

Quinn v Dean N. Assoc.
2016 NY Slip Op 32252(U)
November 2, 2016
Supreme Court, New York County
Docket Number: 156264/2015
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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PATRICK N. QUINN, Individually and
on behalf of all Class A Limited
Partnership of DEAN NORTH ASSOCIATES

Plaintiffs,

-against-

DEAN NORTH ASSOCIATES, SYLVESTER LEAKS
CENTRAL BROOKLYN URBAN DEVELOPMENT
CORPORATION, ESSEX REALTY CORP., and
SHINDA MANAGEMENT CORPORATION

Defendants.
-----x

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DECISION AND ORDER

JEFFREY K. OING, J.:

Defendant Dean North Associates ("Dean North"), a limited partnership, was formed for the purposes of acquiring and operating a Brooklyn residential property located at 1061-67 Dean Street (the "Property") (Compl., ¶ 9).

Plaintiff Patrick Quinn alleges that on or about December 30, 1983 Dean North admitted him as a Class A Limited Partner with an ownership of interest of 9.89% (subsequently increased to a 9.9% interest), but that since his admission Dean North's general partners -- defendants Sylvester Leaks, Central Brooklyn Urban Development Corp., and Essex Corp. -- and defendant Shinda Management Corp. have: (1) wrongfully caused the transfer of profits allocable to plaintiff's 9.9% interest in Dean North to

themselves and/or their affiliates; and (2) refused to provide plaintiff with financial reports reflecting the operations of Dean North, or any tax reporting forms reflecting the profits and/or losses attributable to plaintiff's interest in Dean North (Compl., ¶¶ 13, 20-21, 30-31).

In his complaint, plaintiff seeks, inter alia, the appointment of a receiver over Dean North; an accounting of Dean North's assets; the sale of Dean North's assets, including the Property; the dissolution of Dean North; and a judgment for the wrongful conversion of profits allocable to plaintiff's interest in Dean North (Compl., ¶ 44)

Mtn Seq. No. 001

Plaintiff moves for the following reliefs: (1) pursuant to CPLR 3212(e), for partial summary judgment on his first cause of action "declaring plaintiff to be the holder of a 9.9% Class A Limited Partnership Interest in Dean [North]"; (2) for an order directing defendants to provide plaintiff all federal and state tax reporting forms; and (3) pursuant to CPLR 6401(a) for the appointment of a receiver to protect and preserve Dean North's assets.

In support of his motion, plaintiff proffers: (1) the Second Amendment to Dean North's Certificate of Limited Partnership (the

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"Second Amendment") which provides that on February 1, 1982 David Hamburger withdrew as a 9.8% limited partner in Dean North, while plaintiff became a 9.8% limited partner (Second Amendment, Biancone Affirm., Ex. H); (2) Dean North's tax returns for 2012-2014, which include K-1 forms naming David Hamburger as a partner, but do not include K-1 forms for plaintiff (Biancone Affirm., Exs. J-L); and (3) plaintiff's affidavit that he has not received K-1s for any of the years since he joined the partnership (Quinn Aff., ¶ 13).

Mtn Seq. No. 002

Defendant Shinda Management moves, pursuant to CPLR 3025, for an order permitting it to amend its answer so as to assert the affirmative defense that plaintiff has failed to name indispensable parties, namely certain limited partners in Dean North.

Mtn seq. nos. 001 and 002 are consolidated for disposition.

Discussion

Mtn Seq. No. 001

Plaintiff seeks summary judgment on his first cause of action -- a declaration that he has a 9.9% ownership interest in Dean North. Plaintiff alleges that since his admission as a partner in Dean North defendants have distributed Dean North's

profits to its partners; but knowingly and intentionally failed to issue plaintiff his pro rata share of these profits; that plaintiff demanded said pro rata share of Dean North's profits (as well as an accounting of Dean North and all tax reporting forms for Dean North since he became a member), but was ignored; and that defendants have therefore improperly converted plaintiff's share of Dean North's profits (Compl., ¶¶ 23-28).

CPLR 3212(e) provides that in any action other than a matrimonial action, "summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just" (CPLR 3212[e] [emphasis added]).

Although his first cause of action is not denominated as such -- and, indeed, is not labeled at all -- it appears to plead a claim for conversion. In any event, it does not plead a claim for a declaratory judgment as to plaintiff's interest in Dean North. This failure precludes me from granting the declaratory relief requested. Indeed, given plaintiff's failure to plead a proper declaratory judgment claim, if I were to grant such relief I would be permitting plaintiff to use improperly CPLR 3212(e) as a mechanism to establish factual elements of his claim in a piecemeal fashion.

Accordingly, plaintiff's motion for partial summary judgment seeking a declaratory judgment is denied.

Plaintiff also seeks an order directing defendants to produce federal and state tax forms. Such relief is moot, however, as defendants have already been directed to provide such forms in their possession and to provide authorizations to the Internal Revenue Service to produce such records (7/14/16 Order [NYSCEF Doc. No. 35] and 8/23/16 Order [NYSCEF Doc. No. 86]). Any deficiencies in defendants' production will be addressed at the next discovery conference.

Finally, that branch of plaintiff's motion for the appointment of a receiver is denied. Courts are to "exercise extreme caution in the appointment of receivers, which should never be made until a proper case has been clearly established" (Moyal v Stadnik, 8 Misc 3d 1017(A) [Kings Sup Ct 2005]). Furthermore, "[t]he drastic remedy of the appointment of a receiver is to be invoked only where necessary for the protection of the parties [due to the] danger of irreparable loss" (Id.).

Here, plaintiff has failed to demonstrate that the Property will be materially injured or destroyed if a Receiver is not appointed. Rather, plaintiff argues that the appointment of a receiver is necessary because: (1) plaintiff has not received his

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share of Dean North's profits; and (2) financial documents requested by plaintiff have either not been produced or have been produced in a dilatory fashion. These claims, standing alone, do not establish that Dean North's assets are at serious risk of imminent loss (Moyal v Stadnik, 8 Misc 3d 1017(A) [Kings Sup Ct 2005][court constrained to deny plaintiff's motion for the appointment of a receiver given the drastic nature of the receivership remedy, and the lack of a sufficient evidentiary showing on the part of plaintiff that the Property in question is currently in danger of loss or material injury]). In fact, plaintiff acknowledge that the Property has "a substantial market value well in excess of the mortgages affecting the Property" (Quinn Aff., ¶ 17). As such, the Property's value provides sufficient security to protect any interest plaintiff may have -- if a future accounting reveals that profits have been improperly diverted, a setoff may be made against defendants' interest in the Property (Kristensen v Charleston Sq., Inc., 273 AD2d 312, 312 [2d Dept 2000]).

Mot. Seq. No. 002

Defendant Shinda Management moves for an order permitting it to amend its answer to assert an affirmative defense that

plaintiff has failed to name certain indispensable parties, namely certain limited partners in Dean North Associates.

Leave to amend pleadings is freely granted, absent prejudice or surprise to the opposing party or "unless the proposed amendment is palpably insufficient or patently devoid of merit" (Risk Control Assoc. Ins. Group v Maloof, Lebowitz, Connahan & Oleske, P.C., 127 AD3d 500, 500 [1st Dept 2015]).

A review of the Shinda Management's proposed amendment demonstrates that it is neither palpably insufficient or patently devoid of merit. Moreover, plaintiff does not even allege that he will be prejudiced or surprised by such amendment.

Accordingly, Shinda Management's motion to amend its answer is granted.

Accordingly, it is

ORDERED that branch of plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED that branch of plaintiff's motion for the appointment of a receiver is denied; and it is further

ORDERED that defendant Shinda Management's motion to amend its answer is granted, and the proposed amended answer annexed as Exhibit D to its moving papers shall be deemed served upon

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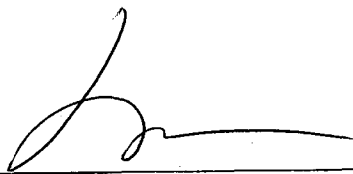
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service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a status conference in Part 48, Room 242 on November 23, 2016 at 10 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 11/2/16



HON. JEFFREY K. OING, J.S.C.
JEFFREY K. OING
J.S.C.