TO BE ARGUED BY:
LAWRENCE B. GOODMAN, ESQ.
TIME REQUESTED: 15 MINUTES

Supreme Court of the State of New York
Appellate Division:Second Department

GIL ZOHAR,

Plaintiff-Respondent,

-against-

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

Defendants-Appellants.

Appellate Division Docket No. 2015-07849 2016-00418

BRIEF FOR DEFENDANTS-APPELLANTS

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Supreme Court, Nassau County, Index No. 14826/2010

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

GIL ZOHAR,	:	
Plaintiff-Respondent,	:	Index No. 14826/10
- against -	:	
ALLEN L. LAROCK, DARIO PEREZ, ZOHAR, LAROCK & PEREZ, LLP,	:	
Defendants-Appellants.	:	

STATEMENT PURSUANT TO CPLR 5531

1. The index number of this action is 14826/10.

2. The names of the original parties are set forth in the above caption. There has been no change in the parties.

3. This action was commenced in the Supreme Court, Nassau County.

4. This action was commenced on or about August 4, 2010 by filing a summons with notice. Plaintiff served a complaint on or about December 2, 2011. Defendants served their answer on or about April 11, 2012.

5. Plaintiff commenced this action for breach of a limited partnership agreement and for an accounting.

6. Defendants' appeal is from (i) so much of the order of the Supreme Court, Nassau County (Bucaria, J.), dated May 7, 2015, as concluded that an amendment of the limited partnership agreement which reduced plaintiff's interest in the partnership to 15% was invalid; and (ii) so much of the order of the same court and justice, dated November 16, 2015, as granted plaintiff's motion for leave to reargue the order dated May 7, 2015 as dismissed the complaint, and upon reargument, (a) ordered an accounting; and (b) adhered to the Court's determination

in its order dated May 7, 2015 that the amendment of the limited partnership agreement which reduced plaintiff's interest in the partnership to 15% was invalid.

7. This appeal is on the full record.

TABLE OF CONTENTS

Page

BRIEF OF DEFENDANTS-APPELLANTS

PRELIMINARY STATEMENT

Defendants-appellants respectfully submit this brief in support of their appeal from (i) so much of the order (R. 3-5)[1] of the Supreme Court, Nassau County (Bucaria, J.), dated May 7, 2015, as concluded that an amendment of the limited partnership agreement which reduced plaintiff's interest in the partnership to 15% was invalid; and (ii) so much of the order of the same court and justice, dated November 16, 2015 (R. 7-9), as granted plaintiff's motion for leave to reargue the order dated May 7, 2015 as dismissed the complaint, and upon reargument, (a) ordered an accounting; and (b) adhered to the Court's determination in its order dated May 7, 2015 that the amendment of the limited partnership agreement which reduced plaintiff's interest in the partnership to 15% was invalid.

[1] References to "R.___" are to the pages of the Record on Appeal.

ISSUES PRESENTED FOR REVIEW

(1) Whether plaintiff is entitled to an accounting where neither party sought a judicial dissolution of the partnership, and the limited partnership agreement provides that the partnership is not dissolved by the withdrawal of a partner and a partner who leaves the partnership is entitled to a buy out price, and not an accounting?

In its order dated November 16, 2015 (R. 7-9), the Supreme Court, inter alia, granted the motion by plaintiff for leave to reargue the order dated May 7, 2015 as dismissed the complaint, and upon reargument ordered an accounting.

(2) Whether section 15.01 of the limited partnership agreement (R. 84), which provides that the limited partnership "may be amended or modified from time to time only by a written instrument executed and agreed to by Partners holding 66% of the outstanding Points", authorized defendants LaRock and Perez, as holders of a combined 75% of the outstanding points in the partnership, to reduce the plaintiff's partnership interest from 25% to 15% ?

In its order dated May 7, 2015 (R. 3-5), the Supreme Court concluded that "[t]he purported July 29, 2010 amendment of the limited partnership agreement, attempting to reduce Zohar's interest to 15% was invalid because it was not consented to by plaintiff."

In its order dated November 16, 2015 (R. 7-9) granting defendants and plaintiff leave to reargue the order dated May 7, 2015, the Supreme Court, Nassau County (Bucaria, J.) adhered to the Court's prior determination that the amendment of the limited partnership agreement which reduced plaintiff's interest in the partnership to 15% was invalid.

STATEMENT OF FACTS

Background

Plaintiff and defendant LaRock were partners in Zohar & LaRock, a law firm (R. 3, 7-8).

Pursuant to a limited partnership agreement dated August 1, 2005 (the "Partnership Agreement") (R. 27-88) , the plaintiff and defendant LaRock agreed that defendant Perez would become a partner and that plaintiff, Zohar and Perez would each own a one-third (33.33%) interest in the new firm of Zohar, LaRock & Perez, LLP (R. 3-4, 8, 13, 30, 38, 222).

The Partnership Agreement

Insofar as is pertinent to this appeal, paragraph 3.06 of the Partnership Agreement (R. 45) provides that a partner may voluntarily withdraw from the limited partnership upon 60 days written notice. If a partner withdraws prior to normal retirement age and without disability, he shall be paid the buyout price, defined as the partner's net book value (R. 45).

Pursuant to paragraph 3.08 (R. 46-47), if a partner is expelled for cause by the other partners, the expelled partner is still entitled to the buyout price (R. 46).

Section 12.01 of the Partnership Agreement (R. 78-79), which

governs dissolution, provides in pertinent part:

> 12.01 Dissolution. The company shall dissolve and its affairs shall be wound up upon the first to occur of the following:
>
> (a) the written consent of a Required Interest;
>
> (b) the expiration of the period fixed for the duration of the Company set forth in the Partnership Agreement; or
>
> (c) the entry of a decree of judicial dissolution of the Company.
>
> The Company shall not be dissolved upon the . . . resignation . . of a Partner; provided, however, that such event will cause a dissolution if it occurs at a time when the Company has only one other Partner, unless within ninety (90) days after such event, the remaining partner agrees to continue the business of the Company either (i) with a new Partner admitted to the Company (R. 78-79).

Section 15.01 of the Partnership Agreement (R. 84), entitled "Amendment or Modification", expressly provides that "[t]he Articles and this Agreement may be amended or modified from time to time only by a written instrument executed and agreed to by Partners holding 66% of the outstanding Points."[2]

[2] Section 7.01 (b)(1) of the Partnership Agreement similarly provides that an "Amendment to this Agreement must be approved by Members having sixty-six percent (66%) of all outstanding Points" (R. 65).

The Initial Reduction of
Plaintiff's Partnership Interest

Pursuant to a written amendment dated August 24, 2009 (R. 89-90), the Partnership Agreement was modified to reflect that defendants LaRock and Perez would thereafter own a 37.5% interest or "points" in the partnership and that Zohar would own 25%.

The Further Reduction of
Plaintiff's Partnership Interest

After notice was given to all parties, a partnership meeting was held on July 29, 2010 at which defendants LaRock and Perez, the holders of a combined 75% interest in the partnership, elected to reduce plaintiff's partnership interest from 25% to 15% (R. 91-93) and increase defendants LaRock and Perez's partnership interest to 42.5% each (R. 92).

During the meeting, defendants LaRock and Perez gave plaintiff several reasons for the reduction of his partnership interest, including plaintiff's failure to bring in new business for over a year, his failure to perform numerous fundamental tasks on the firm's files such as making necessary motions and preparing cases for trial; his failure to timely file two cases, rendering them time-barred; and his failure to properly complete a client's no-fault application, which resulted in the firm being substituted by another attorney (R. 216-218).

Defendant Perez also brought up plaintiff's improper socializing after hours with the firm's female staff and his inappropriate and unwanted sexual advances on Mr. Perez's 20 year old niece, an intern at the firm (R. 217-218).

Plaintiff's Withdrawal From the Partnership

On or about August 3, 2010, five days after the partnership meeting at which plaintiff's interest therein had been reduced to 15%, plaintiff left the partnership without providing any prior notice to defendants (R. 14, 152). At that time, plaintiff unilaterally withdrew a total of $49,750.00 from the firm's corporate accounts without defendants' knowledge, permission or consent ($45,000.00 representing plaintiff's liquidated 25% interest in the firm's assets and $4,750.00 representing return of plaintiff's capital contribution to the firm) (R. 4-5, 8, 14, 205, 214-215). Plaintiff also wrote checks to both defendants for their purported share of the balance of the money left in the operating account (R. 213). Plaintiff did not return to the firm (R. 153).

The Instant Action

On or about August 4, 2010, plaintiff commenced the instant action by filing a summons with notice (R. 94-95) to recover for "[b]reach of a Partnership Agreement and for an accounting" (R. 95). At no time prior to commencement of the action did plaintiff request an accounting of the firm's

assets.

Nearly one year and a half after he commenced the action, plaintiff finally served on or about December 2, 2011, a complaint (R. 118-131) which alleged two causes of action. In the first cause of action (R. 118-128), plaintiff claimed that he was entitled to at least $1,000,000 in damages caused by defendants' alleged breach of the Partnership Agreement, and by defendants' improperly reducing his interest therein from 25% to 15%. The second cause of action (R. 128-129) sought an accounting of the partnership. Plaintiff's complaint did not seek a dissolution of the partnership.

In their answer (R. 132-140), defendants denied the material allegations of the complaint and interposed various affirmation defenses and counterclaims, including plaintiff's breach of contract and fraud.

Plaintiff's Lengthy Failure to Litigate This Action

After defendants served their answer, plaintiff, for several years took no steps to prosecute the case. Plaintiff did not serve any discovery demands or follow up on his request for an accounting. Consequently, the matter was marked off calendar (R. 143).

Thereafter, plaintiff moved to restore the case to active status (R.143). By order dated July 28, 2014, the Supreme Court (Bucaria, J.) (R. 143) granted

plaintiff's motion without opposition. The court certified the case "as ready for trial" because of the parties' unexplained delay in prosecuting the case from October 19, 2012 to April 2, 2014 (R. 143). The court directed plaintiff to file a note of issue within 90 days of the date of this order (R. 143).

Notwithstanding the fact that the court had certified the case as trial ready, on or about September 2, 2014, approximately five weeks after the certification order, plaintiff served defendants with various discovery demands, which defendants promptly rejected as untimely (R. 96-117).

On or about October 24, 2014, the plaintiff filed a note of issue (R. 141-142).

Defendants' Motion to Dismiss

By notice of motion dated December 17, 2014 (R. 10-11), defendants moved to dismiss the complaint upon the ground that plaintiff was merely entitled to an accounting and that plaintiff's cause of action for breach of contract should be dismissed as premature (R. 15-20).

Plaintiff's Cross-Motion to Dismiss Defendants' Counterclaims

Plaintiff cross-moved (R. 144-186) to dismiss and/or for summary judgment dismissing defendants' counterclaims. Plaintiff contended that the

limited partnership was dissolved, and that he is entitled to an accounting and, refusing to recognize the reduction of his partnership interest to 15%, that the "sum I took [on August 3, 2010] was calculated based on my 25% interest in the Partnership and that defendants, LAROCK and PEREZ, each received a sum consistent with their 37.5% interest in the Partnership" (R. 171).

The Order dated May 7, 2015

In its order dated May 7, 2015 (R. 3-5), the Supreme Court granted defendants' motion and dismissed the complaint. The court, in treating defendants' motion to dismiss as a motion for summary judgment, first concluded that defendants established prima facie that plaintiff was paid the buyout price based upon his 25% partnership interest and that plaintiff failed to raise a question of fact as to whether he received these payments. The court went on to determine that "[t]he purported July 29, 2010 amendment of the limited partnership agreement, attempting to reduce Zohar's interest to 15% was invalid because it was not consented to by plaintiff" (R. 5). The court noted that neither party asserted a claim for dissolution of the limited partnership (R. 4).

Plaintiff's Motion to Reargue

By notice of motion June 29, 2015 (R. 233-234) plaintiff moved to reargue that portion of the May 7, 2015 order as dismissed the complaint, arguing

that defendants' counsel had agreed that the partnership was dissolved and an accounting was necessary (R. 242-243). Plaintiff further argued that even if he was only entitled to the buyout price, an accounting was necessary to calculate the buyout sum (R. 240).

Defendants' Opposition and Cross-Motion to Reargue

In opposition to plaintiff's motion, defendants argued that plaintiff's request for an accounting was not allowed by the Partnership Agreement, since it expressly provide that plaintiff's voluntary withdrawal from the partnership did not dissolve the partnership (R. 258-259).

Defendants cross-moved, in the event plaintiff's motion for reargument was granted, to reargue that part of the May 7, 2015 order as determined that defendants reduction of plaintiff's partnership interest to 15% was invalid, and to reinstate their counterclaims (R. 254). Defendants contended that the amendment which reduced plaintiff's partnership interest from 25% to 15% did not require plaintiff's consent, since the Partnership Agreement authorizes holders of at least 66% interest in the partnership to amend the Partnership Agreement (R. 259-260).

The November 16, 2015 Order

By order dated November 16, 2015 (R. 7-9), the Supreme Court

granted plaintiff's and defendants' respective motions for reargument, and upon reargument, simply stated, without explanation, that the motions are granted "to the extent of ordering" (R. 7, 8).

The Court also stated, again without explanation, that its prior determination that the "purported reduction of plaintiff's interest in the limited partnership was improper" (R. 9).

POINT I

PLAINTIFF IS NOT ENTITLED TO AN ACCOUNTING UNDER THE PARTNERSHIP AGREEMENT

It is well settled that absent "prohibitory provisions of the statutes or of rules of the common law relating to partnerships, or considerations of public policy, the partners * * * may include in the partnership articles any agreement they wish concerning the sharing of profits and losses, priorities of distribution on winding up of the partnership affairs and other matters. If complete, as between the partners, the agreement so made controls." Lanier v. Bowdoin, 282 N.Y. 32, 38, 24 N.E.2d 732, *rearg. denied* 282 N.Y. 611, 25 N.E.2d 391 (1940). Thus, partners may include in the partnership articles practically "any agreement they wish." Riviera Congress Assocs. v. Yassky, 18 N.Y.2d 540, 548, 277 N.Y.S.2d 386 (1966); see also, Cohen v. Lord, Day & Lord, 75 N.Y.2d 95, 102, 103, 551 N.Y.S.2d 157 (1989).

Unless there is an agreement to the contrary, withdrawal of a partner constitutes dissolution of the law partnership. Partnership Law § 60; Matter of Vann v. Kreindler, Relkin & Goldberg, 54 N.Y.2d 936, 445 N.Y.S.2d 139 (1981). However, where there is an agreement to avoid automatic dissolution of the firm,

the withdrawing partner may forego the ordinary and full accounting for the amount owed had there been a formal dissolution and liquidation. Partnership Law § 69.

Here, the Supreme Court's order dated November 16, 2015 erroneously directed an accounting. Notwithstanding defendants' position taken on the original motion, plaintiff is not entitled to an accounting because the Partnership Agreement does not authorize an accounting where, as here, a partner voluntary withdraws from the partnership. See Lai v. Gartlan, 46 A.D.3d 237, 243, 845 N.Y.S.2d 30 (1st Dep't 2007) ("Under Partnership Law § 44, any partner has the right to a formal account of partnership affairs if the right exists under the terms of the partnership agreement"). Rather, as the Supreme Court correctly noted in its May 7, 2015 order, plaintiff, upon leaving the firm, was merely entitled to a buyout price, defined as the product of the partner's percentage of net book value and sharing ratio as of an applicable date (R. 30, 45).

Moreover, as the court noted in its May 7, 2015 order, "neither plaintiff nor defendants have asserted a claim for dissolution of the limited partnership" (R. 4), which is a prerequisite for an accounting. Nicholson v. Nicholson, 288 A.D.2d 743, 744, 732 N.Y.S.2d 749 (3d Dept 2001) ("By its terms, Partnership Law § 74 precludes an accounting prior to the termination or dissolution of the partnership").

Under Section 12.01 of the Partnership Agreement, the partnership

did not automatically dissolve when plaintiff left the partnership since defendants LaRock and Perez remained after plaintiff's departure. See Klein, Wagner & Morris v. Lawrence A. Klein, P.C., 186 A.D.2d 631, 632, 588 N.Y.S.2d 424 (2d Dep't 1992) ("The partnership agreement between Lawrence A. Klein, P.C., and Wagner & Morris, P.C., provided that the death of any of the partners would not terminate the partnership and that the partnership shall be continued by the remaining partners"); Odette Realty Co. v. DiBianco, 170 A.D.2d 299, 565 N.Y.S.2d 815 (1st Dep't 1991) (neither withdrawal nor sale of respective interests of four partners resulted in dissolution of partnership nor entitled partner to accounting where partnership agreement specifically provided that withdrawal would not effect dissolution of partnership and that partner could sell his or her interest without restriction or limitation).

Since the partnership was not automatically dissolved when plaintiff left the firm, plaintiff was not entitled to an accounting. Arrants v. Dell Angelo, 73 A.D.2d 633, 422 N.Y.S.2d 761, 763 (2d Dep't 1979) (to enlist aid of a court of equity in vindicating a former partner's right to an accounting of his interest the partner must show existence of a partnership, transaction of business by the partnership producing profits or losses to be accounted for, termination or dissolution of the partnership, demand for an accounting and the failure or refusal by the partner with the books,

records, profits or other partnership assets in its possession to account to the other partner or partners); Lanier v. Bowdoin, 282 N.Y. 32, 38, 24 N.E.2d 732 (1939) ("In the absence of prohibitory provisions of the statutes or of rules of the common law relating to partnerships, or considerations of public policy, the partners of either a general or limited partnership, as between themselves, may include in the partnership articles any agreement they wish concerning the sharing of profits and losses, priorities of distribution on winding up of the partnership affairs and other matters. If complete as between the partners, the agreement so made controls").

The allegations in plaintiff's own complaint supports defendants' position, since plaintiff characterizes himself as a "Leaving Member" who is entitled to the buyout price, regardless of whether he voluntarily withdrew as a partner or was expelled (R. 127).

Consequently, the May 7, 2015 order focused on whether plaintiff received his buyout price, not whether he was entitled to an accounting. The court concluded that plaintiff's buyout price was obtained when plaintiff unilaterally helped himself to the sum of $49,750 from the firm's account upon leaving the firm (R. 5). As plaintiff acknowledged below, the "sum I took [on August 3, 2010] was calculated based on my 25% interest in the Partnership and that defendants, LAROCK and PEREZ, each received a sum consistent with their 37.5% interest in the Partnership"

(R. 171). Having made such a determination, the court properly dismissed the complaint (R. 3, 5).

Since plaintiff withdrew his appeal from the May 7, 2015 order[3], plaintiff may not challenge the Supreme Court's determination that the $49,750 he took from the firm's account fully satisfied his buyout price (as that term is defined in the limited partnership agreement) and the return of his initial capital contribution.

Accordingly, the order dated November 16, 2015, to the extent appealed from by defendants, should be reversed and the complaint dismissed.

[3]By Order dated March 21, 2016, this Court, inter alia, granted plaintiff's application to withdraw his appeal and marked the appeal withdrawn.

POINT II

THE REDUCTION OF PLAINTIFF'S PARTNERSHIP INTEREST FROM 25% TO 15% WAS PROPER AND IN ACCORDANCE WITH THE PARTNERSHIP AGREEMENT

The rights and obligations of partners as between themselves arise from and are fixed by their agreement. Levy v. Leavitt, 257 N.Y 461, 466 (1931).

Section 15.01 of the Partnership Agreement, entitled "Amendment or Modification", expressly and unambiguously provides, without limitation, that "[t]he Articles and this Agreement may be amended or modified from time to time only by a written instrument executed and agreed to by Partners holding 66% of the outstanding Points" (R. 84). Under this provision, defendants LaRock and Perez had the right to reduce plaintiff's interest to 15%, since they collectively held more than 66% of the partnership interest (points). Silverman v. Caplin, 150 A.D.2d 673, 541 N.Y.S.2d 546, 547 (2d Dep't 1989) ("If, as in the instant case, it is evident that a written partnership agreement is a complete expression of the parties' intention, the language of the partnership agreement controls and will not be questioned"); Bailey v. Fish & Neave, 30 A.D.3d 48, 51-52, 814 N.Y.S.2d 104 (1st Dep't 2006), affd, 8 N.Y.3d 523, 837 N.Y.S.2d 600 (2007) ("the parties' partnership agreement, which provides that a majority partnership interest vote is

conclusive on 'all questions relating to the partnership business (including dissolution of the partnership),' was properly amended by majority vote on the issue of the compensation of withdrawing partners").

The Supreme Court's conclusion in its May 7, 2015 order – which the court adhered to in its November 16, 2015 order – that the July 29, 2010 amendment "was invalid because it was not consented to by plaintiff" (R. 5), impermissibly rewrote the Partnership Agreement to require unanimity for the amendment at issue herein to become effective. Heritage Co. of Massena v. LaValle, 199 A.D.2d 1036, 1037, 605 N.Y.S.2d 613 (4th Dep't 1993) ("Because the detailed partnership agreement is a complete expression of the partners' intentions, we cannot, as plaintiff suggests, rewrite the agreement to disqualify defendant from voting on this partnership decision").

Further, there is no dispute that the subject amendment went into effect before plaintiff left the partnership and therefore plaintiff is bound thereunder. Bailey v. Fish & Neave, supra, 30 A.D.3d at 53 ("Plaintiff Bailey's claim that he withdrew from the law firm prior to the effective date of the amendment, and therefore was not bound by its terms, is without merit").

Accordingly, in the event the complaint is not dismissed, this Court should conclude that plaintiff's interest in the partnership is 15%.

CONCLUSION

FOR THE FOREGOING REASONS, THE ORDERS DATED MAY 7, 2015 AND NOVEMBER 16, 2015, TO THE EXTENT APPEALED FROM BY DEFENDANTS:

(1) SHOULD BE REVERSED;

(2) PLAINTIFF'S MOTION FOR REARGUMENT SHOULD BE DENIED AND THE COMPLAINT DISMISSED;

(3) ALTERNATIVELY, PLAINTIFF'S INTEREST IN THE PARTNERSHIP AT ISSUE HEREIN IS 15%

Dated: New York, New York
May 2, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 670.13 that the foregoing appellants' brief was prepared on a computer.

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Dated: New York, New York
May 2, 2016

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