

SHORT FORM ORDER

ORIGINAL

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

HELEN WEBSTER,TRIAL/IAS, PART 1
NASSAU COUNTY

Plaintiff,

INDEX No. 603009/15

MOTION DATE: Jan. 13, 2016
Motion Sequence # 003

-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
 Reply Affirmation..... X
 Memorandum of Law..... X

Motion by plaintiff Helen Webster for clarification or leave to reargue the court's order of January 13, 2016 is **granted**. Upon reargument, defendants' motion to dismiss the complaint is **granted** to the extent indicated below.

This is an action for unpaid distributions by a minority 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 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. 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.” “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.

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 in Kings County on September 18, 2014. Webster alleges that other members of the companies have received distributions, but she has not received the distributions from Forest Hills Care and Forest Hills Estate to which she is entitled (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 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 and a final accounting with respect to the affairs of the two companies (*Gramercy Equities Corp. v Dumont*, 72 NY2d 560, 564-65 [1988]); *Mizrahi 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 must be brought in the judicial district in which the office of the company is located, took precedence over the venue provision in the settlement agreement. By order dated November 10, 2015, the court, upon reargument, granted defendants' motion to dismiss based upon the statute of limitations only to the extent of dismissing all claims for distributions which accrued prior to September 18, 2011. While payment of distributions is subject to the business judgment rule, the fiduciary duty of good faith precludes "deliberately singling out a minority member for harmful treatment" (*Pokoik v Pokoik*, 115 AD3d 428, 431 [1st Dept 2014]); see also Limited Liability Company Law § 409). A non-managing member of a limited liability company may pursue a breach of fiduciary duty claim for unpaid distributions without seeking dissolution of the company.

By notice of motion dated December 18, 2015, plaintiff moves pursuant to CPLR 2221 for clarification of the court's November 10, 2015 order. Plaintiff argues that her claims for an accounting are governed by a six year statute of limitations. In opposition, defendants argue that plaintiff's claim for unpaid distributions is governed by a three year statute of limitations.

As the court noted in its original order, it is reluctant to engage in a piece-meal adjudication of plaintiff's request for distributions, absent dissolution and a final accounting with respect to both companies (*Gramercy Equities Corp. v Dumont*, 72 NY2d 560, 564-65). Plaintiff has clearly elected not to seek dissolution of Forest Hills Care Center or Forest Hills Estate Associates (Affirm of Floyd Grossman at ¶ 7). Having elected to forego dissolution, plaintiff is barred from seeking an accounting. Accordingly, defendants' motion to dismiss

is **granted** to the extent of dismissing the first and second causes of action for an accounting for failure to state a cause of action.

Similarly, plaintiff's claims for breach of the operating agreements and the settlement agreement may not be considered absent dissolution and winding up of the companies. Accordingly, defendants' motion to dismiss the complaint is **granted** to the extent of dismissing so much of the third, fourth, and fifth causes of action as asserts a claim for breach of contract.

However, the third and fifth causes of action may be read as asserting claims against defendants Ostreicher, Landa, Forest Hills Care, and Forest Hills Estate for breach of fiduciary duty by failing to pay distributions which were paid to other members. 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]). The relief which plaintiff seeks is purely monetary, since she has foregone dissolution and final accounting with respect to both companies.

Accordingly, plaintiff's motion for clarification is **granted** to the extent of reargument. Upon reargument, defendants' motion to dismiss the complaint is **granted** to the extent of dismissing all breach of fiduciary duty claims for distributions which accrued prior to September 18, 2011.

So ordered.

Dated FEB 02 2016


J.S.C.

ENTERED

FEB 04 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE