

CORRECTED SHORT FORM ORDER

JUAN S

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

GIL ZOHAR,

INDEX No. 14826/10

Plaintiff,

MOTION DATE: June 10, 2016
Motion Sequence #007, 008

-against-

ALLEN L. LAROCK, DARIO PEREZ and
ZOHAR, LAROCK & PEREZ, LLP,

Defendants.

The following papers read on this motion:

Notice of Motion.....	X
Cross-Motion.....	X
Affirmation in Support.....	XX
Affirmation in Opposition.....	X
Reply Affirmation.....	XX

Motion by plaintiff Gil Zohar to compel discovery is **granted** to the extent indicated below. Cross-motion by defendants to vacate the court's January 11, 2016 order with respect to discovery and to stay the action pending appeal is **denied**.

This is an action for breach of a limited partnership agreement and for an accounting. Plaintiff Gil Zohar, defendant Allen LaRock, and defendant Dario Perez are attorneys whose practice is concentrated on personal injury. Prior to August 2005, Zohar and LaRock had practiced as a limited partnership, Zohar & LaRock, LLP. On August 1, 2005, the parties entered into a limited partnership agreement, admitting Perez as an equal partner without a

capital contribution. The parties subsequently changed the name of the limited partnership to defendant Zohar, LaRock & Perez, LLP.

Paragraph 3.06 of the limited partnership agreement provides that a partner may voluntarily withdraw from the limited partnership upon 60 days written notice. If a partner withdraws prior to normal retirement age and without disability, he shall be paid the "buyout price," defined as the partner's percentage of "net book value" (§ 1.01). Additionally, Zohar and LaRock were each to receive 50 % of the balance in the operating account as of August 1, 2005 (§ 3.06). Pursuant to paragraph 3.08, if a partner is expelled for cause by the other partners, the expelled partner is still entitled to the buyout price.

Article 12.01 provides that the company shall not be dissolved upon the resignation or expulsion of a partner. Finally, § 7.01 provides that amendment of the limited partnership agreement must be approved by members having "66% of all outstanding points."

On August 24, 2009, the parties modified the limited partnership agreement so that Zohar was a 25 % partner and LaRock and Perez were each 37 ½ % partners. Zohar alleges that a dispute arose and he informed LaRock and Perez of his intention to serve notice of withdrawal. Zohar alleges that, in response, LaRock and Perez called a partnership meeting for July 29, 2010 for the purpose of reducing Zohar's partnership interest to 15 %. Zohar alleges that on August 3, 2010 he withdrew from the partnership pursuant to paragraph 3.06 of the agreement.

This action was commenced on August 4, 2010. Plaintiff asserts a claim for breach of the limited partnership by failing to pay him the buyout price. Plaintiff also asserts a claim for an accounting as to the affairs of the limited partnership.

In their answer, defendants assert counterclaims for breach of fiduciary duty, breach of the limited partnership agreement, and fraud. Among the breach of fiduciary duty alleged are soliciting firm clients, soliciting firm employees, misrepresenting and failing to disclose facts to the firm, misappropriating firm property, and mishandling legal matters. Defendants also argue that plaintiff failed to give the required 60 days notice before withdrawing from the firm. Defendants allege that on August 3, 2010, the day before the action was commenced, plaintiff withdrew \$49,750 from the firm's accounts. Defendants argue that \$45,000 constituted plaintiff's "buyout price," based upon a 25 % partnership interest, and \$4,750 represented the return of plaintiff's capital. Defendants seek both damages and an accounting.

On July 28, 2014, in view of the unexplained delay in prosecuting the case, the court directed that plaintiff file a note of issue within 90 days. A note of issue was filed on October 24, 2014.

By order dated November 16, 2015, upon reargument, defendants' motion for summary judgment and plaintiff's cross-motion for summary judgment were granted to the extent of ordering an accounting. Upon the accounting, defendants were to receive credit for the funds withdrawn by plaintiff prior to the date the action was commenced. On January 11, 2016, the court ordered the parties to conduct post-note of issue discovery as to the assets, liabilities, income, and expenses of defendant Zohar, LaRock & Perez, LLP for the period August 1, 2005 through July 31, 2010. Said accounting was to be completed by February 28, 2016. The order provided that there was to be no further discovery.

On February 29, 2016, plaintiff provided defendants with a list of approximately 179 client files as of August 3, 2010. On March 2, 2016, plaintiff requested defendants to provide retainer statements for all of the 179 clients whose cases were open as of August 3, 2010, and closing statements for those of the 179 cases which were closed subsequent to that date (plaintiff's ex G).

By notice of motion dated March 22, 2016, plaintiff moves to compel discovery of the retainer statements and closing statements referred to above, as well as escrow account statements, operating account statements, and documents relating to the firm's security deposit with its landlord.

By notice of cross-motion dated May 23, 2016, defendants move to vacate the court's discovery order dated January 11, 2016 and stay the action pending defendants' appeal from the November 16, 2015 order. Defendants argue that their July 29, 2010 amendment of the partnership agreement, reducing Zohar's partnership interest to 15 %, was valid. Defendants argue that the January 11, 2016 order, requiring discovery as to assets of the partnership, did not encompass pending cases. Defendants further argue that, in view of plaintiff's long delay in prosecuting the action, there are no unusual or unanticipated circumstances requiring post-note of issue discovery.

The act of dissolution, upon the withdrawal of a partner, confers on the withdrawing partner the right to an account of his interest, as against the partnership continuing the business (*Dawson v White & Case*, 88 NY2d 666, 670 [1996]). Thus, plaintiff Zohar is entitled to an accounting of his interest in Zohar, LaRock & Perez as of August 3, 2010, regardless of the provision in Article 12 that the partnership would not be dissolved and that

defendants Larock and Perez would continue the practice. The accounting is performed by computing the firm's assets less its liabilities, with the balance hypothetically apportioned among the partners to fix the former partner's share of the partnership (Id). Clearly, the inventory of pending cases are the primary assets of a personal injury law firm. Thus, plaintiff has an interest in Zohar, LaRock & Perez' pending cases as of August 3, 2010, and information as to pending cases was encompassed within the January 11, 2016 discovery order.

“In the absence of prohibitory provisions of the statutes or of rules of the common law relating to partnerships, or considerations of public policy, the partners..., as between themselves, may include in the partnership articles any agreement...concerning the sharing of profits and losses, priorities of distribution on winding up..., and other matters” (*Bailey v Fish & Neave*, 8 NY3d 523, 528-29 [2007]). The partners may agree to be bound by majority vote as to the most fundamental change, dissolution, as well as matters of payment and compensation (Id). The majority may agree to switch from an accrual to a cash-based system, and make other retroactive changes, to the compensation of partners who have not yet withdrawn from the partnership. (Id). However, as a general rule, rights which accrued or vested under the partnership agreement are not forfeited upon a partner's withdrawal from the partnership (Cf. *Kolbe v Tibbetts*, 22 NY3d 344, 353 [2013]).

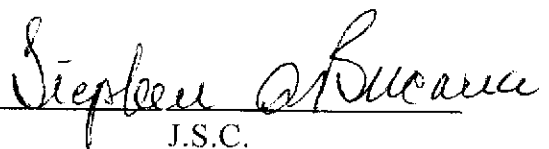
Because Larock and Perez controlled 75 % of the partnership, their reduction of Zohar's partnership interest to 15% on July 29, 2010 was valid, subject to his retention of a 25% interest in vested rights. Accordingly, on the court's own motion, the court's order of November 16, 2015 is **vacated**. Plaintiff Zohar's motion for summary judgment is **granted** to the extent of declaring that plaintiff is entitled to an accounting of his interest in Zohar, LaRock & Perez as of August 3, 2010, defined as i) 15% of the net attorney fees generated by open cases which settled after that date, ii) 25% of the net fees of any cases which had settled as of August 3, 2010 but as to which the settlement proceeds had not been received, iii) 25% of the net book value of the firm's fixed assets, including the security deposit under the lease, iv) 50 % of the balance in the firm's operating account as of August 1, 2005, and v) \$4,750 return of capital.

Upon the accounting, defendants are to receive credit for the \$49,750, or other amount, which plaintiff withdrew from the firm's accounts prior to the date the action was commenced. Defendants are also to receive credit for 15% of any extraordinary expenses which the firm incurred within 60 days of plaintiff's withdrawal on August 3, 2010.

Plaintiff's motion to compel discovery is granted only to the extent that defendants shall produce the closing statements for any of the 179 cases which settled after August 3, 2010 within 15 days of service of a copy of this order. Defendants shall also produce within that time the retainer agreements, only for those cases as to which the attorney fee was shared with other counsel. Plaintiff's motion to compel discovery is otherwise denied. The court's discovery order of January 11, 2016 is deemed amended to be consistent with this order. Defendants' motion for a stay pending appeal is denied.

So ordered.

Dated JUL 25 2016


J.S.C.

ENTERED

JUL 27 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE