SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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DAVID TRACHTEN, VICKI TRACHTEN SCHWARTZ, ROBERTA ZEVE, GARY TRACHTEN, BARBARA F. GREEN AND ERIC M. GROSS, AS TRUSTEES OF THE TRUST U/W NORMAN HAFLICH, SIX WHITES FAMILY LLC,DANA CURRENT, AS TRUSTEE OF THE SONA A. CURRENT TRUST U/A DATED 3/22/93, DANIEL D. PECK, AS TRUSTEE OF THE DANIEL D. PECK GENERATION SKIPPING TRUST

Plaintiffs,

- v -

CAROL WOLOWITZ,

Defendant.

INDEX NO. 659787/2024

MOTION DATE 03/11/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, and for the reasons set forth on the record (*tr*. 9.17.25), Defendant Carol Wolowtiz's motion (Mtn. Seq. No. 001) to dismiss is GRANTED solely to the extent that the cause of action sounding in tortious interference (first cause of action) is dismissed.

Reference is made to a certain settlement agreement (NYSCEF Doc. No. 2; the **Initial Agreement**) dated June 6, 2019, by and among David Trachten, Vicki Trachten Schwartz, Roberta Zeve , Gary Trachten, Arnold Wolowitz, LBV Properties, LLC (**LBV**), Suffolk Equities, LLC, La Bonne Vie Associates, L.P. (**LBV**) and LBV Realty Associates, L.P. (**Realty**, and collectively with LBV, the **Partnerships**), as modified by an agreement (the **Amendment**; the

Amendment together with the Initial Agreement, hereinafter collectively, the **Settlement Agreement;** NYSCEF Doc. No. 2) dated August 14, 2019,[1] by and among David Trachten, Ms. Trachten Schwartz, Ms. Zeve , Gary Trachten, Carol Wolowitz, the Estate of Arnold Wolowitz, LBV, Gerri Zetlin, and SBW Realty Holding, LLC. The Settlement Agreement was a settlement of the case captioned *Gary Trachten, et al. v Carol Wolowitz, et al.* (Index No. 650885/2018).

Simply put, one can not tortiously interfere with one's own contract (*Beast Investments, LLC v Celebrity Virtual Dining, LLC*, 238 AD3d 558, 559 [1st Dept 2025]). Defendant Wolowitz is a party to the Settlement Agreement. As such, the tortious interference cause of action (first cause of action) asserted against her must be dismissed.

Defendant Wolowitz is not however entitled to dismissal based on her arguments that (i) although the all of the properties have been sold not ***all*** of the proceeds have been distributed ***by her*** such that she can require the plaintiffs to first try to resolve the dispute with Mediator Lawrence Pollack which has not occurred prior to filing the action, (ii) the complaint fails to state a cause of action because Defendant Wolowitz was empowered under the Settlement Agreement to withhold the $5,500,000.00, (iii) the plaintiffs have waived their right to sue under the Settlement Agreement because they ***received and accepted without objection the lion's share of the settlement proceeds and did not refuse to accept such sums by saying that they were entitled to portions of the money that the plaintiffs allege she is unreasonably retaining***, and (iv) the case should have been filed as a derivative action.

[1] The amendment was necessitated by the death of defendant Arnold Wolowitz and the resulting dissolution of the Partnerships. Carol Wolowitz was substituted for Arnold Wolowitz in the Settlement Agreement for the purposes of performing his obligations thereunder (NYSCEF Doc. No. 2 at 78).

As relevant, although the parties agreed to mediate disputes arising out of the Settlement Agreement before coming to Court, ***they agreed pursuant to Section 22 of the Settlement Agreement that such agreement was no longer effective upon consummation of the sale of the real estate and distribution of the proceeds from those sales***:

> 22. To the extent that there are any disagreements between the Trachtens and the Defendants in interpreting or implementing the terms of this Settlement Agreement or arising out of the Settlement Agreement, the parties shall endeavor to resolve such disagreements with the assistance of the mediator, Lawrence Pollack, before resorting to any other measures. The costs of any such mediation shall be borne by the Partnerships. The Trachtens shall have the right to apply to the court for a supplemental award of attorneys' fees and expenses, to the extent that any are incurred after the initial application made pursuant to Section 15 above. ***This paragraph shall cease to be effective upon the consummation of the sale of the real property owned by both Partnerships and the distribution to the partners of the proceeds from such sales.*** The Trachtens shall have twenty-one (21) days (unless counsel for the Defendants and the Trachtens agree to extend such deadline) after being notified by Wolowitz of the completion of the sale of each property to make an application for a supplemental award of attorneys' fees and expenses to be paid by the Partnership that sold such property.

(NYSCEF Doc. No. 2 § 22 [emphasis added]). As relevant, according to the complaint:

> 20. The Partnerships sold the Properties in February 2020 and made substantial distributions of the sale proceeds to the Partners in March and July of that year.

(NYSCEF Doc. No. 1 ¶ 20). Taking these allegations as true as the Court must at this stage of the proceedings (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]), the § 22 agreement requiring mediation as a precondition to bringing this lawsuit, is alleged to have been satisfied. As such, the branch of the motion seeking dismissal on this ground must be denied.[2]

[2] To be clear, Defendant Wolowitz concedes that all of the properties have been sold and that the lion's share of the proceeds from such sales have in fact been distributed in accordance with this provision. Instead, she argues that because as a factual matter she has withheld $5.5 million of proceeds from distribution (and potentially inappropriately), she can force the plaintiffs to go the Mediator before bringing suit such that she is entitled to dismissal at this stage of the lawsuit. The argument fails. At most, the argument suggests that Section 22 which refers to "the proceeds" and not "***all of the proceeds***" is ambiguous – *i.e.*, requiring total and not material satisfaction. This is not a basis for dismissal at this stage absent discovery as both readings of the Settlement Agreement are plausible.

Defendant Wolowitz is also not correct that the Settlement Agreement permits her to withhold $5,500,000.00 as a matter of law warranting dismissal. The Settlement Agreement provides that she was entitled to withhold "reasonable reserves:"

> (a) Commencing with the year 2019 and thereafter, the Partnerships shall make quarterly distributions (on April 15, July 15, and October 15, 2019 and January 15, 2020 for each of the preceding quarters and continuing thereafter) to all of the partners, whether limited and general, including Wolowitz and the Affiliated Limited Partners, pro rata, of available cash on hand, less reasonable reserves for anticipated expenses and capital improvements as reasonably determined by Wolowitz ("Reasonable Reserves").
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> (b) "Reasonable Reserves" shall have the following meaning: if quantified prior to the time that Wolowitz determines that a sale of the Partnership properties pursuant to a particular offer is likely to occur within the next six months, then Reasonable Reserves shall include such funds as are reasonably necessary for anticipated expenses of management, one-half of the anticipated annual real property taxes, and projected capital improvements, if any, taking into account the anticipated revenues of the respective Partnership during the relevant time period. If quantified at or after the time that Wolowitz determines that a sale of the Partnership properties pursuant to a particular offer is likely to occur within the next six months, then Reasonable Reserves may also include funds sufficient to enable the Partnerships to pay all creditors of the Partnerships, tax authorities as well as governmental authorities required under the Partnership Agreements and by law in order to effectuate the dissolution of the Partnerships, and all anticipated expenses and professional fees in connection with the wind up and dissolution of the Partnerships, taking into account the anticipated revenues of the respective Partnership during the relevant time period.
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> (c) In the event that Wolowitz determines that Reasonable Reserves of greater than onehalf of the anticipated annual real property taxes, plus $300,000 for LBV and $250,000 for Realty, are appropriate, he shall provide to the Trachtens, and make available to any other limited partner upon request, a signed written statement, including appropriate supporting documentation, to explain any increase in the reserves over these amounts.

(NYSCEF Doc. No. 2 § 2).

The reasonableness or unreasonableness of the amounts withheld require examination of the "totality of the circumstances" and simply cannot be decided on a motion to dismiss particularly where the reserve holdback only contemplates 10% of the amount Defendant Wolowtiz is alleged to be holding back, where there is no evidence in the record of any known or threatened liens or claims and when the properties have already been sold and finally where she had only indicates that her concern are potential tax audits for the tax year 2020 where the time for audit would be "through September 15, 2024" (NYSCEF Doc. No. 50 and where such date has come and passed.

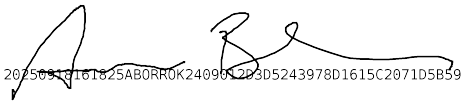
Defendant Wolowitz is also not correct that she is entitled to dismissal at this stage of the litigation based on the fact that the plaintiffs received and accepted the lion's share of the proceeds from the sales. Waiver requires a clear manifestation of an intent by a party to relinquish a known right (*DLJ Mortg. Capital Corp., Inc. v Fairmont Funding, Ltd.*, 81 AD3d 563, 564 [1st Dept 2011]). This can not be said as a matter of law to be that. Nor is she correct that the plaintiffs had to make an election of remedies by refusing to accept money that was owed to them if they intended to challenge that other money being withheld from distribution should not be withheld.[3] Finally, the Court notes that Defendant Wolowitz's letter (NYSCEF Doc. No. 5) was not an offer of compromise and settlement where she indicated that by accepting the sales proceeds, the plaintiffs would be waiving their right to challenge the reserve amount, and in any event, she does not dispute that the sales proceeds are required to be distributed at some point to these plaintiffs.

[3] As discussed above, Defendant Wolowitz indicated that she intended to hold the $5.5 million until the time for tax audit expired as of September 15, 2024. The plaintiffs did not delay in bringing this lawsuit. They brought a lawsuit a few days later (September 27, 2024) – which lawsuit has been discontinued -- and brought the instant action a few months later.

Finally, Defendant Wolowitz is not correct that she is entitled to dismissal because the allegations in this case involve breach of a Settlement Agreement that settled a derivative such that this should have been filed as derivative action. Initially, the Court notes that the partnerships have been dissolved (NYSCEF Doc. No. 6) pursuant to the Settlement Agreement. More importantly, the plaintiffs are not suing to recover on behalf of the company. The company has the money and if successful in this lawsuit based on a finding that Defendant Wolowitz's reserve amounts are unreasonable and should be distributed, the plaintiffs would receive their share not a recovery by the company (*Serino v Lipper*, 123 AD3d 34, 40 [1st Dept 2014]). Thus, the complaint properly alleges breach of the Settlement Agreement and dismissal is not warranted.

The Court has considered Defendant Wolowitz's remaining arguments and finds them unavailing.

Accordingly, it is hereby ORDERED that the motion (Mtn. Seq. No. 001) to dismiss is granted solely to the extent that the cause of action sounding in tortious interference is dismissed.



9/18/2025
DATE

ANDREW BORROK, J.S.C.

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