

Bonst Realty L.L.C. v Stapen

2013 NY Slip Op 31957(U)

July 19, 2013

Supreme Court, New York County

Docket Number: 106342/2010

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: LUCY BILLINGS
J.S.C.
Justice

PART 46

Index Number : 106342/2010
BONST REALTY L.L.C.
vs.
STAPEN, ANITA ET AL.
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 2, were read on this motion for summary judgment and dismissal of cross-claims
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1 - 2
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered ~~that this motion is~~ and adjudged that:

The court grants defendant Arber's motion for summary judgment on his claim and to dismiss cross-claims by defendants Anita Stapan, Tatiana Hirsz, Lois Stapan, and Irving Stapan to the extent set forth in the accompanying decision and pursuant to the accompanying stipulations dated 1/25/13 and 7/25/12. C.P.L.R. §§ 3001, 3211(a)(1), 3212(b).

FILED
AUG 21 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/19/13

Lucy Billings, J.S.C.
LUCY BILLINGS
J.S.C.

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

- 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 46

-----x

BONST REALTY L.L.C. and MARVIN
TARSHES,

Index No. 106342/2010

Plaintiffs

- against -

DECISION AND ORDER

ANITA STAPEN, TATIANA HIRSU, LOIS
STAPEN as Trustee of the LOIS R.
STAPEN FAMILY TRUST, IRVING STAPEN,
WACHOVIA BANK, N.A., as Trustee of the
KRITCHMAN MAR TRUST, MYLES ARBER,
ADELE GODOFSKY as Trustee Under
Agreement Dated 5/2/89, LUCILLE
BRODIO, DONALD R. TARSHES as Trustee
of TRUST B OF TARRIES 1984 LIVING
TRUST, SHERRY ARBER, BILLIE BERNSTEIN,
JEFFREY BERNSTEIN, MARTIN L. EDELMAN
& DENNIS A. ROACH as Trustees of the
RICHARD M. COHEN REVOCABLE TRUST,
MARTIN L. EDELMAN as Trustee of the
MARILYN DAVIMOS PROPERTY TRUST, and
KAREN COHEN,

FILED
AUG 21 2013
COUNTY CLERK'S OFFICE
NEW YORK

Defendants

-----x

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiffs, a limited liability company (LLC) and Marvin
Tarshes, one of its two managers, have sought a judgment against
defendants, plaintiff LLC's members, distributing plaintiff LLC's
remaining assets to its members. Defendant Arber, the other
manager and a member of plaintiff LLC, claimed \$550,400.00
against plaintiffs, co-defendants, and the distribution of
assets, as compensation for services he performed and as
reimbursement for expenses he incurred on plaintiff LLC's behalf.

Defendants Anita Stapen, Tatiana Hirsu, Lois Stapen, as Trustee of the Lois R. Stapen Family Trust, and Irving Stapen (Stapen defendants) cross-claimed against Arber for (1) a declaratory judgment that he is not entitled to any proceeds from plaintiff LLC's assets and (2) damages for his breach of his fiduciary duty. The court dismissed the Stapen defendants' counterclaims, including for an accounting, in an order entered June 13, 2012, based on a stipulation dated June 7, 2012.

Defendant Arber has moved for summary judgment on his claim, C.P.L.R. § 3212(b), and for dismissal of the Stapen defendants' cross-claims. C.P.L.R. § 3211(a)(7). By a stipulation January 29, 2013, Arber withdrew his motion insofar as it sought sanctions against the Stapen defendants, and they withdrew their cross-claim against Arber for breach of his fiduciary duty. For the reasons explained below, and without opposition, the court grants the remainder of Arber's motion, seeking summary judgment on his claim for compensation for services performed and reimbursement for expenses incurred and dismissal of the Stapen defendants' cross-claim for a declaratory judgment to the extent set forth.

II. SUMMARY JUDGMENT ON ARBER'S CLAIM

In a stipulation dated July 25, 2012, Arber, co-defendants other than the Stapen defendants, and Tarshes agreed that Arber be paid \$210,000.00 for his fees and expenses, constituting approval by both of plaintiff LLC's managers and by 62.5% of its members in interest. Its operating agreement allows its two

managers to decide and act "with respect to the Company's business," Aff. of Gregory J. Ryan Ex. G ¶ 5; Aff. of Myles Arber Ex. A ¶ 5, consistent with New York Limited Liability Company Law § 408(b). Thus Arber's and Tarshes's execution of the stipulation would be enough to authorize the payment to Arber, unless it were viewed as plaintiff LLC incurring an indebtedness "other than in the ordinary course of business." N.Y. Ltd. Liab. Co. Law § 402(c)(2). In the latter instance, Limited Liability Company Law § 402(c) requires approval by a majority of plaintiff LLC's members in interest.

Consequently, even if the stipulated payment to Arber were viewed as outside "the ordinary course of business," since more than a majority of plaintiff LLC's members in interest signed the stipulation, it is sufficient to authorize the action. N.Y. Ltd. Liab. Co. Law § 402(c)(2). Having presented evidence that the stipulation was authorized, Arber demonstrates entitlement to a judgment on his claim to the extent authorized. Kiam v. Park & 66th Corp., 66 A.D.3d 415, 416 (1st Dep't 2009); TIC Holdings v. HR Software Acquisitions Group, 301 A.D.2d 414, 415 (1st Dep't 2003).

III. THE STAPEN DEFENDANTS' CROSS-CLAIM FOR A DECLARATORY JUDGMENT

In light of Arber's entitlement to judgment on his counterclaim, the Stapen defendants' entitlement to the declaratory judgment they seek, that Arber is not entitled to any proceeds from plaintiff LLC's assets, would contravene Limited Liability Company Law §§ 402(c) and 408(b) and fails as a matter

of law. See Kiam v. Park & 66th Corp., 66 A.D.3d at 416; 319 McKibben St. Corp. v. General Star Natl. Ins. Co., 245 A.D.2d 26, 29 (1st Dep't 1997). While the Stapen defendants are not entitled to the declaratory judgment they seek, the court, having granted relief on the merits of the parties' claims, may grant a declaratory judgment consistent with the decision on the merits: a result preferred over simply dismissing the claim for a declaratory judgment. Port Parties, Ltd. v. Merchandise Mart Props., Inc., 102 A.D.3d 539, 541 (1st Dep't 2013); Nineteen Eighty-Nine, LLC v. Icahn, 96 A.D.3d 603, 607 (1st Dep't 2012); Urban Justice Ctr. v. Silver, 66 A.D.3d 567, 570 (1st Dep't 2009). See Kiam v. Park & 66th Corp., 66 A.D.3d at 416.

Therefore the court declares that Arber is entitled to compensation and reimbursement as agreed by a majority of plaintiff LLC's members and to a judgment on his claim in the agreed amount. C.P.L.R. § 3001.

IV. CONCLUSION

In sum, the court grants defendant Arber's motion for summary judgment on his claim, to the extent authorized by plaintiff Bonst Realty L.L.C.'s managers and by more than a majority of its members in interest, and without opposition, for \$210,000.00. C.P.L.R. § 3212(b). The court declares and adjudges that Arber is entitled to compensation for services performed and reimbursement for expenses incurred on plaintiff

Bonst Realty L.L.C.'s behalf to that extent. C.P.L.R. § 3001.
This decision constitutes the court's order and judgment.

DATED: July 19, 2013

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

FILED

AUG 21 2013

**COUNTY CLERK'S OFFICE
NEW YORK**