SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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PETER LENGYEL-FUSHIMI,

Plaintiffs, Decision and order

- against - Index No. 512764/2021

ANTHONY BELLIS, ZACHARY KINNEY, and KINGS COUNTY BREWERS COLLECTIVE, LLC,,

Defendants, August 25, 2021

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved seeking to reargue a decision rendered on July 15, 2021. In that decision the court granted the plaintiff's request seeking an injunction staying the defendants from further diluting his ownership share of the company Kings County Brewers Collective LLC [hereinafter 'KCBC'] on the grounds the operating agreement prohibited actions taken pursuing such dilution. The defendants have moved seeking to reargue that decision arguing it was rendered in error.

As recorded in the prior order, in 2012 the plaintiff and defendant Anthony Bellis formed Kings County Brewers Collective, LLC [hereinafter 'KCBC']. Zachary Kinney joined at a later date and each of them contributed $33,000. An operating agreement was executed between the parties on January 15, 2014. The plaintiff alleged that disagreements arose between them and the other managing members changed the operating agreement in violation of the operating agreement itself and downgraded the plaintiff's status from a Class A member to a Class D member. Thus, the

plaintiff was terminated as a manager and an officer of the Company was denied access to corporate books and records and has been denied any further income. In the prior order the court considered numerous and perhaps contradictory provisions of the operating agreement. The court harmonized the various provisions as explained in the prior order. The defendants now argue that the harmonization was in error and in any event, even if not in error the plaintiff is still not entitled to the relief sought. The plaintiff opposes the motion arguing the prior decision was correct in all respects.

Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at in its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS2d 617 [2d Dept., 2019]).

It is well settled that "a contract should not be interpreted in such a way as would leave one of its provisions substantially without force or effect (see, McCabe v. Witteveen, 34 AD3d 652, 825 NYS2d 499 [2d Dept., 2006]). Moreover, "an interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation (see, Nautilus Insurance Company v.

Matthew David Events, Ltd., 69 AD3d 457, 893 NYS2d 529 [1st Dept., 2010]).

As noted, Article 10.1 of the operating agreement states that the agreement "shall not be modified or amended in any respect except by a written instrument executed by all of the Members" (id). That provision necessarily and clearly requires a unanimous consent to amend the agreement. That provision is not an "odd-duck of a clause" (see, Memorandum of Law in Support, page 7) that should be ignored because it is inconvenient to the parties or because it was not honored by the corporation in the past. The fact the parties conducted their business without adherence to that clause and calls into question the behavior of the parties and the tax consequences that may flow from such behavior, does not mean the court should likewise ignore the clause. The clause is not confusing or complicated or indecipherable nor is it contradicted by any other provision in the operating agreement. The defendants argue that adopting this interpretation "causes serious harm as the LLC has to refund the investments of these non-members it has held for years, likely with interest, or face litigation as a result of the failure to take these actions. The Court surely did not intend these outcomes and must reconsider its Decision, since 10.1 destroys the company while a modification to it allowing for a vote maintains the status quo and allows the LLC to continue in

operation" (see, Memorandum of Law in Support, page 4). While the court is sympathetic to the parties' plight, which they caused themselves, they fail to explain how a modification of that clause, allowing a vote without unanimity, is even possible.

The defendants argue that Article 10.1 conflicts with Article 4.3. That clause states that "the Class A Members are authorized to appoint one or more officers from time to time. The officers shall hold office until their successors are chosen and qualified by Class A Members. Subject to any employment agreement entered into between the officer and the Company, an officer shall serve at the pleasure of the Class A Members. The current officers of the Company are listed on Exhibit B" (id). Exhibit B lists the managing members as Bellis, Lengyel and Kinney and Lengyel as the operating manager. The defendants argue that clause conflicts with 10.1 because 4.3 permits the Class A members to remove any officer. Although 4.3 does not state how many Class A members may remove an officer (a majority or unanimity) surely unanimity is not required. The removal or appointment of officers is not a matter that modifies or amends the agreement (Article 10.1) for which a unanimous decision is required. Thus, a majority of the Class A members had the right to remove the plaintiff as an officer. Further, pursuant to Article 4.1 the defendants had the right to remove the plaintiff as an employee. Thus, 4.3 does not conflict with 10.1 but rather

it deals with other eventualities. The plaintiff argues that although 4.1 and 6.1 deal with day to day activities they do not "include something as extraordinary as the removal of a manager" which must be unanimous (Memorandum of Law in Opposition, page 8). While the scope of day to day activities is not defined, it is anything that does not amend the operating agreement as outlined in 10.1. Thus, day to day activities are not routine or "extraordinary" but rather include anything that does not actually amend the operating agreement. Since a change of ownership necessarily amends the operating agreement it is not a day to day activity and requires a unanimous vote. Thus, there is no way that changes in day to day activities, even if it changes the plaintiff's status as a manager or officer or employee can be said to change or amend the operating agreement.

The motion seeking to reargue is granted to reflect the allowances noted that the injunction cannot cover the plaintiff's status as an officer or employee. However, there is no basis to disturb the prior decision and the injunction that was issued concerning the plaintiff's ownership interests. There has been no basis presented that would demand a change of that determination. Therefore, the motion seeking to reargue the imposition of an injunction is granted to all aspects of the plaintiff's connection with the company other than ownership. Upon reargument any injunction in this regard is hereby vacated.

The injunction regarding the plaintiff's ownership interests remains.

So ordered.

ENTER:

DATED: August 25, 2021
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC