

<b>Quinn v Dean N. Assoc.</b>
2017 NY Slip Op 32130(U)
October 10, 2017
Supreme Court, New York County
Docket Number: 156264/15
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 48

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

Plaintiff,

Index No. 156264/2015

-against-

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

Defendants.

-----X  
**Masley, J.:**

In motion sequence number 005, plaintiff Patrick Quinn moves, pursuant to CPLR 3212, for partial summary judgment on his first cause of action in the amended complaint for a declaration that he is the holder of a 9.9% Class A Limited Partnership Interest in defendant Dean North Associates (DNA). Quinn also moves to dismiss the first counterclaim of defendants DNA, Central Brooklyn Urban Development Corporation (Central), and the Estate of Sylvester Leaks (the Estate), as well as the first counterclaim of defendant Shinda Management Corporation (Shinda).

**Background**

According to the Certificate of Redevelopment dated March 3, 1981, DNA, a limited partnership, was formed for the purposes of acquiring, rehabilitating, and operating a Brooklyn residential property located at 1061-67 Dean Street (the Property). On February 6, 1981, Sylvester Leaks, Central, and nonparty P.J.R. Construction Corporation (PJR) entered into a limited partnership agreement, creating DNA, pursuant to which Leaks and Central were general partners while PJR was an "initial

limited partner.” It appears to be undisputed, as alleged in the complaint, that a deed shows that on March 25, 1981, DNA acquired title to the Property from New York City. On June 1, 1981, Leaks, Central and PJR entered into an agreement of limited partnership with defendant Essex Realty Corp. (Essex), admitting Essex as an additional general partner in DNA (the Limited Partnership Agreement). According to the Limited Partnership Agreement, it superseded all prior agreements of DNA.

In addition to Essex, the Limited Partnership Agreement provides that eight individuals were admitted as Class A Limited Partners, each of whom were obligated to contribute capital to DNA in the amount of \$43,500 for a 9.89% interest. One of those individuals was nonparty David Hamburger. Pursuant to a second amendment to the Certificate of Limited Partnership of DNA, dated February 1, 1982, Leaks, Central, and Essex certified that Hamburger withdrew as a Class A Limited Partner, Quinn was admitted as a Class A Limited Partner in lieu of Hamburger, and Quinn became owner of a 9.89%<sup>1</sup> Class A Limited Partner in DNA.

Quinn alleges that, since his admission as a Class A Limited Partner, defendants have failed and refused to provide him with (a) financial reports reflecting DNA’s operating business and ownership and operation of the Property, (b) any distributions of profits or allocation of losses with respect to DNA’s ownership and operation of the Property, and (c) any tax reporting forms, including a Schedule K-1. In his amended complaint, Quinn seeks a declaration that he is a 9.9% Class A Limited Partner, the dissolution of DNA, appointment of a receiver, the sale of DNA’s assets and division of any proceeds, an accounting, and a judgment for the wrongful conversion of profits

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<sup>1</sup>The 9.89% interest was allegedly increased to a 9.9% interest once the mortgage affecting the Property was endorsed by HUD and PJR withdrew as limited partner.

allocable to his interest in DNA, as well as compensatory and punitive damages.

### Analysis

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The motion must be supported "by affidavit, by a copy of the pleadings and by other available proof, such as depositions. The affidavit shall be by a person having knowledge of the facts" (CPLR 3212[b]). However, a party can show a prima facie entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman*, 49 NY2d at 563). "Once the prima facie showing has been made, the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]), quoting *Zuckerman*, 49 NY2d at 562).

In support of his motion, Quinn submits, *inter alia*, a copy of the Limited Partnership Agreement, DNA's Certificate of Limited Partnership (the LP Certificate) and three amendments to the LP Certificate. Pursuant to the Second Amendment to the LP Certificate, Leaks, Central, and Essex certified that (1) Hamburger withdrew as a Class A Limited Partner, (2) Quinn was substituted as a Class A Limited Partner in lieu of Hamburger, and (3) Quinn became owner of a 9.89% Class A Limited Partner in DNA. While this document, filed with the New York County Clerk's Office, clearly shows that Quinn was substituted for Hamburger and became a Class A Limited Partner, it is not certified as a public record (see CPLR 4520, 4540 [a] and [b]). Thus,

this court is compelled to deny Quinn's motion solely for this reason. The denial is without prejudice with leave to renew to permit Quinn to submit certified copies of the public records on which he relies.

Although the burden has not shifted to defendants, due to Quinn's simple failure to submit certified public records, the court will still address the arguments raised by defendants in opposition to the summary judgment motion.

Defendants argue that Quinn waited over 30 years to bring his claims and has offered no explanation for this wait. Where the relief sought is equitable in nature, the six-year limitations period set forth in CPLR 213 (1) applies. While the six-year limitations period applies here, what Quinn alleges is akin to a "continuing wrong" each year that he was not recognized as a limited partner (*see Harvey v Metro. Life Ins. Co.*, 34 AD3d 364, 364 [1<sup>st</sup> Dept 2006]). Accordingly, Quinn commencement of this action in 2015 is timely, but he can only seek relief for six years prior to this commencement under CPLR 213 (1).

It is also asserted that this motion is premature as the parties have only engaged in document discovery.

"A motion for summary judgment should not be denied for lack of discovery alone; there must be a showing that, because of lack of disclosure, material facts not presented are unavailable to the party opposing the motion. CPLR 3212 (f) provides that 'should it appear from affidavits ... that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion....' The party opposing the motion must demonstrate that the facts are exclusively within the control of the moving party in order to rely on CPLR 3212 (f)"

(*Gettinger Assoc. v One Move Upward, Inc.*, 19 Misc. 3d 1118 [A] [Sup Ct, NY County 2008] [internal citation omitted]). Defendants assert that Quinn must be deposed, that he has failed to produce his tax returns, and has failed to produce evidence that he

contributed to acquired and/or paid for his alleged interest. Defendants seek to show that Quinn is not a Class A Limited Partner. In fact, they speculate that, at some point, Quinn transferred his interest back to Hamburger.

Any records involving DNA and its partners, including any transfers of interest, should be in the control of defendants. Defendants have failed to demonstrate that Quinn exclusively controls the information needed for them to show that Quinn was not a Class A Limited Partner or that he transferred his interest.

Defendants also argue that Quinn has failed to name indispensable parties, namely Hamburger and the other Limited Class A Partners. The court disagrees with defendants' assertion that the other limited partners of DNA will be "substantially affected" by a declaration that Quinn is a Class A Limited Partner. Defendants have failed to show how such a finding would "substantially affect" the other partners. Defendants simply make the blanket assertion that the other limited partners have an interest in DNA's finances. Further, as to Hamburger, if defendants believe he should be a party to this litigation, there is nothing preventing them from impleading him.

Finally, defendants argue that Quinn has not presented evidence of a "New Limited Partner Signature Page," which was signed by the original limited partners, including Hamburger. According to the Limited Partnership Agreement, section 17.01,

"no Limited Partner shall have the right to sell, assign, exchange, transfer, encumber, or otherwise dispose of ... all or any part of his Partnership Interest without the prior written consent of the General Partners which may be documents, including collateral assignments, promissory notes and UCC-1 financing statements related to such Partnership Interest all as may be reasonably required by the General Partners. Such substitution shall then take effect upon the filing of such amendment of the Certificate in the office of the New York County Clerk ... ."

This provision makes clear that substitution takes effect upon the filing of an

amendment to the LP Certificate. There is no additional requirement that a "New Limited Partner Signature Page" must be entered into. Assuming that the Second Amendment to the LP Certificate is true and accurate, it clearly is a certification by general partners Leaks, Central, and Essex that Quinn was substituted as a Class A Limited Partner in lieu of Hamburger and that Quinn became a Class A Limited Partner in DNA.

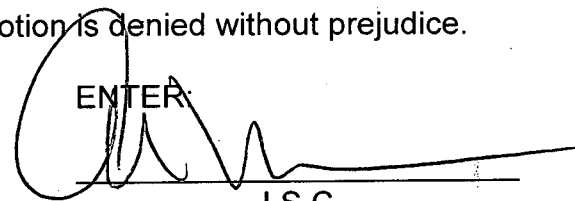
If the burden had shifted to defendants, they failed to raise any triable issues of fact.

Quinn also moves to dismiss the counterclaim asserted by DNA, Central, and Estate as well as the counterclaim asserted by Shinda. This portion of the motion is also denied as it hinges on whether Quinn has a successful claim against these defendants. The court finds that, in light of the foregoing, it would be premature to dismiss at this point, and again, denies this portion of the motion without prejudice.

Accordingly, it is

ORDERED that plaintiff Patrick Quinn's motion is denied without prejudice.

October 10, 2017

ENTER:   
J.S.C.

**HON. ANDREA MASLEY  
J.S.C.**