

Kaminski v Sirera

2016 NY Slip Op 32994(U)

March 28, 2016

Supreme Court, Orange County

Docket Number: 0103/2016

Judge: Catherine M. Bartlett

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

 ORIGINAL

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X

JILL KAMINSKI,

Plaintiff,

-against-

CHRISTINA SIRERA; ALLYSON AVILA, ESQ.;
WILSON, ELSER, MOSKOWITZ, EDELMAN &
DICKER, LLP; CHAR & HERZBERG, LLP, and
ED CHAR, ESQ.;

Defendants.

To commence the statutory time
period for appeals as of right
(CPLR 5513 [a]), you are
advised to serve a copy of this
order, with notice of entry,
upon all parties.

Index No. 0103/2016

Motion Date: February 24, 2016

-----X

The following papers numbered 1 to 7 were read on Plaintiff's order to show cause for a temporary restraining order and permanent injunction and other relief, and defendant Christina Sirera's order to show cause for a permanent injunction:

Plaintiff's Order to Show Cause - Verified Complaint / Exhibits	1-2
Affirmation in Opposition	3
Reply Affirmation	4
Defendant Sirera's Order to Show Cause - Affidavit / Exhibits - Affidavits (2)	5-7

Upon the foregoing papers, it is ORDERED that the orders to show cause are disposed of as follows:

[* 2]

This action arises out of a dispute between plaintiff Jill Kaminski and defendant Christina Sirera over the operation of the Melange Med Spa, LLC (the "Spa"), a New York limited liability company engaged in the business of providing customers with various medical and non-medical beauty remedies. The Plaintiff's complaint asserts causes of action against defendant Sirera for a temporary restraining order, preliminary injunction, and appointment of a receiver in connection the business of the Spa, a declaratory judgment with respect to Plaintiff's ownership interest in the Spa, an accounting and waste, and breach of fiduciary duty. The complaint also asserts causes of action against a number of attorney defendants for breach of fiduciary duty, breach of contract and legal malpractice.

By order to show cause, Plaintiff sought *inter alia* an order (1) enjoining Sirera from diverting the Spa's funds and committing waste of the Spa's resources, (2) enjoining Sirera from breaching her fiduciary duty to Plaintiff, (3) appointing a receiver for the Spa, (4) declaring Plaintiff to be a 50% owner of the Spa, (5) disqualifying Char & Herzberg, LLP and Ed Char, Esq. from representing defendant Sirera,¹ and (6) ordering an immediate accounting. By order to show cause, defendant Sirera sought a permanent injunction restraining Plaintiff from entering the Spa's premises and from conducting business on behalf of the Spa. Defendant Sirera's order to show cause was granted on the record in open court on February 24, 2016.

Melange Med Spa, LLC was founded in 2007 by defendant Sirera and non-party Margaret Scully. By Purchase & Sales Agreement of Membership Units entered into on July 27, 2009, Ms. Sirera agreed to purchase Ms. Scully's Membership Units in the Spa. Pursuant to a Purchase

¹The motion to disqualify Char & Herzberg, LLP and Ed Char, Esq. was denied on the record in open court on January 26, 2016.

[* 3]

Price Promissory Note made by defendant Sirera, (a) the purchase price was to be paid by Buyer to Seller in 98 equal monthly installments of \$505.00, (b) the Buyer's rights under the Purchase & Sales Agreement were assignable without limitation to plaintiff Jill Kaminski, and (c) the Buyer's duties, obligations and responsibilities under the Purchase & Sales Agreement were delegable without limitation to Ms. Kaminski. Ms. Kaminski alleges that "in or about 2009 or early 2010, [she] and Ms. Sirera agreed that [she] would acquire Scully's shares and would pay for said shares through deferred compensation payments not requiring [her] to pay any monies up front."

While Plaintiff may thereby have acquired Ms. Scully's Membership Units, she did not thereby become a Member of the Spa or become entitled to exercise the rights of a Member.

The Spa's Operating Agreement provides *inter alia* that:

- (A) The initial Members of the Spa were Ms. Sirera and Ms. Scully.
- (B) "New members may be admitted only upon the unanimous consent of the Members and upon compliance with the provisions of this agreement."
- (C) "The management of the LLC shall be vested in the Members without an appointed manager...."
- (D) "Any officer or agent may be removed by a majority of the Members whenever they decide that the best interests of the Company would be served thereby. Such removal shall be without prejudice to the contract rights, if any, of the person so removed."
- (E) "Action of the Members...may be accomplished with or without a meeting. If a meeting is held, evidence of the action shall be by Minutes or Resolution reflecting the action of the Meeting, signed by a majority of the Members, or the President and Secretary. Action without a meeting may be evidenced by a written consent signed by a majority of the Members, or the President and Secretary."

- [* 4]
- (F) “A non-member purchaser of a member’s interest cannot exercise any rights of a Member unless, by a unanimous vote, the non-selling Members consent to him becoming a Member. The non-member purchaser will be entitled, however, to share in such profits and losses, to receive such distributions, and to receive such allocation of income, gain, loss, deduction, credit or similar items to which the selling member would be entitled, to the extent of the interest assigned, and will be subject to calls for contributions under the terms of this Agreement. The purchaser, by purchasing the selling member’s interest, agrees to be subject to all the terms of this Agreement as if he were a Member.”
 - (G) The LLC will be dissolved and its affairs must be wound up only upon the written consent of a majority of the Members.

Section 602(b) of the Limited Liability Company Law provides in pertinent part:

After the effective date of a limited liability company’s initial articles of organization, a person may be admitted as a member:

- (1) in the case of a person acquiring a membership interest directly from the limited liability company, upon compliance with the operating agreement or, if the operating agreement does not so provide, upon the vote or written consent of a majority in interest of the members;
- (2) in the case of an assignee of a membership interest of a member who has the power, as provided in the operating agreement, to grant the assignee the right to become a member, upon the exercise of that power and compliance with any conditions limiting the grant or exercise of the power;

Section 603(a) of the Limited Liability Company Law provides in pertinent part:

Except as provided in the operating agreement, ...

- (2) an assignment of a membership interest does not...entitle the assignee to participate in the management and affairs of the limited liability company or to become or to exercise any rights or powers of a member;
- (3) the only effect of an assignment of a membership interest is to entitle the assignee to receive, to the extent assigned, the distributions and allocations of profits and losses to which the assignor would be entitled....

[* 5]

Section 604(a) of the Limited Liability Company Law provides in pertinent part:

Except as provided in the operating agreement, an assignee of a membership interest may not become a member without the vote or written consent of at least a majority in interest of the members, other than the member who assigned or proposes to assign membership interest.

Section 407(a) of the Limited Liability Company Law provides in pertinent part:

Whenever under this chapter members of a limited liability company are required or permitted to take any action by vote, except as provided in the operating agreement, such action may be taken without a meeting, without prior notice and without a vote, if a consent or consents in writing, settling forth the action so taken shall be signed by the members who hold the voting interests having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting...

The legal effect of the cited provisions of the Spa's Operating Agreement and the Limited Liability Company Law is that Plaintiff could become a Member of the Spa only upon the consent of defendant Sirera evidenced in writing. Plaintiff has not established, or even asserted, that formal action was taken under the Operating Agreement or under the provisions of the Limited Liability Company Law to admit her as a new Member of the Spa; and defendant Sirera expressly denies that Plaintiff was admitted to Membership in the Spa.

Plaintiff provides no legal authority for her claim that she may be deemed a Member of the Spa absent compliance with the requirements of the Operating Agreement and the Limited Liability Company Law. Moreover, her claim that she was in fact informally admitted to Membership – i.e., that her legal status with the Spa was precisely the same as Defendant's – is contradicted by the Spa's tax returns: the K-1 forms designate Defendant as "General partner or LLC member-manager", and Plaintiff only as "Limited partner or other LLC member."

Plaintiff has therefore failed to establish that she is entitled to exercise the rights of a Member of the Spa. As a "non-member purchaser" of Ms. Scully's Membership Units, Plaintiff

[* 6]

is entitled only “to share in such profits and losses, to receive such distributions, and to receive such allocation of income, gain, loss, deduction, credit or similar items to which the selling member would be entitled, to the extent of the interest assigned.”

On the record presently before this court, the court can only conclude that defendant Sirera is the sole Member of the Spa. Under the terms of the Operating Agreement, then, the management of the Spa is vested entirely in defendant Sirera as its sole Member. During the course of this proceeding, she has exercised her management authority to terminate Plaintiff’s employment with the Spa. In addition, as the Spa’s sole Member, she has exercised her authority under the Operating Agreement to commence proceedings for the dissolution of the Spa.

In view of the foregoing, Plaintiff’s Order to Show Cause is denied in its entirety. Plaintiff’s rights as a non-member purchaser of an interest in the Spa may be vindicated in the Spa’s dissolution proceedings. Since Plaintiff’s employment with the Spa has been terminated, Defendant Sirera’s Order to Show Cause is granted, and Plaintiff is permanently restrained from entering the Spa’s premises and from conducting business on behalf of the Spa.

It is therefore

ORDERED, that Plaintiff’s Order to Show Cause is denied in its entirety, and it is further

ORDERED, the defendant Christina Sirera’s Order to Show Cause is granted, and it is further

ORDERED, that Plaintiff Jill Kaminski is permanently restrained from entering the premises of Melange Med Spa, LLC at its locations at 135 Erie Street East, Blauvelt, New York 10913 and 35 Lake Street, Monroe, New York 10959, and it is further

ORDERED, that plaintiff Jill Kaminski is permanently restrained from conducting any business on behalf of Melange Med Spa, LLC.

The foregoing constitutes the decision and order of this Court.

Dated: March 28, 2016
Goshen, New York

ENTER



HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE