

Berman v Jankelowitz
2019 NY Slip Op 32439(U)
August 15, 2019
Supreme Court, New York County
Docket Number: 651789/2018
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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ASAF BERMAN, AYELET BERMAN,
Plaintiff,

INDEX NO. 651789/2018

MOTION DATE 03/13/2019

MOTION SEQ. NO. 004

- v -

DEAN JANKELOWITZ, MAYA JANKELOWIZ,
NOAMBENNY, LLC, JANKMAN, LLC, MAYADEAN LLC,
MOLLY PICON, LLC

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 87, 88, 89, 90, 91, 92, 93, 94, 95, 98, 99, 100, 101

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents and for the reasons set forth on the record (8/15/19), the plaintiffs' motion for summary judgment on the third and sixth cause of action is granted.

Asaf and Ayelet Berman (together, the Bermans) invested in two Manhattan restaurants, operated under the name Jack's Wife Freda, with Dean and Maya Jankelowitz (together, the Jankelowitzes). To that end, the Bermans became minority members of Molly Picon LLC (Molly Picon) and Jankman, LLC (Jankman), the LLCs operating the restaurants, with the Jankelowitzes as majority members. The Bermans also became minority members in third entity, MayaDean LLC (MayaDean), which was intended to serve as a holding company for the restaurants and the associated "Jack's Wife Freda" trademarks (Molly Picon, Jankman, and MayaDean, together, the LLCs). The Bermans allege that the Jankelowitzes mismanaged the LLCs for their own benefit, breached their fiduciary duties, stole and/or wrongfully assigned the

corporate trademarks, and refused to provide the Bermans with access to company books and records.

The instant motion seeks summary judgment on the third cause of action for breach of the audit requirement of the LLCs' operating agreements and for a declaration on the sixth cause of action that the MayaDean operating agreement is a valid and operative agreement.

The Molly Picon and Maya Dean operating agreements contain identical section 11.3 provisions, requiring the managing member to prepare audited financial statements on an annual basis as follows:

11.3 Reports. *The Managing Member shall prepare the Company's annual income tax return and annual financial statements which shall include a balance sheet, and the related statements of income and cash flows, which shall be audited* [emphasis added]. The Managing Member shall further prepare and distribute quarterly unaudited financial statements and business reports, tax filings and K-1's and, upon request, a list of all Members. The Managing Member may, in its reasonable discretion, appoint an independent accountant to perform its duties under this Section 11.3. The Managing Member shall transmit within ninety (90) and seventy-five (75) days, respectively, after the end of the fiscal year to each Person who was a Member during such fiscal year both a copy of such financial statements and a report indicating such Person's respective proportionate share of the Net Income, Net Loss, tax credits, deductions, tax preference items, investment credits, if any, and any other relevant tax item for such fiscal year for federal income tax purposes. The Managing Member shall provide to the Class B Members management reports at such time and in such form as the Managing Members determines in its reasonable discretion.

(Berman Aff., Exs. C-D; NYSCEF Doc. Nos. 91, 92).

Section 7.11 of the MollyPicon and Maya Dean operating agreements also contains the following language:

7.11 Compensation

..... The books, records and supporting documents of Company shall be made available for inspection by Members at the Restaurant during normal business hours. ***To confirm the accuracy of statements delivered and payments of the Management Fee made to it hereunder, Members may request an audit of such books and records by an auditing firm of its choice, but no more frequently than once annually. Any such audit shall be conducted at the Company office at the expense of the requesting Member*** [emphasis added].

(*id.*).

The Jankelowitzes argue that section 7.11, which provides that requested audits will be at the expense of the requesting Member is contradictory to the requirement set forth in section 11.3 and therefore summary judgment should be denied. The argument fails. The provisions are not inconsistent. As stated more completely on the record at oral argument (8/15/19), Section 7.11 simply permits members to inspect the companies records to confirm the calculation of the Management Fee which is calculated monthly once per year. It does not release or otherwise affect the Managing Member's obligation from providing annual audited financial statements in the first instance and K-1 statements, etc. It is a well-settled principle of contract interpretation that a contract should be interpreted in a way that reconciles all its provisions, whenever possible. Here, the provisions are clear: section 11.3 requires the managing member to audit the companies' books and records on an annual basis, and section 7.11 permits (but does not require) LLC members to further inspect the company books with respect to the Management Fee. There is no contradiction or ambiguity.

To the extent that the MayaDean operating agreement is undated and unsigned, it may still form the basis for an audit as indicated below, *i.e.*, Mr. Jenkolowitz has admitted that the MayaDean operating agreement was previously signed by all MayaDean members and now governs the operations of the company.

The entire issue with the sixth cause of action for declaratory judgment that the MayaDean operating agreement is a valid and operative agreement is that the operating agreement provided to the court (by both the plaintiffs and the defendants) is unsigned (NYSCEF Doc. Nos. 92, 42). However, as indicated, in a prior affidavit submitted to the court in opposition to the Bermans' motion to amend the complaint and in support of the Jankelowitzes' motion for summary judgment dismissing certain claims relating to the intellectual property trademarks associated with the Jack's Wife Freda restaurants, Mr. Jankelowitz *relied* on the MayaDean operating agreement and attested that:

9. Nor did Chiesa advise that registering the Trademarks to MayaDean was in direct contrast to the terms of *MayaDean's operating agreement (the "MayaDean Agreement")*, which governs the operations of the two existing Jack's Wife Freda restaurants. See PAC at ¶¶ 45-46.
10. *The MayaDean Agreement provides*, in relevant part, that MayaDean "has been organized to own, operate, develop, promote and manage restaurants pursuant to a concept developed by the Managing Member and licensed to [MayaDean] under the name Jack's Wife Freda..." (*A true copy of the MayaDean Agreement is annexed to the accompanying Affirmation of Gary M. Kushner as Exhibit "A."* It is also filed at Exhibit "2" to the original Complaint (NYSCEF 4)).

* * *

12. The effect of the assignment was to confirm that the Trademarks are and have always been owned by me, consistent with the written operating agreement [for MayaDean] *that was signed by all of the members, including Berman.*

(Jankelowitz Aff., ¶¶ 9-10, NYSCEF Doc. No. 43 [emphasis added throughout]).

The Jankelowitzes argue that the court should not consider these statements to be admissions as they were only made for the purposes of the prior motion and assumed as true the allegations

made in the Bermans' proposed amended complaint. This argument is unavailing. The court relied on Mr. Jankelowitz's statements in granting him the right to certain trademarks. Moreover, and significantly as it relates to the Defendant's position, Mr. Jankeklowitz's statement that the MayaDean operating agreement was signed by all parties was *not* alleged in the Bermans' proposed amended complaint but was added to the record by Mr. Jankelowitz. Indeed, Mr. Berman took the opposite position (NYSCEF Doc. No. 32, ¶ 45). As such, Mr. Jankelowitz's statement is an admission and the MayaDean operating agreement is valid and in effect. Having taken the position that the MayaDean operating agreement is enforceable and having benefitted from this position, the Jankelowitzes cannot now take a contrary position.

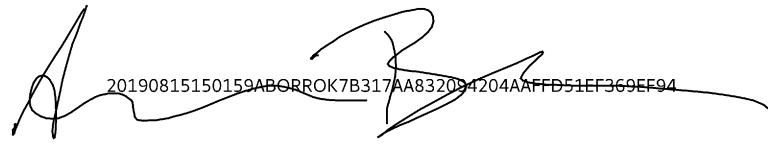
Accordingly, it is

ORDERED that the plaintiffs' motion for summary judgment on the third and sixth cause of action is granted in favor of the plaintiffs, and it is further

ORDERED that the third and sixth causes of action are severed and the balance of the claims are continued; and it is further

ADJUDGED and DECLARED that the MayaDean LLC operating agreement is a valid and operative agreement.

8/15/2019
DATE



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ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE