

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

PROFESSIONALS REAL ESTATE,
PARTNERSHIP,¹

Plaintiff,

vs.

HEISTER H. LINN, JR.,
Defendant.

: NO. 14-1392

:

:

:

: CIVIL ACTION

:

: *Petition for Charging Order,*

: *Foreclosure, & Judicial Sale*

MEMORANDUM OPINION

Before the Court is Plaintiff Professionals Real Estate Partnership's ("PREP") *Petition for Charging Order, Foreclosure, and Judicial Sale* (the "Petition"). As Defendant Heister H. Linn, Jr., D.D.S. ("Dr. Linn") consented to the entry of a Charging Order, the only remaining issues before the Court are whether foreclosure and ordered sale on judgment debtor Dr. Linn's partnership interest in PREP pursuant to 15 Pa.C.S.A. § 8454 are appropriate. For the reasons that follow, this Court finds in the affirmative.

I. PROCEDURAL HISTORY

On October 11, 2018, William P. Carlucci, Esq. ("Mr. Carlucci") presided as an arbiter over the underlying civil dispute between PREP and Dr. Linn pursuant to PREP's partnership agreement.² Mr. Carlucci found in PREP's favor and awarded a total amount of \$111,728.53.³ Dr. Linn did not appeal the arbitration award within thirty (30)

¹ The parties' filings diverge as to whether "Professional" is plural. The Court has decided to follow the arbiter's award caption.

² Plaintiff's Petition to Confirm Arbitration Award, Exhibit A, 2 (Nov. 14, 2018) [hereinafter "Award"].

³ *Id.* at 13. Count one of PREP's Complaint concerned pro rata monthly partnership payments from July 2012 to October 2018; count two concerned monthly rent for Dr. Linn's apportioned use of the Property; and count three concerned a pro rata share of the cost for mold remediation by PREP. Award at 1-2. Part of the arbitration award also involved interest and reimbursement for arbitrator fees since Dr. Linn refused to pay his share of the fee and PREP was required to advance the monies on his behalf. *Id.* at 13.

days.⁴ On November 16, 2018, this Court confirmed the arbitration award entered by Mr. Carlucci.⁵

On February 14, 2019, PREP filed the instant Petition, which sought the Court's issuance of a charging order against Dr. Linn's transferable interest in PREP, as well as foreclosure and ordered sale of said interest.⁶ The evidentiary hearing was scheduled for March 22, 2019. On March 5, 2019, Dr. Linn filed his *Response to Petition for Charging Order, Foreclosure of Lien and Judicial Sale*.⁷ On March 7, 2019, PREP filed a *Brief of Plaintiff in Support of its Petition for Charging Order, Foreclosure of Lien and Judicial Sale*.⁸ On March 19, 2019, the parties stipulated to the entry of a charging order in favor of PREP and against the transferable interest of Dr. Linn for the unsatisfied amount of the confirmed arbitration award on November 16, 2018.⁹ The evidentiary hearing was rescheduled to May 13, 2019. On April 1, 2019, this Court confirmed the stipulation and entered a charging order pursuant to § 8454.¹⁰

On April 17, 2019, Dr. Linn filed an expedited *Motion to Compel*, arguing that PREP's delivery of a compact disc containing PREP's Quicken file records was non-responsive to his request for production of documents.¹¹ At argument on May 6, 2019, PREP argued that Dr. Linn's request was irrelevant to the instant matter because PREP

⁴ 42 Pa.C.S.A. § 7320(b) (1980), § 7342 (1982); accord *Housekeeper v. Frederick*, 456 A.2d 222, 222 (Pa. Super. Ct. 1983).

⁵ *Professionals Real Estate Partnership v. Heister H. Linn, Jr.*, No. 14-1392, Order: Confirming Arbitration Award (Nov. 16, 2018).

⁶ Plaintiff's Petition for Charging Order, Foreclosure of Lien and Judicial Sale, ¶14 (Feb. 14, 2019).

⁷ Defendant's Response to Petition for Charging Order, Foreclosure of Lien and Judicial Sale (Mar. 5, 2019).

⁸ Plaintiff's Brief of Plaintiff in Support of its Petition for Charging Order, Foreclosure of Lien and Judicial Sale (Mar. 7, 2019).

⁹ Stipulation of Counsel (Mar. 19, 2019).

¹⁰ *Professionals Real Estate Partnership v. Heister H. Linn, Jr.*, No. 14-1392, Order: Stipulation of Counsel (Apr. 1, 2019).

was never structured in such a way for the partners to receive distributions. PREP asserted that Dr. Linn was simply attempting to re-litigate the underlying matter by collaterally attempting to show that PREP's records were mismanaged and; thus, each partner should have been receiving distributions since PREP's inception. In an abundance of caution—not desiring to strip Dr. Linn of a legal property right—the Court ordered that PREP provide the last three years of corporate book records in one of the following ways:

- 1) Purchase the Quicken software for Defense counsel to utilize in opening and reading the Quicken file, or
- 2) Obtain a converted version of the Quicken file that is accessible and readable (ex. .pdf), and electronically mail Defense counsel the converted file, or
- 3) Print a hardcopy of the Quicken file and provide Defense counsel with a readable version.¹²

The Court also rescheduled the evidentiary hearing to June 12, 2019. On June 4, 2019, Dr. Linn filed an expedited *Motion for Judicial Intervention* claiming that even after PREP aided him in accessing the corporate book records, he was unable to interpret them.¹³ Thus, he requested the right to depose the preparer of the records, A. David Parks, D.M.D. (“Dr. Parks”), a Florida resident.¹⁴ After argument was heard on June 6, 2019, the Court, over PREP's continued objection of relevancy, granted Dr. Linn's request and continued the evidentiary hearing to August 1, 2019.

¹¹ Defendant's Motion to Compel (Apr. 17, 2019).

¹² *Professionals Real Estate Partnership v. Heister H. Linn, Jr.*, No. 14-1392, Order: Motion to Compel (May 7, 2019).

¹³ Defendant's Motion for Judicial Intervention 2 (June 4, 2019).

II. FINDINGS OF FACT¹⁵

At the evidentiary hearing on August 1, 2019, the Court heard from Dr. Parks, who testified by video, Dr. Linn, and Steven Poorman (“Mr. Poorman”), who was qualified at trial as an expert in real estate and land development. The Court finds the following:

A. Formation

- 1) In 1982, PREP was formed by Dr. Linn, an orthodontist, Dr. Parks, a periodontist, and Michael S. Bumagin, M.D. (“Dr. Bumagin”), a plastic surgeon.¹⁶
- 2) Dr. Linn, Dr. Parks, and Dr. Bumagin created PREP in order to purchase a building that could accommodate three offices.¹⁷
- 3) PREP purchased 427 Market Street and the adjacent building, which shared a common wall with 427 Market Street, 425 Market Street; ultimately, both properties were designated as 425 Market Street (the “Property”).¹⁸
- 4) Dr. Linn, Dr. Parks, and Dr. Bumagin were originally equal partners, each owning a 33 1/3% share.¹⁹
- 5) Dr. Linn, as “lead partner,” had first choice of the location for his office at the Property, and decided on the third floor.²⁰

¹⁴ *Id.*

¹⁵ While the matter before the Court is limited to whether “distributions” would be forthcoming within a “reasonable time,” the following findings are necessary to provide a context underlying the ability of PREP to make said distributions.

¹⁶ Unofficial Draft Transcript at 3 (Aug. 1, 2019) [hereinafter “Tr.”]; Plaintiff’s Exhibit 2, at 26-38.

¹⁷ Tr. at 3-4, 25.

¹⁸ Tr. at 3-4.

¹⁹ Tr. at 4.

²⁰ *Id.*

- 6) Dr. Parks claimed the second floor and Dr. Bumagin chose the first floor.²¹
- 7) The partners were allowed carte blanche to renovate their respective floors.²²
- 8) The debts of PREP were divided equally.²³
- 9) The cost of each partner's renovations was not a debt of PREP, but the individual partner.²⁴
- 10) In 1983, Stuart M. Olinsky, M.D. ("Dr. Olinsky"), a medical doctor, became a 6% partner in PREP, as he desired his percentage to be limited to his office space usage.²⁵
- 11) As PREP expanded into 427 Market Street in 1983, the partners' debts were based on the percentage of their accumulated office space.²⁶
- 12) Based on this calculation, Dr. Olinsky became an 8.25% partner, Dr. Linn and Dr. Bumagin became 27.41% partners, and Dr. Parks became a 36.93% partner.²⁷
- 13) Dr. Linn, Dr. Parks, Dr. Bumagin, and Dr. Olinsky are the current, and only, partners of PREP.²⁸

B. Management

- 14) Dr. Parks has solely managed PREP's books for more than thirty (30) years.²⁹

²¹ *Id.*

²² Tr. at 4-5.

²³ Tr. at 5.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Plaintiff's Ex. 2, at 39-41.

²⁸ Tr. at 6.

²⁹ Tr. at 7.

15) Dr. Linn, Dr. Bumagin, and Dr. Olinsky were apprised of the financial life of PREP as a result of Dr. Park's (nearly) annual reports, and the tax forms prepared by the accountant firm Gearhart & Associates, P.C. on behalf of PREP and the individual partners related to their Schedule K-1 tax forms.³⁰

16) Neither Dr. Linn nor any other partner expressly objected to Dr. Parks managing PREP's books until Dr. Linn's recent 2019 objections.³¹

C. Rent

17) Dr. Parks, Dr. Bumagin, and Dr. Olinsky are current on their rent.³²

18) Dr. Linn stopped paying rent for his office space beginning in July 2012, despite possessing two office spaces at the Property, and vacated the Property in 2014.³³

19) Since July 2012, Dr. Parks, Dr. Bumagin, and Dr. Olinsky have covered the deficit resulting from Dr. Linn's refusal to pay.³⁴

20) As of July 2019, Dr. Linn owes PREP \$125,895.46.³⁵

21) Additionally, in September 2016, both Dr. Parks and Dr. Bumagin personally loaned PREP \$8,000 to cover rent and the following expenses: \$694.30 for

³⁰ Tr. at 8, 17-19, 21-22, 48; Plaintiff's Ex. 1, at 1-55 (IRS's 2013-2018: Form 8879-PE IRS e-file Signature Authorization for Form 1065, Form 1065 U.S. Return of Partnership Income, Form 8825 Rental Real Estate Income and Expenses of a Partnership or an S Corporation, Form 4562 Depreciation and Amortization, Form 1065 Rent and Royalty Schedule, and Form 8688 Federal Statements), 55-57.

³¹ Tr. at 8; Plaintiff's Ex. 2, at 44-49.

³² Tr. at 10.

³³ Tr. at 10, 45; Plaintiff's Ex. 1, at 55-57. It is unclear whether Dr. Linn was incorporated as Linn Orthodontics, P.C. when these lease agreements were signed. Dr. Linn testified that Linn Orthodontics, P.C., not himself, entered into these agreements, but did not know if the lease agreements reflected this fact. Tr. at 47. Dr. Linn testified that he stopped paying rent because he requested that Dr. Parks "justify the rent," which Dr. Linn asserted Dr. Parks did not do. Tr. at 46. The Court does not find this rationale credible as Dr. Linn's letters confirming his dissatisfaction did not begin until 2019. It strains credulity that Dr. Linn waited seven (7) years before expressing his disagreement in writing.

³⁴ Tr. at 12-13.

ServPro cleaning services, \$7,393.90 to replace the air conditioner unit in the second floor's staff lounge, and \$4,950.00 to replace windows in a tenant's office space.³⁶

22) Since PREP purchased the Property in 1982, each partner understood that he was allowed to sublet his office space and retain the sublessee's rental payments as long as said partner continued to fulfill his rental obligations to PREP.³⁷

23) Throughout PREP's lifetime, all four partners have sublet their office space.³⁸

24) As of 2017, Dr. Parks is paying \$1,175.00 per month, Dr. Bumagin is paying \$900.00 per month, and Dr. Olinsky is paying \$390.00 per month.³⁹

D. Distributions

25) Historically, PREP has not made distributions to its partners.⁴⁰

26) Concomitantly, for the last thirty-five (35) years, PREP has not made distributions to its partners.⁴¹

27) Therefore, based on the current income of PREP, Dr. Linn's judgment debt would never be paid.⁴²

E. Sale of the Property

28) Several years ago, as retirement loomed, all four partners discussed

³⁵ Tr. at 20; Plaintiff's Ex. 1, at 58-61. This debt includes the arbitration award.

³⁶ Tr. at 14-15, 21-22; Plaintiff's Ex. 1, at 62-81. Dr. Parks requested that each partner contribute since a comparable loan would incur additional costs and expenses. Plaintiff's Ex. 1, at 62-81.

³⁷ Tr. at 10-11. In fact, Dr. Linn testified that he sublet his office space to a "Dr. Holden" who paid Dr. Linn directly, not PREP. Tr. at 47-48.

³⁸ Tr. at 12.

³⁹ Tr. at 44.

⁴⁰ Tr. at 16.

⁴¹ Tr. at 16, 48.

⁴² Tr. at 23.

selling the Property.⁴³

29) On April 13, 2016, Dr. Linn, on behalf of PREP, contracted with John Brindger (“Mr. Brindger”) of ReMax Real Estate Agency to list the Property for \$725,000.⁴⁴ The Property was eventually removed from the market for lack of buyer interest.⁴⁵

30) On July 21, 2016, the partners consented to Mr. Brindger relisting the Property for \$950,000.⁴⁶ The Property was again removed from the market for lack of interest.⁴⁷

31) Recently, Mr. Brindger approached PREP with a potential buyer for the Property offering \$550,000.⁴⁸

32) The partners considered the offer too low.⁴⁹

33) After Mr. Brindger’s negotiation with the potential buyer, the potential buyer provided a counteroffer of \$600,000.⁵⁰

34) Dr. Parks, Dr. Bugamin, and Dr. Olinsky, although not enthused with the counter offer, agreed that selling the Property would be in their best interests.⁵¹

35) Dr. Linn refused to sell the Property for \$600,000.⁵²

36) On February 1, 2019, Dr. Linn sent Mr. Brindger a letter (“February

⁴³ Tr. at 16, 26.

⁴⁴ Tr. at 60-61; Plaintiff’s Ex. 2, at 52-55.

⁴⁵ Tr. at 25-26.

⁴⁶ Tr. at 61; Plaintiff’s Ex. 2, at 56-59.

⁴⁷ Tr. at 25-26.

⁴⁸ Tr. at 26.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* Dr. Linn testified that he would not agree to a sale until he received documentation evidencing the value of the Property. Tr. at 55, 62.

Letter”) indicating that Dr. Linn would purchase the other partners’ shares, or the Property, if Dr. Linn’s conditions were met.⁵³

37) In the February Letter, Dr. Linn stated that he would purchase the Property and 100% of the partnership interest for \$601,000.00 if the parties would agree to his proposed “Agreement of Sale.”⁵⁴

38) Dr. Linn enclosed the proposed agreement that—among other things—not only required Dr. Parks, Dr. Bumagin, and Dr. Olinsky to agree to extinguish all claims against Dr. Linn and Linn Orthodontics, P.C, but also subtracted Dr. Linn’s PREP share percentage from his proposed purchase price.⁵⁵

39) Dr. Linn concluded in his February Letter by threatening legal action, stating “While I recognize this approach to the resolution of this dispute could cost tens of thousands of dollars, I refuse to accept some of the claims being made by PREP and I’m prepared to endure that financial investment [. . .] Keep in mind, it is one thing to get an arbitrator’s award, and another to collect the money.”⁵⁶

40) On March 27, 2019, Dr. Linn held an impromptu “partnership meeting” without the other partners present.⁵⁷

41) During this March 27th meeting, Dr. Linn took issue with the structure of PREP and Dr. Parks’ management of PREP’s records.⁵⁸

42) Also during this March 27th meeting, Dr. Linn stated that he would obstruct

⁵³ Tr. at 50; Plaintiff’s Ex. 2, at 1-3.

⁵⁴ Tr. at 50-51; Plaintiff’s Ex. 2, at 2.

⁵⁵ Plaintiff’s Ex. 2, at 2, 13. Also among these conditions, Dr. Linn demanded the Lease Agreement with Geisinger Health Systems. *Id.* at 13.

⁵⁶ *Id.*

⁵⁷ *Id.* at 44-46. Sarah McCracken, who recorded the minutes, Dr. Linn’s attorney, Scott T. Williams, Esq., and Mr. Poorman were also present. *Id.* at 44.

the sale of the Property by filing an injunction.⁵⁹

43) On July 2, 2019, Dr. Linn wrote Dr. Parks informing Dr. Parks that he sent a letter to Mr. Brindger objecting to the sale of the Property and notifying Dr. Parks that Dr. Linn was withdrawing his money from PREP's bank account ("July Letter").⁶⁰ Dr. Linn also refused to authorize PREP's payment of their attorney, Mr. Austin White, Esq., related to settlement discussions.⁶¹

44) In his July Letter, Dr. Linn reiterated that he refused to allow the Property to be sold or rented.⁶²

45) On July 5, 2019, Dr. Linn filed a complaint against Dr. Parks, Dr. Bumagin, and Dr. Olinsky, claiming breaches of contract and fiduciary duties.⁶³

III. ANALYSIS

Pursuant to Pennsylvania law:

(a) General rule.—On application by a judgment creditor of a partner or transferee, a court may enter a charging order against the transferable interest of the judgment debtor for the unsatisfied amount of the judgment. A charging order constitutes a lien on a judgment debtor's transferable interest and requires the partnership to pay over to the person to which the charging order was issued any distribution that otherwise would be paid to the judgment debtor.

[. . .]

(c) Foreclosure.—*Upon a showing that distributions under a*

⁵⁸ *Id.* at 44-45.

⁵⁹ *Id.* at 45. The meeting minutes indicated that the other partners had ten (10) days to object to the minutes or they would be deemed approved; despite no evidence of post-meeting notice being attempted. *Id.* at 46.

⁶⁰ *Id.* at 47-51.

⁶¹ *Id.* at 47.

⁶² *Id.*

⁶³ Plaintiff's Ex. 2, at 15-43; see also Heister H. Linn, Jr., DDS, individually and on behalf of Professional Real Estate Partnership v. Bumagin, MD, Parks, DMD, & Olinsky, MD, No. 19-1085, Complaint (July 5, 2019). Dr. Linn stipulated to this fact at the evidentiary hearing. Tr. at 52.

charging order will not pay the judgment debt within a reasonable time, the court may foreclose the lien and order the sale of the transferable interest. The purchaser at the foreclosure sale obtains only the transferable interest, does not thereby become a partner and is subject to section 8453 (relating to transfer of transferable interest).⁶⁴

As evident from the procedural history, this Court has graciously indulged Dr. Linn in his requested discovery in order than he would be better situated to argue that foreclosure is unnecessary since “distributions” would cure his debt “within a reasonable time.” The Court permitted Dr. Linn considerable latitude because his arguments were ones of first impression. That is, the definition of “distributions” under § 8454(c) could be met based on either a showing that: (a) PREP should have possessed monetary contributions if the partnership had been appropriately managed, or (b) PREP’s only asset, the Property, was primed to sell within a “reasonable time.” Dr. Linn has wholly failed to show either one.

First, the testimony presented at the evidentiary hearing was insufficient to establish the specifics of how PREP should have been more appropriately managed. While Mr. Poorman expressed his opinion that Dr. Parks did not possess the proper expertise to manage a partnership,⁶⁵ sufficient evidence was not presented as to whether PREP should have been distributing surplus monies. Dr. Linn is essentially asking this Court to engage in pure speculation. The Court declines such a bold invitation.

Second, no testimony was presented as to a “reasonable” timeframe for sale of

⁶⁴ 15 P.A.C.S. § 8454(a), (c) (emphasis added); see, e.g., *Macharg v. Macharg*, 151 A.3d 187, 194 (Pa. Super. Ct. 2016) (discussing a regular § 8454 scenario where the entity’s distributions will not cure the lien).

⁶⁵ Tr. at 80-82.

the Property. Even Mr. Williams Esq.'s proposed sale of the Property to Dr. Linn at the evidentiary hearing was not satisfactory to Dr. Linn as Dr. Linn testified that further discussions would be necessary.⁶⁶ Moreover, Dr. Linn's insistence that he intends to purchase the Property in a "reasonable time" is dubious.⁶⁷ Although Dr. Linn testified that he has acquired capital and investment partners,⁶⁸ it is apparent from his conduct and testimony that he will not negotiate in good faith with the other partners. In his view, as he stated in his February Letter, PREP can either sell and relinquish their claims against him or he will continue to be dilatory. On the other hand, PREP is merely attempting to remain solvent and sell the Property for a fair value as determined by market demand.

This Court believes that Dr. Linn will continue to prolong the sale of the Property until he is satisfied that the terms of the sale are in his best interests. This not only fails to satisfy the "reasonable time" standard, but it provides a window into Dr. Linn's obstructionist motivations. For example, despite Dr. Linn's adamance that he will not sell the Property for \$600,000 because Dr. Parks and PREP never provided supportive documentation for such a valuation and he believes the Property is worth more, he only offered \$601,000 to purchase the Property.⁶⁹ Indeed, Dr. Linn's own expert witness testified that while he is unable to determine a "market purchase price" for the property, he believed that the \$600,000 purchase price is "likely unfair."⁷⁰ It is clear that Dr. Linn's obstinacy is an attempt to circumvent the other partners and ultimately pressure them

⁶⁶ Tr. at 29-41, 64-66.

⁶⁷ Tr. at 66-67.

⁶⁸ Tr. at 67-70. Mr. Poorman also testified to Dr. Linn's efforts. Tr. at 78-80.

⁶⁹ Tr. at 55, 59, 62-64.

into selling him the Property under vindictive and unreasonable terms.

The Court has afforded Dr. Linn ample opportunity to develop a coherent defense regarding why the Court should not order foreclosure on his partnership interest. Dr. Linn has squandered that opportunity, and the Court will no longer hold PREP hostage.

CONCLUSION

Based on the above reasoning, and pursuant to the Pennsylvania Uniform Partnership Act, the Court orders that the lien on Dr. Linn's partnership interest be foreclosed upon and the transferable interest sold.

IT IS SO ORDERED this 26th day of August 2019.

BY THE COURT,

Eric R. Linhardt, Judge

cc:

Austin White, Esq.
McCormick Law Firm
Scott T. Williams, Esq.
Perciballi & Williams, LLC
Gary Weber, Esq. (Lycoming Reporter)

⁷⁰ Tr. at 76-77.