SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN J.S.C. PART 3
Justice

Index Number : 652200/2010
CAROLYN LE BEL, AS EXECUTRIX
vs.
DONOVAN, AND, MARY A.
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. 652200/10
MOTION DATE 5/20/13
MOTION SEQ. NO. 004

The following papers, numbered 1 to 3, were read on this motion to/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). 1
Answering Affidavits — Exhibits ____ No(s). 2
Replying Affidavits ____ No(s). 3
Cross Motion ✓ yes ___ no
Upon the foregoing papers, it is ordered that this motion is

IS DECIDED ✓

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
OCT – 1 2013
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8-19-13

Eileen Branston
EILEEN BRANSTEN 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COM. DIV. PART 3

----------X

CAROLYN LE BEL, As Executrix of the Estate of Marya Lenn Yee,

Plaintiff,

- against -

MARY A. DONOVAN and DONOVAN & YEE, LLP,

Defendants.

----------X

Index No. 652200/10
Motion Date: 5/20/13
Mot. Seq. No.: 004

EILEEN BRANSTEN, J.:

Plaintiff's decedent, Marya Lenn Yee, and defendant Mary A. Donovan were partners in a law firm known as Donovan & Yee, LLP (the "Firm") that specializes in intellectual property. Yee died tragically as a result of a plane crash on December 1, 2008. Yee's estate subsequently commenced this action alleging that defendant Donovan continued to operate the partnership in violation of the Firm's partnership agreement and failed to distribute Yee's interest to her estate. Plaintiff sues for, among other things, breach of the partnership agreement and breach of fiduciary duty, and seeks, in addition to monetary damages, an accounting, dissolution of the Firm, and injunctive relief.

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment in her favor on liability on the first cause of action for breach of contract and the second cause of action for breach of fiduciary duty. Plaintiff also seeks summary judgment on the fourth, fifth and sixth causes of action, which seek, respectively, an accounting, a declaration that

the Firm dissolved upon Yee's death on December 1, 2008, and a permanent injunction prohibiting Donovan from any continued use of Yee's name in furtherance of Donovan's law practice. Defendants cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

I. Background

Yee and Donovan, together with a third attorney, Bela Amladi, entered into a written partnership agreement dated July 15, 1997 (the "1997 Partnership Agreement"), forming a law firm then known as Donovan Amladi & Yee, LLP. Amladi withdrew from the Firm shortly after its formation, and the Firm continued under the name Donovan & Yee, LLP, with just Yee and Donovan as equal partners.

Section 6.2 of the 1997 Partnership Agreement provides that although a partner's interest terminates at her death, the Firm would pay to the estate of the deceased partner an amount to be calculated by the Firm's regular accountants in accordance with an agreed-upon formula tied to the deceased partners "Net Capital Account Balance" and pro rata share of the net unpaid profits for the year. Section 6.8 of the 1997 Partnership Agreement, entitled "Provisions Applicable Upon Death, Disability, Retirement, Withdrawal or Expulsion," provides, in relevant part as follows:

> (a) Priority Among Provisions. A voluntary dissolution (including any dissolution by law resulting from only one Partner in the Partnership following the death, . . . of the other Partner(s)) and termination of the Partnership shall override any of the provisions of this Article VI then in effect, except those as to Partners whose interest in the Partnership were terminated more than six (6) months prior to the date of dissolution.
>
> . . .
>
> (b) Continuation of the Partnership. The death, . . . of any Partner shall not cause the dissolution of the Partnership, unless following such death, . . . only one Partner shall remain in the Partnership and no additional Partner shall be admitted within ninety (90) days following such death, ... The remaining Partners, together with any new Partners, shall have the right, but not the obligation to continue the use of the Partnership Name, provided that a disabled, or withdrawing partner shall consent to the use of his name in the Partnership name, if his name has been included in the Partnership name.

Affidavit of David S. Douglas ("Douglas Aff."), Ex. 3 at 12.

In April 2008, the Firm entered into an agreement with another attorney then working at the Firm, Andrea Calvaruso. Under this agreement, Calvaruso became a non equity or "contract" partner of the Firm, who did not share in any of the profits or losses of the partnership, but was paid a fixed annual salary of $180,000 and yearly bonus of not less than $20,000 plus an additional amount based, in part, on her collections.

After Yee's death on December 1, 2008, Donovan and Calvaruso signed what they termed was an "Amended and Restated Partnership Agreement" (the "2009 Partnership Agreement") for the Firm, now called Donovan, Calvaruso & Yee, LLP. Although the document was actually signed on February 25, 2009, it purports to be "Amended and

Restated as of January 1, 2009." (Douglas Aff., Ex. 6, at D0192, D0213). The 2009 Partnership Agreement terminated the April 2008 agreement between the Firm and Calvaruso and provided for the admission of Calvaruso "as a Partner with units of participation in the Partnership." *Id.* at Recital Cl. F. Calvaruso was allocated five of the 100 units of participation, with the remaining 95 units allocated to Donovan; however, this allocation could be changed by majority vote, but not prior to January 1, 2010. The 2009 Partnership Agreement provides that "[n]et profits and losses shall be shared amongst the Partners on the basis of units of participation." *Id.* at Art. 5.2. Section 5.4, entitled "Guaranteed Payments," states:

> (a) To the extent of available cash, Mary Donovan shall receive a monthly distribution equal to one-twelfth of $350,000 and Andrea Calvaruso shall receive a monthly distribution equal to one-twelfth of $250,000, for each fiscal year. After the satisfaction of the payments in the immediately preceding sentence, all additional distributions made to the Partners shall be allocated on the basis of the units of participation allocated to each Partner at such time and shall be distributed as determined by a Majority Vote.
>
> (b) For the avoidance of doubt, the term 'guaranteed payments' as used in this Agreement shall have the meaning set forth in Section 707(c) of the Code, and shall not mean that the Partnership or any Partner is guaranteeing any amount of distributions to any Partner."

Id. at Art. 5.4). Finally, as is relevant to this dispute, the 2009 Partnership Agreement provided that Calvaruso was not required to make a capital contribution. It is undisputed that Calvaruso left the Firm at the end of 2009. The Firm issued her a Schedule K-1 for

the 2009 tax year, which indicates that she received $223,910 in "guaranteed payments." (Douglas Aff., Ex. 15).

After Yee's death, her heirs received $500,000 in life insurance proceeds from a $1 million "key man" or "buy out" life insurance policy that Donovan maintained on the life of her partner. Yee had owned a similar policy on Donovan's life. The other $500,000 was paid directly to Donovan. Donovan maintains that, as a result of a 2006 oral agreement she entered into with Yee, whereby they changed how their respective insurance policies would be paid out, this insurance payout was in lieu of the accounting and payments due a deceased partner's estate as provided in Section 6.2 of the 1997 Partnership Agreement. Plaintiff disputed that the 1997 Partnership Agreement was amended in this fashion, demanded an accounting of the Firm as of December 1, 2008, and objected to the continued use of Yee's name by Donovan in her practice of law. Both Donovan and the firm's accountant, Michael Ferber, CPA, maintain that the required accounting was provided to plaintiff, but that it showed that nothing was owed to Yee's estate. This lawsuit was commenced on December 7, 2010.

II. Discussion

Under New York law, a partnership dissolves, by operation of law, upon the death of one of the partners where there is no agreement to the contrary. *See* Partnership Law §

62 [4]; *Burger, Kurzman, Kaplan & Stuchin v. Kurzman*, 139 A.D.2d 422, 423-424 (1st Dep't 1988); *see also Peirez v. Queens P.E.P. Assoc. Corp.*, 148 A.D.2d 596, 597 (2d Dep't 1989).

Defendants maintain that the partnership continued, in accordance with subsection (b) of Section 6.8 of the 1997 Partnership Agreement, because a new partner, Calvaruso, was added to the partnership within 90 days of Yee's death.

Plaintiff takes the opposite view. According to plaintiff, the Firm dissolved upon Yee's death, because Donovan was the sole remaining partner for purposes of the 1997 Partnership Agreement. Plaintiff maintains that subsection (b) of Section 6.8 is ineffective under the circumstances presented here, because subsection (a) of Section 6.8 takes priority and mandates that the dissolution by operation of law that occurred upon Yee's death overrides any of the other provisions of article 6 of the Partnership Agreement.

Plaintiff's interpretation of Section 6.8(a) and (b) of the 1997 Partnership Agreement is that the death of one of two partners necessarily results in the dissolution of the partnership. The Court does not read subsections (a) and (b) of Section 6.8 in such a strained fashion. Subsection (a) merely provides that *if* the Firm dissolves because of, among other reasons, the death of one of two partners, then all of the provisions of article 6 are overridden. It does not, however, mean that the death of one of two partners

necessarily causes a dissolution by law. Thus, if a dissolution by law is avoided by the surviving partner by the addition of a new partner to the Firm within 90 days of the death, as Yee and Donovan provided for in subsection (b) of Section 6.8, there is no dissolution by law.

Plaintiff's proposed construction of Section 6.8(a) would mean that subsection (b)'s provision for preserving the partnership by the timely addition of a new partner could never be invoked, and thus be rendered meaningless. Such an interpretation violates key principles this court must follow in construing the language of a contract, which are to "avoid an interpretation that would leave contractual clauses meaningless," *Two Guys from Harrison-N.Y. v. S.F.R. Realty Assoc.*, 63 N.Y.2d 396, 403 (1984), and that "[a] contract 'should be read to give effect to all its provisions.'" *God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assoc. LLP.*, 6 N.Y.3d 371, 374 (2006) (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995)).

Accordingly, the court finds that the Firm did not dissolve by operation of law upon Yee's death *if* a new partner was timely added within the meaning of Section 6.8(b) of the 1997 Partnership Agreement. Plaintiff contends that Calvaruso's partnership with Donovan was a sham and transparent ruse to avoid dissolution of the Firm, and that Calvaruso never in fact had any of the rights or obligations of an actual partner and was

never treated as a partner. Plaintiff bases this argument on the terms of the 2009 Partnership Agreement and the deposition testimony of Calvaruso and Donovan.

Calvaruso never testified that her partnership with Donovan was a sham. Rather, Calvaruso testified that she agreed to become a 5% "equity partner" of the Firm to avoid dissolution although she was not happy with the terms being offered to her. *See* Douglas Aff., Ex. 8 at 23-24 ("Calvaruso Deposition Tr."). Although she did not, in fact, share in any profits or losses for the year 2009 and only collected her salary, she testified that she was obligated, by the terms of the 2009 Partnership Agreement, to share in losses and profits in accordance with her 5% interest. *Id.* at 24-25. She testified that she was involved in the management of the Firm "up to a point," and that "the day-to-day decisions Mary and I would discuss," but that she did not have an equal vote and that "major decisions Mary made with Mike Ferber." *Id.* at 26. Calvaruso testified that she did not have to make a capital contribution to the Firm and that Donovan did not request that she do so. *Id.* at 26.

Donovan does not deny that the reason for changing Calvaruso's status from contract partner to equity partner in early 2009 was specifically to prevent the Firm from dissolving as a result of Yee's death. *See* Affidavit of Mary A. Donovan ¶¶ 13-14. Donovan contends that Calvaruso did not, in fact, share in any profits of the Firm in 2009, because there were no profits to distribute that year after both of them received the

guaranteed payments set forth in section 5.4 of the 2009 Partnership Agreement. *Id.* ¶ 16. "As for losses, the Firm met all its obligations, and there was no call on the partners to personally pay the Firm's debts." *Id.* Donovan admits that Calvaruso was not required to make a capital contribution in the first year "as a concession to her." (Donovan Aff. ¶ 17.)

While Calvaruso testified that she left at the end of 2009 "because we could not come to terms -- come to agreement on the terms of what our partnership was going to be" (Calvaruso Deposition Tr. at 38), she is clearly referring to 2010 and beyond. As Donovan explains, their partnership ended at the end of 2009, because Calvaruso wanted a greater share of ownership of the Firm than Donovan was willing to give based on Calvaruso's origination of business (Donovan Aff. ¶ 17 & Ex. K), not because they never had a partnership agreement in the first place.

The court finds that plaintiff has failed to raise a triable issue of fact regarding whether Calvaruso was timely added as a new partner of the Firm within the meaning of Section 6.8(b) of the 1997 Partnership Agreement. Notably, this document does not require that any new partner be a 50% equity partner or specify any minimum amount of equity ownership. The undisputed testimonial and documentary evidence establishes that Calvaruso and Donovan entered into a written agreement making Calvaruso a 5% equity partner of the Firm and obligating her to share in the profits and losses of the Firm up to that 5% interest. She was treated by the Firm's accountant as a partner and was issued a

Schedule K-1 for 2009, not a W-2, and participated in the management of the Firm, even if she did not have "equal" management rights with Donovan.

Shine & Co. LLP v. Natoli, 89 A.D.3d 523 (1st Dep't 2011), upon which plaintiff heavily relies, is distinguishable on its facts. In that case, the letter of intent upon which the defendant attempted to base his one-third equity interest in an accounting partnership did not provide for him to share in the accounting firm's profits and losses, which the First Department noted were "essential elements of a partnership agreement." *Id.* at 523. Also, the agreement provided for the defendant to receive a Form 1099, not a Schedule K-1. Likewise, in *D'Esposito v. Gusrae, Kaplan & Bruno PLLC*, 44 A.D.3d 512 (1st Dep't 2007), although the plaintiff was called a "partner" of the firm and received distributions of net profits at a fixed rate, he was never responsible for the firm's rent or losses.

To recap, the court finds that the Firm did not dissolve by operation of law upon Yee's death, because Calvaruso was timely added as a partner of the Firm within the meaning of Section 6.8(b) of the 1997 Partnership Agreement. Accordingly, pursuant to Section 6.8(b), the Firm has the right to continue to use Yee's name. The only remaining question is whether the Firm owes Yee's estate any money. In this regard, defendants raise a triable issue of fact on their claim that the 1997 Partnership Agreement was orally

amended[1] by Yee and Donovan in 2006 to change how their respective insurance policies would be paid out and that they agreed that this insurance payout would be in lieu of the accounting and payments due a deceased partner's estate as provided in Section 6.2 of the 1997 Partnership Agreement.

Even if the 1997 Partnership Agreement was not amended in this fashion, the court finds that a triable issue of fact exists as to whether any monies are owed to Yee's estate under the formula set forth in Section 6.2. As explained by the Firm's accountant, Michael Ferber, CPA, this amount is "based on the partner's Net Capital Account Balance, plus the partner's pro rata share of the net profits for the year, less amounts paid to the partner before death." (Affidavit of Michael Ferber ("Ferber Aff.") ¶ 4). He contends that he calculated this amount as zero "using the accounting methods used by the Firm in the preparation of its financial statements (cash basis)" (*Id.*), and submits a consolidated financial statement for the years ending December 31, 2007 and 2008 showing a negative partners' capital for the year ending 2008. *See* Ferber Aff., Ex. D. However, Ferber's firm also apparently prepared a financial statement for the Firm for the year ending December 31, 2008 showing $415,520 in partner's capital. *See* Douglas Aff., Ex. 9. Ferber explains this discrepancy as the difference between cash basis accounting

[1] Nothing in the 1997 Partnership Agreement requires that amendments or modifications thereto be in writing.

and accrual accounting, and contends that the 1997 Partnership Agreement required that the calculation be on a cash basis. (Ferber Aff. ¶ 6, n.1.)

The 1997 Partnership Agreement provides, in Section 6.2(a), that the "Net Capital Account Balance" shall be determined by the Firm's regular accountant "in accordance with OCBOA consistently applied (except as noted therein) using the accounting methods used by the Partnership in the preparation of its financial statements." "OCBOA" is defined in Article 5.1 as "other comprehensive basis of accounting," and it is the Court's general understanding that OCBOA can be a cash, modified cash or accrual based accounting method. If, as Ferber maintains, the Firm's regular financial statements were prepared on a cash basis, he does not explain why his firm prepared a financial statement based on an accrual basis for the year ending 2008. Thus, a question of fact remains as to whether Yee's estate is owned any monies pursuant to the 1997 Partnership Agreement.

For theses reasons, plaintiff's motion for summary judgment is denied. Defendants' cross motion for dismissal of the complaint[2] is denied with respect to the first cause of action which alleges a breach of the 1997 Partnership Agreement and the second cause of action for breach of fiduciary duty. *See Le Bel v. Donovan*, 96 A.D.3d 415, 417 (1st Dep't 2012). However, the fourth cause of action seeking an accounting is

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[2] The court previously dismissed the third cause of action, which is based on theories of unjust enrichment, money had and received, and constructive trust.

dismissed. Whether Yee's estate is entitled to any payment pursuant to Section 6.2 of the 1997 Partnership Agreement is a question of fact that can be resolved in this action, and the Firm has prepared at least two accountings for the year ending 2008. The sixth cause of action, seeking a permanent injunction prohibiting any continued use of Yee's name, is also dismissed on the merits based on the explicit provisions of Section 6.8(b) of the 1997 Partnership Agreement allowing for the continued use of a deceased partner's name. The fifth cause of action, seeking a declaration that the Firm dissolved upon Yee's death, is resolved in defendants' favor. *See Hirsch v. Lindor Realty Corp.*, 63 N.Y.2d 878, 881 (1984); *Port Parties, Ltd. v. Merchandise Mart Prop., Inc.*, 102 A.D.3d 539, 541 (1st Dep't 2012).

III. Conclusion, Order and Declaratory Judgment

For the foregoing reasons, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendants' cross motion for summary judgment is granted to the extent of dismissing the fourth, and sixth causes of action of the complaint; and it is further

ADJUDGED AND DECLARED that the law firm Donovan & Yee, LLP did not dissolve by operation of law upon the death of Marya Lenn Yee on December 1, 2008; and it is further

ORDERED that the first and second causes of action are severed and continued.

Dated: New York, New York
August 19, 2013

ENTER:

Hon. Eileen Bransten, J.S.C.

CLERK

SUPREME COURT
STATE OF NEW YORK, COUNTY OF NEW YORK Index No. 652200/10 Year

CAROLYN LE BEL, As Executrix of the Estate of Marya Lenn Yee,

Plaintiff,

-against-

MARY A. DONOVAN and DONOVAN & YEE, LLP,

Defendants.

[redacted] JUDGMENT

AMOS ALTER, ESQ.
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To

FILED
OCT - 1 2013
AT 4:04 P M
N.Y., CO. CLK'S OFFICE

Attorney(s) for

Signature (Rule 130-1.1-a)

Print name beneath

Service of a copy of the within is hereby admitted.

Dated:

PLEASE TAKE NOTICE:

☐ NOTICE OF ENTRY

that the within is a *(certified) true copy of a*
duly entered in the office of the clerk of the within named court on

☐ NOTICE OF SETTLEMENT

that an order
will be presented for settlement to the HON.
within named Court, at
on
at M.
Dated,

of which the within is a true copy
one of the judges of the

Yours, etc.