

Perl v Perl

2005 NY Slip Op 30294(U)

December 23, 2005

Supreme Court, New York County

Docket Number: 602898/05

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH L. GISCHE
Justice

PART 10

PERL
- v -
PERL

INDEX NO. 602898/05
MOTION DATE 10/12/05
MOTION SEQ. NO. 2
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for PI

	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

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED
JAN 04 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: DEC 23 2005

[Signature]
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 10

-----X

SHARI PERL a/k/a SHARI PERL-HERMAN,
individually and as parent and natural guardian
of Bridget Hanna Herman, a minor, and as
Trustee of the SHARI PERL FAMILY TRUST,
and STEPHEN H. ROSEN, as Trustee of the
HAT TRUST,

Plaintiffs,

-against-

ANDREA PERL, individually and as Trustee
of the SHARI PERL FAMILY TRUST, GERALD
SHALLO, 145-147 MULBERRY REALTY CO.,
LLC, MINERVA 54 REALTY CO., L.L.C., and
PERL PROPERTIES, INC.,

Defendants.

-----X

DECISION/ORDER

Index No.: 602898/05
Seq. Nos.: 001, 002
003 & 004

Present:
Hon. Judith J. Gische

J.S.C.

FILED
JAN 04 2006
NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers	Numbered
<u>Motion Sequence No. 001</u>	
Pltf's OSC#1 [pi] w/SHR affid, exhs	1
Def's AP affid w/exhs	2
Pltf's HW reply affirm w/exhs	3
Pltf's SHR reply affid w/exh	4
Pltf's SP a/k/a SPH reply affid	5
<u>Motion Sequence No. 002</u>	
Def's OSC#2 [pi] w/AP affid, exhs	6
Def's RRH affirm	7
Pltf's SHR affid w/exh	8
Def's AP reply affid	9

Motion Sequence No. 003

Pltf's motion [compel] (sep back)	10
Pltf's HW affirm w/exhs	11
Pltf's HW reply affirm w/exh	12
Def's x-motion w/AP affid, exh	13
Pltf's SHR affid w/exh	14
Pltf's HW affirm w/exhs	15
Def's reply and supplemental affid w/exhs	16

Motion Sequence No. 004

Pltf's OCS#4 [pi] (sep back)	17
Pltf's affirm in support (HW) w/exhs	18
Pltf's affid in support (SHR) w/exhs	19
Def's affid in oppos (AP) w/RJDiG affid, KW affid, exhs	20
Def Roncati affid in oppos (CR)	21
Pltf's reply affirm in further support (HW) w/exhs	22
Pltf's affid (EPH)	23
Pltf's affid (RB)	24
Pltf's affid (RK)	25

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

There are several motions before the court. Plaintiffs' motion sequence #1 seeks a preliminary injunction, restraining defendants from contracting, selling, etc., real property known as 145-147 Mulberry Street, New York County ("145 Mulberry"). Defendants' motion sequence #2, also for a preliminary injunction, seeks to enjoin plaintiffs, and others acting on plaintiffs' behalf from physically interfering with defendants' efforts to market and sell the 145 Mulberry property. Plaintiffs' motion sequence #3 is for an order directing defendants to allow plaintiffs to have access to the books and records of various limited liability companies. Defendants have cross moved to dismiss the complaint. Plaintiff's motion sequence #4 seeks further injunctive relief.

After the cross-motion was made, plaintiffs served an amended complaint as of right. CPLR § 3025 [a]. Contrary to plaintiffs' contention, the amendment of the

complaint does not render the original cross-motion to dismiss moot. The same arguments in favor of dismissal of the original complaint are still applicable to the amended complaint, and will be considered. Therefore, at the outset the court grants defendants' application to have the cross motion deemed as one to dismiss the amended complaint. 49 West 12 Tenants Corp. v. Seidenberg, 6 AD3d 243 (1st dept. 2004).

Since all the motions involve the same parties and facts, and have related legal arguments, they are consolidated herein for consideration and decision.

Introduction

Shari Perl ("SP") and Andrea Perl ("AP") are sisters. Their father Calvin Perl, now deceased, set up a revocable trust naming his daughters as co-trustees ["Cal Perl Trust"]. The Cal Perl Trust provides that upon his death the principal is to be held in separate irrevocable trusts in each of his daughter's individual names, to wit: the Shari Perl Family Trust ["SP" trust] and the Andrea Perl Family Trust ["AP" trust].

Each sister is the trustee of her own trust as well as the co-trustee her sister's trust. The trust provisions of the SP and AP trusts are otherwise identical. Although the net income of the trusts can be distributed to each named beneficiary (e.g. AP and SP), the principal must remain in trust until the named beneficiary dies, or unless both trustees agree to invade the principal (3.B.5 Carl Perl Trust instrument):

"At any time during the existence of the [AP or SP trust], the Trustees may, in their sole and absolute discretion, elect to invade all or a portion of the principal of the Trust for the benefit of [AP or SP] and/or any of the Grantor's issue in such amounts as the Trustee may deem advisable in their sole and absolute discretion. . . ."

Provision 3.B.5 - Carl Perl Trust instrument

Any transfer or encumbrance, etc., of income or principal has to be on consent of

both trustees:

"No disposition, charge or encumbrance on the net income or principal of the CALVIN PERL REVOCABLE TRUST and any other trust hereunder (hereinafter collectively referred to as the "Trust") or any part thereof by any beneficiary under this Indenture by way of anticipation shall be valid or in any way binding upon the Trustees unless the Trustees consent thereto in writing, and no beneficiary shall have the right to assign, transfer, encumber or otherwise dispose of such income or principal or any part thereof until the same has been paid to such beneficiary by the Trustees unless the Trustees consent thereto in writing and no income or principal or any part thereof shall in any way be liable for any claim of any creditor of any such beneficiary."

Provision 5 - Carl Perl Trust instrument

Upon AP and/or SP's death, the remaining principal is to be distributed to Cal Perl's "descendants". Presently, the only remainderman is Bridget Hannah Herman ("Bridget"), SP's unemancipated daughter. As further addressed *infra*, Bridget also has her own separate, individual trust that her grandfather established for her. SP and AP are the co-trustees of that trust as well.

Through their trusts, and individually, SP and AP acquired substantial beneficial interests in a number of real properties throughout Manhattan. Each property is (was) owned by a limited liability company ("LLC"). Each of these LLCs has different members, but similar operating agreements. SP contends that her sister sold all but two of the properties and that these sales were either without her consent, or that AP misappropriated the proceeds of these sales. Therefore, SP seeks an accounting of these sales proceeds and the distribution of her share of this money either to her individually or to the SP trust.

The most contentious dispute between the sisters at the present time, and the primary subject of three motions before the court, is the property located at 145-147 Mulberry Street ("145 Mulberry"). 145 Mulberry is a commercial building that is presently empty, but for an occupied operational restaurant on the ground floor. 145 Mulberry is owned by defendant 145-147 Mulberry Realty Co., LLC. According to the operating agreement, as amended in October 1, 2001, the members of this LLC are the Cal Perl Trust (40%)¹, AP trust (27%), SP trust (27%), Bridget Hannah Herman Minority Trust (3%) and Rebecca Perl (3%). Rebecca Perl is SP and AP's mother.

There is a signed contract of sale for 145 Mulberry. The contract, with defendant Conrad Roncati as purchaser, is dated June 29, 2005 and sets a purchase price of Eight Million Dollars (\$8,000,000) ("Roncati contract"). The sale is for the property in its "as is" condition, but subject to a change in how it is zoned/classified. The Roncati contract was executed by AP as "manager" of 145-147 Mulberry Realty Co., LLC. It is not signed by any other LLC member. It is not signed by SP.

The AP and SP trusts also have an interest in the real property located at 238-240 West 54th Street, New York County ("54th Street" property). There is also a dispute about whether 54th Street property should be sold, but there is no contract of sale pending for that building. 54th Street is owned by defendant Minerva 54 Realty Co., LLC ("Minerva LLC"). The members of Minerva LLC are the AP trust (37.5%), the SP trust (37.5%) and Gerald Shallo (25%).

¹ There is a dispute over whether the Cal Perl Trust should at this time be holding economic and/or property interests now that Calvin Perl has died, which further impacts on each sister's beneficial interest in the LLC.

Insofar as relevant to the parties' present disputes on these motions regarding 145 Mulberry, the operating agreement for 145-147 Mulberry Realty Co., LLC provides as follows:

"Section 5.3 Transfers and Assignments of Membership Interests.
A Membership Interest, and any economic interest therein, is assignable, in whole or in part, only with the written consent of all the non-transferring Members, or all of the non-transferring Managers, which consent may be withheld for any reason or no reason in the sole discretion of such non-transferring Members or non-transferring Managers. Each Member hereby acknowledges the reasonableness of this prohibition in view of the purposes of the Company and the relationship of the Members. Any transfer of any Membership Interest, including any economic interest therein, in violation of the prohibition contained in this Section 5.3 shall be deemed invalid, null and void, and of no force or effect. Any Person to whom any Membership Interest is attempted to be transferred in violation of this Section 5.3 shall not be entitled to vote on matters coming before the Members, participate in the management of the Company, act as an agent of the Company, receive distributions from the Company, or have any other rights in or with respect to such Membership Interest. The assignment of a Membership Interest does not dissolve the company."

Limited Liability Operating Agreement of 145-147 Mulberry Realty Co., LLC

Further complicating this case, and causing additional friction between the sisters, is SP's decision to irrevocably transfer all her personal assets to a newly created trust in which she gives up all rights to control her property, but remains the beneficiary ("HAT trust"). Plaintiff Stephen H. Rosen is the trustee of the HAT Trust that SP established in April 2005. It purports to hold, among other things, the property designated in Schedule A of that trust instrument, including:

"All real property rights title and interests presently held in the name of Shari Perl a/k/a Mrs. Shari Herman and Shari Perl Herman. . . ."

* * *

"Any and all personal and business interests held in on [sic] the grantor's behalf under the name of Perl Rose Realty, Minerva Realty, Minerva 54th, 32 West 22nd Street, 494 Broadway, 143 and/or 145 and/or 147 Mulberry Street, all aforesaid properties located in Manhattan, New York."
Schedule A - HAT Trust

The court will first address defendants' cross motion to dismiss the amended complaint because if any part of it is granted, some or all of the relief plaintiffs are seeking in the other motions would be rendered moot. Although some of plaintiffs' causes of action are for injunctive relief and there are motions by each side for temporary stays, the burden of proof on a CPLR § 3211 motion to dismiss is more easily met than for relief pursuant to CPLR § 6301. Therefore, the motions for temporary relief are addressed later in this decision, even though the parties' factual claims and legal arguments in connection with the dismissal motion and the CPLR § 6301 motions are virtually indistinguishable.

A. Motion to dismiss the complaint

1. Standard of Review

When evaluating a motion to dismiss, the court's attention "should be focused on whether the plaintiff has a cause of action rather than on whether he has properly stated one." Rovello v. Orofino Realty Co., 40 NY2d 633, 634 (1976). Although bare conclusions will not suffice, affidavits and other evidence may be freely relied upon to preserve inartfully pleaded but potentially meritorious claims. Rovello v. Orofino Realty Co., *supra*. The sole criterion is whether the pleading states a cause of action, and if

from its four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law." Guggenheimer v. Ginzburg, 43 NY2d 268 (1977). Furthermore, the facts as alleged must be accepted by the court as true, for purposes of such a motion, and are to be accorded every favorable inference. Morone v. Morone, 50 NY2d 481 (1980); Beattie v. Brown & Wood, 243 AD2d 395 (1st dept. 1997).

2. Issues of SP's standing

Defendants first contend that none of the plaintiffs have standing to bring this action. CPLR §§ 3211 [a][3] and [a][7]. Defendants contend that SP is incompetent to maintain this action and that Mr. Rosen - an attorney with "questionable credentials" - is exploiting her. They urge the court to have SP evaluated by a psychologist to determine her competency. SP admits she has experienced emotional and psychological problems in the recent past. She explains this is why she established the HAT trust and is relying on Mr. Rosen to help her prosecute these claims. SP vehemently denies, however, that she has been coerced by any of the people within her trusted circle, or that she lacks capacity to maintain this action.

The question of SP's capacity, while serious, is not a basis to dismiss this action. Defendants have neither commenced an Article 81 proceeding, nor have they moved pursuant to CPLR Article 12 for the appointment of a guardian ad litem for SP in this case. Even were they successful in pursuing these remedies, any duly appointed representative would still have the right to proceed with this litigation. SP's mental condition does not deprive her of standing to maintain this action.

The collateral request for a psychological evaluation of SP without her consent is not appropriate in this case. SP has not put her mental capacity to bring this action into issue, defendants have². Defendants have not brought any action to set aside the HAT trust or the power of attorney SP has given to Mr. Rosen to act on her behalf. They assert these claims merely in a defensive posture to SP's claims against them. Under these circumstances SP need not, at this time, submit to a psychological exam at their urging. See: People v. Segal, 54 NY2d 58 (1981); Barclays Bank of New York v. Tutter, 137 AD2d 473 (2nd dept 1988). It would be a violation of SP's rights to privacy and due process. This ruling is without prejudice to defendants proceeding with an Article 81 proceeding under the Mental Hygiene Law which provides the necessary due process protections required, and an organized framework for the appointment of guardians for persons who are judicially declared incapacitated to manage their own financial affairs and/or attend to their needs of daily living. MHL § 81.01 et seq.

AP argues that SP otherwise has no standing to maintain this action because SP cannot institute an action on behalf of the SP trust without first obtaining AP's consent. This is however, an oversimplification of the very complicated issues before the court. Certainly it would make no sense, nor do courts prohibit, co-trustees and/or beneficiaries from suing another trustee for his or her wrongful conduct.

SP is both the beneficiary and co-trustee of the SP trust. The beneficiaries of a trust may sue the trustees for an accounting or other relief related to their duties as

²Contrary to what defendants assert, plaintiffs have not placed SP's mental condition into controversy. They do not seek to set aside any documents she has previously signed based on any claim of incapacity. They differ with defendants on what such documents mean.

trustees. Velez v. Feinstein, 87 AD2d 309 (1st Dept 1982). Moreover, the trustee has standing to sue for the benefit of the trust on a cause of action that belongs to the trust. See: Strain v. Seven Hills Associates, 75 AD2d 360 (1st Dept 1980). SP has legal standing to maintain this action in either her capacity as beneficiary or trustee. Furthermore, some of the claims raised arise from SP's individual membership in the LLCs. Thus, for example, in 494 Broadway Realty LLC, SP holds 26 membership units in her own name. Members of an LLC may sue other members for breach of fiduciary duties. Solita v. FMC Corp., 385 FSupp2d 324, 331 (SDNY 2005).

3. Mr. Rosen's Standing to Sue

Defendants argue that the case by Mr. Rosen should be dismissed because he has no legal standing to sue, even though he is the trustee of the HAT trust. AP contends that even though Mr. Rosen is the named trustee of the HAT trust, he does not hold any interest in any property or trust that is the subject of this action. The transfers of the interests in the LLCs all required AP's consent before transferring any membership interests, which it is undisputed, was not given. Thus, AP argues that any purported transfer by SP of any LLC or SP trust interest into the HAT trust was of no legal effect.

The court agrees. Any effort by SP to transfer interests in the LLC's without consent of the other members is a nullity. Since all the properties were held by LLCs, SP could not effectively transfer her interests in such LLCs to the HAT trust.

Mr. Rosen has also brought this action on SP's behalf as her attorney-in-fact pursuant to a durable power of attorney SP signed April 18, 2005. He claims that this is a separate basis for him to proceed as a plaintiff. Although the defendants raise a

number of issues about the legal validity of the power of attorney, the fundamental and over-riding reason that Mr. Rosen cannot proceed as a named party pursuant to these powers is that SP herself is proceeding to enforce her own rights in this action.

Therefore, she does not need an attorney-in-fact to also proceed as a plaintiff. See generally, General Obligations Law, Article 5. The motion to dismiss Mr. Rosen as a party plaintiff is granted.

The court's findings that Mr. Rosen cannot bring this action as SP's attorney in fact, does not mean, that he is prohibited from acting pursuant to such power in this action, provided the instrument itself is facially legally valid. Defendants argue the power of attorney is legally invalid because it is a durable power, surviving her death. They maintain in New Jersey, where the instrument was executed, an instrument with such a clause is not recognized. New Jersey Statutes Annotated provides, in relevant part as follows:

"a. The death of a principal who has executed a written power of attorney, durable or otherwise, does not revoke or terminate the agency as to the attorney-in-fact or other person who, without actual knowledge of the death of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds the principal's successors in interest."
N.J.S.A. 46:2B-8.5

Although Mr. Rosen's durable power of attorney may terminate (abate) upon SP's death, that limitation is beyond the scope of, and has no bearing on, these motions because SP is still alive.

This holding, however, is without prejudice to defendants bringing an action to set aside the power of attorney based upon their claims that SP was not competent to

sign it in the first instance.

4. Joinder of necessary parties

SP has amended her complaint to withdraw those causes of action related to Bridget. In her original complaint, SP had sought relief against the defendants in her capacity as Bridget's mother and natural guardian. AP originally argued that SP is not Bridget's legal guardian, rather Bryan Herman, Bridget's father is; therefore SP had no standing to sue on behalf of Bridget, individually. Although SP has now withdrawn her claims on Bridget's behalf, the question remains whether Bridget and/or her trust are necessary parties to this action. CPLR § 3211 [a] [10].

CPLR § 1001(a) provides for the necessary joinder of persons who should be parties if complete relief is to be accorded between the parties to the action or who might be inequitably affected by a judgment in the action. In the event the court finds that someone is a necessary party, then the court shall order that such person be joined. If joinder is not accomplished, then the court proceeds to determine whether the matter should be dismissed or may it proceed in the absence of such joinder. CPLR 1001(b).

Dismissal this juncture is, therefore, premature. The court needs to first consider whether plaintiffs have failed to include necessary parties, and if so, make the appropriate order to effectuate their joinder.

Bridget is not only a contingent beneficiary of the SP and AP trusts, she also has a 3% beneficial interest in the 145-147 Mulberry Realty LLC. Her grandmother, Rebecca Perl, who is Carl Perl's widow ("Mrs. Perl") is also a member of the 145-147 Mulberry Realty LLC with a 3% interest. Neither side has addressed whether Mrs. Perl,

who is not a named party, should also be joined as a party.

Insofar as Bridget is concerned, her trust ("Bridget Hannah Herman Minority Trust" or "Bridget Trust") provides as follows:

"Subject to the provisions of Paragraph 7, the Trustees (other than the Grantor) shall be authorized and empowered to invade the principal of the Trust for the benefit of BRIDGET HANNAH HERMAN, from time to time, in such amounts as the Trustees, in their sole and absolute discretion, deem necessary or advisable for her use, benefit, maintenance, support, education or welfare . . ."

Paragraph 2 (E) - Bridget Hannah Herman Minority Trust

In addition, at AP and SP's death, the principal remaining in the AP and/or SP trusts, if any, passes directly to Cal Perl's "descendants". At the present time, Bridget is his only living grandchild. Bridget has a remainder interest in 145 Mulberry and/or its proceeds that is presently unknown, and could be "zero" because there is no requirement that trust monies be preserved for Calvin Perl's descendants. Thus, the Cal Perl trust instrument expressly provides that:

"Any invasion shall be authorized even though it may have the effect of greatly reducing or completely exhausting the principal of the Trust."

3.B.5 - Cal Perl Trust

Under the Bridget Trust, however, Bridget's interest is certain, although unquantified ("one member unit"). As per the 145-147 Mulberry Realty Co., LLC operating agreement, the Bridget Trust's interest is equal to 3%. Although she does not have the right to demand any distribution from the company in any form other than cash, Bridget Trust is entitled to 3% of the principal, if sold. Section 6.9 "Distributions in Kind."

Plaintiffs' 1st, 2nd, and 9th causes of action directly concern the sale of the property held by 145-147 Mulberry Realty LLC. Since the Bridget Trust and Mrs. Perl, have an ownership interest in 145-147 Mulberry Realty LLC, they clearly will be affected by any decision the court makes relative to the 1st, 2nd and 9th causes of action. They are, therefore, necessary parties on those 3 causes of action.

The 3rd cause of action concerns Minerva Realty LLC. There is no proof that the Bridget Trust or Mrs. Perl have a direct interest in this LLC, or the 54th Street property. Nonetheless, the SP and AP trusts hold interests in the Minerva Realty LLC and Bridget (individually) has a remainder interest in those trusts. That interest is, however, sufficiently contingent so that Bridget is not a necessary party as to this cause of action. EPTL § 7-1.9. Consequently, the Bridget Trust, Bridget and Mrs. Perl are not necessary parties to the 3rd cause of action.

The 4th, 5th, 6th and 7th causes of action relate to AP's actions as the managing member of all of the LLCs and co-trustee of the relevant trusts. These causes of action necessarily include 145-147 Mulberry Realty LLC in which the Bridget Trust and Mrs. Perl have an interest. Since these claims all include 145-147 Mulberry Realty LLC, the Bridget Trust and Mrs. Perl are necessary parties with respect to these causes of action.

The 8th cause of action relates to 32 West 22nd Street LLC only. Since there is no proof that the Bridget Trust or Mrs. Perl has an interest in this LLC, and Bridget's contingent interest is too remote, they are not necessary parties on this cause of action.

As more full set forth later in this decision, the 10th cause of action is dismissed and the 11th cause of action is dismissed to the extent it seeks relief relative to 145-147

Mulberry Realty LLC. Thus there are no necessary parties that are missing in connection with such causes of action.

The 12th cause of action relates to the involuntary judicial dissolution of the SP trust and the 13th cause of action relates to judicial dissolution of the Cal Perl Trust. Bridget's interest in these trusts is only as Calvin Perl's "descendent". This interest is too remote to make her a necessary party on these causes of action. EPTL § 7-1.9(b).

Having determined that the Bridget Trust and Mrs. Perl are necessary parties in *certain causes of action the court directs that plaintiffs take the necessary steps to* make them named party defendants. Plaintiffs shall have sixty (60) days from the date of this decision/order below to draft and serve a second amended complaint naming these parties. Mrs. Perl must be served in any manner provided for under CPLR § 308.

The Bridget Hannah Herman Minority Trust, however, presents separate issues both as to service and representation. The co-trustees of the Bridget Trust are SP and AP. They are in conflict with each other and given their positions in this action, they cannot act either in concert or individually to protect Bridget's beneficial interest under Bridget trust. Thus, Bridget needs a separate representative in this action to protect her beneficial trust interest.

Although Bridget has been referred to as a "minor", it is unclear from the record on this motion what her present age is. There appears to be no dispute that pursuant to court order, Bridget is now in the legal custody of her father, Bryan Herman. There is some indication, however, that Bridget's parents' high conflict divorce may impact on Mr. Herman's ability to represent Bridget's interests in this case. Nonetheless, the court will order that plaintiffs serve the second amended complaint upon Mr. Herman. CPLR

§ 309. Service must be made in any manner provided for under CPLR § 308.

The court raises, on its own motion, the issue of whether Bridget needs to have a guardian ad litem appointed to represent her beneficial interests in the Bridget Trust. CPLR § 1201, 1202(a). **A hearing on this issue will be held on April 20, 2006 at 2:30 p.m. in Part 10, 80 Centre Street, Room 122³.** The court will, during that same hearing, if necessary, consider, who should serve as the Guardian Ad Litem. The court, by separate order, will provide for notice and an opportunity to be heard on the motion for the appointment of a guardian ad litem for Bridget ("Companion Order"). Plaintiff shall serve the companion order upon counsel for all parties that have appeared thus far and all necessary parties identified by this court. Bridget Herman's father shall be served with a copy of the companion order, and in addition, if Bridget Herman is over the age of 14, she too shall be served with such companion order as well. Rebecca Perl shall also be served with such order.

5. Significant of the Pleadings

Defendants assert other reasons why the amended complaint should be dismissed.

On their 1st, 2nd and 9th causes of action, plaintiffs claim that defendants have entered into a contract of sale for 145 Mulberry without SP's express written consent; therefore they argue the contract is void or voidable. Plaintiffs further claim that the sale is for far less than the fair market price for such property. They claim further that

³The hearing date is selected to accommodate the service of a second amended complaint on the necessary parties identified by the court and to give such new parties time to appear.

AP has a personal relationship with the broker on the sale (defendant Gerald Shallo) and they have conspired, etc., to make sure he gets the commission from the sale, even if it means the property sells for less than it should. Plaintiffs claim that these actions are a breach of AP's fiduciary duty to the plaintiffs.

Defendants seek to dismiss these causes of action because they claim that SP consented to the sale of 145 Mulberry. While they have provided written consents to other sales of property, there is no irrefutable document proving SP's consent to the sale of this particular property. Thus, there is no irrefutable documentary evidence warranting dismissal of these causes of action. Herman v. Greenberg, 221 AD2d 251 (1st dept. 1995). Moreover, claims of SP's recent consent to the sale of 145 Mulberry is further complicated by defendants own arguments that SP lacks capacity. There is no basis to dismiss the 1st, 2nd and 9th causes of action.

Parenthetically, the court notes that in these causes of action, SP also seeks other relief (such as prejudgment attachment) which have questionable merit as separately asserted causes of action. Nonetheless, the wholesale striking of these causes of action, on such basis is unwarranted at this time.

The 3rd cause of action pertains to the 54th Street Property and seeks a permanent injunction against AP selling such property without SP's consent. Defendants claim that this cause of action should be dismissed because there is no pending sale.

There are allegations that AP has taken measures in the past to sell property without SP's consent. Since these allegations must be assumed true on a motion to dismiss, this 3rd cause of action to enjoin future conduct, withstands pre-answer

dismissal.

While the complaint is prolix, the 4th, 5th, 6th and 7th causes of action all relate to all of the properties and LLCs held by SP, whether individually or as part of the SP trust. The 4th cause of action claims AP breached her fiduciary duties. The 5th cause of action claims waste of assets and self dealing. This cause of action also appears grounded in breach of fiduciary duty. The 6th cause of action claims breach of contract and seeks examination of the LLC books and records. The underlying contracts it is based on are all the LLC operating agreements. The 7th cause of action is for an accounting of everything.

To the extent, the 4th and 5th causes of action seek money damages for transactions that occurred more than three years prior to the institution of this action, they are dismissed. Money damages for breach of fiduciary duty are subject to a three year statute of limitations. Kaufman v. Cohen, 307 AD2d 113 (1st dept. 2003).

Defendants also argue that these causes of action should be dismissed in their entirety because SP consented to the sales. Further they argue the closing statements from the sales, constitute AP's "accounting".

While the consents defendants rely upon have some evidentiary value, they are not conclusive documentary evidence warranting a wholesale dismissal of the amended complaint or even these particular causes of action. Herman v. Greenberg, 221 AD2d 251 (1st dept 1995). The consents do not pertain to all of the properties identified. In any event, they do not contradict plaintiffs' claim, that even if those properties were sold with SP's consent, she has not received an accounting or a full distribution of proceeds from the properties sold.

Similarly, although defendants provide closing statements which they contend directly contradict plaintiffs' claims and show that all the sale proceeds were accounted for, such documents do not conclusively contradict any of plaintiffs' claims, that SP has not received her complete share of the sale proceeds. Herman v. Greenberg, supra.; Beattie v. Brown & Wood, 243 AD2d 395 (1st Dept 1997). Whether plaintiff will prevail on any one of her claims is not for the court to decide at this time. Plaintiff has, however, made sufficient allegations to withstand a dismissal motion that are not irrefutably contradicted by any evidence.

With respect to the 6th cause of action, LLC operating agreements are contracts between the members. Any violation of the provisions may give rise to a breach of contract cause of action.

With respect to the 7th cause of action for an accounting, plaintiffs need only claim there is a fiduciary relationship and wrongdoing by the defendants. They have done so. These factual claims support the elements of a cause of action for an accounting. Hamilton v. Patrolmen's Benevolent Ass'n of the City of New York, 88 NYS2d 683 (Sup Ct., Queens Co. 1949) [citations omitted]. Since AP is the managing member of the LLCs (except Minerva LLC) and the co-trustee of the SP trust, AP is responsible to account to SP.

Thus the 4th, 5th 6th and 7th causes of action withstand pre-answer dismissal.

Plaintiffs' 8th cause of action is for recovery of money damages that SP claims she sustained when 32 West 22nd Street was sold for less than its fair market price. Plaintiff claims that the property was sold for \$6,000,000 but was worth "substantially in excess" of that amount. These factual claims support a cause of action and there is no

basis for a dismissal.

Plaintiffs' 10th cause of action is for damages arising from AP's breach of fiduciary duty to SP. SP claims that the LLCs paid management fees to a corporation, PerlProperties Inc. ("PPI") and PPI failed to distribute her share of those fees to her. Allegations of mismanagement or diversion of assets by an officer or director of a corporation for their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually. Abrams v. Donati, 66 NY2d 951 (1985). Shareholder derivative actions are governed by Business Corporation Law § 626. The statute not only sets forth who has standing to sue, but other necessary steps that must be taken before such an action can be maintained (e.g. demand upon the Board of directors and prior notice). Not only has SP not taken those steps, she is not suing as a shareholder, but in her individual capacity. This cause of action is therefore improperly pled and plaintiffs have failed to state a cause of action against PPI. Defendants' motion to dismiss the 10th cause of action is granted and it is dismissed.

In their 11th cause of action, plaintiffs seek the dissolution of the various LLCs that owned the sold properties, and the two LLCs that still have property to be sold (e.g. 145 Mulberry and 54th Street). Plaintiffs seek the additional relief of the appointment of a receiver to aid in the "winding up" of the LLCs' business affairs. Alternatively, SP seeks to withdraw as a member of the LLCs and to be bought out. To support that cause of action, plaintiff claims that the LLCs of the sold properties have no further business to conduct except winding up and making disbursements of monies owed to SP, therefore they should be formally dissolved. As to the LLCs with unsold property,

plaintiffs allege that she and the other members of the LLC have irreconcilable differences concerning the operation and affairs of the companies.

Preliminarily the court rejects defendants' arguments that the non-operational LLCs have been dissolved. This would require that articles of dissolution be filed with the Department of State. LLCL § 750. There is no proof of such filings. The court also rejects out of hand defendants' argument that the "form" of this request for judicial dissolution is wrong. Nothing in the LLCL requires the "form" urged by defendants.

Substantively, judicial dissolution of a limited liability company, however, will be ordered only where the complaining member can show that "it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement." Schindler v. Niche Media Holdings, LLC, 1 Misc3d 713 (Sup Ct, N.Y. Co. 2003). An individual member has no right to bring a "derivative" action seeking the dissolution of an LLC. LLCL §702; Schindler v. Niche Media Holdings, supra. Any such right belongs to the members individually. The standard for dissolution is whether the LLC is unable to function as intended or else that it is failing financially. Schindler v. Niche Media Holdings, supra. The fact that the members are in conflict is not, in and of itself, a basis for judicial dissolution, particularly where there is a managing member capable of making decisions without stalemate. Spires v. Lighthouse et al., 4 Misc3d 428 (Sup. Ct., N.Y. Co. 2004).

Since plaintiffs allege that some of the LLC's are "shells," holding no property and effectively non-operational, such allegations are enough to show that these LLCs can no longer function as intended. This cause of action for judicial dissolution of non-operational LLCs withstands defendants' motion to dismiss.

The LLCs that hold property and are operational, however, are not entitled to be judicially dissolved simply because SP and AP do not get along. AP as the manager of 145-147 Mulberry Realty Co. LLC can still operate that LLC for its intended purpose⁴. It is unclear who manages the Minerva 54 Realty Co., LLC. AP says she does not. The operating agreement only gives Gerald Shallo to right to manage through 2002. Under these circumstances a claim that the LLC needs to be dissolved because it cannot operate, withstands dismissal.

The 145 Mulberry operating agreement permits withdrawal of a member pursuant to LLCL § 606. Absent agreement to the contrary LLCL § 606 limits withdrawal of a member to the time of dissolution and the winding up of affairs. Since this court has held that, as a matter of law, plaintiffs are not entitled to judicial dissolution of the 145 Mulberry LLC at this time, they are not entitled to alternative relief enforcing SP's rights of withdrawal.

Thus, the cross-motion to dismiss the 11th cause of action is granted to the extent that it seeks any relief relative to 145-147 Mulberry Realty Co., LLC. In all other respects the motion to dismiss is denied.

Plaintiffs' 12th cause of action seeks the termination of the SP trust because there is "deadlock between the Trustees of the Shari Trust" and because there is no "current reason for the continuation of the Shari Trust, and the original purposes of such Trust no longer exist. All of the monies that belong to the Shari Trust should be

⁴145 Mulberry's operating agreement states LLC's purpose to be the broadest possible purpose allowed by law. The other LLC operating agreements are presumably similar in scope.

distributed to Plaintiffs.” A deadlock between trustees is not a basis to dissolve an irrevocable trust. A conclusion that the trust cannot serve its purposes may be. Velez v. Feinstein, 87 AD3d 309 (1st dept. 1982). While the defendants have raised arguments about why this claim will not ultimately succeed (e.g. that the trust serves a legitimate tax savings purpose) it is not a basis to dismiss this cause of action at the pleading stage. In any event, SP seeks alternate relief of the appointment of a successor trustee, which would still survive any denial of a claim to dissolve the trust.

The 13th cause of action seeks to dissolve the Cal Perl trust and have the appropriate assets distributed to the SP trust or to SP individually. The terms of the Cal Perl Trust provide that upon Cal Perl’s death the principal and assets of the Cal Perl trust will be distributed equally to the AP and SP trusts. Calvin Perl died in 2000. Defendants claim that the Cal Perl trust remains open because there are affairs of Calvin Perl’s estate, including the payment of estate taxes, that need to be taken care of before the Cal Perl Trust can be dissolved. Defendants’ position, if proved, may constitute a viable defense to the claim for dissolution. It does not warrant, at this juncture, a dismissal of the cause of action for dissolution of the trust. The cross-motion to dismiss the 13th cause of action is, therefore, denied.

B. Injunctive relief: temporary and permanent

On a motion for a preliminary injunction, the movant must prove the likelihood of ultimate success on the merits, that she will suffer irreparable harm unless the relief is granted, and a balance of the equities in her favor. Paine v. Chriscott v. Blair House Associates, 70 AD2d 571 (1st dept. 1979); Aetna Insur. Co. v. Capasso, 75 NY2d 860 (1990). A preliminary injunction, if granted, is intended to maintain the *status quo* and

prevent the dissipation of property that could render a judgment ineffectual. Moy v. Umeki, 10 AD3d 604 (2nd dept. 2004). "Likelihood of success" need only be shown from the evidence presented; conclusive proof is not required. Thus, even where there are facts in dispute, the court may, in its discretion, order such relief pendente lite to maintain the status quo. Moy v. Umeki, supra at 605.

Plaintiffs factually claim that defendants have proceeded with plans to sell 145 Mulberry without their express written consent; therefore any contract of sale is void or voidable. Plaintiffs further claim that the sale is for less than the fair market price for such property, and defendant Gerald Shallo, the broker on the sale, has a personal relationship with AP. Plaintiffs contend that AP and Shallo have conspired, etc., to make sure he gets the commission from the sale, even if it means the property sells for less than it should. Plaintiffs claim that these actions are a breach of AP's fiduciary duty to the plaintiffs.

In their first motion for injunctive relief, plaintiffs only asked the court for a restraint on the distribution of any proceeds from the sale. At that time, plaintiffs did not oppose the sale of the property to Roncati. (Tr. 9/15/05). After oral argument, the court continued the TRO on the distribution of the proceeds, pending its decision on these motions. Order, Gische J., 9/16/05. Plaintiffs later brought another motion for injunctive relief, but this time seeking a stay on the closing altogether, claiming that the sale of the property for \$8,000,000 was far below its fair market value. The plaintiffs relied upon their own recently obtained appraiser's report, that the property was worth \$15,000,000. Plaintiffs then obtained a second appraisal. The appraiser concluded that the fair market value of 145 Mulberry is even higher (\$16,000,000). They then

obtained yet another (3rd appraisal) estimating the fair market value at \$12,000,000.

In the intervening time, defendants brought their own motion for injunctive relief. Defendants claim that SP and her husband ("Mr. Stamey"), are interfering with the Roncati contract by padlocking the entrance to 145 Mulberry, and obliterated with spray paint the information on a "for sale" sign that is hanging. Defendants aver that since the Roncati contract is "subject to" the zoning change, part of their application to have the property re-classified is to provide the City Planning Commission with proof (among other things) that they have made a "good faith effort" to rent the property for its presently zoned commercial use, but without any success. Thus, defendants allege that plaintiffs' activities will effectively kill the deal they have.

There is little disagreement that the property would be more valuable were it converted to a residential use and reclassified. It is presently, however, an unrenovated commercial loft, classified commercial. Apparently there are also some structural defects in the building and it is not in prime condition. Only the restaurant on the first floor is occupied; the upper floors are vacant.

Even utilizing plaintiff's most conservative appraisal (e.g. by Mr. Haims), it assumes the property could sell for more than \$8,000,000 – provided it is reclassified *and* converted to residential condominium units.

There is no tangible evidence that the Roncati contract is not the product of arms' length negotiations. Though the Roncati contract is subject to a reclassification of the property, it requires no development or construction by the sellers. Thus, while the Haims appraisal is \$4,000,000 higher, it entails far greater efforts and substantial financial contributions (for conversion) by the seller as well.

Even were defendants ultimately found to have engaged in self-dealing, plaintiffs' losses could be compensated by money damages. Sterling Fifth Avenue Assoc. v Carpentille Corp., Inc., 5 AD3d 328 (1st Dept 2004). Plaintiffs are not seeking to keep ownership in the real estate. They agree it should be sold. Thus, while plaintiffs argue the property is unique, this is not a compelling argument to stay the sale.

Plaintiffs have not sustained their burden on these preliminary injunction motions, to show they have a likelihood of success on the merits. They have also failed to show that SP will suffer irreparable harm unless the sale of Mulberry Street is stayed. Paine v. Chriscott v. Blair House Associates, *supra*; Aetna Insur. Co. v. Capasso, *supra*. Plaintiffs interest, if any, can be compensated with money damages.

The court also denies plaintiff's request that the proceeds of the sale of 145 Mulberry be held in escrow. This relief is really tantamount to a prejudgment attachment, since approximately 47% of the proceeds belong beneficially to AP. Another 6% belongs to the Bridget Trust and Mrs. Perl. SP has not provided a legal basis to tie up the assets of AP, the Bridget Trust and Mrs. Perl while this action is pending. Attachment is drastic provisional relief which requires proof that defendants intend to frustrate the enforcement of any judgment that may be rendered in their favor. Abacus Federal Savings Bank v. Lim, 8 AD3d 12 (1st dept. 2004). That standard has not been met by plaintiffs on this record.

Both of plaintiffs' motion for temporary injunctive relief are, therefore, denied for the reasons stated.

Defendants have made a *prima facie* showing that SP and Mr. Stamey's continued interference with defendants' efforts to rent the property for its commercial

use will not only undermine the pending application with the City Planning Commission to reclassify the property. It will consequently jeopardize the Roncati contract, possibly subjecting the 145-147 Mulberry Realty Co., LLC to certain default penalties thereunder. Mr. Rosen acknowledges that SP and her husband defaced the sign, but that they did so out of "extreme frustration." He also admits they padlocked the entrance doors, but claim this was to secure the premises. Regardless of motivation, these actions were self-help measures that cannot continue. Accordingly, defendants' motion for injunctive relief, preventing, enjoining and restraining plaintiffs and Mr. Stamey, and their agents from defacing signs at the building, padlocking the doors, or otherwise interfering with the management of the 145 Mulberry property, is hereby granted, pending the final resolution of this case, or further court order.

C. Right to Inspect Books and Records

Plaintiffs seek an order compelling defendants to let them inspect the books and records of the defendant LLCs. Section 7.2 of the LLCs operating agreements and LLCL § 1102 allow for the inspection of these books and records by company members. SP is a member of some of these LLCs in her personal capacity. She is also a member of some of them in her capacity as co-trustee of the SP trust. In either event she is entitled to inspect these books and records.

Defendants opposes the motion for a number of reasons. First, they claim that AP is not the manager of Minerva 54 Realty Co., LLC., therefore the motion is improperly brought against her. AP further argues that SP never asked to inspect these records. She argues that even assuming SP did ask, SP conducted herself so "badly" with respect to the marketing of 145 Mulberry (spray painting a sign, etc.), SP should

not be allowed to examine the records to insulate the 145 Mulberry LLC from any further harm.

None of these arguments defeat plaintiffs' motion for inspection of the books and records of the LLCs. Moreover, although AP argues that SP has to personally (physically) inspect these records herself, there is no legal authority supporting that argument. Thus, while the court has held that Mr. Rosen need not be named as a plaintiff in his attorney in fact status, this does not preclude SP from designating him as her representative to examine records on her behalf. Although AP may not be the "Manager" of Minerva 54th Realty Co., LLC to the extent she has access to and/or controls the books and records of such LLC, she is to give plaintiffs access to those records as well.

Conclusion

In accordance with the foregoing it is hereby:

ORDERED that plaintiffs' motion sequence 001 and for a preliminary injunction is denied in its entirety; and it is further

ORDERED that defendants' motion sequence 002 for a preliminary injunction is granted; Plaintiffs, and others acting on plaintiffs' behalf are hereby enjoined from physically interfering with defendants' efforts to market and sell the 145 Mulberry property; and it is further

ORDERED that plaintiffs' motion sequence # 3 which, seeks access to the books and records of the LLCs in which SP has an individual or beneficial interest, is granted and such books and records shall be made available at the location at which they are

maintained in the regular course of business on **January 9, 2006** beginning at **10:00 a.m.**, unless the parties mutually consent, in writing, to other arrangements regarding the time and place of such production; and it is further

ORDERED that plaintiffs' motion sequence 004, which seeks a further preliminary injunction against the sale of 145 Mulberry Street, is denied in its entirety; and it is further

ORDERED that defendant's motion to dismiss is granted only to the extent that Stephen H. Rosen is dismissed as a named plaintiff, the 4th and 5th causes of action are limited to actions taken only within the three year period preceding the commencement of this action, the 10th cause of action is dismissed in its entirety and the 11th cause of action is dismissed only insofar as it seeks dissolution of 145-147 Mulberry Realty Co., LLC. In all other respects the motion to dismiss is denied, and it further

ORDERED that Mrs. Rebecca Perl and The Bridget Hannah Herman Minority Trust are hereby determined to be necessary parties and that plaintiff shall proceed to join them in this action in the manner provided for in this decision/order.

Any relief not expressly addressed herein has nonetheless been considered by the court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
December 23, 2005

So Ordered

HON. JUDITH J. GISCHE, J.S.C.

FILED
JAN 04 2006
NEW YORK
COUNTY CLERK'S OFFICE