

Nimkoff v Central Park Plaza Assocs., LLC
2010 NY Slip Op 31374(U)
May 25, 2010
Supreme Court, Nassau County
Docket Number: 005307/09
Judge: Stephen A. Bucaria
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

BARBARA R. NIMKOFF, AS EXECUTRIX
OF THE ESTATE OF MARTIN B. NIMKOFF,
DECEASED,

Plaintiff,

INDEX No. 005307/09

MOTION DATE: April 5, 2010
Motion Sequence # 001

-against-

Seq 2

CENTRAL PARK PLAZA ASSOCIATES, LLC,
DONALD MONTI, GERARD A. LEVI,
RALPH F. PARISI, BYRON H. TERK,
MARIO FRACASSA, LAWRENCE J. PACERNICK,
FREDERICK KAPLAN, WILLIAM CACCESE,
JEFFREY GOODMAN, JEFFREY SHERWOOD,
BERNARD POLATSCH, ILAN ISRAELI,
STANLEY WEINREB, CHANCHAI, SAHA,
THOMAS SZULZ, RONALD C. RICHMAN,
JOHN DOE 1, JOHN DOE 2, JOHN DOE 3,
JOHN DOE 4 and CONCORDE MANAGEMENT
SERVICES, INC.,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Cross-Motion..... X

NIMKOFF

Index no. 005307/09

Affirmation in Opposition.....	X
Reply Affirmation	X
Supplemental Reply Affirmation.....	X
Memorandum of Law.....	XXX
Reply Memorandum of Law.....	X

Motion by defendants Central Park Plaza Associates, LLC, Concorde Managements Services, Inc., Donald Monti, Mario Fracassa, Frederick Kaplan, William Caccese, Ronald C. Richman, Jeffrey Goodman, Chanchal Saha and Ralph F. Parisi for summary judgment dismissing the complaint is **denied**. Cross-motion by plaintiff Barbara R. Nimkoff as Executrix of the Estate of decedent Martin B. Nimkoff for an order permitting her to amend the complaint is **granted**.

This is an action for breach of contract and breach of fiduciary duty. Plaintiff Barbara Nimkoff is the executrix of her late husband, Dr. Martin Nimkoff. Dr. Nimkoff died on April 15, 2004. Prior to his death, Nimkoff was a member, holding a 3.602% interest, of defendant Central Park Plaza Associates, LLC (CPPA), a real estate group. Defendant Donald Monti is a member of CPPA and the president of Concorde Management Services, Inc, which was CPPA's managing agent. Thus, Monti appears to be the managing member of the LLC. The other individual defendants are also members of the limited liability company. CPPA's only asset was an office building located at 700-76 Old Country Road, Plainview, New York, where Nimkoff maintained his practice. Plaintiff alleges that in April 2008, CPPA sold the building for \$ 7 million and has refused to pay plaintiff the estate's proportionate share, \$252,140.

Paragraph 10 of CPPA's Operating Agreement, dated 6/7/95, provided that the LLC dissolved upon the death or bankruptcy of one of the members. Nimkoff alleges that, upon her husband's death, CPPA dissolved and was required to wind up its affairs.

In moving for summary judgment, defendants argue that they have tendered the appropriate amount due to the decedent's estate. Defendants assert that paragraph ten of the Operating Agreement was amended by a "Letter Agreement Continuing the LLC and Amending Section 10 of the Operating Agreement" dated 6/22/99. The Letter Agreement amended Section 10 to provide that the death or bankruptcy of a member "does not result in the dissolution of the LLC, and the LLC shall continue notwithstanding the occurrence of any such event." (Movants' Ex. 11). The reason for the amendment was that a change in the tax laws no longer required a dissolution and election. The Letter Agreement was signed by Martin Nimkoff.

NIMKOFF**Index no. 005307/09**

Plaintiff questions the validity of the Letter Agreement, notwithstanding her husband's signature. However, plaintiff relies upon default provisions of the LLC Law which are not applicable to operating agreements which provide otherwise. Plaintiff also seeks leave to serve an amended complaint clarifying her claims regarding defendants' failure to update the stated value of the property.

Plaintiff relies upon several provisions of the Limited Liability Law to support her argument that the Letter Agreement is invalid and that, therefore, the unamended Operating Agreement remains controlling. Plaintiff relies upon Limited Liability Company Law § 417(b) to assert that the signature of Jeffrey Sherwood, the bankrupt member, was required to amend the Operating Agreement.

The Limited Liability Company Law is "a 'default' statute, recognizing through freedom of contract that the members may override or opt out of most of the statutory provisions affecting the management of their LLC" (Rich, Practice Commentaries, McKinney's Cons Laws of NY, Book 32, 32A, Lien, Limited Liability Company 5A, p 40, Supp Pham 2009). Thus, when an operating agreement "does not address certain topics, a limited liability company is bound by the default requirements set forth in the LLCL" (*Matter of 1545 Ocean Ave., LLC*, 72 AD3d 121 [2d Dept 2010]).

CPA's Operating Agreement addresses voting by written consent and by majority vote. It provides that "all provisions of the Partnership Agreement relating to the management and operation of the Partnership (including without limitation, meetings and voting) shall be applicable to the management and operation of the LLC except that reference to Partners shall be deemed replaced by reference to Members." Thus provisions of the Second Amended Partnership Agreement, as well as the Operating Agreement may operate to nullify contrary requirements of the Limited Liability Company Law.

The Second Amended Partnership Agreement states in Paragraph XI(B) that an amendment to the Agreement must be made in writing. The Operating Agreement, Paragraph 3(e) provides that LLC shall act "as a majority" of the Members shall determine. Accordingly, as the Operating Agreement addresses the issue, LLC § 417(b) requiring a vote by all members who may be negatively affected by an action is not operative, and the vote of bankrupt member Jeffrey Sherwood was not required to give effect to the Letter Agreement.

Plaintiff also relies upon LLC § 407(b) to invalidate the Letter Agreement. LLC § 407(b) states:

except as provided in the operating agreement, no written consent shall be effective to take the action referred to therein unless, within sixty days of the earliest dated consent delivered in the manner required by this section to the limited liability company, written consents signed by a sufficient number of members to take the action are delivered to the office of the limited liability company, its principal place of business or a manager, employee or agent of the limited liability company having custody of the records of the limited liability company. Delivery made to such office, principal place of business or manager, employee or agent shall be by hand or by certified or registered mail, return receipt requested (emphasis supplied)

Plaintiff attempts to invalidate the Letter Agreement because some of the signatures were not dated, and it appears some were faxed to the offices of CPPA. Dated signatures under § 407(b) are necessary to show compliance with the 60 day delivery requirement.

CPPA's Operating Agreement sets forth its own time schedule. Former section 10 of the Operating Agreement governed continuance of the LLC in the event of a dissolution due to the death or bankruptcy of a Member. It stated that bankruptcy or death "will cause a dissolution of the LLC unless, within 180 days after such event, the LLC is continued by the vote or written consent of a majority in interest of the Remaining Members..." The Letter Agreement, amending Paragraph 10 of the Operating Agreement, is in conformity, as 17 of the 18 members gave written consent to continue on June 22, 1999, within 180 days of Sherwood's bankruptcy filing on April 1, 1999. Moreover, Martin Nimkoff provided his consent to the form taken and the substance amended, and waived any objection. Based upon the Letter Agreement, CPPA did not dissolve upon the death of Martin Nimkoff. The court will proceed to consider whether defendants complied with the applicable provisions governing the valuation of Nimkoff's interest.

The Operating Agreement provides that a member may dispose of his interest in the LLC only in accordance with the "relevant terms and provisions of the Partnership Agreement". The Second Amended and Restated Partnership Agreement, section VIII, dated 4/16/91 in relevant part, requires the Estate of a deceased partner to sell the partner's interest to the partnership. The purchase price must be equal to "the last Stated Value . . . of the Partnership (to be agreed upon on an annual basis by the Partners) multiplied . . . by the deceased Partner's percentage interest in the Partnership." Section VIII provides that the stated value "shall be redetermined annually by the Partners on or about the anniversary date

NIMKOFF

Index no. 005307/09

of the first Stated Value.” Section VII further provides that should the Partnership fail to determine the Stated Value in any given year, in that event “the last Stated Value shall be controlling.” Defendants tendered to plaintiff the amount of \$111,107.14, based upon a stated value of \$2,750,000 which is dated March 7, 2001. (Although 3.602 % of \$2,750,000 is \$99,055, defendants elected to tender a lump sum distribution, plus interest, rather than pay the estate over a 10 year period as provided in the agreement.)

Plaintiff alleges that the members of the LLC failed to update the “Certificate of Stated Value” for a period of three years prior to her husband’s death. She avers that the breach of this obligation to update the Certificate resulted in a loss to the decedent, as the Certificate did not reflect the true value of the LLC, and the decedent’s 3.602% interest was applied to a value which was not equal to the true market value of the LLC.

In order to obtain summary judgment the movant must establish a defense “sufficiently to warrant a court’s directing judgment in its favor as a matter of law . . . The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests” and mere “conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’ for this purpose” (*Gilbert Frank Corp. v.*, 70 NY2d 966, 967 [1988]; *Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]).
Federal Ins. Co.

“A manager [of a limited liability company] shall perform his or her duties as a manager...in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances” (Limited Liability Company Law § 409). (See also *Cottone v Selective Services*, 68 AD3d 1038 [2d Dept 2009][managing member of LLC owes fiduciary duty to minority member]). On defendants’ motion for summary judgment, it is their burden to establish prima facie that the failure to update the stated value for three years before Nimkoff’s death was in good faith. According to the affidavit of defendant Donald Monti, Dr. David Koretz, another member of the LLC, died shortly after Dr. Nimkoff, and Koretz’ estate received payment according to the 2001 stated value (Aff § 27). The court concludes that defendants have carried their prima facie burden. Accordingly, the burden shifts to plaintiff to show a triable issue was to whether defendants’ failure to update the stated value was not in good faith.

In opposition to defendants’ motion, plaintiff submits a memorandum dated February 6, 2001 to CPPA from its counsel. In the memorandum, Brian Ziegeler, Esq. states, “[I]t has

NIMKOFF**Index no. 005307/09**

been several years since a Certificate of Stated Value has been executed by you in connection with the ownership of your interests in Central Park Plaza Associates, LLC...It is important that the Stated Value be current so that the estate of a member is properly compensated in the event of a buy-out following a member's death. It is strongly recommended that the Stated Value be reviewed each year." Based upon the memorandum from CPPA's counsel, plaintiff has shown a triable issue as to whether the failure to update the stated value was not in good faith. Accordingly, defendants' motion for summary judgment dismissing the complaint is **denied**.

CPLR 3025(b) provides that leave to amend shall be freely given. The proposed amendment states more clearly plaintiff's claim that defendants breached their fiduciary duty of good faith by failing to update the stated value on an annual basis. Accordingly, plaintiff's motion for leave to serve an amended complaint is granted. The amended complaint shall be deemed served in the form annexed as exhibit C to the affidavit of Barbara Nimkoff. Defendants shall serve their answer to the amended complaint within 15 days of service of a copy of this order.

So ordered.

Dated 25 May '10


J.S.C.

ENTERED
MAY 27 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE