

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: PART 8

RODEO FAMILY ENTERPRISES LLC, *et*
ano.,

Plaintiffs,

- *against* -

SCOTT MATTE, *et al.*

Defendants.

Index No.: 600378/2010
(Warshawsky, J.)

**PLAINTIFFS' MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO COMPEL**

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Plaintiffs Rodeo Family Enterprises LLC (“Rodeo”) and Samir M. Shah (“Mr. Shah”), through their undersigned counsel Schlam Stone & Dolan LLP, submit this Memorandum of Law, together with the Affirmation of David J. Katz (“Katz Aff.”) and the exhibits attached thereto, and the Affirmation of Good Faith of David J. Katz, in support of Plaintiffs’ motion for an order compelling Defendants Oyster Bay Group LLC (“OBG”), Scott Matte, Neil Matte, NMY Corp., and S&CM Enterprises LLC (collectively the “Matte Defendants”) (1) to produce documents held by the Matte Defendants and responses to Interrogatories, pursuant to CPLR 3124; and (2) to provide Rodeo access to OBG’s books and records, pursuant to Section 1102 of the New York Limited Liability Company Law and Section 6.7 of the OBG Operating Agreement.

PRELIMINARY STATEMENT

This motion seeks to remedy the Matte Defendants’ refusal to provide documents and information central to the issues in this matter, pursuant to discovery requests and as required under the New York Limited Liability Company Law and OBG’s Operating Agreement. As the Court will recall, this case is primarily about the amount that Rodeo is entitled to receive for its interest in OBG under a “Buy Out Formula” set forth in the parties’ 2004 Buy/Sell Agreement, which also adopts portions of a separate Cross-Purchase Agreement. The Court will also recall that the Buy Out Formula consists of four components: (i) the value of Rodeo’s capital account; (ii) the value of OBG’s LTR subsidiary, as determined by its financial statement; (iii) the value of OBG’s Island subsidiary, as determined by its financial statements; and (iv) the “Net Liquidation Value” of OBG’s RJM subsidiary, as determined by the projected collections of the portfolios purchased by RJM over a specified period of time, and the projected costs of collection and operating expenses of RJM in a specified period of time.

The Matte Defendants have categorically refused to provide key information and documents regarding the agreements at the heart of this dispute as well as necessary financial information regarding OBG and its subsidiaries relevant not only application of the Buy Out Formula and the relevant agreements, but also to Plaintiff Rodeo's Second Cause of Action for breach of fiduciary duty, and certain of the Matte Defendants' remaining counterclaims.¹

Indeed, the Matte Defendants' failure to provide the most fundamental discovery is part of a pattern of misbehavior to bring this case to a stand-still. The Court will recall that at the May 2010 preliminary conference, John Gionis, Esq., the counsel for all the Matte Defendants, except OBG, steadfastly refused to enter into any PC order until he was repeatedly ordered to do so by the Court. The Court then issued a PC Order that provided for documents to have been exchanged in the summer and depositions to have occurred by October. Yet, the depositions have not occurred because of the Matte Defendants' stone-walling.

The Court will further recall that these discovery disputes began in July 2010, when Plaintiffs' counsel sent letters to the Matte Defendants' counsel in an attempt to resolve these issues. The Matte Defendants' counsel ignored these letters and violated the rules of the Commercial Division to conduct a meet and confer. Again, the meet and confer did not occur until the Court ordered it. And at the meet and confer, the Matte Defendants refused to produce anything that they had already withheld.

Time and again the Matte Defendants have violated this Court's rules and directives, and even when they are brought to task by the Court, they still have obtained what they desired: they have brought this case to an almost stand-still. This action was filed almost a year ago (in December, 2009) and yet scores of crucial documents have been withheld, interrogatories have not

¹ On October 7, 2010, counsel for OBG e-mailed the parties that the Matte Defendants would be withdrawing, without prejudice, all but their Eleventh, Twelfth, Thirteenth, Fourteenth, and Fifteenth counterclaims, (Katz Aff. Ex. A), although they have not formally done so.

been answered and no depositions have occurred. We ask that the Court put a stop to these obstructionist tactics by granting this motion to compel.

ARGUMENT

Plaintiffs are entitled to the documents and information discussed below: (a) under the CPLR, because the documents and information are relevant to the claims and counterclaims in this action; and (b) under the LLC Law, because Rodeo remains a member of OBG.

I. THE LLC LAW AND THE OBG OPERATING AGREEMENT PROVIDE FOR BROAD ACCESS BY OBG'S MEMBERS TO OBG'S BOOKS AND RECORDS

Separate and apart from any obligation that OBG has to produce documents to Plaintiffs as a Defendant in this action, OBG, as a New York LLC, is required to provide information to Rodeo, in its capacity as a member. Limited Liability Company Law 1102(b) provides that any member, subject to reasonable standards as may be set forth in the LLC's operating agreement, may inspect and copy for purposes reasonably related to the member's interest, among other things, the items set forth in Section 1102(a)(1-5), financial statements maintained by the LLC for the three most recent years, "*and other information regarding the affairs of the limited liability company as is just and reasonable.*" (emphasis added). Section 1102(b) also gives any member the right to inspect all of the LLC's records so long as such inspection is reasonably related to the member's interest. Any restrictions on a member's right to inspect the records of an LLC must be contained in the LLC's operating agreement.

In addition to its rights under Section 1102, Rodeo has a broad right of inspection under the Operating Agreement. Section 6.7(b) of OBG's Operating Agreement provides that: "From time to time upon the request of any Member, [OBG] will deliver to such Member such information and data pertaining to the business, financial and corporate (internal) affairs of [OBG] as may be reasonably requested by him."

In *In re O'Neill*, Nassau Co. Sup. Ct. Index No. 015126/2006, Slip Op. at 6 (May 7, 2007) (a copy of which is attached to the Katz Aff. as Exhibit B), then Commercial Division Justice Austin broadly construed these provisions of the LLC Law and rejected the respondent's assertion that petitioners had to "demonstrate a need to review the records before such records are made available." As Justice Austin explained: "The only statutory requirements for obtaining full access to the records is that the person demanding access is a member at the time the demand is made and that the demand is reasonably related to the member's interest." *Id.*

A. Rodeo Is a Member of OBG

By letter dated August 7, 2009, Mr. Shah provided twenty-four (24) days' notice of his resignation as a Manager of each of RJM and OBG. OBG has disingenuously argued that, by this resignation letter, Ms. Shah purported to terminate the membership interest of Rodeo in OBG or that Rodeo is now only a "nominal member" of OBG. This Court already determined, in the July 19, 2010 Order (at 6) that these arguments are meritless. Accordingly, the Matte Defendants now argue that Rodeo has no right to any information after June 30, 2009, since it holds no more than an economic interest in the value of Rodeo's buy out, which is to be calculated as of June 30, 2009. This argument is equally meritless and, in fact, is the same essential argument that was already rejected by this Court.

The Matte Defendants are correct about one thing: Rodeo does retain an economic interest in OBG, but, contrary to their assertions, there is no limitation of that interest to pre-June 30, 2009, since Rodeo remains a member, and that is exactly why Rodeo is entitled to the documents it seeks. The Matte Defendants have gone even further in flouting this Court's clear ruling that Rodeo remains a member by recently issuing Rodeo a 2009 Form K-1 stating that Rodeo began 2009 with a 25% membership interest in OBG but ended the year with 0% membership interest, thereby depriving Rodeo of the most basic benefit of its membership interest, *i.e.*, the pro rata allocation of

OBG's profits and losses at some point in 2009, without any explanation of how, why, or when this could have occurred.

Because the Matte Defendants have succeeded in delaying the resolution of the case, among other things, the Special Purpose Audit Report is not now due until December 31, 2010. That, along with all the other delays that have happened, and will happen, means that it will be at least another year, if not years, until the litigation is resolved and the purchase price is paid to Rodeo.

The Matte Defendants cannot have it both ways. They cannot delay the buyout of Rodeo's interest all the while arguing that Rodeo is no longer a full member because it is being bought out. Many things can occur that could affect OBG's ability to buyout Rodeo. Rodeo, even as a minority member, has the right to vote on matters regarding OBG and to participate in its governance. Indeed, the Matte Defendants admit that Rodeo retains its voting rights after June 30, 2009 (*See Katz Aff. Ex. C*). But the Matte Defendants fail to explain how, in this absurd dichotomy they are attempting to construct, Rodeo can properly exercise its voting rights if it is restricted from all information relating to OBG after June 30, 2009. None of the statutory authority, cases, or even the agreements between the parties in this matter makes the distinction that the Matte Defendants attempt to make for this express reason.

Thus, Matte Defendants have not cited any authority (because none exists) for the proposition that one can only be a partial member of an LLC, or that once a member is obligated to be bought out, it has any fewer rights until the buy-out is effectuated. Indeed, such a holding would violate the public-policy inherent in the LLC Law to protect the interest of members from overreaching by management.

Indeed, on facts on virtually all fours with those alleged here, New York County Commercial Division Justice Ramos held that an LLC member's exercise of a put requiring an LLC

to purchase its membership interest did not terminate that member's status as a member **until the put transaction actually closed**. There, the LLC member exercised its contractual right granted to it under the LLC's operating agreement to "put" its membership interest to the LLC after the member had been removed as a Manager of the LLC. *See Arfa v. Zamir*, 63 A.D.3d 484, 485, 880 N.Y.S.2d 635, 636 (1st Dep't 2009). At a motion hearing, Justice Ramos rejected the argument by the LLC's counsel that, upon exercising the put, the LLC member lost its membership status and became a creditor. *See Arfa v. Zamir*, N.Y. Co. Index No. 603602/2005, May 7, 2007 Hr'g Tr. at 17-25 (attached as Ex. D to the Katz Aff.)² As Justice Ramos correctly explained in the following colloquy:

THE COURT: But, until the put is closed, [the LLC member] still [has] an equity position.

[LLC COUNSEL]: Well, no. The put is an irrevocable exercise. [The LLC member] no longer [has] an equity interest. [It has] an --

THE COURT: It requires the [LLC] to purchase its interest in accordance with the provision. To purchase it doesn't effect the purchase as of that moment.

Id. at 24. Justice Ramos' ruling was subsequently affirmed on appeal. *See Arfa*, 63 A.D.3d 484, 880 N.Y.S.2d at 635.

Here, just as in *Arfa*, Rodeo's obligation to sell its membership interest to OBG is executory, and the purchase of Rodeo's membership interest in OBG will not be completed until OBG has paid Rodeo the price specified in the buy-out provisions of the parties' agreements.

As discussed in Part I.B, *infra*, the parties' own agreements contemplated the exchange of the sort of information Mr. Shah and Rodeo seek while a buy-out is pending for the express reason of protecting the holder whose interest was being purchased. Until then, Rodeo remains a member

² The caption on the first page of this transcript incorrectly lists only one of two related captions and does not list the *Arfa v. Zamir* caption. Both captions are listed in the First Department decision cited above affirming Justice Ramos, however.

of OBG, as this Court, rejecting the Matte Defendants' and OBG's arguments, determined without qualification in its July 19, 2010 Decision and Order, and is entitled to all the rights and privileges of such membership. Indeed, there is no such thing, and to date the Matte Defendants have cited no authority to support such a proposition, as a member who is an "economic interest holder" with only ongoing voting rights as of June 30, 2009. Thus, per this Court's July 2010 ruling, Rodeo remains a member of OBG, Rodeo is entitled to the same rights that it possessed before Mr. Shah resigned through and up until the date that OBG actually complies with its obligation to pay for Rodeo's membership interest.

At bottom, the Matte Defendants are claiming that, even though Mr. Shah did not resign as a Manager of RJM until August 31, 2009, which triggered OBG's obligation to purchase Rodeo's membership interest, Rodeo's membership interest somehow metamorphasized into a "voting-only" membership interest with no accompanying economic interest or ability to obtain any information related to Rodeo's membership interest in OBG from and after June 30, 2009. But this Court has already rejected the Matte Defendants' prior argument that Rodeo's status was somehow metamorphasized from that of a member to a mere creditor of OBG. Thus, to end run this Court's prior ruling, the Matte Defendants are arguing for a construct that has no basis in fact or law. To add insult to injury, the Matte Defendants are also claiming that they cannot complete the purchase of Rodeo's membership interest due to the "impossibility" of preparing the contractually required Special Purpose Audit Report, even though on December 17, 2009, they retained Defendant Hertz Herson to prepare just that report. If this Court were to accept these arguments, it would put Rodeo in the untenable position of (a) having the purchase of its membership interest in OBG delayed indefinitely while the Matte Defendants claim that they cannot produce a report that they themselves engaged Hertz Herson to prepare on December 17, 2009; (b) Rodeo retaining no

economic interest in OBG, which is the sole purpose of Rodeo's existence; and (c) Rodeo having no access to information related either to Rodeo's buyout, this litigation, or Rodeo's own *existing* membership interest in OBG. This is exact kind of scenario of Rodeo being "held hostage" by the Matte Defendants actions that this Court rejected in its July 2010 ruling.

Accordingly, there is no such thing as a membership interest with the characteristics described by the Matte Defendants, and they have cited no authority to support their position. As this Court has already ruled, *Rodeo remains a member* of OBG, and thus Rodeo is entitled to the same rights as it possessed before Mr. Shah resigned through and up until the date that OBG actually complies with its obligation to pay for Rodeo's membership interest.

B. There Are No Limitations in OBG's Operating Agreement Restricting Rodeo's Right to the Information It Is Requesting

In a letter dated July 29, 2010, Rodeo requested the following information pursuant to Section 1102:

- 1) Monthly closing folders from August 2009 through the present;
- 2) Quarterly financials due and submitted to the RJM bank group for the Third and Fourth Quarters of 2009 and the First and Second Quarters of 2010, whether audited or unaudited;
- 3) Documents pertaining to the April or May 2010 presentation to the RJM bank group, as well as any letters from the bank group declaring default other than the May 13, 2010 letter from Keybank National Association produced at 05182-05183;
- 4) Personal financial statements of Scott and Neil Matte submitted to the RJM bank group in the Fourth Quarter of 2009;
- 5) Information on payments from OBG or any of its subsidiaries to Scott Matte, Neil Matte, NMY, S&CM or any of their attorneys;
- 6) The portfolios bid on or purchased since June 2009;
- 7) Any transactions between OBG (or any of its operating units) and any of Scott Matte, Neil Matter, NMY, S&CM or any third-party;
- 8) Any communications since June 2009 with the banks, not already provided;
- 9) Any communications since June 2009 with any regulatory agency regarding OBG (or any of its operating units);

- 10) Any communications or filings since June 2009 with any tax authorities (including any K1s, returns requests for extensions etc) and to the extent that OBG makes any filings in the fall, they must be provided to Rodeo;
- 11) Any communications or agreements with any accountants retained or to be retained by OBG.

(Katz Aff. Ex. E).

Rodeo remains a guarantor, and Mr. Shah remains a personal guarantor, of the Sixty Million Dollar (\$60 million) RJM Credit Facility. Upon information and belief, the Mattes recently re-negotiated the terms of the RJM Credit Facility (purportedly leaving both Mr. Shah's and Rodeo's guaranties in place) without providing any information or notice to Rodeo or to Mr. Shah. OBG has failed to provide Rodeo with OBG's 2009 tax return or the K-1s of OBG's two other members. OBG only provided Rodeo with Rodeo's K-1 on October 14, 2010, the day before Mr. Shah's personal tax-filing deadline, and a full month after Rodeo's tax-filing deadline. Furthermore, Rodeo's K-1 provides that Rodeo had a 25.00% membership interest in the profits and losses of OBG at the beginning of 2009 but a 0% interest in the profits and losses of OBG at the end of 2009.

(Katz Aff. Ex. F).

As discussed above, Section 6.7(b) of OBG's Operating Agreement requires OBG to provide Rodeo with "such information and data pertaining to the business, financial and corporate (internal) affairs of [OBG] as may be reasonably requested by [Rodeo]." Thus, the only limitation on Rodeo's requests for information is that its requests be reasonable. Here, the requested information is plainly reasonable.

For example, most of the information requested dating back from May 2009 was intentionally withheld from Mr. Shah by OBG and the Mattes beginning in May 2009, once they decided to freeze him out of the day-to-day management of OBG and RJM and informed him on an almost weekly basis that they would soon be terminating him as a Manager of RJM.

With respect to Rodeo's request for information on an ongoing basis, the fact that Rodeo's ownership interest in OBG is to be calculated as of June 30, 2009, does not make requests for this information unreasonable. Specifically, Rodeo is certainly entitled to information about the finances of OBG on an ongoing basis to satisfy itself that OBG will have sufficient assets so that Rodeo and Mr. Shah are not called upon to satisfy their guaranties of the above-mentioned renegotiated RJM Credit Facility. Moreover, the information requested about any change-of-control transactions is also relevant and proper for the obvious reason that Rodeo is entitled to satisfy itself that any prospective purchaser of OBG's assets or equity is aware of and willing to abide by OBG's contractual obligations requiring the redemption of Rodeo's membership interest in OBG by OBG. In fact, the OBG Operating Agreement specifically provides that the Matte Defendants cannot effect any such transactions without Rodeo's written consent. Indeed, this very same information was unsuccessfully requested by Rodeo and Mr. Shah before the effective date of resignation as a Manager of OBG, and the Mattes breached their contractual and fiduciary duties to him as his co-Managers by refusing to provide this information to him.

Moreover, the Cross Purchase Agreement provides, in Section 3(ii)(b)(3)(B), that in the case where the purchase price is determined pursuant to, *inter alia*, Section 2(e) of the Agreement, and in the case of the death or disability of a member, the insurance proceeds are less than such price, the interest holder in the outstanding amount, his attorney and accountant have the right to examine the books and records of OBG and its subsidiaries, and to receive copies of all accounting reports, financial statements (audited and unaudited) and tax returns prepared for or on behalf of OBG and its subsidiaries until payment is complete. (Am. Compl. Ex. 5, ¶ 3(ii)(b)(3)(B)). Plaintiffs' requests are less onerous than this provision, which is plainly meant for the protection of the member that is owed any balance on the purchase price of its membership interest in OBG.

Thus, the information requested is reasonable and is required to be produced to Rodeo by OBG pursuant to both Section 1102(b) of the LLC Law and Section 6.07(b) of OBG's Operating Agreement. *See In re O'Neill*, Slip Op. at 5-6.

II. THE DOCUMENTS SOUGHT ARE MATERIAL AND NECESSARY TO THE PROSECUTION AND DEFENSE OF THIS ACTION

CPLR § 3101 provides that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action...” The standard of whether something is “material and necessary” is whether it is “relevant.” *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 407, 288 N.Y.S.2d 449, 453 (1968); McKinney's Practice Commentaries, C3101:5. The standard allowing disclosure of “all matter material and necessary” is by those terms broad and to be “interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.” *Allen*, 21 N.Y.2d at 406, 288 N.Y.S.2d at 452; *Osowski v. AMEC Constr. Mgmt., Inc.*, 69 A.D.3d 99, 106, 887 N.Y.S.2d 11, 15 (1st Dep't 2009). The requested documents concerns subjects that are central to this matter, and are therefore “material” under this standard.

III. SPECIFIC REQUESTS AND INTERROGATORIES TO WHICH OBG AND THE MATTE DEFENDANTS MUST RESPOND

A. OBG and the Matte Defendants Must Provide Information and Documents Concerning the Valuation Under the Buy-Out Formula

Quite egregiously, the Matte Defendants have refused to answer **Interrogatory No. 3**,³ which asks them to state their view as to how the Buy Out Formula should be applied by providing the dollar value of each of the four components,⁴ and the methodology utilized to realize those

³ Plaintiffs' discovery requests and Defendants' Objections and Responses are attached to the Katz Aff. at Exs. L, M, N, and O.

⁴ These components are, again: (i) the value of Rodeo's capital account; (ii) the value of the LTR subsidiary, as determined by its financial statement; (iii) the value of the Island subsidiary, as determined by its financial statements; and (iv) the “Net Liquidation Value” of the RJM subsidiary, as determined by the projected collections of the portfolios