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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x **TRIAL/IAS PART: 20**

1047 OLD NORTHERN ASSOC. LLC and ALAN J. COOPER,

NASSAU COUNTY

Plaintiffs,

Index No: 23965-09
Motion Seq. No: 1
-against- **Submission Date: 10/4/11**

MATTHEW P. KORN,

Defendant.

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The following papers have been read on this motion:

Notice of Motion, Affirmation in Support, Affidavit in Support and Exhibits...x
Affidavit in Opposition, Affirmations in Opposition and Exhibits.....x
Reply Affirmation.....x

This matter is before the Court for decision on the motion filed by Plaintiffs 1047 Old Northern Assoc. LLC ("LLC") and Alan J. Cooper ("Cooper") (collectively "Plaintiffs") on June 10, 2011 and submitted on October 4, 2011. For the reasons set forth below, the Court denies Plaintiffs' motion.

A. Relief Sought

Plaintiffs move for an Order, pursuant to CPLR § 3212, granting Plaintiffs summary judgment and 1) declaring that Cooper is the owner of 62.5% of the membership interests of the LLC, pursuant to the agreement between the parties; 2) declaring that there remains a $100,000 loan owed by the LLC to Cooper, plus interest thereon; and 3) compelling Defendant Matthew P. Korn ("Korn") to execute the LLC's tax returns.

Defendant opposes Plaintiffs' motion.

B. The Parties' History

The Verified Complaint (Ex. A to Rothkrug Aff. in Supp.) alleges as follow:

This is a derivative action, and an action by the fifty percent (50%) voting member of the LLC to 1) compel the other fifty percent (50%) voting member to execute the LLC's 2007 tax return ("Tax Return"); 2) confirm that Cooper owns a 62.5% capital interest in the LLC and Defendant a 37.5% capital interest; and 3) obtain an accounting.

The LLC was formed on February 28, 2003 ("Formation"). The LLC's primary purpose is to own, manage, operate and lease commercial real property ("Property") located at 1047 Old Northern Boulevard, Roslyn, New York, and the LLC has owned the Property at all times relevant to this action.

At the time of the Formation, Cooper and Korn were each 50% voting and 50% capital members of the LLC. Shortly after the Formation, the LLC acquired title to the Property for the sum of $215,000.00. Thereafter, by written agreement ("Agreement") between Cooper and Korn dated April 2, 2004, the parties agreed that Cooper would lend $200,000 to the LLC to complete construction and renovation of the Property ("Loan").

Pursuant to the Agreement, 1) if the Loan was not repaid, either with interest within 18 months, or by Korn repaying Cooper one-half of the Loan, then there would be a shift in the equity interests in the LLC pursuant to a stated formula ("Formula"); 2) based on the Formula, the shifting of the equity interests would convert one-half of the Loan, specifically $100,000, into a 12.5% interest in the LLC, with the balance of the $100,000 of the Loan still owed by the LLC to Cooper, with interest; and 3) notwithstanding the shift in equity interests, Cooper and Korn would each retain 50% voting power.

Cooper made the Loan to the LLC, pursuant to the Agreement. No portion of the Loan was repaid as of 18 months after the Loan, despite Cooper's demands. By letter dated July 13, 2007, Cooper made written demand on Korn for repayment of the Loan, but Kooper refused to repay the Loan. In three separate letters, Cooper made written demand on Korn to acknowledge the shift in the equity interests of the LLC, which Korn has refused to acknowledge.

Pursuant to the Operating Agreement of the LLC, Cooper is designated the tax matters member. In that capacity, Cooper retained an accountant who prepared the Tax Return which correctly reflects that Cooper owns a 62.5% interest in the LLC and Korn owns a 37.5% interest

in the LLC. Korn has refused to execute the Tax Return, rendering the LLC unable to file the Tax Return. Plaintiffs allege that, in light of the foregoing and the fact that Korn and Cooper are each 50% voting members of the LLC, it would be futile to demand that the Board of Directors of the LLC bring this action.

The Complaint contains three (3) causes of action: 1) a request for a judicial declaration that a) Cooper owns a 62.5% equity interest in the LLC; b) Korn owns a 37.5% equity interest in the LLC; and c) there remains a $100,000 loan to the LLC from Cooper with interest to be calculated at 10%, 2) breach of fiduciary duty by Korn in light of his failure to execute the Tax Return, for which Plaintiffs request an Order compelling Korn to cooperate with the execution of the Tax Return, and 3) a request for an accounting in light of Korn's failure to a) pay market rent to the LLC for his use and occupancy of the Property; and b) cooperate in the preparation of the LLC's books and records.

In his Affidavit in Support, Cooper affirms that he and Korn are architects, and that Korn approached Cooper in 2003 about jointly purchasing the Property. Prior to purchasing the Property, Cooper retained counsel who advised him to form a separate LLC to purchase the Property, and to prepare an Operating Agreement setting forth the parties' rights and obligations. Cooper and Korn retained separate counsel to assist them in preparing the necessary documentation.

Prior to purchasing the Property, Korn suggested to Cooper that Korn's father, Richard Korn ("Richard") lend the LLC the sum of $550,000 "at a favorable interest rate" (Cooper Aff. in Supp. at ¶ 6), which would cover the $215,000 purchase price, closing costs and provide capital for renovations to the Property. Korn and Cooper also discussed the formation of an architectural firm to be operated at the Property. Cooper affirms that, at the time, he did not appreciate the fact that Korn had minimal funds of his own and the funding for the LLC would come from Richard.

On March 25, 2003, the LLC purchased the Property and signed loan documents with Richard. Approximately one year later, the LLC needed an additional $200,000 for renovations. Neither Korn nor Richard would lend additional funds and, therefore, Cooper agreed to make the Loan. Cooper and Korn retained counsel to draft the Agreement.

Cooper affirms that the Loan was to be treated as a construction loan, with interest due only on the amounts advanced. The Loan could be repaid in a number of ways: 1) the LLC

could refinance the Property and repay Cooper; 2) Korn could repay one-half of the Loan, specifically $100,000, to Cooper with the other half remaining an LLC obligation; or 3) Korn could transfer to Cooper 12.5% of his interest, based on the Formula, with the $100,000 balance of the Loan remaining the LLC's obligation ("Third Option"). Cooper affirms that it was "clearly understood" (Cooper Aff. in Supp. at ¶ 19) that, under the second and third options, the LLC would remain liable to Cooper for one-half of the Loan. Cooper affirms the truth of the allegations in the Complaint regarding Korn's refusal to repay the Loan, acknowledge the equity shift or sign the Tax Return.

Plaintiffs' counsel affirms that Korn admitted in open court on May 19, 2010, in an "unsolicited outburst" (Rothkrug Aff. in Supp. at ¶ 29) that he had offered Cooper the $100,000 that he is owed. Plaintiffs' provides a transcript of that proceeding (*id.* at Ex. F).

In opposition, Korn affirms that there was no Third Option, and that the Agreement "contains no option which combined a shifting of our membership interests with a further financial obligation owned by [the LLC] to Cooper" (Korn Aff. in Opp. at ¶ 7). Rather, the shifting of the parties' respective membership interests was intended to be the sole remedy afforded to Cooper in the event that the first and second options were not exercised. Korn avers that the refinancing did not occur, the LLC did not repay the Loan from another source and Korn did not exercise his option to pay the sum of $100,000 directly to Cooper. Thus, Cooper's sole recourse was to receive an increase in his membership in the LLC.

Korn concedes that he has been experiencing personal difficulties. He disputes the assertion of Plaintiffs' counsel, however, that his statement on the record on May 19, 2010 constituted an admission as to the correctness of Plaintiffs' position. Korn affirms that his statement that "We had offered him $100,000 that he is wed" (Korn Aff. in Opp. at ¶ 9) was a reference to Korn and Richard, as Korn had discussed borrowing money from Richard to repay Cooper. It was not an acknowledgment that he had offered to shift the parties' membership interests and pay money to Cooper, and Korn contends that the language of the Agreement does not support such an interpretation.

Korn also notes that Plaintiffs have not annexed a copy of the Tax Return to their motion papers. Korn affirms that his recollection is that he was asked to sign a tax return which incorrectly reflected the terms of repayment of the Loan and, therefore, he refused to sign it.

In his Affirmation in Opposition, Philip L. Sharfstein, Esq. ("Sharfstein") affirms that he represented the LLC when it acquired the Property. He was retained by Korn to represent him during the Loan negotiations and, during those negotiations, communicated with counsel retained by Cooper. At a meeting on March 31, 2004, the parties and their counsel reached a "verbal understanding" (Sharfstein Aff. in Opp. at ¶ 4) about the terms of the Loan, and Sharfstein prepared a Memorandum of an agreement pursuant to which Cooper agreed to lend $200,000 to the LLC. Cooper's counsel reviewed the Memorandum, advised Sharfstein that it was acceptable, and Cooper and his counsel signed the Agreement.

Sharfstein affirms that advances on the Loan were to be drawn in the same manner as those contained in a construction loan made by Richard to the LLC. Specifically, the Loan could be satisfied in one of two ways: 1) the LLC would repay the Loan to Cooper with funds received from either a second mortgage on the Property or from refinancing the first mortgage on the Property; or 2) Korn could pay to Cooper one-half of the outstanding sums owed under the Loan. In the event the Loan was not satisfied, Paragraph 2 of the Agreement provides for Cooper's sole remedy. The LLC's failure to satisfy the Loan, or Korn's failure to pay one-half of the outstanding sums owed, would trigger a shift in the equity interests of the parties, increasing Cooper's interest in the LLC to 62.5% and reducing Korn's interest to 37.5%. Sharfstein submits that there is no provision in the Agreement that authorizes a shift in equity interest along with repayment. Sharfstein contends, further, that the interpretation of the Agreement urged by Plaintiffs is "entirely inconsistent with its express terms and customs of partners' remedies for a partner default and interest-shifting provisions in these types of agreements" (Sharfstein Aff. in Opp. at ¶ 11).

In reply, Plaintiffs' counsel submits, *inter alia*, that "to give a practical interpretation to the Agreement, Cooper's $200,000 combined loan cannot possibly be deemed fully satisfied by the 12.5% equity shift" (Rothkrug Reply Aff. at ¶ 24).

C. The Parties' Positions

Plaintiffs submit that they have demonstrated their right to the requested relief by establishing that the Agreement is unambiguous, and supports Plaintiffs' contention that Cooper is entitled to the equity shift and repayment of the remaining $100,000 balance of the Loan.

Defendant opposes Plaintiffs' motion, submitting that the interpretation urged by Plaintiffs would disregard the express terms of the Agreement, and impose an additional

obligation on Korn that the parties did not contemplate.

RULING OF THE COURT

A. Summary Judgment Standards

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Mere conclusions or unsubstantiated allegations will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

B. Contract Interpretation

Where a contract is straightforward and unambiguous, its interpretation presents a question of law for the court to be made without resort to extrinsic evidence. *Ruttenberg v. Davidge Date Sys. Corp.*, 215 A.D.2d 191, 193 (1st Dept. 1995). When, however, the meaning of a contract is ambiguous and the intent of the parties becomes a matter of inquiry, a question of fact is presented that cannot be resolved on motion papers alone. *Id.*, quoting *Eden Music Corp. v. Times Sq. Music Publs.*, 127 A.D.2d 161, 194 (1st Dept. 1987). Where interpretation of a contract is susceptible to varying reasonable interpretations, and intent must be gleaned from disputed evidence or from inferences outside the written words, resolution by the fact finder is required. *Time Warner Entertainment Co., L.P. v Brustowsky*, 221 A.D.2d 268 (1st Dept. 1995), *app. den.*, 89 N.Y.2d 809 (1997).

C. Declaratory judgment

CPLR § 3001 provides, in pertinent part:

> The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds.

Declaratory relief is usually unnecessary where a full and adequate remedy is already provided by another well-known form of action. *James v. Alderton Dock Yards*, 256 N.Y. 298, 305 (1931), *reh. den.*, 256 N.Y. 681 (1931). *See also Olsen v. New York State Dept. of Env. Conservation*, 307 A.D.2d 595 (3d Dept. 2003), *app. den.*, 1 N.Y.3d 502 (2003) (action for declaratory judgment unnecessary where action at law for damages is available, citing *James*, *supra*).

D. Application of these Principles to the Instant Action

The Court denies Plaintiffs' motion based on its conclusion that the meaning of the Agreement is ambiguous regarding Cooper's remedy under these circumstances. The intent of the parties is a question of fact that cannot be resolved on the motion papers alone. Moreover, the appropriateness of Korn's refusal to execute the Tax Return is related to the ultimate determination as to the parties' obligations under the Agreement and, therefore, declaratory relief compelling Korn to execute the Tax Return is also not appropriate at this juncture.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court on December 16, 2011 at 9:30 a.m. for a Certification Conference.

DATED: Mineola, NY
November 29, 2011

ENTER

HON. TIMOTHY S. DRISCOLL
J.S.C.