

Williamson v Barish

2005 NY Slip Op 30455(U)

October 11, 2005

Sup Ct, NY County

Docket Number: 601564/04

Judge: Karla Moskowitz

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ
Justice

PART 03

-----x
RICHARD A. WILLIAMSON, ESQ., as Successor
Liquidating Trustee of Lipper Convertibles, L.P.

Plaintiff,

-against-

Edith Anne Barish,

Defendant.
-----x

601564/04

INDEX NO. 601564/2004

MOTION DATE _____

MOTION SEQ. NO. 001

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

FILED

DEC 07 2005

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying
Decision and Order.

Dated: October 11, 2005

Karla Moskowitz
KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 3

-----X
RICHARD A. WILLIAMSON, ESQ., as Successor
Liquidating Trustee of Lipper Convertibles, L.P.

601564/04

Index No. ~~60184/2004~~

Plaintiff,

DECISION and ORDER

-against-

Edith Anne Barish,

Defendant.

-----X

MOSKOWITZ, J:

This action arises out of the demise of Lipper Convertibles, L.P. ("Lipper Convertibles" or the "Partnership"). Richard A. Williamson, the Successor Liquidating Trustee ("Trustee" or "Plaintiff") that this court appointed in the liquidation proceeding of the Partnership, *In the Matter of the Application of Lipper Holdings, LLC*, Case No. 603563/2002, seeks to recover amounts he claims represent overpayments to defendant Edith Anne Barish.

Lipper Convertibles was a private investment hedge fund that Lipper Holdings LLC managed. Starting in January 1997, various individuals and entities invested in Lipper Convertibles. Barish made a \$5,000,000 contribution to capital on February 1, 1997 thereby joining the Partnership as a limited partner. In June 1998, Barish began liquidating her investment in Lipper Convertibles in order to withdraw from the Partnership. By July 27, 1998, Barish had received three distributions totaling \$6,208,285.00.

Unfortunately, the net asset value of Lipper Convertibles was 40% less than what the Partnership had reported in its financial statements. Plaintiff alleges that, because of this

overstatement in value, Barish received \$221,854.00 more than she should have at the time she withdrew from the Partnership. Plaintiff seeks to recover the amount of this alleged overpayment by asserting various causes of action: (1) unjust enrichment; (2) money had and received and (3) conversion. Barish has moved to dismiss all claims.

I. Statute of Limitations

Defendant argues that the three-year statute of limitations from Partnership Law Section 121-607 applies and therefore the entire complaint is time-barred. Partnership Law section 121-607(a) dictates a three-year statute of limitations: “a limited partner who receives a wrongful distribution from a limited partnership shall have no liability under this article or other applicable law for the amount of the distribution after the expiration of three years from the date of distribution.” The Trustee contends that a “wrongful distribution” is only one that renders the partnership insolvent. As the distributions to Barish did not render the Partnership insolvent, the Trustee reasons, § 121-607(a)’s limitations period does not apply. Defendant disagrees. She reads the limitations period to apply to any distribution. (Def. Reply Mem. at 2).

Defendant’s interpretation reads subdivision (c) of § 121-607 in isolation and is at odds with the plain language of the overall statute. Section 121-607 (a) precludes “distribution to a partner to the extent that, at the time of distribution, all liabilities of the limited partnership... exceed the fair market value of the assets of the limited partnership.” Thus, subdivision (a) clearly refers only to distributions that render the partnership insolvent. Section 121-607 (b) then restricts the liability of the partner who receives a distribution in violation of subdivision (a) to situations where the limited partner “knew at the time of the distribution that the distribution violated subdivision (a).” Section 121-607 (c) sets a three-year time limit for actions against a

limited partner “who receives a wrongful distribution.” The statute does not define “wrongful distribution.” However, as it is not defined, and, as it follows subdivisions (a) and (b), subdivision (c) must refer to the distribution that (a) and (b) describe, i.e. one that renders the partnership insolvent and that the partner receiving the distribution knew would make the partnership insolvent.

This interpretation makes sense given that the statute’s primary purpose was to address situations where third parties have sued the partnership and the “wrongful distribution” put the assets outside the reach of creditors. Indeed, practice commentary to the nearly identical Delaware statute supports this interpretation:

Section 17-607(a) is one of the few sections of the Act that, under its express terms or pursuant to an intent otherwise apparent from the Act, cannot be overridden in a partnership agreement, and therefore partners cannot contractually alter Section 17-607(a). Section 17-607(a) attempts to balance the interests of creditors of a limited partnership and the interests of the partners of a limited partnership. Thus, to protect the creditors of a limited partnership, Section 17-607(a) cannot be modified by the partners in their partnership agreement.

(Lubaroff & Altman on Delaware Limited Partnerships § 6.10 at 6-20 [2000 supplement])

The case defendant cites, *In re Die Fliedermaus LLC*, Case No. 01-42518(ALG), slip op. (Bankr. SDNY Mar. 30, 2005), actually supports plaintiff’s position because it involved an LLC that became insolvent because of fraudulent conveyances. Defendants in *Die Fliedermaus* had been members of the debtor. The trustee was suing on behalf of creditors who allegedly lost money because of defendants’ fraudulent conveyance. *Die Fleidermaus* involved an analogous statute, New York Limited Liability Corporation Law § 508 (c).

While interpreting § 508 (c), the *Die Fleidermaus* court stated that “[w]rongful is a broad term and the common understanding of the term would include distributions that could be

recovered as either constructive or intentional fraudulent conveyances under the DCL, or as distributions based on an alleged breach of the LLC operating agreement.” This is of no consequence. The court still had before it a situation in which an entity became insolvent through a fraudulent conveyance. There is no reason to think that the court would have applied the term if there had been no insolvency. Thus, the court rejects defendant’s dismissal argument based on the statute of limitations in Partnership Law § 121-607 (c).

II. Unjust Enrichment and Money Had and Received

Defendant argues that the Amended and Restated Partnership Agreement, dated as of July 1, 1993 (“Partnership Agreement”) covers this dispute and therefore precludes a cause of action for unjust enrichment and money had and received. It is true that “the existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same matter” (*EBCI, Inc., v. Goldman Sachs & Co.*, 5 NY3d 11, 23 [1995]). However, “where the contract does not cover the dispute in issue, plaintiff may proceed under a theory of quantum meruit and will not be required to elect his or her remedies.” (*Sternberg v. Walber 36th Street Associates*, 187 AD2d 225, 228 [1st Dep’t 1993])

Defendant argues that several provisions of the Partnership Agreement operate to prevent a partner from receiving an overpayment. For example, according to section 8.2 (c), a withdrawing partner may receive only 90% of the amount of the withdrawal within the first 20 days of the withdrawal’s effective date and receive the remaining balance within the next 50 days. Finally, according to section 8.3, the General Partner may withhold or limit the amount of and distribution to a Partner pursuant to Section 8.2 for one or more of the following reasons:

- (a) If, upon any withdrawal pursuant to Section 8.2, the audited financial

statements of the Partnership for the Fiscal Year in which such withdrawal is to be effective have not yet been completed, such distribution shall be made on the basis of unaudited financial statements, and the Partnership may withhold from such distribution a reasonable amount determined by the General Partner pending completion of such audited financial statements.

(b) The General Partner may withhold from any distribution to a Partner a reserve to pay for contingent liabilities arising from events occurring during a period of time in which a withdrawing Partner was a Partner of the Partnership

(Notice of Motion Ex. A).

However, there is nothing in the Partnership Agreement to indicate that these provisions preclude the Trustee from trying to recover accidental overpayments the Partnership may have made to certain limited partners. The provisions from the Partnership Agreement that defendant cites merely lay out the procedures in the event a limited partner withdraws. Nothing in the Partnership Agreement addresses mistaken overpayments. Indeed, defendant tacitly concedes this point in that part of its memorandum addressing plaintiff's conversion claim by stating that the "Lipper partnership agreement creates no such obligation" to return or treat in a particular manner the specific money in question (Def. Mem. at 7).

Although section 8.2 (c) states that once a partner withdraws all of a "Partner's Capital Account, such Partner shall cease to be a Partner. . . and shall cease to share in Net Profits and Net Losses, as of the last day of the Accounting Period which ends upon the effective date of such withdrawal" defendant has not made the argument in its papers that this provision precludes the Trustee from recovering and there is nothing in the record on this motion to indicate when the Partnership took the loss for accounting purposes. Given the fiduciary nature of the relationship between partners to deal with each other in the utmost good faith, one would think that, had the

parties to the Partnership Agreement desired to release partners from liability for mistaken overpayments, they would have specifically said so.

“There is a long-established principle that money paid under mistake of material fact may be recovered, unless the party resisting repayment can demonstrate that its position has not changed by reason of payment as to make repayment inequitable.” (*Kirby McKinerny & Squire, LLP v. Hall Charne Burce & Olson S.C., et al*, ___AD3D___, 790 NYS2D 84 [1st Dep’t 2005]). Particularly here, where the partners were in a fiduciary relationship to each other, the court is reluctant to dismiss this action on the basis of contractual provisions that do not squarely address the issue at stake.

III. Conversion

For conversion of money to be viable, there must be a specific identifiable fund and an obligation to return it. (*Walden Terrace, Inc. v. Broadwell Mgmt Corp.*, 213 AD2d 630 [2d Dep’t 1996]). Where the plaintiff seeks reimbursement or recovery from the general assets of the defendant, conversion does not lie. (*See The High View Fund, L.P. v. Hall*, 27 FSupp2d 420, 429 [SDNY 1998]). Here, plaintiff seeks to recover \$221,854.00, the amount he claims as the overpayment. Because plaintiff does not claim ownership of a specific, identifiable fund, he has failed to allege a claim for conversion. However, even if the cause of action for conversion were viable, I would dismiss it as duplicative. (*See Manufacturer’s Hanover Trust Co., v. Chemical Bank*, 160 AD2d 113, 124 [1st Dep’t 1990]).

Accordingly, it is

ORDERED THAT defendant Edith Barish’s motion to dismiss is granted to the extent of

dismissing the cause of action for conversion and is otherwise denied; and it is further

ORDERED THAT the remaining claims are severed and shall continue.

Dated: October 4, 2005



J.S.C.

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