AMENDED
SHORT FORM ORDER

INDEX NO.: 608516-17

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

x

WALDORF INVESTMENTS, L.P., AND CHRISTOPHER V. WALDORF, JR. INDIVIDUALLY AND DERIVATIVELY AS A PARTNER OF WALDORF INVESTMENTS, L.P.,

Plaintiffs,

-against-

KATHLEEN WALDORF, WILLIAM WALDORF, STEPHEN WALDORF, WALDORF RISK SOLUTIONS, LLC. AND JOHN DOE 1-2,

Defendants,

AND WALDORF INVESTMENTS, L.P.,

Nominal Defendant.

x

MOTION DATE: 1-31-22
SUBMITTED: 3-10-22
MOTION NO.: 005-MG; CASE DISP

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Upon the following papers read on this motion for summary judgment ; Notice of Motion and supporting papers 117-135 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 139-141 ; Replying Affidavits and supporting papers 143-148 ; Other 149-150; 152 ; it is,

ORDERED that this motion by the defendants for an order dismissing the remaining causes of action for breach of contract, dissolution, and breach of fiduciary duty is granted.

The plaintiff Waldorf Investments, L.P. ("Waldorf Investments" or the "Partnership"), is a limited partnership that owns a parcel of real property located at 30 Prospect Street, Huntington, New York. The plaintiff Christopher Waldorf and the defendants William and Stephen Waldorf are the general partners. Christopher Waldorf is also a limited partner along with the defendant Kathleen Waldorf. Christopher has a 40% interest in Waldorf Investments (20% as a general partner and 20% as a limited partner). William, Stephen, and Kathleen each have a 20% interest.

The plaintiffs allege that the property owned by Waldorf Investments was destroyed by a fire in 2014 and that the Partnership received insurance proceeds in the amount of $457,806.45

in connection with the loss. The plaintiffs allege that the insurance proceeds were not used for legitimate business purposes and that the individual defendants, Kathleen, William, and Stephen Waldorf, distributed the proceeds to themselves and used them for their own personal benefit. The plaintiffs also allege that the individual defendants engaged in waste and self-dealing by permitting the defendant Waldorf Risk Solutions, LLC, an entity owned and controlled by them, to use and occupy the premises without paying rent and by not collecting rent from other, unidentified tenants.

By an order dated September 28, 2018, this court granted the motion by the defendants for an order partially dismissing the amended complaint to the extent of dismissing all but the sixteenth cause of action for breach of contract, the twenty-first cause of action for dissolution of the Partnership, and the twenty-second cause of action for breach of fiduciary duty. The court also granted the cross motion by the plaintiffs for partial summary judgment to the extent of directing Kathleen, William, and Stephen Waldorf to provide Christopher Waldorf with an accounting within 90 days after service upon them of a copy of the order with notice of entry. The defendants provided the accounting on February 19, 2019. They now move for summary judgment dismissing the remaining causes of action.

The sixteenth cause of action for breach of contract alleges that the defendants breached their contractual obligations to Christopher Waldorf by failing to distribute his share of the Partnership's profits for the years 2008 to 2017. The provision of the Certificate of Limited Partnership upon which Christopher Waldorf relies provides as follows:

> "All annual net profits of the Partnership shall be divided among the General and Limited Partners in the same proportions as the Partner's then capital interest accounts, **unless retained for the Partnership investment and business activities** (emphasis added)."

Preliminarily, the court notes that any claim for profits before 2011 is outside of the six-year statute of limitations applicable to breach-of-contract claims (see, **CPLR** 213 [2]). In any event, the record reflects that the partners, including Christopher Waldorf, received distributions in 2008 and 2009 and that no distributions were made after 2009. Contrary to Christopher Waldorf's contentions, Waldorf Investments was not required to distribute profits. The Certificate of Limited Partnership clearly allowed Waldorf Investments to retain profits "for the Partnership investment and business activities." Accordingly, there was no breach of the Partnership Certificate.

The twenty-first cause of action seeks dissolution of the Partnership on the ground that Christopher Waldorf and the individual defendants have been unable to agree on decisions affecting the day-to-day operations of the Partnership and the property that it owns. The plaintiffs allege that, as a result, it is not reasonably practicable for the Partnership to carry on its business.

Judicial dissolution of limited-liability companies and partnerships is a limited remedy that is granted sparingly (**Matter of 1545 Ocean Ave, LLC**, 72 AD3d 121, 129-130). Dissolution is reserved for situations in which the entity's management has become so dysfunctional or its business purpose so thwarted that it is no longer practicable to operate the business, such as in the case of a voting deadlock or where the defined purpose of the entity has become impossible to fulfill (**Id**. at 131, *quoting* **Matter of Arrow Inv. Advisors, LLC**, 2009 WL 1101682 at *2-3, 2009 Del Ch LEXIS 66 at *9-14). The "not reasonably practicable" standard

requires a showing (1) that the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved or (2) that continuing the entity is financially unfeasible (**Id.**).

The record reflects that the individual defendants have been carrying on the business of the Partnership by redeveloping the property that was destroyed by fire in 2014. That Christopher Waldorf disagrees with their redevelopment of the property and their use of the insurance proceeds to redevelop the property does not warrant a finding that it is not reasonably practicable for the Partnership to continue (**Id.** at 130). The record does not support Christopher Waldorf's contentions that the individual defendants have misused and mismanaged the Partnership's funds or that they have engaged in a pattern of self-dealing. Courts will not dissolve an entity merely because it has not experienced a smooth glide to profitability or because events have not turned out exactly as the owners originally envisioned (**Id.**). Accordingly, dissolution is not warranted.

Although denominated as a cause of action for breach of fiduciary duty, the twenty-second cause of action is for mandatory injunctive relief. The plaintiffs allege that the individual defendants have excluded Christopher Waldorf from the management and business affairs of the Partnership, that they have excluded him from communications among the partners, and that they have concealed the Partnership's bank and financial records from him. Christopher Waldorf seeks an injunction directing the individual defendants to hold quarterly meetings, to notify him of such meetings in advance, to copy him on all communications regarding the Partnership's business, and to include him in the management of the Partnership.

As the defendants correctly point out, nothing in the Partnership Law or the Partnership Certificate requires them to hold quarterly meetings. The record reflects that the individual defendants regularly advised Christopher Waldorf when they would be having meetings to discuss the Partnership's business. Christopher Waldorf, however, chose not to attend. Moreover, the individual defendants have prepared and delivered to Christopher Waldorf a complete accounting of the insurance proceeds from the fire that destroyed the property. Accordingly, the requested injunctive relief is not necessary.

In view of the foregoing, the court finds that the defendants have established, prima facie, their entitlement to judgment as a matter of law on the sixteenth, twenty-first, and twenty-second causes of action. The plaintiffs' opposition is merely a reiteration of the allegations found in the previously dismissed derivative causes of action. The plaintiffs contend that the defendants engaged in waste and mismanagement by occupying the premises without paying rent therefor, by allowing it to remain empty for a period of eight years, and by not using the insurance proceeds for legitimate business purposes. In support thereof, they identify in the accounting various expenditures of Partnership funds that they contend were used by the defendants to pay expenses on behalf of other Waldorf entities.

The court finds that the plaintiffs have failed to raise a triable issue of fact in opposition to the defendants' prima facie case. The plaintiffs' contentions assert a wrong to the Partnership, not a wrong to Christopher Waldorf individually. Allegations of mismanagement or diversion of assets plead a wrong to the entity only, for which a partner may sue derivatively but not individually (*cf.*, **Abrams v Donati**, 66 NY2d 951, 953; **Elenson v Wax**, 215 AD2d 429).

Christopher Waldorf, therefore, may not use allegations of waste and mismanagement, which are derivative in nature, to oppose dismissal of his individual claims. Accordingly, the defendants' motion is granted, and the sixteenth, twenty-first, and twenty-second causes of action are dismissed.

Finally, in reaching its determination, the court has not considered the reply of affirmation of Michael D. Brown, Esq.

DATED: March 29, 2022

Elizabeth H. Emerson

J. S.C.

HON. ELIZABETH HAZLITT EMERSON