

Laor v Allied Urological Servs., LLC

2015 NY Slip Op 30137(U)

January 29, 2015

Supreme Court, New York County

Docket Number: 111626/10

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 39

-----X
JUDITH LAOR,

Plaintiff,

-against-

Index No. 111626/10

ALLIED UROLOGICAL SERVICES, LLC,

DECISION AND ORDER

Defendant.

-----X
HON. SALIANN SCARPULLA, J.:

In this action seeking, *inter alia*, a declaratory judgment, plaintiff Judith Laor (“Laor”) moves for partial summary judgment on her second and third causes of action in her complaint and defendant Allied Urological Services, LLC (“Allied”) cross moves for partial summary judgment dismissing the first, second and third causes of action in the complaint.

Allied is a management company for Metropolitan Lithotripter Associates, PC and Metropolitan Urological Specialists, PC. Allied leases office space to those companies and provides equipment and surgery facilities to perform medical services and treatment for, *inter alia*, kidney stones and benign kidney cancer.

Dr. Eliahu Laor (“Dr. Laor”), a urologist, obtained a membership interest in Allied in or about 1999. Dr. Laor passed away in 2001, and his rights with respect to his membership interest passed to his wife, Judith Laor. Thereafter, she received quarterly annual member distributions from Allied.

On or about January 1, 2003, the members of Allied approved an amended and restated operating agreement. In 2009, Allied's board of directors sought to amend the amended operating agreement to add a provision conditioning membership in Allied upon the active practice of medicine, and to add a provision providing Allied with the option of purchasing the membership interest of a member that no longer satisfied the active practice of medicine requirement. To approve the proposed amendment, Allied needed at least 80% of the voting board of directors and a supermajority in interest of Allied's members. The amendment was approved and adopted on May 12, 2009.

As of May 12, 2009, there were approximately thirty members of Allied, including Laor, that no longer met conditions and requirements for continued membership in Allied because they no longer engaged in the active practice of medicine. Allied exercised its right to purchase the membership interests of all of those members. Other than Laor, all of those members sold their membership interests back to Allied.

By letter dated June 30, 2010, Allied informed Laor that it intended to repurchase her membership interest and enclosed a check in the amount of \$27,310.50, representing the fair market value of her membership interest, as determined by Allied.

Laor rejected Allied's demand to purchase her membership interest, and commenced this action in or about August 2010. She referred to Section 8.2 of the operating agreement in effect at the time of Dr. Laor's death, which provided, in relevant part:

“(a) If at any time any individual Member (a “Withdrawing Member”) . . . shall die. . . then:

(I) the Majority Investor, or at the election of the Majority Investor, the Company, shall have the first right (the “Majority Investor Option”) to purchase all (but no less than all) of such Withdrawing Member’s Membership Interest in the Company at a price equal to the fair market value of such Membership Interest; and

(ii) if the Majority Investor Option is not exercised, the Withdrawing Member may require (the “Withdrawing Member Option”) the Company to purchase all (but not less than all) of such Withdrawing Member’s Membership Interest in the Company at a price equal to the fair market value of such Membership Interest.

“(b) Any Majority Investor Option may be exercised by giving notice of such exercise to the Withdrawing Member within ninety (90) days after the occurrence of the Option Event with respect to such Majority Investor Option may be exercised (the “Majority Investor Option Period”), and any Withdrawing Member Option may be exercised (if the Majority Investor Option has not been exercised) by giving notice of such exercise to the Board within ninety (90) days after the expiration of the Majority investor Option Period or such earlier date that the Majority Investor has delivered written notice to the Company of its intention not to exercise the Majority investor Option. If any Majority Investor Option or any Withdrawing Member Option is not exercised within the time limit set forth above, then such Option shall terminate and be of no further force or effect.”

Laor maintained that the Withdrawing Member Option was not exercised within ninety days after the date of Dr. Laor’s death, and at the end of that ninety day period, the option terminated. She then acquired her late husband’s membership interest in Allied.

She further referred to Section 6.1 of the operating agreement, which provided, “notwithstanding the foregoing, no amendment of this agreement may be implemented which materially and adversely affects the rights of any member in a manner that discriminates against such member vis-a-vis other members, unless the prior written

consent of such affected member is obtained.” Laor maintained that the 2009 amendment to the operating agreement discriminated against her in relation to other Allied members and adversely affected the contractual rights already in effect between her and Allied. She claimed that she did not provide written consent, and the amendment did not apply to her. She also maintained that the fair market value per share as determined by Allied was not reasonable.

Laor asserted causes of action for specific performance of the operating agreement that was in effect prior to the 2009 amendment; specific performance of the terms of the operating agreement without regard to the 2009 amendment because the amendment did not apply to her, as a widow of a deceased member; a judgment declaring that the 2009 amendment had no force or effect with regard to her; and an accounting to determine the proper amount of money that Laor should have been receiving for her membership distributions.

Laor now moves for partial summary judgment on her second cause of action seeking specific performance of the January 1, 2003 operating agreement, and on her third cause of action seeking a declaratory judgment that the 2009 amendment has no force or effect on her.

She first argues that because the contract between her and Allied was not executory, Allied could not unilaterally alter her rights. She claims that the operating agreement under which she obtained her interest did not contain a clause allowing for her

to be bought out or otherwise expelled from the company and Allied was not able to change the operating agreement without her consent in order to expel her as a member.

She next argues that the 2009 amendment materially and adversely affects her right to receive distributions from the company in the future in a manner that discriminates against her in relation to the members, in violation of Section 6.1 of the operating agreement. She contends that although Allied claims that the amendment applies to all members equally, its result is to allow the majority of members to remain as members, while expelling those members who do not meet the qualifications of the majority.

Allied cross moves for partial summary judgment dismissing the first, second and third causes of action in the complaint. In support of its cross motion and in opposition to Laor's motion, it argues that the amendment that added the active practice of medicine requirement to Allied's operating agreement is valid, effective, and not discriminatory. Pursuant to Section 6.1 of the operating agreement, the amendment did not require her consent. Further, Laor was in a similar position, and treated the same as, the approximately thirty members of Allied that no longer actively practiced medicine at the time the amendment was enacted. Allied's CEO Jon Marks ("Marks") testified at an examination before trial that within that group of approximately thirty members, in addition to Laor, there were retired urologists and urologists that moved away. Their interests were all repurchased by Allied after February 2009 at the same price per membership share offered to Laor.

Discussion

Here, the 2003 operating agreement plainly provides that consent of at least 80% of the board of directors' voting interest and a supermajority of the members would be needed to effectuate an amendment of the agreement. The evidence presented establishes that the required voting interest and supermajority were obtained in order to approve the 2009 amendment that added the active practice of medicine requirement.

The only limitation placed on amending the agreement was if the amendment would "materially and adversely affect the rights of any member in a manner that discriminates against such member vis-a-vis other members, unless the prior written consent of such affected member is obtained." Laor's claim that the amendment materially and adversely affects her right to receive distributions from the company in a manner that discriminates against her in relation to the members is not supported by the evidence. The amendment did not make any prejudicial distinction between Laor and any of Allied's other members. There were approximately thirty members of Allied who were not engaged the active practice of medicine when the amendment to the agreement was effectuated. Allied exercised its right to purchase the membership interests of all of those members. According to Allied, other than Laor, all of those members sold their membership interests back to Allied. Allied was entitled to purchase Laor's membership interest as well. As such, Laor's claims seeking specific performance and a declaratory judgment must be dismissed.

Further, although neither party moved with respect to the fourth cause of action for an accounting, I find that the accounting cause of action must also be dismissed because in light of the above holding, Laor's demand for a determination as to the proper amount of money that she should have been receiving for her membership distributions is moot. Rather, the fair market value of Laor's membership interests must be determined so that Allied can purchase them from her.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff Judith Laor's motion for partial summary judgment on her second and third causes of action in her complaint is denied; and it is further

ORDERED defendant Allied Urological Services, LLC's cross motion for partial summary judgment dismissing the first, second and third causes of action in the complaint is granted, and Allied Urological Services, LLC is entitled to a declaration in its favor adjudging and declaring that the 2009 amendment to the operating agreement is valid, effective and binding on plaintiff Judith Laor, plaintiff Judith Laor no longer satisfies the membership requirements of Allied Urological Services, LLC, and Allied Urological Services, LLC is entitled to purchase her membership interests; and it is further

ORDERED that pursuant to Section 8.4 of the Allied Urological Services, LLC Operating Agreement, the appraiser previously hired by Judith Laor and the appraiser previously hired by Allied Urological Services, LLC together shall select an appraiser to

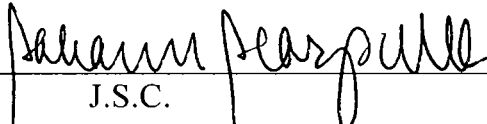
determine the fair market value of Judith Laor's membership interests, within thirty days from the date of notice of entry of this order; and it is further

ORDERED that the fourth cause of action for an accounting is dismissed

Settle judgment on notice.

Dated: New York, New York
January 29, 2015

ENTER:



J.S.C.

HON. SALIANN SCARPULLA