Family Group 188, LLC v Foukas
2022 NY Slip Op 30764(U)
April 1, 2022
Supreme Court, Kings County
Docket Number: Index No. 506970/2018
Judge: Reginald A. Boddie
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At an IAS Commercial Term Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 1st day of April 2022.

P R E S E N T:
Honorable Reginald A. Boddie, JSC

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FAMILY GROUP 188, LLC,

Plaintiff(s),

-against-

IOANNAS FOUKAS,

Defendant(s).

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Index No. 506970/2018
Cal. No. 7, 8 MS 3, 4

AMENDED DECISION AND ORDER

Papers	Numbered
MS 3	Doc. # 160-204

Upon the foregoing cited papers, the decision and order on plaintiff's motion for partial summary judgment, pursuant to CPLR 3212, and for defendant's cross-motion to amend the answer is as follows:

Plaintiffs are limited liability companies that were formed to own and operate rental properties. Margarita Podorova, Oxana Soboleva, Kristina Foukas and Yana Kovaleva (the PSFK Members), and defendant Ioannis (John) Foukas are members of plaintiffs Family Group 188, LLC, Family Group 196, LLC and Family Group 200, LLC (the Group LLCs). Plaintiffs allegedly hold a combined majority interest in the Group LLCs and defendant Foukas holds a minority interest. The rental properties at issue are 188 Brighton 10th Street, Brooklyn, New York 11235 (Block 8707, Lot 35), 196 Brighton 10th Street, Brooklyn, New York 11235 (Block 8707, Lot 19), and 200 Brighton 10th Street, Brooklyn, New York 11235 (Block 8707, Lot 11).

The relationship between the PSFK Members and defendant Foukas allegedly broke down in 2017. On March 20, 2019, the PSFK Members executed and delivered to defendant Foukas Written Consents for each of the Group LLCs, allegedly pursuant to Limited Liability Company

Law § 407, whereby they terminated defendant's authority to unilaterally act in relation to the subject properties, including collecting rent from tenants of the subject premises, entering the subject properties, or performing any action whatsoever on behalf of the Group LLCs without their written consent. Plaintiffs averred that when defendant violated the 2019 Written Consents, they sought and obtained a preliminary injunction against defendant. The Court's November 13, 2019 Order also enjoined the parties from selling the subject properties without an appropriate court order.

In September 2021, plaintiffs identified buyers for each of the subject properties and negotiated terms of sale. On September 16, 2021, the PSFK Members executed and delivered to defendant Foukas Written Consents for each of the Group LLCs, allegedly pursuant to Limited Liability Company Law § 407, whereby they authorized themselves to execute the contracts for sale of each of the subject properties and seek an order from this Court allowing for the sale. Plaintiffs contended defendant Foukas testified under oath that if the PSFK Members were able to sell the subject properties, he would consent.

Plaintiffs moved herein for partial summary judgment (MS 3) on counts 8, 19, and 30 of their complaint which sought judgment declaring the PSFK Members are entitled to sell the three properties owned by the Group LLCs without the consent of defendant Foukas, use the sale proceeds to pay off any existing debts associated with those properties, including loans made by members in connection with the properties, and disburse the remainder among the members. Plaintiffs' instant motion for partial summary judgment seeks an order declaring the PSFK Members may sell the properties, use the profits from the sale to pay off any existing liens and/or mortgages in connection with the properties, and have the remaining profits held in escrow by plaintiffs' legal counsel or as otherwise directed by this Court until the resolution of this action.

In support of their motion for summary judgment on counts 8 and 19 of the complaint, plaintiffs proffered evidence including the undated and partially executed 2016 operating agreements for Family Group 188, LLC (2016/188 Operating Agreement) and Family Group 196, LLC (2016/196 Operating Agreement) and the September 16, 2021 Written Consents of the majority members to sell.

The operating agreements for Family Group 188, LLC and Family Group 196, LLC identified Svetlana Ivanova (Ivanova) and Lidiia Arkhipova (Arkhipova) as members, in addition to the PSFK Members and defendant Foukas. Plaintiffs contended the PSFK Members have an undisputed majority interest in the Group LLCs and hold a combined 80% interest. Plaintiffs averred the discrepancy between their calculation of the PSFK Members' ownership interests and defendant's calculation is due to defendants' inclusion of Ivanova and Arkhipova, although they surrendered all interests they had in the two LLCs in January 2017. There is no contention that these parties were ever involved in Family Group 200, LLC.

Plaintiffs conceded the 2016/188 and 2016/196 operating agreements required unanimous consent of the LLCs' members to sell the properties owned by these LLCs, but contended these agreements are unenforceable on the ground they were only executed by two members and were never adopted. Plaintiffs argued the 2019 and 2021 Written Consents were executed in accordance with Limited Liability Company Law § 407 (a), which permits members of an LLC to "provide written consents to take action in lieu of an actual vote, unless [the LLC's] operating agreement provides otherwise," citing *Madison Hudson Assocs., LLC v Neumann*, 806 NYS2d 445 (Sup Ct, NY County 2005). They further contended that since the Written Consents were signed by members holding a collective majority voting interest, contrary to defendant's objection, no meeting was required, citing LLCL § 407 (a).

Plaintiffs argued Limited Liability Company Law § 402 (c) (3) explicitly states that, "[e]xcept as provided in an operating agreement, . . . the vote of a majority in interest of the members shall be required to . . . adopt, amend, restate or revoke the articles of organization or operating agreement." They further argued that the operating agreements themselves stated that "this Agreement may be adopted, altered, amended or repealed . . . by a unanimous consent of the Membership." Podorova and Kovaleva, the members who signed, together held only a 28.5714% ownership interest when these LLCs were initially formed, and now hold only a 40% combined ownership interest, and therefore, their signatures alone were insufficient to effectuate these operating agreements either under Limited Liability Company Law § 402 (c) (3) or the terms of the agreements.

Plaintiffs further argued the operating agreements are nonbinding even if defendant is correct that there is objective evidence evincing the parties' intent to be bound by these operating agreements, citing *Flores v Lower E. Side Serv. Ctr., Inc.*, which defendant also cited, for the principle that unsigned agreements may be enforceable if there is objective evidence establishing the parties' intention to be bound only if " . . . [the contract's] subject matter does not implicate a statute . . . that imposes such a requirement" (4 NY3d 363, 368 (2005); *see also Priceless Custom Homes, Inc. v O'Neill*, 104 AD3d 664, 665 (2d Dept 2013) (citing *Flores*, 4 NY3d at 368). Here, plaintiffs argued, the operating agreements implicated Limited Liability Company Law § 402 which requires the vote of a majority in interest of the members entitled to vote in order to adopt an operating agreement. Plaintiffs contended defendant did not offer any evidence of such a vote because there is no such evidence.

In support of their motion for summary judgment on count 30 of their complaint, plaintiff proffered the fully executed 2017 Limited Liability Company Resolution of Family Group 200, LLC (2017/200 company resolution) and the September 16, 2021 Written Consents of majority

members for the LLC to sell. The 2017/200 company resolution was entered into for the purpose of permitting the limited liability company to consummate the purchase of 200 Brighton 10th Street, Brooklyn, New York 11235 (Block 8707, Lot 11) pursuant to the Contract of Sale dated January 23, 2017, and requires consent of two-thirds in interest of the members.

Plaintiff also proffered excerpts of the EBT transcripts of defendant Foukas purportedly conceding plaintiffs' authority to sell the three properties owned by the Group LLCs without unanimous consent and his lack of contact and knowledge of the properties. Plaintiffs further averred that with regard to Family Group 188 and 196, the PSFK Members and defendant Foukas orally agreed that the income collected from the properties would not be used for any purpose without the approval of a majority of members.

Defendant Foukas opposed plaintiffs' motion on the following grounds: (1) two of the properties cannot be sold without unanimous consent, which the PSFK Members have not obtained, (2) none of the properties should be sold because the PSFK Members intentionally created the financial debt that they now claim justifies the sale of those properties, (3) the PSFK Members have failed to establish that the proposed sales are in the best interest of the LLCs because they have not shown that the proposed sales will satisfy all of the outstanding debts of the LLCs, and (4) placement in escrow of any sales proceeds remaining after the LLCs' debts are paid is premature without any proof of the debts owed by the LLCs.

Defendant Foukas argued the PSFK members do not have unanimous consent of the members of these Family Group 188 and 198 LLCs as they have not produced any documentation showing that he, who is a member of both LLCs, has consented to the sale of the properties owned by these two LLCs. Instead, he argued, the PSFK Members purported to authorize the sale of the subject properties by producing Written Consents signed by all of the PSFK Members and relied on the default rules under New York Limited Liability Company Law §§ 402 (a) & 407 (a) that

resolutions may be passed by a simple majority of the members of an LLC. Defendant argued it is black letter law that an operating agreement supersedes the default provisions of the New York Limited Liability Company Law, citing *see Garcia v Garcia*, 187 AD3d 859, 133 NYS3d 631, 634-35 (2d Dept 2020). Thus, defendant contended, the PSFK Members are not entitled to rely on their Written Consents to authorize the sale of the subject properties.

Defendant also argued the parties' conduct demonstrated their intent to be bound by the 2016/188 and 2016/198 Operating Agreements, citing *Flores*, 4 NY3d 369-370; *Barrett v Magnetic Const. Group Corp.*, 149 AD3d 1022, 1024 (2d Dept 2017). For example, he argued, he and Oxana Soboleva acted as managers as provided for in Article VII of both operating agreements. He argued that she executed promissory notes on behalf of the LLCs, a duty which was vested in her by the operating agreements. Defendant argued her actions demonstrated she and the other PSFK Members treated the operating agreements as binding despite the operating agreements not being fully signed and therefore, the written consents were insufficient to authorize the sale of the subject properties.

Defendant cross-moved to amend his answer to include a twelfth affirmative defense alleging, "Plaintiffs' claims to authorize the sale of the properties owned by the Plaintiff Limited Liability Companies in order to pay for the debt of those Companies must be barred because the cited debts arose solely due to the mismanagement of the Plaintiff Members and thus are sales that are without a legitimate business purpose and which constitute breaches of fiduciary duty to those Companies and to all of the Companies' Members." He also opposed the branch of plaintiffs' motion to use the proceeds of the sale to pay company debts on the same ground. He further disputed the amount of the LLCs liabilities and argued that without clearly establishing the amount of liabilities chargeable to the LLCs, the PFSK Members cannot possibly know whether the proposed sale is in the best interests of all members of the LLCs and thus whether they are

complying with their fiduciary duty to all members of the LLCs, including him. Defendant Foukas also argued that if the Court granted plaintiffs' motion, all proceeds of the sale should be held in escrow pending the resolution of this action.

Plaintiffs opposed the amendment on the grounds such amendment at this late stage in litigation would deprive them of the opportunity to properly investigate these claims or conduct discovery or depositions. Plaintiffs opposed the cross-motion on the grounds defendant failed to plead the existence of a fiduciary duty, misconduct by the alleged breacher, and damages directly caused by the breach, and the proposed amendment lacks particularity. Plaintiffs also argued Rule 24 of the Commercial Division Rules of the Supreme Court states that "[p]rior to the making or filing of a motion, counsel for the moving party shall advise the Court in writing (no more than two pages) on notice to opposing counsel outlining the issue(s) in dispute and requesting a telephone conference," citing see Uniform Rules for Trial Court (22 NYCRR) § 202.70, Rule 24 (c), and the only exceptions to this rule are disclosure disputes covered by Rule 14 or dispositive motions pursuant to CPLR 3211, 3212, or 3213 - and Defendant's motion to amend his answer is clearly neither.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*see* CPLR 3212; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). It is fundamental that "summary judgment should only be granted where there are no material and triable issues of fact" (*Stretch v Tedesco*, 263 AD2d 538, 539 [2d Dept 1999]; *see Andre v Pomeroy*, 35 NY2d 361, 362 [1974]) and that " . . . issue finding, as opposed to issue determination, is the key to summary judgment" (*Stretch*, 263 AD2d at 539, citing *see Krupp v Aetna Life & Cas. Co.*, 103 AD2d 252, 261 [2d Dept 1984]). The papers should be scrutinized in

the light most favorable to the party opposing the motion (*Gitlin v Chirinkin*, 98 AD3d 561, 561-562 [2d Dept 2012], citing *see Robinson v Strong Mem. Hosp.*, 98 AD2d 976 [4th Dept 1983]). Upon such showing the burden shifts to the party opposing to raise a triable issue of fact.

To defeat a motion for summary judgment the opposing party must "show facts sufficient to require a trial of any issue of fact" (*see* CPLR 3212; *Zuckerman*, 49 NY2d at 562). The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet the strict requirement of tender in admissible form (*Krupp*, 103 AD2d at 262). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a motion for summary judgment (*Zuckerman*, 49 NY2d at 562). "In reaching a decision, the court may not ordinarily weigh the credibility of the affiants unless untruths are clearly apparent" (*Krupp*, 103 AD2d at 262 [citations omitted]). Where the proponent fails to make a prima facie showing of entitlement to judgment as a matter of law, the motion must be denied regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]; *Winegrad*, 64 NY2d at 853).

Limited Liability Company Law § 417 (a) mandates members of an LLC "adopt a written operating agreement . . . not inconsistent with law or its articles of organization relating to (i) the business of the limited liability company, (ii) the conduct of its affairs and (iii) the rights, powers, preferences, limitations or responsibilities of its members, managers, . . ." Notwithstanding the mandate of Limited Liability Company Law § 417, the absence of an operating agreement does not render company action void or voidable but simply subjects it to governance by the default provisions of the Limited Liability Company Law (*see Matter of Eight of Swords, LLC*, 96 AD3d 839, 839 [2d Dept 2012]; *see* Limited Liability Company Law §§ 401-704).

Here, both sides agree that the 2016/188 and 2016/196 operating agreements were not executed. Both sides also cited *Flores*. In *Flores*, the Court explained, "We have long held that a contract may be valid even if it is not signed by the party to be charged, provided its subject matter does not implicate a statute-- such as the statute of frauds (General Obligations Law § 5-701)--that imposes such a requirement" (4 NY3d at 368). The Court went further in explaining, that the absence of an executed document did not end the inquiry, stating: ". . . an unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound" (4 NY3d at 368-369). Defendant, citing *Flores*, argued the operating agreements were binding because the parties acted in accord with the provisions of the operating agreements, therefore demonstrating their intent to be bound.

However, where, as here, the parties failed to adopt operating agreements for Family Group 188 and 196 LLC, the provisions of the Limited Liability Company Law apply to management actions by their members (*see Matter of Eight of Swords, LLC*, 96 AD3d at 839; citing *see* Limited Liability Company Law §§ 401-704). Plaintiffs correctly argued Limited Liability Company Law § 402 was implicated. This section provides, "Except as provided in the operating agreement, whether or not a limited liability company is managed by the members or by one or more managers, the vote of at least a majority in interest of the members entitled to vote thereon shall be required to: . . . adopt . . . [an] operating agreement" (Limited Liability Company Law § 402 [c] [3]). Plaintiffs averred no such vote was taken and defendant failed to raise an issue of fact as to such vote. Therefore, the PFSK Members were entitled to proceed pursuant to a majority vote to agree to sell the properties, pursuant to Limited Liability Company Law § 402 [d] [2]).

Further, section 407 [a] permits "[m]embers of a limited liability corporation [to] provide written consent in order to take action in lieu of an actual vote, unless the operating agreement provides otherwise" (Limited Liability Company Law § 407). Limited Liability Company Law §

414 provides, "Except as provided in the operating agreement, any or all managers of a limited liability company may be removed or replaced with or without cause by a vote of a majority in interest of the members entitled to vote thereon." Here, plaintiffs issued Written Consents in accordance with statute.

Therefore, plaintiffs established entitlement to summary judgment on their 8th, 9th, and 30th causes of action and defendant failed to raise a triable issue of fact (*see Winegrad*, 64 NY2d 851, 853; *see* Limited Liability Company Law §§ 401-417). Accordingly, it is hereby ordered plaintiffs' motion for partial summary judgment is granted to the extent the PSFK Members are entitled to sell the subject properties. The branch of the motion seeking judgment declaring the PSFK Members may use the profits from the sale to pay off any existing liens and/or mortgages in connection with the properties and have the remaining profits held in escrow by plaintiffs' legal counsel pending the resolution of this action is granted to the extent plaintiffs may use the profits of the sale to pay off only the existing liens and/or mortgages in connection with the properties necessary to deliver clear and marketable title. There are questions of facts as to the remainder of Group LLCs' liabilities and therefore the balance of the proceeds from the sales shall be held in the escrow account of plaintiffs' legal counsel pending resolution of this litigation.

Defendant also cross-moved to amend the answer to conform the pleading to the evidence. Accordingly, defendant's motion is denied without prejudice to moving based on the evidence adduced at trial (*see* CPLR 3025 [c]).

ENTER:

Honorable Reginald A. Boddie
Justice, Supreme Court

HON. REGINALD A. BODDIE
J.S.C.