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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

JOSEPH DIGIROLOMO,

Plaintiff,

INDEX No. 008756/13

MOTION DATE: Oct. 30, 2013
Motion Sequence # 002

-against-

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

Defendants.

LEONARD OLIVA,

Plaintiff,

INDEX No. 008822/13

MOTION DATE: Oct. 30, 2013
Motion Sequence # 002

-against-

SUGAR LI, LLC and RANDY NAROD,

Defendants.

The following papers read on these motions:

Notice of Motion..... X
Affirmation in Support..... X
Affirmation in Opposition..... XX
Reply Affirmation..... X

**DIGIROLOMO v SUGAR LI, LLC, et al** **Index no. 008756/13**
**OLIVA v SUGAR LI, LLC et al** **Index no. 008822/13**

Motion by defendants Sugar LI, LLC and Randy Narod for leave to reargue plaintiff Joseph DiGirolomo and plaintiff Leondard Oliva's motions for a preliminary injunction, enjoining defendants from disposing of plaintiffs' membership units in defendant Sugar LI, is **granted**. Upon reargument, plaintiffs' motion for a preliminary injunction, restraining defendants from repurchasing plaintiffs' interests in Sugar LI, LLC, is **granted** to the extent indicated below.

In these related actions, minority members of a limited liability company seek to restrain the controlling member from repurchasing their interests. Plaintiff Joseph DiGirolomo and plaintiff Leonard Oliva previously operated a restaurant known as Caio Baby in Carle Place. In July 2009, plaintiffs and defendant Randy Narod formed defendant Sugar LI, LLC for the purpose of operating a nite club on the premises. Narod holds a 56 % interest in Sugar and is the managing member. DiGirolomo and Oliva each hold 17 % non-voting membership interests.

When Sugar was formed, DiGirolomo and Oliva assigned the lease covering the premises to Sugar LI 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.

Paragraph 7.2(a) 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." Paragraph 7.2(b) provides that Narod may call for additional capital contributions in order to pay ordinary business expenses, "such as sales and payroll taxes, rent, repairs, and maintenance..." Paragraph 7.2(c) 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. Narod claims that the additional capital was necessary because the nite club was operating at a loss.

DiGirolomo commenced this action on July 19, 2013. DiGirolomo 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. DiGirolomo further alleges that Sugar received a notice of sales tax lien in the amount of approximately $100,000. DiGirolomo asserts claims for conspiracy, conversion, breach of the operating agreement, constructive fraud, and breach of fiduciary duty, and an accounting. An action has also been commenced by Oliva against Sugar LI and Narod, asserting similar claims. Despite the admitted unprofitability of Sugar LI, neither plaintiff seeks judicial dissolution of the Limited Liability Company (See Limited Liability Company Law § 702).

By order dated August 26, 2013, the court granted plaintiffs' motions for a preliminary injunction, enjoining defendants from purchasing or otherwise disposing of plaintiffs' membership interests. The court also restrained defendants from removing the business records of the company, whether stored electronically or otherwise.

An operating agreement may provide that, if a member fails to make a required capital contribution, his membership interest shall be subject to "specified consequences," including a forced sale of the defaulting member's interest (Limited Liability Company Law § 502[c]). 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]). In granting the preliminary injunction, the court determined that plaintiff had shown a likelihood of success on the merits that Narod has breached his fiduciary duty by failing to call for the additional capital in good faith.

Defendants move for leave to reargue plaintiffs' motion for the preliminary injunction, restraining them from repurchasing plaintiffs' membership interests. Defendants argue that because the operating agreement permitted a capital call to pay sales taxes, Narod's request for additional capital was made in good faith.

"[C]ourts are generally loath to intercede in squabbles between partners that result in

piece-meal adjudications, preferring that partners either settle their own differences amicably or dissolve and finally conclude their affairs by a full accounting" (***Gramercy Equities Corp. v Dumont***, 72 NY2d 560,564-65 [1988]). Since a limited liability company is operated with the flexibility of a partnership, a court is similarly reluctant to intercede in a dispute between the members, absent dissolution of the company (See Limited Liability Company Law, McKinney's Practice Commentary at p. 251).

The Limited Liability Company Law does not expressly authorize a buyout in a dissolution proceeding (***Mizrahi v Cohen***, 104 AD3d 917, 920 [2d Dept 2013]). Nonetheless, in certain circumstances, a buyout may be an appropriate equitable remedy upon the dissolution of an LLC (Id). While the price agreed upon in the operating agreement is generally enforceable, the court may impose a surcharge or adjustment, if the majority member has dissipated assets or engaged in other oppressive conduct toward the minority members (Business Corporation Law § 1104-a(d).

Since the court may adjust the buyout price based upon a dissipation of assets, it may temporarily restrain the repurchase of a minority member's interest, pending determination of the appropriate adjustment. Accordingly, defendants' motion for leave to reargue plaintiffs' motion for a preliminary injunction is **granted**. Upon reargument, plaintiffs' motion for a preliminary injunction, restraining defendants from repurchasing plaintiffs' interests in Sugar LI, LLC, is **granted** to the extent that defendants' are restrained from purchasing plaintiffs' interest pending a hearing upon whether defendant Narod has dissipated company assets or otherwise engaged in oppressive conduct toward the minority members. The preliminary injunction will terminate 30 days from the date of this order if plaintiffs have not served amended complaints seeking judicial dissolution of Sugar LI, LLC.

So ordered.

Dated NOV 20 2013

J.S.C.

ENTERED

NOV 25 2013

NASSAU COUNTY
COUNTY CLERK'S OFFICE