Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES PART 17

Justice

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PRIYA HOSPITALITY LLC, By and Through Its Member, VIPUL PATEL,

Plaintiff,

-against-

Index No. 9010/11
Motion Date: 5/18/11
Motion Cal. No. 38

CHANDRAKANT PATEL, JASMIN PATEL, and MUKESH PATEL

Defendants.

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The following papers numbered 1 to 13 read on this application by plaintiff for an Order directing the return of Priya Hospitality LLC's ("Priya") $500,000.00 to Priya, entry of a temporary injunction enjoining defendants from making any loans or transfers of the funds of Priya to Ideal Hospitality LLC or any other individual or entity except upon the unanimous consent of all members of Priya Hospitality LLC; the appointment of a temporary receiver pursuant to CPLR 6401 over the business of Priya Hospitality LLC to insure that none of the assets of Priya are further dissipated or wasted; and an Order replacing the purported Co-Managing Members.

	PAPERS NUMBERED
Order to Show Cause-Affidavits-Affirmation-Exhibits.....	1-3
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Upon the foregoing papers it is ordered that this application by plaintiff for an Order directing the return of Priya Hospitality LLC's ("Priya") $500,000.00 to Priya, entry of a temporary injunction enjoining defendants from making any loans or transfers of the funds of Priya to Ideal Hospitality LLC or any other individual or entity except upon the unanimous consent of all members of Priya Hospitality LLC; the appointment of a temporary receiver pursuant to CPLR 6401 over the business of Priya Hospitality LLC to insure that none of the assets of Priya are further dissipated or wasted; and an Order replacing the purported Co-Managing Members is decided as follows:

According to the complaint, Priya was formed as a New York limited liability company in February of 2007 to acquire, develop and otherwise operate hotel property located at 39-34 21st Street and 38 71 13th Street Long Island City, New York which was developed and improved at 39-36 21st Street Long Island City, New York. Vipul Patel ("V. Patel) and defendants Jasmin Patel ("J. Patel") and Mukesh Patel ("M. Patel") are owners of membership

interests in Priya; defendant Chandrakant Patel ("C. Patel") owns no interest in Priya, yet claims to be a co-managing member of Priya. The members executed an Operating Agreement, dated February 21, 2007, that was subsequently amended. V. Patel was designated the sole managing member of Priya and thereafter, at the meeting of members, on June 4, 2010, C. Patel, J. Patel, and M. Patel were also elected as additional co-managing members. An amendment to the Operating Agreement memorialized this election and V. Patel was removed as managing member of Priya.

Plaintiff claims that defendants diverted Priya's funds and assets by improperly transferring not less than $500,000.00 to Ideal Hospitality ("Ideal") in violation of Priya's Operating Agreement. Thereafter, plaintiff commenced the instant action which contains five causes of action. The first cause of action claims defendants breached their fiduciary duties by transferring Priya's funds to Ideal and seeks to recover no less than $6,600,000.00 and a return of the $500,000.00 to Priya, plus costs and attorney's fees. The second cause of action claims defendants breached their material obligations under the Operating Agreement by authorizing and executing the loan transaction with Ideal and seeks to recover no less than $5,600,000.00. The third cause of action seeks to permanently enjoin defendants fro making any further transfers fo Priya's funds to Ideal or any other entity or individual without obtaining the unanimous consent of all of the members of Priya. The Fourth Cause of action seeks the appointment of a receiver to insure defendants do not cause any additional waste of Priya's assets. The fifth cause of action seeks the removal of defendants from their positions within Priya.

Plaintiff now has made the instant application and defendants have opposed. The Court shall first address the branch of the application that seeks a temporary injunction enjoining defendants from making any loans or transfers of the funds of Priya to Ideal Hospitality LLC or any other individual or entity except upon the unanimous consent of all members of Priya. Plaintiff claims that on or about April 1, 2011 V. Patel learned that defendants had caused Priya to improperly transfer $500,000.00 to Ideal, and this was outside the purposes for which Priya had been formed. Plaintiff claims Article III of the Operating Agreement required plaintiff's consent to this transaction and such consent was neither sought nor obtained.

In response, Plaintiff requested defendants to immediately return the funds to Priya, however, such was not done. In fact, defendants claimed that the transaction was justified as a valid investment of Priya's funds. This caused plaintiff to seek the instant temporary restraining order to prevent the Defendants from violating the Operating Agreement and thereby causing Priya irreparable injury. The temporary injunction was requested pending this Court's determination of the instant application for a preliminary injunction. Plaintiff claims that such relief is necessary to prevent defendants from making additional improper transfers of Priya's funds to Ideal which will cause irreparable harm to Priya and its members.

Plaintiff also claims that there is a substantial likelihood plaintiff will likely succeed on the merits because on its face, Priya's Operating Agreement does not permit a transaction of this type. Priya's Operating Agreement does not contemplate the transfer of monies to an entity such as Ideal, which according to plaintiff, has no cash flow, no construction financing, and whose

acquisition financing currently is in excess of $6,550,000.00 and which will initially mature on July 1, 2011. Furthermore, plaintiff claims the transfer of funds to Ideal is not authorized by Priya's Operating Agreement, even if it is considered to be a loan, because it violates Priya's business purpose and is outside of the scope of any investment vehicle contemplated by the Operating Agreement. Plaintiff claims that defendants' argument that the promissory note is a "cash equivalent" is illogical, since Section 8.8 of the Operating Agreement cited by Defendants counsel merely contemplates investment of Priya's funds and does not contemplate Priya making loans or transfers to other entities. As reflected in Section 8.8 the investments were to be made in "demand, money market or time deposits, obligations, securities investments or other instruments constituting cash equivalents." According to plaintiff, a promissory note to Ideal cannot be considered a cash equivalent. Nor can this transaction be considered an "investment", as contemplated by the Operating Agreement. Plaintiff has submitted, *inter alia*, a copy of the Operating Agreement and an affidavit of V. Patel in support of its claims.

Defendants oppose the instant application and have submitted various correspondence between the parties, the Operating Agreements, and an affidavit of J. Patel. Defendants argue that this evidence shows that V. Patel (a 25% member) served as sole Managing Member of Priya through June 4, 2010 during the development, construction, and initial operational phases of Priya's hotel facilities. In or about May, 2010, after the hotels on the Property began operations, and Priya began generating income, the Priya Managing Members became suspicious of several of V. Patel's activities and began reviewing the books and records of the company from the pre-construction, construction, and operational phases of the property. On June 4, 2010, the members of Priya agreed to the First Addendum to the Priya Operating Agreement which amended the Operating Agreement to require at least two Managing Members of the company. The members further agreed to install two additional Managing Members of Priya in addition to V. Patel, including C. Patel (on behalf of Priya's largest member TIC Capital II LLC) and J. Patel. V. Patel agreed to, and signed the First Addendum to the Operating Agreement.

According to J. Patel, a document concerning construction costs shows that V. Patel engaged in several ongoing schemes during each application for loan funds from the State Bank of Texas in order to fraudulently embezzle and convert no less than $1,875,000.00 from Priya, the difference between the actual construction costs and the inflated construction costs reflected in defendant's ledger. At a meeting on July 20, 2010, the members of Priya confronted V. Patel with these concerns and he initially admitted to writing fifteen fraudulent checks and taking three fraudulent bank withdrawals, which amounted to a total of $1,292,246.00. The list of the fraudulent checks and withdrawals Vipul Patel admitted to at the July 20, 2010 meeting was recorded in the meeting minutes. At a meeting on July 28, 2010, V. Patel admitted to writing twelve more fraudulent checks which totaled $603,137.90. Based on upon Vipul Patel's admissions of theft, and the independent investigation conducted regarding such theft, on September 14, 2011, the majority of the membership interest in Priya voted to immediately remove V. Patel from his role as co-managing member of Priya, replacing him with M. Patel. As a result of this information, on September 15, 2010, the Managing Members of Priya commenced the Priya Lawsuit against Vipul Patel, Index number 23475/10. This action includes claims that

V. Patel falsified and misrepresented the actual amount of Priya's construction costs by $1,875,000.00, and embezzled more than $2 million from Priya by admittedly issuing fraudulent checks, including numerous checks defendant issued to George Hsu, the owner of Metal Stone Construction, Inc. ("Metal Stone"), Priya's general contractor, which were then endorsed by Hsu, and the funds deposited into bank accounts controlled by Defendant.

On March 2, 2011, a majority membership interest in Ideal voted to remove Vipul Patel as sole Managing Member of Ideal pursuant to § 414 of the N.Y. Limited Liability Company Law and § 7.7 of the Ideal Operating Agreement. However, V. Patel has refused to provide the new Managing Members of Ideal with access to the Ideal operating account and refused to provide them with Ideal's books and records. This has caused Ideal to suffer from a shortage of funds and has rendered it possible that Ideal will halt construction. Ideal is in the middle of a construction project whereby it is erecting a hotel facility on the property it owns in Manhattan. To prevent such cessation, on March 25, 2011, the Managing Members of Priya agreed to provide Ideal with an emergency loan of five hundred thousand dollars at ten percent interest to be paid off in one year in order to permit Ideal to continue its construction operations while Ideal fights with V. Patel to get him to release Ideal's bank account, banking records and other financials books and records. This is evidenced by a Promissory Note issued by Ideal to Priya.

Defendants claim that this emergency loan was authorized by Section 8.8 of the Priya Operating Agreement. They also claim that Priya and Ideal have overlapping members and business interests and benefits the members of both Priya and Ideal as there is a ten percent return on the emergency loan and construction on the Ideal project can continue uninterrupted. It is this transaction that forms the basis of Priya's instant action and the application for a permanent injunction. Defendants claim that plaintiff has not established the elements necessary for the granting of injunctive relief. In reply, plaintiff has denied the allegations of V. Patel's misconduct and reiterates the impropriety of the transaction with Ideal.

Initially, the Court notes that a preliminary injunction may issue only if the moving party can demonstrate (1) the likelihood of success on the merits; (2) irreparable injury if the preliminary injunction is not granted, and (3) a balancing of the equities in its favor. (Doe v Axelrod, 73 NY2d 748; Preston Corp. v Fabrication Enters., 68 NY2d 397; W.T. Grant Co. v Srogi, 52 NY2d 496.) "Preliminary injunctive relief is a drastic remedy that will not be granted unless a clear right to it is established under the law . . . and the burden of showing an undisputed right rests upon the movant." (Zanghi v State of New York, 204 AD2d 313, 314.)

At issue here is whether the transaction between Priya and Ideal was unauthorized by Priya's Operating Agreement. Section 8.8 of the Priya Operating Agreement expressly provides that:

> The Capital Contributions of the Members and any cash held by the Company from time to time shall be invested, until such time as such funds shall be used for other Company purposes, by the Managing Member in demand, money market, or time deposits, obligations, securities, investments, or other instruments constituting cash equivalents. Such investments shall be made by the Managing Member for the benefit of the Company.

The transaction between Priya and Ideal is secured by a Promissory Note, and defendants claim that such is a "cash equivalent". In support of this claim, Defendants cite to language in the dissenting decision in Federal Deposit Ins. Corp. v. Philadelphia Gear Corp., 476 U.S. 426, 106 S. Ct. 1931 (1986). This Court does not find this to be dispositive on the issue. In any event, this Court is aware of the fact that promissory notes are negotiable instruments. However, the Court finds that negotiable instruments of a third party private business entity are not the "cash equivalents" contemplated in the Operating Agreement.

According to Article III of Priya's Operating Agreement, its purpose is to "acquire, improve, own, develop, manage, finance, lease and otherwise operate the Asset and to otherwise deal with any Property that the Company may acquire or have a right to acquire, and, in that connection, to finance and refinance the Asset and any Property, and ultimately to dispose of the Asset, and to do the same with respect to any Property that the Company may acquire, have a right to acquire as a result of its ownership of the Asset and to engage in any and all business in connection therewith." The section goes to state that "The Company exists only for the purpose specified in this Article Ill and may not conduct any other business without the unanimous consent of the Members. The authority granted to the Managing Member hereunder to bind the Company shall be limited to actions necessary or convenient to this business." There is no dispute that defendants did not seek Vipul Patel's or any of the other members consent to such unauthorized activities.

Moreover, the clear and unambiguous intent of Section 8.8 of the Operating Agreement was to limit the discretion of the Managing Member(s) in making investment decisions with respect to the cash funds of Priya by limiting such investments to those with little or no risk attached thereto. Such investments usually consist of government securities. Consequently, Priya has established the likelihood of success on the merits of its claim that the transfer of funds to Ideal was not authorized by the Operation Agreement. .

Regarding the second element in procuring injunctive relief, establishing irreparable injury, in the instant case, Priya primarily seeks money damages from plaintiff, which is clearly not an instance of recovery for a unique property and thus granting an injunction is precluded. *See*, Schrager v. Klein, 267 AD2d 296. This is especially so since there is nothing to suggest that the award to which plaintiff may be entitled would be rendered ineffectual without injunctive relief. Moreover, plaintiff's mere apprehension and speculation that defendants will improperly deplete the assets of Priya to bolster the construction project of Ideal is an insufficient basis upon which to grant an injunction. (*See*, Holdsworth v. Doherty, 231 AD2d 930.) Moreover, plaintiff's have failed to show that the construction project is doomed to fail and Priya will not be able to recover on the Promissory Note from Ideal. Finally, defendants have presented significant evidence to suggest that V. Patel's actions have caused the cash shortage of Ideal. As such, Priya has not established element two, irreparable injury.

In regard to the third element, the weight of the equities, Priya has not demonstrated that the alleged irreparable injury to be sustained by it is more burdensome to it, than the harm that will be caused to the other managing members of Priya, and to the overlapping members of Priya and Ideal. *See*, Reuschenberg v Town of Huntington, 16 AD3d 568 (2d Dept 2005.) Moreover,

there is significant evidence that indicates V. Patel has engaged in inappropriate actions that caused Ideal's cash shortage that necessitated the money transfer to Priya. Thus, it would be inappropriate to allow V. Patel to prevent Priya from supporting Ideal in its efforts to avoid the consequences of V. Patel's actions. As such, Priya has not established the third element, the balance of equities in their favor. The Court notes that to the extent Ideal's cash shortage is due to V. Patel's actions, if he were to stop such actions, the problems set forty in Priya's application would be resolved.

Consequently, Priya's submissions have not established the necessary elements for obtaining the requested injunctive relief and the branch of the application seeking a permanent injunction is denied.

Based on the above, the Court directs the return of Priya Hospitality LLC's ("Priya") $500,000.00 to loan to Ideal, pursuant to the terms of the Promissory Note. As stated above, the Court is not satisfied that V. Patel did not cause the need for this emergency transfusion of cash into Ideal. Furthermore, contrary to Priya's claims, it is clear that Priya and Ideal have substantially the same members. This Court cannot allow V. Patel's actions to cause injury to Ideal and to allow him to prevent it from seeking financial help from Priya. Accordingly, while the transfer of funds was not authorized, this Court will not order the immediate return of those funds.

The branch of the application seeking the appointment of a temporary receiver is denied. "The appointment of a temporary receiver is an extreme remedy resulting in the taking and withholding of property from a party without the benefit of a trial on the merits . . .." (Modern Collection Associates, Inc. v Capital Group, Inc., 140 AD2d 594; Schachner v Sikowitz, 94 AD2d 709.) The appointment of a temporary receiver is warranted where the applicant establishes by clear and convincing evidence the need for such a drastic remedy. (*See*, Beatty v Williams, 227 AD2d 912; Serdaroglu v Serdaroglu, 209 AD2d 606.)

In view of the conflicting allegations of the parties, the court cannot find that the plaintiff established by clear and convincing evidence the need for the appointment of a temporary receiver. (*See*, Halle v Halle, 53 AD2d 684.) Moreover, the appointment of a temporary receiver would interfere with the operation of an ongoing business and"[c]ourts are generally disinclined to appoint a receiver where the business is solvent, or when appointing a receiver would interfere with the normal operation of the business. (2 NY Prac Com, Litig. in New York State Courts § 15:46 [2d ed]; *see*, *e.g.*, Arrants v Dell Angelo, 73 AD2d 633; Shapiro v Ostrow, 46 AD2d 859.) Accordingly, the branch of the motion seeking the appointment of a temporary receiver is denied.

The branch of the application seeking an Order replacing the purported Co-Managing Members is denied. Plaintiff has failed to establish that there was any impropriety in selecting the current Managing Members.

Dated: May 24, 2011 **.....**

ORIN R. KITZES, J.S.C.