Seeking Valhalla Trust v Deane
2018 NY Slip Op 31920(U)
August 7, 2018
Supreme Court, New York County
Docket Number: 653174/2018
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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SEEKING VALHALLA TRUST f/k/a CARL DEANE 2013 REVOCABLE TRUST & ABSALOM ABSALOM TRUST f/k/a ANNE DEANE 2013 REVOCABLE TRUST derivatively on behalf of SAINT GERVAIS LLC,

Plaintiffs,

-against-

CAROL DEANE and STARRETT CITY PRESERVATION LLC,

Defendants.

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DECISION AND ORDER
Index No.: 653174/2018

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

Under motion sequence number 001, plaintiffs seek a preliminary injunction enjoining defendants from (i) "distributing, disposing, or otherwise transferring any of the proceeds received by ["Starrett City Preservation LLC"] on or about May 24, 2018, directly or indirectly, from the sale of Starrett City," and (ii) "purporting to retroactively reallocate SG's sharing ratio in" Starrett City Preservation LLC. The motion shall be denied for failure to establish irreparable harm.

I. BACKGROUND

Defendant Carol Deane ("Carol") is the managing member of defendant Starrett City Preservation LLC ("Preservation"), which was established by her late husband to hold a 19.9% indirect interest in a large real estate development in Brooklyn named Starrett City (verified complaint ¶ 2). Starrett City is comprised of 46 buildings including commercial tenants and federally subsidized housing (*id.* ¶ 20). Carol is also the managing member of Saint Gervais LLC ("SG") (*id.*). At the time it was formed, SG had a 45.1% interest in Preservation and Carol had a 14.3% interest, but after refinancing, Carol caused certain members stakes in Preservation to be reallocated to herself, making Carol a 52.4% owner in Preservation (*id.* ¶ 25-39). Through their personal trusts, Anne Deane ("Anne") and Carl Deane ("Carl") each own a 35.96% membership interest in SG (respectively, plaintiffs Absalom Absalom Trust f/k/a Anne Deane 2013 Revocable Trust ["Absalom"] and Seeking Valhalla Trust f/k/a Carl Deane 2013 Revocable Trust ["Valhalla"]) (*id.* ¶¶ 2, 11-12).

On May 24, 2018, Preservation received a total of $85,570,000 in distributions relating to the sale (*id.* ¶ 49). Under section 4.2 of the Preservation LLC Agreement, all "payments received [by Preservation] shall be distributed and applied by [Preservation] in the following order and priority": (i) to the payment of accrued expenses; (ii) to the payment of debts and liabilities; (iii) to the payment of bonus awards to office staff up to a maximum of ten (10%) percent of all payments; (iv) to repay the Members' capital contributions; (v) to the members to the extent of their positive Capital Account; and (vi) "the balance, to the Members in proportion to their Sharing Ratios." These distributions are to be made "as soon as practicable but at least in the same calendar year in which Payments are received by [Preservation]." (*Id.* ¶ 41; *see also* NYSCEF Doc. No. 31 "Preservation LLC Agreement"]).

The following day, Carol sent an email to Anne and Carl claiming, without supporting evidence, that "on May 16, 2018, in the exercise of my discretion as Managing Member of [Preservation] and pursuant to Section 3.3 of the Preservation LLC Agreement, I reduced [SG's] sharing ratio in Preservation from 45.1% to 22.5%, a reduction of approximately 50%" (*id.* ¶ 50; *see also* NYSCEF Doc No. 8). Plaintiffs do not dispute that, as Managing Member of Preservation, Carol has the right to alter the sharing ratios, but contend that Carol has improperly altered those shares on a retroactive basis, after the date by which the money was earned (*see* verified complaint ¶ 5). Carol now claims to have a 75% direct interest in Preservation and the profits it received from the sale of Starrett City (*id.* ¶ 51).

Plaintiffs have asserted four causes of action: (1) a declaratory judgment that SG is the rightful owner of 45.1% of Preservation's interest in the proceeds of the sale of Starrett City, along with an order directing Carol and Preservation to transfer those funds to SG, (2) breach of fiduciary duty claim against Carol on behalf of SG "by engaging in a self-interested transaction, to the detriment of SG" (*id.* ¶ 74), (3) for an accounting, and (4) to compel the production of books and records.

II. ARGUMENTS

The issuance of a preliminary injunction is governed by CPLR 6301, which provides, in pertinent part:

> "A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiffs rights respecting the subject of the action, and tending to render the judgment ineffectual . . . ."

"The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). "The decision to grant or deny provisional relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion of the lower courts" (*id.*).

Plaintiffs contend they are likely to succeed on their declaratory judgment claim since nothing in the Preservation LLC Agreement allows Carol to "go back in time after moneys were earned by Preservation's members," to alter a member's share of profits and proceeds (NYSCEF Doc. No. 3 ["sup mem"] at 5-8). Plaintiffs argue the same with respect to the breach of fiduciary duty claim since, as the managing member of Preservation, Carol owed a duty to SG as a minority member (*id.* at 8 citing *Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014] [as "the managing member of the LLCs," defendant "owed plaintiff—a nonmanaging member—a fiduciary duty"]), which she violated by reallocating sharing ratios in bad faith, and favoring her own interests over the interests of Preservation. In the last instance, plaintiffs contend they are likely to succeed on their claim to compel production of books and records under Limited Liability Company Law § 1102 (*id.* at 9-10).

Regarding irreparable harm, plaintiffs concede that "irreparable harm may not traditionally lie where money damages are adequate," but argue that, nevertheless, that element is satisfied here because their claims involve an "identifiable corpus of funds" in the form of the "Preservation's proceeds from the sale of Starrett City" (*id.* at 11-12). In support of this contention, plaintiffs cite to three cases. The first is *AQ Asset Mgt. LLC v Levine* (111 AD3d 245, 259 [1st Dept 2013]), which upheld an injunction to the extent it "related to the proceeds of the sale of [certain] inventory" since "the monies at issue are identifiable proceeds that are supposed to be held [in escrow] for the party seeking injunctive relief." The second is *Amity Loans, Inc. v Sterling Nat. Bank & Tr. Co. of New York* (177 AD2d 277, 279 [1st Dept 1991]), which reached the same result where a commercial borrower assigned its accounts receivable to the lender and was required by the terms of the loan agreement to hold any money collected on the receivables in trust for the lender's benefit. The court, in upholding the injunction, noted that it "is well-settled that an action will lie for the conversion of money where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question" (*id.*). The last is *1650 Realty Assoc., LLC v Golden Touch Mgt., Inc.* (101

AD3d 1016 [2d Dept 2012]), which in an accounting action, upheld a preliminary injunction enjoining petitioners' property managers from "transferring any assets or monies belonging to the petitioners" without the written consent of petitioners' managing member "and from making any payments from the petitioners' funds to them or their principals, or anyone on their behalf" (*id.* at 1018).

Plaintiffs suggest that irreparable harm is further established here since transfer of these funds would render defendants judgment proof (sup mem at 12-13). They fail to detail exactly how that might be so.

On the balance of the equities, plaintiffs argue that they "simply seek[] to collect the assets set aside for them by Carl and Anne's late father," whereas Carol "due to a spat with her children, seeks to change the status quo . . . so that she could obtain a windfall" (*id.* at 13). Plaintiffs also argue the only harm to Carol from the requested relief would be "that a portion of her profit . . . will be delayed," whereas if the injunction were not granted "SG (and ultimately Anne and Carl) will lose over half their interest in the Starrett City proceeds" (*id.* at 13-14).

In opposition, defendants first note that the issue of the Managing Member's power to reallocate sharing ratios under the Preservation LLC Agreement has gone to the First Department once before, where the court modified Justice Kornreich's order granting partial summary judgment "to declare that Preservation's Managing Member has the power to reallocate the Sharing Ratios of any Member once Preservation has distributed to its Members, in accordance with Section 4.2, at least $10 million, and otherwise affirmed" the decision.

> Justice Kornreich's order previously declared that the managing member had:
>
> the power to reallocate the Sharing Ratios of any member of said company once (i) nonparty Starrett City Associates LP (SCA) or its successors has distributed to Preservation all the distributions that SCA is required to make to its managing general partner and general partner under Sections 3.02 and 3.03 of the SCA partnership agreement, (ii) Preservation has distributed to its members, in accordance with Section 4.2 of its LLC Agreement, any and all distributions it received from SCA, and (iii) such distributions by Preservation are $10 million or more

(*Rudman v Deane*, 138 AD3d 537, 538 [1st Dept 2016], *lv to appeal denied,* 27 NY3d 911 [2016]; *see also* NYSCEF Doc. No. 23 ["opp mem"] at 6-7). Defendants do not dispute that Carol reduced SG's sharing ratio after the sale of Starrett City closed, but contend that the First Department's decision in *Rudman* "explicitly deleted in its modification of the lower court's

ruling any requirement that existing funds already received by or due Preservation had to be distributed before a sharing ratio could be reduced" (*see* opp mem at 10-11). Accordingly, defendants contend plaintiffs have not shown likelihood of success on their declaratory judgment claim.[1] Defendants also argue that the breach of fiduciary claim fails in that the Preservation LLC Agreement already covers the dispute in question and plaintiffs have not alleged any independent duties Carol would owe to SG other than those arising under that agreement (*id.* at 12-14, citing *e.g. Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 389 [1987]).

Defendants argue that plaintiffs' concession that their harm is compensable through monetary damages is dispositive, since the "identifiable corpus" exception plaintiffs rely on "applies only where the funds in question are held in trust for the benefit of the party seeking the injunction" (opp mem at 15, 14-17). Defendants note that in each of the cases plaintiffs rely on, the identifiable funds were either held in trust or in escrow, and that in *AG Asset Mgt. LLC*, the court also found that injunctive relief was not warranted to the extent it related to funds one of the parties "claims he received from AH as a so-called 'M & A fee'" since that "claim [did] not involve any identifiable proceeds that were required to be held on [the movants'] behalf," and thus "the claim d[id] not fall within the exception noted in *Amity Loans*" and gave rise to "no threat of irreparable harm" (*AQ Asset Mgt. LLC*, 111 AD3d at 259). Defendants also note that this court also rejected a claim of irreparable harm where funds were in escrow, finding that "the alleged harm is entirely compensable through an award of money damages" (*Kroll v 440 W. 164th St. HDFC*, 2015 NY Slip Op 30597[U] [Sup Ct, New York County 2015]). Defendants further urge that there is no identifiable fund here because SG has no interest in any identifiable assets. In support of this argument, defendants rely on *Rudman v Deane* (2012 NY Slip Op 33629[U], *7 [Sup Ct, New York County 2012]) in which Justice Kornreich stated that the "law governing New York limited partnerships expressly provides that neither limited nor general partners can hold an interest in specific property of the partnership." (*see* opp mem at 16-17).

Finally, defendants argue that the balance of equities weighs against injunctive relief, since Carol will suffer adverse consequences if the relief requested is granted (*id.* at 18-19). Defendants argue that federal tax code obligates Preservation to allocate Carol a taxable "gain,"

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[1] Defendants also contend that plaintiffs' argument relies on the same "misinterpretation of Section 3.3" that the First Department rejected in *Rudman v Deane* (138 AD3d at 538) (opp mem at 11-12). However, plaintiffs' argument that sharing ratios could not be retroactively modified does not rely on that section (*see* sup mem at 6-7).

and if the court enjoins the distribution of the sale proceeds, Carol would have to pay "millions of dollars in taxes for 'gain' allocated to her, but for which she will be prevented from receiving the cash related to the gain being taxed" (*id.*).

III. ANALYSIS

Defendants are incorrect that the decision in *Rudman v Deane* (138 AD3d at 538) defeats plaintiffs claim for a declaratory judgment. *Rudman* held only that Preservation's managing member may reallocate sharing ratios "once Preservation has distributed to its Members, in accordance with Section 4.2, at least $10 million." It does not hold that Carol may make those reallocations with retroactive effect, after plaintiffs have become entitled to payment.

However, the motion fails for lack of irreparable harm. Plaintiffs concede that the harm here reducible to monetary damages, but argue that this case falls under the exception articulated in *Amity Loans, Inc* (177 AD2d at 279) and *AQ Asset Mgt. LLC* (111 AD3d at 259). As defendants correctly note, however, that exception applies only where "there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question" (*Manufacturers Hanover Trust Co. v. Chemical Bank,* 160 A.D.2d 113, 124, 559 N.Y.S.2d 704; *see also AQ Asset Mgt. LLC*, 111 AD3d at 259 [noting that the exception applies where the "monies at issue are identifiable proceeds that are supposed to be held for the party seeking injunctive relief"]). Plaintiffs' argument fails to distinguish between funds that can be identified – in this case the proceeds from the sale – with identifiable funds that carry with them some requirement to be treated in a certain manner. The cases plaintiffs rely on involve only the latter and plaintiffs have failed to provide any authority establishing that the former gives rise to irreparable harm. Accordingly, the motion is DENIED.

This constitutes the decision and order of the court.

DATED: August 7, 2018

E N T E R,

O. PETER SHERWOOD J.S.C.