

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D36652
G/hu

_____AD3d_____

Argued - October 25, 2012

ANITA R. FLORIO, J.P.
JOHN M. LEVENTHAL
LEONARD B. AUSTIN
JEFFREY A. COHEN, JJ.

2011-04001
2011-09114
2011-09115

DECISION & ORDER

ProHealth Care Associates, LLP, appellant-respondent,
v Henry K. Prince, etc., et al., defendants-respondents,
Emily S. Brooks, respondent-appellant.

(Index No. 8712/00)

Garfunkel Wild, P.C., Great Neck, N.Y. (Roy W. Breitenbach, Kevin G. Donoghue,
and Theresa A. Harris of counsel), for appellant-respondent.

Ackerman, Levine, Cullen, Brickman & Limmer, LLP, Great Neck, N.Y. (John M.
Brickman and Andrew J. Luskin of counsel), for defendants-respondents and
respondent-appellant.

In an action, inter alia, to recover damages for breach of fiduciary duty, the plaintiff
appeals (1) from a decision of the Supreme Court, Nassau County (McCarty III, J.), entered
December 23, 2010, made after a nonjury trial, (2), as limited by its brief, from so much of an order
of the same court entered February 28, 2011, as denied its motion pursuant to CPLR 4404(b) to set
aside so much of the decision as found that the cause of action to recover damages for breach of
fiduciary duty must be dismissed and that the defendant Emily S. Brooks was entitled to an award
of severance compensation pursuant to the parties' partnership agreement, and (3), as limited by its
brief, from so much of a judgment of the same court entered March 11, 2011, as, upon the decision
and the order, is in favor of the defendant Emily S. Brooks and against it on her counterclaim in the
principal sum of \$60,645.15 and dismissing the cause of action to recover damages for breach of
fiduciary duty, and the defendant Emily S. Brooks cross-appeals, as limited by her brief, from so
much of the same judgment as, upon the decision, and upon, in effect, so much of the order as denied

December 5, 2012

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that branch of her motion, made jointly with the defendant Henry K. Prince, which was pursuant to CPLR 4404(b) to set aside so much of the decision as found that she was not entitled to an award of an attorney's fee, is in favor of the plaintiff and against her dismissing her counterclaim for an award of an attorney's fee pursuant to the parties' partnership agreement.

ORDERED that the appeal from the decision is dismissed, as no appeal lies from a decision (*see Schicchi v J.A. Green Constr. Corp.*, 100 AD2d 509, 509-510); and it is further,

ORDERED that the appeal from the order is dismissed; and it is further,

ORDERED that the judgment is affirmed insofar as appealed from; and it is further,

ORDERED that the judgment is reversed insofar as cross-appealed from, on the law, that branch of the motion of the defendant Emily S. Brooks, made jointly with the defendant Henry K. Prince, which was pursuant to CPLR 4404(b) to set aside so much of the decision as found that the defendant Emily S. Brooks was not entitled to an award of an attorney's fee is granted, the order entered February 28, 2011, is modified accordingly, and the matter is remitted to the Supreme Court, Nassau County, for a determination of the amount of the attorney's fee to be awarded and for the entry thereafter of an appropriate amended judgment; and it is further,

ORDERED that one bill of costs is awarded to the defendant Emily S. Brooks, payable by the plaintiff.

The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of the judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see CPLR 5501[a][1]*).

On an appeal from a judgment entered after a nonjury trial, the power of this Court "to review the evidence is as broad as that of the trial court, bearing in mind . . . that due regard must be given to the decision of the Trial Judge who was in a position to assess the evidence and the credibility of the witnesses" (*Tornheim v Kohn*, 31 AD3d 748, 748, quoting *Universal Leasing Servs. v Flushing Hae Kwan Rest.*, 169 AD2d 829, 830; *see Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499).

The Supreme Court's determinations, inter alia, that the plaintiff failed to meet its burden of establishing that the defendant Emily S. Brooks breached a fiduciary duty, and that she was entitled to severance compensation pursuant to the terms of the parties' partnership agreement, were warranted by the facts (*see ProHealth Care Assoc., LLP v Shapiro*, 46 AD3d 792, 793; *Greenberg v Joffe*, 34 AD3d 426, 427; *ProHealth Care Assoc., LLP. v April*, 4 Misc 3d 1017[A], 2004 NY Slip Op 50919[U] [Sup Ct, Nassau County]; *see also Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d at 499; *Tornheim v Kohn*, 31 AD3d 748; *cf. Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112, 118; *Bronx-Lebanon Hosp. Ctr. v Wiznia*, 284 AD2d 265, 265-266; *Gibbs v Breed, Abbott & Morgan*, 271 AD2d 180, 182-189). We find no reason to disturb those determinations.

Moreover, the parties' partnership agreement provides that if any party thereto prevails in a judicial proceeding "concerning any provision of [the] agreement or the rights and duties of any person in relation thereto," then that party is entitled to an award of a reasonable attorney's fee. Contrary to the Supreme Court's determination, Brooks prevailed on all her claims and, therefore, she was entitled to an award of a reasonable attorney's fee (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491; *Mancheski v GGCP, Inc.*, 41 AD3d 790, 791; *Village of Hempstead v Taliercio*, 8 AD3d 476; *Fatsis v 360 Clinton Ave. Tenants Corp.*, 272 AD2d 571).

The plaintiff's remaining contention is without merit.

FLORIO, J.P., LEVENTHAL, AUSTIN and COHEN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court