

Arfa v Zamir

2008 NY Slip Op 31332(U)

April 29, 2008

Supreme Court, New York County

Docket Number: 0603602/2005

Judge: Charles E. Ramos

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

Charles Edward Ramos

53

PRESENT: _____

PART 812

Justice

AREA

INDEX NO. 603602/05

MOTION DATE _____

- v -

MOTION SEQ. NO. 027

Zamir

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with accompanying Memorandum Decision.

[Handwritten signature]

FILED

MAY 09 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/29/08

[Handwritten signature]
CHARLES E. RAMOS I.S.C.
 FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X
RACHEL L. ARFA, ALEXANDER SHPIGEL, ARGELT
LLC, on behalf of themselves and on behalf of
HARLEM HOLDINGS, LCC, HARLEM MAINTENANCE
SERVICES, INC. and AMELITE MANAGEMENT
SERVICES, INC.,

Plaintiffs,

-against-

Index No.
603602/05

GADI ZAMIR and ZAMIR PROPERTIES, INC.,

Defendants.

546-522 WEST 146TH STREET LLC, 522-536 WEST
147TH STREET LLC, WEST 162ND STREET AND
ACADEMY STREET LLC, 100-102 EAST 124TH STREET
PACKAGE, LLC, HARLEM I LLC and HARLEM II LLC

Intervenor-Defendants.

FILED
MAY 09 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----X

Charles Edward Ramos, J.S.C.:

Motion sequence numbers 027 and 028 are consolidated for disposition.

In motion sequence number 027 (formerly 016), plaintiff Alexander Shpigel moves to dismiss the intervenor-defendants' fourth counterclaim pursuant to CPLR 3211 (a) (3) and (a) (7).

In motion sequence number 028 (formerly 020), counterclaim defendant Harlem Holdings LLC (Harlem Holdings)¹ joins in Shpigel's (together, the Managers) motion to dismiss the intervenor-defendant's fourth counterclaim.

¹ Lawrence Mandelker, Esq. was appointed the temporary receiver of Harlem Holdings on February 22, 2006.

Background²

The underlying action was commenced by Rachel Arfa and her husband, Alexander Shpigel, against their former business partner, defendant Gadi Zamir. The three partners had formed Harlem Holdings to hold the membership interests of the intervenor-defendants,³ that are comprised of various limited liability companies (LLC Intervenors), that, in turn, own and manage dwellings around Manhattan, New York. Arfa and Shpigel formerly owned 60% of the membership interests in Harlem Holdings, and Zamir owned the remaining 40% membership interest. Until November of 2005, Harlem Holdings served as the co-manager for each of the LLC Intervenors. As of August 2006, Zamir has served as the sole manager of each of the LLC Intervenors.

Discussion

The LLC Intervenors' fourth counterclaim alleges that Harlem Holdings, the managing member of the LLC Intervenors, breached each of the LLC Intervenors' operating agreements (Operating Agreements), by: (1) assigning its membership interests in each LLC without obtaining the requisite consent from the other members; (2) failing to fund certain approved capital calls made by Zamir; and (3) causing the LLC Intervenors to incur loans that were not approved by each of the LLC's members (LLC Intervenors

² For a full recitation of the background of this action, see this Court's decision dated January 7, 2008.

³ The LLC Intervenors were given leave to intervene in this action as defendants, for the purpose of filing counterclaims against Arfa, Shpigel and Harlem Holdings, and cross-claims against Zamir.

Counterclaims and Cross-Claims, ¶¶ 27-35).

The Managers argue that the LLC Intervenors lack standing to assert a cause of action for breach of contract, because the LLC Intervenors are non-signatories to the Operating Agreements that were allegedly breached. They analogize the LLC operating agreement to a corporate shareholder agreement, that, like any agreement, can only be enforced by a party that executes it.

The LLC Intervenors contend that a cause of action for breach of an operating agreement can be asserted by an LLC, irrespective of whether the LLC actually executed it. They analogize an LLC's operating agreement that is adopted unanimously by shareholders to corporate bylaws, that have been held to constitute a contract between members of the corporation and the members among themselves.

For the reasons set forth below, affording the counterclaim a liberal construction, accepting the facts alleged as true and according the LLC Intervenors the benefit of every favorable inference (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]), the Court determines that the LLC Intervenors have standing to pursue the cause of action, and have sufficiently pled a cause of action for breach of contract.

An LLC is a hybrid entity, combining elements of the corporate and partnership form (Rich, Practice Commentaries, McKinney's Consolidated Laws of NY, Book 32A, Limited Liability Corporation Law at 175). The operating agreement is the governing instrument of the LLC. Section 417 (a) of the Limited

Liability Corporation Law (LLCL) provides that the members of an LLC "shall adopt a written operating agreement ... relating to (I) the business of the limited liability company, (ii) the conduct of its affairs, and (iii) the rights, powers, preferences, limitations or responsibilities of its members, managers, employees or agents." Further, the operating agreement is defined as "any written agreement of the members concerning the business of the LLC and the conduct of its affairs and complying with section 417" (LLCL section 102 [u]).

Recognizing that an LLC is bound by, and can enforce, its own operating agreement, is not a novel concept in the oft-times murky area of LLC law. For instance, in *Hoffman v Finger Lakes Instrumentation, LLC* (7 Misc 3d 179, 185-86 [Sup Ct, Monroe County 2005]), an LLC moved to compel arbitration based upon an arbitration provision contained in the operating agreement. Relying upon principles of equitable estoppel, the court determined that, although the LLC was a non-signatory to the operating agreement, it could enforce the arbitration clause contained therein because all persons that were concerned with the LLC had executed the operating agreement, and presumed that it was in effect (*id.* at 185).

Hoffman (7 Misc 3d at 185-86), is narrowly distinguishable to the extent that it involves arbitrability. However, it is broadly applicable to the issue raised here. That court reasoned that the signatories to the operating agreement that were seeking to prevent the LLC from enforcing the arbitration clause cannot

"have it both ways, by "seek[ing] to hold the non-signatory liable pursuant to duties imposed by the agreement . . . , but, on the other hand, deny[ing] the arbitration's applicability because the defendant is a non-signatory" (*id.*; accord *Elf Atochem North America, Inc. v Jaffari*, 727 A2d 286 [Del 1999]).

The LLC Intervenor's allege that the Managers are seeking to enforce the Operating Agreements against the LLCs by demanding the funding of loans in the Managers' favor, and the payment of fees for services that the Managers allegedly performed for the LLCs (Counterclaims and Cross-Claims of LLC Intervenor's, ¶¶ 27-35, 38 [4-5]). Implicit in the Managers' claims is that the Operating Agreements govern the parties' relationship, and are binding upon them. The Managers cannot logically seek to enforce the Operating Agreements against the LLC Intervenor's, while simultaneously seeking to deny the LLC Intervenor's from enforcing the identical Operating Agreements against them.

Moreover, insofar as the LLC Intervenor's allegedly bore the direct injury from the breach of the Operating Agreements, logic dictates that they would have standing to pursue redress for that injury, a principle that is recognized in the Revised Uniform Limited Liability Company Act (RULLCA), although not yet adopted by the New York Legislature. Section 111 (b) of the RULLCA states, "A limited liability company is bound by and may enforce the operating agreement, whether or not the company has itself manifested assent to the operating agreement."

Alternatively, the LLC may enforce the operating agreement

as the intended third-party beneficiary of the Operating Agreements. There is no doubt that the LLC and the Managers regarded the Operating Agreements, adopted unanimously by members, as governing their relationship, and for the benefit of the LLCs (*compare State of California Public Employees Retirement Sys. v Sherman & Sterling*, 95 NY2d 427, 434-35 [2000]).

For these reasons, the Court determines that the LLC Interveners have standing to directly pursue a cause of action for breach of its own Operating Agreements against the Managers, and that they adequately pled the elements of a claim for breach of contract.

Accordingly, it is

ORDERED, that the motions to dismiss the fourth counterclaim by plaintiff Alexander Shpigel (027) and counterclaim defendant Harlem Holdings LLC (028) are denied; and it is further

ORDERED that the action in all other respects shall continue.

Dated: April 29, 2008



CHARLES E. RAMOS

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