

In the matter of the Application of  
FRANCIS KOSAKOWSKI, ELEANOR  
KOSAKOWSKI, WILLIAM BRENNAN and  
DAWN BRENNAN, individually and as  
a partners in a New York Partnership  
named PEBBLE BEACH ESTATES,

Petitioners,

DECISION AND ORDER

v.

Index #2007/11259

for the Dissolution of  
PEBBLE BEACH ESTATES  
a New York Partnership, and  
appointment of a Temporary Receiver  
of the Partnership during the  
period of Dissolution according to  
Section 63 of the Partnership Law  
of the State of New York; and,  
JOHN L. ALKER, M.D., and ROBERTA J.  
RIGNEY, individually, and as partners  
in a New York Partnership named  
PEBBLE BEACH ESTATES,

Respondents.

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Petitioners, Francis Kosakowski, Eleanor Kosakowski, William Brennan, and Dawn Brennan move by order to show cause for an order: (1) dissolving the partnership Pebble Beach Estate pursuant to Section 63 of the Partnership Law and distributing the partnership property; (2) appointing a temporary receiver or liquidating agent to wind up the partnership's affairs; (3) requiring the temporary receiver or liquidating agent to sell the real property assets of the partnership at a public auction at an appropriate place and time but no later than 30 days from the

order of the court; and (4) requiring the temporary receiver to preserve the assets and carry on the business of the partnership *pendente lite* to achieve the goals of preserving the partnership's assets and carrying on the partnership's business affairs. Respondents, John L. Alker, M.D. and Roberta Rigney, cross move to dismiss the petition.

The parties herein all reside in Livingston County, and the real property which is the subject of both the partnership and the instant dispute is also located in Livingston County. The real property is a 47-acre parcel of unimproved land and located behind the personal residences of the Kosakowskis and Alkers-Rigneys. The partnership, which was formed to acquire property in Lakeville, New York, purchased the subject property on May 3, 2004 for \$144,000. Two building lots off the property have been sold by the partnership, and the distribution of the proceeds among the partners is not questioned herein.

The partners of Pebble Beach Estates signed a partnership agreement on March 18, 2004. The partnership requires unanimous approval for many partnership decisions, such as dissolution, management, operation, and control of the partnership, as well as sale of the real property held by the partnership.

Tensions and animosities have arisen between the two factions of the partnership, petitioners on the one hand and respondents on the other. On August 15, 2005, petitioners wrote

to respondents demanding their withdrawal from the partnership after a dispute arose over a right of way located between the Kosakowski's home and respondents' home. On September 18, 2005, respondents responded to the request, refusing to withdraw from the partnership. In late 2006, petitioners proposed to purchase certain lots from the partnership. Respondents refused to consent to the sale. Petitioners allege that from late 2006 through August, 2007, they proposed the sale of a portion of the property as a means of discontinuing the partnership.

Petitioners allege that the stalemate between the factions has eroded the partners' ability to meet and resolve their disputes. Petitioners called a meeting of the partnership on August 8, 2007 to discuss, among other issues, dissolution of the partnership. Petitioners failed to obtain the unanimous consent necessary to dissolve under the Partnership Agreement. Petitioners claim that the impasse of the parties requires dissolution and the appointment of a temporary receiver.

#### Venue

\_\_\_\_\_To the extent respondents seek either to change venue or dismissal of this action based upon improper venue, the motion is denied. The court may only change venue upon motion. See CPLR 501 ("[W]ritten agreement fixing place of trial, made before an action is commenced, shall be enforced upon a motion for change of place of trial"); CPLR 510 ("The court, upon motion, may

change the place of trial of an action...."). Venue can only be transferred upon motion or consent. See Phoenix Ins. Co. v. Casteneda, 287 A.D.2d 507 (2d Dept. 2001); Travelers Indem. Co. of Illinois v. Nnamani, 286 A.D.2d 769 (2d Dept. 2001).

Moreover, this action was commenced as a special proceeding, and CPLR 506(a) states:

Unless otherwise prescribed in subdivision (b) or in the law authorizing the proceedings, a special proceeding may be commenced in any county within the judicial district where the proceeding is triable.

Subdivision (b) of CPLR 506 is inapplicable to the facts of the case before the court. As such, since both Monroe County and Livingston County are within the Seventh Judicial District, this special proceeding was properly brought in Monroe County.

#### Arbitration

While respondents do not move to compel arbitration or to stay this action pending arbitration, respondents' motion to dismiss lists the mandatory arbitration provision as a basis for dismissal of the action. The arbitration provision at issue in the partnership agreement states:

Any dispute, controversy or claim arising out of or in connection with this Agreement or any breach or alleged breach hereof shall, upon the request of any party involved, be submitted to, and settled by, arbitration in the city in which the principal business of the Partnership is then located, pursuant to the commercial arbitration rules then in effect of the American Arbitration

Association (or at any other time or place under any other form of arbitration mutually acceptable to the parties involved). Any award rendered shall be final and conclusive upon the parties and a judgment thereon may be entered in a court of competent jurisdiction. The expenses of the arbitration shall be borne equally by the parties to the arbitration, provided that each party shall pay for and bear the cost of its own experts, evidence and attorneys' fees, except that in the discretion of the arbitrator any award may include the attorneys' fees of a party if the arbitrator expressly determines that the party against whom such award is entered has caused the dispute, controversy or claim to be submitted to arbitration as a dilatory tactic or in bad faith.

(Emphasis supplied).

"[T]he mere existence of an arbitration clause in the contract would not . . . authorize dismissal of the action." BR Ambulance Serv., Inc. v. Nationwide Nassau Ambulance, 150 A.D.2d 745 (2d Dept. 1989) (only an arbitration and award warrant dismissal pursuant to CPLR 3211(a)(5)). The remedy, which the court may order upon a motion to dismiss, is a stay without a direction compelling arbitration. Allied Building Inspectors International Union of Operating Engineers, Local Union No. 211, Afl-cio, V. Office of Labor Relations of the City of New York, 45 N.Y.2d 735 (1978); Avery v. Avery, 81 A.D.2d 849 (2d Dept. 1981) ("since the defendant has not yet moved to compel arbitration, this court will simply direct that the first and second causes of action be conditionally stayed"); In the Matter

of Board of Education of the Roosevelt Union Free School District v. The Roosevelt Administrators Association, 65 A.D.2d 591 n.\* (2d Dept. 1978) ("the court, without directing arbitration, may stay the action"). Only "upon a proper and timely motion by the defendants pursuant to CPLR 7503(a), [may] the court . . . sta[y] the action and direc[t] the parties to arbitrate." Nachman v. Jenelo Corp., 25 A.D.3d 593, 593-94 (2d Dept. 2006).

Accordingly, the motion to dismiss is denied, and a conditional order for a stay may be submitted to the court with an agreed number of days after entry thereof to permit either the filing of a motion to compel arbitration, or the service of a notice of intention to arbitrate. CPLR 7503(a), (c). There is no indication of waiver on these facts, thus far. Singer v. Jeffries & Co., Inc., 78 N.Y.2d 76, 85-86 (1991) (under the FAA).

SO ORDERED.

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KENNETH R. FISHER  
JUSTICE SUPREME COURT

DATED: October \_\_, 2007  
Rochester, New York