At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of July, 2014.

P R E S E N T:

HON. CAROLYN E. DEMAREST,
Justice.

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JOZEF SOKOLOWSKI and WIESLAWA SOKOLOWSKA a/k/a WIESLAWA SOKOLOWSKI,

Plaintiffs,

- against -

Index No. 20793/12

MACIEJ WODKIEWICZ, as fiduciary of the Estate of ARKADIUSZ WODKIEWICZ, and SELF RELIANCE (NY) FEDERAL CREDIT UNION,

Defendants.

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The following e-filed papers read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	6, 8, 15, 27
Opposing Affidavits (Affirmations)	34
Reply Affidavits (Affirmations)	37
Memoranda of Law	7, 34, 40
Other Papers Letter from Plaintiffs	41
Transcript of Proceedings of March 26, 2014	42

Upon the foregoing papers, Jozef Sokolowski and Wieslawa Sokolowska, also known as Wieslawa Sokolowski, (collectively, plaintiffs) move for an order, pursuant to CPLR 3212, granting them summary judgment and directing Maciej Wodkiewicz, as fiduciary of

the estate of Arkadiusz Wodkiewicz, (defendant) to comply with the terms of a partnership agreement.

Background And Allegations

(1)

Plaintiffs and Arkadiusz Wodkiewicz (decedent) entered into a partnership agreement on or around March 25, 1991 (the Agreement). The Agreement created J & J Real Estate Partnership (J & J) for the stated purpose of holding real estate, namely two mixed-use buildings at 223 and 225 Franklin Street, in Brooklyn (the Property). The Agreement stated that plaintiffs would "be deemed one partner, as an owner of a fifty (50%) per cent undivided interest in the partnership's holdings" and that profits and losses would be equally divided between plaintiffs, as one partner, and decedent, as the other. A clause titled "DEATH OF PARTNER OR SALE OF PARTNERSHIP INTEREST" (the Buyout Clause) stated,

> "In the event of the death of one of the **Partners** or the purchase of a partner's interest by the other **Partner**, the value of such shall be the fair market value. Fair market value shall be the average price of two obtained by two independent licensed business brokers. The **Partners** intend to obtain partner's life insurance coverage on each other to satisfy the Estate of the deceased partner's interests."

Plaintiffs and decedent also executed, at the same time, a business certificate for partners, which represented that they were conducting business as the members of J & J. Plaintiffs and decedent acquired the Property by a bargain-and-sale deed, which conveyed a 50% interest in the Property to plaintiffs and the remaining 50% interest to decedent. They

facilitated the purchase with a mortgage loan from Self Reliance (NY) Federal Credit Union. Plaintiffs and decedent thereafter operated and maintained the Property, leasing out its residential and commercial units.

Decedent died on July 19, 2009. A January 7, 2010 decree by the Honorable Margarita Lopez Torres admitted decedent's will to probate and appointed defendant, who primarily resides in Poland, as administrator of decedent's estate (*see Matter of Wodkiewicz*, Sur Ct, Kings County, Jan. 7, 2010, Lopez Torres, S., file No. 2009-3175). Plaintiffs sought to buy out decedent's interest in J & J, but a dispute developed over the proper terms for such a transaction.

(2)

Plaintiffs commenced this action on October 19, 2012 against defendant and Self Reliance (NY) Federal Credit Union[1] and alleged causes of action for declaratory and injunctive relief. The verified complaint sought declarations that the Property should be transferred to plaintiffs based on its fair market value at the time decedent died and that the partnership was dissolved by decedent's death, an injunction against defendant asserting any right or authority under the Agreement and actual damages caused by defendant's refusal to observe the Agreement's terms, as well as attorney's fees and costs. Plaintiffs contended that they obtained an appraisal of the Property by Diversified Valuation Group, which valued it at $2.32 million as of October 7, 2010. They alleged that they attempted to reach an

[1] Plaintiffs discontinued the action as against Self Reliance (NY) Federal Credit Union with a January 7, 2014 stipulation of discontinuance.

agreement with defendant to buy out decedent's interest, but that defendant "refuses to deal with the plaintiffs about valuation of the property and transferring the Estate interest to the plaintiffs according to the Partnership Agreement." Plaintiffs recounted that they sent an August 23, 2012 letter demanding that defendant engage pursuant to the Agreement's terms, but that defendant refused to negotiate or cooperate in obtaining an appraisal.

Defendant, in his verified answer, asserted counterclaims for an accounting of the Property's income and expenses, for partition and auction of the Property and, alternatively, for a declaration that the parties co-own the Property.

(3)

Plaintiffs now move for an order, pursuant to CPLR 3212, granting them summary judgment as to their claims and directing defendant to comply with a sale of decedent's partnership interest under the Agreement's terms. They urge that the explicit terms of a partnership agreement bind the partners and that the Agreement herein demonstrates the existence of an equal partnership between themselves and decedent as a matter of law. Plaintiffs contend that, as defendant lived in Poland at the time, he lacks grounds to dispute the circumstances of the Agreement's formation. They further argue that, under Partnership Law §§ 62 and 73, a partnership dissolves upon the death of a partner and that the value of a former partner's interest becomes fixed upon the dissolution. Accordingly, plaintiffs urge that, pursuant to the Agreement's terms, they are entitled to purchase decedent's partnership

interest for its fair market value as of his death. Defendant's demand for an accounting, plaintiffs contend, contradicts the Agreement's clear terms.

Plaintiffs support their motion with the affidavit of Wieslawa Sokolowska, who recounts, among other things, that, when entering into the Agreement, "[t]he Partners agreed that in the event of one partner's death, the surviving partner was entitled to purchase the deceased's interest in the Partnership." She asserts that she made "numerous attempts" to acquire decedent's partnership interest, but that defendant was "not responsive." She also alleges that defendant eventually agreed, on November 2, 2012, to a buyout, but then failed to follow through. She recounts that she obtained a November 23, 2012 appraisal valuing the Property, as of July 2009, at $2.075 million and that defendant obtained an appraisal valuing the Property at $3.45 million. She contends that "[d]espite these appraisals, Defendant did not agree to a buyout" and that he instead sought a sale of the Property.

Plaintiffs also support their motion with the affidavit of Michael Kelly, Esq. (Kelly), who explains that decedent retained him in 1991 to prepare the Agreement. He recounts that he was present for the Agreement's execution by plaintiffs and decedent and that they "agreed that in the event of one partner's death, the surviving partner was entitled to purchase the deceased's interest in the Partnership" at its fair market value. Kelly also states that plaintiffs and decedent held the Property as a partnership property.

(4)

Defendant, in opposition, argues that plaintiffs fail to establish that the Property was a partnership asset, as plaintiffs and decedent funded the purchase and took title to the

Property as individuals, not in the name of J & J. Defendant emphasizes that plaintiffs and decedent never transferred the title to J & J, though Partnership Law § 12 specifically permits acquisition of property in a partnership's name. The Agreement, defendant contends, concerned only the partners' management of the Property and their division of the profits. He argues that the Buyout Clause's provision for determination of the partnership's fair market value by a business broker, rather than a real estate appraiser, indicates that the partners did not consider the Property a partnership asset. Defendant concedes that the value of a former partner's interest in a partnership becomes fixed upon the partnership's dissolution, but contends that this rule is irrelevant, as J & J never held the Property's title.

Defendant argues, alternatively, that, if the Property is considered a partnership asset, he is entitled to a buyout of decedent's interest at its value as of the time of dissolution and, additionally, to interest or half of any undistributed income as of decedent's death, as required by Partnership Law § 73. He contends that plaintiffs have continued the partnership business and have failed to wind it up and distribute its property following the dissolution triggered by decedent's death. Defendant also asserts that summary judgment must be denied as discovery is not yet complete and J & J's books or Department of Finance records concerning J & J would likely reveal that plaintiffs failed to perform an accounting at the time of dissolution and deprived decedent's estate of benefits from the Property's operation.

Defendant supports his opposition with his own affidavit, in which he recounts that plaintiffs did not approach him until a year after the Surrogate's Court appointed him administrator of the estate and initially offered only $200,000 to purchase decedent's interest

in J & J. In response to this offer, defendant states that he obtained a real-estate broker's assessment of the Property, which valued it at $2.24 to $2.64 million. He explains that he thereafter offered to sell the interest for $1.2 million, but plaintiffs rejected this offer and suggested a formal appraisal. Plaintiffs, he asserts, thereafter hired R.J. Saar Associates, which issued the $2.075-million appraisal, and defendant hired RC Berntsen Associates, which issued the $3.45-million appraisal. Defendant contends that only after this did plaintiffs reveal the terms of the Agreement, that defendant then stated he would accept no offer lower than the average of the two appraisals and that plaintiffs then commenced this action.

(5)

Plaintiffs, in reply, first urge that their motion should be granted by default, because, despite the parties' consent to electronic filing, defendant never electronically filed his opposition papers, instead sending them to plaintiffs via electronic mail. Plaintiffs also contend that defendant's opposition fails to present any admissible evidence, as it relies solely on an unsigned and unnotarized affidavit by a person lacking knowledge of the facts.

Plaintiffs further urge that the Agreement's terms are controlling herein and entitle them to purchase decedent's interest in J & J based on the Property's value at the time of his death. The partners purchased the Property, plaintiffs contend, on J & J's account, and they urge that the Agreement explicitly indicates that J & J's purpose was to hold the Property. Accordingly, plaintiffs urge that the partners clearly considered the Property a partnership asset, even though their names appeared individually on the deed. Plaintiffs argue that the

provisions of Partnership Law § 73 bear no application to this case, as they have force only if partners have not "otherwise agreed." Plaintiffs assert that the partners herein otherwise agreed that, in the event of a partner's death, the estate would be entitled only to a buyout based on the Property's value at the time of death.

Finally, plaintiffs contend that defendant has offered no evidence or basis for a finding that further discovery is required before deciding this motion. The Agreement, they argue, clearly and unambiguously demonstrates the partners' intent pertinent to the instant dispute.

(6)

In a subsequent letter, plaintiffs acknowledge that defendant electronically filed his opposition papers on January 31, 2014, though they urge that this still occurred after the stipulated January 28, 2014 deadline. Plaintiffs also acknowledge that this filing included an affidavit signed by defendant and notarized, but they contend that this affidavit must be rejected as inadmissible because it was acknowledged in Poland, yet includes no certificate of conformity pursuant to CPLR 2309 (c).

Discussion

The Summary Judgment Standard

"Summary judgment is a drastic remedy made in lieu of a trial which resolves the case as a matter of law" (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 54 [2011], citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *see also Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). A summary judgment movant must show prima facie entitlement to judgment as a matter of law by producing sufficient admissible evidence demonstrating

the absence of any material factual issues (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such a showing requires denying the motion, regardless of the sufficiency of any opposition (*Vega*, 18 NY3d at 503). The opposing party overcomes the movant's showing only by introducing "evidentiary proof in admissible form sufficient to require a trial of material questions" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Considering a summary judgment motion requires viewing the evidence in the light most favorable to the motion opponent (*Vega*, 18 NY3d at 503). Nevertheless, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a summary judgment motion (*Zuckerman*, 49 NY2d at 562). "The court's function on a motion for summary judgment is to determine whether material factual issues exist, not to resolve such issues" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010] [internal quotation marks omitted]).

Admissibility Of Defendant's Opposition Papers

Plaintiffs concede that defendant electronically filed his opposition papers, but contend that these papers must still be rejected as filed on January 31, 2014, whereas a January 14, 2014 stipulation of adjournment required defendant to serve his "reply" by January 28, 2014. Plaintiffs demonstrate no prejudice to any substantial right caused by this slight delay, particularly as they also note that defendant e-mailed his opposition papers to them on January 29, 2014, as a subsequent stipulation adjourned the motion until March 26, 2014 and as plaintiffs did not file a reply to these opposition papers until March 24, 2014.

Given this lack of prejudice and the public policy favoring decisions based on an action's merits (*see* CPLR 2001; *Jennings v Queens Tribune Publs., LLC*, 101 AD3d 1086, 1087 [2012]), defendant's opposition papers shall be considered despite their untimeliness.

Plaintiffs also argue that defendant's affidavit, which was acknowledged by a consul at the United States embassy in Warsaw, Poland, must be disregarded as defendant did not include a certificate of conformity pursuant to CPLR 2309 (c). Contrary to plaintiffs' position, a consular official is explicitly authorized to acknowledge documents (*see* CPLR 2309 [a]; Real Property Law § 301), and CPLR 2309 (c), operating in conjunction with Real Property Law § 311 (4) and (5), does not require a certificate of authentication for the admissibility of an affidavit acknowledged in this manner (*Pensionsversicherungsanstalt v Lichter*, 2012 NY Slip Op 31208[U], *2-*3 [Sup Ct, NY County 2012); *see also Blue Danube Prop., LLC v Mad 52 LLC*, 2012 NY Slip Op 33438[U], *9 [Sup Ct, NY County 2012], *mod* 107 AD3d 561 [2013]; *Sperry v Fliegers*, 194 Misc 438, 439 [Sup Ct, Special Term, NY County 1949]; 245 Siegel's Practice Review, *Oath Taken Before U.S. Vice Consul at Embassy in Foreign Country Does Not Need Certificate of Authentication* at 2 [May 2012]).

Ownership Of The Property

Addressing the motion's merits, defendant argues that plaintiffs fail to demonstrate that the Property was a partnership asset and that the Agreement constituted anything more than a management agreement, as both the deed and mortgage documents bore only the partners' names individually. Despite this, however, "[i]t is well established that 'it may

always be shown that property[,] title to which is taken in the name of individuals, is in truth and in fact partnership property'" (*Vick v Albert*, 17 AD3d 255, 256-257 [2005] [second alteration in original], quoting *Benham v Hein*, 50 AD2d 808, 809 [1975]; *see also Wiener v Spahn*, 110 AD3d 443, 444 [2013]). Partnership ownership, in such a case, may be proven by circumstantial evidence, and the names listed on a property's deed are thus not conclusive (*see Wiener*, 110 AD3d at 444; *Benham*, 50 AD2d at 809; *Goldberg v Goldberg*, 276 App Div 1084, 1084 [1950], *rearg denied* 277 App Div 782 [1950]; *cf. Carr v Caputo*, 114 AD3d 62, 72 [2013] [finding property not a partnership asset as "there is no documentation or other evidence indicating that the partners intended, or the partnership was formed, to actually hold title to the building"], *lv dismissed* ___ NY3d ___, 2014 NY Slip Op 74791 [2014]).

Here, the Agreement clearly indicates that the partners intended J & J to hold title to the Property and the evidence demonstrates that they operated and managed the Property as a partnership asset. Additionally, defendant acknowledges that the partners *intended* the Property to be a partnership asset, but argues simply that the deed's use of the partners' individual names precluded the realization of that intent. As shown by the cases cited above, this technical infirmity is insufficient to overcome the evidence showing the partners' treatment of the Property as a partnership asset and thus raises no question of fact that would preclude granting the declaratory relief that plaintiffs seek.

Applicability Of Partnership Law § 73

Defendant apparently agrees with plaintiffs that, if the Property is treated as a partnership asset, the appropriate path for plaintiffs to continue J & J's business is to pay the

estate the value of decedent's partnership interest at the time of his death. Defendant's disagreement with plaintiffs appears limited to his assertion that the estate is additionally entitled to interest upon the value of decedent's partnership share at the time of death or, at defendant's option, disgorgement of the profits that plaintiffs have realized in continued reliance on decedent's rights to partnership property.

Partnership Law § 73 states, in relevant part,

> "When any partner retires or dies, and the business is continued under any of the conditions set forth in [Partnership Law §§ 69 (2) (b) or 72 (1), (2), (3), (5) or (6)], without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; . . . ."

Pursuant to § 73, therefore, the estate of a deceased partner is generally entitled to choose between receiving the value of the decedent's interest in the partnership at the time of death plus interest from that time or that value plus any profits subsequently derived from the decedent's rights in the partnership property (*see Ronan v Valley Stream Realty Co.*, 249 AD2d 288, 289 [1998]; *Tarantino v Albert*, 160 AD2d 310, 313, 314-315 [1990]; *see also Silvernail v Silvernail*, 22 AD3d 970, 971 [2005]).

Partners are free, however, to arrange for dissolution on whatever terms they wish (*see Bailey v Fish & Neave*, 8 NY3d 523, 528-529 [2007], quoting *Lanier v Bowdoin*, 282 NY

32, 38 [1939], *rearg denied* 282 NY 611 [1940]; *Gabay v Rosenberg*, 29 AD2d 653, 654 [1968], *affd* 23 NY2d 747 [1968]). Where a partnership agreement contains terms that comprehensively dictate an agreed-upon course of action in the event of the retirement or death of a partner, including continuation of the business by surviving partners, those terms shall control and the provisions of § 73 shall have no effect (*Audino v Lincoln First Bank of Rochester*, 105 AD2d 1091, 1094 [1984] [finding no applicability of § 73 where "the agreement furnishes a complete scheme for distribution of the profits and for determining the rights and obligations of the parties on liquidation"], *affd* 65 NY2d 631 [1985]; *see also Hand v Kenyon & Kenyon*, 227 AD2d 137, 137 [1996] [finding no right to accounting upon dissolution, as partnership agreement "sets forth the exclusive method for calculating and distributing the partnership's assets upon dissolution"]; *Hermes v Compton*, 260 App Div 507, 510 [1940] [finding no right to accounting under Partnership Law § 74 where partnership agreement terms were inconsistent with right to accounting]; *see generally Lanier*, 282 NY at 38).

Here, the Agreement's Buyout Clause does not rise to the level of "a complete scheme for distribution of the profits and for determining the rights and obligations of the parties" (*see Audino*, 105 AD2d at 1094). This clause merely dictates that, in the event of a buyout by continuing partners of the interest that belonged to a retired or deceased partner, (1) the price shall be fair market value and (2) fair market value shall be determined by averaging two appraisals by independent business brokers. This specification of the method by which the value of a departing partner's share should be determined presents no inconsistency with

Partnership Law § 73, and the omission of any reference to interest or profit sharing for the period between dissolution and the buyout's consummation cannot be properly understood as a waiver of that statutory provision. If a deceased partner's estate were deprived of the statutory right to interest or profits derived from the decedent's partnership rights, continuing partners would lack any incentive to effect a timely buyout.

Furthermore, plaintiffs are attempting, in their arguments on this motion, to pick and choose which portions of § 73 to apply and which to discard. They contend that the Buyout Clause waives the statutory default giving defendant the right to interest or profit sharing, yet they still rely on the provision of § 73 that freezes the value of decedent's interest upon his death, which is not otherwise required by the Agreement. Plaintiffs present no rationale why the Buyout Clause should have the effect, through implication rather than explicit waiver, of obviating some portions of § 73 while preserving others, nor do they introduce any evidence that the partners intended such a consequence.

Although the language of the Buyout Clause is not facially explicit in requiring, or even granting a right to, buyout of a deceased partner's interest by the surviving partners, both Wieslawa Sokolowska and the partners' attorney, Kelly, aver that the partners intended the Agreement to have this effect, and defendant does not dispute this intent. Consequently, plaintiffs' motion may be granted to the extent of declaring that defendant, on behalf of the estate, should sell decedent's interest in J & J to plaintiffs for an amount determined by averaging two fair-market-value appraisals of such interest by licensed business brokers. The applicable provisions of Partnership Law § 73 require both that such appraisals consider not

J & J's present value, but its value as of decedent's death, on July 19, 2009, and that decedent's estate shall have the option of receiving either statutory interest upon the buyout amount or the portion of profits realized from decedent's rights in partnership property from the date of death through the conveyance's completion. Defendant's determination of whether to opt for interest or for a portion of the profits will require analysis of J & J's finances since July 19, 2009 (*see Tarantino*, 160 AD2d at 314-315; *see also Priel v Linarello*, 44 AD3d 835, 836 [2007]).[2] Accordingly, plaintiffs shall immediately provide to defendant access to the books and records of J & J from July 19, 2009 to the present.

Other Relief Sought

Plaintiffs make no argument and introduce no evidence that provides any support for summary judgment as to the other relief they seek, namely an injunction against defendant asserting rights under the Agreement, damages, attorney's fees or costs. Accordingly, it is

ORDERED that plaintiffs' summary judgment motion seeking declaratory relief is granted to the extent that it is declared that defendant, on behalf of decedent's estate, shall convey decedent's interest in J & J to plaintiffs in exchange for an amount determined by averaging two appraisals from independent, licensed business brokers of the fair market value of decedent's interest as of July 19, 2009, plus statutory interest from that date, or, at

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[2] Two prerequisites exist to completing the buyout of decedent's interest: the parties' agreement as to the proper appraisals to employ in determining fair market value and defendant's choice of whether the estate shall receive interest or a portion of the profit since decedent's death. Accordingly, the parties shall appear for a conference to determine the schedule for resolving such issues or submitting any disputes to the court.

defendant's option, in lieu of interest, the portion of the profits derived from decedent's rights in the partnership property since that date; and it is further

ORDERED that the parties shall appear at 9:45 AM on July 22, 2014 for a conference to determine a schedule for resolving the issues necessary to facilitate the conveyance; and it is further

ORDERED that the remaining portions of plaintiffs' summary judgment motion are denied in their entirety; and it is further

ORDERED that, given the discontinuance of the action as against Self Reliance (NY) Federal Credit Union, the caption is amended as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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JOZEF SOKOLOWSKI and WIESLAWA SOKOLOWSKA a/k/a WIESLAWA SOKOLOWSKI,

Plaintiffs,

- against -

Index No. 20793/12

MACIEJ WODKIEWICZ, as fiduciary of the Estate of ARKADIUSZ WODKIEWICZ,

Defendant.

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This constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. CAROLYN E. DEMAREST