



SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 7

RODEO FAMILY ENTERPRISES, LLC, in its individual capacity, and derivatively on behalf of OYSTER BAY GROUP LLC, and SAMIR M. SHAH,

Plaintiffs,

INDEX NO.: 600378/2010
MOTION DATE: 2/28/2011
SEQUENCE NO.: 07

- against -

SCOTT MATTE, NEIL MATTE, NMY CORP. S & CM ENTERPRISES LLC, OYSTER BAY GROUP LLC, and HERTZ, HERSON & CO. LLP,

Defendants.

The following documents were read on this motion:

- Plaintiffs' Motion to Compel Production of Documents, Response to Interrogatories, and Access to Books and Records 1.
- Plaintiffs' Memorandum of Law in Support of Motion 2.
- Affirmation of John H. Gionis, Esq. in Opposition to Motion 3.
- Reply Affirmation of David J. Katz, Esq. in Further Support 4.
- Reply Memorandum of Law in Further Support of Motion 5.

PRELIMINARY STATEMENT

Plaintiffs move to compel defendants to respond to interrogatories and produce documents from defendants NMY Corp. ("NMY"). S & CM, Inc., Scott Matte and Neil Matte (collectively "Matte Defendants"), and Oyster Bay Group, LLC ("OBG"); compel OBG, Scott Matte, and Neil Matte, as Managers of OBG to provide Rodeo access to OBG's books and records, pursuant to § 1102 of New York Limited Liability Company Law, and § 6.7 of the OBG Operating Agreement.

DISCUSSION

These proceedings have been the subject of numerous motions, and the Court presumes familiarity by the parties of all relevant issues. In essence, plaintiffs seek to compel defendants to purchase the share of Rodeo in OBG in accordance with the formula contained in a 2004 Buy/Sell Agreement and, to the extent relevant, a Cross-Purchase Agreement, amongst the parties. The Buyout formula consists of four components:

- a) The value of Rodeo's capital account;
- b) The value of OBG's subsidiary, LTR, as determined by its financial statements;
- c) The value of OBG's Island subsidiary, as determined by financial statements;
- d) The "Net Liquidation Value" of OBG's subsidiary, RJM, as calculated by projected collections of the portfolios owned by RJM, over a specified period of time, and the projected costs of collection and operating expenses of RJM over a specified period of time.

Defendants have challenged the applicability of the formula, since it does not deduct the cost of acquisition of various portfolios, and, furthermore, assert that the formula was created primarily by plaintiff Shah in a manner intended to deceive them, and, as drafted, is impossible to perform. Their opposition to this motion is that they have already produced all required documents relating to the operation of OBG and its subsidiaries for the period prior to June 30, 2009, the date as of which the buyout was to be valued, and that information subsequent to that date is irrelevant to the claims of plaintiffs.

By letter dated August 7, 2009, Mr. Shah advised RJM Acquisitions, LLC that "(e)ffective August 31, 2009, I hereby resign my position as employee, officer, Manager, and fiduciary of RJM Acquisitions LLC, and all of its affiliates, parents, and subsidiaries.

For the avoidance of confusion, please be advised that by tendering this resignation I am

not withdrawing my membership interest in Oyster Bay Group LLC.”

Defendants argue that this letter had the effect of converting Rodeo’s status to one of “economic interest holder”, and they define “economic interest” as “. . . the share of a Member in the Company’s Net Profits and Net Losses, and shall not include distributions made to Members as compensation for services or as a special allocation”. They dispute the claim that Rodeo remains a full fledged member of OBG. The Matte Defendants acknowledge that Rodeo has a status as a “member” of OBG, but dispute the attributes of membership. They contend that financial information post-dating the valuation date is simply an effort by plaintiffs to ascertain the viability of a judgment which they are seeking.

§ 1102 of New York Limited Liability Company Law states in pertinent part as follows:

....

(b) Any member may, subject to reasonable standards as may be set forth in, or pursuant to, the operating agreement, inspect and copy at his or her own expense, for any purpose reasonably related to the member's interest as a member, the records referred to in subdivision (a) of this section, any financial statements maintained by the limited liability company for the three most recent fiscal years and other information regarding the affairs of the limited liability company as is just and reasonable.

....

However one chooses to classify Rodeo’s membership in OBG, it is a member. As such it is entitled to access to the three most recent fiscal year’s records. The motion to compel defendants to grant access to the books and records of OBG is granted.

Plaintiffs annex as Exh. “A” to their motion their correspondence of July 29, 2010, which they describe as the claimed deficiencies in defendants’ response to Interrogatories and Document Production. Plaintiffs’ First Set of Interrogatories is annexed to the motion

as Exh. "L" and the First Demand for Documents is annexed as Exh. "M".

Response to Interrogatories

Interrogatory "3" calls upon defendants to set forth their calculation of the amount that Rodeo is entitled to receive under the 2004 Buy/Sell Agreement for its interest in OBG. Defendants contend that, in the absence of an "audited Special Purpose Report", the calculation cannot be accomplished. They contend that three reputable accountancy firms have advised them that the preparation of the report is impossible. Defendants, therefore, need not produce the calculation which they assert is impossible to accomplish. They will, however, be precluded from offering evidence at the time of trial as to the result of such calculation, unless they produce such a calculation to plaintiffs prior to the filing of a Note of Issue. The motion to compel production of the calculation upon which defendants value Rodeo's share of OBG under the Buyout Formula is denied.

There is another reason why response to this interrogatory by application of an interpretation of the formula is problematic to the Court. Interrogatories, as opposed to bills of particular, are designed to evince support for positions taken by the adversary. Bills of Particulars, on the other hand, are only designed to expand upon the pleadings. Interrogatories which call for such things as calculations, are referred to as contention interrogatories. In *Mijatovic v. Noonan*, 172 A.D.2d 806 (2d Dept. 1991) the court expressed a dim view of them, stating that "(t)he propriety of interrogatories depends upon the extent of the material requested, and whether that material is reasonably necessary in preparing the prosecution or defense of an action", and that "(i)nterrogatories which call for opinions or conclusions of law, rather than relevant facts, should be stricken".

Interrogatory "4" seeks information on the purchase and sale of portfolios from May 2009 to present. The motion to compel production is denied. Information after the valuation date for the Buyout calculation is not relevant and is not likely to lead to relevant information. In any event, plaintiffs may be able to glean this information from

the books and records which they are entitled to inspect as a member of OBG. The motion to compel production under Interrogatory "5" is denied for the same reason.

The motion to compel production of the financial performance records for each of the financial portfolios after June 2009 is similarly denied.

Interrogatory "7" calls upon defendants to identify any application of the Buyout Formula in ¶ 2(b)(i) of the Cross-Purchase Agreement. The motion to compel a response to this interrogatory is granted. To the extent defendants are aware of any prior exercise of the formula in the Cross-Purchase Agreement in which debt, or cost of acquisition was deducted from the final estimate of value, they are to identify the transactions.

Interrogatory "8" is little more than a rhetorical question as to what the Buy/Sell and Cross-Purchase Agreement say. Defendants' claims are clearly that the Formula does not represent Net Present Value of the various portfolios as that term is generally understood. The motion to compel a response is denied. It asks for an opinion, rather than a statement of facts. *Mijatovic, supra*.

Interrogatory "9" calls upon defendants to explain their understanding of the meaning of the term "Curve", how it is used in the preparation of financial statements of OBG and the valuation of RJM, and a specific example of its use. Again, this contention interrogatory requests an opinion as opposed to a statement of facts. The motion to compel an answer to Interrogatory "9" is denied.

Defendants are directed to respond to Interrogatory "11" which requests identification of specific instances in which the "Curve" has been used to estimate the value of acquisitions of RJM, or to calculate revenue in OBG's financial statements.

Interrogatory "12" requests the factual basis for defendants claim that the Curve should not be used in calculating "projected collections over the remaining life" of a portfolio acquired by RJM, with respect to the calculating the buy-out value of Rodeo's interest in Oyster Bay. The interrogatory improperly restricts the response to specific contractual language. To the extent that defendants can state the factual basis for their

claim that the use of the Curve is improper for the calculation of net present value and the valuation of Rodeo's interest in OBG, they are directed to answer.

Production of Documents

Defendants indicate that since the original service of this motion dated October 19, 2010 they have made two additional document productions. The requests outlined in the July 29, 2010 correspondence which itemizes Document Request 2, 3, 4, 7, 19, 28, 41, 43, 46, 47, 51, 52, 53, 56, 57, 82, 87, 88, 91, 92, 93 and 94, are as follows:

2. All documents concerning any communications between or among any of the defendants about any of their disputes with Mr. Shah, or concerning his termination as manager or the buyout of Rodeo;
3. All documents concerning any communications between or among any of the defendants and any third parties about Mr. Shah;
4. All documents concerning Mr. Shah's employment by RJM or Oyster Bay or any of its subsidiaries, including without limitation any personnel file of Mr. Shaw's and any communications between or among the defendants concerning Mr. Shah's performance as manager or employee
7. All communications with Hertz Herson (including without limitation communications between any of Scott Matte, Neil Matte, S & CM, Oyster Bay or any of their counsel on one hand with either Hertz Herson or counsel for Hertz Herson on the other) concerning: (a) the buyout of either Shanti's or Rodeo's interest in Oyster Bay or any of its subsidiaries; (b) the value of the interest held by Shanti or Rodeo in Oyster Bay or any of its subsidiaries; (c) Mr. Shah, since January 1, 2006; (d) the auditing, review, compilation and preparation of any financial statements of Oyster Bay or any of its subsidiaries; (e) the restatement of any financial statements of Oyster Bay or any of its subsidiaries; (f) the 2004 Buy/Sell Agreement; (g) the Cross-Purchase Agreement; (h) the Operating Agreement; (i) any tax filing or

Communications with tax authorities about Oyster Bay or any of its subsidiaries, or Mr. Shah, or Rodeo; and (j) either this lawsuit or any potential claims or lawsuits by Shah or Rodeo or any disputes between Shah and Rodeo on one hand and any other defendant on the other; (k) the valuation of Oyster Bay and any of its subsidiaries, or of the ownership interests in Oyster Bay or any of its subsidiaries of Scott Matte, Neil Matte, NMY, S & CM, Mr. Shah, Rodeo or Shanti

19. All Documents concerning Scott Matte's transfer of any ownership interest in Oyster Bay, including that referenced in paragraph 65 of the First Amended Complaint;
28. All Documents concerning the Cross-Purchase Agreement, including without limitation all amendments thereof (including all drafts of the principal agreement and any amendments);
41. All Documents relating to any instructions given to Hertz Herson not to communicate with Mr. Shah or Rodeo;
43. All Documents supporting the contention by Defendants that Rodeo is no longer a member of Oyster Bay;
46. All Documents relating to the financial condition of Oyster Bay or any of its subsidiaries, including without limitation:
 - financial statements;
 - interim financial statements;
 - income statements;
 - balance sheets;
 - cash flow statements;
 - bank statements;
 - statements of account;
 - notes to any of the above statements; and

- drafts of any of the above.
47. All Documents related to the preparation of all financial statement for Oyster Bay and any of its subsidiaries, including without limitation all journal entries and their supporting Documentation made in connection with the closing of the books as of the date of the financial statements, and all work papers connected to the recording of revenue and the compliance with the accounting methodology referenced in the notes to the financial statements for income;
 51. All financial statements, or other related Documents required to be submitted to the RJM Bank Group, including any drafts thereof, that have been presented by Oyster Bay or any of its subsidiaries to any third party, including but not limited to the RJM Bank Group, from the first quarter of fiscal year 2009 to the present;
 52. Documents sufficient to show any and all expenditures by Oyster Bay, or any of its subsidiaries from May 2009 to the present;
 53. Documents sufficient to show any and all distributions to any of the Members of Oyster Bay from May 2009 to present;
 56. The monthly printout of the chart of accounts for Oyster Bay and each of its subsidiaries from May 2009 to present;
 57. The end of the month printout of the chart of accounts for Oyster Bay and each of its subsidiaries from May 2009 to present;
 82. All Documents concerning any diminution of Mr. Shah's responsibilities or authority as a manager of RJM or Oyster Bay or any withholding of information from him while he was still a manager, including without limitation those Documents concerning the matters alleged in Paragraph 139 of the First Amended Complaint;
 87. All invoices and supporting Documents sent by any third-party professional

firms, including, but not limited to attorneys, accounting firms (including without limitation Hertz Herson), and brokers, to Oyster Bay or any of its subsidiaries from May 2009 to present;

89. All Documents supporting the data presented in Exhibit 6 to the First Amended Complaint;
91. All Documents supporting the numbers presented in the schedules to Exhibit 8 to the First Amended Complaint;
93. All Documents concerning or constituting certifications made to any lenders that Oyster Bay or any of its subsidiaries are in compliance with all covenants to the governing lending agreements, and all supporting Documents created or used to demonstrate such compliance;
94. All minutes or other Documents reflecting any actions taken by any of the managers or members of Oyster Bay or any of its subsidiaries.

Based upon a review of the Affirmation in Opposition to the Motion, the Reply Affirmation, and the Reply Memorandum of Law, defendants have supplemented their production of documents since the initiation of the instant motion. At the outset, the Court disagrees with plaintiffs' contentions that they are entitled to the production of documents beyond June 30, 2009, the valuation date for the buyout. They claim that this information is relevant to ascertain whether or not defendants have stripped OBG of assets since that date, to determine whether or not there is substance to defendants counterclaims involving improper competition, and to evaluate the reliability of the proposed DDA Curve as a substitute for the previously used Curve.

These arguments are not convincing. The performance post resignation by Shah has no bearing on the valuation of his share of OBG. To permit otherwise would constitute, in effect, a supplementary proceeding to seek recoupment of business assets. If one wishes to test the reliability of a proposed substitute curve, this can be accomplished by its application with respect to the same performance levels of the

portfolios which plaintiff asserts is the proper measurement of value. To the extent the document demands call for production of post June 2009 material, it is denied.

Presumably, the Reply Memorandum targets the claimed deficiencies in document production which remain since the filing of the motion. They contend that Document Request No. 46 is incomplete, and acknowledged the affirmation of John Gionis, Esq. that monthly portfolio folders are no longer internally produced, and are therefore unavailable. The retort is that this should not preclude the production of historical information. Defendants are directed, to the extent that they have not already done so, to supply plaintiffs with historical monthly portfolio reports up until the time they were no longer produced.

Plaintiff claims that defendants have not produced financial statements of OBG for the third quarter 2010. The motion to compel production of this document is denied, since the cutoff date for valuation was June 30, 2009. To the extent Rodeo, as a "member" of OBG, is entitled to review documents, they will undoubtedly have an opportunity to inspect this document.

The memorandum of law alleges a deficiency in defendants' response to Document Demand No. 93. The request was for certifications by OBG or any of its subsidiaries to lending institutions that they were in compliance with covenants in the lending agreements. It is not known whether such certifications were ever issued, but to the extent defendants are in possession of such documents, they must be made available to plaintiffs.

Plaintiffs take umbrage with the response to Document Request No. 82, that defendants do not have documents responsive to the request for items referable to Mr. Shah's responsibilities or authority as Manager. If plaintiffs have particular documents in mind, they must identify them within 30 days of the date hereof. In the absence of such identification, an affidavit from a representative of OBG within 60 days that there are no responsive documents to this inquiry will be regarded as a satisfactory response.

Document Demand No. 94 seeks “minutes or other documents reflecting any actions taken by any of the managers or members of OBG or any of its subsidiaries”. Aside from the fact that this appears extremely broad, plaintiffs’ primary objection to the level of production to date appears to be with the lack of production for the period subsequent to June 2009. As the Court has determined, these records are not relevant to the valuation of the plaintiffs’ interest in OBG, and the motion to compel such documentation is denied.

This constitutes the Decision and Order of the Court.

Dated: April 22, 2011



J.S.C.

ENTERED

MAY 04 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**