. See CPLR 101; CPLR 6501. As a result, if the LLC agreement requires disputes arising under it to be litigated in Delaware, a dispute under the agreement will not support the filing of a notice of pendency in New York even if the requirements for such a notice are otherwise met.

While it may be possible to file a notice of pendency in another court (see *Donovan Realty LLC v. Campers Inn Holding Corp.*, 2024 WL 2158254, *1, *13 and n.120 (E.D. Pa. May 13, 2024) (referring to “notices of lis pendens” apparently filed in Pennsylvania district court with respect to property located in Pennsylvania and New York)), such a notice would not be indexed against the property in the county where it is located—and therefore would not appear in the chain of title. Parties may have differing views on the desirability of this result, but its possibility should in all events be taken into account.

Conclusion

The discussion above touches on some of the many kinds of situations where the parties’ contractual choice of a forum for the resolution of disputes arising under the operating agreement of a Delaware LLC formed for the purpose of a New York real estate transaction could make a difference.

The permutations may be complex and difficult to predict, and careful consideration of them requires the parties to focus on what will happen if things go wrong—something they may prefer not to do at the outset of a transaction, when the hope and expectation is that all will go according to plan. Such care, however, can help avoid unpleasant surprises later.

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