

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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

Plaintiffs,

-against-

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

Defendants.

-and-

OYSTER BAY GROUP LLC,

Nominal Defendant.
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Index No. 600387/10

**AFFIRMATION IN
OPPOSITION TO
PLAINTIFFS' MOTION
TO COMPEL**

**Assigned to:
Warshawsky, J.**

**Return Date:
December 23, 2010**

JOHN H. GIONIS, being duly sworn, deposes and says that he is an attorney
duly licensed to practice law in the Courts of this State and is fully familiar with the
facts and circumstances hereinafter set forth.

1. I am a member of the firm of Certilman Balin Adler & Hyman,
LLP, attorneys for Defendants Scott Matte, Neil Matte, NMY Corp. and S&CM
Enterprises LLC (collectively hereinafter the "Matte Defendants"). We offer this
affirmation in opposition to Plaintiffs' motion to compel.

2. This case involves a closely held LLC wherein one member seeks to compel the buy-out of its membership interest.¹

Opposition to Plaintiff's Motion to Compel

3. Plaintiffs are simply wrong when they argue that the documents and information they seek is "central to the issues in this matter". As admitted by Plaintiffs, "this case is primarily about the amount that Rodeo Family Enterprises LLC ("Rodeo") is entitled to receive for its interest in Oyster Bay Group LLC ("Oyster Bay") under a "buy-out formula" set forth in the parties' 2004 Buy/Sell Agreement, which also adopts portions of a separate Cross-Purchase Agreement.²

4. Notwithstanding the foregoing, as maintained in the Matte Defendants' Amended Answer, Plaintiff Shah signed a covenant not to sue on behalf of Shanti Holding Corp., the predecessor to Rodeo as a "junior creditor" wherein it agreed not to sue Oyster Bay as the Guarantor to the Credit Facility (and by extension the Matte Defendants as parties thereto) unless and until the Credit Facility is fully paid off. See Subordination Agreement, p. 3, annexed at Exhibit "2". Admittedly, the Credit Facility remains outstanding (although the Facility has been reduced from \$60,000,000.00 to \$35,000,000.00 as Plaintiffs are aware). As such, any and all claims or

¹ By prior agreement between the parties, the Matte Defendants have agreed to discontinue, without prejudice, its counterclaims denominated "first" through "tenth" inclusive, and "sixteenth" and "seventeenth" in the Matte Defendants' Answer to the First Amended Complaint. Thus, the Matte Defendants continue to maintain and assert their counterclaims originally denominated as "eleventh", "twelfth", "thirteenth", "fourteenth" and "fifteenth." The Matte Defendants have amended their Answer to reflect the foregoing, and to add additional counterclaims and affirmative defenses. A copy of the Matte Defendants' Amended Answer ("Amended Answer") is annexed at Exhibit "1". In addition, the claims and counterclaims and cross-claims in this action have not been finalized yet, and motions to dismiss are forthcoming.

²See Plaintiff's Memorandum of Law in Support of Motion to Compel at p. 1.

demands for discovery seeking information relative to Plaintiffs' buy-out are improper and premature at best.

5. Moreover, and notwithstanding the fact that Plaintiffs have no right to seek the documents and information that they request in light of the covenant not to sue, it must be noted that Plaintiffs have already received over 10,250 pages of documents produced jointly by the Matte Defendants and Oyster Bay. Much, if not all of what Plaintiffs sought (which is not objectionable), has been produced. The Matte Defendants categorically deny all of the accusations hurled against them concerning the alleged "obstructionist tactics" concerning discovery in this case. In any event, the Matte Defendants have indeed produced "key information and documents involving the agreements at the heart of this dispute, as well as necessary financial information". It is simply a blatant prevarication that "scores of crucial documents have been withheld".³

6. Furthermore, the Matte Defendants and Oyster Bay jointly produced a supplemental document response which was served on December 6, 2010, and contains more information than plaintiffs are entitled to.

7. Indeed, anything that was legitimately requested and related to Oyster Bay and/or its subsidiaries prior to June 30, 2009 (the date by which the buy-out is purportedly measured), has been produced to Plaintiffs and/or will be produced in supplemental production(s). Plaintiffs cannot embark upon a fishing trip so that they can assure themselves that Oyster Bay will have the financial wherewithal

³ See Plaintiffs' Memorandum of Law at p. 2.

to pay any judgment Plaintiff(s) hope to obtain. This is particularly so, whereas here, Plaintiff(s) have breached the covenant not to sue.

8. In light of the fact that the Matte Defendants' and Oyster Bay's counterclaim(s) effectively bar Plaintiffs' claims, the Matte Defendants should not be compelled to produce more documents and information which are improperly sought, particularly when they were not entitled to have received the huge production which they already have. This was and is prejudicial to the Matte Defendants and Oyster Bay.

**Rodeo is An Equity Holder and/or
Economic Interest Holder in Oyster Bay**

9. Plaintiff Shah resigned on August 7, 2009, effective August 31, 2009. See Resignation Letter annexed at Exhibit "3". What is incredible is that Shah resigned not only as a manager, but as a fiduciary as well. Clearly, when one purports to abrogate his fiduciary duties (as here); one must abrogate all rights and indicia of membership as well. One cannot retain the benefits of membership but shun the obligations.

10. The governing documents of Oyster Bay seemingly provide that Rodeo is entitled to a buy-out of his membership interest. However, the Operating Agreement defines an "economic interest holder" which is what Rodeo/Shah became once he resigned. The Operating Agreement provides in relevant part:

"Economic Interest: shall mean 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.

"Economic Interest Owner" shall mean the holder of an Economic Interest.

See Operating Agreement, p.6, annexed at Exhibit "4" hereto.

11. It thus stands to reason that Rodeo cannot continue to remain a "full fledged member" of Oyster Bay, equally entitled to all of the benefits and privileges of members who have not so resigned.

12. Plaintiffs do not provide authority establishing that Rodeo remains a "full fledged member" of Oyster Bay. The decision by Judge Ramos (repeatedly cited by Plaintiffs), in Arfa v. Zamir, 63 A.D.3d 484, 880 N.Y.S.2d 635 (1st Dep't 2009), does not so provide. All the Arfa court reportedly ruled during colloquy is that the status of a member as a "member" as opposed to a "creditor", remains as such until the "put" transaction closes. However, none of the reported decisions in Arfa relate to this issue. Significantly, the Arfa decision does not set forth the parameters of a resigning member's status, specifically when such member also resigned his/its fiduciary duties. See Resignation Letter at Exhibit "3." Although the Matte Defendants do not dispute that Rodeo has a status as a "member" of Oyster Bay, the attributes of that status is what Plaintiffs and Defendants sharply dispute.

13. Moreover, this Court did not determine that Rodeo is a member "for all purposes". In fact, at a conference before the Court in this matter on August 24, 2010, Justice Warshawsky indicated that the issue of Rodeo's membership interest and what it entails would have to be fully briefed and ruled upon.

14. It is wholly unknown as to what "voting rights" Plaintiffs claim

Rodeo is entitled to. Exhibit "C" to the Katz Affirmation, which Plaintiffs reference as defendants' "admission" that Rodeo retains voting rights, is actually a letter from plaintiffs' counsel dated August 16, 2010. Clearly this does not contain any "admission" by defendants that Rodeo/Shah retains any voting rights. In any event, Oyster Bay can certainly continue to operate through the vote of its two remaining "full fledged members", S&CM and NMY. Rodeo is not entitled to all the rights and privileges of membership as Plaintiffs contend.

Plaintiffs Are Not Entitled to Information Sought

15. In simple terms, the Buy-Out Agreement requires an "Audited Special Purpose Report" to value Rodeo's membership interest in Oyster Bay to be prepared by Oyster Bay's accountant. (See Cross-Purchase Agreement, ¶2(b)(i) at Exhibit "5" to Amended Complaint.) Hertz Herson was formally engaged by the Oyster Bay to perform this task -- but resigned as Oyster Bay's accountants after Plaintiffs interposed a malpractice claim against it. Thus without such an "audited Special Purpose Report," the buy-out cannot be accomplished.

16. It is most ironic that Plaintiffs contend that the failure of Hertz Herson or any subsequent accounting firm to produce the so-called "Special Purpose Report" has nothing to do with Plaintiffs. In fact, assuming arguendo that Hertz Herson was prepared to issue such a report, Plaintiffs suing Hertz Herson for malpractice brought that to a screeching halt. Moreover, as Plaintiffs are well aware, not one, not two, but three reputable accounting firms to date, have indicated to Defendants that no such document is capable of being issued. Thus, the Court