

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: Dec. 14, 2012
Motion Sequence # 003

-against-

AGH REALTY, LLC, BAHMAN AZIZ and
KHOSROW HAKIMIAN,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Affirmation in Opposition..... X
Affirmation in Support..... X
Affirmation in Further Support..... X

Motion by defendant Khosrow Hakimian for a declaratory judgment that he holds a 50 % interest in AGH Realty, LLC is **granted**. Defendant's application for the appointment of temporary receiver is **denied**.

This is a derivative action for waste of the assets 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 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. Nevertheless, the parties agreed that the expenses for the project would be funded by a construction loan, the proceeds of which were apparently used to return their capital investment.

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 began to operate as a limited liability company, AGH Realty, LLC. AGH’s operating agreement provides that capital contributions shall be as provided in the joint venture agreement. 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 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 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, and breach of fiduciary obligation.

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.

Ghatani and Hakimian subsequently offered to purchase Aziz’ interest from the bankruptcy trustee for \$5,000. However, the trustee estimated that the value of the property

was \$2.2 million and the mortgage was \$1.2 million. Thus, in the trustee's view, Aziz' interest was worth considerably more than Ghatani and Hakimian's \$5,000 offer. Ghatani and Hakimian increased their offer to \$25,000 on July 11, 2011.

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.

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. 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.

By order dated January 3, 2012, the court denied plaintiff Ghatani's motion for a preliminary injunction, ordering defendant Hakimian to comply with the terms of the operating agreement. The court determined that plaintiff had an adequate remedy at law and that injunctive relief might infringe upon Hakimian's managerial discretion as a member of the limited liability company (*Marx v Akers*, 88 NY2d 189 [1996]).

By notice of motion dated February 24, 2012, defendant Hakimian moves for a declaratory judgment that he holds a 50 % membership interest in AGH Realty. Hakimian also seeks the appointment of a temporary receiver for the property. In opposition, plaintiff Ghatani argues that he holds a 2/3 interest pursuant to the bankruptcy court's order.

Where a corporation has an interest or "tangible expectancy" in a property or business venture, it is a "corporate opportunity" which may not be diverted by an individual officer or director (*Alexander & Alexander v Fritzen*, 147 AD2d 241, 247 [1st Dept 1989]). A corporate opportunity must be more than a hope or a desire, but is much less tenable than an

