SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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PETER LENGYEL-FUSHIMI,

Plaintiffs, Decision and order

- against - Index No. 512764/2021

ANTHONY BELLIS, ZACHARY KINNEY, and KINGS COUNTY BREWERS COLLECTIVE, LLC,,

July 15, 2021

Defendants,

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §6301 seeking a preliminary injunction staying the defendants from taking any action without the participation of the plaintiff and from excluding the plaintiff from the management of the company. The defendants have cross-moved pursuant to CPLR §3211 seeking to dismiss the complaint on the grounds it fails to state any cause of action. The motions have been opposed respectively. Papers were submitted by the parties and arguments held and after reviewing all the arguments this court now makes the following determination.

In 2012 the plaintiff and defendant Anthony Bellis formed Kings County Brewers Collective, LLC [hereinafter 'KCBC']. Zachary Kinney joined at a later date and each of them contributed $33,000. An operating agreement was executed between the parties on January 15, 2014. Further, the owners attracted twenty-four investors who became non-managing members of KCBC.

The plaintiff alleges that disagreements arose between the managing members and the other managing members changed the operating agreement in violation of the operating agreement itself. Specifically, the purported amendment downgrades the plaintiff's status from a Class A member to a Class D member. The repercussions of this are, the plaintiff was terminated as a manager and an officer of the Company, he has been denied access to corporate books and records, and his entitlement to any further income has been stopped. The plaintiff instituted this lawsuit and has asserted the defendants downgraded plaintiff's membership share in violation of the operating agreement. The complaint alleges causes of action for a declaratory judgement, breach of contract, breach of implied covenant of good faith and fair dealing, a violation of New York Limited Company Law §409 and breach of fiduciary duty. The plaintiff has now moved seeking to enjoin the defendants from taking any further action that would further dilute his share and for a determination the dilution that occurred was improper. The defendants oppose the motion arguing that an injunction is not proper and move to dismiss the lawsuit.

Conclusions of Law

CPLR §6301, as it pertains to this case, permits the court to issue a preliminary injunction "in any action... where the plaintiff has demanded and would be entitled to a judgement

restraining defendant from the commission or the continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (id). A party seeking a preliminary injunction "must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of the injunction and a balance of the equities in its favor" (Nobu Next Door, LLC v. Fine Arts Hosing, Inc., 4 NY3d 839, 800 NYS2d 48 [2005], see also, Alexandru v. Pappas, 68 Ad3d 690, 890 NY2d 593 [2d Dept., 2009]). Further, each of the above elements must be proven by the moving party with "clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010]).

Considering the first prong, establishing a likelihood of success on the merits, the plaintiff must prima facie establish a reasonable probability of success (Barbes Restaurant Inc., v. Seuzer 218 LLC, 140 AD3d 430, 33 NYS3d 43 [2d Dept., 2016]). In this case the basis for the injunction is the argument the defendants have breached the agreement in many significant ways. An examination of the operating agreement dated January 15, 2014 is therefore necessary. Article 1 of the Operating Agreement defines a member as anyone "who acquires Membership Interests, as permitted under this agreement, and who becomes or remains a Member, either Class A, B or C (id). Article 10.1 of the operating agreement states that the agreement "shall not be modified or amended in any respect except by a written instrument

executed by all of the Members" (id). That provision necessarily requires a unanimous consent to amend the agreement. Further, Article 4.1 states that "the business of the Company shall be managed by the Class A Members. In the event of a dispute between Members, final determination shall be made by a vote of the majority of the Class A Members (unless a greater percentage is required in this Agreement or under New York law). Any Class A Member may bind the Company in all matters in the ordinary course of business" (id). Further, Article 6.1 states that "Class A Members will have sole voting rights on Company day to day operations and shared voting rights with Class B Members on Merger & Acquisition decisions. Class A Members shall have the right and power to vote on all matters with respect to which this agreement or New York law requires or permits such Member action. Voting shall be based on Class A Membership Interests. Unless otherwise stated in this Agreement or under New York law, the vote of the Class A Members holding a majority of the Class A Membership Interests shall be required to approve or carry an action" (id). Thus, Article 4.1 and Article 6.1 deal with the running of the business, the day to day operations and matters in the ordinary course of business. However, Article 10.1 concerns amendments to the agreement, clearly not something which happens on a daily or frequent basis. Thus, there is no conflict between these provisions and they are harmonized as noted. The defendants assert that as Class A members they maintained a

majority and had the right to change the status of the plaintiff from a Class A member to a Class D member, with no voting right at all, based upon the authority granted in Article 4.1 and Article 6.1. However, as noted, this activity was not in the ordinary course of business and was not a daily activity. Rather, it was an amendment to the agreement which required the consent of all members. Any other reading of the operating agreement renders Article 10.1 meaningless, an untenable outcome. Thus, the entire action taken by the defendants as Class A members was without authority. Consequently, the court only needs to consider the original operating agreement. That agreement requires the approval of all members to make such significant changes to the ownership and management structure. While that requirement appears cumbersome there is no reason not to enforce its simple and straightforward language. Therefore, there was no basis to exclude the plaintiff without a vote of all members. Thus, the plaintiff has presented a likelihood of success on the merits.

In order to satisfy the second prong of irreparable harm it must be demonstrated that monetary damages are insufficient (Autoone Insurance Company v. Manhattan Heights Medical P.C., 24 Misc3d 1229(A), 899 NYS2d 57 [Supreme Court Queens County, 2009]). The harm the plaintiff asserts is not about money damages *per se* but about the management and participation in a business he started which cannot be quantified in any dollar

amount. Moreover, at this juncture the balance of the equities favors the plaintiff. Consequently, the plaintiff has satisfactorily presented sufficient evidence necessitating an injunction. Therefore, the motion seeking a preliminary injunction enjoining the defendants is denied is denied. Based upon the above analysis there are surely questions of fact regarding the activities of the defendants. Therefore, the motion seeking to dismiss the lawsuit is denied.

So ordered.

ENTER:

DATED: July 15, 2021
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC