

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

JOSEPH DIGIROLOMO,

Plaintiff,

-against-

SUGAR LI, L.L.C., RANDY NAROD,
"JOHN DOE" and "JANE DOE",

Defendants.

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 008756/13

MOTION DATE: July 29, 2013
Motion Sequence # 001

LEONARD OLIVA,

Plaintiff,

-against-

SUGAR LI, LLC and RANDY NAROD,

Defendants.

INDEX No. 008822/13

MOTION DATE: July 29, 2013
Motion Sequence # 001

The following papers read on these motions:

Order to Show Cause..... XX
Affirmation in Opposition..... XXXXXX
Memorandum of Law..... XX

Motion by plaintiff Joseph DiGirolomo for a preliminary injunction enjoining

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defendants from disposing of plaintiff's membership units in defendant Sugar LI, LLC is **granted**. Motion by plaintiff Leondar Oliva for a preliminary injunction enjoining defendants from disposing of plaintiff's membership units in defendant Sugar LI, LLC is **granted**.

This is an action for breach of fiduciary duty by a minority member of a limited liability company. Plaintiff Joseph DiGirolomo holds a 17 % non-voting membership interest in defendant Sugar LI, LLC. The company was formed in July 2009 for the purpose of operating a nite club in Carle Place. Defendant Randy Narod holds a 56 % interest in Sugar and is the managing member. Leonard Oliva holds a 17 % non-voting interest, and Robert Bram holds a 10 % non-voting interest in the company. Since the complaint names "John Doe" and "Jane Doe" as defendants, it is unclear whether plaintiff intended to name the other minority members.

DiGirolomo and Oliva previously operated a restaurant known as Caio Baby on the premises. When Sugar was formed, DiGirolomo and Oliva assigned their lease to the limited liability company and were each credited with \$100,000 to their capital accounts. Narod claims to have initially contributed \$665,000 to the capital of the company.

Article 7 of Sugar's operating agreement provides that, if the cost of alteration of the premises exceeds \$750,000, the members shall make additional cash capital contributions "in proportion to their respective sharing ratios." Article 7 also provides that Narod may call for additional capital contributions in order to pay ordinary business expenses. Article 7 further provides that if a member fails to make his mandatory capital contribution, the members who have contributed their additional capital may buy out the non-contributing members at a price of \$7.50 per unit.

Sugar opened for business in May 2010. Narod claims that in April 2010 and August 2012 there were additional capital calls, and he contributed an additional \$190,000 to the company.

On July 5, 2013, Narod sent a notice of mandatory capital contribution to the minority non-voting members. In the notice, Narod claimed that in June 2013 he had made an additional capital contribution of \$103, 600 to cover rent, liquor, and sales tax payments. Narod called upon the other members to contribute their respective shares of the additional capital and offered to purchase their interests at a price of \$7.50 per unit, if the other

members were not able to contribute in response to the capital call.

DiGirolomo commenced this action on July 19, 2013. Plaintiff alleges that he discovered that Sugar received a notice of sales tax lien in the amount of approximately \$100,000. Plaintiff further alleges that Narod withdrew approximately \$200,000 from Sugar without authorization and, since December 2012, he has refused access to the company's books and records. Plaintiff asserts claims for conspiracy, conversion, breach of the operating agreement, constructive fraud, and breach of fiduciary duty, and an accounting.

By order to show cause dated July 22, 2013, plaintiff DiGirolomo moves for a preliminary injunction enjoining defendants from disposing of plaintiff's membership units in Sugar, or purchasing the units in accordance with the operating agreement. In the order to show cause, the court temporarily restrained defendants from purchasing, selling, or disposing of plaintiff's membership units. The court also restrained defendants from removing the business records of the company, whether stored electronically or otherwise.

In opposition to the motion, defendants claim that Sugar is operating at a loss and that additional capital is necessary to fund operating expenses.

Limited Liability Company Law § 502(a) provides that, except as provided in the operating agreement, a member is obligated to the company to perform any promise to contribute cash or property, or to perform services, that is otherwise enforceable in accordance with applicable law. The operating agreement may provide that, if a member fails to make a required contribution, his membership interest shall be subject to "specified consequences" (Limited Liability Company Law § 502[c]). The consequences may include reduction or elimination of the defaulting member's interest, subordination of the defaulting member's interest to that of non-defaulting members, a forced sale of the defaulting member's interest, forfeiture of the defaulting member's interest, lending by the other members of the amount necessary to meet the defaulting member's commitment, or a fixing of the value of the defaulting member's interest by appraisal or by formula and redemption or sale of such member's interest at such value (*Id.*). The calling for additional capital is subject to the business judgment of those in control of the company, provided they follow the terms of the operating agreement in good faith (*Van Der Lande v Stout*, 13 AD3d 261 [1st Dept 2004]). Where a member fails to make a required capital contribution, the buyout price may be based upon a multiple of earnings, with an allowance for debt (*Fuixas v 111*

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Huron Street, 58 AD3d 798 [2d Dept 2009]). Since a member's interest may be forfeited for failing to make a required contribution, it would seem that the operating agreement may provide for a nominal buyout price.

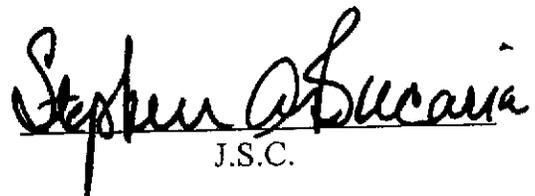
Under the operating agreement, Narod may call for additional capital to meet operating expenses, provided he is managing the business in good faith. In view of Narod's concession that additional capital was necessary to make sales tax payments, plaintiff has shown a likelihood of success on the merits that Narod breached the operating agreement failing to call for additional capital in good faith. Even though plaintiff's membership interest is non-voting, plaintiff will suffer irreparable harm if Narod is not restrained from purchasing plaintiff's membership interest. Since Narod may obtain the additional capital by lending to Sugar, or by borrowing from other sources, the equities are balanced in plaintiff's favor.

Accordingly, plaintiff DiGirolomo's motion for a preliminary injunction, enjoining defendants from purchasing or otherwise disposing of plaintiff's membership interest in Sugar LI, LLC is **granted**. The temporary relief granted in the order to show cause will also continue pending further order of the court.

A similar action has been brought by Leonard Oliva against Sugar LI and Randy Narod (Index No. 8822/13). On the court's own motion, the two actions are joined for discovery and trial. For similar reasons, plaintiff Leonard Oliva's motion for a preliminary injunction, enjoining defendants from purchasing or otherwise disposing of plaintiff's membership interest in Sugar LI, LLC, is also **granted**.

A Preliminary Conference has been scheduled for October 21, 2013 at 9:30 a.m. in Chambers of the undersigned on both cases. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated AUG 26 2013


J.S.C.

ENTERED

AUG 28 2013

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**