

**Shurka v Shurka**

2011 NY Slip Op 30230(U)

January 27, 2011

Supreme Court, New York County

Docket Number: 110809/10

Judge: Saralee Evans

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

PRESENT: **HON. SARALEE EVANS**

PART 51

Index Number : 110809/2010

SHURKA, NANCY

vs

SHURKA, EFRAIM

Sequence Number : 003

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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

**PAPERS NUMBERED**

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

*Defendant's motion to dismiss this action is resolved in accordance with the Court's decision and order dated January 27, 2011.*

**FILED**

FEB 01 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/27/2011

*Saralee Evans*  
**HON. SARALEE EVANS** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, PART 51

-----X  
NANCY SHURKA, MELANIE SHURKA, and  
MATHEW SHURKA,

Plaintiffs,

Index No. 110809/10

-against-

DECISION AND ORDER

EFRAIM SHURKA, MANNY SHURKA,  
ESTHER ZERNITSKY and MALKA CARMAZI,

Defendants,

-and-

ASHLEY SHURKA, a minor, JASON SHURKA,  
a minor, NATALIE ZERNITSKY, EDEN  
ZERNITSKY, RACHEL CARMAZI KARNI,  
MICHELLE CARMAZI and BENNY CARMAZI,

**FILED**

FEB 01 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Nominal Defendants.

-----X  
SARALEE EVANS, JSC

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this motion to dismiss.

<b>Papers</b>	<b>Numbered</b>
Notice of Motion, Affirmation, Affidavit & Exhibits . . . . .	1
Affirmation & Exhibits in Opposition . . . . .	2
Reply Affidavit & Affirmation in Reply . . . . .	3

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiffs are the children of Jane and Efraim Shurka, the parties to a divorce action commenced in 2008 and currently before this court. They bring suit against their father and his three siblings to declare the invalidity of an agreement, purportedly entered into in 2002, which

grants defendant Efraim Shurka and his siblings complete control over property allegedly transferred to plaintiffs and plaintiff's cousins who are named herein as additional defendants. Efraim Shurka has asserted in the action for divorce that the family's significant assets are unavailable for equitable distribution to his wife of 30 years, because all assets are titled in the name of the parties' children. Their titular ownership is subject, however, to the terms of the management agreement being challenged by plaintiffs in this action.

The management agreement at issue purportedly governs the ownership, operation, and finances of all property transferred from Efraim Shurka and his siblings (denominated the "parents" in the agreement) to the plaintiffs and their cousins (denominated the "children.") The agreement provides that the parents retain all rights of ownership of any property purportedly transferred to the children "in the same manner as if they [ the parents] were the absolute owner(s) thereof." Notably, Mrs. Shurka is not included in the parental management group.

The major issue in the divorce proceeding is the equitable distribution of marital property. Domestic Relations Law § 236[B](1)[c] and (d) provide that marital property is subject to equitable distribution, and that marital property includes "all property acquired by either or both spouses during the marriage and before the . . . commencement of a matrimonial action." *Lolli-Ghetti v. Lolli-Ghetti*, 165 AD2d 426 (1<sup>st</sup> Dept. 1991), *ap. dism.* 78 NY 2d 864 (1991).

Efraim Shurka has contended throughout the divorce proceeding that none of the property acquired during the parties' 30 year marriage is marital, because of purported transfers to the children. Those transfers are, however, subject to the 2002 management agreement, pursuant to the terms of which, all indicia of ownership are retained by the parents. There is therefore an issue of fact as to whether the purported transfers of marital property are effective, i.e., whether

the parents effectively divested themselves of an ownership interest in all of their property.

The validity of those transfers is therefore seminal to the parties' marital dispute before this court and will ultimately determine whether there is a marital estate to be distributed in the divorce proceeding.

Defendants move to dismiss the Shurka children's challenge to the management agreement, contending that there is another action pending between the parties for the same cause of action. Defendants reference a Summons and Complaint filed by four of the defendants herein against two of the plaintiffs, seeking to enjoin them from selling the house currently occupied by two of the plaintiffs and their mother. That case was commenced in August of 2009 when the summons and complaint were filed and a *lis pendens* placed on the house. The Shurka children who were named in that action contend that they were never served in the action and only learned in recently when the *lis pendens* was discovered. They have moved to dismiss for lack of jurisdiction. That motion is currently *sub judice* in Nassau County and should defendants prevail, defendant's motion is moot.

An examination of the complaint filed in Nassau County reveals that it is a different cause of action involving different parties. There is no basis from which to conclude that the validity of the 2002 Agreement will be resolved in that action. Moreover, only some of the parties here are named in that suit. Under the circumstances, the court declines to dismiss this action pursuant to CPLR §3211(a)(4).

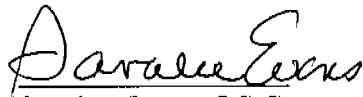
Defendants further contend that the action should be dismissed for lack of a judicable controversy. Defendants have accused the children of attempting to sell a house in violation of the challenged agreement and have restrained the children from exercising ownership rights in an

house in their name. Certainly plaintiffs have a present interest in determining the validity of a transfer of property to them that is called into question by the challenged management agreement. Whether the children seek to sell their property or potentially to redress a perceived injustice to their mother, they are entitled to a determination of the extent to which their "ownership" rights exist.

Defendants' sweeping generalization that the challenged agreement simply memorializes, with "refinements" decades-long business practices to which plaintiff's never objected does not set forth a basis for dismissal of the complaint. Nor can plaintiffs be accused of laches for failing to challenge an agreement they did not see until October 2009, when Efraim Shurka introduced it in the divorce action. raises numerous issues of fact for which trial is necessary. Defendants' motion to dismiss is therefore denied.

This constitutes the decision and order of the court. .

Dated: New York, New York  
January 27, 2011

  
Saralee Evans, J.S.C.  
**HON. SARALEE EVANS**

**FILED**  
FEB 01 2011  
NEW YORK  
COUNTY CLERK'S OFFICE