

# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Ramos  
Justice

PART 53

Index Number : 654831/2016  
WIENER, EDITH  
vs.  
WEISSMAN, RICHARD  
SEQUENCE NUMBER : 001  
PARTIAL SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

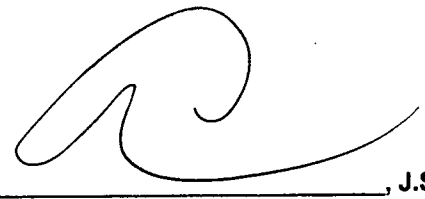
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

~~Motion is decided~~ in accordance with  
~~accompanying~~ Memorandum Decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 5/21/2017



\_\_\_\_\_, J.S.C.  
**HON. CHARLES E. RAMOS**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X  
EDITH WIENER, LAURA SPAHN, LAURA SPAHN REVOCABLE TRUST, NANCY LENVIN, JESSICA ROBLES, BURT STEIN, BETTEY REISS, ANDREA KRAMER DESCENDANT'S TRUST, SIDNEY NISBET, and CHAIM SCHWEID, as all partners of 5400 CO., ABSAR REALTY COMPANY, and ABSAR GERARD ASSOCIATES, general partnerships as reconstituted,

Plaintiffs,

-against-

Index No.  
654831/16

RICHARD WEISSMAN and JOAN LEVINE,

Defendants,

-----X  
**Hon. C. E. Ramos, J.S.C.:**

In motion sequence 001, the plaintiffs Edith Wiener, Laura Spahn, Laura Spahn Revocable Trust, Nancy Lenvin, Jessica Robles, Burt Stein, Betty Reiss, Andrea Kramer Descendants' Trust, Sidney Nisbet, and Chaim Schweid (collectively the Partners), as partners of 5400 Co., Absar Realty Company, and Absar Gerard Associates (collectively the Partnerships), move pursuant to CPLR 3212 for a grant of partial summary judgment against defendants Richard Weisman and Joan Levine (collectively, the Weisman Trust)<sup>1</sup> on their first and second causes of action seeking declaratory judgment and for an order compelling the Weisman Trust to cooperate with the refinancing of the property located

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<sup>1</sup>This action was commenced against Richard Weisman and Joan Levine in their capacities as trustees of the Louis Weisman Trust, a partner of the Partnerships (the Weisman Trust).

at 3900 Greystone Avenue, Bronx, NY (the Greystone Property).

The Weisman Trust cross-moves pursuant to Rule 1.7 and 3.7 of the New York Rules of Professional Conduct (the NYRPC) to disqualify Anderson & Ochs LLP (A&O), Schechtman Halperin Savage LLP (SHS), and Lynn E. Judell as counsel to the Partners.

#### Background

This action arises out of an attempt by the Weisman Trust to unilaterally withdraw from the Partnerships, trigger a mandatory dissolution of Partnerships, and force a sale of the Partnership assets.

In 2014, the Partners Lenvin, Robles, Stein, and Reiss (collectively, the West Coast Partners) commenced a special proceeding seeking to sell the Partnership assets and effectively dissolve the Partnerships (*Lenvin v Wiener* Index #159885/14).

On August 19, 2015, this Court denied the petition and ruled that the sale of the Partnership assets and a dissolution of the Partnerships requires the consent of all the Partners (tr 8/19/15 19:25-26).

As alleged in the complaint, the parties were all at one time partners in the Partnerships, which owns and operates residential and commercial properties in New York City.

The Partners allege that the Weisman Trust negotiated a sale of Partnership assets unbeknownst to the other Partners, in an attempt to obtain a premium for its minority Partnership

interests.

On October 15, 2015, the Weisman Trust sent a notice to the Partners asserting that the Partnerships were terminable at-will, and purporting to effectuate the Weisman Trust's withdrawal from the Partnerships and thus, triggering a dissolution of the Partnership (the October Notice) (Judell Aff., Ex. F).

Prior to the transmittal of the October Notice, the Weisman Trust held a 4%, 10%, and 10% partnership interest in 5400 Co., Absar Realty Company, and Absar Gerard Associates, respectively.

Subsequently, the Partners elected to continue the Partnerships and liquidate the Weisman Trusts' minority interests and effectuate its withdrawal from the Partnerships (Complaint, ¶ 48).

The Partners' instant motion seeks a declaration that the October Notice constituted a wrongful dissolution pursuant to the NY Partnership Law (the NYPL) and that the Weisman Trust is liable to the Partners for damages in accordance with NYPL § 69(2)(a)(II), and a declaration that the Weisman Trust is only entitled to the liquidated value of its interests in the Partnerships, taking into account its minority stakes, and the illiquidity of its assets. In addition, the Partners seek to compel the Weisman Trust's consent and participation in the refinancing of the Greystone Property.

The Weisman Trust cross-moves to disqualify Judell as

counsel for the Partners pursuant to the advocate-witness rule, and to disqualify A&O and SHS as counsel for the Partners on the basis that an unwaivable conflict of interest exists.

#### **Discussion**

For the reasons set forth below, the Partners' motion for partial summary judgment and a mandatory preliminary injunction and the Weisman Trust's cross-motion for disqualification are both denied in their entirety.

On January 4, 2017, during oral argument on this motion, this Court ruled that the October Notice was a nullity that was ineffective to dissolve the Partnerships and does not subject the Weisman Trust to liability under NYPL § 69(2)(a)(II) (tr 1/4/17 at 29:6-30:15). However, the Weisman Trust could convert the October Notice into a notice of withdrawal, if so advised, and seek the value of its Partnership interests in an appraisal proceeding. A withdrawal by the Weisman Trust would relieve it of any obligation to consent or otherwise participate in the refinancing of the Greystone Property (tr 1/4/17 at 32:18-33:2).

In the event that the Weisman Trust elects to withdraw from the Partnerships, the parties are directed to attempt in good faith to agree upon a method of appraisal for valuating its interest.

The cross-motion to disqualify the Partners' counsel is based primarily the drafting of a the notice of withdrawal

(executed by Judell in September 2015), on behalf the West Coast Partners, purporting to unilaterally dissolve the Partnerships (the September Notice). The Weisman Trust premises its motion for disqualification on the theory that the mere drafting of the September Notice manifested an intent by the West Coast Partners to dissolve the Partnerships thereby subjecting the West Coast Partners to liability under the NYPL § 69(2)(a)(II) to the other Partners. Thus A&O and SHS, as counsel to the Partners are in the position of representing Partners with adverse interests.

In addition, the Weisman Trust contends that Judell should be disqualified as counsel because it would be improper for her to remain as counsel when she potentially will be a witness as the drafter of the September Notice.

In response, Judell submits an affirmation stating that she was never authorized to send the September Notice and that it was never sent (Judell Aff., ¶¶ 12-15). It is unclear from the evidentiary record as to who did send the September Notice, only that the September Notice was received by counsel for the Weisman Trust.

The courts are highly critical of any restriction on a party's right to the counsel of their choice (*Ullmann Schneider v Lacher & Lovell Taylor PC*, 110 AD3d 469, 469-70, [1st 2013]). Furthermore, the Weisman Trust "must meet a heavy burden..." given the potential for a heightened strategic advantage of

invoking the NYRPC during a litigation as opposed to a disciplinary proceeding (*id.*).

This Court has already ruled at oral argument that the September Notice, similar to the October Notice, was ineffective (tr 1/4/17 at 29:3-5 ["in order for such notice to be effective, it has to be consented to by everyone"]). As a result, no basis for disqualification exists and the Weisman Trust's cross-motion to disqualify must be denied.

Accordingly it is,

ORDERED that the plaintiffs' motion for partial summary judgment and mandatory preliminary injunction is denied in its entirety, and it is further

ORDERED that the defendants' cross-motion for disqualification is denied in its entirety, and it is further

ORDERED that the parties appear for a telephonic status conference on June 20, 2017 at 4:00 pm to report on the selected method of appraisal, and it is further

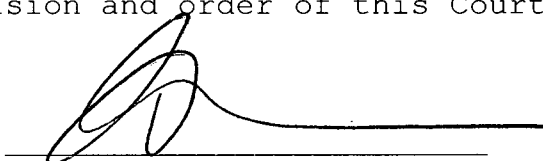
ORDERED and DECLARED that the plaintiffs' are not entitled to a declaration that the defendants' purported dissolution was wrongful under the NY Partnership Law or that the defendants are liable for damages under the NY Partnership Law associated with the unlawful withdrawal, and it is further

ORDERED and DECLARED that the plaintiffs' are not entitled to a declaration that the defendants are only entitled to the

liquidated value of their interests, taking in to account their minority stakes, and the lack of transferability/liquidity of their assets.

This constitutes the decision and order of this Court.

Dated: May 18, 2017

A handwritten signature in black ink, consisting of a stylized, cursive 'C' followed by a horizontal line extending to the right.

J.S.C.

**CHARLES E. RAMOS**