

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 41

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LEONARD GARTNER

Plaintiff,

-against-

Index No.
150609-11

CARDIO VENTURES LLC

Defendant.
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September 30, 2013
60 Centre Street
New York, New York

BEFORE: HON. LAWRENCE K. MARKS
Supreme Court Justice

APPEARANCES:

Attorney for Plaintiff
SMITH VALLIERE PLLC
75 Rockefeller Plaza
New York, New York 10019
BY: Gregory Zimmer, Esq.

Attorney For Defendant
ALAN M SWIEDLER, P.C.
60 East Eighth Street
New York, NY 10003
BY: Alan M. Swiedler, Esq.

BECKMAN, LIEBERMAN & BARANDES LLP
111 John Street
New York, NY 10038
BY: Robert A. Buckley, Esq.

JACQUELINE GLASS
Senior Court Reporter

1 Proceedings

2 in -- excuse me, Mr. Zimmer for you to say and
3 point to me about that is absolutely
4 unprofessional because Mr. Gartner had an attorney
5 in Florida who is admitted in New York. It was
6 his responsibility to look at the New York statute
7 and he can't say he didn't understand it.

8 MR. ZIMMER: I'll let the record speak
9 for itself. I'm certainly not looking to impugn
10 Mr. Swiedler..

11 THE COURT: We will take a recess and I
12 will be back for a decision before the lunch hour
13 so stick around.

14 (Brief recess)

15 THE COURT: Okay. I have a decision
16 that I will now read for the record. Before the
17 court are motion sequence number 5, 6 and 7 all
18 for partial summary judgment. Defendant Cardio
19 Ventures is a New York LLC which provides physical
20 therapy services in New York. It's managing
21 member is defendant James Cardone who is a Florida
22 resident. Defendant Alan Swiedler a New York
23 resident is also a member of the company and its
24 attorneys. Plaintiffs Leonard Gartner and
25 defendant Andrienne Edelstein were divorced in
26 Florida in 2007 after nine years of marriage.

1 Proceedings

2 During the marriage Gartner purchased a 4.045
3 percent membership interest in Cardio. In an
4 amended final judgment of dissolution of marriage
5 dated November 3, 2010, the Florida 16th circuit
6 court found that Gartner's membership interest in
7 Cardio was a marital asset and it was divided
8 equally between Gartner and Edelstein. After the
9 amended final judgment ^{of} dissolution of marriage was
10 issued, ^the parties engaged in post judgment
11 mediation and on February 11, 2011, the parties
12 executed a written mediation settlement agreement
13 wherein Gartner and Edelstein voluntarily agreed
14 that the membership interest in Cardio was a
15 marital asset and was to be equally divided
16 between them. The agreement stated -- the
17 agreement states that if the Cardio shares could
18 not be transferred to Edelstein, ^{as} the parties agree *LM*
19 that they intend to, Edelstein shall receive the
20 net benefits of the Cardio transfer. By written
21 request dated March 25th, 2011, Gartner requested
22 that Cardio transfer one half of his membership
23 interest to Edelstein. In writing dated April
24 1st, 2011, the majority of the membership interest
25 approved the request. On October 4, 2012, Gartner
26 commenced the instant action. The gravamen of the

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complaint is that the membership interest was not

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transferable because the company did not have a

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valid operating agreement which provided for such

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transfer. Gartner relied on Section 4 of the

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subscription agreement that states that the

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subscriber agrees quote "not to transfer or assign

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this agreement or any interest herein," end quote

9

in that the subscriber agrees not, to sell, assigned,

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transfer or dispose of the membership interest

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acquired
~~required~~ unless such action complies with any *LM*

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applicable laws or is exempt from such laws.

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However, Section 4 by its terms only prohibits

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Gartner's unilateral disposal of his interest in

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the subscription agreement itself which is not at

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issue here. It explicitly contemplates disposal

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of the membership interest which is at issue here

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as long as such disposal **complies**
~~applies~~ with applicable *LM*

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laws. Moreover, Section 7(I) of the **Subscription**
~~State~~ *LM*

20

agreement states that any document representing

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the membership interest must bear **a legend**
~~alleging~~ stating *LM*

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that unauthorized transfers or assignments are

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voided ab initio. **Thus, t**
~~Does~~ the subscription agreement *LM*

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clearly contemplate **s** the possible sale or transfers *LM*

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of membership interests **s** and does not support *LM*

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Gartner's motion for summary judgment? There are

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some questions of fact as to whether the parties executed a valid operating agreement. Gartner **avers** ~~refers~~ that he never received a copy of an **LM** operating agreement and never signed one as required under the subscription agreement. However, this does not change the outcome here. The operating agreement clearly authorizes certain transfers of membership interests. But even if there is no valid operating agreement, New York's LLC law Section 603 provides for the transfer of membership interest. Therefore the transfer is permissible. This is clear even given the high standard for summary judgment motion. A party for summary judgment is required to make a prima facie showing that it is entitled to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact from the case. Wingrad versus New York University Medical Center 64 NY 2d 851. The party opposing the motion must demonstrate the existence of a factual issue requiring the **trial** ~~tryer~~ of the action, Zuckerman **LM** v City of New York 49 N.Y.2d 55⁷ at 562. **LM**

Accordingly, with regard to motion sequence number 5 by plaintiff Gartner, this motion is denied in part and granted in part. That portion

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2 that seeks declaration that the purported transfer
3 of part of his membership interest in Cardio to
4 Edelstein is null and void is denied. With regard
5 to that portion of the plaintiff's motion that
6 seeks dismissal ~~after~~^{of} Cardio's first counterclaim *Lm*
7 which seeks rescission of his subscription
8 agreement on the grounds that he failed to sign an
9 operating agreement, Gartner argues that this
10 claim is untimely. This portion of the motion is
11 granted and that counterclaim is dismissed. The
12 subscription agreement was signed by Gartner in
13 1999 ~~in~~^{and} the counterclaim asserted in 2011 is well *Lm*
14 beyond the six year statute of limitations set
15 forth in CPLR 213. Moreover, the counterclaim
16 ~~claims~~^{fails} to allege any fraud that might have tolled *Lm*
17 the limitations period.

18 With regard to motion sequence number 6
19 defendant Edelstein moves for partial summary
20 judgment. Again this motion is granted in part
21 and denied in part. That portion of the motion
22 that seeks summary judgment dismissing Gartner's
23 third cause of action which seeks a declaration
24 that the transfer of his interest in Cardio to
25 Edelstein is void is granted. Except as set forth
26 above the transfer is valid.

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2 Accordingly, Gartner's third cause of action
3 is dismissed. With regard to that portion of the
4 motion that seeks dismissal of Gartner's second
5 cause of action wherein Gartner seeks a
6 declaration that Cardio has no effective operating
7 agreement, the motion is denied. Although
8 Edelstein may prevail on this point, ultimately
9 the court is not able to state that she has met
10 the standard for summary judgment and that no
11 questions of fact remain. That portion of the
12 motion in which Edelstein seeks summary judgment
13 on her third counterclaim which seeks the net
14 benefits of the transfer of the cardio shares
15 pursuant to ^{the} settlement agreement in the event that *LM*
16 the shares cannot be transferred is denied as
17 moot, ^g Given that this court has determined that *LM*
18 the shares can be transferred. That portion of
19 this motion ~~of this motion~~ in which Edelstein *LM*
20 seeks summary judgment on her third and fourth
21 affirmative defenses which state respectively that
22 the complaint should be dismissed pursuant to the
23 full faith and credit clause and on the ground of
24 res judicata is also denied. ^{In t} This portion in her *LM*
25 motion Edelstein does not specify why each cause
26 of action should be dismissed, but rather makes

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 2: ~~general statement that these basis, makes~~ only the *LM*
 3 general statement that these are basis for
 4 dismissing the complaint. That is insufficient.

5 With regard to motion sequence number 7 by
 6 the Cardio defendants which include Cardio
 7 Ventures, Cardone and Swiedler, this motion is
 8 granted in part and denied in part. Cardio moves
 9 for summary judgment dismissing Gartner's first,
 10 second, third and fourth causes of action. Taking
 11 them in order Gartner's first cause of action
 12 seeks access to Cardio's books and financial
 13 information. Cardio's motion to dismiss this
 14 claim is granted. At this point discovery is
 15 complete and a note of issue was filed. Any
 16 information in these books or financial records
 17 could have been caught in the discovery process.

18: This claim is ^{now} ~~not~~ moot and the motion to dismiss *LM*
 19 is granted. Gartner's second cause of action
 20 seeks a declaration that cardio has no effective
 21 operating agreement. As ^{it was with} ~~is true from~~ Edelman's *LM*
 22 motion, this portion of Cardio's motion for summary
 23 judgment is denied. Gartner's third cause of
 24 action seeks a declaration that the transfer of
 25: Gartner's shares is invalid. ^{As it was} ~~That is true~~ with *LM*
 26: Edelman's motion, ^t This portion of Cardio's *LM*

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2 motion for summary judgment is granted and this
3 claim is dismissed. Gartner's fourth cause of
4 action is for negligent misrepresentation that
5 Cardio and the individual defendants falsely
6 represented to the Florida court that the shares
7 could be transferred. This portion of Cardio's
8 motion is granted. Given the court determination
9 that the transfer was valid, this cause of action
10 should be dismissed since it is premised on
11 Gartner's underlying assertion that the transfer
12 is not transferable under New York law. Cardio
13 also seeks summary judgment on its own fourth,
14 fifth, sixth and eleventh affirmative defenses.
15 The first three of these affirmative defenses are
16 for full faith and credit judicial notice and
17 collateral estoppel. This portion of the motion
18 is denied. Cardio asserts only generally that
19 this court must recognize and enforce the Florida
20 judgment and should not relitigate issues
21 originally litigated in Florida. However, Cardio
22 does not adequately specify which issues it refers
23 to or the manner in which it seeks enforcement of
24 the judgment. The central issue here is whether
25 the shares in Cardio can be transferred to
26 Edelstein which is an issue that the Florida court

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stated should^{be} decided in New York, and which has LM
been addressed in the instant motions. Cardio has
not set forth any additional grounds to support
these portions of its motion. Cardio also seeks
summary judgment on its 11th affirmative defense
third counterclaim and first cross claim. These
all arise from its concern that it will be exposed
to multiple liability with respect to the shares
of Cardio that are at issue between Gartner and
Edelstein. As such it seeks a determination of
those parties rights to such shares under CPLR
Section 1006. However, these concerns and claims
are ~~not~~^{now} moot in light of this court's LM
determination that the shares may be transferred
to Edelstein under New York law and in accordance
with the directive of the Florida matrimonial
court and the parties settlement agreement. As
such these portions of the motion are denied as
moot.

As for the request by both Edelstein and the
Cardio defendants for attorney's fees and costs
addressed today, that portion of their motion is
denied. However, the court notes that plaintiff's
counsel was among those who asserted to this court
that if the transfer issue is resolved the parties

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2 would be able to resolve the remaining issues.
3 Although the court is unwilling to state today
4 that plaintiff's litigation has reached the point
5 of being frivolous and for the purposes of
6 harassment, a claim for attorney's fees may be
7 appropriate if counsel continues down this path.
8 In that light, all counsel are again strongly
9 urged to make every effort to settle this action
10 and finally counsel are reminded that the next
11 conference in this case has been scheduled for
12 October 16th, 2013, at 11:30 A.M. Thank you.

13 MR. SWIEDLER: Thank you, your Honor.

14 MR. BUCKLEY: Thank you, your Honor.

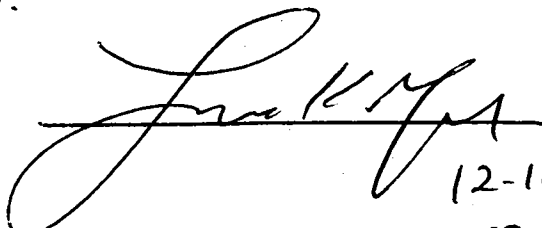
15 MR. ZIMMER: Thank you, your Honor.

16 Certified to be a true and accurate
17 transcript of the original stenographic
18 notes.

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JACQUELINE GLASS
SENIOR COURT REPORTER

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22 SO ORDERED:

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24 
25 12-16-13
26 HON. LAWRENCE K. MARKS