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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM : PART 48

-----X

VITTORIO ANTONINI, individually and as a
member of BRIDGEVIEW AT BROADWAY, LLC,
on behalf of Himself and all other
members of BRIDGEVIEW AT BROADWAY, LLC
similarly situated, and in the right of
BRIDGEVIEW AT BROADWAY, LLC,

Plaintiffs,

Index No.
652070/10

-against-

ORAZIO PETITO and ROCCO PETITO,

Defendants.

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Transcript of Motion Proceedings
New York Supreme Court
60 Centre Street
New York, New York 10007
August 18, 2011

B E F O R E:

HON. JEFFREY K. OING, Justice of the
Supreme Court

A P P E A R A N C E S:

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* * * * *

ELLEN RUBIN, CSR, RPR
Senior Court Reporter
60 Centre Street - Room 420
New York, New York 10007
Phone: (646) 386-3093

Proceedings

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2 THE COURT: The Court has before it the matter of
3 Vittorio Antonini, et al. versus Orazio Petito, et al.,
4 Index 652070 of 2010.

5 Parties enter their appearances for the record.

6 For the plaintiff?

7 MR. ARONSTAM: David Aronstam, attorney for the
8 plaintiffs.

9 THE COURT: Thank you.

10 For defendant?

11 MR. EAGLE: For the defendant, Bart Eagle for
12 Orazio and Rocco Petito.

13 Good morning, your honor.

14 THE COURT: Good morning.

15 I have before me a motion for -- I guess it's a
16 motion for summary judgment by plaintiff under Sequence
17 No. 001.

18 I read the facts here, some interesting facts.
19 It's unfortunately, as is always the case, three
20 individuals get together to be going into business together
21 and there is a disagreement. They start being unhappy with
22 each other.

23 Okay, Mr. Aronstam, you want to tell me why you
24 think you are entitled to summary judgment?

25 MR. ARONSTAM: Yes, your Honor.

26 Good morning. I represent the plaintiffs in this

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case and we are moving for partial summary judgment on
the --

THE COURT: First and second cause of action.

MR. ARONSTAM: -- first and second cause of
action. It's really seeking a declaratory judgment from
the Court that certain actions by my client were valid.

THE COURT: I looked over the record and the
papers. It's essentially, even though it's a declaratory
judgment, you are asking the Court to give you summary
judgment on a breach of contract. That's if you strip it
down to the essentials, it's a breach of contract. And you
want to know whether or not you are entitled to relief at
this juncture.

MR. ARONSTAM: Yes, your Honor.

The single most important and undisputed fact
that's relevant to this motion is that these defendants,
the individual defendants Orazio Petito and Rocco Petito,
failed to make contributions to the company to pay the
company's mortgage for a 13-month period. This --

THE COURT: Didn't your client also fail to pay
the mortgage at some point?

MR. ARONSTAM: No, your Honor.

THE COURT: I thought that was the assertion.

MR. ARONSTAM: No.

THE COURT: I guess defendants will correct me on

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2 that, but I believe I read somewhere where the defendants
3 assert that your client also failed to make payments at
4 some point and then paid up.

5 MR. ARONSTAM: No, your Honor. My client, there
6 was a capital call asking him to deposit future payments
7 with the company. We actually came to this court on that
8 issue and that matter was settled by the settlement
9 agreement.

10 THE COURT: Right, and that's where your basis of
11 your motion here is that the operating agreement, Article 5
12 Section 1, when it talks about the capital contributions,
13 is referable or connected to Section 1.9 of the settlement
14 agreement, where the settlement agreement is talking about
15 making contributions or additional contributions in the
16 payment of the debt.

17 MR. ARONSTAM: Yes.

18 THE COURT: And what you are arguing is that the
19 term "additional contributions," is referable to the word
20 or the phrase "any required contribution," under the
21 operating agreement. And your argument is they failed to
22 make their payment or the additional contribution under the
23 mortgage note is the same as them failing to make any
24 required contribution under the operating agreement,
25 therefore, they are in default and therefore, it triggers
26 all the these Draconian situations in terms of reduction of

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their percentages and all that.

I think I got it. That about right?

MR. ARONSTAM: Yes, your Honor.

THE COURT: Okay. I've got a question. You know, I'm looking at the settlement agreement. If that is, in fact, the case, why is it there is nothing in the settlement agreement that sort of mentions the fact that it's a capital contribution? Because I don't see a capital contribution defined anywhere in the terms.

MR. ARONSTAM: I think that's one of the pitfalls of the defendant's argument is it's the word "capital contribution." The language in Article 5 Section 1 of the operating agreement says, "the failure to make any required contribution." It doesn't say the failure to make a required capital contribution. It's a contribution to the company. And section --

THE COURT: Yes, but this operating agreement was written prior to that mortgage or that settlement agreement, correct?

MR. ARONSTAM: Oh, definitely, yes, your Honor.

THE COURT: So you are saying that they had the foresight back then to realize, oh, you know what? We should put down any required contribution, because later on we can have situations that come up with required contributions.

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2 MR. ARONSTAM: Your Honor, I referred to the
3 Limited Liability Company Law Section 502(a) to show the
4 Court that this provision, which did have Draconian
5 consequences, as the Court said, was not something that
6 some lawyer dreamed up. The lawyer who drafted this
7 operating agreement basically put that clause down
8 verbatim. And it's -- I'm asking the Court to --

9 THE COURT: So the lawyer knew, whoever -- who
10 was the lawyer that drafted this agreement?

11 MR. ARONSTAM: It was a company lawyer, your
12 Honor.

13 THE COURT: It was a company lawyer. So he
14 knew -- so that's where I'm missing because that's
15 something that I had in my notes here, who drafted this
16 agreement. Because if that's the case, I don't recall
17 seeing an affidavit or an affirmation from the person
18 actually constructing this agreement, operating agreement,
19 saying, Judge, when we did this I'm going to tell you
20 exactly what the parties talked about and this is how we
21 structured it and we meant for any required contribution,
22 exactly that, any required contribution, not just capital
23 contribution.

24 I don't seem to have that.

25 I have a lot of people telling me what it means,
26 both sides having different versions of what it means. But

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2 I don't have the scribe, as they say, who actually wrote it
3 and said, we talked about it, we negotiated, this is what
4 we meant.

5 MR. ARONSTAM: Your Honor, I was puzzled by
6 defendant's papers because they seem to totally ignore that
7 particular sentence in Article 5 Section 1. I didn't see
8 anything --

9 THE COURT: But it's your motion for summary
10 judgment. You've got to come forward to say there is no
11 factual issue.

12 MR. ARONSTAM: Well, they need to come up with
13 real opposition.

14 THE COURT: I just gave you one of my problems
15 with it.

16 MR. ARONSTAM: Your Honor, part of my argument,
17 an important part of my argument is the case law coming
18 from the Court of Appeals, that where the contract is
19 ambiguous you don't look for extrinsic evidence and you
20 don't look at the intent of the parties.

21 And I don't -- that phrase "any required
22 contribution," is a very simple English phrase. And what
23 Section 1.9 of the settlement agreement did is it
24 identified what a required contribution was.

25 THE COURT: But 1.9 does identify, but doesn't
26 say or doesn't use the term "capital" anywhere in 1.9. I

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2 don't see it. It just says -- if I'm looking at the phrase
3 here -- 1.9 says, the only place where it says contribution
4 is, "Antonini, Orazio and Rocco represent that after the
5 return of capital contributions described in Section 2
6 below, Bridgeview shall have sufficient assets to meet its
7 current obligations provided, however, that the Bridgeview
8 members shall each be required to make monthly
9 contributions to Bridgeview in order for Bridgeview to keep
10 current with its obligations under the Bridgeview loan and
11 any future loans obtained by Bridgeview to complete the
12 renovations of Bridgeview 'additional contributions.'"

13 Now, except for that first sentence that talks
14 about capital contributions, I don't see anywhere else in
15 the following sentences mentioning the word "capital."

16 MR. ARONSTAM: Well, your Honor, I actually
17 addressed that very point in my reply papers. First of
18 all, Article 5, the heading of it is "Money Matters." It's
19 not headed "capital contributions."

20 Secondly, the phrase that I'm relying on squarely
21 is not capitalized and it says any required contributions.

22 THE COURT: I agree with you.

23 MR. ARONSTAM: And this is a very plain and
24 simple English expression. It's in plain and simple
25 English.

26 THE COURT: You're right about that.

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2 MR. ARONSTAM: And it doesn't say any required
3 capital contribution. It said a contribution is something
4 that the members put into the company to pay the company's
5 expenses. And Section 1.9 identified a contribution for
6 paying the mortgage.

7 THE COURT: Then how do you explain then the
8 first two sentences prior to the term "any required
9 contribution" speaks only of capital contribution? Such
10 that you can argue or there can be an argument that says
11 the third sentence is referring to those first two
12 sentences and not anything subsequent. Particularly in
13 view of the fact that the settlement agreement doesn't sort
14 of refer back or pull in the operating agreement.

15 I have seen agreements where you have several
16 agreements where you are talking about loans and
17 everything. And they're in those subsequent loan documents
18 saying, and by the way that loan document that was executed
19 on X date, two years ago, is all herein incorporated for
20 all purposes. I see that. And that eliminates any factual
21 issue with respect to whether or not that prior loan
22 agreement is or is not in.

23 That's what I'm looking at.

24 MR. ARONSTAM: Well, Section 1.9 in the
25 settlement agreement did call the contribution towards the
26 mortgage as an additional contribution. You know, that

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2 again, plain English. That's a contribution that's an
3 additional -- in addition to another contribution.

4 THE COURT: It is a contribution. I'm glad you
5 raised that point. Here's a point that I have to ask.
6 Capital contributions in the traditional sense is something
7 that you put into the company, that in terms of either cash
8 or services or inanimate objects like furnishings that
9 people put into companies as their capital contribution.

10 This thing with Bridgeview is a debt. It's a
11 liability. It's payment of a liability, payment of a debt.
12 So are you arguing then or do you take the position that
13 payment of a debt is considered a capital contribution?
14 Because that would be an interesting spin on what a
15 traditional sense of capital contribution is.

16 MR. ARONSTAM: Your Honor, I'm trying to avoid
17 the word "capital" because it doesn't appear in the
18 language I'm relying on.

19 But the answer to that question is a company
20 needs working capital to operate. So where the company is
21 not earning any income, as with Bridgeview at this time,
22 it's wholly dependent on members' contributions.

23 THE COURT: Your point is that the operating
24 agreement used "any required contribution" in the lower "C"
25 without mentioning capital.

26 MR. ARONSTAM: Yes.

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2 THE COURT: And your position is that by not
3 defining any required capital contribution, that means then
4 that the subsequent settlement agreement 1.9 is linked to
5 that. That's your argument.

6 MR. ARONSTAM: Section 1.9 in the settlement
7 agreement clearly identified what was -- that the mortgage
8 payment was required.

9 THE COURT: Because they identified it as
10 contribution little "c."

11 MR. ARONSTAM: Yes.

12 THE COURT: Here's the point. They also define
13 it as additional contribution, capital "A." It's no longer
14 a capital "C."

15 If you take that position about how you're
16 looking at the words, precise words and their meanings and
17 how they are connected, well, the other argument then is
18 1.9 talks about additional contribution. Nowhere in the
19 operating agreement does it talk about additional
20 contribution as a capital gain.

21 MR. ARONSTAM: And nowhere else in the settlement
22 agreement does it talk about it either, your Honor.

23 There is nowhere in the settlement agreement that
24 it says that this is not subject to Article 5 section 1 of
25 the operating agreement. It doesn't exclude it either,
26 but --

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THE COURT: There is no exclusion or there is no inclusion.

MR. ARONSTAM: But it clearly identifies the payment as required.

THE COURT: But identifies it now as additional contribution.

MR. ARONSTAM: And I think the plain meaning of that term is that it's another -- it's just another contribution that the members were required to make.

THE COURT: Okay. Anything further, Mr. Aronstam?

MR. ARONSTAM: Well --

THE COURT: The second cause of action flows from the first. I mean, if I give you your relief with respect to the first, the second sort of comes in because that's where you're asking for a declaration that their interest should be shifted or reduced because of their violation or breach of the settlement agreement.

MR. ARONSTAM: Yes. You have to find a breach before you can hold that there are consequences.

Your Honor, the defendants' argument, if you take it to its logical extreme, they're saying that a member can default on its most basic -- on his most basic obligation forever more, he never has to pay another penny towards this company --

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THE COURT: And suffer no consequences.

MR. ARONSTAM: -- and there's no consequences.

And I really don't think that anyone intended that. Also, I thought the defendants' argument about -- I didn't quite get the defendants' argument about how Section 2 of the settlement agreement amended the operating agreement and that raises an issue of fact. Article 5 Section 1 of the operating agreement was left totally intact, untouched. And this Section 1.9 was inserted into the settlement agreement.

It was to protect all the parties, your Honor. They recognized that these payments at the time were crucial. The company is not earning any income, you don't pay the mortgage, you're in foreclosure, you're gone. So it was to protect everybody. And we are not talking about a minor default here. We are talking about a 13-month period where my client is carrying the company and saving it and saving other collateral from --

THE COURT: Let me ask you a question.

During that 13-month period did he try to attempt after the first month to tell them, if you don't start paying, I'm going to start reducing your percentage interest in this company?

MR. ARONSTAM: Well, most of all my client wanted the defendants to pay their share.

Proceedings

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2 THE COURT: No good deed goes unpunished as they
3 say.

4 MR. ARONSTAM: And --

5 THE COURT: I see. He is trying to do the right
6 thing. Okay.

7 Anything else, Counsel?

8 MR. ARONSTAM: If I can have an opportunity to
9 reply after defendant's counsel.

10 THE COURT: Sure.

11 Counsel, you're up. I mean did they pay or they
12 didn't pay?

13 MR. EAGLE: First of all, they did pay. They
14 didn't pay during that 13-month period, but in January of
15 2011 they did pay. And a point that your Honor asked a few
16 moments ago, during that period from July to July when they
17 did not pay, all the plaintiff was asking them to do or all
18 he kept demanding that they do is pay the money.

19 In August of 2010 they started paying again, he
20 was very happy to accept those payments. They were
21 contributing half the expenses, paying towards half the
22 expenses of the company, which he was very, very happy to
23 accept. And then all of a sudden in November, he sends
24 this notice out saying, by the way, I'm going to foreclose
25 on your interest.

26 Mr. Aronstam said a few moments ago, he

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2 hypothesized that logical ramifications of the defendants'
3 argument is speculating that there would be no
4 consequences. And he said that a lot in the reply papers.
5 It's not that there would not be consequences. There is a
6 settlement agreement which is a contract. And if there was
7 a breach, there are consequences.

8 In this instance there would have been no damages
9 because in January of 2011 they paid the plaintiff, they
10 put money into the company, the exact amount that they had
11 not paid from July to July. And then the company issued a
12 check, my client wrote the check from the company to him,
13 which gave him all of that back. So there are no damages.
14 They never brought a cause of action for breach of
15 contract, the settlement agreement. And I think the reason
16 they didn't do that is because what they really want here
17 is control of the company and not the damages.

18 THE COURT: Plaintiff. You mean plaintiff?

19 MR. EAGLE: The plaintiff, yes.

20 If you take their argument to its extreme and if
21 you look at the numbers here, at least as of October --
22 excuse me, May when these papers were submitted, the end of
23 May --

24 THE COURT: May of 2011.

25 MR. EAGLE: 2011, my clients had contributed in
26 cash to the company about \$1,584,000. The plaintiff had

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2 contributed in cash \$927,000.

3 THE COURT: No small change on both sides.

4 MR. EAGLE: Agreed. But if you accept his
5 argument and look at the ramifications of that, if you ask
6 for a \$100 contribution and you fail to make it, the
7 Draconian effect of that is you forfeit your share.

8 THE COURT: What's your argument -- I hear what
9 you're saying -- what's your argument to his position that
10 the settlement agreement is referable to the operating
11 agreement?

12 MR. EAGLE: Your Honor, the operating agreement
13 in Article 5 is very clear. It dealt with capital
14 contributions, formation of the company. Each member of
15 the company, and there are three, they all had one-third
16 interest at the time, were supposed to invest I believe it
17 was \$285,000. And there were consequences in the event
18 that they failed to do so. They invested the money. There
19 was no impact after that.

20 The reason why 1.9 appears where it does, and
21 it's set out in Orazio Petito's affidavit, was for a very,
22 very specific reason. And I would -- the reason is that at
23 the time of the settlement agreement, what was happening is
24 that Mr. Antonini was increasing his interest in the
25 company to 50 percent and Rocco and Orazio were each
26 reducing their interest in the company to 25 percent each.

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2 And to do that, Mr. Antonini owed money, approximately
3 \$165,000 to each. He didn't have the money to pay. One of
4 the other companies that was involved in all of these
5 disputes between the parties he is involved with, he needed
6 the money there. And we have an e-mail from Mr. Aronstam
7 saying he doesn't have cash. So they took the notes.

8 They were not going to expose themselves with the
9 amount of their investment, and at the time the investment
10 was way disproportionate in terms of cash, to any type of
11 Draconian consequences. So as a result, this requirement
12 to contribute to the debt service payments of BRT was set
13 out in 1.9. Section 2 of the settlement agreement revises,
14 it amends certain sections of the operating agreement. And
15 specifically it never amended the section which says and
16 begins "the sole capital contribution."

17 THE COURT: That's my question. Was there some
18 change or altering? And I think I asked that question with
19 respect to the operating agreement anything that, you know,
20 I'm reading contracts everyday, that when it comes to loan
21 documents or other contract documents, there is always a
22 clause or phrase in there, by the way that contract dated
23 so and so is incorporated herein fully in all meaning and
24 all terms, period.

25 I don't see that. And you are telling me
26 Section 2, and I've read it, is wait a minute, we are not

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touching the operating agreement.

MR. EAGLE: Yes, we're amending very specific provisions of the operating agreement.

THE COURT: But nowhere was Article 5 Section 1 touched?

MR. EAGLE: That's right. And what is interesting, your Honor, is that before we decided to handle certain revisions to the operating agreement and settlement agreement, Mr. Aronstam had prepared a draft of a new operating agreement which we ultimately decided not to go forward with. And it's one of the exhibits here. And in that draft there are no additional capital contributions, there are no consequences. And any additional payments --

THE COURT: Mr. Aronstam makes a very good argument in the sense that the scribe or the person who negotiated this deal, I don't have the affidavit and affirmation from him, said you know what, we did that, put in that phrase "any required contribution" just to cover all those instances later on, like the one that we have right now with respect to the mortgage.

MR. EAGLE: Your Honor, there is nothing -- you are absolutely correct that there is nothing here, nothing submitted from the scribe of the operating agreement.

But I think that to accept Mr. Aronstam's

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2 argument, you would have to, first of all, take it
3 completely out of context and also read out the language
4 that precedes it about the sole capital contribution.

5 THE COURT: The two sentences prior to that
6 phrase.

7 MR. EAGLE: Your Honor asked a question right at
8 the beginning about the plaintiff having failed to make
9 contributions earlier. And he made a big point of that or
10 having had his membership interest reduced at some earlier
11 time. And the plaintiff made a very big point of that in
12 his original papers and his reply papers that actually
13 supports the defendants' argument.

14 What happened was that in 2007 there was a
15 resolution. Two-thirds of the members passed it, so it was
16 passed by a majority, requiring additional money to be paid
17 in, in advance. What happened at that point is precisely
18 because there was no enforcement mechanism because of
19 Article 5, they put an enforcement mechanism in there. If
20 someone doesn't put it in, their membership interest will
21 be decreased.

22 Interestingly, Mr. Aronstam then sent me a letter
23 saying that he doesn't believe that's appropriate, that
24 that's even proper under the operating agreement, which is
25 entirely opposite to the position he is taking today.

26 So what wound up happening is that Mr. Antonini's

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2 membership interest was reduced, it was actually reduced to
3 an amount less, lower than what it was at the time of the
4 settlement agreement. But what my clients did, and they
5 did not have to do it, is that he was making incrementally
6 month-by-month payments so they increased it.

7 THE COURT: Your clients could have hit him with
8 the Draconian measures too and they didn't.

9 MR. EAGLE: And did not.

10 Well, I would argue that they couldn't because it
11 didn't apply. The only thing they could do was enforce the
12 consequences. What they could have done was refuse to
13 accept those additional payments and kept his membership
14 interest low. But instead they let it work up.

15 Just a few -- you raised issues with waiver and
16 estoppel. In January of 2011, there was a loan extension
17 agreement signed with the bank. All the parties signed it.
18 This is after his purported notice. The renew guarantee's
19 given by my clients.

20 There is property that is still -- that my client
21 had pledged, real property on Sackett Street in Brooklyn,
22 that still serves as collateral. They would have that
23 completely wiped out. And despite the fact that even today
24 my clients have invested far more in cash than the
25 plaintiff has, that their entire interest just evaporate.

26 THE COURT: It's always the root of all evil,

Proceedings

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2 cash. For some reason that greenback rears its ugly head
3 every single case I have.

4 MR. EAGLE: This is a lot of cash, your Honor.

5 THE COURT: Not as much as the other cash I have
6 been dealing with, but close enough.

7 Thank you, Counsel.

8 MR. EAGLE: Thank you, your honor.

9 THE COURT: Mr. Aronstam, do you want to respond
10 briefly please.

11 MR. ARONSTAM: Your Honor, yes.

12 Firstly, the waiver and estoppel issue, my client
13 said to me after he sent a notice saying I'm now the
14 hundred percent member shouldn't I act like the
15 hundred percent member? And Mr. Eagle had sent me a
16 letter, don't you dare act as the hundred percent member.
17 So I looked at the operating agreement and I saw Article 7
18 Section 2 says that my client will not be deemed to have
19 waived any right or remedy unless there is a very clear
20 writing. And I -- once again, it's a contractual provision
21 that he is entitled to rely upon.

22 THE COURT: Your client is not deemed to waive
23 anything, but the argument on the other hand is your
24 client's conduct perhaps can be used against him in terms
25 of what he is doing. But that's another point. Okay. I
26 got it.

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2 MR. ARONSTAM: But I think the contractual
3 provision protects him in that regard.

4 You know, it's ironic that the defendants would
5 argue that they would never put their investment at risk by
6 putting certain language in these agreements. But
7 amazingly, they decided it was okay to put the investment
8 at risk by not making the mortgage payments. And if
9 plaintiff had not made those payments, we would be down the
10 road at the Bankruptcy Court.

11 THE COURT: I was going to say, if the payments
12 weren't made my either side, all three people would not be
13 happy. The company would be gone. But anyway, okay.

14 Anything else, Mr. Aronstam?

15 MR. ARONSTAM: Your Honor, the prior dealings
16 with the capital calls that Mr. Eagle referred to, those
17 were presettlement agreement instances. Everything, the
18 settlement agreement we then agreed that Mr. Antonini's
19 membership interest had been reduced and the settlement
20 agreement once again has a contractual provision that
21 everything is subsumed in that agreement and all prior
22 dealings are irrelevant.

23 So it really boils down to asking the Court to
24 just interpret clear language in agreements.

25 THE COURT: Thank you for your arguments.

26 I have heard everything. I have read the record.

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2 I have read the briefs. I'm going to give you a decision
3 at this point.

4 The principle is well settled that while the
5 meaning of a contract is ordinarily a question of law;
6 namely, whether or not there is an ambiguity, when a term
7 or clause is ambiguous and the determination of the
8 parties' intent depends upon the credibility of extrinsic
9 evidence or a choice among inferences to be drawn from
10 extrinsic evidence, then the issue is one of fact.

11 I'm relying on the Court of Appeals case
12 Amusement Business Underwriters versus American
13 International Group, 66 NY2d 878 (1985). I'm relying on it
14 for that principle stated.

15 I find as a matter of law there is ambiguity. I
16 know plaintiff's counsel is arguing that the terms are very
17 clear and that there is no ambiguity. While I'm agreeing
18 that the words used are very clear, I do disagree or I
19 don't agree that the term "any required contribution" is
20 meant to incorporate and capture subsequent agreements that
21 mention the word "contribution" in there. Especially,
22 given the fact that the September agreement talks about
23 contribution, but contribution in the sense of paying a
24 debt.

25 I don't find that the two are connected and in
26 particular, looking at Article 5 Section 1 of the operating

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2 agreement, and this is the convincing argument that defense
3 counsel raised and I also thought about it last night, is
4 the fact that you can't take the three sentences in
5 Section 1 out of context. They need to be read together as
6 a whole. And if you read them as a whole, the term "any
7 required contribution" is referable or at least attaches to
8 the term "capital contribution."

9 So in that sense, I find there is a factual issue
10 as to whether or not the term "any required contribution"
11 is indeed inclusive of the settlement agreement or any
12 subsequent agreements that mention the word "contribution."

13 One last point. Plaintiff's counsel argued in
14 oral argument, made the point to tell us that there was a
15 negotiator, a company lawyer drafting and crating this
16 operating agreement, and that when they put in the term
17 "any required contribution," that was meant to include
18 subsequent agreements that had or can be deemed
19 contributions.

20 The fact of the matter is I don't have the
21 company lawyer's affirmation here explaining that. Because
22 what I have instead is both sides, plaintiff and
23 defendants, all give me their version of what this term
24 means. So without that affirmation, which I believe is
25 critical in determining whether or not there is ambiguity,
26 in the absence of that, I find that the plaintiff hasn't

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1
2 carried its burden of establishing prima facie that there
3 is no factual issue. And even if it did, I find
4 defendant's raise sufficient arguments to create an issue
5 of fact.


6 So accordingly, based on what I have in the
7 record and the arguments here, I'm going to deny
8 plaintiff's motion for summary judgment with respect to the
9 first and second causes of action.

10 You have that for the record. Mr. Aronstam, if
11 you would please order the record, I will so-order it and
12 you will have that decision and order for your files. And
13 please bear of cost of that, since you are the moving
14 party.

15 Thank you. Have a good afternoon.

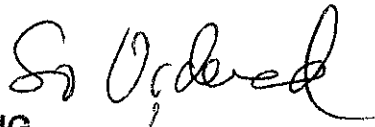
16 * * * * *

17 Certified to be a true and accurate record of the
18 within proceedings.

19 

20 Ellen Rubin, CSR, RPR
21 Senior Court Reporter

22 9/12/11



23 JEFFREY K. OING
24 J.S.C.

