

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

JAHANSHIR MARTIN GHATANI, individually
and on behalf of AGH REALTY, LLC,

INDEX No. 4774/10

Plaintiffs,

MOTION DATE: Nov. 6, 2013
Motion Sequence # 004

-against-

MOD

AGH REALTY, LLC, BAHMAN AZIZ and
KHOSROW HAKIMIAN,

Defendants.

The following papers read on this motion:

Order to Show Cause..... X
Affirmation in Opposition..... X
Reply Affirmation..... X

Motion by plaintiff Jahanshir Martin Ghatani for leave to reargue defendant Khosrow Hakimian's motion for a declaratory judgment that he holds a 50 % interest in AGH Realty, LLC is **granted**. Upon reargument, defendant Hakimian's motion for a declaratory judgment that he holds a 50 % interest in AGH Realty is **denied**.

This action arises from a dispute as between the members of AGH Realty, LLC, a limited liability company. Plaintiff Jahanshir Martin Ghatani and defendant Khosrow Hakimian are the present owners of the company.

On March 20, 2006, Ghatani, Hakimian, and defendant Bahman Aziz entered into a

joint venture agreement. The purpose of the joint venture was to acquire two vacant lots, 87 and 89 Newport Street in Brooklyn, and to improve the properties. The joint venture agreement provides in paragraph 5 that the three parties would share profits and losses equally. However, Aziz was to contribute only \$130,000, while Ghatani and Hakimian were each to contribute \$340,000 to the venture. Ghatani alleges that Aziz was permitted to contribute less cash because he was to serve as the general contractor. The parties agreed that the expenses for the project would be funded by a construction loan, for which the parties were to be equally liable. The parties subsequently obtained a \$1,320,000 building loan to improve the property.

Paragraph 9 of the joint venture agreement provides that no "partner" shall transfer his interest in the partnership except to one of the other "venturers." Paragraph 9 further provides, if a venturer was declared a bankrupt or became insolvent, the other venturers had the right to buy out his interest at "liquidating," or book, value.

Later in 2006, the parties formed a limited liability company, AGH Realty, LLC. AGH's operating agreement dated April 10, 2006 provides that profits and losses shall be allocated among the members as provided in paragraph 5 of the joint venture agreement. Thus, according to the operating agreement, the parties each held a 1/3 membership interest in AGH Realty. The operating agreement further provides that no member shall transfer his interest except to one of the other members, as set forth in the joint venture agreement.

After AGH Realty took title to the two lots in Brooklyn, the parties built five two-family houses on the property. However, rather than selling the homes, AGH leased them to rent subsidized tenants.

The action was commenced on March 12, 2010. Plaintiff Ghatani alleges that Aziz misappropriated the proceeds of the construction loan and used the money to pay personal credit card bills. Plaintiff further alleges that Aziz and Hakimian paid themselves salaries or management fees in violation of the terms of the joint venture agreement. Plaintiff asserts claims for breach of a joint venture agreement, breach of AGH's operating agreement, breach of fiduciary duty, and an accounting. In his sixth cause of action, plaintiff requests an order directing that the properties be sold. In the seventh cause of action, plaintiff requests dissolution of AGH Realty, LLC, and in the eighth cause of action plaintiff requests the appointment of a receiver. In the ninth cause of action, plaintiff requested reformation of the operating agreement to reduce Aziz' equity interest from 1/3 of AGH Realty to his proportionate share of the paid in capital. Plaintiff alleges that Aziz was not entitled to a 1/3 equity interest because his promised construction work was not performed.

On May 3, 2010, defendants Aziz and Hakimian filed a joint answer. In their answer, they asserted a counterclaim against Ghatani for breach of fiduciary duty, alleging that he collected brokerage commissions and rent without rendering an accounting. Defendants also asserted counterclaims for conversion, fraud, defamation, injunctive relief, and an accounting.

On November 2, 2010, Aziz filed a Chapter 7 petition with the Bankruptcy Court. On December 10, 2010, Ghatani and Hakimian served notice on Aziz that they intended to purchase his interest in AGH Realty at liquidating value, in view of his bankruptcy proceeding. On December 23, 2010, Ghatani served the notice of intent to purchase on Marc Pergament, Aziz' bankruptcy trustee.

On March 16, 2011, Meltzer, Lippe, Goldstein & Breitstone, who were then counsel for Ghatani, wrote to the bankruptcy trustee, offering to purchase Aziz' interest from the bankruptcy estate for \$5,000. Meltzer Lippe's letter suggests that, despite the pendency of this action, they were acting on behalf of both Ghatani and Hakimian (Ex D to plaintiff's ex A). After the trustee rejected that offer, Ghatani, on June 10, 2011, increased his offer to \$12,000. In the June 10 letter, counsel for Ghatani represented to the trustee that Ghatani and Hakimian each held 42 % interests in AGH Realty, and Aziz held a 16 % interest in the limited liability company (Ex G to plaintiff's ex A). Presumably, Ghatani was still acting on behalf of himself and Hakimian at that time. On July 11, 2011, Meltzer Lippe, now purporting to represent both Ghatani and Hakimian, increased their offer to \$25,000 (Ex H to plaintiff's ex A).

On July 27, 2011, Pergament, as Aziz' bankruptcy trustee, entered into an asset sale and purchase agreement with Hamdam Hakimi. The agreement provided that Hakimi would purchase Aziz' assets, including his interest in AGH Realty, for \$20,000 (Ex I to plaintiff's ex A).

On September 6, 2011, Ghatani served objection in the Bankruptcy Court to the trustee's proposed sale of Aziz' interest in AGH Realty for \$20,000. Ghatani argued, among other things, that the proposed sale violated transfer restrictions in AGH's operating agreement and that, based upon Aziz' \$130,000 contribution, he owned only 16 % of the company. By order dated September 14, 2011, the Bankruptcy Court overruled Ghatani's objections and authorized the trustee to sell Aziz' assets for \$32,000 within 14 days, or \$30,000 if the closing did not occur by that date.

Meanwhile, on August 31, 2011, counsel for Ghatani wrote to counsel for Hakimian stating that Ghatani intended to purchase Aziz' interest on his own behalf (Ex J to plaintiff's ex A). On the same date, counsel for Hakimian wrote to counsel for Ghatani insisting that Ghatani purchase Aziz' interest on behalf of both members of the company. Ghatani purchased Aziz' interest from the trustee for \$32,000. Hakimian continues to maintain that Ghatani purchased Aziz' interest on behalf of both members of the limited liability company.

By order dated February 4, 2013, the court granted defendant Hakimian's motion for a declaratory judgment that he holds a 50 % membership interest in AGH Realty. In opposition, plaintiff Ghatani argued that, having purchased Aziz' interest in his own behalf, he now holds a 2/3 interest in the company.

In finding that Ghatani and Hakimian each held a 50 % membership interest, the court reasoned that the purchase of Aziz' interest was a corporate opportunity, which plaintiff Ghatani acquired from the bankruptcy trustee on behalf of the limited liability company (*Alexander & Alexander v Fritzen*, 147 AD2d 241, 247 [1st Dept 1989]). Nevertheless, the court determined that Ghatani was to receive credit for Hakimian's \$16,000 share of the purchase price upon a final accounting between the parties.

Plaintiff Ghatani moves for leave to reargue Hakimian's motion for a declaratory judgment that he holds a 50 % membership interest. Ghatani argues that Hakimian may not obtain declaratory relief because he never asserted a counterclaim requesting the court to determine his membership interest in the LLC. However, in his seventh cause of action, Ghatani requested dissolution of AGH Realty. Upon dissolution and winding up of the LLC's affairs, the court may issue a declaratory judgment stating the respective membership interests of the parties (CPLR § 3001).

Ghatani next argues that this court lacks jurisdiction over the present dispute because the Bankruptcy Court retained jurisdiction. In its September 14, 2011 order, approving the sale of Aziz' assets, including his interest in AGH Realty and three other companies, the Bankruptcy Court retained jurisdiction to resolve any dispute arising under the Asset Sale and Purchase Agreement (Ex M to plaintiff's ex A). However, that agreement was between the Bankruptcy Trustee and the purchaser, Hamdam Kakimi. In its order, the Bankruptcy Court did not purport to assert jurisdiction over a dispute as to whether some other purchaser acquired the assets in a corporate or individual capacity.

Ghatani's obligation to purchase Aziz' interest in AGH Realty on behalf of himself and Hakimian is dependent upon a fiduciary relationship between Ghatani and the other limited liability company member. A fiduciary relationship ceases when parties become adversaries in litigation (*Carr v Neilson*, 77 AD3d 877 [2d Dept 2010]). Once Ghatani commenced an action against Hakimian in March 2010, charging him with breach of fiduciary duty and requesting dissolution of AGH Realty, the parties became adversaries for the duration of the litigation.

It is unclear why Meltzer Lippe did not disclose the pending dissolution proceeding to the trustee and why the firm purported to act on behalf of LLC members who were adversaries in litigation. Perhaps counsel chose to present a "united front" to the bankruptcy trustee for fear that the trustee would demand a higher price for Aziz's interest if he knew that dissolution of AGH Realty would obviate the restrictions on transfer contained in the operating agreement. Nevertheless, because the dissolution proceeding was still pending, Ghatani's fiduciary duty ceased, and he was free to purchase Aziz's interest in AGH Realty from the bankruptcy trustee in his own capacity.

While Ghatani now holds Aziz' interest in AGH in his own right, it does not follow that Ghatani holds a 2/3 interest in the company. As noted, Ghatani represented to the bankruptcy trustee that Aziz held a 16 % interest. Thus, if Ghatani is held to that representation, he holds a 58 % interest in the company. Nevertheless, that interest may be adjusted upward or downwards, if Hakimian or Ghatani breached his fiduciary duty to the company (Cf. Business Corporation Law § 1118[b]).

Plaintiff Ghatani's motion for leave to reargue defendant Hakimian's motion for a declaratory judgment that he holds a 50 % interest in AGH Realty, LLC is **granted**. Upon reargument, defendant Hakimian's motion for a declaratory judgment that he holds a 50 % interest in AGH Realty is **denied**. The parties' respective interests in the AGH Realty will be determined upon a date to be set by the court.

So ordered.

Dated

2 December 13

ENTERED

DEC 03 2013

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Stephen A. Bucaria
J.S.C.