

<b>Nimkoff v Central Park Plaza Assoc., LLC</b>
2013 NY Slip Op 33841(U)
January 30, 2013
Supreme Court, Nassau County
Docket Number: 5307/09
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

**ORIGINAL**

Present:

**HON. STEPHEN A. BUCARIA**

Justice

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

Plaintiff,

-against-

CENTRAL PARK PLAZA ASSOCIATES LLC,  
DONALD MONTI, GERARD A. LEVI,  
ANNA ASSANTE AS EXECUTRIX OF THE  
ESTATE OF 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,  
CHANCHAL SAHA, THOMAS SZULZ, RONALD  
C. RICKMAN, JOHN DOE 1, JOHN DOE 2,  
JOHN DOE 3, JOHN DOE 4 and CONCORDE  
MANAGEMENT SERVICES, INC.,

Defendants.

TRIAL/IAS, PART 1  
NASSAU COUNTY

INDEX No. 5307/09

MOTION DATE: Dec. 20, 2012  
Motion Sequence # 003, 004, 005

The following papers read on this motion:

- Notice of Motion..... X
- Cross-Motion..... X
- Reply Affirmation/Affidavit..... X
- Order to Show Cause..... X

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Motion by plaintiff Barbara R. Nimkoff, as executrix of the estate of Martin B. Nimkoff, to vacate the order of this court dated November 16, 2012 is **granted**, there being no opposition thereto. Defendants' motion for a protective order is **granted** to the extent that plaintiff is directed to proceed by way of interrogatories as indicated below. Plaintiff's motion 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, which Central Park sold for \$ 7 million in April, 2008. Defendant Donald Monti is the managing member of Central Park and president of defendant Concorde Management Services, the property manager.

Defendant Gerard Levi holds a 6.551 % membership interest in Central Park, defendant estate of Ralph Parisi holds a 4.79 % interest, defendant Byron Terk a 3.602 % interest, defendant Mario Fracassa an 11.546 % interest, defendant Lawrence Pacernick an 8.059 % interest, defendant Frederick Kaplan a 4.4 % interest, defendant William Caccese a 3.439 % interest, defendant Jeffrey Goodman a 1.112 % interest, defendant Jeffrey Sherwood a 4.69 % interest, defendant Bernard Polatsch a 6.551 % interest, defendant Ilan Israeli a 7.113 % interest, defendant Stanley Weinrib a 5.822 % interest, defendant Chanchal Saha a 3.696 % interest, defendant Thomas Szulz a 4.35 % interest, and defendant Ronald Richman a 1.112 % interest.

Paragraph 10 of Central Park's operating agreement, as amended, provides that death or bankruptcy of a member does not result in dissolution of the company. The operating agreement further provides that a member may dispose of his interest only in accordance with 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. Plaintiff rejects the tendered sum as inadequate and in bad faith.

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In this action, plaintiff seeks 3.602 % of the \$ 7 million sale proceeds, or \$252,140. Plaintiff claims that defendants breached the operating agreement by refusing to update the stated value of the property and breached their fiduciary duty to Nimkoff by failing to update the stated value in good faith.

After taking the deposition of Donald Monti, the managing member of Central Park, plaintiff served notices of deposition for the above the named individual defendants, who are minority members.

Defendants Central Park, Concorde, Monti, Parisi, Francassa, Pacernick, Kaplan, Caccese, Goodman, and Richman moved for a protective order prohibiting depositions of the minority members on the ground that Monti was the only defendant with personal knowledge of the case. Plaintiff cross moved to strike the answer on the ground that the individual defendants had failed to appear for their depositions as scheduled during a prior status conference.

By order dated November 16, 2012, the court denied defendants' motion for a protective order prohibiting further discovery but directed plaintiff to proceed by way of interrogatories. Plaintiff's cross-motion to strike defendants' answer was denied. Subsequent to the order, counsel for defendants learned that defendant Ralph Parisi died April 14, 2011. On November 19, 2012, the parties entered into a stipulation substituting Anna Assante, Parisi's executrix, as a party defendant. Rather than submitting the stipulation of substitution separately, plaintiff submitted it as an exhibit to the present motion.

By order to show cause dated December 7, 2012, plaintiff moves to vacate the order of November 16, 2012, on the ground that the court lacked jurisdiction to grant it because the substitution of Parisi's executrix had not yet taken effect. In the order to show cause, the court extended plaintiff's time to serve interrogatories to December 27, 2012 and directed that the interrogatories be answered within 17 days of that date.

The stipulation substituting Anna Assante, as executrix, is so ordered nunc pro tunc to November 19, 2012. The order of November 16, 2012 is vacated. The court will proceed to consider the merits of motion sequence # 3 and 4, the two outstanding discovery motions.

Presumably, the partnership agreement provided that the stated value would be updated annually, so that a member's estate would be bought out at current market value in the event of the member's death. Nevertheless, in a time of rising real estate values, there

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may have been a tax incentive in allowing the stated value to become "out of date."

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 [1<sup>st</sup> 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. Nevertheless, because of the cumulative nature of the evidence, interrogatories, rather than depositions, are appropriate.

Accordingly, defendants' motion for a protective order is **granted** to the extent that plaintiff is directed to proceed by way of interrogatories directed to the minority members of Central Park Plaza Associates rather than taking their depositions. The interrogatories shall be served within 20 days of the date of this order and shall be responded to within 17 days of the service date. Cross-motion by plaintiff to strike the answer is **denied**.

So ordered.

Dated

JAN 30 2013

ENTERED

FEB 01 2013

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

*Stephen A. Bucaria*  
J.S.C.