To be Argued by:
DIRK A. GALBRAITH
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Third Department

THOMAS AMICI,

Case No.: CV-24-0809

Plaintiff-Appellant,

– against –

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.

BRIEF FOR DEFENDANTS-RESPONDENTS

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STATEMENT OF FACTS

This action was commenced by the plaintiff requesting an order pursuant to Limited Liability Law §702 and common law dissolving Mazza and Amici, LLC ("LLC"), the withdrawal of plaintiff, an equitable buyout of the plaintiff, Thomas J. Amici ("Amici") and judgment against defendant, Edward A. Mazza ("Mazza"), individually and as member of the LLC for damages caused by defendants' breaches of fiduciary duty, fraud, breach of contract and breaches of the implied covenant of good faith fair dealings (50-62).

The defendant has denied the allegations of the complaint and asserts that there have been no such breaches of fiduciary duty, no fraud, no breach of contract or of any covenants of good faith and fair dealing and no damages to the plaintiff (64-66). The LLC has been and continues to operate in an immensely profitable manner (78-307). The dispute surrounding plaintiff's demand to dissolve the LLC is now, and has been throughout the life of the business, the only dispute between the members and that, during this dispute, the LLC business continues to be extremely profitable.

Mazza and Amici, LLC ["LLC"] is a New York limited liability company formed in January 2012 with two members, Thomas J. Amici ["Amici"] and Edward A. Mazza ["Mazza"] (336). Prior to the formation of the LLC, these two members, Mazza and Amici, were joint owners of real estate purchased and held by them as

residential rentals. They commenced this business in 1986 with the purchase of a few small buildings and the business grew through the acquisition of more buildings. The last building was purchased in 1998 making a total of twenty different tax parcels owned. Along the way, only one building has been sold (27).

The acquisition of the properties, except for one property, was a result of opportunities being presented to Mazza through his contacts. When he was presented with opportunities, he would evaluate them. If he felt it might be a viable opportunity, he would present the opportunity to Amici and Amici would inspect the property and report back to him about the condition thereof. At that time, a joint decision would be made whether to make an offer or not (27).

Once properties were acquired, the two members were hands on operators of the business with Amici being responsible for the maintenance of the buildings and Mazza was responsible for the business aspects. As the business grew, they found that they needed to hire an employee to help with the maintenance and retained some independent contractors to also assist in certain parts of the operation of the business (27).

When the business was started, Mazza presented a proposed partnership agreement to Amici. Upon receipt of it, Amici never spoke to Mazza about it and no partnership agreement was ever signed (27).

Thereafter, Amici presented to Mazza the idea of forming an LLC for this business (72). Mazza told Amici that he was not sure that forming an LLC would be much of a benefit to them. However, Amici said that he wanted to form one, so an LLC was formed and filed. Attorney Bruno A. Mazza, Jr., Mazza's father, was the attorney who formed this LLC on or about January 26, 2012 (27-28).

At the time of formation, Bruno A. Mazza, Jr. prepared a proposed Operating Agreement. A copy of the proposed Operating Agreement was provided to Mazza, who then provided a copy of it to Amici. Upon receipt of it, Amici never spoke about it and it was never signed (28).

Mazza did not act as legal counsel to anyone in the formation of this LLC. He had never formed an LLC for any of his clients in his legal career and did not know the intricacies of the law restricting dissolution of the LLC. He never advised Amici that he was representing the business or him individually in the formation of the LLC (28).

POINT I

THE COURT BELOW CORRECTLY HELD THAT PLAINTIFF HAS FAILED TO ALLEGE FACTS TENDING TO SHOW THAT MAZZA BREACHED A FIDUCIARY DUTY

The Court below correctly held that accepting Amici's allegations as true there is no evidence that Mazza engaged in any misconduct. It was Amici who suggested the formation of the LLC and Mazza, who was not familiar with the intricacies of the Limited Liability Company Law, therefor caused his law partner to prepare and file articles of organization (28).

There is no allegation that Mazza entered into an attorney-client relationship with Amici concerning the formation of the LLC and cases such as *Greene v. Greene (56 NY 2d 86 [1982])* are therefor distinguishable. There is no allegation that Amici, who was no stranger to attorneys (28), ever sought legal advice from Mazza concerning the formation of the LLC or that Mazza ever rendered legal advice to Amici. He simply agreed to Amici's request to form an LLC for the purpose of operating their business. There has been no showing by Amici that Mazza had any knowledge of the intricacies of LLC laws other than to state that he is an attorney. He did not show any instance where Mazza formed an LLC. Amici claims that Mazza unilaterally made the transfer of the property to the LLC and simply advised

Amici that the jointly owned properties had been transferred to the LLC. There was nothing "unilateral" about this transfer. Amici suggested to change to an LLC and Mazza agreed to it. Amici clearly knew about the transfer before it was made, because they owned the properties in their joint names so the deed conveying the properties to the LLC was signed by both Amici and Mazza.

The formation of the LLC and the lack of an executed operating agreement created no advantage to Mazza in the parties' business relationship. They were at all times equal members of the LLC and the restrictions concerning the dissolution of a limited liability company applied equally to both. It would have been impossible to predict in 2012, when the LLC was formed, that it would be Amici who wanted to withdraw from the business a decade later and not Mazza.

Cases such as *Beltrone v. General Schuyler & Co. (252 AD2d 640 [3rd Dept. 1998])* and *Howard v. Murray (43NY2d 417 [1977])* are distinguishable from the present facts since there is no allegation that Mazza exploited whatever knowledge he is alleged to have concerning limited liability companies to create an advantage to himself in his dealings with Amici and for the further reason that nothing he did damaged Amici. As the court below noted "the LLC has remained a lucrative enterprise," generating net income of at least $655,000.00 in the most recent tax year (4).

If Amici were to retire from the business, i.e. give up his job responsibilities, for reasons of health or otherwise, he would nevertheless be entitled to fifty percent (50%) of the net income of the LLC, which in recent years has resulted in distributions to him of over $300,000.00 annually (165, 241). If Amici were to retire the LLC would presumably hire a worker to replace him, which might reduce the net profits of the business but would not destroy the viability of the business as a going concern (7).

In his brief, plaintiff points to the fact that Mazza hired his wife as bookkeeper for the LLC, paid law office expenses from LLC funds, paid health insurance costs unequally and deposited LLC funds in certificates of deposit. In point of fact, both parties hired family members to provide services to the LLC and the partnership before the creation of the LLC, Mazza provided an office and staff to the benefit of the LLC at no charge and the LLC and the law office shared office equipment, the parties' respective health insurance costs were never equal throughout the time of the LLC and partnership, but the funds spent were always equalized in their member/partner withdrawal distributions and the certificate of deposit earned interest which the LLC checking account did not (351-365). None 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. The only disagreement was Amici's desire to dissolve the LLC.

"In cases where there is no agreement between the members, the law is it to be require that there be no dissolution of an LLC unless (1) the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or (2) continuing the entity is financially unfeasible" (*Matter of 1545 Ocean Ave., LLC, 72 AD 3d 121, 131, [2nd Dept. 2010]; see Limited Liability Company Law § 702*). One party is not able to unilaterally shut down a very profitable business that is fulfilling its original purpose. Upon this appeal, the plaintiff does not argue otherwise. The purpose of Mazza and Amici, LLC, although not explicitly stated in its articles of organization, is the management of commercial real estate (72) and it does so in a financially successful manner. The plaintiff has alleged no facts to the contrary.

The court below therefor properly held that even assuming Mazza owed a fiduciary duty to Amici, the plaintiff had alleged no facts tending to show that Mazza had committed misconduct or that Amici had suffered damages by reason of anything which Mazza may have done. The complaint herein was correctly dismissed.

POINT II

THE COURT BELOW PROPERLY CONSIDERED AND REJECTED PLAINTIFF'S CLAIMS FOR RESCISSION, DISSOLUTION OR EQUITABLE BUYOUT

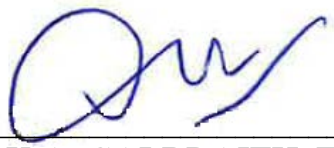
The court below correctly observed that rescission is an equitable remedy available to declare a contract void and restore the parties to the status quo. It is inappropriate to the facts of the present case for the reason that the transfer of the business to an LLC did not involve the formation of a contract and in any case, plaintiff failed to allege a breach on the part of Mazza, willful conduct or conduct that strongly defeats the object of the parties in entering their business relationship (*Lenel Systems Intern. v. Smith, 106 AD 3d 1536 [4th Dept. 2013]*).

The remedy of equitable buyout, as the Court below correctly held is only available in the context of the dissolution of an LLC. *Matter of Superior Vending, LLC [Tal. Plotkin] (71 AD 3d 1153 [2nd Dept. 2010])* is not in point for the reason that the parties to that proceeding consented to the dissolution of their LLC.

CONCLUSION

The order of the Court below should be in all respects affirmed.

Dated: October 8, 2024



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Dated: October 8, 2024