

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

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

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HARVEY RUBIN,

Plaintiff,

- v -

JAMES BAUMANN, WINN WINN ASSET MANAGEMENT LLC, 330
WEST 85, LLC

Defendant.

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INDEX NO. 653707/2015
MOTION DATE N/A
MOTION SEQ. NO. 006

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 006) 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149 were read on this motion to/for JUDGMENT - SUMMARY

In this dispute concerning the management and sale of property held by defendant 330 West 85, LLC (the "LLC"), defendants move pursuant to CPLR 3212 seeking summary judgment dismissing plaintiff's only remaining cause of action in the complaint in which he alleges that defendant Bauman improperly excluded him from managing the property.

In his affidavit in support of the motion, defendant Baumann states that approximately 18 years ago, he and plaintiff, as the sole members and managers of the LLC, made the decision to appoint defendant WinWin Asset Management LLC ("WinWin"), a company owned by defendant Baumann, as the manager of the property. Affidavit of James S. Baumann sworn to on February 27, 2019, ¶ 25. Further, defendants argue that the LLC's operating agreement does not discuss the appointment or replacement of managing agents for the property and as such, the default provisions of the Limited Liability Company Law govern. Baumann Aff., Exh. L. As such, defendants argue that § 408(b) of the Limited Liability Company Law is applicable and requires an affirmative vote of a majority of the managers to change the manager for the property. Since defendant Bauman, who controls 50% of the votes in managing the LLC,

opposes changing the management company for the property, defendants argue that plaintiff is not entitled to this relief.

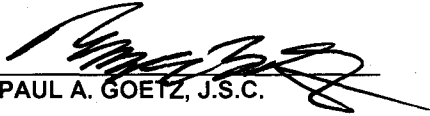
Even if the defendants' argument is correct, and a majority vote is required to replace WinWin as the management company for the property, then a majority vote is also required to keep WinWin as the management company for the property as this is also a major management decision for the LLC. Indeed, defendants seems to acknowledge this in their papers by stating that plaintiff's approval was required in order to appoint WinWin as the manager of the property. Thus, under the defendants' interpretation of the operating agreement, the parties are deadlocked as to this fundamental decision regarding the LLC's operations.

Moreover, contrary to the defendants' argument, the LLC agreement is not silent but is ambiguous as to whether a majority vote is required in order the change the management for the property. Paragraph 3.3.2 requires majority approval for the following actions: (i) sale or net lease of the property; (ii) dissolution of the company; and (iii) admission of a new member. Baumann Aff., Exh. L, ¶¶ 1.1.16 (defining "Required Approval), 3.3.2. Thus, it is arguable that under the maxim of *expression unius est exclusion alterius*, the parties intentionally omitted this management decision from requiring majority approval. See *Quadrant Structured Products Co. v. Vertin*, 23 N.Y.3d 549, 560 (2014). This interpretation is further supported by paragraphs 3.3.3 and 3.3.5 of the operating agreement, which provide that each manager has the authority to execute contracts and commitments of every kind and nature on behalf of the LLC. Baumann Aff., Exh. L, ¶¶ 3.3.3 & 3.3.5. Accordingly, it is

ORDERED that the motion is denied.

6/10/19

DATE


PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE