

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Ramos
Justice

PART 53m

B&B Capital LLC

INDEX NO.

604080/05

MOTION DATE

MOTION SEQ. NO.

012

MOTION CAL. NO.

Linda Merritt

- v -

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DISPOSED OF
IN ACCORDANCE WITH THE ACCOMPANYING
MEMORANDUM DECISION

FILED
JAN 17 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/4/08

[Signature]
HON. CHARLES E. RAMOS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION
-----X
R&R Capital LLC and FTP Capital LLC,

Plaintiff,

Index No. 604080/05

-against-

LINDA MERRITT a.k.a. LYN MERRITT,

Defendants.
-----X

Charles Edward Ramos, J.S.C.:

Defendant Linda Merritt a.k.a. Lyn Merritt seeks: (1) to hold plaintiffs and its counsel in contempt for commencing concurrent litigation, and (2) for permission to dispose of jointly owned properties as required to satisfy primary and indemnity obligations.

This action arises out of a failed business relationship between plaintiff R&R Capital LLC ("R&R") and Ms. Merritt. Beginning in 2003, the parties formed a series of nine Delaware LLCs¹ (collectively the "Entities") for the purposes of investing in real property located in Pennsylvania. FTP Capital LLC, a wholly owned subsidiary of R&R, and Ms. Merritt were equal members of Hope Land LLC. R&R and Ms. Merritt were equal members in the other eight Entities.

Although R&R and Ms. Merritt executed separate operating agreements for each Entity, each operating agreement designated Ms. Merritt as the "Managing Member," charging her with the day-

¹ The Entities consist of Merritt Land LLC, Moore Street LLC, Hope Land LLC, Pandora Farms LLC, PDF Properties LLC, Pandora Racing LLC, Grays Ferry Properties LLC, Unionville Land LLC, Buck & Doe Run Valley Farms LLC.

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to-day responsibilities. The operating agreements were identical, except the stated purpose of each Entity was to acquire, hold, maintain, operate, sell, and dispose of a different tract of land.

On November 17, 2005, R&R brought suit to have Ms. Merritt removed as Managing Member and sought a temporary restraining order ("TRO") to enjoin Ms. Merritt from managing the Entities. The complaint alleged unjust enrichment, breach of contract, fraud, and breach of fiduciary duty. This Court granted a TRO restricting Ms. Merritt's management authority to making expenditures in the ordinary course of business.

On February 23, 2006, this Court ordered modification of the TRO to allow Ms. Merritt to manage the Entities without restriction, provided that Ms. Merritt gave 48 hour notice before selling, transferring, or encumbering any assets of the Entities. Upon notice, R&R was given 48 hours to offer a counter-proposal or seek a TRO to enjoin the transaction.

Ms. Merritt contends that the plaintiffs have indirectly violated this Court's February 23, 2006, order by commencing an action to quiet title in the United States District Court for the Eastern District in Pennsylvania.

A finding of civil contempt based upon a violation of a court order requires a lawful court order clearly expressing an unequivocal mandate was in effect and the person alleged to have violated the order had notice of its terms. *Raphael v Raphael*, 20 AD3d 463 (1st Dept 2005).

This Court did not issue an order with a prohibition against federal litigation. As such there can be no finding of contempt. It is well established that "[s]tate courts are without power to restrain federal court proceedings in in personam actions." *Leake v Merrill Lynch, Pierce, Fenner & Smith*, 213 Ad2d 155, 156 (1st Dept 1995).

The parties also seek clarification on the powers and authority of the Managing Member, Ms. Merritt. Pursuant to Section 18-402 of the Delaware Limited Liability Company Act (the "Act"):

"if a limited liability company agreement provides for the management, in whole or in part, of a limited liability company by a manager, the management of the limited liability company, to the extent so provided, shall be vested in the manager who shall be chosen in the manner provided in the limited liability company agreement. The manager shall also hold the offices and have the responsibilities accorded to the manager by or in the manner provided in a limited liability company agreement."

The statute is a default statute and contemplates the execution of an operating agreement. On September 15, 2003, the parties executed an Amended and Restated Operating Agreement for Merritt Land LLC (the "ML Agreement"). Pursuant to Section 4.1 of the ML Agreement:

"The Managing Member of the Company shall be Lyn Merritt (aka Linda Merritt)...except as expressly provided to the contrary in Section 4.2...the Managing Member shall have full power and authority to take any and all actions with regard to the Company and the Property as may lawfully be delegated to the

Managing Member under the Act²."

The relevant provision in Section 4.2 states:

"unless the managing member has obtained the prior written consent of each of the Members, the Managing Member shall not cause the Company to do, any of the following...sell, exchange or effect any disposition of all or any portion of the Property for a purchase price that is less than the sum of the then-outstanding amount of the Loan and all amounts payable thereunder plus the aggregate Capital Contributions of the Members hereunder.

Pursuant to the ML Agreement, Ms. Merritt has the power and authority to transfer, sell, or encumber the assets of the Entities to satisfy the primary obligations of the Entities. The only restriction the ML Agreement places on Ms. Merritt is that she is not allowed to dispose of the properties for a price less than the outstanding debt of the Entities plus the contributions of the Members.

Ms. Merritt also seeks to dispose of the assets to satisfy the indemnity obligations the Entities owe to her.

Section 9.1 of the ML Agreement defines an Indemnified Party as any member or officer of the Company, who shall:

"be indemnified and held harmless by the Company from and against any and all losses, claims, damages, liabilities, expenses... judgments, fines, settlements, and other amounts (collectively "Indemnification Obligations")...arising from any and all claims...in which such indemnified party may be involved...by reason of such indemnified party's service to...or management of the affairs of the Company, its properties,

² The ML Agreement defines the "Act" as the Delaware Limited Liability Company Act.

business or affairs...provided that such Indemnification Obligation resulted from a mistake of judgment, or from action or inaction...that did not constitute gross negligence, wilful misconduct or bad faith."

Pursuant to the ML Agreement, Ms. Merritt has the right to be indemnified unless the Indemnification Obligation arose from action or inaction constituting gross negligence, wilful misconduct, or bad faith. There was no evidence presented that suggests the Indemnification Obligation arose in such a manner.

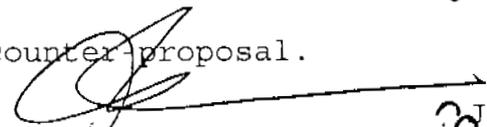
There is no ambiguity in the ML Agreement as to what Ms. Merritt may or may not do in her capacity as Managing Member. Since the Act does not contain any provision that would preclude Ms. Merritt from exercising her powers, this Court must adhere to the principle that "clear and complete writings should generally be enforced according to their terms." *Wallace v 600 Partners Co.*, 86 NY2d 543, 546 (1995).

Accordingly, it is,

ORDERED, that the defendant's motion to hold plaintiffs in contempt is denied, and it is further;

ORDERED, that the defendant is permitted to dispose of the properties as required to satisfy the primary obligations of the Entities and their indemnity obligations to defendant, provided that defendant provides 48 hour notice to plaintiff of any intended disposition, and allows plaintiff 48 hours from receipt of notice to move this Court for an order to enjoin the transaction or offer a counter proposal.

Dated: January 4, 2008


HON. CHARLES E. RAMOS

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Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.