

Majority Opinion >

SUPREME COURT OF NEW YORK, APPELLATE
DIVISION, FIRST DEPARTMENT

Robert Shapiro, Plaintiff-Appellant, v Gabriel Ettenson,
et al., Defendants-Respondents.

2849 653571/14

January 24, 2017, Entered January 24, 2017, Decided
THIS OPINION IS UNCORRECTED AND SUBJECT
TO REVISION BEFORE PUBLICATION IN THE
OFFICIAL REPORTS.

Kilhenny & Felix, New York (James M. Felix of
counsel), for appellant.

Carter Ledyard & Milburn LLP, New York (Stephen M.
Plotnick of counsel), for respondents.

Sweeny, J.P., Renwick, Andrias, Kahn, Gesmer, JJ.

Order and judgment (one paper), Supreme Court, New
York County (Kelly O'Neill Levy, J.), entered
September 2, 2015, insofar as appealed from as
limited by the briefs, declaring, inter alia, that nonparty
ENS Health, LLC's operating plan is valid, that the
capital call was valid, and that defendants were
authorized to reduce plaintiff's salary by majority vote,
unanimously modified, on the law, to vacate the
declaration that defendants were authorized to set their
own salaries and reduce plaintiff's salary by majority
vote, and otherwise affirmed, without costs.

Plaintiff argues that ENS Health, LLC's operating
agreement is invalid because its adoption was not
unanimous. However, New York Limited Liability
Company Law § 402(c) provides that the operating
agreement may be adopted by "the vote of a majority
in interest of the members entitled to vote thereon."

Plaintiff contends that the parties had an oral
agreement regarding unanimity on this issue. However,
Limited Liability Company Law § 417 requires a
written operating agreement, and where there is no
operating agreement or the operating agreement
fails to address issues in dispute, the default
provisions under the Limited Liability Company Law
govern (*see e.g.* Limited Liability Company Law §§
401[a] ; 408[a] ; *Doyle v Icon, LLC*, 135 AD3d 642 , 24
N.Y.S.3d 602 [1st Dept 2016]; *Matter of Eight Swords,
LLC*, 96 AD3d 839 , 946 N.Y.S.2d 248 [2d Dept 2012]).

As the operating agreement explicitly provides that a
member's participating interest may be reduced
proportionally if the member fails to make a requested
additional capital contribution, defendants were acting
in accordance with the agreement when they issued
their "Notice of Call for Additional Capital Contributions
from Members."

However, the defendants' action in setting salaries for
themselves and setting plaintiff's salary at zero is
precluded by section 9.01 of the operating agreement.

We have considered plaintiff's remaining arguments
and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION,
FIRST DEPARTMENT.




ENTERED: JANUARY 24, 2017



General Information






Topic(s)	Other
Parties	Robert Shapiro, Plaintiff-Appellant, v Gabriel Ettenson, et al., Defendants-Respondents.
Court	Appellate Division of the Supreme Court of New York, First Department
Date Filed	2017-01-24 00:00:00

Shapiro v. Ettenson, No. 2849, 2017 BL 19404 (App Div, 1st Dept Jan. 24, 2017), Court Opinion

Direct History

- 1  **Shapiro v. Ettenson, No. 2849, 2017 BL 19404 (App Div, 1st Dept Jan. 24, 2017)**
affirming the order (in part), affirming the judgment (in part), modifying the order, modifying the judgment and vacating the order (in part) in
 Shapiro v. Ettenson, No. 653571/2014, 2015 BL 288781 (Sup. Ct. Aug. 16, 2015)
- 2  **Shapiro v. Ettenson, No. 653571/2014, 2015 BL 288781 (Sup. Ct. Aug. 16, 2015)**
motion for summary judgment granted (in part), declaratory judgment granted, motion to dismiss granted, case dismissed, motion for summary judgment denied (in part)







Direct History Summary	
 Caution	0
 Negative	0
Total	0






Case Analysis Summary	
 Positive	0
 Distinguished	0
 Caution	0
 Superseded	0
 Negative	0
Total	0

Case Analysis

No Treatments Found

Table Of Authorities (2 cases)

- 1   Cited , (See, e.g.)  Doyle v. Icon, LLC, 135 A.D.3d 642, 24 N.Y.S.3d 602 (App Div, 1st Dept 2016)
- 2   Cited , (See, e.g.)  Matter of Eight of Swords, LLC, 96 A.D.3d 839, 946 N.Y.S.2d 248 (App Div, 2d Dept 2012)

Authorities Summary	
 Positive	2
 Distinguished	0
 Caution	0
 Superseded	0
 Negative	0
Total	2