

Bookhamer v I. Karten-Bermaha Textiles, Co., L.L.C.
2007 NY Slip Op 30555(U)
March 29, 2007
Supreme Court, New York County
Docket Number: 0603008/2005
Judge: Herman Cahn
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HERMAN CAHN**

PART 49

Index Number : 603008/2005
BOOKHAMER, BERNICE

vs
I.KARTEN-BERMAHA

INDEX NO. _____

MOTION DATE 3/6/06

Sequence Number : 001

MOTION SEQ. NO. 001

PARTIAL SUMMARY JUDGMENT

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this 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

FILED
APR 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3/29/06 Herman Cahn

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE [* 1]

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

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

-----X
BERNICE BOOKHAMER and
MARCIA TOLEDANO in their Capacity as
Executors of the estate of Julia Karten,

Plaintiffs,

-against-

Index No. 603008/05

I. KARTEN - BERMAHA TEXTILES, CO.,
L.L.C.,

and

HAROLD KARTEN,

Defendants.

CAHN, J.

FILED
APR 05 2007
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Plaintiffs move for partial summary judgment. Defendants cross-move to remove this action to the Surrogates Court of Rockland County.

Plaintiffs Bernice Bookhamer and Marcia Toledano are sisters, and the executrixes of the estate of Julia Karten, their mother, who passed away in 2002. The individual defendant, Harold Karten (H. Karten), is plaintiffs' brother.

The complaint alleges three causes of action: breach of statutory duty; breach of fiduciary duty; and for an accounting.

Plaintiffs claim that H. Karten breached his fiduciary duty to the estate of Julia Karten. They have also joined as a defendant I. Karten-Bermaha Textiles Co., LLC (Bermaha), the limited liability company owned by the parents of the plaintiffs before their deaths. Plaintiffs complain of unequal distributions to H. Karten from his capital account at Bermaha, after H.

Karten inherited their father's interest in Bermaha.

Plaintiffs submitted a Statement of Undisputed Facts, pursuant to Local Rule 19-a of the Consolidated Rules of the Commercial Division, which was largely undisputed by defendants and states in relevant part: In February 1995, the individual parties' parents converted the partnership, in which they had equal shares, into a limited liability company, known as Bermaha. During their lifetimes, the parents, Isidore and Julia Karten, were members in Bermaha. Bermaha is and was active in the apparel industry. From 1995 through 1998, Isidore and Julia Karten were paid substantially equal capital account distributions.

Isidore Karten died in 1999. His will was admitted to probate in Rockland County Surrogate's Court. He bequeathed his 50% interest in Bermaha, valued at approximately \$3.5 million for estate tax purposes, to his son, defendant H. Karten. Thus, H. Karten inherited Isidore's full membership interest in Bermaha and has managed it since that time.

As also directed by Isidore Karten's will, in 2003, Bookhamer and Toledano each inherited approximately \$3.5 million, an amount approximately equal to the value of Isidore Karten's 50% interest in Bermaha at the time of his death.

Bookhamer, Toledano and H. Karten are the three residuary beneficiaries of the estate of their mother, Julia Karten, who died on October 5, 2002. Letters testamentary were issued to Bookhamer and Toledano. Pursuant to Julia Karten's will, plaintiffs and H. Karten were each to receive an equal share of Julia Karten's residuary estate.

Plaintiffs claim that, despite this provision, and despite the fact that H. Karten and Julia Karten held equal shares in Bermaha, between April 1999 and October 2002, H. Karten received approximately \$1.75 million in capital account distributions from Bermaha, while Julia Karten

received only \$853,000.

Defendants cross-move to transfer the action to Rockland County Surrogate's Court, or, in the alternative, for partial summary judgment.

In support of his cross-motion for partial summary judgment, H. Karten states that prior to his mother's death in 2002, he and his mother each owned 50% of the outstanding units in Bermaha; Bermaha's accountant had advised him that since Bermaha was first started, all cash distributions, whether in the form of compensation or distributions to his parents in their capacity as members, were charged to their respective capital accounts; after his father's death, Bermaha continued to classify distributions in the same manner that they had been classified prior to his death; the accountant further advised H. Karten that this classification system was permissible so long as the members agreed to such treatment.

H. Karten argues that plaintiffs' objections to a distribution to him of \$893,507 over what Julia Karten received, is unfounded, since this amount actually represented compensation for services rendered, which had been charged to his capital account.

H. Karten avers that after becoming aware of plaintiffs' objections to the charges to his capital account, he instructed Bermaha's accountant to reclassify these entries in the company's books and records. He also decided to return \$336,443.50 to Bermaha for the years 1999-2001, which sum has been distributed by Bermaha to the Julia Karten's estate in order to "equalize" the distributions to the estate for these years, without prejudice to H. Karten's claim for reasonable compensation.

Further, he claims that \$220,620, charged to capital account for the year 2002, also represents compensation due to him. However, he has advised the accountant to amend

Bermaha's books and records to reclassify this amount as a "guaranteed payment," to reverse the charge of said sum against his capital account and to file an amended tax return for the year 2002 reflecting such changes.

~~H. Karten summarily denies that he breached his fiduciary duty to plaintiffs.~~

Finally, defendants state that there is presently an accounting proceeding for Julia Karten's estate pending in Rockland County Surrogate's Court, and seeks to have this action transferred to that court.

Motion to Transfer Action:

The defendants' request to transfer this action to Rockland County Surrogate's Court raises a threshold issue.

Defendants argues that this case should be transferred in the interests of judicial economy, citing *Benjamin v Morgan Guaranty Trust Company of New York*, (173 AD2d 373 [1st Dept 1991]). Conceding that the Supreme Court has concurrent jurisdiction with the Surrogate's Court, defendants asserts that jurisdiction should lie in the court in which the action was first commenced, citing *Burmax Co. v B & S Industries*, (135 AD2d 599 [2nd Dept 1987]).


Defendants state that: a probate proceeding was commenced in Rockland County prior to the commencement of this proceeding; in August 2005, a probate decree admitting Julia Karten's will to probate was issued in November 2005; and an accounting proceeding is currently pending in Rockland County Surrogate's Court.

Courts have looked to a variety of factors to determine whether a transfer from Supreme to Surrogate's Court is appropriate, among them: whether the Surrogate is "uniquely suited" to handle the dispute (*Rosenman & Colin v Winston*, 205 AD2d 451 [1st Dept 1994]) where an

ORDERED that the motion and cross-motion are denied.

Dated: March 29, 2007

ENTER:



J.S.C.

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