14 Misc.3d 1226(A), 836 N.Y.S.2d 493, 2007 WL 315348 (N.Y.Sup.), 2007 N.Y. Slip Op. 50182(U)
Unreported Disposition
(Cite as: 14 Misc.3d 1226(A), 2007 WL 315348 (N.Y.Sup.))

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(The decision of the Court is referenced in a table in the New York Supplement.)

Supreme Court, Nassau County, New York.
Sheilah MARGOLIN, Individually and as Executrix of the Estate of Martin J. Margolin, Deceased, Plaintiff,
v.
MARGOLIN LOWENSTEIN & COMPANY, LLP, Lawrence G. Ceasar and Alvin Smilow, Defendants.
No. 18375/03.

Jan. 31, 2007.

Ackerman, Levine, Cullen, Brickman & Limmer, LLP, by John M. Brickman, Esq., James M. Meaney, Esq., Great Neck, for Plaintiff.

Weinstein, **Kaplan** & Cohen, P.C., by Robert N. Cohen, Esq., Danielle D. DeVoe, Esq., Garden City, for Defendants.

LEONARD B. AUSTIN, J.

INTRODUCTION

***1** On this trial, which took place on August 28 and September 5 and 6, 2006, testimony was presented with regard to Plaintiff's complaint seeking a valuation and payment of the partnership interest of Plaintiff's decedent in the Defendant Margolin Lowenstein & Company accounting firm and Defendants' counterclaims seeking a declaratory judgment as to the status of the capital account [FN1] of Plaintiff's decedent and the percentage of the respective partnership shares at the time of the death of Plaintiff's decedent.[FN2]

FN1. By Stipulation of Facts (Court exhibit 1, ¶ 2), the parties stipulated that as of December 31, 2001, the capital account of Martin J. Margolin was (negative $184,034).

FN2. While denominated as counterclaims which, in the first instance, places the burden of proof on Defendants, the claims made by Defendants are effectively part of the proof necessarily established by Plaintiff in her affirmative case. See gen'lly, *Armstrong v. Forgione*, 237 NYLJ 5, p. 24, col. 3 (Sup.Ct. Nassau Co. 1/8/07).

FINDINGS OF FACT

On December 29, 1989, Martin J. Margolin, Plaintiff's decedent ("Margolin"), and Defendant Lawrence G. Ceasar ("Ceasar") entered into a partnership agreement outlining the terms of their relationship ("1989 Agreement") (Dx A) [FN3].

FN3. Plaintiff's exhibits are cited herein as (Px ---). Defendants' exhibits are cited herein as (Dx ---).

Prior to that time, Margolin had been the sole proprietor of the accounting practice known as Margolin Lowenstein & Company ("the Firm" or "ML & Co."). Ceasar had been a staff accountant for the firm starting in 1969. He became a partner in January 1978.

Under the terms of 1989 Agreement, Margolin held a two-thirds (2/3) interest while Ceasar held a one-third (1/3) interest in ML & Co. The 1989 Agreement set forth the rights and interests of the partners upon the passing of one of them so that the partnership could continue without being financially burdened by the death of the partner.

In January, 1991, Defendant Alvin Smilow ("Smilow") became a partner in the firm. With his admission to the partnership, the respective interests of the parties was established as Margolin 60%, Ceasar 30% and Smilow 10%. Although a new agreement with regard to the relationship of the partners was drafted in 1998, it was never executed. However, Smilow orally agreed to be

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bound by the terms of the 1989 Agreement. Consistent with that understanding the three partners conducted themselves in accordance therewith. Indeed, life insurance policies were purchased to enable the buy-out of Smilow's interest in the Firm upon his death.

In January 1997, Margolin gave an additional 5% interest to Smilow. This change in partner equity in the Firm was reflected by distribution checks issued to each partner in the proportion of Margolin 55%, Ceasar 30% and Smilow 15% (Dx B).

Defendants claim that, in 2001, an additional 5% interest was ceded to Smilow from Margolin's share so that the respective partnership interests were Margolin 50%, Ceasar 30% and Smilow 20%. They assert that this is demonstrated by the quarterly draws the partners took thereafter (Dx C, C-1). Although Plaintiff suggests that these proportions had another explanation, none was adduced during the trial.

Although it has no substantial affect on the outcome of this matter, the Court finds that, at the time of his death, Margolin's interest in ML & Co. was 50%.

Margolin passed away on April 7, 2002. Upon his death, his Estate received the proceeds of a $750,000 Prudential Life Insurance policy owned by the Firm in accordance with the 1989 Agreement. The Estate received the full life insurance proceeds and noted same on its tax return. In addition, certain moneys were due in the amount represented by 25% of Margolin's salary and profit as was distributed in the fiscal year prior to his death (¶ 1.4). Payment of that sum is not disputed.

***2** Pursuant to ¶ 1.2 of the 1989 Agreement, the estate of a deceased partner was entitled to receive:

The balance of the deceased partner's capital account (as reflected on the balance sheet of the firm for the last day of the month preceding the date of death)

PLUS

The value of the deceased partner's interest in the Firm's outstanding receivables and goodwill (based upon fees billed and collectible) FN4

FN4. Paragraph 1.2(b) defines “fees earned” as the averages of the annual amount billed tax clients at that billing rate and the amount billed all other clients at the rate of one and a half (1 1/2) times such billings for the three years prior to the partner's death less uncollectible billings. Such uncollectibles were to be calculated based on the same formula.

MINUS

The aggregate net proceeds, received by the deceased partner's beneficiary, of any life insurance policies on his life owned by the Firm.

If the amount due to the estate, under this formula, was more than the life insurance proceeds, the remaining balance was to be paid in six equal quarterly installments together with interest calculated pursuant to the Citibank prime rate. (¶ 1.3) However, if the amount due to the estate was less than the life insurance proceeds, the estate was entitled to keep the proceeds and had no further claim (¶ 1.3[c]).

While the insurance policy utilized to pay the Estate was not listed Schedule B of the 1989 Agreement, the substitution of policies was permitted under ¶ 1.3(c).

In applying the formula established in the 1989 Agreement, Margolin's capital account, at the time of his death was (negative $184,028) (see fn.1). This is consistent with the partnership tax return prepared by Margolin for 2001 (Dx G). Margolin's negative capital account was (negative $150,440) in 1999 (Dx E) and (negative $180,194) in 2000 (Dx F).

The primary issue between the parties is the calculation of the amount due, if any, to Plaintiff in conformity with the 1989 Agreement. At various points after Margolin's passing, a number of calculations were made by

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Ceasar and Defendants' expert, Gary M. Karlitz, C.P.A. Each calculation, using the same base numbers, yielded a different valuation of Plaintiff's distribution. Plaintiff's claim is that, as a result of these varied calculations, some of which showing that there are moneys due over and above the proceeds of the life insurance policy, there should be a distribution to the Estate under ¶ 1.2. Her position is reasonable, under the circumstances.

At the request of counsel for the Estate, Ceasar prepared a reconciliation which showed that the Estate was entitled to an additional $5,061 (Px 1). That was based upon the assumption of Margolin having a 50% share at the time of his death.

More than a year later, Ceasar prepared a second analysis (Dx I) which showed, after accounting for the life insurance proceeds, the Estate's claim totaled (negative $149,211). This analysis was prepared after the Firm consulted with an outside accounting firm.

Although it was rejected, counsel for Defendants wrote to Plaintiff on December 19, 2002 proffering a check in the sum of $3,789 (Dx N). No analysis for such amount was included even though acceptance of the check, by the terms of the letter, constituted a full and complete settlement of the matter.

***3** Plaintiff also introduced a third Ceasar analysis of the moneys due to the Estate which was prepared in or about October 2003 showing that the sum of $42,005 was due to the Estate (Px 4).

The essential flaw in the Ceasar analysis which twice showed a positive balance to the Estate is that he construed the formula for the valuation of Margolin's interest in the Firm to be on an accrual basis.[FN5] At trial, Mr. Karlin and Ceasar agreed that such an approach was erroneous since the Firm's records were kept and maintained and, thereby partnership tax returns were prepared, on a cash basis. Certainly, the capital account was prepared on a cash basis during the term of the partnership. Likewise, the payment due to the Estate pursuant to ¶ 1.4 plainly employs a cash basis approach.

FN5. Smilow did not testify. Thus, it is assumed that he agreed with Ceasar's initial interpretation of the 1989 Agreement that the valuation of a partner's share of the practice was to be done on an accrual basis.

Plaintiff urges that, with the various Ceasar analyses presented, it is difficult, if not impossible, to trust any of them. While that point is well taken, Plaintiff's position is equally untenable. That is, Plaintiff argues that the life insurance should not be a credit to the Firm's buy-out obligation since the policy which generated the $750,000 payment to the Estate is not listed on Schedule B of the 1989 Agreement.

It is undisputed that after Margolin's death, the Firm advanced certain expenses for Plaintiff including partnership drawings after April 7, 2002 ($8,458); medical insurance premiums ($2,712); and the April car payment ($719). It is laudable that the Firm made those payments inasmuch as there was no obligation to do so under the 1989 Agreement. Defendants seek a credit for those payments as an advance only if this Court finds that Plaintiff is entitled to any moneys over and above the insurance proceeds.

CONCLUSIONS OF LAW

A. *Evidentiary Issue Dead Man's Statute*

During the course of the trial, Defendants attempted to introduce testimony and documents relating to the operation of ML & Co. Plaintiff consistently objected to such proffers as violative of the Dead Man's Statute (CPLR 4519). Over objection, those documents were received into evidence.

In essence, the Dead Man's Statute “provides that a party or person interested in the outcome of the litigation, or a predecessor in interest, is incompetent to testify to a personal transaction or communication with a deceased ... person when the testimony is offered against the representative or successors in interest of the deceased ... person.” Prince, Richardson on Evidence §

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6-121 (11th Ed. Farrell). On its face, the Dead Man's Statute should bar Defendants from testifying with regard to their business relationship and the issues presented on this trial.

While it is true that Defendants are interested parties (See, e.g. *Hobart v. Hobart,* 62 N.Y. 80 [1875]; and *Stay v. Howarth,* 177 A.D.2d 897 [3rd Dept.1991]), and their interest could ultimately increase the value of their interest in the Firm, the documentary evidence and testimony submitted was properly admitted into evidence. *Acevedo v. Audubon Mgt., Inc.,* 280 A.D.2d 91, 95 (1st Dept.2001). See also, *Kiser v. Bailey,* 92 Misc.2d 435 (Civ.Ct. N.Y. Co., 1977).

***4** Ceasar's testimony with regard to Margolin's transactions with the Firm are admissible (*William L. Mantha Co. Inc. v, Degroff,* 266 N.Y. 581 [1935]), as are the business records maintained by the Firm such as cancelled checks. See, *Acevedo v. Audubon Mgt., Inc., supra;* and *People v. Bentley,* 106 A.D.2d 825 (3rd Dept.1984) (business records admissible pursuant to CPLR 4518).

Here, the checks and tax returns of the Firm were duly authenticated. Thus, notwithstanding the Dead Man's Statute, they were admissible and considered herein.

B. *Contract Interpretation*

A partnership results from an express or implied contract. *Martin v. Peyton,* 246 N.Y. 213 (1927); See also, Partnership Law §§ 10, 11. The rights and obligations of the partners arise from, and are fixed by, their agreement. *Levy v. Leavitt,* 257 N.Y. 461 (1931).

A contract will be interpreted in accordance with the intent of the parties as expressed in the language of the agreement. *Greenfield v. Philles Records, Inc.,* 98 N.Y.2d 562 (2002); and *Katina, Inc. v. Famiglietti,* 306 A.D.2d 440 (2nd Dept.2003). The terms of an agreement are to be interpreted in accordance with their plain meaning. *Greenfield v. Philles Records, Inc., supra;* and *Tikotzky v. New York City Transit Auth.,* 286 A.D.2d 493 (2nd Dept.2001). The court is to give "... practical interpretation to the language employed and the parties' reasonable expectations." *Slamow v. Del Col,* 174 A.D.2d 725, 726 (2nd Dept.1991), *aff'd.,* 79 N.Y.2d 1016 (1992).

A clear and complete written agreement should be enforced in accordance with its terms. *South Road Assocs., LLC v. International Business Machines Corp.,* 4 NY3d 272 (2005); and *Greenfield v. Philles Records, Inc., supra;* and *W.W.W. Assocs. v. Giancontieri,* 77 N.Y.2d 157 (1990).

The question or whether an agreement is ambiguous is a question of law to be determined by the court. *Id.;* and *JJFN Holdings, Inc, v. Monarch Investment Properties, Inc.,* 289 A.D.2d 528 (2nd Dept.2001).

Ambiguity exists where the terms of the agreement are susceptible to two reasonable interpretations. See, *Uribe v. Merchants Bank of New York,* 92 N.Y.2d 336 (1998); and *Around the Clock Delicatessen, Inc. v. Larkin,* 232 A.D.2d 514 (2nd Dept.1996). Ambiguity does not exist simply because the parties urge different interpretations of its terms. *Bethlehem Steel Co. v. Turner Construction Co.,* 2 N.Y.2d 456 (1957); and *Elletson v. Bonded Insulation Co., Inc.,* 272 A.D.2d 825 (3rd Dept.2000).

Parol evidence will not be considered in interpreting a contract unless the contract is ambiguous. *South Road Assocs., LLC. v. International Business Machine Corp., supra;* and *767 Third Avenue, LLC v. Orix Capital Markets, LLC,* 26 AD3d 216 (1st Dept.2006).

1. *Applying Accrual or Cash Basis Analysis*

The 1989 Agreement is silent as to how the formula for valuing the practice under ¶ 1.2 is to be applied.

***5** In two of his attempts at establishing the value of the Firm so as to satisfy the requirements of the 1989 Agreement, Ceasar believed, and operated under the assumption, that an accrual basis approach was required. Such approach was not challenged or questioned until

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Defendants' expert, Gary Karlitz, C.P.A., reviewed the Agreement and challenged Cesar's analysis. At that point, a cash basis approach was applied.

Defendants argue that the cash basis approach is appropriate because, despite Ceasar's error, ML & Co. never operated its business in any way other than on a cash basis.

The absence of any accounting methodology being designated in 1989 Agreement was not explained by the sole witness for Plaintiff, Robert Cooperman, Esq., who drafted the subject agreement. This renders the agreement ambiguous. Thus, the Court must look to extrinsic evidence to determine the correct basis on which to apply the valuation formula. *Ackerberg v. Ackerberg,* 154 A.D.2d 414 (2nd Dept.1989).

While it is indeed curious that Ceasar, an accountant of long experience, would make such a glaring, fundamental error with regard to his own firm and then compound it with a second erroneous analysis, it is clear to this Court that it was simply that, an error which flies in the face of the Firm's customary accounting procedure as well as the 1989 Agreement itself which applies a cash basis approach to the 25% payment due under. ¶ 1.4.

There is nothing presented, other than Ceasar's plainly erroneous analysis which suggests the application of an accrual method. The undisputed testimony at trial demonstrates that the Firm's capital account (Dx E, F, G, H) and general internal firm business accounting was done on a cash basis. To apply a different approach would be counterintuitive and unjust.

2. *Life Insurance*

Plaintiff urges that the life insurance proceeds totaling $750,000 which she received are not referable to the 1989 Agreement. Thus, pursuant to the valuation formula under ¶ 1.2, Plaintiff claims that no credit for those moneys should be given.

Such an approach would result in a windfall which was clearly not contemplated under the 1989 Agreement. While ¶ 1.2(b) refers to life insurance set forth in Schedule B of the agreement, the parties also addressed the possibility of other life insurance being obtained to satisfy the financial obligation of the Firm and the surviving partners. In ¶ 1.2(c), the partners agreed, “If the Firm shall be designated a beneficiary of the policies listed on Exhibit B hereto *or of any other additional policies of insurance on the lives of the Partners obtained by the Firm* ... “ (Emphasis added).

There is no question but that the $750,000 realized by Plaintiff was from the life insurance maintained by the Firm pursuant to the 1989 Agreement. Thus, Defendants are entitled to a credit for that sum under the valuation formula.

3. *Partnership Percentages*

While it is clear and undisputed that Smilow's equity interest in the Firm increased from the original 10% in 1991 to 15% in 1997, the parties dispute whether Margolin ceded an additional 5% of his interest in 2001 to give Smilow a 20% stake in the Firm.

***6** Again, Plaintiff argues that it is improper for the Court to assume Smilow's having a 20% interest due to the Dead Man's Statute. However, the admissible documentary evidence, namely the Schedule K-1's prepared by Margolin (Dx E, F, G [FN6]) and then draw checks signed by the three partners (Dx B, C. C-1) reflect a consistent view that, in 2001, Smilow became a 20% equity owner in ML & Co.

> FN6. It would appear that Dx G was prepared after Margolin's passing. Nevertheless, it is consistent with Dx C, C-1.

Based upon the credible evidence presented, at the time of Margolin's passing, the Court concludes that the respective shares of ML & Co. were Margolin-50%; Ceasar-30% and Smilow-20%.

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C. *Plaintiff's Rights Under the 1989 Agreement*

Based upon the credible evidence, the Court finds that, in applying the formula under ¶ 1.2 (Dx X-1), the value of Plaintiff's share of ML & Co. is as follows:

Capital Account as of 3/31/02	($142,158.00)
Value of Margolin's interest in the Firm's outstanding receivables and good will	$798,590.25 [7]
Life insurance proceeds	($750,000.00)
Margolin's share at 50%	($ 93,567.75)

FN7. The fees earned from business clients for 1999 2001 totaled $2,814.271. After deducting uncollectible fees in the sum of $15,622. The net business client amount is $278,649. The average for the three years is $932,883. At the multiple of 1.5 times that amount the business client component is $1,399,324.50.

The fees earned from tax clients for 1999 2001 totaled $593,567. The average for the three years is $197,856.

The total fees earned under the agreed formula is $1,597,180.50.

At 50%, Margolin's share is $798,590.25.

Thus, Plaintiff is not entitled to recover any further moneys from Defendants (¶ 1.3[c]).

Even were the formula to be applied at a rate which assumes Margolin's partnership interest to be 55%, the result would be no different in that a negative amount would result (Dx X-2), as follows"

Capital Account as of 3/31/02	($134,221.00)
Value of Margolin's interest in the Firm's outstanding receivables and good will	$878,449.28 [8]
Life insurance proceeds	($750,000.00)
Margolin's share at 55%	($5,771.73)

FN8. Utilizing the calculation in fn. 7, 55% of the total fees of $1,597,180.50 is $878,449.28.

D. *Counsel Fees*

Pursuant to ¶ 4.3 of the 1989 Agreement, the failure to comply with the terms of ¶¶ 1 and 2 exposed the defaulting surviving partners to, *inter alia*, reasonable attorneys fees. This Court has found that Plaintiff has received all of the moneys due pursuant to the 1989

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Agreement. An award of counsel fees is unwarranted inasmuch as Plaintiff was not the prevailing party herein. See, *501 East 87th St. Realty Co., LLC v. Ole Pa Enterprises, Inc.*, 304 A.D.2d 310, 311 (1st Dept.2003).

Based on the foregoing, the complaint is dismissed.

Settle judgment on ten (10) days notice.

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