

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD  
*Justice*

PART 49

O'NEIL, MARTIN, et al.,

Petitioners

INDEX NO. 651542/2013

-against-

MOTION DATE June 19, 2013

AXON, THOMAS, et al.,

MOTION SEQ. NO. 002

Respondents.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

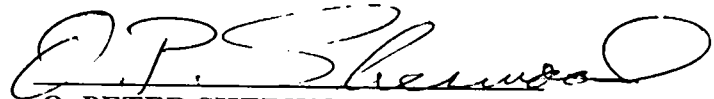
Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion to dismiss action is decided in accordance with the accompanying decision and order.

Dated: July 10, 2013

  
O. PETER SHERWOOD, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 49

-----X  
In The Matter Of the Application of MARTIN O'NEIL,  
JACK SALTZ, DALE WOOGEN FREITAS, as Executor  
of the Estate of Sidney Roberts, ROSEANN FRANK, and  
GABRIELLE KORET, as successor to the interest of John  
D. Votano, Jr.,

Petitioners,

DECISION AND  
ORDER

For the Dissolution of 185 Franklin Street  
DEVELOPMENT ASSOCIATES, A Domestic  
Limited Partnership,

Mot Seq. No. 001 - 002  
Index No.: 651542/2013

-against-

THOMAS AXON and 185 Franklin Street Corp.

Respondents.

-----X  
O. PETER SHERWOOD, JSC:

Petitioners who hold 16.5% of a limited partnership that owns a commercial office building located in Tribeca, commenced this action for dissolution of the partnership and for an accounting. On this motion, Motion Sequence 001, respondent seeks dismissal of the petition on grounds of (1) failure to join all of the limited partners, (2) failure to state a cause of action, and (3) laches, waiver and estoppel. The motion will be granted on the first and second grounds.

Generally, "partners cannot sue each other for acts relating to the partnership unless there has been an accounting, prior settlement or adjustment of the partnership affairs" *Goodwin v MAC Resources, Inc.*, 149 AD2d 666, 667 (2d Dept 1989). None of these are alleged in the petition. Accordingly, the petition must be dismissed without prejudice pursuant to CPLR 1003 (*see id.*).<sup>1</sup>

The petition must be dismissed in for an additional reason, namely the failure to state a cause of action. As is reflected in petitioners' opposition to the motion to dismiss, the petition alleges that in breach of their fiduciary obligations, respondents (1) failed to provide annual reports, (2) failed

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<sup>1</sup> That portion of the petition that purports to seek disclosure of partnership accounts and records and to enjoin respondents from destroying partnership books and records had been resolved by stipulation.

to provide information requested by petitioners, (3) failed to permit petitioners to inspect partnership books, (4) offered to purchase the property at a below market price, (5) failed to make distributions to the limited partners but instead took “all the Partnership’s net cash flow for themselves based on dubious debts owed by the Partnership to [respondent] Axon or his affiliates” and (6) caused the Partnership to grant a mortgage to an Axon affiliates that incorporated debt that had not previously been shown as liens against the Partnership Property.” The disclosure issues have been addressed by the parties and need not be resolved by the court. None of the remaining alleged actions constitute a breach of fiduciary duty given the provisions of the Partnership Agreement which authorize the general partner perform the acts complained of. Moreover, whether viewed individually or together, these alleged breaches are not sufficient to warrant court mandated dissolution of a limited partnership (*see Matter of 1545 Ocean Avenue, LLC v Ocean Suffolk Properties, LLC*, 72 AD3d 121, 128 [2d Dept 2010] [“[D]isagreements between the partners with regard to the accounting of the entity and insufficient to warrant dissolution”]).

As noted above, petitioners seek the assistance of the court to force a sale of the Partnership Property. The facts alleged do not warrant the drastic remedy being sought. Moreover, pursuant to paragraph 11.1(b) of the Partnership Agreement (“PA”), the limited partners have adequate authority to dissolve the partnership upon a mere vote of a majority in interest of the limited partners.

Article 11.1 of the PA, sets forth the occurrences that will trigger dissolution of the partnership:

1. 90 day after withdrawals or removal of the General Partner;
2. A vote to dissolve of a majority in interest of the limited partners;
3. Expiration of the term of the partnership;
4. Sale, transfer or other disposition of the Partnership Property; and
5. Otherwise by operation of law.

None of these events are alleged to have occurred.

Regarding the alleged refusal to make distributions from net cash flows to the limited partners, Article 4.1 the PA provides for *allocation* of profits and losses among the limited partners.

Article 5.1 provides for *distribution* of cash receipts net of expenses and reserves “in the discretion of the General Partner” (Art. 5.1, last sentence). The petition does not allege that excessive reserves are being built up and should be paid to the limited partners. With regard to the mortgage taken out

against the property, Article 2.4 of the PA authorizes the borrowing of money and the pledging of Partnership Property to secure repayment. It is undisputed that the proceeds of the mortgage was used for Partnership purposes. Pursuant to Article 8.4(d) of the PA, the general partner is authorized to mortgage Partnership Property for such purposes. Thus the alleged failure to make distributions and the decision to assume a mortgage secured by Partnership Property cannot support the claim for breach of fiduciary duty.

Accordingly, it is

**ORDERED** and **ADJUDGED** that the motion to dismiss the petition is **GRANTED** and the petition is **DISMISSED**.

**DATED: July 10, 2013**

**E N T E R,**

A handwritten signature in cursive script, reading "O. P. Sherwood".

**O. PETER SHERWOOD**

**J.S.C.**