Eikenberry v Lamson
2021 NY Slip Op 30561(U)
February 19, 2021
Supreme Court, Kings County
Docket Number: 516653/20
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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KRISTEN L. EIKENBERRY,

Plaintiffs Decision and order

- against - Index No. 516653/20

RICHARD JOSEPH LAMSON,

Defendants, February 19, 2021

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PRESENT: HON. LEON RUCHELSMAN

The defendant has moved seeking to dismiss the complaint on the grounds it fails to state any cause of action and on the basis of documentary evidence. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held and after reviewing all the arguments this court now makes the following determination.

According to the complaint in 1995 and 1996 the plaintiff and defendant entered into a romantic relationship as well as an oral partnership together developing and renovating real estate in New York and New Jersey. The complaint refers to the partnership as EL Partnership. The complaint asserts that Mr. Lamson provided all the investment and construction services and Ms. Eikenberry supplied "market intelligence" and interior and other designs for the properties (Verified Complaint, ¶¶2, 21). The partnership proved successful and although the couple never married they had four children together. The complaint alleges that although some of the partnership assets are in the name of only one of the partners, the partnership owns 330 Atlantic Ave

Development LLC a Wyoming corporation formed in 2019, Easy Wind LLC, a Delaware corporation formed in 2015, Fairmont Industries Supply, LLC, a Delaware corporation, Fairmont Industries Inc., also known as Fairmont Industries Corp., a New York corporation formed in 2007, HTHP Leasing Inc., a New Jersey corporation formed in 2010, Two Route 17 South LLC, a New Jersey corporation formed in 2013, Birdsong Farm located in Delhi, New York, 297 Pacific Street, Brooklyn, New York, 110 North Atlantic, Beach Haven, New Jersey, 28 Sidney Avenue, Rutherford, New Jersey and numerous bank accounts held at various institutions.

The relationship between Eikenberry and Lamson deteriorated and the complaint alleges that Lamson essentially deprived Eikenberry of all partnership resources and sought to transfer partnership assets held jointly into accounts beyond the reach of Eikenberry. Any attempt at a reconciliation failed and this lawsuit was commenced. The plaintiff alleges causes of action for an accounting, breach of fiduciary duty, breach of contract, unjust enrichment, constructive trust, fraudulent conveyance and dissolution.

The defendant has now moved seeking to dismiss the lawsuit on the grounds that no partnership ever existed and that as a matter of law no such partnership could have been created, even orally, in the manner described in the complaint. The plaintiff opposes the motion arguing the facts pleaded surely establish, at

this juncture, the existence of a partnership and the parties should be permitted to proceed with discovery.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

It is well settled that a partnership or joint venture need not be in writing to be enforceable (see, Blank v, Nadler, 143 AD2d 966, 533 NYS2d 891 [2d Dept., 1988]). An oral agreement to form a partnership or joint venture for an indefinite period creates a partnership or joint venture at will (Foster v. Kovner, 44 AD3d 23, 840 NYS2d 328 [1st Dept., 2007]). Moreover, the existence of an oral agreement is generally a question of fact which cannot be summarily determined on a motion to dismiss (see, Martin v. Cohen, 17 Misc3d 1116 (A), 851 NYS2d 64 [Supreme Court

Suffolk County 2007]).

It is well settled in New York that a partnership or a joint venture may not operate through a corporate form and that any fiduciary obligations that the 'partners' owe one other cease to exist once they agree to conduct business as a corporation (Weisman v. Awnair Corporation of America, 3 NY2d 444, 165 NYS2d 745 [1957], WMW Machinery Inc., v. Werkzeugmaschinenhandel Gmbh Im Aufbau, 960 F.Supp 734 [SDNY 1997]). It is true that many other states do not follow this approach (Mann v. GTCR Golden Rauner, LLC, 425 F.Supp2d 1015 [District of Arizona 2006]). In Mann the court noted that "despite the clear law in New York, cases in California, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, North Carolina, and Wisconsin hold the opposite" (id). The reasoning for the New York rule is based upon public policy, namely it is inconsistent for individuals to treat themselves as partners among themselves but as shareholders to the rest of the world (Karanian v. Maulucci, 440 A2d 959, 185 Conn. 320 [Supreme Court of Connecticut 1981]). Therefore, once the partners adopt a corporate form and are shielded from personal liability they are no longer partners and only have rights, obligations and duties as stockholders (id., quoting Jackson v. Hooper, 75 A 568, 76 NJ Eq. 592 [Court of Errors and Appeals of New Jersey 1910]). Although the New York rule has been criticized (see, *The New York Fiduciary Concept in*

Incorporated Partnerships and Joint Ventures, by Francis Conway, 30 Fordham Law Review 297 [1961]) it remains the law in the state of New York.

In Miglietta v. Kennecott Copper Corp., 25 AD2d 57, 266 NYS2d 936 [1st Dept., 1966] although the facts of the case did not warrant its adoption, the court enunciated an exception to the Weisman rule where rights pursuant to the joint venture would survive the formation of any corporation "by virture [sic] of a covenant or agreement which was intended to survive the merger of the joint venture into the corporate entity" (id). Indeed, in Sagamore Corp., v. Diamond West Energy Corp., 806 F.2d 373 [2d Cir. 1986] the court held that "when the parties to a joint venture agreement, in forming a corporation to carry out one or more of its objectives, intend to reserve certain rights inter sese under their agreement, which do not interfere with or restrict the management of the affairs of the corporation, its exercise of corporate powers, or the rights of third parties doing business with it, these rights being extrinsic to the corporate entity and its operations, such joint venture agreement may be enforced" (id). The court explained that "a complete merger of a joint venture into corporate form, which legally supplants the venture, does not occur when the parties retain rights under the venture agreement that are not in conflict with the corporation's functioning" (id). Thus, for example, where

the corporation is a mere adjunct of the joint venture or the rights retained in the partnership are independent of and extrinsic to the corporate entity then the joint venture does not merge with the corporation formed. Indeed, in Blank v. Blank, 222 AD2d 851, 634 NYS2d 886 [3rd Dept., 1995] the Third Department, based on prior cases including Sagamore Corp., qualified Weisman and held a partnership can survive a subsequent corporate formation "as long as the rights of third parties, like creditors, are not involved and the parties' rights under the partnership agreement are not in conflict with the corporation's functioning" (id). The plaintiff asserts that Blank "represents current law" (see, Plaintiff's Memorandum of Points and Authorities In Opposition to Defendant's Motion to Dismiss the Complaint, page 10, Footnote 6). However, in D'Orazio v. Mainetti, 24 AD3d 915, 805 NYS2d 455 [3rd Dept., 2005] the Third Department, citing Weisman and other cases that adhere to Weisman's more traditional rule, held that "a partnership and a corporation are mutually exclusive entities and cannot coexist" therefore, when the partners created a corporation the partnership dissolved. Thus, it is inaccurate to argue that Weisman has been qualified to the point of irrelevancy. Rather, a more nuanced analysis is necessary.

Therefore, examining the precise situations where the joint venture or partnership survives the corporate formation the

following distinction emerges. Where the parties intend to reserve rights under the partnership or joint venture agreement, and such a reservation of rights does not interfere in any way with the management of the corporation or the rights of third parties the joint venture agreement may be enforced. Intent may be gleaned from the actions taken. Consequently, where the individual partners actually abandon the partnership and embrace a corporate structure then the partnership indeed dissolves. Thus, in Weiner v. Hoffinger, Friedland, Dobrish & Stern P.C., 298 AD2d 453, 749 NYS2d 255 [2d Dept., 2002] the partners "decided to reorganize as a professional corporation" and as a result pursuant to Weisman the partnership dissolved. Again, in D'Orazio, (supra) the partners "formed a professional corporation" and thus the partnership evolved into the corporation erasing any partnership rights. Again, in Notar-Francesco v. Furci, 149 AD2d 490, 539 NYS2d 800 [2d Dept., 1989]) two doctors who were initially partners but then decided to change the partnership "formed a professional corporation" (id). The court concluded that "once the doctors formed a professional corporation, the partnership was no longer in existence, and the partnership agreement was a nullity" (id). Further, in Nutronics Imaging Inc., v. Danan, 2000 WL 33128504 [EDNY 2000] the court held the joint venture dissolved into a corporation called Nutroics "because Nutronics was the only vehicle by which the

parties conducted their business" (id). Further, the court held there were no assets or revenues to which the parties claimed they were entitled that was separate from Nutronics. The court concluded that "the undisputed record reflects that the parties did not reserve any rights to their putative partnership when they agreed to conduct business through Nutronics" (id).

Thus, when the partners themselves actually form a corporation, or otherwise clearly intend to change the structure of the entity, the partnership necessarily dissolves into such corporation.[1]

However, where the partnership exists and a corporation is created for some purpose, while the partnership remains intact, then, to be sure, the intent of the parties demonstrates the partnership need not dissolve. Therefore, in Blank (supra) a partnership was formed and one of the goals of the partnership was investing in real estate. The partnership decided to purchase such real estate through the corporate form. The court held those corporations did not thereby dissolve the partnership "as long as the rights of third parties, like creditors, are not involved and the parties' rights under the partnership agreement

[1] To the extent Hochberg v. Manhattan Pediatric Dental Group Inc., 41 AD3d 202, 836 NYS2d 615 [1st Dept., 2007] held the joint venture survived the corporate formation even though the partners themselves incorporated, that First Department case is in direct conflict with Weiner v. Hoffinger, Friedland, Dobrish & Stern P.C., 298 AD2d 453, 749 NYS2d 255 [2d Dept., 2002] and cannot govern the outcome here.

are not in conflict with the corporation's functioning" (id). Again, in Priel v. Heby, 4 Misc3d 1011(A), 791 NYS2d 873 [Supreme Court New York County 2004] the partners were engaged in purchasing real estate and established corporations to own some of the properties. The court concluded such corporations did not destroy the partnership because the "corporations were utilized by the parties to conduct business...it cannot be said, at least at this juncture, that the alleged joint venture ceased to exist after the creation of the defendant corporations" (id, see, also, Rinaldi v. Casale, 13 AD3d 603, 788 NYS2d 137 [2d Dept., 2004]).

Again, in Napoli v. 243 Glen Cove Avenue Grimaldi Inc., 397 F.Supp3d 249 [EDNY 2019] the court concluded a corporation formed did not dissolve the joint venture because only one joint venturer owned shares in the corporation clearly evincing an intent to maintain the joint venture. This was particularly true because there was no evidence "that plaintiff was promised or demanded shares in the Corporation. Therefore, this is not an instance where both parties held an interest in the Corporation, indicating an intent to carry out the underlying joint venture while still seeking the protections of the corporate form" (id) which is prohibited by Weisman (supra).

Weisman itself exemplifies this understanding. In Weisman the parties entered into a joint venture "for the purpose of selling, distributing, merchandising and exploiting the products

of defendant Awnair Corporation of America in the territories of Nassau, Suffolk, Queens and Kings Counties in the State of New York through a corporation to be organized by Weisman under the laws of the State of New York" (id). The court held the attempt to conduct business as joint venture "through the instrumentality of a corporation presenting itself to the world as the responsible entity" (id) was impermissible, hence the joint venture dissolved. However, Weisman qualified its own holding and explained "this is not to say, of course, that plaintiff Weisman could not have entered into an agreement of joint venture with the defendants or that corporations may not be parties to a joint venture agreement. Neither do we say that individuals agreeing to go into business together jointly cannot decide to conduct the business through a corporation. What we do declare is that when individuals do determine to conduct business through a corporation, as is here alleged, they are not at one and the same time joint venturers and stockholders, fiduciaries and nonfiduciaries, personally liable and not personally liable" (id). Therefore, there is nothing that prevents a joint venture from surviving the corporate formation in appropriate circumstances.

This balance represents a measured understanding of Weisman and its subsequent qualifications. Further and far-reaching disapproval of Weisman is unwarranted. It is true that in

Macklem v. Marine Park Homes Inc., (17 Misc2d 439, 191 NYS2d 374 [Supreme Court Nassau County 1955], affirmed 8 AD2d 824, 191 NYS2d 545 [2d Dept., 1959], affirmed 7 NY2d 887, 197 NYS2d 194 [1960], affirmed 8 NY2d 1076, 207 NYS2d 451 [1960]) the Court of Appeals affirmed a lower court ruling holding a joint venture survived a subsequent corporate formation. However, the lower court in that case specifically impugned the integrity of the corporation formed noting the corporation was formed "merely as a conduit of title and that there never was any intention on the part of" the joint venturers "to carry on their venture as stockholders in a corporation. It is very likely, under the facts as developed at the trial, that were this an action brought by a creditor of" the joint venturers "the 'corporate veil' would be 'pierced'" (id). Further, the trial court found that "the incorporators were 'dummies' and apparently no corporate meetings were held and no stock issued" and that the party seeking to enforce the corporate status of the venture could not even be entitled to shares since he was only a promoter and did not earn any rights to shares. Based on these facts the court concluded the corporation was formed "merely as a conduit of title" and therefore the joint venture survived that 'corporate' formation. That case can hardly support arguments that Weisman was thus impacted by Macklem to the extent it replaced or diluted Weisman's holding (*cf.*, Cosy Goose Hellas v. Cosey Goose USA

Ltd., 581 F.Supp2d 606 [SDNY 2008]). Indeed, the first case to assert that Macklem "limited the scope of Weisman," Artidi v. Dubitsky, 354 F.2d 483 [2d Cir. 1965] based its relaxation of the rule on three cases which all adhered to Weisman in every respect (see, Fromkin v. Merrall Realty Inc., 15 AD2d 919, 225 NYS2d 632 [2d Dept., 1962], M.P.E. Holding Corp., v. Freeman's Dairy Inc., 36 Misc2d 594, 232 NYS2d 639 [Supreme Court Queens County 1962], Loverdos v. Vomvorous, 23 Misc2d 464, 200 NYS2d 921 [Supreme Court New York County 1960]). Thus, there is no question subsequent cases have modified Weisman, however, it has not been diluted to the extent urged by the plaintiff.

Turning to the facts of this case, the plaintiff argues the corporations formed following the alleged joint venture all operated "under the venture's umbrella" (see, Plaintiff's Memorandum of Points and Authorities In Opposition to Defendant's Motion to Dismiss the Complaint, page 10). According to the complaint the plaintiff is the sole owner of 330 Atlantic LLC, Easy Wind LLC and Fairmont Industries Inc. and is the sole managing member of HTHP Leasing LLC. Concerning these entities the complaint alleges that "the EL Partnership holds its interest in the 330 Atlantic venture through 330 Atlantic LLC and funds the development with EL Partnership funds held in the 330 Atlantic Account" (see, Complaint, §88). The complaint does not allege any facts demonstrating the parties intended to maintain a

partnership relationship following the incorporation of the entities noted. Indeed, the complaint does not allege any action taken by the partnership in any meaningful way permitting an allegation the venture survived the incorporation. The plaintiff argues that in this case "there is no allegation that the Partnership ceased to exist or reorganized as another entity" (see, Plaintiff's Memorandum of Points and Authorities In Opposition to Defendant's Motion to Dismiss the Complaint, page 10). Of course, there can be no such "allegation" since that is the natural result upon operation of law (Weisman, supra). To assert otherwise and avail herself of the limiting qualifications of that rule the plaintiff must actually demonstrate the intent to maintain the joint venture. No such intent can be gleaned from the complaint. On the contrary, based upon the above analysis all the facts indicate the joint venture dissolved. First, once the corporations were formed there was nothing left for the partnership to do. Moreover, the plaintiff received shares and membership interests in the corporations evincing a dissolution of the prior joint venture. Essentially, the plaintiff is asserting that an all encompassing oral agreement was reached which by its very nature survived any further corporate formation to do precisely what the oral agreement proposed to do. Those claims are clearly barred by Weisman (supra).

However, the complaint also alleges an oral partnership in numerous properties that were allegedly purchased as a partnership. These include the residences of the couple as well as Bird Song Farm. While the defendant vigorously disputes those contentions, on a motion to dismiss all the allegations must be accepted as true (Parsippany Construction Company Inc., v. Clark Patterson Associates PC, 41 AD3d 805, 839 NYS2d 179 [2d Dept., 2007]). None of those transactions took place in a corporate form. Thus, those claims are merely based upon an alleged oral partnership. Further discovery will explore the nature of the partnership, if any, and will narrow the scope of the claims of the plaintiff.

Therefore, based on the foregoing, all allegations that are based upon any corporate activity is hereby dismissed. Therefore, the causes of action for an accounting regarding any bank accounts for Fairmont Industries and any other corporate entity is hereby dismissed. The causes of action for breach of fiduciary duty, breach of contract, unjust enrichment and constructive trust regarding any of the corporate entities are hereby dismissed. The cause of action alleging fraudulent conveyances regarding any corporate funds or bank accounts is hereby dismissed. The cause of action seeking dissolution is dismissed to the extent the only dissolution that now remains concerns the various homes. Thus, all allegations based upon

non-corporate activities, namely the purchase, sale and renovation of various homes including Bird Song Farm remain valid and the motion seeking to dismiss those claims is denied.

So ordered.

ENTER:

DATED: February 19, 2021
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC