

Nimkoff v Central Park Plaza Assoc., LLC
2012 NY Slip Op 33747(U)
November 16, 2012
Supreme Court, Nassau County
Docket Number: 005307/09
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

ORIGINAL

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

BARBARA R. NIMKOFF, AS EXECUTRIX
OF THE ESTATE OF MARTIN B. NIMKOFF,
DECEASED,

Plaintiff,

INDEX No. 005307/09

MOTION DATE: Sept. 24, 2012
Motion Sequence # 003, 004

-against-

CENTRAL PARK PLAZA ASSOCIATES, LLC,
DONALD MONTI, GERARD A. LEVI,
RALPH F. PARISI, BYRON H. TERK,
MARIO FRACASSA, LAWRENCE J. PACERNICK,
FREDERICK KAPLAN, WILLIAM CACCESE,
JEFFREY GOODMAN, JEFFREY SHERWOOD,
BERNARD POLATSCH, ILAN ISRAELI,
STANLEY WEINREB, CHANCHAI, SAHA,
THOMAS SZULZ, RONALD C. RICHMAN,
JOHN DOE 1, JOHN DOE 2, JOHN DOE 3,
JOHN DOE 4 and CONCORDE MANAGEMENT
SERVICES, INC.,

Defendants.

The following papers read on this motion:

- Notice of Motion..... X
- Cross-Motion..... X

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Reply Affirmation/Affidavit..... X

Motion by defendants Central Park Plaza Associates, LLC and Concorde Management Services, Inc. for a protective order is denied. Cross-motion by plaintiff to strike the answer is denied.

This is an action for breach of contract and breach of fiduciary duty. Plaintiff Barbara Nimkoff is the executrix of her husband, Dr. Martin Nimkoff, who died on April 15, 2004. At the time of his death, Nimkoff held a 3.602 % membership interest in defendant Central Park Plaza Associates, LLC. Central Park's only asset was an office building located at 700-76 Old Country Road in Plainview. Plaintiff alleges that Central Park sold the building for \$ 7 million in April 2008.

Paragraph 10 of Central Park's operating agreement, dated June 7, 1995, provides that the limited liability company would dissolve upon the death or bankruptcy of one of the members. However, paragraph 10 was amended by a letter agreement dated June 22, 1999 which provides that death or bankruptcy would not result in the dissolution of the company.

The operating agreement further provides that a member may dispose of his interest only in accordance with the terms of an antecedent partnership agreement. The partnership agreement, dated April 16, 1991, requires the estate of a deceased partner to sell the partner's interest to the partnership. The purchase price is based upon "the last stated value...to be agreed upon on an annual basis by the partners...." If the partners fail to agree upon the stated value in any given year, "the last stated value shall be controlling."

Defendants have tendered plaintiff the amount of \$111,107.14, based upon a stated value of \$2,750,000 as of March 7, 2001. Although 3.602 % of \$2,750,000 is \$99,055, defendants elected to tender a lump sum, including interest, rather than pay the estate over a 10-year period, as provided in the agreement.

In this action, plaintiff seeks 3.602 % of the \$ 7 million sale proceeds, or \$252,140. Plaintiff asserts claims for breach of the operating agreement and breach of fiduciary duty. Plaintiff's theory is that defendants breached their fiduciary duty to Nimkoff by refusing to update the stated value of the property.

Plaintiff has taken the deposition of defendant Donald Monti, the managing member of Central Park and president of defendant Concorde Management Services, the property

manager. Plaintiff seeks to take the deposition of the individual named defendants, who have minority membership interests in Central Park. More specifically, plaintiff seeks to depose defendants Gerard Levi (6.551 % membership interest), Ralph Parisi (4.79 % interest), Byron Terk (3.602 % interest), Mario Fracassa (11.546 % interest), Lawrence Pacernick (8.059 % interest), Frederick Kaplan (4.4 % interest), William Caccese (3.439 % interest), Jeffrey Goodman (1.112 % interest), Jeffrey Sherwood (4.69 % interest), Bernard Polatsch (6.551 % interest), Ilan Israeli (7.113 % interest), Stanley Weinreb (15.822 % interest), Chanchal Saha (3.696 % interest), Thomas Szulz (4.35 % interest), and Ronald Richman (1.112 % interest).

Defendants Central Park, Concorde, and certain of the individual defendants move for a protective order prohibiting the depositions of the above individual defendants on the ground that Donald Monti purportedly is the only defendant with personal knowledge of the case. Plaintiff cross moves to strike the answer on the ground that the individual defendants have failed to appear for their depositions as directed by the court.

In theory, every member of Central Park had an interest in the stated value of the property being updated regularly, so that a member's estate would be bought out at current market value, in the event of the member's death. However, if Nimkoff was elderly or in poor health after 2001, while a majority of the members were "young and in good health," those members might have had an incentive to allow the stated value to become "out of date." On the other hand, in a time of rising real estate values, a majority of the members may have decided to forego increasing the stated value in order to avoid recognizing a capital gain.

The business judgment doctrine bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes (*Consumers Union v New York*, 5 NY3d 327, 372 [2005]). A similar discretion is accorded to members of limited liability companies (See Limited Liability Company Law § 409; *Van Der Lande v Stout*, 13 AD3d 261 [1st Dept 2004]). Thus, the business judgment rule bars inquiry into the members' decision not to update the stated value, provided the decision was taken in good faith. Whether the individual members of Central Park acted in good faith in failing to update the stated value will depend upon their assessment of the value of the property, their health and stage of life, and their individual tax plan. These factors will likely vary from member to member and are a proper subject of discovery.

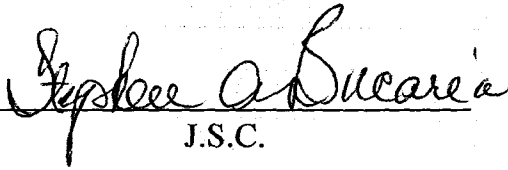
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Accordingly, defendants' motion for a protective order prohibiting discovery is **denied**. Cross-motion by plaintiff to strike the answer is **denied**. Plaintiff is directed to proceed by way of interrogatories as to the remaining defendants. The interrogatories shall be served by December 14, 2012 and shall be answered by December 31, 2012.

So ordered.

Dated NOV 16 2012


J.S.C.

ENTERED

NOV 20 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE