

**Rodriguez v Vidal**

2013 NY Slip Op 30302(U)

January 22, 2013

Sup Ct, New York County

Docket Number: 652534/2012

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Index Number : 652534/2012
RODRIGUEZ, MARIA
vs.
VIDAL, JR., MANUEL
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO.
MOTION DATE 1/10/13
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for
Notice of Motion/Order to Show Cause — Affidavits — Exhibits [No(s).]
Answering Affidavits — Exhibits [No(s).]
Replying Affidavits [No(s).]

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

Motion sequence 001 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that defendants' motion to dismiss the complaint pursuant to CPLR § 3211(a)(3) for lack of standing is denied; and it is further

ORDERED that defendant shall serve responsive pleadings within 30 days of the date of this order; and it is further

ORDERED that the parties shall appear for a preliminary conference on March 29, 2013, 2:15 p.m., in Part 35; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

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

Dated: 1.22.2013

[Signature] J.S.C.

HON. CAROL EDMEAD

- 1. CHECK ONE: [ ] CASE DISPOSED [ ] NON-FINAL POSITION
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 35

-----X  
MARIA RODRIGUEZ,

Index No.: 652534/2012

Plaintiff,

Motion Seq. #001

-against-

MANUEL VIDAL, JR. and R.S.V. S/S INC.,

Defendants,

-----X  
HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this declaratory judgment action, defendant Manuel Vidal, Jr. (“defendant”) moves pursuant to CPLR § 3211(a)(3) to dismiss the complaint of the plaintiff, Maria Rodriguez (“plaintiff”) on the ground that the plaintiff does not have the legal capacity to sue.

*Factual Background*

Plaintiff seeks to resolve a dispute over her alleged ownership, control and management in defendant R.S.V. S/S INC. (“RSV” or the “Company”), which interest formerly belonged to her deceased husband Victorino Rodriguez.

According to the Complaint, the Company (an automotive service station in the Bronx, N.Y.) was formed on or about October 28, 1991, with three shareholders, defendant Vidal, non-party Pedro Santana (“Santana”), and plaintiff’s husband, pursuant to an Agreement of Shareholders, dated April 29, 1992 (the “Agreement”). The Agreement was modified by the Addendum and Modification of the Agreement, dated April 6, 1998 (the “Addendum”).

Under the Agreement, Vidal, Santana and Rodriguez are directors of the Company (Article 11), and that unanimous approval of the Directors is required for certain enumerated

actions. Pursuant to Article 2 of the Agreement, plaintiff's husband and Pedro Santana had sole, exclusive and equal authority and responsibility for daily management of the Company. And, pursuant to Article 3 of the Agreement and the Addendum, the Company's net profits are to be divided and paid equally to the shareholders (*i.e.*, 33 1/3% to each).

On or about May 1, 1992, Vidal borrowed \$210,000 from plaintiff's husband and Santana and executed a Promissory Note, dated May 1, 1992 (the "Note").

Pursuant to the Addendum in 1998: (i) Vidal's indebtedness under the Note was reduced to \$100,000; (ii) ownership of the Company was vested equally (*i.e.*, 33 1/3 %) in each of plaintiff's husband, Santana and defendant Vidal; and (iii) the Company was to attempt to establish another, parallel business at the Company's present location, such as "a food mart or similar business."

Plaintiff alleges that upon plaintiff's husband death on January 1, 2001, plaintiff became the heir and authorized representative of the estate of her husband.

Under Articles 4, 5 and 6 of the Agreement, upon her husband's death, his shares were "automatically considered" for sale to the remaining stockholders by his estate, with any decision to purchase the shares to be made in writing and served by certified mail, and in the event the remaining stockholder does not accept the automatic offer to sell the shares, the Company was required to sell the Company, liquidate, or sell all the shares in a single unit. Also, upon her husband's death, the remaining shareholders were permitted to buy out the deceased shareholder's interest within 120 days.

However, the Agreement (Article 4(i) and 15) provides that prior to any purchase of the decedent's shares or the sale/dissolution of the Company, the heirs, administrators and executors

of a deceased shareholder are to be viewed, treated and act with the full rights of the decedent shareholder.

Since Vidal and Santana never bought plaintiff's husband's 33 1/3 % interest, and the Company has not been liquidated, dissolved or sold in the open market. the 33 1/3 % ownership in the Company originally belonging to plaintiff's husband now vested in plaintiff as his heir and legal successor.

For several years, plaintiff received *pro rata* distributions and payments from the Company along with the other shareholders, and was consulted and included in decision-making. However, Vidal later ignored plaintiff in matters relating to the management of the Company. Plaintiff tried repeatedly, without success, to discuss with Vidal issues relating to the overall management and direction of the Company, to no avail. Vidal's failure to recognize plaintiff's interests and to engage in discussions with her regarding Company business has led to the loss of significant opportunities and revenue, including the Exxon On the Run deal (by which the Exxon Corporation would have helped the Company finance the construction and operation of the food mart contemplated by the Addendum). Plaintiff also has sought to have the Company negotiate with its current supplier to improve upon its current oil marketing deal. This has not been pursued.

On or about December 27, 2011, Vidal had an attorney send the Company a letter purporting that Vidal was a 50% owner of the Company, and (i) stating that plaintiff was not a Company shareholder, and had no right or interest in the Company; and (ii) directing that the Company cease making payments of any kind to her. After plaintiff's counsel's response, Vidal retracted his demand that the Company stop payments to plaintiff. Plaintiff has continued to

receive payments from the Company.

However, since Vidal continues to exclude plaintiff from all Company management and refuses to discuss Company business, operations and planning with plaintiff, to the detriment of the Company. Vidal has also refused to repay the loan due under the Note despite due and repeated demand.

As such, plaintiff commenced this action for breach of the Agreement (first cause of action) and the Note (second cause of action), breach of the implied covenant of good faith and fair dealing (third cause of action), breach of fiduciary duty to the Company (fourth cause of action), conversion (fifth cause of action), and declaratory relief (sixth cause of action).<sup>1</sup>

In support of dismissal, defendants argue that in addition to the fact that plaintiff's complaint is not verified, plaintiff failed to provide any documentary evidence that her husband's Estate was ever properly probated or that she was appointed as the Estate's Fiduciary. Even if plaintiff was appointed as the proper legal representative of her husband's Estate, then, plaintiff would have to commence the action in her capacity as a fiduciary for the Estate of Victorino Rodriguez and not in her individual capacity.

#### *Discussion*

"It is well established in New York that a person who has not obtained letters as personal representative lacks standing or the legal capacity to commence an action on behalf of an estate" (*Schoeps v Andrew Lloyd Webber Art Foundation*, 17 Misc. 3d 1128(A), 851 N.Y.S.2d 74 [Sup.

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<sup>1</sup> Plaintiff seeks an injunction and declaration (1) declaring her status, rights and interest as shareholder of the Company, (2) requiring that management and control of the Company, and resolution of any resulting disputes, be conducted in accordance with the Agreement.

Ct., New York County 2007] citing EPTL § 11-3.2). In addition, EPTL § 13-3.5 states that in order to have standing and legal capacity to bring a claim on behalf of an estate in New York, a plaintiff must have been appointed as a personal representative in the United States (*Schoeps, supra, citing Tajan v Pavia & Harcourt*, 257 A.D.2d 299, 302 [1st Dept 1999]).

However, this body of law does not apply to the plaintiff herein. In the case cited by plaintiff, *Elghanayan v Elgahanayan* (190 A.D.2d 449 [1st Dept.1993]), the decedent partner's heirs commenced a claim for financial misconduct that occurred subsequent to the decedent's death. In concluding that EPTL 11-3.2 did not apply, and permitting the heirs to pursue their claim in their own names, the Court explained that "the causes of action asserted by the intervening plaintiffs are not alleged to have arisen before decedent's death and, therefore, could not have abated on his death." (*Id.* at 455).

To the extent plaintiff's claims are premised on, and triggered by, her husband's death, and did not arise prior to his death, plaintiff has standing to pursue such claims. Notably, Article 4(h) provides that:

Upon the death of either stockholder, all of the shares of stock of [the Company] presently owned or hereafter acquired by such stockholder shall automatically be considered to be offered for sale to the remaining stockholder by the estate of the decedent.

And, Article 4(i) provides that the

In the event the remaining stockholder does not accept the offer automatically made upon the death of the other stockholder, then ... [the Company] shall sell the business of [the Company] in the open market and proceed to liquidate or dissolve ... all the shares of the stock then issued and outstanding shall be sold as a single unit in the open market..."

As to those claims which could not have abated on his death, the procedural mandates of EPTL 11-3.2 do not apply. Notably, defendants cite no legal authority in response to

*Elghanayan v Elgahanayan*, or otherwise dispute its applicability to facts herein. Therefore, under *Elghanayan v Elgahanayan (supra)*, defendants' claim that the complaint is subject to dismissal for lack of standing lacks merit.

Therefore, dismissal for lack of standing is unwarranted.

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that defendants' motion to dismiss the complaint pursuant to CPLR § 3211(a)(3) for lack of standing is denied; and it is further

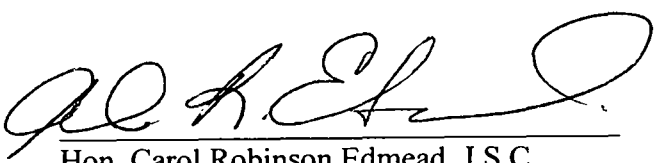
ORDERED that defendant shall serve responsive pleadings within 30 days of the date of this order; and it is further

ORDERED that the parties shall appear for a preliminary conference on March 29, 2013, 2:15 p.m., in Part 35; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: January 22, 2013

  
\_\_\_\_\_  
Hon. Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**