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

PRESENT: Kornreich Justice PART 54m

Robert C. Friedman

- v -

Bridge Capital Corp

INDEX NO. 603851/09

MOTION DATE 1/7/10

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this ~~motion to~~/for OSC preliminary injunction

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answering Affidavits — Exhibits	4 — 8
Replying Affidavits	9

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/28/10

JUSTICE SHIRLEY WERNER KORNREICH J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

ROBERT G. FRIEDMAN and BERNARD FRIEDMAN, individually and in the right and on behalf of 257/117 REALTY, LLC, and 257/117 REALTY, LLC in its own right,

Plaintiffs,

-against-

BRIDGE CAPITAL CORP. and STANLEY WOLFSON,

Defendants.

----------X

Index No.: 603851/2009

BRIDGE CAPITAL CORP.,

Plaintiff,

-against-

ROBERT G. FRIEDMAN and BERNARD FRIEDMAN,

Defendants.

----------X

Index No. 650663/2009

DECISION and ORDER

KORNREICH, SHIRLEY WERNER, J.:

These are related disputes concerning the management and legal status of 257/117 Realty, LLC (the Company). The parties have brought competing motions for preliminary injunction and other relief. The first is made on Order to Show Cause under Index No. 603851/09 by plaintiffs and current managers Robert G. Friedman and Bernard Friedman (individually and derivatively on behalf of the Company) and the Company on its own behalf. The second is made on cross-motion under both Index No. 603851/09 (Friedman v Bridge) and Index No. 650663/09 (Bridge v Friedman) by Bridge Capital Corp. (Bridge) and Stanley Wolfson (Wolfson), its President and sole shareholder. That motion also seeks to dismiss the Friedmans' complaint or, alternatively, to consolidate the actions.

I. Background

Unless otherwise stated, the following facts are taken from the parties' pleadings, affidavits of Wolfson and Robert Friedman and attached documents, including the Company's Operating Agreement.

257/117 Realty, LLC was formed on June 16, 2005 for the purpose, *inter alia,* of developing a high-class residential condominium building with forty-seven luxury units at 257 West 117th Street in Manhattan (the Project). Initially, Bridge Capital Corp. (Bridge) was the sole member of the Company. Stanley Wolfson is the President and sole shareholder of Bridge.

Within a month of forming the Company, Bridge assigned 24.95% of its Company interest to each Robert G. Friedman and Bernard Friedman, experienced real estate developers, and retained 51.1% for itself. Bridge and the Friedmans then entered into a July 13, 2005 Amended and Restated Operating Agreement (the Agreement), which contains the following pertinent provisions:

> 3.1 Management of the Company. Except as otherwise reserved to the Members, the management, operation and control of the Company shall be vested solely in the Managers. The Managers of the Company shall be RGF and BF [the Friedmans].
>
> 3.2 Authority of the Manager Except for any Major Decision or as expressly provided in this Agreement, ... the Managers shall have all necessary and appropriate powers to carry out the business of the Company ....
>
> 3.3 Major Decisions. The matters set forth in subsections (a) through (g) below (each, a "Major Decision") may be taken by the Managers only with the approval of all members ...
>
> * * *
>
> (f) The taking of any action to voluntarily dissolve, terminate or liquidate the Company or sell the Company Property other than pursuant to the Condominium Plan; ....
>
> (g) The material amendment or modification of this Agreement.
>
> 3.10 Meetings. Meetings of the Members shall be held only at the request of a Member and may be for any purpose.

* * *

9.1 Events of Dissolution. The Company shall be dissolved upon the happening of any of the following events:

(a) The happening of any other event causing the dissolution of the Company under the Law [defined in § 1.34 as New York Limited Liability Company Law]; or

(b) The expiration of its term. ....

Additionally, Section 3.11 of the Agreement, titled "Deadlock," provides an arbitration option on election by any member to resolve "a bona fide dispute as to whether any matter is a Major Decision or whether any Major Decision should be approved by the Members, (a "Deadlock")." A Member's right to elect arbitration is made contingent on his issuing a "Deadlock Notice." The members are then required to meet, after which any member may elect arbitration if the matter is not resolved.

On November 20, 2009, Bridge filed a Complaint against the Friedmans in New York Supreme Court, Index No. 506631/09 (Bridge Complaint), which was amended in December 2009. The amended complaint includes claims for breach of fiduciary duty, "diversion of opportunity" and negligence, and seeks both injunctive and monetary relief. Among the allegations made in the Bridge Complaint are that the Friedmans, in developing the property, failed to perform the work in a good and workmanlike manner and overcharged, hired a company wholly owned by the Friedmans at an excessive salary to serve as the real estate broker, refused to provide accounting information to Bridge upon request, and diverted a Company business opportunity for their own gain.

By letter dated and served November 29, 2009, Bridge notified the Friedmans that it had voted to remove them as managers of the Company pursuant to Limited Liability Company Law

(LLCL) 414, and substituted Wolfson as manager in their stead. The letter also warned that failure by the Friedmans to cease management activities "will result in swift legal action against you."

In a letter dated December 15, 2009, Robert Friedman rejected termination of the Friedmans' management. In a subsequent letter dated December 22, 2009, Bridge notified the Friedmans of its decision, effective immediately, to dissolve the Company and appoint Wolfson as liquidator pursuant to LLCL 701(3) and Operating Agreement Article 9, § 9.1(a). The Friedmans, as individuals and on behalf of the Company, in turn filed the December 23, 2009 Order to Show Cause (OSC), now before the court, and a complaint against Bridge and Wolfson under Index No. 603851/09 (Friedmans' Complaint) claiming injunctive and declaratory relief, breach of the operating agreement and breach of fiduciary duty and the duty of loyalty. The claims characterize Bridge's and Wolfson's November 29 letter removing the Friedmans as a "coup attempt" in violation of the Agreement, and also cite Wolfson's unauthorized personal use of a unit at the Project and actions he undertook while acting as the manager.

The court (Kapnick, J.) set an argument date of January 7, 2010 and issued a temporary restraining order against Bridge and Wolfson, restraining them from dissolving or liquidating the Company, from appointing Wolfson as liquidator, and from terminating any existing agreements with third-parties on behalf of the Company. The court did not, as requested by the Friedmans, restrain Wolfson from acting as the Company's manager and carrying out related duties. Bridge and Wolfson filed a cross-motion dated January 5, 2010, in which they oppose the OSC and further seek a preliminary injunction against the Friedmans and dismissal of the Friedmans' Complaint pursuant to CPLR 3211(a)(1), (3), (4) and (7).

The court (Kornreich, J.) heard argument on January 7, 2010 and made the following rulings on the record: (1) The Friedmans will continue as the managers of the Company until further order of the court; (2) Bridge and Wolfson are to be provided full access to the books and records of the Company; (3) Wolfson may remain in the unit he currently occupies on condition that he pays all pending and future, but not retroactive, utility bills, taxes and common charges; (4) The Friedmans shall engage an independent real estate broker with whom they are not affiliated, unless Wolfson agrees otherwise; and (5) Wolfson shall turn over to the Friedmans all rent that he collected as the purported manager of the Property, and the funds shall be deposited into the account of the Company for business purposes. The court further joined the actions for discovery and trial, ordered a preliminary conference forthwith and continued the previously issued temporary restraining order. It, also, directed the parties to court ADR.

II. *Discussion*

A. *Preliminary Injunction*

A moving party must establish the following three elements to obtain a preliminary injunction under CPLR 6301: (1) the likelihood of success on the merits of the underlying cause of action; (2) irreparable injury in the absence of the preliminary injunction; and (3) a balancing of the equities in plaintiff's favor. *Nobu Next Door, LLC v Fine Arts Hous., Inc.,* 4 NY3d 839, 840 (2005); *Second on Second Café v Hing Sing Trading,* 66 AD3d 255, 264 (1st Dept 2009).

The Friedmans and the Company ask the court to enjoin Bridge and Wolfson from managing or dissolving the Company and from interfering in the Friedmans' management of the Company. They also request an order requiring that Bridge and Wolfson adhere to the Operating Agreement in which the Friedmans are named as managers, arguing that they agreed to accept

less than 50% of the company with the proviso that they manage the venture. They further request that Bridge and Wolfson be directed to turn over all proceeds collected on behalf of the Company. Specifically, they argue: (1) The Agreement makes the Friedmans managers for an unlimited term; (2) Removing or changing the managers is a "Major Decision" requiring approval of all members under §3.3(g) or arbitration because it constitutes a "material amendment or modification of the Agreement"; (3) Voluntary dissolution of the Company is a Major Decision requiring approval of all members; (4) Even were the LLCL controlling, Bridge and Wolfson failed to follow the LLCL procedure; and (5) Bridge and Wolfson's actions threaten the interests of the Company and of the Friedmans.

In a cross-motion, Bridge and Wolfson oppose and ask the court to enjoin the Friedmans from acting as the managers, and to sanction Bridge's voluntary dissolution of the Company. They argue: (1) The Friedmans lack standing to seek an injunction because they were not managers when they filed the complaint and the Agreement vests the authority to bring an action on the Company's behalf with the managers; (2) Bridge was authorized to remove the Friedmans as managers under LLCL 413-414, which controls because the Agreement neither contains a provision making the designated managers' term unlimited or a procedure for removal of managers; (3) LLCL 407 authorized Bridge to take action without giving notice or holding a meeting; and (4) LLCL 701 and Article 9.1(a) of the Agreement authorized Bridge, as the holder of the majority interest, to voluntarily dissolve the Company.

(i) *Likelihood of Success on the Merits*

The showing of a likelihood of success on the merits does not require a certainty of success. *Doe v Dinkins*, 192 AD2d 270, 276 (1st Dept 1993); *Bingham v Struve,* 184 AD2d 85,

88 (1st Dept 1992); *Babylon v John Anthony's Water Café Inc.,* 137 AD2d 791, 792 (2d Dept), appeal denied, 73 NY2d 703 (1988). The mere fact that there may be questions of fact for trial does not preclude a court from granting a preliminary injunction. *See, e.g., Karabatos v Hagopian,* 39 AD3d 930, 931 (3d Dept 2007). It is enough if the moving party makes a *prima facie* showing. *See Tucker v Toia,* 54 AD2d 322, 326 (4th Dept 1976).

To resolve the Friedmans' application, the court must determine whether the Agreement precluded Bridge from removing the Friedmans as managers or whether LLCL 414 was controlling. LLCL 414 provides:

> Except as provided in the operating agreement, any or all managers of a limited liability company may be removed or replaced with or without cause by a vote of a majority in interest of the members entitled to vote thereon.

An LLC's operating agreement is the basic document that sets forth the rights and duties of the members and managers among themselves. *TIC Holdings, LLC v HR Software Acquisitions Group, Inc.,* 301 AD2d 414, 415 (1st Dept 2003); LLCL 417. Whether an agreement is unambiguous is an issue of law for the court; the agreement should be enforced according to the plain meaning of its terms. *R/S Assocs. v N.Y. Job Dev. Auth.*, 98 NY2d 29, 32 (2002); *Rahman v Park*, 63 AD3d 812, 813-4 (2d Dept 2009). In determining whether an agreement is ambiguous, the court should "'examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought.'" *RM Realty Holdings Corp. v Moore*, 64 AD3d 434, 436 (1st Dept 2009).

The Friedmans assert that the unambiguous language of the subject operating agreement expressly made them managers of the Company for an unlimited term and that a change in the identity or number of managers could not be made without amending the Agreement on approval by all members. The Friedmans have made a *prima facie* showing that their position is consistent with the Agreement as a whole. *See generally Chester Music Ltd. v Schott Musik Int'l GmbH & Co.*, 4 AD3d 75, 81 (1st Dept 2003) (explaining general principles of contract interpretation). Throughout the Agreement, managers are referred to in the plural. Additional evidence on summary judgment or at trial could establish there is an ambiguity in the Agreement and that it should be construed otherwise, but for now the Friedmans have met their burden.

Indeed, LLCL 413(b) recognizes that LLCs may appoint managers for lifetime terms: "Each manager shall hold office and have the terms (which may be unlimited) and responsibilities accorded to him...." The Agreement, which contains a merger clause, defines the term "Manager(s)" as "Person(s) appointed by the Members in accordance with Section 3.1." § 3.1 of the Agreement explicitly states that "the management, operation and control of the Company shall be vested solely in the Managers. The Managers shall be RGF and BF [the Friedmans]." It also gives the managers control of the Company "[e]xcept as otherwise reserved to the Members." Again, throughout the Agreement, when managers are mentioned, the term is plural, a fact in keeping with §3.1. Moreover, as noted by Bridge, the Agreement contains no provisions for the appointment of new managers or removal of the managers.

The lack of any language in the Agreement contemplating a change or removal of managers is compelling. It prevents the triggering of LLCL 414, the default mechanism for changing or removing managers. *Cf. Ross v Nelson*, 54 AD3d 258 (1st Dept), *appeal dismissed,*

11 NY3d 906 (2009). The agreement in *Ross*, like the Agreement here, did not contain a specific provision for removal of managers. The agreement did, however, contain a provision allowing dissolution of the LLC *on the expulsion of a manager*. *Id.* at 259 (emphasis added). The *Ross* Court found that because the agreement lacked any description of how that removal could be triggered or effected, the gap would be filled by LLCL 414. *Id.* LLCL 414 would not have kicked in, however, if the *Ross* Court had not found the agreement allowed for a change in managers in the first place.

Since the Agreement here, on its face, unambiguously appoints the Friedmans to an unlimited term as managers, at this point, LLCL 414's default mechanism does not come into play. Thus, any change in the managers appears to require a modification of the Agreement. § 3.3 specifically provides that a modification to the Agreement is a Major Decision, which requires approval of all the members. That is not what occurred here. Bridge's November 29th letter did not legally effect a removal of the Friedmans as managers of the Company.

The lack of unanimous membership approval also undermines Bridge's attempted voluntary dissolution of the Company under LLCL 701. Under §§ 3.3 and 3.11 of the Agreement, the manager needs the approval of all the members to effect a voluntary dissolution. The Friedmans have shown a likelihood of success on their claim that Bridge's December 22nd letter did not legally effect a voluntary dissolution of the Company.

Bridge's and Wolfson's cross-motion for a preliminary injunction is denied. At the outset, they submitted their request as a cross-motion in the Friedmans' action, in which they are defendants. Only plaintiffs are authorized to seek a preliminary injunction. *See* CPLR 6301, 6311, 6312. CPLR 6301 authorizes a preliminary injunction in actions where defendant's

conduct threatens to destroy plaintiff's rights in the subject of the plaintiff's action, or in actions where the plaintiff has sought a permanent injunction. *See* Alexander, 1992 Supplementary Practice Commentaries, CPLR 6301, McKinney's Cons Laws of NY, Book 7B. CPLR 6312(a) refers only to motions by plaintiffs against defendants: "On a motion for a preliminary injunction the *plaintiff* shall show...."

Bridge and Wolfson could have sought a preliminary injunction on filing their own complaint, but they chose not do so, which undercuts their claim now that an injunction is necessary to maintain the status quo. Notwithstanding the inclusion, in their notice of cross-motion of the caption for their complaint against the Friedmans, the court considers their request to be an unauthorized defensive litigation tactic.

In any event, they have not met their burden to establish a likelihood of success on the merits. The court has already found that the Friedmans have made a *prima facie* showing that Bridge alone could not fire them as the Company's managers. At this preliminary stage, Bridge and Wolfson have not presented any evidence supporting a different construction of the Company's Operating Agreement. Additionally, the damages Bridge seeks under its substantive claims are those for which a monetary award would be adequate compensation, precluding injunctive relief. *See Busters Cleaning Corp. v Frati*, 180 AD2d 705, 706 (2d Dept 1992) (where plaintiff could be fully recompensed with a monetary award there was no irreparable injury); *Winkler v Kingston Hous. Auth.*, 238 AD2d 711, 712 (3d Dept 1997) ("monetary damages simply are not irreparable and are an insufficient harm to support the issuing of an injunction").

(ii) *Irreparable Injury and Balance of Equities*

A preliminary injunction is necessary to maintain the status quo pending litigation. Without relief, Wolfson and the Friedmans each will claim the right to manage the Company and Wolfson will continue with his attempt to dissolve it. The resulting chaos will jeopardize the well-being of the condo tenants, the value of the Property and the ability of the Company to do business. This is sufficient to establish irreparable injury and that the equities are tipped in the Friedmans' favor. *See, e.g., Mr. Natural Inc. v Unadulterated Food Products, Inc.*, 152 AD2d 729, 730 (2d Dept 1989) (preliminary injunction necessary to maintain status quo where "there (was) no assurance that the plaintiff (would) be able to stay in business pending trial" and was in "real danger of losing its business or suffering dissolution" if injunctive relief were not imposed). Apropos to this case, in 2008, the Supreme Court in Albany found irreparable injury would ensue without an injunction where members of an LLC intended to set in motion a process that would deny the petitioner any role in the management and affairs of the company. *Madelone v Whitten,* 18 Misc3d 1131(A) (Sup Ct Albany 2008).

The Friedmans' request for a preliminary injunction is granted and Bridge'scross-motion for a preliminary injunction is denied.

B. *Cross-Motion to Dismiss*

Bridge and Wolfson argue that the Friedmans do not have standing to sue because the Agreement vests the authority to bring an action on behalf of the Company with the managers, and they are no longer the managers. The court's grant of a preliminary injunction in the Friedmans' favor also resolves this claim. The Friedmans would have standing regardless, as

LLC members may bring derivative suits on the LLC's behalf [*Tzolis v Wolff,* 10 NY3d 100, 103-109 (2008)], and they are suing also as individuals.

Bridge and Wolfson's additional claim, that the complaint against them should be dismissed because it lacks merit, is itself without merit. They have not set forth any substantive arguments to support this claim. In any event, the Friedmans' Complaint is sufficient.

On a motion to dismiss pursuant to CPLR 3211, the court must accept the facts alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. *Morone v Morone*, 50 NY2d 481, 484 (1980); *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 (1976).

The court has already determined there is a likelihood of success on the merits of the claim against Bridge and Wolfson for preliminary injunction. The Friedmans' Complaint sets forth all of the facts necessary to warrant injunctive relief, and to support the claims for declaratory judgment, breach of contract, and breach of fiduciary duty and the duty of loyalty.

The complaint alleges a justiciable controversy, the requisite for maintaining a declaratory judgment claim. *See Travelers Ins. Co. v Diamond*, 50 AD2d 845, 846 (2d Dept), *appeal dismissed* 39 NY2d 802 (1976); *Cherry v Koch,* 126 AD2d 346, 350 (2d Dept), *appeal denied* 70 NY2d 603 (1987). It further adequately alleges the elements of a cause of action for breach of contract, which are: (1) formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. *Noise in Attic Productions, Inc. v London Records*, 10 AD3d 303 (1st Dept. 2004). The Friedmans have alleged that the parties entered into an agreement (the Operating Agreement), that the Friedmans

performed under the Agreement by building and managing the Project, that Bridge and Wolfson breached and that the Friedmans were damaged by the breach.

Finally, the complaint adequately pleads a claim for breach of fiduciary duty and the duty of loyalty. Members of an LLC owe fiduciary duties to each other, essentially on the theory that they are similar to partners. *McGuire Children, LLC v Huntress*, 24 Misc3d 1202A (Sup Ct Erie Cty 2009); *Willoughby Rehab and Health Care Ctr, LLC v Webster*, 13 Misc3d 1230(A) (Sup Ct N.Y. Cty), *order affirmed* 46 AD3d 801 (2d Dept 2007) ("The acts of working in concert and managing a limited liability company clearly give[s] rise to a relationship among members which is analogous to that of partners").

The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) misconduct of the defendant; and (3) damages that were directly caused by that misconduct. *Kurtzman v Bergstol*, 40 AD3d 588, 590 (2d Dept 2007). The complaint adequately pleads these elements and with the specificity required by CPLR 3016(b). The complaint alleges facts establishing, *inter alia*, that Bridge is a majority member, that the Friedmans are minority members, that Wolfson is the president and sole shareholder of Bridge, and that Bridge and Wolfson (1) engaged in behavior disruptive to the Company and self-dealing, (2) used Company property and assets for their own private benefits, (3) subverted, diverted, blocked and hindered Company business and opportunities, and (4) impaired or deprived the Friedmans' rights as managers and members. Accordingly, it is

ORDERED that the cross-motion of defendants Bridge and Wolfson for consolidation is granted to the extent that Index No. 603851/2009 and index No. 650663/2009 are joined for discovery and trial; and it is further

ORDERED that the cross-motion of defendants Bridge and Wolfson for a preliminary injunction and to dismiss the Friedmans' Complaint (Index No. 603851/09) is denied; and it is further

ORDERED that the motion by plaintiffs (Index No. 603851/2009), the Friedmans and 257/117 Realty, LLC, for a preliminary injunction is granted, and (1) The Friedmans will continue as the managers of the Company until further order of the court, (2) Bridge and Wolfson shall refrain from dissolving or liquidating the Company, from appointing Wolfson as liquidator, from interfering in the Friedmans' management of the Company, and from terminating any existing agreements with third-parties on behalf of the Company, and (3) Bridge and Wolfson shall adhere to the Operating Agreement in which the Friedmans are named as managers; and it is further

ORDERED that the court's January 7, 2010 order remains in effect, requiring that (1) Bridge and Wolfson are to be provided full access to the books and records of the Company, (2) Wolfson may remain in the unit he currently occupies on condition that he pays all pending and future, but not retroactive, utility bills, taxes and common charges, (3) The Friedmans shall engage an independent real estate broker with whom they are not affiliated, unless Wolfson agrees otherwise, and (4) Wolfson shall turn over to the Friedmans all rent that he collected as the purported manager of the Property, and the funds shall be deposited into the account of the Company for business purposes; and it is further

ORDERED that Index No. 603851/2009 and Index No. 650663/2009 are joined for discovery and trial; and it is further

ORDERED that the request by plaintiffs in Index No. 603851/2009 (the Friedmans and 257/117 Realty, LLC) for attorney's fees and costs is held in abeyance pending completion of the litigation; and it is further

ORDERED that the parties shall appear for a preliminary conference on the joined actions in part 54 of the New York Supreme Court, Commercial Division, 60 Centre Street, Room 228, New York, NewYork, at 9:30 A.M. on ~~February~~ March 11, 2010.

ENTER,

Date: January 28, 2010
New York, N. Y.

J.S.C.