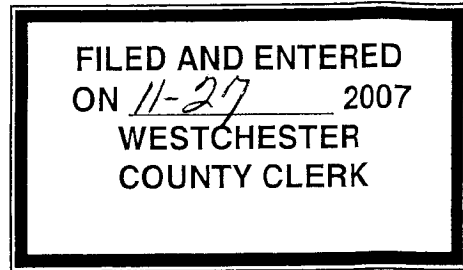


SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION, WESTCHESTER COUNTY



To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**PRESENT: HON. KENNETH W. RUDOLPH**  
**Justice**

Index No.: 17227/07  
Motion Date: 10/19/07

-----X  
ANASTASIOS MANITARAS,

Plaintiff,

- against -

DECISION

CURTIS C. BEUSMAN, ROBERT L.  
SCOPELITI, HENRY DAVISON, JR.,  
JOHN G. THORN, DAVID P. GUTMAN,  
HERBERT DALY, EDWARD LUBIC and  
KISCO RADIO CIRCLE ASSOCIATES, LLC,

Defendants.  
-----X

The following papers numbered 1 to 12 read on this motion

PAPERS NUMBERED

Notice of Motion/Affirmation/Exhibits 1-5	1-7
Opposition Memorandum of Law, Plaintiff	8
Notice of Cross Motion/Affirmation	9-10
Opposition Affirmation to Plaintiff's Cross Motion, Plaintiff	11
Reply Affirmation to Defendants' Cross Motion, Defendants	12

Upon the foregoing papers, and a conference with the Court on October 16, 2007, it is ORDERED that this motion by defendants for an order, pursuant to CPLR 3212, granting summary judgment to the defendants herein, on the ground that the resolution of the declaration demanded in the complaint herein involves questions of law only and not questions of fact, and the cross motion of plaintiff for an order pursuant to CPLR 6301, temporarily restraining and preliminarily enjoining defendants, and all persons acting in concert with them, from entering into a contract to sell the property of defendant, Kisco Radio Circle Associates, LLC ("LLC"), and/or taking any steps to sell or to close on the sale

of the property, pending the determination by this Court of the rights and obligations of defendant, LLC with respect to the proposed sale, is decided as follows.

Defendant, LLC was formed in 2001 for the purpose of owning and operating improved real property located at Radio Circle, Mt. Kisco, New York ("property"). The LLC was formed when a prior partnership was converted into a limited liability company and the property was conveyed to the LLC.

In the summer of 2007, defendants' counsel notified plaintiff of an offer to sell the LLC property, its sole asset, for approximately \$5.8 million. Plaintiff, the holder of approximately 49.89% of the LLC's membership interests, opposed the sale and has withheld his consent thereto.

Defendants, each of whom holds not more than 7.18% of the LLC's membership interests, have consented to the proposed sale and have indicated that they intend to proceed with the sale and the dissolution of the LLC, notwithstanding plaintiff's objection.

Plaintiff seeks a declaration that, under the LLC's operating agreement, defendants have no power to sell the property without plaintiff's consent.

Plaintiff's complaint interposes a single cause of action alleging that there is an actual justiciable controversy and that plaintiff, pursuant to CPLR 3001, is entitled to a declaration of this Court that under the LLC operating agreement the members and managing members of the LLC are not authorized, and have no right or power, to bind the LLC to a contract pursuant to which the LLC would sell its sole asset: the property, without the consent of all members.

The complaint cites the LLC operating agreement Section 10.1(b) providing that the managing members of the LLC control the LLC's business and shall make all decisions and take such actions as are appropriate to accomplish the purpose of the LLC which is "to own and operate the property" Section 3.1. The operating agreement does not authorize the managing members to sell the property. Plaintiff is one of the three or four managing members. Section 12.1(i) of the operating agreement provides that the LLC's sale of the property will cause the LLC to dissolve; Section 12.1(iii) provides that dissolution of the LLC requires the written consent of all members.

## Defendants' Motion for Summary Judgment

Martin J. King, Esq. ("King") defendants' attorney, since the LLC's formation in 2001, avers that the seven individual defendants collectively own 50.26% of the LLC interests. King frames the issue before this Court thusly: Pursuant to the LLC's operating agreement and/or applicable law, can the LLC's managing members, authorized by the consent of the members holding the majority of the LLC interests, sell the LLC's sole asset, notwithstanding the fact that such sale will cause a dissolution of the LLC. King cites Limited Liability Company Law ("LLCL") §402.(d)(2) as follows

"§402. Voting Rights of Members

"(d) Except as provided in the operating agreement, whether or not a limited liability company is managed by the members or by one or more managers, **the vote of at least a majority in interest of the members** entitled to vote thereon shall be required to:

"(2) **approve the sale**, exchange, lease, mortgage, pledge or other transfer **of all or substantially all of the assets** of the limited liability company;...."

King contends that the LLCL is a default statute resort to which is required if the operating agreement is silent on a particular matter. Accordingly, herein, the vote of a majority in interest of members entitled to vote is required to approve the sale of their LLC's property. All members, except plaintiff have consented in writing to the sale; managing members have been authorized to accept the offer to purchase the property as provided in the operating agreement, which would be an appropriate act in furtherance of the LLC's purpose. The operating agreement does not mandate that the managing members actions be measured by a majority of the membership interest held by the managing members.

It is well established that summary judgment is a drastic remedy and should only be granted if there are no material and triable issues of fact. Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395. In evaluating a motion for summary judgment, a court should not determine credibility but whether there exists such issues. S. J. Capelin Assoc. v. Globe Manufacturing Corp., 34 NY2d 338. When reviewing a motion the papers must be scrutinized carefully in the light most favorable to the party opposing the motion. Robinson v. Strong Memorial Hosp., 98 AD2d 976. The party moving for summary judgment has the burden initially of coming forward with admissible evidence to support the motion so as to warrant the Court's directing judgment in movant's favor as a matter of law;

the burden then shifts to the opposing party to demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action. See, Friends of Animals, Inc. v. Associated Fur Manufacturers, Inc., 46 NY2d 1065, 1067. Alvarez v. City of New York, 68 NY2d 320; Zuckerman v. City of New York, 49 NY2d 557.

The Court finds that defendants have met their burden of establishing their entitlement to summary judgment as a matter of law. In opposition, plaintiff has raised no genuine issues for a trier of the facts or statutory or documentary evidence to warrant the denial of defendants' motion.

The Court finds the LLC's operating agreement with respect to the issue presented is unambiguous and its plain meaning may be determined as a matter of law. W.W.W. Associates, Inc. V. Grancontieri, 77 NY2d 157.

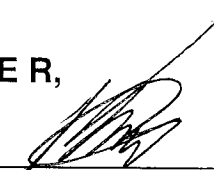
Defendants' motion is granted; plaintiff's cross motion is denied, as moot.

Submit judgment to the Clerk of the Commercial Division, on notice.

The foregoing constitutes the Decision and Order of this Court.

DATED: White Plains, New York  
November 26, 2007

ENTER,



---

HON. KENNETH W. RUDOLPH  
Justice of the Supreme Court

TO: MARTIN J. KING, ESQ., LLC  
Attorney for Defendants  
15 Moore Avenue  
Mt. Kisco, New York 10549

ROOSEVELT & BENOWICH, LLP  
Attorneys for Plaintiff

1025 Westchester Avenue  
White Plains, New York 10604