SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, COMMERCIAL PART 10

SCOTT EPSTEIN, individually and as a partner of CANTOR, EPSTEIN & MAZZOLA, LLP,

Plaintiff,

Index No. 506730/2019

-against-

DECISION & ORDER
Hon. Larry D. Martin

ROBERT I. CANTOR, ROBERT I. CANTOR PLLC, BRYAN J. MAZZOLA, W. TODD BOYD, BOYD RICHARDS PARKER COLONELLI, P.L., and BOYD RICHARDS NY, LLC,

Defendants.

The underlying case involves the plaintiff Scott Epstein's disputed relationship with the law firm, Cantor, Epstein & Mazzola, LLP (the "Firm"). On December 11, 2020, this Court concluded that Epstein's relationship with the Firm lacked certain indispensable elements of a partnership under New York law, notwithstanding the existence of a partnership agreement between Epstein and defendant Robert Cantor (Decision & Order, NYSCEF Doc 157). Epstein's claims sounding in breach of fiduciary duty fell as a result ("Dismissed Claims").

Seeking the Dismissed Claims' reinstatement, Epstein now moves for leave to reargue under CPLR 2221(d) alleging the Court "overlooked or misapprehended" binding precedent and for renewal under CPLR 2221(e) "based upon new facts" that warrant the same (Mot Seq 10, NYSCEF Doc 171).

BACKGROUND

In October 1995, Epstein and Cantor entered into an agreement purporting to form a partnership (the "Agreement"). Under the Agreement's terms, Epstein was not required to make capital contributions to the Firm, did not share in its profits and losses, and had little, if any, control over its operation. On motion to dismiss, defendants argued that these are essential elements of a

partnership. This Court agreed and cited, among other cases, a 1958 decision from the New York Court of Appeals for the proposition that sharing in profits and losses is an "indispensable" element of a partnership (*Steinbeck v Gerosa*, 4 NY2d 302, 317, 175 NYS2d 1, 13 [1958]). Finding that Epstein was not a partner at the Firm, the Court reasoned that the Firm did not owe Epstein a fiduciary duty subject to breach. The Dismissed Claims fell in turn.

On reargument, Epstein cites a 2018 decision from the New York Court of Appeals seeming to contradict and/or overturn its 1958 decision (*see Congel v Malfitano*, 31 NY3d 272, 288, 76 NYS3d 873, 881 [2018] ["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"]). In support of renewal, Epstein alleges that Cantor has since testified at a deposition in a related case that Epstein was, in fact, a "partner" at the Firm (Pl.'s Ex. 5, Cantor Dep. Tr. 291, 292).

Defendants argue that the Agreement on which this Court based its Decision is fully integrated and unambiguous and that Epstein does little now but rehash arguments this Court found unpersuasive in the first instance.

DISCUSSION

For the most part, New York Partnership Law supplies default provisions implicated only when there is "no partnership agreement," the partnership agreement is "silent on a particular point," or an article within the partnership agreement is "contrary to law" (*Ederer v Gursky*, 9 NY3d 514, 526, 851 NYS2d 108, 116 [2007]; *Congel*, 31 NY3d at 287). Indeed, nearly all of partnership law contemplates an agreement specifying the terms of the partners' relationship (*see, e.g.*, Partnership Law § 74 [right to an accounting exists absent agreement to the contrary]). Where such agreement exists, the partners may therein embrace virtually "any" article they "desire"

such agreement exists, the partners may therein embrace virtually "any" article they "desire" (*Congel, supra* at 287–288, quoting *Cohen v. Lord, Day & Lord*, 75 NY2d 95, 102–03, 551 NYS2d 157 [1989]). This includes "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" (*Congel, supra* at 288, citing *Lanier v Bowdoin*, 282 NY 32, 38, 24 NE2d 732, 735 [1939]).

In short, the current law seems clear: excepting illegality and public policy considerations, where a partnership agreement exists, it controls, and the partners' rights and obligations are determined by contract law (*Congel, supra* at 287–288). Since the law alone seems to warrant reinstating the Dismissed Claims, the Court does not reach the question of renewal. Nonetheless, the Court is inclined to grant the parties an opportunity to submit briefs reconciling Court of Appeals precedent as to the indispensability profit and loss sharing. The parties may therein address the import, if any, of Cantor's alleged admissions that Epstein was a partner at the Firm.

CONCLUSION

Accordingly, upon reargument, plaintiff's motion (Mot Seq 10) is **granted** solely to the extent that the parties are granted leave to submit one final memorandum of law each. Such final briefs may be served and submitted by April 25, 2022.

Dated: March 14, 2022
Brooklyn, New York

Hon. Larry D. Martin
Supreme Court of the State of New York

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT