

Weinstein v RAS Prop. Mgt. LLC

2020 NY Slip Op 31860(U)

June 15, 2020

Supreme Court, New York County

Docket Number: 653735/2019

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

LOIS WEINSTEIN,

Plaintiff,

- v -

RAS PROPERTY MANAGEMENT LLC, RITA SKLAR, RITA SKLAR, STEVEN MERO, NINETY-FIVE MADISON COMPANY LP

Defendant.

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INDEX NO. 653735/2019
MOTION DATE 02/07/2020
MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138

were read on this motion to/for DISMISS

Upon the foregoing documents and as set forth on the record (6/15/2020), (1) the respondents' motion to (i) dismiss the verified petition pursuant to CPLR § 3211(a)(1), (a)(3) and (a)(7) and (ii) for attorneys' fees is denied, and (2) the cross motion by the proposed substitute petitioners/preliminary executors of the Estate of Lois Weinstein (the Estate) for (i) leave to amend the petition pursuant to CPLR § 3025, (ii) summary judgment pursuant to CPLR § 3212, (iii) reargument of the court's order dated February 5, 2020 pursuant to CPLR § 2111, and (iv) for attorneys' fees is granted with respect to reargument and leave to amend only, and otherwise denied with leave to renew as set forth below

Relevant Factual Background

Reference is made to a certain Ninety-Five Madison Company Limited Partnership Agreement (the Partnership Agreement), dated June 1, 1982 (NYSCEF Doc. No. 14). Lois Weinstein, a

limited partner of Ninety-Five Madison Company LP (the **Partnership**), commenced this special proceeding against RAS Property Management LLC (**RAS**), Rita A. Sklar, individually and as trustee, and the Partnership, on June 26, 2019 seeking, among other things, judicial dissolution of the Partnership, the appointment of a receiver, and the sale of the Partnership's primary asset, a 16-story commercial building located at 95 Madison Avenue, New York, New York (the **Building**). In sum and substance, Ms. Weinstein alleged gross mismanagement and waste by RAS, the Partnership's general partner, and RAS's manager and limited partner Ms. Sklar, in the management of the Building, including, but not limited to, Ms. Sklar's refusal to lease out of most of the Building even though it cost more to operate than it generated in revenue, and Ms. Sklar's alleged theft of millions of dollars from Ms. Weinstein in order to prop-up the operation of the Partnership.

On November 25, 2019, Ms. Weinstein died (Death Certificate, NYSCEF Doc. No. 104) and the action was stayed by operation of law as a result (CPLR § 1015). Following her death, Carol E. Keller and Gail Shields were appointed as preliminary executors of Ms. Weinstein's estate pursuant to a Surrogate's Court Order dated December 31, 2019 and Preliminary Letters Testamentary of even date (NYSCEF Doc. No. 105). In motion seq. no. 005, counsel for the Estate moved to substitute Ms. Keller and Ms. Shields for Ms. Weinstein as petitioner and to amend the caption accordingly. In a decision and order (the **Prior Decision**) of the court dated February 5, 2019, the court denied the motion because the court understood the petition to seek solely derivative relief, explaining that:

Inasmuch as Ms. Weinstein's standing to bring this petition was based on her status as a partner in the Partnership, and the estate of Ms. Weinstein does not automatically become a successor partner under the terms of the Partnership Agreement (hereinafter defined) ...

the personal representatives lack standing to maintain this derivative action and, therefore, cannot be substituted.

(NYSCEF Doc. No. 116, p. 2).

The respondents now move to dismiss the verified petition with prejudice. The Estate cross-moves to reargue the Prior Decision, for leave to file an amended petition, and for summary judgment arguing that they should be permitted to pursue both the derivative and direct claims because RAS automatically ceased to be the general partner of the Partnership by operation of law on October 24, 2019 or, alternatively, on November 7, 2019, and, thus, the Partnership was dissolved by operation of law and in accordance with the Partnership Agreement on January 22, 2020, or, at latest, alternatively, on February 3, 2020. Both sides also seek legal fees and expenses on the basis that each of their respective motions is patently frivolous and without merit.

The instant motion and cross motion were fully briefed on February 18, 2020. On March 16, 2020, the Surrogate's Court (Mella, J.) signed an Order to Show Cause (the **Surrogate's Court OSC**) in a proceeding captioned *In the Matter of the Application of Rita Sklar to Remove Carol E. Keller and Gail Shield as Preliminary Executors of the Estate of Lois M. Weinstein, Deceased* (the **Surrogate's Court Action**; File No. 2019-4714), which included a temporary restraining order (the **TRO**) as follows:

ORDERED, that pending the return date of this Order, Gail Shields and Carol Keller, as Preliminary Executors, are restrained from:

Selling, transferring, encumbering, and/or otherwise disposing of the Building, located at 95 Madison Avenue, New York, NY, and from taking any action to dissolve Ninety-Five Madison Company LP.

(Surrogate's Court OSC, p. 5).

Argument on the OSC is scheduled for June 30, 2020.

DISCUSSION

I. The Cross Motion to Reargue

The court will first address that branch of the cross motion seeking reargument. The purpose of a motion to reargue is “to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law” (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]; CPLR § 2221[d][2]). Although the majority of the claims asserted in this action are, indeed, derivative claims (a fact which the respondents do not dispute), on the prior motion the court misapprehended the fact that in addition to the derivative claims, the verified petition also sought dissolution on behalf of Ms. Weinstein, *individually as a limited partner*. To wit, the caption in this action does *not* state that this is solely a derivative proceeding even if the majority of the claims in the verified petition belonged to the Partnership. Inasmuch as Ms. Weinstein, herself, had a property right in the Partnership, which right has now passed to her Estate, this is something that her Estate may pursue on her behalf.

In the event of the death of a limited partner, NY RLPA § 121-706 provides:

If a partner who is an individual dies . . . , the partner's executor, administrator, guardian, conservator or other legal representative may exercise all of the partner's rights for the purpose of settling his estate or administering his property, including any power under the partnership agreement of an assignee to become a limited partner. If a partner is a corporation, trust, or other entity and is dissolved or terminated, the powers of that partner may be exercised by its legal representative or successor.

Based on this provision, representatives of Ms. Weinstein's Estate may be substituted in this action to continue inasmuch as such substitution is necessary to "sett[e] [her] estate or administer[] [her] property" (*id.*). Accordingly, the motion to reargue is granted and, upon reargument, the court holds that Ms. Keller and Ms. Shields may be substituted to maintain Ms. Weinstein's direct claims only.

II. The Cross Motion to Amend

Under CPLR § 3025 leave to amend is to be freely given and denied only where such amendment causes prejudice or surprise to the non-moving party (*CIFG Assur. N. Am., Inc. v JP Morgan Sec. LLC*, 146 AD3d 60, 65 [1st Dept 2016]). There is plainly no surprise from the fact that an estate representative may be substituted for a party who has suddenly died in an as-yet-pending action. Nor is there any prejudice to the Respondents as the nature of Ms. Weinstein's direct claim does not alter with the substitution of the Estate, and as the Estate may not assert claims on behalf of the Partnership there is no prejudice to the respondents from the proposed amendment, which would allow the Estate's direct claim only. The cross motion to amend is, thus, granted. However, as the Proposed Amended Petition (NYSCEF Doc. No. 134) seeks to assert its claim for dissolution on behalf of the Estate and "on behalf of the Partners of Ninety-Five Madison Company LP," the Estate is directed to re-file the petition for dissolution on behalf of the Estate only because, as discussed in the Prior Decision, the Estate may not maintain derivative claims on behalf of the Partnership (NYSCEF Doc. No. 116).

III. The Cross Motion for Summary Judgment

The Estate also seeks summary judgment and argues that RAS ceased to be the general partner of the Partnership on either October 24, 2019 or November 7, 2019 by operation of law. New York Revised Limited Partnership Act (the **Partnership Law**) § 121-402, entitled “Events of Withdrawal of a General Partner” provides:

A person ceases to be a general partner of a limited partnership upon the happening of any of the following events:

* * *

(e) unless otherwise provided in the partnership agreement or approved by all partners, (i) *if within one hundred twenty days after the commencement of any proceeding against the general partner seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation, the proceeding has not been dismissed or stayed, or within ninety days after the expiration of any such stay, the proceeding has not been dismissed*, or (ii) if within ninety days after the appointment without his consent or acquiescence of a trustee, receiver, or liquidator of the general partner or of all or any substantial part of his properties, the appointment is not vacated or stayed, or within ninety days after the expiration of any such stay, the appointment is not vacated;

The Partnership Law defines “Event of withdrawal of a general partner” as “an event that causes a person to cease to be a general partner as provided in section 121-402 of this article”

(Partnership Law, § 121-101[d]). The 120th day after the commencement of this action was October 24, 2019 (i.e., counting from June 26, 2019). The Estate maintains that because the action against RAS as the general partner seeking dissolution was not dismissed or stayed during the 120-day period from June 26 to October 24, 2019, then RAS “withdrew” and ceased to be the general partner by operation of law.

Alternatively, the Respondents argue that even if RAS did not cease to be the general partner of the Partnership on October 24, 2019, RAS certainly ceased to be the General Partner on November 7, 2019 because Partnership Law § 212-402(e) also provides that a person ceases to

the general partner of a limited partnership “if within ninety days after the appointment without his consent or acquiescence of a trustee, receiver, or liquidator of the general partner or of all or any substantial part of his properties, the appointment is not vacated or stayed (Partnership Law, § 121-402[e][iii]). Here, a receiver was appointed in a related action (*Vitra, Inc. v Ninety-Five Madison Company, L.P.*, Index No. 652342/2017) on August 7, 2019 and the ninetieth day following such appointment is November 7, 2019 (NYSCEF Doc. Nos. 249, 250).

The Estate maintains that as RAS the General Partner withdrew from the Partnership on either October 24 or November 7, 2020, the Partnership was necessarily dissolved by operation of law and in accordance with the Partnership Agreement on either January 22 or February 3, 2020. Partnership Law § 121-801 provides that a limited partnership is dissolved and its affairs shall be wound up upon the happening of the first to occur of the following:

* * *

(b) at the time or upon the happening of events specified in the partnership agreement;

* * *

(d) unless the partnership agreement provides otherwise, if within ninety days after the withdrawal of the last general partner, not less than a majority in interest of the limited partners agree in writing to continue the business of the limited partnership and to the appointment, effective as of the date of the withdrawal, of one or more additional general partners if necessary or desired.

In addition, the Partnership Agreement expressly provides that the Partnership is dissolved upon the withdrawal of the General Partner unless the Limited Partners expressly elect to continue the Partnership as set forth therein (NYSCEF Doc. No. 14, §§ 9.1[b]; 8.5). The Estate contends that as RAS withdrew as general partner by operation of law on either October 24 or November 7,

2019, the Partnership necessarily dissolved on January 22 or February 3, 2020, i.e., 90 days from the date of withdrawal of the general partner. There is no dispute here that an election to continue the business under Section 8.5 of the Partnership Agreement has not been made.

Therefore, the Estate argues that since the limited partners failed to elect to continue the business of the Partnership and to appoint a new general partner, the Partnership was dissolved on the 90th day following RAS's withdrawal as general partner.

The Respondents do not dispute any of the foregoing and instead simply argue that they should not have to "oppose a vexatious cross-motion" because the cross-movants do not have standing.

Inasmuch as the Surrogate's Court OSC imposed a TRO preventing Ms. Shields and Ms. Keller, as representatives of the Estate, from "[s]elling, transferring, encumbering, and/or otherwise disposing of the Building, located at 95 Madison Avenue, New York, NY, *and from taking any action to dissolve Ninety-Five Madison Company LP*" pending the return date of the OSC, this court will not rule on the Estate's motion seeking an order adjudging the Partnership dissolved and appointing a receiver to sell the Building while the TRO remains in place (Surrogate's Court OSC, p. 5 [emphasis added]). However, the Estate may renew its application once the temporary restraint is lifted by Surrogate's Court.

V. Respondents' Motion to Dismiss

The respondents' motion seeks dismissal on the basis that this is a derivative action only and as the Estate cannot be substituted as a limited partner in place of the petitioner, the verified petition must be dismissed. However, as the court now holds that the verified petition alleged a claim for

dissolution on behalf of Ms. Weinstein in addition to the derivative claims, this argument is simply unavailing. Accordingly, the motion to dismiss is denied.

VI. Attorneys' Fees

Both sides move for legal fees and costs in bringing their respective motions. Both requests are denied.

Accordingly, it is

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that the cross motion to reargue is granted, and upon reargument the court finds that Carol E. Keller and Gail Shields as preliminary executors of the Estate of Lois Weinstein may be substituted for the petitioner in this proceeding as set forth herein, and it is further

ORDERED that the cross for leave to amend is granted and the Estate is directed to serve its amended petition within 20 days of this decision and order; and it is further

ORDERED that Ms. Shields and Ms. Keller, as executors of the estate of Lois Weinstein, deceased, be substituted as petitioner in the above-entitled action in the place and stead of the petitioner Lois Weinstein, without prejudice to any proceedings heretofore had herein; and it is further

ORDERED that all papers, pleadings, and proceedings in the above-entitled action be amended by substituting the name of Carol E. Keller and Gail Shields, as preliminary executors of the estate of Lois Weinstein, deceased, as petitioner in the place and stead of said decedent, without prejudice to the proceedings heretofore had herein; and it is further

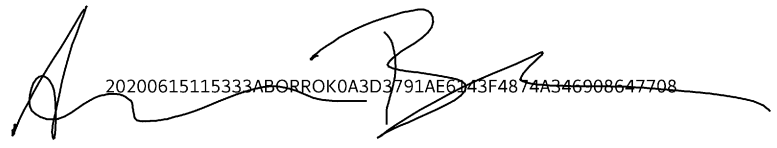
ORDERED that counsel for petitioner shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office 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/supctmanh).

ORDERED that the cross motion for summary judgment is denied without prejudice; and it is further

ORDERED that both branches of the motion and cross motion seeking summary judgment are denied, and it is further

ORDERED that the parties appear for a status conference in Part 53 by Skype Business on July 22, 2020 at 11:30 am.



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6/15/2020

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE