STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 24CV005620-590
KEN FAIRLEIGH, INDIVIDUALLY and AS TRUSTEE FOR THE LOUISE ROBERTSON FAIRLEIGH TRUST, Plaintiff, v. PHILIP WEGNER and SECURE VENTURES GROUP, LLC, Defendants.	**ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

THIS MATTER is before the Court on the Motion for Preliminary Injunction of Plaintiff Ken Fairleigh, individually and as Trustee for the Louise Robertson Fairleigh Trust ("Motion," ECF No. 16). The Court, having considered the Motion, the briefs, the affidavits, the arguments of counsel, and all appropriate matters of record, **CONCLUDES**, in its discretion, that the Motion should be **DENIED** for the reasons set forth below.

FINDINGS OF FACT

1. The Court's factual findings are made solely for purposes of deciding the present Motion and are not binding in any subsequent proceedings in this action. *See DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 578 (2002) (citing *Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 16 (1993)).

2. Defendant Secure Ventures Group, LLC ("Secure Ventures"), is a limited liability company organized under North Carolina law that owns and leases three commercial condominiums in Charlotte, North Carolina. (Am. Compl. ¶¶ 3, 6, ECF No. 15.)

3. Fairleigh owns a 24.5% interest in Secure Ventures and also serves as the Trustee of Plaintiff Louise Robertson Fairleigh Trust (the "Trust"), which owns a separate 24.5% interest in the company. (Am. Compl. ¶ 10.)

4. Defendant Philip Wegner owns a 51% interest in Secure Ventures and also serves as the company's sole manager. (Am. Compl. ¶¶ 10, 12.) In addition to his majority interest in Secure Ventures, Wegner independently owns two separate companies—Secure Edge Networks, LLC ("SEN"), and The Launch Factory, LLC ("Launch Factory," and together with SEN, the "Tenants"). (Am. Compl. ¶¶ 13, 14.)

5. Since 2016, Secure Ventures has owned, managed, and leased Units 220 and 310 in the Dyestuff building located at 2459 Wilkinson Boulevard in Charlotte. (Am. Compl. ¶ 6.) In 2018, Secure Ventures purchased Unit 300 in the same building (together with Units 220 and 310, the "Properties"). (Am. Compl. ¶ 8.)

6. On 1 January 2018, Secure Ventures executed separate leases of the various Properties with the Tenants (the "Leases").[1] (Wegner Aff. ¶ 7, ECF No. 23.)

7. In 2019, Secure Ventures obtained two loans from Select Bank. (Am. Compl. ¶ 19.) The first loan ("First Loan") was used to refinance Secure Ventures' outstanding indebtedness in connection with the purchase of the Properties. (Am. Compl. ¶ 19.) The First Loan was guaranteed by both Wegner and Fairleigh and was secured by a deed of trust on the Properties. (Am. Compl. ¶ 19.) The second loan ("Second Loan")—which was in the principal amount of $500,000—was used to

[1] On 1 September 2021—for reasons not directly related to the present Motion—the two separate Leases were consolidated into a single lease agreement between Secure Ventures and Launch Factory. (Suppl. Fairleigh Aff., Ex. A, ECF No. 24.) Thereafter, Launch Factory subleased certain Properties to SEN. (Wegner Aff. ¶ 9; Suppl. Fairleigh Aff. ¶¶ 3, 4, Ex. A.)

refinance SEN's debt. (Am. Compl. ¶¶ 20–21.) Although the Second Loan did not directly benefit Secure Ventures[2] and was guaranteed solely by Wegner, it was nevertheless secured by a deed of trust on the Properties. (Am. Compl. ¶¶ 20–21.)

8. Secure Ventures is currently governed by a Third Amended and Restated Operating Agreement of Secure Ventures Group, LLC, which is dated 1 July 2019. ("Op. Agrmt.," ECF No. 15.1.)

9. The Operating Agreement provides that—among other things—rental income from the Properties will be used to fund Secure Ventures' payment of distributions to Fairleigh, the Trust, and Wegner (the "Distribution Payments"). (Op. Agrmt. §§ 4.1, 11.1.) These Distribution Payments are to be made in accordance with the payment scheme set forth under Section 4.1 of the Operating Agreement, which provides for payments that are proportional to the parties' respective investments and ownership interests in Secure Ventures. (Am. Compl. ¶ 29; Op. Agrmt. § 4.1.)

10. For several years, Fairleigh and the Trust received monthly Distribution Payments from Secure Ventures in amounts of either $4,004.00 or $4,204.00. (Am. Compl. ¶¶ 35–37.)

11. Beginning in August 2023, the monthly Distribution Payments ceased. (Am. Compl. ¶ 38.) Fairleigh became concerned about the financial status of Secure Ventures and ultimately requested copies of the company's financial records from Wegner pursuant to his inspection rights under Section 10.13 of the Operating Agreement. (Am. Compl. ¶ 41; Op. Agrmt. § 10.13.)

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[2] Wegner asserts that the proceeds from the Second Loan were intended to be used to fund the Tenants' rent payments to Secure Ventures. (Wegner Aff. ¶¶ 18, 20.)

12. Despite sending Wegner multiple inspection requests, Wegner failed to provide Fairleigh with any of the requested documents. (Am. Compl. ¶¶ 41, 47–50.)

13. On 5 February 2024, Fairleigh filed an initial Complaint in this matter. (Compl., ECF No. 3.) Fairleigh later amended his Complaint on 1 April 2024. (Am. Compl., ECF No. 15.) The Amended Complaint asserts claims for (1) breach of contract against Wegner and Secure Ventures; (2) breach of fiduciary duty against Wegner; (3) accounting/access to company records against Secure Ventures; (4) declaratory judgment against Wegner; and (5) dissolution of Secure Ventures. (Am. Compl. ¶¶ 54–88.)

14. Following the filing of this lawsuit, Wegner—on behalf of Secure Ventures—began providing Fairleigh with various financial documents of the company, including financial reports, general ledgers, and bank statements. (Am. Compl. ¶ 51.)

15. Fairleigh asserts that the documents that were produced reveal "serious financial concerns," including—among other issues—the use of Secure Ventures' funds to service debt on the Second Loan and the "underpayment of rent by [Tenants] in the approximate amount of $250,000 since 2020." (Am. Compl. ¶ 52.)

16. Section 6.8 of the Operating Agreement provides that "[the Leases] entered into between [Secure Ventures] and each of [SEN] and [Launch Factory] are hereby approved for all purposes of this Agreement." (Op. Agrmt. § 6.8.)

17. However, Section 6.3(b)(viii) states that members of Secure Ventures owning at least 66% of the outstanding interests in the company must "approve or

execute any amendment, revision or modification to the Leases or cause the cancellation or termination thereof." (Op. Agrmt. § 6.3(b)(viii).)

18. Fairleigh contends that because no reduction or modification of the Tenants' rent obligations was approved by the holders of at least 66% of the membership interests in Secure Ventures (and were instead approved solely by Wegner), the Tenants' underpayment of rent constitutes an existing default under the Leases. (Am. Compl. ¶ 27; Fairleigh Aff. ¶ 8.)

19. Section 11.1 of the Operating Agreement defines a "Default Event" to include "a default under either of the Leases." (Op. Agrmt. § 11.1.) Accordingly, Fairleigh maintains that the Tenants' default under the Leases constitutes a "Default Event" under the Operating Agreement. (Am. Compl. ¶ 78.)

20. Section 2.2 of the Operating Agreement states, in relevant part, as follows:

> Upon the occurrence and during the continuation of any Default Event, the voting rights with respect to the Membership Interests of Wegner . . . shall be suspended and all voting rights of the Members shall be exercised solely by the Members other than Wegner.

(Op. Agrmt. § 2.2.)

21. Fairleigh asserts that because a "Default Event" currently exists (as that term is defined in the Operating Agreement), the application of Section 2.2 has been triggered, thereby mandating the suspension of Wegner's voting rights. (Am. Compl. ¶ 78.)

22. On 1 April 2024, Fairleigh requested a meeting of Secure Ventures' members pursuant to the terms of the Operating Agreement. (Fairleigh Aff. ¶ 14.)

Given Fairleigh's belief that Wegner's voting rights have been suspended on account of the above-described "Default Event," Fairleigh's intent in calling this meeting was to unilaterally vote to remove Wegner as Manager of Secure Ventures and install himself as Manager in Wegner's place. (Fairleigh Aff. ¶ 14.)

23. Due to scheduling conflicts, the parties could not agree on a date for the meeting, and Fairleigh ultimately filed the present lawsuit instead. As of the present date, Wegner continues to serve as Secure Ventures' Manager. (Fairleigh Aff. ¶ 16; Wegner Aff. ¶ 37.)

24. On 12 April 2024, Fairleigh filed the present Motion, requesting that the Court enter a preliminary injunction removing Wegner as Manager of Secure Ventures and designating Fairleigh as the Manager. (Mot., at 1.)

25. In opposing Fairleigh's Motion, Wegner has submitted an affidavit in which he testified that he and Fairleigh had numerous informal conversations about the financial problems of the Tenants and their adverse effect on the ability of Secure Ventures to continue paying scheduled distributions to Fairleigh and the Trust. (Wegner Aff. ¶¶ 31, 35.) His affidavit further states that during these conversations, Fairleigh repeatedly gave verbal approval for the Tenants' reduced rent payments. (Wegner Aff. ¶¶ 31–32; Defs.' Mem. L. Op. Pl.'s Mot. Prelim. Inj., at 6, ECF No. 22.) Specifically, Wegner testified—in part—that he informed Fairleigh that the Tenants "had no more money to continue to pay rent to [Secure Ventures] . . . until either the funding for SEN closed or the [Properties were] sold." (Wegner Aff. ¶ 31.) Additionally, Wegner testified that Fairleigh responded by saying that "it was fine

and [that] he would figure out things on his end." (Wegner Aff. ¶ 31.) Wegner stated that he interpreted Fairleigh's statement as an agreement that "the [T]enants would not pay rent to cover distributions to [Fairleigh] and the . . . Trust" until the eventual sale of the Properties. (Wegner Aff. ¶¶ 31–32.)

26. In light of Fairleigh's prior agreement to allow the suspension of rent payments by the Tenants, Wegner argues that (1) no default exists under the Leases and, accordingly, no Default Event has occurred under the Operating Agreement; and (2) therefore, no basis exists to deem Wegner's voting rights to be suspended and to remove him as Secure Ventures' Manager against his will. (Defs.' Mem. L. Op. Pl.'s Mot. Prelim. Inj., at 6–7.)

27. Alternatively, Wegner asserts that even if a Default Event technically occurred, Fairleigh's verbal consent to Wegner's actions serves to waive any ability Fairleigh would otherwise possess to invoke the voting rights suspension clause in Section 2.2 of the Operating Agreement. (Defs.' Mem. L. Op. Pl.'s Mot. Prelim. Inj., at 11.)

28. Fairleigh, conversely, has submitted an affidavit in which he denies that he ever agreed to a reduction in the Tenants' rent payments. (Fairleigh Aff. ¶ 8; Suppl. Fairleigh Aff. ¶¶ 4–5.)

29. The affidavits of Fairleigh and Wegner present conflicting testimony on the key issue of whether Fairleigh approved Wegner's decision to allow the Tenants to make reduced rental payments to Secure Ventures or to suspend those payments

entirely (and the resulting effect on the right of Fairleigh and the Trust to continue receiving the distributions that they were due).

30. Based on its careful consideration of the affidavits and all other applicable matters of record, the Court finds Wegner's testimony to be more credible on this issue. Wegner's affidavit contains substantially more detail than Fairleigh's, including specific dates of the parties' conversations and recollections of specific topics that were discussed during those conversations. (*See, e.g.*, Wegner Aff. ¶¶ 21–26, 31–34.)

31. A hearing on the Motion was held on 3 May 2024, and the matter is now ripe for resolution.

CONCLUSIONS OF LAW

32. Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

33. Any Finding of Fact that is more appropriately deemed a Conclusion of Law, and any Conclusion of Law that is more appropriately deemed a Finding of Fact, shall be so deemed and incorporated by reference as a Finding of Fact or Conclusion of Law, as appropriate.

34. A preliminary injunction "is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation." *Ridge Cmty. Inv'rs, Inc. v. Berry*, 293 N.C. 688, 701 (1977). The issuance of such injunctive relief "is a matter of discretion to be exercised by the hearing judge after a careful balancing of the

equities." *State ex rel. Edmisten v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 357 (1980).

35. The plaintiff bears the burden of establishing the right to a preliminary injunction. *Pruitt v. Williams*, 288 N.C. 368, 372 (1975). The entry of a preliminary injunction is proper only where the plaintiff is (1) able to show a "likelihood of success on the merits of his case," and (2) "likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of [the] plaintiff's rights during the course of litigation." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401 (1983) (cleaned up).

36. Fairleigh contends that the injunctive relief he seeks is warranted because he is likely to suffer irreparable harm in the absence of judicial intervention. (Pl.'s Br. Supp. Mot. Prelim. Inj., at 8, ECF No. 17.) Specifically, Fairleigh argues that the deprivation of his claimed right under the Operating Agreement to acquire managerial control over Secure Ventures upon the occurrence of a Default Event constitutes irreparable harm *per se*. (Pl.'s Br. Supp. Mot. Prelim. Inj., at 8–11.)

37. However, the Court need not reach the issue of irreparable harm because it concludes that Fairleigh has failed to demonstrate a likelihood of success on the merits—a failure that precludes the granting of injunctive relief. *See A.E.P. Indus., Inc.*, 308 N.C. at 401.

38. The Court finds that Fairleigh has not met his burden of showing that he is likely to prevail on his argument that Section 2.2 of the Operating Agreement has been triggered.

39. As stated above, the Court deems Wegner's testimony that Fairleigh gave verbal approval to the decisions that Fairleigh now claims have given rise to a Default Event to be more credible than Fairleigh's testimony that no such approval was given. Thus, either there was no Default Event at all or, alternatively, Fairleigh's right to invoke Section 2.2 in response to such a Default Event has been waived by him.[3] *See*, *e.g.*, *Fletcher v. Jones*, 314 N.C. 389, 394–95 (1985) (finding oral representations and assurances effectuated a waiver of a contractual term and noting that "[t]he basis for a waiver can be inferred from conduct or expressed in words"). Either way, Fairleigh has failed to show a likelihood of success on the merits of his claim that he is entitled to become Manager of Secure Ventures at the present time in place of Wegner.

CONCLUSION

THEREFORE, IT IS ORDERED that Fairleigh's Motion for Preliminary Injunction is **DENIED**.

SO ORDERED, this the 9th day of May, 2024.

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge
for Complex Business Cases

[3] At the 3 May hearing, Fairleigh's counsel conceded that the informal course of dealing that existed between Fairleigh and Wegner in their business relationship would have permitted decisions affecting the company to have been made without a formally noticed members' meeting.