

Pokoik v Pokoik

2011 NY Slip Op 31952(U)

July 11, 2011

Sup Ct, NY County

Docket Number: 115224/10

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
J.S.C.

PART 8

Justice

Index Number : 115224/2010
POKOIK, LEE
vs.
POKOIK, GARY
SEQUENCE NUMBER : 002
COMPEL OR STAY ARBITRATION

INDEX NO. 115224/10
MOTION DATE 6/6/11
MOTION SEQ. NO. 002

tion to/for _____
No(s). 1-8
X Motion No(s). 9-22
Reply - opp to X Motion ^{+ removed fr} No(s). 23-29
Reply is opp to X motion 30

Upon the foregoing papers, it is ordered that this motion is

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

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

FILED

JUL 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 8, 2011


JOAN M. KENNEY, J.S.C.
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE:MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 8

-----X

Lee Pokoik a/k/a Leon Pokoik,
Plaintiff,

-against-

Gary Pokoik, Jonathan Pokoik
and J. Pokoik Realty, LLC,
Defendants.

-----X

Joan M. Kenney, J.:

DECISION & ORDER
Index No.: 115224/10

FILED

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Recitation, as required by CPLR 2219(a), of the papers considered
in review of this motion to compel arbitration and dismiss this
action and cross motion to consolidate.

Papers	Numbered
Notice of Motion, Affidavit, and Exhibits	1 - 8
Affirmation in Opposition, X- Motion and Exhibits	9 - 22
Reply to Motion in Chief, Opp to X-Motion & Memo	23 - 29
Reply to Opp and in Support of X-Motion	30

The motion and cross motion are consolidated herein for disposition.

Gary Pokoik (Gary), Jonathan Pokoik (Jonathan) and J. Pokoik Realty, LLC (Realty) (collectively, Defendants) move for an order, pursuant to CPLR 7501 and 7503(a), compelling arbitration of Lee Pokoik's (Leon) claims relating to the property located at 221 East 76th Street, New York, N.Y. (the East 76th Street Property). Defendants also seek an Order, pursuant to CPLR 3211(a)(1), (a)(7) and (a)(10), dismissing the complaint.

Leon cross-moves for an Order, pursuant to CPLR 602(a), consolidating this action with an action entitled *Estate of Saul Spitz and Lee Pokoik a/k/a Leon Pokoik against Gary Pokoik a/k/a Gary Michael Pokoik a/k/a Gary M. Pokoik, Jonathan Pokoik a/a/ Jon*

Pokoik, J. Pokoik Realty, LLC, Gail Pokoik a/k/ Gail Waldes, Gary Pokoik and/or Gail Pokoik as trustees of the Marion Pokoik Dick Revocable Trust, Edward Breger, 242-244 East 77th Street, LLC, 234 East 82nd Street, LLC and John Doe and Jane Doe, persons named being fictitious, true first names being unknown to plaintiffs, persons intended being recipients of any GRATIS (Grantor Retained Annuity Trust) from investors named herein, defendants and Davin Pokoik, additional counterclaim defendant, Sup Ct, NY County, Index Number 109854/2008 (the Accounting Action).

FACTUAL & PROCEDURAL BACKGROUND and ARGUMENTS

Leon alleges that he and Gary are managing members of Realty (complaint, ¶4), and that they were involved in owning and managing various real estate properties, together with other family members (*id.*, ¶5). He contends that he had the actual management of these businesses until April 2006, when he yielded management control to Gary (*id.*, ¶8). He further states that Realty was formed thereafter in 2006 by Gary and Jonathan to manage the properties (*id.*)

The complaint concerns Leon's claims regarding the East 76th Street Property, property located at 234 East 82nd Street, New York, N.Y. (the East 82nd Street Property), property located at 242-244 East 77th Street, New York, N.Y. (the East 77th Street Property) and property located at 521 East 83rd Street, New York, N.Y. (the East 83rd Street Property (collectively, the Properties)

(*id.*, ¶ 11).

Leon asserts that the Properties' ownership and management rights and obligations are embodied in operating agreements or similar documents, which provide for distribution payments (*id.*, ¶ 6). He further contends that he has a 20% ownership interest in the East 76th Street Property, pursuant to a co-tenancy agreement dated December 31, 1985 (the East 76th Street Agreement); a one-third ownership interest in 234 East 82nd Street LLC (the East 82nd Street LLC), which owns the East 82nd Street Property, pursuant to an operating agreement dated July 28, 1997 (the East 82nd Street Operating Agreement); a one-quarter ownership interest in 242-244 East 77th Street, LLC (the East 77th Street LLC), which owns the East 77th Street Property, pursuant to an operating agreement dated July 28, 1997 (the East 77th Street Operating Agreement); and a one-sixth ownership interest in the East 83rd Street Property, under a tenancy in common agreement (the East 83rd Street Agreement) (*id.*, ¶¶ 11-12).

Leon contends that Defendants breached their obligation to make "appropriate distributions" to him (*id.*, ¶ 15), instead, making "a lesser or no" distribution to him (*id.*, ¶ 16), and that this constituted a breach of their fiduciary duty to him (first cause of action). Leon's remaining causes of action are only against Gary for breach of contract for failure to make

"appropriate distributions" regarding the East 76th Street Property (second cause of action), the East 82nd Street Property (third cause of action), the East 77th Street Property (fourth cause of action) and the East 83rd Street Property (fifth cause of action). This action was commenced on November 24, 2010 by filing a summons and complaint.

The Accounting Action was commenced on July 17, 2008, and in it, Leon and Saul Spitz, a purported 50% owner in the East 83rd Street Property, sought an accounting as to the Properties from April 2006, injunctive relief as to the management of the Properties, including the removal of Gary, Jonathan and Realty from management, cash distributions and other damages. The court's computer records indicate that the Accounting Action is on the trial calendar, Leon's and Spitz's attorney having filed a note of issue on April 6, 2010, and the matter is ready for trial.

Defendants contend that Leon transferred management of the Properties to Gary, after Leon's misappropriation of \$2.5 million was discovered (Gary affidavit dated March 10, 2011, ¶¶ 7-8 [Gary affidavit]), that Jonathan handles the day to day operations of Realty (*id.*, ¶ 9) and that Gary is the managing member of the various business entities managing the Properties, with discretionary authority to make distributions and to determine the amount of such distributions (*id.*, ¶ 10). They also state that the

distributions were correct, since they reflected reductions to Leon's capital accounts, due to his financial abuses (Gary affidavit dated May 16, 2011, ¶¶ 10-18).

Defendants further assert that the East 76th Street Agreement, governing the East 76th Street property, contains an arbitration clause (the Arbitration Clause) providing that "[a]ny dispute arising of this agreement shall be resolved by arbitration" and that, pursuant to the Arbitration Clause, the claims against Gary relating to the East 76th Street Property should proceed to arbitration, and should be stayed or dismissed against Jonathan and Realty.

Defendants further contend that Leon's assertions of breach of fiduciary duty are duplicative of his breach of contract claims, since it is based upon the purported failure to make proper "distributions to [him]" (complaint, ¶ 16). They further assert that the breach of fiduciary duty claim lacks the specificity required by CPLR 3016 (b).

Defendants also state that the claims for breach of contract of the East 82nd Street Operating Agreement (third cause of action) and East 77th Street Operating Agreement (fourth cause of action) do not lie against Gary, but rather against East 82nd Street LLC and East 77th Street LLC, respectively, under their respective operating agreements and Limited Liability Company Law (LLC Act) §

609.

Defendants also assert that the determination to pay distributions and the amount of such distributions is protected by the business judgement rule.

Finally, Defendants state that the Accounting Action lacks common issues of law and fact to this action and that the Accounting Action is so procedurally advanced that the delay involved in consolidation would prejudice them.

In reply, Leon asserts that he was "maliciously [singled] out for unequal treatment" (Leon affidavit, ¶ 14), and that Gary purportedly waived arbitration by participating in the litigation of the Accounting Action (*id.*, ¶ 20). He states that neither Jonathan and Realty are signatories to the East 77th Street Agreement and, consequently, arbitration should not proceed.

DISCUSSION

Arbitration

"Arbitration is favored in New York State as a means of resolving disputes, and courts should interfere as little as possible with agreements to arbitrate" (*Shah v Monpat Constr., Inc.*, 65 AD3d 541, 543 [2nd Dept 2009]). In arbitration, the parties give up many rights, both substantive and procedural (*id.* at 543; *Merrill Lynch, Pierce, Fenner & Smith v Benjamin*, 1 AD3d 39, 43 [1st Dept 2003]). For this reason, "a party may not be

compelled to arbitrate a dispute unless there is evidence which affirmatively established that the parties clearly, explicitly, and unequivocally agreed to arbitrate the dispute" (*God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 10 AD3d 671, 672 [2nd Dept 2004], *affd* 6 NY3d 371 [2006]).

A party can be deemed to have waived its right to arbitration by "litigation activity ... clearly inconsistent [with arbitration]" (*Sherrill v Grayco Bldrs.*, 64 NY2d 261, 272 [1985] [internal quotation marks and citations omitted]). However, since arbitration is favored as a method of resolving disputes, the crucial question is whether the degree of participation manifests an affirmative acceptance of litigation (*Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66 [2007]).

Leon's claims in the Accounting Action were principally for financial information as to the Properties and management of the business entities which ran the Properties. This is not so closely related to the distribution of proceeds involved in this action that would warrant finding that Gary has affirmatively accepted litigation and, thereby, waived his right to arbitration (*Court v MacWeeney*, 195 AD2d 381, 382-383 [1st Dept 1993]). Therefore, the general rule that arbitration of claims pursuant to an agreement should proceed must prevail.

The claim against Jonathan, a non-signatory, relating to the

East 76th Street Property is "sufficiently similar so that the arbitration proceeding might resolve the disputed issues" (*Brown v V & R Adv.*, 112 AD2d 856, 859 [1st Dept 1985], *affd* 67 NY2d 772 [1986]) thereby warranting staying the action against Jonathan relating to the East 76th Street Property until the arbitration between Leon and Gary is concluded.

Dismissal Standard

On a motion to dismiss pursuant to CPLR 3211, the court must accept as true, for the purpose of deciding the motion, the allegations of the complaint and afford them every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Breach of Fiduciary Duty

Leon has alleged that he was "maliciously [singled] out for unequal treatment" (Leon affidavit, ¶ 14), that this was done by Jonathan and Realty, as well as by Gary, and that the alleged "tampering with the capital accounts" was done in bad faith and out of enmity towards him (*id.*, ¶ 13). Shareholders in closely held corporations have a fiduciary relationship towards other shareholders (*Global Mins. & Metals v Holme*, 35 AD3D 93, 98 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]; *Brunetti v Musallam*, 11 AD3d 280 [1st Dept 2004]) and the same rule applies with limited liability companies. However, the claim against Realty for alleged breach of fiduciary duty must be dismissed since "a corporation

does not owe fiduciary duties to its members or shareholders." (*Hyman v New York Stock Exch.*, 46 AD3d 335, 337 [1st Dept 2007]). Since Leon's only cause of action against Realty is for breach of fiduciary duty and Realty has no fiduciary duty towards Leon, Leon's complaint as against Leon must be dismissed.

Accepting Leon's allegations as true, solely for the purpose of deciding Defendants' motion, Leon has adequately stated a cause of action for breach of fiduciary duty against Gary and Jonathan. Moreover, the allegations of self-interest and unequal treatment also raise "a question of fact ... [as to] [w]hether or not the business judgement rule applies" (*Bryan v West 81 St. Owners Corp.*, 186 AD2d 514, 515 [1st Dept 1992]; see also *Matter of Levandusky v One Fifth Ave. Apt. Owners Corp.*, 75 NY2d 530, 540 [1990]). Dismissal of Leon's complaint based upon the business judgement rule is, therefore, denied.

With regard to the purported inadequate specificity, CPLR 3016 (b) only requires sufficient detail to clearly inform a party as to the incidents complained of (*Shearson Lehman Bros. v Bagley*, 205 AD2d 467 [1st Dept 1994]; *Board of Mgrs. of 411 E. 53rd St. Condominium v Dylan Carpet*, 182 AD2d 551, 552 [1st Dept 1992]). Leon has adequately identified the basis of his claim and dismissal based upon inadequate specificity is denied. Gary and Jonathan may seek additional details through the discovery process.

Duplicative Claims

Defendants also seek dismissal of the breach of fiduciary duty cause of action, contending that it is duplicative of Leon's contract causes of action. However, Leon's complaint raises alleged breach of contract causes of action solely against Gary. Gary states that he was the managing member of the business entities managing the Properties, and that he had the responsibility to determine whether to make distributions, and, if so, the amount (Gary affidavit, ¶ 10). This sufficiently raises a breach of fiduciary duty claim, independent of Gary's alleged contractual obligations, in light of the duties owed between shareholders and, similarly, between members of closely held business entities (*Rodin Props. -Shore Mall, N.V. v Ullman*, 264 AD2d 367, 368 [1st Dept 1999]).

LLC Liability

The East 82nd Street Operating Agreement and the East 77th Street Operating Agreement have identical provisions (paragraph 15) limiting liability for obligations and liabilities of the respective LLCs to that encompassed by the LLC Act (motion, Exhibits E, F). LLC Act § 609 restricts liability against a member of a limited liability company in a similar fashion to those of a corporate shareholder, who cannot be held liable due to his status for the corporation's action (*Matias v Mondo Props. LLC*, 43 AD3d

367, 367-368 [1st Dept 2007]; *Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 210 [1st Dept 2005]). East 82nd Street LLC and East 77th Street LLC had provisions regarding distributions in their respective operating agreements and, to the extent that these entities may have breached their obligations to make distributions, Leon's claims for breach of contract run against them, rather than against Gary (*Matias*, 43 AD3d at 367-368; *Collins v E-Magine, LLC*, 291 AD2d 350, 351 [1st Dept], *lv denied* 98 NY2d 605 [2002]). The portion of the motion seeking dismissal of the third and fourth causes of action against Gary is, therefore, granted.

Consolidation

Finally, consolidation with the Accounting Action is denied since "[e]ven where there are common questions of law or fact, consolidation is properly denied if the actions are at markedly different procedural stages and consolidation would result in undue delay in the resolution of either matter" (*Abrams v Port Auth. Trans-Hudson Corp.*, 1 AD3d 118, 119 [1st Dept 1999]).

In this matter, there is little overlap in factual or legal matters, and the Accounting Action has been on the pretrial calendar for more than a year and this action is at the very onset of litigation. Accordingly, it is

ORDERED that Defendants' motion to compel arbitration and stay the portion of this action related to the property located at 221

East 76th Street, New York, N.Y. is granted; and it is further

ORDERED that plaintiff shall arbitrate his claims against defendant Gary Pokoik in accordance with the Co-Tenancy Agreement dated December 31, 1985; and it is further

ORDERED that all proceedings in this action related to the property located at 221 East 76th Street, New York, N.Y., including plaintiff's claims against defendant Jonathan Pokoik are hereby stayed, except for an application to vacate or modify said stay; and it is further

ORDERED that any party may make an application by order to show cause to vacate or modify said stay upon final determination of the arbitration; and it is further

ORDERED that the portion of Defendants' motion to dismiss the complaint as against J. Pokoik Realty, LLC is granted, and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements as taxed by the Clerk of the Court, upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgement accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the portion of Defendants' motion seeking dismissal of the complaint is granted to the extent of dismissing

the third and fourth causes of action and is otherwise denied; and it is further

ORDERED that defendants Gary Pokoik and Jonathan Pokoik are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiff's cross motion for consolidation, is denied; and it is further

ORDERED that the remaining parties shall appear for a preliminary conference on August 11, 2011 at 9:30 a.m. in Room 304 located at 71 Thomas Street, NYC 10013.


Dated: July 11, 2011

E N T E R:

FILED

JUL 14 2011

NEW YORK
COUNTY CLERK'S OFFICE



Hon. Joan M. Kenney

J.S.C.