Jensen v 1050 Pacific, LLC
2020 NY Slip Op 31170(U)
April 22, 2020
Supreme Court, Kings County
Docket Number: 516881/2019
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CIVIL TERM: COMMERCIAL PART 8

----------X

PAUL JENSEN and MARK RIGERMAN,

Plaintiff,

Decision and Order

-against-

April 22, 2020

Index #516881/2019

1050 PACIFIC, LLC,

Defendant,

----------X

PRESENT: HON. LEON RUCHELSMAN

The defendant has moved pursuant to CPLR §2221 seeking to reargue a decision and order dated November 4, 2019. The plaintiffs have cross moved seeking the appointment of a receiver. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in the prior decision on March 27, 2015 the defendant awarded five percent of its ownership to the plaintiffs who then moved seeking to enforce their ownership interests. The defendant sought to dismiss the causes of action on the grounds that a prior agreement dated September 28, 2012 stated that Hershel Herbst had become a member of the company and that no transfers could be made without his consent. Since

Herbst did not consent to the transfer such transfer was invalid and the action seeking its enforcement required dismissal. The court denied that request finding that there was scant evidence Herbst was an owner of the defendant since the K-1's of the company did not list Herbst as an owner. Upon this motion to dismiss the defendant argues that Herbst was appointed the 'manager' of the company and not an owner thus his absence from the company's K-1's did not mean there were questions of fact whether Herbst's consent was required and consequently the lawsuit should be dismissed. Further, the plaintiff seeks the appointment of a receiver to secure the plaintiff's interests in the property.

Conclusions of Law

It is well settled that a motion to reargue "shall be based upon matters of law or fact allegedly overlooked or misapprehended by the court in determining the prior motion" (CPLR §2221(d)(2), Vaughn v. Veolia Transportation Inc., 117 AD3d 939, 986 NYS2d 504 [2d Dept., 2014]).

The defendant admits that Herbst is both an owner/member of the defendant as well as the sole manager of the defendant. Thus, as the sole manager of the defendant the 2015 agreement must be rendered void since it was executed without Herbst's consent who, pursuant to the declaration, is the sole

manager of the defendant and presumably must approve all such transactions. Therefore, regardless of whether Herbst is an owner of the defendant as the sole manager of the defendant his consent was surely required.

However, the very same document, namely the 'Declaration' that conferred ownership status upon Herbst, which the court held must be subject to discovery since there were no indications of such ownership expressed in any tax documents, also conferred upon Herbst the status of sole manager. The defendant therefore argues that notwithstanding one portion of the Declaration that the court held was insufficient to dismiss the action, a different portion of the same Declaration is sufficient to dismiss the action. However, the Declaration cannot be parsed in that fashion. Indeed the Declaration states that "Hershel Herbst…has become a member of 1050 Pacific LLC…and has become the sole manager of said LLC" (see, Declaration dated September 28, 2012). Both designations are stated in the very same sentence. Since there are questions of fact whether Herbst is a true owner since the tax documents do not indicate as such, thus, there are likewise questions whether Herbst was the sole managing member as well.

The defendant further argues that in any event the K-1 tax documents do not raise any questions of fact concerning

ownership because the K-1's concerned shareholders and not members. "It is entirely possible that an LLC may have non-shareholder and/or non-equity holding members" (Memorandum of Law in Support, page 8). That 'possibility' is precisely why there are questions of fact and the motion to reargue and the underlying motion to dismiss must be denied and the parties must engage in discovery. Therefore, the motion seeking reargument is denied. The motion seeking to dismiss the cause of action for a constructive trust is denied.

Concerning the cross motion seeking a receiver, it is well settled that "a temporary receiver should only be appointed where there is a clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect a party's interests in that property" (see, Quick v. Quick, 69 AD3d 828, 893 NYS2d 583 [2d Dept., 2010]). Thus, a temporary receiver is appropriate where the party has presented "clear and convincing evidence of irreparable loss or waste to the subject property and that a temporary receiver is needed to protect their interests" (Magee v. Magee, 120 AD3d 637, 990 NYS2d 894 [2d Dept., 2014]).

In this case there really is no allegation of waste or loss to the subject property. Rather, the plaintiffs seek to recover money in the form of profits and distributions they claim they

are owed. The plaintiffs also argue the loan has not been reduced and based upon the rental income it should have been. While all these issues require exploration they do not support the appointment of a receiver since they are only money claims. Thus, a temporary receiver is not appropriate where the property itself does not require any specific protection but rather protection is sought to preserve money claims (At the Airport v. Isata LLC, 18 Misc3d 1106(A), 856 NYS2d 22 [Supreme Court Nassau County 2007]). Therefore, the motion seeking a receiver is denied.

The motion seeking to amend the complaint to add a claim for an accounting is granted.

So ordered.

ENTER:

Dated: April 22, 2020
Brooklyn, N.Y.

Hon. Leon Ruchelsman
JSC