Matter of Pachter v Winiarsky
2021 NY Slip Op 30129(U)
January 15, 2021
Supreme Court, Kings County
Docket Number: 502779/2020
Judge: Leon Ruchelsman

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

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In the Matter of the Application of

RENA PACHTER, in her representative capacity as Administrator of the ESTATE OF JUDITH LINDENBERG, deceased, individually and derivatively on behalf of 3046 WEST 22 ST. PROPERTIES LLC, D-WIN PROPERTIES LLC, HOMES R BEAUTIFUL RE LLC, and PARK 50 WEST PROPERTIES LLC,

Petitioner,

Decision and Order
Index No. 502779/2020

For the Dissolution of 3046 WEST 22 ST. PROPERTIES LLC, D-WIN PROPERTIES LLC, HOMES R BEAUTIFUL RE LLC, and PARK 50 WEST PROPERTIES LLC, and other relief,

- against -

January 15, 2021

DAVID WINIARSKY, ESTHER WINIARSKY, and MYRON WINIARSKY,

Respondents,

- and -

3046 WEST 22 ST. PROPERTIES LLC, D-WIN PROPERTIES LLC, HOMES R BEAUTIFUL RE LLC, and PARK 50 WEST PROPERTIES LLC,

Nominal Respondents,

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PRESENT: HON. LEON RUCHELSMAN

The petitioner has moved seeking to enforce a prior order of the court seeking various discovery and compelling the respondents to comply with such discovery orders. Further, the petitioner seeks sanctions. The respondent has cross-moved seeking discovery. Further, the petitioner has moved seeking to dismiss two counterclaims filed by respondent seeking quantum meruit and unjust enrichment. All the motions have been opposed respectively. Papers were submitted by the parties and after

reviewing all the arguments this court now makes the following determination.

As recorded in prior orders the petitioners have instituted this action seeking dissolution of various entities. Further, the Petition seeks derivative claims of breach of fiduciary duty and conversion. The Petition alleges the respondents harmed the entities by engaging in improper conduct. In an order dated September 2, 2020 this court ordered the computer drives of respondent be made available for cloning in efforts to examine documents that would surely be discoverable.

The petitioners now argue the respondents have not fully complied with that order. The only issue of contention is a computer for an entity called Homes R Beautiful Inc., which is located at 3135 Coney Island Avenue in Kings County. The respondents assert the computer at that location has no connection with any of the claims in this lawsuit. However, there is evidence, at this discovery stage, that the computer may contain information relevant to petitioner's claims since Ms. Lindenberg worked together with Esther Winiarsky in a similarly named entity. The petitioner may explore the contents of that computer. Therefore, the motion seeking to clone that computer is granted and the respondents must make such computer available for cloning within twenty days of receipt of this order. Any motion seeking sanctions is denied.

Turning to other aspects of petitioner's motion seeking discovery as well as respondent's cross motion, pursuant to CPLR §408 in the court's discretion all parties must participate and comply with all discovery requests. Thus, the respondents shall have thirty days from the date of this order in which to respond to all interrogatories and other discovery requested by petitioner. Likewise, petitioner shall have thirty days in which to comply with any discovery demands of the respondents. This allowance to proceed with discovery shall continue for the duration of the case. Thus, there will be no need for any additional requests in this regard. Further, there is no reason why any party can now decline to engage in such discovery. The materials sought are necessary and relevant for both sides to pursue their respective claims and defenses. The court stresses the obligation of all parties to comply with the discovery sought. The court should be contacted if any party has failed to provide the discovery sought after thirty days have passed. The court will then schedule an immediate conference.

Next, concerning the motion to dismiss two counterclaims, the parties are each fifty percent owners of four companies. The petition alleges the respondents acted in ways that were contrary to the best interests of the companies including stealing rental income, giving interest free loans to themselves and other improprieties including fraud and harassment. The answer

essentially disputed all the allegations and further David Winiarsky asserted to counterclaims. The first is that as acting manager of the entities he is entitled to compensation in an amount approximating one million dollars and seeks that amount in quantum meruit. Similarly, the next counterclaim is for unjust enrichment, essentially arguing that the entities were unjustly enriched by David's activities as manager and it would be unjust for David not to be compensated by the entities. The petitioner has moved seeking to dismiss those counterclaims.

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]). Whether the complaint or counterclaim will later survive a motion for summary judgment, or whether the party will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

It is well settled that a party may file a claim for quantum meruit as an alternative to a breach of contract claim (see, Thompson v. Horowitz, 141 AD3d 642, 37 NYS3d 266 [2d Dept., 2016]). "To be entitled to recover damages under the theory of

quantum meruit, a plaintiff must establish: "(1) the performance of services in good faith, (2) the acceptance of services by the person or persons to whom they are rendered, (3) the expectation of compensation therefor, and (4) the reasonable value of the services rendered" (F and M General Contracting v. Oncel, 132 AD3d 946, 18 NYS3d 678 [2d Dept., 2015]). In this case, there was no expectation of compensation. It is well settled that any joint venturer including an owner of a corporation is not entitled to compensation for services rendered and are only entitled to the appreciation of their interests in the venture (Birnbaum v. Birnbaum, 73 NY2d 461, 541 NYS2d 746 [1989]). The respondent argues that there are cases which permit a corporate member to receive compensation for work performed on behalf of the corporation. First, respondent cites to Crespi v. PHD GBW, 2019 N.Y. Lexis 1345 [Supreme Court Kings County 2019] decided by this court that held a corporate owner maintained an action for quantum meruit. However, in that case there were questions whether the work performed was after the relationship between the entity and the plaintiff had already terminated. Even if that was not the case in Crespi that decision cannot guide the legal issues raised in this case where a clear pronouncement by the Court of Appeals bars the relief sought. Likewise, Tesser v. Allboro Equipment Company, 73 AD3d 1023, 904 NYS2d 701 [2d Dept., 2010] does not demand a contrary result. In that case the court

awarded quantum meruit to an individual termed one of the shareholders of a corporation. However, that corporation was later dissolved and a partnership was formed. As explained in the lower court decision of earlier litigation the court specifically noted that "under the terms of the Partnership Agreement at issue, plaintiff's rights would not mature until the deaths of both of his in-laws, provided he was still working for the company and provided that defendants Neal Vichinsky and Linda Tesser still leased out the properties. Plaintiff was not a signatory to this agreement, and in any event, his in-laws are still alive, and, thus, the conditions of the agreement have not been met" (Tesser v. Allboro Equipment Company, 2002 WL 34234682 [Supreme Court Queens County 2002]). Thus, the plaintiff was not an owner of the partnership and was therefore entitled to compensation via quantum meruit.

Again, in Kadosh v. Kadosh, 2013 WL 3389348 [Supreme Court New York County 2013] the court seemed to allow claims of quantum meruit to proceed where the plaintiff was a member of an entity. However, that decision does not explain which party is seeking the quantum meruit and for what services allegedly rendered. Therefore, that decision cannot serve as precedent that a member of a joint venture can be paid for services rendered without any express agreement. Therefore, the counterclaims seeking quantum meruit and unjust enrichment based upon the same facts cannot be

supported considering David's role as a member of all the entities. Therefore, the motion seeking to dismiss the two counterclaims is granted.

So ordered.

ENTER:

DATED: January 15, 2021
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC