

Sperber v Rubell

2005 NY Slip Op 30568(U)

January 27, 2005

Supreme Court, New York County

Docket Number: 109933/05

Judge: Marcy Friedman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

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STANLEY SPERBER, et al.,

Index No.: 109933/05

Plaintiff,

DECISION/ORDER

- against -

SIDNEY RUBELL, et al.,

Defendants.

FILED

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Plaintiffs move for leave to reargue a prior motion for a preliminary injunction to enjoin defendant Sidney Rubell from serving as managing agent for rental properties in Manhattan that are owned by partnerships known as Franklin Holding Co. and RSR Holding Co. This motion was denied by this court's decision and order dated August 8, 2005 ("prior decision").

Leave to reargue is granted. Upon reargument, the court adheres to its prior decision, as the court is not persuaded that it misapprehended applicable facts or law. It is undisputed that Franklin Holding Co. was originally formed by defendant Rubell and his sisters Mollie Sperber and Helen Rakosi, while RSR Holding Co. was formed by Rubell and his brothers-in-law Emanuel Sperber and Stanley Rakosi. Plaintiffs are the children of Rubell's brothers-in-law and sister Mollie Sperber, who are now deceased. As found in the court's prior decision, plaintiffs have produced evidence that they acquired the partnership interests of Rubell's deceased former partners. Plaintiffs claim that they own a majority of the interests in each of the partnerships, and that they have terminated the services of Rubell as managing agent. In their complaint, they

seek, among other relief, damages for Rubell's alleged mismanagement of the properties owned by the partnerships, and a permanent injunction enjoining Rubell from acting as managing agent for the properties. In denying plaintiff's motion for a preliminary injunction for the same relief, the court reasoned that plaintiffs had failed to demonstrate a likelihood of success on the merits, because a sharp factual dispute exists between the parties as to the terms of the partnership agreements. The court further held that plaintiffs had not demonstrated irreparable harm.

Contrary to plaintiffs' contention, the prior decision did not ignore settled law that, absent an agreement to the contrary, a partnership dissolves upon the death of any of the partners, and that continuation of the partnership following a partner's death creates a new partnership at will. (Partnership Law § 62[4]); Burger, Kurzman, Kaplan & Stuchin v Kurzman, 139 AD2d 422 [1st Dept 1988], appeal dismissed 72 NY2d 909, appeal denied 74 NY2d 606 [1989]; 15A NY Jur 2d Business Relationships § 1585.) Nor did the decision make any finding that plaintiffs are bound by an alleged oral agreement between Rubell and his original partners under which sole responsibility for the management of the properties was conferred upon Rubell.

Rather, the court found that there was a sharp dispute as to the terms of the new partnership agreement concerning management of the partnership properties. Plaintiffs acknowledge that after the death of the original partners, "[t]he Partnerships continued to operate as before." (Roschelle Aff. In Support, ¶ 9.) However, they assert, without any factual support either on the instant motion or on the prior motion, that "[n]o partnership agreements or other agreement exists between Rubell and plaintiffs concerning the operation of the Partnerships or the management of the Properties." (Id.) Rubell contends that after the deaths of the original partners, he continued to manage the properties in the same manner as they had always been run,

and that plaintiffs allowed him to manage the properties without objection or interference for over a decade. (Rubell Aff. In Opp. To Prior Motion, ¶ 12.)

Plaintiffs had the burden on the motion for a preliminary injunction of demonstrating their entitlement to that relief. (See McLaughlin, Piven, Vogel, Inc. v Nolan & Co., 114 AD2d 165, 172 [2d Dept 1986], lv denied 67 NY2d 606). However, plaintiffs did not deny on the prior motion that they permitted Rubell for years to exercise sole management authority over the properties. (See Rakosi Reply Aff. To Prior Motion, ¶ 15.) Rather, they relied on the claim, which the court rejected, that an agreement of indefinite duration for Rubell to exercise sole management would violate the Statute of Frauds. Plaintiffs also claimed that Partnership Law § 40(5), under which all partners have equal rights in the management and conduct of partnership business, is applicable to the partnership at will that was created after the death of the original partners.

Partnership Law § 40(5) applies, by its terms, only in the absence of a contrary agreement. Significantly, however, plaintiffs did not address the legal issue of whether plaintiffs' conduct – namely, their apparently lengthy acquiescence in Rubell's sole management of the properties – amounted to an agreement that the partnership would be managed on that basis (cf., Stone Capital Advisors, LLC v Fortrend Intl., LLC, 15 AD3d 300 [1st Dept 2005]), and thus overrode section 40(5). Based on their failure to address this issue, and therefore to eliminate a sharp dispute as to whether the partnership at will included an agreement to permit Rubell to manage the properties, the court concluded that plaintiffs did not meet their burden of demonstrating a likelihood of success on the merits. On the instant motion, plaintiffs do not demonstrate any basis for the court to reject this conclusion.

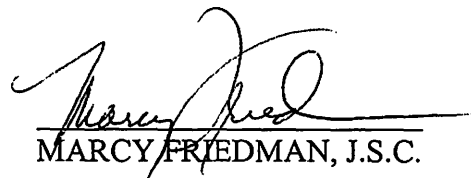
The court also found in the prior decision that plaintiffs had not demonstrated irreparable harm. While plaintiffs raised questions on the prior motion as to whether Rubell has properly managed the properties or maximized profit from them, plaintiffs made no showing that there has been any recent change in the manner in which the properties are managed or that there is any urgent management issue that has not been properly addressed by Rubell. The court is not persuaded that it misapprehended applicable law in concluding that plaintiffs failed to demonstrate irreparable harm under these circumstances.

It is accordingly hereby ORDERED that plaintiff's motion is granted only to the following extent: Leave to reargue is granted. Upon reargument, the court adheres to its decision and order dated August 8, 2005.

This constitutes the decision and order of the court.

Dated: New York, New York
January 27, 2005

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MARCY FRIEDMAN, J.S.C.