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SUPREME COURT - STATE OF NEW YORK

Present:

**HON. VITO M. DESTEFANO,**

Justice

TRIAL/IAS, PART 11
NASSAU COUNTY

**ANTHONY GENOVESE AND MAGNETIC CONSTRUCTION GROUP CORP.,**

**Decision and Order**

**Plaintiffs,**

**MOTION SEQUENCE: 01**
**INDEX NO.:608246-15**

**-against-**

**LOUIS GUZMAN, QUINN WALDRON AND MAGNETIC BUILDERS GROUP, LLC,**

**Defendants.**

**The following papers and the attachments and exhibits thereto have been read on this motion:**

| | |
|---|---|
| Notice of Motion | 1 |
| Memorandum of Law in Support | 2 |
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| Affirmation in Opposition | 4 |

Plaintiffs, Anthony Genovese and Magnetic Construction Group Corp. ("Magnetic Construction") move this court for an order pursuant to CPLR 6301 granting the Plaintiffs immediate access to the books and records of Defendant Magnetic Builders Group, LLC ("Magnetic Builders"); and enjoining the Defendants Louis Guzman, Quinn Waldron, and Magnetic Builders from:

> (a) making any distributions of cash, consideration, or other value from or on behalf of Magnetic Builders regardless of the manner in which such funds or value are held or maintained (including, but not limited to, from any accounts in Magnetic Builders' name, or from or in respect of any funds as to which Magnetic Builders has any interest or right) in respect of any ownership or membership

distribution to Louis Guzman or Quinn Waldron;

(b) making any distribution of cash, consideration, or other value from or on behalf of Magnetic Builders regardless of the manner in which such funds or value are held or maintained (including, but not limited to, from any accounts in Magnetic Builders' name, or from or in respect of any funds as to which Magnetic Builders has any interest or right) in respect of any salary or other employment-related compensation to Louis Guzman or Quinn Waldron until a judicial determination is made regarding the suitability of any salary or other employment-related compensation payable to Guzman or Waldron in the normal course of Magnetic Builders' business operations;

© making any distributions or allocations of cash, consideration, or other value, from or on behalf of Magnetic Builders that are outside the normal course of Magnetic Builders' business operations; or

(d) promoting, engaging in, or in any way facilitating or supporting any activities outside the normal course of Magnetic Builders' business operations.

**Factual and Procedural Background**

In 2003, Anthony Genovese, the sole owner and President of Magnetic Construction, hired Quinn Waldron as an estimator/purchaser for Magnetic Construction. In 2004, Genovese hired Louis Guzman to work as a Project Executive for Magnetic Construction. Both Guzman and Waldron were "at will" employees.

According to his affidavit, Genovese, age 76, contemplated forming a successor business entity in which he would "remain involved as an owner and participant in the business" along with Guzman and Waldron who would also to have a membership interest (Affidavit in Support at ¶¶ 12, 13). In early 2014, Genovese, Guzman and Waldron discussed the formation of a new and/or successor entity, Magnetic Builders, LLC. Genovese, Guzman and Waldron were to be equal members and equal shareholders, with each contributing an equal amount of cash and/or capital. All business of Magnetic Construction was to transition to Magnetic Builders.[1]

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[1] Guzman stated as much in his affidavit when he stated that Magnetic Construction:

[W]ould participate as a 1/3 member of the new entity, provided that the existing financial history and bonding capacity would be
afforded the new entity.

Defendants similarly stated that Magnetic Construction "would participate as a 1/3 member of the new entity, provided that the existing financial history and bonding capacity would be afforded the new entity" (Guzman Affidavit in Opposition at ¶ 5).

On June 17, 2015, Magnetic Builders filed its Articles of Organization (Ex. "F" to Motion). Notwithstanding numerous attempts and drafts, Genovese, Guzman and Waldron could not come to terms on an acceptable operating agreement. According to Plaintiffs, the parties nevertheless, throughout the period of time an operating agreement was being drafted and negotiated, "continued to work diligently on [transitioning] the construction business from Magnetic Construction to Magnetic Builders" (Affidavit in Support at ¶ 20).

On September 15, 2015, Guzman and Waldron "had a meeting and decided to 'vote out' or proceed with [Magnetic Builders] without Genovese or [Magnetic Construction]" (Guzman Affidavit in Opposition at ¶ 10). Specifically, according to Guzman's affidavit:

> Waldron and I had a meeting as 2/3 members of [Magnetic Builders] prior to any operating agreement being executed and decided by a majority vote to eliminate Genovese from [Magnetic Builders]. By that time, we had put up $600,000 of our own money into the LLC and had obtained private funding to act as the necessary credit for any and all pre-construction and construction agreements. There was no longer a need for Genovese's bonding capacity or credit history and, as such, we agreed to form [Magnetic Builders] without him (Guzman Affidavit in Opposition at ¶14).[2]

Months after their meeting, on November 29, 2015, Guzman and Waldron executed an Operating Agreement for Magnetic Builders naming themselves as sole owners, with each

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* * *

The sole reason Genovese was to be a member of [Magnetic Builders] was to act as a surety for pre-construction agreements. At the time formation was being discussed, Waldron and I did not have the bonding capacity necessary to enter into pre-construction agreements. He was going to be a silent member acting solely for the purpose of providing [Magnetic Builders] with the necessary bonding capacity to obtain jobs. He was to have no part of the daily running of [Magnetic Builders] (Guzman Affidavit in Opposition at ¶¶ 5, 13).

[2] In August 2015, during the time in which operating agreements were being negotiated and drafted, the Defendants placed $600,000 into a bank account in the name of Magnetic Builders which, according to Guzman, was necessary because Defendants had a new client, the Hoxton Hotel, which required proof of funding prior to the execution of a pre-construction agreement (Guzman Affidavit in Opposition at ¶ 7).

having a 50% membership interest (Ex. "A" to Affirmation in Opposition).[3]

The Plaintiffs thereafter moved for a temporary restraining order ("TRO") and a preliminary injunction. On December 23, 2015, the court (Janowitz, J.) issued a TRO enjoining the Defendants from: making any distributions or allocations of cash, consideration, or other value, from or on behalf of Magnetic Builders that are outside the normal course of Magnetic Builders' business operations; or promoting, engaging in, or in any way facilitating or supporting any activities outside the normal course of Magnetic Builders' business operations.

The complaint, which was served with the motion papers, contains the following causes of action: declaratory judgment that Genovese is a member of Magnetic Builders and therefore entitled to a judgment establishing the value of the members' interests in Magnetic Builders; access to Magnetic Builders' books and records; dissolution of the Magnetic Builders' LLC and/or Defendants' "forced buyout" of Plaintiffs' membership interests in Magnetic Builders; unjust enrichment; breach of duty of loyalty; and breach of fiduciary duty.

For the reasons that follow, the motion for a preliminary injunction is granted in part and denied in part.

**The Court's Determination**

On a motion for a preliminary injunction, the moving party must demonstrate by clear and convincing evidence, a likelihood of ultimate success on the merits, irreparable injury if the injunction were not granted, and a balancing of equities in favor of granting the injunction (*Family-Friendly Media, Inc. v Recorder Television Network*, 74 AD3d 738 [2d Dept 2010]). An injunction is a provisional remedy to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual, not to determine the ultimate rights of the parties. As such, absent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief sought in the complaint (*Reichman v Reichman*, 88 AD3d 680 [2d Dept 2011]; *SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d 727 [2d Dept 2005]). In addition, mandatory preliminary injunctions should not be granted absent extraordinary or unique circumstances or where the final judgment may otherwise fail to afford complete relief (*SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d at 727, *supra*). "The mere existence of an issue of fact will not itself be grounds for the denial of the motion" (*Arcamone–Makinano v Britton Prop., Inc.*, 83 AD3d 623, 625 [2d Dept 2011]). The decision whether to grant or deny a preliminary injunction is within the sound discretion of the court

[3] Although the Operating Agreement was executed on November 29, 2015, the Agreement's effective date was October 29, 2015.

(*Family-Friendly Media, Inc. v Recorder Television Network*, 74 AD3d at 738, *supra*; *Masjid Usman, Inc. v Beech 140, LLC*, 68 AD3d 942 [2d Dept 2009]).

*Likelihood of Success on the Merits*

In support of their motion for a preliminary injunction, the Plaintiffs argue that Guzman and Waldron "have converted Magnetic Builders to their own use, and are operating it to the exclusion of Genovese, as if they were its only two shareholders"; that Genovese is undoubtedly a member of Magnetic Builders; and further, that as a member of Magnetic Builders, Genovese is entitled to access Magnetic Builders' books and records (Memorandum of Law in Support at pp 12, 13).

In opposition, the Defendants argue that Plaintiffs' entire case rests on the assumption that Genovese is a member of Magnetic Builders. According to Defendants, however, he is not a member because Waldron and Guzman created Magnetic Builders with their own funding and in their own names as 50-50 equal members (Affirmation in Opposition at ¶¶ 14-15). Further, according to Defendants, even if no operating agreement existed and the Magnetic Builders LLC is operating under the default rules of the Limited Liability Company Law ("LLC Law"), Genovese would be a 1/3 member of the LLC and, under the default rules of the LLC Law, Guzman and Waldron could take any actions necessary by a majority vote against Genovese (Affirmation in Opposition at ¶¶ 20-22; *see also* LLC Law 402(c)(3), and (f))[4].

Pursuant to LLC Law 203(d), a limited liability company:

> is formed at the time of the filing of the initial articles of organization with the department of state or at any later time specified in the articles of organization . . . . This filing of the articles of organization shall, in the absence of actual fraud, be conclusive evidence of the formation of the limited liability company as of the time of filing or effective date if later . . . . A limited liability company formed under this chapter shall be a separate legal entity, the existence of which as a separate legal entity shall continue until the cancellation of the limited liability company's article of organization.

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[4] Section 402(c)(3) of the LLC Law states that "a majority in interest of the members" is all that is required to "adopt, amend, restate or revoke the . . . operating agreement." Likewise, section 402(f) of the LLC Law specifically states that "whenever any action is to be taken . . . by the members. . . , it shall, except as otherwise required or specified by this chapter or the articles of organization or the operating agreement as permitted by this chapter, be authorized by a majority in interest of the members' votes cast at a meeting of members by members . . . entitled to vote thereon."

Given the undisputed fact that Articles of Organization for Magnetic Builders LLC were filed on June 17, 2015, the court concludes that Plaintiffs have demonstrated a likelihood of success on the merits with respect to Genovese being a 1/3 member of Mechanical Builders at the time of Magnetic Builders' formation.[5] The Defendants indicated that prior to the execution of the operating agreement they had a meeting and decided to "vote out" Genovese (Guzman Affidavit in Opposition at ¶¶ 10, 14).[6]

Given the above, the issue remaining is the propriety of the Defendants' removal of Genovese as a member of Magnetic Builders.

Here, the Articles of Organization do not contain a provision concerning expulsion of members nor was there an operating agreement in existence at the time the Defendants "voted out" Genovese as a member of Magnetic Builders. Consequently, there was no voting mechanism in place or provision regarding the removal of a member and, thus, Magnetic Builders is subject to the "numerous sections in the [LLC Law] that set forth default provisions applicable to the limited liability company" (*In re Eight of Swords, LLC*, 96 AD3d 839 [2d Dept 2012]; *Matter of 1545 Ocean Ave., LLC*, 72 AD3d 121, 129 [2d Dept 2010] [where operating agreement "does not address certain topics, a limited liability company is bound by the default requirements set forth in the [LLC] Law"]; *Manitaras v Beusman*, 56 AD3d 735 [2008] [where operating agreement was silent on the issue of the sale of the company's assets, the default provisions of the [LLC] Law applied]; *Ross v Nelson*, 54 AD3d 258 [2008]).

Inasmuch as the default provisions of the LLC Law apply to the case at bar, and, further, because there is no provision in the LLC Law addressing the expulsion of a member, there is merit to Plaintiffs' contention that neither Magnetic Builders nor the Defendants can expel a

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[5] As noted, Guzman stated in his affidavit that on September 15, 2015, more than two months before he and Waldron entered into an operating agreement, that he and Waldron "had a meeting as 2/3 members" of Magnetic Builders and "decided by a majority vote to eliminate Genovese" from Magnetic Builders (Affidavit in Opposition at ¶¶ 10, 14). Guzman's statement that he and Waldron were 2/3 members of Magnetic Builders and that they were a "majority" necessarily implies that Magnetic Construction was the other 1/3 member.

[6] Magnetic Builders existed for several months prior to the Defendants entering into the Operating Agreement. LLC Law 417(c) permits the operating agreement to be "entered into before, at the time of or within ninety days after the filing of the articles of organization". Notwithstanding these time frames with respect to the execution of an operating agreement, there is no provision in the LLC Law imposing any type of penalty or punishment for failing to adopt a written operating agreement (*In re Spires v Lighthouse Solutions, LLC*, 4 Misc3d 428 [Sup Ct Monroe County 2004]).

member of Magnetic Builders (*Chiu v Chiu*, 71 AD3d 646 [2d Dept 2010]).[7]

With respect to Plaintiffs' request to inspect the books and records of Magnetic Builders, LLC Law 1102(b) sets forth that:

> Any member may, subject to reasonable standards as may be set forth in, or pursuant to, the operating agreement, inspect and copy at his or her own expense, for any purpose reasonably related to the member's interest as a member, the records referred to in subdivision (a) of this section, any financial statements maintained by the limited liability company for the three most recent fiscal years and other information regarding the affairs of the limited liability company as is just and reasonable.

Given Plaintiffs' clear and convincing showing that Genovese is a member of Magnetic Builders, Genovese has an independent statutory right to conduct an inspection of Magnetic Builders' books and records (LLC Law 1102; *Gartner v Cardio Ventures, LLC*, 121 AD3d 609 [1st Dept 2014]; *Sachs v Adeli*, 26 AD3d 52 [1st Dept 2005] ["any member may inspect the federal, state and local income tax returns and reports of the company so long as it is for a reason reasonably related to the member's interest as a member"]).

*Irreparable Harm*

Where the movant can be fully compensated by a monetary award, an injunction will not be granted because no irreparable harm will be sustained in the absence of injunctive relief (*306 Rutledge, LLC v City of New York*, 90 AD3d 1026 [2d Dept 2011]).

Here, the agreed upon transition of business from Magnetic Construction to Magnetic Builders (of which, according to Defendants, they are the only members), coupled with the

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[7] In *Chiu v Chiu* (71 AD3d at 647, *supra*), the Second Department ruled accordingly:

> The Supreme Court properly granted that branch of the defendant's motion which was to dismiss the second cause of action seeking his expulsion as a member of the plaintiff [LLC]. It is undisputed that the default provisions of the Limited Liability Company Law apply, as neither the articles of organization nor the alleged operating agreement of the LLC contain a provision concerning expulsion of members. Although Limited Liability Company Law § 701 mentions expulsion of members, there is no statutory provision authorizing the courts to impose such a remedy. Rather, the reference to expulsion of members contemplates the inclusion of such a provision in an operating agreement. As the LLC did not have an operating agreement setting forth a mechanism for the expulsion of members, the plaintiff failed to state a cause of action for this relief (*Id.* at 647 [internal citations omitted]).

Defendants' denial of the Plaintiffs' right to participate in the ownership and management of Magnetic Builders, constitutes irreparable harm (*Yemini v Goldberg*, 60 AD3d 935 [2d Dept 2009] [because control and management of company and its holdings were at stake, money damages were not sufficient]; *Wisdom Import Sales Co. v Labatt Brewing Co.*, 339 F3d 101 [2d Cir 2003] [holding that the loss of the right to participate in management constituted irreparable harm where such right was essential to preserving an agreed-upon balance of power in management]).

*Balance of Equities*

When considering the equities, the court must weigh the harm each side will suffer in the absence or in the face of injunctive relief (*Washington Deluxe Bus, Inc. v Sharmash Bus Corp.*, 47 AD3d 806 [2d Dept 2008]). Specifically, to obtain an injunction at bar, Plaintiffs are required to show that the burden caused to Defendants by the imposition of the injunction is less than the harm caused to Plaintiffs by Defendants' activities without the injunction (*Lombard v Station Square Inn Apartments Corp.*, 94 AD3d 717 [2d Dept 2012]).

In opposition to the motion, Guzman states:

> [I]t is important to note, that without any shadow of a doubt, I am 100% positive that in the event that this Court orders Genovese to play an active role in [Magnetic Builders], permits him to have access to the books and records, and become involved in the management of either of the existing projects [the Moxy Hotel and Hoxton Hotel Projects], both projects will immediately terminate [Magnetic Builders]; Waldron and I will be forced to lose our $600,000 immediate investment in addition to a $1,000,000 letter of credit we secured as a pre-requisite in offer to sign the Moxy Construction Management Agreement; and we will suffer irreparable harm and damages, as we will lose any possible credibility in the Construction Management field (Affidavit in Opposition at ¶ 24).

However, the Defendants fail to articulate why Genovese's role in the management of Magnetic Builders or his having access to books and records, will, in effect, cause an immediate termination of Magnetic Builders, especially given the fact that Genovese provided Magnetic Construction's financial statement and a letter from Magnetic Construction's bonding company in order to allow Magnetic Builders to be awarded the Moxy Hotel project (Affidavit in Support at ¶¶ 37, 38).[8]

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[8] The pre-construction contract for the Moxy Hotel Project was with Genovese's Magnetic Construction, not Magnetic Builders, notwithstanding the fact that the new entity Magnetic Builders had already been formed (Guzman Affidavit in Opposition at ¶ 9).

Accordingly, the Defendants' submissions offer no basis to conclude that they will suffer significant hardship from the limited restraints imposed from an injunction, whereas Plaintiffs would likely suffer injury if the injunction were denied. Notably, the relief Plaintiffs seek will not prevent Defendants from working in the construction field or, more particularly, working on the Hoxton Hotel and Moxy Hotel Projects.

**Conclusion**

Based on the foregoing, it is hereby

Ordered that branch "(i)" of the Plaintiffs' motion for a preliminary injunction is granted but only to the following extent: Defendants are enjoined from: 1) making any distributions of cash, consideration, or other value from or on behalf of Magnetic Builders regardless of the manner in which such funds or value are held or maintained (including, but not limited to, from any accounts in Magnetic Builders' name, or from or in respect of any funds as to which Magnetic Builders has any interest or right) in respect of any ownership or membership distribution to Louis Guzman or Quinn Waldron; and 2) making any distributions or allocations of cash, consideration, or other value, from or on behalf of Magnetic Builders that are outside the normal course of Magnetic Builders' business operations, with the exception of salary or other employment-related compensation to Louis Guzman and Quinn Waldron, which is permitted; and it is further

Ordered that, to the extent the court previously issued a TRO with respect to branch "(i)(d)" of the motion and enjoined the Defendants from "promoting, engaging in, or in any way facilitating or supporting any activities outside the normal course of Magnetic Builders' business operations", that branch of the TRO is vacated; and it is further

Ordered that branch "(ii)" of the Plaintiffs' motion is granted to the extent that Anthony Genovese shall be granted access to the books and records of Magnetic Builders as permitted pursuant to Limited Liability Company Law § 1102(b); and it is further

Ordered that the Plaintiffs shall post an undertaking in the amount of $1,500 no later than April 11, 2016; and it is further

Ordered that counsel for all parties are directed to appear for a conference before the

undersigned on June 7, 2016 at 9:30 a.m.

This constitutes the decision and order of the court.

Dated: March 31, 2016

**Hon. Vito M. DeStefano, J.S.C.**