Kalmanowitz v Kalmanowitz & Lee, C.P.A.'s, PLLC
2022 NY Slip Op 32381(U)
July 14, 2022
Supreme Court, New York County
Docket Number: Index No. 654210/2021
Judge: Margaret Chan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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EVA KALMANOWITZ, as Executrix of the Estate of Irwin A. Kalmanowitz,

Plaintiff,

\- v -

KALMANOWITZ & LEE, C.P.A.'S, PLLC,WILLIAM LEE

Defendants.

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INDEX NO. 654210/2021

MOTION DATE 09/15/2021, 10/29/2021

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66
were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49, 67, 68, 69, 70, 71, 72
were read on this motion to/for PRECLUDE.

In this action arising out of a dispute as to the dissolution of the defendant accounting firm, defendants move for summary judgment dismissing the complaint, and plaintiff cross moves for leave to amend her complaint pursuant to CPLR §3025(b) (motion seq.no. 001). Defendants separately move for an order pursuant to CPLR 3126 precluding plaintiff from producing certain evidence at trial (motion seq. no. 002), which motion is opposed by plaintiff.[1]

Background

The accounting firm of Kalmanowitz & Lee, C.P.A., PLLC (K & L or the Firm), a professional limited liability company, was formed on or about January 27, 2005, by Irwin Kalmanowitz (Kalmanowitz or Decedent) and defendant William Lee (Lee) (NYSCEF #2-Complaint, ¶ 6). Kalmanowitz and Lee each initially owned a 50% interest in the Firm (*id.).* In June of 2018, Kalmanowitz was diagnosed with cancer which caused him to month Kalmanowitz died on October 6, 2019. After Kalmanowitz's death, Lee was the sole working partner. The firm ostensibly stopped conducting business as of December 31, 2019 (NYSCEF # 9, ¶ 8) and was

[1] Motion sequence nos. 001 and 002 are consolidated for disposition.

officially dissolved on March 12, 2020 (NYSCEF # 10-Notice to Admit Item 3[a][b] at 4, Articles of Dissolution at 25; NYSCEF # 54-Response to Notice to Admit, Response 3, at 3-4).

A dispute subsequently arose regarding the date that the Firm was dissolved which impacted on the amount of Kalmanowitz's interest in the Firm on the date of dissolution, and his entitlement to continuing distributions. While defendants argue that based on the Operating Agreement, the Firm was dissolved at the time Kalmanowitz stopped working to obtain cancer treatment, plaintiff argues that Kalmanowitz did not intend to permanently withdraw from the Firm at that time.

In the original complaint, plaintiff, who is Kalmanowitz's widow and Executrix of his Estate, asserts claims for (1) the judicial dissolution of K & L, (2) examination of K & L's books and records, (3) breach of contract, (4) judicial wind-up including appointment of receiver, and (5) an accounting. The original complaint basis its claims for relief on the Firm's Operating Agreement.

Defendants move for summary judgment, arguing that based on the Operating Agreement, the Firm was properly dissolved when Kalmanowitz left the Firm to receive cancer treatments on June 1, 2018, after which the income of the Firm was derived solely from Lee's efforts. In support of this position, defendants submit an unsigned Operating Agreement (NYSCEF # 35). Specifically, defendants rely on Article VI, paragraph 1 (c) of the agreement which provides in relevant part:

ARTICLE VI DISSOLUTION

> 1. This company shall be dissolved, and its affairs wound up upon the first to occur of the following:
>
> (c) The bankruptcy, death, dissolution, expulsion, incapacity or withdrawal of any member or the occurrence of any other event that terminates the continued membership of any member, unless within six months after such event, this company is continued either by vote or written consent of a majority in interest of all the remaining members. (NYSCEF # 35, Article VI(1)).

Based on this provision, defendants argue that the Firm was properly dissolved when Decedent left the Firm on June 1, 2018, due to his incapacity, and that he was paid the amount owed to him based on this dissolution date. Defendants also submit evidence that Lee paid Decedent the sum of $64,726.12 after he left the firm on or about June 1, 2018, and that plaintiff is owed only an additional $6,329.94 (NYSCEF # 25-Lee Aff. ¶¶ 5, 6).

Additionally, defendants argue that plaintiff has refused to produce certain documents regarding plaintiff's date of incapacity which would be required to calculate plaintiff's interest in the accounting firm.

Plaintiff counters that summary judgment is not warranted as there has been no discovery, and that plaintiff did not intend to permanently leave the Firm on June 1, 2018. In support of her opposition, plaintiff submits the affidavit of Mark Kalmanowitz,[2] an accountant employed by K &L, who states that Decedent did not intend to leave permanently in June 2018; that he never withdrew from the Firm; and that he continued to communicate with clients (NYSCEF #52-Aff. Mark Kalmanowitz, ¶¶ 10-15) Additionally, plaintiff maintains that because the Firm was not dissolved on June 1, 2018, and Decedent was not incapacitated, the $64,726.12 paid to plaintiff and the additional $6,329.94 purportedly owed is less than the amount to which Decedent and his estate is entitled, and that an accounting is required so that the Firm's books and records can be examined (*id.*, ¶¶ 26-34). Plaintiff also contends that defendants did not provide her with a signed copy of the Operating Agreement despite numerous requests for the document (*id.*, 35-40).

In her cross motion, plaintiff seeks to amend the complaint pursuant to CPLR 3025(b) so as to base her claims for relief on New York's Limited Liability Company Law (NY LLCL), as opposed to the purported Operating Agreement. The proposed amended complaint asserts causes of action for (1) judicial dissolution of K&L pursuant to NY LLC § 702, (2) statutory right to exam of K&L's books and records pursuant to NY LLCL § 1102(b), (3) judicial windup and appointment of receiver pursuant to NY LLC § 703, and (4) an accounting of K& L's books and records (NYSCEF #55, ¶¶ 14-21).

Discussion

The court will first consider whether plaintiff's cross motion to amend should be granted since defendants' summary judgment motion may be rendered moot to the extent leave is granted and the amended pleading supersedes the original complaint (*Baker v 16 Sutton Place Apartment Corp.*, 2 AD3d 119, 120 [1st Dept 2003]).

"Leave to amend a pleading pursuant to CPLR 3025 (b) "shall be freely given... in the absence of prejudice or surprise" (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]). It is well established that "delay alone is not a sufficient ground for denying leave to amend" (*Greenburgh Eleven Union Free School Dist. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 298 AD2d 180, 181 [1st Dept 2002] [internal citation omitted]). Instead, the party opposing that amendment must show prejudice which occurs when the party "has been hindered in preparation of its case

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[2] Mark Kalmanowitz is the son of plaintiff and Decedent.

or has been prevented from taking some measure in support of [its] position" (*Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652, 655 [1st Dept 2009][internal citation and quotation omitted]). At the same time, in order to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated (*Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept 2005]). Thus, leave to amend will be denied when "the proposed action fails to state a cause of action, or is palpably insufficient as a matter of law" (*Thompson v Cooper*, 24 AD3d at 205 [internal citations omitted]; *see also MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]).

At the outset the court finds that as discovery has not even begun, granting plaintiff leave to amend the complaint will not lead to "prejudice or surprise resulting in delay." In addition, defendants have not shown the amendment will prejudice their ability to defend the action. As for the merits of the proposed amended complaint, in light of the parties' dispute as to the whether the purported Operating Agreement governs, the amendment to omit the agreement as a basis for relief is of sufficient merit. However, with regard to the proposed first cause of action, the court finds that the request for judicial dissolution is without prima facie merit since while the parties dispute the date that the Firm was dissolved, the record establishes the articles of dissolution were filed on March 12, 2020. Therefore, there is no limited liability company in existence that may be judicially dissolved (*see Bayer v Bayer*, 215 AD 454, 472 [1st Dept 1926][a court cannot "retroactively revivify that which was long since dead" nor can it dissolve a nonexistent entity]).

On the other hand, when, as here, there was a non-judicial dissolution of a limited liability company, pursuant to NY LLC § 703 (a)[3], the court may wind up a company's affairs upon a request of a member (*In re Fassa Corp*, 31 Misc 3d 782, 785 [Sup Ct, Nassau County 2011]; *see also* Rich, *Practice Commentaries*, McKinney's Consol, Laws of NY, Book 32A, Limited Liability Companies, § 8.5, at 247). Moreover, contrary to defendants' arguments in support of summary judgment, the record is insufficient to establish as a matter of law that the affairs of the Firm were wound up as required under Limited Liability Company Law § 701,

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[3]Limited Liability Law § 703(a) provides, in relevant part, that:

Upon cause shown, the supreme court in the judicial district in which the office of the limited liability company is located may wind up the limited liability company's affairs upon application of any member, or his or her legal representative or assignee, and in connection therewith may appoint a receiver or liquidating trustee.

(NY LLC Law § 703[a]).

particularly prior to discovery. Thus, the proposed third cause of action seeking this relief has prima facie merit.

As for the proposed second cause of action, it also is of sufficient merit since under NY LLC § 1102(b),[4] a member has a right to inspect the books and records of the LLC, and in opposition to the motion for summary judgment plaintiff has submitted evidence that this right was not afforded (*see Gartner v Cardio Ventures*, LLC, 121 AD3d 609, 610 [1st Dept 2014] [noting that "[p]laintiff, as a member of the LLC, has an independent statutory right to conduct an inspection [of the LLC's books and records"]).

Lastly, the fourth proposed cause of action, which seeks an accounting, is potentially meritorious in light of allegations and evidence that examination of the Firm's books and records was not permitted (*see Atlantis Mgt.Group II LLC v Nabe*, 177 AD3d 542, 543 [1st Dept 2019] [accounting was warranted based on the fiduciary relationship between members of the LLC, and in view of defendants denial of the demands of plaintiff, a non-managing member of LLC, for an accounting and access to the LLC's books and records]).

In view of the foregoing, plaintiff's motion to amend is granted to the extent of permitting her to amend the complaint to add the second, third, and fourth causes of action, and defendants' motion for summary judgment is denied.

As for defendants' motion to preclude plaintiff from introducing evidence requested in defendants' notice to produce based on plaintiff's alleged refusal to respond, such relief is unwarranted as plaintiff has submitted her response to the notice to produce in opposition to the motion. Finally, any outstanding discovery disputes can be resolved at the preliminary conference scheduled below.

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[4] Limited Liability Company Law § 1102(b) provides that:

Any member may, subject to reasonable standards as may be set forth in, or pursuant to, the operating agreement, inspect and copy at his or her own expense, for any purpose reasonably related to the member's interest as a member, the records referred to in subdivision (a) of this section, any financial statements maintained by the limited liability company for the three most recent fiscal years and other information regarding the affairs of the limited liability company as is just and reasonable]

NY LLC § 1102[b]).

Conclusion

In view of the above, it is

ORDERED that defendants' motion for summary judgment (motion seq. no. 001) is denied; and it is further

ORDERED that plaintiff's cross motion for leave to amend the complaint is granted to the extent set forth herein; and it is further

ORDERED that within 20 days of entry of this order, plaintiff shall serve defendants with and efile an amended complaint consistent with this decision and order; and it is further

ORDERED that defendants shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that defendants' motion to preclude (motion seq. no .002) is denied; and it is further

ORDERED that a preliminary conference shall be held by telephone on September 14, 2022, at 10:30 am, with the call-in information to be provided by the court before the conference.

7/14/2022
DATE

MARGARET CHAN, J.S.C.

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