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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T :
HON. IRA B. WARSHAWSKY,
Justice,

TRIAL/IAS PART 7

MAYER MEHRABAN AND 116-126 ROGERS AVE., LLC.,

Plaintiffs,

-against-

BRENDA MCINTOSH AND VIOLET MOORE, Individually and d/b/a CARMEL CHRISTIAN NURSERY AND GRADE SCHOOL,

Defendants.

INDEX NO.: 001683/2009

Decision after Trial

PRELIMINARY STATEMENT

The Court held a bench trial on this matter between October 12, 2010 and October 14, 2010.

BACKGROUND

In 2004, defendants Brenda McIntosh("McIntosh") and Violet Moore("Moore") owned property located at 116-126 Rogers Avenue, Brooklyn New York("Rogers Property"). At the time, McIntosh were Moore were operating a school on a portion of said property. But, due to a foreclosure judgment, they were facing the substantial risk of losing the Rogers Property in a foreclosure sale.

Plaintiff, Meyer Mehraban ("Mehraban"), approached McIntosh and Moore and proposed a transaction that would have the effect of preventing McIntosh and Moore from losing the Rogers Property through foreclosure sale. According to Mehraban, he first approached Keith Byers, whom he understood to be McIntosh's son, who then put him in contact with McIntosh and Moore. The ultimate goal of the transaction was to subdivide the property such that the part of the property that had previously been used for the school would be owned by McIntosh and Moore, and the remaining part would be owned by Mehraban. McIntosh, Moore and Mehraban entered a written agreement for the overall transaction when they signed the joint venture agreement. Nonetheless, the overall transaction was complicated, in part, by implicit contingencies outside the control of McIntosh, Moore and Mehraban.

The overall transaction was intended to unfold as follows based on the written joint venture agreement that was signed on January 3, 2005. A limited liability company would be formed with the name 116-126 Rogers Ave. LLC("Rogers LLC"), with Mehraban owning 50% and McIntosh and Moore each owning a 25% share. The title to the Rogers Property would then be conveyed to Rogers LLC. Upon conveyance of title to the LLC, Mehraban was then act to redeem the premises and satisfy the mortgage. Mehraban was to be the managing partner of the LLC and had authority to take reasonable actions needed to ultimately obtain necessary approvals to subdivide the Rogers Property. Once the contemplated subdivision of the Rogers Property was approved, then the LLC would convey title to the part of the parcel that has been used for the school("Parcel A") to McIntosh and Moore(or some entity that designated by them). In exchange for receiving title to Parcel A, McIntosh and Moore were to convey their interest in the LLC to Mehraban.

The transaction did not fully unfold to completion as planned. Title to the Rogers Property was conveyed to Rogers LLC on January 10, 2005.(See Evidence Exhibit 7, Closing Statement). Pursuant to the joint venture agreement, Mehraban owned 50% of Rogers LLC and McIntosh and Moore each owned 25%. Complicating matters, however, is the fact that the joint venture agreement called for Mehraban, McIntosh and Moore to pay certain specified debts individually which might otherwise have been viewed as debts of Rogers LLC. The parties both argue that the opposing party has failed to meet the obligations to pay said debts pursuant to the joint venture agreement. The defendants, further argue that Plaintiff Mehraban's failure to fulfill certain specified obligations should be classified as a failure to provide his full share of consideration for his ownership interest in Rogers LLC.(Defendants' Summation, pg. 5, lines 21-23). "The cost was whatever the Plaintiff had to spend to demolished(sic) Sections C & B on Defendants property, the cost of building a 2,400.00 square foot extension and the cost of paying off an existing mortgage and outstanding debts that were liens on Defendants property.(*Id.* at lines 5-8). Perhaps most importantly, Rogers LLC has been unable to obtain approval to subdivide the Rogers Property. Without approval, the LLC cannot satisfy its objective of subdividing the Rogers property, and then conveying part of the property to McIntosh and Moore in exchange for their ownership interest the LLC.

At trial, Plaintiff introduced to evidence a "Receipt and Acknowledgment" document.(See Evidence Exhibit 8) It was executed on December 5, 2005 by McIntosh, Moore and Mehraban. It states in pertinent part,

> "Payment of $17,923.09 has been made this date by Mayer Mehraban to Brenda McIntosh and Violet Moore. This payment represents the remainder of the $50,000.00 which Mayer Mehraban is obligated to pay in accordance with paragraph 12 (c) ii (b) for liens, judgments and other monetary encumbrances on the Premises. Mayer Mehraban has paid the following sums to clear encumbrances: $10,085.86 for real estate taxes, water and sewer charges which were overdue, and $ 21, 991.05 for outstanding tax lien. Brenda McIntosh and Violet Moore represent that they have satisfied all other encumbrances which affect these premises. In the event that there are additional liens, judgments and other monetary encumbrances which in fact have not been paid by Brenda McIntosh and Violet Moore, despite their representation, such sums shall be paid by them immediately."*Id.*
>
> "Brenda McIntosh and Violet Moore further represent that they will satisfy any other outstanding obligations or encumbrances which

arise in the future which affect the property."*Id.*

Plaintiff also introduced into evidence at trial an agreement("Modification Agreement") which purports, inter alia, to amend the January 2005 joint venture agreement, provide for a loan, and obligate to McIntosh and Moore to deposit money into an escrow account monthly to be used for costs associated with obtaining a certificate of occupancy.(See Evidence, Exhibit 9) The document is signed by McIntosh and Moore, individually and as members of Rogers LLC. It is also signed by Mehraban, though it's not clear in which capacity he signed the document. At trial, McIntosh testified that she did not sign this document and the signatures that above her name are not hers. The validity of Moore's signatures on this document was not questioned at trial. The parties were not represented by counsel in the drafting and execution of this document. Mehraban promised to loan $100,000.00 by depositing money but he did not deposit this full amount and its not clear, based on the document, to whom such monies were to be deposited. It's not clear whether these funds were to be a loan to McIntosh and Moore, or whether they were to be a loan to Rogers LLC. Also, while the document says McIntosh and Moore "Shall deposit in escrow $3,000.00 per month", neither McIntosh nor Moore made any such deposits.

DISCUSSION

Under LLCL 702, "On application by or for a member, the Supreme Court in the judicial district in which the office of the limited liability company is located may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement." A recent second department decision clarified the "not reasonably practicable" standard.

> "LLCL 702 is clear that unlike the judicial dissolution standards in the Business Corporation Law and the Partnership Law, the court must first examine the limited liability company's operating agreement to determine, in light of the circumstances presented, whether it is or is not "reasonably practicable" for the limited liability company to continue to carry on its business in conformity with the operating agreement. Thus, the dissolution of a limited liability company under LLCL 702 is initially a contract-based analysis."
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> "[W]e hold that for dissolution of a limited liability company pursuant to LLCL 702, the petitioning member must establish, in the context of

> the terms of the operating agreement or articles of incorporation, that (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." (In re 1545 Ocean Ave., LLC, 72 A.D.3d 121, [2d Dept 2010]).

Here, the Articles of Incorporation state the purpose of Rogers LLC to be "to engage in any lawful act or activity" allowed under the LLCL. The operating agreement provides similar language stating "any lawful act or activity for which limited liability companies may be formed." However, the operating agreement goes on to state: "[t]he prime intent of the members, initially, is to implement the Joint Venture Agreement". Neither the articles of incorporation nor the operating agreement discuss the possibility of dissolution.

The Joint Venture agreement, in part, provides:

> "The LLC shall ... make all of the necessary applications to the appropriate boards, agencies, and commissions of the City of New York to obtain approval to subdivide the Premises"
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> "Upon receipt of said subdivision approval, title to Parcel A shall be conveyed to the [McIntosh and Moore], or to such other entity as they may designate and, in consideration for such conveyance, the [McIntosh and Moore] shall convey all of their rights, title, and interest in the LLC to Mehraban."
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> (Evidence, Exhibit 7, para 7,8)

The joint venture agreement does not address the possibility of dissolution. The "prime intent" of the joint venture agreement was to facilitate the necessary approvals of a subdivision of the Rogers Property such that title to Parcel A could be conveyed to McIntosh and Moore in exchange for their ownership interest in Rogers LLC. This purpose was conditional on the receipt of the necessary approvals. The requisite approvals were never obtained and there is no guarantee such approvals can be obtained in the future.

Defendants do not directly contest plaintiff's petition for dissolution, though they do argue over the obligations of each party pursuant to the joint venture agreement.

Complicating matters is the choice by McIntosh, Moore & Mehraban to treat the property on parcel A, the property where the school is located as property of McIntosh and Moore prior to any subdivision of property. When the property was conveyed to Rogers LLC it became property of the LLC. Moreover, the joint venture agreement placed certain financial obligations of Rogers LLC on the individual member. Nonetheless, these obligations remain the obligations of Rogers LLC. Non-payment by Moore & McIntosh of many of these obligations, whether by choice or because they are unable, has left a growing debt for Rogers LLC.

All necessary approvals to allow for a subdivision of the property cannot be obtained without a certificate of occupancy permitting the use as a school. The Rogers property does not have a certificate of occupancy permitting the operation of a school on the premises. Any liens encumbering the property may prevent the issuance of a new certificate of occupancy permitting a school to operate on the premises.

Given these underlying facts, Rogers LLC debts will continue growing unless Mehraban continues making loans or Moore & McIntosh pay their obligations pursuant to the Joint Venture agreement. Even if these payments are made, it does not guarantee approval of a subdivision of the property of the property will be granted. Moreover, Rogers LLC does not have revenues coming in from the collection of rents from the Rogers Property to offset debts. Since approval permitting subdivision of the Rogers property is speculative and Rogers LLC's growing debts combined with its inability to mitigate its debts, this Court concludes, in the context of the terms of the operating agreement and articles of incorporation, that continuing the entity is financially unfeasible. The Court hereby decrees the dissolution of Rogers LLC.

The Rogers Property, which is likely Rogers LLC's primary asset, remains property of Rogers LLC until distributed in accordance with LLCL 704. Therefore a final ruling on plaintiff's second cause of action that seeks partition of the Rogers Property is premature until a determination is made on how the disposition of Rogers LLC's assets will proceed. The Court does note however, that given the evidence presented that necessary approvals for a subdivision of the property were not obtained it would likely be improper for this Court to grant partition of the Rogers Property to the extent it would result in subdivision of the property. This cause of action is hereby temporarily stayed pending a conference concerning the winding up of Rogers LLC.

Plaintiffs argue the parties entered an agreement in February 2007("Modification Agreement"), the defendants breached said agreement and therefore the defendants should be liable for damages. The defendants argue said agreement is void because the signature of McIntosh on the document is not actually hers. The agreement is binding as against Moore who did sign the agreement.

The February 2007 Modification Agreement was undisputedly signed by Moore and Mehraban. Even if the Court accepts McIntosh's testimony that the signature on the agreement is not hers, the agreement can still be binding against her if, by her actions, the court finds she ratified the agreement. McIntosh admitted to seeing a draft copy of the agreement. Thus, she was aware of the contents of the agreement. In April 2007, a joint bank account was opened at Chase Bank with McIntosh and Mehraban's name on the account as called for in the agreement.(See Evidence, Exhibit 15). Mehraban contributed the money to the account and the funds were used to pay elevator bills as called for in the Modification Agreement. Additionally, at trial, Mehraban claimed Mr. Byer took this agreement and returned it with the signatures of McIntosh and Moore on it. Mr. Byer is listed on a January 22, 2008 letter as one of the three directors of the school at the Rogers property, with McIntosh and Moore being the other two. McIntosh claimed at trial she opened the Joint account to pay taxes at the suggestion of her son(Byer), but this is inconsistent with her actions as she signed a check for Up-Rite Elevator on June 11, 2007, for $30,000.00. Moreover, there is a lack of evidence that she ever paid any taxes from the joint account. Additionally, there is a lack of evidence that McIntosh did not follow up on the draft agreement to determine what happened to the negotiations, and notwithstanding the fact that Moore did sign the agreement and had knowledge of the agreement. The Court finds, McIntosh had knowledge of the terms of the agreement and accepted the benefits of the agreement, thereby ratifying it. McIntosh is therefore bound by the terms of the agreement.

Plaintiff's third cause of action seeks damages, on behalf of Rogers LLC, for damages resulting from defendants failure to make payments pursuant to their obligations arising out of the joint venture agreement. At trial it became clear that defendants McIntosh and Moore failed to satisfy many of these obligations resulting in liabilities accruing to Rogers LLC. The joint venture agreement is created these contractual obligations, many of which McIntosh and Moore failed to fulfill. McIntosh and Moore breached the agreement by failing to comply with these terms of the agreement and they are liable for such debts that accrued to Rogers LLC as a result. Likewise, McIntosh and Moore are liable for debts arising out of the Modification Agreement. However, McIntosh and Moores liability are limited to those debts which have been proven, and been incurred. Their liability excludes indeterminate items. For example, the Modification Agreement obligates McIntosh and Moore to "deposit in escrow $3,000.00 per month to cover and additional coasts(sic) that is(sic) needed to obtain the certificate of occupancy."(Evidence, Exhibit 9) While McIntosh and Moore never deposited the $3,000.00 per month to escrow, their liability is limited to costs, incurred and proven, that were necessary to obtain the certificate of occupancy. The calculation of the damages arising out of the joint venture agreement and the modification agreement is referred to a referee.

Defendants argue Mehraban breached the joint venture agreement by not building an extension to the Rogers Property and this breach should be a deemed a failure to pay for 50% of defendants property. The Court disagrees. Pursuant to the modification agreement, the failure of McIntosh and Moore to repay the loan relieved Mehraban from having to fulfill this obligation.

Even if the modification agreement were not binding, Mehraban still would have fully satisfied his obligations as it relates to payment for the Rogers Property and pursuant to the joint venture agreement. Not only did plaintiff provide evidence that the outstanding mortgage was satisfied, he also produced the "Receipt and Acknowledgement" document, signed by McIntosh and Moore which acknowledged Mehreban's compliance with other terms of the joint venture agreement which might have been construed as being part of the payment for the Rogers property on behalf of Rogers LLC. The Court cannot conclude Mehraban breached the contract with respect to rebuilding the property on parcel B as directed in paragraph 10 of the joint venture agreement because these obligations were not yet capable of being breached. Paragraph 10, merely creates on obligation for Mehraban to complete prior to the contemplated future conveyance of Parcel A to McIntosh and Moore. Since the property has to be approved for a subdivision, upon which such conveyance depends, Mehraban did not breach an obligation as to Parcel B because such conveyance cannot go forward without such approvals.

Whether McIntosh, Moore, or Mehraban owe money to Rogers LLC as a result of any outstanding obligations to Rogers LLC is an issue that should be determined during the winding up of the corporation prior to the disposition of assets. To help facilitate the winding up of the corporation, and since many of the outstanding obligations can be classified as damages resulting from defendants breach of the agreements, the referee is directed to calculate the parties' outstanding obligations to Rogers LLC arising out of the joint venture agreement and the modification agreement.

The parties are reminded that, pursuant to LLCL 702, a "certified copy of the order of dissolution shall be filed by the applicant with the department of state within thirty days of its issuance."

The parties are directed to appear for a hearing before Referee Frank Schellace on Thursday, February 17, 2011 at 9:30am to determine damages owed to plaintiffs.

This constitutes the Decision and Order of the Court.
Submit Judgment.

Dated: January 19, 2011

J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE