

Benishai v Benishai

2005 NY Slip Op 30406(U)

February 25, 2005

Supreme Court, New York County

Docket Number: 113840/04

Judge: Herman Cahn

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

PRESENT: ROBERTAN CAHN

PART 49

0113840/2004

BELLA BENISHAI BY
vs
BENISHAI, DAVID

DEX NO. _____

OTION DATE _____

SEQ 2

OTION SEQ. NO. _____

DISMISS ACTION

OTION CAL. NO. _____

The following papers, numbered _____ motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE

FILED
FEB 28 2005
NEW YORK
COUNTY CLERK'S OFFICE

Dated: Arsl of

Robertan Cahn
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X
BELLA BENISHAI by JACK BENISHAI, :
her Attorney in Fact, :
 :
 Plaintiff, :
 :
 - against - :
 :
 DAVID BENISHAI, :
 :
 Defendant. :
-----X

Index No. 113840/04

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

Herman Cahn, J.

Defendant moves (seq. no. 2) to dismiss the complaint on grounds of lack of subject matter jurisdiction and plaintiff's capacity to sue, another action pending, collateral estoppel, statute of limitations, and failure to state a claim, CPLR 3211 (a) (2)-(5), (7). Plaintiff cross-moves for leave to amend the complaint to assert additional claims, CPLR 3025 (b).

The Action:

Plaintiff Bella Benishai, and her son, defendant David Benishai, each own 50% of Ilan Properties, Inc., a corporation which owns and operates residential real property, including 250-52 West 76th Street, and 202 West 102nd Street, in Manhattan.

The first cause of action, cast as one for conversion, alleges that defendant wrongfully withdrew corporate assets and mortgaged corporate real estate for his own benefit. It is alleged that defendant drew checks on corporate accounts, payable to himself or his creditors, and that he has failed to pay use and occupancy for personal use of an apartment at the West 76th Street building, owned by the corporation.

The second cause of action is cast as one for breach of fiduciary duty and



“mismanagement.” Specifically, it is alleged that defendant oversaw “an alleged major capital improvement, which was done improperly” It is further alleged that he failed to pay rent stabilization fees to the City of New York, offered unauthorized rent discounts to a personal friend at the West 76th Street building, ignored Fire Department violation warnings, and allowed the properties to fall into a state of disrepair. He is alleged to have failed to pay corporate franchise taxes, and that he allowed DHCR rent overcharges and elevator violation penalties to accrue. This cause of action further alleges that defendant caused the West 102nd Street building to be lost in foreclosure.

The complaint demands damages in excess of \$1,000,000.00, “plus interest from the year 1987.” That year is identified as the year when defendant first became a shareholder and began to manage the properties.

Plaintiff is ninety years of age (*see*, Epstein Aff. Ex. A at 11).

The Prior Proceeding:

In January 2000, plaintiff commenced a shareholder special proceeding to compel defendant to grant her access to the corporate books and records. The petition (Notice of Motion Ex. B) alleged that plaintiff, while living overseas, had entrusted the management of the buildings to her son, the defendant; but that she returned to ascertain why this formerly prosperous family business had been declining. The petition noted the foreclosure of the West 102nd Street building, and alleged that defendant was the only shareholder to have received any proceeds from that building.

The petition noted defendant’s alleged use of corporate funds for his own purpose, providing a table of checks drawn by him against the corporate account from 1990 through 1992,

payable either to himself or related payees. It was further alleged that defendant failed to respond to plaintiff's demands for access to the books and records and for compliance with corporate formalities, such as the holding of shareholders' meetings.

Significantly, the petition made clear that its allegations of wrongdoing on defendant's part were constrained by defendant's failure to provide documentation and were, thus, based "upon information and belief" (Petition ¶ 11) and that only full and free access to the books and records could substantiate those beliefs and possibly uncover additional acts of malfeasance by defendant (*id.*; *see also, id.* ¶¶ 16 [C], 19 [alleging defendant's failure to provide plaintiff with balance sheets and profit and loss statements], 24 [alleging defendant's failure to provide plaintiff access to the books and records], 28 [alleging plaintiff's inability to ascertain the extent of the suspected wrongdoing]). The petition alleged that plaintiff's inquiries about the decline in profits were routinely met by defendant's unsubstantiated assertion that the cause was solely due to a general decline in New York's real estate market (*id.* ¶ 6).

The petition demanded the right to inspect the books and records of Ilan Properties, Inc., pursuant to the BCL, and a temporary restraining order to prohibit defendant from paying out further monies from the corporation. No plenary demand for damages under any substantive cause of action was made. The court (Wetzel, J.) granted a temporary restraining order on January 12, 2000, and referred the matter for further proceedings to a referee to hear and report, after defendant moved to dismiss on the ground that plaintiff was no longer a shareholder.

Evidentiary hearings were conducted before Special Referee Marilyn B. Dershowitz (Epstein Aff. Ex. A). She reported, based on the evidence, that defendant kept plaintiff in the dark as to the operations of the corporation, and that he conducted all negotiations

and executed all documents on its behalf (*id.* at 6-7). She further found that:

On August 10, 1990, he signed documents as President of Ilan and owner of 252 West 76th Street whereby he secured the mortgage on the property in the amount of \$2.4 million from Greater New York Bank. In May, 1992 he entered into a modification agreement with Greater New York and signed the name of his mother to the document, not as Attorney in Fact. The defendant claimed quite incredibly that he had the General Power of Attorney with him but that he signed her name anyway in front of the bank representative, with their knowledge.

(*Id.* at 7.)

The referee further reported that defendant unilaterally filed a bankruptcy petition on Ilan's behalf, listing himself and one, Hanna Hendler, as its only shareholders (Epstein Aff. Ex. A at 8). No notice of the bankruptcy proceedings was ever provided to plaintiff (*id.*). The referee observed that "[i]t became pretty clear that Mr. David Benishai treated the corporation like his personal property" (*id.* at 10). She further noted plaintiff's testimony that "David thwarted her efforts to see the corporate books" (*id.* at 11). Plaintiff testified that only after she returned to the United States in 1999 did she learn that defendant had encumbered the property and forged her name (*id.* at 12). Although she had always received corporate proceeds in the past, she received nothing under defendant's management (*id.*).

The referee reported that plaintiff was a fifty percent shareholder of Ilan, having never transferred her interest, contrary to defendant's assertions on his motion to dismiss (Epstein Aff. Ex. A at 13). Her report was confirmed by the court (Wetzel, J.) on August 2, 2000, at which time an independent managing agent was appointed to replace defendant in the day-to-day management of the properties. The decision was affirmed by the Appellate Division on March 13, 2003, which acknowledged that the purpose of the underlying proceeding was for "inspection of corporate books and records" (*Benishai v Benishai*, 303 AD2d 226, 226 [1st Dept

2003)).

The Instant Motion to Dismiss:

Defendant asserts that plaintiff is collaterally estopped from bringing this action by virtue of her failure to assert her plenary claims within the context of the prior special proceeding. He further asserts that the action is time barred under what he argues is a three-year statute of limitations for breach of fiduciary duty, and that the claims are not sufficiently pleaded under CPLR 3016 (b). He similarly asserts that the claim cast as conversion is time barred under its three-year statute (CPLR 214 [3]).

Additionally, defendant asserts that the claims are derivative in nature, and that plaintiff has neither brought them in that capacity, nor pleaded any demand from the board of directors to bring them pursuant to BCL 626 (c).

Defendant finally asserts that his brother, Jack Benishai, lacks the capacity to sue on plaintiff's behalf by virtue of an alleged Israeli court order barring him from acting as her attorney in fact.

Collateral Estoppel:

"Once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]).

As the Appellate Division observed in its affirmance of Justice Wetzel's order confirming the special referee's report, the prior proceeding was a narrowly tailored special proceeding under the BCL to compel shareholder access to corporate books and records, and to seek temporary injunctive relief in facilitation thereof. It was not, by any means, a final

conclusion on any substantive "claim" by plaintiff. Indeed, as the petition alleged throughout, plaintiff required the books and records in order to ascertain the very existence and extent of the wrongdoing alleged in this plenary action. In truth, the prior proceeding was nothing more than a discovery proceeding, to which shareholders are statutorily entitled (BCL 624) irrespective of the existence of a substantive claim that may or may not be discovered upon inspection.

It is true that the proceedings before the special referee apparently uncovered facts which may also be of relevance to plaintiff's substantive claims herein, such as defendant's unilateral actions purportedly taken on behalf of the corporation, without plaintiff's knowledge or consent. However, those facts were adduced for the limited purpose of refuting defendant's assertions that plaintiff had consciously abandoned her shareholder standing, which includes the right of inspection underlying the proceeding (*see*, Epstein Aff. Ex. A, *passim*). As the special referee noted, plaintiff "became angry and anguished" at learning of defendant's usurpation of the corporate governance, which she never abdicated (*id.* at 12-13). Plaintiff cannot be estopped here because the broader issues material to this plenary action go beyond the limited issue of her shareholder status, and were, thus, not "necessarily decided" in the prior proceeding (*Bansbach v Zinn*, 1 NY3d 1, 10 [2003], *rearg denied* 1 NY3d 593 [2004]).

The motion to dismiss on the ground of collateral estoppel is denied.

Statute of Limitations/Specificity of Pleading:

This action was commenced on September 28, 2004. Defendant asserts that claims for alleged breach of fiduciary duty are subject to a three year statute of limitations, citing *Yatter v William Morris Agency* (256 AD2d 260 [1st Dept 1998]). Therefore, while the complaint seeks redress for actions taken during defendant's management, commencing in 1987, defendant

contends that only those activities occurring after September 28, 2001, are potentially actionable.

Yatter v William Morris Agency, supra, is inapposite. That case involved the alleged undervaluation by a corporation of a departing shareholder's stock for purposes of repurchase. As it involved an alleged injury to the plaintiff's property (CPLR 214 [4]), i.e., his stock, and did not involve fraud, the court applied the otherwise general rule that breach of fiduciary duty is actionable for three years when seeking damages and six years when seeking equitable relief (*Yatter*, 256 AD2d at 261). Here, on the other hand, plaintiff alleges that defendant breached his fiduciary duties by defrauding her as to the causes for the decline in corporate profits; concealing his alleged diversion of assets, forgery, unauthorized mortgages, and other *ultra vires* actions. Under such circumstances, a six year statute of limitations accrues from the date of the breach, or two years from its reasonable discovery (*Kaufman v Cohen*, 307 AD2d 113 [1st Dept 2003]).

Therefore, alleged activities occurring six years before the filing of this action, i.e., from September 28, 1998, and on, are actionable. Thus, any conduct which occurred prior to September 28, 1998, is not actionable where a six year statute applies.

Defendant's challenge to the specificity of the fiduciary breach allegations is similarly without merit. Because the claim does implicate fraud, as discussed, the pleading requirements of CPLR 3016 (b) apply (*Kaufman, supra*). However, plaintiff has satisfied this requirement by supplying "sufficient detail to inform defendants of the substance of the claims" (*Bernstein v Kelso & Co., Inc.*, 231 AD2d 314, 320 [1st Dept 1997]).

Accordingly, the motions to dismiss the fiduciary breach claims on statute of limitations and pleading grounds are denied, to the extent herein set forth.

The statute of limitations for conversion is three years (CPLR 214 [3]). Insofar as plaintiff's conversion claim is asserted as against defendant's alleged diversion of assets pre-dating September 28, 2001, the motion to dismiss this claim is granted. This does not preclude plaintiff from pursuing her claims against such activity under other, concurrent, theories (*Greenberg v Greenberg*, 206 AD2d 963 [4th Dept 1994]).

Derivative Capacity:

Claims relating to diversion of corporate assets cannot form the basis of individual claims, as they are wrongs to the corporation *per se*, and must be brought derivatively (*Abrams v Donati*, 66 NY2d 951 [1985], *rearg denied* 67 NY2d 758 [1986]). Plaintiff has not done so, nor has she pleaded the prerequisite demand "or the reasons for not making such effort" (BCL 626 [c]; *Bansbach, supra*). Accordingly, the motion to dismiss such claims is granted, with leave to replead.

On the other hand, plaintiff's claims relating to alleged efforts by defendant to exclude her from the corporate governance and his forgery of her name are individual to her, because such acts constitute breach of fiduciary duties owed by shareholders to each other in a close corporation (*Richbell Information Servs., Inc. v Jupiter Partners, L.P.*, 309 AD2d 288 [1st Dept 2003]). The motion to dismiss those claims on derivative capacity grounds is denied.

Lack of Capacity to Sue:

Defendant submits a certified translation of a decision and order of the Family Court of the State of Israel, District of Tel Aviv (Varda Platt, J.), in a proceeding entitled *Geula*

Lazar v Bella Ben Ishay.¹ It appears to have been a competency proceeding, commenced by plaintiff's daughter for the purpose of protecting plaintiff's property, which is acknowledged to be substantially present in this country (Notice of Motion Ex. C at 4). The decision recites that "Jacob Ben Yishay," presumably Jack Benishai suing herein as attorney in fact, "attacked the Mother and exercised against her physical violence" (*id.* at 3). It further recites that "Jacob has petitioned to declare his mother incompetent to serve as President of the family Company but his request was denied" (*id.*). Finally, the order provides, *inter alia*, that "Jacob Ben Yishay" is forbidden:

to do any act of any kind and type in the Assets and the Rights (including Shares) belonging to Mrs. Bella Ben Ishay, including an Order, forbidding him the use of a Power of Attorney, signed by Mrs. Bella Ben Ishay and which Respondent [i.e., Jacob Ben Yishay] presently attempts to act through it, in order to transfer on his name Shares owned by her.

(*Id.* at 2.)²

Defendant submits that Jack Benishai lacks the capacity to bring this lawsuit on plaintiff's behalf by virtue of the foregoing decision and order of the Israeli court.

Plaintiff's counsel responds by submitting a copy of a notarized opinion letter from Israeli co-counsel, Amnon Ben Dror, Esq. (Epstein Aff. Ex. L). The letter says nothing about the particular facts and circumstances underlying the Israeli court order; but rather, provides a generic opinion as to the limits on judicial power concerning what he terms "Antisuit

¹ Geula Lazar is identified as plaintiff's daughter and defendant's sister (Complaint at 1).

² A copy of the referenced power of attorney, dated, signed, and acknowledged on December 2, 1999, is Exhibit E to the Epstein Affirmation. It is in the form of a New York Durable General Power of Attorney, and purports to grant Jack Benishai, and, in case of his incapacitation, accountant Richard Kaput, broad power to act on Bella Benishai's behalf.

injunction[s]” (*id.* at 2).

Under the doctrine of judicial comity, our courts are bound to recognize the judgments of foreign states absent a showing of fraud in the procurement thereof or an offense to our own public policy (*Greschler v Greschler*, 51 NY2d 368 [1980]). Our courts have consistently honored the orders of Israeli courts under that standard (*e.g.*, *Schwartz v Schwartz*, 251 AD2d 648 [2d Dept 1998]). Plaintiff has made no showing that the order in question was procured fraudulently, or is offensive to the public policies of this state, especially in light of the Israeli court’s finding of physical violence perpetrated by Jack Benishai against his mother, plaintiff Bella Benishai. Neither has plaintiff’s counsel cross-moved for the appointment of a guardian *ad litem* to serve the interests of his client Bella Benishai.

Accordingly, the motion to dismiss the complaint on the ground of lack of capacity to sue is granted.

Cross-Motion to Amend:

Plaintiff cross-moves for leave to amend the complaint to include a cause of action for fraud, submitting a proposed amended complaint. CPLR 3025 (b) provides that such “leave shall be freely given upon such terms as may be just.” In addition, plaintiff may amend her pleading as of right under CPLR 3025 (a) because she is still in a pre-answer posture due to the instant motion to dismiss, which has extended defendant’s time to answer (*e.g.*, *Siegel*, *New York Practice*, § 236, at 377 [3d ed 1999]).³

³ The court adheres to the instruction of the Appellate Division in *Sage Realty Corp. v Proskauer Rose LLP* (251 AD2d 35 [1st Dept 1998]) which resolved a conflict among the IAS courts by holding that a court should determine a motion to dismiss within the context of the complaint to which it was addressed, without regard to a subsequent amended complaint which may have corrected defects uncovered by the motion.

However, in view of the dismissal of the complaint on the grounds of lack of capacity, as hereinabove recited, the cross-motion to amend is denied. In the event plaintiff seeks to reinstate the action individually or by other representative, leave is granted to renew the cross-motion.

Dated: February 25, 2005

ENTER :



J. S. C.

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