

<b>Picarella v HMA Props., L.L.C.</b>
2013 NY Slip Op 31354(U)
June 17, 2013
Supreme Court, Suffolk County
Docket Number: 6376-12
Judge: Elizabeth H. Emerson
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**SUPREME COURT - STATE OF NEW YORK**  
**COMMERCIAL DIVISION**  
**TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 12-11-12

SUBMITTED: 1-24-13

MOTION NO.: 003-MG/CASEDISP

\_\_\_\_\_x  
MICHAEL PICARELLA,

Plaintiff,

-against-

**SOLFERINO & SOLFERINO, L.L.P.**  
**Attorneys for Plaintiff**  
**15 Roslyn Road**  
**Mineola, New York 11501**

**HMA PROPERTIES, L.L.C., a Florida Limited Liability Company; ESPERAZNA GAVILLA; HECTOR P. GAVILLA; ALEXANDER GAVILLA,**

**HAGNEY, QUATELA, HARGRAVES, MARI PLLC**  
**Attorneys for Defendants**  
**888 Veterans Memorial Highway, Suite 530**  
**Hauppauge, New York 11788**

Defendants.

\_\_\_\_\_x

Upon the following papers numbered 1-17 read on this motion to dismiss; Notice of Motion and supporting papers 1-17; Notice of Cross Motion and supporting papers\_\_\_\_; Answering Affidavits and supporting papers 18-23; Replying Affidavits and supporting papers 24-29; it is,

**ORDERED** that the motion (003) by the defendants for an order dismissing the complaint is granted; and it is further

**ORDERED** that the counsel for the defendants shall serve a copy of this Order with Notice of Entry upon counsel for the plaintiff pursuant to CPLR 2103(b)(2) or (3) within twenty (20) days of the date hereof and thereafter file the affidavit of service with the Clerk of the Court.

In this action, the plaintiff seeks damages for the alleged improper sale of real property located at 430 NE 29<sup>th</sup> Terrace, Miami, Florida ("the premises"), by the majority members of HMA Properties, LLC ("the company"). The record reveals that the premises are comprised of two adjacent tax lots, one of which is improved by an 8-unit apartment building, and an undeveloped lot. The gravamen of the complaint is that the defendants sold the subject premises, the only asset of the company, for less than its true value, thereby causing damage to himself and the company.

The record reveals that the company was formed in Florida in 2003. The company borrowed the sum of \$500,000 from BNC Florida Bank to purchase the subject premises in 2004. To evidence the loan, on January 6, 2004, the company executed and delivered to BNC Florida Bank a note, mortgage and security agreement securing repayment of the indebtedness under the note. The note was guaranteed by the plaintiff, the defendant Hector Gavilla, and the defendant Esperanza Gavilla. A foreclosure action on the note, mortgage, security agreement, and personal guaranties was commenced by 1<sup>st</sup> United Bank, the successor in interest to BNC Florida Bank, on or about October 21, 2011<sup>1</sup>. To avoid foreclosure, the members other than the plaintiff voted to sell the premises for the sum of \$540,000.00. A closing was scheduled for February 23, 2012, to which the plaintiff objected. This action was commenced on February 22, 2012 by way of an order to show cause (Molia, J.), which granted the plaintiff a temporary restraining order to stop the sale of the premises. The temporary restraining order was subsequently rescinded by stipulation of the parties and a closing took place on April 3, 2012. The sale of the premises allegedly resulted in a net profit of \$7,495.22 to the company.

The complaint in the instant matter alleges two causes of action: 1) that the defendants Esperanza Gavilla, Hector P. Gavilla, and Alexander Gavilla (“the Gavilla defendants”) breached their fiduciary duties to the plaintiff by accepting an offer to purchase the premises at an amount lower than its value; and 2) that the defendants violated applicable law and the company’s operating agreement by failing to acknowledge the plaintiff’s intention to withdraw from the company and provide a distribution to the plaintiff.

The Gavilla defendants now move by way of a pre-answer motion to dismiss the complaint on the grounds that documentary evidence provides a defense to the action, that the plaintiff lacks standing, that there is another action pending between the same parties for the same cause of action in a court in Florida<sup>2</sup>, that the complaint fails to state a cause of action, and on the ground of forum nonconveniens. In support of the motion, the defendants submit, *inter alia*, the complaint, copies of the pleadings in the Florida foreclosure action and dissolution proceeding, copies of three appraisal reports, a copy of the Operating Agreement for Management of HMA

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<sup>1</sup>The foreclosure action was captioned *1<sup>st</sup> United Bank v HMA Properties, LLC, Hector M. Gavilla, Esperanza Gavilla, Michael Picarella, and any unknown tenants in possession*, case number 11-34730CA31. 1<sup>st</sup> United Bank is the successor in interest to BAC Florida Bank f/k/a Hemisphere National Bank f/k/a Pinebank National Association by asset acquisition from the Federal Deposit Insurance Corporation as Receiver for Republic Federal Bank, N.A. The complaint in that action alleged that the company defaulted under the note and mortgage and owed the principal amount of \$442,599.26. In addition, the complaint alleged that Hector Gavilla, Esperanza Gavilla and Michael Picarella defaulted under the guaranties by failing to pay the indebtedness of the company, as agreed, and owed the above-stated principal amount.

<sup>2</sup> The Florida dissolution proceeding is captioned *HMA Properties LLC, Esperanza Gavilla, Hector Gavilla and Alexander Gavilla v Michael Picarella*, case number 12-44019CA-20, was commenced on November 8, 2012, and seeks a judicial dissolution, an accounting, and damages for unjust enrichment, breach of duty of care and loyalty, and conversion.

Properties, LLC, and a copy of the Articles of Organization. The Operating Agreement reveals that the company's principal office is located at 3990 Alhambra Circle, Coral Gables, Florida, and its mailing address is 38 Stonehurst Lane, Dix Hills, New York. The members of the company are as follows: the defendant Esperanza Gavilla (35% owner), the plaintiff (35% owner), the defendant Hector P. Gavilla (15% owner), and the defendant Alexander Gavilla (15% owner). As the entity is a Florida limited liability company, the Operating Agreement is drafted in accordance with Florida Law and incorporates by reference specific sections of Florida Statute § 608 throughout the agreement, which require, *inter alia*, the commencement of an action in Florida should the members seek to: dissolve the company (Fla. Stat. § 608.4491), withdraw from the company (Fla. Stat. § 608.43585), or assert derivative claims (Fla. Stat. § 608.601). Pursuant to the Articles of Organization the stated purpose of the company is "to by (*sic*), sell, rent, lease, and develop real estate and may include the transaction of any and all lawful business for which limited liability companies may be organized in the State of Florida."

In support of the motion, the Gavilla defendants contend that the first cause of action alleging breach of fiduciary duty must be dismissed inasmuch as the allegations appear to be derivative in nature, and that the majority members' decision to sell the property at a private sale prior to the foreclosure sale is protected by the business judgment rule. Moreover, they state that a review of their appraisals will reveal that the sale price of the premises was reasonable. The defendants contend that the second cause of action must also be dismissed on the ground that the plaintiff failed to follow the notice and demand conditions precedent in the Operating Agreement, the terms of which are governed by Florida Statute § 608.428. In addition, the Gavilla defendants contend that the statute provides that the Florida courts in Miami-Dade County have exclusive jurisdiction over such a claim.

In opposition, the plaintiff submits, *inter alia*, a supplemental summons and amended complaint, and the plaintiff's appraisal of the subject premises. The plaintiff claims that he has individual tort claims against the defendants which are not subject to the business judgment rule and can be litigated in New York. The amended complaint contains seven causes of action: 1) that the defendants breached their fiduciary duties to the plaintiff and the company by depriving the plaintiff and the company of assets and opportunities; 2) that the defendants converted the plaintiff's interest in the company for their own uses and injured the plaintiff in the amount of \$200,000; 3) that the defendants have committed waste of the premises; 4) that the defendants have committed fraud; 5) that the defendants were negligent; 6) that the defendants were grossly negligent; and 7) that the defendants violated applicable law and the company's operating agreement by failing to acknowledge the plaintiff's intention to withdraw from the company and provide the plaintiff with a distribution. The Court notes that in each cause of action, the plaintiff seeks damages of \$200,000, the alleged total amount of his investment.

In reply, the Gavilla defendants contend that the plaintiff merely seeks the return of his investment despite the need to sell the premises to avoid foreclosure. The Gavilla defendants submit, *inter alia*, the personal affidavits of defendant Hector P. Gavilla, defendant Alexander Gavilla, and non-party Javier Cervera. The affidavits of defendants Hector P. Gavilla and Alexander Gavilla state that upon the sale of the premises to Javier Cervera, neither Hector Gavilla nor Alexander Gavilla retained any rights in the premises or any beneficial interest therein. Javier Cervera avers in his affidavit that he entered into a contract to purchase the subject premises for the sum of \$540,000.00, which was the only consideration he paid in exchange for the sale of the premises by the company to him. The Gavilla defendants reiterate their position

that the plaintiff's claims are derivative in nature and should be heard in the Florida Courts.

Initially, the Court notes that the New York Limited Liability Company Law § 801(a) provides that the law of the jurisdiction under which the limited liability company is formed governs the liability of its members and managers. The plaintiff's claims revolve around the operation and management of HMA Properties, LLC, which is a Florida limited liability company. Thus, Florida law applies.

Turning to the branch of the motion which seeks to dismiss on the ground of inconvenient forum, CPLR 327 (a) permits the court to stay or dismiss an action in the interest of substantial justice when the court finds that the action should be heard in another forum. Under CPLR 327 (a) and the common-law doctrine of forum non conveniens, the court may stay or dismiss an action when it determines that, although it has jurisdiction over the action, the action would be better adjudicated elsewhere (*see, Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479). "Although a New York court may have jurisdiction over a claim, it is not, of course, compelled to retain jurisdiction if the claim has no substantial nexus with New York" (*see, Banco Ambrosiano S.p.A. v Artoc Bank & Trust, Ltd.*, 62 NY2d 65, 73, *quoting Silver v Great American Ins. Co.*, 29 NY2d 356, 361). It is well settled that New York courts "need not entertain causes of action lacking a substantial nexus with New York (*Martin v Mieth*, 35 NY2d 414, 418). A heavy burden is on the defendant to establish that the selection of New York as the forum will not best serve the ends of justice and the convenience of the parties (*see, Banco Ambrosiano v Artoc Bank & Trust*, *supra* at 74; *Islamic Republic of Iran v Pahlavi*, *supra* at 479; *Globalvest Mgmt. Co. v Citibank, N.A.*, 7 Misc3d 1023 [A], 4).

The New York courts consider and balance various competing factors when evaluating whether or not to retain jurisdiction over a particular action (*see, Islamic Republic of Iran v Pahlavi*, *supra* at 479). Although not every factor is necessarily articulated in every case, collectively, courts have considered and balanced the following factors: the existence of an adequate alternative forum, the situs of the underlying transaction, the residency of the parties, the state of incorporation, the potential hardship to the defendant, the location of documents, the location of a majority of the witnesses, and the burden on the New York courts (*Berger v Scharf*, 9 Misc3d 1122[A] 3; *Globalvest Mgmt. Co. v Citibank, N.A.*, *supra* at 4). The determination rests within the exercise of the court's sound discretion, and no one factor is controlling (*see, Islamic Republic of Iran v Pahlavi*, *supra* at 479). The fact that the company was created in another state weighs in favor of dismissal (*see, Berger v Scharf*, *supra* at 2). When an action involves the internal affairs of a foreign corporation, the state of creation has a paramount interest in hearing the claim (*see, Sturman v Singer*, 213 AD 324, 325).

The Gavilla defendants have met their heavy burden of establishing that the selection of New York as the forum will not best serve the ends of justice and the convenience of the parties. Therefore, the Court finds that the present action should be dismissed and the parties are directed to raise their claims in Florida. First, the Court notes that there is a dissolution proceeding pending in Florida. Such claim can only be heard in Florida and the New York court has no jurisdiction. With respect to the remaining claims, the Court notes that these are a mix of derivative claims and possibly member-to-member claims. As is apparent, the purpose of a dissolution claim is to ultimately establish the valuation of the entity, complete a winding up of its affairs, and to make appropriate distributions to the members. To the extent the plaintiff's claims in the New York action, as articulated in his amended complaint, are derivative, these must be

evaluated and determined before the Florida court can complete valuation. To the extent the claims are between members, they must be established before any distribution takes place. Moreover, the claims in each action are based on the same facts, and, indeed, the Gavilla defendants' claims against the plaintiff in the Florida action are the mirror image of the plaintiff's claims against the defendants as asserted in the instant action. If the actions were decided in separate states, the result could be inconsistent judgments, and the timing of a judgment in one action may be detrimental to the other.

Additionally, the Court notes that the number and weight of the relevant factors in this action are centered in Florida, and not in New York. The facts and circumstances pertinent to this action occurred in Florida, the material witnesses and documents are located there, an alternative forum exists in Florida, the company was created in Florida, and the parties relied upon Florida law when drafting the Operating Agreement. Moreover, the situs of the transaction and the premises lie in Florida, the documents relating to the sale of the premises are in Florida, and the non-party witnesses reside in Florida, which would cause a hardship for the Gavilla defendants if the instant action was heard in New York. This action's only connection to New York is that some of the members in the company reside in this State. Thus, the Court, in its discretion, finds that, given the company's creation in Florida, Florida's jurisdiction over the dissolution proceeding, and the lack of a substantial nexus between the company and the State of New York, the ends of justice and the convenience of the parties would best be served if the litigation were to proceed in Florida.

Accordingly, the motion to dismiss is granted, and the complaint is dismissed. The parties are directed to raise their respective claims in the Florida courts as they deem appropriate.

Dated: June 17, 2013

**HON. ELIZABETH HAZLITT EMERSON**

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J.S.C.