

Matter of PerlRose Realty Co., LLC
2011 NY Slip Op 31867(U)
July 8, 2011
Supreme Court, New York County
Docket Number: 112210/2010
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE

PRESENT: _____

J.S.C.
Justice

PART 10

Index Number : 112210/2010

EVANS, MARTIN

vs.

PERL, ANDREA

SEQUENCE NUMBER : 003

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

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 (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

JUL 11 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/8/11


HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

Supreme Court of the State of New York
County of New York: IAS 10

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In the Matter of the Petition to Appoint a Wind-Up
Person for PerlRose Realty Co., LLC
pursuant to Limited Liability company Law §703

Decision/Order
Index # 112210/10
Mot Seq. # 003

Martin Evans as Guardina of the Property of Shari Perl,

Petitioner,

-against-

Andrea Perl,

Respondent.

FILED

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Gische, J.:

Pursuant to CPLR 2219 (A) the following numbered papers were considered by the court in connection with this motion:

PAPER	NUMBERED
Notice of Motion, KMM affirm,, exhibits.....	1
JVH affirm., exhibits.....	2
Reply affirm., exhibit.....	3

Upon the foregoing papers the decision and order of the court is as follows:

This is one of several pending related actions concerning family business disputes between Martin Evans ("Evans") as guardian of the property for Shari Perl and Andrea Perl. Perlrose Realty Co., LLC ("Perlrose") is owned 50% by Shari Perl ("SP") and 50% by Andrea Perl ("AP"). The underlying petition sought to have the court appoint a "wind up" person for Perlrose. The petition was granted to the extent of appointing Michele Kahn, Esq. receiver of Perlrose (Order March 10, 2011). When AP interposed her answer, however, she asserted two counterclaims, against Evans and

Perlrose. The first counterclaim is for contractual indemnification for all of AP's "expenses, including disbursements and legal fees, in the defense of this proceeding and the companion action under index number 602898/2005." The contract relied upon is the operating agreement for Perlrose. The second counterclaim seeks "reimbursement from [Evans] and [Perlrose] for [AP's] time as the Managing Member and for expenses in each and every situation associated with the performance of her duties as the Managing Member." Evans now moves to dismiss the counterclaims. He also seeks sanctions.

Evans claims that the counterclaims should be dismissed because AP did not obtain leave of court to sue him as guardian. He also argues that the claim for indemnity is based on contractual provisions that bind neither him or his ward, SP, personally; that there is another action pending in which AP seeks relief that encompasses the legal fees claim made in this action and that there is no legal basis for a claim against him for indemnification or reimbursement for AP's time and expenses as managing member of Perlrose.

In opposition, AP argues that the failure to obtain prior permission is not jurisdictional and does not warrant dismissal. AP also argues that in any event the appointing order gives him implicit permission and/or that by pursuing litigation against AP the guardian has waived any claim that AP needs permission to interpose a counterclaim. AP also claims that Evans has no right to seek to dismiss the counterclaim to the extent that it is asserted against Perlrose. On the merits, AP argues that: "there is a contractual basis for indemnification in the Perlrose Operating Agreement. There is a statutory basis under the Limited Liability Company Law for

indemnification..." AP also claims that these dual capacities for indemnification are clearly distinct from claims against third parties for common law indemnification.

For the reasons that follow, the motion is granted and the counterclaims are dismissed. The collateral relief for sanctions, however, is denied. Although the convoluted nature of the proceedings makes the analysis somewhat confusing, the conclusion is inescapable. There is no legal basis for the counterclaims asserted against Evans either individually or in his capacity as guardian of SP.

Preliminarily, the court does not reach the issue of whether the admitted failure of AP to seek court permission to sue warrants dismissal, because the underlying claims otherwise have no merit. AP is instructed, however, that any future claims she wishes to bring against the guardian in his capacity as guardian requires prior court approval from the judge presiding over the guardianship proceeding. Smith v. Keteltas, 27 AD 279 (1898). While the failure to obtain prior court consent may not affect this court's jurisdiction, it does affect the legal capacity to sue. See: Gruberman v. Rudder, __ AD3d __ (1st dept. 2011); 2011 NY slip Op 05626 (June 30, 2011). No action can be maintained against the guardian without court permission.

The first cause of action for indemnification is based upon the Perlrose operating agreement. By its terms, the obligation of indemnification in the operating agreement is on Perlrose and not any of the individual members. The agreement certainly does not obligate Evans personally. In addition, since the operating agreement does not obligate SP individually, there is no claim against Evans in his capacity as guardian of AP. Contrary to AP's arguments, there is nothing in the Limited Liability Law that makes Evans or his ward SP individually responsible for

Perlrose's obligation of indemnification.

The second cause of action is for services rendered and expenses paid on behalf of Perlrose. There is no legal basis on which to hold the Evans, either individually or in his capacity as guardian, responsible for what is alleged to be Perlrose's obligation. While Perlrose's obligations may ultimately have a financial effect on SP as an owner of Perlrose, that is not the same thing as having personal responsibility for the obligations of Perlrose.

To the extent that the court previously refused to sever the counterclaims at the time they were interposed, the court is not now precluded from finding on this motion that the counterclaims lack merit. The determination on the prior motion never addressed the merits of the counterclaims.

The issue raised by AP about Evan's ability to seek dismissal of counterclaim against Perlrose is a non-issue, because although the counterclaims are denominated as against Perlrose, they have not been properly interposed against such entity. Perlrose is not technically the petitioner in this case, so that there can be no counterclaim asserted against it and it was never properly served with such counterclaim. The claim needs to be styled differently and served on Perlrose. More importantly, as AP notes, Michele Kahn was not appointed receiver until March 11, 2011, which was after the "counterclaims" were even interposed. Thus, there are no properly interposed counterclaims against Perlrose and in this procedural posture they have no legal viability. This finding, however, does not address the merits of the claims and is not intended to preclude from or encourage AP to bring a separate proceeding against Perlrose.

As for sanctions, the court denies them. While the counterclaims against Evans lacked merit, that in itself is not a sufficient basis for sanctions. While the court has repeatedly commented on the rancor among counsel in these litigations, the court believes that the focus of these cases should be more about resolving legitimate legal issues than punishing or praising the behavior of any particular party or attorney. The court, therefore, in its discretion finds that sanctions are not warranted at this time.

Grozea v. Lagoutova, 67 AD3d 611 (1st dept. 2009).

In accordance herewith it is hereby

ORDERED that the motion to dismiss the counterclaims is granted and it is further

ORDERED that the motion for sanctions is denied.

Any requested relief not expressly granted herein is denied and this constitutes the decision and order of the court.


Dated: New York, NY
July 8, 2011

FILED

JUL 11 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

SO ORDERED:



J.G.J.S.C.