

Weber v Barnett

2022 NY Slip Op 33200(U)

September 19, 2022

Supreme Court, Kings County

Docket Number: Index No. 508333/2022

Judge: Leon Ruchelsman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART 16

-----x
YOEL WEBER and YOEL LEONOROVITZ, Individually
and derivatively on behalf of HORSEPOWER
ELECTRIC AND MAINTENANCE CORP.,

Plaintiff, Decision and order

- against -

Index No. 508333/2022

GARY BARNETT, HP STOCK LLC and EXTELL
DEVELOPMENT COMPANY,

Defendants, September 19, 2022

-----x
GARY BARNETT,

Third-Party Plaintiff,

- against -

PASCACK GROUP LLC and PASCACK WL HOLDINGS
LLC,

Third-Party Defendants,

-----x
PRESENT: HON. LEON RUCHELSMAN

The Plaintiff/Third Party Defendants have moved seeking to compel responses to Notices to Admit served May 31, 2022. The defendant has opposed the motion. Papers have been submitted by the parties and arguments held. After reviewing the arguments of the parties this court now makes the following determination.

According to the Verified Complaint Horsepower Electric and Maintenance Corp., is equally owned by plaintiffs Yoel Weber, Yoel Leonorovitz and an entity called HP Stock LLC pursuant to an operating agreement dated October 28, 2014. Gary Barnett is the managing member of HP Stock. Horsepower Electric is an electrical subcontractor in the construction industry. Pursuant to the operating agreement Horsepower Electric was required to prioritize

its work on behalf of defendant Extell Development Company, an entity owned by Barnett. The Verified Complaint alleges various wrongs committed by Barnett including reducing the profits to which Horsepower Electric was entitled, failing to pay Horsepower Electric for work performed on Extell projects and other acts and omissions. The Verified Complaint alleges causes of action for breach of fiduciary duty, breach of contract, unjust enrichment, tortious interference, quantum meruit and attorney's fees. The defendant served an amended answer and raised various counterclaims. Regarding this motion the counterclaims allege that Horsepower Electric, termed the Horsepower Joint Venture, "over time, acquired multiple parcels of land in Rockland County, New York, Village of Chestnut Ridge ('Rockland County Properties'). Upon information and belief, the Rockland County Properties consist of dozens of acres of mostly undeveloped land" (see, Amended Verified Answer with Counterclaims, ¶ 204 [NYSCEF Doc. #9]). Further, the counterclaim alleges that "upon information and belief, Weber and Leonorovitz, in a wrongful effort to gain an unfair advantage and extract concessions from Barnett and limit their losses on Company projects, have embarked on a bad faith campaign to frustrate Barnett and appropriate for themselves the Rockland County Properties" (*id.* at ¶ 248). In Paragraph 251 the counterclaim asserts that during a meeting between Weber Leonorovitz and Barnett "neither Weber nor Leonorovitz denied that

Barnett had a one third interest in the entities that owned the Rockland County Properties. Instead, to justify excluding Barnett from all further interest in the Rockland County Properties, they argued that Barnett's failure to timely adhere to the formality of executing an operating agreement reflecting Barnett's interest somehow rendered Barnett's interest unenforceable, and - incredibly -- arguably forfeited" (id).

As noted on May 31, 2022 the plaintiff served notices to admit all involving the counterclaim about the properties in Rockland County. Specifically, the notices to admit contain twenty-three individual paragraphs and all of them, with the exception of requests three through eight, deal with various aspects of the operating agreements of the third party defendants and various provisions of such agreements. The defendant has objected to such notices to admit on the grounds they seek ultimate issues in the case.

Conclusions of Law

It is well settled that a notice to admit is a proper device to resolve matters of fact, about which there is no disagreement, in order to expedite matters for trial (32nd Avenue LLC v. Angelo Holding Corp., 134 AD3d 696, 20 NYS3d 420 [2d Dept., 2015]). However, a notice to admit may not be utilized for ultimate contested questions of fact (Burrell v. West, 163 AD3d 660, 81 NYS3d 433 [2d Dept., 2018]).

The third counterclaim asserts a cause of action for breach of fiduciary duty regarding the Rockland County properties. Paragraph 267 alleges that "as the managing co-venturers, Weber and Leonorovitz owed a fiduciary duty to Barnett to hold his membership interest in the Horsepower Joint Venture, including Barnett's interest in and to the Rockland County Properties on behalf of the venture, and Weber and Leonorovitz were not permitted to appropriate the opportunities and benefits incidental to the position they occupied as co-venturers in derogation of Barnett's rights" (id). Two paragraphs later the counterclaim provides more specificity. It asserts that "Weber and Leonorovitz's conduct in, among other things: (i) usurping Barnett's ownership interest in the Rockland County Properties; (ii) creating documents to conceal Barnett's contributions to the Rockland County Properties; (iii) refusing to acknowledge Barnett's equity share of the entities that own the Rockland County Properties; (iv) refusing to turnover financial records or other records related to Barnett's equity share of the Rockland County Properties; and (v) appropriating for themselves benefits and profits generally of the Horsepower Joint Venture in stark derogation of Barnett's rightful expectations as a partner in a common venture, constitute breaches of their fiduciary duties and duties of utmost good faith and loyalty" (see, Amended Verified Answer with Counterclaims, ¶ 269). Thus, essentially, the counterclaim alleges the plaintiffs acted to

eliminate Barrett's share from the Rockland County properties. The notices to admit seek to compel Barrett to admit that he has no share in the Rockland County properties.

A careful review of the notices to admit reveals that requests one, two, nine and fifteen all concern the "true and accurate" operating agreements of Pascack Group LLC and Pascack WL Holdings LLC as well as the list of members of each entity. However, there is no way the defendant could admit to such information since he has no way of knowing, since he is not a signatory, whether those documents are true and accurate. Requests three through eight seek an admission whether any joint venture exists between the plaintiffs and the defendant. However, it is well settled that a partnership or joint venture need not be in writing to be enforceable (see, Blank v. Nadler, 143 AD2d 966, 533 NYS2d 891 [2d Dept., 1988]). Moreover, the existence of an oral agreement is generally a question of fact (see, Martin v. Cohen, 17 Misc3d 1116 (A), 851 NYS2d 64 [Supreme Court Suffolk County 2007]). Thus, these requests for admission are more than mere matters about which there is no disagreement. Indeed, they concern the very crux of the counterclaim. The remainder of the requests seek admissions about operational provisions of the operating agreements and admissions that defendant Barnett did not take certain actions with respect to those agreements. These matters are not matters that could not possibly be subject to any dispute but rather are

vigorously contested.

These notices to admit seek to undermine Barrett's ability to pursue his counterclaim regarding the Rockland County properties. That is an improper use of a notice to admit.

Therefore, based on the foregoing, the motion seeking to compel the defendant to respond to the notices to admit is denied.

So ordered.

ENTER:



DATED: September 19, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC