SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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BERNICE HARRIS AND, ALLISON HARRIS SCHIFINI INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF, TJ MONTANA ENTERPRISES, LLC,

Plaintiff,

- v -

BETSY HARRIS A-K-A BETSY SAVAGE, TAMARA HARRIS INDIVIDUALLY AND AS PRELIMINARY EXECUTOR OF THE, ANDREW LICHTENSTEIN, TJ MONTANA ENTERPRISES, LLC

Defendant.

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INDEX NO. 656962/2017

MOTION DATE 04/07/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 103, 105, 109

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

I. INTRODUCTION

In this declaratory judgment action to determine ownership of a 19.35% share of a company, TJ Montana Enterprises, LLC, following the death of one of its owners, Steven Harris (Steven), the plaintiffs Bernice Harris (Bernice) and Allison Harris Schifini (Allison) move, prior to the commencement of discovery, for summary judgment on their first cause of action seeking a declaration that, pursuant to the company's operating agreement, Steven's 19.35% ownership interest transferred to his wife Bernice following his death. The defendants, Betsy Harris a/k/a Betsy Savage (Betsy) and Tamara Harris (Tamara), oppose the motion, and cross-move for summary judgment on their first counterclaim seeking a declaration that, pursuant to Steven's will and assignment, the 19.35% ownership interest transferred to them. The defendants also cross-move pursuant to CPLR 3211 (a) (3) and (7) to dismiss the complaint as against them, and for sanctions. The plaintiffs' motion for summary judgment is denied. The branch of the defendants' cross-motion seeking summary judgment is denied. The branch of the cross-motion seeking to dismiss the complaint is granted in part. The branch of the motion seeking sanctions is denied.

II. BACKGROUND

TJ Montana Enterprises LLC was formed by Steven and defendant Andrew Lichtenstein (Lichtenstein) in 1994. The company holds title to the building located at 82 East 3rd Street in Manhattan. At the time the company was formed, Steven owned 50% of the company. After transfers between him and his daughter Allison, Steven retained a 19.35% interest in the company at the time of his death on April 28, 2017.

Following Steven's death, Betsy and Tamara, in a related action before this court Harris v Lichtenstein, Index No. 154155/2017, brought an action to enjoin all TJ Montana assets, which they claimed were being improperly dissipated to reduce the value of their alleged ownership interest. The action was predicated on a will and assignment by Steven wherein he transferred his 19.35% interest in the company to Betsy for the remainder of her life and then to Tamara. The will and assignment were offered in the action Estate of Steven Harris, Bronx County Surrogate Court, File No. 2017-1035. The plaintiffs maintain that the will and assignment are invalid and are contesting the will and assignment in the Surrogate Court Action.

The plaintiffs further maintain that, even were the will to be found valid, Steven could not have transferred his ownership interest in the company under the company's operating agreement. On December 19, 1994, Steven and Lichtenstein entered into a Limited Liability Partnership Agreement, referred to by the parties as the company's operating agreement. The agreement sets forth the order of succession for each member's interest, with Steven's order of succession stating that Bernice was to receive his membership interest. The agreement further states that "Bernice Harris shall have a power of attorney to sign on behalf of Steven Harris if he is away, sick or disabled or in the event of his death she shall accede to his interest in the [company]" and that "[u]pon death, Bernice Harris shall accede to Steven Harris' full interest thereunder." However, the operating agreement also contains significant handwritten modifications and marginalia, including portions of which are illegible. The agreement also has a sentence written in above the signature lines which states "[t]his agreement shall be retyped and redrawn and prepared in a proper and final fashion containing the text and substance of this agreement which shall be incorporated into the formal agreement at a later time."

Following Betsy and Tamara's motion to enjoin the company's assets in the related action, the plaintiffs brought this action, seeking a determination that under the operating agreement, Steven's interest transferred to Bernice, irrespective of any transfers to the contrary

made in the will and assignment. Betsy and Tamara oppose, arguing that Steven was free to revoke his transfer to Bernice and transfer his share in the company by will or assignment.

III. DISCUSSION

A. Summary Judgment Standard

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). However, if the initial burden is not met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013); O'Halloran v City of New York, 78 AD3d 939 (1st Dept. 2010). This is because "'summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d 480, 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

B. Motion and Cross-Motion for Summary Judgment

In support of their motion for summary judgment, the plaintiffs submit, *inter alia*, the affidavit of the plaintiffs' attorney, Jules Epstein, and the affidavit of Lichtenstein, both of which had copies of the operating agreement annexed. These submissions fail to establish a *prima facie* showing of entitlement to judgment as a matter of law. Of the two copies of the operating agreement submitted by the plaintiffs, the one attached to the Lichtenstein affidavit has additional handwritten text at the top of the first page and initialing on the first three pages, raising an issue of fact as to whether there are multiple versions of the operating agreement. Moreover, both documents have significant handwritten modifications and marginalia, including portions of which that are illegible, and a sentence written above Steven and Lichtenstein's signatures which states "[t]his agreement shall be retyped and redrawn and prepared in a proper and final fashion containing the text and substance of this agreement which shall be incorporated into the formal agreement at a later time." This further raises issues of fact as to whether a formalized agreement between Steven and Lichtenstein exists and whether the operating agreement is enforceable. See Joseph Martin, Jr. Delicatessen, Inc. v Schumacher,

52 NY2d 105 (1981) ("Mere agreement to agree, in which material term is left for future negotiations is unenforceable.").

Furthermore, assuming arguendo that one of the submitted agreements was the operative agreement at the time of Steven's death, there would still be a triable issue of fact as to whether it irrevocably conveys Steven's membership to Bernice, such that Steven's subsequent will and assignment transferring his membership interest are void. It is well established that because a testator has the right to freely revoke a will until death, an agreement not to revoke a prior will, or an agreement irrevocably making a testamentary bequest, "demands the most indisputable evidence of...agreement" and must "unequivocally renounce [the] testator's right to execute a will making other disposition of [the] property." Am. Comm. For Weizmann Inst, Of Sci, v Dunn, 10 NY3d 82, 92 (2008) *quoting* Edson v Parsons, 155 NY 555, 558 (1898); see also Hamlin v Stevens, 177 NY 39, 48 (1903) (contracts to make testamentary bequests should only be enforced "when they have been established by evidence so strong and clear as to leave no doubt."). Although the operating agreements submitted do contemplate Bernice Harris acceding to Steven's rights and ownership interests in the company, the plaintiff fails to point to any language where Steven clearly and unambiguously renounces his future power of testamentary disposition such that summary judgment would be proper.

As there are triable issues of fact regarding what was the operating agreement at the time of Steven's death and whether there was another operating agreement retyped or rewritten as contemplated, irrevocably making a testamentary bequest to Bernice, the defendants cross-motion seeking a declaration that Steven's ownership interest transferred to them is also denied. Moreover, to the extent that the defendants rely on Steven's will and assignment in support of their cross-motion, the court notes that the validity of both the will and assignment are being disputed by the plaintiffs in a related action before the Bronx Surrogate Court, File No. 2017-1035. Therefore, whereas here, it appears that the facts essential to oppose a motion for summary judgment "exist but cannot then be stated" (CPLR 3212[f]), a court may deny the motion. See Schlichting v Elliquence Realty, LLC, 116 AD3d 689 (2nd Dept. 2014); Wesolowski v St. Francis Hospital, 108 AD3d 525 (2nd Dept. 2013). "This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion." Wesolowski v St. Francis Hospital, supra at 526 [internal quotation marks omitted]; see Belziti v Langford, 105 AD3d 649 (1st Dept. 2013); Blech v West Park Presbyterian Church, 97 AD3d 443 (1st Dept. 2012).

C. Cross-Motion to Dismiss

The defendants' cross-motion to dismiss the complaint is granted in part. The defendants argue that the first cause of action for a declaratory judgment should be denied pursuant to CPLR 3211(a) (3) to the extent that Allison does not have standing to assert that her mother, Bernice, is the proper owner of Steven's membership interest. The defendants also seek to dismiss the second, third, fourth, and fifth causes of action for impermissibly mixing individual and derivative claims.

A plaintiff has standing when they have a sufficiently cognizable stake in the outcome of a matter so as to "cast the dispute in a form traditionally capable of judicial resolution." Community Bd. 7 of Borough of Manhattan v Schaffer, 84 NY2d 148, 154 (1994) (internal marks omitted). The concept of standing "is, at its foundation, aimed at advancing the judiciary's self-imposed policy of restraint, which precludes the issuance of advisory opinions." Id. at 155. As a general rule, before a plaintiff has standing, they must show injury in fact, that the injury is fairly traceable to the defendant's allegedly unlawful conduct, and they are likely to be redressed by their requested relief. See Silver v Pataki, 96 NY2d 532 (2001); People ex rel. Spitzer v Grasso, 54 AD3d 180 (1st Dept. 2008).

Here, Allison demonstrates a sufficiently cognizable stake in the outcome of this matter. The operating agreement that Allison is looking to enforce states that "upon the death of Bernice and Steven Harris, Allison shall accede as heiress to all that right, title and interest that her father and mother had in succession." As such, were the defendants to be found to be the proper owner of Steven's interest in the company, Allison would lose her right to inherit the ownership interest from Bernice under the operating agreement.

The plaintiff's remaining four causes of action for conversion and unjust enrichment relating to various funds allegedly diverted from the company are dismissed pursuant to CPLR 3211(a) (7). The defendants are correct in asserting that said causes of action should be denied as they improperly mix individual and derivative claims. Allegations of mismanagement or diversion of corporate assets generally plead a wrong to the corporation and should be pleaded as derivative claims. See Abrams v Donati, 66 NY2d 951 (1985). A shareholder or member of a limited liability company may not assert an individual cause of action to recover for the company's losses although that person thereby loses the value of his or her investment. See id.; Glenn Hoteltron Sys. Inc., 74 NY2d 386 (1989). Here, the second through the fifth causes of

action all seek judgement "in favor of Plaintiff Allison Harris Schifini, individually and derivatively" demonstrating an impermissible mixing of individual and derivative claims.

D. Sanctions

Inasmuch as the defendants move for sanctions arguing that the plaintiff has engaged in frivolous conduct, 22 NYCRR 130-1.1(a) provides, in relevant part, that the court, "in its discretion, may award…costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct...[or] may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct." Frivolous conduct includes conduct that is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law, is undertaken primarily to harass or maliciously injure another, or asserts material factual statements that are false. See 22 NYCRR 130-1.1(c). "In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of…the party." Id. Upon applying this standard, the court concludes that the conduct of the plaintiffs does not merit the imposition of sanctions.

IV. CONCLUSION

Both the plaintiffs' motion and the defendants' cross-motion for summary judgment are denied as there are questions of fact regarding whether the operating agreement provided by the plaintiffs was the operative agreement at the time of Steven Harris' death and whether the will and assignment relied upon by the defendants are valid. The defendants' cross-motion to dismiss is granted to the extent that the second through fifth causes of action are dismissed for impermissibly mixing individual and derivative claims. The defendants' cross-motion for sanctions is denied.

Accordingly, it is,

ORDERED that the motion of the plaintiffs, Bernice Harris and Allison Harris Schifini, for summary judgment on their first cause of action is denied; and it is further,

ORDERED that the branch of the cross-motion of the defendants, Betsy Harris a/k/a Betsy Savage and Tamara Harris, for summary judgment on their first counterclaim is denied; and it is further,

ORDERED that the branch of the cross-motion of the defendants Betsy Harris a/k/a Betsy Savage and Tamara Harris seeking to dismiss the second, third, fourth, and fifth causes of action in the complaint is granted; and it is further,

ORDERED that the branch of the cross-motion seeking sanctions is denied; and it is further,

ORDERED that the parties shall appear for a status conference on August 20, 2020 at 3:00 p.m.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

4/23/2020
DATE

NANCY M. BANNON, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE