SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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DEAN ROSS,

Plaintiff,

-against-

Index No. 601814/01

ERIC NELSON, GARY PODELL, 424-44 THIRD AVE. REALTY, LLC, CHELSEA VILLAGE REALTY LLC, VINTAGE REAL ESTATE SERVICES, LTD., VINTAGE REAL ESTATE ORGANIZATION, INC., and VINTAGE REAL ESTATE SERVICES,

Defendants.

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HELEN E. FREEDMAN, J:

In this action, Dean Ross sues various defendants contending that he was wrongfully removed as a Member-Manager of two companies, 424-44 Third Avenue Realty LLC ("Third Avenue"), and Chelsea Village Realty LLC ("Chelsea"), each of which owns one building. Third Avenue is a 33 unit residential building with three commercial units at 442-44 Third Avenue and Chelsea is a 30 unit residential building at 216-18 West 16th Street. Third Avenue was purchased on or about August 29, 1996 and Chelsea was purchased on or about March 3, 1997 by individual investors who became members of the LLC's. Ross also claims that he is entitled to one-third of the 5% of the gross rent rolls as a management fee that each building generated from 1996 and 1997 respectively, to the present and into the future.

The other named defendants, Eric Nelson and Gary Podell, are the other two Member-Managers of the defendant companies. The Vintage entities are the managing agents of the two buildings and the recipients of the 5% management fees that the buildings generated.

Ross owns a 10% interest in Third Avenue and a 13.93% interest in Chelsea.

Nelson holds a 14.26% interest in Third Avenue and a12.9% interest in Chelsea and Podell holds a 20% interest in Third Avenue and a 20% interest in Chelsea. Vintage Real Estate Services, Ltd. d/b/a Vintage Real Estate Services and Vintage Real Estate Organization, Inc. ("Vintage") are real estate management companies. Nelson and Podell had an interest in Vintage Real Estate Services, Ltd. until 2002 but no longer have any interest in the company, and the company does not have a relationship with Chelsea or Third Avenue.

Identical Operating Agreements were executed by members of Third Avenue on August 29, 1996 and members of Chelsea on March 3, 1997–the only differences were the identities of respective members and percentage of respective shares. In 2001, at a membership meeting called by Nelson and Podell, Ross was expelled from his position as a Member-Manager of both buildings and his brother Todd Ross was substituted as the third Member-Manager. Ross contends that his expulsion was not authorized by the Operating Agreement and that he was entitled to but deprived of a share of the management fee. He contends that Nelson and Podell received the entire management fee because they were the principals of Vintage, the managing agent. Nelson and Podell contend that the management fee provided for in the Operating Agreement was for services rendered by the managing agent and that they did not receive the fee as individuals. Rather the fee went to Vintage, the management company for services performed. They also contend that while the Operating Agreement did not specifically provide for expulsion of a Member-Manager, they followed the removal provisions in Section 414 of New York's Limited Liability Company Law. In order to continue the entities, Todd Ross, also a shareholder in each of the building companies was voted in as the third Manager-Member. Todd Ross has never received any management fee.

Plaintiff moves for summary judgment seeking to be declared a Member-Manager and for a substantial amount of money reflecting what he believes is due for his one third share of the five percent management fees paid to Vintage and one third of anticipate management fees. Defendants oppose plaintiff's summary judgment motion and cross move for summary judgment dismissing the first, second, fifth sixth, seventh, eighth, ninth, tenth and seventeenth causes of action and for an affirmative declaration that Dean Ross' removal comports with statutory mandates and that he is not entitled to management fees.

Background

The Complaint sets forth nineteen causes of action including requests for various injunctions and declaratory judgments to the effect that Dean Ross is still a member-manager, as well as claims of abuse of process, conversion, fraud, breach of fiduciary obligation and violations of the Operating Agreements.

In order to determine the respective rights of the parties, it is necessary to examine the provisions of the documents involved, specifically the Operating Agreements. The Operating Agreements, executed in 1996 and 1997 respectively, provide for selection of Member-Managers in Article II as follows:

> 7. Eric Nelson, Gary Podell and Dean Ross have been elected member managers and shall continue to serve as member managers in accordance with provisions of this Agreement. In case of any vote for the election of managers all members agree to vote for Eric Nelson, Gary Podell and Dean Ross only. The vote of two of the three managers only shall be required to approve the sale, exchange, lease mortgage, pledge or other transfer or disposition of all or substantially all of the assets of this Company and all documents relating thereto shall be signed by any two of the three managers only and no other signature will be required and no person shall inquire into the authority of said managers to execute such documents as the act and deed of this Company.

Another Article II provision deals with filling vacancies.

> 8. (b) Should there at any time be less than three managers because of the death, retirement, resignation, or insanity of a manager, the decision to continue this Company and the election of a new manager shall be made by vote or written consent of at least a majority in interest of all members entitled to vote thereon.

The Operating Agreements do not make any provision for expulsion or removal of a member manager although Article VI, paragraph 1(c)of the Operating Agreements makes reference to expulsion by providing that :

> 1. This Company shall be dissolved and its affairs wound [sic] upon the first to occur of the following:
>
> > (c) The bankruptcy, death, expulsion, incapacity or withdrawal of any manager, unless within six months after such an event, this Company is continued and a new manager elected to replace said manager either by vote or written consent of a majority interest of all remaining members.

The parties functioned pursuant to the Operating Agreements of the buildings between 1996 and 2001 without incident. In 2001, he relationship between Nelson and Podell on the one hand and Ross on the other became severely strained over an alleged ownership interest in another building. At that time, Ross engaged in electronic eavesdropping (secret taping) during telephone conversations with Nelson. In or about March 23, 2001, Podell and Nelson called a meeting of the entire membership of the respective LLC's, many individuals of whom were members of both. The stated purpose of the meeting was to remove Dean Ross as Member-Manager. Since there was no provision in the Operating Agreement for expelling a member, they relied upon Limited Liability Company law Section 414 which authorizes removal of a Member Manager by a majority of the interest holders in the LLC. The meeting was convened on April

11, 2001. Nelson and Podell were present as were two other members, Todd Ross, Dean Ross' brother, and Harvey Bilker (a member of Chelsea). Dean Ross did not attend or submit a proxy. Other members submitted proxies. The members voted to remove Ross and substitute his brother Todd, who was also a member of both LLC's. Todd Ross and Harvey Bilker abstained. Plaintiff sought injunctive relief in this court to prevent the meeting relating to his removal and his removal, and was successful to the extent that in July 2001 the Court stated orally that "until further order of the court defendants are enjoined from representing to third parties that plaintiff Dean Ross is not a member manager of the defendants 42-44 Third Avenue Realty, LLC and Chelsea Village Realty LLC."

Discussion

Plaintiff now seeks a declaration that he continues as a Member-Manager, pay for what he deems to be 1/3 of the management fees, past and future, and compensation for breach of fiduciary obligation and fraud.

While the Operating Agreements of the LLC's do not specifically provide for removal or expulsion of a Member-Manager, they do provide for replacing Member-Managers according to a process that comports with the New York Limited Liability Company Law. Implicit in the various provisions contained in the Operating Agreement is the right of members to expel or remove a Member- Manager. Paragraph 1(c) of Section VI of the Operating Agreements specifically uses the word "expulsion".

In the absence of a specific expulsion provision, the provisions of the Limited Liability Company Law (LLC) apply. Section 414 of the LLC states as follows:

§414 Removal or replacement of managers

> Except as provided in the operating agreement, any or all managers of a limited liability company may be removed or replaced with or without cause by a vote of a majority in interest of the members entitled to vote thereon.

Based on the uncontradicted statements of Eric Nelson, the meeting that was called to remove Ross followed statutory procedures. In order to comply with the replacement provisions of the Operating Agreements and to continue the entities pursuant to the Operating Agreements, the members voted to replace Dean Ross with his brother Todd Ross. There was no evidence of animosity between the brothers, and Todd Ross, had an equitable interest comparable to Dean Ross' in both premises. Thus it appears that there is no basis for injunctive relief or for reinstating or declaring Dean Ross to be a Member-Manager. He still retains his equitable interest in the premises and is entitled to all of the benefits that the interest conveys.

With respect to Dean Ross' claim for a percentage of the management fees, the Operating Agreements govern. The language of the Agreements specifically states in Article II Section 8 (a) that:

> ".... The managers shall jointly receive as a management fee a sum equal to five percent (5%) of the collected rent payable monthly in advance from the premises....Such management fee shall be separate and distinct from any distributions made, should such manager be a member. The managers cannot appoint or employ another person or company as managing agent without the consent in writing of two thirds of the members in interest."

It appears that at the inception of the ownership of the respective buildings, the members appointed Vintage Real Estate Services, Ltd. ("Vintage") later Vintage Real Estate Organization, Inc. (also "Vintage") to manage the properties and no objections were made. Although Nelson and Podell have or had an interest in Vintage, the Vintage entities were separate corporations that

provided all management services.

In order to find that Nelson and Podell received individual distributions, the court would have to pierce the Vintage corporate veil. To do so would entail a finding of complete domination by the individuals for the purpose of committing a fraud or wrong. See *Matter of Guptill Holding Corp. V. State of New York,* 33 A.D.23d 362, aff'd 31 N.Y.2d 897 (1973); *Morris v. New York State Department of Taxation and Finance,* 82 N.Y.2d 135 (1993). There is no evidence of that here. To the contrary, Vintage operated separately to perform managerial services and pursuant to the Operating Agreements, was entitled to a five percent fee. Vintage as functioning manager, and not individual member-managers, was entitled to the five percent management fees.

Moreover, there is nothing in the language of the Operating Agreements that indicates any intent to distribute the 5% among the Member- Managers. The use of the words "jointly receive" means that no individual will receive an amount for management; rather it implies that the entire 5% would be used for management. Clearly, the right to appoint the manager derived from the Operating Agreements' provision that a company could not be appointed without the consent of two thirds of the members. Until 2001, Dean Ross had no quarrel with the appointment of Vintage to perform the managerial tasks and services which included, *inter alia,* lease preparations, rentals, collection of rentals, accounting functions, insurance, renovations and repairs, emergency responses, and tax payments. Ross also made no claim for any portion of the five percent during the time that he was a member-manager. It was only after his removal in 2001 that he claimed an entitlement to a one third member-manager fee. However, to make such an award would belie common sense. When Ross and the other members acquiesced in

Vintage's performing management services, it was entitled to receive the 5% that the member managers were entitled to receive *jointly* as managers. The member managers were never entitled to individual or separate distributions for management services. Additionally, his calculations are as to what he should receive are purely conjectural.

Conclusion

For the foregoing reasons, there do not appear to be issues concerning either the validity of the removal of Dean Ross as a Member-Manager or his entitlement to a one third percentage of the five percent (1.67 percent) allocated to management fees.

Based upon the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendants' cross motion dismissing the first, second, fifth, sixth, seventh, eighth, ninth, tenth and seventeenth causes of action is granted; and it is further

ORDERED that Dean Ross' removal comported with statutory mandates and he is not entitled to management fees; and it is further

ORDERED that the parties appear for a conference in Part 39 on November 14, 2006 to determine whether any issues remain to be resolved.

Dated: October 12, 2006

Enter:

Helen E. Freedman

Helen E. Freedman, J.S.C.