To be Argued by: Janet D. Callahan, Esq.
Time Requested: 10 Minutes

New York State Supreme Court
Appellate Division - Third Department

DOCKET NO.
CV-24-0809

THOMAS AMICI,

Plaintiff-Appellant

-v-

EDWARD A. MAZZA, ESQ., Individually and as Member of MAZZA AND AMICI, LLC, MAZZA AND AMICI, LLC, and for the Judicial Dissolution of MAZZA AND AMICI, LLC,

Defendants-Respondents.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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Tompkins County Index No.: EF2022-0516

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

State Statutes

Regulations

Other Authorities

PRELIMINARY STATEMENT

The Record on Appeal demonstrates a number of factual issues that were improperly disregarded by the lower court and which should have prevented the grant of summary judgment in favor of Mazza. Specifically, as will be set forth in greater detail below, the record contains issues of fact as to: (1) the existence of a fiduciary duty owed by Mazza to Amici; (2) whether that duty was breached; and (3) whether an equitable remedy was available for the breach. The lower court's grant of summary judgment dismissing Amici's Complaint was erroneous and should be reversed by this Court.

POINT I

THE PARTIES UNQUESTIONABLY WERE PARTNERS FOR YEARS UNTIL MAZZA UNILATERALLY CONVERTED THEIR BUSINESS INTO A LIMITED LIABILITY COMPANY

In his Statement of Facts, Mazza implicitly seeks to deny the existence of a formal business relationship with Amici prior to the time Mazza unilaterally converted their business from a partnership to an LLC, referencing the fact that there was no written partnership in effect between the two. It is well settled under New York law, however, that an oral partnership agreement to deal in real property is valid. See, e.g., *Livanthinos v. Vaughan*, 121 A.D.3d 485 (1st Dep't 2014).

This Court provided a detailed discussion of the requirements for a valid oral partnership in *Leonard v. Cummins*, 196 A.D.3d 886 (3d Dep't 2021), a case in which, coincidentally, Mazza's attorney represented one of the parties:

> A partnership is an association of two or more persons to carry on as co-owners a business for profit" (Partnership Law § 10[1]). "Where, as here, there is no written partnership agreement between the parties, a court looks to the parties' conduct, intent, and relationship to determine whether a partnership existed in fact. The relevant factors are (1) the parties' intent, whether express or implied; (2) whether there was joint control and management of the business; (3) whether the parties shared both profits and losses; and (4) whether the parties combined their property, skill, or knowledge" (*Hammond v. Smith*, 151 A.D.3d 1896, 1897, 57 N.Y.S.3d 832 [2017] [citations omitted]; see *Sterling v. Sterling*, 21 A.D.3d 663, 665, 800 N.Y.S.2d 463 [2005]).

The factors enumerated by this Court in *Leonard, supra*, are present here: (1) Mazza and Amici intended to become partners in the business of buying, selling and managing real property; (2) they jointly managed the business; (3) they shared the profits; and (4) they combined their respective skills and knowledge. Based on those factors, it cannot be disputed that a partnership, with all of its attendant rights and obligations, existed between Amici and Mazza for many years.

The facts surrounding the inception of the partnership are also relevant. Amici first came to Mazza to retain Mazza to act as attorney for Amici and Amici's father, who had purchased a piece of property and needed an attorney to represent them in connection with that transaction. (R.70) Amici and his father subsequently sold that

property and Mazza acted as their attorney for that transaction. (R.70) After that, Mazza told Amici that he would like to get into the real estate business and the partnership was formed. From the inception, Amici's responsibilities were to maintain the properties that were purchased and do any remodeling that needed to be done, and Mazza's responsibilities were to keep the books and do the office work. (R.70-71)

POINT II

AS A PARTNER, MAZZA OWED AMICI A FIDUCIARY DUTY

All partners are fiduciaries of each another, subject to an obligation of the utmost good faith and integrity in their dealings with one another with respect to partnership affairs. *Meinhard v. Salmon*, 249 N.Y. 458 (1928); *Holmes v. Gilman*, 138 N.Y. 369 (1893); *Styles v. Shaver*, 151 A.D. 903, (3d Dep't 1912). The members of a partnership owe each other a duty of loyalty and good faith and, as a fiduciary, a partner must consider his or her partners' welfare and refrain from acting for private gain. See *Gibbs v. Breed, Abbott & Morgan*, 271 A.D.2d 180 (1st Dep't 2000).

That partners owe a fiduciary duty to the other partners is well settled. See, e.g. *Birnbaum v. Birnbaum*, 73 N.Y.2d 461 (1989). The duty was described by the Court of Appeals in *Birnbaum* as "a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect." 73 N.Y.2d at 466, citing *Meinhard v. Salmon*, 249 N.Y. 458 at 463–464 (1928) and *Matter of Rothko,* 43 N.Y.2d 305, 319

(1977). The Court of Appeals went on to state, "This is a sensitive and inflexible rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty", 73 N.Y.2d at 466, quoting *Matter of Ryan*, 291 N.Y. 376, 407 (1943),

PJI 3:59 is the Breach of Fiduciary Duty jury charge. It reads, in pertinent relevant part, as follows:

> Plaintiff, [Amici], claims that defendant, [Mazza], breached [his] fiduciary duty to [Amici]. A [partner] has a duty to [his] [partner] to act in good faith and in the [partner's] best interests during the period of the [partnership]. A fiduciary owes [his] [partner] undivided and unqualified loyalty and may not act in any manner contrary to the interests of the [partner]. *A person acting in a fiduciary capacity is required to make truthful and complete disclosures to those to whom a fiduciary duty is owed and the fiduciary is forbidden to obtain an improper advantage at the other's expense.*

(Emphasis added) (PJI 3:59). A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of the other on matters within the scope of that relation. *Roni LLC v Arfa*, 18 N.Y.3d 846, 939 (2011). In that case, the Court of Appeals held that the defendants, who organized LLCs and solicited investors, owed a fiduciary duty to the investors since "confidence [was] reposed on one side and there [was] a resulting superiority and influence on the other", citing *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co*., 11 N.Y.3d 146, 158 (2008). Since the defendants in that case had "particular experience

and expertise", they assumed a position of trust and confidence and owed a fiduciary duty to the investors.

Similarly, in this case, Mazza had "particular experience and expertise" as a longstanding attorney and, as such, he had assumed "a position of trust and confidence" as to Amici and owed him a fiduciary duty. See, also *EBC I, Inc. v Goldman, Sachs & Co*., 5 N.Y.3d 11 (2005); *Pergament v Roach*, 41 A.D.3d 569 (2d Dep't 2007); Restatement (Second) of Torts § 874. A fiduciary relationship may exist where, as here, one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge, *Roni LLC v Arfa, supra*.

Mazza's fiduciary duty to Amici was heightened by the fact that during the course of their long-standing partnership, Mazza was entrusted with the financial and legal responsibilities of the business, and Amici reposed confidence in him and reasonably relied on his superior expertise in such matters to perform his obligations in keeping with the fiduciary duty he owed to Amici as his partner.

POINT III

THE RECORD CONTAINS FACTUAL ISSUES REGARDING THE CIRCUMSTANCES SURROUNDING THE CREATION OF THE LLC THAT SUPPORTED A FINDING THAT MAZZA BREACHED HIS FIDUCIARY DUTY AND THEREFORE PRECLUDED SUMMARY JUDGMENT

Whether a fiduciary duty has been breached is generally a question of fact. See *Zimmerman v. Pokart*, 242 A.D.2d 202 (1st Dep't 1997); *Grund v. Delaware Charter Guar. & Trust Co.,* 788 F.Supp.2d 226, 249 [SDNY 2011] ("... the extent to which

Defendants owed fiduciary duties to Plaintiffs, and then breached those duties, are questions of fact...."); *Musalli Factory for Gold & Jewellry v. JP Morgan Chase Bank*, 261 F.R.D. 13, 26 [SDNY 2009] ("[breach of fiduciary duty claims] usually involv[e] a question of fact").

Applying that law to this case, the lower court erred in holding as a matter of law that Mazza did not breach a fiduciary duty to Amici when he converted the partnership arrangement between the two men to an LLC, thereby depriving Amici of the right to withdraw that was present under the prior business form. The record demonstrates triable issues of material fact that support a finding of breach and therefore precluded the holding of the lower court in favor of Mazza as a matter of law.

In his Responding Brief, Mazza contends that it was Amici's idea to convert the partnership into an LLC. Specifically, he claims that Amici presented the idea to him; that he told Amici he was not sure forming an LLC "would be much of a benefit o them"; and that they formed one because "Amici said that he wanted to form one." (Respondents' Brief, p 3).

Amici's version of the circumstances pursuant to which the LLC replaced the partnership arrangement between the two men is vastly different. Amici contends that in late 2011, he happened to mention to Mazza that he had noticed other property owners in the area registering their properties as LLCs and he wondered what that

was about, since he knew nothing about LLCs. (R.332, 72) According to Amici, Mazza explained generally to him the purpose of an LLC, but neglected to inform him of the fact that the right of a member of an LLC to terminate the entity was extremely restricted, as contrasted with the right of a partner to withdraw from a partnership at any time. (R.332, 72)

It is also significant to bear in mind that Mazza was the attorney for the partnership and knew that Amici had relied on him for years for legal information and advice and to handle the legal affairs and decisions of the partnership. (R.332) In addition, he and Amici had been partners in their business enterprise for some 38 years. Despite that fact, and despite Mazza's admission that when the two men first formed their partnership, it was he who had drawn up the proposed partnership agreement (R.27), he now claims, without explanation, that he did not act in the role of attorney in preparing the paperwork to create an LLC but, rather, had his father—who also happened to be his law partner— draw up the papers. (R.28)

Moreover, contrary to Mazza's claim that he did not prepare the paperwork for the LLC or act as attorney for the partnership in connection with the conversion, it was he who unilaterally filed the Articles of Organization for the LLC (R.340-341) and he signed them in the capacity of "Sole Organizer." (R.341) Despite the fact that Mazza now claims that his father and law partner acted as the attorney in converting

the partnership to an LLC, the Articles of Organization were not signed by Mazza's father and did not identify him as the attorney for the LLC. (R.341)

Mazza also argues in his Responding Brief that he "did not know the intricacies of the law restricting dissolution of the LLC" and that he had "never formed an LLC." Respondents' Brief, p. 3. Yet, it is undisputed that he had been a practicing attorney for decades and that he had served as the attorney for the partnership throughout its existence. (R.17, 331) By contrast, Amici had a high school education, no legal experience, and relied completely on Mazza to handle the legal, business and financial aspects of the partnership while he managed the real property end. *Id*. The relationship between the two men as partners in the business clearly gave rise to a fiduciary relationship. Moreover, Amici relied on, and reposed confidence in, Mazza's superior expertise and knowledge of the law.

In addition, Mazza's claim that he had no particular knowledge of LLCs or the "intricacies of LLC law" is somewhat disingenuous. Mazza is a practicing attorney with a B.A. in Economics from Syracuse University and a J.D. from Cornell Law School. He has maintained his own law practice for over 45 years. Moreover, he holds himself out as practicing in the areas of "Real Estate Law, Landlord Tenant Law, Business Law". To accept that a longstanding practicing attorney who practices in the area of business law has no knowledge of LLC law defies credibility.

More significantly, to accept that such a person, while acting in the role as attorney for the partnership, would readily convert the partnership to an LLC at the mere suggestion of a partner whose contribution to the business was to perform physical labor, and that he would do so without conducting some rudimentary research into the nature of an LLC and the manner in which one member might leave the LLC, defies belief.

It is respectfully submitted that based on the foregoing, the circumstances pursuant to which the partnership between Amici and Mazza was converted to an LLC and whether those circumstances gave rise to a breach of Mazza's fiduciary duty as Amici's partner and the partnership's attorney, are factual issues that should have precluded the grant of summary judgment to Mazza. The lower court's ruling in favor of Mazza as a matter of law and dismissal of Amici's Complaint constitutes reversible error.

POINT IV

THE MERE FACT THAT THE LLC CONTINUES TO FUNCTION PROFITABLY DOES NOT COMPEL THE CONCLUSION THAT MAZZA DID NOT BREACH HIS FIDUCIARY DUTY TO AMICI

One of Mazza's first statements in support of the argument that the LLC could not be dissolved is that "the LLC had been and continues to operate in an immensely profitable manner." Respondents' Brief, p. 1. That would be relevant if Amici were, for example, trying to dissolve a corporation pursuant to Business Corporation Law

§ 1104. Even in such case, however, this Court has held that dissolution is not to be denied simply because the business continues to be profitable or because dissension between the principals of the business has not yet had an appreciable impact on the profitability of the business. See, e.g. *Cellino v. Cellino & Barnes, P.C.,* 175 A.D.3d 1120, 1121-22 (4th Dep't 2019); see, also, *Molod v Berkowitz*, 233 A.D.2d 149, 150 (1st Dep't 1996), lv. dsmd. 89 N.Y.2d 1029 (1997). The fact that the business continues to make a profit does not mean that the conclusion is compelled that Mazza did not breach a fiduciary duty to Amici or that Amici is not entitled to an equitable remedy for that breach.

POINT V

MAZZA'S ARGUMENT THAT AMICI HAS NOT BEEN DAMAGED BY THE CONVERSION OF THE PARTNERSHIP TO AN LLC BECAUSE HE IS STILL ENTITLED TO HALF OF THE NET PROFITS MUST BE REJECTED

Mazza contends that even if Amici were to simply retire from the LLC for reasons of his advanced age and terminal illness, he would not sustain any damages since "he would nevertheless be entitled to fifty percent (50%) of the net income of the LLC". Respondents' Brief, p. 6. This is a fallacious statement. The conversion of the partnership to an LLC caused Amici to sustain damages because it deprived him of the ability to withdraw from the business and to withdraw the value of his one-half share of its assets.

If the nature of the business entity between the two parties had remained a partnership—as it had been for many years—Amici would have been able to retire and cash out his one-half share of the partnership assets. Once Mazza converted the partnership to an LLC, however, that right was taken away. Instead, as Mazza concedes, Amici's only entitlement would be to receive one-half of the LLC's net income each year. That has caused him to sustain damages in two respects.

First, he would only be entitled to a share of the *income*, not the assets of the LLC. The conversion has cost him the right to have Mazza, as a 50% partner, buy him out. Instead, he is relegated to receive only a share of profits, and only on an annual basis.

Second, his share is of the *net* profits. As noted by Mazza in the Respondents' Brief (p. 6), if Amici wished to retire, the LLC would hire someone to replace him, and his share of the net profits would be reduced to reflect that additional expense. Clearly, and contrary to Mazza's argument, Amici has sustained financial damages as a result of Mazza's conversion of the partnership into an LLC, which stripped Amici of his right to retire and to cash out his share of the business immediately. This has become an even more devastating loss in view of Amici's terminal illness.

POINT VI

THE RECORD CONTAINS EVIDENCE OF SELF DEALING BY MAZZA THAT SHOULD HAVE PRECLUDED SUMMARY JUDGMENT

At page 6 of Respondents' Brief, Mazza challenges the examples offered by Amici in his Brief of self-dealing that further demonstrate a breach by Mazza of his fiduciary duty to Amici as his partner. It should be noted, however, that while Amici gave specific page references to the Record on Appeal to support each of his examples, Mazza did not. Further, Mazza does not deny any of the examples offered by Amici—that Mazza placed his wife on the payroll, that the health care expenses paid by the LLC were more for him than for Amici, that he was paying for his wife's health insurance from LLC funds, that he was dipping into LLC funds to pay for expenses associated with his personal law office, and that he unilaterally placed $800,000 of the LLC's money, which represented a significant portion, into a certificate of deposit, thereby tying it up without informing Amici or discussing it with him.

Since Mazza cannot refute these facts, instead he simply asserts in his Brief that "[n]one of these things ever resulted to an advantage or benefit to Mazza over Amici nor were they ever a source of disagreement between Amici and Mazza." Respondents' Brief, p. 6. However, whether this conduct by Mazza constituted self-dealing to the detriment of his partner in breach of his fiduciary duty is a question of fact that should have precluded summary judgment. See, e.g. *Sutton v. Burdick,* 135

A.D.3d 1016 (3d Dep't 2016) (defendant partner claimed certain expenditures to be operating expenses for which he was entitled to reimbursement from the partnership beyond his share of the profits); *Birnbaum v. Birnbaum*, *supra*, 73 N.Y.2d 461 (1989) (holding that a fiduciary duty to partners may be breached by improper dealings that benefit a partner's family members); *Levine v. Levine*, 184 A.D.2d 53 (1st Dep't 1992). The lower court erred in finding as a matter of law that Mazza's admitted conduct did not constitute self-dealing to the detriment of Amici, his partner.

POINT VII

MAZZA'S ARGUMENT THAT THE LOWER COURT WAS CORRECT IN REJECTING ANY POSSIBLE EQUITABLE REMEDY AS A MATTER OF LAW IS UNPERSUASIVE

At Point II of his Respondents' Brief, Mazza briefly touches on the lower court's utter rejection of possible equitable remedies that might be available to Amici for Mazza's breach of fiduciary duty. He contends that the rejection was appropriate. His arguments, however, are unpersuasive, particularly as to rescission.

Mazza argues that the lower court correctly rejected rescission as a possible remedy as a matter of law because rescission is available only to void a contract, citing a single Fourth Department case, *Lenel Systems Intern. v. Smith*, 106 A.D.3d 1536 (4th Dep't 2013). While the case relied on by Mazza did happen to involve a contract, courts have discussed rescission as a remedy in cases involving other types of disputes. For example, *Picard v. Fish*, 139 A.D.3d 1331 (3d Dep't 2016) was an

action in which the plaintiff sought rescission of the conveyance of a deed.[1] In *Zoo Holdings, LLC v. Clinton*, 11 Misc. 3d 1051(A) (Sup. Ct. New York Cty., January 24, 2006), the plaintiff sought rescission of a stock offering. *North Greenbush Dev. Corp. v. Fragomeni*, 226 A.D.2d 854 (3d Dep't 1996) involved a request for rescission of a negative declaration issued by a town planning board, and in *May v. Flowers*, 106 A.D.2d 873 (4th Dep't 1984), the Appellate Division granted rescission of an assignment of an equipment lease. Finally, in the case of *Cetrola v. John Hancock Ins. Co*., 51 Misc. 2d 1047 (Civil Ct. City of New York, November 16, 1966), the plaintiff sought rescission of its waiver of payment of premium on an insurance policy.

Based on the foregoing, the lower court erred in rejecting rescission outright as a possible remedy available to Amici to compensate him for any damages sustained as a result of Mazza's breach of his fiduciary duty.

CONCLUSION

By holding that Amici failed to establish either that Mazza owed him a fiduciary duty or that Mazza committed wrongdoing that breached that duty, the lower court engaged in impermissible issue determination rather than issue finding and committed reversible error. The record before the lower court demonstrated

[1] While ultimately rescission was not allowed, the reason was that the claim was time-barred, not that the remedy was unavailable.

triable issues of fact as to both issues. Further, the lower court erred in holding as a matter of law that Amici was not entitled to any equitable remedy. jdcsig

The lower court's dismissal of Amici's Complaint should be reversed. The cause of action for breach of fiduciary duty and the claims for equitable relief should be reinstated.

Dated: October 28, 2024

Respectfully submitted,

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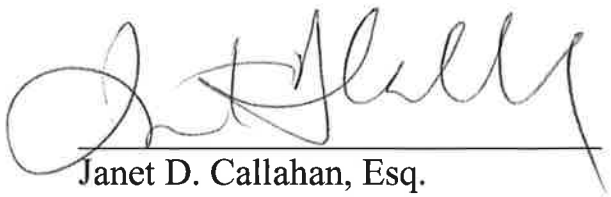

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