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[Back to Decision](#)

Tina Georgi, Individually and Derivatively on Behalf of A & T Partners, LLC, Plaintiff v. Andrew Polanski, Defendant, 10406/10

Justice David I. Schmidt

10406/10

10-22-2010

Cite as: Georgi v. Polanski, 10406/10, NYLJ 1202473629865, at *1 (Sup., KI, Decided September 22, 2010)

Justice David I. Schmidt

Decided: September 22, 2010

NOMINAL DEFENDANT

A & T Partners, LLC

The following papers numbered 1 to 6 read on this motion:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed 1-4

Opposing Affidavits (Affirmations) 5-6

Reply Affidavits (Affirmations)

*1

Upon the foregoing papers, the motion by plaintiff Tina Georgi, individually and derivatively on behalf of A & T Partners, LLC, for injunctive relief pursuant to CPLR 6301 is denied.

*2

A & T Partners, LLC (A & T) is a limited liability company which was formed in 2004 for the purpose of owning and operating the real property at 60 Pulaski Street in Brooklyn. At the time of its formation, the membership interests of Tina Georgi (Georgi) and defendant Andrew Polanski (Polanski), its two members, were divided equally. In order to acquire the subject real property, Georgi and Polanski obtained a second mortgage of \$200,000 on real property that they jointly own at 58 Pulaski Street.¹ In May 2008, Georgi obtained, on behalf of A & T, a \$640,000 construction loan from Oritani Savings Bank, which loan she had to personally guarantee because Polanski had lost his job in the interim. According to Georgi, after Polanski was laid off from his job, Polanski no longer contributed either money or services to A & T as he was required to pursuant to the Operating Agreement of A & T.

Consequently, Georgi allegedly obtained two loans of \$100,000 from her father in order to "facilitate" the project. By Georgi's reckoning, as of December 24, 2009, she has contributed over \$140,000 to the project, while Polanski has contributed only \$52,400.² Thus, she maintains that, under the terms of the Operating Agreement, the profits of A & T should be allocated to her in the same ratio as their respective contributions; i.e., 73 percent and 27 percent. Moreover, although the Operating Agreement is silent regarding a member's right to

*3

vote in connection with A & T, Georgi argues that pursuant to Limited Liability Company Law (LLCL) §402, each member shall vote in proportion to such member's share of the current profits (again, in this case, 73 percent and 27 percent).

In her motion, Georgi asserts that, as the member with a majority (73 percent) interest in A & T, on December 24, 2009 she issued a "capital call" to Polanski in which she, on behalf of A & T, demanded that he contribute the amount of \$189,114.43 to A & T's capital fund in order to service A & T's outstanding loans and to complete the necessary renovations to the property. To date, Polanski has not contributed the capital required by the capital call. Georgi explains that the balance of a \$636,000 construction loan is due in May 2010 and that, without any new capital, it would be difficult to complete the project. Georgi contends that, pursuant to the Operating Agreement, upon the failure of a member of A & T to make any required contribution, his or her interest in A & T may be reduced or eliminated. Therefore, since Polanski has allegedly refused to contribute the necessary capital to A & T, Georgi elected to eliminate Polanski's membership interest in A & T and seek a new member who would be willing to contribute the necessary capital to A & T so that it can complete the project.³ Because Polanski purports to maintain a 50 percent interest in A & T and no new investor would infuse capital into A & T so long as Polanski asserts such an interest, Georgi commenced the instant action seeking a judgment declaring that Polanski is not entitled to

*4

any interest in A & T and an injunction barring him from acting on behalf of A & T or purporting to be a member of A & T.⁴ In her motion, Georgi essentially seeks the same relief.

In opposition to the motion, Polanski explains that, when the subject property was purchased, it was his intention to keep costs as low as possible by renovating the property, rather than by demolishing it and building a new steel girded building as Georgi wished. He also explains that, for the first year after the purchase (and until he lost his job), he contributed more funds into A & T than Georgi.⁵ Since then, the parties have been deadlocked as to what to do with the property and, because Georgi was able to contribute funds, he was "marginalized" by Georgi regarding the management of the project. Polanski argues that, because he and Georgi are each 50 percent members of A & T, Georgi had no power to make a capital call. Polanski further notes that he has commenced a special proceeding (under index no. 12233/10) seeking judicial dissolution of A & T and an injunction barring Georgi from terminating his membership in A & T, given the "internal deadlock which impedes the smooth operating of A & T."

The members of a limited liability company are required to adopt a written operating agreement that contains any provisions not inconsistent with law or its articles of incorporation relating to (i) the business of the limited liability company, (ii) the conduct of its affairs and (iii) the rights, powers, preferences, limitations or responsibilities of its

*5

members, managers, employees or agents (LLCL §417[a]). "The operating agreement is, therefore, the primary document defining the rights of members, the duties of managers and the financial arrangements of the limited liability company" (Willoughby Rehabilitation and Health Care Center, LLC v. Webster, 13 Misc 3d 1230 [A] [2006]). The operating agreement may provide that the membership interest of a member who fails to make any required contributions shall be subject to specified consequences of such failure, including the reduction or elimination of the defaulting member's interest (LLCL §502[c]). In this case, the Operating Agreement provides (at Article V, Section 1) that each member of the limited liability company (i.e., Georgi and Polanski) shall contribute the amount set forth in the books and records of the company as "the *sole capital contribution* to be made by him [or her]" (emphasis added). The Operating Agreement further provides that the failure of a member to make any required contribution shall be subject to certain consequences, including reduction or elimination of the defaulting member's interest, at the option of a majority in interest of the remaining members who shall be entitled to vote thereon. Under the circumstances, Georgi was not authorized to call for a capital contribution under the Operating Agreement once Polanski made the initial contribution. Although Georgi does not state whether the company's records specify the amount of the initial contribution or, if so, what that amount is, according to her affidavit, in 2008 she "caused A & T to return \$40,000 to Polanski in order to make [their] capital accounts equal." The return of capital was allegedly made "on the assumption that, when necessary in the future, [they] would both make equal capital contributions." That assumption, which has no support in the language

*6

of the Operating Agreement, proved to be mistaken. As the party seeking a preliminary injunction, Georgi was required to demonstrate a likelihood of success on the merits, "danger of irreparable injury in the absence of an injunction and a balance of equities in [her] favor" (Nobu Next Door, LLC v. Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005]; see CPLR 6301). Since Georgi could not require any additional capital contribution from Polanski without his consent, she is unable to demonstrate a likelihood of success on the merits. Therefore, her motion is denied.

The foregoing constitutes the decision and order of this court.

1. Georgi characterizes the \$200,000 as a loan to A & T. Polanski considers the \$200,000 as a capital contribution. Forgetting the issue of the \$200,000 for the moment, Georgi asserts that Polanski made an initial capital contribution to A & T of \$90,000 and she made an initial capital contribution of \$50,000; however, in 2008, she allegedly caused A & T to return \$40,000 to Polanski in order to make the capital accounts equal "on the assumption that, when necessary in the future, we would make equal capital contributions."
2. Georgi has not included the \$200,000 which the parties obtained from the second mortgage on their jointly-held property at 58 Polanski Street since she views the money as a loan to A & T, not a capital contribution.
3. Georgi's father is apparently "willing to convert portions of [his] loans, which are past due, in return for a membership interest in A & T."
4. In her complaint, Georgi also seeks money damages for breach of contract and unjust enrichment.
5. According to Polanski, he contributed \$207,400 and Georgi contributed \$152,238.25 in the first year and one half.