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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARTIN SHULMAN Justice PART 1

Switzer

-v-

1326 Restaurant LLC

INDEX NO. 109176/08

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits	3,4
Replying Affidavits Notice of Cross-Motion, Affidavits-Exhibits to Cross-Motion Exhibits	5

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion and cross-motion are determined in accordance with the attached decision and order.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: DEC 30 2008

Martin Shulman, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 1

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LUCIOUS SWITZER and GINA SWITZER,

Index No.: 109176/08

Plaintiffs,

-against-

DECISION, ORDER & JUDGMENT

1326 RESTAURANT LLC, DAVID GUTZEIT, PHILLIP DiGENNARO and JOHN TESCHNER,

Defendants.

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SHULMAN, J.

Plaintiffs, members of defendant 1326 Restaurant LLC ("Company"), move for summary judgment on their second cause of action, pursuant to CPLR 3212, seeking a declaratory judgment that, according to § 4.2 of the Company's Operating Agreement and §§ 402 and 407 of the New York Limited Liability Law, only a majority of the members is needed to direct a sale of Company assets. Defendant John Teschner ("Teschner"), another member of the Company, cross-moves for summary judgment declaring that defendants David Gutzeit ("Gutzeit") and Philip DiGennaro ("DiGennaro") have no authority to interpose a cross-claim against him on the Company's behalf.

In December, 2003, plaintiffs, Gutzeit, Teschner, DiGennaro and non-party Van Rodman ("Rodman")(collectively, the "Initial Members"), formed the Company, whose sole business is to operate a restaurant. Pursuant to the Operating Agreement, a Board of Members was created and provided with the authority to make decisions on limited matters, i.e., awarding salaries or bonuses, taking or making a loan, and determining whether the Company requires an increase in capital contributions (§§ 4.4 and 4.5 of the Operating Agreement).

Section 4.2 of the Operating Agreement, the provision in contention in this case, states that:

> "Until this Agreement is terminated or a Member has sold 75% or more of his or her Interest to any other person or entity, the Company shall not, without obtaining the written consent of 75% of the Members: . . .
> (ii) for the [5] year period commencing on the date hereof, sell, convey, or otherwise dispose of all or substantially all of its property or business, or merge into or consolidate into any other corporation, or effect any transaction or series of related transactions in which more than 75% of the voting owner of the Corporation is disposed of ... ."

On or about December 15, 2007, Rodman sold 100% of his interest to the other Initial Members, each member purchasing Rodman's shares according to such member's proportionate interest in the Company.

On June 18, 2008, plaintiffs and defendant Teschner, the holders of a collective interest in the Company of 52.2%, based on their original percentage interest plus the shares they purchased from Rodman, executed and served a written consent directing the Company to investigate its value and market the Company and/or its assets for sale to potential purchasers. Gutzeit and DiGennaro protested this consent, arguing that, pursuant to § 4.2 of the Operating Agreement, the written consent of 75% of the members was needed. On July 18, 2008, plaintiffs instituted the present action. Gutzeit, DiGennaro and the Company filed a counterclaim and cross-claim against Teschner.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]."

Santiago v Filstein, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

The only issue presented for resolution by this motion is the interpretation of § 4.2 of the Operating Agreement. Plaintiffs claim that once Rodman sold 100% of his interest in the Company to the other members, § 4.2 of the Operating Agreement terminated, and, according to New York's Limited Liability Law §§ 402 and 407, only a majority of members was required to authorize the sale of the Company's assets. Sections 402 (d) (2) and 407 of the Limited Liability Law provide that a vote of only a majority interest is needed for major company action unless there is a provision in an operating agreement to the contrary.

In contrast, defendants assert a three-fold argument against the termination of the supermajority requirement. First, defendants contend that, pursuant to the wording of § 4.2 of the Operating Agreement, the sale of a member's 75% interest must be to a *single* person or entity in order to terminate that provision. Defendants maintain that, since the sale was to several members, each of whom received less than 75% of Rodman's interest, § 4.2 is still in effect.

Second, defendants argue that, pursuant to § 4.2, the sale must be made to persons who are not members of the Company. Defendants say that if the Operating

Agreement wished to include members as well as non-members in this provision, the provision would have specified "members or other persons." Based on these two arguments, defendants contend that there is a question of fact as to the interpretation of the terms employed in this section of the Operating Agreement, because they are ambiguous. Third, Gutzeit alleges that he would not have consented to the Operating Agreement if he knew its supermajority requirements could be defeated.

"The question whether a writing is ambiguous is one of law to be resolved by the courts. The rules governing the construction of ambiguous contracts are not triggered unless the court first finds an ambiguity [internal citations omitted]." *Wallace v 600 Partners Co.*, 86 NY2d 543, 548 (1995). The goal of the court in interpreting contractual provisions is to give the words their fair and reasonable meaning. "Put another way, the aim is a practical interpretation of the expressions of the parties to the end that there be a realization of [their] reasonable expectations [internal quotation marks omitted]." *Sutton v East River Savings Bank*, 55 NY2d 550, 555 (1982).

Defendants' first argument, that the transfer must be to only a single individual, is contrary to the general contract rules of construction. As stated in *Matter of Maico-Norea, Inc. v Matz*, 22 AD3d 495, 496 (2d Dept 2005):

> "It is the primary rule of construction of contracts that when the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and the parties' reasonable expectations. Further, a court may not write into a contract conditions the parties did not insert by adding or excising terms under the guise of construction, nor may it construe the language in such a way as would distort the contract's apparent meaning. The words and phrases used in an agreement must be given their plain meaning so as to define the rights of the parties [internal quotation marks and citations omitted]."

Further, "[t]he rule of construction is that singular number includes plural number in the interpretation of contracts, and a contrary construction is only necessary when the plain intent of the contract shows the contrary construction necessary to give effect to the intention of the contracting parties." *American Lumbermen's Mut. Casualty Co. of Illinois v Wilcox*, 16 F Supp 799, 800 (WD NY 1936). In codifying this common law rule of construction, General Construction Law, Art. 2 § 35 states, "[w]ords in the singular include the plural, and in the plural number include the singular."

It is noted that elsewhere in the Operating Agreement, the singular and plural forms are used interchangeably, such as in §§ 2.2 (a) ["The Members (or their Permitted Transferees hereunder) (the "Purchasing Member")"] and 2.4 (b) [Purchasing Member and Terminating Member also referred to in the plural]. Consequently, based on ordinary rules of construction, and a reasonable interpretation of the words of the Operating Agreement, the court concludes that § 4.2 of the Operating Agreement is not ambiguous, and that when it refers to "other person," it uses the term "person" to mean both the singular and the plural.

To support the contention of their second argument, defendants point to §§ 1.2 (a) (iii) and 1.2 (a) (vi) of the Operating Agreement, in which a distinction is made between "members" and "other persons." Specifically, these sections of the Operating Agreement refer to "Permitted Transfers" of a member's interest, and the distinction so stated indicates that transfers to other members may be freely made, but transfers to "other persons" may only be effectuated with the prior written consent of other members.

Defendants' argument that there is a distinction, for the purposes of § 4.2 of the Operating Agreement, between members and non-members is unpersuasive. The

provisions defendants point to differentiate the procedures for transferring shares to members and non-members. The import of this provision is to protect existing members from having strangers involved in the operation of the business, not to indicate that there is any other limiting factor or distinction among transferees.

Lastly, defendant Gutzeit argues that he would not have agreed to the Operating Agreement if he knew that the supermajority provisions of § 4.2 could be terminated. However, "[w]here, as here, a written agreement between sophisticated, counseled businessmen is unambiguous on its face, [defendant] cannot defeat summary judgment by a conclusory assertion that the writing did not express his own understanding of the oral agreement reached during negotiations [internal quotation marks and citation omitted]." *Namad v Salomon, Inc.*, 74 NY2d 751, 753 (1989). Therefore, based on the foregoing, plaintiffs' motion is granted.

In the opposition papers, Gutzeit and DiGennaro state that the cross-claim and counterclaim were filed only on behalf of the individual defendants, not on behalf of the Company, which they claim to have told Teschner in writing. As a consequence, Teschner's cross-motion alleging that Gutzeit and DiGennaro lack the authority to move on the Company's behalf is denied as moot. Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion for summary judgment on their second cause of action is granted; and it is further

ORDERED and ADJUDGED that the written consent of the holders of an interest equal to 75% of 1326 Restaurant LLC is no longer required in order to take action pursuant to Paragraph 4.2 of the Operating Agreement to sell, convey or otherwise dispose of 1326 Restaurant LLC; and it is further

ORDERED and ADJUDGED that New York Limited Liability Law § 402 controls the voting requirements to sell, convey or otherwise dispose of 1326 Restaurant LLC; and it is further

ORDERED that defendant John Teschner's cross-motion to dismiss the other defendants' cross-claim and counterclaim is denied; and it is further

ORDERED that the second cause of action is severed and the action shall continue as to the remaining causes of action.

Counsel for the parties are directed to appear for a preliminary conference on January 27, 2009 at 9:30 a.m. at I.A.S. Part 1, 111 Centre Street, Room 1127B, New York, New York.

The foregoing constitutes this court's Decision and Order. A copy of this Decision and Order has been sent to counsel for the parties.

Dated: December 30, 2008

Martin Shulman, J.S.C.