SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA CRANE **PART** 60M

Justice

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KENNETH ROSENBLUM,

Plaintiff,

- v -

BERNICE ROSENBLUM,

Defendant.

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INDEX NO. 654177/2015

MOTION DATE 05/05/2020

MOTION SEQ. NO. 015

DECISION + ORDER ON MOTION and Decision After Trial

The following e-filed documents, listed by NYSCEF document number (Motion 015) 477, 478, 479, 480, 481, 482, 483

were read on this motion to/for ENFORCE/EXEC JUDGMENT OR ORDER.

Upon the foregoing documents, it is

This trial was the latest act in a long running dispute between defendant mother (Bernice Rosenblum) and plaintiff son (Kenneth Rosenblum) who were also partners in companies that invested in rental properties in lower Manhattan. The companies are Standard Realty Associates (Standard) and Restoration Realty Development Corp. ([Restoration] and collectively with Standard the "Corporations").

To settle prior disputes, the parties signed an agreement on October 2, 2013 (the Settlement Agreement). Section 1 of the Settlement Agreement provided: "Each of the parties hereby releases and dismisses any and all claims against the other arising out of or related in any way to Standard as of this date, except as specifically set forth otherwise in this Agreement." The preamble to the Settlement Agreement broadly defined "Standard" as "Standard Realty and related entities and transactions." Section 2 of the Settlement Agreement provided:

> Ken shall pay the sum of $14 million to Standard, in full payment of all loans and business opportunities he has taken from Standard. Ken agrees that he will fully repay said sum to Standard prior to entering into or funding in any way any other business transaction, but in any event on or before June 1, 2017. As consideration thereunder, Bernice hereby releases her claim for lost business opportunities and for the repayment of all loans taken by Ken (or mortgages extended to his property to date). Such payment obligation shall be memorialized in a promissory note and confession of judgment in the forms to be drafted by Bernice's counsel Etta Brandman.

(emphasis added).

The Settlement Agreement did little to end disputes between the parties. Accordingly, in 2015, a fed up Kenneth once again sued to dissolve his business relationship with his

mother. Bernice counterclaimed for breach of the Settlement Agreement and breach of fiduciary duty. The case proceeded past summary judgment. As both parties were elderly, the court granted a trial preference. At the time of trial, Bernice was 101. While the trial decision was sub judice, she died. However, not even her death could end this dispute.

The issues for trial were:

1. Whether or not Standard owned the properties located in New York county at 25 Thompson Street, 71 Thompson Street, 98 Thompson Street, 117 Waverly Place, 42 Bank Street, and 99 Perry Street or whether Bernice and Kenneth owned these properties as tenants in common such that the Court should grant Plaintiff's claim for partition

2. Whether Plaintiff withdrew from 132 Realty LLC and Village Realty LLC (the "LLCs") in December 2016 or at a later date.

3. Whether Standard and Restoration, of which the Parties are 50-50 shareholders, are so deadlocked as to warrant their dissolution pursuant to New York Business Corporation Law ¶ 1104.

4. Whether Plaintiff owns the property located at 107 West 11th Street, New York, New York ("11th Street") outright, with Defendant having a life estate in two apartments, or whether the recorded deed of ownership is accurate, but subject to Defendant's contractual obligation pursuant to the Settlement Agreement to convey her half interest at death.

5. Whether Plaintiff breached the Settlement Agreement when he engaged in business transactions after the settlement date, prior to repaying the money he took from Standard (the "Post-Settlement Business Transactions")

6. Whether Plaintiff breached his fiduciary duties to Defendant and their shared businesses—the Partnership, the Corporations and/or the LLCs (together, the "Companies")—after the date of the Settlement Agreement by acquiring multiple properties in New York, including: 1154 President Street, 1452 Carroll Street, 1552, 1575, 1581 President Street, and 520 Crown Street in Brooklyn, and 133-135 West 13th Street in New York

7. What amount is required to equalize the Parties' capital accounts and whether there are any setoffs, considering the Decision and Order on Plaintiff's Motion for Summary Judgment, dated September 19, 2019.

The following is the court's findings of fact and conclusions of law. Both parties testified, as well as several experts and individuals involved with the parties' business. All witnesses were more or less credible, with one exception. As discussed on the record, the court does not find Bernice's testimony competent due to her severe memory and cognitive problems.

1. Were the Properties TIC or Partnership Properties?

A large aspect of this dispute turns on whether the parties held certain properties as tenants in common or whether Standard instead held these properties. The properties in question are: 25 Thompson, 71 Thompson, 98 Thompson, 42 Bank Street[1], 117 Waverly and 99 Perry.

Kenneth contends that he owned these properties with Berenice as tenants in common. Bernice's position is that Standard owned the properties. The documentary evidence on this issue cuts both ways.

First, the deeds for these properties list Kenneth and Bernice as tenants in common. In addition, both Bernice and Kenneth have sued as tenants in common with respect to one of the properties (see *Kenneth Rosenblum and Bernice Rosenblum v Trinity Hudson Holdings*, index no. 160656/2014 pending in New York County).

However, it is also undisputed that the parties represented that the Partnership was the lessor of these properties on the Partnership's tax returns. In addition, the parties represented that the Partnership was the owner on tax certiorari petitions. The Partnership counted the properties as assets on some mortgage applications to banks. Meanwhile, other mortgage applications and easements (see exhibits K14-19) reflect that the properties were owned as tenants in common. Clearly then, both parties had a course of conduct to treat these properties as being owned as tenants in common when it suited them and as partnership assets for other purposes, such as taxes.

The manner in which the parties treated the properties vis a vis each other then comes down to credibility. Because Berenice's entire testimony must be disregarded as incompetent, Kenneth's testimony that these properties were owned as tenants in common is uncontroverted and stands. Accordingly, the properties are owned as tenants in common. Kenneth is therefore entitled to judgment on his claim for partition and sale of these properties. Because the court holds that the above properties were held as tenants in common, there is no need to decide the date Kenneth withdrew from the Partnership.

2. The Date Plaintiff Withdrew, If Ever, from the LLC's

On September 19, 2019, this court granted that part of plaintiff's motion seeking withdrawal from the LLC entities: 132 Realty LLC and Village Realty LLC (collectively the "LLC entities"). LLC Law §509 states:

> if not otherwise provided in the operating agreement, he or she is entitled to receive, within a reasonable time after withdrawal, the fair value of his or her membership interest in the limited liability company as of the date of withdrawal based upon his or her right to share in distributions from the limited liability company.

Unlike the above properties where there was an issue of fact as to how they were held (i.e. TIC or Partnership), here, there is no dispute that the LLC entities are, in fact, LLCs. As

[1] Originally a joint tenancy.

such, Kenneth is entitled to a valuation as of the date of withdrawal or a reasonable time thereafter.

As with everything else, the parties contest the date Kenneth withdrew from the LLC entities. Kenneth contends that he withdrew at the latest on December 10, 2016, six months after he asserted a claim for withdrawal in the amended complaint. Defendant claims that Kenneth's portion should be valued, at the earliest, on the date that the court issued its dissolution order, i.e. September 19, 2019.

"The court should set the valuation date for the minority member's interest by reference to the equities of the case" *PFT Tech., LLC v. Wieser*, 181 A.D.3d 836, 838, [2d Dep't 2020], *leave to appeal denied,* 35 N.Y.3d 915 (2020). Here, the evidence shows and the equities dictate that the September 2019 date is more appropriate. First, Kenneth is not a minority member. In addition, although Kenneth sued for dissolution, he: (1) never advised the managing agents of the LLC Properties that he had withdrawn; (2) continued to manage the LLCS; (3) continued to receive 50% of the LLC income distributions; (4) continued to report himself as a member of the LLCs on his personal returns (K-1s), thereby representing to the IRS that he was still a 50% owner and member of the LLCs; (5) for tax year 2017, plaintiff designated himself as the tax matters partner for both LLC entities, (6) plaintiff also designated himself as the "partnership representative" of 132 Realty LLC and Village Realty LLC for tax year 2018 (*see Matter of Chimsanthi*a, 2021 Slip op 14776 [Appellate Division, 1st Dep't December 7, 2021][doctrine of tax estoppel precluded petitioner from arguing that decedent paid respondents for real property]; *Chiu v Man Choi Chiu*, 125 AD3d 914 [2d Dep;'t 2015][on bench trial to determine valuation of interest, member of limited liability company (LLC) was barred from subsequently taking position contrary to that taken in his income tax returns]). Thus, the proper date for withdrawal is, at the earliest, September 20, 2019, the date this Court ordered dissolution of the LLCs.

3. Should the Corporations be Dissolved?

Citing BCL § 1104, Kenneth claims he is entitled to dissolution of the corporations because "the directors are so divided respecting the management of the corporation's affairs that the votes required for action by the board cannot be obtained." At trial, Kenneth explained that it became impossible to work with his mother, due to her hostility towards him. Kenneth seemed genuinely upset over the prospect of having to continue in business with his mother, at one point exclaiming that "I had to separate from my mother!" However, as Berenice has since died, and Kenneth has no other grounds to dissolve the corporations that are admittedly profitable, the cause of action for dissolution, without more, is moot. In fact, as the only surviving owner, Kenneth does not need court approval to dissolve the corporations. To the extent another family member may have acceded to Bernice's role, Kenneth has not identified a deadlock with respect to that person. Accordingly, the court holds that plaintiff has not carried its burden to demonstrate that the corporations need to be dissolved.

4. 11th Street Property

Any issues surrounding the 11th Street Property are moot due to Berenice's death. By the terms of the October 2013 settlement, that property is now Kenneth's solely. To the extent that it matters how the parties held the property prior to Berenice's death, they clearly held it

together. First, the recorded deed on the property lists both plaintiff and defendant as owners. Further, the Settlement Agreement includes a provision that "Berenice agrees to bequeath any interest she may own in the West 11th Street property to Ken if he survives her." There would be no need for plaintiff to sign a document with a survivorship provision unless both held the property.

5. Bernice's Counterclaims

The Settlement Agreement between the parties precluded plaintiff from entering into "or funding in any way" any other business transaction until he repaid money he had taken from Standard. It is undisputed that Ken finished paying back Standard in April 2017. Nevertheless, Bernice contends: (1) usurped opportunities for himself that should have been offered to Bernice as his partner thereby breaching his fiduciary duty either to her or to the Corporation, and (2) that Kenneth in fact did engage in separate transactions prior to paying back the money to Standard thereby breaching the Settlement Agreement

a. Breach of Fiduciary Duty

To the extent that Bernice has asserted a claim for direct injury on her own behalf for usurpation of a business opportunity, it is dismissed. Allegations of diversion of corporate opportunities belong to the corporation and therefore must be asserted as derivative claims (*see Sajust, LLC v. Mendelow*, 198 A.D.3d 582, 905 [1st Dep't 2021]; *Yudell v Gilbert*, 99 AD3d 108, 115 [1st Dep't 2012]). Moreover, at trial Kenneth demonstrated that he offered Bernice the opportunity to invest in Brooklyn, but she was not interested. Again, due to her severe memory issues, Bernice was unable to contradict this testimony.

Finally, there is no evidence that Kenneth used Standard's employees for his own ventures. There was no proof that any employee failed to perform any duties with respect to the parties' joint business affairs. To the extent employee Yaacov Blachman was not available, it was because of his own projects as a broker connected to the Orthodox Jewish community in Brooklyn. Therefore, Bernice has failed to carry her burden that Kenneth breached his fiduciary duties to Standard and the court dismisses this claim.

b. Breach of Contract

With respect to claims for breach of the Settlement Agreement, it is undisputed that Kenneth did not finish paying back the full $14 million due under the settlement agreement until April 2017. Kenneth engaged in several transactions between the settlement agreement in October 2013 and April 2017. Not all constitute a breach of the settlement agreement. For example, the contract to purchase 1154 President Street was signed on June 7, 2013. The signing of the contract, not the closing, is the usurpation of the corporate opportunity and breach of the settlement agreement (*see In re Fischer*, 259 BR 23, 31 [EDNY 2001]; *cf., IDT v Dean Witter*, 12 NY3d 132, 140 [2009] [claim accrued when defendant first refused to comply with MOU]) The June 7, 2013 contract was BEFORE the October 2013 settlement agreement and therefore Bernice released claims relating to it.

Similarly, 133-35 West 13th Street was a foreclosure on a mortgage that was purchased in 2011. Therefore, that event too was prior to the Settlement Agreement and thus released under the terms of the Settlement Agreement. In any event, Kenneth's testimony at trial that

Bernice did not want any part of 13th Street, because to her buying a mortgage was money lending, is unrefuted. This is again because Bernice's testimony was not competent due to her severe cognitive problems.

However, Kenneth does not dispute that there were purchases of properties in Brooklyn after the settlement agreement (the "Brooklyn After Properties")[2]. Kenneth makes the convoluted argument that: (1) because he funded the purchase of these new properties through Four Roses Development that had borrowed money from Standard and (2) because Bernice had released claims related to Four Roses' loans, (3) she had released her claims under the Settlement Agreement as to properties purchased with Four Roses' funds.

This makes no sense. Kenneth's interpretation reads Kenneth's obligation not to fund "in any way any other business transaction," prior to repaying Standard, right out of the agreement. "In any way" means what it says and would include transactions using Four Roses funds (as well as funds from anywhere else). Therefore, to the extent the contracts for the Brooklyn After Properties were signed after October 2, 2013, Kenneth breached the settlement agreement not to fund "in any way" any other business transaction. Just because Kenneth had until June 2017 to repay, did not mean he could fund other transactions.

Standard's damages are the loss of the use of the money that funded the Brooklyn After Properties rather than repaying Standard. The damages run from the time of the breach (i.e. the time the contracts for the Brooklyn After Properties were signed) until payment to Standard (most likely April 2017). Loss of use damages is statutory interest on those amounts. Defendant is directed to send the court a proposed judgment in accordance with the parameters the court has set on this counterclaim for breach of the Settlement Agreement (i.e. do the math).

6. Equalization

In motion seq. 15, Kenneth moves to enforce the directive of this court on September 20, 2019 to equalize the parties' capital accounts. This motion is denied without prejudice. Given this trial decision, the amounts due each side can only be determined upon the completion of an accounting. Defendant is entitled to a set-off from damages for her counterclaims. Moreover, at the time the court ordered equalization, the hope was there would be enough money to equalize capital accounts. Apparently, this is not the case (see Trial Tr. at 14:5–14:8). Therefore, equalization must await an accounting. The parties are directed to attend a conference on January 31, 2021 at noon over microsoft TEAMS to discuss the mechanics of that accounting.

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1/4/2022
DATE

MELISSA CRANE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

[2] These properties are: 1552 President Street and 1581 President Street on June 18, 2014; 1542 Carroll Street on June 26, 2014; and 520 Crown Street on November 27, 2015.