

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

	x	Index
NATHAN BERMAN, etc., et al.		Number <u>22284</u> 2007
- against -		Motion
		Date <u>February 27,</u> 2008
VICTOR WEINGARTEN		Motion
	x	Cal. Number <u>4</u>
		Motion Seq. No. <u>4</u>

The following papers numbered 1 to 7 read on this motion by defendant Victor Weingarten for, inter alia, summary judgment dismissing the complaint against him.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Reply Affidavits	3
Other (Memoranda of Law, Statements of Facts) ...	4-7

Upon the foregoing papers it is ordered that the motion is granted.

Defendant Victor Weingarten, Fred Weingarten (his brother), and the late Jacob Popovic were equal partners in WPW Associates. Victor Weingarten filed a claim with the American Arbitration Association for the purpose of dissolving the partnership. Fred Weingarten and Jacob Popovic responded to the claim which accused them of, inter alia, self-dealing. However, on July 1, 2007, while the arbitration proceeding was pending, Jacob Popovic died. Upon being informed of the death, the arbitrator directed Victor Weingarten and Fred Weingarten to replead. Victor Weingarten filed an amended arbitration claim against Fred Weingarten and the Estate of Jacob Popovic. After conducting a preliminary hearing, the arbitrator issued an order dated August 15, 2007 which found, inter alia, that section 10(E)

of the partnership agreement required both surviving partners to collectively purchase the interest of the Popovic estate in the business, but since Victor Weingarten refused to join with his brother in the purchase, the partnership had to be liquidated. Section 10(E) of the partnership agreement provides in relevant part: "Upon the death of any partner, the surviving partners shall have the right to purchase the entire interest of the decedent in the partnership, or to terminate and liquidate the partnership business."

The Surrogate's Court of the County of Nassau issued preliminary letters testamentary to plaintiff Nathan Berman and plaintiff Sophia Popovic on August 21, 2007. Fred Weingarten raised issues before the arbitrator concerning the alleged right of the estate to be heard in the arbitration proceeding. The arbitrator issued a partial award dated August 27, 2007 finding, inter alia, that the partnership agreement gave him jurisdiction over claims and controversies arising from it and that a dispute existed concerning whether and how the partnership should be dissolved which were proper for him to determine. The arbitrator further found: "[T]he estate of Jacob Popovic, by virtue of the clear and unambiguous provisions of the Partnership Agreement and by operation of law, did not become a partner in WPW and is not a party ('necessary' or otherwise) to these proceedings. Indeed, under the circumstances presented here, the sole role of the Estate is to be the recipient of the economic value of the Decedent's interest in the partnership as will be determined in these proceedings...." The arbitrator directed the dissolution and liquidation of the partnership under his supervision, and he scheduled a hearing for September 10, 2007 concerning the manner of the liquidation, permitting a representative of the Estate to attend "in the interest of transparency."

The plaintiff executors began this action by the filing of a summons and a complaint on or about September 6, 2007. Although the complaint asserts only one cause of action, read liberally, the plaintiffs are apparently seeking declaratory relief in regard to both (1) the arbitration proceeding and (2) the rights of the estate, if any, under the partnership agreement. The plaintiffs seek a judgment declaring, inter alia, that the arbitration award rendered without the joinder of the estate is void and that the estate has a contractual right to sell its interest in the partnership to Fred Weingarten. The attorney for Victor Weingarten offered to stipulate to a stay of the arbitration proceeding so that the estate could move before the arbitrator for a reconsideration of his partial award, but the attorney for the estate declined the offer. The attorney for Victor Weingarten also offered to stipulate that the estate was a party to the arbitration

proceeding, but the attorney for the estate again declined the offer.

The plaintiff executors submitted a motion for, inter alia, a preliminary injunction prohibiting defendant Victor Weingarten from enforcing the arbitrator's award, but by decision and order dated October 24, 2007, this court denied the motion.

Defendant Victor Weingarten submitted a motion for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against him, which this court, by decision and order dated January 2, 2008, converted into one for summary judgment pursuant to CPLR 3211(c).

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact***." (Alvarez v Prospect Hospital, 68 NY2d 320, 324.) Defendant Victor Weingarten successfully carried this burden. Although the complaint asserts only one cause of action, read liberally, the plaintiffs are apparently seeking declaratory relief in regard to both (1) the arbitration proceeding and (2) the rights of the estate, if any, under the partnership agreement. The plaintiffs seek a judgment declaring, inter alia, that the arbitration award rendered without the joinder of the estate is void and that the estate has a contractual right to sell its interest in the partnership to Fred Weingarten. Insofar as declaratory relief concerning the arbitration proceeding is concerned, the arbitrator's determinations are not invalid for failure to join the Estate of Jacob Popovic. Unless required by the agreement of the parties, an arbitrator need not observe the principles of substantive law or rules of procedure which govern the traditional litigation process. (See, Matter of Sprinzen, 46 NY2d 623; In re Windsor Cent. School Dist. (Windsor Teachers Assn.), 306 AD2d 669; Dutchess Bldg. Renovations, Inc. v Immerblum, 198 AD2d 413.) While generally a court must order the substitution of a representative for a party who dies during litigation (see, CPLR 1015; Kelly v Methodist Hosp., 276 AD2d 672), the arbitrator merely had to proceed in a rational manner after the death of Jacob Popovic, and, under all of the circumstances of this case, the arbitrator did so. Moreover, an arbitrator's award will not be vacated for nonjoinder and the like where a party has chosen not to participate in the proceeding. (See, Matter of Antique Rug Dealers Assn. (Hakimian), 210 AD2d 111; Matter of Condell (Shanker), 151 AD2d 798.) In the case at bar, the arbitrator gave a representative of the estate an opportunity to attend a meeting in late August 2007 and the hearing scheduled for September 10, 2007. In addition, Victor Weingarten was willing to stipulate to the joinder of the estate to allow it to move for reconsideration of

the partial award. The plaintiffs chose not to participate in the underlying arbitration proceeding. Insofar as declaratory relief concerning the parties' contract is concerned, defendant Victor Weingarten has made a reasonable argument that the plain meaning of section 10(E) of the partnership agreement requires both surviving partners to consent to the purchase of the decedent's shares. The burden on this motion shifted to the plaintiffs to produce evidence showing that there is a genuine issue of fact which must be tried. (See, Alvarez v Prospect Hospital, supra.) They failed to carry this burden.

Dated: April 28, 2008

J.S.C.