

At a Commercial Division Part 1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24 day of February, 2014.

PRESENT:

HON. CAROLYN E. DEMAREST,
Justice.

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DORINE BORRIELLO, individually and derivatively
on behalf of CATERINA REALTY, LLC,

Plaintiffs,

- against -

MICHAEL LOCONTE, DIANE SCHMIDT, and
MARIA PENNEY SELIGSON,

Defendants,

- and -

CATERINA REALTY, LLC,

Nominal Defendant.
-----X

**DECISION
AND
ORDER**

Index No. 503180/2013

The following papers read on this motion:

Papers Numbered

Notice of Motion/Order to Show Cause/Petition/ Cross Motion and Affidavits(Affirmations)Annexed	7, 9, 10, 12, 17
Opposing Affidavits (Affirmations)	15-16
Reply Affidavits(Affirmations)	
Affidavits(Affirmations)	
Other Papers (Memoranda of Law)	8, 13, 14

Plaintiff Dorine Borriello ("Borriello") brings this action individually and derivatively on behalf of nominal defendant Caterina Realty, LLC ("Caterina") for breach of fiduciary duty and self-dealing. Individual defendants move to dismiss and counterclaim against the plaintiff for breach of contract. Plaintiff cross moves for summary judgment dismissing defendants' affirmative defense

of release and the counterclaim. Plaintiff also seeks a preliminary injunction enjoining defendants from the use of Caterina's funds for legal fees related to this action.

BACKGROUND

The individual parties in this action are all siblings engaged in the operation of a family business, Jersey Lynne Farms, Inc. ("JLF"), a closely held corporation operating at 8801 Foster Avenue in Brooklyn (the "Premises"). Plaintiff is a 25% owner of JLF and defendants Michael Loconte ("Loconte"), Diane Schmidt ("Schmidt") and Maria Penney Seligson ("Seligson") are 35%, 20%, and 20% owners of JLF, respectively. Defendants are also all officers, directors, and employees of JLF. Plaintiff was also an officer, director, and employee of JLF until her termination on November 26, 2011. Pursuant to this termination, plaintiff signed a "Separation Agreement and General Release" on June 28, 2012 (the "General Release"), which states, in pertinent part:

[Borriello] . . . knowingly and voluntarily forever releases and discharges [JLF] and its past and present affiliates, subsidiaries, parent companies, predecessors, insurers, successors and assigns and its and their current and former partners, members, owners, shareholders, officers, directors, employees, employee benefit plans, attorneys, fiduciaries, representatives and agents both individually and in their business capacities (collectively, the "Releasees"), of and from any and all claims, complaints, demands, lawsuits, causes of action or expense of any kind (including attorney's fees and costs) . . . whether known or unknown, that [Borriello] now has or ever had against the Releasees as of the signing of this Agreement, including but not limited to [c]laims related to or arising from [Borriello's] employment with [JLF] and/or the termination thereof; [c]laims arising under common law; [c]laims for breach of contract and in tort . . . It is further expressly agreed and understood by [Borriello] that the release contained herein is a GENERAL RELEASE.

In 1999, while plaintiff was still a director, officer, and employee of JLF, the parties formed Caterina as a limited liability company and transferred ownership of the Premises to Caterina. JLF rents the entire Premises from Caterina. At all relevant times, the parties each had a twenty five percent ownership interest in Caterina and were all co-managers. This dispute arises mainly from

a lease agreement that defendants entered into on behalf of Caterina with JLF on or about December 13, 2011 (the "Lease"). Plaintiff alleges that the terms of the lease greatly favor JLF at the expense of Caterina in that the annual rent of \$342,000 is substantially below fair market value and that the Lease requires Caterina to assume responsibility for expenses which JLF should assume as the tenant. During the lease negotiations, plaintiff obtained an appraisal that indicated that fair market base rent would be in the range of \$1,100,000 per year. Defendants obtained a separate appraisal that estimated fair market rental value at \$342,000 per year. During a meeting of the Caterina board on December 13, 2011, plaintiff voted against the Lease while the defendants voted in favor. Plaintiff alleges that by entering into the Lease, defendants breached their fiduciary duties as members and managers of Caterina and engaged in self-dealing to benefit their position as shareholders of JLF. Defendants argue in their seventh affirmative defense of their First Amended Verified Answer that the General Release bars plaintiff from asserting any claims relating to the Lease because the Lease was signed prior to execution of the General Release. Defendants also assert a counterclaim alleging that the instant action violates the terms of the General Release, which provides that a breach of the General Release would subject the plaintiff to forfeiture of consideration received.

Plaintiff also alleges that various actions taken by defendants as directors of Caterina after the execution of the General Release constitute a breach of fiduciary duty and self-dealing. During Caterina's annual meeting on May 28, 2013, the board members approved a charge to Caterina from JLF for the sum of \$6,779.67 for maintenance performed on the Premises, which plaintiff alleges was the responsibility of JLF under the Lease. During the same meeting, the defendants also approved payment by Caterina of 33% of the yearly premium for insurance policies for the Premises,

also which plaintiff contends was JLF's sole responsibility. Lastly, the defendants approved Caterina's operating budget and voted for a reduction in distributions to Caterina's members. Plaintiff objected and voted against each of these actions during the meeting. Plaintiff alleges that, as a result, Caterina is losing money and has become unprofitable while the defendants are reaping the benefits of the Lease as directors and employees of JLF.

Defendants argue that plaintiff's claims regarding events occurring after the execution of the General Release are barred by the majority voting provision of Caterina's operating agreement (the "Operating Agreement"). Accordingly, defendants move to dismiss the complaint pursuant to CPLR 3211(a)(1) based on the documentary evidence of the General Release and the Operating Agreement. Plaintiff cross-moves for summary judgment dismissing the defendants' seventh affirmative defense of release and their counterclaim. Plaintiff also seeks a preliminary injunction enjoining Caterina from paying the legal fees incurred by the individual defendants during the pendency of this matter.

DISCUSSION

The General Release

CPLR 3211(a)(1) enables a party to move to dismiss a cause of action based upon documentary evidence. The court may dismiss a cause of action under CPLR 3211(a)(1) "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). Defendants argue that plaintiff's claims regarding the Lease, signed approximately seven months before plaintiff signed the General Release, are barred by the terms of the General Release. Defendants specifically point to the language where Borriello "knowingly and voluntarily forever release[d] and discharge[d]" JLF's current and former officers, directors, and employees, both in their individual and business capacities, from "any claims,

complaints, demands, lawsuits, causes of action or expense of any kind . . . whether known or unknown” that plaintiff had as of the signing of the General Release on June 28, 2013. Defendants also emphasize the language of the General Release that indicates that it is “expressly agreed and understood by [Borriello] that the release contained herein is a GENERAL RELEASE.” Defendants’ position is that the broad language of the General Release bars any claims that plaintiff may have against the defendants that stem from events that took place before June 28, 2013.

Plaintiff contends that claims involving Caterina are beyond the scope of the General Release, which was only intended to preclude claims arising out of matters concerning JLF. Plaintiff argues that Caterina is never mentioned in the General Release, which demonstrates that the parties never intended to settle plaintiff’s Caterina related claims. Conversely, defendants argue that if the parties intended a carve out for any Caterina claims, the General Release would have included such an exception. “In construing a general release it is appropriate to look to the controversy being settled and the purpose for which the release was executed[,] . . . [and] a release may not be read to cover matter which the parties did not desire or intend to dispose of” (*Bugel v WPS Niagra Properties, Inc.*, 19 AD3d 1081, 1082 [4th Dept 2005]; see also *Wechsler v Diamond Sugar Co.*, 29 AD3d 681, 682 [2d Dept 2006]). It is also well settled that “releases are contracts that, unless their language is ambiguous, must be interpreted to give effect to the intent of the parties as indicated by the language employed” (*Rubycz-Boyar v Mondragon*, 15 AD3d 811, 812 [3d Dept 2005]). Neither party has argued that the language of the General Release is ambiguous, and so the court will look to the language employed to determine the intent of the parties.

Plaintiff attempts to introduce evidence of the communications and discussions between her attorney, Thomas A. Torto, and JLF’s attorney during the negotiation of the General Release to

demonstrate that the parties did not intend to release any claims related to Caterina. However, the court will not consider such extrinsic evidence to determine the parties' intent where the agreement is unambiguous (*see id.*). Further, where an agreement includes an integration clause, as does the General Release, parol evidence is barred unless the party can demonstrate that the agreement is incomplete (*see NAB Constr. Corp. v City of New York*, 276 AD3d 388, 390 [1st Dept 2000]). Neither party has argued that the General Release is incomplete. The court will not consider any extrinsic evidence beyond the plain language of the General Release.

In construing the meaning and coverage of a general release, the court must consider the controversy being settled and the purpose for which the release was actually given (*see Cahill v Regan*, 5 NY2d 292, 299 [1959]). The General Release was negotiated and signed by the parties in the context of Borriello's termination from employment at JLF. Clearly, the controversy being settled was the termination of Borriello's employment with JLF and the General Release should be interpreted in that context. The General Release, functioning mainly as a separation agreement, includes the terms of Borriello's separation from employment at JLF, and includes terms such as severance compensation and a non-competition agreement. Paragraph 7 of the General Release includes the actual terms of release and releases JLF and its "past and present affiliates, subsidiaries, parent companies, predecessors, insurers, successors and assigns and its and their current and former partners, members, owners, shareholders, officers, directors, employees, [etc.]" from any and all claims that plaintiff has or ever had against these releasees as of the signing of the agreement. The releasees here are defined by their relationship to JLF and are released from any claims relating to JLF. Therefore, the individual defendants are released from claims in their capacity as directors, officers, and employees of JLF.

Defendants insist that the phrase "including, but not limited to" prior to the listing of possible claims relating to Borriello's employment with JLF should mean that any imaginable claims that Borriello may have had against the individual defendants as of the signing of the General Release are barred. While the court agrees that the General Release would bar any claim against JLF or against the individual defendants in their capacity as JLF officers, directors, or employees, the General Release does not extend to cover claims relating to Caterina or the individual defendants in their capacity as directors and officers of Caterina. Caterina is not an affiliate, subsidiary, parent company, or predecessor of JLF. Caterina is not a party to the subject General Release, nor is it ever mentioned in the document. Although the directors and officers of JLF who are released by the General Release are the same individuals who comprise the board of Caterina, they are not protected from claims of any alleged wrongdoing with respect to Caterina. The individual defendants' liability with respect to their fiduciary duties as directors of Caterina is distinct from their obligations as directors of JLF and there is nothing in the General Release that refers to the defendants as directors of Caterina (*see generally Murray-Gardener Management, Inc. v Iroquois Gas Transmission System, L.P.*, 229 AD2d 852 [3d Dept 1996] (finding that absence of indication in written release of intent to encompass the distinct contractual obligations upon which the plaintiff's breach of contract claim was premised excludes such claim from release)).

The cases cited and relied upon by defendants in their motion to dismiss the claim related to the Lease are all distinguishable from the case at bar because they involve a release of claims against the same defendant party. For example, in *LeMay v Keeney*, the plaintiff had signed a general release in settlement of his unfair labor practice claims against the defendant (124 AD2d 1026 [4th Dept 1986]). The release in *LeMay* covered any and all claims that plaintiff, the employee, had or may

have against the defendant, the employer (*Id.* at 1027). When the plaintiff tried to bring a personal injury suit based on a slip and fall that had occurred on the job prior to the signing of the release, the court dismissed his claim based on the language of the release which released the employer from all claims (*Id.*). Similarly distinguishable is *Booth v 3669 Delaware, Inc.*, 92 NY2d 934 [1998] (employee had released “all claims” against defendant employer); *Rocanova v Equitable Life Assurance Assoc.*, 83 NY2d 603, 616 [1994] (release of defendants covered subject matter of new action not disputed); *Delaney v County of Westchester*, 90 AD2d 819, 820 [2d Dept 1982] (release issued as result of settlement expressly included “intention . . . [to] resolve all outstanding or existing disputes, claims or controversies between the persons named”); *Sparacio v Sparacio*, 283 AD2d 481, 483 [2d Dept 2001] (release of all claims between same parties). Here, discussed above, the General Release released JLF and the individual defendants in their capacity as JLF officers, directors, and employees, such that if Borriello had brought, for example, a personal injury claim against JLF that occurred prior to the signing of the General Release, it would be barred. However, plaintiff’s present claim is not against JLF or its officers, directors, and employees, but is rather against the directors of Caterina, even though the individuals in question happen to be the same people. Accordingly, the documentary evidence does not support a dismissal of the claims related to the Lease pursuant to CPLR 3211(a)(1) and defendant’s motion to dismiss is denied. As a result, defendant’s counterclaim for breach of the General Release is rendered moot and is also dismissed.

The Operating Agreement

Plaintiff’s other claims arise from the May 28, 2013 annual meeting of the Caterina board where the defendants, constituting the majority of the vote, approved payment by Caterina of certain expenses on behalf of JLF, approved Caterina’s operating budget, and reduced monthly distributions

to Caterina's members. Plaintiff objected and voted against all of these actions and now alleges that, by approving these acts, the defendants breached their fiduciary duties to Caterina and engaged in self-dealing to benefit their status as shareholders of JLF. Defendants seek to dismiss these claims pursuant to CPLR 3211(a)(1) based on Caterina's operating agreement (the "Operating Agreement"), which provides, in pertinent part, that "[a]ny matter that requires the vote or consent of the Members shall be decided by the Members holding at least a majority of the Membership Interests." However, the Operating Agreement also provides that "[e]ach Member shall discharge the Member's duties to [Caterina] and the other Members in good faith and with that degree of care that an ordinarily prudent person in a similar position would use under similar circumstances."

"Directors and officers are bound by their duty of undivided and unqualified loyalty to their corporations, a duty which encompasses good faith efforts to insure that their personal profit is not at the expense of their corporations" (*Limmer v Medallion Group, Inc.*, 75 AD2d 299, 303 [1st Dept 1980]; see also Limited Liability Company Law § 409). In instances involving self-dealing, the defendants have the burden of demonstrating the fairness of the transactions (*Limmer*, 75 AD2d at 303). The fact that the defendants, as majority members, approved certain actions by a vote does not automatically preclude a claim for breach of fiduciary duty and self-dealing, particularly where all of the majority members allegedly have a conflict of interest as officers and employees of JLF. The Operating Agreement's provision for majority voting is not sufficient documentary evidence to support dismissal of a cause of action for breach of fiduciary duty to Caterina pursuant to CPLR 3211(a)(1). Accordingly, defendants' motion to dismiss the claims relating to the March 28, 2013 board meeting is denied.

Preliminary Injunction

Plaintiff also seeks a preliminary injunction pursuant to CPLR 6301 enjoining Caterina from advancing legal fees and expenses to the individual defendants in this instant action. According to the individual defendants, they voted in favor of advancing legal fees using Caterina's funds at a properly noticed meeting of Caterina's managers. Plaintiff was in attendance and voted against the advancement of legal fees. CPLR 6301 provides, in pertinent part, that "[a] preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff." The purpose of CPLR 6301 is to preserve the status quo and to prevent dissipation of property which may make a judgment ineffectual (*see Rattner & Associates v Sears, Roebuck, & Co.*, 294 AD2d 346 [2d Dept 2002]).

A party seeking preliminary injunctive relief has the burden of demonstrating (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of the equities favors the movant's position (*see Walter Karl, Inc. v Wood*, 137 AD2d 22 [2d Dept 1988]). Limited Liability Company Law § 420 provides:

Subject to the standards and restrictions, if any, set forth in its operating agreement, a limited liability company may, and shall have the power to, indemnify and hold harmless, and advance expenses to, any member, manager or other person, or any testator or intestate of such member, manager or other person, from and against any and all claims and demands whatsoever; provided, however, that no indemnification may be made to or on behalf of any member, manager or other person if a judgment or other final adjudication adverse to such member,

manager or other person establishes (a) that his or her acts were committed in bad faith or were the result of active and deliberate dishonesty and were material to the cause of action so adjudicated or (b) that he or she personally gained in fact a financial profit or other advantage to which he or she was not legally entitled.

This statutory language is permissive and does not create a legal duty to indemnify (*see* 546-522 *West 146th Street LLC v Arfa*, 99 AD3d 117, 121 [1st Dept 2012]). “Rather, it empowers a limited liability company to tailor an indemnity clause in accordance with its own ‘standards and restrictions,’ subject to the limitations of the specified statute. When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed” (*see id.* at 121-22; *see also Hooper Assoc. v AGS Computers*, 74 NY2d 487 [1989]).

To determine whether the individual defendants are entitled to advancement of their legal fees, it is necessary to look to the language of the Operating Agreement (*see Ficus Investments, Inc. v Private Capital Management*, 61 AD3d 1, 7 [1st Dept 2009]). The Operating Agreement provides that “[Caterina] shall indemnify and hold harmless each Member against any loss, damage or expense (including attorneys’ fees) incurred by the Member as a result of any act performed or omitted on behalf of [Caterina] or in furtherance of [Caterina’s] interests without, however, relieving the Member of liability for failure to perform his or her duties in accordance with the standards set forth herein.” The Operating Agreement does not provide for advancement of legal fees, but only for indemnification provided that the indemnitee is not found to be in breach of any duties to Caterina. The fact that the individual defendants voted in favor of advancing legal fees to themselves in contravention of the Operating Agreement does not make the advancement valid. Therefore, there is a likelihood of ultimate success on plaintiff’s claim that the defendants breached

their fiduciary duties by approving the advancement of legal fees out of Caterina's funds.

Plaintiff alleges that the advancement of legal fees out of Caterina's funds is depleting Caterina's resources. Although monetary damages may be awarded to Caterina in reimbursement, Caterina may be irreparably injured by the use of its funds for the defendants' legal fees during the pendency of this action. Moreover, because Caterina's Operating Agreement does not permit the advancement of legal fees, the equities clearly are balanced in favor of granting the relief requested. "The 'balancing of the equities' usually simply requires the court to look to the relative prejudice to each party accruing from a grant or denial of the requested relief" (*Ma v Lien*, 198 AD2d 186, 186-87 [1st Dept 1993]). Here, Caterina and Borriello would suffer if Caterina's funds continue to be used for defendants' legal fees, but if the injunction is granted, the defendants would also be harmed, but only inasmuch as they would have to pay their own legal fees. However, the language of the Operating Agreement compels the granting of the preliminary injunction pending a determination of the claims against defendants (*see Ficus Investments, Inc. v Private Capital Management*, 61 AD3d 1, 7 [1st Dept 2009]).

CONCLUSION

Accordingly, defendants' motion to dismiss the Verified Complaint is denied. Plaintiff's cross-motion dismissing defendants' seventh affirmative defense is granted and plaintiff's motion to dismiss defendants' counterclaim is also granted. Plaintiff's motion for a preliminary injunction is granted.

This constitutes the decision and order of the court.

ENTER:



J.S.C.

HON. CAROLYN E. DEAREST