Matter of Doyle v Icon Two, LLC
2015 NY Slip Op 31808(U)
September 24, 2015
Supreme Court, New York County
Docket Number: 158644/2014
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of KEITH DOYLE, Holder of a ten percent Ownership Interest,

Petitioner,

Index No. 158644/2014

For Dissolution of ICON, LLC, a Domestic Limited Liability Company, Pursuant to Section 702 of the New York Limited Liability Company Law,

- against -

ICON TWO, LLC, DAVID FINNEGAN, SEAN CUNNINGHAM and PAUL CUNNINGHAM

Respondents

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JOAN A. MADDEN, J.

In this proceeding, petitioner Keith Doyle ("Doyle") seeks, *inter alia*, an order directing the dissolution of Icon, LLC ("Icon"), the appointment of a receiver to supervise the liquidation of Icon, an accounting and an appraisal of Doyle's membership interest and rescission of the sale of Icon's business to Icon Two, LLC ("Icon Two"). Respondents David Finnegan, Sean Cunningham and Paul Cunningham oppose the petition and seek to dismiss it.

Background

The relief sought in this petition is closely related, and, in some instances overlaps with, that sought in an action filed by petitioner in 2009 entitled, Keith Doyle v. Icon, LLC, d/b/a as "R Bar," David Finnegan and Sean Cunningham; Index No. 602832/09 (hereinafter the "plenary action"), against Icon David Finnegan and Sean Cunningham. The plenary action asserted causes of action for judicial dissolution, appointment of a receiver, an accounting, conversion, unjust enrichment and breach of contract. Before answering, defendants moved to dismiss the complaint, and by decision

and order dated April 4, 2011, the court granted the motion only to the extent of dismissing the sixth cause of action for breach of contract.

Defendants appealed that part of the court's decision denying the motion to dismiss the causes of action seeking judicial dissolution and appointment of a receiver, and by order dated February 7, 2013, the Appellate Division, First Department reversed and dismissed these claims, writing that:

> Plaintiff's allegations that he has been systematically excluded from the operation and affairs of the company by defendants are insufficient to establish that it is no longer "reasonably practicable" for the company to carry on its business, as required for judicial dissolution under Limited Liability Company Law § 702. The allegations do not show that "the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or [that] continuing the entity is financially unfeasible" (see Matter of 1545 Ocean Ave., LLC, 72 A.D.3d 121, 131, 893 N.Y.S.2d 590 [2d Dept. 2010]; Schindler v. Niche Media Holdings, 1 Misc.3d 713, 716, 772 N.Y.S.2d 781 [Sup.Ct., New York County 2003]). Indeed, the allegations show that the company has been able to carry on its business since the alleged expulsion of plaintiff in 2007; the allegation that defendants failed to pay plaintiff his share of the profits and award him distributions shows that the company is financially feasible. In view of the foregoing, there is no occasion for the appointment of a receiver (see Limited Liability Company Law § 703). We note that plaintiff admits that he can seek appointment of a temporary receiver under CPLR 6401(a), given his remaining causes of action.

Doyle v. Icon, LLC, 103 AD2d 440, 440-441 (1st Dept 2013).

Following discovery, Doyle moved for summary judgment on his three remaining claims in the plenary action for conversion, unjust enrichment and an accounting. By decision and order dated December 17, 2014, the court denied the motion.[1] Note of issue has been filed, and the action is now trial ready.

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[1]The court, however, granted Doyle's motion to the extent it sought to dismiss defendants' two counterclaims.

While the summary judgment motion was pending, Doyle filed this petition, which alleges as follows. Icon was organized on February 6, 2001, under the Limited Liability Law of the State of New York, to operate the Pioneer Bar, subsequently renamed the "R Bar," located at 218-220 Bowery, New York, New York. The members of Icon never adopted a written operating agreement. Petitioner and respondents have membership interest in Icon, based, at least in part, upon their respective financial contributions to Icon. (Verified Petition ¶¶ 15-17). Since 2006, respondents Sean Cunningham and David Finnegan have excluded Doyle from the day to day operations of the business and sharing in its profits. (Id. ¶¶ 18-19). As of December, 2013, Icon and respondents have transferred the liquor license for the R Bar business from Icon, LLC to a new, and recently formed entity, "Icon Two, LLC," in which respondent David Finnegan is one of the two named principals, without either informing Doyle, or providing him with any underlying information concerning the transfer or its financial terms and implications. (Id. ¶¶ 20). Icon is currently devoid of assets since they were all transferred to Icon Two. (Id. ¶¶ 40). The R Bar has ceased its operations since May 31, 2013 and Icon, LLC is no longer operational. (Memorandum of Law in Opposition to Verified Petition at 5).

The petition seeks an order directing (1) the dissolution of Icon, pursuant to § 702 of the New York Limited Liability Company Law (LLCL), on the grounds that it is no longer reasonably practicable to carry on the business for which it was organized, (2) rescission of the sale of the "R Bar" to Icon Two on the grounds that the sale was made without an objective valuation of the business and a concomitant appraisal of Doyle's membership interest in the assets of the business, (3) the appointment of a receiver to supervise the liquidation of Icon leading to its dissolution; and, (4) that the receiver determine the net asset value of the assets of Icon's business, book value of the

business, earnings for the past eight years, market value of the business, its investment value and future value as of the date of the proposed asset sale. (Verified Petition ¶ 1). By Stipulation dated December 12, 2014, the petition was dismissed as against Icon Two, LLC.

In support of the petition, Doyle argues that (1) Icon should be dissolved because its lack of assets makes it reasonably impracticable to carry on the business in conformity with the articles of organization, (2) he is entitled to an appraisal because the sale of Icon's assets to Icon Two was in effect a freeze-out merger to deliberately remove Doyle as a member of the operating entity and depriving him of the fair price for his membership interest, (3) Limited Liability Company Law § 1005(b) provides that if a former member disputes the surviving limited liability company's calculation of the fair market value of the former member's interest, then a special proceeding must be commenced to fix its value pursuant to Business Corporation Law § 623, and (4) circumstances underlying the recent sale of Icon's assets to Icon Two requires the court to closely examine the transaction to fix a fair market value on the business and not to rely solely upon the "purchase price" reflected in the contract of sale.

In opposition, respondents argue that (1) the petition should be denied pursuant to CPLR 3211(a)(4) based on the pendency of the plenary action to the extent the petition seeks relief, including an accounting and appraisal of Doyle's interest in Icon, as such relief is duplicative of the relief sought in the plenary action, (2) the rescission claim must be dismissed as a matter of law since rescission is an equitable remedy and Doyle has not shown that money damages are inadequate and in any event, it is impossible to restore the status quo since Icon was unable to keep its lease on commercially reasonable terms, and (3) the petition's attempt to revive the dismissed claim for dissolution and the related relief of the appointment of a receiver should be denied and particularly

as Icon has no assets and no longer operates and now exists sole purpose of being a defendant in the plenary action.

Discussion

"Pursuant to CPLR 409(b), in a special proceeding, where there are no triable issues of fact raised, the court must make a summary determination on the pleadings and papers submitted as if a motion for summary judgment were before it" Korotun v Laurel Place Homeowner's Assn., Inc., 6 AD3d 710, 711-712 (2d Dept 2004); see also, Matter of Empire Mut. Ins. Co. (Greaney), 156 AD2d 154, 156 (1st Dept 1989); Jones v. Marcy, 135 AD2d 887, 888 (3d Dept 1987)("[t]he same test that is applied to a motion for summary judgment is used to determine a special proceeding. Thus, if the papers and pleadings fail to raise a material issue of fact, the court is authorized to make a summary determination")(internal citations and quotations omitted).

With respect to the claim for dissolution of Icon and the related relief of appointing a receiver to preserve Icon's property and carry out the business, even assuming *arguendo* that circumstances have changed since the dismissal of these claims by the First Department, as Icon has transferred all of its assets to Icon Two, a claim to dissolve Icon must be dismissed as moot. Moreover, Doyle has voluntarily discontinued the petition as against Icon Two.

The claim seeking rescission of Icon's the sale of the "R Bar" to Icon Two must also be dismissed. In general,"the equitable remedy of rescission is to be invoked only when there is lacking complete and adequate remedy at law and where the status quo may be substantially restored." Rudman v. Cowles Communications, Inc., 30 NY2d 1, 13 (1972); see also, Cherokee Owners Corp. v. DNA Contracting, LLC, 96 AD3d 480 (1st Dept 2012). Here, as Doyle has

failed to show that he would not be adequately compensated by money damages, his claim for rescission must be dismissed. See MBIA Ins. Corp. v. Merrill Lynch, 81 AD3d 419, 420 (1st Dept 2011) (finding that "plaintiffs could not seek rescission since they failed to demonstrate that they could not be compensated by damages"). Moreover, there has been no showing that the status quo can be restored, particularly since, as respondents point out, R' Bar no longer has a lease for the space in which to operate the bar.

As for petition's claims for an accounting and an appraisal in light of the transfer of Icon's assets to Icon Two, respondents do not argue that these claims are without merit but, rather, that they should be dismissed under CPLR 3211(a)(4) based on the pendency of the plenary action.

CPLR 3211(a)(4) provides:

> A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires...

To warrant dismissal under this provision, "the two actions must be 'sufficiently similar' and the relief sought must be the same or substantially the same." Montalvo v. Air Dock Systems, 37 A.D.3d 567 (2d Dept 2007) (quoting Kent Dev. Co. v. Liccione, 37 N.Y.2d 899, 901 [1975]). There must also at least be a "substantial identity of parties 'which generally is present when at least one plaintiff and one defendant is common in each action.'" Proietto v. Donohue, 189 A.D.2d 807 (2d Dept 1993) (citing Morgulus v. J. Yudell Realty, 161 A.D.2d 211, 213 [1st Dept 1990]).

The determination as to whether dismiss on the ground of another action pending is subject to the court's broad discretion. Whitney v. Whitney, 57 NY2d 731 (1982). Furthermore, the court need not dismiss the action but may make such order as justice requires, including granting a stay instead of dismissal or granting relief with respect to the earlier commenced action. See SafeCard Services, Inc. v. American Exp. Travel Related Services, Co., Inc., 203 A.D.2d 65 (1st Dept 1994); Siegel, *Practice Commentaries*, McKinney's Consol. Laws of NY, Book 6B, CPLR 3211; 3211:14, 3211:18, 3211:20 (2005); Zelin, 2A Carmody-Wait 2d, Another Action Pending § 12:2 (March 2014).

In this case, the petition's request to appoint a receiver to determine the net asset value of the assets of Icon's business, book value of the business, earnings for the past eight years, market value of the business, its investment value and future value as of the date of the proposed asset sale, is related to, and overlaps with, Doyle's demand for an accounting and inspection of the books and records, in the plenary action. Moreover, there is "substantial identity of parties" insofar as both the petition and the plenary action are brought by Doyle against two of the same parties, David Finnegan and Sean Cunningham. While the respondents therefore argue that the petition should be dismissed pursuant to CPLR 3211 (a)(4), such dismissal would not take into account that circumstances have changed since the plenary action was brought insofar as Icon's business has been sold to Icon Two, giving rise to additional theories and factual basis for requesting an appraisal and accounting of Doyle's interest in Icon. On the other hand, respondents have agreed to re-open discovery in the plenary action so that Doyle can obtain information relevant to his claim for an accounting and damages insofar as it relates to the sale. Therefore, to promote judicial efficiency, while ensuring that Doyle obtains information and/or

any additional potential relief related to the sale, the appropriate remedy is to consolidate the petition, insofar as it seeks an accounting and appraisal, with the plenary action for joint trial and discovery.

Conclusion

In view of the above, it is

ORDERED that claims for rescission and to dissolve Icon and to appoint a receiver to oversee Icon's dissolution are denied and dismissed ; and it is further

ORDERED that the remainder of the petition, which seeks an accounting and appraisal, shall be consolidated for joint trial and discovery with Keith Doyle v. Icon, LLC, d/b/a as "R Bar," David Finnegan and Sean Cunningham; Index No. 602832/09; and it is further

ORDERED that the parties in the consolidated matters shall appear in Part 11, room 351, 60 Centre Street, on October 15, 2015, at 9:30 am, for a status conference to address any discovery sought by Doyle arising out of the sale of Icon and such discovery shall be ordered on an expedited basis; and it is further

ORDERED that upon payment of the appropriate calendar fee and the filing of notes of issues and statements of readiness in this proceeding and in Keith Doyle v. Icon, LLC, d/b/a as "R Bar," David Finnegan and Sean Cunningham; Index No. 602832/09, the Clerk of the Trial Support Office shall place the aforesaid actions upon the trial calendar for a joint trial.

Dated: September 14, 2015

HON. JOAN A. MADDEN
J.S.C.