Mazurek v Rogers
2021 NY Slip Op 31942(U)
February 11, 2021
Supreme Court, Bronx County
Docket Number: 34158/2019E
Judge: Eddie J. McShan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA-32

DOROTHEA MAZUREK, individually
and derivatively on behalf of
1090 UNIVERSITY AVE., LLC,
3929 CARPENTER AVE., LLC,
4026 CARPENTER AVE., LLC,

Plaintiffs,

-against-

ETHER ROGERS,

Defendant,

and
1090 UNIVERSITY AVE., LLC,
3929 CARPENTER AVE., LLC,
4026 CARPENTER AVE., LLC,

Nominal Defendants.

DECISION AND ORDER

Index No. 34158/2019E

Present:
HON. EDDIE J. MCSHAN

The following Papers Numbered: 1 to 20 were read on this Notice of Motion for Leave to Reargue:

No on Calendar of	PAPERS NUMBERED
Notice of Motion-Order to Show Cause-Exhibits and Affirmation Annexed	1 – 11
Answering Affidavit, Amended Cross-Motion and Exhibits- (Oral Argument and Exhibit)	12 – 19
Replying Affirmation and Exhibits	20
Other	

Upon the foregoing cited papers, the Decision/Order of this Motion is as follows:

Plaintiff moves for leave to reargue this Court's Decision and Order ("Order") dated May 6, 2020, which denied, among other things, Plaintiff's applications for a preliminary injunction and permanent injunction, and vacated the temporary restraining orders previously granted in Plaintiff's Order to Show Cause dated December 20, 2019. Defendant vehemently opposes Plaintiff's application and requests that Plaintiff's attorney be sanctioned for his alleged frivolous statements.

Motion to Reargue

Plaintiff argues that this Court misapprehended issues of law and fact in denying both her application to continue the temporary restraining order issued on December 20, 2019, and her

application for a preliminary injunction and permanent injunction. Plaintiff asserts that this Court misapprehended the applicable legal standard when it misapprehended two significant facts in finding that: 1) it could not determine whether (a) Plaintiff is a co-managing member of the LLCs absent an operating agreement or that (b) Defendant violated Section 408 of the New York State Limited Liability Law; and 2) Defendant's alleged misappropriation of the LLCs' funds and mismanagement did not constitute irreparable harm warranting injunctive relief.

Plaintiff insists that the Defendant does not dispute that Plaintiff Mazurek and Defendant Rogers are co-managing members of the LLCs. Plaintiff emphasizes that both the Defendant in her affidavit and her attorney in her affirmation acknowledge that Plaintiff is "an officer and managing member of the Companies" and that "[Plaintiff] has always been a managing member" respectively. Plaintiff contends that the parties do not dispute that there is no written operating agreement. Plaintiff argues that it is well-settled that in the absence of an operating agreement, New York State Limited Liability Law §§ 401(a) and 408(a) govern vesting management roles on the LLC members. Plaintiff asserts that she annexed emails reflecting the parties' agreement requiring both of their approvals for all management and operational decisions.

Plaintiff argues that while the February 2019 agreement is not an operating agreement, it is a valid and enforceable agreement entered into between the two co-managing members. Plaintiff insists that Defendant does not contest nor deny that Plaintiff's approval was necessary prior to any management actions. Plaintiff further insists that she has established indisputably that the Defendant violated "LLC Law, their February 2019 agreement and their prior course of performance wrongfully and unilaterally . . ." Plaintiff contends that the Defendant misappropriated $900,000 by distributing said money to herself and the other two members, including the Plaintiff, in violation of LLC Law. Plaintiff suggests that Defendant's subsequent placement of $250,000 of the $300,000 she distributed to herself in escrow evidences that she took wrongful action in making such distributions.

Plaintiff argues that this Court also misapprehended certain matters of fact and law in finding that there is no irreparable harm to Plaintiff based on "alleged misappropriation of LLCs' funds and mismanagement of the properties against the Defendant dating back several years". Plaintiff argues that contrary to this Court's finding, the irreparable harm in the instant matter involved Defendant's unauthorized and unilateral conduct which has abrogated Plaintiff's rights and authority as co-managing member thereby vitiating the statutory and contractual requirements that management decisions require majority approval of the managing members. Plaintiff insists that Defendant's actions threaten her ownership rights. Plaintiff contends that by making unilateral decisions such as issuing distributions without majority approval, Defendant is wresting control of the LLCs away form Plaintiff and exclusively to herself.

Defendant insists that Plaintiff's applications seeking leave to reargue must be denied arguing that the Plaintiff provided no clear and convincing evidence of the elements to justify a temporary restraining order or injunction. Defendant insists that Plaintiff makes fraudulent allegations of mismanagement, and that her arguments were predicated on a "hoax". Defendant insists that nowhere in registration statements is the superintendent listed or ever was listed as a general partner. Defendant contends that Plaintiff's attorney tried to "trick" the Court. Defendant states that contrary to Plaintiff's assertions, in the absence of an operating agreement, any member may act as an agent for the day-to-day operations pursuant to LLC § 412. Defendant insists that Plaintiff falsely represents that she had no authority to make decisions without the approval of the other managing partner. Defendant annexes the articles of organization for 4026 Carpenter Avenue and 3929 Carpenter Avenue LLCs indicating that each company is "to be managed by ONE OR MORE MEMBERS." Defendant emphasizes that there is nothing in the articles of organization that requires both members for the management of the day-to-day actions.

CPLR § 2221(d) provides in part that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the

prior motion, but shall not include any matters of fact not offered on the prior motion." It is well settled that a motion to reargue is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principles of law (*Foley v Roche*, 68 A.D.2d 558 [1st Dept. 1979]). The purpose of a motion to reargue is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided (*Foley*, 68 A.D.2d 558).

The Court finds on this record that it has not overlooked or misapprehended any matters of fact or law that would warrant leave to reargue. The Court finds that the Plaintiff failed to establish that this Court overlooked or misapprehended the irreparable injury element of her application seeking injunctive relief. In its Order, this Court noted that "Plaintiff enumerates a litany of alleged misappropriation of LLCs' funds and mismanagement of properties against the Defendant dating back several years." After carefully considering Plaintiff's allegation and relying on First Department precedent, this Court found that Plaintiff failed to establish "the kind of urgency contemplated by the statute" or that "an award of money damages would not be fair compensation of the Defendant's malfeasance and mismanagement" (*see for example Meissner v Yun,* 126 AD3d 565 [1st Dept 2015] *citing Zodkevitch v Feibush,* 49 AD3d 424 [1st Dept 2008]). Even if the Court misapprehended the existence of an operating agreement as Plaintiff contends, this Court continues to find that Plaintiff failed to establish irreparable injury, or that an award of money damages would not be fair compensation for the Defendant's alleged malfeasance and mismanagement (*see Meissner v Yun,* 126 AD3d 565 [1st Dept 2015]). The Court notes that Plaintiff changes course of argument in this application suggesting that the irreparable injury is not monetary but rather an abrogation of her ownership rights and authority.

The Court similarly notes that it relied on Plaintiff's and her attorney's assertions in the application subject of this motion that the parties "*formalized* the management agreement, providing that all the Companies' and Properties' management decisions would require Defendant's and Plaintiff's joint approval as co-managing members; constituting the majority

vote of the managing members, as required under the LLC Law" (emphasis added). Plaintiff suggests for the first time in this application that the parties do not dispute that there is no written operating agreement, and proffers arguments pursuant to New York State Limited Liability Law § 401(a) not previously advanced in her initial Order to Show Cause.

Based upon the foregoing, Plaintiff's application seeking leave to reargue this Court's Order is hereby denied in its entirety.

Sanctions

Defendant's application seeking to sanction Plaintiff's attorney is hereby denied in its entirety. The Court notes that Defendant failed to properly cross-move for such relief. Moreover, the Court finds that Plaintiff's application seeking reargument was not frivolous.

In light of the foregoing, it is hereby

ORDERED AND ADJUDGED that the Plaintiff's notice of motion seeking leave to reargue is hereby denied in their entirety; and it is further

ORDERED AND ADJUDGED that Defendant's application seeking to sanction Plaintiff's attorney is hereby denied.

The foregoing shall constitute the decision and order of this Court.

Dated: February 11, 2021

J.S.C.