

Matter of Lev v Rosenberg
2019 NY Slip Op 30824(U)
March 13, 2019
Supreme Court, Kings County
Docket Number: 516497/16
Judge: Lawrence S. Knipel
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

At an IAS Term, Commercial Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 13th day of March, 2019.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

-----X

In the Matter of the Application of
MELVIN LEV and RONALD GLAZER,
Holders of a 66.66% Membership Interest,

Petitioners,

DECISION AND ORDER

For Appointment of a Receiver or Liquidating
Trustee for RMD PROPERTIES LLC, Pursuant
to § 703 of the Limited Liability Law,
and PROSPECT HEIGHTS ASSOCIATES, L.P.,
Pursuant to the Limited Partnership Act,

Index No. 516497/16

Mot. Seq. No. 5-6

- against -

VPD
DOUGLAS ROSENBERG, NOAH DEVELOPMENT
CORPORATION and R&H INVESTMENT CO. LLC,

Respondents.

-----X

The following e-filed papers read herein:

NYSCEF No.:

Notice of Motion/Cross Motion, Supporting Affirmations
(Affidavits), and Exhibits Annexed _____
Affirmation in Opposition and Exhibits Annexed _____
Reply Affirmations and Exhibits Annexed _____

107-109; 110-113
115-117; 120-121
123-125

Petitioners Melvin Lev (Lev) and Ronald Glazer (Glazer), together with respondent Douglas Rosenberg (Rosenberg), are equal members in RMD Properties LLC (RMD), which is the majority limited partner in Prospect Heights Associates, L.P. (PHA),¹ in which Rosenberg, through his wholly owned entity, respondent Noah Development Corporation

¹ PHA is the owner of an apartment building and an adjoining rental property in Brooklyn, New York, both of which are managed by an entity wholly owned by Rosenberg.

2019 MAR 21 AM 11:49
KINGS COUNTY CLERK
FILED

(Noah), is the sole general partner. In a prior order, dated Dec. 28, 2018 (the prior order), the Court noted that, in the course of the then-pending motion practice, petitioner Glazer had executed a stipulation of discontinuance. In light of petitioner Glazer's decision, *as it appeared at that time*, to disengage himself from further litigation, the Court in the prior order denied the parties' then pending motion and cross motion for summary judgment, in each instance, with leave to renew. Supplementing the record, petitioners Lev and Glazer (collectively, petitioners) and respondents Rosenberg and Noah (collectively, respondents) have renewed their respective requests for relief.

Discussion

(1)

Glazer's stipulation of discontinuance was ineffective because it was not signed by attorneys of record for *all* parties; specifically, it was not signed by Lev's counsel (*see* CPLR 3217 [a] [2]; *Madison Acquisition Group, LLC v 7614 Fourth Real Estate Dev., LLC*, 134 AD3d 683, 685 [2d Dept 2015]; *Phillips v Trommel Const.*, 101 AD3d 1097 [2d Dept 2012]). Although discontinuance can be sought on motion where, as here, not all parties have agreed to discontinuance (*see* CPLR 3217 [b]), no motion for an order of discontinuance was served in this proceeding (*see C.W. Brown, Inc. v HCE, Inc.*, 8 AD3d 520, 521 [2d Dept 2004]). Considering, in addition, Glazer's newly submitted affidavit indicating his desire to *remain* in this proceeding, his earlier execution of a stipulation of discontinuance is of no force and effect.

(2)

Sections 701 (a) (2) and (a) (3) of the Limited Liability Company Law (LLC Law) provide that a limited liability company (LLC) may be dissolved, and its affairs will be wound up, upon either “the happening of events specified in the operating agreement,” or “the vote or written consent of at least a majority in interest of the members” or such higher number as is required by the operating agreement.² RMD’s Operating Agreement provides (in § 7.1.2) that RMD “shall be dissolved . . . upon the written agreement of the Members holding two-thirds or more of the [ownership] Percentages then held by Members.” By an undated “Written Agreement to Dissolve RMD Properties LLC” (NYSCEF #8), petitioners Glazer and Lev, “each holding a 1/3 interest in RMD and collectively holding a 2/3 interest in RMD, hereby agree[d] pursuant to § 7.1.2 . . . that RMD be and hereby shall be dissolved.” Glazer and Lev’s joint decision to dissolve RMD fulfilled the terms of its Operating Agreement and thus complied with Section 701 (a) (2) of the LLC Law (*see Matter of Fassa Corp.*, 31 Misc 3d 782, 785 [Sup Ct, Nassau County 2011]; *see also In re Futterman*, 584 BR 609, 624 [Bankr SD NY 2018]).

That Glazer and Lev subsequently attempted, by written agreement (NYSCEF #88), to retract their prior decision to dissolve RMD, is unavailing. Whereas it is true that dissolution fails to immediately terminate an LLC and that the LLC continues in existence until the winding up of its affairs is completed (*see LLC Law § 703*), it does not follow that Glazer and Lev may retract their election to dissolve RMD to avail themselves of legal

² Dissolution under Section 701 of the LLC Law must be distinguished from judicial dissolution under Section 702 of the LLC Law on which respondents rely. If the requirements of the former are met, the latter (Section 702 of the LLC Law) becomes irrelevant.

standing to *directly* (rather than through RMD) seek liquidation of PHA (*accord McElduff v Mansperger*, 214 AD2d 653, 655 [2d Dept 1995], *lv dismissed* 86 NY2d 778 [1995]).

(3)

“[A]n amendment [of pleadings under CPLR 3025 (b)] which would shift a claim from a party without standing to another party who could have asserted that claim in the first instance is proper since such an amendment, by its nature, does not result in surprise or prejudice to the defendants who had prior knowledge of the claim and an opportunity to prepare a proper defense” (*JCD Farms, Inc. v Juul-Nielsen*, 300 AD2d 446, 446 [2d Dept 2002] [internal quotation marks omitted]). Here, it is appropriate to grant Lev and Glazer leave to amend their petition to substitute RMD, as a limited partner in PHA, in place of themselves in their individual capacity as members of RMD (*see D’Angelo v Kujawski*, 164 AD3d 648, 650 [2d Dept 2018]).

(4)

LLC Law § 703 provides, in relevant part, that:

(a) . . . Upon cause shown, the supreme court . . . may wind up the limited liability company’s affairs upon application of any member . . . , and in connection therewith may appoint a receiver or liquidating trustee.

(b) Upon dissolution of a limited liability company, the persons winding up the limited liability company’s affairs may, in the name of and for and on behalf of the limited liability company, prosecute and defend suits, whether civil, criminal or administrative, settle and close the limited liability company’s business, dispose of and convey the limited liability company’s property, discharge the limited liability company’s liabilities and distribute to the members any remaining assets of the limited liability company. . . .”

Under the unusual circumstances of this proceeding, court-supervised winding up of RMD's affairs is warranted. Pursuant to LLC Law § 703 (a), Gregory LaSpina, Esq.³ 19-02 Whitestone Expressway, Whitestone, New York 11357, Telephone: 718-767-3333, is hereby appointed as liquidating trustee for RMD (the liquidating trustee). Upon his compliance with the requirements of Part 36 of the Rules of the Chief Judge, the liquidating trustee is to obtain from RMD's accountant an up-to-date accounting of the assets and liabilities of RMD. In addition, respondent Rosenberg shall immediately turn over to the liquidating trustee (with copies to petitioners' counsel) copies of all books and records, including bank statements and leases, relating to the management and operation of the subject properties owned by PHA. The costs of such accounting shall be a charge to RMD and shall take priority over any other debts except compensation of the liquidating trustee who shall be compensated for his services at the rate of \$ ___ per hour, plus any reasonable costs incurred.

Pursuant to LLC Law § 703 (b), the liquidating trustee may prosecute this proceeding on behalf of RMD, as a limited partner of PHA, for judicial dissolution of PHA, following his report and recommendation to the Court whether, in accordance with Revised Limited Partnership Act (RLPA) § 121-802, "it is [or is not] reasonably practicable to carry on the business [of PHA] in conformity with the partnership agreement." Contrary to respondents' contention, RMD, as a limited partner of PHA, has the requisite standing to seek judicial dissolution of PHA pursuant to RLPA § 121-802. Although RLPA § 121-802 is not specific as to who may seek judicial dissolution of a limited partnership, a limited partner may do so

³ Mr. LaSpina previously served, at the parties' joint request, as a mediator in this proceeding (NYSCEF #49).

because (1) the term “partner” is defined to encompass both a limited partner and a general partner (RLPA § 121-101 [k]), and (2) under the RLPA, a limited partner does not forfeit his or her limited liability by proposing the “dissolution and winding up of the limited partnership” (§ 121-303 [b] [6] [B]).

(5)

CPLR 3215 (c) provides that “[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.” Although counterclaims are not specifically mentioned in CPLR 3215, the legislative history reveals that it was intended to apply to counterclaims, in addition to claims pleaded in a complaint (*see Giglio v NTIMP*, 86 AD3d 301, 307 [2d Dept 2011]). Here, Rosenberg has failed to (1) seek leave to enter a default judgment on his counterclaims against Lev within one year after default, (2) establish a reasonable excuse for his delay in seeking a default judgment on his counterclaims, and (3) demonstrate that his counterclaims are potentially meritorious. Accordingly, all of Rosenberg’s counterclaims against Lev, as set forth in his and Noah’s joint answer, dated Oct. 24, 2016 (NYSCEF #16), are dismissed as abandoned, without costs, pursuant to CPLR 3215 (c) (*see Wells Fargo Bank, N.A. v Chaplin*, 107 AD3d 881, 883 [2d Dept 2013]).

(6)

Each side's request for an award of sanctions for frivolous litigation pursuant to 22 NYCRR 130-1 is denied in the Court's discretion (*see e.g. Miller v John A. Keeffe, P.C.*, 164 AD2d 933, 936 [2d Dept 1990]).

Conclusion

Based on the foregoing and after oral argument, it is

ORDERED that petitioners' motion in Seq. No. 5 is *granted to the extent* set forth in this decision and order; and it is further

ORDERED that respondents' cross motion in Seq. No. 6 is *denied in its entirety*; and it is further

ORDERED that the caption of this proceeding is amended to read as follows:

-----X
In the Matter of the Application of
RMD PROPERTIES LLC, limited partner in
PROSPECT HEIGHTS ASSOCIATES, L.P.,
by MELVIN LEV and RONALD GLAZER,
Holders of a 66.66% Membership Interest in
RMD PROPERTIES LLC,
Petitioner,

Index No. 516497/16

For Appointment of a Receiver or Liquidating
Trustee for RMD PROPERTIES LLC, Pursuant
to § 703 of the Limited Liability Law,
and PROSPECT HEIGHTS ASSOCIATES, L.P.,
Pursuant to the Limited Partnership Act,

- against -

DOUGLAS ROSENBERG, NOAH DEVELOPMENT
CORPORATION and R&H INVESTMENT CO. LLC,
Respondents.

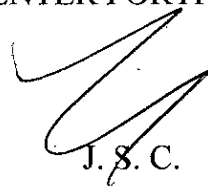
-----X

Petitioners' counsel is directed to serve a copy of this decision and order with notice of entry on respondents' counsel electronically and on the liquidating trustee by first-class mail, and to electronically file an affidavit of said service with the Kings County Clerk.

The next scheduled appearance in this proceeding is on April 5, 2019 in Commercial Part Trial 4.

This constitutes the decision and order of the Court.

ENTER FORTHWITH,



J. S. C.

Justice Lawrence Knipel

2019 MAR 21 AM 11:59
KINGS COUNTY CLERK
FILED