

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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In the Matter of the Application of RENA
PACHTER, in her representative capacity as
Administrator of the ESTATE of JUDITH
LINDENBERG, deceased, individually and
derivatively on behalf of 3046 WEST 22 ST.
PROPERTIES LLC, HOMES R BEAUTIFUL RE
LLC, and PARK 50 WEST PROPERTIES LLC

Decision and Order
Index No. 502779/2020

Petitioners,

For the Dissolution of 3046 WEST 22 ST
PROPERTIES LLC, D-WIN PROPERTIES LLC,
HOMES R BEAUTIFUL RE LLC, and PARK 50
WEST PROPERTIES LLC, and other relief,

-against-

May 5, 2021

DAVID WINIARSKI, ESTHER WINIARSKI,
MYRON WINIARSKY, ROBERT LUBIN, ARYEH
WEBER, and the LAW OFFICE OF ARYEH
WEBER, ESQ.

Respondents,

-and-

3046 WEST 22 ST. PROPERTIES LLC, D-WIN
PROPERTIES LLC, HOMES R BEAUTIFUL RE LLC
and PARK 50 WEST PROPERTIES LLC,

Nominal Respondents,

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PRESENT: HON. LEON RUCHELSMAN

The respondents David, Esther and Myron Winiarski and Aryeh
Weber have moved pursuant to CPLR §3211 seeking to dismiss the
amended complaint on the grounds it fails to state any cause of
action. The petitioner 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.

As recorded in prior orders the petitioners have instituted

this action seeking dissolution of various entities. Further, the Petition seeks derivative claims of breach of fiduciary duty, conversion and other claims. The Petition alleges the respondents harmed the entities by engaging in improper conduct.

The respondents now move seeking to dismiss the amended complaint on the grounds that the petitioner Rena Pachter has no standing to pursue any claims. They assert that Judith Lindenberg passed away on May 8, 2018 and thus lost her membership in the companies and consequently her administrator or the estate has no standing to pursue derivative claims. Specifically, Ms. Lindenberg and David Winiarsky were each fifty percent owners of 3046 West 22 Street Properties LLC and 50 West Properties LLC. Ms. Lindenberg and Esther Winiarsky were each fifty percent owners of D-Win Properties LLC and Homes R Beautiful RE LLC. Further, the respondents assert that in any event the statutory dissolution claim must be dismissed since the court already ruled on that claim and the remaining claims must also be dismissed since they are all barred.

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]).

Limited Liability Company Law §608 states that "if a member who is a natural person dies...the member's executor, administrator...or other legal representative may exercise all of the member's rights for the purpose of settling his or her estate or administering his or her property, including any power under the operating agreement of an assignee to become a member. If a member is a corporation, trust or other legal entity and is dissolved or terminated, the powers of that member may be exercised by its legal representative or successor" (id). Clearly, the statute differentiates between an individual and a corporation that are no longer connected to a parent corporation either by death or some other reason and affords greater rights upon a corporation. While that distinction is not relevant in this case, in any event the representative of an individual who has died can act with all rights the member enjoyed for the defined purposes enumerated in the statute. Thus, a

representative does not have the status of an assignee. This contrasts the treatment in other states. For example, in Louisiana when a member of a corporation dies "the member's executor, administrator...or other legal representative shall be treated as an assignee of such member's interest in the limited liability company" (see, Louisiana Revised Statutes 12:1333 'Powers of Estate of a Deceased or Incompetent Member').

Further, the fact 50 West Properties LLC and D-Win Properties LLC have written operating agreements which provide that no new members can join without the consent of all members does not bar the Estate from maintaining membership status. The Estate is not a "new" member but rather has assumed the membership responsibilities of Ms. Lindenberg pursuant to statute upon Ms. Lindenberg's death. For similar reasons 3046 West 22 Street Properties LLC and Homes R Beautiful RE LLC which do not maintain operating agreements must accept the Estate as a replacement of Ms. Lindenberg in a seamless transition. Thus, any wrongs allegedly committed while Ms. Lindenberg was alive may be pursued by the Estate since the Estate may assume all claims that could have been brought by Ms. Lindenberg herself. Pappas v. 38-40 LLC, 173 AD3d 409, 101 NYS3d 16 [1st Dept., 2019] does not demand a contrary result. In that case the operating agreement specifically stated a successor in interest was not a member of the corporation and did not have any ownership

interest. In this case there is no such exclusionary or limiting language.

Therefore, the petitioner in this case, the Estate of Judith Lindenberg, surely maintains standing to pursue derivative claims and the motion seeking to dismiss in this regard is denied.

Next, turning to the motion seeking to dismiss the common law dissolution cause of action, the motion is really one to reargue a decision of this court dated October 13, 2020 which denied a previous motion to dismiss that claim.

First, there is no merit to the argument that an amended pleading must be rejected due to res judicata. Indeed, the whole basis allowing a party to replead dismissed claims is to correct infirmities in the original pleading. Thus, the amended complaint which significantly addresses all the reasons the court dismissed the judicial dissolution claim cannot be barred because of res judicata. This is especially true where the amended complaint raises facts and issues that were not part of the original complaint making res judicata impossible. There are serious allegations the respondents breached duties to the corporations. The technicalities regarding limited liability corporations as opposed to business corporations may prevent equitable dissolution claims. However, the new amended complaint adequately suffices to assert judicial dissolution claims. There is no basis to dismiss both causes of action. Thus, the judicial

dissolution claim is now viable and asserts claims pursuant to LLCL §702. Those claims are detailed, factually relevant and more than sufficient to survive a motion to dismiss. Thus, the amended complaint now properly asserts a claim for judicial dissolution. Thus, the motion seeking to dismiss the judicial dissolution claim is denied. The motion seeking to reargue to dismiss the equitable dissolution claim is granted and upon such reargument the equitable dissolution claim is dismissed.

The motion seeking to dismiss the third and fourth causes of action of equitable buyout and withdrawal is denied. As explained in the prior decision those remedies are available post-dissolution. Since dissolution still remains possible those causes of action are proper.

The motion seeking to dismiss the constructive trust claim is granted. Generally, a constructive trust may be imposed when property has been acquired under such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest therein (Plumitallo v. Hudson Atl. Land Co., 74 AD3d 1038, 903 NYS2d 127 [2d Dept., 2010]). It is well settled that in order to impose a constructive trust the following four elements must be proven. There must be a confidential or fiduciary relationship, a promise, a transfer in reliance of the promise and unjust enrichment (Sharp v. Kosmalski, 40 NY2d 119, 386 NYS2d 72 [1976]). These elements are

not applied rigidly but flexibility is employed, especially to promote and satisfy the demands of justice (Sanxhaku v. Margetis, 151 AD3d 778, 56 NYS3d 238 [2d Dept., 2017]). Essentially, as expressed by Justice Cardozo in Beatty v. Guggenheim Exploration Co., 225 NY 380, 122 NE 378 [1919], "a constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee" (id). Thus, while such relationship existed between the parties, the remaining elements of a constructive trust cannot be satisfied. The remaining elements require a promise made, a transfer of an asset in reliance upon the promise and unjust enrichment flowing from the breach of the promise (Mei Yun Chen v. Mei Wan Kao, 97 AD3d 730, 948 NYS2d 426 [2d Dept., 2012]). Thus, the petitioner must demonstrate that it transferred property to the respondents in reliance on a promise and that such property is being held whereby a trust should be imposed (Kalmon Dolgin Affiliates Inc. v. Tonacchio, 110 AD3d 848, 973 NYS2d 304 [2d Dept., 2013]). There is no evidence at all the petitioner transferred to the respondents any asset as a result of such promise (Swartz v. Swartz, 145 AD3d 818, 44 NYS3d 452 [2d Dept., 2016]). Therefore, the motion seeking to dismiss this cause of action is granted.

The motion seeking to dismiss the breach of contract claim

is denied. The amended complaint alleges the respondents borrowed money from the companies and failed to repay those loans. That allegation sufficiently alleges a breach of contract. Of course, the parties will engage in discovery, however, at this juncture, all the allegations must be deemed true and the amended complaint sufficiently alleges a breach of contract.

The motion seeking to dismiss the eight, ninth and twelfth causes of action is denied. The basis for the motion is that the petitioner is not a member of the companies. As explained, the petitioner is a member of the corporations and is not an assignee. Thus, the allegations of breaches of fiduciary duty, aiding and abetting breaches of such duty and an accounting are all viable.

The motions seeking to dismiss the accounting and legal malpractice claims are denied. The amended complaint sufficiently alleges malpractice committed by both the accountant and the attorney. Concerning the accountant the amended complaint alleges that the accountant "breached the duties he owed to the Companies by knowingly, recklessly, or negligently failing to prepare truthful and accurate reports, returns, ledgers, balance sheets, and filings for the Companies; including by intentionally turning a blind eye to inaccurate and incomplete information presented to him regarding the Companies and by

failing to detect the looting, self-dealing, and other gross malfeasance alleged herein" (see, Amended Complaint, ¶261). Concerning the attorney, the amended complaint alleges the attorney "breached the duties owed to the Companies by not creating operating agreements for 3046 WEST 22 ST. PROPERTIES LLC and HOMES R BEAUTIFUL RE LLC, by not keeping and maintaining such operating agreements, and/or by losing, misplacing, or destroying such operating agreements" (see, Amended Complaint, ¶271). At this stage of the proceeding where the allegations must be taken as true they sufficiently allege conduct that is malpractice. Of course, as noted, the parties will be subject to discovery and substantive motions may be filed at the conclusion of all discovery, however, at this juncture the allegations are sufficient. Further, the amended complaint surely alleges the damages suffered as a consequence of such malpractice. Further, the allegations are timely.

Lastly, concerning the unjust enrichment claim, it is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, *Corsello v. Verizon New York Inc.*, 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (*id.*). Since the amended complaint contains other contract and tort claims the unjust enrichment claim is duplicative. Thus, the

motion seeking to dismiss this claim is granted.

Thus, the motion to dismiss is granted only concerning the equitable dissolution claim, the constructive trust claim and the unjust enrichment claim. The motion seeking to dismiss the remaining claims is denied.

So ordered.

ENTER:

DATED: May 5, 2021
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC