STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

[FILED: November 14, 2013]

ANDREW KUSHNER, INDIVIDUALLY AND ON BEHALF OF GREEN TREE REALTY, LLC	:	
v.	:	**C.A. NO: WB 13-0335**
SUFFOLK REALTY, LLC; THOMAS DIPRETE; DENNIS DIPRETE; PAUL SULLIVAN, in his capacity as Trustee of SFD Trust; and ALEX PETRUCCI	:	

DECISION

STERN, J. Before this Court is the Plaintiff's (hereinafter Plaintiff or Mr. Kushner) Motion to Adjudge Suffolk Realty, LLC, Thomas DiPrete, Dennis DiPrete, Paul Sullivan and Alex Petrucci (Defendants or LLCs) in Contempt of this Court's July 30, 2013 Order (hereinafter Temporary Restraining Order) restraining and enjoining the Defendants from, inter alia, distributing, transferring or alienating assets of the LLCs in which the Plaintiff has a minority interest, other than in the ordinary course of business.

I

Facts and Travel

A

Background

On July 18, 2013, the Plaintiff filed a civil action requesting that this Court issue a Temporary Restraining Order and Preliminary Injunction against the Defendants. The Plaintiff sought to enjoin Defendants from taking certain actions with respect to various entities in which

the Plaintiff has a minority interest in the development known as the Village at South County Commons in Wakefield, Rhode Island.

On July 22, 2013 the Court heard arguments on the Plaintiff's motion. At this hearing, several undisputed facts were established. First, it was established that Mr. Kushner was a 9%[1] minority member in several LLCs along with the Defendants, having acquired, in 2004, an equity interest through Big City Partners. It was also established that over the ensuing years, segments of the group's real estate holdings were transferred to other entities, and the Plaintiff maintained a minority interest in those entities as well. It was further established that the Plaintiff and the Defendants operated these entities for a period of time and realized considerable financial success. Condominiums were sold, buildings were leased, and hotel rooms were booked. Distributions were made to the members of the various LLCs.

This is where the undisputed facts end and the disputed issues begin. The Plaintiff alleged that the Defendants had engaged in—and threatened to continue to engage in—oppressive conduct aimed at depriving Mr. Kushner of his right to participate in the entities' business activities, and destroying the value of Mr. Kushner's minority interest. Mr. Kushner asserted that from 2003 to 2009, North Colony, LLC and/or Green Tree, LLC, without any corporate authorization, paid approximately $579,937 on behalf of Suffolk Realty, LLC for property taxes, engineering, insurance and work done on land south of the Village at South County Commons. Mr. Kushner claimed that proceeds obtained from the sale of condominiums were distributed to the group's three majority partners rather than used to reduce an alleged

[1] According to the Plaintiff, in 2007 the co-owner of Big City Partners agreed to sell back his interest in the Project. The Plaintiff purchased an additional 3% interest, raising his equity stake in the project to 9%.

receivable. Mr. Kushner also averred that this purported receivable owed to certain entities is actually a capital contribution. The Defendants denied Mr. Kushner's allegation.

The Defendants contended that Mr. Kushner had "disassociated" from the group and that consequently, he was only entitled to payment for his interest in accordance with the provisions of the entities' Operating Agreements. The Defendants denied that Mr. Kushner had any right to participate in the group's business activities, having disassociated himself from the group, and denied that they had engaged in behavior aimed at destroying the value of Mr. Kushner's minority interest.

Following the hearing, this Court issued its Temporary Restraining Order and scheduled the matter for expedited discovery and a hearing on the Preliminary Injunction on September 18, 2013. By agreement of the parties, that hearing was continued, as expedited discovery was still being completed.

B

The Instant Motion

The Plaintiff filed the instant motion for contempt on October 22, 2013. This Court held an evidentiary hearing on this motion on October 30, 2013. The Plaintiff contends that the Defendants violated this Court's Temporary Restraining Order in three ways. First, the Plaintiff complains that South County Commons Management Group, LLC made a $20,000 payment on July 16, 2013 to the New England Patriots for football tickets—a transaction that was not in the course of ordinary business and therefore violative of the Temporary Restraining Order. Second, the Plaintiff alleges that Village Hotel Associates, LLC made a distribution on July 10, 2013 for $150,000, also not in the course of ordinary business, and therefore also violative of the Temporary Restraining Order. Finally, the Plaintiff contends that Village Hotel Associates, LLC

made another distribution, this time for $225,000 on September 13, 2013, also not in the course of ordinary business, and also violative of the Court's Temporary Restraining Order. The Defendants deny the Plaintiff's allegations.

II

Standard of Review

"The authority to find a party in civil contempt is among the inherent powers of our courts." Now Courier, LLC v. Better Carrier Corp., 965 A.2d 429, 434 (R.I. 2009) (citing Gardiner v. Gardiner, 821 A.2d 229, 232 (R.I. 2003)). The purpose of civil contempt is to '"coerce the contemnor into compliance with the court order and to compensate the complaining party for losses sustained."' Id. (quoting Biron v. Falardeau, 798 A.2d 379, 382 (R.I. 2002)). A finding of civil contempt—which is within the sound discretion of the trial justice to make and which depends on the particular circumstances of each case—is based on clear and convincing evidence of a party's lack of substantial compliance with a court order. State v. Lead Industries, Ass'n, Inc., 951 A.2d 428, 464 (R.I. 2008) (citing Durfee v. Ocean State Steel, Inc., 636 A.2d 698, 704 (R.I. 1994)). The evidence must specifically demonstrate "(1) that the alleged contemnor had notice that he was within the order's ambit, (2) that the order was clear and unambiguous, (3) that the alleged contemnor had the ability to comply, and (4) that the order was indeed violated." U.S. v. Saccoccia, 433 F.3d 19, 27 (1st Cir. 2005) (internal citations and quotations omitted).

III

Analysis

A

The Temporary Restraining Order Was Clear and Unambiguous

To be enforceable by contempt proceedings, an order must '"be clear and certain and its terms should be sufficient to enable one reading [it] to learn therefrom what he may or may not do thereunder."' Lead Industries, Ass'n, Inc., 951 A.2d at 465 (quoting Ventures Management Co. v. Geruso, 434 A.2d 252, 254 (R.I. 1981)). The terms of the order must be "specific, clear and precise so that one need not resort to inference or implications to ascertain his duty or obligation thereunder." Id. Accordingly, an enjoined party '"should not be punished for disobedience of an order which is capable of a construction consistent with innocence."' Ventures Management Co., 434 A.2d at 255 (quoting Sunbeam Corp. v. Ross-Simons, Inc., 86 R.I. 189, 194, 134 A.2d 160, 162 (1957)).

The Temporary Restraining Order states that the "Defendants are restrained and enjoined from distributing, transferring or alienating assets of the LLCs in which Plaintiff has a minority interest other than in the ordinary course of business." The Court's July 30, 2013 Order is "clear and certain" and its terms are "sufficient to enable one reading [them] to learn therefrom what he may or may not do thereunder." Lead Industries, Ass'n, Inc., 951 A.2d at 465. There is no ambiguity. The terms are sufficiently "specific, clear, and precise" to put individuals on notice as to what conduct is both prohibited and required. Id. 467. Under the express terms of the July 30, 2013 Order, the Defendants were not to make any distributions out of the ordinary course of business.

B

The Defendants Had Notice That They Were Within the Order's Ambit and Had the Ability to Comply

The Defendants had notice of the July 30, 2013 Order (See Exhibit 3). Counsel for the Defendants presented the agreed upon Order to this Court on July 30, 2013. A number of the Defendants were present at the Temporary Restraining Order hearing. Two of the Defendants, Dennis DiPrete and Thomas DiPrete, acknowledged during their testimony at the October 30, 2013 evidentiary hearing that they were aware of the Court's Temporary Restraining Order.[2]

C

Did the Defendants Violate the Temporary Restraining Order?

Per the Court's Temporary Restraining Order, the Defendants were restrained and enjoined from taking certain actions outside the ordinary course of business and without this Court's prior approval. The Defendants' $20,000 payment to the New England Patriots, purportedly for tickets to an NFL game, was made on July 16, 2013. Defendant Village Hotel Associates, LLC's $150,000 distribution was made on July 10, 2013. This Court does not need to decide whether or not these transactions were made in the ordinary course of business. Since these transactions took place prior to the Court's July 30, 2013 Order, the Defendants may not be found in contempt of that Order as a matter of law.

However, Village Hotel Associates, LLC made its second distribution, this time for $225,000, on September 13, 2013, clearly after entry of the July 30, 2013 Order. Exhibit 5 evidences that the distribution was made to three members—Thomas DiPrete, Dennis DiPrete and Alex Petrucci—for $75,000 each. The Defendants contend that this distribution was made in

[2] Both Dennis DiPrete and Thomas DiPrete testified that it was their understanding that the disbursements were permitted as they were in the ordinary course of business.

the ordinary course of business and therefore in compliance with the terms of the Temporary Restraining Order. The Defendants have attempted to show that Village Hotel Associates, LLC had made four distributions per year, every year since 2010.[3] The question for this Court is whether or not these distributions were made "in the ordinary course of business."

The "ordinary course of business" is "the normal routine in managing a trade or business." Black's Law Dictionary (8th ed. 2007). In the case of a Limited Liability Company, the members of an LLC have broad authority under the Limited Liability Company Act to determine the definition of terms for their own purposes under the LLC's Operating Agreement. Walker v. Resource Development Company Limited, LLC et al., 791 A.2d 799, 813 (Del. Ch. 2000). Once members exercise their contractual freedom in the Operating Agreement, they can be virtually certain that the Agreement will be enforced in accordance with its terms. Therefore, this Court must look to the Operating Agreement to determine whether or not these distributions were in the "ordinary course of business."

Under the Operating Agreement, a certain procedure must be followed in order for the LLC to make a distribution to its Members. Article VI of the Defendants' Operating Agreement is entitled "Distribution of Cash Flow and Proceeds of Transactions Not in the Ordinary Course of Business." Section 6.01 of that Article, titled "Cash Flow," provides that "Cash Flow shall be distributed to the Members in accordance with their Percentage Interests, at such time or times as the Members deems appropriate."[4] According to Section 6.01(b), the "Manager permitting cash flow and taking into account the seasonal nature of the Company shall, with the advice of the

[3] The Defendants admit that no distribution was made to Plaintiff Andrew Kushner during the last two distributions based on the Defendants position that he had disassociated under the applicable provisions in the Operating Agreement.

[4] Section 6.01 also provides for mandatory Tax Distribution prior to March 31st of each year. There is no evidence that this distribution was a Tax Distribution and therefore this provision is inapplicable.

Company CPA and the Consent of the Members, establish a budget which established an appropriate reserve." Section 6.02 of the Operating Agreement, titled "Net Cash From Capital Transactions," further provides that "Net cash from capital transactions shall be distributed, within a reasonable time after the occurrence of the event giving rise to such net cash from capital transactions, to the Members in accordance with their respective Percentage Interests." The Operating Agreement also establishes the procedure that must be followed to transact business of the entity. Under Article XII ("Meetings of Members"), Section 12.01 ("Meetings"), holders of at least 51% of the then outstanding Member Percentage Interest of the Company are entitled to vote, shall constitute a quorum, and any vote shall require "Consent of the Members." These meetings may be called by the Managing Member or any Member and may designate any place within the State of Rhode Island as the place of the meeting. Additionally, under Section 12.02 ("Action by Members Without a Meeting"), one or more written consents describing the action taken, signed by such number of Members who would be entitled to cast at least the minimum number of votes that would be required to take such action at a meeting, and the delivery of the consents to the Members of the Company for filing with the Company records, is required.

The testimony at the contempt hearing was undisputed: the procedures required under the Operating Agreement for distribution were not followed. There is no evidence that a Member meeting was ever commenced under Article XII, or that the requirements for action without a meeting were adhered to. Aside from the fact that there was no meeting as defined under the Operating Agreement, there is no evidence that the Defendants abided by the process prescribed in Article VI for establishing the amount of the distribution, including the seasonal nature of the Company, the advice of the Company CPA and the Consent of the Members. The testimony of

Dennis DiPrete and Thomas DiPrete taken together demonstrates that the authorization of a distribution was not by any formal process or a meeting, as required under the terms of the Operating Agreement. A decision was made to pay a distribution to all of the Members except the Plaintiff because there was available cash in the Village Hotel Associates, LLC bank account at the end of the season. This action was taken, not with any formal meeting, but after a telephone call with their attorney.

This Court does not need to delve further into the issue of whether or not distributions in prior years suggest that the September 2013 distribution was "in the ordinary course of business." Clearly, the September 2013 distribution itself was not conducted in accordance with the procedures that the Defendants themselves put in place in their own Operating Agreement. Accordingly, this Court finds that the Defendants indeed willfully violated the Temporary Restraining Order.

IV

Conclusion

The Limited Liability Company Act is a very flexible Act. Its aim is to combine some of the best features of a partnership and a corporation. It allows the members broad discretion to define the business relationship as they believe is fair and appropriate. In fact, the Members are even permitted to abrogate certain protections granted by statute to shareholders and owners of other types of entities. Once the Members of an LLC execute an Operating Agreement, it becomes the contract by which their conduct is governed and it must be strictly followed and construed. The September 13, 2013 distribution was not conducted in accordance with Article VI and Article XII of the Operating Agreement and was therefore outside the course of ordinary business. Defendants Dennis DiPrete, Thomas DiPrete and Alex Petrucci are hereby ordered to

immediately redeposit the $225,000 purported distribution back into the account of Village Hotel Associates, LLC. The Defendants are further ordered to pay the Plaintiffs legal fees, cost and expenses, after application to this Court by the Plaintiffs. Finally, the Temporary Restraining Order is hereby amended to include a provision restraining and enjoining any and all future distributions by the Defendants from these entities, in which the Plaintiff has or had an interest, without the prior approval of this Court. Counsel for the Plaintiff shall prepare an order in accordance with this Court's Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Andrew Kushner, Individually and on Behalf of Green Tree Realty, LLC v. Suffolk Realty, LLC, et al.
CASE NO:	C.A. No. WB 13-0335
COURT:	Washington County Superior Court
DATE DECISION FILED:	November 14, 2013
JUSTICE/MAGISTRATE:	Stern, J.
ATTORNEYS:	
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