To be Argued by:
LEOPOLD GROSS
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division – Second Department

RONALD MIZRAHI, individually and as a 50% member of and in the right of 372-376 Avenue U Realty LLC, a New York limited liability company,

Plaintiff-Appellant-Respondent,

Docket No.: 2012-02021

- against -

EZRA COHEN,

Defendant-Respondent-Appellant.

BRIEF FOR DEFENDANT-RESPONDENT-APPELLANT

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Kings County Clerk's Index No. 3865/10

corporation." *Yudell*, 2012 WL 3166788, at *3 (citations omitted). As such, Mizrahi does not have individual right of recovery.

Lastly, in response to Mizrahi's claim that Cohen wrongfully failed to equally contribute capital, and it was the intention of the parties to create a 50/50 partnership. (Mizrahi Br. 32). These claims are meritless, inasmuch as shown above. The Operating Agreement's express terms negates such a conclusion as a matter of contract construction.

Indeed, "[a] complaint the allegations of which confuse a shareholder's derivative and individual rights will, therefore, be dismissed." *Abrams*, 66. N.Y.2d at 953. At bar, Mizrahi's confusion between a derivative and direct claim is manifest throughout his Complaint (R. 28-36) and Appellate Brief.

Accordingly, the Court below correctly held that Mizrahi's claims herein are derivative, and as a result, Mizrahi does not have an individual right of recovery against Cohen; and this portion of the Decision and Order should be affirmed.

IV. THE ORDER OF "DISTRIBUTION" OF THE COMPANY'S ASSETS SHOULD BE AFFIRMED BECAUSE THE OPERATING AGREEMENT EXPRESSLY PROVIDES FOR THIS REMEDY.

When an Operating Agreement expressly provides for the winding up of the Company's affairs through distribution of its assets, a buy-out remedy cannot be

invoked as a substituted remedy. Neither the Operating Agreement provides for a buy-out (subsection A *infra*), nor does applicable law provide a basis to ignore the express provisions of the Operating Agreement requiring liquidation and distribution of the Company's assets upon dissolution (subsection B *infra*).

A. The Operating Agreement expressly provides for an order of "distribution" of the Company's assets upon dissolution. Thus, a buy-out remedy must be rejected.

Most disingenuously Mizrahi argues that "the Operating Agreement contemplates a buy-out rather than an auction upon dissolution" (Mizrahi Br. 55). Mizrahi further argues that "All §7.2 provides is that on dissolution and following payment to creditors, 'the assets of the Company shall be distributed... to the Members and Economic Interest Holders in accordance with Section 4.4 of this Agreement" (Mizrahi Br. 55).

The Operating Agreement *expressly* and *unequivocally* provides:

> "7.2. Procedure for Winding Up and Distribution. *If the Company is dissolved*, the remaining Members shall wind up its affairs. On winding up of the Company, *the assets of the Company shall be distributed*, first, to creditors of the Company, including Members and Economic Interest Holders who are creditors, in satisfaction of the liabilities of the Company, and then to the Members and Economic Interest Holders in accordance with Section 4.4 of this Agreement."

(R. 672). (emphasis added).

Turning to the Operating Agreement's other provisions directly addressing dissolution:

> "4.2. Liquidation and Dissolution.
>
> 4.2.1 If the Company is liquidated, the assets of the Company shall be distributed to the Economic Interest Holders in accordance with the provisions of Section 4.1.1.
>
> ***
>
> 4.1.1 Profit or Loss shall be allocated to the Economic Interest Holders in proportion to their percentages... [And, Exhibit A to the Operating Agreement states that Mizrahi and Cohen's percentage interest in the Company is '50%']. "

(R. 666, 676).

Applying these provisions to the instant case, the Operating Agreement: first, mandates that "if the Company is dissolved, the remaining Members *shall wind up* its affairs" (R. 672) (emphasis added); secondly, instructs that upon "winding up of the Company, the assets of the Company *shall be distributed*" (*Id.*) (emphasis added); thirdly, sets forth an order of priority in the distribution of the Company's assets, first to "creditors" and then to "Members" (*Id.*); lastly, instructs that "the assets of the Company shall be distributed" to the Members, and sections 4.1.1-4.2.1 state that the distribution shall be in "proportion to the [Members'] percentages" -- which Exhibit A unequivocally states "50%". (R. 672, 666, 676).[12]

[12] In his Brief Mizrahi conveniently disregards the aforementioned provisions in the Operating Agreement pertaining to dissolution, and most disingenuously argues "[t]he simple fact is that

In light of the foregoing, "distribution" of the Company's assets through a public auction should be affirmed pursuant to two separate bodies of law. First, LLCL "§ 702 has been authoritatively held to... reflecting legislative deference to the parties' contractual agreement..." *Horning*, 12 Misc.3d at 409, and second, general principles of contract law requires this Court to give deference to the Operating Agreement's express terms. *See Consedine*, 12 N.Y.3d at 293.

Moreover, it is a cardinal rule of contract construction that a court should "avoid an interpretation that would leave contractual clauses meaningless." *Two Guys from Harrison-N.Y., Inc. v. S.F.R. Realty Associates*, 63 N.Y.2d 396, 403 (1984). As this Court noted:

> "A court should construe a contractual agreement so as to give full meaning and effect to its material provisions. A reading of the contract should not render any portion meaningless, and the contract should be read as a whole, with every part interpreted with reference to the whole; if possible, the contract will be interpreted as to give effect to its general purpose."

CNR Healthcare Network, Inc. v. 86 Lefferts Corp., 59 A.D.3d 486, 489 (2d Dept. 2009) (citations omitted).

Accordingly, a buy-out by Mizrahi of Cohen's interest in the Company would render numerous material provisions in the Operating Agreement (expressly addressing dissolution) meaningless, including section 7.2 (entitled "Procedure for

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the only language in the contract regarding disposition of the company's assets is distribution in kind to a member at fair market value." (Mizrahi Br. 56).

Winding Up and Distribution"), and sections 4.2-4.2.1 (entitled "Liquidation and Dissolution") (R. 672, 666). Thus, the court below correctly rejected Mizrahi's attempt to buy-out Cohen's interest in the Company (R. 22-23), and this portion of the Decision and Order should be affirmed.

Mizrahi concedes that section 7.2 of the Operating Agreement is applicable to dissolution. (Mizrahi Br. 55). And, section 7.2 mandates distribution of the Company's assets *first* to creditors, and then to members. (R. 672). Now, if this Court orders a buy-out it would render the express order of distribution meaningless. *See 350 E. 30th Parking v. Board of Mgrs. of 350 Condominium*, 280 A.D.2d 284, 287 (1st Dept. 2001) ("a contract as a whole should not be interpreted in a way that would leave one of its provisions without force or effect"). Indeed, here, the word *distribution* would be rendered meaningless, without force or effect.

Turning to Mizrahi's argument that "§ 4.4.2 of the Operating Agreement contemplates a buy-out rather than an auction upon dissolution." (Mizrahi Br. 55). Admittedly, section 7.2 (R. 672) points to section 4.4 (R. 667), however, contrary to Mizrahi's contention, section 4.4 does *not* contemplate a buyout upon dissolution; thus, this provision cannot be invoked as authority for a buy-out.

First, section 4.4.1 (R. 667) states "[e]xcept as otherwise provided in this Agreement," thus, by its own terms this provision defers to other sections of the Operating Agreement. And, the other sections, directly addressing dissolution,

such as sections 4.2, 4.2.1 (R. 666), expressly provides for a mechanism of how the Company's assets should be "distributed", as discussed above.

Second, section 4.4.1 states "the timing and amount of all distributions shall be determined by the Members." (R. 667). And, section 5.2.2 (R. 668) provides that "the affirmative vote of Members holding all (100%) of the Percentages then held by Members shall be required to approve any matter coming before the Members." At bar, there isn't 100% vote by the members holding 100% membership interest in the Company for the proposed distribution. Thus, section 4.4 that Mizrahi refers to cannot be invoked as contemplating a buy-out.

Third, section 4.4.2 (that Mizrahi invokes as authority for the contemplated buy-out) states "*if* any assets of the Company are distributed in kind..." (emphasis added). As the Court is aware, "if" is a conditional word, and Mizrahi has to meet some condition precedent before invoking the "distribution in kind" formula. However, Mizrahi did not point to any trigger that satisfies the condition precedent. Thus, this provision cannot be invoked.

Fourth, the word "in kind" does by no means contemplate a buy-out. Indeed, in kind is defined as "[i]n goods or in services rather than money." Blacks Law Dictionary, 3d ed. 2006. Thus, "distribution in kind" cannot be construed as

contemplating a buy-out where Mizrahi pays money to Cohen to obtain his interest in the Company.[13]

Lastly, and most importantly, the Operating Agreement contains sections *expressly* discussing "Liquidation and Dissolution", such as, sections 4.2-4.2.1 (R. 666), and Article VIII "Dissolution, Liquidation, and Termination of the Company", including section 7.2 "Procedure for Winding Up and Distribution." (R. 672). These sections are applicable to the judicial dissolution proceeding at bar.

At bottom, if the Court would order a buy-out as Mizrahi suggests, this would render "material provisions" of the Operating Agreement "meaningless", including sections 7.2 and 4.2 (R. 666, 672). This is an impermissible exercise because the Operating Agreement "should be read as a whole... to give effect to its general purpose." *CNR Healthcare Network, Inc.*, 59 A.D.3d at 489. Clearly, the Operating Agreement's sections directly dealing with dissolution, as set forth above, mandate a public auction in which the Company's assets will be sold, liquidated and the proceeds thereof *distributed* to Both Mizrahi and Cohen on a 50% basis. (R. 666, 676).

[13] As the Court is aware, a partition "in kind" is where the property is physically divided and portions thereof are given to the parties. However, "in kind" cannot mean buying out the other. Thus, Mizrahi's analogy in his Brief to a partition in kind is misplaced. (Mizrahi Br. 56).

Accordingly, the Court should affirm the portions of the Decision and Order rejecting Mizrahi's attempt to buy-out Cohen's interest in the Company, as this would be in direct contravention to the Operating Agreement's express terms.

B. A court of equity may not disregard contract terms. Accordingly, this Court may not disregard the Operating Agreement's terms stating that upon dissolution the Company's assets shall be distributed.

Mizrahi seeks to importune the Court to order a buy-out under the guise of equity. (Mizrahi Br. 58-60). However, the buy-out remedy cannot be granted when the Operating Agreement expressly calls for distribution of the Company's assets.

In the scholarly words of the Court of Appeals, as enunciated in *Graf v. Hope Bldg. Corp.*, 254 N.Y. 1, the court stated: "Stability of contract obligations must not be undermined by judicial sympathy." *Id.* at 4. Indeed, "Plaintiffs may be ungenerous, but generosity is a voluntary attribute and cannot be enforced *even by a chancellor" in equity. Id.* (emphasis added). Given that "both parties willingly consented" to the contract, "no court will interfere to relieve him from the... conditions of his own agreement." *Id.* at 5; *see also First Nat. Stores, Inc. v. Yellowstone Shopping Center, Inc.*, 21 N.Y.2d at 638 (courts of equity cannot render "contractual rights... meaningless and ineffectual"; "Stability of contract obligations must not be undermined by judicial sympathy.") *and Emigrant Mortg.*

Co., Inc. v. Fisher, 90 A.D.3d at 824 (court of equity enforced contract because "stability of contract obligations must not be undermined by judicial sympathy").

Moreover, aside from general accepted principles of contract law, under case law applicable to judicial dissolution, it is well-established that the court must look to the terms of the Operating Agreement to determine what rules are applicable to the operation and dissolution of a particular LLC. *Matter of 1545 Ocean Ave., LLC*, 72 A.D.3d 121 at 128; LLCL § 417(a)). Only where the Operating Agreement does not contain any provision for the particular matter at issue, do the statutory provisions of the Limited Liability Company Law (LLCL) control. *1545 Ocean Ave., LLC*, 72 A.D.3d at 129; *Matter of Spires v. Lighthouse Solutions, LLC*, 4 Misc.3d 428, 436 (Sup Ct. Monroe Co. 2004).

As articulated above, here the Operating Agreement expressly and unequivocally provides for a precise order of priority in the distribution of the Company's assets. (R. 672, at § 7.2 ["Procedure for Winding Up and Distribution"]). Furthermore, the Operating Agreement provides for a precise formula of how the Company's assets shall be distributed upon dissolution. (R. 666, at §§ 4.2 [Liquidation and Dissolution], 4.2.1, 4.1.1).

Turning to Mizrahi's argument that this Court's holding in *Superior Vending, LLC*, 71 A.D.3d 1153 (2d Dept. 2010) "stands for the proposition that although the Limited Liability Company Law does not expressly authorize a buy-

out in a dissolution proceeding, the Supreme Court has that authority where it is determined to be 'the most equitable method of liquidation.'" (Mizrahi Br. 58). However, Mizrahi's interpretation of *Superior Vending* is misplaced. *Superior Vending* is distinguishable on multiple grounds.

First and foremost, in *Superior Vending*, the members "never executed an operating agreement." 71 A.D.3d at 1154. Sitting under the default LLCL provisions, this Court held that a buy-out is an "equitable method of liquidation." *Id.* In sharp contrast, here, Mizrahi and Cohen (the two 50% members) executed an Operating Agreement that specifically provides that upon dissolution "the assets of the Company shall be distributed..." (R. 672, 666). As the court below correctly stressed, at bar, "the Operating Agreement contains an express Procedure for Winding Up and Distribution upon dissolution." (R. 22) (citing Section 7.2. of the Operating Agreement, [R. 672]).

Second, in *Superior Vending*, the members "consented to the dissolution" and had severed their mutual operation of the business years prior to the litigation. *Id.* 71 A.D.3d at 1154. As the court below cogently noted:

> "Unlike the case here, [in *Superior Vending*] the members consented to dissolution and had severed their mutual operation of the business years prior to the litigation. Because one member had continued to operate, and had expanded, the business in the intervening years, the court found it appropriate, after determining the departing member's right to recovery on his investment, to permit the remaining member to purchase, or buy-out, the other member's interest for that sum, notwithstanding

> the absence of a provision for such relief in the LLCL. As is apparent from the stated facts of that case, the equities of the Superior Vending case differ from the circumstances at bar in which both members have remained active in the operation of the LLC and there has been no hiatus in their joint participation, other than that created by plaintiff's removal of the bank account from access by defendant."

(R. 22) (citing *Superior Vending, LLC*, 71 A.D.3d at 1154). Thus, the court below correctly concluded that "the equities of the *Superior Vending* case differ from the circumstances at bar..." (R. 22).

Accordingly, the portion of the Decision and Order rejecting Mizrahi's purported buy-out, and instead "enforcing the contractual terms of the Operating Agreement, as mandated ([citing] *1545 Ocean*)," should be affirmed, and "the LLC [should] be wound up in accordance with Section 7.2." (R. 22).

C. The speculative figures advanced by Mizrahi that are outside of the record should plainly be disregarded.

In support of his argument that a buy-out is the most appropriate method of liquidation, Mizrahi's brief recites facts and arguments that are outside of the record. Particularly, Mizrahi points to market value numerical figures and damages that he speculates he will incur if the Company's assets are distributed. (Mizrahi Br. 58-60). This is, of course, a back-door attempt to importune the Court to order a buy-out, when the Operating Agreement calls for distribution of the assets.