*To be Argued by:*
ALEXANDRA P. KOLOD
(*Time Requested: 15 Minutes*)

# Supreme Court of the State of New York
## Appellate Division – Second Department

**Docket No.: 2023-09113**

In the Matter of the Application of
MARK ROZOF, LINDA ROZOF-GUBER and
JUDITH TEITELL, GENERAL PARTNERS,

*Petitioners-Appellants,*

For the Judicial Winding Up of 392 1st Street Company, a Domestic Partnership, Pursuant to Section 68 of the Partnership Law,

- against -

ARTHUR ROZOF, AS A GENERAL PARTNER AND IN HIS REPRESENTATIVE CAPACITY AS EXECUTOR OF THE ESTATE OF EDNA ROZOF, GENERAL PARTNER, DECEASED,

*Respondent-Respondent.*

# BRIEF FOR RESPONDENT-RESPONDENT

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**Kings County Clerk's Index No.: 525611/2019**

APPELLATE INNOVATIONS
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# TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page**

**Cases:**

**Rules, Laws and Statutes:**

## QUESTION PRESENTED

1. Was the Supreme Court correct in dismissing Petitioners-Appellants' Petition for judicial winding-up of a partnership?

Answer: Yes, the Supreme Court correctly dismissed the Petition for multiple reasons. *First*, the Petitioners-Appellants have not demonstrated a need for a judicial winding-up of the partnership as they have been operating the partnership as an ongoing business for years, including by expending money to make non-essential improvements, hiring personnel, and paying distributions. *Second*, the purported withdrawal of one partner was a sham given that Petitioners-Appellants have been acting as a majority bloc—despite collectively only holding a majority interest if the alleged withdrawn partner's interest is counted. *Third*, the relief Petitioners-Appellants truly seek with this proceeding is a declaration that they can market and sell the partnership's sole asset over Respondent's objection, despite the existence of a 1954 agreement which provides each owner a right of first refusal to purchase a disposing owner's interest for a nominal amount. *Fourth*, given the material factual issues in dispute, Petitioners-Appellants should have brought a plenary action to obtain their requested relief.

Respondent-Respondent Arthur Rozof ("Arthur") submits this brief in opposition to the appeal of his siblings Petitioners-Appellants Mark Rozof ("Mark"), Linda Rozof-Guber ("Linda"), and Judith Teitell ("Judy") (collectively, the "Siblings"), from the Decision and Order ("Order") of the Hon. Leon Ruchelsman dated August 31, 2023 (RR5-9) dismissing the Siblings' Verified Petition, which sought an Order and Judgment: (a) supervising the winding up of 392 1st Street Company ("Partnership") under Partnership Law § 68; (b) authorizing Appellants to sell the Partnership's only material asset, a walk-up apartment building, and distribute the sale proceeds to the partners; and (c) directing that a final accounting be prepared and that upon a final accounting, issuing a declaration that the Partnership's affairs have been wound up (the "Appeal").

## PRELIMINARY STATEMENT

As the Supreme Court recognized in the Order, this special proceeding "for the judicial winding up" of the Partnership is nothing more than a waste of judicial time and resources. Following the death of the parties' mother, Edna Rozof ("Edna") in 2011, the Siblings took control of the Family Enterprise (defined below), that Edna and Arthur had been running together for many years. Then, in 2015, the Siblings began an illicit plan to liquidate the real estate owned by the Family

Enterprise, of which the Partnership is a part, in violation of its governing 1954 agreement containing a familial right of first refusal.

When Arthur brought an action against his Siblings to prevent this sale, the Siblings concocted a plan to race Arthur to the courthouse for an order regarding the Partnership's property. In February 2016, six weeks after Arthur filed his case, Judy purported to withdraw from the Partnership, and, immediately thereafter, the Siblings brought a competing proceeding—nearly identical to the present one—purporting to seek supervision of the winding up of the Partnership. Their true intention, however, was to obtain a judicial order granting them permission to sell the Partnership's sole asset before Arthur was able to get an order preventing them from doing so in his action. Accordingly, the Siblings brought a truncated proceeding that they hoped would be adjudicated on an expedited basis, when they should have sought a declaratory judgment in a plenary action.

Due to various procedural issues, set forth in more detail below, the Siblings' prior proceeding languished, and they filed another proceeding—the instant Petition—in 2019, again seeking supervision of the winding up of the Partnership, based on Edna's death and Judy's purported withdrawal. But the Petition ignores the fact that, since taking control in 2011, the Siblings have operated the Partnership as a continuing business, part of the Family Enterprise, and not as a partnership in dissolution. Indeed, since assuming control in 2011, there is no evidence that the

Siblings identified the Partnership *to anyone* with whom it did business as a partnership in dissolution. And even since Judy's alleged withdrawal in 2016, the Siblings have not treated the Partnership as dissolved or in dissolution. They have continued in the ordinary course to sign leases, pay vendors, renovate apartments (without consulting Arthur), and pay distributions to Judy.

Moreover, Judy's treatment as a partner has remained unchanged since her purported withdrawal in 2016. The Siblings have acted, and continue to act, as though they have complete control and can do whatever they want over Arthur's objections, despite the fact that they only hold a majority interest in the Partnership if Judy's supposedly withdrawn interest is counted.

As the Supreme Court recognized, the Partnership is not winding up, and the Siblings' assertions that it has been winding up in the years since Edna's 2011 death, and Judith's purported 2016 withdrawal are belied by the evidence. The Partnership's operations have not changed substantially since 2011. As the Supreme Court correctly held, "there has been no dissolution of the current partnership [which] continues to operate…The court cannot oversee any judicial dissolution where none exists." (R9.)

Alternatively, and as Arthur argued below, given that (1) the Partnership was only created in an attempt to convert its sole building into a cooperative corporation, a plan that was ultimately abandoned, and, (2) since the Partnership's creation, it has

always been operated as part of the singular Family Enterprise, which is governed by the 1954 Agreement (defined below), it is clear that it was the intention of the owners of the Family Enterprise, who are also the owners of the Partnership, that the Partnership also be governed by the 1954 Agreement, which limits transfers of the ownership interests in the Company by providing each owner a right of first refusal to purchase a disposing owner's interest for a nominal amount. Accordingly, if the Order is not affirmed, this proceeding should be converted to a plenary action with the full opportunity for discovery, to adjudicate the issue of whether the 1954 Agreement prevents a judicial order allowing the Siblings to sell the Partnership's sole asset.

## STATEMENT OF FACTS

### A. The Family Enterprise

Since the 1950s, the family has owned and operated various properties in New York City (the "New York City Properties"). When acquired in the 1950s, the New York City Properties were purchased by a closely-held New York domestic corporation that was incorporated on or about December 30, 1953, called D. Karnofsky, Inc. (the "Company," and together with the Partnership, the "Family Enterprise"). (RR43-44.)

The Company's shareholders have always been only family, and it was always intended that any sale of the shareholders' interests in the Company be only to other

family shareholders. In January 1954, the Company's then-shareholders entered into an agreement, to which Arthur and his Siblings are successors (the "1954 Agreement," RR54-57). That agreement limits transfers of the ownership interests in the Company by providing each owner a right of first refusal to purchase a disposing owner's interest for a nominal amount. (*See* RR55-56; R44.)

There are presently outstanding fifty-two (52) authorized shares in the Company, and each share has equal voting power and rights. Presently, the Company's shareholders are Arthur, Mark, Linda, Judith, and Edna's estate. The Siblings own a combined thirty-four (34) shares. Based on Edna's will, which the Siblings are disputing in a pending proceeding, Arthur owns or controls, as part of Edna's estate, eighteen (18) total shares in the Company.[1]

Since acquisition of the New York City Properties in the 1950s, the Family Enterprise has owned and operated the properties, including renting the residential apartments in the buildings thereon. In January 2014, the Siblings hired a management company that began managing the properties. (R45.) Before that, the business operated out of Edna's home in Brooklyn and Arthur managed the buildings

[1] Edna left her shares in the Company, and her interest in the Partnership, to Arthur. She also gave him her proxy. (R44.) The Siblings were unhappy with the share of the family business that their mother left to Arthur and commenced a Kings County Surrogate's Court Action in 2012. The proceedings in Surrogate's Court are active and the matter is unresolved. (R44.)

from 1981 to December 2013 (from 1981 to 1990 with Edna). (R45.) Business continued as usual after Edna died in 2011 and continues to this day. (R45.)

### B. The First Street Property & Partnership

There is a historical wrinkle for one of the New York City Properties, which is that the property located at 392 First Street, Brooklyn (the "First Street Property") is now titled in the name of the Partnership, rather than in the name of the Company. (RR45-46.)

Like most of the other New York City Properties, the First Street Property was acquired by the Company in January 1954, subject to the 1954 Agreement. In 1986, the Company's shareholders created the Partnership, with all shareholders designated as partners, for the purpose of being the sponsor of a plan to convert the First Street Property into a cooperative corporation, and transferred the First Street Property to the Partnership as reflected in the deed from the Company to 392 First Street Company. (RR24-25.) The transfer was a cashless transaction of $150,000, $140,000 of which was in the form of a mortgage held by the Company. To Arthur's knowledge, the $10,000 difference was never paid, nor were any of the monthly mortgage payments. (R46.) This is likely because in or about 1990, the plan for conversion was withdrawn. After the withdrawal, ownership was simply not transferred back to the name of the Company and the First Street Property continued to be owned in the name of the Partnership, whose partners continued to be the

Company's shareholders. The First Street Property was and still is the Partnership's only asset. (R46.)

Although owned in the name of the Partnership, the First Street Property was always, and has continued to be, operated and managed in conjunction with the other New York City Properties that are owned in the Company's name, and it was always part of the singular Family Enterprise. (R46.)

As stated above, the Partnership's partners have always been the Company's sole shareholders. Historically, the Partnership ownership interests were treated similarly as ownership of shares in the Company. When a partner died, the interest was treated as though it transferred by inheritance and business continued as usual. (RR46-47.)

After Edna died in 2011, the business similarly continued in the regular course as though a Company shareholder had died. Edna's interest in the Partnership was transferred in her will. Between Edna's death in 2011 and the time that Siblings retained attorneys in the fall of 2015, they did not take the position that the Partnership had dissolved and was winding up, nor did the partners undertake any actions to wind up the Partnership's affairs and business continued as usual. (RR39-40, 47-48.)

Simply stated, the Partnership was never operated separately from the Company and was never treated differently from the Company. No separate

partnership agreement exists, and the Partnership has continually operated as though the Company's governing documents, including the 1954 Agreement with limitations on ownership dispositions, controlled. Arthur and his Siblings recognized it as one business until late 2015, when the Siblings hatched their plan to sell all of the New York City Properties. (RR46-48.)

### C. The Siblings' Plan To Liquidate The New York City Properties

The Family Enterprise's usual or regular course of business was not, and is not, the sale or exchange of its property. However, in 2015, Arthur learned that his Siblings had adopted a plan to sell all of the New York City Properties. Such a sale is outside the Family Enterprise's usual and regular course of business. Arthur did not consent to such a sale, and he informed the Siblings of his objection. (R49.)

The Siblings engaged a real-estate broker, marketed all of the New York City Properties for sale, took potential purchasers on tours, solicited bids, and negotiated a contract of sale for at least one of the properties. (RR49, 107-115, 123-175.)

It was then that the Siblings adopted a strategy to differentiate the First Street Property (owned in the name of the Partnership) from the Family Enterprise, in an attempt to sell the property piecemeal, and in violation of Arthur's right of first refusal. That is when the Siblings, for the first time, took the position that the Partnership had dissolved upon Edna's death in 2011 and had been winding up for the four years since her death. The Siblings' counsel stated to Arthur's counsel in

the letter informing Arthur of the liquidation plan that "[t]he Partnership was dissolved by operation of law under Partnership Law §62.4 upon the death of Edna Rozof and is winding up its affairs." (R107.) This, of course, was belied by the fact that since Edna's death, the Partnership took no steps towards winding up its affairs. The purported four year winding up of the Partnership was a baseless claim, and Arthur told the Siblings as much. Arthur also privately stated his objection to the sale, and his position that absent his consent they could not sell the New York City Properties. (R49.) Nonetheless, the Siblings continued with their plans over Arthur's objection, challenging him to bring an action to dissolve the business. (R49.)

### D. The Prior Kings County Action

In response to the Siblings' attempts to sell the properties, on January 6, 2016, Arthur commenced an action in Kings County Supreme Court, entitled *Rozof v. Rozof et al.*, Index No. 500150/2016 (Sup. Ct., Kings Co. 2016) (the "Prior Kings County Action"), seeking a judgment, *inter alia*, declaring that the Siblings could not sell the New York City Properties absent Arthur's consent, and absent his consent any sale would be void. (R50.)

In the Prior Kings County Action, Arthur argued, *inter alia*, that the proposed sale of the New York City Properties was a transaction within the purview of Business Corporation Law (BCL) § 909, the purpose of which is to prevent a

business from disposing of all, or substantially all, of its assets without obtaining prior shareholder approval. Arthur's position was that the First Street Property is also subject to BCL §909 because it is part of the singular Family Enterprise that is controlled by the 1954 Agreement. *Accord*, *Savasta v. 470 Newport Associates*, 180 A.D.2d 624, 626-27 (2d Dept 1992), *aff'd* 82 N.Y.2d 763 (1993). This is because, *inter alia*, the transfer of ownership to the Partnership was done solely for the attempted co-op conversion, the Company received nothing in exchange for the transfer, and after the conversion was abandoned the First Street Property was treated like all the other New York City Properties as part of the Family Enterprise. (R46.) While the Siblings are attempting to sell the First Street Property separately, BCL § 909 precludes piece-meal sales when they are part of an overall liquidation plan.

In opposition, the Siblings argued that they only had "elected to sell the single parcel of property owned by the Partnership as part of the winding-up of its affairs..." (Prior Kings County Action, NYSCEF Doc. No. 14, ¶ 8.) However, as noted above, the documentary record rebuts that characterization of their actions, and confirms that the Siblings planned to liquidate all the New York City Properties. (*See* RR50-51, 107-175.)

Following extensive motion practice and procedural history (*See* R180-82, 190-99), on September 29, 2017, the Prior Kings County Action was resolved with

the entry of an Order & Judgment in the form submitted by Arthur, stating that the "[the Siblings] must comply with Business Corporation Law ("BCL") § 909 and obtain [Arthur]'s consent to a sale of all or substantially all of the assets of Defendant D. Karnofsky Inc. ("Corporation)." (R200-202; the "Justice Knipel Order".) Practically speaking, this meant that if the Siblings wanted to sell a substantial amount of the New York City Properties belonging to the Family Enterprise, they would need to obtain Arthur's consent.

Notably, in the Prior Kings County Action, the Siblings asked the court to sign a Proposed Order and Judgment stating that the First Street Property could be sold as part of a "winding up" of the Partnership's affairs and Judge Knipel refused. (*See* RR190-202.)

### E. The Siblings Respond To The Prior Kings County Action By Trying To Evade It

In response to Arthur's filing of the Prior Kings County Action, the Siblings agreed to manufacture a purported dissolution of the Partnership by having Judy sign a withdrawal from the partnership "effective immediately" on February 19, 2016 (six weeks after the Prior Kings County Action was commenced). (R26.) Immediately thereafter, the Siblings commenced a special proceeding in Supreme Court, Nassau County that was identical to the present proceeding, under Index No. 601181/2016 (the "Nassau County Proceeding"), by filing a petition (the "Nassau Petition"), the day before their response to the complaint was due in the Prior Kings

County Action. In the Nassau Petition, the Siblings sought, exactly as they do here, an order and judgment declaring that that they "be permitted and directed to sell" the First Street Property, for judicial oversight of the winding up of the Partnership's affairs, and a final accounting. (RR48, 51, 178-79.)

On August 31, 2016, the Nassau County Proceeding was transferred to Kings County, and assigned Index No. 515373/2016 and to Justice Knipel. (R16.) Thereafter, the Siblings took no meaningful steps to renew or prosecute the transferred Nassau Petition, and ultimately, it languished without action or the issuance of any orders. (*See* R179-80, 184-185, 188.)

Then, almost 4 years after they first sought to wind up the purportedly dissolved Partnership, the Siblings commenced the instant proceeding in Kings County—which is, in all material respects, identical to the Nassau County Proceeding. (R180.) Again, under the guise of seeking supervision of the winding up of the Partnership, what the Siblings really want is an order green-lighting them to sell the First Street Property, without having to address the right of first refusal contained in the 1954 Agreement, or the Justice Knipel Order.

### F. Judy is Still Being Treated as a Partner

Despite Judy's purported withdrawal from Partnership in 2016, she has continued to be treated as a full partner to this day. (RR38-39.) Notably, she is a named petitioner in the instant proceeding, and paragraph 6 of the Petition states that

"At all relevant times she was, and is, a general partner of the Partnership owning 16.35% of the Partnership." (R13) (emphasis added.) And she continues to receive a K-1 from the Partnership. (RR58-95.) The continuation of Judy's treatment as a partner demonstrates that her withdrawal was a mere sham and belies the Siblings' claims that the Partnership is in dissolution.

### G. The Siblings Continue to Operate the Partnership and are Not Winding it Up

Despite their claims of dissolution, the Siblings continue to operate the Partnership as a going concern. The Siblings have leased apartments in the First Street Property, put funds into the building, and written checks on the Partnership checking account for seemingly non-essential expenses. (R96-98.) Similarly, the contract the Partnership entered into with a real estate broker to market the First Street Property includes no mention of the Partnership being in dissolution. (RR. 109-111.)

As of January 31, 2023, the Partnership had a total of $660,954.24 in its two bank accounts. (RR463-64, 468-479.) There is no reason for a partnership winding down its affairs to possess so much money in its accounts. Moreover, the Partnership's cancelled checks demonstrate that it has expended money to renovate apartments—conduct that is clearly not consistent with an entity wrapping up its affairs. (R464-65, 480-489.) For example, check No. 10803, for $1,245.51, made

out to CS Brown Company, the Partnership's appliance supplier, notes that it was for "APARTMENT RENOVATION." (R481.)

Significantly, the cancelled checks also demonstrate that the Partnership is paying the Company's credit card fees, further evidence that the Partnership and Company continue to commingle affairs and act as one Family Enterprise. (*See* RR5480-89 at checks Nos. 10770 (R482), 10786 (R484), 10797 (R486), 10812 (R487), 10846 (R488), 10848 (R488), 10968 (R489), 10970 (R489.))

### H. The Order

On November 1, 2022, Arthur moved to dismiss the Petition arguing, *inter alia*, that the Siblings wrongfully purported to dissolve the Partnership, and therefore do not have the right to wind up the Partnership's affairs, with or without judicial supervision. After the motion was fully briefed and argued, the Court issued the Order dismissing the Petition. The Order found that because the Partnership "continued all operations upon Edna's death…[and] upon Judith's withdrawal or retirement from the partnership…such continuation created a new partnership at will." (R7.) And "there can be no winding-up of the original partnership that has been replaced by the new partnership at will still functioning at this time." (R7.) The Court recognized further that the Siblings "continued to perform the same duties, and responsibilities, and earn the same profits, without Edna," and noted that "the desire to sell the asset in question is not evidence of any winding-up of a

partnership that had already been terminated for over five years." (R8.) The Supreme Court concluded that because the "the new partnership has replaced the old one there can be no winding-up of its affairs." (R8.)

## ARGUMENT

### I. THE SUPREME COURT CORRECTLY DISMISSED THE PETITION.

The Petition seeks a sale of the First Street Property and requests "that the Court supervise the winding up of the Partnership's affairs pursuant to Partnership Law § 68." (R16.) Partnership Law § 68 provides, in pertinent part, that, "[u]nless otherwise agreed the partners who have not wrongfully dissolved the partnership…has the right to wind up the partnership affairs; provided, however, that any partner…upon cause shown, may obtain winding up by the court." "A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is prima facie evidence of a continuation of the partnership." Partnership Law § 45(2).

Accordingly, the Siblings, by their own conduct after Edna passed away, as well as subsequent to Judy's sham withdrawal from the Partnership, waived their right to terminate the partnership. *Savasta*, 180 A.D.2d at 626-27, *aff'd* 82 N.Y.2d 763 (1993) (partners waived their right to terminate because they accepted the benefits of the partnership for 22 months after the termination right was triggered).

After Edna passed away, and after Judy's "withdrawal," the Partnership continued its usual course of business as part of the Family Enterprise, with the Siblings in control, despite the fact that without Judy, the Siblings did not own a majority share of the Partnership, as Arthur owns or controls, as part of Edna's estate, nearly 50%. (*See* R13.) The Siblings have leased apartments in the First Street Property, put funds into the building, and written checks on the Partnership checking account with no indication that it is winding up affairs. (R96-98.). The Partnership files tax returns, Judy continues to receive distributions from the Partnership, and is identified as a partner on the Partnership's tax returns. (R48.) In all material respects, Judy is still acting as a Partner and benefiting as a Partner, and the Partnership is still operating in the same manner as it was upon Edna's death. Thus, the Siblings cannot establish that the Partnership is in dissolution.

The Siblings argue that their actions in continuing to operate the Partnership as a going concern are really their attempts to wind up the partnership's affairs. (App. Br. at 14-15.) But the Siblings have gone well beyond the limited existence required to wind up the entity's affairs; they are continuing the business as usual, except without consulting Arthur.

Under Partnership Law § 64:

> [E]xcept so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership…[w]ith

> respect to the partners… [w]hen the dissolution is by such act [of a partner]…in cases where section sixty-five so requires.

Partnership Law § 64 (McKinney). Partnership Law § 65, in turn, only allows a partner to act for a dissolved partnership when the partner does not have knowledge of the dissolution. Partnership Law § 65 (McKinney). Accordingly, all extraneous actions taken by the Siblings after Judy's purported withdrawal that were not required to wind up the business—such as renovating apartments and paying distributions to Judy— belie the Siblings position that the Partnership is dissolved.

Additionally, the Siblings' claim that failure to continue the Partnership's operations would have "destroyed the value of the Partnership's only material asset while giving rise to a claim for waste and breach of the fiduciary duty of due care." (App. Br. at 15.) But this ignores the fact that the Siblings' actions went well beyond merely collecting rents and paying taxes. Instead, the Siblings poured money into apartment renovations and paid distributions to Judy. The Siblings fail to explain how these extraneous actions, in any way, facilitated the prompt winding up of the Partnership. Moreover, as noted above, these actions were taken without Arthur's

consent, and purportedly based on the Siblings majority share in the Partnership, which they only have if Judy's interest is included.[2]

Moreover, in their Appeal, the Siblings argue that the Supreme Court erred in concluding that they took no steps to wind up the Partnership after Judy's alleged withdrawal in 2016, because it "overlooked the subsequent events surrounding [her] withdrawal". (*See* App. Br. at 8, 10.) However, the Supreme Court did no such thing. The Order specifically states that "the partnership continued all operations upon Judith's withdrawal or retirement from the partnership…[and] [i]t would be improper to seek to wind-up a partnership that has continued in a new form with the remaining partners." (R7.) Moreover, the Siblings point to their attempt to sell the Partnership's property as evidence that they have been winding up the Partnership since Judy's purported withdrawal, however, they began this process in 2015, before Judith's alleged withdrawal. (App. Br. at 11.) Accordingly, any steps taken to further this goal cannot be evidence of the winding up of the Partnership.

Because the Court properly considered and rejected all of Petitioners' arguments, the Order should be affirmed.

[2] Therein lies the inherent contradiction with the Siblings' position. On the one hand, the Siblings argue that Judy withdrew from the Partnership in 2016. On the other hand, years later, the Siblings admit to undertaking actions that require a majority vote, which they can only reach if they include Judy's purportedly withdrawn interest. Thus, if Judy legitimately withdrew in 2016, the remaining Siblings would not have the authority to take the actions that they have in the following years.

## II. THE PETITION SHOULD BE DISMISSED AS IT IS AN ATTEMPT TO EVADE THE 1954 AGREEMENT AND THE JUSTICE KNIPEL ORDER

The 1954 Agreement—and its attendant right of first refusal—and the Justice Knipel Order both restrict or condition the unfettered sale of assets belonging to the Family Enterprise. This includes the First Street Property, which has historically been treated as part of the Family Enterprise.

In filing this Petition, the Siblings slyly seek to avoid the adjudication of these issues, and instead are asking the Supreme Court, in a summary proceeding, to green-light their sale of the First Street Property, without considering these material factual disputes. This cannot be. The Petition must be dismissed as it is nothing but an end-run around the disputes involving the 1954 Agreement or the Justice Knipel Order.

Because the 1954 Agreement governs the Partnership, the First Street Property remains subject to it and the Siblings do not have the right to wind up the Partnership's affairs or sell its sole asset, with or without judicial supervision. *Yoni Tech., Inc. v. Duration Sys. (1992) Ltd.*, 244 F. Supp.2d 195, 212 (S.D.N.Y. 2002) (plaintiff lacked right to unilaterally sell assets because the parties agreed to resolve all disputes relating to the winding up of their affairs under the eyes of a panel of arbitrators).

The Siblings' allegation that the Partnership does not have an agreement

"covering its affairs, governance, and operations" (R22) ignores the 1954 Agreement, which the partners could, and did, adopt and apply to their affairs after title to the First Street Property was transferred to the partnership in a cashless transaction. *Corr v. Hoffman*, 256 N.Y. 254, 272-73 (1931); *Hochberg v. Manhattan Pediatric Dental Group, P.C.*, 41 A.D.3d 202 (1st Dept 2007). This is confirmed by the fact that business continued as usual after Edna died as it did when the parties' uncle had died. (R47.) *Accord* Partnership Law § 45(2) ("A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is prima facie evidence of a continuation of the partnership.").

The 1954 Agreement, and its restriction on disposing of ownership interests, precludes the Siblings' claim that the Partnership dissolved pursuant to Partnership Law 62. *Congel v. Malfitano*, 61 A.D.3d 807, 808-09 (2d Dept 2009); *Dental Health Assocs. v. Zangeneh*, 34 A.D.3d 622, 623-24 (2d Dept 2006); *see also*, *generally*, *Gelman v. Buehler*, 20 N.Y.3d 534, 538-39 (2013), and R14 (implying that the default provisions of the Partnership Law are inapplicable when there is an agreement amongst partners).

"The rights and obligations of the partners as between themselves arise from and are fixed by their agreement." *Corr*, 256 N.Y. at 272. The 1954 Agreement restricts disposition of ownership interests by granting the non-disposing owner a

right of first refusal. The Siblings' allegation under Partnership Law § 62 that the partnership dissolved upon Edna's death in 2011 and/or upon Judy's staged withdrawal in February 2016, ignores the agreement. [3]

The fact that the agreement was originally prepared for one type of entity (*e.g.*, a corporation) does not preclude applying the agreement to a different type of entity (*e.g.*, a partnership). *Hochberg*, 41 A.D.3d 202 (in dispute between two dentists who entered into a partnership agreement for the operation of their dental practice, but then converted the practice to a professional corporation, judicial dissolution of the corporation was inappropriate because there was a question of fact whether the dispute must be resolved in accordance with the arbitration clause in the parties' partnership agreement, which the respondent asserted survived incorporation). The question is the parties' intent. *Corr*, 256 N.Y. at 273-75. As Arthur demonstrated in support of his motion to dismiss the Petition, the intent—as manifested by the partners and shareholder's actions for over twenty years, including after the death of a partner—was for the 1954 Agreement to control.

To reiterate: the Partnership did not operate separately from the Company. The Company was incorporated in December 1953, purchased the First Street Property in 1954, and the only reason the Company transferred the First Street

[3] If Edna's death caused the dissolution, it would be bizarre for Judy to withdraw from the winding up process. Nor does withdrawing from the winding up process result in dissolution.

Property to the Partnership in a cashless transaction was for the Partnership to sponsor a plan to convert that property to a cooperative corporation. (RR40, 41, 43, 45-48.) After the conversion plan was withdrawn, the First Street Property continued to be operated and managed in conjunction with the other New York City Properties (that were held in the Company's name), the Partnership never purchased any other real property; the partners have always been Company shareholders, no separate meetings were held, the Partnership and Company operated out of a single office with the same management, both utilized the same accounting firm, monies were commingled, checks were issued by the Partnership to pay the Company's debts (RR96-98), all of the New York City Properties were insured under a single policy of insurance, the Siblings wanted to certify that the Partnership was doing business in Manhattan even though it does not own property there (but the Company does), and, like the Company, the Partnership continued its regular course of business after partners died. (RR45-48.) Moreover, there is no evidence that the Partnership actually paid the Company for the First Street Property. (R46.)

Partners (like shareholders) may grant each other buy-out rights, *Napoli v. Domnitch*, 18 A.D.2d 707 (2d Dept 1962), and, given the above, the 1954 Agreement provides Arthur with a right of first refusal to purchase his Siblings' interests in the Partnership as well as the Company. Specifically, the 1954 Agreement, at article "FIFTH," provides that each owner has a right of first refusal when another owner

seeks to transfer their interest (subparagraph "A"), states how each owner may exercise that right (subparagraph "B"), and establishes a formula for valuing the selling price (subparagraph "C"). The selling price is intended to be "a nominal amount" (article FIFTH, at subparagraph "C"). This summary proceeding is a wrongful effort to evade Arthur's right of first refusal to purchase his Siblings' interests for a nominal amount. (RR54-57.)[4]

Moreover, the Siblings present a new argument here that if this Court affirms the Order it would be rewarding Arthur for his allegedly obstreperous behavior related to his perfectly legal attempts to prevent his Siblings from illicitly selling the First Street Property. (App. Br. at 15-16.) First, this argument must be rejected as it was not presented in opposition to the motion to dismiss the Petition and was therefore waived. Second, more importantly, Arthur's attempts to protect and exercise his right of first refusal, under the 1954 Agreement that governs the Family Enterprise (*see* RR55-56; R44), should not be viewed as obstreperous or in violation of any fiduciary duties owed to his Siblings. It was Arthur's contractual rights that were being violated by the Siblings actions and he was only defending himself.

Accordingly, the Siblings have triggered (perhaps inadvertently[5]) Arthur's

[4] Relatedly, the Justice Knipel Order prohibits the Siblings form selling substantially all of the assets of the Family Enterprise absent Arthur's consent. This Petition wrongly seeks to allow the sale of the First Street Property, without addressing whether it is even permitted under the Justice Knipel Order.

[5] *See* Peter A. Mahler and Michael A.H. Schoenberg, "Dissolution Petition Can Unwittingly

right to purchase their interests in the First Street Property for "a nominal amount." Their concerted effort to purportedly dissolve the Partnership by sending the February 2016 withdrawal notice, followed by commencement of the Nassau County Proceeding, and now this special proceeding, indicates that they intend to dispose of their interests, which triggered Arthur's right of first refusal. *In re Johnsen v. ACP Distribution, Inc.*, 31 A.D.3d 172 (1st Dept 2006); *In re El-Roh Realty Corp.*, 48 A.D.3d 1190 (4th Dept 2008).

Therefore, the Petition must be denied as it operates as a clear effort to evade Arthur's rights under the 1954 Agreement and the Justice Knipel Order.

## III. IF NOT DISMISSED, THIS SPECIAL PROCEEDING SHOULD BE CONVERTED TO A PLENARY ACTION

Finally, as Arthur argued below, given that the relief sought in the Petition is actually a declaration that the Siblings can sell the First Street Property, if this proceeding is not dismissed, it should be converted to an ordinary plenary action for a declaratory judgment, with a right to discovery and a full hearing on the numerous disputed facts. *Phalen v. Theatrical Protective Union No. 1*, 22 N.Y.2d 34, 41-42 (1968); *Lakeland Water Dist. v. Onondaga Co. Water Auth.*, 24 N.Y.2d 400, 408-09 (1969). CPLR 103(b) is explicit: "All civil judicial proceedings shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding

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Trigger Stock Buyback," NYLJ July 21, 2016 (Vol. 236, No. 14).

is authorized." CPLR 103(c) continues that, when there is jurisdiction over the parties, the Court shall make whatever order is required for proper prosecution when it is not brought in the proper form. The Siblings have provided no statutory authorization permitting a Partnership Law §68 claim to be brought in a special proceeding, or statutory authorization for their underlying substantive claims for a declaration of rights to be brought in the form of a special proceeding, and we have found none. As such, the Supreme Court is without authority to summarily award the Siblings the relief sought in the Petition. *Taskiran v. Murphy*, 8 A.D.3d 360 (2d Dept 2004); *Neilson v. 6D Farm Corp.*, 123 A.D.3d 676 (2d Dept 2014) (issues relating to the winding up of partnership after death of a partner were determined in a regular plenary action, not a special proceeding); *Birnbaum v. Flaum*, 172 A.D.2d 473 (2d Dept 1991) (action for dissolution of a partnership by operation of law was brought by complaint); *Patycki v. Slaski*, 42 Misc.3d 1213(A) (Sup. Ct., Kings. Co. Jan. 17, 2014); *see also Magid v. Magid*, No. 653440/2015, 2017 WL 6383826 (N.Y. Sup. Ct. Dec. 14, 2017) (holding that summary judgment was not appropriate in plenary action seeking judicial dissolution of partnership where facts were highly disputed).

Given that this case involves highly disputed fact questions—most significantly, whether the Partnership has been operating under the terms of the 1954 Agreement since Edna's death, and whether the sale of the First Street Property is

prohibited by the Justice Knipel Order—it would be most inappropriate to decide it in a summary proceeding.

## CONCLUSION

For the reasons set forth above, the Appellate Division should affirm the Supreme Court's grant of Arthur's Motion to Dismiss the Petition.

Dated: New York, New York
September 23, 2024

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