SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

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AARON SELIGSON, ANITA E.L. SELIGSON, MARTIN S. ROTHMAN, SIGMUND A. ROLAT, and AARON SELIGSON, MARTIN S. ROTHMAN and PATRICIA ROTHMAN, AS EXECUTORS OF THE ESTATE OF HERBERT A. ROTHMAN, Deceased,

Plaintiffs,

-against- Index No. 601608/99

ALBERT RUSSO, LENA RUSSO, ALBERT RUSSO, AS A TRUSTEE OF THE TRUST FOR THE BENEFIT OF LENA RUSSO, CLIFTON RUSSO and LAWRENCE RUSSO,

Defendants.

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Herman Cahn, J.:

Defendants move for partial summary judgment in their favor on the first cause of action for judicial dissolution of a limited partnership and dismissing the claim, pursuant to CPLR 3212. Plaintiffs cross-move for partial summary judgment in their favor on the same claim and for dissolution of the partnership, an accounting, and forced sale of the partnership assets.

The relevant facts and circumstances underlying this action are set forth in this court's prior decisions and orders, and need not be repeated here, except as is necessary for clarification. Briefly, this action arises out of an acrimonious dispute between two groups of partners who together own a 26-story commercial building located at 401

Broadway in Manhattan. The partnership agreement divides the partners' interests into two groups. Group A is headed by defendant and general partner Albert Russo and consists of the limited partnership interests held by defendants. Group B is headed by plaintiff and general partner Aaron Seligson and consists of the limited partnership interests held by plaintiffs (see partnership agr. ¶ 15.5). Collectively, each group owns 50% of the limited partnership and the premises.

Plaintiffs commenced this action for dissolution, an accounting, and sale of the building on allegations that the two groups were deadlocked and unable to reach any agreement concerning the building's management and disposition, including whether the building should be retained, net leased or sold. By order dated March 9, 2000, granted on consent of the parties, the court appointed Park Tower Management Ltd. to manage the building's day-to-day operations, including rent collection, leasing and repair and maintenance, pending further court order, or discontinuance of this action, whichever is sooner.

Both sides now seek summary judgment on the first cause of action for judicial dissolution of the limited partnership, an accounting, and forced sale of the building.

Defendants contend that plaintiffs' claim should be dismissed on the ground that plaintiffs are judicially estopped from seeking dissolution and sale because they opposed a prior motion to compel the sale of one Group B partner's interest to the Group A partners.

In opposition, plaintiffs contend that judicial estoppel is not appropriate because they have consistently sought dissolution of the partnership and sale of the building.

"The doctrine of judicial estoppel or the doctrine of inconsistent positions 'precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed,' " (Jones Lang Wootton USA v LeBoeuf, Lamb, Green & McRae, 243 AD2d 168, 176 [1st Dept], lv dismissed 92 NY2d 962 [1998], citing Ford Motor Credit Co. v Colonial Funding Corp., 215 AD2d 435, 436 [2d Dept 1995]). "The doctrine rests upon the principle that a litigant 'should not be permitted * * * to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise,' " (Environmental Concern, Inc. v Larchwood Constr. Corp., 101 AD2d 591, 593 [2d Dept 1984], citing Note, The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings, 59 Harv L Rev 1132; Jones Lang Wootton USA v LeBoeuf, Lamb, Green & McRae, 243 AD2d 168, supra).

The doctrine is not applicable here. The prior motion to which defendants refer was brought by the guardian ad litem representing Melinda Rothman, an infant, to compel plaintiffs Aaron Seligson, Martin Rothman and Patricia Rothman, as executors of the Estate of Herbert Rothman, to accept defendants' offer to purchase decedent's 13.3 percent limited partnership interest from the Estate. The motion was precipitated by

defendants' offer to purchase the Estate's interest for $4 million. That motion concerned the sale of one Group B partner's interest, to Group A and did not concern dissolution of the entire partnership or sale of the building. Throughout the course of this litigation, each side has attempted to obtain majority control over the partnership and the building. Plaintiffs note that the sale of the Estate's interest to defendants would have given defendants a majority share in the partnership and that, therefore, plaintiffs opposed the motion. Inasmuch as the parties' arguments were circumscribed by the narrow issues presented by the motion, no inconsistency in plaintiffs' position exists, and the application of the doctrine of judicial estoppel is not warranted.

Defendants also contend the claim should be dismissed because judicial dissolution would frustrate their contractual right to operate the partnership and own the building until the expiration of the partnership's term on December 31, 2021. In a related argument, defendants contend that the general partners have a fiduciary duty toward the limited partners to ensure that the partnership continues until the end of its term.

In opposition, plaintiffs contend that dissolution and sale are the only equitable solutions realistically available, given the acrimony which has grown between Seligson and Russo and between the two groups of partners over some ten years' time.

Dissolution is appropriate under the relevant statutory and case law. The Partnership Law provides in relevant part that the court shall decree a dissolution on application by or for a partner whenever "[a] partner wilfully or persistently commits a

breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him, * * * [or] [o]ther circumstances render a dissolution equitable," (Partnership Law §§ 63[1][d], 63[1][f]). The Revised Limited Partnership Act similarly empowers the court to decree dissolution of a limited partnership, "[o]n application by or for a partner * * * whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement," (Partnership Law §§121-802).

The law imposes an obligation of a high degree of fidelity and good faith in the dealings between partners in the conduct of the partnership affairs. Partners owe to one another "the duty of the finest loyalty. * * * Not honesty alone, but the punctilio of an honor the most sensitive, is * * * the standard of behavior," (Meinhard v Salmon, 249 NY 458, 463-64 [1928]). When the relationship between partners "begins to deteriorate, the ensuing deadlock and dissension can effectively destroy the orderly functioning of the [entity]," (Greer v Greer, 124 AD2d 707, 708 [2d Dept 1986], lv dismissed 69 NY2d 900 [1987]). Where "[t]he degree of dissension, reflected by the intense personal hostility, poses an irreconcilable barrier to the continued functioning and prosperity of the [entity], a hopeless deadlock [occurs] which mandates dissolution as the only viable remedy," (Matter of Ronan Paint Corp., 98 AD2d 413, 421 [1st Dept 1984]; DelCasino v Koeppel, 177 AD2d 464 [2d Dept 1991]; Application of Cunningham, 75 AD2d 521 [1st Dept 1980]).

Here, each general partner alleges in some detail that, over the course of ten or more years, the other has: engaged in self-dealing; executed "sweetheart" leases with preferred tenants; ostensibly acted in the partnership's name without the knowledge, consent or approval of the other general partner while dealing with current tenants, including at least one limited partner, Seligson's own law firm and members of Russo's family, prospective tenants and prospective purchasers; overstepped his contractual authority; wasted partnership assets; exercised poor business judgment and improperly refused to cooperate with the other's partnership decisions on a daily basis.

In addition, soon after commencement of this action, the court urged and encouraged the parties to engage in settlement negotiations, in order to peacefully, if not amicably, resolve their dispute. Despite prolonged negotiations and several settlement conferences with the court, the parties are unable to reach a settlement. Seligson and Russo concededly have not spoken since August 1998. Further, despite the appointment by this court of a managing agent for the building, the inability of Seligson and Russo to agree on any decision of significance has caused the parties to periodically seek the court's intervention on arriving at resolution of even relatively simple problems regarding the building operations and services, such as the provision of air conditioning during a heat wave in April 2002. Thus, the parties' conduct during the pendency of the action, again demonstrates that their relationship has deteriorated to the point where it is no longer reasonably practicable for them to carry on the business of the partnership in

conformity with the partnership agreement.

Contrary to defendants' argument that the original partners intended the partnership to continue until the end of its fixed term, the limited partnership agreement includes language demonstrating that they did indeed contemplate early dissolution. The agreement refers to the sale, assignment or transfer of one partner's interest to another partner or to a third-party in a variety of circumstances (see partnership agr. ¶¶ 14, 15). In addition, dissolution "is a right inseparably incident to every partnership. There can be no such thing as an indissoluble partnership," (Skinner v Dayton, 19 Johns 513, 538 [1822] [emphasis in original]).

Defendants next contend that Seligson and his law partners took advantage of Maurice Russo (Albert Russo's father and a Seligson Rothman & Rothman client) in 1981 when they drafted and executed the original partnership agreement and purchased the building. Specifically, defendants allege that the Seligson and the law firm breached their fiduciary duties to Maurice Russo and the Group A partners by, among other things, intentionally omitting from the agreement any reference to the possibility of judicial dissolution. This contention is without merit.

Neither Maurice Russo nor any of the defendants questioned the enforceability or propriety of the 1981 partnership agreement until these motions were brought. At no time did they choose to inquire into the applicable partnership statutes and case law, although they were not prevented from doing so. Having reaped the benefits of the agreement,

including ownership of a profitable commercial building, without voicing such complaints for more than 21 years, defendants will not now be heard to complain that the agreement was the product of overreaching and undue influence.

Defendants next contend that dissolution is unnecessary because, despite the acrimony between Seligson and Russo, the partnership is generating a profit. It is true that the building, under Park Tower's excellent management, is generating a profit. However, this is only possible with the almost constant supervision of the court. "Dissolution is not to be denied merely because the dissension has not yet had an appreciable impact on the firm's profitability," (Molod v Berkowitz, 233 AD2d 149, 150 [1st Dept 1996], lv dismissed 89 NY2d 1029 [1997]; Tavlin v Munsey Candlelight Corp., 69 AD2d 865 [2d Dept 1979]).

No hearing regarding the cause of the disharmony is required. " '[T]he underlying reason for the dissension is of no moment, nor is it at all relevant to attempt to ascribe fault to either party. Rather, the critical consideration is the fact that dissension exists and has resulted in a deadlock,' " (Matter of Ronan Paint Corp., 98 AD2d at 421, citing Application of Weiss, 32 AD2d 279, 281 [1st Dept 1969]).

For these reasons, and to fully protect the financial interests of the parties and to advance the ends of justice by a resolution of the impasse, partial summary judgment on that branch of the first cause of action for dissolution of the partnership is granted and the court directs an immediate dissolution by public sale. The court notes that, at the auction,

each group will have an equal opportunity to purchase the property.

Summary judgment is also granted on the branch of the first cause of action for an accounting. The Partnership Law affords any partner the right to an accounting of that partner's interest unless there is an agreement to the contrary (see Cantor Fitzgerald Inc. v Cantor Fitzgerald Secs., 268 AD2d 324 [1st Dept], affd 95 NY2d 919 [2000]; Raymond v Brimberg, 99 AD2d 988 [1st Dept 1984], appeal dismissed 64 NY2d 775 [1985]; Partnership Law § 74). No such agreement exists here.

The court has considered the parties' remaining contentions and finds them to be without merit.

Accordingly, both summary judgment motions are granted to the extent that dissolution of the limited partnership, public auction by a receiver to be appointed by the court in the order to be entered herein, and sale of the partnership assets, including the building, and an accounting in accordance with the relevant provisions of the Partnership Law, are granted.

Settle order.

Dated: January , 2004

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J.S.C.