

Matter of Franzese v Daly
2009 NY Slip Op 33139(U)
December 16, 2009
Supreme Court, Nassau County
Docket Number: 18355-09
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**In the mater of the Application of
PATRICK FRANZESE,**
Petitioner,

**TRIAL/IAS PART: 25
NASSAU COUNTY**

**Index No: 18355-09
Motion Seq. No: 1
Date of Submission: 11/13/09**

For The Dissolution of

**FRANZESE REALTY ASSOCIATES, a partnership
and,**

-v-

**DONNA DALY and EUGENE MESSINA, as
Executor of the Estate of Rosemarie Messina,**

Respondents.

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The following papers having been read on this order to show cause:

- Order to Show Cause, Affidavit in Support, Petition and Exhibits.....x**
- Affidavit in Partial Opposition.....x**

This matter is before the Court for decision on the Order to Show Cause filed by Petitioner Patrick Franzese on September 9, 2009, which was submitted on November 13, 2009. The Court grants the Order to Show Cause in part and denies it in part. For the reasons set forth below, the Court 1) directs that the partnership of Franzese Realty Associates ("Partnership") is dissolved; 2) authorizes the Partnership business to be continued, during the pendency of the action, by Petitioner and Respondent Daly, upon their executing and filing with the clerk an undertaking, in the sum of \$50,000 with sureties to the effect that they will obey all orders of the court, and in the action, and perform all things which this Order requires them to perform;

3) denies Petitioner's application for the appointment of a receiver; 4) denies Petitioner's application for injunctive relief with respect to Daly; and 5) directs Petitioner and Daly to conduct the winding up in the manner prescribed by Partnership Law § 71.

BACKGROUND

A. Relief Sought

Petitioner Patrick Franzese ("Franzese" or "Petitioner") moves for an Order 1) declaring that, pursuant to Partnership Law § 62(4), the Partnership was dissolved on March 18, 2009 as a result of the death of Rosemarie Messina ("Messina") and directing that the affairs of the Partnership be wound up, and that an accounting be prepared of its assets, accounts, debts, rights and liabilities and all of the Partnership's dealings and transactions; 2) directing that, during the winding up of its affairs ("winding up"), the Partnership's business be continued in order to protect and preserve its assets; 3) directing that the winding up be conducted by the Petitioner and that Respondent Donna Daly ("Daly") be enjoined and restrained from interfering with the winding up; or 4) alternatively, declaring that, pursuant to Partnership Law § 68, the winding up be conducted by the Court; 5) appointing Petitioner receiver of the assets and accounts of the Partnership, and directing him to marshal and manage the assets and collect the accounts receivable and pay the liabilities of the Partnership pursuant to the winding up of its affairs; 6) granting to the Petitioner, in the capacity of receiver, full authority to sell the assets of the Partnership, including its real property, under the supervision of the Court, at public auction and directing that, upon the sale of that property, the proceeds be deposited with the Clerk of the Court pending the final accounting and an order of the Court directing their distribution; and 7) authorizing Petitioner, in the capacity of receiver, to retain the services of Hyde Park Realty and Lucille Messina, at no cost or expense to the Partnership, to serve at its managing agent during the winding up of its affairs.

B. The Parties' History

In the Petition filed September 9, 2009, Petitioner alleges as follows:

The business of Franzese Realty Associates ("Partnership") consists of the ownership and management of real property located in New Hyde Park and Franklin Square, New York ("Property"). Prior to March 18, 2009, Messina, Franzese and Daly were equal partners in the partnership. The Partnership terminated on March 18, 2009, by operation of law, due to the

death of Messina.

Since Messina's death, Franzese has managed the Partnership, to preserve its assets during the winding up period. Franzese affirms that, due to the acrimonious relationship between Daly and him, it is impossible to conduct a winding up of the Partnership's affairs without the Court's intervention pursuant to Partnership Law § 68. Further, to preserve the Partnership's assets and effect an orderly dissolution of the Partnership, Franzese requests an Order, pursuant to Partnership Law § 75, appointing Franzese as sole receiver of the Partnership's assets, and authorizing him to continue the Partnership's business during the pendency of this action.

In the Petition, Franzese outlines the history of the Partnership, which is a family business that once included his father Charles Franzese ("Charles"), who died in 1987. Franzese also provides a history of litigation that Daly has instituted since 1987, which Franzese characterizes as "a series of vexatious and meritless legal challenges to the operations of the Partnerships, her parents' testamentary plans and the operations of the family business, contesting the decisions of the majority members of the Partnership...which actions were intended to wrest control of the Partnership's assets for her benefit" (Petition at ¶ 26). Franzese alleges that Daly commenced the following litigation:

1) Daly filed objections with the Surrogate's Court challenging the admission of Charles' will to probate. On September 22, 1994, the Surrogate dismissed Daly's objections and admitted Charles' will to probate.

2) In or about 1990, Daly commenced an action in Nassau County Supreme Court ("Supreme Court") alleging that Petitioner and others had defrauded her of her interest in the Property and mismanaged the Partnership, and seeking to terminate Messina as the Partnership's managing agent. Maria Franzese ("Maria"), Charles' wife, died in 1993, while this action was pending. In 1994, the court granted the Partnership's motion to dismiss Daly's causes of action to set aside the deed for certain Property. In 1998, the court granted the motion by Messina, Eugene Messina ("Eugene") and Petitioner to dismiss the causes of action for fraud. In 2000, immediately before the trial on the remaining causes of action, Daly voluntarily discontinued the litigation. These orders were affirmed by the Appellate Division, Second Department.

3) In 1993, Daly filed objections to Maria's will, alleging fraud and undue influence by

Messina and her husband Eugene. Prior to the trial of that matter, Daly withdrew her petition, with prejudice.

4) In 2003, Daly filed an action in Supreme Court against Messina and the Partnership alleging a breach of fiduciary duty and demanding an accounting with respect to certain accounts and fees. After trial, the court granted judgment dismissing Daly's claims, and Daly did not appeal that decision.

5) In 2007, Daly commenced an action in Supreme Court against Petitioner, Messina and the Partnership, seeking partition of the Property. The court granted judgment dismissing the Complaint, and the Appellate Division, Second Department affirmed that dismissal.

Petitioner affirms that, since Charles' death in 1987, virtually all of the Partnership's actions have been determined on a 2/3 majority vote, with Daly as the lone dissenter. Petitioner and Messina determined that the Partnership required the services of a management company. With Petitioner's approval, Messina formed Hyde Park Management Corp. ("Hyde Park") to act as the management company for the Partnership. The Partnership selected Messina, who was a licensed real estate broker, to operate Hyde Park. Since on or about 1990, Messina and her daughter Lucille Messina ("Lucille"), as an employee of Hyde Park, have performed all duties related to the marketing and financial obligations of the Partnership. Since Messina's death in March of 2009, Lucille has continued to manage the day-to-day operations of the Partnership.

Petitioner affirms that he has been actively involved in the management of the Partnership for thirty (30) years and, since Messina's death, has managed the Partnership's business to preserve its assets pending the winding up of its affairs. Hyde Park and Lucille are prepared to continue to serve as the Partnership's management company, and to waive the fees for their services, during the winding up period.

The Petition seeks the same relief that Petitioner seeks in the instant Order to Show Cause, except that the Petition also contains a request for an Order directing that, if the Court grants Petitioner's application to be appointed as the Partnership's receiver, the Court require Petitioner to post an undertaking in favor of the Partnership, Daly and the Estate of Messina in the sum of \$50,000 as security during the pendency of this action.

Daly has submitted an Affidavit in Partial Opposition, in which she affirms that she agrees with the request of Petitioner (her brother) to wind up the Partnership's business affairs,

and sell its assets at public auction. Daly opposes Petitioner's applications to 1) appoint him as sole receiver of the Partnership; 2) retain the services of Hyde Park and Lucille; and 3) enjoin Daly from acting in a Partnership role.

Daly concedes that, as a minority partner in the Partnership, she instituted the litigation to which the Petition refers. She submits, however, that it was her prerogative to institute these lawsuits, based on her position that the Partnership made improper financial decisions. Daly also provides, *inter alia*, a transcript of the testimony of Messina at an examination before trial on December 1, 2004 at which Messina testified that she was the only employee of Hyde Park, and that Hyde Park never hired any other employees. Daly submits that this testimony refutes Petitioner's assertion that Lucille worked for Hyde Park.

Daly affirms that she has "no problem" working with Petitioner to wind up the Partnership's affairs (Aff. in Partial Opp. at ¶ 8). She submits, as one of the two surviving partners, that the Court should appoint Petitioner and her as joint receivers of the Partnership's assets.

C. The Parties' Positions

Petitioner submits that the Court should grant his Order to Show Cause in light of 1) his active involvement in the management of the Partnership for thirty (30) years, 2) his management of the Partnership's business, since the date of Messina's death, to preserve its assets pending the winding up of its affairs, and 3) the willingness of Hyde Park and Lucille to continue to serve as the Partnership's management company, and to waive the fees for their services, during the winding up period.

Daly opposes Petitioner's application and submits that the Court should appoint Petitioner and Daly as joint receivers of the Partnership's assets.

RULING OF THE COURT

Pursuant to Partnership Law § 62(4), dissolution is caused by the death of any partner. Partnership Law § 68 provides that, unless otherwise agreed, the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representative, or his assignee, upon cause shown, may obtain winding up by the court. Partnership Law § 71 provides the rules for distribution of a partnership's assets and satisfaction of a partnership's liabilities. Partnership Law § 75 provides as follows:

In an action brought to dissolve a partnership, or for an accounting between partners, or affecting the continued prosecution of the business, the court may, in its discretion, by order, authorize the partnership business to be continued, during the pendency of the action by one or more of the partners, upon their executing and filing with the clerk an undertaking, in such a sum and with such sureties as the order prescribes, to the effect that they will obey all orders of the court, in the action, and perform all things which the judgment therein requires them to perform. The court may impose such other conditions as it deems proper, and it may in its discretion at any time thereafter require a new undertaking to be given. The court may also ascertain the value of the partnership property, and of the interest of the respective partners by a reference or otherwise, and may direct an accounting between any of the partners; and the judgment may make such provision for the payment to the retiring partners, for their interest, and with respect to the rights of creditors, the title to the partnership property, and otherwise, as justice requires, with or without the appointment of a receiver, or a sale of the partnership property.

With respect to Petitioner's application for the appointment of a receiver, CPLR § 6401 provides as follows:

(a) Appointment of temporary receiver; joinder of moving party. Upon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed, before or after service of summons and at any time prior to judgment, or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, materially injured or destroyed. A motion made by a person not already a party to the action constitutes an appearance in the action and the person shall be joined as a party.

(b) Powers of temporary receiver. The court appointing a receiver may authorize him to take and hold real and personal property, and sue for, collect and sell debts or claims, upon such conditions and for such purposes as the court shall direct. A receiver shall have no power to employ counsel unless expressly so authorized by order of the court. Upon motion of the receiver or a party, powers granted to a temporary receiver may be extended or limited or the receivership may be extended to another action involving the property.

(c) Duration of temporary receivership. A temporary receivership shall not continue after final judgment unless otherwise directed by the court.

The appointment of a receiver is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits. *Vardaris Tech v. Paleros Inc.*, 49 A.D.3d 631, 632 (2d Dept. 2008), quoting *Schachner v. Sikowitz*, 94 A.D.2d 709 (2d Dept. 1983). The court should grant a motion seeking such an

appointment only when the moving party has made a clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect the moving party's interests. *Id.*, quoting *Lee v. 183 Port Richmond Ave. Realty*, 303 A.D.2d 379, 380 (2d Dept. 2003). The appointment of a receiver should be used sparingly in partnership dissolution actions. *Ronan v. Valley Stream Realty*, 249 A.D.2d 288, 290 (2d Dept. 1998).

The Court concludes that Petitioner has not made the requisite showing to warrant the appointment of a receiver. While it is clear that the relationship between Petitioner and Daly is strained, and that Daly has instituted extensive litigation related to the Partnership in which she has not been successful, the Court cannot conclude that she has engaged in fraud or waste that would support the appointment of a receiver. For the same reasons, the Court denies Petitioner's applications for injunctive relief and an accounting. The Court is hopeful that Daly is being candid when she affirms that she is willing to work with Petitioner in the winding up, and that the winding up can be effected without future litigation.

In light of the foregoing, the Court 1) directs that the Partnership is dissolved, as the parties apparently agree that dissolution is appropriate; 2) authorizes the partnership business to be continued, during the pendency of the action, by Petitioner and Daly, upon their executing and filing with the clerk an undertaking, in the sum of \$50,000, with sureties to the effect that they will obey all orders of the court, and in the action, and perform all things which this Order requires them to perform; 3) denies Petitioner's application for the appointment of a receiver; 4) denies Petitioner's application for injunctive relief with respect to Daly; and 5) directs Petitioner and Daly to conduct the winding up in the manner prescribed by Partnership Law § 71.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Counsel are reminded of their required appearance before the Court on December 18, 2009 at 9:30 a.m.

DATED: Mineola, NY
December 16, 2009

ENTER
ENTERED
HON. TIMOTHY S. DRISCOLL
DEC 21 2009
J.S.C.
NASSAU COUNTY
COUNTY CLERK'S OFFICE