O'Donoghue v Brooke
2025 NY Slip Op 35604(U)
March 31, 2025
Supreme Court, Nassau County
Docket Number: Index No. 604591/2024
Judge: Sharon M.J. Gianelli
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: COMMERCIAL DIVISION – Part 7
Present: Hon. Sharon M.J. Gianelli

X

PAUL O'DONOGHUE, Individually and Derivatively as a Member of BETHPAGE GOLF GROUP, LLC,

Plaintiff,

-against-

KELLEY BROOKE, BROOKE HOLDINGS, LLC, BETHPAGE GOLF GROUP, LLC, and DAVID I. MACKLIN, CPA,

Defendants.

X

Index No. 604591/2024

Motion Seq. 002

Decision and Order

Papers Submitted:
Notice of Motion, Memorandum of Law, Affirmation and Exhibits in Support X
Memoranda of Law in Opposition, Affirmations and Exhibits in Opposition X
Memoranda of Law, Affirmation and Exhibits in Reply X

Defendants Kelley Brooke, Brooke Holdings, LLC, and Bethpage Golf Group, LLC ("Defendants") move for an Order pursuant to CPLR 3211(a)(1), dismissing the First, part of the Second, part of the Third, the Fifth, and the Sixth Causes of Action in the Complaint, each of which is based on the claim that Plaintiff has a 50%, rather than 30%, interest in Bethpage Golf, on the basis that there is indisputable documentary evidence refuting this claim.

Factual Summary

This action arises from a dispute over the ownership structure and governance of Bethpage Golf Group, LLC ("BGG"), a company formed on December 12, 2017 for the purpose of submitting a bid and subsequently holding a license issued by the New York State Office of Parks, Recreation and Historic Preservation. The license authorized the operation and maintenance of year-round golf professional concessions at Bethpage State Park. Plaintiff alleges that the parties discussed and agreed to form BGG as equal members, each holding a 50% ownership interest and equally sharing voting rights, distribution rights and management responsibilities. Plaintiff contends that at the time of BGG's formation, no written operating agreement was executed; however, Defendant Brooke, without Plaintiff's knowledge or approval, prepared and signed a "Written Consent of Majority in Interest of the Members of Bethpage Gold Group, LLC" dated March 30, 2018, which she then used to effectuate an unauthorized operating agreement. The subject operating agreement states that Plaintiff O'Donoghue holds a 30% membership interest and Defendant Brooke, through her company Brooke Holdings, LLC, held a 70% membership interest in BGG. Defendant Brooke claims a 70% membership interest in BGG based on an alleged capital contribution of $2.375 million – a claim, which Plaintiff disputes and asserts is unsubstantiated. Particularly, Plaintiff asserts that after commencing this action on March 15, 2024, Plaintiff's counsel obtained certain financial records which show that Defendant Brooke made no such contribution. Moreover, Plaintiff alleges, *inter alia*, that Defendant Brooke made unauthorized loans to herself or her related entities, caused BGG to make excessive annual distributions of unearned profits, caused BGG to borrow funds from financial institutions, and refused to provide Plaintiff with a complete production of certain financial documentation.

Based upon these allegations, Plaintiff filed an Amended Complaint on October 11, 2024 asserting causes of action as follows:

1st – Declaratory Judgment – declaring that: (1) the Unauthorized Written Consent is a nullity and unenforceable as a matter of law; (2) the Unauthorized Operating Agreement is a nullity and unenforceable as a matter of law; (3) O'Donoghue and Brooke remain equal members (50%/50%) in BGG, with equal ownership interests, voting rights, distribution rights and management responsibilities; (4) all prior actions taken by Brooke with respect to BGG, without O'Donoghue's knowledge and consent, are null and void and without legal effect; and (5) O'Donoghue is entitled to his rightful share of all profits and distributions of BGG, which is not less than the principal amount of $949,666.00 through the end of 2023

2nd – Breach of Sections 4.7, 7.3, 10.2, 10.4 of the purportedly Unauthorized Operating Agreement

3rd – Equitable Accounting

4th – Declaratory Judgment – compelling Brooke to provide O'Donoghue with full and complete access to the books and records of BGG, as set forth in NY Limited Liability Company Law 1102

5th – Unjust Enrichment

6th – Constructive Trust

7th – Breach of Fiduciary Duty against Kelley Brooke by O'Donoghue in His Individual Capacity

8th – Breach of Fiduciary Duty against Kelley Brooke by O'Donoghue in His Derivative Capacity on Behalf of BGG

9th – Aiding and Abetting Breach of Fiduciary Duty against David I. Macklin, CPA by O'Donoghue in His Individual Capacity

10th – Aiding and Abetting Breach of Fiduciary Duty against David I. Macklin, CPA by O'Donoghue in His Derivative Capacity on Behalf of BGG

Now, before this Court is Defendants' motion to dismiss the First, part of the Second, part of the Third, the Fifth, and the Sixth Causes of Action in the Amended Complaint (collectively, the "Equal Ownership Claims") pursuant to CPLR 3211(a)(1) on the basis of documentary evidence. Defendants assert that the Equal Ownership Claims, which are premised on Plaintiff's allegation that he has a 50% membership interest in BGG and should therefore receive half of BGG's distributions, are refuted by documentary evidence signed by Plaintiff in which he allegedly acknowledges and represents that he holds only a 30% membership interest in BGG. The documents cited as "indisputable documentary evidence" include: (1) a 2017 Credit Application signed by Defendant Brooke as President and Plaintiff O'Donoghue as Vice President used to obtain a line of credit to acquire gold carts for Bethpage State Park; (2) a 2018 Credit Application used to obtain a line of credit to purchase golf equipment and apparel; (3) K-1 Schedules, which Plaintiff used to obtain health insurance coverage and renewals of that coverage; and (4) Plaintiff's Health Insurance Applications from 2021 and 2022. Defendants argue that each of these documents indisputably state or reflect the 70%/30% ownership split.

Plaintiff contends that these documents do not constitute binding documentary evidence pursuant to CPLR 3211(a)(1) because they were prepared and controlled by

Defendants, submitted without Plaintiff's review or approval, and reflect Defendants' unilateral assertion, rather than a mutually-agreed upon fact. Plaintiff argues that Defendants omit or misrepresent "important details regarding the circumstances in which these documents were prepared and submitted, which further illustrate why these documents are not even the 'admissions' Defendants claim."

Law/Analysis

"A motion to dismiss a complaint based on documentary evidence 'may be appropriately granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law'" *(Attallah v. Milbank, Tweed, Hadley & McCloy, LLP*, 168 AD3d 1026, 1028 [2nd Dept. 2019], *quoting Goshen v. Mutual Life Ins. Co. of N.Y.*,98 NY2d 314 [2002]; see *also* CPLR 3211[a][1]). To qualify as documentary evidence, the evidence must be "unambiguous and of undisputed authenticity" – definitively resolving the material factual dispute in Defendants' favor *(Attallah v. Milbank, Tweed, Hadley & McCloy, LLP*, 168 AD3d at1028, quoting *Fontanetta v. John Doe 1*, 73 AD3d 78, 86 [2nd Dept. 2010]). Here, upon review and consideration, the Court finds that the documentary evidence presented falls short of meeting this standard, failing to conclusively establish as a matter of law that Plaintiff directly and definitively affirmed the alleged ownership interests.

Accordingly,

It is

ORDERED, that Defendants Kelley Brooke, Brooke Holdings, LLC, and Bethpage Golf Group, LLC ("Defendants") move for an Order pursuant to CPLR 3211(a)(1), dismissing the First, part of the Second, part of the Third, the Fifth, and the Sixth Causes of Action in the Complaint, each of which is based on the claim that Plaintiff has a 50%, rather than 30%, interest in Bethpage Golf, on the basis that there is indisputable documentary evidence refuting this claim, is Denied.

All applications not specifically addressed herein are denied.

The foregoing constitutes the decision and order of this Court.

DATED: March 31, 2025
Mineola, New York

Sharon M.J. Gianelli
Justice of the Supreme Court

ENTERED
Apr 03 2025
NASSAU COUNTY
COUNTY CLERK'S OFFICE