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IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION—CIVIL

SCOTT CANTER and **MERYL CANTER** *Plaintiffs* v. **ANDREW CAPPONI** and **SHEMP, INC.** *Defendants* **DUE AMICI DEVELOPMENT ASSOCIATES, L.P.** and **DUE AMICI DEVELOPMENT, LLC** *Garnishees*	August Term, 2008 Case No. 02455 Commerce Program

DOCKETED
FEB 16 2016
R. POSTELL
COMMERCE PROGRAM

ORDER

AND NOW, this 6th day of February, 2016, after a hearing held on November 2—3 2015, and in accordance with this court's Findings-of-Fact and Conclusions-of-Law filed simultaneously herewith, it is **ORDERED** as follows:

I. Valuation of defendant Andrew Capponi's interest in garnishees Due Amici Development Associates, L.P. and Due Amici Development, LLC, shall be calculated under the method described by Mr. Joseph M. Egler, expert for garnishees, found at pages 155-164 of the Notes of Testimony dated November 2, 2015.

II. The court lacks subject matter jurisdiction to determine the percentages of interests which defendant Andrew Capponi owns in garnishees Due Amici

Canter Etal Vs Capponi Etal-ORDER
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Development, L.P. and Due Amici Development LLC.[1]

BY THE COURT,

GLAZER, J.

[1] "In Pennsylvania, an indispensable party is one whose rights are so directly connected with and affected by litigation that he must be a party of record to protect such rights, and his absence renders any order or decree of court null and void for want of jurisdiction." Columbia Gas Transmission Corp. v. Diamond Fuel Co., 464 Pa. 377, 379, 346 A.2d 788, 789 (1975).

In this case, the court cannot determine what percentages Capponi owns in Due Amici Development Associates, L.P., and Due Amici Development, LLC, because the court lacks jurisdiction to determine the rights of a non-party in this action who is also an alleged co-owner of interests in the same entities. The Court lacks subject matter jurisdiction in this instance because the rights of Andrew Capponi cannot be determined without a simultaneous determination of the rights of the non-party. For this reason, the court cannot at this time provide a sum certain as to the value of Andrew Capponi's interests.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION—CIVIL

SCOTT CANTER and **MERYL CANTER**	:	
	:	August Term, 2008
Plaintiffs	:	
	:	Case No. 02455
v.	:	
	:	
ANDREW CAPPONI and **SHEMP, INC.**	:	
	:	
Defendants	:	
	:	
DUE AMICI DEVELOPMENT ASSOCIATES, L.P.	:	Commerce Program
and	:	
DUE AMICI DEVELOPMENT, LLC	:	
	:	
Garnishees	:	

FINDINGS OF FACT

1. Due Amici Development Associates, L.P. ("LP"), is a Pennsylvania limited partnership formed on February 3, 2006; Due Amici Development, LLC ("LLC"), is a Pennsylvania limited liability company also formed on February 3, 2006. At all times relevant to this action, LLC was the "General Partner" of LP.
2. LP was founded by individual defendant Andrew Capponi ("Capponi"), Mr. Steven Argentina, a non-party to this action ("Argentina"), and by LLC. At all times relevant to this action, Capponi and Argentina were the "Limited Partners" of LP.
3. On the day LLC was founded, Capponi and Argentina each owned a 50% interest therein. On the day LP was founded, Capponi and Argentina, as limited partners, each owned 49.5% of LP, whereas LLC, as general partner, owned the remaining 1% of LP,

pursuant to a governing document named "Limited Partnership Agreement."[1]

4. *Inter alia,* the Limited Partnership Agreement states as follows:

> No amendment of this [Limited Partnership] Agreement shall be binding unless such amendment is agreed to in writing by the General Partner [LLC], provided, however, that no amendment which has a material effect on any Limited Partner's right to allocations and distributions of income shall be effective unless agreed to in writing by such Limited Partners.[2]

5. On April 30, 2007, Capponi, Argentina and an individual named Eric Gorsen, a non-party in this action, ("Gorsen"), executed an agreement (the "Gorsen Agreement"). The Gorsen Agreement states that Gorsen purchased a 1/3 interests in LLC and LP, respectively, pursuant to a capital contribution of $350,000.00. The Gorsen Agreement also states that as a result of this transaction, Gorsen, Capponi, and Argentina each owned 1/3 in LLC and 1/3 in LP.[3]

6. At the time the Gorsen Agreement was executed, neither LLC as general partner of LP, nor Capponi and Argentina as limited partners thereof, had executed an amendment to the Limited Partnership Agreement, even though this was a requirement under the provision quoted above at paragraph 4. No subsequent-but- retroactive amendment appears to have been made with respect to the transaction described in the Gorsen Agreement.

7. On August 19, 2008, herein plaintiffs Scott Canter and Meryl Canter ("Plaintiffs"), entered judgment by confession against Capponi and an entity named Shemp, Inc. in the amount of $1,520,000.00.

8. On November 21, 2008, Plaintiffs served interrogatories in attachment upon LLC and LP,

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[1] Limited Partnership Agreement, Plaintiffs' Exhibit LP—1; Garnishees' Exhibit G—9, Exhibit A therein.
[2] Id., Article 13.1.
[3] Agreement dated April 30, 2007, plaintiff's Exhibit LLC—2; Garnishee's Exhibit G—1.

as garnishees having control over property of defendants Capponi and Shemp, Inc.[4]

9. On September 19, 2011, Plaintiffs filed a motion and application for a charging order and judicial sale to enforce judgment against the interests of defendant Capponi in the LP.[5]

10. On October 3, 2011, Capponi instituted Chapter 7 bankruptcy proceedings; shortly thereafter, on October 6, 2011, the instant action was placed on a deferred status.

11. On March 3, 2015, garnishees LP and LLC filed a petition for a decree setting forth the terms whereby Capponi's interests subject to garnishment should be purchased by LP and LLC.[6]

12. On March 10, 2015, the instant action was removed from deferred status.

13. On October 16, 2016, this court issued its rulings on—

    - Plaintiffs' motion and application for a charging order and judicial sale to enforce judgment against the interests of defendant Capponi in LP, and on
    - Garnishees' petition for a decree setting forth the terms whereby Capponi's interests subject to garnishment should be purchased by LP and LLC.

The court's Order and *Memorandum* Opinion directed the parties to select experts for the purpose of determining the interests of Capponi in LP and LLC, and to select appraisers for the purpose of assessing the market value of the interests subject to garnishment.

CONCLUSIONS-OF-LAW

14. On November 2—3, 2015, this court held a hearing during which the parties presented

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[4] PA. R.C.P. 3101(b) states that "[a]ny person may be a garnishee ... if the person ... (2) has property of the defendant in his or her custody, possession or control...." Also, "[s]ervice of the writ upon garnishee shall attach all property of the defendant...." PA. R.C.P. 3111(b).

[5] Motion control No. 15030910.

[6] Motion control No. 15030657.

their respective positions as to the market value of the real estate owned by LP.

15. After hearing the experts on both sides, the Court ruled that the real estate owned by LP has a market value of $7,450,000.00.[7]

16. At the hearing, the parties presented their respective positions as to what percentages of LP and LLC are currently owned by Capponi. Specifically, garnishees LP and LLC presented testimonial and documentary evidence for the purpose of showing that beginning April 30, 2007, and on a number of subsequent occasions thereafter, non-party Gorsen lawfully acquired certain interests in LP and LLC, from Capponi and predominantly from Argentina.[8]

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[7] Notes of Testimony of November 2, 2015, p. 145:17—22. The court found the parties' respective experts to be credible; therefore, the court fixed the value of the real estate at $7,450,000, a value "slightly higher than one estimate and slightly lower than the other estimate." Id., 145:18—21.

[8] Id., pp, 9—96.

The record shows that this action was commenced on August 19, 2008. Discovery began shortly thereafter, and, since then, the parties have vigorously litigated the action notwithstanding bankruptcy proceedings which placed the case on a deferred status from October 6, 2011, to March 10, 2015. Throughout more than eight years of litigation, the parties had ample time to realize that this court would be called upon to determine what percentages Capponi owned in LP and LLC. Most importantly, the parties had ample time to realize that under the facts in this action, determining Capponi's percentages of ownership in LP and LLC could affect the rights of Gorsen, if any. "In Pennsylvania, an indispensable party is one whose rights are so directly connected with and affected by litigation that he must be a party of record to protect such rights, and his absence renders any order or decree of court null and void for want of jurisdiction." Columbia Gas Transmission Corp. v. Diamond Fuel Co., 464 Pa. 377, 379, 346 A.2d 788, 789 (1975).

"The determination of an indispensable party question involves the following considerations:

1. Do absent parties have a right or interest related to the claim?
2. If so, what is the nature of that right or interest?
3. Is that right or interest essential to the merits of the issue?
4. Can justice be afforded without violating the due process rights of absent parties?

Bastian v. Sullivan, 2015 Pa. Super. 123, 117 A.3d 338, 343 (2015).

In this case, Gorsen, the absent party, has testified that he acquired from Capponi and Argentina 33.33% in LP, and 33% in LLC, on April 30, 2007. Therefore, this court is tasked to determine what percentages of LP and LLC, if any, are owned by Gorsen, in order to establish what percentages therein are owned by Capponi. For example, the court could conceivably void the Gorsen Agreement dated April 30, 2007, due to the failure by LLC, Capponi, and Argentina, to adhere to certain amendment formalities required under the Limited Partnership Agreement. However, should the court enter a decree consistent with this finding, then the due process rights of Gorsen might be violated. For this reason, the court cannot determine what percentages Capponi owns in LP and LLC, unless Gorsen, and any other party whose rights may be directly connected to the instant litigation, are joined in the action as indispensable parties.

17. Also at the hearing of November 2—3, 2015, the parties presented their respective positions as to whether or not the interests of Capponi should be subject to a discounted valuation. Specifically, garnishees LP and LLC argued that Capponi's interests should be valued at a discount to reflect, *inter alia*, two inherent disadvantages of a limited partnership: lack of control by the limited partner in the partnership, and the resultant poor marketability of the interests therein.[9]

18. On the issue of whether Capponi's interests should be discounted, the court found credible the testimony of Mr. Joseph M. Egler on behalf of garnishees LP and LLC.[10] Specifically, Mr. Egler testified that valuation of the real property owned by LP should take into account "other assets as well as debt" associated with the real property.[11] In addition, Mr. Egler credibly testified that Capponi's interest in LP should be discounted to reflect the lack of control in the partnership by a limited partner such as Capponi, as well as the limited marketability of such a closely-held interest.[12] Based on the foregoing, this court finds that the percentage of interests in LP and LLC of Capponi, when finally determined, shall be calculated under the method described by Mr. Joseph M. Egler at pages 155-164 of the Notes of Testimony dated November 2, 2015.

By The Court,

Glazer, J.

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[9] Notes of Testimony of November 2, 2015, pp. 158—164, 166—168.
[10] "As the finder of fact, the trial court has exclusive authority to weigh the evidence, make credibility determinations and draw reasonable inferences from the evidence presented." In re Sale of Real Estate by Lackawanna Cty. Tax Claim Bureau, 986 A.2d 213, 216 (Pa. Commw. 2009).
[11] Notes of Testimony of November 2, 2015, p. 156:8—12.
[12] Id., p. 156:4—16:20.