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<b>Camuso v Brooklyn Portfolio LLC</b>
2014 NY Slip Op 50940(U)
Decided on June 9, 2014
Supreme Court, Kings County
Demarest, J.
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Decided on June 9, 2014

Supreme Court, Kings County

<b>Henry F. Camuso, Plaintiff,</b>
<b>against</b>
<b>Brooklyn Portfolio LLC, et al., Defendants.</b>

19269/13

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Carolyn E. Demarest, J.

By Order to Show Cause, defendant Arthur Gallinaro moves to dismiss the complaint pursuant to CPLR 3211(a)(1). The cross-motion by plaintiff Henry Camuso ("Henry") to amend the complaint was granted on consent on January 15, 2014 and service was accepted. Defendant Brooklyn Portfolio LLC cross-moves to dismiss the amended complaint.

### ***BACKGROUND***

Henry and defendant Arthur Gallinaro ("Gallinaro") were general partners of defendant Regent Associates ("Regent"), a limited partnership formed for the purpose of "acquir[ing] title to [nine identified properties ("Property")] and to develop, rent, sell and otherwise dispose of the Property" (§3.1 of the Regent Partnership Agreement signed on January 28, 1988 ("Partnership Agreement")). Henry and Gallinaro each possessed a 50% interest in Regent, after a buy-out of the other two original general partners. Acting as the general partner of Regent, Gallinaro executed a contract for the sale of all of Regent's

properties to defendant Brooklyn Portfolio LLC for \$5,900,000 without Henry's consent. Henry's action seeks a declaration that the contract of sale is void.

On December 16, 1997, Henry and defendant Madeline Camuso ("Madeline"), Henry's ex-wife, executed a Marital Stipulation consenting to a divorce judgment ("Divorce Stipulation"), Article IX, Section 5(A) of which addresses Henry's interest in Regent:A) REGENT ASSOCIATES:

[Henry's] interest in the [Property] owned by [Regent] shall be equally divided between the parties.<sup>[FN1]</sup> Accordingly, the ownership percentages shall be as follows: Arthur Gallinaro 50% interest, Henry Camuso 25% interest, and Madeline Camuso shall have 25% interest.

The partners, namely Arthur Gallinaro, Henry Camuso and Madeline Camuso, shall form separate and distinct management companies in order to collect the rents and pay the carrying charges associated with said properties.

The Divorce Stipulation is not signed by Gallinaro, however, tax returns indicate that Madeline has been acknowledged as both a general and limited partner since 2010.

On June 10, 2013, Gallinaro and Madeline signed a stipulation ("Gallinaro Stipulation") in a related action, *Gallinaro v Camuso, et al.* (Index No. 500746/12) ("Gallinaro Action"), which is also before this court, stating that Gallinaro was a 50% owner of Regent and Henry and Madeline "each own a twenty-five percent (25%) interest in Regent Associates." The Gallinaro Stipulation also stated that Gallinaro had received a \$5,900,000 offer to purchase the Property and Gallinaro and Madeline had agreed to "accept the [\$5,900,000] Offer immediately upon [its] [\*2]execution . . ." <sup>[FN2]</sup> On August 12, 2013, Gallinaro, acting on behalf of Regent, entered into a contract with Brooklyn Portfolio, LLC ("Brooklyn Portfolio") to sell the Property for \$5,900,000 ("Contract"). Henry commenced the present action on October 31, 2013, seeking a declaratory judgment that the Contract was null and void as it was not signed by Henry. In the instant complaint, Henry argues that Madeline was never a partner of Regent and did not have the authority to authorize the sale of the Property.

Gallinaro brought the present motion to dismiss the action, arguing that, pursuant to the Divorce Stipulation, Madeline became "an interest holder in Regent", noting that Regent's accountant had prepared tax returns for 2010, 2011 and 2012 that listed Madeline as a general partner and that her 25% interest, together with Gallinaro's 50% interest authorizing the sale, was binding. Henry has not disputed that the tax returns filed by Regent identified Madeline as a general partner. Gallinaro has argued that he "entered into the [Contract] because [he] had a right to do so as a General Partner holding a fifty percent ownership interest in Regent Associates along with Madeline Camuso's twenty-five percent interest." In the memorandum of law submitted in support of the Order to Show Cause, Gallinaro argues that Henry "has given Madeline a General Partnership interest, and, as such, she has the legal right to participate in the management and decisions of the Partnership." Madeline submitted a memorandum of law in support of Gallinaro's Order to Show Cause, arguing that Henry conveyed half of his General Partnership and Limited Partnership interests to her. Further, Madeline argued that Gallinaro impliedly gave his consent to her becoming a general partner.

In opposition to the motion, Henry argues that pursuant to the Partnership Agreement and the New York Partnership Law, Madeline was never a partner of Regent and did not have authority to authorize the sale of the Property. Henry argues that under New York Partnership Law §40(7), an individual cannot become a member of a partnership without the consent of all partners and that Gallinaro did not consent to Madeline becoming a partner. Further, pursuant to §§ 6.3(a), 10.2., and 10.3 of the Partnership Agreement, Henry did not have the authority to transfer his partnership interest to Madeline and, therefore, Henry's own Divorce Stipulation was null and void. Accordingly, Henry argues that since Henry and Gallinaro were equal general partners, each maintaining a 50% interest in Regent, Gallinaro did not have the authority to sell the Property without Camuso's consent.<sup>[FN3]</sup>

In reply to Henry's opposition, Gallinaro modified the position he took in the Order to Show Cause and argues for the first time that Camuso's transfer of his partnership interest to Madeline in the Divorce Stipulation was a violation of § 10.1 of the Partnership Agreement because he did not obtain Gallinaro's consent prior to the transfer to Madeline. Accordingly, Gallinaro argues in his reply that Henry became a "Terminating General Partner" pursuant to § 10.1(b) of the Partnership Agreement and that Madeline was never

a general partner. [\*3]Accordingly, Gallinaro argues that he became the sole General Partner with the full authority to sell the Property when the Divorce Stipulation was signed. Gallinaro further argues that even if the court found that Gallinaro did not have the full authority to sell the Property, the Contract was still valid because Brooklyn Portfolio entered into the Contract with the belief that Gallinaro had such authority. The Court also takes judicial notice that in Gallinaro's verified complaint in the Gallinaro Action, in which he seeks to dissolve the partnership and appoint a receiver for the winding up of Regent's affairs, he alleged that Madeline became a limited partner of Regent as a result of the divorce proceeding. Brooklyn Portfolio cross-moves to dismiss the amended complaint, arguing that Gallinaro was fully authorized to enter into the Contract as the sole general partner of Regent after the occurrence of the "terminating event", Henry's transfer of half of his interest in the partnership without Gallinaro's consent, and that it entered into the Contract under the reasonable belief that Gallinaro was acting on behalf of, and with the full authority of, the partnership.

### ***DISCUSSION***

On a motion to dismiss pursuant to CPLR 3211, the court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according it the benefit of every possible favorable inference (*Campaign for Fiscal Equity, Inc. v State of New York*, 86 NY2d 307, 318 [1995]; see also *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). The role of the court is to "determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). Therefore, the complaint must be declared legally sufficient if the court determines that plaintiff may be entitled to relief on any reasonable view of the facts stated (*Campaign for Fiscal Equity, Inc.*, 86 NY2d at 318). "To succeed on a motion to dismiss pursuant to CPLR 3211(a) (1), the documentary evidence that forms the basis of the defense must resolve all factual issues as a matter of law, and conclusively dispose of the plaintiff's claim" (*NY Cmty. Bank v Snug Harbor Square Venture*, 299 AD2d 329, 329-330 [2d Dept 2002]).

In addition to the Divorce Stipulation and Gallinaro Stipulation, which identified Madeline as a partner, and the memorandum of law submitted in support of Gallinaro's

motion indicating that Madeline was a general partner,<sup>[FN4]</sup> Regent also filed tax returns for 2010, 2011 and 2012 <sup>[FN5]</sup> that identified Madeline as a general partner. As partners are "bound by the representations made in the partnership tax returns" (*Czernicki v Lawniczak*, 74 AD3d 1121, 1125 [2d Dept 2010]), neither Camuso nor Gallinaro can now claim that Madeline was not a general partner. While provisions in both the Partnership Agreement (§§ 6.3(a), 10.1(a)) and the [\*4]New York Partnership Law (§40(7)) address the limitations on transferring partnership interests without the prior consent of the remaining partners, based upon the tax filings, and Gallinaro's written representations to this Court, Gallinaro ratified Henry's transfer of his 25% general and limited partnership interest to Madeline (*see In re Securities Group*, 926 F2d 1051, 1054 [11th Cir 1991], interpreting New York law, citing *Application of Lester*, 87 Misc 2d 717, 723 [Sup Ct, New York County 1976]; *Monarch Ins. Co. v Insurance Corp. of Ireland, Ltd.*, 835 F2d 32, 36 [2d Cir 1987]). Henry may not now challenge his own stipulation, now incorporated into a judgment.<sup>[FN6]</sup> Accordingly, Madeline is a 25% general and limited partner of Regent.<sup>[FN7]</sup>

Although Madeline is a general and limited partner, §6.3(d) of the Partnership Agreement <sup>[FN8]</sup> and §20(3)(c) of the New York Partnership Law <sup>[FN9]</sup> address the prohibition against a general partner from transferring all of the assets of a partnership which would make it impossible to carry on the ordinary business of the partnership without the consent of all of the partners (*see also In re Verrazzano Towers, Inc.*, 10 BR 387, 407 [Bankr EDNY, 1981]). As there are issues of fact as to whether the Contract would be in violation of either of those provisions, since it is not established whether the Property is the sole asset of Regent, the motion to dismiss must be denied (*see NY Cmty. Bank*, 299 AD2d at 329-330).

Brooklyn Portfolio's argument that the action must be dismissed because it entered into [\*5]the Contract with Gallinaro, believing he had the authority to do so, and that the Contract is therefore binding, is also unavailing. Brooklyn Portfolio has not produced sufficient documentary evidence to establish all of the factual issues as a matter of law in this matter, particularly when Brooklyn Portfolio became aware of the dispute between Camuso and Gallinaro and Camuso's objection to the sale of the Property (*see id.*). It is noted that the complaint filed on April 9, 2012 in the Gallinaro Action, sixteen months

before the Contract was signed, indicates that Regent had received a \$5,900,000 offer to purchase the Property and Camuso would not consent to the sale. While the Gallinaro Action complaint does not identify the offeror, it is noted that the purchase price in the Contract is also \$5,900,000. It thus appears that significant unresolved questions of fact preclude the granting of defendants' motions. **CONCLUSION**

Accordingly, defendants' motion to dismiss and cross-motion to dismiss are denied. Defendants are directed to file an answer within 20 days of this order. A preliminary conference is calendared for July 23, 2014.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

### Footnotes

**Footnote 1:**The only parties to the divorce proceeding were Henry and Madeline.

**Footnote 2:**It is noted that by letter dated August 9, 2013, this Court declined to so-order the Gallinaro Stipulation, as requested by Gallinaro's counsel, as all parties to the Gallinaro Action had not signed the stipulation.

**Footnote 3:**Henry does not cite to a specific provision in the Partnership Agreement in support of this argument.

**Footnote 4:**The memorandum of law submitted in support of Gallinaro's motion states:

Because the Marital Stipulation divides Camuso's interest in Regent Associates equally, Madeline now indisputably possesses a total of twenty-five percent interest in the partnership. Moreover, in order to truly affect [*sic*] an equal distribution of Camuso's interest in Regent Associates, that interest must be in the form of both a General Partnership interest as well as a Limited Partnership interest. It is completely contradictory to the Documents and the law for Camuso to suggest any other interpretation.

**Footnote 5:**Henry has not contested the authenticity of the tax returns submitted by



Gallinaro.

**Footnote 6:** Henry has not contested the authenticity of the Divorce Stipulation or divorce judgment submitted by Gallinaro.

**Footnote 7:** Gallinaro's argument, that Henry's transfer of the partnership interest to Madeline was a "terminating event" pursuant to the Partnership Agreement, was improperly raised for the first time in his reply to the Order to Show Cause. However, even if this argument were considered, it would be unavailing as Gallinaro ratified the transfer.

**Footnote 8:** Section 6.3 of the Partnership Agreement states:

*Restrictions on Authority of General Partners.*

Notwithstanding the preceding provisions of this Article VI or anything elsewhere contained in this Agreement, without in each instance receiving the prior written consent of the Limited Partners, the General Partners shall not have any authority to, and the General Partners covenant to and agree with the Limited Partners that they shall not:

...

(d) permit to sell, transfer, assign, pledge, hypothecate or otherwise encumber any of the proceeds from the Partnership.

**Footnote 9:** Section 20(3) of the Partnership Law states:

Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to:

...

(C) Do any other act which would make it impossible to carry on the ordinary business of the partnership.

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