SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JEREMY CASILLI, JON FOSTER, DIANE ROSENCRANTZ, DC YORK RESTAURANT, LLC, MICHAEL MORRIS, and 268 WEST BROADWAY, LLC, Plaintiffs,	Hon. Andrea Masley
- against -	Index No. 652545/2017
SHAUL NATAN and NADOV COHEN, Defendants.	

DEFENDANTS' MEMORANDUM OF LAW REGARDING COURT'S POWERS TO INVOKE LIMITED LIABILITY COMPANY LAW TO ADDRESS VOTING STALEMATE

PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted by Shaul Natan and Nadov Cohen (collectively, "Defendants") in response to the Court's request for analysis and authority relating to the question as to what happens if the quorum provisions in the Operating Agreement of 268 West Broadway LLC (the "Company") are not functioning because of internal conflicts (i.e., what powers does the Court have to invoke the provisions of the N.Y. Limited Liability Company Law?).

The Operating Agreement

The Company is governed by an Amended Operating Agreement, dated August __, 2011 (the "Operating Agreement"), a copy of which is attached hereto for the Court's ready reference as Exhibit A. Pursuant to the Operating Agreement, the Company is to be managed by a Board of Managers comprised of three specified Managers [See Operating Agreement Section 3.1(a)], to wit: Jeremy Casilli, Shaul Natan and Nadov Cohen. [See Operating Agreement Section 3.1(c)].

The Board of Managers can act upon the majority vote of the Managers. [See Operating Agreement Section 3.1(g)]. However, any meeting of the Board of Managers, before it can act by a majority, requires a quorum of all three Managers attending. [See Operating Agreement Section 3.1(g)].

While any one Manager is empowered to call a meeting of the Board upon written notice to the others [See Operating Agreement Section 3.1(e)], all three Managers must attend the meeting for quorum purposes, although a majority vote of two Managers controls decision making. [See Operating Agreement Section 3.1(g)]. Thus, by not attending a duly scheduled meeting, Jeremy Casilli can stop the Company from conducting any business through Board action. Mr. Casilli has refused to attend Board meetings to prevent a vote on his removal as President of the Company, which is in the discretion of the Board to do by majority vote with or without cause. [See Operating Agreement Section 3.1(c)].

The inability to convene a quorum now renders the Operating Agreement a functional nullity since the Operating Agreement contains no provision by which this type of stalemate can be broken. Dissolution of the Company is a blunt and unsatisfactory end, but even with dissolution, the Board still must first call a meeting of all Members to consider such a matter. [See Operating Agreement Section 8.2 and Schedule 8.2]. Yet, to call a meeting for dissolution, the Board must have a quorum of all Managers. Thus, quite ironically, the Company cannot even dissolve itself and end the impasse because it cannot convene a necessary quorum of the Board of Managers to vote on such a recommendation to the members for purposes of Section 8.2 of the Operating Agreement.

The question then appropriately posed by the Court is, what is to be done? The answer should be to resort to the Limited Liability Company Law to end the stalemate. It is the

Legislature's default mechanism where the parties have provided themselves no functioning alternative for corporate governance.

The Limited Liability Company Law Should Be Applied

The Legislature adopted the Limited Liability Company Law in 1994 to establish the law and governance of limited liability companies when the parties failed to adopt their own. The law codifies "default" provisions for situations where a company fails to have an operating agreement of its own or where, as here, an operating agreement adopted by a company fails to adequately provide for particular circumstances. *In the Matter of Spires v. Lighthouse Solutions LLC*, 4 Misc.3d 428, 778 N.Y.S.2d 259 (Sup. Ct. Monroe Co. 2004) ("In the event there is no formal written 'Operating Agreement' of the company, or such agreement does not address certain business matters, then there are numerous sections in the statute that set forth default provisions applicable to the limited liability company.").

Here, the absence of a viable mechanism to conduct Board meetings renders the Operating Agreement inadequate, since it does not contain any provision addressing the precise situation of what happens when no quorum can be convened. This stalemate leads the Court back to provisions of the Limited Liability Company Law in order to break the stalemate.

Application of the Limited Liability Company Law to the Company

The analysis starts with the recognition that there is a duty of directors and members to attend Board meetings. *See Gearing v. Kelly*, 15 A.D.2d 219, 222, 222 N.Y.S.2d 474, 477 (1st Dep't 1961) ("Clearly, Mrs. Meachem, who as a director had a duty to attend meetings, should not be allowed to gain an advantage by a deliberate breach of that duty."), *aff'd*, 11 N.Y.2d 201, 227 N.Y.S.2d 897 (1962); *Board of Managers v. Seligson*, 2009 WL 8392412 (Sup. Ct. N.Y. Co. Oct. 8, 2009) (court directed defendant Board member to attend Board meeting, while noting that

the "[f]ailure to attend may very well constitute a failure to meet the fiduciary duties of" a member); *Capellan v. Jackson Avenue Realty, LLC*, 2011 WL 11077456, at 6 (Sup. Ct. Queens Co. Oct. 7, 2011) (refusing to dismiss claim for breach of fiduciary duty arising from refusal by members of Board of Managers to attend meetings as part of scheme to avoid quorum from being obtained).

Accordingly, by absenting himself merely because he does not like the agenda, Mr. Casilli has committed a breach of his fiduciary duty to attend Board meetings.

With the provisions of the Operating Agreement providing no alternative procedure to work around Mr. Casilli's abrogation of his fiduciary duty to tend to the Company's affairs, the provisions of the Limited Liability Company Law should be applied. Section 403 of the Limited Liability Company Law dictates that "a limited liability company shall hold meeting of members annually." The Company has not had a meeting of its membership in years. The Court should direct one to occur immediately.

The Operating Agreement provides that all three Managers must be present for a quorum. The quorum threshold is unattainable due to the internal disputes among the Managers and Mr. Casilli's breach of his fiduciary obligations. This effectively has shut the Company down, because the quorum provisions of the Operating Agreement are unworkable, and they should be superseded and the Operating Agreement read as if no provision for quorum is established. *See New York Electrical Workers' Union v. Sullivan*, 122 A.D. 764 (1st Dept. 1907) ("I reach the conclusion that ... if the by-laws in question are invalid by reason of their inconsistent and conflicting provisions ... then we must be governed by ... the membership corporation law.").

Limited Liability Company Law Section 404 should be applied to the extent of establishing a quorum of two Managers where an act of Managers is sought. The applicable

statute provides as follows: "[W]here a specified item of business is required to be voted on by a class of members voting as a class, a majority in interest of the members of such class shall constitute a quorum for the transaction of such specified item of business." Notably, Section 408 of the Limited Liability Company Law, while providing that management of the company is to be by "the affirmative vote of a majority of the managers," does not establish a distinct quorum requirement for Managers as opposed to members. Hence, majority vote should control.

CONCLUSION

For the foregoing reasons, the Court is respectfully asked to supersede the provisions of the Operating Agreement that are unworkable, and utilize the default provisions of the Limited Liability Company Law in their place.

Dated: New York, New York
May 23, 2018

Goldberg Weprin Finkel Goldstein LLP
Attorneys for the Defendants

By: Kevin J. Nash, Esq.
Matthew Hearle, Esq.

1501 Broadway – 22nd Floor
New York, New York 10036
(212) 221-5700