

Hertz v Hertz
2026 NY Slip Op 30964(U)
March 11, 2026
Supreme Court, Kings County
Docket Number: Index No. 517800/20
Judge: Steven Z. Mostofsky
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 11 day of ~~February~~ ^{March}, 2026.

P R E S E N T:

HON. STEVEN Z. MOSTOFSKY,
Justice.

-----X

JOSEPH HERTZ,
Plaintiff,

-against-

SAMUEL HERTZ, individually,
SAMUEL HERTZ, as Executor of the Estate of MIRA HERTZ,
KARA REALTY CO. LLC, LANA REALTY CO. LLC,
CORES REALTY CORPORATION,
GODER REALTY CORPORATION,
WOLMIR REALTY CORP.,
93 UNDERHILL REALTY CORP., and
JOSAM REALTY CORP.,
Defendants.

-----X

DECISION AND ORDER

Index No. 517800/20

Mot. Seq. No. 1

The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion, Affirmations, and Exhibits Annexed _____
Affirmations (Affidavits) in Opposition and Exhibits Annexed _____
Reply Affirmation _____

38-46
65-81
82

On September 22, 2020, plaintiff Joseph Hertz (“Joseph”) commenced this action against: (1) his brother Samuel Hertz (“Samuel”), individually and as the executor of the estate of their late mother, Mira Hertz (“Mira”); and (2) certain LLCs and corporations owned by the Hertz family (collectively, the “Realty Companies” and, together with Samuel, “defendants”).¹ This action is predicated on the terms and conditions of two agreements, one dated March 20, 2012, and the other dated September 9, 2014 (the “2014 Agreement” and collectively with the March 20, 2012 agreement, the “Agreements”), by and among (others) Joseph, Samuel, and their

¹ Approximately one year prior, Joseph commenced a separate, and still-ongoing, action against Samuel, individually, as executor of Mira’s will, and as trustee of Mira’s trusts under index No. 526061/19, Supreme Court, Kings County (the “related action”). The related action challenges the validity of Mira’s Last Will & Testament and of certain living trusts she allegedly established. In the related action, Joseph’s motion for an extension of time to move for summary judgment is currently scheduled for March 26, 2026, before Justice Heela D. Capell.

then-living mother Mira.² By way of his complaint, dated February 16, 2021 (the “complaint”), Joseph asserts four causes of action which are for: (1) a declaratory judgment that “[t]he Agreements are Null and Void” because the attorney who was holding the escrowed funds in the amount of approximately \$5 million to be disbursed at closing under the 2014 Agreement had misappropriated those funds;³ (2) a declaratory judgment “to resolve whether the parties to the 2014 Agreement have abandoned it”; (3) rescission of the 2014 Agreement “in the event it is determined that [such agreement] is in effect”; and (4) specific performance and contract damages in the event the 2014 Agreement was not rescinded or abandoned (NYSCEF Doc No. 40).⁴

Defendants jointly answered the complaint. Their original answer, dated May 6, 2021 (the “original answer”), consisted, for the most part, of general denials and, in addition, interposed 25 affirmative defenses (NYSCEF Doc No. 41). One substantive denial in the original answer is notable at this stage of litigation. In ¶ 54 of their original answer, which responded to Joseph’s *first* cause of action for a declaration that the Agreements are “null and void,” defendants denied “knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph ‘54’ of the [c]omplaint.” The underlying paragraph 54 of the complaint to which the foregoing denial was addressed alleges that:

“Joseph is entitled to a declaratory judgment declaring that the Agreements are null and void. It has been over six years since the scheduled [c]losing under the 2014 Agreement was aborted after . . . [the] theft of escrowed funds. The parties have taken none of the steps contemplated by the 2014 Agreement to transfer their

² On April 27, 2015, Mira passed away at the age of 93.

³ The attorney at issue, David S. Frankel, subsequently resigned from the New York bar (*see Matter of Frankel*, 133 AD3d 62 [2d Dept 2015]).

⁴ *See* Complaint, ¶¶ 54-68, 70-72, 74-90, and 92-101, respectively.

interests in the [Realty Companies] or do anything else contemplated by this agreement.”

Approximately four years later on April 1, 2025, defendants served the instant motion for leave, pursuant to CPLR 3025 (b), to interpose their proposed amended answer, dated April 1, 2025 (NYSCEF Doc No. 43), and, upon granting such leave, for summary judgment on defendants’ amended answer, dismissing (by way of defendants’ proposed admissions) the entirety of the complaint against them. While the instant motion was in the briefing stages, defendants moved, by order to show cause, dated April 30, 2025, for an interim stay of all discovery or, in the alternative, for an interim protective order specifically precluding Samuel’s pretrial deposition (NYSCEF Doc No. 58). By short-form order, dated May 22, 2025, the court denied defendants’ request for a stay and protective order (NYSCEF Doc No. 60). On January 15, 2026, the court reserved decision on the instant motion, as fully submitted.

(1)

As noted, the initial branch of defendants’ motion seeks leave to serve their proposed amended answer (“PAA”). The PAA admits certain allegations in the complaint and, in particular, the aforementioned ¶ 54 thereof regarding Joseph’s request in his *first* cause of action for a declaration that the Agreements are “null and void.”

“No evidentiary showing of merit is required under CPLR 3025 (b)” (*Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008], *appeals withdrawn* 12 NY3d 804 and 813 [2009]). The presumption is that leave to amend should be granted routinely unless “the proposed amendment is ‘palpably insufficient’ to state a cause of action . . . or is patently devoid of merit” (*id.*). “If the

opposing party wishes to test the merits of the proposed added cause of action. . . , that party may later move for summary judgment upon a proper showing (*see* CPLR 3212)” (*id.*).

Here, defendants’ admission in ¶ 54 of the PAA that “Joseph is entitled to a declaratory judgment declaring that the Agreements are null and void” is neither palpably insufficient nor devoid of merit. Nor is ¶ 54 of the PAA (or any other admission in the PAA) prejudicial to Joseph. Under the totality of the circumstances, it is appropriate, in the court’s discretion, to grant defendants leave to amend their original answer to admit the allegations in ¶ 54 of the complaint, as well as to make several other less significant admissions (*see Rubin v Poly Prep Country Day School*, 227 AD3d 741, 743 [2d Dept 2024]; *Lee v Allen*, 165 AD3d 907, 907-908 [2d Dept 2018]; *Edwards v 1234 Pac. Mgt., LLC*, 139 AD3d 658, 658-659 [2d Dept 2016]; *Favia v Harley-Davidson Motor Co., Inc.*, 119 AD3d 836, 836-837 [2d Dept 2014]; *Pellegrini v Richmond County Ambulance Serv., Inc.*, 48 AD3d 436, 437 [2d Dept 2008]).

(2)

In light of defendants’ aforementioned admission in ¶ 54 of the PAA that “Joseph is entitled to a declaratory judgment declaring that the Agreements are null and void,” they are entitled to summary judgment on his *first* cause of action for declaratory relief (*see Field v Guttilla*, 2019 WL 13106417, *3 [Sup Ct, Westchester County 2019]). Although this branch of defendants’ motion is not supported by an affidavit of person with knowledge as required by CPLR 3212 (b), the aforementioned admission constitutes a formal judicial admission and is conclusive as to the facts so admitted (*see GMS Batching, Inc. v TADCO Const. Corp.*, 120 AD3d 549, 551 [2d Dept 2014] [“Facts admitted in a party’s pleadings constitute formal judicial admissions, and are conclusive of the facts admitted in the action in which they are

made.”]; *see also Re/Max of New York, Inc. v Weber*, 177 AD3d 910, 914 [2d Dept 2019]; *Brainard v Barden*, 148 AD3d 1687, 1688 [4th Dept 2017]; *Zegarowicz v Ripatti*, 77 AD3d 650, 653 [2d Dept 2010]; *Falkowski v 81 & 3 of Watertown, Inc.*, 288 AD2d 890 [4th Dept 2001]). Further, the fact that the PAA is verified by counsel (rather than by defendant Samuel) is immaterial. “Admissions by counsel, as by any other agent, are admissible against a party[,] provided that the statements had been made by the attorney while acting in his authorized capacity” (*Rosales v Rivera*, 176 AD3d 753, 755 [2d Dept 2019] [internal quotation marks omitted]).

The balance of the remaining branch of defendants’ motion for summary judgment, which is for dismissal of the *second, third, and fourth* causes of action, is *denied*. Dismissal of the *first* cause of action, together with defendants’ remaining admissions in the PAA, do not render academic the *second, third, and fourth* causes of action. Notably, the proposed amended answer preserves all the previously raised affirmative defenses contained in the original answer. As one appellate court noted in another context, but which is equally applicable herein, “amendment of pleadings is not a vehicle that can be utilized to relieve a party from the consequences of prevarication” (*Bogoni v Friedlander*, 197 AD2d 281, 292 [1st Dept 1994], *lv denied* 84 NY2d 803 [1994]).

The court has considered the parties’ remaining contentions and found them either unavailing or moot in light of its determination.

Accordingly, it is

ORDERED that defendants’ motion is *granted to the extent* that: (1) the proposed amended answer, dated April 1, 2025, in the e-filed form under NYSCEF Doc No. 43, is deemed served on plaintiff’s counsel; and (2) upon such amendment, defendants are granted summary

judgment *solely to the extent* that the Agreements (as defined in the complaint) are hereby *declared* to be “null and void” as requested in the *first* cause of action and as admitted to in ¶ 54 of the proposed amended answer; and *the remainder of defendants’ motion is denied*; and it is further

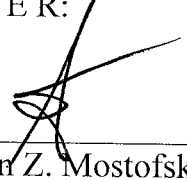
ORDERED that for the avoidance of doubt, this action shall continue on the *second, third, and fourth* causes of action of the complaint.

Defendants’ counsel shall electronically serve a copy of this Decision and Order with notice of entry on plaintiff’s counsel and shall electronically file an affidavit of service thereof with the Kings County Clerk.

The above is the court’s Decision and Order.

ENTER:

Hon. Steven Z. Mostofsky
Justice, Supreme Court



Hon. Steven Z. Mostofsky
Justice, Supreme Court