

Russo v Russo

2007 NY Slip Op 30968(U)

April 26, 2007

Supreme Court, Richmond County

Docket Number: 0102159/2006

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**
**THOMAS J. RUSSO, Individually and Derivatively
as a Member of RUSSO PICCIURRO MALOY, LLC,**

**Calendar No.: 3634-001
3829-002
Index No.: 102159/06**

Plaintiffs

against

**DECISION
HON. JOSEPH J. MALTESE**

**MARK E. RUSSO,
FRANK PICCIURRO, JR.,
FRANK PICCIURRO, SR.,
EDWARD J. MALOY, IV, and
RUSSO PICCIURRO MALOY LLC,**

Defendants.

The following papers numbered 1 to 4 were used on this motion the 9th day of February 2007.

Order to Show Cause by Plaintiff Thomas Russo, Affidavits and Exhibits in support (dated November 15, 2006)	1
Notice of Cross Motion by Defendants, Affidavit, Exhibits and Memorandum of Law in support (dated December 7, 2006)	2
Combined Affidavit and Memorandum of Law by Plaintiff (dated December 22, 2006)	3
Reply Affirmation by Defendants (dated January 12, 2007)	4

Upon the foregoing papers, the motion and cross motion, each for summary judgment, are denied.

Plaintiff, Thomas J. Russo, commenced this action on or about May 22, 2006, seeking damages and an accounting based upon allegations of fraud, violation of his rights as a minority member and breach of fiduciary duty. It is uncontroverted that the predecessor of the defendant LLC, the Russo Picciurro Agency, was formed for the purpose of selling insurance, and that it was later converted into a limited liability company under the name of Russo Picciurro Maloy LLC (hereinafter “RPM”). Plaintiff, an eligible retiring member of RPM, brought this action after learning that his retirement compensation would be calculated under a different formula than he originally thought was applicable.

According to plaintiff, the formula for calculating retirement compensation was changed by defendants when they altered the governing Operating Agreement without proper notice or consent. It is alleged that the company has operated under several different operating agreements in the past and that the Operating Agreements adopted in 1997 and 1999 provided for retirement buy-outs to be calculated on the basis of gross commissions. However, plaintiff claims that the Operating Agreement was changed without his consent in 2003 to provide for the calculation of retirement buy-outs based on “fair market value” rather than commissions. Plaintiff contends that he never signed the 2003 Operating Agreement, nor was he notified of the prospective change. In moving for summary judgment and an accounting, plaintiff claims that he has been prevented from inspecting the source documents for the purpose of determining the appropriate buy-out. Defendants oppose the motion, and cross-move for summary judgment dismissing the complaint.

The “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 Hosp.*, 68 NY2d 320, 324 [1986]). Once established, the burden shifts “to the [opposing party] to lay bare his or her proof and demonstrate the existence of a triable issue

of fact” (*Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]; see *Zuckerman v City of New York*, 49 NY2d 557 [1980]). In reviewing such a motion, the court is enjoined to accept as true the evidence tendered by the opposing party, and “must deny the motion if there is even arguably any doubt as to the existence of a triable issue” (*Fleming v Graham*, 34 AD3d 525, 526 [2d Dept 2006] quoting *Barker v Briarcliff School Dist.*, 205 AD2d 652, 653 [2d Dept 1994] [internal quotations marks omitted]).

Limited Liability Company Law § 1102 (b) provides that

Any member may, subject to reasonable standards as may be set forth in, or pursuant to, the operating agreement, inspect and copy at his or her own expense, for any purpose reasonably related to the member's interest as a member, the records referred to in subdivision (a) of this section, any financial statements maintained by the limited liability company for the three most recent fiscal years and other information regarding the affairs of the limited liability company as is just and reasonable.

However, subdivision (c) states that,

If provided in the operating agreement, certain members or managers shall have the right to keep confidential from other members for such period of time as such certain members or the managers deem reasonable, any information which such certain members or the managers reasonably believe to be in the nature of trade secrets or other information the disclosure of which such certain members or the managers in good faith believe is not in the best interest of the limited liability company or its business or which the limited liability company is required by law or by agreement with a third party to keep confidential.

Here, plaintiff has failed to present sufficient evidence to establish his right to summary judgment. While plaintiff contends, *inter alia*, that defendants have refused to account, the view of the evidence most favorable to the defendants, suggests that plaintiff was provided with an opportunity to review most of the documents and participate in an accounting, but that he objected to the individual who was designated to conduct the accounting. In addition, defendants have included

in their cross motion some of the documents plaintiff requested, i.e., RMC's financial statements from 2003 and 2004. As quoted above, Limited Liability Company Law § 1102 (c) gives managers the option of withholding certain information in specific circumstances. Whether or not the withholding of documents in this case was reasonable presents a question of fact for a jury.

Nor have defendants presented sufficient evidence to warrant the granting of their cross motion for summary judgment. Viewed in the light most favorable to plaintiff, questions of fact exist as to (1) notice, (2) the validity of the 2003 revision of the Operating Agreement and (3) the reasonableness of the alleged withholding of certain financial documents.¹

Accordingly, it is hereby:

ORDERED, that the motions are denied.

All parties shall appear in DCM 3 for a preliminary conference at 9:30 a.m. on **May 15, 2007**.

DATED: April 26, 2007

Joseph J. Maltese
Justice of the Supreme Court

¹ The foregoing recital of factual issues is for purposes of illustration only, and is not intended to be exhaustive.