

SHORT FORM ORDER

ORIGINAL

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

HELEN WEBSTER,

INDEX No. 603009/15

Plaintiff,

MOTION DATE: Aug. 27, 2015
Motion Sequence # 002

-against-

FOREST HILLS CARE CENTER LLC,
FOREST HILLS ESTATE ASSOCIATES, LLC,
DVORA OSTREICHER and BENJAMIN LANDA,

Defendants.

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Support..... X
- Affirmation in Opposition..... X
- Reply Affirmation..... X

Motion by plaintiff Helen Webster for leave to reargue defendants' motion to dismiss the complaint is **granted**. Upon reargument, defendants' motion to dismiss based upon a defense founded upon documentary evidence and failure to state a cause of action is **denied**. Defendants' motion to dismiss based upon the statute of limitations is **granted** to the extent indicated below.

This is an action for unpaid distributions by a member of two related limited liability companies. Defendant Forest Hills Care Center LLC operates a nursing home located at 71-44 Yellowstone Boulevard, Forest Hills, Queens. Defendant Forest Hills Estate

WEBSTER v FOREST HILLS CARE CENTER LLC, et al Index no. 603009/15

Associates, LLC owns the real property upon which the nursing home is located. Plaintiff Helen Webster holds a 15 % membership interest in both limited liability companies. The operating agreements state that defendant Benjamin Landa is a 25 % member, and defendant Dvora Ostreicher is a 10 % member, of each company. The remaining 50 % of Forest Hills Care and Forest Hills Estate is held by non-parties Naomi Sherman, Josef Janklowics, Renee Pollak, Leonard Janklowicz, and Jack Janklowicz in the same per centages as to each company (Ex C to defendants' motion to dismiss the complaint at 6; Ex D to defendants' motion to dismiss the complaint at 27). Webster alleges that defendant Ostreicher is the manager of both Forest Hills Care and Forest Hills Estate.

Article 10.3 of the Operating Agreement for Forest Hills Care Center provides that "The Member will, from time to time, make distributions of distributable cash to the members and economic interest owners (Ex C to defendants' motion to dismiss the complaint). "Distributable cash" is defined as "the excess of cash income over cash outflows" (Article 1.1.9). Article 10.4 provides that "All distributions made pursuant to Article 10 will be made to the members and economic interest owners in proportion to their respective economic interests on the record date of such distributions. An "economic interest owner" is defined as the owner of an economic interest who is not a member (Art 1.1.11). Article 5.2 provides that "The requisite consent of the membership (affirmative consent of 55 %) is required [for]...making additional distributions of distributable cash...." The operating agreement of Forest Hills Estate has similar provisions governing distributions (Ex D to defendants' motion to dismiss the complaint).

Landa previously commenced an action against Webster in Supreme Court, Nassau County which was assigned to Justice Austin (Index No. 17269/04). That action was settled pursuant to a settlement agreement dated January 12, 2006. The settlement agreement provides in part that the "Forest Hills Nursing Home" owed a distribution to Webster of \$41,250.00 as of December 14, 2005. The settlement agreement provides that "all future and further distributions...made to any...member...shall be simultaneously paid proportionately to Webster, consistent with her percentage ownership." The settlement agreement provides that the Supreme Court, County of Nassau shall retain jurisdiction to determine any claims arising under the agreement.

This action was commenced on September 18, 2014 in Kings County. Webster alleges that she had not received the distributions from Forest Hills Care and Forest Hills Estate to which she is entitled, but the other members of the companies have received their distributions (Complaint ¶¶ 17-18; 33-34). In the first cause of action, Webster seeks an accounting with respect to Forest Hills Care Center. In the second cause of action, Webster

WEBSTER v FOREST HILLS CARE CENTER LLC, et al Index no. 603009/15

seeks an accounting with respect to Forest Hills Estate. In the third cause of action, Webster alleges that Landa has interfered with her rights under the operating agreements of Forest Hills Care and Forest Hills Estate. The fourth cause of action is against Landa for breach of the settlement agreement. The fifth cause of action is against Ostreicher for breach of the operating agreements of both companies by failing to make distributions to Webster. Webster seeks distributions from 2009 to the present.

Defendants moved to dismiss the complaint based on a defense founded upon documentary evidence, statute of limitations, and failure to state a cause of action. By order dated July 14, 2015, defendants' motion to dismiss the complaint was granted, without prejudice to plaintiff's commencing a proceeding for the judicial dissolution of Forest Hills Care Center LLC and Forest Hills Estate Associates, LLC in Supreme Court, Queens County. The court was reluctant to engage in a second piece-meal adjudication of plaintiff's request for distributions from Forest Hills Care Center and Forest Hills Estate, absent a dissolution or a buyout of her interest in the two companies (*Gramercy Equities Corp. v Dumont*, 72 NY2d 560,564-65 [1988]); *Mizrabi v Cohen*, 104 AD3d 917 [2d Dept 2013]). The court determined that the venue provision in the Limited Liability Company Law § 702, which requires that a proceeding for the judicial dissolution of a limited liability company should be brought in the judicial district in which the office of the company is located, should take precedence over the venue provision in the settlement agreement.

By notice of motion dated August 11, 2015, plaintiff moves for leave to reargue defendants' motion to dismiss the complaint. Plaintiff argues that the court may entertain her request for distributions without requiring dissolution of the limited liability companies.

As the managing member of Forest Hills Care and Forest Hills Estate, Ostreicher owes a fiduciary duty to plaintiff, who is a non-managing member (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). While payment of distributions is subject to the business judgment rule, the duty of good faith precludes "deliberately singling out" a minority member for "harmful treatment" (Id at 431; see also Limited Liability Company Law § 409). In support of her claim, plaintiff submits a letter dated December 4, 2013 from Boris Nisanov, the controller of Forest Hills Care Center. In the letter, the controller states that Forest Hills will be making a "partners distribution" of \$100,000 (Ex 1 to plaintiff's ex 3). Plaintiff alleges that she did not participate in this distribution. A non-managing member of a limited liability company may pursue such a breach of fiduciary duty claim without seeking dissolution of the company. Accordingly, leave to reargue is **granted**. Upon reargument, defendants' motion to dismiss based on a defense founded upon documentary evidence and failure to state a cause of action is **denied**.

WEBSTER v FOREST HILLS CARE CENTER LLC, et al Index no. 603009/15

New York Law does not provide a single statute of limitations for breach of fiduciary duty claims (*IDT Corp v Morgan Stanley*, 12 NY3d 132, 139 [2009]). Where the remedy sought is purely monetary, a three year statute of limitations applies (Id; CPLR 214[4]). Accordingly, upon reargument, defendants' motion to dismiss based upon the statute of limitations is **granted** to the extent of dismissing all claims for distributions which accrued prior to September 18, 2011.

A Preliminary Conference has been scheduled for December 10, 2015 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

So ordered.

Dated NOV 10 2015



J.S.C.

ENTERED
NOV 13 2015
NASSAU COUNTY
COUNTY CLERK'S OFFICE