

DPB Family LLC v Eutychia Group LLC

2022 NY Slip Op 34705(U)

July 8, 2022

Supreme Court, New York County

Docket Number: Index No. 652555/2018

Judge: Jennifer G. Schechter

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: COMMERCIAL DIVISION**

PRESENT: HON. JENNIFER SCHECTER PART 54

Justice

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DPB FAMILY LLC, BMCPS LLC, DEA ASTON LLC,
ARISTOTLE DEFTEREOS, SPIROS DEFTEREOS,
STAVROS KALOGEROPOULOS, EDWIN PINTO, FIDI
DISTRICT LLC, COLUMBUS VILLAGE LLC, NGM
MANAGMENT GROUP LLC,

MOTION SEQ. NO. 004

Plaintiffs,

- v -

**DECISION + ORDER ON
MOTION**

EUTYCHIA GROUP LLC, EL TORO GROUP LLC, FIDI
DISTRICT LLC, COLUMBUS VILLAGE LLC, NGM
MANAGEMENT GROUP LLC,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252

were read on this motion to/for JUDGMENT - SUMMARY.

Section 2.4 of the operating agreements requires that "all Major Decisions shall be taken only with majority consent of all the Class A and Class B Members" (Dkt. 201 at 4). This is ambiguous. Plaintiffs aver that majority consent of each class of members is required, while defendants suggest that an aggregate majority is needed. Neither interpretation is unreasonable. For instance, the Class B Members ordinarily have no management rights so requiring a majority of them to be on board with Major Decision seems reasonable. So too would it be reasonable to give them input by aggregating their votes with the Class A Members. The problem, of course, is that the operating agreements do not clearly spell this out. Nor have the parties proffered any clear extrinsic evidence of their intent. Summary judgment must therefore be denied (*Chiusano v Chiusano*, 55 AD3d 425, 426 [1st Dept 2008]; *see Kolbe v Tibbetts*, 22 NY3d 344, 355 [2013]).

To be sure, this issue has nothing to do with the accounting and is not determinative of the other claims in this action; thus, a trial would be needed regardless of the disposition of this motion, the balance of which concerns plaintiffs seeking summary judgment on liability on: (1) breaches of "the Operating Agreement with Ultra Vires Acts: Approving Misuse of Funds, Taking Bad Loans, False Bankruptcy, Amendments to the Operating Agreements and Other Bad Acts" (Dkt. 232 at 14); (2) breaches of "Fiduciary Duties By Taking and Misusing Loans, Funds of the Franchise Entities for Other Entities and Entering

the Companies into Bankruptcy" (*id.* at 16); and (3) "Self-Dealing and Waste By Misappropriating Corporate Opportunities and Funds" (*id.* at 22). The first category turns, at least in part, on the meaning of § 2.4. The second and third categories require a detailed assessment of the accounting (Dkt. 150), which the motion does not provide.

Moreover, it is difficult here to separately address liability and damages since whether there were breaches turns on, among other things, whether the companies were harmed (*Ali v Chaudhry*, 197 AD3d 1084, 1085 [2d Dept 2021]; *see Estate of Spitz v Pokoik*, 83 AD3d 505, 506 [1st Dept 2011]), and whether the companies were harmed turns on resolution of the objections to the accounting (*see* Dkt. 182). The conflicting arguments about the legitimacy of the disputed transactions warrants denial of summary judgment. A clear and complete trial record will be necessary for the court to determine whether each of these transactions had a legitimate corporate purpose. To do so, the court will need to evaluate the credibility of the parties' testimony.

The court declines to consider granting summary judgment on issues raised for the first time in the opposition brief, as defendants admit they failed to affirmatively move for summary judgment by the court-ordered deadline (Dkt. 196; *see* Dkt. 238 at 20). Indeed, defendants did not cross-move for any affirmative relief. The briefing schedule did not contemplate having to respond on reply to an extensive affirmative summary judgment motion and it would be prejudicial to have expected plaintiffs to have done so. Defendants correctly aver that the court should not have "to scour the record on its own in search of possible evidence to support Plaintiffs' claims" (Dkt. 238 at 9); likewise, the court will not conduct a search of the vast record to grant summary judgment to defendants.

Accordingly, it is ORDERED that plaintiffs' motion for partial summary judgment on liability is DENIED, and in accordance with the September 30, 2021 order, the parties shall e-file and email the court a proposed stipulation setting expert discovery deadlines by July 15, 2022.

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7/8/2022
DATE

JENNIFER SCHECTER, J.S.C.

CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
 GRANTED DENIED GRANTED IN PART OTHER