

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4
Justice

DROR ROSENFELD, Individually and as a
member of ROTHSCHILD ROSENFELD
REAL ESTATE EQUITIES, LLC,

Plaintiff,

- against -

JACQUES ROTHSCHILD, ROTHSCHILD
ROSENFELD REAL ESTATE EQUITIES, LLC,
78 E 3 STREET REALTY LLC, 278 E 10
STREET REALTY LLC and EASTWAYS
HOLDINGS LIMITED LIABILITY COMPANY,

Defendants.

x

Index
Number 21263 2010

Motion
Date October 5, 2010

Motion
Cal. Number 16

Motion Seq. No. 1

x

The following papers numbered 1 to 11 read on this motion by plaintiff Dror Rosenfeld, suing individually and as a member of Rothschild Rosenfeld Real Estate Equities, LLC (RR), for a preliminary injunction, inter alia, prohibiting the defendants from removing RR as the manager of defendant 78 E 3 Street Realty, LLC (78 LLC) and defendant 278 E 10 Street Realty LLC (278 LLC).

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits.....	1-8
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Upon the foregoing papers it is ordered that the motion is denied.

Plaintiff Dror Rosenfeld and defendant Jacques Rothschild are the members of RR which is in turn a member of 78 LLC, the owner of property located at 78th East 3rd Street, New York, New York, and 278 LLC, the owner of property located at 278 East 10th Street, New York, New York. Defendant East Waves Holdings LLC (EW) is the majority member of both 78 LLC and 278 LLC. On April 5, 2006 and on February 13, 2007, RR and EW entered into operating agreements for 78 LLC and 278 LLC respectively which provided in section 1.1 that the term “ ‘Manager’ shall mean R&R or any Person who or which, at the time of reference thereto, has been designated pursuant to the terms hereof as the Manager of the Company as a successor to the interest of R&R.” Section 1.1 defined the term “Operating Manager” in a similar manner. Section 5.1 provided: “Duties and Responsibilities of the Manager. Except as otherwise expressly provided herein and subject to the limitations contained in Section 5.4, the Manager shall have the exclusive right and power to manage, operate and control the company ***.” Section 5.1(h) gave the Manager the power “[t]o terminate the agreements for the management and leasing of the Property in accordance with the terms thereof.” Section 5.2, “Duties and Responsibilities of the Operating Manager,” provided in relevant part that “the Operating Manager shall have the obligation, right and power to manage, operate and control the day-to-day operations of the Property ***.” Section 7.11 provided: “Admission of Successor or Additional Manager. The Manager may at any time designate one or more Persons to be its successor Manager ***.” RR served as the manager and operating manager of 78 LLC and 278 LLC from April, 2006 to August, 2010, collecting management fees that Rosenfeld and Rothschild divided equally between themselves. By letter dated August 12, 2010, an attorney acting on behalf of EW terminated RR as the manager of 78 LLC and 278 LLC because (1) RR had never executed management agreements with the companies, and (2) Rosenfeld and Rothschild had engaged in litigation between themselves. Plaintiff Rosenfeld alleges that defendant Rothschild has acted in collusion with EW for the purpose of removing RR from its management positions. The plaintiff began this action on or about August 20, 2010.

A party moving for a preliminary injunction has the burden of establishing by clear and convincing evidence (1) a likelihood of ultimate success on the merits; (2) irreparable injury if the provisional relief is withheld; and (3) a weight of the equities in his favor. (*See, Doe v Axelrod*, 73 NY2d 748; *Destiny USA Holdings, LLC v Citigroup Global Markets Realty Corp.*, 69 AD3d 212.) Plaintiff Rosenfeld failed to carry this burden. In regard to the first element, Limited Liability Company Law § 414, “Removal or replacement of managers,” provides: “Except as provided in the operating agreement, any or all managers of a limited liability company may be removed or replaced with or without cause by a vote of a majority in interest of the members entitled to vote thereon.” Defendant EW, relying on section 414, asserts that the operating agreements for 78 LLC and 278 LLC are silent about the removal of company managers by members, thereby giving it, as the majority member of both companies, the right to remove RR. On the other hand, plaintiff RR argues that “Sections 1.1., 5.1(h), 5.2 and 7.11, when read as a whole, provide that only the Manager

(which is R&R) may designate its ‘successor Manager’ who in turn has the ‘sole’ right to remove R&R as the Operating Manager.” At this point in the litigation, the court finds that the language of the operating agreements is not sufficiently clear for it to reach the conclusion that there is a likelihood of success on the merits. (*See, SportsChannel America Associates v National Hockey League*, 186 AD2d 417.) A preliminary injunction should not be issued where the terms of an agreement sued upon are ambiguous. (*See, Harbour View Racquet Club, Inc. v Village of Mamaroneck*, 287 AD2d 437; *Credit Index, L.L.C. v Riskwise Intern. L.L.C.*, 282 AD2d 246; *SportsChannel America Associates v National Hockey League, supra*; *Gulf & Western Corp. v New York Times Co.*, 81 AD2d 772.) At this point in the litigation, the terms of the operating agreements are at best for the plaintiff ambiguous. The plaintiff also failed to establish the second element of irreparable injury. Section 5.3 of the operating agreements entitled RR to compensation for its services at a rate provided for therein. “Economic loss, which is compensable by money damages, does not constitute irreparable harm.” (*EdCia Corp. v McCormack*, 44 AD3d 991, 994; *see, Family-Friendly Media, Inc. v Recorder Television Network*, 74 AD3d 738.) The plaintiff alleges that RR will suffer irreparable harm because a breach of the operating agreements by EW will cause the former to lose certain rights of the Manager under section 5.1(i) of the operating agreements such as the right to refinance the property. However, the plaintiff did not show by clear and convincing evidence that the alleged irreparable harm is “imminent, not remote or speculative.” (*Family-Friendly Media, Inc. v Recorder Television Network, supra*, 739, quoting *Golden v Steam Heat*, 216 AD2d 440, 442)

Dated: 11/22/10

J.S.C.