To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Disp _x_ Dec ___ Seq. No. ___ Type _post trial_

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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BROWNE & APPEL, LLC, a New Jersey Limited Liability Company; SIR PAUL REALTY, LLC, a Delaware Limited Liability Company; ALEXANDER SIROTKIN; and PAUL SIROTKIN,

Index No. 50941/2015

Plaintiffs,

DECISION AND ORDER AFTER TRIAL

-against-

TEDDY LICHTSCHEIN a/k/a Tzvi Lichtschein; ELIZER SCHEINER a/k/a Eli Scheiner; and 455 HOSPITALITY, LLC, a New York Limited Liability Company,

Defendants.

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Over the course of more than a year, the Court tried this action, finally concluding the testimony in June 2019. The parties thereafter submitted post-trial memoranda and reply memoranda. This Decision and Order After Trial follows.

The parties were involved in multiple transactions regarding a hotel in Tarrytown, the Doubletree. 455 Hospitality, LLC ("455") owns and operates the hotel, and has since early 2005. At that time, the members of 455 were the Sirotkins, a father and son (16.66%); defendants Scheiner and Lichtschein (16.66%); a non-party, Lieb Puritz (16.66%); and Jordan LLC ("Jordan") (50.02%). The Sirotkins, Scheiner and Lichtschein, and a non-party, Eliyahu Spitzer, owned Jordan. There is no dispute that the Operating Agreement for 455 does not contain any provision concerning capital calls. *See* Joint Trial Exhibit 1.

At around the same time, the Sirotkins transferred their entire interest in 455 to plaintiff Browne & Appel LLC ("Browne"). Browne and plaintiff Sir Paul Realty, LLC ("Sir Paul"), although both owned by the Sirotkins, are separate entities, formed in different states.

In July 2007, Sir Paul bought the ground lease of the hotel from 455 for $3 million. Under the terms of that agreement, 455 was obligated to pay Sir Paul $25,000 per month in rent. *See* Joint Trial Exhibit 12. The agreement contained a purchase option, which allowed 455 to repurchase the ground lease from Sir Paul for $3 million. Scheiner guaranteed half of 455's obligation to Sir Paul (the "Sir Paul Guaranty") under the purchase option. *See* Joint Trial Exhibit 13. The Sir Paul Guaranty waived all defenses and counterclaims, as well as specifically waiving demand. This document provides, in relevant part, that Purchaser - Sir Paul - "shall not be required to make any demand on Seller [455] or any other guarantor of the Guaranteed Obligations or any other Person or otherwise pursue or exhaust its remedies against Seller or any other guarantor. . . ." It also provides that "If any Guaranteed Obligation is not satisfied when due . . . the Guarantors shall forthwith satisfy such Guaranteed Obligation upon demand. . . ." The Sir Paul Guaranty further contains a robust integration clause, stating that it cannot be "changed, modified [sic] amended, restated,

waived, supplemented, canceled or terminated other than by an agreement in writing signed by" Sir Paul and Guarantors.

In February 2009, 455 exercised the option at the insistence of 455's lender, CIBC Bank. Sir Paul agreed to terminate the sublease, and transferred the ground lease back to 455. The documents which accomplished this stated that they were the "full and complete understanding" between the parties (Sir Paul and 455) about the sublease, and "supercedes any and all prior written and oral agreements which relate to the Sublease." This document does not reference the Sir Paul Guaranty in any way. Although defendants argue that this document canceled the guaranty, Scheiner was not a party to it. *See* Joint Trial Exhibit 14.

Plaintiffs argue that the obligation to repay it the $3 million ripened in February 2009. However, there is no dispute that in July 2013, Sir Paul sent a formal demand letter to 455. See Joint Trial Exhibit 29. In this letter, Sir Paul sought the repayment of $3 million, plus interest. There is no dispute that 455 did not repay this amount. Nor did Scheiner pay this amount.

There is no dispute that 455 credited the Browne account with $3 million, the amount of the repayment. There is also no dispute that - although defendants lump Brown and Sir Paul into one big Sirotkin family entity - Browne and Sir Paul are separate legal entities.

Analysis

There are only three claims remaining in this action. First, there is Sir Paul's claim against Scheiner for $1.5 million arising out of the Sir Paul Guaranty. As stated above, this is an unconditional guaranty, with no demand necessary; nor is an attempt to collect from 455 necessary; and there can be no waiver unless there is a writing signed by both parties. There is no dispute that 455 unwound the transaction by canceling the sublease (with Sir Paul's cooperation) in February 2009 at the insistence of CIBC bank, the lender. This transaction triggered the obligation for 455 to pay Sir Paul $3 million, which it did not do. The Court rejects defendants' argument that by crediting Browne's capital account with $3 million, 455 fulfilled its obligation to Sir Paul. These are two separate legal entities, and a credit to Browne cannot serve to repay Sir Paul without an express writing acknowledging the same. *See Cty. of Nassau v. Grand Baldwin Assocs., L.P.*, 128 A.D.3d 1004, 1005, 10 N.Y.S.3d 296, 297 (2d Dept. 2015).

The Court agrees with plaintiffs that Sir Paul did not need to pursue collection efforts against 455 before turning to Scheiner's obligations under the Sir Paul Guaranty. *See Fed. Deposit Ins. Corp. v. Schwartz*, 78 A.D.2d 867, 867, 432 N.Y.S.2d 899, 901 (2d Dept. 1980), *aff'd*, 55 N.Y.2d 702 (1981) ("A reading of the agreement herein demonstrates unequivocally that the

guaranty was intended to be one of payment, and not of collection."). The Court disagrees with plaintiffs, however, about the operative date for the running of interest. Plaintiffs contend that interest runs from the date of the ground lease transfer, in February 2009. They downplay the July 2013 demand letter as "an effort to take whatever steps might conceivably be necessary to protect Sir Paul Realty's claim." In the complaint, however, Sir Paul identifies that letter as being the date of the demand. Accordingly, the Court determines that Scheiner is obligated on the Sir Paul Guaranty to pay to Sir Paul the amount of $1.5 million, with interest at the statutory rate from the date of demand, July 22, 2013.[1]

Next, the Court examines plaintiffs' demand for a declaration that Browne and Lichtschein/Scheiner each own 25% of 455 (with Jordan owning the other 50.02%). The parties agree that Puritz is no longer a partner in 455. Plaintiffs contend in their post-trial memorandum that Puritz's interest "was, in effect, either cancelled or equally distributed between Browne & Appel, on the one hand, and Lichtschein/Scheiner, on the other hand." While this seems to be a disorganized way to deal with a

[1]Scheiner argues that there is no repayment obligation, but if there is one, interest should begin to run with the filing of plaintiffs' action in Federal Court in January 2014. A review of the background in this action shows that in January 2014, plaintiffs amended the complaint that they first filed in July 2013. As the July 2013 complaint included the cause of action against Scheiner under the Sir Paul Guaranty, there is no basis for the Court to find that January 2014 is the operative date.

significant asset, a review of the testimony demonstrates that this was indeed the parties' understanding. Specifically, Scheiner testified at trial (in accordance with Sirotkin's testimony) that although initially each of Puritz, the Sirotkins and Scheiner/Lichtschein had a third of the remaining 50% of 455, eventually Puritz was no longer involved with 455, at "a time where Mr. Puritz walked away from the hotel and we became 50/50 partners with the Sirotkins." The Court thus finds that Browne owns 24.99% of 455, and Lichtschein/Scheiner collectively own 24.99%, with, as stated, Jordan owning the remaining 50.02%.

Finally, the Court turns to the remaining claim. Plaintiffs seek a declaration that the manager of 455 has no authority to issue capital calls to the members. A review of the Operating Agreement for 455 shows that there is no such provision therein. According to plaintiffs in their post-trial memoranda, and, not insignificantly, entirely unrebutted by defendants, Limited Liability Law Sections 417[2] and 609[3] do not allow for capital

[2]This section provides, in relevant part that "the operating agreement of a limited liability company may be amended from time to time as provided therein; provided, however, that, except as otherwise provided in the operating agreement or the articles of organization, without the written consent of each member adversely affected thereby, (i) no amendment of the operating agreement or (ii) to the extent any provision concerning (A) the obligations of any member to make contributions . . . is contained in the articles of organization, no amendment of such provision in the articles of organization, shall be made that (i) increases the obligations of any member to make contributions."

[3]This section provides, in relevant part, that "Neither a member of a limited liability company, a manager of a limited liability company managed by a manager or managers nor an agent of a limited

calls to be made unless the operating agreement provides for the same, and amendments to the operating agreement can only be made with written consent of the affected members or as provided in the operating agreement. Instead, all 455 states is that Browne "has an obligation to cooperate in all aspects to procure financing, refinancing, franchise and management agreements and all other matters for the progress and efficient and [sic] operation of the Company," and that this includes a capital call "if it is for the purposes set forth in Section 3.2 of the Operating Agreement."

A review of this provision of the Operating Agreement reveals that although the parties do have an obligation to cooperate "to procure financing, refinancing, franchise and management agreements, licenses and insurance (including, without limitation, self-insurance) on behalf of the Company and in all other matters with respect to the proper and efficient operation of the Company," contributing to capital calls is not listed as one of their obligations. The Court thus finds that, as a matter of law, unless and until it is amended, the Operating Agreement does not obligate the parties to contribute to capital calls, although they must cooperate in the matters listed above.

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liability company (including a person having more than one such capacity) is liable for any debts, obligations or liabilities of the limited liability company or each other, whether arising in tort, contract or otherwise, solely by reason of being such member. . . ."

All other requests for relief are denied.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
January 10, 2020

HON. LINDA S. JAMIESON
Justice of the Supreme Court

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