SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

DORINE BORIELLO, individually and derivatively on behalf of CATERINA REALTY, LLC, Plaintiff, vs. MICHAEL LOCONTE, DIANE SCHMIDT and MARIA PENNEY SELIGSON, Defendants, and CATERINA REALTY, LLC, Nominal Defendant.	Index No. 503180/2013 HON.

BRIEF IN SUPPORT OF DEFENDANTS MICHAEL LOCONTE, DIANE SCHMIDT, AND MARIA PENNEY SELIGSON'S AND NOMINAL DEFENDANT CATERINA REALTY, LLC'S MOTION TO DISMISS THE VERIFIED COMPLAINT

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PRELIMINARY STATEMENT

Plaintiff Dorine Borriello ("Borriello") is suing her brother and sisters challenging the rent for their family business as determined by an independent certified licensed real estate appraiser and despite Borriello having executed a general release after the signing of the lease containing the rent.

Borriello alleges that she and her brother and sisters defendants Michael Loconte ("Loconte"), Diane Schmidt ("Schmidt"), and Maria Penney Seligson ("Seligson") are members and owners of Caterina Realty, LLC ("Caterina"). The three named defendants are shareholders, directors, officers, and employees of Jersey Lynne Farms, Inc. ("Jersey Lynne"). Borriello is a shareholder of Jersey Lynne. Caterina and Jersey Lynne are family-owned businesses. Caterina is a landlord and Jersey Lynne is the tenant for purposes of this case. Borriello's Verified Complaint alleges that Loconte, Schmidt, and Seligson breached their fiduciary duties and engaged in self-dealing vis-à-vis Caterina.

The essential allegation stems from Borriello's dissatisfaction with the rent terms in a lease between Caterina and Jersey Lynne dated December 1, 2011 (the "Lease"). However, when Borriello's employment with Jersey Lynne terminated, Borriello signed a Separation Agreement and General Release (the "General Release"), dated on or about June 28, 2012, which released and discharged Loconte, Schmidt, and Seligson from "any claims, complaints, demands, lawsuits, causes of action or expense of any kind (including attorney's fees and costs) . . . whether known or unknown" that Borriello "now has or ever had" against these defendants as of June 28, 2012, including claims arising under common law. The General Release explicitly stated, "It is further expressly agreed and understood by [Borriello] that the release contained herein is a GENERAL RELEASE."

Borriello (and her lawyer) certainly knew of the Lease when she signed the General Release. She voted against approving the Lease in a properly noticed corporate meeting. She also mentioned the Lease in two separate letters negotiating the terms of the very General Release at issue.

The rest of Borriello's allegations stem from Borriello's quibble with the votes cast by her siblings, the majority of members of Caterina. However, the Caterina Operating Agreement explicitly states, "Any matter that requires the vote or consent of the Members shall be decided by the Members holding at least a majority of the Membership Interests." Borriello's dissatisfaction that Loconte, Schmidt, and Seligson – constituting 75% of the ownership stake in Caterina – voted differently from her is not grounds for claims of breach of fiduciary duty or self-dealing.

Because all the allegations in Borriello's Verified Complaint are barred by the clear language of the General Release or by the Operating Agreement, this Court should grant the defendants' motion to dismiss pursuant to N.Y. C.P.L.R. 3211(a)(1) and dismiss Borriello's Verified Complaint with prejudice.

STATEMENT OF FACTS

A. Ownership Interests in Caterina Realty, LLC and Jersey Lynne Farms, Inc.

As set forth in the Verified Complaint, plaintiff Borriello and defendants Loconte, Schmidt, and Seligson are each members, 25% owners, and co-managers of Caterina. On December 29, 1999, Borriello, Loconte, Schmidt, and Seligson signed the Operating Agreement for Caterina. See Certification of Howard J. Schwartz ("Schwartz Cert."), Exhibit A, pp. 2, 22. Article VI, paragraph 6.1 of the Operating Agreement states, "Any matter that requires the vote or consent of the Members shall be decided by the Members holding at least a majority of the Membership Interests." See id., p. 7.

Borriello, Loconte, Schmidt, and Seligson are also owners of the outstanding and issued stock of Jersey Lynne, holding 25%, 35%, 20%, and 20% interests, respectively. See Schwartz Cert., Exhibit B, ¶¶ 12 (Borriello), 14 (Loconte), 15 (Schmidt), 16 (Seligson). Loconte, Schmidt, and Seligson are officers, directors, and employees of Jersey Lynne; Borriello had been, but is no longer, an officer, director, and employee of Jersey Lynne. See id., ¶¶ 13-17.

B. The General Release

Pursuant to the General Release dated on or about June 28, 2012, Borriello's employment with Jersey Lynne terminated on November 26, 2011. See Schwartz Cert., Exhibit C, ¶ 1. This General Release contains ¶ 7, which states in pertinent part:

> [Borriello] . . . knowingly and voluntarily forever releases and discharges [Jersey Lynne] and its past and present affiliates, subsidiaries, parent companies, predecessors, insurers, successors and assigns and its and their current and former partners, members, owners, shareholders, officers, directors, employees, employee benefit plans, attorneys, fiduciaries, representatives and agents both individually and in their business capacities (collectively, the "Releasees"), of and from any and all claims, complaints, demands, lawsuits, causes of action or expense of any kind (including attorney's fees and costs) . . . whether known or unknown, that [Borriello] now has or ever had against the Releasees as of the signing of this Agreement, including but not limited to . . . Claims arising under common law; Claims for breach of contract and in tort. . . . It is further expressly agreed and understood by [Borriello] that the release contained herein is a GENERAL RELEASE.

Id., ¶ 7. The main allegation in Borriello's Verified Complaint relates to the Lease between Caterina and Jersey Lynne dated December 1, 2011 – close to seven months before Borriello signed the General Release. See Schwartz Cert., Exhibit B, ¶¶ 22(a), (f), (g). When Borriello signed the General Release, she certainly knew about the Lease, because she had voted against this Lease during a December 13, 2011 annual meeting. See Schwartz Cert., Exhibit D.

In addition, this General Release was the product of extensive negotiations between counsel. For example, in letters dated December 12, 2011 and February 24, 2012, counsel for Borriello (the lawyer representing her in this action) noted that Borriello's settlement position as

to Caterina involved Jersey Lynne paying annual rent to Caterina in the annual sum of $342,000.[1] See Schwartz Cert., Exhibits E and F. When Borriello signed the General Release on June 28, 2012, she was well aware of the Lease and negotiations concerning its terms. She knew of her potential claim regarding the Lease.

C. Caterina Stockholders' Votes at Annual Meeting

The events in Borriello's Verified Complaint which may have occurred after Borriello signed the General Release involve Borriello's objections to:

> (i) 75% of the stockholders of Caterina voting in favor of Jersey Lynne charging Caterina less than $7,000 for maintenance, labor, and supplies;
>
> (ii) 75% of the stockholders of Caterina voting in favor of Caterina paying part of the premium for general liability and umbrella insurance policies for insuring the very property Caterina owns;
>
> (iii) 75% of the stockholders of Caterina voting in favor of Caterina's 2013 operating budget;
>
> (iv) 75% of the stockholders of Caterina voting in favor of a reduction in the monthly distributions to each of Caterina's members, including the defendants; and
>
> (v) 75% of the stockholders of Caterina voting in favor of Caterina paying legal fees for the instant case.

See Schwartz Cert., Exhibit B, ¶¶ 22(b)-(e). For each of these issues, Loconte, Schmidt, and Seligson voted in favor of the proposals, and Borriello voted against them. See id. All meetings were properly noticed and attended by Borriello herself.

ANALYSIS

N.Y. C.P.L.R. 3211(a)(1) states, "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that a defense is founded upon

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[1] Acknowledging that the fair market annual rent is $342,000 is contrary to Borriello's assertions in her Verified Complaint that $342,000 is not the fair market annual rent for the property.

documentary evidence." A motion to dismiss a complaint based on documentary evidence is granted "where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." Guido v. Orange Reg'l Med. Ctr., 102 A.D.3d 828, 830, 958 N.Y.S.2d 195, 198 (2013) (internal citations omitted). "While pleadings should be liberally construed on a motion to dismiss, claims flatly contradicted by documentary evidence must be rejected." Igarashi v. Higashi, 289 A.D.2d 128, 735 N.Y.S.2d 33, 34 (2001) (internal citations omitted). In Guido, the court held that a severance agreement constituted documentary evidence within the meaning of CPLR 3211(a)(1). Guido, 102 A.D.3d at 831.

POINT I: THE CLAIMS IN BORRIELLO'S VERIFIED COMPLAINT RELATING TO EVENTS OCCURRING BEFORE JUNE 28, 2012 AND THE CHALLENGE TO THE FAIR MARKET RENT IN THE LEASE ARE BARRED BY THE GENERAL RELEASE.

Borriello executed a general release of all claims against the defendants in June 2012. She cannot file a claim against the defendants one year later for acts which took place in 2011.

In her Verified Complaint, Borriello alleges that Loconte, Schmidt, and Seligson engaged in self-dealing by entering into the Lease whereby Jersey Lynne would rent property from Caterina pursuant to rent certified as being fair market rent by an independent licensed real estate appraiser. See generally Schwartz Cert., Exhibit B, ¶¶ 22(a), (f), (g). The Lease from Caterina to Jersey Lynne was signed December 1, 2011.

Almost seven months later, on or about June 28, 2012, Borriello signed the General Release in which she "knowingly and voluntarily forever release[d] and discharge[d]" Jersey Lynne's current and former officers, directors, and employees, both in their individual and business capacities, from "any claims, complaints, demands, lawsuits, causes of action or expense of any kind (including attorney's fees and costs) . . . whether known or unknown" that Borriello had as of June 28, 2012. Schwartz Cert., Exhibit C, ¶ 7. The release language further

stated, "It is further expressly agreed and understood by [Borriello] that the release contained herein is a GENERAL RELEASE." Id.[2]

"Where the language of the release is clear, effect must be given to the intent of the parties as indicated by the language employed." In re Schaefer, 18 N.Y.2d 314, 317, 221 N.E.2d 538 (1966); see also Rocanova v. Equitable Life Assur. Soc. of U.S., 83 N.Y.2d 603, 616, 634 N.E.2d 940, 945 (1994) (granting motion to dismiss certain causes of action based on clear language of release); Sparacio v. Sparacio, 283 A.D.2d 481, 483, 724 N.Y.S.2d 204, 206 (2d Dep't, 2001) (affirming dismissal of complaint based on broad language of general release); Delaney v. Westchester Cnty., 90 A.D.2d 819, 820-21, 455 N.Y.S.2d 839, 841-42 (2d Dep't, 1982) (dismissing complaint based on broad language of release).

The case Booth v. 3669 Delaware, Inc., 92 N.Y.2d 934, 935, 703 N.E.2d 757 (1998) requires dismissal of the Verified Complaint. In that case, the plaintiff, a drywall installer, injured his knee while working on stilts in the course of his employment. Id. The plaintiff later signed a document captioned "RELEASE OF ALL CLAIMS," which relieved the defendants of "any and every claim . . . or cause of action of whatever kind and nature . . . especially the liability arising from" plaintiff's accident, in exchange for the sum of $3,000. Id. The release stated, "YOU ARE MAKING A FINAL SETTLEMENT. THIS IS A RELEASE. READ CAREFULLY BEFORE SIGNING." Id. When the plaintiff later brought claims against the defendants alleging negligence and violations of various Labor Law provisions, the defendants moved to dismiss on the grounds of the release. Id. The New York Court of Appeals found that the release was valid and binding, stating:

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[2] Loconte, Schmidt, and Seligman are officers, directors, and employees of Jersey Lynne. See Verified Complaint, ¶¶ 14-17.

> Where, as here, the language of a release is clear and unambiguous, the signing of a release is a "jural act" binding on the parties. While a release obtained through fraud may be rendered invalid, plaintiff has failed to raise a triable issue concerning the validity of the release. Therefore, consistent with the public policy favoring enforcement of settlements, the release plaintiff signed should be enforced according to its terms, and plaintiff's claim dismissed.

Id. (internal citations omitted); see also Krumme v. WestPoint Stevens Inc., 238 F.3d 133, 144 (2d Cir. 2000) (Under New York law, "[a]n unambiguous release should be enforced according to its terms" (internal citations omitted).); Davis & Associates, Inc. v. Health Mgmt. Servs., Inc., 168 F. Supp. 2d 109, 113 (S.D.N.Y. 2001) ("It is well established under New York law that a valid release which is clear and unambiguous on its face and which is knowingly and voluntarily entered into will be enforced as a private agreement between parties.").

Similarly to the language of the general release in Booth v. 3669 Delaware, Inc., the general release in the instant case states, "It is further expressly agreed and understood by [Borriello] that the release contained herein is a GENERAL RELEASE."

The court in LeMay v. H.W. Keeney, Inc., 124 A.D.2d 1026, 1026, 508 N.Y.S.2d 769, 769 (4th Dept., 1986), recognized the broad scope of a general release to bar subsequent claims by a given plaintiff against the same party. In that case, the plaintiff filed an unfair labor practice charge against the defendant and, when settling that case in 1983, signed a general release, releasing the defendant "from any and all claims . . . damages and liabilities, in law or in equity, the Releasors ever had, now have or hereafter can, shall or may have." Id. The plaintiff later sued the defendant for personal injuries he sustained while working for the defendant in 1981. Id. The court found that the general release signed in connection with the unfair labor practice charge barred the subsequent personal injury case. Id. The court stated:

> Where, as here, the language of a release is clear, effect will be given to the intention of the parties as indicated by the language employed and the fact that one of the parties may have intended something else is irrelevant. Since at the time he executed the release plaintiff was aware of the injuries for which he now

> seeks compensation and failed to exclude his personal injury claim from the embrace of the release, the release bars the instant lawsuit and the complaint must be dismissed.

Id. This case presents exactly the parallel situation. Borriello was aware of the existence of the Lease (having voted against it and having negotiated to obtain the General Release); she is barred from raising the Lease claim.

The court in Rubycz-Boyar v. Mondragon, 15 A.D.3d 811, 811, 790 N.Y.S.2d 266, 266 (3d Dept., 2005), affirmed the Supreme Court's dismissal on summary judgment of the plaintiff's medical malpractice case in light of a general release previously signed by the plaintiff. The plaintiff was both the defendant's gynecology patient and her tenant in her gynecology office. Id. In settling a dispute in 2002 between the plaintiff and the defendants regarding money owed by the plaintiff to the defendants for the leased office space, the plaintiff, with advice of counsel, executed a general release encompassing all claims the plaintiff ever had or might have against the defendant personally or against the defendant's professional corporation. Id. Two months later, the plaintiff filed a medical malpractice action against the defendant and her professional corporation stemming from treatment the plaintiff received in 2000. Id. at 811-12. The defendants moved for summary judgment on the ground that the general release was a complete bar to her action. Id. at 812.

The lower court granted summary judgment, and the plaintiff appealed, arguing that she never intended for the general release to apply to her cause of action for malpractice. Id. The Appellate Division rejected that argument, explaining, "It is well settled that releases are contracts that, unless their language is ambiguous, must be interpreted to give effect to the intent of the parties as indicated by the language employed and that releases bar suits on causes of action arising on or prior to the date of their execution." Id. (internal citations omitted). The Appellate Division held that the release "unequivocally recite[d] an intent to absolve defendants

from their liabilities and obligations for any and all claims that plaintiff had or might have" and affirmed the grant of summary judgment. Id. at 812-13. These cases demonstrate that courts interpret general releases very broadly, and therefore, the general release in the General Release should likewise be so interpreted.

Furthermore, the general release in this case was the product of extensive negotiations between counsel. Where sophisticated parties represented by counsel in a commercial setting enter into a settlement that includes a broadly-worded release of all claims whether "known or unknown," such language will be taken to reflect the "clear and unambiguous intent" of the settling parties to generally release and bar future claims and suits. See In re WorldCom, Inc., 296 B.R. 115, 123 (Bankr. S.D.N.Y. 2003). The parties in this case are sophisticated parties, having been involved in these two family businesses for more than ten years.

Borriello has the burden of demonstrating that the General Release is limited, a burden she cannot carry. As the court in Calavano v. New York City Health & Hospitals Corp., 246 A.D.2d 317, 318-19, 667 N.Y.S.2d 351 (1st Dep't, 1998) stated:

> It is well recognized that strong policy considerations favor the enforcement of settlement agreements. Therefore, a release may not be treated lightly since it is a jural act of high significance without which the settlement of disputes would be rendered all but impossible. It should never be converted into a starting point for renewed litigation except under circumstances and under rules which would render any other result a grave injustice. The burden falls on the releasor who tries to retract a release to demonstrate both that the injury was unknown at the time of the release and that the release was limited rather than general, in order to establish that the parties had not intended the literal effect of the release.

Id. (internal citations omitted) (emphasis added). Borriello can never demonstrate that she did not know of the injury – the signing and existence of the December 2011 Lease. She can never demonstrate that the General Release is a limited release or that the parties had limited intentions regarding the scope of the General Release. She cannot meet her burden to retract the General Release which she signed, fully represented by competent counsel, and fully aware of the

potential claims against her brother and sisters. The General Release is not a starting point for litigation.

POINT II: THE CLAIMS IN BORRIELLO'S VERIFIED COMPLAINT RELATING TO EVENTS OCCURRING AFTER JUNE 28, 2012 ARE BARRED BY THE OPERATING AGREEMENT.

Borriello has no basis for successfully arguing that Loconte, Schmidt, and Seligson, acting on behalf of Caterina, engaged in self-dealing by voting in favor of Caterina paying certain relatively minor expenses, approving Caterina's operating budget, and reducing monthly distributions to Caterina's members. The clear language of the Operating Agreement mandates that matters requiring a vote are decided by majority rule. See Operating Agreement, p. 7 ("Any matter that requires the vote or consent of the Members shall be decided by the Members holding at least a majority of the Membership Interests."). Borriello's suggestion that Loconte, Schmidt, and Seligson engaged in self-dealing is a strawman argument intended to detract from the fact that Loconte, Schmidt, and Seligman's votes simply constituted the majority of voting members.

Accordingly, this Court must grant the defendants' motion to dismiss all claims alleged by Borriello herein stemming from events in connection with votes at Caterina's May 28, 2013 annual meeting and other matters (i.e., payment of legal expenses) decided by the members' majority rule.

CONCLUSION

For the reasons set forth above, this Court must grant the defendants' motion to dismiss and dismiss the Verified Complaint with prejudice.

Respectfully submitted,

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Dated: September 19, 2013