To be Argued by:
EDWARD B. SAFRAN
(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,

Docket No.: 2012-02021

Plaintiff-Appellant-Respondent,

– against –

EZRA COHEN,

Defendant-Respondent-Appellant.

REPLY BRIEF FOR PLAINTIFF-APPELLANT-RESPONDENT

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POINT IV

THE EQUITIES OF THIS CASE REQUIRE THAT MIZRAHI BE PERMITTED TO BUY COHEN'S INTEREST AT FAIR MARKET VALUE AND NOT INTERRUPT THE DENTAL PRACTICE WHICH HE ESTABLISHED AT THE PROPERTY AT GREAT COST

The self-serving and tortured reading by Cohen of those provisions of a terribly drafted operating agreement pertaining to liquidation and distribution, distorts both the language of the agreement and common-sense. Cohen argues that because creditors are listed first in the waterfall of payments on liquidation, a public auction is the only method of turning the asset into distributable form. He argues that we should not "ignore the express provisions of the Operating Agreement" [Brief, pg. 60] and goes on to cite precedent applicable to contract construction. But he fails to point to any provision in that agreement requiring, or even suggesting, that a public auction is a means, much less a required means, of liquidating the assets of the Company. Our appellate brief demonstrates that the agreement clearly contemplates a buy-out when referring to an appraisal and distribution in kind.

Contrary to Cohen's statement [Brief, pg. 61], the Court below did not "reject" Mizrahi's attempt to buy out

Cohen's interest in the Company, but deferred its decision pending an accounting [R.23]. The trial Court did, however, express its concern that the lender, to whom the parties were personally liable under separate guarantees, have its debt satisfied [R.22]. It also recognized the optional nature of the provisions of Limited Liability Company Law § 703 and noted that "plaintiff clearly has the greater stake in maintaining" the building.

We expressed to the Court below, and to this tribunal in our appellate brief [Pg. 60, footnote #16], that as a condition of a buy-out, Mizrahi would have Cohen released from his liability on the mortgage debt. The existing mortgage debt could either be refinanced with the same lender, or otherwise satisfied as a condition of a buy-out.

Cohen misses the point in discussing the equitable principles involved here. He fails to recognize that it was his violation of contractual and fiduciary duties which precipitated the financial difficulties of the Company. He fails to own up to the fact that he embezzled $230,000 of Company funds, which he never repaid. He fails to own up to the fact that in order to have the Company stay afloat, Mizrahi infused ±$1.2 Million into the Company which Cohen failed to either match or equalize. He fails to recognize that

as of the time of trial, Mizrahi's economic interest in the Company was ±82% versus his of only ±18% ($1.336 Million vs. $295,500)[R. 943-950].

Cohen takes no responsibility for his perjury in this case in referring to his embezzlement as a "loan" at one point and an "equalization of capital" at another. He did admit, time and again, that the agreement he had with Mizrahi was that they would share equally in profits and losses. But he didn't share in the losses and now seeks to have Mizrahi be the sole victim.

Yet, Cohen insists that he be afforded the right of a 50% owner under an agreement which he breached and which, as we have demonstrated, was laden with ambiguities and provisions having no meaning, drafted by a single attorney to expedite the closing of tile on the building. Cohen has been receiving a free ride at Mizrahi's expense for years. He would naturally like that to continue for the balance of the 100 year term of that absurd contract. And, he urges this tribunal to declare that Mizrahi has no right to a return of capital before distributions are made to members on liquidation. That is frankly absurd.

Cohen attempts to distinguish *Matter of Superior Vending, LLC.*, 71 AD3d 1153 (2nd Dept. 2010) by pointing out

some of the factual differences. He did not address the fact that *Matter of Superior Vending* implemented long-standing New York law holding that the mere fact that a case is novel and is not brought plainly within the limits of some previously judged case is not enough to preclude equity from taking jurisdiction and exercising equitable powers to furnish a remedy. Nor did he address the fact that immediately before testimony was taken in this case his attorney agreed to a dissolution upon a "fair accounting," bringing this case within the parameters of *Superior Vending* [R.307].

The Limited Liability Company Law, passed in 1994, is relatively young with little precedential guidance. The Court in *Tzolis v. Wolf,* 10 NY3d 100 (2008) recognized a deficiently in the statute, comparing it with the codification of the rule that derivative suits could be brought in the context of corporations and the lack of such right in the Limited Liability Company Law. In spite of a vigorous dissent pointing to a "legislative bargain" when enacting the statute, the Court applied common law principles going back to 1832 (citing *Robinson v. Smith,* 3 Paige Ch. 222), noting that "the Legislature obviously did not intend to give corporate fiduciaries a license to steal" when it held that derivative suits were available in the context of limited liability

companies notwithstanding the absence of such a remedy in the statute. Cohen in is here seeking such a license.

Although constructed as a hybrid of a corporation and a limited partnership [see, *Hotel 71 Mezz Lender LLC v. Falor*, 58 AD2d 270 (1st Dept. 2008), *reversed on other grounds*, 14 NY3d 303; *People v. Highgate LTC Management LLC*, 69 AD3d 185 (3rd Dept. 2009); *Bischoff v. Boar's Head Provisions Co., Inc.*, 436 F.Supp.2d 626 (SDNY, 2006)], as with derivative suits, the Limited Liability Company Law does not address the expansive dissolution provisions afforded small corporations [see, BCL §1104-a] or the buy-out procedures available to shareholders of small corporations [see, BCL §1118]. Nor does it afford members rights similar to those of partners in these circumstances. See, *Sealy v. Clifton LLC*, 343 Misc.3d 266 (NY Sur. 2011) [oppressive conduct justifying dissolution may be found in corporate law (BCL §1104, 1104-a) and partnership law (Partnership Law § 62) but is not found in the Limited Liability Company Law]; *Shure v. S&S Eatery, LLC*, 35 Misc.3d 1218(A) (NY Sup. 2012)[standard for dissolution of limited liability company different from those of corporations and partnerships].

Accordingly, as in *Tzolis v. Wolf* utilizing ancient common-law principles, we look to the judiciary to fill in the

gaps, and offer equitable remedies where none may otherwise exist. Mizrahi is not requesting that contract terms be disregarded, as suggested by Cohen [Brief, pg. 66]. He is requesting that the Court enforce the undisputed agreement between the parties that they were to be equal partners in the enterprise, in both profits and losses, and fashion a sensible, and just, remedy.

POINT V

THE PROOF AT TRIAL OVERWHELMINGLY ESTABLISHED THE GROUNDS FOR DISSOLUTION

Cohen cross-appeals seeking reversal of the order dissolving the Company based upon his unsupported claim that the testimony of the Company's accountant, Joshua Silberberg, was unreliable. Nothing could be further from the truth. The Court below found that "Cohen admitted that Mr. Silberberg was "very accurate" and accordingly credited his testimony regarding financial losses. The trial Court also credited Mizrahi's proof in that regard, supported by the Company's business and financial records, noting that the plaintiffs' proofs "are not significantly contradicted by defendant." Cohen's testimony that the Company will show a profit "going