SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
--X
KEVIN P. GALLAGHER,

Plaintiff,

-against-

JOHN CROTTY, JOHN WARREN, and JOHN FITZGERALD,

Defendants.
--X

Index No. 651498/2015

AFFIRMATION IN OPPOSITION TO PLAINTIFF'S MOTION AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION

Edmond J. Pryor, an attorney duly admitted to practice law in the State of New York, and mindful of the penalties for perjury, hereby affirms:

1. I represent John Crotty, John Warren, and John Fitzgerald (the "Defendants") in this action, and as such, am fully familiar with the facts set forth herein based upon records maintained in my office and communications with my clients.

2. I submit this Affirmation in opposition to plaintiff's Motion for Summary Judgment on his Third Cause of Action in his Amended and Supplemental Complaint and in support of Defendants' cross-motion for summary judgment seeking an Order and Judgment (1) dismissing the Plaintiff's First and Second Causes of Action inasmuch as the purported Workforce Housing Advisors oral "partnership" is void, as alleged, in that it violates the Statute of Frauds; (2) dismissing the First, Second and Third Causes of Action because Plaintiff improperly sued the individual Defendants instead of the Limited Liability Companies for accountings; (3) dismissing those parts of the First, Second and Third Causes of Action insofar as Plaintiff, an individual, is not a member of Sedgwick Avenue Renaissance Developers, LLC, Workforce Walton-Creston, LLC, Habitare Urbana Fund, LLC, or Creston Avenue Renaissance Developers, LLC and does not have standing to sue to enforce provisions of their operating agreements; (4)

dismissing the Fourth Cause of Action in its entirety to the extent that Plaintiff relies on the purported "Workforce Housing Advisors" oral partnership is void and, in any event, to the extent that Plaintiff is not a member of Sedgwick Avenue Renaissance Developers, LLC, Workforce Walton-Creston, LLC, Habitare Urbana Fund, LLC, or Creston Avenue Renaissance Developers, LLC and does not have standing to sue to enforce provisions of their operating agreements; (5) dismissing the Fifth Cause of Action because the Plaintiff is improperly seeking relief from the individual defendants instead of the Limited Liability Companies; and (6) for such other and further relief as to this Court seems just and proper.

ARGUMENT

Plaintiff's Motion for Summary Judgment Should be Denied Because the Amendments did not Adversely Affect Plaintiff in any Material Respect Nor Did They Disproportionately Affect Him

3. While summary judgment deprives the litigant of his day in court and is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues, See Andre v Pomeroy, 35 N.Y.2d 361 (N.Y. 1974), it is in all respects proper to grant the Defendants' cross-motion for summary judgment and deny the Plaintiff's motion herein.

4. On a motion for summary judgment, it is the duty of the court to determine if any material question of fact exists and, if so, to deny the motion. See Puffer v Binghamton, 301 N.Y.S.2d 274 (S. Ct., NY County 1969).

5. On a motion for summary judgment, facts must be viewed in the "light most favorable to the non-moving party." See Vega v. Restani Const. Corp., 18 N.Y.3d 499 (2012). Further, the court is empowered to search the record and award summary judgment to the non-moving party. See Fed'l Nat. Morg. Ass'n v. Katz, 33 A.D.3d 755 (2d Dep't 2006) (trial court properly

exercised its authority in awarding summary judgment to defendants, even though the plaintiff alone had moved for summary judgment).

6. Plaintiff has fallen far short of his burden to demonstrate the absence of any material issues of fact in his Motion for Summary Judgment.

7. Plaintiff moves for summary judgment on the basis that the amendments made to the operating agreements: (1) adversely affected him in a material respect; and (2) altered the manner of computing his distributions. See Plaintiff's Motion for Summary Judgment.

8. Plaintiff's first argument fails because the amendments to the operating agreements benefitted him. The asset management duties had to be performed by someone. At the time of the amendments to the operating agreements of Workforce Housing Advisors MM LLC ("MM I"), Workforce Housing Advisors MM II LLC ("MM II"), and WFHA Kelly Managers LLC ("Kelly Managers"), Plaintiff was not performing any services and had otherwise abandoned all interaction with the Defendants, including communications with anyone connected to the properties owned by those entities. See Affidavit of John Warren para. 10. Consistent with their right to employ personnel or hire third parties in connection with the management of the properties owned by those entities, the operating agreements of MMI, MMII, and Kelly Managers were amended to provide all members of the LLCs who actively engaged in asset management responsibilities with a small fee to compensate them for their work. See Affidavit of John Warren, p. 6. See Plaintiff's Exhibits 15, 16, and 17.

9. Had the operating agreements not been amended, MMI, MMII and Kelly Managers would have had to hire an employee or contractor to perform the asset management responsibilities assumed by defendants Crotty and Warren. See Affidavit of John Warren, para. 12. Moreover, employing others to perform such duties would have been more costly to the

entities, and would have resulted in less profit for investors. See Affidavit of John Warren, para. 12.

10. Therefore, this course of action of amending the operating agreements to compensate defendants Crotty and Warren for their actual work benefitted Plaintiff and did not adversely affect Plaintiff in any respect. It is patent that defendants Crotty and Warren should be compensated for work in this regard, particularly because it resulted in a savings to the ownership entities and, consequently, to the Plaintiff and other investors. Certainly, and at a minimum, this action constitutes a significant question of fact that should result in the denial of Plaintiff's summary judgment motion.

11. The business judgment rule prevents courts from inquiring into "actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." See Auerbach v. Bennett, 47 N.Y.2d 619, 629 (1979). The business judgment rule equally applies to the actions taken on behalf of Limited Liability Companies in furtherance of their business interests. See, Simon v Moskowitz, 193 A.D.3d 520, 521 (1st Dep't 2021).("the court will not second guess a decision protected by the business judgment rule").

12. Plaintiff also maintains that the amendments to the operating agreements altered the manner of computing his distributions and, thus, that they violated the provisions of the operating agreements that were in existence prior to the amendments. However, Plaintiff conveniently overlooks that the provisions of the operating agreements that provide, ". . . none of the following amendments shall be made with respect to any Member if the effect on such Member is disproportionate to such Member as compared to the effect on all other Members without such Member's consent: . . ." See Plaintiff's Exhibits 7, 8, and 9, Section 19.1. Thus, the complained of amendments were only proscribed if they adversely impacted Plaintiff to the

exclusion of other members. That is not the case here and, at a minimum, also constitutes a significant question of fact.

13. Indeed, the complained of amendments do not disproportionately affect Plaintiff because the amendments applied to all members equally. Plaintiff chose to abandon his duties to the various LLCs and not to engage in asset management responsibilities. See John Warren Affidavit, para. 10. Therefore, he is not entitled to earn an asset management fee for any of the years during which he was not involved in asset management tasks.

14. Plaintiff alleges that he was "squeezed out" and not allowed to participate in the oversight and management of the entities. See Plaintiff's Exhibit 1, paras. 1, 8. However, Defendants have consistently maintained throughout this litigation that Plaintiff abandoned his duties and responsibilities owed to the various limited liability companies in which he claims an interest. See Affidavit of John Warren, p. 11. This is a question of fact which should go before a factfinder and Plaintiff's summary judgment motion should be denied.

15. What is more, Plaintiff improperly sued the defendants individually. Instead, he should have brought suit against the Limited Liability Companies that he claims engaged in actions adverse to his interests. See, Limited Liability Company Law ("LLCL") §§ 609 and 610.

The Defendants' Cross-Motion for Summary Judgment should be granted in all respects

Plaintiff's Alleged Oral Partnership Agreement Violates the Statute of Frauds and Cannot be the Basis for any Cause of Action

16. No material issues of fact exist in the context of the Defendants' cross-motion for summary judgment.

17. In his Amended and Supplemental Complaint, Plaintiff alleges, "Gallagher and Crotty entered into an oral agreement to form a partnership known as WFHA. Warren and Fitzgerald

were later added as partners." See Exhibit 1, para. 73. That is not true. In each and every instance where the parties did a deal, they entered into a written agreement, that is, an Operating Agreement for each and every Single Purpose Entity LLC or Limited Partnership Agreement that was used to fund, acquire, develop and/or manage a property, without exception.

18. Plaintiff's only legal basis in pursuing this case was to advocate the existence of an alleged and fallacious oral partnership agreement. However, that tactic fails because the purported oral partnership, as alleged, is void and unenforceable in all respects as violative of the statute of frauds.

19. Plaintiff admits at his deposition that the alleged general partnership was strictly oral and was not recorded anywhere. A true and accurate copy of Plaintiff's deposition transcript is attached hereto and made apart hereof as **EXHIBIT A**. At his deposition, Plaintiff testified, as follows:

Q. You keep referring to a 'WFHA partnership.' Did you file something with New York State to create a partnership?

A. I did not, no.

Q. Did someone else?

A. Not that I know of.

See Exhibit A, p. 98, Lines 6-12.

20. Plaintiff also testified that the alleged oral general "WFHA" partnership would continue in perpetuity. Specifically, he testified, as follows:

Q. What was the term of this so-called partnership agreement? What was the begin date, what was the end date of this so-called partnership?

A. It started when we, you know, shook hands in '08, and would run - - be inevitable. It would run for, you know - - it would continue to run.

Q. In perpetuity?

A. Yeah.

See Exhibit A, p. 126, Lines 10-20.

21. Later in his deposition, Plaintiff reaffirmed that the alleged oral general partnership would never end, when he further testified, as follows:

Q. Is that part of the oral partnership agreement that you testified to about?

A. Fitzi and I and John and John had an understanding that if we were looking at an investment, we would show it to, you know, each other and see if it was something that was prudent to invest in.

Q. In perpetuity?

A. Yeah. We are partners.

See Exhibit A, p. 219, Lines 7-16.

22. Plaintiff alleges in his complaint that this alleged oral general partnership is, ". . . in the business of purchasing over-leveraged loans on multi-family real estate properties in New York City and rehabilitating the properties to function as affordable/workforce housing in partnership with private investors and government agencies." See Exhibit 1, para. 2.

23. To put in perspective the scale of the real estate transactions Plaintiff is referring to, just one of the properties Plaintiff and Defendants purchased through WFHA Creston, LP, necessitated two mortgages, one for $6,000,000.00 and the other for $1,500,000.00. True and accurate copies of these mortgages are attached hereto as **EXHIBIT B**.

24. Pursuant to the General Obligations Law § 5-701(a)(1), all agreements are void unless it is memorialized in writing and signed by the party to be charged with the agreement if "by its terms is not to be performed within one year from the making thereof . . ." See GOL §5-701(a)(1). A contract, void by the statute as between the parties, is void for all purposes, and as to third persons. Kenlon v Corbin, 268 A.D. 318, (3rd Dep't 1944), reh'g denied, 269 A.D. 720 (1945).

25. The Court of Appeals found a similar unwritten agreement to be void and unenforceable in D & N Boening, Inc. v. Kirsch Beverages, Inc., 63 N.Y.2d 449 (1984). In that case, the Court

opined, ". . . this court has continued to analyze oral agreements to determine if, according to the parties' terms, there might be any possible means of performance within one year." See Id, 455.

26. The Court determined that the oral agreement in D & N could not, by its terms, be performed within one year and, thus,that it was unenforceable. See Id, at 457-458. It reasoned that the parties' agreement, ". . . was to continue 'for as long as [plaintiff and its predecessors] satisfactorily distributed the product, exerted their best efforts and acted in good faith.' There was no provision under which 'either party might rightfully terminate it within the year [of its making]'" See Id, at 457, citing Blake v. Voigt, 134 NY 69, 72 (1892).

27. The same analysis must apply in this case. In D & N, the court found, ". . . the agreement required defendants to continue plaintiff's subdistributorship indefinitely. It provided for no expiration and there was no contemplation of any completion or final discharge. See Id, at 458. Thus, ". . . the agreement alleged in the complaint was not one by its terms that could be performed within one year. As such, it came within the ambit of the Statute of Frauds and is void for being unwritten." See Id.

28. The First Department has also found an agreement wherein one party would, ". . . finance a 'multi-year build-out' of the cable systems as well as the costs of operating them 'over the long term'" was not possible to perform within one year and violated the Statute of Frauds. See U.K. Cable Ventures v. Bell Atl. Invs., 232 A.D.2d 294, 295 (1st Dep't 1996). The First Department concluded, ". . . the very magnitude of the contract, involving an estimated cost of $ 166 million to construct and operate the cable systems, is such that a formal writing would be an ordinary expectation." See Id, citing to Allied Sheet Metal Works v. Kerby Saunders, Inc, 206 A.D.2d 166, 170 (1st Dep't 1994).

29. This Court should similarly find Plaintiff's alleged oral general partnership is void and unenforceable because it violates the Statute of Frauds because it could not, by its terms, be

performed within one year. Plaintiff unequivocally testified that this purported agreement would last "in perpetuity." Necessarily, therefore, the terms of the agreement could not be completed within one year and Defendants cannot be bound by it in the absence of a written agreement signed by the parties sought to be bound, that is, the Defendants.

30. Based on the foregoing, Plaintiff's First Cause of Action "For an Accounting of the Partners of WFHA" should be dismissed in its entirety because the alleged WFHA oral general partnership violates the Statute of Frauds. Further, Plaintiff's Second Cause of Action for "Attorneys' Fees" should be dismissed as it similarly pertains to "WFHA." See Exhibit 1, para. 83.

Plaintiff is Not a Member of Sedgwick Avenue Renaissance Developers, LLC, Workforce Walton-Creston, LLC, Habitare Urbana Fund, LLC, or Creston Avenue Renaissance Developers, LLC, Plaintiff Does Not Have Standing to Sue to Enforce Their Operating Agreements and, moreover, the Individual Defendants are not Proper Parties

31. Plaintiff is not entitled to seek relief from the individual defendants in this action for an accounting or otherwise. Rather, to seek relief, such as an accounting, the proper parties from which relief is to be sought are the Limited Liability Companies. Suing the individual Defendants was in all respects improper and, thus, Plaintiff is not entitled to any relief sought in his Second Cause of Action, which should be dismissed in its entirety. See, LLCL §§ 609 and 610; Center for Rehabilitation & Nursing at Birchwood, LLC v S & L Birchwood, LLC, 92 A.D.3d 711, 713-714 (2nd Dep't 2012) (member of a limited liability company cannot be held liable for the company's obligations by virtue of its status as a member).

32. Further, the Plaintiff himself is not a member of several of the Limited Liability Companies ("LLCs") from which he has sought accountings. Therefore, even assuming he

properly sought accountings from the LLCs, Plaintiff is not entitled to accountings from LLCs of which he is not a member.

33. The members of Sedgwick Avenue Renaissance Developers, LLC are: Sedgwick Avenue Managers, LLC, Ren Gaeta, LLC, Twin Lakes Holdings, LLC, JCK 1520, LLC, Breezy Point Holdings, LLC, KG Consulting LLC, Peter Molloy, and Sedgwick Winn LLC. A true and accurate copy of Sedgwick Avenue Renaissance Developers, LLC's Operating Agreement is attached hereto and made apart hereof as **EXHIBIT C**.

34. The members of Workforce Walton-Creston, LLC are: Workforce Walton-Creston Managers, LLC, Ren Gaeta LLC, JCK 1520 LLC, Twin Lakes Holdings, LLC, Christopher P. O'Hara and Kelly S. O'Hara, Breezy Point Holdings, LLC, KG Consulting, LLC, and Brian Gallagher. A true and accurate copy of Workforce Walton-Creston, LLC's Operating Agreement is attached hereto and made apart hereof as **EXHIBIT D**.

35. The sole member of Habitare Urbana Fund, LLC is Workforce Housing Advisors MM II, LLC. A true and accurate copy of Habitare Urbana Fund, LLC's Operating Agreement is attached hereto and made apart hereof as **EXHIBIT E**.

36. The members of Creston Avenue Renaissance Developers, LLC are: Creston WFHA Managers, LLC, Joseph A. Minichini and Deborah A. Minichini, Ren Gaeta LLC, JCK 1520 LLC, Twin Lakes Holdings, LLC, Christopher P. O'Hara and Kelly S. O'Hara, Breezy Point Holdings, LLC, KG Consulting LLC, Mayway LLC, and Brian Gallagher. A true and accurate copy of Creston Avenue Renaissance Developers, LLC's Operating Agreement is attached hereto and made apart hereof as **EXHIBIT F**.

37. Noticeably absent from the lists of members of the referenced LLCs is Plaintiff Kevin Gallagher. While Plaintiff is believed to be the sole member of KG Consulting LLC, Plaintiff is not the proper party to seek accountings from entities in which he is not the member. KG

Consulting LLC would be the proper party to seek accountings. KG Consulting LLC would, in the first instance, be entitled to seek accountings from the various LLCs in which it holds membership interests. Then, if those LLCs did not make available to KG Consulting LLC their books and records for inspection, then it could seek judicial relief.[1]

38. In none of the foregoing instances is Plaintiff the proper party to seek judicial relief. CPLR 3211(a)(3) provides for dismissal of an action where the party asserting the cause of action lacks the legal capacity to sue. See CPLR 3211(a)(3).

39. Standing involves a determination of whether the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast the dispute in a form traditionally capable of judicial resolution. See Graziano v. County of Albany, 3 N.Y.3d 475, 479 (2004); Community Bd. 7 of Borough of Manhattan v. Schaffer, 84 N.Y.2d 148 (1994).

40. A plaintiff, to have standing in a particular dispute, must demonstrate an injury in fact that falls within the relevant zone of interests sought to be protected by law. See Caprer v. Nussbaum, 36 A.D.3d 176, 183 (2d Dep't 2006) citing Matter of Fritz v. Huntington Hosp., 39 N.Y.2d 339, 348 (1976). Standing goes to the jurisdictional basis of a court's authority to adjudicate a dispute. Matter of Eaton Assoc. Inc. v. Egan, 142 A.D.2d 330, 334-335 (3d Dep't 1988) citing Allen v. Wright, 468 U.S. 737, 750-751 (1984).

41. A plaintiff generally has standing only to assert claims on his own behalf. Caprer, supra at 182. An individual or entity that is not a party to an agreement lacks standing to enforce the terms of that agreement. See VAC Service Corp. v. Technology Ins. Co, Inc., 49 A.D.3d 524, (2d Dep't 2008) citing DaRaffele v. 210-220-230 Owners Corp., 33 A.D.3d 752 (2d Dep't 2006).

[1] All of the LLCs remain ready, willing and able to make their books and records available for inspection in accordance with their respective Operating Agreements and pursuant to the Limited Liability Company Law.

42. In Liebman Goldberg & Hymowitz LLP v. Michael R. Drogin CPA, P.C., 2011 NY Slip Op 33654(U) (S. Ct., Nassau Cty. 2011), the Court dismissed claims in a case similar to the one before this Court. In Liebman, the Court found that the Plaintiffs were asserting claims as individuals when the parties to the agreement were professional corporations. See Id at 6. Therefore, the plaintiffs were improper parties and the claims were not properly brought against the defendant individually. See Id.

43. Here, Plaintiff Kevin Gallagher, individually, does not possess membership interests in Sedgwick Avenue Renaissance Developers, LLC, Workforce Walton-Creston, LLC, Habitare Urbana Fund, LLC, or Creston Avenue Renaissance Developers, LLC. Therefore, he is not entitled to enforce Section 19.7 of their operating agreements as he alleges in his Supplemental and Amended Complaint, See Exhibit 1, para 82, and he is not entitled to accountings or to recover attorney's fees as related to these entities.

44. For all of the foregoing reasons, the First and Second Causes of Action should be dismissed based on the Statute of Frauds, the , the First, Second and Third Causes of Action should be dismissed because Plaintiff improperly sued the individual Defendants and not the LLCs from which he sought accountings; the First, Second and Third Causes of action should be dismissed because Plaintiff is not a member of the LLCs from which he sought accountings, the Fourth Cause of Action should be dismissed because it is based on the alleged oral partnership agreement that is void under the statute of frauds and, in any event, Plaintiff is not member of Sedgwick Avenue Renaissance Developers, LLC, Workforce Walton-Creston, LLC, Habitare Urbana Fund, LLC, or Creston Avenue Renaissance Developers, LLC and does not have standing to sue to enforce provisions of their operating agreements, and the Fifth Cause of Action should be dismissed because it improperly seeks relief from the individual Defendants instead of the Limited Liability Companies.

WHEREFORE, Defendants respectfully request that: (1) Plaintiff's Motion for Summary Judgment be denied in all respects; (2) Defendants' Cross Motion for Summary Judgment be granted in all respects; and (3) Defendants be awarded such other and further relief as to this Court seems just and proper.

Dated: Bronx, New York
May 13, 2022

s/ Edmond J. Pryor

Edmond J. Pryor

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 202.8-b(c) that the forgoing document complies with the word count limit.

Word Count: The total number of words in the document, inclusive of point headings and exclusive of the caption, table of contents, table of authorities, signature block and certificate of compliance is 3,726.

Dated: Bronx, New York
May 13, 2022

s/ Edmond J. Pryor

Edmond J. Pryor, Esq.