Singer v Seavey
2011 NY Slip Op 34009(U)
October 3, 2011
Sup Ct, New York County
Docket Number: 602568/2008E
Judge: Paul G. Feinman

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. PAUL G. FEINMAN PART 12
Justice

Singer

-v-

Seavey

INDEX NO. 602568/2008 E
MOTION DATE
MOTION SEQ. NO. 006
MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/Petition — Affidavits — Exhibits ____	
Answering Affidavits — Exhibits (Memo)____	
Notice of Cross-Motion — Affidavits — Exhibits ____	
Replying Affidavits (Reply Memo)____	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ORDERED that this motion

MOTION AND CROSS MOTION(S) ARE DECIDED
IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

Dated: OCT 03 2011

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION
☐ DO NOT POST ☐ REFERENCE
☐ Preliminary Conf. ____ ☒ Compliance Conf. 11/2/2011 2:15 pm

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

----------X

DOROTHY SINGER, NORMA BRANDES, MARS ASSOCIATES, INC., NORMEL CONSTRUCTION CORP., GARY A. SINGER, BRAD C. SINGER, STEVEN G. SINGER, WENDY BRANDES, FRIEDA TYDINGS, ADINE D. BRANDES, GEORGE KLEINMAN, GBK ASSOCIATES, INC., ELISE WEINGARTEN, individually and on behalf of FIFTH AND 106TH ST. ASSOCIATES, L.P.,

Plaintiffs,

against

ROBERT W. SEAVEY, JOHN L. EDMONDS, BNA REALTY COMPANY, LLC, DALTON MANAGEMENT CO., LLC,

Defendants.

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Index Number 602568/2008E
Mot. Seq. Nos. 006, 007, 008, 009

DECISION AND ORDER

For the Plaintiff:
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By: Sabrina H. Cochet, Esq.
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New York, NY 10022

For "Seavey Defendants":
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For Defendant Edmonds:
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Efiled papers considered in review of this motion and cross motion for partial summary judgment, and motions to discontinue, for sanctions, and to enjoin and restrain certain actions and parties:

	Papers	**Efiled Document Number**
Mot. No. 006	Order to Show Cause	45, 46
	Affirmation, Affidavit, Exhibits in Support	41, 42, 42-1
	Notice of Cross Motion, Affirmation, Exhibits, Memo of Law	74 - 76-9, 78
	Reply Affirmation, Exh. 1, 2	59, 59-1 - 59-2
	Suppl. Reply Aff., Exh. 3-5	60, 60-1 - 60-3
	Aff. in Opp to Cross Mot.	79 -81
	Interim Decision/Order	64
Mot. No. 007	Notice of Motion, Affirmation, Memo of Law	36 - 38
	Affidavit in Opposition, Exh. A, B	44, 44-1
	Interim Decision/Order	62
Mot. No. 008	Notice of Motion, Affirmation, Affidavit, Memo of Law, Exh. 1-7	54 - 57
	Answering Affidavits	72 [efiled pages 13-73]
	Memo of Law in Reply	82
	Interim Decision/Order	63
Mot. No. 009	Order to Show Cause, Affidavit, Affirmation	72
	Memo of Law in Opposition	77
Decision, 12/09/2010 First Dept. Appellate Division		58-1, 61
Decision, 04/ 12/2011 First Dept. Appellate Division		73
Transcript of Oral Argument of May 25, 2011		83, 90

PAUL G. FEINMAN, J.:

Motion sequence numbers 006, 007, 008, and 009 are consolidated for purposes of decision.

This is a derivative action for breach of fiduciary duty brought on behalf of a limited partnership known as Fifth and 106th St. Associates, L.P. (the Partnership). The complaint alleges breaches of fiduciary duties on the part of the Partnership's managing and general partners, and seeks a declaration as to defendant's John Edmonds' interest in the Partnership.[1]

By interim decisions of January 3, 2011 (motion sequence number 007), and January 4, 2011 (motion sequence numbers 006 and 008), the resolution of these motions was held in abeyance pending vacatur of the stay of all proceedings, as directed by the Appellate Division First Department in its initial December 9, 2010 decision following an appeal, in order for the parties to undertake arbitration (*Singer v Seavey*, 79 AD3d 511 [1st Dept 2010]). This decision was recalled and vacated in April 2011 by *Singer v Seavey*, 83 AD3d 481 (1st Dept 2011), which stayed all proceedings, other than any related to the fourth cause of action seeking declaratory relief (83 AD3d at 482). By interim order dated April 21, 2011, the three motions were restored to the court's motion calendar, and oral argument was held on May 25, 2011 concerning motions sequence numbers 006, 007, 008, and also 009.

In motion sequence number 006, defendant Edmonds moves by order to show cause seeking partial summary judgment pursuant to CPLR 3212 against plaintiffs and the

[1]By decision dated June 1, 2009, the claims alleging breach of contract (second and third causes of action) were dismissed without prejudice.

defendants/cross-claimants, on the ground that there is no triable issue of fact as to Edmonds' status as that of a managing general partner of the Partnership. Robert Seavey and BNA Realty oppose and cross-move pursuant to CPLR 2215 for partial summary judgment on the ground that there is no triable issue of fact that Edmonds is not a managing partner of the Partnership. In motion sequence number 007, plaintiffs GBK Associates, George Kleinman, Elise Weingarten, Loren Kleinman, and Gayle Reisman move to discontinue the action as brought by them. In motion sequence no. 008, defendants Robert Seavey and BNA Realty move for sanctions against Edmonds and his attorney, M. Douglas Haywood, Esq. In motion sequence no. 009, Edmonds moves for an order seeking injunctive relief to prohibit any action regarding transfer of Partnership assets; to enjoin the parties from barring him from the business premises, or inhibiting him from exercising his authority as a managing general partner; and for the appointment of a receiver or alternate designation to determine the financial status of the Partnership.

For the reasons set forth below, Edmonds' motion for partial summary judgment and Seavey and BNA Realty's cross motion for partial summary judgment are both denied. The motion by certain of the plaintiffs seeking to discontinue the action as brought by them is granted. The motion for by Seavey and BNA Realty for sanctions is denied. The motion by Edmonds seeking injunctive relief and for appointment of a receiver or other oversight is denied, with the branch seeking an order enjoining the parties from refusing him access to the premises and the books and records deemed withdrawn.

The principal asset of the Partnership is a large Manhattan apartment building called the Lakeview Apartments, which is part of the Mitchell-Lama housing program (Doc. 42-1, pp. 16 *et*

seq., Complaint ¶ 4).[2] The Partnership, originally formed in 1973, consists of general partnership interests and limited partnership interests; the limited partners are the plaintiffs herein (Complaint ¶¶ 4-5). Defendant Robert Seavey is a managing general partner (Complaint ¶¶ 1, 22); BNA Realty, a company controlled by Seavey and/or Edmonds, is a managing or a general partner (Complaint ¶ 23). Defendant Edmonds was a managing general partner who sold most of his interest to BNA Realty in 1999 and converted the remainder of his interest to that of a limited partner and now, according to the complaint, has an unknown interest in the Partnership (Complaint ¶ 21)..

Seavey and BNA Realty's Answer includes a cross claim against Edmonds seeking indemnification and/or contribution (Doc. 42-1 pp. 34-36 [Seavey & BNA Answer ¶¶ 52-67).

Motion and cross motion for partial summary judgment (Mot. Seq. No. 006)

Defendant Edmonds moves pursuant to CPLR 3212 for partial summary judgment against plaintiffs and cross claimants on the ground that there is no issue of fact as concerns his status as managing general partner of the Partnership. Plaintiffs have submitted no opposition.[3] Seavey and BNA Realty oppose and cross-move for partial summary judgment and a declaration pursuant to CPLR 3001 that Edmonds is not a managing general partner.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the disposition of the causes of action may be decided as a matter of law (*Security Pacific*

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[2]Because the building is part of the Mitchell-Lama housing program, various government entities, in particular the Urban Development Corporation (UDC), the Division of Housing and Community Renewal (DHCR), and the Department of Housing Preservation and Development (HPD) play a role in the functioning of the Partnership and the property (see Doc. 55, Seavey Def. Memo of Law, p. 4 n 5).

[3]At oral argument on May 25, 2011, plaintiffs' attorney indicated that plaintiffs "take no position" on the question of Edmonds' status (Docs. 83, 90 Tr. of Oral Arg. 05/25/2011 at 10:22-25).

Bus. Credit, Inc. v Peat Marwick Main & Co., 79 NY2d 695 [1992], *rearg denied* 80 NY2d 918 [1992]). To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor (*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]). Summary judgment will be granted if the proponent makes a prima facie showing of entitlement to judgment as a matter of law, and the opponent does not rebut that showing by raising a triable question of fact (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010] [quotation and citation omitted).

Both parties rely on various Partnership documents. Edmonds argues that the documents show that he sold his interest in 1999 and bought it back in 2001 and resumed functioning as a general partner and a managing general partner with the approval of the Partnership, including Seavey, until some time in 2007 or thereafter. Seavey and BNA concede that the documents show that Edmonds bought back his interest, but dispute that he was ever again a general or managing general partner, based on certain partnership formalities that were never complied with. The pertinent documents are discussed below.

The Amended Agreement of August 1974 sets forth certain of the Partnership provisions (Doc. 76-2 Am. Agreement).[4] "[A]ll powers and rights of the General Partners" are vested exclusively in the Managing General Partners" (Am. Agreement p. 24). The managing general

[4]The "Amended Agreement of Limited Partnership of Fifth and 106th St. Associates," dated August 9, 1974, was signed by Seavey, Edmonds, and two other entities as "General Partners," and four persons or entities as "Limited Partners" (Doc. 76-2).

partners are to "act unanimously at all times; otherwise their actions shall be null and void." (Am. Agreement p. 25). As long as the Project is subject to the Private Housing Finance Law and the Urban Development Corporation Act, the Agreement cannot be changed or amended without the consent of the UDC (Am. Agreement p. 49). In terms of the partners, the Agreement indicated that Seavey and Edmonds were the managing general partners, and the Housing Company was the third general partner. The partners all consented to the appointment of an additional managing general partner to be approved by the Urban Development Corporation (UDC) (Am. Agreement pp. 29-30).

The Second Amended Agreement, dated July 30, 1999 (Doc. 76-3),[5] addressed certain changes among the partners and indicated that the Partnership elected to be governed by Article 8-A of the Partnership Law (Sec. Am. Agreement p. 6). Of particular relevance here is that Edmonds "assigned, transferred and conveyed 6.3% of his 7.5 % general partnership interest to BNA Realty Company, LLC," and upon consent of all the partners, BNA was admitted to the Partnership as a general partner with a 6.3% interest "with all of the general partnership powers previously held by Edmonds and subject to all of the general partnership restrictions and obligations previously imposed upon Edmonds" (Sec. Am. Agreement p. 3). "All references to Edmonds as a general partner in the partnership agreement are deemed deleted and replaced by BNA." (Sec. Am. Agreement p. 4, para. 8). The partners also agreed that Edmonds would retain 1.2% of his partnership interest as a limited partner, with the interest to be transferred to BNA

[5]The "Second Amended Agreement of Limited Partnership of Fifth and 106th St. Associates, L.P," dated July 30, 1999, was signed by Seavey, Edmonds, BNA Realty by Avery Seavey, Mars Associates and Normel Construction Corp. by Joseph Brandes, GBK Associates by George Kleinman, and George Kleinman, Joseph Brandes, Martin Singer by Dorothy Singer, Executrix, and Sam Singer by Norma Brandes, Executrix. (Doc. 76-3).

upon Edmonds' demise (Sec. Am. Agreement pp. 1- 2). In addition, Edmonds "irrevocably appoint[ed]" BNA as his attorney-in-fact to make any and all decisions concerning his former general partnership interest and to execute and deliver on his behalf any amendment or restatement of the Partnership Agreement" and this power of attorney "shall survive . . the further transfer by Edmonds of all or any portion of his remaining partnership interest" (Sec. Am. Agreement pp. 3-4, para. 5).

Separately, Seavey on behalf of BNA Realty, and Edmonds, signed an "Agreement for Purchase and Sale of Partnership Interest," dated July 26, 1999, conditioned on the partners' consent, concerning the transfer from Edmonds to BNA Realty (Doc. 42-1, pp. 39 *et seq.;* p. 41). The Agreement articulated the terms by which Edmonds would sell his interest in the Partnership to BNA Realty for $325,000 and retain a certain interest as a limited partner to revert to BNA on his death (*id.* p. 41 ¶ 3[b]). It also provided that prior to January 31, 2001, Edmonds "and only Edmonds" had an option to repurchase the "Assets," which included "a 6.3% interest in the Partnership as a general partner" and the retained interest (Doc. 42-1, p. 41 ¶ 5). If he wished to exercise this option, Edmonds was to send notice to BNA, the closing was to occur within 10 business days thereafter, and the amount to be repaid, if full payment had been made by BNA, was $393,500 (Doc. 42-1, pp. 41-42 ¶ 5). Edmonds exercised his option, and an "Assignment" was signed by BNA Realty and Edmonds on January 9, 2001, and notarized by Robert Seavey, in which BNA sold and transferred to Edmonds "a 6.3% interest in the . . . Partnership . . as a general partner," as well as the "retained interest" that was to have reverted to BNA Realty upon Edmonds' demise, in consideration for $393,500 (Doc. 76-4, p. 2).

Edmonds argues that he resumed his managerial role with the approval of Seavey, and

points to subsequent documents that explicitly indicate that he a general partner, and implicitly that he is a managing general partner. For instance, Seavey issued letters to three banks on May 13, 2002 requesting that statements be sent to Edmonds as "general partner" in the Partnership (Doc. 42-1, pp. 58-61). On October 22, 2001, both he and Seavey are termed "general partners" with the authority to bind the Partnership, presumably a managerial function, in an Investment Resolution signed by Seavey allowing Chase Investments Services Corp. to purchase investments on behalf of the Partnership; the Resolution provided that duplicate statements were to be sent to Edmonds (Doc. 60-1). Furthermore, the partners understood him to be a managing general partner, as seen in the May 1, 2007 Letter of Understanding and Consent, signed by Seavey, the two Class A limited partners, the Class B limited partner, and eight "Holders of Economic Interests in the Partnership," which is addressed to Seavey as "Managing General Partner" and to John Edmonds without title, but refers in its first paragraph to both Seavey and Edmonds as "managing general partners," and includes signature lines for both Seavey and Edmonds as "managing general partners."[6]

Contrary to Edmonds' claims, the documents do not sufficiently establish that upon repurchase of his interests in the Partnership from BNA Realty in 2001, he automatically resumed his status as managing general partner. However, the July 26, 1999 "Agreement for Purchase and Sale of Partnership Interest" indicates specifically that Edmonds had the option, which he took, of repurchasing the "6.3% interest in the Partnership *as a general partner*" (Doc. 42-1, p. 41 ¶ 5). Edmonds' November 17, 2010 "affidavit" in support of his motion is not notarized and does not further establish his entitlement to summary judgment (Doc. 42). When

[6]The document is not signed by Edmonds.

deciding a motion on summary judgment, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Turning to the cross motion for summary judgment made by Seavey and BNA, the court begins with the observation that the motion is unaccompanied by a first-person affidavit (see CPLR 3212 [b]). Cross movants' attorneys argue, as noted above, that Edmonds is not a managing general partner because there was never full compliance with the partnership formalities as set forth in the Partnership Agreements. They point to the 1974 Amended Agreement which states that an additional Managing General Partner must be specifically appointed by the existing Managing General Partner and approved by the UDC, and the limited partners were to receive notice of the admission. Defendants argue, without a first-person affidavit from Seavey, that he did not appoint Edmonds, the UDC never approved readmission of Edmonds, the Limited partners did not receive written notice, and Edmonds did not receive a necessary approval from the Division of Housing and Community Renewal (Doc. 75 p. 4). Buttressing their argument, they point out that while the partners approved of the transfer of interest from Edmonds to BNA in 1999, there is no subsequent amendment to the Partnership agreement that indicates Edmonds' return or resumption of duties as a managing general partner.

Edmonds in essence argues that it was understood that he resumed his prior status and interest upon buying back the interest from BNA in 2001. The problem lies in there not being a document memorializing the Partnership's understanding and agreement that Edmonds could buy back his interest in the Partnership within a specified time period, let alone what this buy-back

actually entailed. Notably, the 1999 Second Amended Agreement providing for the sale and transfer of Edmonds' interest to BNA Realty does not mention the possibility of repurchase or that the partners approved of the possibility. As well, the Agreement for Purchase and Sale signed by Seavey and BNA with Edmonds is silent as concerns whether the "6.3% interest in the Partnership as a general partner" included managerial functions and status.

The few documents submitted that were created subsequent to Edmonds' resumption of his partnership interest tend to suggest that the partners agreed with and intended that Edmonds be allowed to resume his former position as a managing general partner, and that Seavey and Edmonds appear to have conducted partnership business as if Edmonds were a managing general partner. This could be understood based on the terms of the Amended Partnership Agreement noted above stating that all powers and rights of the general partners are vested exclusively in the managing general partners, and based on Seavey's instructing various financial institutions to add Edmonds' name to their distribution lists, seeming to suggest that Seavey intended both men to make financial and investment managerial decisions for the Partnership.

When the intent of an agreement must be gleaned from evidence that is disputed, or inferences outside the written words of the contract, a question of fact is presented and summary judgment is not appropriate (*Ashland Mgmt. Inc. v Janien*, 82 NY2d 395, 401-402 [1993]). Accordingly, the cross motion seeking summary judgment and a declaration that Edmonds is not a managing general partner must be denied.

Motion to Voluntarily Discontinue (Mot. Seq. No. 007)

Plaintiffs GBK Associates, Inc., George Kleinman, Elise Weingarten, Loren Kleinman, and Gayle Reisman move pursuant to CPLR 3217 (b) to voluntarily discontinue this action on

their behalf. According to their attorney, on October 7, 2010, they sold their interests in the Partnership to LP Solutions, LLC (Doc. 38 Cochet Aff. ¶ 3). LP Solutions informed plaintiffs' attorney that it does not wish to participate in the lawsuit brought against defendants (Doc. 38 Cochet Aff. ¶ 5). According to plaintiffs' counsel, the attorney for Seavey and BNA Realty have agreed their clients would sign a stipulation of voluntary discontinuance, but Edmonds' attorney indicates he will not agree (Doc. 38 Cochet Aff. ¶¶ 8, 9). Plaintiffs argue that Edmonds will suffer no prejudice and since they no longer have any interest in the Partnership, and there is no counterclaim asserted by any of the defendants, their motion should be granted (Doc. 38 Cochet Aff. ¶ 12).

CPLR 3217 (b) authorizes a court to grant a motion for voluntary discontinuance requested by a party asserting a claim, upon terms and conditions as the court deems proper. The determination of whether to grant a motion for discontinuance is within the court's sound discretion, and "ordinarily" a plaintiff has a right to discontinue a pending action at any time "unless substantial rights have accrued or [its] adversary's rights would be prejudiced thereby." (*Louis R. Shapiro, Inc., v Milspemes Corp.*, 20 AD2d 857 [1st Dept 1964]). However, pursuant to CPLR 3217 (b), after a cause has been submitted to "the court or jury to determine the facts," the court may not order an action discontinued except upon the stipulation of all parties appearing in the action.

Here, the parties have previously been directed to undertake arbitration as required by the terms of the Partnership agreements. In *Jamaica Hosp. Med. Center, Inc. v Oxford Health Plans [NY], Inc.*, 58 AD3d 686 (2d Dept. 2009), a motion to voluntarily discontinue was denied as this was seen as an attempt to circumvent the prior order compelling arbitration. In the case at bar,

however, there is no such concern that plaintiffs are actually attempting to avoid arbitration. The court notes that Edmonds' opposition consists only of an "affidavit" that is not notarized, and two exhibits including a portion of the Amended Agreement (Docs. 44, 44-1 [see Doc. 76-2 Am. Agreement]). Edmonds argues in essence that the Partnership Agreement requires the managing general partners to agree in writing as to any transfer of interest by the limited partners, and that as he has not agreed, the purchaser of plaintiffs' interests should be on notice that there may be a "considerable cloud" on the title (Doc. 44 Edmonds. Aff. ¶ 4; Doc. 44-1 [excerpt from Am. Agreement, p. 36]). This argument has little merit here, as the purported purchaser's concerns have no bearing in this litigation alleging breach of fiduciary duty. Furthermore, Seavey and BNA Realty provide a copy of the "Assumption and Consent" signed on October 7, 2010, by LP Solutions, LLC, and Seavey as "a managing general partner" of the Partnership, showing that Seavey gave consent to the transfer of the limited partners' interests "subject to the consent of Edmonds, if required" (Doc. 56-6 Assumption & Consent p. 2 § 3). LP Solutions acknowledged that no representation had been made as to the necessity for Edmonds' consent, and until the issue of Edmonds' status is determined, LP Solutions has no "right to vote the Interests in its own name" (*id.*). There being no actual prejudice shown, those plaintiffs who seek to discontinue this action should have their motion granted.

Motion for Sanctions (Mot. Seq. No. 008)

Defendants Seavey and BNA Realty move for an order pursuant to NYCRR § 130-1.1 imposing sanctions against Edmonds and his attorney, M. Douglas Haywoode, Esq. (Doc. 54).

Under § 130-1.1 of the New York Rules of Court, the court may award sanctions costs, in the form of reimbursement for actual expenses incurred and attorneys' fees, resulting from

"frivolous conduct." Conduct is frivolous when it is "completely without merit in law or fact and cannot be supported by a reasonable extension, modification or reversal of existing law," or "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another," or "asserts material factual statements that are false." (*Yenom Corp. v 155 Wooster St., Inc.*, 33 AD3d 67, 73 [1st Dept 2006] [citing 22 NYCRR 130-1.1 (c)]). Movants argue that Edmonds and his attorney have engaged in motion practice completely without merit in law or fact, undertaking primarily to delay or harass, and containing false material factual statements.

Edmonds and his attorney argue that as the situation has unfolded, the need has arisen again to seek certain injunctive relief and to make certain claims, and that sanctions under NYCRR § 130-1.1 are not warranted.

Neither side is without blemish in their conduct during this litigation. To the extent that Seavey and BNA Realty couch their arguments in terms of what went on in the federal court litigation, this court will not address them. Their argument that the order to show cause filed by Edmonds and his attorney seeking injunctive relief (denominated motion sequence no. 009), is "completely without merit" itself lacks sufficient merit. For instance, although Phyllis Seavey submits an affidavit explaining an incident in 2007 in which Edmonds was told that security would be called if he did not leave their law office because she felt threatened by him (Doc. 57 Seavey Aff. ¶¶ 1-5), until the submission by Edmonds of his April 19, 2011 affidavit indicating he has now "regained the right of entrance" (Doc. 72 p. 13 *et seq.* [Edmonds Aff. ¶ 7]),[7] Seavey and BNA Realty submitted nothing other than the statements by their attorney to indicate that

[7]The first page of Edmonds' Affidavit is missing from the efiled copy.

Edmonds has always had access.[8] Thus the court cannot entirely ignore Edmonds' demands to have access. Seavey/BNA Realty's assertion that Edmonds' claims concerning mismanagement by Seavey of the partnership are false is, at the very least, a question of fact given the claim of breach of fiduciary duty. Other claims and counterclaims concerning whether and when certain documents were produced show no credit to either side, given the rancourous nature of this litigation which has taken place in both federal and state court. The court also has no way to gauge the "outrageousness" of Mr. Haywoode's comment concerning Seavey's memory and competency (Doc. 55, Seavey Defs.' Memo of Law p. 9).

It is disturbing however, that counsel for Edmonds continues to assert, in April 2011 (Doc. 81, Memo of Law p. 6), a claim made originally in his November 16, 2010 affirmation (Doc. 41 ¶ 11), that Seavey had not properly served his motion to dismiss the complaint on counsel's office, after appearing to concede in his reply papers of December 14, 2010 that the motion to dismiss was made before he filed Edmonds' Answer (Doc. 59 ¶ 12). Indeed, it appears that Edmonds' counsel's argument is actually that some of the exhibits contained in Seavey/BNA Realty motion papers should have been produced earlier in the course of discovery in the federal action (*id.*). This may be a legitimate argument, yet continuing to couch it as a failure by Seavey/BNA Realty to properly serve the motion to dismiss on Edmonds, requiring them to respond in protest, is inaccurate and a waste of everyone's time. Accordingly, although the court finds that sanctions pursuant to NYCRR § 130-1.1 are not warranted, counsel is urged to be careful in his characterization of the record.

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[8]The court notes the averments of Mr. Mastro, as an officer of the court, that Edmonds received access for six months in 2007 (Doc. 76-7 Oral Arg. of Nov. 12, 2010 at 13: 13-17), and that he has not and would not be barred from the property and the books and records (*id.* at 15:6-8; 16:17-19; 21:15-17).

Motion for Injunctive Relief (Mot. Seq. No. 009

Edmonds again moves for an order to enjoin defendants from taking any action regarding transfer of Partnership assets or making any payments or transfer of funds with certain exceptions, to restrain all parties from inhibiting him from exercising his authority as a managing general partner, and to appoint a receiver to determine the financial status of the Partnership. The branch of his motion seeking to enjoin the parties from barring him or his representative from the business premises is deemed withdrawn, pursuant to his averments dated April 19, 2011 (Doc. 72 p. 13 *et seq.* [Edmonds Aff. ¶ 7]), discussed above.

Preliminary injunctive relief will only be granted where the movant establishes a clear right thereto under the law and demonstrates a clear right to relief that is plain from the undisputed facts (*Hoeffner v John F. Frank, Inc.*, 302 AD2d 428, 429-430 [2d Dept 2003]). To prevail in a motion for preliminary injunction, the party seeking injunctive relief must demonstrate a probability of success on the merits; danger of irreparable injury if the injunction is not granted; and that the equities balance in its favor (*Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]). A preliminary injunction will not be granted where there are issues of fact (*see Lincoln Plaza Tenants Corp. v MDS Properties Dev. Corp.*, 169 AD2d 509 [1st Dept 1991]).

Edmonds brings this motion subsequent to a meeting of the "so-called board" in March 2011 in which "persons wholly unknown and never approved" by Edmonds declared themselves to be members of the Partnership and "spearheaded resolutions seeking to retain real estate brokers to effectuate the sale of the partnership asset" (Doc. 67 p. 11 [OSC Haywoode Aff. ¶ 24]). Edmonds' attorney indicates that the Seavey defendants and the purported new limited partners/investors have declared that the Partnership and another interest in which Edmonds is

involved "are becoming bankrupt" and require "emergency efforts to retain brokers and complete sales" (*id.* ¶ 22). He points to references allegedly made in presentations by defendant Dalton Management Co. "based on information in its records" (*id.* ¶ 23). He does not include any documentation to substantiate this claim, other than a transcript of a partners meeting held on March 30, 2011 (Doc. 67 pp. 27-73 [Ex.B Transcript]). The transcript consists of a discussion about selling the Property and possible brokers and pricing; mention was made that the Property is losing money and never made a profit (Doc. 67 Transcript p. 23). The transcript makes clear that the dispute between Edmonds and Seavey is acknowledged but that there is a desire by some, if not all, of the other partners, to move forward with a sale; there is also a difference of opinion between Edmonds who does not want to list the Property with a broker and believes a previous individual bidder has made the best offer, and some of the other partners who stated they plan to move forward and list the property with a broker (Doc. 76 Transcript pp. 25-32).

Edmonds' motion is denied, to the extent that it is not deemed withdrawn. He asks for relief that goes to the ultimate merits of the case. He has not shown how the partnership moving forward to retain one or more real estate brokers to solicit offers for sale of the Property will cause him irreparable harm. Certainly, there is no evidence of an imminent sale. He has certainly not offered sufficient evidence to show why there is need for the appointment of a receiver or for the court to order any kind of separate audit. While it seems apparent that he has rights in his capacity as a partner, only with a final resolution of his status can there be a determination as to whether he has a managing interest. Absent a finding that he is likely to prevail on that issue, any preliminary injunctive relief would be inappropriate. It is

ORDERED that the motion and cross motion seeking partial summary judgment and

declaratory relief (motion sequence no. 006) are both denied; and it is further

ORDERED that the motion for a voluntary discontinuance pursuant to CPLR 3217 (b), of the action on behalf of plaintiffs GBK Associates, Inc., George Kleinman, Elise Weingarten, Loren Kleinman, and Gayle Reisman (motion sequence no. 007), is granted, and the action shall be discontinued as to GBK Associates, Inc., George Kleinman, Elise Weingarten, Loren Kleinman, and Gayle Reisman only, upon service of a copy of this decision and order with notice of entry upon the Clerk of the Court, with the remaining parties continuing the action under this index number; and it is further

ORDERED that the motion for sanctions (motion sequence no. 008) is denied; and it is further

ORDERED that the motion for injunctive and other related relief, to the extent it was not deemed withdrawn (motion sequence no. 009) is denied; and it is further

ORDERED that the case is restored to the Part 12 compliance conference calendar on November 2, 2011 at 2:15 p.m. for purposes of entering into a final discovery order regarding the fourth cause of action only.

This constitutes the decision and order of the court.

Dated: October 3, 2011
New York, New York

Paul G. Feinman
J.S.C.