

Kinyk v Hart

2021 NY Slip Op 32217(U)

November 8, 2021

Supreme Court, New York County

Docket Number: Index No. 652598/2018

Judge: Francis A. Kahn III

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANCIS KAHN, III PART **32**

Acting Justice

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LORAIN KINYK,

Plaintiff,

- v -

DARLENE HART and 519 EAST 6TH STREET LLC,

Defendants.

-----X

INDEX NO. 652598/2018

MOTION DATE _____

MOTION SEQ. NO. 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 147-181, 186-188 were read on this motion to/for RENEWAL

Upon the foregoing documents, the motion is determined as follows:

This is an action commenced by Plaintiff Loraine Kinyk (“Kinyk”) to judicially dissolve Defendant 519 East 6th Street, LLC (“518 East”), a New York limited liability company formed by Kinyk and Defendant Darlene Hart (“Hart”). Kinyk and Hart are the sole members of 519 East with equal interests in the company. In addition to seeking dissolution of 519 East based upon an allegation that continuation of business is not reasonably practical, Plaintiff pled, in her amended complaint, a cause of action for unjust enrichment. Defendant Hart joined issue through service of an amended answer and asserted 18 affirmative defenses and 19 counterclaims, including causes of action for breach of contract, breach of fiduciary duty, violation of LLCL §409, conversion, an accounting, fraud and waste.

By order of this Court dated July 12, 2021, Plaintiff’s motion for summary judgment was denied for failure to comply with sections 202-b[c] and 202.8-g of the Uniform Rules for Trial Courts [22 NYCRR]. Those sections, which became effective prior to Plaintiff filing her motion for summary judgment, provide that motions for summary judgment shall contain a statement of material fact and that all motions shall contain a certification that legal memoranda do not exceed the limitations established by the Rules.

Now, Plaintiff moves pursuant to CPLR §2221[e] to renew the motion for summary judgment and, upon renewal, granting summary judgment to Plaintiff. Defendant Hart opposes the motion and requests the Court search the record and award her summary judgment.

Plaintiff’s motion to renew is granted as the Court finds that the failure to comply with the requirements of Uniform Rules §202-b[c] and §202.8-g qualifies, in this instance, as excusable law office failure (*see Castor v Cuevas*, 137 AD3d 734 [2d Dept 2016]). The rules at issue were promulgated on December 29, 2020 and became effective on February 1, 2021, just 29 days before Plaintiff filed her motion. It is readily conceivable that Plaintiff’s counsel was

caught unaware (*see* David P. Horowitz and Lukas M. Horowitz, *Outside Counsel, Surprise! New Court Rules Take Effect Monday*, NYLJ, Jan. 28, 2021 at 3, col 1). In any event, blind adherence to the Uniform Rules at issue is not compulsory and the Court has discretion in application of same (*see Abreu v Barkin & Assoc. Realty, Inc.*, 69 AD3d 420 [1st Dept 2010]; *see also Cushman & Wakefield, Inc. v Kadmon Corp., LLC*, 175 AD3d 1141 [1st Dept 2019]), particularly where, as here, there is no demonstrable prejudice to Defendant Hart.

Upon renewal, Plaintiff's underlying motion sought summary judgment on her causes of action for disillusionment and unjust enrichment is determined as follows:

Kinyk and Hart, who are sisters, formed 519 East, via articles of organization and an operating agreement dated March 28, 2007, for the purpose of owning and managing a multiple dwelling located at 519 East 6th Street, New York, New York. At its inception, Kinyk and Hart were each 50% owners of 519 East.

In 2013, 519 East resolved to refinance the mortgage it gave on March 19, 2018 to Washington Mutual Bank. An attorney, non-party Rizpah Morrow ("Morrow"), was engaged to facilitate the process. As part of the refinance, Morrow apparently prepared an amended operating agreement for 519 East and a "side agreement". In the former document, Hart transferred her entire interest to Kinyk who was made 100% owner of 519 East. In the latter document, the parties agreed that Hart transferred her interest to Kinyk "[f]or the purpose of securing a mortgage" and "because of her "poor credit report". Both parties' deposition testimony corroborates these statements (Hart deposition, pg. 40, ln. 5-18; Kinyk deposition [11/19/2020] pg. 43-44)¹. Both parties admit that this scheme was concocted unbeknownst to the lender. Both documents were executed, but only a signed copy of the amended operating agreement has been located by the parties. On December 10, 2013, 319 East closed on the refinance with Customers Bank and obtained a loan of \$1,575,000.00. As part of the transaction, Kinyk executed a personal guarantee of the loan.

After Kinyk commenced this action, 319 East sold the property for the sum of \$5,250,000.00. The net proceeds of the sale were distributed equally to Kinyk and Hart, except for \$1,250,000.00 which was held in escrow by non-party Mitchell H. Kossoff, Esq. ("Kossoff")² pursuant to a stipulation of the parties dated May 21, 2019. That agreement provided the proceeds would remain in escrow pending the outcome of this litigation, whether by settlement or final judgment. These funds are presently missing and may be part of some \$10 million in client funds allegedly misappropriated by Kossoff (*see* <https://therealdeal.com/2021/05/28/feds-investigating-awol-real-estate-attorney>).

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], *citing Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*id.* at

¹ Hart denied this allegation in paragraph 5 of her counter statement of material facts despite her express testimony to the contrary.

² Until recently, Kossoff's firm, Kossoff, LLP, was Hart's counsel in this action.

324). If a *prima facie* demonstration is made, the party opposing the motion is obliged to produce evidentiary proof establishing the existence of material issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Concerning the cause of action for judicial dissolution of 319 East, Limited Liability Company Law §702 provides, in pertinent part, that “[o]n application by or for a member, the supreme court in the judicial district in which the office of the limited liability company is located may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement”. Therefore, “[i]n order to demonstrate entitlement to dissolution of a limited liability company, the member seeking such relief ‘must establish, in the context of the terms of the operating agreement or articles of incorporation, that (1) the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or (2) continuing the entity is financially unfeasible’” (*Mace v Tunick*, 153 AD3d 689, 690 [2d Dept 2017]; *Matter of 1545 Ocean Ave., LLC*, 72 AD3d 121, 131 [2d Dept 2010]). “The appropriateness of an order for dissolution of [a] limited liability company is vested in the sound discretion of the court hearing the petition” (*id.* at 133 [internal quotation marks and citations omitted]). In support of her motion, Kinyk does not address the elements of this cause of action in any respect, much less establish entitlement to summary judgment. Similarly, Kinyk offers no argument specifically addressing a summary winding up of 319 East (*see* LLCL §703) and, more importantly, the provisions of section 704 of the Limited Liability Company Law concerning distribution of 319 East’s assets.

As to the cause of action for unjust enrichment, a plaintiff must establish that “(1) the other party was enriched, (2) at [plaintiff’s] expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered” (*Georgia Malone & Co., Inc. v Ralph Rieder*, 19 NY3d 511 [2012], *citing Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173 [2011]). In addition, “[g]enerally, courts will look to see if a benefit has been conferred on the defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant’s conduct was tortious or fraudulent” (*Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415 [1972]). Again, Kinyk failed to even acknowledge in her moving papers the above elements or offer any argument as to how she is entitled to judgment as a matter of law on this claim.

Accordingly, as Plaintiff has failed to establish a *prima facie* case, the motion for summary judgment is denied.

Hart’s invitation that the Court search the record and grant her summary judgment is also denied. At the outset, Hart’s assertion that Kinyk’s failure to respond to her statement of material facts requires resolution of those facts in her favor is entirely misplaced. Uniform Rule §202.8-g[c] provides that “[e]ach numbered paragraph in the statement of material facts required to be served by the *moving party* will be deemed to be admitted unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the *opposing party*.” [emphasis added]. Kinyk’s failure to provide a response to the purported statement of facts served with Hart’s opposition to the summary judgment motion is irrelevant as Hart was

indisputably not the moving party. In any event, the Court finds application of this rule is discretionary not mandatory (see *Abreu v Barkin & Assoc. Realty, Inc.*, supra at 421).

As to the substance of the request for accelerated judgment, "a court may search the record and grant summary judgment in favor of a nonmoving party only with respect to a cause of action or issue that is the subject of the motions before the court" (*Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430 [1996]). As Hart opposed Kinyk's motion for summary judgment on the claim for judicial dissolution of 319 East, she cannot seek distribution of that entity's assets pursuant to LLCL §704. To the extent Hart argues a constructive trust has been imposed, that claim is unavailing as she pled no counterclaim for that relief. Although the issue of unjust enrichment is before the Court, Hart has asserted eight counterclaims for breach of contract which have not been adjudicated. Resort to an equitable claim like unjust enrichment is only available in the absence of an agreement governing a particular subject matter (see *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]).

Accordingly, it is

ORDERED that upon renewal, Plaintiff's motion for summary judgment and Defendant Darlene Hart's request for summary judgment upon a search of the record are denied.

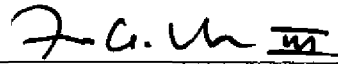
11/8/2021
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE


 FRANCIS KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
 J.S.C.