

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

DEBRA A. GAVIN

Index #: 152259/2021

Plaintiff

-against-

ORDER

DEL REY, TANZI, GUGLIETTA,
D'AMBROSI, CPAS, LLP et al
Defendants

The court reviewed the following e-filed documents listed by NYSCEF as (Motion 003 and Motion 004) document numbers 89-151. Based upon the foregoing, Plaintiff's and Defendants' motions are denied in entirety.

BACKGROUND

In 1990, Plaintiff began working at Del Rey & Tesoriero as an accountant. In 1996, founding partner Bernard Del Rey dissolved his association with Tesoriero and entered into a new partnership with Defendant Anthony Tanzi pursuant to an operating agreement (the "1996 Operating Agreement"),¹ which provided that Del Rey would hold a 90% ownership and managerial interest, while Tanzi would hold a 10% interest, in the profits, losses, and capital of the partnership (NYSCEF Doc. No. 91). Around September 2008, Plaintiff was granted a five percent (5%) non-equity interest in the partnership, entitling her to share in the profits and losses (NYSCEF Doc. No. 90).

On January 9, 2017, Del Rey & Co. was renamed Del Rey, Tanzi & Gavin LLP ("DTG"). Mr. Del Rey passed away unexpectedly on June 1, 2018 (NYSCEF Doc. No. 123 & 139). At the time of Del Rey's death, the 1996 Operating Agreement provided that "[a] Person shall cease to be a Member upon the happening of any of the following events: the death of the Member," and

¹ The 1996 Operating Agreement appears to have been drafted using a limited liability company form, notwithstanding that Defendants present their firm out as a partnership.

further provided that “successors, executors, administrators or legal representatives will not have the right to become a Substitute Member in the place of their predecessor in interest unless all of the other Members shall so consent as provided in Section 11.3(a)” (NYSCEF Doc. No. 91).

On or about January 17, 2019, DTG purchased Mr. Del Rey’s interest from his estate for \$1,000,000 pursuant to a written Purchase Agreement, effective June 1, 2018, and executed by Anthony Tanzi in his capacity as partner. Tanzi executed the Purchase Agreement a second time as one of the “Purchasers’ Guarantors,” along with Debra Gavin and Defendant Phyllis Guglietta. Tanzi, Gavin, and Guglietta also executed a Guaranty securing the \$900,000 promissory note (NYSCEF Doc. Nos. 95 & 123)

Following the January 2019 purchase of Del Rey’s shares, Tanzi, Gavin, and Guglietta allegedly “orally agree[d] that” Plaintiff would hold a 39% equity interest in the partnership; however, no written agreement was ever executed (NYSCEF Doc. Nos. 123, 139).² Thereafter, monthly payments were proportionately deducted from DTG’s distributions to Plaintiff and reflected on Plaintiff’s 2018 Schedule K-1 as a capital contribution in the amount of \$123,960. DTG’s corporate tax returns for 2018, 2019, and 2020 further list Plaintiff’s “Ending” profit, loss, and capital share as 39% (NYSCEF Doc. Nos. 134, 135 and 136).

On or about January 2, 2020, Tanzi and Guglietta advised Plaintiff that there “could never be a reconcilable (sic) business relationship” and that “the only solution is to move in another direction.” Plaintiff was further informed that “we [Tanzi, Guglietta, and D’Ambrosi] came to a final binding decision that it would be best to part ways.” The following day, January 3, 2020, Gavin left the LLP’s offices and did not return (NYSCEF Doc. Nos. 123 & 139).

² While the parties agree that the 39% was orally agreed to, a dispute exists as to whether Plaintiff’s interest was intended to be “subject to the terms of the Operating Agreement or a subsequently amended Operating Agreement” (NYSCEF Doc. No. 123).

Plaintiff commenced this action on December 8, 2021, with the filing of a Summons and Complaint. On September 5, 2025, Defendants moved post-answer for an Order pursuant to CPLR § 3212(1) dismissing the Verified Complaint in its entirety; (2) granting Defendants' motion for summary judgment on liability on all causes of action in the Answer and Counterclaims; and (3) granting such other and further relief as the Court deems just, proper, and equitable. On September 5, 2025, Plaintiff also moved pursuant to CPLR 3212 for an Order granting (1) partial summary judgment on liability on Plaintiff's affirmative claims against Defendants Del Rey, Tanzi, Guglietta, D'Ambrosi, CPAs, LLP and Anthony Tanzi; and (2) summary judgment dismissing Defendants' counterclaims against Gavin in their entirety.

LEGAL STANDARD AND ANALYSIS

Standard of Review on a Motion for Summary Judgment

Summary judgment is a "drastic remedy" and will only be granted in the absence of any material issues of fact. To prevail, the movant bears the initial burden of establishing a *prima facie* entitlement to judgment as a matter of law by tendering admissible evidence demonstrating the absence of any material factual dispute (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). This burden is a heavy one, as the facts must be viewed in the light most favorable to the non-moving party (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). If the movant fails to make this *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing papers (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]). Moreover, the non-moving party is entitled to the benefit of every favorable inference that may reasonably be drawn from the evidence (*Nicklas v Tedlen Realty Corp.*, 305 AD2d 385, 386 [2d Dept 2003]). If the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual

issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

When deciding a motion for summary judgment, the court's function is issue finding rather than issue determination (*Goldin Real Estate, LLC v Shukla*, 227 AD3d 674, 676 [2d Dept 2024]). Questions of fact and issues of credibility are generally not to be resolved on summary judgment unless clearly contradicted by the record (*MIC Gen. Ins. Corp. v Okapa*, 191 AD3d 479 [1st Dept 2021]). Moreover, where an inquiry involves a mixed question of law and fact, ordinarily the cause of action should not be disposed of summarily but rather is one for the trier-of-fact (*Saphir Intern., SA v UBS PaineWebber Inc.*, 25 AD3d 315, 316 [1st Dept 2006]). "Summary judgment must be denied 'where there is any doubt as to the existence of a triable issue' or where 'the issue is arguable'" (*Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC*, 157 AD3d 479, 482 [1st Dept 2018]), accord, *Goldin Real Estate, LLC v Shukla*, 227 AD3d 674, 676 [2d Dept 2024].

Plaintiff's first cause of action alleges that she was terminated from the partnership and has a right to an accounting because circumstances render it just and reasonable (NYSCEF Doc. No. 4). There is no dispute that Plaintiff held a five percent (5%) non-equity interest in the partnership beginning in 2008 (NYSCEF Doc. Nos. 140, 151). Rather, the dispute instead centers on whether Plaintiff and Defendants ever entered an equity partnership.

By definition, "[a] partnership is an association of two or more persons to carry on as co-owners a business for profit and includes for all purposes of the laws of this state, a registered limited liability partnership" (Partnership Law § 10A). Although "[n]o person can become a member of a partnership without the consent of all the partners" (Partnership Law § 40[7]), an oral agreement to form a partnership for an indefinite period creates a partnership at will and is not barred by the Statute of Frauds (*Prince v O'Brien*, 234 AD2d 12 [1st Dept 1996]). A partnership

at will can also be dissolved “on a moment’s notice” and entitles a partner to an accounting (*Shandell v Katz*, 95 AD2d 742, 743 [1st Dept 1983]).

Absent specific agreement to the contrary, a partnership dissolves upon the death of a partner, such that the survivors who continue to operate the business of the former partnership, in effect create a new partnership at will (*Peirez v Queens P.E.P. Assoc., Corp.*, 148 AD2d 596, 597 [2d Dept 1989]; Partnership Law § 62(4)). The surviving partners have the exclusive right to wind up the affairs of the partnership (Partnership Law § 51[2][d]); and the representative of the deceased partner does not have any right to participate or interfere with the management of the partnership (*Gross v Neiman*, 147 AD3d 505, 506 [1st Dept 2017]). “The right to an account of...interest shall accrue to any partner, or [their] legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of agreement to the contrary” (Partnership Law § 74).

To begin with, the 1996 Operating Agreement is drafted on a limited liability company form that *inter alia* expressly provides that it is governed by the New York Limited Liability Company Law, which is inapplicable to a partnership (NYSCEF Doc. No. 150). Defendant asks this Court to recognize that DTG has operated as a partnership “registered with the New York Department of State as a limited liability partnership since 1996, pursuant to Partnership Law § 121-1500 et seq.” (NYSCEF Doc. No. 151). However, the conflict between the registration status and the terms of the 1996 Operating Agreement raises a material issues of fact and law—the first of many—as to whether the parties intended to form a partnership or a limited liability company, whether the 1996 Operating Agreement is valid and enforceable, and—if so—how this Court should apply the 1996 Operating Agreement *vis-a-vis* the parties’ claims and counterclaims (*Tilles Inv. Co. v Town of Oyster Bay*, 207 AD2d 393, 394 [2d Dept 1994] [Court properly denied cross motion for summary judgment due to mixed questions of law and fact]).

Continuing, Plaintiff maintains that she never signed, received, reviewed, or otherwise assented to the 1996 Operating Agreement, and therefore cannot be bound by its terms (NYSCEF Doc. No. 144). Yet Defendant contends that Plaintiff “had known of the Agreement for at least five years prior to 2018 and that it was repeatedly discussed at partnership meetings in [her] presence” (NYSCEF Doc. No. 142). Defendant also argues that “[b]y accepting her non-equity five percent (5%) interest in the LLP, [Plaintiff] implicitly and de facto agreed to the terms of the” 1996 Operating Agreement (NYSCEF Doc. Nos. 7, 90). In pertinent part, “[a] partnership is an association of two or more persons” (Partnership Law § 10-A), and the 1996 Operating Agreement provides that “[a] Person shall cease to be a Member upon...the death of the Member,” and that “successors, executors, administrators or legal representatives will not have the right to become a Substitute Member in the place of their predecessor in interest unless all of the other Members shall so consent as provided in Section 11.3(a)” (NYSCEF Doc. No. 91).

On these facts, mixed questions of law and fact exist as to whether Defendant-Tanzi was lawfully entitled to continue the partnership—even temporarily—following Del Rey’s death, whether Defendant-Tanzi assumed the role of “Managing Member” with authority to admit Plaintiff as partner assuming the partnership legally continued, whether plaintiff and/or defendant had the state of mind to enter a partnership, whether Plaintiff ever saw, received, or agreed—explicitly or implicitly—to the 1996 Operating Agreement (Partnership Law § 40[7]).³

To complicate matters further, Defendant-Tanzi arranged to purchase Del Rey’s partnership interest from his estate for \$1,000,000, an obligation Plaintiff personally guaranteed (NYSCEF Doc. No. 144). Although no written agreement was ever executed, Plaintiff, Defendant-Tanzi, and Defendant-Guglietta “orally agreed” that Plaintiff would be entitled to a 39% interest

³ The 1996 Operating Agreement defined the parties as “Members” and “Managing Member” pursuant to the Limited Liability Company Act.

in the profits, losses, and capital of DTG, effective as of June 1, 2018 (NYSCEF Doc. Nos. 123, 142). Defendant-Tanzi stated that though the parties orally “agreed” in 2018 to allocate Plaintiff a 39% share as an “equity partner,” the parties “never got to that point” because “there was an unfinished business that had to be completed [such] as creating a new operating agreement and figuring out the buy-in percentage” (NYSCEF Doc. No. 131). Defendant-Tanzi also claims that he was “a lay accountant who...was not represented by counsel during negotiations and who mistakenly conflated the legal definition of ‘equity partner’ and ‘non-equity partner,’ and LLPs and LLCs” (NYSCEF Doc. No. 124). Whether Defendant-Tanzi is credible and has a cognizable defense under the law presents yet another mixed issue of law and fact that requires this Court to determine whether the parties had the state of mind to arrive at the essential “[m]utual assent evincing the intention of the parties to form a contract” (*Miranco Contr., Inc. v Perel*, 29 AD3d 873, 873 [2d Dept 2006]), and, if so, whether that oral partnership was one at will or subject to the Statute of Frauds (*Prince v O’Brien*, 234 AD2d 12 [1st Dept 1996]; see also *Saphir Intern., SA v UBS PaineWebber Inc.*, 25 AD3d 315, 316 [1st Dept 2006]).

Relatedly, Plaintiff’s claims that her 39% equity interest is evidenced by K-1 tax forms issued to her by DTG reflecting a 39% allocation of profits, losses, and capital, and a capital contribution of \$123,960.00. Defendant counters that Plaintiff’s K-1 “does not satisfy Article XI’s [of the 1996 Operating Agreement’s] admission requirements,” nor standing alone confer equity status (NYSCEF Doc. Nos. 141, 151). While “K-1s... standing alone, do not prove an express partnership exists,” they “are relevant to the inquiry,” but “are not determinative” (*Rakosi v Sidney Rubell Co., LLC*, 155 AD3d 564, 565 [1st Dept 2017]). Rather, such evidence must be viewed in context of the conversations between the parties, and Plaintiff’s day-to-day role in the operations of DTG (NYSCEF Doc No. 139), which requires additional credibility determinations not yet appropriate for this Court to perform at the summary judgment juncture.

In sum, neither Defendants nor Plaintiff have made a *prima facie* showing of entitlement by tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]); (*MIC Gen. Ins. Corp. v Okapa*, 191 AD3d 479 [1st Dept 2021] [Issues of fact and credibility are not ordinarily determined on a motion for summary judgment absent clear contradiction by previous evidence]).

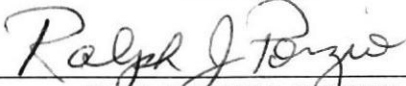
Moreover, a valuation of Plaintiff's purported partnership interest is unripe absent a conclusive determination that Plaintiff was, in fact, an equity partner. For the same reasons, the Court must deny Plaintiff's motion for summary judgment dismissing Defendants' counterclaims (NYSCEF Doc. No. 6), as those counterclaims arise directly from the threshold factual dispute concerning Plaintiff's status within the partnership.

Accordingly, it is hereby:

ORDERED, that Defendants' Motion Sequence No. 003 to dismiss the Verified Complaint in its entirety, and for summary judgment on liability as to all causes of action asserted in the Answer and Counterclaims, are denied. Plaintiff's Motion Sequence No. 004 for partial summary judgment on liability on its affirmative claims against Defendants Del Rey, Tanzi, Guglietta, D'Ambrosi, CPAs, LLP, and Anthony Tanzi is likewise denied.

Date: December 15, 2025

ENTER


HON. RALPH J. PORZIO
J.S.C.