To Be Argued By:
SCOTT T. HORN
Time Requested: 15 Minutes

New York Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT

GIL ZOHAR,

Plaintiff-Respondent-Appellant,

—against—

ALLEN L. LAROCK, DARIO PEREZ and ZOHAR, LAROCK & PEREZ, LLP,

Defendants-Appellants-Respondents.

DOCKET NOS.
2016-11211
2017-05391
2017-07932

BRIEF FOR PLAINTIFF-RESPONDENT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

PRELIMINARY STATEMENT

In this action, *inter alia*, for a partnership accounting, Defendants, Allen L. LaRock ["LaRock"], Dario Perez ["Perez"] and Zohar, LaRock & Perez, LLP [collectively "Defendants"] have appealed from an Order of the Supreme Court, Nassau County (Bucaria, J.) ["Motion Court"], dated June 16, 2016 ["June 16, 2016 Order"], which, *inter alia*, [i] denied Defendants' motion to vacate a January 11, 2016 discovery order, [ii] *sua sponte* vacated a November 15, 2016 Order, which, *inter alia*, had determined that Plaintiff was a 25% partner on the dissolution date, [iii] determined that Plaintiff was a 15% partner on the dissolution date, [iv] re-affirmed that portion of the November 15, 2016 Order which determined that Plaintiff is entitled to an accounting; and [v] delineated how the Motion Court intended to conduct the accounting (A3-7).[1]

In addition, Defendants have appealed from an Order of the same Court, dated July 25, 2016 ["Corrected Order"], which, *inter alia*, corrected the June 16, 2016 Order so as to require Defendants – instead of Plaintiff – to produce certain retainer agreements for certain cases handled by the dissolved law firm (A16-20).[2]

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[1] By Decision & Order On Motion, dated April 27, 2018, Plaintiff's motion to dismiss the appeal from the June 16, 2016 Order was "held in abeyance and referred to the panel of Justices hearing the appeals and cross appeal for determination upon the argument or submission thereof * * *."

[2] Defendants, as limited by their Appellants' Brief, have not challenged this aspect of the Corrected Order.

Defendants have also appealed from an Order of the same Court, dated March 28, 2017 ["Reargument Order"], which, *inter alia*, denied Defendants' motion to reargue the June 16, 2016 Order.[3]

[3] Defendants, as limited by their Appellants' Brief, have not challenged any aspect of the Reargument Order.

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Motion Court properly re-affirmed that portion of the November 15, 2016 Order which determined that Plaintiff is entitled to an accounting and delineated how it intended to conduct the accounting?

> The Motion Court correctly held that Plaintiff is entitled to an accounting, which it defined as: "i) 15% of the net attorney fees generated by open cases which settled after [the Dissolution Date], ii) 25% of the net fees of any cases which had settled as of [the Dissolution Date] but as to which the settlement proceeds had not been received, iii) 25% of the net book value of the firm's fixed assets, including the security deposit under the lease, iv) 50% of the balance in the firm's operating account as of August 1, 2005, and v) $4,750 return of capital" (A6).

COUNTERSTATEMENT OF FACTS

A. BACKGROUND

1. Parties

Prior to August 2005, Plaintiff and Defendant-LaRock had operated a personal-injury firm law as a limited partnership, known as Zohar & LaRock, LLP (A128).

2. The Limited Partnership Agreement

On August 1, 2005, the parties entered into a limited partnership agreement [the "Agreement"], admitting Defendant-Perez as an equal partner without a capital contribution (A129). The parties subsequently changed the name of the limited partnership to Defendant, Zohar, LaRock & Perez, LLP ["Firm"] (A129).

The Agreement contained conflicting provisions which were to apply if: [1] a partner left the Firm and the Firm continued operating; and [2] the Firm dissolved (A66, 78-83, 114-116).

For example, Article 3 of the Agreement provides for numerous instances where a partner leaves the partnership and the firm continues to operate [i.e., retirement, disability, death, voluntary withdrawal, and expulsion] (A78-83).[4] In

[4] The provision for Voluntary Withdrawal requires 60 days written notice to the Firm (A81). The provision for Expulsion provides that an expulsion "for cause" may be effectuated immediately, whereas as an expulsion "without cause" must be voted on "at a duly constituted meeting" of the partners (A83).

each instance, the departing partner is paid a "Buy-Out Price" in contemplation of the Firm continuing to operate (A78-83). In all such cases, the "Buy-Out Price" is paid out in installments, once again in contemplation of the firm continuing to operate (A83-84).

Significantly, while the term "Buy-Out Price" is defined in the Agreement, it is defined in a manner which applies only to withdrawal by death, disability, and/or retirement (A66). The Agreement defines "Buy-Out Price" as follows (A66):

> "Buy-Out-Price" means, with respect to a Partner who had died, has become disabled (as defined in paragraph 3.05(b)) or retires at or after his or her Normal Retirement Age, the product of (a) the Company's Net Book Value as of the last day of the month in which his death, disability or retirement occurred and (b) such Partner's Sharing Ration as of such date.

As such, by definition, the "Buy-Out-Price" only applies "with respect to a Partner who has died, has become disabled * * * or retires at or after his or her Normal Retirement Age * * * [emphasis supplied]" (A66).[5]

Separate and apart from the situation where a partner departs and the partnership continues to operate, Article 12 of the Agreement, entitled "DISSOLUTION, LIQUIDATION, AND TERMINATION," governs the dissolution of the partnership (a114). Since this provision contemplates the

[5] In addition, the Agreement provides that Plaintiff and Defendant-LaRock were to each receive 50% of the balance in the operating account as of August 1, 2005 (A81-82).

cessation of the partnership, it does not make reference to the aforementioned "Buy-Out-Price" (A114116). Instead, Article 12 requires that the parties "proceed diligently to wind up the affairs of the Company and make final distributions as provided herein and in the [New York State Partnership Law]" (A115).[6]

3. The Modification Of The Agreement

On August 24, 2009, the parties modified the Agreement so that Plaintiff became a 25% partner and LaRock and Perez each became 37.5 % partners (A131).

4. The Deterioration Of The Relationship Between The Partners

In or about 2009, the relationship between Plaintiff and Defendant-LaRock deteriorated (A129). At that time, Defendant-LaRock commenced efforts to exercise complete dominion and control over the affairs of the Firm, displayed disrespect for Plaintiff in the presence of their employees, and became aggressive towards Plaintiff (A129).

In addition, Defendant-LaRock began to compel Plaintiff to assume direct responsibility for cases previously controlled by others and to perform most of the financial and administrative responsibilities required for the Firm (A130). Plaintiff

[6] Since by all accounts the Firm was operated as a limited liability partnership, it appears that the Agreement's reference to the "New York Liability Company Law" was a typographical error (A63).

thereupon announced his intention to serve notice of withdrawal pursuant to 3.06 of the Agreement (A130).

In response, and before Plaintiff had the opportunity to issue sixty (60) day written notice of his intention to withdraw, Defendant-LaRock and Defendant-Perez called a partnership meeting and, on July 29, 2010, purported to reduce Plaintiff's partnership interest from 25% to 15% (A131).

On or about August 3, 2010 ["Dissolution Date"], Plaintiff notified Defendants that he rejected their efforts to reduce his interest, and he withdrew from the Firm (A341).

B. THE LITIGATION

1. The Pleadings

By Summons and Verified Complaint, By Summons and Verified Complaint, dated August 4, 2010, Plaintiff commenced the within action asserting claims for: [1] breach of the Agreement based upon Defendants' failure to pay him the buyout price provided for in the Agreement; and [2] an accounting pursuant to New York State Partnership Law (A125-140).

By Verified Answer, dated April 13, 2011 Defendants joined issue (A4, A141-149). Significantly, in their Answer, Defendants specifically stated that "[e]ffective August 6, 2010, [the Firm] dissolved" (A141).

The Note of Issue was filed on October 24, 2014 (A5, A11).

2. The Motion Court Orders An Accounting

By Order dated May 7, 2015 [the "May 7, 2015 Order"], the Motion Court dismissed the Complaint and Defendants' counterclaims, finding that the $49,750 which Plaintiff withdrew from the Firm's account upon his withdrawal from the Firm represented his "buyout price" and the return of Plaintiff's capital (A42-43). (A41). Significantly, in rendering this determination, the Motion Court determined that Defendants' attempt to reduce Plaintiff's partnership interest from 25% to 15% was invalid (A43).

By Notice of Motion dated June 29, 2015, Plaintiff moved to reargue (A165). Defendants' cross-moved, arguing that in the event Plaintiff's motion to reargue was granted, the Motion Court should revisit its determination that the reduction of Plaintiff's partnership interest to 15% was invalid (A165).

By Order dated November 16, 2015, the Motion Court granted reargument and, upon reargument, granted the summary judgment motions of both parties to the extent of ordering an accounting (A44-46).[7]

[7] Defendants' appeal from the November 16, 2015 Order is pending before this Court under AD Docket Nos.: 2015-07849 and 2016-00418.

3. The Motion Court Orders The Discovery Necessary to Conduct the Accounting

By Order dated January 11, 2016 ["January 11, 2016 Discovery Order"], the Motion Court ordered the parties to conduct post-note of issue discovery as to the assets, liabilities, income and expenses of Defendant Zohar, LaRock & Perez, LLP for the period of August 1, 2005 through July 31, 2010 (A5, 47).

C. THE FIRST ORDER APPEALED FROM

1. Plaintiff's Motion To Compel Discovery

By Notice of Motion dated March 22, 2016, Plaintiff moved to enforce the January 11, 2016 Discovery Order by compelling discovery of retainer statements, closing statements, escrow account statements, operating account statements and documents relating to the Firm's security deposit with its landlord (A29).

In support, Plaintiff stressed that "[a] full accounting cannot be achieved absent production of the Firm's records establishing its assets, including the contingency fee cases that were its assets at the time of the partnership dissolution, and the fees and expenses (i.e., liabilities) for each of the cases reflected in the closing Statements filed with OCA and the other partnership records maintained by the defendants" (A40). Since Defendants had failed to comply with the Motion Court's January 11, 2016 Order Discovery Order, which required production of discovery as to the assets, liabilities, income and expenses of the Firm, Plaintiff asserted that its motion to compel should be granted (A40).

2. Defendants' Cross-Motion

By Notice of Cross-Motion dated May 23, 2016, Defendants, *inter alia*, moved to vacate the Motion Court's January 11, 2016 Discovery Order (A48).

In support, Defendants contended that since there was no discovery conducted before the note of issue was filed, "there is no basis to provide discovery now" (A51). Defendants further asserted that since they have a meritorious appeal pending concerning the Motion Court's November 16, 105 Order ordering the accounting, any and all discovery proceedings should be stayed (A51).

3. The June 16, 2016 Order

By Decision and Order, dated June 16, 2016, the Motion Court, *inter alia*, [i] granted Plaintiff's motion to compel discovery; [ii] denied Defendants' motion to vacate the January 11, 2016 Discovery Order and/or stay discovery proceedings; [iii] *sua sponte* vacated the November 15, 2016 Order, which, *inter alia*, had determined that Plaintiff was a 25% partner on the dissolution date; [iv] determined that Plaintiff was a 15% partner on the dissolution date, "subject to his retention of a 25% interest in vested rights;" and [v] specified the manner in which Plaintiff's interest in the former partnership was to be calculated (A3-7).

In so holding, the Motion Court directed Defendants to produce the closing statements for the 179 cases which settled after August 3, 2010, as well as the

retainer agreements for all cases wherein the attorney fee was shared with other counsel (A7).

In addition, the Motion Court directed that the accounting of Plaintiff's interest in the firm as of the Dissolution Date, would proceed in the following manner (A6):

- 15% of the net attorney fees generated by open cases which settled after the Dissolution Date;
- 25% of the net fees of any cases which had settled as of the Dissolution date but as to which the settlement proceeds had not been received by the Firm;
- 25% of the net book value of the firm's fixed assets, including the security deposit under the lease;
- 50% of the balance in the firm's operating account as of August 1, 2005; and,
- $4,750 return of capital.

The Motion Court further directed that upon the accounting Defendants are to receive credit for: [1] amounts which Plaintiff had withdrawn from the Firm's accounts prior to the date the action was commenced; and [2] 15% of any extraordinary expenses which the Firm incurred within 60 days of Plaintiff's withdrawal on the Dissolution Date (A6).

D. THE SECOND ORDER APPEALED FROM

By Order dated July 25, 2016 ["Corrected Order"], the Motion Court, *inter alia*, corrected the June 16, 2016 Order so as to require Defendants – not Plaintiff – to produce certain retainer agreements for certain cases (A16-20).

E. THE THIRD ORDER APPEALED FROM

By Notice of Motion dated November 23, 2016, Defendants moved to reargue the June 16, 2016 Order (A21).

In support, Defendants contended that the Motion Court had misapprehended the fact that Plaintiff was not entitled to an accounting, ostensibly because the partnership was not automatically dissolved under the terms of the Partnership Agreement (A24-26). In the alternative, Defendants contended that the June 16, 2016 Order "failed to appreciate" that the Partnership Agreement did not provide for an accounting which incorporates the guideline established by the Motion Court in the June 16, 2016 Order (A27).

In opposition, Plaintiff stressed that regardless of the whether the Partnership Agreement mandated the dissolution of the partnership upon Plaintiff's withdrawal, the fact is that the partnership did dissolve and Defendants "have repeatedly admitted that [the Law Firm] was dissolved" as of August 3, 2010

(A196). Of course, Plaintiff further stressed, upon the dissolution of a partnership a partner is entitled to an accounting (A204).[8]

By Decision and Order dated March 28, 2017, the Motion Court denied Defendants' motion for leave to reargue, and it granted Plaintiff's cross-motion for a discovery sanction against Defendants, directing that Defendants were precluded from offering evidence as to the attorney fee earned in the 16 cases for which Defendants failed to provide closing statements, unless Defendants produced such closing statements within five (5) days of service of a copy of the order (A10-13).[9]

[8] In addition, Plaintiff cross-moved for discovery sanctions against Defendants on the grounds that they had failed to comply with the Motion Court's January 11, 2016 Discovery Order and the subsequent June 16, 2016 Order denying Defendants' request to stay discovery proceedings (A207-208).

[9] By Decision & Order On Motion, dated April 27, 2018, Plaintiff's motion to dismiss the appeal from the March 28, 2017 Order was "held in abeyance and referred to the panel of Justices hearing the appeals and cross appeal for determination upon the argument or submission thereof * * *."

LEGAL ARGUMENT

POINT I
THE MOTION COURT PROPERLY DETERMINED THAT PLAINTIFF IS ENTITLED TO AN ACCOUNTING WHICH ACCOUNTS FOR HIS INTEREST IN THE DISSOLVED PARTNERSHIP

Defendants contend that they are entitled to an accounting for the reasons set forth in their briefing on the appeals pending under AD Docket Nos.: 2015-07849 and 2016-00418 (see, Appellants' Br. at p. 15).

Likewise, for the reasons set forth in Plaintiff-Respondent's Brief, filed with this Court in connection with those earlier appeals, it is clear that Plaintiff is entitled to an accounting based upon, *inter alia*, the acknowledged dissolution of the parties' former partnership (see, Brief for Plaintiff-Respondent, dated June 1, 2016, at pp. 18-24).[10]

Indeed, it is axiomatic under New York law that upon the dissolution of a partnership, a partner is entitled to an accounting (see, Arrants v. Dell Angelo, 73 AD2d 633 [2d Dept., 1979]).

[10] The Court may take judicial notice of the record and briefs filed with the Court in the other pending appeals in this case (see, Allen v. Strough, 301 AD2d 11, 18 [2d Dept., 2002]).

Here, the dissolution of the partnership is unequivocally established and admitted in Defendants' Answer, wherein Defendants stated that "[e]ffective August 6, 2010, [the Firm] dissolved" (A141).

POINT II

THE MOTION COURT'S STATEMENT AS TO HOW IT INTENDS TO CONDUCT THE ACCOUNTING CONSTITUTES NONAPPEALABLE *DICTA* AND, IN ANY EVENT, WAS PROPER UNDER THE CIRCUMSTANCES

In Point II of their Appellants' Brief, Defendants contend that even if Plaintiff is entitled to an accounting (which he certainly is), the Motion Court erred in signaling the manner in which it intended to conduct the accounting (see, Appellants' Br. at pp. 16-20).

It is respectfully submitted that this contention is without merit.

A. THE MOTION COURT'S *SUA SPONTE* STATEMENT REGARDING ITS FUTURE INTENTIONS IN CONDUCTING THE ACCOUNTING IS NOT APPEALABLE

Initially, it should be noted that the portion of the June 16, 2016 Order which *sua sponte* vacated the prior Order of November 16, 2015 Order, before then proceeding to re-affirm its prior determination to order an accounting, is not appealable by Defendants.

The Motion Court's *sua sponte* determination to vacate and re-affirm its earlier decision to order an accounting did not decide any aspect of any motion made on notice (see, CPLR 5701[a][2]), nor does it involve "some part of the merits" (CPLR 5701[a][2][iv]) or "affect[] a substantial right" (CPLR 5701[a][2][v]).

Furthermore, to the extent the Motion Court proceeded to *sua sponte* delineate the manner in which it intended to conduct the future accounting, this also did not decide any aspect of any motion made on notice (see, CPLR 5701[a][2]), nor does it involve "some part of the merits" (CPLR 5701[a][2][iv]) or "affect[] a substantial right" (CPLR 5701[a][2][v]).

At bottom, the Motion Court's *sua sponte* statement of future intent in this regard does not have any immediate effect on any party (see, Finkelstein v. Lincoln Nat. Corp., 107 AD3d 759 [2d Dept., 2013] – "A person is aggrieved when he or she asks for relief but that relief is denied in whole or in part [and] when someone asks for relief against him or her, which the person opposes, and the relief is granted in whole or in part [citation omitted]").

Accordingly, that portion of Defendants' appeal which challenges the Motion Court's *sua sponte* statement of future intent regarding this accounting proceeding should be dismissed.

B. THE MOTION COURT PROPERLY OUTLINED THE MANNER IN WHICH THE ACCOUNTING WOULD BE CONDUCTED DURING THE COURSE OF FUTURE PROCEEDINGS

After *sua sponte* re-affirming its prior determination to order an accounting, the Motion Court went on to state that the accounting of Plaintiff's interest in the Firm would consist of: "i) 15% of the net attorney fees generated by open cases which settled after [the Dissolution Date], ii) 25% of the net fees of any cases

which had settled as of [the Dissolution Date] but as to which the settlement proceeds had not been received, iii) 25% of the net book value of the firm's fixed assets, including the security deposit under the lease, iv) 50% of the balance in the firm's operating account as of August 1, 2005, and v) $4,750 return of capital" (A6).

On appeal, Defendants contend that this was error because the Motion Court did not apply a Partnership Agreement provision [i.e., Article 3] ostensibly limiting Plaintiff to a "Buy-Out-Price," as such term is defined in the Partnership Agreement (see, Appellants' Br. at pp. 17-19). However, Defendants' contention in this regard is misplaced for several reasons.

First, contrary to Defendants' contention (see, Appellants' Br. at p. 18), the "Buy-Out-Price" provision plainly does not apply to the facts of this case. That is, by definition, the "Buy-Out-Price" only applies "with respect to a Partner who has died, has become disabled * * * or retires at or after his or her Normal Retirement Age * * *" (A66).

Here, Plaintiff was forced to immediately withdraw from the partnership because of Defendants' oppressive conduct, at which point Defendants-Larock and

Perez opted to immediately dissolve the partnership (A141).[11] This scenario simply does not fit within the definition of "Buy-Out-Price," as provided in the parties' Agreement. Stated otherwise, since Plaintiff did not die, become disabled, or retire, the Motion Court correctly eschewed applying the "Buy-Out-Price" in this case.

Critically, this litigation does not concern merely "buying out" a departing partner in the situation where the partnership continues to operate, as contemplated in Article 3 (A77-83). Having admittedly acted to dissolve the partnership rather than continuing to operate it (A141), Defendants have waived any right to continue the partnership in accordance with Article 3 and they are estopped from invoking its proviso in an effort to limit Plaintiff's remedies in this proceeding (see, Poole v. West 111th Street Rehab Associates, 121 AD3d 571 [1st Dept., 2014] – "by continuing the business of the partnership after one general partner died in 1997, and after another dies in 1998, the limited partners waived the dissolution provision, and they are estopped from invoking it now;" see also, Matter of Birnbaum v. Birnbaum, 157 AD2d 177 [4th Dept., 1990]).

[11] The dissolution of the partnership is unequivocally established and admitted in Defendants' Answer, wherein Defendants stated that "[e]ffective August 6, 2010, [the Firm] dissolved" (A141).

Rather than implicating the situation where the partnership continues following the departure of a partner, the within litigation concerns an accounting for a partner's share in the assets of a dissolved partnership. Contrary to Defendants' contention, Article 3 of the parties' agreement does not provide for any accounting of the dissolved partnership assets, it did not define how any such accounting should be conducted, and it did not cover the situation presented at bar.

The provision which governs the dissolution of the partnership is Article 12, which specifically requires that the parties "proceed diligently to wind up the affairs of the Company and make final distributions as provided herein and in the [New York State Partnership Law]" (A115). However, it is clear that Defendants, having opted to dissolve the partnership nearly eight years ago, thereupon failed to liquidate the partnership in accordance with Article 12. Accordingly, Defendants have waived any right to liquidate the partnership in accordance with Article 12 and they are estopped from invoking its proviso in an effort to limit Plaintiff's remedies in this proceeding (see, Poole v. West 111th Street Rehab Associates, 121 AD3d 571, supra; Matter of Birnbaum v. Birnbaum, 157 AD2d 177, supra).

Presented with Defendants' failure to liquidate the Firm's assets in accordance with Article 12, the Motion Court properly established a rubric for the accounting which ensures that Plaintiff's interest in the dissolved partnership will be accounted for in accordance with the Partnership Law.

To the extent that Defendants argue that Article 3 of the Agreement should apply here (see, Appellants' Br. at p. 18), the facts plainly demonstrate otherwise. That is, Defendants admit that they dissolved the partnership immediately upon Plaintiff's forced withdrawal, rather than carry on its business. In any event, neither side to this controversy has established that either an expulsion occurred within the meaning of Article 3 (A82), or that a voluntarily withdrawal had been effectuated on 60-days' notice in accordance with the terms of Article 3 (A81).

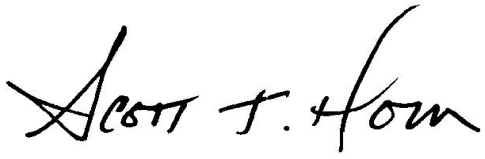
Accordingly, the Motion Court correctly eschewed application of Article 3 to the facts of this case. The process mapped out by the Motion Court will properly account for Plaintiff's share of the assets in this dissolved partnership in accordance with the Partnership Law.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the order appealed from be affirmed, with costs and disbursements and such further relief as the Court deems just under the circumstances.

Dated: New York, New York
May 29, 2018

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

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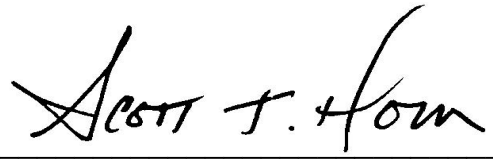

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