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

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YMSF FAMILY PARTNERSHIP LP,

Plaintiff, Decision and order

Index No. 514791/17

- against -

BINYAMIN BEITEL and 5309 18TH AVENUE BESYATA LLC,

Defendants, January 25, 2022

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking summary judgement pursuant to CPLR §3212. The defendant opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

In September 2013 the plaintiff and the defendants entered into an operating agreement whereby the plaintiff paid $800,000 "towards purchase of equity interest" and was given a 49.9% share in an entity called 5309 18th Ave Besatya LLC. The defendant Beitel maintained a 50.1% share of the entity. Thereafter the plaintiff sought access to the entity's books and records and such request was denied numerous times. On July 31, 2017 the plaintiff brought this action seeking a declaratory judgement that they are a member of the entity and have all rights of membership. The plaintiff has now moved seeking summary judgement arguing that there are no questions of fact the operating agreement has conferred ownership interests upon the plaintiff and that pursuant to those interests they are entitled

to the books and records. The defendants have opposed the motion arguing that the operating agreement did not intend to provide any ownership interest to the plaintiff. Rather, the transaction was only one of a loan provided by the plaintiff and the operating agreement was worded in that fashion to avoid the appearance of an interest bearing loan prohibited by Jewish law. The defendants assert that the principles of the plaintiff as well as the defendant are all Orthodox Jews and purposefully and intentionally crafted the transaction as an operating agreement as such to avoid the appearance of a prohibited interest bearing loan. Therefore, the defendants argue there are surely questions of fact whether the plaintiff is an owner of the entity and consequently summary judgement must be denied.

Conclusions of Law

It is well settled that an agreement that is clear and unambiguous on its face shall be enforced according to its plain terms (Greenfield v. Philles Records Inc., 98 NY2d 562, 750 NYS2d 565 [2002]). Extrinsic evidence demonstrating the true intent of the parties is generally inadmissible (Pentacon LLC v. 422 Knickerbocker LLC, 165 AD3d 829, 86 NYS3d 177 [2d Dept., 2018]). Such extrinsic evidence may be admissible if an ambiguity exists and whether such ambiguity exists is a question of law (NRT New York, LLC, Brown, 167 AD3d 764, 89 NYS3d 695 [2d Dept., 2018]).

Further, extrinsic evidence may not be submitted to create an ambiguity (Brad H. v. City of New York, 17 NY3d 180, 921 NYS2d 221 [2017]). A contract will be considered ambiguous if susceptible to more than one interpretation (id).

The terms of the operating agreement are clear and are not ambiguous in any manner. The operating agreement provides that the purpose of the entity is engage "in any Lawful act or activity for which limited liability companies may be formed under the LLCL and engaging in all activities necessary or incidental to the foregoing" (see, Operating Agreement, ¶2). The agreement further provides that "the Membership interests and contributions of the Members as of the date hereof are as follows: Binyamin Beitel: 50.1%, YMSF Family Partnership L.P. 49.9% $800,000 (paid towards purchase of entity interest)" (see, Operating Agreement, ¶4). In addition the agreement provides that "the Members shall have the power to do any and all acts necessary or convenient to or for the furtherance of the purposes described herein…" (see, Operating Agreement, ¶6). These provisions plainly and unmistakably afford the plaintiff with membership interests in the entity. The defendants argue that an unproduced document evidencing a loan exists which undermines the unambiguous terms of the operating agreement. Specifically, the defendants assert that a heter iska, a religious document utilized to circumvent the Jewish prohibition against interest by

treating all loans as partnerships or business ventures was entered into between the parties (see, In re Venture Mortgage Fund L.P., 245 BR 460 [S.D.N.Y. 2000]) and thus the operating agreement merely evidenced a loan without any membership interests on the part of the plaintiff. However, that argument really seeks a determination that despite the unambiguous language of the operating agreement such ambiguity exists and the ambiguity is resolved by completely altering the terms of the operating agreement. Thus, as noted without any ambiguity the plain meaning of the contract terms control (Goetz v. Trinidad, 168 AD3d 688, 91 NYS3d 513 [2d Dept., 2019]). This is especially true in this case where there is no heter iska agreement presented.

Further, the affidavit of Rabbi Avrohom Moshe Lewanoni who stated that he was consulted by the plaintiff because the plaintiff "wanted to loan Binyamin Beitel money" (see, Affirmation of Rabbi Lewanoni, January 20, 2020, ¶13) does not raise any questions of fact. First, even if true such a consultation occurred it has no bearing on the actual operating agreement signed in 2013 which is clearly a membership agreement. Further, in a subsequent affirmation dated February 18, 2020 Rabbi Lewanoni explained that he never consulted with the plaintiff concerning the specific property that is the subject of the operating agreement (see, Affirmation of Rabbi

Lewanoni, February 18, 2020, ¶6). Thus, the second affidavit which may appropriately be considered in Reply surely diminished the limited value of the first affidavit. In any event, even if the second affidavit would not be considered, the first affidavit does not create any question of fact because the operating agreement contains no ambiguity that would permit such extrinsic evidence.

Moreover, it is not proper to utilize parol evidence in the religious context to establish the substance of a secular agreement (see, In re Marriage of Shaban, 88 Cal App. 4th 398, 105 Cal.Rptr2d. 863 [Court of Appeal, 4th District, Division 3, California 2001]).

Lastly, there is no merit to the argument any buy-back provision further supports the argument the operating agreement is really a loan since in any event the defendants failed to exercise the buy-back provision in the requisite time frame further supporting the conclusion the plaintiff is a member of the entity.

For these reasons the motion is not premature. Further discovery or depositions will have no impact and cannot alter the plain language of the operating agreement. Similarly, the defendant's counterclaims are all dismissed.

Thus, based on the foregoing the motion seeking summary

judgement on the three causes of action of the complaint is granted.

So ordered.

ENTER:

DATED: January 25, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC