

Casilli v Natan

2018 NY Slip Op 32621(U)

October 12, 2018

Supreme Court, New York County

Docket Number: 652545/2017

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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JEREMY CASILLI, JON FOSTER, DIANE ROSENCRANTZ, DC
YORK RESTAURANT, LLC, MICHAEL MORRIS, 268 WEST
BROADWAY, LLC,

Plaintiffs,

- v -

SHAUL NATAN, NADOV COHEN,

Defendants.

INDEX NO. 652545/2017

MOTION DATE 04/26/2018

MOTION SEQ. NO. 004

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 161, 162, 163, 164

were read on this motion to/for

INJUNCTION/RESTRAINING ORDER

MASLEY, J.:

This action arises from certain disputes surrounding a New York City bar and restaurant, operated by plaintiff 268 West Broadway, LLC (Company), of which plaintiff Jeremy Casilli, defendant Shaul Natan, and defendant Nadov Cohen are the sole Managing Members under the Company's amended operating agreement (Operating Agreement) (see NYSCEF Doc. No. 151). Plaintiffs' prior motion for a preliminary injunction was granted by order of this court, dated June 9, 2017 (NYSCEF Doc. No. 142 [Oing, J.]), and a temporary receiver was appointed by order, dated December 20, 2017 (Receiver Order) (NYSCEF Doc. No. 143). Defendants then moved, in February 2018, to vacate the Receiver Order, but that motion was permitted to be withdrawn on April 11, 2018 (see NYSCEF Doc. No. 135).

Subsequent to withdrawing their motion to vacate the Receiver Order, defendants attempted to notice two membership meetings at which to vote on agenda

items, including whether the Company should file for Chapter 11 bankruptcy. As a result, plaintiffs now move, by order to show cause dated April 26, 2018, for further injunctive relief. Oral argument was held on April 26, 2018 and May 3, 2018.

Meeting Notice and the Amended Notice

On April 24, 2018, certain plaintiffs received from defendants a "Notice of Emergency Member Meeting" (Meeting Notice) that purported to schedule a meeting at which the agenda would include: whether to remove (without further order of this court) the temporary receiver, Jeffrey Zegen (Receiver); whether to retain outside counsel to file for Chapter 11 bankruptcy on behalf of the Company if the receivership "is not reversed"; and whether to adopt buy-out procedures to enable certain members to buy out others "to eliminate the current internal strife" (NYSCEF Doc. No. 145). Following oral argument on April 26, 2018, defendants issued an "Amended Notice of Emergency Member Meeting" (Amended Notice), the agenda of which was identified as: filing a Chapter 11 bankruptcy proceeding on behalf of the Company; retaining counsel to file for bankruptcy; and adopting buy-out procedures (NYSCEF Doc. No. 155).

Plaintiffs filed this motion after they became aware of the of Meeting Notice, and now seek an order: (1) restraining defendants from holding the "emergency general member meeting"; (2) restraining defendants from contacting any employees of the Company; (3) restraining defendants from commencing a Chapter 11 bankruptcy proceeding on behalf of the Company; (4) awarding plaintiffs attorney's fees; and (5) "[a]ny other relief as this Court may deem fair and equitable" (4/26/18 order to show cause [NYSCEF Doc. No. 148]).

The Meeting Notice and Amended Notice were addressed at oral argument in April and May 2018, respectively. Following argument on May 3, 2018, the court requested that the parties further brief the following issues: (a) whether the emergency meeting notices issued by defendants are defective under the Operating Agreement for being issued without first conducting a meeting with a quorum of the Managing Members; and, (b) if the Operating Agreement does not provide a mechanism for resolving a deadlock of the Managing Members, whether a provision of the New York Limited Liability Company Law (LLC Law) may be applied to fill the gap in the Operating Agreement.

The Relevant Provisions of the Operating Agreement

Section 8.2 of the Operating Agreement requires that matters set forth in Schedule 8.2—which include involuntary and voluntary bankruptcy proceedings—must be submitted to all members of the Company for a vote; however, presentation of such matters “must be recommended by the” Board of Managers (NYSCEF Doc. No. 145). Under section 3.1 of the Operating Agreement, the Board of Managers (Board) consists of Casilli, Natan, and Cohen. The Board may recommend a general meeting of all members for matters contemplated in Schedule 8.2 once a majority of the Board so vote at a Board meeting held with a quorum of the Board present (Board Meeting). A quorum of the Board sufficient to constitute a Board Meeting requires, “[t]he presence of all . . . Managers” (*id.* § 3.1 [g]). Thus, under the plain, unambiguous language of the Operating Agreement, the Meeting Notice and Amended Notice are defective inasmuch as they were issued to address matters contemplated in Schedule

8.2 without first holding an authorize Board Meeting; if the full Board was not present at a Board Meeting regarding those matters, the requisite quorum was lacking.

The parties agree that the Operating Agreement contains no contingency provisions to address or resolve the situation in which a Board Manager refrains from attending a Board Meeting, and, by doing so, prevents a quorum from being reached and blocks the Board's ability to transact certain business.

Discussion

In further briefing the issues identified above, plaintiffs contend that the LLC Law does not fashion a resolution for the stalemate engendered by a Manger's refusal to attend a Board Meeting that is unaddressed in the Operating Agreement. Specifically, plaintiffs note that, while there are provisions of the LLC Law addressing meetings, sending notice to members, and reaching a quorum, each of the provisions impose default mechanisms that apply only "[e]xcept as provided in the operating agreement"; further, none address procedures for resolving a deadlock of board members, or a stalemate in achieving a quorum (e.g. LLC §§ 403-407, 418-419) . Thus, plaintiffs assert that none of those provisions can be applied here to delineate the process by which the Board can transaction business matters in Schedule 8.2 absent a quorum.

Defendants' memorandum of law is untimely as it was not submitted until more than 11 days after the deadline imposed by the court had expired; defendants and their counsel are admonished that they will be sanctioned or otherwise penalized if this conduct continues.

In any event, defendants argue that the Operating Agreement is inadequate with regard to resolving the stalemate, thus, the LLC Law must be applied to fill the gap.

Specifically, defendants contend that Casilli, in declining to appear for a Board Meeting, is in violation of his fiduciary duty as a Manager, and, thus, the court should impose the default provision in LLC § 403, which states that limited liability companies shall hold meetings of members annually. Defendants also argue that, because the quorum provisions of the Operating Agreement are “unworkable,” and should be deemed waived or stricken; instead, LLC § 404 should be applied to establish that a quorum of the Board would be attained with the presence of a majority of the Board. The court notes that defendants have not demonstrated that a Board Meeting was ever scheduled or notice of such a meeting was ever properly delivered to Casilli; thus, defendants’ argument in that regard is conjecture, at best.

The plain, unambiguous language of the LLC Law provisions identified by the parties establish default mechanisms applicable to limited liability companies in the absence of an operating agreement or where the operating agreement fails to specify what procedures are to be employed in a given circumstance. None of the sections identified by the parties address resolution of a stalemate amongst board members, or an inability to reach a quorum to take action.

Furthermore, the Operating Agreement here does not contain conflicting or inconsistent provisions. It is clear: a quorum of the Board is had when all three Managers are present. There are no mechanisms for forcing a Manager to appear for a Board Meeting, or for circumventing an inability to obtain a quorum. Importantly, defendants have not made a formal application for any relief, let alone moved the court to reform the Operating Agreement. The court declines to adopt defendants’ reasoning and apply default LLC Law provisions where, as here, the Operating Agreement is plain

and unambiguous in spite of its lack of certain contingency procedures, especially where defendants have not established that a Board Meeting was noticed, let alone convened, but the necessary quorum was not attained due to one Managing Member's refusal to attend.

Further, the court declines to grant plaintiffs' motion inasmuch as they ask for an order enjoining the Board from holding a meeting. As the Meeting Notice and Amended Notice were defective absent a quorum, the Board is not authorized under the Operating Agreement to put the above-listed agenda items before the general members for a vote. Accordingly, the relief sought by plaintiffs is, at present, superfluous, and the court declines to needlessly rule as to whether and to what extent it shall exercise its discretionary equitable powers. However, plaintiffs' motion is granted, in part, to the extent that the stay imposed by the court on the record at the April 26, 2018 proceeding, and as contemplated above in this decision, shall remain in effect: the Company shall not hold a meeting until such meeting is properly noticed under the Operating Agreement (*see* 04/26/2018 tr at 16-20; *see also generally* 05/03/2018 tr [continuing stay of "emergency meeting" in Amended Notice]).

Additionally, defendants agreed on the record of the May 3, 2018 proceeding to refrain from contacting/communicating with the Company's employees; accordingly, that prong of plaintiffs' motion is granted on consent (05/03/2018 tr at 25-27) and pursuant to the court's Receiver Order, any violation of which may result in the issuance of an order of contempt and all associated penalties, as appropriate.

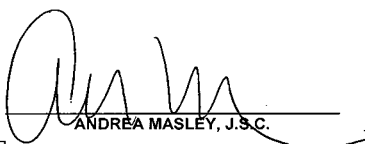
Accordingly, it is

ORDERED that plaintiffs' motion is granted in part, and the stay imposed on the record of the April 26, 2018 hearing, and continued at the May 3, 2018, continues, and defendants shall not hold a general membership meeting until such time as such meeting is properly noticed under the Operating Agreement; and it is further

ORDERED that plaintiffs' motion is granted in part, on consent, to the extent that defendants shall not communicate with the Company's employees while the Receiver is in place; and it is further

ORDERED that the parties shall appear for a conference at Room 242, 60 Centre Street, on 11/13/18 at 12:30 a.m./p.m.

10/12/2018
DATE


ANDREA MASLEY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE