Redel v Redel
2015 NY Slip Op 31941(U)
October 16, 2015
Supreme Court, New York County
Docket Number: 653395/2014
Judge: Shirley Werner Kornreich
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SHIRLEY WERNER KORNREICH
J.S.C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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DONNA REDEL,

Index No.: 653395/2014

Plaintiff,

DECISION & ORDER

-against-

IRVING REDEL, VICTORIA REDEL, JESSICA REDEL, LEDER ENTERPRISES, and PAUL SINGER, solely in his individual capacity,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendants Irving Redel (Irving), Victoria Redel (Victoria), Jessica Redel (Jessica), Leder Enterprises (Leder or the Partnership), and Paul Siegel move, as limited by the briefs, pursuant to CPLR 3211, to dismiss the amended complaint (the AC) for failure to state a claim.[1] Plaintiff Donna Redel (Donna) opposes. Defendants' motion is granted in part and denied in part for the reasons that follow.

I. Procedural History & Factual Background

As this is a motion to dismiss, the facts recited are taken from the AC (Dkt. 34) and the documentary evidence submitted by the parties.

This action concerns a dispute over the Redel family's investment in real property located at 225 Broadway in Manhattan (the Building). On December 4, 1981, a New York general partnership called "Leder Enterprises" (the Original Partnership) was formed. It is unclear whether the Original Partnership was formed orally or if there was a written partnership agreement, which, in any event, cannot be located. It is further undisputed that the Original

[1] This motion (Seq. 001) originally sought dismissal of the original complaint and also addressed Siegel's claim of lack of service. The service issue has since been resolved and, by agreement of the parties, the motion is now directed at the AC. Additionally, Donna seeks to convert the motion to summary judgment. That application is denied. As set forth herein, all that is warranted at this juncture is dismissal of certain of Donna's claims.

Partnership had five partners, each owning a 20% interest: Irving, the father; non-party Natalie Redel (Natalie), Irving's wife; Donna, their daughter; and Victoria and Jessica, Donna's sisters. *See* Dkt. 59 (the Original Partnership's Business Certificate). It also is undisputed that the Original Partnership was a shell and had no assets. The questions of fact about the Original Partnership are of no moment because in 1983, upon Natalie's death, the Original Partnership was automatically dissolved pursuant to New York Partnership Law § 62(4).[2]

Afterward, in July 1983, a new oral partnership was formed. Donna, Victoria, and Jessica again obtained 20% interests. Irving had a 36% interest. The remaining 4% was sold by Irving to Siegel, Donna's ex-boyfriend, for $60,000. *See* Dkt. 87 at 12-14. The parties dispute whether Donna knew and consented to Siegel becoming a partner. Donna, however, did not pay for her 20%. Irving loaned her $200,000 to pay for her interest, and memorialized this loan in a no-interest note, which obligated Donna to repay the loan "on the 30th day following demand." *See* Dkt. 87 at 10. The loan has not been repaid.

Irving has always managed the Partnership, which was formed for the purpose of acquiring a 10% interest in the Building. On July 19, 1983, pursuant to an Amended and Restated Agreement of Limited Partnership (the LP Agreement), the Partnership purchased a 10% interest in non-party 225 Broadway Company (the LP). *See* Dkt. 26.[3] The LP Agreement memorializes the fact that one of its general partners, non-party Momar Corporation, had signed

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[2] *See Burger, Kurzman, Kaplan & Stuchin v Kurzman*, 139 AD2d 422, 423 (1st Dept 1988) ("A partnership is dissolved by the death of any partner, absent a specific agreement to the contrary.").

[3] Donna's contention that the Partnership is not bound by the LP Agreement is wrong. It is undisputed that Irving had authority to act on behalf of the Partnership and bind it to contracts. That being said, while the LP Agreement governs the relationship between the Partnership and the LP, the LP Agreement does not governs the parties' rights as partners in the Partnership. Nonetheless, as discussed herein, the terms of the LP Agreement are highly relevant.

a contract to purchase the Building on behalf of the LP for $29.5 million. *See id.* at 7. Irving paid $1.5 million[4] to acquire a 10% limited partnership interest in the LP on behalf of the Partnership. *See id.* at 46. Shortly after the LP Agreement was executed, on July 28, 1983, the LP purchased the Building.[5]

Section 2.3 of the LP Agreement provides that the LP's sole purpose is to own and operate the Building. *See id.* at 12. Section 2.4 provides that the LP's term runs through December 31, 2033. *See id.* at 13. Section 6.1 provides that Limited Partners, such as Leder, have no right to participate in the management of the LP. *See id.* at 22. Section 6.3 prohibits Limited Partners from, *inter alia*, withdrawing their capital contributions, causing the termination and dissolution of the LP, and bringing an action for partition of the LP. *See id.* at 23. Section 7.1 forbids partners from resigning, withdrawing, or alienating their partnership interests. *See id.* However, section 7.3 permits partners to assign their interest to certain family members or trusts so long as certain conditions are satisfied. *See id.* at 24-25.

Section 7.5 states that the dissolution of a Limited Partner shall not cause the dissolution of the LP. *See id.* at 25-26. Rather, upon a Limited Partner's dissolution, "its representative or successor-in-interest … shall be deemed to be an assignee of the economic interest of the Limited Partner and may apply for admission to the [LP] as a Substituted Limited Partner upon compliance with Section 7.6." *See id.* at 26. Section 7.6 sets forth how a successor-in-interest to a Limited Partner may become a Substituted Limited Partner. *See id.* at 26-27. Section 7.7

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[4] Exhibit B to the LP Agreement indicates that Irving paid $150,000 at closing and *personally* executed a note for the $1.35 million balance. *See* Dkt. 26 at 46-47. In other words, Irving, not his daughters, invested in the Building. Donna got her 20% for free. As she seeks equitable relief, this is relevant.

[5] The LP purchased the Building from Harry B. Helmsley. *See* Dkt. 27.

provides that any assignment or transfers that do not conform to the discussed sections of the LP Agreement are void. *See id.* at 27.

Donna commenced this action on November 4, 2014, by filing her original complaint. On December 17, 2014, defendants filed the instant motion to dismiss. As noted earlier, prior to opposing the motion, on January 6, 2015, Donna filed the AC. *See* Dkt. 34. The AC contains five causes of action: (1) a declaratory judgment that Leder is an oral partnership and for the dissolution and winding up of Leder; (2) the same relief, under section 63 of the New York Partnership Law (the Partnership Law) due to failure to provide Donna with access to Leder's books and records, for making Sigel a partner, and for failure to make proper distributions; (3) a declaratory judgment that Siegel is not a partner in Leder;[6] (4) an accounting of Leder pursuant to section 44 of the Partnership Law; and (5) breach of fiduciary duty for the above mentioned acts and for failure to correct an approximately $50,000 shortfall in Donna's capital account.[7]

On January 28, 2015, Donna filed her opposition to defendants' motion to dismiss. Further briefing followed. By order dated March 18, 2015, the parties agreed, *inter alia*, to apply the instant motion to the AC. *See* Dkt. 104. The court reserved on the motion after oral argument, however the case was not submitted until August 28, when the parties provided the court with a copy of the hearing transcript. *See* Dkt. 110 (6/10/15 Tr.).

II. Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept

[6] If Siegel, in fact, is not a partner, Irving would own Siegel's 4%.

[7] It is undisputed that there is a $49,542 discrepancy. None of the parties know why.

2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

III. Discussion

Before the court addresses the parties' legal arguments, it must first be noted that this is yet another unfortunate example of a family business dispute that has devolved into needless litigation. The outcome here is obvious. Donna will be provided with the ability to inspect Leder's books and records at the offices of Leder's accountants, Scott & Guilfoyle. Defendants have offered to provide her with this level of access, which is exactly what she is legally entitled

to.[8] With respect to the capital shortfall, it appears to have existed for over a decade, and no one knows why. Nothing nefarious is alleged. As for the supposed problems associated with the dissolution of Leder, contrary to defendants' contentions, a dissolution of Leder need not impact the parties' investment in the LP. Rather than fight amongst themselves, the parties could effect a business divorce whereby Donna walks away with 20% and complies with section 7.6 of the LP Agreement to ensure that she becomes a Substituted Limited Partner. Doing so would not cause the dissolution of the LP. That said, Donna, of course, is not entitled to receive a return of her capital contributions in the LP or any other cash by virtue of her split from Leder. Donna would simply effectively own a 2% share in the Building via the LP (20% of 10%), an illiquid holding until 2033.[9] Alternatively, Donna could be bought out under section 7.3. Regardless, the only illogical outcome is to litigate.

That being said, the court resolves certain of the parties' arguments to further remove uncertainty, which will hopefully aid in a resolution.

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[8] Partnership Law § 41 provides that "[t]he partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner **shall at all times have access to and may inspect and copy any of them**" (emphasis added); *see Edmonds v Seavey*, 2009 WL 2150971, at *1 (SDNY 2009) (noting that "§ 41 contains no temporal requirement for the production of a partnership's books and records", and holding the documents should be "made available within a reasonable time."). In contrast, a formal accounting is only permitted under § 44 when: (1) a partner "is wrongfully excluded from the partnership business or possession of its property by his copartners"; (2) "the right [to a formal accounting] exists under the terms of any agreement; (3) "[a]s provided by section forty-three", which states that "[e]very partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property"; and (4) "[w]henever other circumstances render it just and reasonable."

[9] In other words, the dissolution of Leder would not result in Leder obtaining its capital contribution back from the LP. The LP Agreement prohibits this. Hence, Donna would not be entitled to liquidate her investment by virtue of Leder's dissolution.

First, Donna's breach of fiduciary duty claim against Irving is dismissed. The AC does not plead any wrongdoing committed by Irving. The AC's pleading of the capital account shortfall, refusal to provide books and records access, and refusal to dissolve Leder do not amount, separately or collectively, to a claim for breach of fiduciary duty. Simply put, Donna has no idea why there is a shortfall, and does not even allege that the shortfall *improperly* exists. *See Cosentino v Sullivan Papain Block McGrath & Cannavo, P.C.*, 47 AD3d 599 (1st Dept 2008) ("The proposed fiduciary breach claim lacks merit in that it fails to allege facts, rather than conclusions"). It may well be the case that Donna's capital account was properly charged. This question should be resolved by inspecting Leder's books and records.[10] *See Stark v Goldberg*, 297 AD2d 203, 204 (1st Dept 2002) ("It is well established that an action at law may not be maintained by one partner against another for any claim arising out of the partnership until there has been a full accounting except where the alleged wrong involves a partnership transaction which can be determined without an examination of the partnership accounts"), quoting *Kriegsman v Kraus, Ostreicher & Co.*, 126 AD2d 489, 490 (1st Dept 1987); *see Le Bel v Donovan*, 96 AD3d 415, 416 (1st Dept 2012) (this rule applies when "the claim for damages cannot be determined without an examination of the partnership's books"). Nor is the failure to dissolve Leder wrongful since, as explained below, Donna's dissolution claims are infirm.

Next, Donna seeks judicial dissolution of Leder on two grounds. First, Donna argues that she has an absolute right to dissolve Leder at will because it is not a partnership for a "definite term." Second, Donna argues that she is entitled to dissolution due to defendants' wrongdoing. Neither argument has merit.

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[10] If the transaction that led to Donna's capital account did occur more than a decade ago, there may not be any records. However, claims based on events occurring that long ago are, in any event, likely time barred. Donna always had the legal right to inspect Leder's books and records, but only sought to do so for the first time approximately 30 years after Leder was formed.

As the Court of Appeals recently explained, pursuant to Partnership Law § 62(1)(b), "in the absence of a definite term of duration or a particular undertaking to be achieved," a partnership is dissolvable at will by any partner. *See Gelman v Buehler*, 20 NY3d 534, 539 (2013). However, when the partnership was formed for a "particular undertaking" – that is, "a specific objective or project that may be accomplished at some future time, although the precise date need not be known or ascertainable at the time the partnership is created" – the partnership is not dissolvable at will. *See id.* at 537 (collecting cases). In *Gelman*, the Court held that "the 'particular undertaking' requirement [is] satisfied" where "the specific purpose of the partnership [is] the development and construction of a retail factory outlet center on an identified parcel of real property." *See id.* at 539, citing *St. Lawrence Factory Stores v Ogdensburg Bridge & Port Auth.*, 202 AD2d 844 (3d Dept 1994). Here, similarly, Leder's sole purpose is to serve as an investment vehicle for a 10% interest in the LP, an SPV formed to purchase, develop, and manage the Building. Leder, therefore, was formed for a "particular undertaking." Hence, Leder is not dissolvable at will.

Nor is Leder subject to dissolution under Partnership Law § 63, which provides that a "court shall decree a dissolution [o]n application by or for a partner whenever:

> (a) A partner has been declared incompetent in any judicial proceeding or is shown to be of unsound mind,
>
> (b) A partner becomes in any other way incapable of performing his part of the partnership contract,
>
> (c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,
>
> (d) A partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him,

(e) The business of the partnership can only be carried on at a loss,

(f) Other circumstances render a dissolution equitable.

Here, none of these circumstances are present. As noted above, Irving is not alleged to have committed any actual wrongdoing. Nor are there any allegations that the Partnership is not functional. Leder is not an active business; it is merely an investment vehicle. All that is required are rudimentary services to account for its revenues. As noted earlier, Donna shall have access to its books and records. Though Donna may not get along with her family members, none of the allegations in the AC suggest "that it is not reasonably practicable to carry on the business." Dissolution under § 63, therefore, is not warranted.

Finally, the court holds the balance of the motion in abeyance pending the conference directed below.[11] All claims other than the first and fourth causes of action are dismissed without prejudice for the reasons set forth herein. The first cause of action is limited to a claim seeking a declaratory judgment as to the nature of the Partnership. The fourth cause of action survives solely to permit Donna to inspect Leder's books and records. The inspection shall occur by the date set forth below. The parties shall then appear at a status conference, before which they must engage in further good faith settlement negotiations. Accordingly, it is

ORDERED that the motion to dismiss by defendants Irving Redel, Victoria Redel, Jessica Redel, and Leder Enterprises is granted to the extent that (1) the second, third, and fifth causes of action are dismissed without prejudice; (2) the first and fourth causes of action are

[11] The remaining issues are whether Donna's claims are barred by the statute of limitations or laches. These may be academic issues since a business divorce whereby Donna walks away with her 20% or is bought out is the only rational outcome and is not meaningfully impacted by these issues (i.e., only approximately $50,000 is at issue and even if Siegel is not a partner, his interest would revert to Irving, an outcome that does not benefit Donna).

limited to the extent set forth herein; (3) the motion is otherwise denied to the extent set forth herein; and (4) the balance of the motion is held in abeyance; and it is further

ORDERED that within 21 days of the entry of this order on the NYSCEF system, defendants shall arrange for Donna to inspect Leder's books and records at the office of Scott & Guilfoyle; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on November 24, 2015, at 10:30 in the forenoon; and it is further

ORDERED that prior to the preliminary conference, the parties must engage in further good faith settlement negotiations.

Dated: October 16, 2015

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C