Frank Seta & Assoc., LLC v Kancharla
2012 NY Slip Op 33409(U)
March 8, 2012
Sup Ct, New York County
Docket Number: 650627/2010
Judge: Judith J. Gische
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

Scanned to New York EF on 3-9-12

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C.
Justice

PART 10

Index Number : 650627/2010
FRANK SETA & ASSOCIATES, LLC
vs.
KANCHARLA, V. REDDY
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. ____
MOTION DATE ____
MOTION SEQ. NO. 002

The following papers, numbered 1 to ____ , were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ____
FOR THE FOLLOWING REASON(S): ____

MAR 08 2012

Dated: March 8 2012

JUDITH J. GISCHE, J.S.C., J.S.C.

1. CHECK ONE: .... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: ....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10
---X

FRANK SETA & ASSOCIATES, LLC,

Plaintiff,

-*against*-

V. REDDY KANCHARLA,

Defendant.
---X

DECISION/ORDER
Index No. 650627/2010
Seq #: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Def n/m w/ VRK affid, exhs	1
Pltf's opp w/exhs	2
Def's reply	3

Upon the foregoing papers, the Decision and Order of the court is as follows:

This action arises from allegations of breach of fiduciary duties arising under an operating agreement. FRANK SETA & ASSOCIATES, LLC ("Plaintiff") is an LLC. Defendant V. REDDY KANCHARLA ("Defendant") is a former member of FRANK SETA & ASSOCIATES, LLC. Plaintiff seeks compensatory damages, disgorgement of compensation paid to Defendant in 2009, and punitive damages. Defendant has answered the complaint and presently seeks dismissal thereof pursuant to CPLR § 3211 (a)(1) and summary judgment pursuant to CPLR § 3212. This motion is opposed.

Although Defendant seeks "dismissal" and "summary judgment" of the complaint, what he actually seeks is dismissal of the claims against him on the merits, pursuant to CPLR § 3211. Phrased differently, Defendant seeks "summary judgment dismissing the complaint

based upon documentary evidence." Accordingly, Defendant bears the initial burden of setting forth evidentiary facts to prove his *prima facie* case such that he would be entitled to judgment as a matter of law without the need for trial (Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]). Where a motion to dismiss is based upon documentary evidence, such evidence must definitively dispose of plaintiff's claims (Zanett Lobardier, Ltd v. Maslow, 29 A.D.3d 495 [1st Dept. 2006]; Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 A.D.2d 248 [1st Dept. 1995]). If the moving defendant meets this burden then the burden shifts to the plaintiff to submit evidentiary facts to controvert the allegations set forth in the defendant's papers to demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, *supra*).

The Complaint and Arguments Presented

FRANK SETA ("Seta") and Defendant formed FRANK SETA & ASSOCIATES, LLC ("FSA") pursuant to an operating agreement ("Operating Agreement") in January 2006. At its inception, both Seta and Defendant had a 50% member interest in FSA. FSA's services relate to the design of exterior walls, such as roofing, waterproofing, design review, quality control, and field inspection (*see* Plaintiff's Complaint, page 3). FSA's services must be completed under the supervision of a licensed engineer, who is required to certify the work upon completion. Defendant was paid a yearly salary for serving as FSA's a professional engineer.

On or around the time Seta and Defendant entered into the Operating Agreement, Defendant also owned a concrete testing company called Testwell. In 2008, Defendant was indicted by the New York County District Attorney's Office and charged with fraud and racketeering related to his activities at Testwell and Defendant was subsequently convicted.

Pursuant to Article 12.2 of the Operating Agreement, Defendant's criminal conduct warranted his expulsion from FSA. Article 12.2 provides in pertinent part.

> Any one or more of the following events or conditions shall give rise to the mandatory expulsion of a Member, which shall be converted to an offer to sell the Membership Interests to the remaining Member(s), or at his/their the Company at the Purchase Price:
>
> > 12.2.4. A Member is Convicted of a felony, or a crime involving a breach of moral turpitude . . ."

The Operating Agreement addresses the remaining member's options once a member is expelled from FSA:

> 12.3. Remaining Member Option. In the event of a voluntary or involuntary withdrawal of a Member pursuant to either Section 12.1 or 12.2 . . . in lieu of purchasing such Membership Interests pursuant to such Sections of this Agreement, the remaining Member(s) shall have the option to dissolve the Company pursuant to Article 15.

Consequently, Defendant was expelled from FSA on February 18, 2010. Upon Defendant's expulsion, Plaintiff opted to purchase Defendant's 50% membership interests in FSA. Seta is currently the sole owner of FSA, owning 100% of the company's member interests.

Plaintiff subsequently brought this action against Defendant seeking compensatory and punitive damages, contending that Defendant's criminal actions and subsequent expulsion from FSA caused substantial damage to FSA's reputation. Plaintiff alleges that FSA is no longer eligible for government contracts, its insurance and labor costs have substantially increased, and its continued viability is severely impeded.

Defendant argues that under the Operating Agreement, Plaintiff is barred from seeking damages. Defendant contends that Seta's purchase of Defendant's membership interest in

FSA upon Defendant's expulsion is an "excusive remedy," and, therefore, Plaintiff is prohibited from bringing this tort action for damages. He argues further that in drafting the Operating Agreement, both Seta and Defendant contemplated the possibility of expulsion from FSA, as well as the remedies the remaining member may pursue upon expulsion. Defendant argues that he and Seta addressed the ability to sue for damages, if Seta chose to dissolve FSA upon Defendant's expulsion, but that course of action was not contemplated if Seta chose instead to purchase Defendant's member interests.

Article 15 provides in pertinent part:

> "15.1. Dissolution. The Company may be dissolved and its affairs shall be would up upon the happening of any of the following:
>
> 15.1.3. An Election by Remaining Member Pursuant to section 12.3 of this Agreement.
>
> 15.2. Winding Up. Upon the dissolution of the Company, the Manager(s) may, in the name of and for an [sic] on behalf of the Company, prosecute and defend suits, whether, civil, criminal, or administrative . . ."

Defendant contends that he and Seta purposely included the ability to bring a lawsuit in the event of a dissolution and deliberately did not provide for the possibility of a lawsuit, if Plaintiff opted, instead, to purchase Defendant's interests. Defendant contends that the parties intended to make the purchase option an exclusive remedy, a remedy that did not permit Seta or FSA to sue Defendant for damages. Defendant states that the damages suffered by FSA will diminish the company's value, which will be duly reflected in the purchase price. Thus there is no need to institute a tort action for damages.

Plaintiff asserts that Seta's purchase of Defendant's membership interest in FSA, upon Defendant's expulsion, is not an "exclusive remedy" barring this action for damages, because such damage limitations were not expressed clearly in the Operating Agreement. Plaintiff

further argues that its right to bring this action was not waived when Seta chose to purchase Defendant's member interests the Operating Agreement does not contain such a waiver. Plaintiff denies that the damage to its reputation and ability to survive are accurately reflected by a diminution in purchase price, arguing that such damage is ongoing.

Discussion

A movant seeking summary judgment in its favor must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). The purpose of contract interpretation is to give effect to the intention of the parties (AGCO Corp. v. Northrop Grumman Space & Mission Systems Corp., 61 A.D.3d 562 [1st Dept. 2009]). In adjudicating the rights of parties to a contract, the court may not fashion a new contract under the guise of contract construction (Morlee Sales Corp. v. Manufacturers Trust Co., 9 N.Y.2d 16 [1961]). Thus, where the intention of the parties is clearly and unambiguously set forth, effect must be given to the intent as indicated by the language used. If there is an ambiguity in the language of the Operating Agreement, then summary judgment should be denied (*see* Sargiss v. Magarelli, 12 N.Y.3d 527 [2009]).

In the instant action, the Operating Agreement's language clearly and unambiguously states that upon Defendant's expulsion, the remaining member, Seta, has the option to *either* purchase Defendant's member interest in FSA *or* dissolve the company. The language of the Operating Agreement allows the remaining member to commence any action on behalf of FSA, which certainly could include bringing an action against an expelled member. There is no express prohibition against Plaintiff from bringing a tort action for damages if Seta opts to purchase Defendant's member interest in FSA.

"[A] contractual limitation on damages must be expressed 'clearly, explicitly and unambiguously.'" (Terminal Central Inc. v. Henry Modell & Co., 212 A.D.2d 213, 218 [1st Dept. 1995]; Madison Hudson Assoc. LLC. V. Neumann, 44 A.D.3d 473 [1st Dept. 2007]). Although Article 15 of the Operating Agreement explicitly provides that in the event of dissolution, Plaintiff can still institute a legal action on behalf of FSA, the inclusion of such language in connection with purchasing an expelled member's interest, cannot be interpreted to mean that the absence of such language means other available legal remedies were waived. Such an interpretation would be adding terms to the existing Operating Agreement, which is prohibited (*see* Morlee Sales Corp. v. Manufacturers Trust Co., 9 N.Y.2d 16 [1961]; Heller v. Pope, 250 N.Y. 132 [1928]). The Operating Agreement does not contain any express language indicating that purchasing Defendant's member interests is an "exclusive remedy" (Sutton Madison, Inc. v. 27 East 65th St. Owners Corp., 8 A.D.3d 90 [1st Dept. 2004]). Nor is the remedy in Article 15 limited only to situations where an expelled member is sued after dissolution.

A clear and complete written agreement must be enforced according to the plain meaning of its terms (Blonder & Co., Inc. v. Citibank, N.A., 28 A.D.3d 180 [1st Dept. 2006]), extrinsic evidence of the parties' intent may only be considered if the agreement is ambiguous (W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157, 163 [1990]). Therefore, Defendant's statements regarding what the parties' negotiated in reaching their agreement is irrelevant to the interpretation to be afforded by the court.

The court rejects Defendant's argument that in choosing to purchase Defendant's member interest in FSA, Plaintiff has waived the right to bring tort action for damages. Although the remaining member's options under the Operating Agreement are mutually

exclusive, the Operating Agreement does not explicitly state that by choosing to purchase Defendant's remaining member interest in FSA, Plaintiff is waiving its right to bring a tort action for damages (*see* National Westminster Bank v. George A. Fuller Co., 153 A.D.2d 529 [1st Dept. 1989]).

Defendant has not made a *prima facie* showing of entitlement to judgment as a matter of law because he failed to show that the Operating Agreement expressly barred Plaintiff from bringing a tort action for damages because Seta chose to purchase Defendant's member interest in FSA. Therefore, Defendant's motion to dismiss Plaintiff's complaint pursuant to CPLR § 3211 (a)(1) or, alternatively, summary judgment pursuant to CPLR § 3212 is denied.

Conclusion

In accordance with the foregoing, it is hereby

ORDERED that the motion by Defendant for dismissal of Plaintiff's complaint pursuant to CPLR § 3211 (a)(1) or, alternatively, summary judgment pursuant to CPLR § 3212 is denied; and it is further

ORDERED that any relief not expressly addressed has been considered and is hereby denied; and it is further

ORDERED that this constitutes the Decision and Order of the court.

Dated: New York, New York
March 8, 2012

So Ordered:

Hon. Judith J. Gische, JSC