

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

810 PROPERTIES VII, L.L.P., ET AL., :

Plaintiffs-Appellees, :

No. 108922

v. :

WILL SUKENIK, ET AL., :

Defendants-Appellants. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED AND REMANDED

RELEASED AND JOURNALIZED: April 23, 2020

Civil Appeal from the Cuyahoga County Common Pleas Court
Case No. CV-18-895911

Appearances:

Singerman, Mills, Desberg & Kauntz Co., L.P.A.,
Christopher O'Connell, *for appellees.*

Dinn, Hochman & Potter, L.L.C., Steven B. Potter, *for
appellants.*

SEAN C. GALLAGHER, P.J.:

{¶ 1} Will Sukenik, the Fairways, and PDC Office Park appeal an interlocutory order dissolving the Fairways and PDC Office Park partnerships and

appointing a liquidating trustee to oversee the wind down of the partnerships' affairs. We affirm.

{¶ 2} 810 Properties VII, LLP and 810 Properties XI, LLP (collectively "810 Properties") own a limited interest in the Fairways and PDC Office Park, respectively. The Fairways and PDC Office Park each owned and maintained commercial properties since the 1980s, and each had two general partners in charge of the operations — Sukenik and Irving Fine. 810 Properties were general partnerships when each entity entered the partnership agreements with the Fairways and PDC Office Park. In 2018, 810 Properties became limited liability partnerships by filing statements of qualification as permitted under R.C. 1776.81. Under the terms of Fairways' and PDC Office Park's operating agreements, the partnerships were set to terminate in 2005 and 2006, respectively. This did not occur, but none of the general or limited liability partners raised any issues with the continued operation beyond the termination dates.

{¶ 3} One of the two general partners of both the Fairways and PDC Office Park, Irvin Fine, passed away in March 2016. That triggered a clause of the Fairways' and PDC Office Park's agreements requiring further action. Neither Fairways nor PDC Office Park elected to continue the partnerships within 30 days of Fine's death, as required by the terms of their respective agreements. Although the appellants claim to have "prepared" elections to continue the partnerships, it is undisputed that those documents were never signed. Further, the partnerships'

certificates were not amended to reflect the change in the general partner's status as also required.

{¶ 4} 810 Properties filed a verified complaint seeking a judicial dissolution of the partnerships based on the fact that the partnership agreements expired by their express terms in 2005 and 2006, but the entities nonetheless continued operations for the next decade. In the alternative, 810 Properties claimed that Fine's death in 2016 also triggered a dissolution event. 810 Properties filed a motion for partial summary judgment upon the claims for judicial dissolution and sought the appointment of a liquidating trustee to oversee the wind down. The trial court granted the partial summary judgment, dissolved the Fairways and PDC Office Park, and appointed a liquidating trustee.

{¶ 5} In addition to the claims for judicial dissolution advanced in the complaint, 810 Properties included claims against Sukenik, the Fairways, and PDC Office Park (1) for breach of fiduciary duty, in which 810 Properties claimed that Sukenik failed to make timely and adequate distributions to the limited partners and failed in safekeeping and using of all funds and assets of the respective partnership for the benefit of the limited partners; (2) for breach of contract for failure to maintain and provide annual reports and file the appropriate paperwork to maintain the partnerships; (3) for negligence for the failure to properly manage the partnerships' properties; and (4) for an accounting of all financial transactions and finances of the Fairways and PDC Office Park. Thus, the breach of contract and tort claims were separate and distinct claims from the claims for judicial dissolution.

None of the tort or breach of contract claims would affect the dissolution. Further, the tort and breach of contract claims remain pending before the trial court and are beyond the scope of our jurisdiction over this interlocutory and limited appeal. There has been no resolution of those claims.

{¶ 6} This raises a preliminary question: Is the trial court’s order dissolving the Fairways and PDC Office Park and appointing the liquidating trustee a final, appealable order despite the lack of Civ.R. 54(B) certification and the lack of a final resolution to the remaining tort and breach of contract claims? Neither party has addressed this concern, but further briefing on this point is unnecessary.

{¶ 7} “An appellate court has such jurisdiction as provided by law to review and affirm, modify, or reverse judgments or final orders of the inferior courts within its district.” *Durst v. Durst*, 3d Dist. Seneca No. 13-02-38, 2003-Ohio-2029, ¶ 9. An order is a considered final and appealable if the requirements of R.C. 2505.02 and Civ.R. 54(B), if applicable, are met. *Id.* If an order is not final and appealable as contemplated under R.C. 2505.02, then an appellate court has no jurisdiction to review the matter and must dismiss the appeal.

{¶ 8} It suffices for the purposes of this current appeal that the order granting judicial dissolution of a partnership is a provisional remedy under R.C. 2505.02(B)(4) that “‘determine[s] the action with respect to the provisional remedy and prevent[s] a judgment in the action in favor of the appealing party with respect to the provisional remedy’ as well as having the effect that ‘the appealing party would not be afforded a meaningful or effective remedy by an appeal following final

judgment as to all proceedings, issues, claims, and parties in the action.” *Huntington Natl. Bank v. Weldon F. Stump & Co.*, 160 Ohio App.3d 14, 2005-Ohio-1224, 825 N.E.2d 1134, ¶ 19 (6th Dist.). Because the trial court ordered the dissolution and winding down of the Fairways and PDC Office Park partnerships, there would be no effective remedy following the final judgment — the partnerships would cease to exist and all assets disposed of by that time. *Id.* Further, Civ.R. 54(B) is not applicable. *Id.* at ¶ 24. We have jurisdiction over this appeal.

{¶ 9} In this appeal, the appellants advance five assignments of error challenging the trial court’s order granting partial summary judgment in favor of 810 Properties.

{¶ 10} Appellate review of summary judgment is de novo, governed by the standard set forth in Civ.R. 56. *Argabrite v. Neer*, 149 Ohio St.3d 349, 2016-Ohio-8374, 75 N.E.3d 161, ¶ 14. Summary judgment is appropriate only when “[1] no genuine issue of material fact remains to be litigated, [2] the moving party is entitled to judgment as a matter of law, and, [3] viewing the evidence in the light most favorable to the nonmoving party, reasonable minds can reach a conclusion only in favor of the moving party.” *Id.*, citing *M.H. v. Cuyahoga Falls*, 134 Ohio St.3d 65, 2012-Ohio-5336, 979 N.E.2d 1261, ¶ 12.

{¶ 11} In the first and third assignments of error, the appellants claim that 810 Properties waived their right to enforce the 2005 and 2006 termination dates in the Fairways and PDC Office Park partnership agreements and that both entities were permitted to rely on the advice of counsel in continuing operations following

those termination dates. In the second and fifth assignments of error, the appellants generally claim that 810 Properties lacked standing to assert any claims under the Fairways and PDC Office Park partnership agreements in general because 810 Properties filed statements of qualification to become limited liability partnerships. As a result, according to the appellants, 810 Properties became new entities distinct from the general partnerships that entered the Fairways and PDC Office Park partnership agreements and, therefore, 810 Properties were not the real parties in interest to the action or the Fairways and PDC Office Park partnership agreements. Along those same lines, the appellants claim that the 810 Properties entities in existence before the filing of the statements of qualification, breached the terms of the Fairways and PDC Office Park partnership agreements by failing to seek written permission to assign their interests into the newly formed limited liability partnerships that followed the filing of the statements of qualification under R.C. 1776.81.

{¶ 12} We need not reach any conclusions as to whether 810 Properties waived their right to assert the contractual termination dates as a basis to seek judicial dissolution of the Fairways and PDC Office Park partnerships or whether those entities were entitled to rely on the advice of counsel in continuing operations following the termination dates. It is undisputed that both partnership agreements at issue contained clauses requiring the general partner, Sukenik, to elect to continue the partnerships after the death of the other general partner, Fine. It is also undisputed that Sukenik did not so elect through a written document, and in

addition, Sukenik failed to amend the partnerships' certificates as also required under the unambiguous terms of the Fairways and PDC Office Park partnership agreements. Because that alternate basis for seeking judicial dissolution is undisputed, the argument regarding waiver and reliance on the advice of counsel is moot. Even if we agreed with the appellants, waiving the right to enforce the termination clause would not affect the trial court's determination to dissolve the Fairways and PDC Office Park partnerships under a separate provision of the partnership agreements.

{¶ 13} The more pertinent question advanced in this appeal is whether 810 Properties possessed standing to seek enforcement of the partnership agreements following the filing of a statement of qualifications under R.C. 1776.81.

{¶ 14} On this point, the appellants claim that the filing of statements of qualification under R.C. 1776.81, which transforms a general partnership into a limited liability partnership, either affected 810 Properties' standing to enforce the terms of the Fairways and PDC Office Park partnership agreements or violated the terms therein. The argument is a bit convoluted, but it appears that appellants believe that by the filing of statements of qualification, 810 Properties created new entities that required the 810 Properties entities that had existed as general partnerships before invocation of R.C. 1776.81, to transfer or assign their interests and property to the newly formed 810 Properties after the statements of qualification were filed. In essence, according to the appellants, there are four separate entities: the general partnerships 810 Properties VII and 810 Properties XI,

which exist independently of 810 Properties VII, LLP and 810 Properties XI, LLP, formed following the filing of statements of qualification. This argument stems from a misunderstanding of the general law of partnerships codified under R.C. Chapter 1776, the Ohio Uniform Partnership Act (1997).

{¶ 15} Under the express terms of R.C. 1776.81, any partnership may become a limited liability partnership by filing a statement of qualification. R.C. 1776.81 thus presumes the existence of a partnership. The limited liability partnership that emerges following the filing of a statement of qualification “continues to be the same entity that existed before the filing of a statement of qualification under section 1776.81 of the Revised Code.” R.C. 1776.21(B). As explained in the Official Comments to R.C. 1776.21 “there is no ‘new’ partnership resulting from membership changes” processed under R.C. 1776.81. The filing of a statement of qualification under R.C. 1776.81 “does not create a ‘new’ partnership. The filing partnership continues to be the same partnership entity that existed before” the statement of qualification transformed the partnership into a limited liability entity. *Id.* It is undisputed that 810 Properties both filed a statement of qualification and were registered with the Ohio secretary of state as limited liability partnerships following their invocation of R.C. 1776.81.

{¶ 16} The process of filing the statement of qualification under R.C. 1776.81 should not be confused with the process of conversion under R.C. 1776.72 through

1776.74.¹ Under those provisions, a domestic or foreign entity other than a partnership, for example a corporate entity, may take steps to convert into a partnership through the filing of a certificate of conversion. The conversion process is not relevant in the current case in which a general partnership filed a statement of qualification under R.C. 1776.81 to become a limited liability partnership. Appellants' arguments based on the R.C. 1776.74 conversion process are misplaced.

{¶ 17} As it pertains to the issues raised in this appeal, there is no legal distinction between the 810 Properties as the entities existed at the time they entered into the Fairways and PDC Office Park partnership agreements and the 810 Properties that emerged after the filing of the statements of qualification. The statements of qualification did not create new entities — 810 Properties VII, LLP and 810 Properties XI, LLP continue to be the same entities that were in existence before the filing of the statements of qualification under R.C. 1776.81 and are the same entities that entered the Fairways and PDC Office Park partnership agreements. The trial court did not err in granting the dissolution of Fairways and PDC Office Park upon 810 Properties' request.

¹ R.C. 1776.74(A) provides that “[u]pon the adoption of a declaration of conversion pursuant to section 1776.72 or 1776.73 of the Revised Code, or at a later time as authorized by the declaration of conversion, a certificate of conversion that is signed by an authorized representative of the converting entity shall be filed by the authorized representative with the secretary of state.” Both R.C. 1776.72 and 1776.73 discuss the scope of the conversion process, unambiguously setting forth that “a domestic or foreign entity other than a domestic partnership” may be converted into a domestic partnership. Conversion as statutorily defined is not relevant to filing a statement of qualification so that the general partnership becomes a limited liability one. R.C. 1776.81(A) (“A partnership may become a limited liability partnership pursuant to this section.”).

{¶ 18} In the final assignment of error, appellants claim that the trial court erred by appointing a liquidating trustee in light of the appellants' motion for summary judgment pertaining to the tort and breach of contract claims that remains outstanding. We summarily overrule the final assignment of error.

{¶ 19} Appellants claim, in the pending motion for summary judgment, that 810 Properties lacked standing to enforce the Fairways and PDC Office Park partnership agreements (an issue resolved above); that the tort or breach of contract claims were barred by R.C. 1782.241; that Sukenik's actions were consistent with his business judgment and therefore there is no negligence; that the breach of fiduciary duty and negligence claims were barred by the terms of the partnership agreements or the applicable statute of limitations; and that 810 Properties breached the terms of the Fairways and PDC Office Park partnership agreements by failing to request permission to assign their interests into the newly formed limited liability version of the 810 Properties entities (an issue also resolved above).

{¶ 20} Thus, the remaining arguments advanced in the pending motion for summary judgment have no bearing on the dissolution of the Fairways and PDC Office Park partnerships or the appointment of the liquidating trustee to achieve those ends. The issues that remain to be resolved in appellants' motion for summary judgment pertain to the unresolved tort and breach of contract claims that are pending before the trial court and have no bearing on the dissolution or the appointment of a liquidating trustee. The trial court did not err in appointing the liquidating trustee despite the pending summary judgment motion.

{¶ 21} We affirm the order dissolving the partnerships and appointing a liquidating trustee and remand the cause for further proceedings.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
EILEEN A. GALLAGHER, J., CONCUR