Deerin v Ocean Rich Foods, LLC
2014 NY Slip Op 33917(U)
August 6, 2014
Supreme Court, Nassau County
Docket Number: 600536-2014
Judge: Timothy S. Driscoll
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SUPREME COURT-STATE OF NEW YORK

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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PATRICIA DEERIN as Executor of the Estate of Douglas Deerin,

Plaintiff,

-against-

OCEAN RICH FOODS, LLC, a/k/a OCEAN EDGE FOODS, RICHARD MARINO, and DEAN BERMAN,

Defendants.

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TRIAL/IAS PART: 15
NASSAU COUNTY

Index No. 600536-2014

Papers Read on this motion:

Notice of Motion, Affirmation in Support and Exhibits.....x
Affirmation in Opposition and Exhibit.....x
Reply Affirmation.....x

This matter is before the court on the motion filed by Defendants Ocean Rich Foods, LLC d/b/a Ocean Edge Foods ("Company"), Richard Marino ("Marino") and Dean Berman ("Berman") ("Defendants") on May 8, 2014 and submitted on June 30, 2014 (motion sequence number 2). The Court hereby advises counsel for the parties, pursuant to CPLR § 3211(c), that the Court intends to treat Defendant's motion pursuant to CPLR § 3211 as one for summary judgment under CPLR § 3212. Accordingly, the Court reserves decision on the motion and 1) directs Defendants to submit, on or before September 5, 2014, whatever evidentiary materials are required for the court to render a proper summary judgment determination; 2) directs Plaintiff to submit her opposition papers on or before October 10, 2014; and 3) directs Defendants to submit their reply papers on or before October 31, 2014. **Counsel for the parties are not required to appear before the Court for a Preliminary Conference on August 19, 2014, as**

previously directed by the Court. The motion will appear on the Court's motion calendar on October 31, 2014 and counsel for the parties are not required to appear before the Court on October 31, 2014. The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on December 17, 2014 at 9:30 a.m.

BACKGROUND

A. Relief Sought

Defendants Ocean Rich Foods, LLC d/b/a Ocean Edge Foods ("Company"), Richard Marino ("Marino") and Dean Berman ("Berman") ("Defendants") move for an Order, pursuant to CPLR §§ 3211(a)(1) and 3211(a)(7), dismissing the complaint as against Defendants.

Plaintiff Patricia Deerin as Executor of the Estate of Douglas Deerin ("Plaintiff") opposes the motion.

B. The Parties' History

The parties' history is outlined in detail in a prior decision ("Prior Decision") of the Court dated March 21, 2014 (Ex. E to Ryan Aff. in Supp.) and the Court incorporates the Prior Decision by reference as if set forth in full herein. In the Prior Decision, the Court denied Plaintiff's prior motion ("Prior Motion") for injunctive relief.

The First Amended Complaint ("Amended Complaint") (Ex. D to Ryan Aff. in Supp.) alleges as follows:

Marino, Berman and Douglas Deerin ("Deerin" or "Deceased") were all members of the Company until Deerin's death on January 28, 2013, at which time Deerin's estate ("Estate") became the owner of his interest. Marino, Berman and the Estate each currently own 1/3 of the Company.

Plaintiff alleges that in January 2009, Marino, Berman and Deerin entered into a Cross-Purchase Agreement ("Agreement") which states that life insurance policies had been taken out in the amount of $1.5 million on the lives of each of the three members of the Company, and that "The Company shall be the sole owner of the policies purchased by and issued to it" (Am. Compl. at ¶ 9). The Agreement specifies that the Company was the owner and beneficiary of John Hancock Policy No. 81 602 369 in the amount of $1.5, insuring the life of Deerin ("Policy"). The Agreement provides that, upon the death of a member, "The Company shall pay such life insurance proceeds to the legal representative of the deceased Member as part payment or payment in full, as the case may be, on account of the purchase price of the interest of the

deceased Member" (Am. Compl. at ¶ 11).

The Amended Complaint contains eight (8) causes of action: 1) Marino and Berman breached the Agreement by refusing to pay the life insurance proceeds to Deerin's Estate in exchange for its membership interest in the Company, 2) Marino and Berman breached their fiduciary duty to Deerin and, upon his death, to Deerin's Estate by failing to distribute the life insurance proceeds to the Estate; 3) Marino and Berman breached the implied covenant of good faith and fair dealing by failing to distribute the life insurance proceeds to the Estate; 4) Marino and Berman, parties to the Agreement, are liable for tortious interference with contract by failing to distribute the life insurance proceeds to the Estate; 5) pursuant to New York Limited Liability Company Law ("LLCL") § 509, Plaintiff should receive the fair market value of 1/3 of the Company, as determined by an independent appraiser; 6) Plaintiff seeks dissolution of the Company, pursuant to LLCL § 702, on the grounds that it is financially unfeasible to continue the operations of the Company; 7) Plaintiff, as the representative of the Estate, seeks an accounting of the Company; and 8) Defendants have been unjustly enriched in the sum of $1,500,000 which was to be paid out to Plaintiff as representative of the Estate.

In opposition to the Prior Motion, Defendants provided a copy of the Policy to which the Amended Complaint refers, which is dated January 28, 2008, one year before the alleged Agreement and five years before the death of Deerin on January 28, 2013. The Policy, which is a "key person" policy, provides that the Company is the "owner" and sole beneficiary of the Policy. In the Prior Decision, the Court denied the Prior Motion based on the Court's conclusion that 1) Plaintiff had not established a likelihood of success on the merits in light of the fact that the Agreement on which Plaintiff relies is unsigned, and Defendants produced the Policy which designates the Company as the beneficiary of the Policy; 2) Plaintiff had not established that she would suffer irreparable harm without the requested relief as her concern that Defendants would spend the proceeds of the Policy is an injury that is compensable by money damages; and 3) Plaintiff had not demonstrated that a balancing of the equities favors her, in light of the fact that the Agreement on which she relies is unsigned, and Defendants produced the Policy which designates the Company as the beneficiary.

In support of the motion now before the Court, counsel for Defendants submits that it is undisputed that the Company took out the Policy with John Hancock Life Insurance Company of New York, Policy Number 81602369, on Deerin's life, payable in the amount of $1,500,000 (Ex. F to Ryan Aff. in Supp.) with an issue date of May 28, 2008 which names the Company as owner and sole beneficiary. He affirms that, approximately eight (8) months after the procurement of the Policy, a draft of the Agreement was generated and, thereafter, not signed by any members of the Company, including the Deceased. The Agreement, in addition to being unsigned, is also undated, and Plaintiff does not allege that any of the parties negotiated or executed the Agreement.

Counsel for Defendant also affirms that on June 5, 2013, Defendants provided Plaintiff with a complete copy of their financial statements for the year ending December 31, 2012 (*see* Ex. H to Ryan Aff. in Supp.). Counsel for Defendants affirms, further, that Defendants do not object to Plaintiff's request for an accounting and will provide another copy of the accounting information to Plaintiff if required.

In opposition to the motion, counsel for Plaintiff affirms that Plaintiff has served a subpoena duces tecum on Marc Levy (Ex. A to Haber Aff. in Opp.), the insurance broker who obtained the Policy for the Deceased which has not yet been answered. That subpoena contains a return date of June 28, 2014.

C. The Parties' Positions

Plaintiff submits that 1) Plaintiff has no cause of action in breach of contract because Plaintiff has not alleged the existence of a legally binding agreement in light of the fact that the Agreement was never signed by any party, is undated and was "seemingly generated" (Ryan Aff. in Supp. at ¶ 5) approximately eight months after the procurement of the Policy; 2) in light of the fact that the Policy is an unambiguous contract, extrinsic evidence, including the Agreement, is not admissible to alter or add a provision to the Policy; 3) Plaintiff has no cause of action for breach of fiduciary duty because, in light of the fact that there was never any Agreement as alleged by Plaintiff, Plaintiff cannot establish that Defendants breached any fiduciary duty; 4) Plaintiff has no cause of action for breach of the implied covenant of good faith and fair dealing because, given Plaintiff's failure to establish that there was an Agreement as alleged, it is

impossible for Plaintiff to be deprived of the right to receive benefits under a contract that never existed; 5) Plaintiff has no cause of action in tortious interference with contract because the Agreement was not a contract; 6) with respect to Plaintiff's cause of action pursuant to New LLCL § 509, counsel for Plaintiff affirms that, to date, Plaintiff has not accepted Defendants' offers for the fair value of Decedent's membership interest in the Company, despite Defendants' efforts to provide Plaintiff with her membership interest in a reasonable time which included providing an accounting of the Company's financial statements to Plaintiff; 7) Plaintiff has no cause of action for dissolution of the Company because she has not alleged that it is not reasonably practicable to carry on the Company's business; and 8) Plaintiff has no cause of action in unjust enrichment because, given Plaintiff's failure to allege that the Agreement was an enforceable contract and in light of the language of the Policy, Defendants were not enriched at Plaintiff's expense.

Plaintiff opposes the motion submitting that dismissal of the Amended Complaint is not warranted because 1) Defendants have presented no documentary evidence to refute the allegation that they entered into the Agreement, and have not presented an affidavit from Defendants denying their execution of the Agreement; 2) the motion is premature because discovery is necessary to obtain documentation to determine whether a binding Agreement exists; 3) discovery is appropriate in light of the fact that Plaintiff's failure to produced a signed Agreement is attributable to the fact that, as the spouse of the Deceased, she has no access to Company records; 4) the partial performance exception to the Statute of Frauds may be applicable to the instant action and the Court should permit discovery before ruling on that issue; and 5) although Defendant provided Plaintiff with a copy of financial statements for the year ending December 31, 2012, Plaintiff is requesting a current accounting of the Company, as Plaintiff's interest in the Company continues.

In reply, Defendant submits that 1) the Agreement annexed to the complaint conclusively establishes that Plaintiff has no cause of action against Defendant as a matter of law; 2) in the event that the Court determines that there exists an issue of fact regarding whether a signed agreement exists, the Court should, pursuant to CPLR § 3211(c), order an immediate trial on that issue; and 3) if the Court determines that there is an issue regarding Plaintiff's distribution due to the fact that the financial statements did not encompass the period up to the date of the

Deceased's death, the Court should, pursuant to CPLR § 3211(c), also refer this issue to an immediate trial.

CPLR § 3211(c) requires that if a court intends to treat a CPLR § 3211 motion as one for summary judgment under CPLR § 3212, it must give the parties notice of its intention to do so. *Hendrickson v. Philbor Motors, Inc.*, 102 A.D.3d 251, 258 (2d Dept. 2012), citing *inter alia Mihlovan v. Grozavu*, 72 N.Y.2d 506, 508 (1988); *Kempf v. Magida*, 37 A.D.3d 763, 765 (2d Dept. 2007). The Court hereby advises counsel for the parties, pursuant to CPLR § 3211(c), that the Court intends to treat Defendant's motion pursuant to CPLR § 3211 as one for summary judgment under CPLR § 3212. Accordingly, the Court reserves decision on the motion and 1) directs Defendants to submit, on or before September 5, 2014, whatever evidentiary materials are required for the court to render a proper summary judgment determination; 2) directs Plaintiff to submit her opposition papers on or before October 10, 2014; and 3) directs Defendants to submit their reply papers on or before October 31, 2014. **Counsel for the parties are not required to appear before the Court for a Preliminary Conference on August 19, 2014, as previously directed by the Court. The motion will appear on the Court's motion calendar on October 31, 2014 and counsel for the parties are not required to appear before the Court on October 31, 2014. The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on December 17, 2014 at 9:30 a.m.**

The Court reminds counsel for the parties of their required appearance before the Court for a Preliminary Conference on December 17, 2014 at 9:30 a.m. as directed herein.

ENTER

DATED: Mineola, NY
August 6, 2014

HON. TIMOTHY S. DRISCOLL
J.S.C.