

Gerard v Cahill

2012 NY Slip Op 30305(U)

February 3, 2012

Supreme Court, Suffolk County

Docket Number: 26224/2005

Judge: Paul J. Baisley

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.

SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY

COPY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

-----X
NELSON GERARD and BUCKSKILL FARM, LLC,

Plaintiffs,

-against-

CATHERINE CAHILL, AS EXECUTRIX OF THE
ESTATE OF MARVIN HYMAN,

Defendant.

-----X

INDEX NO.: 26224/2005
CALENDAR NO.: 2010022410T
MOTION DATE: 10/27/2011
MOTION SEQ. NO.: 009 MD

PLAINTIFFS' ATTORNEY:
MEYER, SUOZZI, ENGLISH
& KLEIN, P.C.
990 Stewart Ave., Suite 300
Garden City, New York 11530

DEFENDANTS' ATTORNEY:
ESSEKS, HEFTER & ANGEL, ESQS.
108 East Main Street
P.O. Box 279
Riverhead, New York 11901

Upon the following papers numbered 1 to 31 read on this motion in limine: Notice of Motion/ Order to Show Cause and supporting papers 1-16; ~~Notice of Cross Motion and supporting papers~~; Answering Affidavits and supporting papers 17-29; Replying Affidavits and supporting papers 30-31; ~~Other~~; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by plaintiffs Nelson Gerard and Buckskill Farm, LLC, improperly denominated as a motion in limine, is denied.

In 2003, plaintiff Buckskill Farm, LLC, was organized for the purpose of acquiring, subdividing and selling a 9.6-acre parcel of property located in the Town of East Hampton. The members of Buckskill Farm were plaintiff Nelson Gerard, who allegedly made a capital contribution of \$2,000,000, and Marvin Hyman, who allegedly made a capital contribution of less than \$300,000. Both members agreed to act as managers of Buckskill Farm, and Hyman, an attorney, further agreed to provide legal services and to make an additional capital contribution. Significantly, it was anticipated by Gerard and Hyman that the Town of East Hampton would require a portion of the property be set aside as an agricultural reserve.

The operating agreement of Buckskill Farm, which allegedly was adopted in June 2003, states, in part, that every member of the company shall contribute the amount set forth in Exhibit B, and that contributions may be made "in cash, property or services rendered or a promissory note or other obligation to contribute cash or property or to render services." Exhibit B of the operating agreement lists capital contributions of \$2,000,000 for Gerard and \$350,000 for Hyman. Exhibit B also states that Gerard will make a capital contribution of \$2,000,000 "by delivery of a certified or bank check . . . at the time and place established for closing of title," and that Hyman made a capital contribution of \$117,900 "in cash and services and will make the additional contribution as designated above as required." The operating agreement further states that the property to be acquired by the company is zoned for single family residential use, that Hyman has spent \$117,900, including \$110,250 as a down payment on a contract, and that the amount spent represents a portion of his capital contribution. Additionally, it states that Hyman will take all steps necessary or

desirable at his sole cost and expense to process the application for subdivision approval; that, “based upon [Hyman’s] experience, it is not likely that less than five (5) lots will be obtained on a final approved plan”; and that Hyman will consult with Gerard during the process for obtaining subdivision approval and “all decisions to be made shall be made jointly.”

Moreover, in recognition of the parties’ different capital contributions to the company, the operating agreement provides that upon the filing of a subdivision map, the lots and reserve area on such map would be distributed to the members, with the distribution dependent upon the number of buildable lots approved by the Town. Specifically, Exhibit C of the operating agreement states that upon the filing of a subdivision map with the Suffolk County Clerk’s office, the lots on such map shall be distributed to the members, their heirs, agents or assigns in accordance with one of five possible scenarios, each distribution scenario dependent upon the number of lots designated on the map. For example, if the filed subdivision map contained eight lots plus a reserve area, five lots and an undivided one-half interest in the reserve area would go to Gerard, and three lots and an undivided one-half interest in the reserve area would go to Hyman; if it contained only four or five lots, then all of the lots would be distributed to Gerard and the reserve area would be distributed to Hyman. However, if the subdivision map contained less than three lots, Gerard would have the option “to have Marvin Hyman purchase [Gerard’s] interest in the company for the amount of Nelson Girard’s [sic] capital contribution of \$2,000,000.” If the option was not exercised by Gerard, all lots on the subdivision map would be distributed to Gerard and the reserve area would be distributed to Hyman.

In August 2004, after months of negotiations, the Town offered \$1.9 million to purchase four lots, located in the northern portion of the parcel, and the agricultural reserve area from Buckskill Farm, leaving four lots available for residential development. Prior to such offer, Hyman engaged in discussions with the Town regarding the proposed development of the subject parcel, and Gerard allegedly offered to buy out Hyman’s interest in Buckskill Farm for \$500,000. The offer was rejected by Hyman, who allegedly counteroffered to sell his interest in the company for \$1 million. After learning of the \$1.9 million purchase offer by the Town, Gerard allegedly offered to pay \$950,000 for Hyman’s interest in Buckskill Farm. In October 2004, Gerard allegedly made another offer to Hyman to purchase his interest in the company for either \$850,000 or one lot of the subdivision. A dispute exists between the parties as to whether Hyman, who passed away in December 2005, accepted Gerard’s October 2004 offer to buy out his interest in Buckskill Farm. Gerard alleges an agreement to purchase Hyman’s interest in Buckskill Farm was reached in October 2004, after he advised Hyman that his approval of the filing of a subdivision map and the Town’s purchase offer was contingent upon Hyman selling his interest in the limited liability company, and that the terms of the agreement to buy Hyman’s interest were memorialized in a letter dated October 29, 2004.

Subsequently, on September 21, 2005, Hyman filed a subdivision map with the Clerk of Suffolk County. Four days later, he transferred title to the agricultural reserve area, which had increased in size to 6.8 acres due to a merger with the four lots, to the Town in exchange for a check in the approximate amount of \$1.8 million made payable to Buckskill Farm. Hyman allegedly deposited the check from the Town in the company’s bank account. After the check cleared, Hyman allegedly withdrew all but \$6,000 of the sale proceeds from the Buckskill Farm account by writing a check to himself. The sale proceeds, then, allegedly were deposited by Hyman into a joint bank account held by he and his wife, Catherine Cahill.

In 2005, plaintiffs commenced the instant action for a judgment declaring the rights and obligations of the parties to the operating agreement. The amended complaint alleges, in part, that the transfer of title to the four lots and the reserve area was made without Gerard's knowledge or approval. It alleges Hyman misrepresented to Gerard in September 2005 that he was undecided about whether to take the \$850,000 or a lot for his interest in Buckskill Farm, and that no closing date had been set for the transfer of title to the Town. It also asserts Hyman refused demands to return the proceeds of the sale. As to the cause of action for declaratory relief, the amended complaint seeks, among others, declarations that Hyman, by his actions, "signified his choice to accept \$850,000 for his interest in [Buckskill Farm]," that Hyman has no right or interest in Buckskill Farm, and that Hyman owes Buckskill Farm \$1,050,000 "plus the costs of purchase and development (not to exceed \$2,350,000), less the capital contribution" he made to the company. A second cause of action seeks damages for fraud, and the remaining four causes of action seek injunctive relief.

Following Hyman's death, Cahill, in her capacity as executrix of his estate, was substituted as the defendant in this action. Thereafter, in 2007, Gerard and Buckskill Farm commenced another action against Cahill. The action, assigned index number 37856/2007, seeks damages from Cahill individually based on her refusal to return to Buckskill Farm the proceeds from the sale of the reserve area.

By order dated July 16, 2008, this Court (Whelan, J.) granted a cross motion by Cahill for summary judgment, declaring, in effect, that Hyman had an interest in Buckskill Farm at the time of his death, and dismissing plaintiffs' remaining causes of action. The Court also denied, as moot, a motion by plaintiffs for an order consolidating this action with their action against Cahill bearing index number 37856/2007. Thereafter, the Appellate Division modified this Court's order by denying the branch of Cahill's cross motion seeking summary judgment in her favor on the cause of action for declaratory relief (*see Gerard v Cahill*, 66 AD3d 957, 959, 888 NYS2d 104 [2d Dept 2009]). More particularly, the Appellate Division rejected Cahill's argument that, because a provision in the operating agreement prohibits oral modifications, an oral agreement between Gerard and Cahill to redeem Hyman's interest in the company was barred by General Obligations Law § 15-301. Instead, it determined that the alleged oral agreement between Gerard and Hyman "was a separate, additional agreement addressing a scenario that was not anticipated and not covered by the terms of the operating agreement," and that such alleged agreement "did not set forth a new distribution scheme but, rather, provided for a buy-out of Hyman's interest" (*Gerard v Cahill*, 66 AD3d 957, 959, 888 NYS2d 104). The Appellate Division, however, rejected plaintiffs' argument that they were entitled to summary judgment in their favor on the claim for declaratory relief, holding that "questions of fact exist for trial, including whether Hyman accepted the plaintiffs' offer to redeem his interest in the subject property" (*Gerard v Cahill*, 66 AD3d 957, 960, 888 NYS2d 104). Further, while determining that summary judgment was properly granted to Cahill on the cause of action sounding in fraud, the Appellate Division modified the provisions of the order granting summary judgment in Cahill's favor on the third through sixth causes of action, finding that she failed to meet her burden on the cross motion as to the claims for injunctive relief.

Subsequently, by order dated June 25, 2010, Justice Whelan ordered the instant action be joined for trial with the action brought by plaintiffs against Cahill assigned index number 37856/2007, and granted Cahill leave to serve an amended answer. Referring to the order issued by the Appellate Division in 2009, the amended answer contains an affirmative defense, set-off and counterclaim seeking a "declaration regarding the value or fair value of the respective interests of

members Marvin Hyman and Nelson Gerard to Buckskill Farm, LLC.” It also contains a second affirmative defense, set-off and counterclaim seeking an accounting of the value or fair value of Hyman’s and Gerard’s interests as members of Buckskill Farm. It is noted that an appeal of Justice Whelan’s June 2010 order filed by plaintiffs in October 2010 was withdrawn in February 2011. A review of the Court’s computerized records show that a note of issue and certificate of readiness were filed in this action on October 26, 2010, and that no demand for a jury was filed.

Plaintiffs now move for an order precluding defendant Catherine Cahill from presenting evidence at trial “as to the value or fair value of the contributions of Hyman and Gerard in plaintiff Buckskill Farm, LLC . . . pursuant to Exhibit ‘C’ to the LLC’s operating agreement.” According to plaintiffs, Cahill improperly is seeking to argue at trial that under the terms set forth in Exhibit C, Hyman’s interest in the company was equal to the value of three of the eight lots plus one-half of the reserve area. Referring to evidence presented at a hearing on an application for a preliminary injunction, as well as arguments raised on the appeal of Justice Whelan’s 2007 order, plaintiffs assert that the evidence shows Gerard and Hyman entered into an oral agreement to redeem Hyman’s interest in Buckskill Farm. Plaintiffs argue that the Appellate Division “conclusively ruled that none of the sections of Exhibit ‘C’ to the operating agreement covers” the “scenario” of the sale to the Town that actually occurred. Therefore, according to plaintiffs, the distribution of assets of Buckskill Farm is governed by Limited Liability Law §§ 503 and 504. Plaintiffs further argue that as the operating agreement states that member capital accounts are to be maintained in accordance with the Internal Revenue Code and the Treasury Department’s regulations, and Exhibit B specified a capital contribution of \$350,000 on behalf of Hyman, Cahill may not argue Hyman’s capital contribution to the company exceeded such amount. Cahill opposes the motion, arguing that it represents an improper attempt either to reargue plaintiffs’ request to the Appellate Court that it grant summary judgment in their favor on the declaratory judgment action or to reargue Justice Whelan’s order granting her leave to serve an amended complaint.

The function of a motion in limine is to permit a party, before or during a trial, to obtain a preliminary order excluding the introduction of anticipated inadmissible, immaterial or prejudicial evidence or limiting the use of such evidence (*State of New York v Metz*, 241 AD2d 192, 198, 671 NYS2d 79 [1st Dept 1998]). A trial judge has broad discretion as to the admissibility of evidence offered at trial (*see Radosh v Shipstad*, 20 NY2d 504, 285 NYS2d 60 [1967]), and a ruling on a motion in limine, even when made in advance of trial and on paper, constitutes only an advisory opinion, which is not appealable as of right or by permission (*Winograd v Price*, 21 AD3d 956, 956, 800 NYS2d 649 [2d Dept 2005]; *Rondout Elec. v Dover Union Free School Dist.*, 304 AD2d 808, 758 NYS2d 394 [2d Dept 2003]). It is inappropriate for a party to use a motion in limine as a substitute for a motion for summary judgment (*see Ofman v Ginsberg*, 89 AD3d 908, 933 NYS2d 103 [2d Dept 2011]; *Brewi-Bijoux v City of New York*, 73 AD3d 1112, 900 NYS2d 885 [2d Dept 2010]; *Rondout Elec. v Dover Union Free School Dist.*, 304 AD2d 808, 758 NYS2d 394; *Marshall v 130 N. Bedford Rd. Mount Kisco Corp.*, 277 AD2d 432, 717 NYS2d 227 [2d Dept 2000], *lv denied* 96 NY2d 714, 729 NYS2d 441 [2001]; *Downtown Art Co. v Zimmerman*, 232 AD2d 270, 648 NYS2d 101 [1st Dept 1996]).

Plaintiffs’ motion is denied. Although denominated as a motion in limine, plaintiffs do not argue in their moving papers as to the inadmissibility or prejudicial effect of either testimonial or documentary evidence which they anticipate will be presented by Cahill during the nonjury trial of this action. Rather, relying upon a statement in the Appellate Division’s 2009 order in this action that “none of [the] scenarios” for the distribution of lots set forth in Exhibit C “came to pass”

(*Gerard v Cahill*, 66 AD3d 957, 959, 888 NYS2d 104), plaintiffs now seek a pretrial determination that Exhibit C of the operating agreement is irrelevant to determinations as to the respective values of Gerard's and Hyman's interests in Buckskill Farm and the distribution of the proceeds from the property sale to the Town.

The Court rejects plaintiffs' argument that the order of the Appellate Division determined as a matter of law that Exhibit C is irrelevant to the distribution of the assets of Buckskill Farm, particularly the sale proceeds of the subject parcel, as such issue was not necessarily resolved on the merits as part of its holding that Cahill failed to establish as a matter of law the defense that Gerard's claim of an alleged oral agreement to redeem Hyman's interest in the company was barred under General Obligations Law § 15-301 (*see Franco v Jay Cee of N.Y. Corp.*, 36 AD3d 445, 827 NYS2d 143 [1st Dept 2007]; *Puro v Puro*, 79 AD2d 925, 434 NYS2d 424 [1st Dept 1981]). Moreover, if the requested relief is granted, Cahill will be precluded at trial from presenting relevant evidence in defense to plaintiffs' action and in support of her counterclaims regarding the agreement between Gerard and Hyman as to the distribution of company assets, namely the subject parcel of land in East Hampton, after the filing of a subdivision map, as well as evidence relating to the actual subdivision of the parcel and the disposition of the remaining four lots. Plaintiffs' motion, therefore, is the functional equivalent of a motion for partial summary judgment in their favor as to the mechanism for establishing the value of Gerard's and Hyman's interests in the company in the event it is determined that they did not enter into an oral agreement for a buy-out of Hyman's interest in Buckskill Farm (*see Scalp & Blade, Inc. v Advest, Inc.*, 309 AD2d 219, 765 NYS2d 92 [4th Dept 2003]; *Rondout Elec. v Dover Union Free School Dist.*, 304 AD2d 808, 758 NYS2d 394). Finally, as the note of issue was filed in this action on October 26, 2010, the statutory 120-day period for making a summary judgment motion expired on February 23, 2011 (*see CPLR 3212*). Accordingly, plaintiffs' motion is denied.

Dated: February 3, 2012

PAUL J. BAISLEY, JR.

J.S.C.