Cole v Macklowe
2013 NY Slip Op 33772(U)
December 17, 2013
Sup Ct, NY County
Docket Number: 650100/2011
Judge: Cynthia S. Kern

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. PART _____

Justice

Index Number : 650100/2011
COLE, WARREN
vs
MACKLOWE, HARRY
Sequence Number : 005
SUMMARY JUDGEMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

is decided in accordance with the annexed decision.

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

Dated: 12/17/13

CK
CYNTHIA S. KERN 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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WARREN COLE,

Plaintiff,

Index No. 650100/2011

-against-

DECISION/ORDER

HARRY MACKLOWE, MAK WEST 55TH St ASSOCIATES AND MAK 55 ACQUISITION CORP.,

Defendants.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	

Plaintiff commenced the instant action to recover his alleged share of a partnership distribution he claims he should have received as a 9% partner in defendant Mak West 55th Street Associates, L.P. He has brought the present motion for summary judgment against the individual defendant Macklowe and the corporate defendants have brought a cross-motion to reargue and renew plaintiff's motion for partial summary judgment against them. As will be explained more fully below, the plaintiff's motion for summary judgment against Macklowe is granted and defendants' cross-motion to renew and reargue is denied.

The relevant facts, which were stated in this court's prior decision granting plaintiff summary judgment against the corporate defendants, are repeated here. Defendant Macklowe is

a developer and owner of Manhattan real estate. Plaintiff was employed by Macklowe's management company, Manhattan Pacific Management Co. ("Manhattan Pacific"), from 1988 until April 1999. In 1987, Macklowe organized the defendant entity known as Mak West 55th Street Associates, L.P. (the "Partnership") to hold the fee interest in 125 West 55th Street (the "Property"). Thereafter, plaintiff became a limited partner in the Partnership pursuant to the "Limited Partnership Agreement of MAK West 55th Associates" dated January 1, 1994 (the "LPA"). As a limited partner, plaintiff owned a 9% interest in the Partnership. However, Section 11.1 of the LPA provided that:

> Upon the termination for any reason of [plaintiff's] employment by Manhattan Pacific Management Co., Inc., (the "Termination") he shall sell to [Macklowe] or his designee, and [Macklowe] or his designee shall purchase from [plaintiff], [plaintiff's] interest in the partnership at a price determined pursuant to section 11.2.

Pursuant to Section 11.3 of the LPA, the closing for this transaction was to take place "ninety days after the Termination."

In 1998, the Partnership transferred the Property to 125 West 55th Street LLC ("125 West LLC"), which the Partnership allegedly owned a 90% interest in. In April 1999, plaintiff's employment with Manhattan Pacific ended and Macklowe offered to purchase Cole's interest in, *inter alia*, the Partnership. However, plaintiff refused the offer by Macklowe and, thereafter, Macklowe informed plaintiff that he was rescinding plaintiff's interest. It is undisputed that Macklowe paid plaintiff no money to acquire his interest in the Partnership.

In 2008, 125 West LLC sold the Property for over $443 million dollars. Pursuant to Section 12.2 of the LPA, upon sale of the Property, the General Partners were required to dissolve the Partnership and "after paying or making provision for all liabilities to creditors of the

partnership, shall distribute the partnership's cash and other assets among the Partners in proportion to their respective aggregate Percentages." At the time the Property was sold, Macklowe operated under the belief that plaintiff's 9% interest had been rescinded and allocated the Partnership's assets from the sale accordingly. It is undisputed that plaintiff never received any profits from the sale of the Property.

In 2011, plaintiff commenced the instant action asserting claims for breach of contract, unjust enrichment and violations of Section 273 of the Debtor Creditor law against defendants. All of plaintiff's claims are predicated on the alleged failure of defendants to tender 9% of the distribution from the sale of the Property in 2008 to plaintiff. Defendants' originally moved to dismiss the complaint and by order dated November 16, 2011, Justice Solomon granted defendants' motion to dismiss. Plaintiff appealed the motion and the First Department reversed the decision. In its opinion, the First Department stated that:

> Contrary to the defendants' assertion, plaintiff's failure to sell his interest did not divest him of his partnership interest. Not only is the agreement void of any language mandating this result, but such interpretation of the agreement runs afoul of the well settled principle that a contract should not be interpreted to produce an absurd result, one that is commercially unreasonable, or one that is contrary to the intent of the parties (*Matter of Lipper Holdings v. Trident Holdings*, 1 A.D.3d 170, 171 [1st Dept 2003]). In the absence of express language divesting plaintiff of his partnership interest for his failure to sell his interest, such a result is simply contrary to basic contract law. Moreover, the interpretation of the agreement urged by defendants–allowing them to acquire plaintiff's partnership interest absent the consideration expressed in the agreement–represents a windfall to the defendants that is absurd, not commercially reasonable and contrary to the express terms of the agreement and thus the intent of the parties. Accordingly, plaintiff continues to hold his partnership interest.

Plaintiff then moved for an order granting him summary judgment on his first cause of action for breach of contract against the corporate defendants based upon the First Department's finding that he "continues to hold his partnership interest." Specifically, plaintiff argued that

defendants breached Sections 6.1 and 12.2 of the LPA by not distributing to plaintiff 9% of the net proceeds from the 2008 sale of the Property. He withdrew that portion of his motion seeking partial summary judgment against Harry Macklowe ("Macklowe") on his first cause of action for breach of contract. Defendants opposed the motion on the ground that there existed material issues of fact as to whether plaintiff was estopped from asserting his right to the 9% interest in the Partnership or whether plaintiff waived his interest as he never, over nine years, rejected to the rescission of the interest by Macklowe or the Partnership's non-issuance of K-1s for tax purposes. Additionally, defendants argued that plaintiff's motion was premature as no discovery had taken place. This court granted plaintiff's motion for summary judgment against the corporate defendants on the ground that plaintiff made out his prima facie case for breach of contract against the defendants and the defendants failed to demonstrate that a triable issue of fact existed as to their affirmative defenses of waiver and estoppel.

The corporate defendants then made the current motion to renew and reargue in which they argue that there is a new fact which the court did not consider on the prior motion which would change this court's determination. According to defendants, the new fact which was not considered on the prior motion was Cole's failure since 1999 to report or file an amended income tax return to report $363,000 of 1998 taxable income arising from the forgiveness of $16,500,000 of the Partnership's then existing debt despite stating in his 1998 federal income tax return that he would do so to the extent required by law and his failure to ever pay any income tax on the $363,000 of taxable income. The relevant facts with respect to this taxable income are as follows. In 1998, the Partnership refinanced the mortgage debt which existed on the Property, resulting in a debt forgiveness of $16,500,000, creating taxable income for the partners in the

Partnership. In Cole's 1998 tax return, he stated that he had not yet received the K-1 from the Partnership and upon receiving this information, he would file an amended 1998 return to the extent required by law. Cole's 1998 K-1 from the Partnership allocated to him $363,000 in taxable income arising from the $16,500,000 debt forgiveness. In April 1999, plaintiff's employment with Manhattan Pacific ended and Macklowe offered to purchase Cole's interest in, *inter alia*, the Partnership. However, plaintiff refused the offer by Macklowe and, thereafter, Macklowe informed plaintiff that he was rescinding plaintiff's interest. According to Macklowe's affidavit submitted in support of his motion to renew, when he informed Cole that he was rescinding all of his interest in the Partnership in 1999, he instructed his accountants to issue Cole his final K-1 for the Partnership for 1998. Macklowe Affidavit, paragraph 13, footnote 8. Thus, the earliest possible date that Cole could have received his 1998 K-1 was after he had already been informed by Macklowe that his interest in the Partnership was being rescinded. Moreover, according to Cole, the 1998 K-1 was sent to Cole c/o the Macklowe Organization six months after Cole left Macklowe's employ as a result of which he did not receive the K-1 when it was sent to him. Moreover, Cole has alleged in his affidavit that he expected that any income arising from any debt cancellation would be allocated solely to Macklowe because the Partnership Certificate was amended to provide that Macklowe would be entitled to receive all $25 million of the refinancing proceeds available to the Partnership while the other partners would not receive any.

Initially, this court will address the cross-motion by the corporate defendants for reargument and or renewal of plaintiff's motion for summary judgment against them. Although described as a motion to reargue and renew, the court will only address defendants' renewal

argument as the court finds no basis for reargument. Pursuant to CPLR section 2221(e), a motion to renew should be based upon new facts not offered on the prior motion that would change the prior determination and should contain a reasonable justification for the failure to present the facts on the prior motion. According to defendants, the failure on the part of Cole to amend his tax return or report $363,000 of 1998 taxable income arising from the forgiveness of $16,500,000 of the Partnership's then existing debt is behavior that is inconsistent with his claim that he continued to own an interest in the Partnership and should result in him either being estopped from asserting an interest in the Partnership or being deemed to have waived his interest in the Partnership.

The court finds that defendants' motion to renew should be denied as the alleged new fact that Cole did not report the $363,000 of income in his amended tax return would not change the prior determination that there has been no estoppel or waiver. The law is clear that the party seeking to establish an estoppel must establish that it justifiably relied on the actions of the opposing party as a result of which it had a detrimental change in position. *Matter of Shondel J. v. Mark D.*, 7 N.Y.3d 320, 326 (2006); *River Seafoods, Inc. v. JPMorgan Chase Bank,* 19 A.D.3d 120, 122 (1st Dept 2005) ("In order to prevail on the theory of equitable estoppel, the party seeking estoppel must demonstrate a lack of knowledge of the true facts; reliance upon the conduct of the party estopped; and a prejudicial change in position.") In the present case, there is no evidentiary basis for any allegation by defendants that they relied or changed their position in any way based on Cole's alleged failure to pay taxes on his 1998 partnership income. Macklowe clearly took the position in 1999 that Cole did not have any further interest in the Partnership as of that date and caused the Partnership to stop issuing any further K-1's to Cole as

of 1999. Therefore, neither Macklowe nor the corporate defendants were relying on Cole's alleged failure to pay income taxes on 1998 Partnership income to support their position that Cole did not have an interest in the Partnership. The position of Macklowe in 1999 that Cole did not have any interest in the Partnership, from which position he never deviated, was not based in any way on Cole's alleged failure to pay income taxes. Therefore, defendants cannot establish that they relied on anything that Cole did or did not do with respect to the alleged 1998 income to their detriment.

Similarly, there is no basis for defendants' argument that Cole should be estopped from asserting his interest in the Partnership based on the the theory of estoppel by tax return as articulated by the Court of Appeals in *Mahoney--Buntzman v. Buntzman*, 12 N.Y.3d 415 (2009). The court there held that a "party to litigation may not take a position contrary to a position taken in an income tax return." *Id.* However, Cole's tax returns have been consistent with the position he has taken in this litigation that he continued to have an interest in the Partnership. As stated in this Court's prior decision, Cole has taken the position in every tax return he has filed since leaving Macklowe's employ that he does continue to have an interest in the Partnership. The mere failure on Cole's part to amend his 1998 tax return to reflect income from the Partnership, which income he claims should not be allocated to him as he did not receive any of the proceeds available to the Partnership from the refinancing which generated the income, is insufficient to rise to the level of an estoppel as a matter of law in light of his continued position in every tax return he filed since leaving Macklowe's employ that he did continue to have an interest in the Partnership.

Similarly, there is no basis for claiming that Cole's alleged failure to report the 1998

income allocated to him in a K-1 constituted a waiver of his interest in the Partnership. "Waiver is an intentional relinquishment of a known right with full knowledge of the facts upon which the existence of the right depends." *Amrep Corp. v. American Home Assur. Co.*, 81 A.D.2d 325, 329 (1st Dept 1981). It is well settled that waiver "cannot be created by 'negligence, oversight or thoughtlessness.'" *Byer v. City of New York*, 50 A.D.2d 771 (1st Dept 1975) (quoting *Alsens Amer. Portland Cement Works v. Degnon Contr. Co.*, 222 N.Y. 34, 37 (1917)). Indeed, such intention "must be unmistakably manifested, and is not to be inferred from a doubtful or equivocal act." *EchoStar Satellite L.L.C. v. ESPN, Inc.*, 79 A.D.3d 614 (1st Dept 2010). In the present case, Cole's failure to report the income allocated to him by the Partnership in the 1998 K-1, which if it was received by him, was received after he was told that his interest in the Partnership was rescinded by Macklowe, did not unmistakably manifest an intentional relinquishment on Cole's part of his right to his interest in the Partnership, particularly in light of the fact that all of his tax returns clearly stated that he was continuing to assert an interest in the Partnership. Moreover, as stated in this court's previous decision, mere inaction on the part of Cole, the failure to amend his tax return or pay taxes on his alleged 1998 income from the Partnership, is insufficient to establish an intent to waive a known right. *See Echo Star Sattellite,* 79 A.D.3d at 618.

Cole has also moved for summary judgment against Macklowe on his debtor and creditor claim, his breach of contract claim, his claim for breach of the implied covenant of good faith and fair dealing and his piercing the corporate veil claim. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the

movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Id.*

The first claim this court will address is Cole's fraudulent conveyance claim whereby Cole alleges that the distribution of his share of the net proceeds from the Partnership should be set aside as a fraudulent conveyance in violation of the Debtor and Creditor law. New York's Debtor and Creditor law § 273 states that:

> Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

In *10-4 W. 108th Realty v. Redwood Dev.*, the First Department held that the conveyance of the entire proceeds of the sale of a closely held corporate defendant's only asset to the defendant was fraudulent as it was made without fair consideration and rendered the debtor insolvent. 220 A.D.2d 279 (1st Dept 1995). The court held that the conveyance was fraudulent without regard to the intent of the transferor, as a result of which the plaintiff was entitled to summary judgment setting aside the conveyance to the extent necessary to satisfy the judgment which had been previously granted against the corporate defendant. *Id.*

In the present case, Cole has established a prima facie right to judgment as a matter of law on his fraudulent conveyance claim. Based on the undisputed facts of this case, all of the proceeds of the sale of the Partnership's sole asset were distributed on Macklowe's behalf,

thereby rendering the Partnership insolvent and unable to satisfy its obligations to Cole to pay him his share of the Partnership proceeds upon the sale of the only asset of the Partnership. The distribution of the entire net proceeds from the sale of the Partnership's sole asset to a creditor of Macklowe without any consideration to the Partnership, which rendered the Partnership unable to pay Cole his share of the of the distribution of the proceeds, constitutes a violation of § 273 of the Debtor and Creditor law. Based on the distribution being a fraudulent conveyance, it is appropriate to order Macklowe to pay Cole his share of the proceeds from the sale of the Partnership, equaling 9 percent of the distribution that the fraudulent conveyance prevented Cole from receiving.

In response to Cole's prima facie showing of entitlement to summary judgment on his fraudulent conveyance claim, Macklowe has failed to raise any issue of fact. Macklowe's only argument in response to Cole's motion for summary judgment on his fraudulent conveyance claim is that Cole cannot asssert a fraudulent conveyance claim because he is not a creditor of the Partnership. This argument is based on Macklowe's claim that Cole should be estopped from or has waived his right to any interest in the Partnership, which argument this court has already rejected. Based on the foregoing, Cole is entitled to summary judgment on his fraudulent conveyance claim as against Macklowe.

Plaintiff has also moved for summary judgment on his claim that Macklowe breached the express terms of the LPA when he received Cole's share of the liquidating proceeds upon the sale of the sole asset of the Partnership. Section 5.1 of the LPA provides that Cole's percentage interest in the Partnership is 9% and that Macklowe's is 85%. Section 5.2 of the LPA expressly provides that "no partner shall be entitled to...receive distributions from the partnership except as

expressly authorized in [the LPA]." Section 12.2 of the LPA provides that following liquidation of the partnership's assets and making provisions for the liabilities of the Partnership, the general partner shall distribute the Partnership's cash and other assets among the partners in proportion to their respective aggregate percentages.

Initially, Cole has established his prima facie showing that Macklowe breached the LPA by showing that Macklowe received distributions from the Partnership which were not authorized in the LPA. Pursuant to the express terms of the LPA, Macklowe was not entitled to receive Cole's shares of the proceeds when the Partnership was liquidated and the distribution to Macklowe of Cole's interest constituted a breach of section 5.2 of the LPA, which prohibits a Partner from receiving distributions which are not authorized by the LPA.

In response to plaintiff's prima facie showing that Macklowe breached 5.2 of the LPA, Macklowe has failed to raised to raise a triable issue of fact. The argument by Macklowe that the language in section 5.4 of the LPA immunizes him from liability for breaching section 5.2 of the LPA is without basis. Section 5.4 of the LPA provides that no "limited partners shall be personally liable for any of the debts, obligations or losses of the partnership, except to the extent that the Partner specifically assumes in writing liability for any such debt or obligation." The foregoing language, by its very terms, only applies to "debts, obligations or losses" of the Partnership. However, plaintiff's claim against Macklowe is for breaching his own duties as a limited partner pursuant to section 5.2 of the LPA–it is not a claim seeking to hold Macklowe responsible for a debt or obligation of the Partnership. Moreover, section 5.4 does not apply to the extent that the partner assumes in writing liability for any such debt or obligation. By signing the LPA, Macklowe specifically agreed not to receive any unauthorized distributions.

Macklowe's argument that as a limited partner, he could not breach sections 6.1 or 12.2 of the LPA is also without basis. Cole's claim is not that Macklowe breached either of these provisions. Instead, Cole's claim is that Macklowe breached section 5.2 of the LPA.

Finally, the court finds no basis for the argument by Macklowe that Cole's claim for breach of section 5.2 of the LPA can only be maintained as a derivative action on behalf of the Partnership and not directly on behalf of Cole. The First Department has recently articulated the test to be applied to determine whether a claim is direct or derivative. *Yudell v. Gilbert,* 99A.D.3d 108 (1st Dept 2012). The court there stated that "a court should consider who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)." *Id.* at 114. In *Gjurai v. Uplift Elevator Corp.,* the First Department applied this test to find that a minority shareholder had a direct rather than a derivative claim since he was harmed individually by the challenged actions and would receive the benefit of any recovery. 110 A.D.3d 540 (1st Dept 2013). In the present case, Cole also has a direct rather than a derivative claim since he was the one that was harmed by Macklowe's receipt of Cole's share of the proceeds of the 2008 sale and he is the only person who would benefit from any recovery.

Based on this court's finding that plaintiff is entitled to summary judgment against Macklowe on the fraudulent conveyance claim and the breach of contract claim, this court need not reach Cole's motion for summary judgment under either the breach of implied covenant of good faith claim or the piercing the corporate veil claim.

Based on the foregoing, Cole's motion for summary judgment is granted as against Macklowe and the cross-motion to renew or reargue is denied. Settle order.

Dated: 12/17/13

CK

J.S.C.

CYNTHIA S. KERN
J.S.C.