

Rosania v Gluck

2019 NY Slip Op 32087(U)

July 8, 2019

Supreme Court, New York County

Docket Number: 655331/2017

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

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ROBERT ROSANIA,

Plaintiff,

- v -

LAURENCE GLUCK, STELLAR SUTTON LLC, STELLAR
 BRUCKNER LLC, STELLAR 117 GARTH, LLC, STELLAR
 750 TUCKAHOE, LLC, STELLAR 330 EAST 54,
 LLC, STELLAR WEST 110 LLC, STELLAR MORRISON
 LLC, STELLAR KVI LLC, STELLAR STRONG ISLAND
 MEMBER LLC, STELLAR WEST 28 LLC, STELLAR PWV
 LLC, STELLAR JANEL MEMBER LLC, STELLAR ARIES
 INVESTOR LLC, BOULEVARD STORY LLC, STELLAR
 COURT PLAZA LLC, STELLAR UNDERCLIFF
 LLC, STELLAR 2020 LLC, JOHN DOES

Defendant.

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INDEX NO. 655331/2017

MOTION DATE 09/11/2018

MOTION SEQ. NO. 002

**DECISION + ORDER ON
 MOTION**

HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 57, 58, 59, 60, 61 were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

Defendant Laurence Gluck (“Gluck”) moves, pursuant to CPLR 3211 (a)(1), (2), (4), (7) and (10), to dismiss Plaintiff Robert Rosania’s (“Rosania”) amended verified complaint (“AVC”) as asserted against him.

Rosania filed the original verified complaint (“VC”) on August 11, 2017 seeking the dissolution of 17 Delaware limited liability companies (“the LLCs”) in which Rosania and Gluck hold financial interests (the LLCs with the three “John Doe” defendants are

hereby referred to as the “Nominal Defendants”).¹ Rosania claimed that dissolution of the Stellar LLCs pursuant to NY Limited Liability Company Law §§ 702 & 703 and 6 Del. C. §§ 18-802 & 18-803 was necessary because Gluck’s misconduct and “unfettered domination and control” over the Stellar LLCs has made their continued operation impracticable.

Gluck moved to dismiss the VC based on *Matter of Raharney Capital, LLC v Capital Stack LLC*, 138 AD3d 83 (1st Dept 2016). In *Raharney*, the First Department held that the courts of New York do not have subject matter jurisdiction to dissolve a foreign business entity. *Id.* at 85. In response, Rosania e-filed the AVC on December 22, 2017, asserting three causes of action. Although the AVC does not seek judicial dissolution *per se*, it seeks equitable relief associated with judicial dissolution.

In the first cause of action, Rosania asserts that Gluck owes him fiduciary duties, which he has allegedly breached through fraudulent and abusive conduct in the management of the Nominal Defendants. To remedy this breach, Rosania seeks a court order forcing either the sale of the assets owned by the Nominal Defendants or a buy-out of Rosania and Gluck’s respective interests in the Nominal Defendants. The second and third causes of action – the underlying bases for which are identical to the alleged conduct underlying the breach of fiduciary duty cause of action – seek a forced sale of the

¹ In the VC, at ¶ 28, Rosania asserts that the John Doe Defendants are single-purpose limited liability companies through which Rosania and Gluck, “directly or indirectly,” hold interests in three properties in the City of New York. Rosania also asserts that Gluck has refused his request to provide him copies of the John Doe Defendants’ operating agreements, and so he has been unable to learn their true names.

Nominal Defendants' assets and a forced buy-out of Rosania and Gluck's respective interests in the Nominal Defendants, respectively.

The remedies sought here – (1) the forced sale of the Nominal Defendants' assets and the distribution of proceeds and (2) the forced purchase and sale of one party's interests in the Nominal Defendants to the other party – are identical to the relief Rosania previously sought in the VC through judicial dissolution. *See* VC ¶¶ 132-33 and ¶¶ 137-39. The AVC is clearly an ill-disguised attempt to make an end-run around the rule expressed in *Raharney*. *See* September 5, 2018 hearing transcript at 8:4-13 and 9:13-17.

The Nominal Defendants are each single purpose entities, set up for the sole purpose of owning each Stellar investment property. *Id.* at 8:4-13. Granting Rosania an order to sell the assets of each LLC and to distribute the proceeds would be tantamount to ordering the dissolution of each LLC. *Id.* at 9:13-17. I cannot grant such relief because, as explained in *Raharney*, “judicial dissolution of a foreign [business entity] . . . can only be granted by the state that created it.” 138 AD3d at 88. *See generally* *Kassab v Kasab*, 137 AD3d 1138, 1141 (2d Dept 2016) (plaintiff “failed to allege any basis . . . to compel the sale of property owned by those entities in the absence of the dissolution of those entities”).

Although the forced buy-out relief Rosania seeks does not appear to present the same problem because it would not require dissolution of the LLCs, this remedy is not available here. *See* *Kassab v Kassab*, 2015 WL 11090346, * 2 (Sup Ct, Queens County 2015) (LLC member had no right to buyout where claim for dissolution dismissed and

LLC's operating agreement did not contain buyout provision); *see also Belardi-Ostroy, Ltd. v American List Counsel, Inc.*, 2016 NY Slip Op 30727 [U], 10 n.8 (Sup Ct, NY County 2016) ("the remedy of 'equitable buyout' is unavailable when [plaintiff] fails to state a claim for dissolution"), *citing, inter alia, Mizrahi v Cohen*, 104 AD3d 917, 920 (2d Dept 2013) ("in certain circumstances, a buyout may be an appropriate equitable remedy *upon the dissolution of an LLC*" (emphasis added)). Accordingly, Rosania's second and third causes of action are dismissed.

The breach of fiduciary cause of action, which seeks identical relief as the aforementioned causes of action, is also dismissed. While the allegations in the AVC may support relief in the form of damages, Rosania fails to seek this relief in the AVC. Accordingly, Rosania shall have leave to replead the breach of fiduciary cause of action to assert proper relief, *i.e.*, damages, for the reasons set forth on the record on September 5, 2018. Tr. 10:17-24.

In accordance with the foregoing, it is hereby

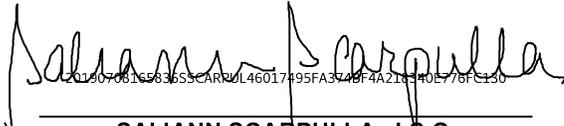
ORDERED that the defendant's motion to dismiss is granted and the complaint is dismissed; and it is further

ORDERED that plaintiff is granted leave to serve and file an amended complaint so as to replead the first cause of action for breach of fiduciary duty within twenty days of the date of this decision and order; and it is further

ORDERED that, in the event that plaintiff fails to serve and file an amended complaint in conformity herewith within such time, leave to replead shall be deemed denied, and the Clerk of the Court, upon service (60 Centre Street, Room 141B) of a copy of this order with notice of entry and an affirmation/affidavit by defendant's counsel attesting to such non-compliance, is directed to enter judgment dismissing the action, with prejudice; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/suptmanh).

This constitutes the decision and order of the Court.

<u>7/8/19</u> DATE			 SALIANN SCARPULLA, J.S.C.	
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE