

Rosin v Schnitzler
2018 NY Slip Op 32320(U)
September 4, 2018
Supreme Court, Kings County
Docket Number: 504136/15
Judge: Lawrence S. Knipel
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At an IAS Term, Commercial Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of September, 2018.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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LEONID ROSIN, individually, as a member
of ZIGGY SNACK FOODS, LLC, and as a
shareholder of CUSTOM CUT SNACK FOODS, INC.,

Plaintiff,

- against -

SIGMOND SCHNITZLER, a/k/a ZIGGY SCHNITZLER,
ZIGGY SNACK FOODS, LLC,
CUSTOM CUT SNACK FOODS, INC., and
JOEL BRAVER,

Defendants

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DECISION AND ORDER

Index No. 504136/15

Mot. Seq. No. 15-16

The following e-filed papers read herein:

NYSCEF No.

Notice of Motion/Cross Motion, Affirmations (Affidavits), and
Memoranda of Law Annexed _____

246-293; 296-306, 308, 309

Affirmations in Opposition and Exhibits Annexed _____

311-320, 321-330

Reply Memorandum of Law _____

310

Plaintiff Leonid Rosin (the plaintiff), individually, and as a member of Ziggy Snack Foods, LLC (Ziggy), as well as a shareholder of Custom Cut Snack Foods, Inc. (Custom), moves, post-Note of Issue, for (1) a declaration that he is a one-third owner of Ziggy and Custom (collectively, the Companies), (2) a finding that defendant Sigmond Schnitzler, also known as Ziggy Schnitzler (Schnitzler), “breached his fiduciary duties to the Companies,” (3) “an injunction preventing Schnitzler from taking additional acts deleterious to the

Companies,” (4) “a judgment requiring Schnitzler to compensate the Companies for the losses and harm that he has caused by his breaches of his fiduciary duties to the Companies,” and (5) “an injunction preventing Schnitzler from further harming and encumbering [the plaintiff’s] ownership in the Companies and a judgment of damages for the harm Schnitzler has caused [the plaintiff] personally.”¹ Defendant Schnitzler cross-moves, by amended notice of cross motion, for summary judgment dismissing the plaintiff’s claim of ownership of a one-third interest in the Companies.²

Whether the Plaintiff Is a One-Third Holder of Membership Interests in Ziggy

Ziggy, as a limited liability company, is governed by the Limited Liability Company Law for its operation, conduct, duties, powers, and rights of its members. Throughout the Limited Liability Company Law, its sections state “except as provided in the operating agreement” or “if the operating agreement does not so provide” or “unless otherwise provided in an operating agreement” (*see* Limited Liability Company Law §§ 401-704). These default provisions establish the statutory terms imposed on a limited liability company for the operation of the business, the conduct of its affairs, and the rights, powers, and responsibilities of its members. The Limited Liability Company Law allows the members to

¹ *See* Plaintiff Leonid Rosin’s Memorandum of Law in Support of His Motion for Summary Judgment, dated May 23, 2018, at 1-2 (NYSCEF #292). The plaintiff’s notice of motion and his counsel’s supporting affirmation state, without any specificity, that the plaintiff is seeking a “judgment” or “summary judgment” (NYSCEF #246-247).

² The Court will consider Schnitzler’s cross motion on the merits, as the objecting parties have failed to demonstrate any prejudice resulting from its minor procedural irregularities (*see* CPLR 2001, 2004).

enter into an operating agreement wherein the members can agree to certain terms, conduct, and provisions for operating the business. Where, as here there is no valid operating agreement, the statutory default provisions set forth in the Limited Liability Company Law apply.

Limited Liability Company Law § 603 (a) provides in subsection (2) “that an assignment of a membership interest does not . . . entitle the assignee to participate in the management and affairs of the limited liability company or to become or to exercise any rights or powers of a member,” and it further provides in subsection (3) that “the only effect of an assignment of a membership interest is to entitle the assignee to receive, to the extent assigned, the distributions and allocations of profits and losses to which the assignor would be entitled” Limited Liability Company Law § 604 (a) provides that “an assignee of a membership interest may not become a member without the vote or written consent of at least a majority in interest of the members, other than the member who assigned or proposes to assign such membership interest.”

A tax return can constitute evidence of a written assignment (*see BMM Four, LLC v BMM Two, LLC*, 48 Misc 3d 1201[A], 2015 NY Slip Op 50917[U], *3 [Sup Ct, Westchester County 2015] [the transfer was recorded in written form when the “tax return was completed and filed”]). *See also Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 (2009) (“A party to litigation may not take a position contrary to a position taken in an income tax return. . . . We cannot, as a matter of policy, permit parties to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury on income tax returns.”).

The plaintiff has established, by way of Ziggy's federal and state tax returns, that he was a one-third owner of all the membership interests in Ziggy.³ In opposition, Schnitzler has failed to raise a triable issue of fact, as he has not challenged the accuracy of Ziggy's federal and state tax returns which listed the plaintiff as a one-third owner of all the membership interests in Ziggy. Schnitzler's citation to Limited Liability Company Law § 1211 ("Transfer of a membership interest") is misplaced because that section applies only to the professional service limited liability companies, whereas Ziggy is not such an entity.

Whether the Plaintiff Is a One-Third Holder of Shares in Custom

The mere fact that an alleged shareholder is not formally issued stock certificates, or does not physically possess stock certificates or a shareholders' agreement, is not dispositive, without more, of whether he or she is a shareholder (*see French v French*, 288 AD2d 256 [2d Dept 2001]). An oral agreement for the acquisition of an interest in a corporation need not be in writing to be enforceable (*see Matter of Estate of Purnell v LH Radiologists*, 90 NY2d 524, 530 [1997]; *LaConti v Urban*, 309 AD2d 735, 737 [2d Dept 2003]; *Blank v Blank*, 256 AD2d 688, 693, 694 [3d Dept 1998]).

The plaintiff has established, by way of Custom's federal and state tax returns, that he was a one-third owner of all the shares in Custom. In opposition, Schnitzler has failed to raise a triable issue of fact. Schnitzler's citation to the since-repealed section 8-319 of the Uniform Commercial Code is unavailing. Former UCC 8-319, which set forth a statute of

³ In so finding, the Court disregards a purported "Operating Agreement [for] Ziggy Snack Foods, LLC and Custom Cut Snack LLC [so in the original], a New York Limited Liability Company," dated as of January 11, 2014 (NYSCEF #300), which defendant Joel Braver signed for the plaintiff without the latter's knowledge or authorization.

frauds for the sale of securities, was repealed effective October 10, 1997. The governing statute, effective July 1, 2001, is UCC 8-113 (a), which provides that “a contract or modification for the sale or purchase of a security is enforceable whether or not there is a writing signed or record authenticated by a party against whom enforcement is sought, even if the contract or modification is not capable of performance within one year of its making.” Moreover, UCC 8-103 (a) provides that “[a] share or similar equity interest issued by a corporation . . . is a security.” The Official Comment to UCC 8-103 explains that “[s]ubsection (a) establishes an unconditional rule that ordinary corporate stock is a security. That is so whether or not the particular issue is dealt in or traded on securities exchanges or in securities markets. Thus, shares of closely held corporations are Article 8 securities.” An oral agreement to issue one-third of Custom’s shares to the plaintiff is not barred by New York’s statute of frauds.

Accordingly, it is

ORDERED that the initial branch of the plaintiff’s motion in Seq. No. 15 which is for a declaration that he is a one-third owner of Ziggy and Custom is *granted*, and the plaintiff is hereby declared to be a one-third owner of all membership interests in Ziggy and a one-third owner of all shares in Custom;⁴ and it is further

⁴ All that the Court declares herein is that “Plaintiff Rosin is a 33.3% member of Defendant Ziggy and a 33.3% shareholder in Defendant Custom,” which corresponds to his request for such declaration in ¶ 84 (i) of the first cause of action of his complaint. His remaining requests for the declarations in ¶ 84 (ii)-(iv) of his complaint – that “Defendant Braver is a 33.3% member of Defendant Ziggy and a 33.3% shareholder in Defendant Custom”; that “Defendant Schnitzler is a 33.3% member of Defendant Ziggy and a 33.3% shareholder in Defendant Custom”; and that “all management decisions relating to the Companies, including the right to hire and fire employees of the Companies, shall be made by vote of at least 2 out of 3 of Plaintiff Rosin, Defendant Braver and Defendant Schnitzler” – are not part of the relief requested either in the motion or the cross motion, and, for that reason, are not addressed herein.

ORDERED that the remaining branch of the plaintiff's motion in Seq. No. 15 which is for (1) a finding that "Schnitzler breached his fiduciary duties to the Companies," (2) "an injunction preventing Schnitzler from taking additional acts deleterious to the Companies," (3) "a judgment requiring Schnitzler to compensate the Companies for the losses and harm that he has caused by his breaches of his fiduciary duties to the Companies," and (4) "an injunction preventing Schnitzler from further harming and encumbering [the plaintiff's] claimed ownership of a one-third interest in the Companies and a judgment of damages for the harm Schnitzler has caused [the plaintiff] personally," is *denied*, as there are issues of fact precluding a summary disposition without trial on the foregoing matters; and it is further

ORDERED that Schnitzler's cross motion in Seq. No. 16 for summary judgment dismissing the plaintiff's claim to the one-third ownership in the Companies is *denied*.

The plaintiff's counsel is directed to electronically serve a copy of this Decision and Order with notice of entry on the defendants' respective counsel and to electronically file an affidavit of service of same with the Kings County Clerk.

The parties are reminded of their next scheduled appearance for trial on October 4, 2018 in Commercial Part, Trial Term 4.

This constitutes the Decision and Order of the Court.

ENTER FORTHWITH

J. S. C.
Lawrence Knobel