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**SHORT FORM ORDER**

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

**PRESENT:**
**HON. IRA B. WARSHAWSKY,**
**Justice.**

**TRIAL/IAS PART 10**

EUGENE SHALIK, individually and on behalf of 7001 BRUSH HOLLOW ROAD, LLC, SHALIK, MORRIS & COMPANY, LLP and SHALIK REALTY VENTURES, LLC,

Plaintiffs,

INDEX NO.: 006717/2007
MOTION DATE: 05/08/2008
MOTION SEQUENCE: 003 and 004

-against-

**XXX**

EDWARD KALIKOW, individually and doing business as The KALIKOW GROUP, and KALED MANAGEMENT CORP.,

Defendants.

The following papers read on this motion:

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| Notice of Motion, Affidavit & Exhibits Annexed | 1 |
| Affirmation in Support of Thomas J. McGowan & Exhibits Annexed | 2 |
| Defendants' Memorandum of Law in Support of their Motion for Summary Judgment | 3 |
| Statement Pursuant to Commercial Rule 19-a | 4 |
| Notice of Cross-Motion, Affirmation, Affidavit & Exhibits Annexed | 5 |
| Statement Pursuant to Commercial Rule 19-a | 6 |
| Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment | 7 |
| Affidavit in Further Support of Motion and in Opposition to Cross-Motion of Edward M. Kalikow | 8 |
| Statement Pursuant to Commercial Rule 19-b | 9 |
| Defendants' Memorandum of Law in Further Support of their Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Partial Summary Judgment | 10 |

This motion by defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing the action and the cross-motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment on the fourth cause of action are determined as follows.

On January 14, 1997, Kalikow and Shalik formed 7001 Brush Hollow Road LLC, (7001 or the LLC) to acquire a building to house the plaintiff businesses and the defendant businesses, which they did by acquiring a long-term Ground lease for the building situate at 7001 Brush Hollow Road. They are the only two members of 7001. Both are major tenants in the building and sundry other tenants are spread throughout the building.

There were no signs on the exterior of the building until March 2007 when, against the express wish of plaintiff, defendant caused to be affixed the words "the Kalikow Group" to the facade of the building facing Brush Hollow Road. The one sign - of three words - has spawned ten causes of action in this law suit. It is a symptom of the fermentation developing among these long time business comrades.

It is conceded that initially defendant was the managing member of the LLC insofar as it was a loan from defendant's mother which enabled the parties to purchase the building. Later the LLC obtained commercial financing of the Building from North Fork Bank in 1998, and the loan to defendant's mother was repaid.

Defendant submits that as the operating manager he could authorize the placement of the sign. However, of greater importance, he argues that the Over Lease to 7001 permits the erection of signs and the sublease to the tenants carries forward that right. In effect no permission by the operating member was necessary.

Plaintiff argues that it was the parties understanding and agreement from the beginning, during the first year when the family (Pearl Kalikow's) loan was in place, that as soon as they arranged commercial financing both would be operating managers, or in plaintiff's words he would be the co-managing member. A copy of an executed second Operating Agreement was never produced, although one was prepared. Plaintiff avers that he signed one in 1998. He contends that the parties even acted like co-managers by consulting with each other on details of running 7001, and to this end he also guaranteed the North Fork Bank Loan. Finally, plaintiff relies upon the LLC's tax returns as evidence that plaintiff was a member manager of the filing

entity and that he is its tax matter's partner.

Plaintiff's affidavit cites three reasons for commencing this action.

The first is Kalikow's breach of fiduciary duty in the respect that Kalikow caused 7001 to install the sign on 7001's property although it confers no benefit on 7001 but benefits one of its members, Kalikow.

The second is to deter defendant from acting in further derogation of plaintiff's rights as a co-manager of the LLC.

The third reason is to seek a determination that a provision of the LLC's Operating Agreement which forbids the transfer of either's membership interest without obtaining the consent of the other member, constitutes an unreasonable restraint on alienation of property.

The foregoing concerns were originally expressed in ten causes of action of which the second, third, ninth and tenth have been withdrawn. The damages sought are minimal; injunctive relief is the engine driving this lawsuit. Plaintiff seeks to be declared a member manager and to have the sign removed. The motion and cross-motion for summary judgment on the causes of action which remain are addressed below seriatim.

The standard to be applied to each cause of action is well established law: "defendant must show, by affidavit or other evidence, that there is no material issue of fact to be tried, and that judgment may be directed as a matter of law...." Brill v City of New York, 2 N.Y.3d 649, 651 (2004). Upon defendant's establishing a prima facie case for summary judgment on any of the six remaining causes of action, the burden shifts to plaintiff to raise a triable issue of fact sufficient to challenge judgment as a matter of law.

In order to raise issues of fact sufficient to defeat a motion for summary judgment, where the movant has presented prima facie evidence in support of its entitlement to such relief, it is incumbent upon the party opposing summary judgment to raise triable issues of fact based upon more than mere conclusory or unsupported assertions. See Sun Yau Ko v Lincoln Savings Bank, 99 A.D.2d 943, *aff'd,* 62 N.Y.2d p38 (1984) (citing to Zuckerman v City of New York, 49 N.Y.2d 557 (1980)).

The first cause of action in the amended complaint seeks an injunction against defendant continuing to unilaterally act in the name of the LLC unless such acts are approved by the LLC.

Resolution of this claim depends upon whether defendant is the sole operating member of 7001. It also depends upon whether the standard for injunctive relief is satisfied.

Defendant establishes that the only signed Operating Agreement by the members of the LLC authorizes defendant to be the operating manager. That writing establishes defendant's prima facie right to summary judgment on the first cause of action. In opposition, plaintiff relies upon an unsigned 1998 "restated operating agreement," an oral promise that they would be co-managers after the loan was repaid to defendant's mother, the LLC's tax returns which confirm plaintiff as a managing manager, and their prior conduct. None are sufficient to raise a material fact as to whether the document unequivocally establishes defendant as the operating manager.

The fourth cause of action seeks injunctive relief for an alleged violation of section 411 of the Limited Liability Law. Allegedly defendant Kalikow, as a member of 7001, "entered into [an] ... agreement with himself and/or the Kalikow Group, pursuant to which defendant Kalikow and or the Kalikow Group has been allowed to affix the sign/logo to the Building, without the authorization or approval of Mr. Shalik and over his repeated objections." Removal of the sign is sought since it was affixed without authorization of the other member of the LLC. Complaint at ¶ 64.

Section 411 provides that a contract entered into between a limited liability company and one of its managers, or business entity of one of its managers, shall not be void for that reason alone if that relationship is disclosed and the contract is approved by the managers, or the members, or in the event that there was no such disclosure the contract will not be avoided unless it can be demonstrated that the contract was not fair and reasonable to the limited liability company at the time it was approved. Tzolis v Wolff, 39 A.D.3d 138 (1st Dept 2007).

Determination of this cause of action depends upon whether 7001 permitted the subtenant to erect the sign, in what would clearly be an interested transaction, and the agreement was unfair and unreasonable at the time it was made. It is not voidable simply because it is a self interested transaction as that is the focus of section 411 of the Limited Liability Law.

It is the fourth cause of action for which plaintiff seeks summary judgment. However, defendant establishes that the LLC did not enter into a transaction or agreement to install the sign. Permission from the LLC was not needed. The Ground Lease granted to the LLC the right

defendant establishes that the LLC did not enter into a transaction or agreement to install the sign. Permission from the LLC was not needed. The Ground Lease granted to the LLC the right to install an exterior sign and the sublease passed on that right to the subtenant. To the extent that plaintiff asserts that it was the LLC that applied to the local municipality for a sign permit, defendant submits documentary proof that he was the applicant on behalf of The Kalikow Group because the Town of Oyster Bay requires the building's owner to sign the application. To the view of the court it is a ministerial act which does not confer any new benefit on the member tenant and does not result in a violation of LLCL § 411.

In sum, the proof presented by defendant does not require the court to reach the issue of whether an agreement between 7001 and defendants to install a sign was fair and reasonable. If the court were to consider the aforesaid issue, it is probable that the answer would be in the affirmative. There have been no damages identified by the plaintiff, and the same right is available to plaintiff. In short, it is a disagreement in taste which the court is ill equipped to rule upon in the absence of a transgression at law. It is not, hypothetically, a matter of whether The Kalikow Group sign benefits the LLC, but whether it was fair and reasonable assuming Kalikow the operating member allowed Kalikow the tenant to affix it to the building.

Procedurally, defendant has submitted a prima facie case for judgment dismissing the fourth cause of action. The burden on plaintiff both as a movant for summary judgment on the fourth cause of action and opponent of defendant's motion has not been met; the LLC did not grant defendant the right to erect the sign, the lease did and plaintiff's argument that the lease to subtenants excludes signage is not persuasive. Moreover, at his deposition plaintiff appeared to concede that his opposition to the sign was not due to a provision of the sublease, but the Operating Agreement. ST p. 105, ll 15-24.

The fifth cause of action seeks damages resulting from defendant's appropriation of a corporate asset in the form of the right to "name" the building.

Defendant has met its burden for dismissal of the fifth cause of action by showing that the exterior of the building cannot be leased to a non-tenant to erect a sign. See Town of Oyster Bay Code, Section 246.11 and 246.12. Plaintiff in opposition has not refuted the claim.

The sixth cause of action seeks reformation of the 1997 Operating Agreement to reflect

with respect to the LLC over Mr. Shalik, are revised to include Mr. Shalik as a co-equal member [sic] and manager," or alternatively an estoppel that he deny that agreement.

The sixth cause of action is the gravamen of the complaint, the determination of which requires the court to find a question of fact as to whether the plain meaning reading of the 1997 Operating Agreement should be disregarded and a collateral oral agreement honored instead.

Addressing the merits, the elements of reformation of contract include a mutual mistake or fraud in reaching the terms of the questioned contract, with the result that the true intent of the parties was not manifested. Chimart Associates v Paul, 66 N.Y.2d 570 (1986). Leaving aside the statute of limitations which defendant correctly argues bars the claim, defendant establishes that the Operating Agreement of 1997 was exactly what the parties intended. Where their intentions diverge is over what was to happen when the original inter-family loan was repaid. Taking defendant's assertions at face value, the court must conclude that the 1997 Operating Agreement recorded what the parties intended at the time they signed it.

In opposition, plaintiff does not argue otherwise. What he seeks is to enforce a separate oral agreement. Since there is no evidence of a mutual mistake in the 1997 Operating Agreement, and not any allegation of fraud, there is no basis for the court to admit parol evidence to vary the written agreement, or to waver in applying the principle of law that a writing to be enforceable must comport with the Statute of Frauds. Id. at 573; see also, Tropical Leasing, Inc. v Fiermonte Chevrolet, Inc., 80 A.D.2d 467 (4th Dept 1981) (parol evidence of prior agreements, especially a condition precedent, is admissible if it does not contradict or vary the terms of the writing); Cosmos Form v American Computer Forms, 193 A.D.2d 577 (2d Dept 1993).

The seventh cause of action seeks a declaration that a 1998 Operating Agreement which provides that both of the members are managers is the Operating Agreement for the LLC.

The seventh cause of action is so closely tied to the sixth cause of action that defendant's contentions against enforcement of an oral agreement apply with equal force. Defendant relies upon the clear and unambiguous Operating Agreement for the source of his authority to act in all respects as the operating manager of 7001.

In opposition, plaintiff endeavors to raise triable issues of fact concerning what the parties

meant. Normally on a motion for summary judgment such argument would give pause to a blanket acceptance of the writing - provided a legal theory was proposed as a basis for so doing. Yet none is stated nor evident. Plaintiff reiterates merely conclusions and unsubstantiated averments that the parties either signed or meant to sign an Operating Agreement in 1998 whereby they would become equal managers. It is troubling to the court that this omission remained of no concern until unrelated disputes arose nine years later between these men and a sign was affixed to the building.

The eighth cause of action seeks a declaration that paragraph 8 in the 1997 Operating Agreement, and the alleged 1998 Operating Agreement, which prevents the members from assigning their interest in the LLC without the consent of Edward Kalikow "which consent may be withheld for any reason or no reason" to be an unreasonable restraint on the alienation of property and violates the rule against perpetuities. The authority cited for support holds that it is a restraint if permission for sale to a third party can be unreasonably withheld and there is no proviso for setting the price which the only possible buyer must pay. Rafe v Hindin, 29 A.D.2d 481, 485 (2d Dept 1968).

A body of law developed which holds: "the general rule in New York is that a restraint on the alienation of corporate stock is enforceable so long as it 'effectuates a lawful purpose, is reasonable and in accord with public policy.'" Benson v RMJ Securities, 683 F. Supp 359 (SDNY 1989). The key was still whether the other shareholder could dictate the price, where it was readily accepted that in a small corporation a shareholder had the right to chose who he or she was in business with.

Later cases, after the Limited Liability Law was enacted in 1994 to take advantage of features of the partnership law and the limited liability afforded shareholders, still adhered to the law as it was laid down in the seminal case of Allen v Baltimore Tissue Corp. 2 N.Y.2d 534, 542 (1957): "what the law condemns is, not a *restriction* on transfer, ...but an effective *prohibition* against transferability itself. Accordingly, if the by-law under consideration were to be construed as rendering the sale of the stock impossible to anyone except to the corporation at whatever price it wished to pay, we would, of course, strike it down as illegal."

The statement applies with equal force to these parties, except that it is a Limited

Liability Corporation, and as a practical measure, plaintiff can at any time withdraw as a member of the LLC (see Operating Agreement ¶ 9) which will effect a dissolution of the 7001pursuant to section 701 of the LLCL, which will in turn effect a return of his interest at fair market value.

On the basis of the foregoing, defendants' motion for summary judgment is granted and plaintiffs' motion for summary judgment on the fourth cause of action is denied, and it is

ORDERED that the complaint is dismissed.

Dated: May 20, 2008

J.S.C.

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ENTERED

MAY 23 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE