| **Gross v Neiman** |
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| 2015 NY Slip Op 32891(U) |
| April 29, 2015 |
| Supreme Court, Bronx County |
| Docket Number: 22127/2014E |
| Judge: Fernando Tapia |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: Part 13

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KAREN GROSS and ALIZA MAIEROVITZ,
Individiually and derivatively on behalf of
GRACON ASSOCIATES

Plaintiffs,

v.

MARVIN NEIMAN, GRACON ASSOCIATES,
GRACON PROPERTIES LLC, CONCOURSE
REHABILITATION & NURSING CENTER
INC., and M&T BANK

Defendants.

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Index No. 22127/2014E
Fernando Tapia, J.S.C

DECISION

Defendant Neiman's motion is granted in part and denied in part. The Court grants the motion to dismiss as to the Plaintiffs' first, second, and fifth causes of action. The Court denies the motion as to the third and fourth causes of action. Defendant Neiman's requests to vacate the notice of pendency and for costs are denied. Plaintiffs' motion to amend the pleadings to include Gracon Holdings, LLC as a party is granted and additionally Plaintiffs are ordered to include 159th Street Associates.

Plaintiffs Karen Gross ("Gross") and Aliza Maierovits ("Maierovits") claim they are partners in Defendants Gracon Associates ("Partnership") and bring suit individually and derivatively on behalf of the Partnership. On June 21, 2013, Marvin Neiman ("Neiman") conveyed the property, 1072 Grand Concourse, Bronx NY, which is the asset of the partnership, to Gracon Properties ("Properties") LLC. On December 23, 2013, Neiman executed a lease between Properties as lessor and Gracon Holdings ("Holdings") as lessee. Both Properties and Holdings appear to be managed by Neiman. The lease relates to a Nursing Home. Neiman is a

shareholder, director, and the president of Concourse Nursing and Rehabilitation Center ("Concourse"). On December 23, Neiman executed a lease between Holdings and Concourse referring to a sublease between Holdings and Concourse relating to the property dated December 1, 2013. On or about December 23, Properties and M&T Bank entered into a Corrective Consolidation, Extension and Modification Agreement ("CEMA") executed by Neiman as well as a Gap Fee and Leasehold Mortgage ("Gap Mortgage") and a General Assignments of Rents ("Assignment of Rents"). M&T Bank is also named as a Defendant.

In their complaint, Plaintiffs dispute Neiman's authority to enter into the above agreements and his claim that he is the sole remaining partner in the partnership. They allege that the deed conveying the property and all subsequent transaction are null and void. They seek damages for breach of the fiduciary duty they claim Neiman owes to them as partners and to enjoin him from transferring, leasing, or encumbering the property. Plaintiffs claim Neiman has failed to make an accounting as to the financial affairs of the partnership and the distributions to which they are entitled.

In addition, Plaintiffs filed a Sur-Reply containing newly raised claims averring that Nieman was never actually a partner and, in any event, that he did not properly exercise his lease option. They also seek to add Gracon Holdings, LLC as a defendant.

Neiman, who appeared for himself and on behalf of the related companies, now moves to dismiss Plaintiffs' complaint. He seeks an Order vacating the Notice of Pendency, dismissing the action, and awarding costs and fees. According to him, the Plaintiffs' Sur-Reply should not be considered.

Neiman contends Plaintiffs' lack standing to sue for claims regarding the deed and the subsequent transactions involving the 1072 Grand Concourse property as well as any claims for breach of the fiduciary duty because they are not partners. Neiman argues that this precise question was already answered by the Second Department in *Fogel v. Neiman* (288 AD2d 429 [2nd Dept 2001]). While it is uncertain that the holding in *Fogel* applied equally to all plaintiffs, [1] the Court agrees that the Plaintiffs are not partners.

Shalom Fogel, one of the original partners of Gracon Associates, apparently assigned one-half of his interest to the Plaintiffs. The partnership agreement, [2] Section 12(b), clearly states:

> "Anything hereinabove contained to the contrary notwithstanding, any parties may assign one-fourth or more, but not all, of his interest in the Partnership property to a third party. Such assignment shall not constitute a dissolution of the Partnership. The assignee of such interest shall to the extent of such assignment be credited and charged with such share of the profit or loss of the Partnership to which the assigning Partner would otherwise be entitled.

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[1] The facts are distinguishable from those presented here. The question raised was whether the partner's widow could be substituted as a plaintiff to continue an action for rents individually and on behalf of the partnership. The Court affirmed the trial court's decision dismissing the action. While Gross and Maierovitz appeared as plaintiffs in the previous action, the fact that their interests coincided with their co-plaintiffs does not necessarily mean that they are indistinguishable from them. Gross and Maierovitz were assigned their interest in the partnership. It was not inherited by them as a widower of a deceased partner.

[2] As Neiman points out in his Reply Affirmation para. 7, even though Plaintiffs submitted an alternative Partnership Agreement, regardless of the document relied upon the result is the same. Paragraph 12(b) in the Agreement submitted by the Plaintiffs provides, "*The assignee shall not be entitled to interfere in the management or administration of the Partnership, but shall be entitled to receive a copy of the Partnership's annual statement.*"

[* 4]

*The assignee shall not be permitted or entitled to participate in the management or administration of the Partnership, but shall be entitled only to receive a copy of the Partnership's annual statement.*" (emphasis added)

According to the plain language of the partnership agreement, Plaintiffs are not permitted to participate (or interfere) in the management or administration of the partnership. As assignees they were to share in the profits/losses of the partnership. As such the Plaintiffs have no say in the decisions made by the partnership and contrary to their claims, the Plaintiffs' consent to any of the above transactions is not required. Therefore, Plaintiffs have no basis to challenge the transactions entered into by Neiman on the grounds that he acted without their authorization. Without establishing standing to sue, Plaintiffs' causes of actions seeking to undo these transactions must fail (*See Abrams v. New York City Transit*, 48 AD2d 69 [1st Dept 1975]). Plaintiffs' causes of action, numbered one and two in the complaint, seeking to void the transactions entered into by Neiman are dismissed. Plaintiffs' derivative claims purportedly made on behalf of the partnership are also dismissed. Plaintiffs have not established that they are partners and they have made no argument as to why they have standing to claim any limited interest in the partnership other than as general partners.

Similarly, any claims for equitable relief contained in the fifth cause of action are also dismissed. As stated, Plaintiffs have no basis to challenge the business decisions of the partnership. This also applies to any derivative claims made by the Plaintiffs.

The Court finds, and Defendant does not contest, that Plaintiffs are entitled to an accounting. After all, an accounting provides the best measure to assess the value of the property against the claim that it was sold for an amount below the fair market value.

However, Defendant claims that it would be improper to grant the accounting as the Plaintiffs have failed to join an indispensable party. The Court does not agree.

Defendant's claim that the inclusion of West 159th Street Associates as a party is integral to this action has some merit, but absence of this party does not warrant dismissal. Neiman proffers that because accountings have been requested in two other cases, it should be denied to the Plaintiffs here. While the practicality of consolidating these matters must be considered, it is the instant matter and only the instant matter that is before the Court. Neiman states, "[T]here is an additional party who *may* be affected by the outcome of this action..."[3] According to Neiman's very own admission, not even he deems West 159th Street Associates indispensable. Moreover, the cases referenced by Defendant Neiman, while involving the same property, raise separate issues from the present case.[4] Lastly, the cases Neiman cites are fairly stale and contrary to his position, more likely evidence which weighs in favor of an accounting.

As it is alleged that 159th Street Associates received its interest in the partnership in the same way as the Plaintiffs and may stand in the same position, this Court finds that it is a necessary party that ought to be joined. Dismissal on these grounds, would be unwarranted, as would be the case even if the Court found this party to be indispensable (David Siegel, New York Practice § 268 at 465 [Fifth ed 2011]). What is appropriate is to order that 159th Street Associates be summoned by the Plaintiffs as a party to this

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[3] Neiman Memorandum of Law, p. 8.

[4] Case no.: 45251/2003 pertains to money held in escrow subsequent to refinancing of a mortgage. Case no.: 678/2004 pertains to claims regarding the distribution of profits from rent and requests an accounting for the share of the profits from these activities.

action. This Court orders Plaintiffs to include 159th Street Associates as a party in this action.

The winding-up of this Partnership should not be prolonged. According to Concourse Rehabilitation v. Gracon Associates, where Neiman was a plaintiff, the partnership had been winding-up since at least the time of that decision which dates back to 2007. With the exception of Neiman, the last surviving partner died in 2010.[5]

The Court finds the allegations purporting to discredit Neiman as a partner contained in the Plaintiffs' Sur-Reply dubious at best. The parties have had a longstanding relationship[6] where Neiman has been recognized as a partner throughout. In any event, Plaintiffs' allegations are based on hearsay and speculation, none of which should be entertained, especially when first raised in a Sur-Reply. The only portion of the Plaintiffs' Sur-Reply which essentially amounts to a motion to amend that is appropriate to consider is the request to amend the caption to include Gracon Holdings, LLC as a Defendant. The Court grants the request to amend the caption to include this Defendant and so orders Plaintiffs to include Gracon Holdings, LLC as a party.

Based on the foregoing, Defendant Neiman's motion to dismiss the causes of action seeking to void the transactions and to estop Neiman from entering into any transactions are dismissed. Thus, Plaintiffs' first, second, and fifth causes of action are dismissed as they have been brought individually or derivatively on behalf of the partnership. Plaintiffs' third cause of action, the claim for an accounting, remains, and, as

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[5] Neiman Reply Affirmation, para. 5.

[6] Plaintiffs' Affirmation in Opposition, para. 20 "In the years and decades that followed, Neiman, Shalom Fogel, Jack P. Schleifer and the Plaintiffs have had several disputes..."

[* 7]

such, so does the notice of pendency. The Court rejects the notion that no duty is owed to the Plaintiffs. Under New York law, partners owe each other a fiduciary duty (*Carolyn Le Bel v. Mary A. Donovan*, 96 AD3d 415, 417 [1st Dept 2012] citing *Appell v. LAG Corp.*, 41 AD3d 277, 278 [1st Dept 2007]). Defendant Neiman also owes the duty to the partner's successor in interest (*Carolyn Le Bel* at 417). Plaintiffs' motion to amend the pleadings to include Gracon Holdings, LLC as a party is granted.

Plaintiffs are ordered to add 159th Street Associates and Gracon Holdings, LLC within 14 business days of this Decision and to provide proof of service to the Court. The Court further orders Neiman to provide Plaintiffs a complete accounting for the 1072 Grand Concourse property from June 21, 2012 (one year before the date of the transaction giving rise to the claims herein) to the present date by no later than June 9, 2015.

This constitutes the Decision and Order of the Court.

**Dated**: April 29, 2015
Bronx, NY

**Hon. Fernando Tapia J.S.C**