

2 SUPREME COURT OF THE STATE OF NEW YORK
3 COUNTY OF NEW YORK : CIVIL TERM: PART 39

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4 ROBERT ROSANIA,

5 Plaintiff,

6 - against -

7 LAURENCE GLUCK,

8 Defendant.

9 - and -

10 STELLAR SUTTON LLC, STELLAR BRUCKNER
11 LLC, STELLAR 117 GARTH, LLC, STELLAR 750
12 TUCKAHOE, LLC, STELLAR 330 EAST 54, LLC,
13 STELLAR WEST 110 LLC, STELLAR MORRISON LLC,
14 STELLAR KVI LLC, STELLAR STRONG ISLAND
15 MEMBER LLC, STELLAR WEST 28 LLC,
16 STELLAR PWV LLC, STELLAR JANEL, MEMBER LLC,
17 STELLAR ARIES INVESTOR LLC, BOULEVARD
18 STORY LLC, STELLAR COURT PLAZA LLC,
19 STELLAR UNDERCLIFF LLC, STELLAR 2020 LLC
20 and "JOHN DOES" 1-3,

21 Nominal Defendants.

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18 Index No. 655331/2017 (Motion #002)

19 September 5, 2018
20 60 Centre Street
21 New York, New York 10007

22 B E F O R E: HON. SALIANN SCARPULLA, Justice

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2 A P P E A R A N C E S:

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M O R N I N G S E S S I O N

THE COURT: Then I have Rosania motion to dismiss. This is 655331 of 2017.

MR. MEISTER: That's what we call the dissolution.

THE COURT: No buyout, no forced sale. This is that case.

MR. MEISTER: May I, your Honor?

THE COURT: Yes.

MR. MEISTER: Your Honor, I think there are two appellate authorities that are controlling here. So just by way of an extremely brief background, Mr. Rosania brought this action in 2016 to dissolve 17 entities that are entities that are owned in part by Mr. Gluck or in part by Mr. Rosania and, in many instances, by other parties who are not parties to the action.

We made a motion to dismiss that action on jurisdictional grounds arguing that there was black letter law that only the Delaware -- they were all Delaware entities, there's no dispute about that -- and that only Delaware in fact, only the Delaware Court of Chancery, which is the equity, they're separated there, could do that.

In response to that motion, Mr. Rosania's counsel amended the Complaint. In the Amended Complaint, in

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relevant part, Mr. Rosania seeks two forms of alternative relief, and I'm quoting verbatim -- this is in the *ad damnum* clause -- "exercising its," meaning the court's, "inherent authority to order that the properties owned by the Nominal Defendants" --

THE COURT: I don't think I even have that inherent authority.

MR. MEISTER: You don't.

THE COURT: The LLC agreement is what -- I'm not a member of this LLC. Whatever the people say in the LLC or the LLC law. I wish I had inherent authority. I would do a lot of other things if I did.

MR. MEISTER: Right. And so the first prong was to order the sale of the properties and distribute the proceeds and the second prong, which was alternative to that, was again exercising its, meaning the court's, inherent authority to order a buy/sell of Gluck and Rosania's respective interest in the Nominal Defendants, which are the 17 LLCs for their consideration.

Now, two cases I want to discuss with your Honor in particular, the first one is in the *Matter of Raharney Capital*. It is a fairly recent 2016 First Department decision. In that decision, the court, the First Department, put before the court squarely was the issue whether a New York court could dissolve a foreign --

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THE COURT: I understood that.

MR. MEISTER: Okay.

THE COURT: I don't think that

Mr. Rosania disagreed.

MR. MEISTER: Well, I want to point out -- they certainly disagreed initially. They brought an action to dissolve 17. That was the explicit relief. I think it bears mention the First Department wrote in that decision: "We conclude, consistent with decisions from the Court of Appeals, this Court," meaning the First Department, "and our sister departments of the Appellate Division, that the courts of this state do not have subject matter jurisdiction to judicially dissolve a foreign business entity. Instead, the decision as to whether dissolution is appropriate lies with the courts of the state in which the entity was created."

Judge Richter, writing for the court, notes:

"The overwhelming majority of courts outside New York have come to the same conclusion." And the First Department cites to a West Virginia court who, in making the same holding, said it would be a violation of the full faith and credit clause of the U.S. Constitution.

THE COURT: You don't have to argue that anymore.

MR. MEISTER: I'm almost done. I will take another minute.

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In a case also in 2016, called in the *Matter of Kassab*, a very similar situation was presented. What happened here is there was a New York LLC, not a Delaware LLC, and an aggrieved minority partner, or a minority member, I should say, brought an action to dissolve under the New York statute, which says, as your Honor well knows, it's not reasonably practicable to carry on the business and affairs.

The court, the lower court -- this was a Queens County case, I think this is the Second Department -- the lower court, Judge Kitsis I think this was, dismissed the dissolution petition, or the dissolutions claims I should say, saying it was not -- there wasn't a showing that it was not reasonable practicable to carry on the business and affairs.

After that decision, which was affirmed on appeal, the petitioner, the person in Mr. Rosania's shoes in this case, amended to seek an equitably forced buyout, exactly the amendment that was done here. Judge Kitsis, at the trial level, dismissed, saying, "Look, maybe I could do that, maybe. As an equitable matter, I could do a forced sale as a more -- a buyout, I'm sorry -- a buy/sell as a more expedient method of liquidation, but since I have found that the substantive test for dissolution is not met, it's only an adjunct alternative relief and I'm not going

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to grant it."

That decision was affirmed and on appeal the Appellate Division said: "In certain circumstances, a buyout may be an appropriate equitable remedy" -- and then they italicize -- "upon the dissolution of an LLC," quoting to another case called *Mizrahi v. Cohen*. So the Appellate Division affirmed the Queens Commercial Division judge saying, look, the petitioner is correct that it can be an adjunct, but once you found that there's no dissolution, you can't do a buy/sell. This holding is on all fours.

Here, there's a different reason why you can't do dissolution, which is that you don't have subject matter jurisdiction, but obviously if the Court can't entertain dissolution, it can't entertain the buy/sell. The only other point that I want to make is that -- and you alluded to this, your Honor -- is that there are multiple provisions of the LLC agreements, which are attached. In the LLC agreements, there is a provision that says that Gluck is the sole manager, which Rosania agreed to. There is a provision that says Gluck can sell or not sell without the consent of Rosania.

And Section 10.5 contains an express waiver of partition that says: "No member or any successor-in-interest to any Member shall have the right while this agreement Remains in effect to have any Company

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assets partitioned," which obviously includes partitioned by sale.

THE COURT: Let me just ask you, are all these entities single purpose entities?

MR. MEISTER: Yes.

THE COURT: So if I order the sale, that essentially dissolves the corporation. Got it. Got it.

MR. MEISTER: And you took the words out of my mouth because the purpose -- not only are they single purpose entities, but in each instance the purpose is to own Property XYZ.

THE COURT: I got it.

MR. MEISTER: And the last point is that Rosania has pled in other actions that these properties, these LLCs that he's now seeking to dissolve or *de facto* dissolve, buy/sell have produced millions upon millions of dollars for Rosania's interest that Gluck has taken.

Now, it's true that that happened. It's true that Gluck took it because he had the right to under the note, but that disproves in any event that it's not reasonably practicable to carry on the business and affairs because they're profitable companies.

So, in sum, you have no jurisdiction. There are square holdings of appellate authority that say you can't order a buy/sell as an adjunct other than to a dissolution,

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which you can't do, and the assertion of a buy/sell is a violent modification of the agreements that the parties reached which the court has frankly no business doing.

THE COURT: Okay.

MR. MEISTER: So for those reasons we ask the case to be dismissed.

THE COURT: Okay.

MR. O'CONNOR: Paul O'Connor for Mr. Rosania.

It's still good morning, your Honor.

First of all, to make clear, we are not asking this Court to dissolve Delaware LLCs.

THE COURT: Well, you're asking me to sell off the one asset, a single asset entity, which, to me, is so clearly an end-run around what I can't do. So you can spend a few minutes talking about it, but I don't think this is going anywhere.

MR. O'CONNOR: Your Honor, what you're being told by Mr. Meister and what we have been told relentlessly by Mr. Gluck through Mr. Meister is that essentially we and you are powerless to resolve this dispute and essentially he's free to do whatever he wants. And I would start with the *Raharney Capital* case, if I could.

THE COURT: Let me say this. I'm not powerless to resolve the dispute. I cannot dissolve these corporations. I can't dissolve them because I don't have

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subject matter jurisdiction and I can't do an end-run around dissolving them. That doesn't mean that I can't resolve your dispute about what Gluck is doing. I absolutely can do that and we have a litigation that's all about that.

MR. O'CONNOR: And, your Honor, that's what this litigation -- first of all, what we're talking here is the relief that we're seeking in the action. The action itself is based on breaches of fiduciary duty and I would urge your Honor before deciding this case to look at the two cases actually that Mr. Meister just spoke about, starting with the *Raharney Capital* case, because he quoted from the one part of the First Department's decision there, but they went on. And if I could, your Honor, it's a paragraph, but I'd like to read it.

THE COURT: But let me just ask you this. The only thing that you are seeking is essentially to sell these as assets. You are not seeking money damages for breach of fiduciary duty. So if you want to amend your Complaint and seek damages, I have no problem with that. That's a good claim. You've already sought that in another lawsuit. What you are seeking here is an end-run around what I can't do. That is my issue.

MR. O'CONNOR: Your Honor, what we have asked the Court to do through this Complaint is either to do a forced

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sale or to do a buyout of the interest of Mr. Rosania.
And, again, if you look at the *Raharney Capital* case, this is the First Department case, the case that Mr. Meister led with, while they note that they agree that there is not the authority in New York to dissolve a foreign corporation, they say: "We recognize that New York State courts play a critical role in resolving disputes involving business entities, and our limited holding here is only that New York courts lack subject matter jurisdiction to dissolve a business entity created under another state's laws, an extremely narrow subset of cases. This case does not involve the authority of our courts to adjudicate the myriad disputes involving foreign entities doing business in the state, or to grant provisional relief in the course of hearing such controversies."

You have not been cited one case by Mr. Meister that says you lack the authority as an equitable remedy to do buy/sell. And I would urge your Honor to look at what's going on here. We have been at this since 2014. I just became aware and I'm now stuck trying to figure out whether to amend a Complaint or file another action. Mr. Gluck sold one of the properties, represented to us that he had sold it, took of course Mr. Rosania's share of the proceeds of that sale because he claims a right to do that under the terms of these notes. Then --

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THE COURT: To pay down the notes.

MR. MEISTER: Yes.

MR. O'CONNOR: Again, he's taking -- he's not even giving us notice of what he's doing. He's taking it at default interest rates. He's abusing the process at a level that's really hard to comprehend and it's set forth in the Complaint.

THE COURT: Stop. What are you talking about?

MR. O'CONNOR: What I'm talking about here is --

THE COURT: No. This thing that you just told me.

MR. O'CONNOR: So what happens is properties are sold or they are recapitalized.

THE COURT: I don't want a general conversation.

MR. O'CONNOR: Sure.

THE COURT: You said that he just sold the property and paid himself at default interest rate.

MR. O'CONNOR: He has taken the interest at an 18 percent default rate because he claims a right to do that.

THE COURT: Is that correct, Mr. Meister?

MR. MEISTER: I don't know. I know that -- I don't remember what property was sold, but I do believe it is correct that a property was sold. The note against that property was paid off and then pursuant to the express

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provisions of the note the other notes were paid down.

Now, I know -- hold on let me respond to your question.

THE COURT: No. I want to know whether or not he took default interest rates.

MR. MEISTER: Throughout the years of mediation, my client has consistently said he will not charge default rate interest. I don't remember. It's also --

THE COURT: I want you to tell me whether or not he took default interest rates on that.

MR. MEISTER: I don't know.

THE COURT: I want to find out.

If he did, I am offering you the opportunity to bring an order to show cause to prevent that from happening in the future.

MR. MEISTER: He probably won't even need to. how about talking to me about it. Maybe we could stipulate to it.

THE COURT: Exactly.

MR. MEISTER: And every single time -- and I want to be clear about something -- every single time a property has been sold -- Mr. Rosania took \$39.5 million out of Parkmerced -- every time a property was sold we send a notice, it comes out of my office. Ms. Ashby or Mr. Sloan signs it, I think, and it informs exactly what happened and

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2 what the calculation is. Let me just finish. I don't
3 remember because I don't want to answer a question
4 inaccurately.

5 THE COURT: I am just interested in the default
6 interest rate.

7 MR. MEISTER: Okay. So if there was default
8 interest, either there was or there wasn't. If there was,
9 I'll find out and I will look into an adjustment to correct
10 it. You won't have to do an order to show cause.

11 Please don't do an order to show cause before at
12 least talking to me.

13 THE COURT: Yes, I agree. Let's have a
14 conference to find out.

15 MR. O'CONNOR: The last piece of paper, if I
16 could be heard, the last piece of paper that I received
17 from Mr. Meister in the context of trying to see if we
18 could reach a resolution charged default interest on every
19 property.

20 THE COURT: I just want to know whether or not
21 during the course of the litigation -- I know that everyone
22 represents their clients well and wants to put their
23 client's positions before me, I absolutely accept that and
24 I agree with it -- all I'm interested now is that during
25 the course of the litigation that only regular interest is
26 charged on the notes.

Debra Salzman, Official Court Reporter

1 Proceedings

2 MR. MEISTER: Understood. And I want you to
3 understand, your Honor, one of the other things that
4 happened, because it's amazing, there was a great amount of
5 money that was applied against these notes -- I don't
6 remember the amount -- millions of dollars.

7 Mr. Rosania did the following. He said: "I lent
8 you, Mr. Gluck, that money and you owe me interest on the
9 money," and then that's the basis of another dispute in our
10 mediation.

11 THE COURT: Okay.

12 MR. MEISTER: In any event, I don't have a
13 dispute with Mr. O'Connor's statement that he's entitled --
14 that either he is entitled to pursue damages for all kinds
15 of breaches, maybe an implied covenant breach, nor I do
16 dispute that this Court has full competent jurisdiction to
17 adjudicate disputes between members of a Delaware LLC, who
18 are jurisdictionally present before this court, which
19 includes, without question, both these members, but let's
20 go back to this motion. It's clear it has to be dismissed.

21 MR. O'CONNOR: And now I'd like to pick up.

22 THE COURT: Let's just finish it off.

23 MR. O'CONNOR: If I could just be heard literally
24 for the next sentence of the paragraph where we started off
25 on that default interest.

26 THE COURT: Yes.

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MR. O'CONNOR: That's just part of the problem with this. What I just discovered and what Mr. Rosania just discovered is actually that Mr. Gluck sold this property basically to himself without telling us that. He had a value at --

THE COURT: I don't have any problem with that. Did your client put in cash? If your client borrowed the money from Mr. Gluck to put into the deal --

MR. O'CONNOR: He had an investment. He was a partner in the deal.

THE COURT: So he borrowed the money and he got paid back. I'm just interested in default interest right now.

MR. O'CONNOR: What this has to do with, there's going to be an Amended Complaint or another cause of action on this because this is self-dealing. He's now marketing it at 90, something that he sold to himself. You can't self-deal like that.

MR. HUTH: So amend the Complaint.

MR. O'CONNOR: But, your Honor, this is the point. We're going to be here for the next 20 years if we have to deal with this.

THE COURT: Which is why off the record I tried to get you to go forward in a way that you can separate from each already.

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MR. O'CONNOR: And that's why I would urge your Honor to look at the *Raharney Capital* case, which says that you have inherent authority to do this and, again, I focus on the language "or to grant provisional relief in the course of hearing such controversies."

The *Kassab* case, which I'm holding right here, is a pleading standard case. They did not hold that New York Supreme Court justices do not have authority in these kinds of abusive contexts. Take a look at the *Raharney Capital* case and the relief we're seeking in the context of the massive level of wrongdoing that's occurring here. We can either do it once in one case or we can have a series of cases over a course of a very long time.

MR. MEISTER: What's really happening, your Honor --

THE COURT: No, no, no. I'm done with that one. I have to move on. We have one more motion to dismiss.

(Proceedings concluded.)

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C E R T I F I C A T E

I, Debra Lynn Salzman, an Official Court Reporter of the State of New York, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes.



Debra Lynn Salzman, RMR
Official Court Reporter

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