

**CTNY Invs. 3, LLC v DME CRE Opportunity Fund I
LP**

2014 NY Slip Op 30268(U)

January 29, 2014

Supreme Court, New York County

Docket Number: 653960/2013

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

JUSTICE SHIRLEY WERNER KORNREICH

PRESENT: _____
Justice

PART 54

Index Number : 653960/2013
CTNY INVESTORS 3, LLC
vs.
DMR CRE OPPORTUNITY FUND I LP
SEQUENCE NUMBER : 001
PREL INJUNCTION/TEMP REST ORDER

INDEX NO. _____
MOTION DATE 1/8/14
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 2-14
Answering Affidavits — Exhibits No(s) 16-21
Replying Affidavits No(s) 22-27

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.

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

Dated: 1/29/14

SHIRLEY WERNER KORNREICH
J.S.C. J.S.C.

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
CTNY INVESTORS 3, LLC,

Index No.: 653960/2013

Plaintiff,

DECISION & ORDER

-against-

DME CRE OPPORTUNITY FUND I LP, n/k/a
BCM CRE OPPORTUNITY FUND I LP, and
DMR/CT VENUTRE LLC,

Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.:

Plaintiff CTNY Investors 3, LLC (CTNY) moves by order to show cause for a temporary restraining order and a preliminary injunction, pursuant to CPLR 6301, to enjoin defendants DMR CRE Opportunity Fund I LP n/k/a BCM CRE Opportunity Fund I LP (BCM) and DMR/CT Venture LLC (the Company) from making distributions under the Company’s operating agreement until the court rules on the parties’ entitlement to such funds. Plaintiff’s motion is denied for the reasons that follow.

I. Procedural History & Factual Background

CTNY and BCM respectively own 5% and 95% the Company, a Delaware LLC formed to invest in and sell a condominium unit in Manhattan (the Property). The Company is governed by a Limited Liability Company Operating Agreement dated May 24, 2011 (the Agreement). The Agreement sets forth how the Company’s proceeds – namely, the proceeds from the sale of the Property – are to be distributed. CTNY was charged with selling the Property, and its affiliate company controls the Company’s funds. The dispute in this action concerns when CTNY’s kicker, called the “Promote”, begins to accrue.

Section 6.1 of the Agreement details how distributions are to be made to the parties:

- (a) Subject to the provisions of Section 6.1(c) hereof, [BCM] shall distribute the Available Cash [defined below] of the Company, if any, pursuant to the following order of priority:
- (i) First, to the Members pro rata, in proportion to their respective Percentage Interests [CTNY 5% & BCM 95%], until each member shall have received the full amount of Capital Contributions made by such member through the date of Distribution;
 - (ii) Second, to the Members pro rata, in proportion to their respective Percentage Interests, until [BCM] shall have received, taking into account the timing and amount of all prior Capital Contributions and Distributions, an Internal Rate of Return equal to 13% per annum;
 - (iii) Third, (x) 80% to the Members pro rata, in proportion to their respective Percentage Interests, and (y) 20% to [CTNY], until [BCM] shall have received, taking into account the timing and amount of all prior Capital Contributions and Distributions, an Internal Rate of Return equal to 18% per annum;
 - (iv) Fourth, (x) 75% to the Members pro rata, in proportion to their respective Percentage Interests, and (y) 25% to [CTNY], until [BCM] shall have received, taking into account the timing and amount of all prior Capital Contributions and Distributions, an Internal Rate of Return equal to 23% per annum; and
 - (v) Thereafter, (x) 65% to the Members pro rata, in proportion to their respective Percentage Interests, and (y) 35% to [CTNY]
- (b) [not applicable]
- (c) Notwithstanding any contrary terms set forth in this Agreement, if, as of the date of any Distribution, the aggregate amount of all distributions theretofore paid to [BCM] is less than 150% of the aggregate amount of all Capital Contributions theretofore made by [BCM] to the Company, then, notwithstanding the Internal Rate of Return theretofore received by [BCM], 100% of all Distributions shall be made to the Members pro rata in accordance with their Percentage Interests, without taking into account the Promote, until such time as [BCM] has received aggregate Distributions equal to 150% of the aggregate Capital Contributions therefore made by [BCM].

Agreement, p.16. Available Cash, a defined calculation (*see* Agreement, p.2) which is not in dispute, is the on-going profit of the Company and applies “for any period in question.”

Promote is defined as “the cumulative amount of Available Cash distributed to [CTNY] in excess of the product of the Percentage Interest of [CTNY] and the cumulative amount of Available Cash distributed to all the Members, as determined under Sections 6.1(a)(iii)-(vi).” Agreement, p.6. In other words, the Promote is the money CTNY gets when Section 6.1(a)’s waterfall reaches subsections (iii) & (iv). The parties do not dispute that the funding prerequisites in Sections 6.1(c) and Section 6.1(a)(i)-(ii) must be paid out before CTNY is entitled to receive the Promote. Yet, these conditions precedent notwithstanding, the parties dispute when the Promote accrues. CTNY argues that the Promote accrues from the outset, and BCM argues that the Promote accrues when the waterfall reaches subsection (iii).

CTNY commenced this action on November 14, 2013. CTNY filed the instant motion on November 18, 2013, at which time the parties agreed to be bound by a temporary restraining order (the TRO) pending the court’s decision on whether to grant a preliminary injunction. After oral argument was held on December 12, 2013, the court vacated the TRO and reserved decision on the motion.

II. Discussion

Pursuant to CPLR 6301, “[i]njunctive relief may only be awarded if the movant makes a clear showing of a probability of success on the merits, a danger of irreparable injury in the absence of an injunction, and that the balancing of the equities weighs in its favor.” *Goldstone v*

Gracie Terrace Apt. Corp., 110 AD3d 101, 104-05 (1st Dept 2013), citing *Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839 (2005), accord *Doe v Axelrod*, 73 NY2d 748 (1988).

Delaware law, which governs the Agreement, is consistent with New York's "traditional contract law principles that give great weight to the parties' objective manifestations of their intent in the written language of their agreement." *In re IBP, Inc. Shareholders Lit.*, 789 A2d 14, 54 (Del Ch 2001). "If a contract's meaning is plain and unambiguous, it will be given effect. Parol evidence may not be used to create a contractual ambiguity; rather, such ambiguity must be discerned by the court from its consideration of the contract as an entire text." *Id.* at 54-55 (citations omitted).

CTNY's argument in support of its interpretation of when the calculation of the Promote begins to accrue is based on its narrative about the nature of the parties' relationship as Members and their respective roles in selling the Property. This is irrelevant. The parties' intent will not be considered by the court where, as here, the Agreement is unambiguous.¹ *See id.*

The Promote is a defined term that relates to a specific category of payment, which is proscribed within the parameters of Section 6.1(a)'s waterfall. Indeed, the very definition of Promote states that it is "determined under Sections 6.1(a)(iii)-(vi)." Thus, as with the other levels of the waterfall, the Promote kicks in when the threshold of the prior level (Section 6.1(a)(ii)) is satisfied. Nothing in its definition nor elsewhere in the Agreement provides for a special accrual rule for the Promote. As with subsections (i) & (ii), subsections (iii) & (iv) are to be calculated when that level of the waterfall is reached. To wit, given that each level governs the distribution of Available Cash, an amount that will change as each level of the waterfall is

¹ To be sure, for the reasons discussed at oral argument, there is nothing commercially unreasonable about BCM's reading of the Agreement. *See Tr.* at 8-11.

paid out, it does not make sense to carve out a piece of the Available Cash payable under subsection (i) & (ii) to be specially held pending payment of the Promote.² Each level of the waterfall is precisely defined to account for the parties' distribution rights. Had the parties intended to apply a special accrual rule to the Promote, they would have explicitly done so.

In conclusion, given the court's rejection of CTNY's reading of the contract, CTNY has failed to establish a likelihood of success on the merits and, hence, CTNY is not entitled to an injunction. *Doe*, 73 NY2d at 751. Further, it should be noted that what is at issue here is entitlement *money* and, therefore, injunctive relief is not appropriate. *See Credit Index, L.L.C. v Riskwise Int'l L.L.C.*, 282 AD2d 246, 247 (1st Dept 2001); *Lombard v Station Square Inn Apts. Corp.*, 94 AD3d 717, 721 (2d Dept 2012) ("Where a plaintiff can be fully compensated by a monetary award, an injunction will not issue because no irreparable harm will be sustained in the absence of such relief"). Accordingly, it is

ORDERED that plaintiff CTNY Investors 3, LLC's preliminary injunction motion is denied; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on February 4, 2014 at 10:30 in the forenoon

Dated: January 29, 2014

ENTER:

J.S.C.

² It should be noted that carving out the Promote from subsections (i) & (ii) would effectively alter the definition of Available Cash, since the Promote, as CTNY understands it, would be excised and de facto escrowed from the Company's funds before the Available Cash is computed. The parties, if they so desired, could have done this quite easily with minor drafting alterations.