

Matter of Goldstein v Sam-Fay Realty Corp.
2008 NY Slip Op 31742(U)
June 23, 2008
Supreme Court, New York County
Docket Number: 0100912/2008
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____

PART 35

Index Number : 100912/2008

Justice

ZUCKERMAN, MYRON

INDEX NO. _____

vs

SAM-FAY REALTY CORP.

MOTION DATE 3/3/08

Sequence Number : 001

MOTION SEQ. NO. 001

ARTICLE 78

MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

FILED

JUN 24 2008

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

The motion sequence 001 is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that this matter is restored to the calendar of Special Referee Nicholas Doyle, and the issue presented, with respect to the funds, if any, that are owed to the corporation or the petitioners by Myron is limited to activity occurring after October 17, 2002; and it is further

ORDERED that counsel for petitioner shall serve a copy of this order with notice of entry within twenty days of entry on counsel for respondents.

Dated: 6/23/08

[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):

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: JAS PART 35

-----X

In the Matter of the Application of

SYDELL GOLDSTEIN, AUDREY SILLER and
BARBARA ZUCKERMAN,

Petitioners,

Index No. 600054/06

For the Dissolution of
SAM-FAY REALTY CORP.,
Pursuant to Sections 1103 and 1104-a
of the BCL.

-----X

CAROL EDMEAD, J.:

Familiarity with prior motion practice with respect to this proceeding is presumed.

This proceeding was reactivated on October 10, 2007, at which time the remaining matters were referred to Special Referee Nicholas Doyle, to hear and report with recommendations. The Special Referee marked the matter off the calendar because a related action involving similar issues had been commenced, and which might serve to narrow the referenced issue. That action, *Zuckerman v Goldstein*, Index No. 113633/07, is before this court, and a motion for summary judgment was decided. As anticipated by the Special Referee, the motion in *Zuckerman v Goldstein* has narrowed the issues in the reference. As a result, any determination of what funds, if any, are owed to the corporation or the petitioners by Myron is limited to any such funds as are owed due to any actions or transactions that occurred after

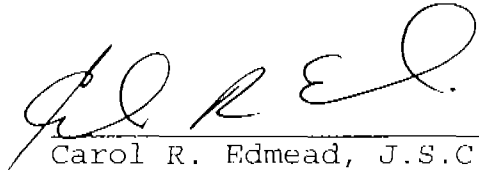
October 17, 2002. The parties entered into an agreement on that date that waived any claim regarding funds owed by Myron.

Accordingly, it is

ORDERED that this matter is restored to the calendar of Special Referee Nicholas Doyle, and the issue presented, with respect to the funds, if any, that are owed to the corporation or the petitioners by Myron is limited to activity occurring after October 17, 2002.

Dated: June 23, 2008

ENTER:



Carol R. Edmead, J.S.C.

PRESENT: _____
Justice

PART 35

Index Number : 113633/2007

ZUCKERMAN, MYRON

vs

GOLDSTEIN, SYDELL

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 2/25/08

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

Motion to/for _____

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

The instant motion sequence 001 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion is granted only to the extent that:

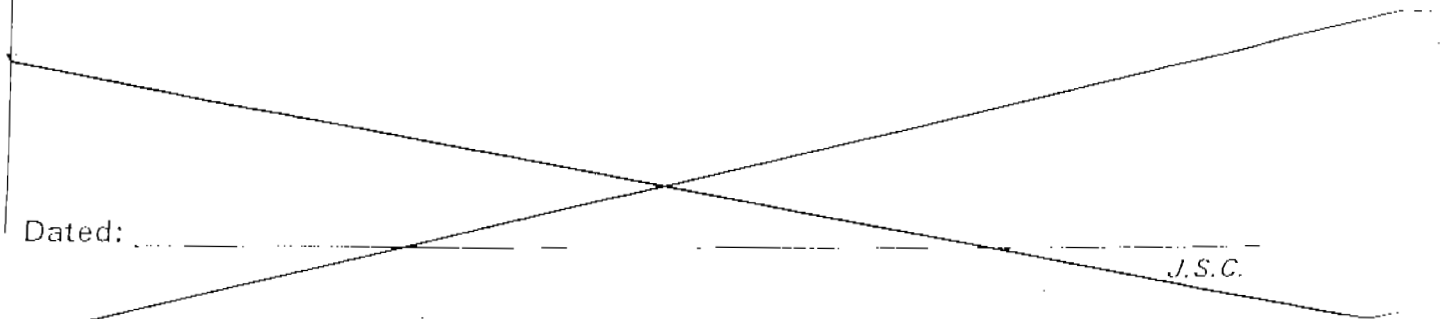
- (I) any portions of Sam-Fay Realty Corp.'s counterclaims based upon actions occurring prior to October 17, 2002, are dismissed;
 - (ii) defendant Lance Landers's counterclaim is severed and dismissed;
 - (iii) the counterclaims of defendants Sydell Goldstein, Audrey Siller, and Barbara Zuckerman are severed and dismissed,
- and is otherwise denied; and it is further

Dated: _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):



ORDERED that the remainder of the action shall continue; and it is further

ORDERED that defendants' cross motion is denied; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendants.

FILED
JUL 2 2008
NEW YORK
COUNTY CLERK

Dated 6/23/08

ENTER: [Signature], 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: 1AS PART 35

-----X

MYRON ZUCKERMAN,

Plaintiff,

Index No. 113633/07

against-

SYDELL GOLDSSTEIN, AUDREY SILLER, BARBARA
ZUCKERMAN, LANCE LANDERS, and SAM-FAY
REALTY CORP.,

Defendants.

-----X

CAROL EDMEAD, J.:

Plaintiff Myron Zuckerman (Myron) moves, pursuant to CPLR 3212, for summary judgment awarding him his pro-rata share of the proceeds of the sale of certain property and for punitive damages, and to dismiss defendants' counterclaims on the grounds that: they are barred by releases of claims, by signed consents and by the statute of limitations; defendants lack the legal capacity to assert the counterclaims; and the counterclaims have no merit. Defendants cross-move, pursuant to CPLR 3212, for partial summary judgment on the issue of liability, finding that Myron is liable for all monies expended on the mortgage that Myron placed against the property located at 515 West 29th Street, New York, New York, owned by defendant Sam-Fay Realty Corp. (Sam-Fay); for all monies paid and/or credited for the management agreement to which Myron committed Sam-Fay; and for all monies taken from Sam-Fay or I.M.S.A. Realty Inc. (IMSA) to

pay for the obligations of Spreading Machine Exchange, Inc. (Spreading Machine) and Myron Zuckerman Sewing Machine & Equipment Corp. (Sewing Machine).

FACTS

This action involves a family dispute over various family businesses. There are two other related actions before the court, *Matter of Goldstein v Sam-Fay Realty Corp.*, index No. 600054/2006, and *Matter of Zuckerman v Sam Fay Realty Corp.*, index No. 100912/2008.

Defendants Sydell Goldstein (Sydell) and Audrey Siller (Audrey) are sisters of Myron. Defendant Barbara Zuckerman (Barbara) is the widow of Ira Zuckerman (Ira), brother of Myron, Sydell and Audrey. Defendant Lance Landers (Landers) is Sydell and Audrey's attorney. Sam-Fay is a corporation which owned a building located at 515 West 29th Street, New York, New York (West 29th Street Property). Sam-Fay was formed by the parents of Ira, Myron, Sydell and Audrey. Upon his father's death, Myron and his mother became trustees of the trust which held Sam-Fay for the benefit of the widow and children. After their mother's death in 1993 and the trust was dissolved, the four siblings became shareholders, and Myron was president of Sam-Fay until 2006, when he resigned amid complaints from his sisters and sister-in-law regarding his handling of the business. Audrey became president of Sam-Fay. Landers was the managing agent for

the West 29th Street Property. Myron, Sydell, Audrey and Barbara each have a 25% interest in Sam Fay, and are directors of the corporation.

In 2007, the West 29th Street Property was sold, and at a meeting of shareholders on August 30, 2007, Audrey, Sydell and Barbara voted to distribute 25% of the available proceeds of the sale to each of the shareholders of Sam-Fay, except to Myron. Myron alleges that, since that time, the majority shareholders of Sam Fay have used the assets of Sam-Fay, consisting primarily of moneys due to Myron, to promote litigation against Myron, making baseless charges of wrongdoing against him. Myron contends that these actions are in violation of Audrey, Sydell and Barbara's fiduciary duties to him. He further maintains that Landers instigated and actively encouraged these actions.

There were three other corporations owned by the same shareholders, although each owned different percentages of each corporation: IMSA, which was formed to acquire property for Spreading Machine; Spreading Machine, which was primarily Ira's business; and Sewing Machine, which was primarily Myron's business. In 1988, a mortgage was placed against the West 29th Street Property in order to acquire property for the benefit of Spreading Machine (the Maspeth Property). A loan to acquire the property was obtained from the New York City Industrial Development Agency, and the property was purchased in the name of

the City Agency, with IMSA being given a lease for the premises and a right to purchase the premises from the agency for \$1.00 at a future time. Myron contends that his siblings consented to the mortgage being placed on the West 29th Street Property, but defendants deny having given such consent. They signed a guarantee of the New York City Industrial Development Loan (IDA loan) in their individual capacities; however, at the time they were beneficiaries under the trust that owned Sam-Fay, but were not shareholders, officers or directors of Sam-Fay. Myron was a trustee, together with his mother. The mortgage was placed on the West 29th Street Property in order to raise the down payment to acquire the Maspeth Property.

Sewing Machine and Spreading Machine became sublessees of the Maspeth Property and agreed to pay sublease rentals in an amount that would equal the lease rentals to be paid by the sublessor under the lease agreement. Myron, as trustee under the trust for Sam-Fay, also entered into a management agreement obligating Sam-Fay to pay not less than \$100,000 per year to enable Spreading Machine to meet its obligations under the sublease.

Myron alleges that he and Sewing Machine made loans in excess of \$600,000 to IMSA because it was burdened by monthly payments of approximately \$9,000.00 on the IDA loan. Defendants contend that they objected to repayments of those loans from IMSA

and Sam-Fay, because IMSA was not the entity burdened by the debt, but Sewing Machine and Spreading Machine were.

Sewing Machine lost its lease in the early 2000's, and moved to the Maspeth Property. After Ira died, in 1996, Myron spent more time administering Spreading Machine. Market conditions in the garment industry continued to deteriorate. It was determined that the Maspeth Property should be sold, and the parties agreed "to move with all due diligence to effectuate the sale of the Maspeth property, all net proceeds of which [are] to be held in escrow pending resolution of all outstanding claims." Ex. K, ¶ 6.

All shareholders were required to consent to the sale of the Maspeth Property. Myron refused to consent unless the other shareholders agreed to execute an agreement providing for releases and repayments of loans that he made. Audrey and Sydell maintained that he was obligated to consent as part of his fiduciary duty. Nonetheless, they signed the agreement in order to enable the sale of the property for \$3 million to proceed (the 2002 Agreement). The 2002 Agreement provided, among other things, for payment to Sewing Machine, for distribution to Myron, of \$338,654.00, payment of \$77,018.66 to each of Barbara, Sydell and Audrey, and the balance to be distributed equally among the shareholders. The parties waived any right to the monies distributed to Sewing Machine, and acknowledged that the

distributions were

in full settlement of the disputes that existed among the Shareholders, [Spreading Machine], IMSA, [Sewing Machine], and Sam Fay regarding prior personal and/or business transactions that involved and/or affected the assets, liabilities and business of IMSA, Sam-Fay, [Spreading Machine] and [Sewing Machine] and/or the Shareholders individually. The parties hereby settle and release any and all claims that:

(i) any Shareholder has or had against any other Shareholder;

(ii) any Shareholder has or had against IMSA, [Spreading Machine], and/or [Sewing Machine], excluding however, the rights of the Shareholders to receive the payments set forth in this agreement and the right of Myron to continue to operate [Sewing Machine] and to pay salary and repay advances from the operations of [Sewing Machine]; and

(iii) IMSA, Sam-Fay, [Spreading Machine] and/or [Sewing Machine] have against each other or against any Shareholder.

Subject to all defenses including the statute of limitations, this release is not intended to cover claims, if any, that are purely personal in nature and do not arise from the operations and business of the four corporations and do not arise from an individual's status as a shareholder of any one of the four corporations listed above.

Notice of Motion, Ex. 8, at 6-7, ¶ 8.

The 2002 T Agreement also provides that the shareholders know that the mortgage on the Maspeth Property was being paid in accordance with the IDA loan documents, and authorized Myron to continue paying for the expenses associated with that property from income generated by Sam-Fay and/or Spreading Machine, in accordance with past practices. *Id.*, ¶ 3.

Myron now seeks distribution from the sale of the West 29th Street Property. Defendants contend that they must first ascertain how much Myron is entitled to, based upon his alleged mishandling of Sam-Fay.

DISCUSSION

Counterclaims

Releases and Consents

Myron maintains that the counterclaims are barred by releases and consents that the other shareholders signed regarding the 1988 mortgage on the West 29th Street Property and the 1988 management agreement. He contends that the 2002 Agreement was reached after extensive negotiations over a period of two years, in which all parties were represented by counsel. Therefore, all claims concerning any business-related dispute arising prior to October 17, 2002, are barred.

Defendants point out that Sam-Fay was not a signatory to the 2002 Agreement, and argue that the agreement does not release the trustee of the trust by the beneficiaries of the trust. Further, defendants maintain that the agreement was the product of economic duress because they had personally guaranteed the IDA loan, and were on the hook for over \$1 million. They contend that Myron was refusing to perform his fiduciary duty as a director of IMSA and sell the property until he exacted the concessions in the 2002 Agreement.

While it is true that Sam-Fay was not a signatory to the 2002 Agreement, all of the shareholders were, and they are the directors of, and control, Sam-Fay. They agreed to waive any claims that Sam-Fay, or any of the other corporations might have. Further, the agreement released all shareholders, regardless of their position within the companies. The only claims reserved were those that were purely personal and did not arise out of the businesses. These counterclaims, even if they date from when Myron was trustee, arise out of the operation of the businesses, and were released by the 2002 Agreement.

Defendants' position that the 2002 Agreement should not be enforced with respect to the release is unpersuasive. Defendants contend that Myron's threat to refuse to consent to the sale of the Maspeth Property was a violation of his fiduciary duty to the corporation and to the other shareholders. *See 805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 453 (1983). However, even if defendants could show that Myron's demands constituted economic duress rather than hard bargaining, defendants waived any claim of duress by failing to repudiate the agreement promptly (*C & H Engrs., P.C. v Klargester, Inc.*, 262 AD2d 984, 985 [4th Dept 1999]), and by retaining the benefits of the agreement. *Fruchthandler v Green*, 233 AD2d 214, 215 (1st Dept 1996). Thus, defendants are bound by the 2002 Agreement, and are, thereby, precluded from seeking any compensation from Myron

for any business activities that occurred prior to the signing of the 2002 Agreement.

The court also notes that the 1989 agreement to the mortgage on the West 29th Street Property specifically states that income derived by Sam-Fay would be used first to pay or contribute toward the payment of the mortgage on the Maspeth Property. Ex. 12, Art. 10. It was signed by all four shareholders; therefore, any contention that Audrey, Sydell and Barbara neither knew nor consented to such an arrangement is specious.

Standing

Myron contends that any alleged injury was to the corporations, not to the individual shareholders. Therefore, the claims can be asserted only by the corporations or derivatively on their behalf, not as direct claims by the individual shareholder. *See Glenn v Hoteltron Sys., Inc.*, 74 NY2d 386, 392 (1989); *Fhrlich v Hambrecht*, 19 AD3d 259 (1st Dept. 2005). None of the corporations other than Sam-Fay is a party to this action. Therefore, their claims cannot be asserted, and Sam-Fay's attempt to assert them cannot be permitted. Myron also points out that the mortgage and management agreements were arranged by Ira, who was also the principal beneficiary of them. Barbara succeeded to his interest. Therefore, she also has no legal capacity to sue with regard to them.

Defendants contend that, since Myron dissolved the other

corporations without benefit of either shareholder vote or court order, it is disingenuous for him to argue that the shareholders must sue in the name of the corporations. They also maintain that the other corporations have little at stake compared to the amount at issue with Sam-Fay. They further assert that it was Myron, in his role of trustee, who placed the mortgage on the property, not Ira. Therefore, Ira also had a claim, to which Barbara succeeded.

Contrary to defendants' implied argument, dissolution is not a bar to a stockholder derivative action. Business Corporation Law (BCL) § 1006 (a) (4), (b). Thus, the individual defendants have no standing to bring the counterclaims in their individual capacities. While Sam-Fay would have standing to raise counterclaims on its own behalf, it does not have standing to raise any claims on behalf of the other corporations. Although defendants assert that the other corporations' claims are only a small percentage of the total amount at issue, that does not alter the fact that Sam-Fay cannot raise them.

As discussed above, even with respect to those claims that Sam-Fay has standing to raise, it is precluded by the 2002 Agreement from raising any claims with respect to any actions by Myron prior to October 17, 2002. Thus, the only claims that can be addressed by this court are the Sam-Fay's claims that date

from after October 17, 2002.¹

Statute of Limitations

Myron contends that, because the counterclaims do not arise from the transaction or occurrence alleged in the complaint, they are barred to the extent that they allege matters predating October 10, 2001.

Defendants contend that the statute of limitations against the trustee of a trust does not begin to run until the trustee gives an accounting that reports the conduct giving rise to the action. In this case, they maintain that Myron never gave any accounting, so the statute has not yet begun to run. Further, they aver that the breaches of fiduciary duty are frauds, and the statute does not begin to run until discovery of the fraud, much of which did not occur until defendants took control of Sam-Fay in 2006. They allege that the fraud continued until the mortgage was satisfied in 2007. Defendants note that the counterclaims in this action are substantially the same as the claims in the related proceeding, *Matter of Goldstein v Sam-Fay*. Thus, even if damages are limited, they include any damages incurred since January 2000.

In view of the fact that the 2002 Agreement waived all claims by the defendants that arose before or at that time, this

¹ The issue of how much money, if any, Myron owes Sam-Fay or the other shareholders is currently before a Special Referee in the related matter, *Matter of Goldstein v Sam-Fay Realty Corp.*

issue is moot. Only claims that arose after October 2002 can be addressed. Since any such claims are within the statute of limitations period, there is no need to determine whether the statute of limitations would be applicable to the counterclaims.

Landers's Counterclaim

Landers raised a counterclaim asserting abuse of process. Myron argues that he has failed to state a claim, citing *Panish v Steinberg* (32 AD3d 383 [2d Dept. 2006]). Landers does not oppose the dismissal of that counterclaim.

Breach of Fiduciary Duty

Myron contends that defendants owe him a fiduciary duty, and have breached that duty by making false accusations against him, and by using their majority power to deprive him of his share of the sale proceeds from the West 29th Street Property. Myron alleges that Landers should be held liable for instigating and aiding and abetting the breach of fiduciary duty, because he saw the documents demonstrating that his clients consented to the mortgage, but encouraged them to raise false claims with respect to the mortgage and related matters.

Defendants include an affidavit of David Weiss, a certified public accountant, who states that no determination can be made yet as to what monetary distribution should be made to Myron. Many of the specific issues that defendants raise predate the 2002 Agreement.

With respect to any issues prior to the 2002 Agreement, there is no basis for defendants to be withholding Myron's share of the proceeds from the sale of the West 29th Street Property. Defendants have not offered any evidence as to the amount at issue; however, any amount in excess of such amounts must be distributed to Myron.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion is granted only to the extent that:

- (I) any portions of Sam-Fay Realty Corp.'s counterclaims based upon actions occurring prior to October 17, 2002, are dismissed;
- (ii) defendant Lance Landers's counterclaim is severed and dismissed;
- (iii) the counterclaims of defendants Sydell Goldstein, Audrey Siller, and Barbara Zuckerman are severed and dismissed,

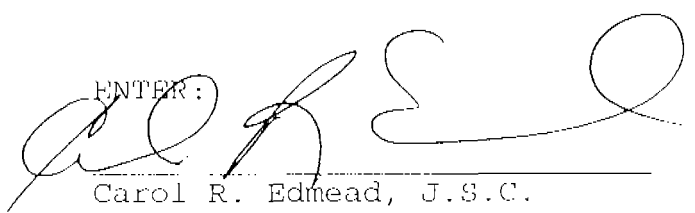
and is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that defendants' cross motion is denied.

Dated: June 23, 2008

ENTER:


 Carol R. Edmead, J.S.C.