

UNFILED ON 2/16/2007  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT  
Index Number : 600986/2006

**Charles Edward Ramos**

PART 53

MILLER, SETH

vs

ROSS, JAMES B.

Sequence Number : 003

SUMMARY JUDGMENT

C

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with  
accompanying memorandum decision and order.

**FILED**  
FEB 16 2007  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 2/7/07

  
**CHARLES E. RAMOS**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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  
SETH MILLER and JENNIFER ROWEN MILLER,

Plaintiffs,

-against-

Index No. 600986/06

JAMES B. ROSS and MASSAPEQUA  
PLAZA, ASSOCIATES LP,

Defendants.  
-----X

**Charles Edward Ramos, J.S.C.:**

Defendants, James B. Ross and Massapequa Plaza LP ("Plaza"), move pursuant to CPLR 3212 for summary judgement as to all causes of action contained in the amended complaint, except causes of action 27, 28, and 29.

Plaintiffs, Seth Miller ("Miller") and Jennifer Rowen Miller ("Rowen") cross-move pursuant to CPLR 3212 for summary judgement on liability for either an appraisal proceeding or an unwinding decree as well as for leave to file a second amended complaint.

**Background**

Plaza has been in existence for over twenty years. Its most recent limited partnership agreement is dated June 27, 1996. Since then, there have been four classes of partners in Plaza: (i) the general partner defendant Ross; (ii) a special limited partner Elihu I. Rose; (iii) a number of limited partners, including Rowen; and (iv) the Class Z limited partner, Miller.

Pursuant to Section 8.1 (b) (i) of the Agreement, Miller, as the Class Z limited partner, effectively had a 12½% interest in the profits and distributions of Plaza.

On January 6, 2006, plaintiffs allege that Ross, Plaza's

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general partner, told Miller, the special Class Z limited partner, that Ross would obtain Miller's share by converting Plaza into a new entity. Plaintiffs then wrote to defendants inquiring about defendants' intentions to effectuate the change of Plaza's form of ownership. Plaintiffs did not receive any response to their request.

By notice of meeting of the partners, dated March 8, 2006, a partnership meeting was scheduled for March 30, 2006, "for the purpose of voting upon the conversion of the partnership into a Delaware limited liability company [...]". On March 21, 2006, the proposed Conversion Agreement was faxed to the offices of plaintiffs' counsel. Plaintiffs allege that no financial or accounting information was supplied regarding Plaza's conversion or its financial status.

Paragraph 5 of the proposed Conversion Agreement provided that the Class Z limited partner's interest in the partnership was to be converted into the right to receive the sum of \$227,500 and the entire class of Class Z limited partner would thereafter cease to exist.

On March 22, 2006, plaintiffs commenced this action. Plaintiffs' initial efforts to obtain a temporary restraining order against the conversion were not successful.

The partners' meeting was held on March 30, 2006. A majority of the partners voted for the conversion, including the special limited partner Elihu Rose and a majority of limited partners. Plaintiffs' counsel voted the proxies for plaintiffs

Miller and Rowen against the conversion. Over plaintiffs' dissent, Plaza was converted to Plaza LLC a limited liability company in Delaware pursuant to a Conversion Agreement.

Plaintiffs claim that at the time of the conversion, Plaza had assets worth approximately \$14 million subject to a \$3 million mortgage on the real property owned by the partnership in Long Island in the town of Massapequa, New York. According to plaintiffs, Miller was deprived of his interest in the entity in exchange for the right to be paid less than 20% of what his limited partnership interest was worth at the time of the purported conversion.

The certificate of conversion was filed in Delaware on March 30, 2006. On April 17, 2006, a certificate of cancellation of Plaza was filed in New York while Plaza LLC became qualified to do business in New York.

Defendants argue that the conversion is effective and has been fully implemented pursuant to the New York Revised Limited Partnership Act, the Delaware Limited Liability Company Act, and the Partnership Agreement.

Plaintiffs challenge the conversion in their cross-motion and assert that it was not legally authorized. Plaintiffs contend that a direct conversion from one business form to another, without any intermediate step of merger, consolidation or dissolution, was not authorized by the Partnership Agreement or any New York or Delaware statutes. Further, plaintiff Miller claims that should the conversion be allowed by this Court, he

should be given appraisal rights to secure fair value for his special class Z limited partnership interest. Miller argues that his interest translates into a value close to \$1,400,000.

Finally, plaintiffs ask this Court for leave to file an amended complaint in order to make corrections to statutory references.

#### Discussion

In order to grant summary judgment, the court must determine whether a material and triable issue of fact exists. See *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957). After the movant makes a prima facie case, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a material issue of fact that requires a trial. *Winegrad v New York Medical Univ. Med. Cen.*, 64 NY2d 851 (1985). When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the party opposing the motion and must give that party the benefit of every inference which can be drawn from the evidence. See *Assaf v. Ropog Cab Corp.*, 153 AD2d 520 (1st Dep't, 1989).

The parties agree that there are no questions of fact. Instead, because converting Plaza into a Delaware LLC has the consequence of disfranchising a special class of limited partners, Miller's class Z, the gravamen of this motion and cross-motion centers around the general partner's authority, or lack thereof, to change or reorganize the partnership.

As a starting point, the general partner's authority must

come from statutes or the partnership agreement relevant to Plaza, not Plaza LLC, because Plaza was the original New York limited partnership.

The Delaware Limited Liability Company Act (the "DLLCA") §17-901 concerning foreign limited partnerships, i.e., non-Delaware partnerships, states in pertinent part that:

Subject to the Constitution of the State of Delaware: (1) The laws of the State of Delaware or the jurisdiction or country under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners.

Clearly, the law of New York in which Plaza, a New York limited partnership, is organized governs Plaza's internal affairs.<sup>1</sup> Conversion is directly related to the powers of the general partner and Plaza's internal affairs. The authority granted to the general partner through the newly formed Delaware LLC is irrelevant because Delaware law defaults to New York law. "[...] the jurisdiction or country under which a foreign limited partnership is organized govern its organization and internal affairs." *Id.* New York law governs the validity of Plaza's conversion to Plaza LLC pursuant to the DLLCA §17-901.<sup>2</sup> New

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<sup>1</sup> All parties are New York residents. Additionally, the vote on the conversion took place in New York.

<sup>2</sup> The parties disagree about the meaning of provision §18-214(a) of the DLLCA. Defendant asserts that the meaning of "[a]ny other entity" in §18-214(a) allows foreign (non-Delaware) limited partnerships to convert to a Delaware limited liability company by complying with all other applicable sections of the DLLCA. Plaintiffs argue that it does not include non-Delaware entities. Both parties overlook that this section of the DLLCA assumes that the conversion in it of itself has been authorized by the Partnership Agreement as well as New York law.

York Limited Liability Company Law ("NYLLCL")

Defendant's argument that the NYLLCL applies solely to limited liability companies formed under NYLLCL §203 and thus does not apply to Plaza LLC which is a limited liability company formed under the Delaware Limited Liability Company Act ("DLLCA") ignores the fact that the only authority for conversion of a New York limited partnership to a Delaware limited liability company is NYLLCL §1006.

The NYLLCL is the only statute pursuant to which a limited partnership may convert to an LLC without any intermediate steps. NYLLCL §1006(c) provides:

Subject to any requirements in the partnership agreement requiring approval by any lesser percentage in interest of partners, an agreement of conversion setting forth the terms and conditions of a conversion of a partnership to a limited liability company must be approved by all of the partners of the partnership. Subject to any requirement in the partnership agreement requiring approval by any greater or lesser percentage in interest of limited partners, which shall not be less than a majority in interest, the terms and conditions of a conversion of a limited partnership to a limited liability company must be approved (i) by such a vote of general partners as shall be required by the partnership agreement, or, if no provision is made, by all general partners, and (ii) **by limited partners representing at least a majority in interest of each class of limited partners.** [...]. [emphasis supplied]

This section is not limited only to the conversion into a New York limited liability company (as defendants contend without citing authority), it applies to the conversion to a Delaware (or any other foreign jurisdiction) LLC. If this was not the case, the rights of limited partners could be forfeited by merely selecting a jurisdiction that did not provide for their

protection and organizing the new entity there. This would effectively moot New York law. In this instance, both New York (in the NYLLCL) and Delaware (in its requirement that the law of the organizing state apply), protect the rights of all classes of limited partners from the over-reaching actions of the other classes of partners. Neither New York nor Delaware law provides the authority to convert Plaza into Plaza LLC without the consent of a majority in interest of each class. As Miller constitutes 100% of Class Z, Plaza, as a limited partnership, could not convert to Plaza LLC, a limited liability company, without Miller's consent. The conversion was a nullity.

#### Fiduciary Duty and Disclosure

Ross violated his fiduciary duty to Miller.

General Partners owe a fiduciary duty to limited partners and are obligated not to engage in self-dealing, unless the partnership agreement permits such self-dealing. See *Carella v Scholet*, 2006 NY Slip Op 7957, (3<sup>rd</sup> Dep't, 2006); (NYPL §43).

There are no provisions in the Agreement of Limited Partnership ("ALP") which provide that the general partner may engage in self-dealing or breach his fiduciary duty. Ross engaged in self-dealing to the detriment of plaintiffs when he sought to convert the partnership to an LLC without disclosure, which plaintiffs had requested. Ross "squeezed" Miller's interest out of Plaza to benefit himself as he in turn received a greater interest in Plaza LLC.

Every partner is accountable as a fiduciary to other partners. New York law is clear and unambiguous. It

affirmatively requires disclosure. *Millard v Newmark & Co.*, 24 AD2d 333, 336 (1<sup>st</sup> Dep't, 1966).<sup>3</sup> See also NYRLPA § 106(b).

Miller's potential loss of interest in Plaza justifies complete disclosure by Ross of the state of Plaza's financial affairs. This disclosure not only ensures transparency as to the partnership's transactions enabling the limited partner to make an informed decision as to whether to convert the partnership, it also allows partners to determine a fair price for interest buy-outs. Ross failed to make such disclosure prior to converting Plaza over Miller's dissent.

Agreement of Limited Partnership ("ALP")

Defendant focuses on Section 5.3(f) of the ALP as a source of authority allowing the general partner's conversion of Plaza. This Section states in pertinent part:

The General Partner(s) shall have no authority to do any act prohibited by law, nor shall the General Partner(s) have any authority to : [...] (f) without the prior consent of a majority-in-interest of the Limited Partners: [...] (ii) change or reorganize the Partnership into any other legal form.

The defendant cannot use section 5.3(f) as the general partner's authority to convert Plaza in a limited liability company. In the first instance, section 5.3(f) defines limits on the General Partner's authority, the provision does not grant any additional authority. Defendant's argument also falls short of

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<sup>3</sup> "A limited partner is not in the hopeless position where he must only suffer in silence when an alleged wrong occurs. He has a right of full and free access to information contained in the partnership books, and of all things affecting the partnership, as well as a right to formal accounting." *Millard v Newmark & Co.*, 24 AD2d 333, 336 (1<sup>st</sup> Dep't, 1966).

persuading the Court that Section 5.3 applies as the ALP does in fact have a section which expressly grants rights to limited partners: Section 6.5, in conjunction with Section 6.6.

In addition, converting a limited partnership to a limited liability company with no intermediate steps is not one of the enumerated powers and is governed by NYLLCL § 1006(c) which provides that the partnership agreement may not provide for approval of a conversion by less than a majority in interest of each class.

[...] Subject to any requirement in the partnership agreement requiring approval by any greater or lesser percentage in interest of limited partners, **which shall not be less than a majority in interest**, the terms and conditions of a conversion of a limited partnership to a limited liability company must be approved (i) by such a vote of general partners as shall be required by the partnership agreement, or, if no provision is made, by all general partners, and (ii) **by limited partners representing at least a majority in interest of each class of limited partners**. [...]. NYLLCL §1006(c). [emphasis supplied]

Therefore, plaintiffs are entitled to summary judgement on liability on their cause of action to nullify the conversion of Plaza to Plaza LLC, a Delaware limited liability company. The direct conversion of Plaza to a Delaware limited liability company without the consent of a majority in interest of each class of limited partners is not permitted under New York or Delaware law.

Defendant's motion for summary judgement is, of course, denied.

Accordingly, it is

ORDERED that defendant's motion for partial summary

judgement is denied; and it is further

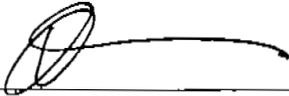
ORDERED that plaintiffs' motion for summary judgement is granted as set forth above; and it is further

ORDERED that plaintiffs' motion to amend the complaint to correct statutory references is granted without opposition.

Settle order (the Unwinding Decree) to provide that the defendants must take all necessary steps to nullify the conversion and to re-establish Plaza as a New York limited partnership.

This action shall otherwise continue.

Dated: February 6, 2007

  
**CHARLES E. RAMOS**  
J.S.C.

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.

**FILED**  
FEB 16 2007  
COUNTY CLERK'S OFFICE  
NEW YORK