2004 WL 5641707 (N.Y.Sup.) (Trial Order)
Supreme Court, New York.
New York County

Wadsworth Ave. Associates v. Maynard
Supreme Court, New York. November 19, 2004 *(Approx. 5 pages)*

In re WADSWORTH AVENUE ASSOCIATES, and the Application of
Robert H. Haggerty, Plaintiff,
v.
Kenneth L. MAYNARD, Defendant.

No. 601707/03.
November 19, 2004.

Decision/Judgment

Robert H. Haggerty, 1301 Avenue of the Americas Room 2918, New York, NY 10019.

James W. Kennedy, Esq., Kennedy Johnson, LLC, 83 Maiden Lane Penthouse, New York, NY 10038.

David J. Kaphlan, Esq., Panl, Hastings, Janofsky & Walker, LLP, 75 East 55th Street, New York, NY 10022.

William Dockery, Esq., The Whitehall Building, 17 Battery Place, Suite 1226, New York, NY 10004.

Hon. Rolando T. Acosta, Supreme Court Justice.

Motion Seq. Nos. 11, 12& 13

Introduction

An evidentiary hearing was scheduled for October 5, 2004, in an attempt to reach the merits of Robert H. Haggerty's seemingly endless barrage of motions and the underlying allegations in the complaint regarding defendant Kenneth L. Maynard. At their core, Haggerty's motions seek an order from the court removing defendant as general partner of Wadaworth Avenue Associates ("Wadsworth"), designating Haggerty as defendant's replacement, and distributing the $3.7 million in proceeds, from the sale of the Wadsworth property in April 7, 2003, currently being held in escrow and managed by co-escrow agents William J. Dockery, Esq.[1] and James W. Kennedy, Esq. On October 5, 2004, Haggerty nor Dockery presented any evidence, and instead the Court took oral argument on the motions. The parties are in agreement that the proceeds should be distributed.

The Court also considered defendant's invitation for the Court to search the record and dismiss Haggerty's claim for the removal of defendant as the general partner based on theft. According to defendant, Haggerty's claim of theft as a basis to remove defendant as general partner is *res judicata* inasmuch as a similar claim of wrongdoing by Haggerty against defendant was settled with prejudiced before Justice Schlesinger of this Court. Haggerty had been given prior notice by this Court on September 8, 2004, that it expected him to produce evidence to support his allegations of theft and to differentiate them from previous allegations addressed both by the stipulation of settlement before Justice Schlesinger and by Justice Abdus-Salaam's denial of his motion for summary judgment, which she characterized as "speculation, unsupported by any admissible evidence." See decision dated February 20, 2004.

Background

Wadsworth is a limited partnership established in 1985 by defendant, the general partner, to rehabilitate and own a building in accordance with federal urban renewal laws. As the income tax benefits began to subside, the limited partners' (which include Haggerty) urged defendant to sell the building. On May 10, 2001, defendant offered to buy the building for $1,300,369.00, but the limited partners did not accept the offer. On November 13, 2001, Haggerty sued defendant for breach of fiduciary duty, alleging that defendant had breached his fiduciary duties by undervaluing the Partnership in connection with his offer to buy the building (see Petition dated November 13, 2001, Index No. 121495/01). That petition was settled on January 29, 2003, before Justice Schlesinger. The settlement provided that the property would be sold in accordance with an outstanding offer, that after the sale the partnership would be dissolved in accordance with the law and that all debt would be paid and distributions would be made in accordance with the partnership agreement, that the action would be dismissed with prejudice, and that each of the parties would bear the cost of its attorney's fees (defendant would reimburse the Partnership from his own personal funds for any Partnership funds he had used to pay for legal fees).

On April 7, 2003 Wadsworth closed on the sale of the building and the proceeds have since been held in an escrow account with two escrow agents: William J. Dockery, Esq. and James W. Kennedy, Esq. (defendant's and Wadsworth's attorney).

On or about June 3, 2003, Haggerty commenced the instant action by serving a summons and complaint for an accounting for the period of June 30, 1997 to date, for repayment of any partnership funds converted or stolen by defendant, and for punitive damages in the event of theft or conversion. On July 14, 2003, Haggerty served a First Amended Complaint seeking compensatory and punitive damages against defendant for theft and conversion of partnership funds and seeking both the removal of defendant as general partner and the immediate distribution of 80% of the proceeds. Haggerty alleged both pre- and post-settlement misconduct by defendant. As to pre-settlement misconduct, Haggerty alleged that "[i]t is clear from the partnership's records that defendant has from time to time appropriated partnership revenue for undisclosed, non-partnership purposes, which appropriation constituted either the crime of grand larceny or the tort of conversion." With respect to post-settlement misconduct, he alleged that defendant breached his fiduciary duties and engaged in conversion of funds by falling and refusing to distribute the proceeds. On August 5, 2003, defendant served his answer, where he alleged, *inter alia,* a defense based on principles of *res judicata.*

On July 14, 2003, Haggerty moved for the immediate distribution of the proceeds. Approximately one month later, he moved for leave to file a Second Amended Complaint adding a claim against the law firm of Paul Hastings. On October 7, 2003, Haggerty moved for summary judgment "on his First Amended Complaint for theft/conversion by defendant of partnership finds, for the repayment of amounts so [misappropriated] and for compensatory and punitive damages for said tortnous/criminal conversion of partnership funds." In his supporting affidavit, Haggerty asserted that a comparison of Wadsworth's reported income with an index of New York City rent increases for the period of 1993-2001 proved that defendant stole partnership funds. On January 27, 2004, Haggerty moved for summary judgment on his post-settlement claim that defendant had converted funds partnership funds by refusing to make an interim distribution of proceeds. Defendant cross-moved for partial summary judgment dismissing Haggerty's post-settlement conversion of funds based on the ground that the proceeds were being held in escrow by Dockery and Kennedy pursuant to a court approved stipulation in a prior proceeding and he could therefore not distribute the funds.

On February 20, 2004, Justice Abdus-Salaam consolidated the pending motions, denied Haggerty's motion to file a Second Amended Complaint, denied Haggerty's motion for immediate interim distribution of the proceeds, denied Haggerty's motion for summary judgment on his pre-settlement conversion of funds, and granted defendant's cross-motion for summary judgment dismissing Haggerty's claim for post-settlement conversion of the proceeds. See Decision dated February 20, 2004. With respect to Haggerty's pre-settlement conversion of funds, Justice Abdus-Salaam held that Haggerty's claims were mere "speculation, unsupported by any admissible evidence, such as business records or deposition testimony, [which] is insufficient to make out a prime facies showing of entitlement to summary judgment."

Apparently, Judge Abdus-Salaam allowed the case to go forward inasmuch as discovery was not yet completed. Rather than securing evidence in admissible form, plaintiff spent the following several months barraging the Court with letters and motions. This decision covers Seq. Nos. 11, 12 and 13.

Removal of Defendant Kenneth L. Maynard as General Partner

Section 6.05 of the Partnership Agreement provides, in relevant part, that a "General Partner ... may be removed for cause (but in no event shall cause be found to exist in the absence of intentional wrongdoing) with the consent of a majority in the Interest of the Limited Partners...." Haggerty's evidence of "for cause" consisted merely of unsubstantiated allegations of theft. Specifically, he speculated that defendant was stealing rent receipts because the amounts reflected in forms submitted to the Department of Housing and Community Renewal (DHCR) were different than what the tenants actually pay in rent. Although this "proffer" was insufficient to make out a *prima facie* showing of theft, defendant answered it by credibly explaining that the DHCR forms reflected the maximum rent allowed per unit, not the amount actually charged. The DHCR forms also did not reflect vacancies nor uncollected rents. Defendant's offer to present evidence by testifying was rejected by the Court inasmuch as it was unnecessary given defendant's explanation and plaintiff's failure to come forward with *prima facie* evidence.

Even if plaintiff had established theft on defendant's part, the partnership agreement required him to prove that defendant's acts of under-reporting were intentional before he could remove defendant as general partner. There is, however, no indication that defendant engaged in intentional wrongdoing, such as writing checks to himself or otherwise funneling money for his personal use. Plaintiff has therefore failed to establish cause to remove defendant as general partner under the Partnership Agreement. Accordingly, that portion of his motion seeking the removal of defendant as general partner is denied.

At this juncture, the remaining question for the Court is whether given the circumstances of this case, it should accept defendant's invitation to search the record and dismiss those causes of action seeking dismissal of defendant as general partner based on theft. The Court, as it should, is reluctant to search the record, especially when there is no pending motion for summary judgment before it. Indeed, the Court's power to search the record is not boundless. ***Dunham v. Hilco Construction Co.*, 89 N.Y.2d 425, 429 (1996)**. The court may search the record and grant summary judgment only on a cause of action or issue that is the subject of the motions before the court. ***Id.*** As the ***Dunham*** Court noted,

> The need for such a limitation is obvious. Apart from considerations of simple fairness, allowing a summary judgment motion by any party to bring up for review every claim and defense asserted by every other party would be tantamount to shifting the well-accepted burden of proof on summary judgment motions (*see, GTF Mktg v. Colonial Aluminum Sales,* 66 N.Y.2d 965, 967-968 [1985][a moving party must assert some basis in support of its summary judgment motion before an opposing party has the burden of producing contrary evidence]).

The relevant question here, however, is whether the Court should be paralyzed from exercising its discretion and search the record when there is no motion for summary judgment pending before the Court, but the issues in the pending motions are identical to the causes of action in the complaint. Although the Court would like nothing better than to put this case out of its misery, given ***Dunham*** and the fact that the pleadings were not attached to the motions, see CPLR 3212(b) ("a motion for summary judgment shall be supported by...a copy of the pleadings"), the Court will decline defendant's invitation to search the record.

It should come as no surprise to Haggerty, however, that his claim of theft as a basis to remove defendant as general partner will not survive an appropriate motion to dismiss absent further evidence in support of its claim. Indeed, it should be noted that Haggerty is suing defendant for the second time for the same relief based on essentially the same set of circumstances. His prior motion for summary judgment in the present case before it was transferred to this Part sought summary judgment based on allegations of theft. In support of that motion, Haggerty "submitted an affirmation in which he states that declines in revenue in 1998 and 200 for the building owned by the partnership 'could only have resulted by the falsification of the records or be defalcations by the defendant.' " He also stated that a "schedule of rents' prepared by him and a rent index prepared by the New York City Rent Guidelines Board 'indicate that as much as $443,547 might have been taken from the partnership funds by the defendant.' " *See* Decision and Order dated February 20, 2004. That motion was denied because Haggerty's "speculation, unsupported by any admissible evidence such as business records or deposition testimony, [was] insufficient to make a prima facie showing of entitlement to summary judgment." *See* Decision and Order

dated February 20, 2004. Since the February 20th decision, Haggerty has not developed any proof, in admissible form, to support his claims.

Second, the Court placed Haggerty on notice that it expected him to produce evidence to support his allegations of theft and to differentiate them from previous allegations addressed both by the stipulation of settlement before Justice Schlesinger and by Justice Abdus-Salaam's denial of his motion for summary judgment. Notwithstanding the Court's notice as well as over a year's time for Haggerty to gather evidence of theft or conversion, there is absolutely no evidence whatsoever supporting Haggerty's claim.

Third, Haggerty's claims of theft, albeit, recast in different legal theories appear to be part of the same transaction or series of transactions as his claim of wrongdoing in the prior action before Justice Schlesinger, which was settled in part by the parties agreeing to dismiss the action with prejudice. Haggerty's claim therefore may be precluded under established principles of *res judicata. Schwartzreich v. E.P.C. Carting Co., Inc.,* 246 A.D.2d 439 (1st Dept. 1998)(a stipulation dismissing a claim with prejudice carries the same effect under the *res judicata* doctrine as a judgment on the merits); *Boorman v. Deutschl,* 152 A.D.2d 48 (1st Dept. 1989); *Harmir v. Shahar,* 3 Misc. 3d 133(A), 2004 WL 1159936 (App. Term. 1st Dept. 2004)("[s]trict enforcement of stipulations of settlement serves the interest of efficient dispute resolution and ensures finality in the litigation process.").

Accordingly, in an effort to move this case along, it is hereby ORDERED that all discovery in the case be completed by January 15, 2005. The Note of Issue must be filed by January 30, 2005.

Distribution of the Proceeds of the Sale and Indemnification of Defendant for his Legal Fees

Distribution of the proceeds of the sale are governed by Section 9.04 of the Partnership Agreement, which states, in relevant part:

In the event capital proceeds are received by the Partnership from a sale or refinancing of the Project they shall be distributed (after giving effect to allocations pursuant to section 9.01, 9.02, and 9.03) in the following order of priority.

(a) First, to the payment of all debts and liabilities of the Partnership....

(b) Second, to the setting up of any reserve which the General Partner may deem reasonably necessary for any contingent or unforeseen liabilities or obligations of the Partnership.

(c) Third, to the General Partner and his Affiliates in repayment of all outstanding advances and loans made by them to the Partnership.

(h) seventh, the balance, 80% to the Limited Partners in proportion to their interest in cash flow from operations described in Section 9.01, and 20% to the general Partner.

Indeed, in her February 20, 2004 decision, Justice Abdus-Salaam held that the Partnership Agreement requires that all debt and liabilities of the partnership be paid prior to the distribution of the proceeds.

Several liabilities totaling $5,263.73 are not in dispute. These include:

1. $190.00 to the law firm of Rappaport, Hertz, Cherson & Rosenthal for legal services;

2. $4,980.00 to Mario Bernardo for accounting services; and

3. $93.73 to NCO Financial Systems for Con Edison collections.

In addition, this Court finds that $9,829.63 is due to the law firm of Paul Hastings for legal services regarding the sale of the property.

At issue at the hearing was whether defendant was entitled to be indemnified for his legal fees; in other words, whether defendant's legal fees are a partnership liability that must be paid prior to the distribution of the proceeds of the sale. Indemnification is governed by Section 5.08 of the Partnership Agreement, which states:

> The general Partner shall be indemnified by the Partnership on account of any loss which he may incur in his capacity as general Partner, and on account of any claim, liability, action or damage for any act performed or omitted to be performed by him within the scope of the authority conferred by Section 5.01

> and made or omitted to be made in good faith or based on the opinion of counsel, and on account of all reasonable attorney's fees incurred in connection therewith, except for acts of fraud, malfeasance, gross negligence, or acts constituting a breach of fiduciary obligation to the Partnership or the limited Partners....

Based on the language of the Partnership Agreement, defendant is clearly entitled to be indemnified for his defense against Haggerty's baseless accusations of under-reporting. Nor has Haggerty presented any evidence whatsoever of fraud, malfeasance, gross negligence or breach of any fiduciary duty. Haggerty's eleventh hour request to be heard on the issue of indemnification is denied.[2] Accordingly, defendant shall be indemnified for his reasonable legal fees incurred in the defense of this action by the firms of Paul Hastings and Kennedy Johnson, LLC, totaling $113,065.16.[3]

Note: Text of footnote 2 missing in original document

Reserve Fund

Pursuant to Section 9.04(b) of the Partnership Agreement, defendant requests permission to set up a reserve fund in the amount of $250,000.00 for any contingent or unforseen liabilities or obligations of the Partnership. This Court finds that $250,000.00 is reasonably necessary to cover any contingent or unforeseen liabilities, especially given Haggerty's litigiousness. Inasmuch as any legal fees incurred by defendant in the defense of baseless allegations will deplete this fund, Mr. Haggerty would be wise to think twice before filing successive motions.

Conclusion

The co-escrow agents (William Dockery, Esq. and James W. Kennedy) are ORDERED to pay the following liabilities from the escrow account by December 30, 2004:

1. $9,829.63 to the law firm of Paul Hastings for legal services regarding the sale of the property;

2. $190.00 to the law firm of Rappaport, Hertz, Cherson & Rosenthal for legal services;

3. $4,980.00 to Mario Bernardo for accounting services;

Note: footnote reference missing in original document

4. Paul Hastings: $56,091.00 through August 31, 2004; Kennedy Johnson, LLC: $20,310.77 through August 31, 2004, $36,182.39 through October 5, 2004, and $481.00 transcript of October 5, 2004 proceeding.

4. $93.73 to NCO Financial Systems for Con Edison collections;

5. $56,974.16 to Kennedy Johnson, LLC for legal fees regarding defendant's representation of this matter; and

6. $56,091.00 to Paul Hastings for legal fees regarding defendant's representation of this matter.

In addition to the above-listed liabilities, the escrow agents are ORDERED to set up a reserve fund on or before December 15, 2004, in the amount of $250,000 for any contingent or unforseen liabilities or obligations of the Partnership, including litigation cost from October 5, 2004. The remainder of the escrow account shall be distributed to the parties in accordance with the partnership agreement; 20% to defendant and 80% to the limited partners on or before January 15, 2005.

This constitutes the Decision and Order of the Court.

November 19, 2004

<<signature>>

ROLANDO T. ACOSTA, J.S.C.

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Footnotes

1 Although not a party to this proceeding nor representing any of the parties, the Court granted leave to Mr. Dockery (who had represented several of the limited partners in a prior proceeding before Justice Schlesinger) to participate.

3 By letter dated October 18, 2004, Haggerty sought leave to address the issues of indemnification, *res judicata* and the need for a $250,000 reserve. this request is denied. All of these issues were addressed at the October 5th proceeding and Haggerty knew or should have known that these issues would have been addressed inasmuch as they all relate to his motions. In addition, with respect to indemnification, Haggerty actually addressed the issue at length at the October 5th proceeding, where he argued, citing *Baker v. Health Management Systems, Inc.,* 98 N.Y.2d 80 (200), that the "American Rule" precluded indemnification, because there was no statutory authority for providing indemnification to a general partner. *See* October 5, 2004 Transcript pages 11-14. The *Banker* case is inspposite because that case dealt with "fees on fees" in the context of the Business Corporations Law. In any event, the *Baker* Court noted that the "American Rule" "provides that 'attorney's fees are incident to litigation and a prevailing party may not collect them from the loser *unless an award is authorized by agreement between the parties* [which Haggerty failed to mention], statute or court rule," *citing Hopoer Assoc, v. AGS Computers,* 74 N.Y.2d 487, 489 (1989). *Id.* at 88 (emphasis added). Here, the Partnership Agreement provided for indemnification.

Haggerty also addressed the reserve issue, when he argued that the reserve should be based on the amount of the reserve that had been used in the past 15 years. *See* October 5th Transcript at page 63-64, Significantly, he agreed that a reserve should be set up. *See* Page 63. Last, as to *res judicata,* the purpose of the hearing was for Haggerty to produce evidence to support his allegations of theft and to differentiate them from previous allegations addressed, *inter alia,* by the stipulation of settlement before Justice Schlesinger. To now state that he did not know that *res judicata* was an issue is disingenuous.

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