

**Von Richthofen v Family M. Found. Ltd.**

2007 NY Slip Op 31317(U)

May 21, 2007

Supreme Court, New York County

Docket Number: 0602326/2004

Judge: Bernard J. Fried

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

PRESENT: **BERNARD J. FRIED**  
**J.B.C.**  
Justice

**FBEM** PART 60

Index Number : 602326/2004  
/ON RICHTHOFEN, JANE  
S  
FAMILY M. FOUNDATION LTD  
Sequence Number : 005  
LEAVE TO INTERVENE

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

is 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

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

**FILED**  
MAY 22 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 5/21/07 1 Bernard J. Fried

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 60

----- X

JANE VON RICHTHOFEN,

Index No. 602326/04

Plaintiff,

- against -

FAMILY M FOUNDATION LTD. and  
ELIZABETH MANUS a/k/a LIBBY MANUS,

Defendants.

----- X

**APPEARANCES:**

For Plaintiff:

For Proposed Intervenor:

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and

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(Adam M. Shonson)

**FILED**  
MAY 22 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**FRIED, J.:**

Non-party Raymond Kalley, as Trustee of the "EB Trust" and "PB Trust," moves for an order permitting him to intervene in this action as an interested party.

Plaintiff Jane von Richthofen (Jane) cross-moves for an order dismissing defendants' counterclaim as moot, with leave to restore in the event that her claims – presently on appeal to the Appellate Division, First Department – are restored and remanded to this court.

For the reasons that follow, the motion is granted and the cross motion is denied.

The facts and issues underlying this action are set forth in a prior decision in this action, dated June 16, 2006 (Prior Decision). Summarized, defendant Family M Foundation Ltd. (Foundation) is an investment company formed in 1992 pursuant to the laws of the Cayman Islands. The three stock certificates that were initially issued to its incorporators were subsequently transferred to defendant Elizabeth Manus a/k/a Libby Manus (Libby), Jane, and non-party Ellen Sue Goldberg (Ellen Sue), a niece of Allen Manus (Allen), who was a director and the Foundation's Chairman, until his resignation from that position in 1993, at which time he became the Foundation's manager, a position that he held until his death in 2003. Jane is Allen's daughter from his first wife, Adele Rogers. Defendant in a related action, Ninotchka Manus (Ninotchka), was Allen's second wife. Libby was Allen's third and surviving wife. Ellen Sue is Libby's step niece.

Libby claims to own 100% of the Foundation, in that, in 2001, allegedly Jane and Ellen Sue tendered back their shares in the Foundation, whereas Libby retained all of her interests in the Foundation. According to Jane, from the Foundation's inception, she, Libby, and Ellen Sue each owned an equal one-third share of the Foundation until July 8, 2004, at which time Ellen Sue sold her interest in the Foundation to Jane. Hence, Jane contends that she presently owns two-thirds, and Libby owns one-third, of the Foundation's outstanding stock.

Jane commenced this action seeking, in the complaint's first cause of action, a declaration to that effect, and an order (1) directing the Foundation and Libby to deliver to her stock certificates representing two-thirds of the Foundation's issued and outstanding

shares, and (2) directing the Foundation and Libby to recognize her share ownership, and to treat her accordingly, and provide her with all shareholder rights to the Foundation. The second cause of action seeks injunctive relief, enjoining Libby and the Foundation from taking any action in derogation of Jane's alleged two-third interest in the Foundation.

The answer contains one counterclaim, which seeks a declaration that Libby is the sole owner, shareholder, officer, and director of the Foundation.

In the Prior Decision, I concluded that Jane and Ellen Sue had transferred their ownership interests in the Foundation, but it was unclear as to who became, and is, the present owner of those interests. On the prior motion, the record contained evidence of testimony by Jane that she had transferred her shares to Allen, but the record did not contain any evidence as to the legal disposition of that interest upon the death of Allen in 2003. The same is true as to Ellen Sue's disposition of shares. Thus, although defendants were entitled to judgment dismissing the complaint, they had not demonstrated entitlement to a declaration that Libby owned 100% of the Foundation. I also denied the motion by non-party Ninotchka for an order substituting her as plaintiff in this action.

In a related action, that also had been pending before me, entitled *Family M Foundation Ltd. v Ninotchka Manus*, Index No. 605207/98, the plaintiff therein (the Foundation) prevailed on its claim that Ninotchka and Ninam International Ltd. S.A., a company that Ninotchka owns, defaulted under the terms of a stipulation of settlement, because they failed to satisfy a \$400,000 loan repayment obligation to the Foundation, thereby entitling the Foundation to enforcement of the terms of the stipulation of settlement.

Kalley bases his motion to intervene upon his assertion that he has obtained Libby's entire interest in the Foundation. Specifically, he alleges as follows: he is the Trustee of the EB Trust and PB Trust, which are investment vehicles for Egil and Pauline Braathen, set up to facilitate investments with Allen. In 1995, Allen made fraudulent misrepresentations that induced the Braathens to purchase worthless stock for \$1.075 million. Kalley, on the trusts' behalf, sued Allen and his spouse at the time, Libby, for securities fraud, in the United States District Court for the Southern District of Florida (96-07809-CIV), which resulted in the entry of a final judgment in his favor and against Allen and Libby in the principal amount of \$1.075 million, plus post-judgment interest.

Kalley asserts further that, following extensive, unsuccessful collection efforts, the parties thereto entered into a settlement agreement whereby Kalley and certain third parties agreed to place various real and personal properties into escrow for a set time period, during which time Allen could sell or mortgage the assets. Unless Allen paid the escrow agent \$2 million on or before the "Termination Date" (December 15, 2000), the various properties would transfer to Kalley. On that same day, Libby filed a voluntary Chapter 11 petition in United States Bankruptcy Court for the Southern District of Florida (eventually converted into a Chapter 7 proceeding). Included on a schedule of assets that Libby filed with the Bankruptcy Court was a 33% percent interest in the Foundation. Following the appointment of a Chapter 7 trustee, the parties executed a stipulated order pursuant to which Libby's interest in the Foundation was transferred to Kalley.

Kalley contends that Libby falsely represented in this action (on the prior motion) that she was the sole shareholder, officer, director of the Foundation, when, in fact, her interest

was transferred to Kalley, as trustee. Thus, he argues, he must be permitted to intervene to protect his interests against her misstatements.

Defendants (the Foundation and Libby) do not object to Kalley's intervention motion insofar as he claims to have a one-third interest in the Foundation (assuming the truthfulness of Kalley's representations). Defendants reject, however, Kalley's representation that Libby has no interest in the Foundation, and they note that I have not yet ruled on the issue of the ultimate beneficiary of the two-thirds interest in the Foundation that Jane and Ellen Sue conveyed to Allen. They also contend that the stipulated order could not have transferred the two-third interest to Kalley, because Libby had not owned that asset at the time of her bankruptcy filing.

In her opposition to the motion for intervention, Jane argues that there is no basis to intervene unless her appeal of the Prior Decision is successful. She reasons that according to the Prior Decision, the two-third interest in the Foundation was surrendered to Allen, not Libby. Thus, for Kalley to press his claim to the two-third's interest as property of Libby, I would have to decide the very issue that I previously declined to decide, namely, what happened to Allen's property upon his death. This assertion is unpersuasive.

CPLR 1012 (a) (3) provides for intervention as of right:

“when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person *may be affected* adversely by the judgment” (emphasis added).

This is the situation presented here. Intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings (*Sieger v Sieger*, 297 AD2d 33 [2d Dept 2002], *lv dismissed* 99 NY2d 651 [2003]). Contrary to Jane's

argument, permitting intervention would not be tantamount to deciding the legal status of Allen's property upon his death. Pursuant to the express language of the statute, Kalley need show only that his interest *may* be affected adversely by a judgment, not that it will, indeed, be affected adversely by a judgment.

Moreover, based on the Prior Decision, Jane no longer has any interest in this action. In contrast, the parties that do continue to have an interest in this action – Libby and the Foundation – do not oppose intervention.

Jane's cross motion for dismissal of defendants' counterclaim as moot, with leave to restore, is denied. As a result of the intervention, the issue raised by the counterclaim – which seeks a declaration that Libby is the sole owner, shareholder, officer, and director of the Foundation – is not moot.

Jane argues that intervention should be denied for the additional reason that introducing Kalley into this action would neither bring Allen's estate before this court, nor render it any more appropriate for me to dispose of the assets of a Canadian citizen who died in Florida. Irrespective of the merits of this argument (and it appears to have some merit), whether the issues regarding Allen's estate can be resolved is not now at issue, and, even if it were, as discussed above, Jane has not established any basis upon which she has standing to make this assertion in that she owns no shares in the Foundation (*see Matter of Brown*, 295 AD2d 127 [1<sup>st</sup> Dept 2002] [executor of estate has standing to bring proceeding to dissolve corporation of which the estate is a shareholder]).

Jane argues that the Appellate Division and the bankruptcy court should resolve all issues of claims and counterclaims concerning the Foundation, Kalley, Libby, and Ninotchka.

However, after Ninotchka removed this action (as related to her bankruptcy proceeding), pursuant to 28 USC § 1452 (a), the United States District Court for the Southern District of New York (05 CIV 3786 [NRB]) granted defendants' motion for remand, stating that my resolution of the dispute will not interfere with the proceeding pending in the bankruptcy court (Memorandum and Order, dated September 9, 2005, at 9, at Exhibit D to Reply Affirmation of Vivian Drohan, Esq.).

Accordingly, it is

ORDERED that the motion by non-party Raymond Kalley, as Trustee of the EB Trust and PB Trust, for an order permitting him to intervene in this action as an interested party, is granted, and the caption shall be amended accordingly; and it is further

ORDERED that the cross motion by plaintiff Jane von Richthofen, for dismissal of defendants' counterclaim as moot, with leave to restore such counterclaim in the event that plaintiff's claims, currently on appeal to the Appellate Division, First Department, are restored and remanded to this court, is denied.

Dated: 5/21/07

ENTER:

*B. J. Fried*  
J.S.C.

**BERNARD J. FRIED**  
**J.S.C.**

**FILED**  
MAY 22 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

### Electronically Filed Motion

SEQ#:	005
CCIS Entry Date:	11/17/06
Initial:	<i>CG</i>

12/7  
 EFC SUBM  
 (CG)

Case/Claim Title: JANE VON RICHTHOFEN vs FAMILY M. FOUNDATION LTD. et al  
 Claim/Index Number: 602326/2004  
 Return Date: 12/07/2006  
 Motion Number: 005  
 Relief Sought: LEAVE TO INTERVENE  
 Date of Service: 11/09/2006  
 Filing User: Christopher Gibson