SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

LINDA ROBIN KOBER and BETTINA IRIS RABINOWITZ, INDIVIDUALLY and on behalf of KGN ASSOCIATES LLC,

Plaintiffs,

- against -

RITA NESTAMPOWER, MARTHA GENDEL KENNETH S. FERRARU, P.C., KENNETH S. FERRAU, and JULES MARK KLEIN,

Defendants.

TRIAL/IAS PART 7

Index No. 602098-18
Motion Date 2-26-2021
Sequence No. 003, 004

AMENDED DECISION & ORDER

XXX

The following papers were read on this motion:

Motion Seq. No. 003
Notice of Motion, Affirmation in Support with Exhibits 1
Affirmation in Opposition..... 2
Reply Affirmation..... 3

Motion Seq. No. 004
Notice of Cross-Motion, Affirmation in Support with Exhibits 1
Affirmation in Opposition to Motion 2
Reply Affirmation..... 3

PRELIMINARY STATEMENT

In Motion Seq. No. 003, Plaintiffs seek an Order; (1) Pursuant to CPLR §3212, granting summary judgment in favor of Plaintiffs and against Defendants; and (2) Granting Plaintiff such further relief as this Court may deem just, equitable. Opposition and reply have been submitted.

In Motion Seq. No. 004, defendants, Rita Nestampower, Martha Gendel and Jules Mark Klein seek an Order pursuant to CPLR §3212, granting summary judgment to defendants Rita Nestampower, Martha Gendel, and Jules Mark Klein, on the first, second and fourth causes of action in the complaint together with such other further and different relief as the Court deems just and proper. Opposition and reply have been submitted.

This matter is now Amended to correct a typo in the index number, from 602096-18, to the correct index number of 602098-18.

BACKGROUND

This is a derivative action on behalf of of KGN Associates, LLC ("KGN"). Bernice Klein, now deceased, and her sisters, Rita Nestampower and Martha Gendel, formed KGN on February 26, 2003, for the purpose of owning and managing commercial property at 180 Merrits Road in Farmingdale, New York. (NYSCEF NO. 12) KGN also owned two parcels of vacant land in Yaphank. All of the properties were inherited from their father.

On October 27, 2004, Bernice, as a "limited partner" of KGN, assigned her interest in KGN, "to the extent of thirty three and one-third Percent (33 1/3%) of the Net Profits in the Company as defined by KGN to the Bernice Klein Revocable Living Trust, of which Linda Kober was the Trustee. (NYSCEF NO. 42).

Bernice died on June 10, 2010. On February 18, 2011, Linda Kober executed an assignment on behalf of the trust, intending to assign the trust's 1/3 interest in KGN to herself, Bettina Rabinowitz, and Jules Klein, the children of Bernice, each as an 11.11% member. (NYSCEF DOC. 13). Plaintiffs contend that defendants have failed to permit them to participate in the management of KGN. On January 3, 2018 KGN sold the Yaphank properties to Salvatore Norberto for $225,000.00, which plaintiffs contend was far below market value.

Plaintiffs commenced this action by filing a Summons and Complaint dated February 13, 2018, alleging four Causes of Action as follows:

FIRST: Declaratory Judgment that plaintiffs and Mark Klein are members of KGN Associates, LLC, each owning an 11.11% interest, and permanently enjoining Rita Nestampower and Martha Gendel from excluding them from the management of KGN;

SECOND: On behalf of KGN and against Rita Nestampower and Martha Gendel in an amount equal to the difference between the fair market value and the sales price of the Yaphank

property, with interest from the date of sale, and reasonable attorney's fees for the prosecution of this claim;

THIRD: On behalf of KGN against defendants Kenneth S. Feraru and Kenneth S. Feraru, P.C., attorney for KGN in connection with the sale of the Yaphank property, in an amount equal to the difference between the fair market value and the sales price of the Yaphank property, with interest from the date of sale;

FOURTH: On behalf of KGN against Rita Nestampower and Martha Gendel, permanently enjoining them from selling the Farmingdale property without notice to plaintiffs and Jules Klein, and without permitting them to participate equally in the management of KGN, together with reasonable attorney's fees in prosecuting this claim.

Decision and Order of this court dated July 23, 2018 (Bucaria, J.) denied defendants' motion to dismiss the Complaint for lack of standing, granted defendants' motion to cancel the notice of pendency, and granted the motion of Kenneth Feraru and Kenneth S. Feraru, P.C. to dismiss the Complaint as against them for failure to state a cause of action. (NYSCEF DOC. 57).

The motions by defendants were made pursuant to CPLR § 3211(a)(7), and the court was required to accept the allegations as true and provide plaintiffs the benefit of every possible favorable inference. Whether plaintiffs can ultimately sustain their allegations is not considered in a motion to dismiss, but must await a summary judgment motion. (*A.G. Capital Funding Partners v. State Street Bank and Trust Co.*, 5 N.Y.3d 582, 591 [2005]).

In *Tzolis v. Wolff*, 10 N.Y.3d 100 (2008), the Court of Appeals concluded that derivative suits by members of limited liability companies are permitted, even though the Limited Liability Company Law, enacted in 1994, makes no mention of derivative suits. The issue presented by this motion is whether, by virtue of the assignment by decedent to the Bernice Klein Revocable Living Trust, and the subsequent assignment after her death by Linda Kober, as trustee, to herself, Bettina Rabinowitz, and Jules Klein, the plaintiffs and Mr. Klein are members of KGN.

Defendants argue that plaintiffs never became members of KGN, and that the assignment of the membership interest only entitled them to a mere financial interest in the LLC, and, that such a transfer was never approved by the LLC, as required by the Operating Agreement.

DISCUSSION

Only a member of an LLC at the time of the alleged wrong and and as of the institution

of the action has standing to bring a derivative claim. Where a plaintiff voluntarily disposes of the stock, the rights as a shareholder cease, and his interest in the litigation is terminated. (*Jacobs v. Cartalemi*, 156 A.D.3d 605, 607 [2d Dept. 2017]). The terms "member" and "membership interest" are defined in Limited Liability Company Law §§ 102 (q) and (r) as follows:

> (q) "Member" means a person who has been admitted as a member of a limited liability company in accordance with the terms and provisions of this chapter and the operating agreement and has a membership interest in a limited liability company with the rights,
>
> (r) "Membership interest" means a member's aggregate rights in a limited liability company, including, without limitation: (i) the member's right to a share of the profits and losses of the limited liability company; (ii) the member's right to receive distributions from the limited liability company; and (iii) the member's right to vote and participate in the management of the limited liability company obligations, preferences and limitations specified under this chapter and the operating agreement.

Limited Liability Company Law § 603 provides in pertinent part as follows:

> (a) Except as provided in the operating agreement,
>
> (1) a membership interest is assignable in whole or in part;
>
> (2) an assignment of a membership interest does not dissolve a limited liability company or entitle the assignee to participate in the management and affairs of the limited liability company or to become or to exercise any rights or powers of a member;
>
> (3) the only effect of an assignment of a membership interest is to entitle the assignee to receive, to the extent assigned, the distributions and allocations of profits and losses to which the assignor would be entitled; and
>
> . . .
>
> (b) The operating agreement may provide that a member's interest may be evidenced by a certificate issued by the limited liability company and may also provide for the assignment or transfer of any of the interest represented by such a certificate. . .
>
> c) Unless otherwise provided in an operating agreement and except to the extent assumed by agreement, until the time, if any, that an assignee of a membership interest becomes a member, the assignee

shall have no liability as a member solely as a result of the assignment.

The Operating Agreement (NYSCEF NO. 100) provides in part as follows:

> 11. **Assignments.** The Members may assign or transfer in whole or in part their interest in the Company.
>
> . . .
>
> 13. **Admission of Additional Members:** The Members may cause the Company to admit one or more additional members to the Company.

It is clear from the forgoing that plaintiffs never became members of KGN, as there is no provision in the Operating Agreement which contradicts the language of § 603(a)(3) that "the only effect of an assignment of a membership interest is to entitle the assignee to receive, to the extent assigned, the distributions and allocations of profits and losses to which the assignor would be entitled; and . . .,

There is no provision in the Operating Agreement that a member's interest may be evidenced by a certificate issued by the company, and plaintiffs do not claim that such a certificate reflecting transfer of membership was ever issued. The Operating Agreement at ¶ 13 sets forth the process whereby members may admit new members. Plaintiffs do not allege that the defendant members ever caused the Company to admit plaintiffs as members. Limited Liability Company Law § 604(a) provides that "[e]xcept as provided in the operating agreement, an assignee of a membership interest may not become a member without the vote or written consent of at least a majority in interest of the members, other than the member who assigned or proposes to assign such membership interest."

Plaintiffs are not members with authority to bring a derivative action against KGN. Moreover, the Exculpatory Clause in ¶ 14 of the Operating Agreement provides that the "[m]embers shall not have any liability for the liabilities or obligations of the Company, except as to the extent provided in the LLCL." It is therefor

ORDERED, that plaintiffs' motion for summary judgment (Motion Sequence 003) is in all respects denied; and it is further

ORDERED, that defendants' cross-motion for summary judgment dismissing First,

Second, and Fourth Causes of Action, the Third Cause of Action against Kenneth S. Feraru, and Kenneth S. Feraru, P.C., having already been dismissed, is granted, and the First, Second, and Fourth Causes of Action, which are claims of damage to KGN, and not directly to the plaintiffs as individuals, are also dismissed. Accordingly, the case is dismissed in its entirety.

To the extent that requested relief has not been granted, it is denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
April 30, 2021

ENTER:

Jerome C Murphy

Hon. Jerome C. Murphy, J.S.C.

ENTERED
May 11 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE