

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:
HON. JEROME C. MURPHY,
Justice.

THE JOSEPH G. SHAPIRO LIMITED FAMILY
PARTNERSHIP, individually and derivatively on
behalf of SADDLE ROCK ASSOCIATES, LP,

Plaintiffs,

- against -

SUN LAKES DEVELOPMENT CORP.,
NAS REALTY CO., R.S. MANAGEMENT CO.,
RS MANAGEMENT CORP. OF N.Y.,
SCHEFER REALTY INC. f/k/a RIC
CONSTRUCTION OF NEW YORK, INC.,
PLAZA MANAGEMENT CO. LLC., SADDLE
ROCK ASSOCIATES, LP, NORMAN SCHEFER,
RONALD SCHEFER, RICHARD SCHEFER,
HELENE SCHEFER, AILEEN SCHEFER,
JOHN DOES NOS. 1 through 10,
XYZ CORP. NOS. 1 through 5, and
LETITIA JAMES, as ATTORNEY GENERAL
OF THE STATE OF NEW YORK,

Defendants.

TRIAL/IAS PART 7

XXX

Index No.: 610179-2020
Motion Date: 3/18/2021
Sequence No.: 002
Action #2

THE JOSEPH G. SHAPIRO LIMITED FAMILY
PARTNERSHIP, individually and derivatively on
behalf of SADDLE ROCK ASSOCIATES, LP,
individually and derivatively on behalf of SADDLE
COVE ASSOCIATES, LLC,

Plaintiffs,

DECISION AND ORDER

Index No. 610132/2020
Motion Date 3-18-21
Sequence No. 003
Action #1

-against-

Sequence No. 003

**SADDLE COVE ASSOCIATES, LLC,
SUN LAKES DEVELOPMENT CORP.,
SADDLE ROCK ASSOCIATES, LP,
NAS REALTY COL, RS MANAGEMENT CO.,
R.S. MANAGEMENT CORP. OF N.Y.,
SCHEFER REALTY INC., f/k/a
RIC CONSTRUCTION OF NEW YORK, INC.,
PLAZA MANAGEMENT CO., LLC,
NORMAN SCHEFER, RONALD SCHEFER,
RICHARD SCHEFER, JON DOES NOS. 1
through 10, XYZ CORP. NOS. 1 through 4, and
LETITIA JAMES as ATTORNEY GENERAL
OF THE STATE OF NEW YORK**

Defendants.

The following papers were read on Motion Seq. Nos. 002 and 003

Notice of Motion, Affirmation and Exhibits.....	1
Memorandum of Law in Support of Motion	2
Affirmation in Opposition to Motion	3
Affidavit of Leonard H. Shapiro in Opposition to Motion	4
Affidavit of James Ashe, CPA in Opposition to Motion	5
Memorandum of Law in Opposition to Motion	6
Memorandum of Law in Reply	7

PRELIMINARY STATEMENT

In Motion Sequence #002, under Index No. 610179-2020, defendants, Sun Lakes Development Corp., NAS Realty Co., R.S. Management Co., RS Management Corp. of N. Y., RS Building Corp. of NY, Plaza Management Co. LLC, Norman Schefer, Ronald Schefer and Helene Schefer bring this application for an order granting this Motion; (1) Pursuant to CPLR §3211(1), (3), and (7), dismissing Plaintiff's complaint asserted against Defendants, Sun Lakes Development Corp., NAS Realty Co., RS Management Co., R. S. Management Corp. of N.Y., RS Building Corp. of N.Y., Plaza Management Co. LLC, Norman Schefer and Ronald Schefer in this action and (2) granting such other and further relief that it deems just and proper.

In Motion Seq. No. 003, under Index No. 610132-2020, plaintiff cross-moves for leave to amend the Verified Complaint by correcting paragraph numbers after ¶ 31 and as to the Fifth Cause of Action, in asserting that Sun Lakes breached Section Eight of the Operating Agreement by retaining RS, a partner in which Norman, Richard, and Ronald Schefer, and/or their entities hold an interest (INCLUDING *inter alia*, NAS) under terms that were highly favorable to RS Management and detrimental to Saddle Cove. Plaintiff also seeks to delete ¶ 93, substitute Saddle Rock for Saddle Cove in ¶¶ 94 and 95, and to change the damages from \$2,000,000 to \$500,000.

BACKGROUND

By Order dated March 3, 2021, this action was joined for the purposes of discovery and trial with *The Joseph G. Shapiro Limited Family Trust, et al. v. Saddle Cove Associates, Inc. et al.*, Index No. 610132/2020. (NYSCEF DOC. 43). Plaintiffs commenced this action by filing a Summons and Verified Complaint on September 28, 2020. (Exh. "A" to Motion). Annexed as Exh. "B" and "C" are copies of the April 1, 1994 Partnership Agreement for Saddle Rock Associates, L.P., and the January 1, 2010 Management Agreement between Saddle Rock Associates, L.P. and RS Management Co.

The original partners of Saddle Rock and their partnership interests were as follows:

Sun Lakes Development Corp.	1%
NAS Realty Co.	30%
RDR Goldberg Associates, LP	31%
Joli Marketing Company	19%
Donald Axinn	12%
Robert Levinson	6%
Anita Schefer	1%

Pursuant to the Partnership Agreement, Sun Lakes Is the General Partner of Saddle Rock. Upon the death of Donald Axinn, his share passed to the Estate of Donald Axinn. Joli Marketing assigned its interest to plaintiff in 2004. (Complaint ¶ 24). Plaintiff, the Estate of Donald Axinn, Robert Levinson, and Anita Schefer are collectively referred to as the "Additional Limited Partners." The Complaint alleges that Norman Schefer, and his sons, Ronald and Richard, and their respective entities, Sun Lakes, NAS, RS, R.S. of NY, RS Building, Schefer

Realty, Plaza Management Co., LLC ("Plaza") and other unknown parties engaged in a deliberate scheme to, *inter alia*, (i) waste the assets of Saddle Rock through self-dealing and misappropriation; and (ii) defraud Saddle Rock and the Additional Limited Partners.

The Complaint alleges the Causes of Action are as follows:

CAUSE OF ACTION	CLAIM	DEFENDANTS
FIRST	Breach of Fiduciary Duty	Sun Lakes
SECOND	Breach of Fiduciary Duty	RS
THIRD	Fraudulent Concealment	Sun Lakes and RS
FOURTH	Aiding & Abetting Breach of Fiduciary Duty	Schefers, NAS, RS of NY, RS Buiding, Schefer Realty
FIFTH	Breach of Operating Agreement	Sun Lakes
SIXTH	Unjust Enrichment	Schefer Defendants
SEVENTH	Constructive Trust	Sun Lakes and RS
EIGHTH	Removal of Sun Lake as Manager	Sun Lakes
NINTH	Accounting	Sun Lakes and RS
TENTH	Injunctive Relief	Sun Lakes and RS
ELEVENTH	Dissolution of Saddle Rock	Sun Lakes and RS
TWELFTH	Award of Attorneys' Fees	
THIRTEENTH	Punitive Damages	Sun Lakes, RS and Schefer Defendants

DISCUSSION

Defendants Sun Lake Development Corp. (Sun Lakes), NAS Realty Co., RS Management Co., R.S. Management Corp. Of N.Y., Plaza Management Co., LLC, Norman Schefer, Ronald Schefer, and Helene Schefer move for dismissal of the Complaint in its entirety because plaintiff lacks standing to bring the action. They also claim that plaintiff is not a member of Saddle Cove, and Saddle Rock is merely a minority member of Saddle Cove. As such, Saddle Rock cannot bring a derivative action against Saddle Cove without a controlling interest.

In addition, defendants argue that even if plaintiff could establish standing to sue on

behalf of Saddle Rock, plaintiff would still lack standing to bring a derivative action on behalf of Saddle Cove. Defendants claim that this form of “double derivative” suit is only permissible only when the parent company owns and controls the subsidiary, citing *Ascot Fund Ltd. v. UBS Paine Webber, Inc.*, 28 A.D.3d 313, 314 (1st Dept. 20060).

They also claim that the following Causes of Action must be dismissed: First, and Second (duplicative of the Contract Claims and Statue of Limitations); Third (fraudulent concealment for lack of specificity); Fourth (aiding and abetting breach of fiduciary duty for lack of particularity required by CPLR § 3016[b]); Sixth (unjust enrichment as duplicative of contract claims); Seventh (failure to allege requirements for constructive trust); Ninth (accounting for failure to allege a demand for accounting); Tenth (injunctive relief, in that plaintiff’s only claimed injury is monetary damages); Eleventh (dissolution claim must be brought by a member, and not as a derivative claim on behalf of a member); Twelfth (no allegation of statutory or contract authority to recover legal fees; and Thirteenth (punitive damages are not a separate cause of action.

In paragraphs 20 & 24 of the Complaint, plaintiff pleads that “by the agreement dated June 24, 2004, Joli Marketing Company duly assigned its interest in Saddle Rock to plaintiff.” See also Shapiro Aff., Exhibit 4.

Defendants’ first contention is that plaintiff, as a assignee of a partnership interest, but that an assignment of a partnership interest “does not . . . entitle the assignee to become or to exercise any rights or powers of a partner.” Revised Limited Partnership Law (RLPA) § 121-702 provides in relevant part as follows

(a) Except as provided in the partnership agreement,

[1] A partnership interest is assignable in whole or in part;

(2) An assignment of a partnership interest does not dissolve a limited partnership or entitled the SNE to become or to exercise any rights or powers of a partner;

(3) The only effect of an assignment is to entitle the assignee to receive, to the extent assigned, of the distributions and allocations of profits and losses to which the assignor would be entitled;

...

(b) The partnership agreement may provide that a limited partner’s

interest may be evidenced by a certificate issued by the partnership and may also provide for the assignment or transfer of any of the interest represented by such certificate. A limited partner's interest may be a certificated security or an un-certificated security within the meaning of section 8 – 102 of the Uniform Commercial Code. If the requirements of section 8 – 103 (c) are met, and if the requirements are not met, shall be deemed to be a general intangible.

Plaintiff, relying on cases such as *Kalaijian v. Grahel Associates*, 2021 WL 1396180 (2d Dept. 2021) which adopted the language of *Mahoney-Buntzman v. Buntaman*, 12 N.Y.3d 415, 422 (2009) that “[a] party to litigation may not take a position contrary to a position taken in an income tax return.” In the Affirmation in Opposition Plaintiff points to the November 2019, December 2019, the 2020 year-end general ledgers (Exh. “3” to Affidavit of James Ashe, CPA), and the Schedule K-1s for Saddle Rock Associates, L.P. (Exh. “5”) indicate that Joseph G. Shapiro Family Ltd. Partnership had a 19.000% partnership interest, and received monthly Partner Distribution payments. This, however, does not mean that plaintiff was entitled to anything more than to receive distributions and allocations of profits and losses or to have a 19% interest if there was capital and if capital was to be distributed. Here the capital account of plaintiff showed a negative balance of over four million dollars for the past few years. The positions expressed in the K-1's are not contrary to defendants' arguments advanced in these motion papers, and do not indicate that plaintiff is a Limited Partner. Additionally, the K-1's for the Partnership do not offer any lines for assignees, so the assignees interests and distributions which must be disclosed, have to be disclosed by default on a partner's line. This does not create an admission that the plaintiffs are limited partners. (See *Pappas v 38-40 LLC*, 72 A.D. 3d 409[1st Dept 2019]), and these financial records do not make an assignee a limited partner. Also, there is no support at all to show that the plaintiff has accepted the reciprocal obligations required by the aforesaid documentary evidence, i.e. The Partnership Agreement, in order to be more than an assignee.

The Partnership Agreement, which defendants advance as documentary evidence to support their position, provides in part as follows:

Any purchaser, assignee or transferee (hereafter "assignee") of any

interest or other interest in the Partnership of a Limited Partner may become a substituted Limited Partner only with the prior written consent of the majority in interest of the Partners, in their discretion, reasonably exercised, and then only in accordance with the other terms and conditions set forth in this Article ELEVENTH. (Exh "B" to Affirmation in Support).

The Partnership Agreement does not identify the plaintiff as a partner or as a limited partner. It shows Joli Marketing Company to be the limited partner with a 19% interest.

Plaintiff does not produce any evidence that a majority in interest of the partners consented in writing to accept The Joseph G. Shapiro Limited Family Trust as a substituted limited partner in place of Joli, the assignor. The Court agrees that plaintiff is the holder of a 19% interest in Saddle Rock, but, as an assignee from Joli Marketing Company, its rights are limited by RLPA 121-702(a)(3) "to receive, to the extent assigned, of the distributions and allocations of profits and losses to which the assignor would be entitled." This is not changed by the K-1's or the general ledger list of distributions.

Thus, in *Kalajjian v. Grahel Associates*, 2021 WL 1396180 (2d Dept. 2021), the issue was plaintiff's entitlement to his monthly distribution of profits as the holder of a 49% ownership interest in defendant. Based upon Schedule K-1 tax documents and tax returns for Grahel, the trial court granted plaintiff summary judgment for a declaration that he was a 49% owner, and remitted the matter to Supreme Court for entry of a declaratory judgment. There was no issue as to the rights of an assignee, as there was no claim that plaintiff was an assignee, and, even if he were, he was entitled to share in the distribution of profits.

In summary, the complaint and the documentary evidence, i.e. The Partnership Agreement, establish that plaintiff is an assignee and not a limited partner and does not have standing to pursue this action.

Based on the claimed allegations, defendants' motion to dismiss the Complaint in its entirety for lack of standing of plaintiff is granted. In view of this result, the Court need not address defendants' other grounds for dismissal of individual causes of action.

Plaintiff's cross-motion for leave to serve and file an Amended Verified Complaint is denied based on the claimed allegations, since under the proposed Amended Verified Complaint,

plaintiff would also not have standing to sue for the relief requested.


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

The conference scheduled for May 27, 2021 is cancelled.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
May 25, 2021

ENTER:



JEROME C. MURPHY
J.S.C.

ENTERED

May 28 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE