

North Fork Preserve Inc. v Kaplan

2008 NY Slip Op 30072(U)

January 10, 2008

Supreme Court, Suffolk County

Docket Number: 0027167/2004

Judge: Elizabeth H. Emerson

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 8-29-07
SUBMITTED: 10-3-07
MOTION NO.: 017-MG; CASE DISP

_____ x
NORTH FORK PRESERVE INC., JOSEPH J.
FROHNHOEFER, ROBERT AMATO, WILLIAM
BECHTOLD, DARRIN BINDER, JOSE LUIS ESTEVEZ,
RONALD FEINBERG, JOHN GIOQUINTO, JOHN
LIBAIRE, STEVEN PASCUAL, ANTHONY
PERETTINE, MICHAEL PERETTINE, DR. JONATHAN
PERRY, JOSEPH SARNO, CHARLES STARKS, PETER
STERLING, PETER STOUTENBURGH, GARY
TROYAN, and EDWIN TUCCIO, individually and as
members of the NORTH FORK PRESERVE INC.,
individually and as members of the MINORITY
SHAREHOLDERS COMMITTEE OF THE NORTH
FORK PRESERVE, and all those shareholders similarly
situated,

STEIN LAW, P.C.
Attorney for Plaintiffs
24 Woodbine Avenue, Suite 4
Northport, New York 11768

ROSENBERG CALICA & BIRNEY LLP
Attorneys for Defendants
100 Garden City Plaza, Suite 408
Garden City, New York 11530

Plaintiffs,

-against-

MYRON KAPLAN, JANET KRUDOP, THE ESTATE OF
ROBERT H. KRUDOP, GREGORY WOLBERT and
THE NORTH FORK PRESERVE CO.,

Defendants.

_____ x

Upon the following papers numbered 1 to 73 read on this motion for summary judgment ; Notice of Motion and supporting papers 1-40 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 41-66 ; Replying Affidavits and supporting papers 67-73; it is,

ORDERED that this motion by the defendants for summary judgment in their favor is granted.

The plaintiff North Fork Preserve, Inc. (hereinafter "the Corporation") operates a

nature preserve and private hunting club on more than 260 acres of land in Riverhead, New York. Its primary purpose, pursuant to its certificate of incorporation, is to cultivate and improve farms and livestock; to operate a facility for the raising of livestock and game birds, hunting, fishing, camping, tennis, hiking and related activities; to own lands, buildings and personal property and to control them under lease in the furtherance of said business. Shareholders are required to pay yearly dues to use the preserve's amenities and to be entitled to vote during board meetings and on motions.

The preserve was created through a partnership known as the North Fork Preserve Co. (hereinafter "the Partnership"), which is a defendant herein. It was formed in 1982 by the defendant Myron Kaplan and the now-deceased Robert Krudop. The Partnership purchased approximately 333 acres of land between Sound Avenue and South Shore Road in Riverhead, New York, from ITT World Communications, Inc. (hereinafter "ITT"). It divided the land into two parcels. The northerly parcel contains approximately 133 acres, and the southerly parcel contains approximately 200 acres. Kaplan and Krudop then formed the Corporation, and the Partnership conveyed the 200-acre parcel to the Corporation in exchange for 75 shares in the Corporation and reimbursement of costs and improvements. The 200-acre parcel was encumbered by a \$600,000 purchase money mortgage held by ITT. In order to raise capital, the Corporation offered for sale an additional 75 shares in the Corporation at \$10,000 each pursuant to a Private Offering Memorandum promulgated in July 1982. A minimum of 55 shares had to be sold in order for the offering to become effective. When the required minimum had not been met, the Partnership agreed to purchase the remaining shares pursuant to the sixth amendment to the Private Offering Memorandum. Each of those shares was then offered as a free third share, and designated as a "dues obligated share," if a subscriber agreed to purchase two other shares. The offering was extended and became effective in 1984, when the Corporation began to operate as a nature preserve and private hunting club.

The membership dues began at \$700 in 1984, rose to \$1,800 in 1985, and varied between \$1,000 and \$3,500 from 1986 through 1999. In 2000, the membership dues rose to \$4,000, dropped to \$3,700 in 2001, rose again to \$4,000 in 2002, increased to \$5,500 in 2003, and increased to \$9,000 in 2004.

In 2002, Myron Kaplan and Robert Krudop informed the shareholders that the Corporation's revenue-generating enterprises, such as the sale of Christmas trees, were no longer covering expenses and that they had decided to sell either the Corporation's assets or its shares. By a letter dated August 5, 2002, Robert Kudop advised the other shareholders that he and Myron Kaplan were offering for sale their majority, controlling interest in the Corporation. At a special meeting on October 5, 2002, the shareholders voted on a motion to sell the assets of the Corporation. Based on advice given at the meeting and on the mistaken assumption that two-thirds of the votes cast carried the motion, the motion was considered passed. However, by a letter dated October 18, 2002, Robert Krudop advised the shareholders that the motion had not passed because it had not received the required two-thirds majority of the outstanding shares. Since then, there has been disagreement among the shareholders about the future of the preserve, and offers by the minority shareholders to purchase the majority shareholders' interest have been rejected. At a shareholder meeting on October 16, 2004, Myron Kaplan informed those present that he wanted to see the property continue as a hunting preserve, that no one besides the minority shareholders had

offered to purchase it, and that the minority shareholders' offers were insufficient. In response to a question about whether he was willing to sell the property for developmental purposes, he responded that there were no plans or limitations with respect to an offer of sale.

The plaintiffs, the Minority Shareholders Committee of the North Fork Preserve, subsequently commenced this action on behalf of the Corporation and its minority shareholders. They allege that they have effectively been "frozen out" of participating in the pending determination of the future existence of the preserve, in which they have an appreciable financial stake. The minority shareholders claim that they purchased shares in the Corporation with the understanding that they were purchasing property rights in a hunting preserve and that, instead, their substantial investment in the Corporation over the years has not been evidenced or accounted for, that they have been required to pay increasingly exorbitant yearly membership fees when operating expenses should have been low, and that their inability to pay the inflated membership fees has essentially rendered their shareholder status worthless by preventing them from voting at meetings and participating in the running of the Corporation.

The complaint, as amended, contains two causes of action: (1) a cause of action pursuant to Business Corporation Law § 626 (a shareholders' derivative action) and (2) a cause of action pursuant to Business Corporation Law § 720 (an action against directors and officers for misconduct). The plaintiffs seek, inter alia, injunctive relief and damages for waste, fraud, misconduct, mismanagement, and breach of fiduciary duty. The complaint also contains 14 categories of alleged wrongdoing by the defendants in furtherance of their purported scheme to prevent the minority shareholders from voting in order to obtain the two-thirds majority required to sell their shares. By an order dated June 9, 2005, this court, inter alia, dismissed four of the aforementioned categories of alleged wrongdoing upon which the plaintiffs' claims are based and enjoined the parties from selling the Corporation's assets and shares and from dissolving the hunting and fishing preserve. By an order dated June 28, 2005, this court, inter alia, denied as premature the defendants' first motion for summary judgment. By a subsequent order dated March 6, 2006, this court, inter alia, denied the defendants' second motion for summary judgment since it was not based on any new evidence. The Appellate Division, by an order dated July 5, 2006, inter alia, dismissed seven additional categories of alleged wrongdoing upon which the plaintiffs' claims are based.

Discovery is now complete, and the defendants again move for summary judgment in their favor. The defendants contend that there is no evidence in the record to support the remaining three categories of alleged wrongdoing upon which the plaintiffs' claims are based and no evidence of any waste, fraud or mismanagement by the defendants. In opposition, the plaintiffs argue that the present motion is duplicative of the defendants' two prior motions for summary judgment and violates the general proscription against successive motions for summary judgment absent a showing of newly discovered evidence or other good cause. The plaintiffs also argue that there are numerous triable issues of fact that preclude the granting of summary judgment in this case. In reply, the defendants contend that this motion is based on evidence that they obtained during discovery after their last motion for summary judgment was made in December 2005. The defendants further contend that the plaintiffs have failed to lay bare any evidentiary proof in admissible form sufficient to defeat the motion.

Contrary to the plaintiffs' contentions, the present motion does not violate the general proscription against successive summary judgment motions. While multiple motions for summary judgment are disfavored, significant discovery (including depositions) has taken place since the defendants' last motion for summary judgment. Accordingly, the court finds that the present motion is entirely appropriate (*see, Kobre v United Jewish Appeal-Fedn. of Jewish Philanthropies of N.Y., Inc.*, 32 AD3d 218, 222; *Staib v City of New York*, 289 AD2d 560, 561; *Fielding v Environmental Resources Mgt. Group*, 253 AD2d 713).

Summary judgment is warranted when there are no issues of fact to be resolved by the trier of fact (*see, Hartford Accident & Indemnity Co. v Wesolowski*, 33 NY2d 169, 172; *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404). 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 issue of fact (*see, Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853; *Zuckerman v City of New York*, 49 NY2d 557, 562; *Sillman v Twentieth Century Fox Film Corp.*, *supra* at 404). To defeat the motion, the opponent must present evidentiary facts sufficient to raise a triable issue of fact (*see, Freedman v Chemical Constr. Co.*, 43 NY2d 260, 264). Mere conclusions, expressions of hope, or unsupported allegations or assertions are insufficient to defeat a motion for summary judgment (*see, Zuckerman v City of New York*, *supra* at 562).

The defendants have established, prima facie, their entitlement to judgment as a matter of law. The defendants, in their moving papers, have made a factual showing of the legality, propriety, and fairness of the occurrences and transactions that form the basis for this action (*see, Bennett v Instrument Systems Corp.*, 66 AD2d 708, 709; *Greenbaum v American Metal Climax, Inc.*, 27 AD2d 225, 232). In opposition, the plaintiffs are required to come forward with proof that they do, in fact, have a case. They are required to show that the majority shareholders were not following their sound business judgment, but were acting in bad faith (*see, Bennett v Instrument Systems Corp.*, *supra* at 709; *Greenbaum v American Metal Climax, Inc.*, *supra* at 232). Moreover, the plaintiffs must set forth something more than vague, general charges of wrongdoing. They must come forward with evidentiary data indicating merit to the causes of action as alleged. They may not merely rely upon their suspicions to defeat the defendants' motion for summary judgment (*see, Greenbaum v American Metal Climax, Inc.*, *supra* at 232).

The court finds that the plaintiffs have failed to meet their burden. Neither the plaintiffs nor their attorney have substantiated their charges of waste, fraud, mismanagement, and breach of fiduciary duty. They have not come forward with any evidence tending to show that the actions of the defendants were so opposed to the true interests of the Corporation as to raise an inference that their actions were taken other than in the proper exercise of judgment in corporate affairs (*see, Greenbaum v American Metal Climax, Inc.*, *supra* at 228). The plaintiffs, as minority shareholders in the Corporation, hold their stock subject to the control and management of the Corporation by the majority shareholders and the corporate board of directors. Having only a minority interest, they cannot validly complain of the management of corporate affairs unless they have proof of fraud, negligence, or bad faith on the part of those in control (*see, Greenbaum v American Metal Climax, Inc.*, *supra* at 230-231). It is clear that the plaintiffs have no such proof.

The plaintiffs claim that the only individuals who know precisely what the defendants did to defraud the minority shareholders are the defendants themselves and that the plaintiffs lack specific information as to how they were defrauded. They contend, however, that they intend to prove their claims “by subpoena, production and live testimony at trial.”

The plaintiffs, in opposing the defendants’ motion for summary judgment, must lay bare their proof in evidentiary form (*see, Badman v Civil Service Employees Assn.*, 91 AD2d 858). They may not rely upon the mere hope that somehow they will uncover evidence that will prove their case (*see, Trails v Wolf*, 32 NY2d 207, 221; *Babcock v Allan*, 115 AD2d 297, 298; *Badman v Civil Service Employees Assn.*, *supra* at 858). A party who claims ignorance of critical facts to defeat a motion for summary judgment must demonstrate that the ignorance is unavoidable and that reasonable attempts were made to discover the facts that give rise to a triable issue (*see, Kenworthy v Town of Oyster Bay*, 116 AD2d 628, 629). Here, the parties have engaged in extensive discovery, including voluminous document discovery and several depositions. Thus, the court finds that the plaintiffs have had ample opportunity to develop the facts before the defendants moved for summary judgment (*see, Babcock v Allan*, *supra* at 298). The plaintiffs proffer no excuse for their ignorance. They do not even request an opportunity to conduct further discovery (*see, Gold Connection Discount Jewlers v American Dist. Tel. Co.*, 212 AD2d 577, 578; Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3212:33), nor do they allege that additional discovery will produce relevant evidence to support their claims (*Firth v Affordable Homes of America*, 253 AD2d 536, 537). The court finds that it would be inappropriate to deny the defendants’ motion for summary judgment on the mere chance that somehow, somewhere, on cross examination or otherwise, the plaintiffs will uncover something that may add to their case, but of which they obviously have no knowledge now (*see, Trails v Wolf*, *supra* at 221).

In a general, blunderbuss attack on the actions of the defendants in the management of the Corporation, the plaintiffs raise several new allegations in an attempt to create a triable issue of fact. While a court may properly look beyond the allegations in the complaint and deny summary judgment when a party’s papers in opposition to the motion raise an issue of fact (*see, Gold Connection Discount Jewlers v American Dist. Tel. Co.*, *supra* at 578), the court finds that, in this case, the additional allegations are principally conclusory in nature and are insufficient to defeat the defendants’ motion.

Contrary to the plaintiff’s contention, there is no issue of fact as to what happened at the shareholder meeting on October 5, 2002. The documentary evidence clearly establishes, and the parties agree, that the shareholders voted on a motion to sell the assets of the Corporation. The motion was mistakenly considered passed based on the assumption that a two-thirds majority of the votes cast was required. The error was corrected by a letter dated October 18, 2002, advising the shareholders that the motion, in fact, had not passed because it required a two-thirds majority of the outstanding shares.

The plaintiffs contend that the defendants have engaged in mismanagement by failing to take appropriate steps to raise revenue. The plaintiffs contend that the defendants have turned away new members, that they have failed to arrange hunting shoots with the same frequency

that they have in the past, and that they have failed to sell any development rights since 2002. However, the plaintiffs have produced no evidence in support of these contentions. For example, although they claim that the defendants deliberately failed to sell shares to new members, they have not produced any affidavits from the purported new members whom they contend were ready, willing, and able to purchase shares and were turned away. Likewise, they have not produced affidavits from anyone interested in purchasing development rights. In any event, there is evidence in the record that the Town of Riverhead has restricted the sale of development rights, and the defendants have been enjoined from selling the assets of the Corporation, which would include development rights, since 2004. Finally, the plaintiffs' conclusory allegations in support of their contention that the defendants engaged in mismanagement by reducing the number of hunting shoots on the Corporation's property are insufficient to overcome the business judgment rule.

The plaintiffs contend that the defendants set the annual dues in order to "freeze out" the minority shareholders. They contend that the dues were not based on "real" financial statements (whether audited, compiled, or reviewed) and that the defendants padded the Corporation's proposed budgets for the years 2002, 2004, and 2006 with many items that were not needed. The record reveals that financial statements and budgets were provided to the shareholders at every annual meeting. There is no evidence in the record, nor do the plaintiffs produce any, that audited, compiled, or reviewed financial statements were required. Moreover, there is no evidence in the record, nor do the plaintiffs produce any, that the proposed budgets for the years 2002, 2004, and 2006 were the budgets that were actually adopted and used to set the annual dues.

The plaintiffs contend that, upon the death Robert Krudop in 2003, the Partnership was dissolved and the 71 shares of stock owned by the Partnership should have passed back through the Corporation to become dues-obligated shares. The plaintiffs further contend that, upon the death of Morris Kaplan in 2002, his four shares of stock also should have passed back through the Corporation to become dues-obligated shares. The plaintiffs contend that the defendants have deliberately delayed winding up the affairs of the Partnership and the estate of Morris Kaplan in order to avoid paying dues on the shares owned by Kaplan and the Partnership. The plaintiffs further contend that there is a question of fact as to who should exercise the rights associated with those shares.

Although the death of Robert Krudop dissolved the Partnership in 2003, it did not terminate the Partnership, which continues until the winding up of its affairs is completed (*see*, Partnership Law § 61). The plaintiff's self-serving contention that the 71 shares of stock owned by the Partnership should have passed back through the Corporation is entirely unsubstantiated and contrary to established law. The Partnership's shares are partnership property (*see generally*, Partnership Law § 12). Upon the death of a partner, his right in specific partnership property vests in the surviving partner or partners (*see*, Partnership Law § 51[d]). Thus, the defendant Myron Kaplan, as the sole surviving partner, immediately became vested with title to all of the assets of the Partnership, including the 71 shares of stock in the Corporation, upon the death of Robert Krudop (*see*, **Silberfeld v Swiss Bank Corp.**, 273 App Div 686, 688, *affd* 298 NY 776). It is the exclusive right of the surviving partner to wind up the affairs of the Partnership (*see*, **Silberfeld v Swiss Bank Corp.**, *supra* at 688), which includes converting the partnership's assets into cash and, after paying the liabilities of the partnership, paying the partners and the legal representative of the deceased partner the net amounts due them for their capital contributions and their shares of profits

and surplus (*see*, Partnership Law § 71; 15A NY Jur 2d, Business Relationships § 1610).

The plaintiff's contention that the four shares of stock owned by Morris Kaplan should have passed back through the Corporation is also entirely unsubstantiated and contrary to established law. Upon the death of Morris Kaplan, title to and the rights in the stock that he owned passed by operation of law to the executor of his estate (*see*, Matter of Bloch, 272 App Div 218, 221; *see also*, Matter of Brown, 295 AD2d 127 [and cases cited therein]), the defendant Myron Kaplan, to be disposed of according to the terms of Morris Kaplan's last will and testament. In any event, the defendants, including Myron Kaplan, have been enjoined during the pendency of this litigation from selling or offering for sale any shares in the Corporation. Prior thereto, the minority shareholders were engaged in negotiations with the defendants to purchase the shares in question. Under these circumstances, it cannot be said that the delay in winding up the affairs of the estate of Morris Kaplan, or the Partnership, is due to any bad faith on the part of the defendants.

In view of the foregoing, there is no issue of fact as to who should exercise the rights associated with the shares owned by the Partnership and Morris Kaplan. It is Myron Kaplan. The plaintiffs contend that, after the death of Robert Krudop, the defendant Janet Krudop "participated in [the Corporation] on behalf of [the Partnership] as did her late husband." While the representative of a deceased partner is not entitled to participate in or interfere with the continuation or winding up of the partnership by the surviving partner (*see*, **Fogel v Neiman**, 288 AD2d 429, 430; **Silberfeld v Swiss Bank Corp.**, *supra* at 688; **Beckley v Speaks**, 39 Misc 2d 241, 244, *aff'd* 21 AD2d 759), this vague and conclusory allegation, which is unsupported by any specific factual allegations of wrongdoing, is insufficient (*see*, **Greenbaum v American Metal Climax, Inc.**, *supra* at 232). Moreover, there is no evidence in the record, nor do the plaintiffs allege, that Janet Krudop's actions, if any, were different from what the actions of Myron Kaplan would have been.

The plaintiffs contend that defendants have a conflict of interest that has prevented them from acting with disinterested independence. The plaintiffs contend that the conflict of interest is evidenced by the defendants' failure to pass through to the Corporation the shares owned by the Partnership and the late Morris Kaplan to become dues-obligated shares. As previously discussed, this argument is specious. The plaintiffs also contend that the defendant Myron Kaplan as a conflict of interest because, in 2007, an arbitrator directed him to repay more than \$76 million to investors of the hedge fund that he founded and managed. The plaintiffs argue that he will be motivated to make it easier to sell his shares and the Partnership's shares in the Corporation in order to satisfy the award. This argument is entirely speculative.

Finally, the plaintiffs contend that the defendants have improperly used the Corporation's funds to pay their attorneys' fees. The defendants admit that they made some initial payments to their attorneys from the Corporation's funds. The record reveals that the payments, which ceased in April 2005, did not exceed \$50,000. The court finds that, while the payments were premature, they fail to raise a triable issue of fact. It is undisputed that the payments were made. In any event, now that they have been completely successful in defending this action, the directors and officers are entitled to indemnification for the expenses that they have incurred, including their attorneys' fees (*see*, Business Corporation Law §§ 722 & 723[a]). Whether the other defendants are entitled to indemnification is not properly before the court at this time.

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In the final analysis, it is clear that the plaintiffs do not have a case. There has been no factual showing that the defendants improperly profited at the expense of the minority shareholders. In fact, it does not appear that the minority shareholders have sustained a loss due to any of the acts complained of (*see, Greenbaum v American Metal Climax, Inc., supra* at 232). Accordingly, the motion is granted.

DATED: January 10, 2008

HON. ELIZABETH HAZLITT EMERSON

J. S.C.