Schuster v Fink
2007 NY Slip Op 33328(U)
September 19, 2007
Supreme Court, Queens County
Docket Number: 0019478/2005
Judge: Joseph P. Dorsa
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SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : **HON. JOSEPH P. DORSA** **IAS PART 12**
Justice

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SUSAN H. SCHUSTER,

Plaintiff, Index No.: 19478/05

\- against - Motion Date: 8/1/07

LILO FINK and RICHARD FINK, Motion No.: 51

Defendant. Motion Seq. No. 3

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The following papers numbered 1 to 12 on this motion:

	Papers Numbered
Plaintiff's Amended Notice of Motion-Affirmation-Affidavit(s)-Service-Exhibit(s) & Memorandum of Law	1-5
Defendant Lilo Fink's Affidavit in Opposition-and Memorandum of Law-Exhibits-Service	4-9
Plaintiff's Reply Affidavit-Exhibit(s)	10-12

By amended notice of motion, plaintiff seeks an order of the Court, pursuant to CPLR § 3212, awarding her partial summary judgment on the seventh [sic] and eighth causes of action in the complaint for an accounting by the defendants. (The causes of action for an accounting are actually the second and eighth. See plaintiff's Exh. B).

Defendants file an opposition and plaintiff replies.

Plaintiff, Susan H. Schuster (Schuster), alleges that she and defendants Lilo and Richard Fink (the Finks), entered into an "oral partnership" on or about November 2002, the purpose of which was to buy certain real property in Marco Island, Florida, for rental income and/or resale. There is no dispute that there was no written partnership agreement.

Plaintiff now seeks summary judgment on her second and eighth

causes of action which would require the defendants to provide an accounting to plaintiff on the rental income from the properties purchased; an explanation concerning what plaintiff characterizes as a "loan" of the sum of twenty-six thousand six hundred and eighty-nine dollars ($25,689) to the defendants individually; and, an accounting of the monies held in the joint account of plaintiff and defendant, Lilo Fink.

Plaintiff maintains that she is entitled to an accounting based on Sections, 42, 43 and 44 of the Partnership Law, as well as the fiduciary relationship established between plaintiff and defendants when she executed a power of attorney in January of 2004, allowing defendants to act on her behalf in matters involving real estate transactions. (See plaintiff's Exh. D).

Defendants respond that there was never a partnership of any kind between plaintiff and the defendants; that the relationship was simply a business convenience; and, that at the very least, there are questions of fact as to whether any partnership was formed.

Moreover, plaintiff, as a named holder of the joint bank account with Lilo Fink has always had access to and the ability to review all transactions involving that account.

"In deciding whether a partnership exists, 'the factors to be considered are the intent of the parties (express or implied), whether there was a joint control and management of the business, whether there was a sharing of the profits as well a sharing of the losses and whether there was a combination of property, skill or knowledge' (Ramirez v. Goldberg, 82 AD2d 850, 852; see also, Matter of Steinbeck v. Gerosa, 4 NY2d 302, 317, appeal dismissed 358 US 39; Boyarsky v. Froccaro, 131 AD2d 710, 712). No one factor is determinative; it is necessary to examine the parties' relationship as a whole (Martin v. Peyton, 246 NY 231; Brodskey v. Stadlen, 138 AD2d 662, 663) '...calling an organization a partnership does not make it one.' (Brodskey v. Stadlen, 138 AD2d 662, 663, supra; see also Ramirez v. Goldberg, 82 AD2d 850, supra)." Kyle v. Ford, 184 AD2d 1036, 1037, 584 NYS2d 698 (4th Dep't 1992).

There are clearly questions of fact in dispute regarding the intent of the parties in this action. There was no written partnership agreement; apparently defendants conducted most of the business transactions; plaintiff says she expected to share in the profits, but makes no mention of sharing any losses. At times, plaintiff claims making capital contributions to the "partnership"; and at other times, the monies are characterized as personal loans.

Thus, to the extent that plaintiff seeks summary judgment on the second and eighth causes of action in her complaint based on an "oral partnership" such relief must be denied as there are questions of fact as to whether there ever was a partnership.

Plaintiff also relies on the durable general power of attorney she executed appointing Lilo Fink and Richard Fink to act as attorneys-in-fact on her behalf in matters involving real estate transactions as a basis for her claim for summary judgment. The power of attorney was executed by plaintiff on or about January 26, 2004. (See plaintiff's Exh. D).

In particular, plaintiff relies on Matter of Ferrara (7 NY3d 244, 819 NYS2d 215 (2006)) for the proposition that the power of attorney executed by plaintiff creates a fiduciary relationship which entitled her to the accounting demanded in her second and eighth causes of action. If in fact, plaintiff is correct in her argument, the "accounting" demanded would be limited to transactions after January 26, 2004, the date the durable power of attorney was furnished to defendants despite her claim that their partnership began in November of 2002. Moreover, as the Court has already noted, plaintiff alleges that the $26,689 for which she demands an accounting was actually a "loan" to defendants as individuals. Thus, there can be no basis for demanding an accounting of money loaned to defendants. Williams v. Humble Oil Co., 432 F2d 1165 (creditor not entitled to accounting from debtor). In addition, it has also already been stated that there is no need for an accounting for the bank account in both plaintiff's and Lilo Fink's name, as each of them has equal access to all transactions in the account.

The Court of Appeals in Matter of Ferrara, supra at 247, held "...that an agent acting under color of a statutory short form power of attorney that contains additional language augmenting the gift-giving authority must make gifts pursuant to those enhanced powers in the principal's best interest." Id. The issue in this matter, of course, was not whether the attorney-in-fact made gifts consistent with this principal's best interest; rather the issue for plaintiff now is how the money she gave (or loaned) to defendants was used in the real estate transactions she authorized them to make.

In this case, plaintiff does not allege gift-giving by the Finks in violation of her interests. Plaintiff alleges, without specificity, that she hasn't received her "fair share" of the profits.

In an action for an accounting, which is equitable in nature, the courts would traditionally exercise equitable jurisdiction

before the merger of law and equity, upon three grounds: "...the complicated character of the accounts; the need of discovery, and the existence of a fiduciary or trust relation." Lee v. Washburn, 80 AD 410, 412, 80 NYS2d 1040 (2d Dep't 1903).

Moreover, although it is clear that this Court has jurisdiction to hear the plaintiff's demands for equitable relief, it should only be afforded when plaintiff has no adequate remedy at law. Chicago Research and Trading v. New York Futures Exchange Inc., 84 AD2d 413, 446 NYS2d 280 (1st Dep't 1982).

Nothing in the evidence presented by plaintiff demonstrates that the records involved in this case are so complicated as to preclude a jury from understanding the nature of her claim, that is, that she failed to receive her "fair share." Plaintiff has long since rescinded the power of attorney. Defendants can no longer take action in her name, thus precluding any further alleged harm.

Accordingly, upon all of the foregoing, plaintiff's motion for summary judgment is denied.

Dated: Jamaica, New York
September 19, 2007

JOSEPH P. DORSA
J.S.C.