

Albert v Torres

2011 NY Slip Op 32318(U)

August 24, 2011

Supreme Court, New York County

Docket Number: 109580/09

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. LOUIS B. YORK PART 2
Justice

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ROBERT ALBERT and JAMIE ALBERT, Individually on
their own behalf and in the name of Washington Heights
Billiard, Inc.,

Plaintiffs,

-against-

Index No. 109580/09
Motion Date 08/11/11
Motion Seq. No. 002
Motion Cal. No.

EDUARDO TORRES and WASHINGTON HEIGHTS
BILLIARD, INC.,

Defendants.

-----X

The following papers, numbered 1 to were read on this motion to Appoint Temp/Permanent Receiver

NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

| PAPERS

FILED

Cross-Motion: Yes No

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This is an action seeking *inter alia* the appointment of a Receiver pending the dissolution of a billiard hall because of the alleged dissipation of the assets by defendant Eduardo Torres. Defendants move to dismiss based on plaintiffs' lack of standing to bring this action. By this motion, the plaintiffs Robert Albert and his daughter Jamie seek to have Jamie appointed a Receiver, as well as an accounting from defendant Torres and an order restraining him from the premises. The defendant Torres cross moves to dismiss the action.

Background

Defendant Torres was establishing a billiard hall in a vacant building rented to him by non-party Greenberg. Robert Albert was the supplier of beer to the pool hall and entered into talks with defendant Torres to invest money into Washington Heights Billiard in order to purchase the items required for the business such as billiard tables, television sets and security items.

To formalize their relationship, the parties executed a shareholders' agreement. In that shareholders' agreement, Jamie Albert was to invest \$390,000 in return for which she was to receive a 39% interest in the billiard hall. The shares allotted to the various owners were as follows: Eduardo Torres - 50 shares, his wife Maria Jose Pizarro - 52 shares, one Rosa Ulloa - 20 shares and Jamie Albert -78 shares. Thus a total of 200 shares were allocated.

Both sides agree that the \$390,000 representing Jamie Albert's capital contribution was not paid at the time the contract was executed, but it was anticipated that these funds would be deposited in the future. As a result, at that time, no shares were issued to Jamie. And, in fact, no shares were ever issued to her.

During the building of the billiard hall and afterwards, Jamie Albert never deposited her \$390,000 contribution with defendant Washington Heights Billiard, Inc. Plaintiffs'

claim, however, that Jamie's capital contribution was satisfied by Albert by paying contractors and purchasing items and furniture to be placed in the billiard hall. Defendant Torres denies that Albert spent anything close to \$390,000.

As time went on, the relationship between the parties deteriorated. Eduardo and Albert accused each other of stealing funds from the corporation and of hiring shady individuals to assist in running the corporation. The result was that Jamie and Albert were barred from the premises, unable to participate in the running of the billiard parlor, and claiming that although the corporation was making substantial profits, none of it was distributed to them.

Findings of Fact

Torres claims he performed 75% of the billiard hall renovations himself, investing close to \$400,000 to get the business up and running. In their cross motion to dismiss this action and during oral argument, the defendants alleged that the billiard hall was no longer functioning and, in fact, was closed. Because the plaintiffs challenged this assertion, the Court held an evidentiary hearing. As a result of the evidentiary hearing, the Court finds that defendant Washington Heights Billiard, Inc. has been evicted from the premises by a City Marshall, and that the premises has been leased to someone else to operate the billiard hall. As a result of the hearing, it is also determined that at that time, the defendants were in the

midst of dissolving defendant Washington Heights Billiards. While the Court cannot make a finding that the corporate defendant has been dissolved because of the absence of proof establishing dissolution, it is quite likely that by now Washington Heights Billiard, Inc. has been dissolved.

Conclusion

The branch of plaintiffs' motion to appoint Jamie Albert as Receiver is denied. Due to the animosity between her and the defendants it would be sheer folly to appoint her. The Court also denies the issuance of a restraining order against Eduardo Torres as he no longer operates the billiard hall, and the Court declines to order an accounting because the plaintiffs have failed to show that they have standing as shareholders to bring this proceeding.

The cross-motion to dismiss is granted in part and denied in part. The cause of action to appoint a Receiver is dismissed as is the cause of action for an accounting as the plaintiffs lack the status as shareholders to assert such a cause of action. In their motion papers, and at the hearing, the plaintiffs utterly failed to corroborate their claim that they expended the \$490,000 to satisfy their capital contribution. Their conclusory assertions of such are insufficient. However, the plaintiffs assert claims for money damages which the motion has not addressed. Therefore, this action continues with respect to those claims.

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The defendants' motion for sanctions is denied. Neither side wholly succeeded in the relief it sought. But both sides prevailed on a part of their claims. Therefore, neither side was entirely frivolous.

The foregoing constitutes the Decision and Order of the Court.

Dated: 8/24/11

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Louis B. York, J.S.C.

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J.S.C.

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