SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **IAS MOTION 53EFM**

Justice

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LOIS WEINSTEIN,

Plaintiff,

- v -

RAS PROPERTY MANAGEMENT LLC,RITA SKLAR, RITA SKLAR, STEVEN MERO, NINETY-FIVE MADISON COMPANY LP

Defendant.

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INDEX NO. 653735/2019

MOTION DATE 07/21/2020

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176

were read on this motion to/for DISMISS.

Upon the foregoing documents, the respondents' motion to dismiss the amended verified petition pursuant to CPLR §§ 3211(a)(1), (a)(3) and (a)(7) is denied, and the petitioners' cross motion (i) for summary judgment pursuant to CPLR §§ 405, 2125 and 3211(c), and (ii) to extend the time to serve the amended petition *nunc pro tunc* pursuant to CPLR § 2004, and (iii) for leave to further amend the petition and file a proposed Second Amended Verified Petition pursuant to CPLR § 3026 is granted as set forth below.

FACTS RELEVANT TO THE INSTANT MOTION

This proceeding was originally commenced on June 26, 2019 by Lois Weinstein, a limited partner of Ninety-Five Madison Company LP (the **Partnership**), seeking, among other things, judicial dissolution of the Partnership, the appointment of a receiver, and the sale of the

Partnership's primary asset, a 16-story commercial building located at 95 Madison Avenue, New York, New York (the **Building**). In sum and substance, Ms. Weinstein alleged gross mismanagement and waste by RAS Property Management (**RAS**), the Partnership's general partner, and by Rita Sklar, RAS's manager, in the management of the Building. Ms. Weinstein is defined as the **Limited Partner** in the Partnership Agreement (NYSCEF Doc. No. 151 at 1).

Ms. Weinstein died on November 25, 2019. Indisputably, no stay or dismissal of this proceeding took place prior to Ms. Weinstein's death.[1]

Inasmuch as the original Verified Petition in this action alleged derivative claims and because the Estate may not maintain derivative claims on behalf of the Partnership, the court originally denied the motion to substitute Carol E. Keller and Gail Shields as the preliminary executors of the Estate of Lois Weinstein (the **Estate)** for Ms. Weinstein as the petitioner (*see* NYSCEF Doc. No. 116). The respondents then moved to dismiss the petition and the Estate cross-moved for, *inter alia*, leave to file an amended verified petition (the **AVP**) (Mtn. Seq. No. 006). In a decision and order dated June 15, 2020 (the **Prior Decision**), the court granted the Estate's motion to serve the AVP, ordered service within 20 days of thereof, and permitted the Estate to be substituted in place of Ms. Weinstein as petitioner (NYSCEF Doc. No. 141). The court denied the respondents' motion to dismiss in its entirety (*id.*).

Per the AVP, the petitioners now seek on behalf of the Estate, individually**,** (i) a declaration that the Partnership was dissolved by operation of law, (ii) the appointment of a Receiver to distribute

[1] The action was only stayed, briefly, by operation of law upon Ms. Weinstein's death.

the assets of the Partnership to the partners and the Estate in their proportionate shares, (iii) a writ of assistance to the Sheriff of the City of New York, to eject RAS and Ms. Sklar from all portions of the Building and (iv) an order requiring the respondents to turn over to the receiver all records concerning operation of the Partnership (NYSCEF Doc. No. 148). The respondents, again, argue that the AVP improperly seeks to assert only derivative claims.

On August 7, 2019, (and also prior to Ms. Weinstein's death), in a separate JAMS arbitration action (the **JAMS Arbitration**) between Vitra, Inc., one of the Building's primary tenants, and the Partnership, the arbitrator, the Hon. Stephen Crane (Ret.) appointed a receiver with authority over "all of the landlord's (RAS Property Management LLC's and Ninety-Five Madison LP's) obligations, responsibilities and prerogatives" (JAMS No. 1425024190; NYSCEF Doc. No. 165, ¶ 14). The appointment was subsequently confirmed by the court (Scarpulla, J.) on October 30, 2019 in "all respects" (*Vitra, Inc. v Ninety-Five Madison Company, LP*, 650656; NYSCEF Doc. No. 170). On the record before the court, this receivership appears to continue to this day (NYSCEF Doc. No. 162, ¶ 43; *see also* NYSCEF Doc. No. 171).

Reference is made to a certain Ninety-Five Madison Company Limited Partnership Agreement (the **Original Partnership Agreement**; NYSCEF Doc. No. 14), dated June 1, 1982, by and between Rita A. Sklar as general partner and Rita A. Sklar and Lawrence Weinstein, trustees of a trust U/W of Irving Weinstein for the benefit of Lois Michelle Weinstein as the limited partner, as amended by the First Amendment to the Ninety-Five Madison Company Limited Partnership Agreement dated December 28, 2012 (the **Amendment**; the Original Partnership Agreement, together with the Amendment, hereinafter, collectively, the **Partnership Agreement**; NYSCEF

Doc. No. 64), by and between Rita A. Sklar, as sole member and manager of RAS Property Management, LLC as the current general partner and Lois M. Weinstein as the current limited partner. Capitalized terms used but not defined herein shall have the meaning ascribed thereto in the Partnership Agreement.

Section 9.1 of the Partnership Agreement provides:

> 9.1 Events Which Cause a Dissolution. The Partnership shall continue in full force and effect until December 31, 2050, except that the Partnership shall be dissolved prior thereto upon the happening of any of the following events:
>
> …
>
> B. The withdrawal or Bankruptcy of a General Partner if the Partnership is not continued in accordance with Section 8.5 hereof;

(NYSCEF Doc. No. 14, § 9.1)

Section 8.5 of the Partnership Agreement provides:

> Effect of Withdrawal; Election to Continue Business. Upon the withdrawal or Bankruptcy of the General Partner, the General Partner or her legal representatives shall promptly notify the Limited Partner of such event and the Partnership shall be dissolved and terminated unless the Limited Partner elects to continue the business of the partnership, either a new general partner shall be admitted to the Partnership or the Partnership shall be reconstituted as a general partnership. … The withdrawal of the General Partner shall not be deemed effective until the expiration of 90 days from the day on which such notice has been mailed to the Limited Partner….

(NYSCEF Doc. No. 14, § 8.5).

As discussed further below, the Estate maintains that pursuant to New York's Revised Limited Partnership Act (**RLPA**), the Partnership was dissolved by operation of law either as of November 5, 2019, i.e., 90 days after a receiver was appointed in the JAMS Arbitration, or on October 24, 2019, i.e., 120 days after this proceeding was commenced by Ms. Weinstein because in either such event the general partner "withdrew" and the Partnership was not continued. The

respondents do not dispute that RAS never sent notice to the Limited Partner (i.e., Ms. Weinstein) of any event of dissolution and that no election to continue the Partnership was made.

DISCUSSION

I. The AVP is Deemed Timely Filed

As noted above, the Estate was required to serve the AVP within 20 days of the Prior Decision, i.e., by July 6, 2020 (*id.*). Due to a technology issue with counsel for petitioners' computer, the amended petition was not actually filed until 12:24 A.M. on July 7, 2020, i.e., 24 minutes into the 21st day (NYSCEF Doc. No. 162, ¶ 7). Although the respondents fail to articulate any actual prejudice from the 24 minute delay in filing, the respondents argue, as part of the instant motion, that the court should "not countenance such a clear and unnecessary flouting" of the court's order (NYSCEF Doc. No. 156 at 1).

The court will not penalize the Estate for filing the AVP 24 minutes late due to what counsel attests was an issue with his computer scanning technology (Barr Affirm., NYSCEF Doc. No. 162, ¶ 7) as the respondents can show no prejudice from this delay. The cross motion to extend the time to file the petition to July 7, 2020 is accordingly granted, *nunc pro tunc*.

II. Failure to State a Cause of Action

On a motion to dismiss a petition, the court must accept the facts alleged therein as true, the petitioner must be accorded every possible favorable inference and the court must determine if the facts alleged by the petitioner fit within any cognizable legal theory (*Lawrence v Miller*, 11 NY3d 588, 595 [2008]).

The respondents argue that the AVP should be dismissed because the Estate is only entitled to share in the profits and losses of the Partnership under the Partnership Agreement, and cannot "bind the Partnership" by seeking to remove its general partner, appoint a receiver, dissolve the Partnership or wind up its affairs (NYSCEF Doc. No. 156 at 2). In its opposition papers, the Estate argues that it is not seeking to remove RAS as general partner, but only seeking a declaration that the Partnership was dissolved by operation of law:

> Respondents misconstrue the [AVP] to seek removal of RAS … [R]emoval is not the relief being sought here. The relief is a declaration that RAS ceased to be the general partner on either October 24, 2019 or November 5, 2019 and that because no election was made within 90 days to continue the partnership, [the Partnership] was dissolved as a matter of law [on] January 22, 2020 or February 3, 2020

(NYSCEF Doc. No. 162, ¶ 22, citing AVP, ¶¶ 23-24).

In other words, the AVP seeks as its remedy, distributions of the Partnership assets and the appointment of a receiver because the Partnership ***has already been dissolved*** (*id.*, ¶ 23 ["Petitioners seek only the distribution to the Estate of the Estate's share of the assets of the partnership as is their rights under sections 9.2 and 9.4 of the Partnership Agreement and NYRPLA § 121-804"]). Inasmuch as this is not explicitly stated in the AVP, the proposed Second Amended Verified Petition makes this clear (NYSCEF Doc. No. 167, ¶ 33).

The RLPA is a "default statute" imposing rules on a limited partnership if the partnership does not explicitly opt out of certain provisions (*A&F Hamilton Heights Cluster, Inc. v Urban Green Mgmt, Inc.*, 186 AD3d 409, 417 [1st Dept 2020]).

Section 121-801 of the RLPA, titled Nonjudicial Dissolution, provides:

> A limited partnership is dissolved and its affairs shall be wound up upon the happening of the first to occur of the following:
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> (a) at the time, if any, provided in the certificate of limited partnership;
>
> (b) at the time or upon the happening of events specified in the partnership agreement;
>
> (c) subject to any requirement in the partnership agreement requiring approval by any greater or lesser percentage of limited partners and general partners, upon the written consent (1) of all of the general partners and (2) of a majority in interest of each class of limited partners;
>
> (d) an event of withdrawal of a general partner unless (1) at the time there is at least one other general partner and the partnership agreement permits the business of the limited partnership to be carried on by the remaining general partner and that partner does so, or (2) unless the partnership agreement provides otherwise, if within ninety days after the withdrawal of the last general partner, not less than a majority in interest of the limited partners agree in writing to continue the business of the limited partnership and to the appointment, effective as of the date of withdrawal, of one or more additional general partners if necessary or desired; or
>
> (e) entry of a decree of judicial dissolution under section 121-802 of this article.

(NY RLPA § 121-801 [emphasis added]).

Section 121-402(e)(ii) of RLPA provides that a person or entity ceases to be the general partner of a limited partnership if, within 90 days after a receiver is appointed without the general partner's consent or acquiescence, the appointment is not vacated or stayed, or if within 90 days after the expiration of any stay, the appointment is not vacated (NY RLPA, § 121-402[e][ii]).

The Estate maintains that RAS "withdrew" and ceased being the general partner because a receiver was appointed over the Partnership's assets on August 7, 2019 in the JAMS Arbitration and such receivership was not vacated within 90 days (RPLA § 121-402[e][ii]) and, not only was

approval of the Limited Partner for the continuation of the business of the Partnership never obtained, RAS never even sought it. Therefore, the Estate argues the Partnership was dissolved on November 5, 2019 – i.e., approximately 21 days before the Limited Partner died.

In their opposition papers, the respondents argue dissolution never occurred because Section 8.5 of the Partnership Agreement first required the general partner to send notice to the Limited Partner in order for the Limited Partner to elect to continue the Partnership and such notice was never sent. Thus, the respondents argue, the Partnership was never dissolved. The respondents also argue that the Partnership would have been continued if such notice were made because 81% of the shares of "the Limited Partnership shares" are controlled by Rita Sklar.

The arguments fail. The respondents cannot use their own failure to send the required notice as a shield and otherwise frustrate the requirement that consent of the "Limited Partner" be obtained. The express language of Section 8.5 provides that the right to continue the Partnership was that of "the Limited Partner" – i.e., Ms. Weinstein – and not a majority of the limited partnership interests (NYSCEF Doc. No. 64; NYSCEF Doc. No. 14, § 8.5 ["the Partnership shall be dissolved and terminated ***unless the Limited Partner*** elects to continue the business of the partnership" [emphasis added]). In any event, on the record before the court, Ms. Sklar was not during the relevant time period, a limited partner. Pursuant to the Partnership Agreement she was originally the general partner, and then she assigned her general partnership interest to RAS.

Under the RLPA, a person or entity also ceases to be a general partner of a limited partnership if, *inter alia*, within 120 days after the commencement of any proceeding against the general

partner seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation, the proceeding has not been dismissed or stayed, or if, within 90 days after the expiration of any such stay, the proceeding has not been dismissed, unless otherwise provided in the partnership agreement or approved by all partners (NY RPLA § 121-402[e][i]).

Ms. Weinstein commenced this proceeding on June 26, 2019 seeking the judicial dissolution of the Partnership and the appointment of a receiver. There was no stay or dismissal of the action prior to the 120th day following June 26, 2019, which was October 24, 2019. The action was stayed only on November 25, 2019 when Ms. Weinstein died, i.e., via the automatic stay imposed upon the death of any party. Therefore, the petitioners argue that the Partnership was dissolved as a matter of law under both Section 8.5 of the Original Partnership Agreement and RPLA Section 121-801(d).

In their opposition papers, the Respondents argue that Section 121-402(e)(i) of the RLPA only applies to actions brought ***against*** the general partner, and not to actions against the limited partnership itself, and that it is, therefore, inapplicable. The argument is unavailing. The original verified petition was properly brought by Ms. Weinstein ***against RAS*** and Ms. Sklar, seeking RAS's removal, i.e., it was "a proceeding against the general partner," the 120th days from the date of commencement occurred prior to Ms. Weinstein's death, and there was no election to continue the business of the Partnership.

In fact, both dissolution dates, whether triggered by Section 121-402(e)(i) or (e)(ii), occurred prior to Ms. Weinstein's death on November 25, 2019. Accordingly, the Estate may properly maintain the instant action to, among other things, distribute the assets of the Partnership to the limited partners and the Estate in their proportionate shares.

To the extent that the respondents broadly maintain that neither Section 121-402(e)(i) or (e)(ii) is applicable because those provisions only apply "unless otherwise provided in the partnership agreement" (NY RLPA § 121-402[e]), this argument also fails. The Partnership Agreement does not provide an exhaustive list of events which constitute a general partner withdrawal or otherwise explicitly opt-out of Section 121-402(e) (*A&F Hamilton Heights Cluster,* 186 AD3d at 417). In fact, the Partnership Agreement addresses what happens upon the withdrawal of the general partner – i.e., dissolution unless there is an election to continue the business of the partnership by the Limited Partner.

III. Summary Judgment

The Estate maintains that summary judgment is appropriate in this case as no issues of fact are actually in dispute. The respondents argue that the Estate's cross motion for summary judgment, brought pursuant to CPLR 3211(c), should be denied as procedurally improper because issue has not been joined (NYSCEF Doc. No. 176 at 14). Although, "[o]rdinarily, a summary judgment motion brought prior to service of an answer should be dismissed as premature, … the CPLR expressly confers upon *nisi prisi* courts the power to dispense with responses to amended pleadings, in their discretion" (*Stephanie R. Cooper, P.C. v Robert,* 78 AD3d 572 [1st Dept 2010] [summary judgment may be granted prior to filing of answer where defendant had notice of

plaintiff's contentions and ample opportunity to submit proof in opposition]; *see also* CPLR § 3211[c]).

Inasmuch as the respondents suggest that there are issues of fact requiring the denial of summary judgment as to (i) their good faith belief that the provisions LRPA Section 121-402(e) were inapplicable, and (ii) the parties' intent to "otherwise provide" for the removal of the general partner in the Partnership Agreement, these are not factual issues requiring denial of the summary judgment motion. The fact that the respondents may have believed that RLPA Sections 121-402(e)(i) and (e)(ii) were inapplicable is simply irrelevant if they did not provide otherwise in their Partnership Agreement (*see A&F Hamilton Heights Cluster*, 186 AD3d at 417). Furthermore, nothing in the Partnership Agreement provides otherwise. To the contrary, Section 9.1 of Article IX, Dissolution and Termination of the Partnership, provides:

> 9.1 Events Which Cause a Dissolution. The Partnership shall continue in full force and effect until December 31, 2050, except that the Partnership shall be dissolved prior thereto upon the happening of any of the following events:
>
> …
>
> B. The withdrawal or Bankruptcy of a General Partner if the Partnership is not continued in accordance with Section 8.5 hereof;

(NYSCEF Doc. No. 14, § 9.1)

Because, as discussed above, the general partner did not send out notice seeking to continue the business of the Partnership and there has been no election by the Limited Partner to continue the business of the Partnership, the Partnership was dissolved.

For the avoidance of doubt, the respondents' motion for sanctions against the Estate is denied.

Accordingly, it is

ORDERED that the respondents' motion is denied in its entirety; and it is further

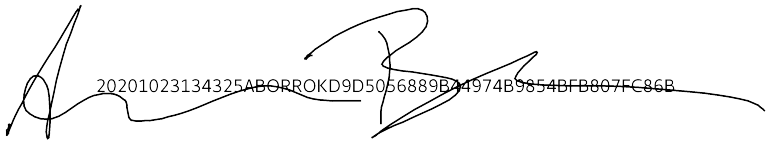
ORDERED that the branch of petitioners' cross motion that seeks leave to extent time to serve the amended verified petition is granted, and such time is extended to 21 days, *nunc pro tunc*, and it is further

ORDERED that the branch of petitioners' cross motion that seeks summary judgment in petitioners' favor on and a declaratory judgment with respect to the subject matter of the instant petition is granted; and it is further

ADJUDGED and DECLARED that Ninety-Five Madison Company LP was dissolved by operation of law; and it is further

ORDERED that the parties are directed to submit proposed orders to the court for the liquidation of the Partnership in accordance with the terms of the Partnership Agreement and the RLPA on notice on or before November 23, 2020; and it is further

ORDERED that the branch of the petitioners' cross motion seeking leave to amend is denied as moot.



10/23/2020
DATE

ANDREW BORROK, J.S.C.

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