

Poole v West 111th St. Rehab Assoc.
2013 NY Slip Op 30827(U)
April 19, 2013
Supreme Court, New York County
Docket Number: 101096/2009
Judge: Saliann Scarpulla
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SALIANN SCARPULLA
Justice

PART 19

Index Number : 101096/2009
POOLE, JONATHAN
VS.
WEST 111TH STREET REHAB
SEQUENCE NUMBER : 007
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

motion and cross-motion are decided in accordance
with accompanying memorandum decision.

FILED

APR 24 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/19/13

[Signature]
HON. SALIANN SCARPULLA J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
JONATHAN POOLE,

Plaintiff,

Index No.: 101096/2009

Submission Date: 12/19/12

-against-

WEST 111TH STREET REHAB ASSOCIATES,
MARILYN C. REZNICK, PAMELA L. REZNICK,
NANCY ROBINSON, SUSAN SELTZER, LAYNE
C. REZNICK, JAMES ROBINSON, LAWRENCE
PESCE, RICHARD PESCE, CHRISTOPHER PESCE,
CHRISTINE LATOUR, RICHARD PESCE,
CHRISTOPHER PESCE and LAWRENCE PESCE,
as Co-Executors of the ESTATE OF LAWRENCE
PESCE, MARILYN C. REZNICK, as Executrix of the
ESTATE OF JEROME REZNICK and
THE SEYMOUR ROBINSON TRUST,

DECISION AND ORDER

FILED

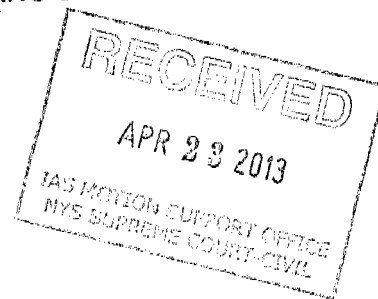
APR 24 2013

Defendants.

-----X
For Plaintiff:
Claude Castro & Associates PLLC
444 Madison Avenue, Suite 500
New York, NY 10022

For Defendants:
Sullivan Gardner PC
7 east 20th Street
New York, NY 10003

NEW YORK
COUNTY CLERK'S OFFICE



Papers considered in review of this motion for summary judgment:

Notice of Motion	1
Aff in Support	2
Mem of Law	3
Affs in Opp	4
Mem of Law	5
Reply Aff	6

HON. SALIANN SCARPULLA, J.:

In this action to dissolve a partnership, plaintiff Jonathan Poole ("Poole") moves
for summary judgment against defendants West 11th Street Rehab Associates, Marilyn C.

Reznick, Pamela C. Reznick, Nancy Robinson, Susan Seltzer, Layne C. Reznick, James Robinson, Lawrence Pesce, Richard Pesce, Christopher Pesce, Christine LaTour, Richard Pesce, Christopher Pesce, and Lawrence Pesce, as Co-executors of the Estate of Lawrence Pesce, Marilyn C. Reznick, as Executrix of the Estate of Jerome Reznick, and the Seymour Robinson Trust (collectively “defendants”), on the first, second, third, sixth, seventh, eight and ninth causes of action of Poole’s supplemental amended verified complaint (“complaint”).

Poole is a limited partner of West 111th Street Rehab Associates (“West 111th” or the “partnership”). The partnership is in the business of managing residential properties location on West 111th Street in Manhattan.

The complaint also alleges that the partnership was formed on or about June 16, 1989 pursuant to the terms of a Certificate of Limited Partnership (the “certificate”), and consisted of four (4) general partners and eight (8) limited partners. The general partners were Seymour B. Robinson, Jerome S. Reznick, Lawrence Pesce and Poole. The limited partners were Seymour B. Robinson, Jerome S. Reznick, Lawrence Pesce, defendant James Robinson (“Robinson”), defendant Pamela Reznick, defendant Susan Seltzer (“Seltzer”), defendant Layne Lederer (now Layne Reznick) and Poole. The partners entered into a Limited Partnership Agreement as of June 1989 (the “partnership agreement”).

Seymour Robinson, a general and limited partner, passed away in 1996, and Lawrence Pesce, a general and limited partner, died in 1997. As the result of a prior litigation and pursuant to a Stipulation, Poole resigned as general partner in or about 2003. On November 24, 2008, Jerome S. Reznick, the last remaining original general partner, died. Poole alleges that defendants Marilyn C. Reznick, Nancy Robinson, Lawrence Pesce, Richard Pesce, Christopher Pesce, Christine LaTour all “purport” to be limited partners of the partnership.

Poole alleges in his complaint that since the death of Jerome Reznick, the last remaining general partner, the partnership has not had an authorized general partner to continue the business of the partnership. Poole alleges that the certificate does not contain a provision authorizing the continuation for the business of the partnership upon the death of a general partnership.

Poole’s counsel sent a letter, dated December 23, 2008, to the remaining limited partners, notifying them that Poole, as a limited partner, did not consent to the continuation of the partnership subsequent to the death of the last general partner. Poole maintains that on November 24, 2008, the partnership dissolved. By letter dated January 7, 2009, several limited partners responded to Poole, stating that the partnership agreement provided for a 90-day period to elect to continue the business and that liquidation was improper and premature.

Layne Reznick and James Robinson sent a letter dated January 20, 2009 to Poole and all of the individual defendants to schedule a meeting of all limited partners, for the purpose of holding an election to continue the business of the partnership, and to appoint a corporation as successor general partner.

In the complaint, Poole argues that there is nothing in the New York Partnership Law, certificate or partnership agreement which allows the election of a successor general partner by the limited partners without consent of all parties. Poole further alleges that “the business of the partnership cannot continue without the written consent of all partners, and the Plaintiff has already advised all partners of the partnership that he does not consent to the continuation of the partnership’s business following the death of the partnership’s sole remaining general partner.”

On or about January 27, 2009, Poole commenced this action, seeking a temporary restraining order to stay the election of a successor general partner. In an order from the bench on February 4, 2009, this Court (Lehner, J.) denied the request and allowed the vote to take place, “with the right of the plaintiff here to reopen the issue and seek liquidation if there isn’t a valid vote or for any other reason”

As a result, on February 17, 2009, a meeting of the limited partners was held at the offices of defendants’ counsel. Poole and his counsel attended the meeting. As reflected in the meeting minutes, Poole made a motion that the meeting be transcribed by a court reporter, and that all present at the meeting identify themselves so that it could be

determined whether a quorum was present. The motion to make a record of the meeting was denied. However, all parties present were identified in the meeting minutes.

Then, a vote was taken on two resolutions: (1) that the business of the partnership be continued and that the partnership be reconstituted; and (2) that West 111 Rehab Corp. ("Rehab Corp.") be named as the general partner of the partnership.

The minutes reflect that in addition to Poole and counsel, the following people attended the meeting: James Robinson, Layne Reznick, Christine Latore and Marilyn Reznick. Poole maintains that Christine Latour and Marilyn Reznick are not limited partners. At the meeting, Layne Reznick stated that she was holding a proxy for limited partners Pamela Reznick and Susan Seltzer, who were not present. James Robinson also held a proxy for Richard Pesce and Nancy Robinson, whom Poole maintains are not limited partners authorized to vote.

At the meeting, Poole objected to the use of proxies, and objected to the meeting because there was not a quorum present. Poole also noted that Christine Latore, Marilyn Reznick, Rich Pesce and Nancy Robinson were not limited partners and thus had no right to vote for the resolutions. Poole and his counsel also objected to the designation of Rehab Corp. as successor general partner, arguing that paragraph 10.1(b) of the partnership agreement provides that any successor general partner could only be an outside person or entity.

The meeting minutes reflect that all those present, except Poole, voted in favor of the resolution appointing Rehab Corp. as successor general partner. Over Poole's objection, a vote was taken, and all persons present at the meeting, except Poole, voted in favor of continuing the business of the partnership.

Section 10.1(b) of the partnership agreement provides in pertinent part

the death of one of the General Partners ("Terminating Event") shall cause the dissolution of the partnership. In the even of such dissolution, the Limited Partners within ninety (90) days of such Terminating Event may elect to continue the business of the Partnership ("Terminating General Partner").

If the Terminating Event is by reason of the occurrence of any Terminating Event with respect to a General Partner and within ninety (90) days of such Terminating Event, the Limited Partners appoint an outside person or entity as Successor, the interest of the Limited Partners . . . shall be diluted to the extent of the interest of the General Partners acquired by the Successor in the proportion that each such Partner's . . . Partnership Percentage bears to the aggregate of all such Partner's Percentages.

Section 10.2 of the partnership agreement states that

- (a) No Limited Partner shall be permitted to sell, assign, pledge, encumber, hypothecate, or otherwise transfer all or any part of its interest as a Limited Partner without the prior written consent of the General Partners, which consent shall be in its sole and absolute discretion. However, any assignment or transfer of any Limited Partners['] interest to a member of his immediate family shall be permitted. "Immediate Family" shall include any of the following: spouse, brother, sister, children, grandchildren, mother, father.

Regarding dissolution, section 11.1 of the partnership agreement states that the partnership will be dissolved upon the substitution of any limited partners, as specified in

section 10.3 (a) and (b). Section 11.1 also states that the death “of any or all of the Limited Partners shall not cause the dissolution of the partnership.”

Paragraph 10 of the certificate states that “[a] Limited Partner’s interest is not assignable without the consent of the General Partners, *except upon his death*. However, any Limited Partner may, without the consent of the General Partners, assign or transfer his Limited Partnership interest to any member of his immediate family.” (Emphasis added.)

In the first cause of action Poole maintains that there is a justiciable controversy between Poole and the defendants regarding the dissolution of the partnership upon the death of Jerome Reznick, and he seeks a declaration of Poole’s rights and obligations. In the second cause of action he seeks a declaration as to whether or not the February 17, 2009 meeting was proper, whether the votes taken at that meeting were proper, and whether Rehab Corp. was properly designated as the successor general partner of the partnership. The third cause of action is for an injunction directing the partnership to conduct an accounting as of the date of death of each deceased limited partner and directing the partnership to pay the estate of each limited partner his share of the profits in accordance with the terms of paragraph 12(b) of the certificate.¹

¹ Paragraph 12(b) of the certificate provides

That the right is also given to the remaining Partners to continue the business on the death or retirement for any reason, of any of the Limited Partners, on the understanding that the profits accruing up to the date of

The sixth cause of action seeks an accounting of the partnership's "business and affairs." The seventh cause of action notes that the defendants "have refused to schedule a meeting for the purpose of appointing a Liquidating Trustee to carry on the affairs of the partnership during the dissolution process," and that Poole "is entitled to the appointment of a receiver of all the property rights and assets of the Partnership during the pendency of this action."

The eighth cause of action seeks, in light of the death of Jerome Reznick and Lawrence Pesce "and since the Certificate has never been amended to reflect changes to the Partnership make-up . . . a declaratory judgment determining who the remaining partners of the partnership are, and their respective rights and obligations." Lastly, the ninth cause of action seeks an injunction directing the partnership to file an amended certificate.

In a written order dated June 2, 2009, this Court (Lehner, J.) held that Poole's motion to set aside the vote taken on February 17, 2009, invalidate the appointment of Rehab Corp. as a successor general partner, appoint a receiver and direct the partnership to buy out the interests of the deceased partners was denied in all respects.²

death or retirement of any Limited Partner shall be computed, the Estate of the deceased Limited Partner or the retiring partner, as the case may be, paid his share, and the Partnership continued as though the Limited Partner had never been a member of the Partnership.

² Defendants submit a copy of the amended certificate, dated March 10, 2010, which reflects that Rehab Corp. is the general partner.

Poole now moves for summary judgment on his complaint.³ He asserts that there are no questions of fact. Poole also argues that there are missing documents, and documents which defendants failed to produce during discovery, relating to the amendment of the certificate and proxy statements, and that defendants are now precluded from producing and relying on these documents.

The defendants oppose the motion. Defendants argue that the motion is premature as discovery is not yet complete, and as of the date of the motion, no party depositions had been held. Defendants assert that Poole refused to appear for his deposition, and has refused to participate in discovery and disclose evidence he may have regarding the parties' intent and understanding concerning the partnership agreement and certificate.

Defendants also argue that plaintiff is seeking to recover the capital accounts of his deceased partners, but that there are many questions of fact to be resolved. Defendants also challenge Poole's assertion that there are missing documents. Defendants maintain that the certificate has been amended, letters testamentary issued, and proxies given, and that all of these documents were provided to Poole in discovery on December 14, 2011.

Defendants also assert that the partnership documents provide for the continuation, not dissolution, of the partnership, that unanimous voting is not required, a quorum is not required, the election of two general partners is not required, and there exist factual questions which prevent granting summary judgment.

³ The fourth and fifth causes of action have been resolved by the parties.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

“It is well settled that when the terms of an agreement are clear and unambiguous, the court will not look beyond the four corners of the agreement and will enforce the writing according to its terms.” *Continental Ins. Co. v. 115-123 West 29th St. Owners Corp.*, 275 A.D.2d 604, 605 (1st Dep’t 2000). Terms of a contract should be interpreted in accordance with their plain meaning, and courts will interpret an agreement to give meaning to each provision. *Petracca v. Petracca*, 302 A.D.2d 576 (2d Dep’t 2003). “The question of whether a writing is ambiguous is one of law to be resolved by the courts.” *In re Wallace*, 86 N.Y.2d 543, 548 (1995).

“These principles are applicable to partnership agreements. It is well settled that partners may fix their partnership rights and duties by agreement.” *Bailey v. Fish & Neave*, 8 N.Y.3d 523, 528 (2007) (citation omitted). Here, moreover, the partnership agreement and certificate “were executed at substantially the same time by the same parties, concern the same subject matter, and refer to each other. Consequently, they were

contemporaneous writings, forming part of the same transaction and their provisions must be read and interpreted together and harmonized.” *Polner v. Monchik Realty Co.*, 9 Misc.3d 755, 760-761 (Sup. Ct. Kings Co. 2005)

In the first cause of action, Poole alleges that the death of the final remaining general partner, Jerome Reznick, automatically triggered the dissolution of the partnership. Judge Lehner addressed this claim, and ordered that any dissolution was not automatic, and that a vote of the partnership was required, pursuant the partnership agreement, to determine whether the partnership would continue.

Poole now argues that the meeting on February 17, 2009, was not authorized because (1) there was not a quorum present; (2) the votes were not unanimous; and (3) proxies were used. As a result, he maintains, the votes were not valid, the partnership should be dissolved, and he is entitled to summary judgment on the first and second causes of action.

Poole relies on paragraph 10.1(b) of the partnership agreement, stating that it requires the consent of all partners. However, looking at the plain meaning of the provision, section 10.1(b) states that upon the death of one of the general partners, the limited partners “may elect to continue the business of the partnership.” The provision, unlike others in the partnership agreement, does not call for “consent” of the partners.⁴

⁴ For example. Section 10.2(a) provides that no limited partner shall be permitted to “sell, assign, pledge, encumber, hypothecate, or otherwise transfer all or any part of its interest as a Limited Partner without the prior written *consent* of the General Partners . . .

There is nothing else in the partnership agreement or certificate to suggest that the vote to continue the business of the partnership must be unanimous. *See Bailey*, 8 N.Y.3d at 529 (“where the firm intended for more than a majority vote to govern regarding a particular question related to the partnership, it so specified in the Agreement”).

Poole also looks to section 109 of the Partnership Law, which provides:

§ 109. Effect of retirement, death or insanity of a general partner

The retirement, death or insanity of a general partner dissolves the partnership, unless the business is continued by the remaining general partners

- (a) Under a right so to do stated in the certificate, or,
- (b) With the consent of all members.

It is well settled that “the law of partnerships contemplates a written agreement among partners specifying the terms of their relationship. The Partnership Law’s provisions are, for the most part, default requirements that come into play in the absence of an agreement.” *Ederer v. Gursky*, 9 N.Y.3d 514, 526 (2007). Where, as here, there are contrary provision in the partnership agreement, “[p]rovisions of the [partnership law] cannot be implied as part of the partnership agreement so as to make a different contract from that which the parties intended nor override the agreement which the parties, in fact, made.” *Lanier v. Bowdoin*, 282 N.Y. 32, 40 (1939).⁵ The terms of the partnership

.” (Emphasis added).

⁵ Moreover, although the partnership partnership agreement provides that the partnership will terminate upon the death of a general partner and for the prompt dissolution and settlement of the partnership, where those provisions were abandoned by

agreement which do not necessitate unanimous consent of the partners governs the election to continue the partnership upon the death of a general partner. The contrary provision in the Partnership Law will not override the partnership agreement, and the Court will not read in a provision which is not present in the partnership agreement. Accordingly, plaintiff fails to make a *prima facie* case of entitlement to judgment on his first cause of action based upon the lack of unanimous voting at the February 17, 2009 meeting.

As to the second cause of action, Poole argues that the votes taken at the February 17, 2009 meeting were invalid because people who were not limited partners were allowed to vote, proxies were allowed to be voted upon, and Rehab Corp., an “outside entity” was allowed to be elected as successor general partner.

Poole has failed to establish that people who were not limited partners were allowed to vote on the resolutions. Poole alleges that Christine Latour, Marilyn Reznick, Pamela Reznick and James Robinson, were allowed to vote even though they were “total Strangers to the Partnership.” Poole maintains that defendants failed to produce any documentation to support a claim that these people were properly at the meeting.

the surviving partners following an earlier general partner’s death and the surviving partners did not dissolve the partnership but continued it while deeming the deceased partner’s estate to have succeeded to a limited partner’s interest, under principles of waiver and estoppel, the surviving partners are barred from attempting to invoke the dissolution provisions of the partnership agreement in a belated effort to force a dissolution of the partnership. *Birnbaum v. Birnbaum*, 157 A.D.2d 177, 186-187 (4th Dep’t 1990).

However, defendant submits letters testamentary which they maintain were produced to Poole on December 14, 2011, indicating that these people, all immediate family of original partners, had succeeded the deceased partners interest upon their death. As discussed below, there are questions of fact regarding the current status of the limited partners in this partnership

Poole also fails to establish that proxy voting was not permitted under the partnership documents. Poole relies on *Holler v. Goldberg*, 163 Misc. 2d 1075 (Sup. Ct. N.Y. Co. 1995) for the proposition that proxy voting is not permitted unless authorized by the entity's governing documents or by statute. *Holler*, however, applied the Religious Corporations Law and Not-For-Profit Corporation Law, in finding that "unless provided in the certificate of incorporation or bylaws, proxy voting by members of a religious corporation is not authorized." Poole does not argue, nor does he have any support, for a claim that these laws apply in the partnership context.

The pertinent provision of the Partnership Law, § 121-302, provides that

A partnership agreement which grants a right to vote may set forth provisions relating to notice of the time, place or purpose of any meeting at which any matter is to be voted on by any limited partners . . . quorum requirements, voting in person or by proxy, or any other matter with respect to the exercise of any such right to vote.

Here, the partnership agreement is silent as to proxy voting and quorum requirements. Yet Poole maintains that pursuant to Partnership Law §121-302, when the agreements are silent as to these provisions, that proxy voting and is prohibited, and that a

quorum is required. Poole is asking the court to read into the partnership documents provisions which are not within the four corners of the documents. At best, these present ambiguities in the governing documents. As such, the court would consider extrinsic evidence to determine the intent of the parties to the agreements. *See Maysek & Moran, Inc. v. S.G. Warburg & Co., Inc.*, 284 A.D.2d 203, 204 (1st Dept 2001). However, as party depositions have yet to take place, there is nothing in the record to make a determination as to the drafters' intentions regarding proxy voting and quorum requirement. These open issues prevent granting summary judgment.

Poole also argues that the election of Rehab Corp. as the successor general partner is invalid because the partnership agreement requires there be at least two (2) general partners, and that it has no authority to act as there is nothing in the record to suggest that Rehab Corp. ever held any equity interest in the partnership, that it contributed capital to the partnership or that any valid transfer of partnership interest was made in accordance with Article 10 of the partnership agreement. Poole also argues that Rehab Corp. is not an outsider as required by section 101.(b) of the partnership agreement.

There are questions of fact as to how many general partners are required pursuant to the partnership documents. Both the partnership agreement and certificate are silent as to any specific requirements as to how many partners are needed. Further, from Poole's resignation as general partner in 2003 until Jerome Reznick's death in 2008, Mr. Reznick was the sole general partner, and no objections were voiced by Poole or any other partner,

and the partnership managed to continue to conduct its business. In fact, in court before justice Lehner on February 4, 2009, Poole's counsel indicated that when Poole resigned, he did so "because we also knew Jerome Reznick was *the remaining general partner*. . . ." (Emphasis added).

Poole notes, however, that section 9.5(a) provides that, regarding bank accounts, "All withdrawal therefrom or checks to be drawn shall be made upon the signatures of any two general partners." Poole does not address how withdrawals and checks have been handled since his resignation in 2003 which left Mr. Reznick as the sole general partner.

Poole also points to paragraph 12(a) of the certificate, which provides that "In the event of the withdrawal or unwillingness of either General Partner to continue in the partnerships, the remaining general partner may, by agreement, within three months after notice of such even, elect to continue the partnership." This provision does nothing to support Poole's claim that two general partners are required. In fact, it supports an interpretation that the partnership may continue with only one general partner, as it spells out a procedure for the continuation of the partnership with one remaining general partner. Whether this procedure was followed is an open question. Regardless, Poole has failed to establish that two general partners are required.

As to whether Rehab Corp. Was required to or did in fact make any capital contributions, Poole makes only conclusory assertions in his affidavit that it did not. As

discovery is still ongoing, summary judgment on this point at this time would be premature. *See Wilson v. Yemen Realty Corp.*, 74 A.D.3d 544, 545 (1st Dep't 2010).

Similarly, Poole points to nothing in the partnership agreement or certificate which would require capital contribution of an incoming successor general partner, as neither document contains such a provision. Moreover, capital contributions are but one indication of partnership. *See e.g., Blaustein v. Lazar Borck & Mensch*, 161 A.D.2d 507, 508 (1st Dep't 1990) ("Whether partnership status is enjoyed turns on various factors including sharing in profits and losses, exercising joint control over the business and making investments and possessing an ownership interest in the partnership).

The argument that only an outsider may be appointed as successor general partner is also without merit. Section 101.(b) merely outlines what would occur if the limited partners appoint an outside person or entity as successor. The plain reading to the section makes clear that it is not a requirement. Accordingly, Poole has failed to meet his burden, and summary judgment is denied as to the second cause of action.

As to the third cause of action, Poole argues that pursuant to paragraph 12(b) of the certificate, the deceased limited partners "must be bought out." Paragraph 12(b) of the certificate provides

That the right is also given to the remaining Partners to continue the business on the death or retirement for any reason, of any of the Limited Partners, on the understanding that the profits accruing up to the date of death or retirement of any Limited Partner shall be computed, the Estate of the deceased Limited Partner or the retiring partner, as the case may be,

paid his share, and the Partnership continued as though the Limited Partner had never been a member of the Partnership.

In opposition, defendants refer to section 12(b) as "rather unfortunate language" and note that it does not appear in the partnership agreement. Defendants also claim that this paragraph was inartfully drafted, and assert that the partners meant to insert "interest" when they used the word "profit" in the certificate. Defendants argue that only further discovery will reveal the true intent of the parties when they drafted this provision, but maintain that it is not, as Poole asserts, that the deceased limited partners should lose their capital contributions upon their deaths.

I find that there remain ambiguities in the partnership governing documents and questions of fact, as to the proper procedure to follow upon the death of a limited partner. In addition to the provision noted above, paragraph 10 of the certificate provides in part that "[a] Limited Partner's interest is not assignable without the consent of the General Partners, *except upon his death.*" (Emphasis added.) Therefore, the certificate provides both that a limited partner's interest is assignable, without consent of the general partners, upon the limited partner's death, but also that upon the death of a limited partner, the partner shall be "bought out" and the partnership continued as though the limited partner had never been a member of the partnership.

There is also an open question as to the procedure the partnership actually followed upon the death of the limited partners to this point. Defendants submitted copies of the letters testamentary, which indicate that certain immediate family members

had been appointed as representatives of the deceased limited partners' estates. But there is nothing to suggest what, if anything, else was done to substitute the new limited partners in place of the deceased partners. No one claims that the "buy outs" discussed in section 12(b) of the certificate were conducted. While Poole maintains he requested them, he does not indicate if the requests were contemporaneous with the deaths, or at some later time. If section 12(b) was not followed all along, the partnership may have waived its rights section under 12(b) and be estopped from attempting to institute it now. As such, summary judgment on this cause of action is denied.⁶

As to the sixth cause of action, Poole seeks an accounting of the partnership's "business and affairs." In support, Poole states that the defendants "have taken charge of the Partnership's assets without authority" and have "usurped full control over the Partnership's books and records" since Jerome Reznick's death. However, the First Department has held that "[w]e are not aware of any decision which has refused to grant a limited partner an accounting, whether the accounting was sought by a retiring limited partner, or by one who, alleging improprieties, is interested only in protecting the value of his interest in the partnership. Under the statute the only criterion for a formal accounting is that 'circumstances render it just and reasonable.' Partnership Law, § 99 (1)(b). Thus, .

⁶ There is also six year statute of limitations for bringing an cause of action for an accounting. *Vays v 139 Emerson Place*, 94 A.D.3d 480, 481 (1st Dep't 2012). As Mr. Robinson passed away in 1996 and Mr. Pesce in 1997, this claim as to these deceased limited partners may be time barred.

... we do not believe that a limited partner can be deprived of his statutory right to a formal account of partnership affairs.” *In re Estate of Brandt*, 81 A.D.2d 268, 282 (1st Dep’t 1981). Defendants make no argument in opposition to summary judgment on this cause of action, and I find no questions of fact to preclude summary judgment. Accordingly, summary judgement is granted as to the sixth cause of action for an accounting.

The seventh cause of action seeks appointment of a receiver during the winding up of the partnership. As I found that Poole has not met his burden and is not entitled to a declaration that the partnership is to be liquidated, summary judgment as to this cause of action is denied at this time.

The eighth cause of action seeks a declaratory judgment determining who the remaining partners of the partnership are, and their respective rights and obligations. The ninth cause of action seeks an injunction directing the partnership to file an amended certificate to reflect “the true and accurate partnership makeup of the Partnership.”

In response, the defendants annex copies of the letters testamentary as evidence of which family members succeeded certain limited partners, as well as a copy of the amended and filed certificate, indicating that Rehab Corp. is the successor general partners. However, it does not reflect any changes to the limited partners from the time of the original certificate.

Based on the record on this motion, there are questions of fact as to the current limited partners. As discussed above, it is unclear of the procedures set forth in the partnership governing documents for substituting limited partners were followed. As such, it can not be determined at this time who the partners are, and their respective rights and obligations. Accordingly, summary judgment as to the eighth cause of action is denied.

In addition, Section 10.4 of the partnership agreement provides in pertinent part that, “[u]pon the change of a General Partner or admission of a substituted Limited Partner, the then remaining general partners or their Successors, as the case may be, shall prepare and file an amendment to the Certificate of Limited Partnership” As discussed above, there are questions of fact regarding the election of a successor general partner. Because the partnership agreement mandates that the successor general partner is the entity responsible for filing an amended certificate, the issues surrounding the successor general partner must be resolved at trial before the certificate can be amended and filed. As such, summary judgment as to the ninth cause of action is denied.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff Joseph Poole’s motion for summary judgment against defendants West 11th Street Rehab Associates, Marilyn C. Reznick, Pamela C. Reznick, Nancy Robinson, Susan Seltzer, Layne C. Reznick, James Robinson, Lawrence Pesce, Richard Pesce, Christopher Pesce, Christine LaTour, Richard Pesce, Christopher Pesce,

and Lawrence Pesce, as Co-executors of the Estate of Lawrence Pesce, Marilyn C. Reznick, as Executrix of the Estate of Jerome Reznick, and the Seymour Robinson Trust is granted as to the sixth cause of action only, and in all other respects is denied; and it is further

ORDERED that the parties shall appear for a status conference in Part 19 on June 12, 2013 at 2:15 p.m. at 60 Centre Street, Room 335.

This constitutes the decision and order of the Court.

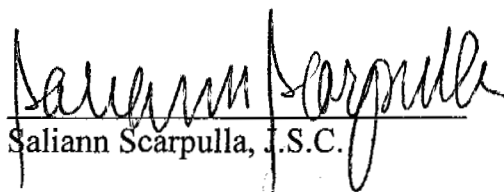
Dated: New York, NY
April 19, 2013

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Saliann Scarpulla, J.S.C.