

<b>Neilson v 6D Farm Corp.</b>
2013 NY Slip Op 33815(U)
January 24, 2013
Supreme Court, Westchester County
Docket Number: 20314/05
Judge: Linda S. Jamieson
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To commence the statutory time period for appeals as of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Disp \_\_\_\_\_ Dec x Seq. Nos. 7-8 Type misc.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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VERNA B. NEILSON, Individually and as  
a Shareholder of 6D Farm Corporation  
Suing in the Right of 6D Farm  
Corporation,

Plaintiff,

-against-

Index No. 20314/05

DECISION AND ORDER

6D FARM CORPORATION, DIANE S. BENEDICT,  
ELENA BENEDICT-SMITH, ANTONIO F. PINELLI,  
BENEDICT DAIRY FARMS and ELENA DUKE  
BENEDICT,

Defendants.

-----X

**FILED**  
**FEB - 7 2013**  
TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

The following papers numbered 1 to 7 were read on this  
motion and cross-motion:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Affirmation and Exhibits <sup>1</sup>	1
Memorandum of Law	2
Notice of Cross-Motion, Affidavit, Affirmation and Exhibits	3
Memorandum of Law	4
Reply Affirmation and Exhibits	5
Reply Affidavit	6
Reply Memorandum of Law	7

<sup>1</sup>Exhibits must be tabbed. Counsel is directed to review the Part Rules.

There are two motions before the Court, to which this case has been transferred. The first motion, brought by defendant Benedict Dairy Farms ("BDM") and the Estate of Elena Duke Benedict ("the Estate"), on behalf of decedent defendant Elena Duke Benedict ("decedent"), seeks (1) leave to amend the answer to include various counterclaims; (2) leave to file a late answer; (3) to dismiss the sole remaining cause of action in the complaint, the Fifth Cause of Action; (4) partial summary judgment determining the obligation of 6D Farm Corporation ("6D") to BDF; (5) partial summary judgment determining the obligation of BDF to the Estate; (6) authorization for counsel for the Estate to collect BDF's assets; and (7) authorization for post-dissolution distribution of BDF's assets to the Estate.

The second motion, filed by plaintiffs, seeks (1) to find decedent and the Estate in default; (2) a constructive trust in favor of 6D; (3) money damages; and (4) an order permitting 6D to wind up the affairs of BDF.

#### Background

At the time of her death, decedent and 6D were equal partners in BDF. Decedent was the managing general partner of BDF. 6D is now the remaining partner in BDF. Over the years, the parties commenced, and resolved, several different actions against each other. In 1998, a majority of 6D's shareholders voted to dissolve BDF. For some reason, BDF was never fully dissolved and wound up.

This litigation began in 2005, with temporary restraining orders, a successful motion to dismiss the complaint, and a trip to the Appellate Division. In a Decision dated June 16, 2009, the Appellate Division affirmed the motion to dismiss in all respects except for the Fifth Cause of Action, which it reinstated. Plaintiffs served defendants' counsel, decedent's guardian, and counsel for the guardian with Notice of Entry on June 23, 2009. When defendants failed to answer the complaint, plaintiffs served a motion for a default motion on August 21, 2009. Defendants then cross-moved for leave to serve a late answer. Because of issues involving decedent's death and the Surrogate's Court, both motions were denied without prejudice on August 23, 2011.

### Analysis

Beginning with the housekeeping issue of the caption, the Court finds that to the extent that either side seeks to amend the complaint and/or caption to reflect decedent's death and substitute in the Estate, that request is granted. Plaintiffs may submit a proposed Order amending the caption, on Notice of Settlement, within 10 days of receipt of this Decision and Order. The remaining requests to amend the Fifth Cause of Action (to find that 6D is the sole surviving partner in BDF and that as a matter of partnership law, the Estate has no rights over BDF property) are addressed below.

Next, the Court addresses defendants' request to file a late answer.<sup>2</sup> Defendants' answer was due in July 2009. They did not file any answer in July 2009. Indeed, defendants first sought leave to file a late answer in September 2009, in response to plaintiffs' motion for a default. When that motion was complicated by decedent's death, the final decision denying the motions without prejudice was decided in August 2011. Defendants waited another year, until August 2012, to file this motion seeking leave to file the late answer.

CPLR § 3012(d)<sup>3</sup> provides that in order for the Court to allow a late answer, a party must make "a showing of reasonable excuse for delay or default." Here, defendants have not made any showing of any excuse for the delay or default in 2009 or in 2011, let alone a reasonable excuse. Defendants simply ignored their obligation to answer the complaint, twice.

In opposition to the motion, plaintiffs pointed out that defendants must make a showing of a reasonable excuse for the delay. Yet in their reply papers, defendants continue to offer no excuse at all for the delay. In fact, a review of the reply papers shows that defendants argue that there is no prejudice to

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<sup>2</sup>Although they seek to "amend" the answer, this is not possible, since no answer was ever filed or served.

<sup>3</sup>Defendants refer to "the principles of CPLR 3025," which "permit the modification (amendment)" of an answer. However, in the next sentence, defendants admit that "the answer being filed is not technically an amended answer because no answer has yet been permitted by the Court to be filed." Because defendants never filed any answer, CPLR § 3025 does not apply at all here.

plaintiffs,<sup>4</sup> and that they have meritorious positions.

Defendants do not even attempt to offer **any** excuses for their lateness. The Court is thus constrained, by the express language of CPLR § 3012(d), to deny the motion to allow the late answer. See *Kolonkowski v. Daily News, L.P.*, 94 A.D.3d 704, 941 N.Y.S.2d 663 (2d Dept. 2012) (motion to compel acceptance of late answer should be denied where "defendant did not . . . proffer an excuse for its delay in serving a late answer five months after the time to serve an answer had expired."). See also *Stephan B. Gleich & Associates v. Gritsipis*, 87 A.D.3d 216, 927 N.Y.S.2d 349 (2d Dept. 2011) (finding "that the showing of reasonable excuse that a defendant must establish to be entitled to serve a late answer under CPLR 3012(d) is the same as that which a defendant must make to be entitled to the vacatur of a default under CPLR 5015(a)(1).").

Since the Court must deny the motion to file the late answer, it also must deny defendants' motion to "amend" the answer to add new counterclaims against plaintiffs and new counterclaim defendants. The Court addresses defendants' remaining requests for relief - to dismiss the Fifth Cause of Action, determine the obligations owed to BDF and the Estate,

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<sup>4</sup>Given the extreme delay involved here, there are multiple examples of prejudice. Since they are not relevant to the disposition of the motion, the Court will not examine them.

authorize counsel to collect BDF's assets, and authorize post-dissolution distribution of BDF's assets to the Estate, below.

The Fifth Cause of Action seeks, essentially, an accounting, a constructive trust, and money damages concerning BDF. Pursuant to Partnership Law § 62(4), upon the death of a partner, a partnership dissolves, as a matter of law. The remaining partnership property "vests in the surviving partner," pursuant to Partnership Law § 51(2)(d). Here, defendants argue, a different result should occur because BDF was already in dissolution at the time of decedent's death. Defendants cite no case law in support of this proposition, and research has revealed none. This is bolstered by Partnership Law § 61, which states that "On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed." The winding up of partnership affairs in this case has taken over two decades, and is not yet complete.

As the Second Department held in the case of *Fogel v. Neiman*, 288 A.D.2d 429, 733 N.Y.S.2d 482 (2d Dept. 2001), "It is well established that the representative of a deceased partner is not entitled to participate in or interfere with the continuation or winding up of the partnership by the surviving partners. The representative's only right is to demand an accounting from the surviving partners upon completion of the winding up of the partnership affairs." The winding up of BDF's affairs may be done by 6D, as the last remaining partner in BDF. See

Partnership Law § 68. ("Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representative, or his assignee, upon cause shown, may obtain winding up by the court.").

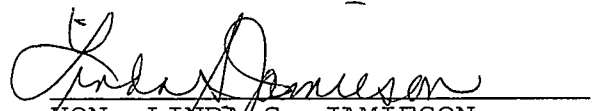
There is no basis for anyone other than 6D to wind up the affairs of BDF. Accordingly, 6D shall commence the winding up of BDF immediately. The winding up must also include an accounting, which shall be served on all parties to this action.

Once the accounting has been finalized, then the Court may, if necessary, appoint a referee to calculate the amounts owed to any of the parties. *Wiesenthal v. Wiesenthal*, 40 A.D.3d 1078, 838 N.Y.S.2d 581 (2d Dept. 2007) ("a partner may not maintain an action at law for any claim arising out of the partnership until there has been a full accounting and a balance struck, or an express agreement to pay.").

All other requests for relief are denied.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York  
January 24, 2013

  
HON. LINDA S. JAMIESON  
Justice of the Supreme Court