

Schoen v Lemberger
2009 NY Slip Op 30106(U)
January 16, 2009
Supreme Court, New York County
Docket Number: 111971/06
Judge: Jane S. Solomon
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SCANNED ON 12/1/2009
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON
J.S.C.
Justice

PART 55

ELIEZER SCHOEN

INDEX NO. 111971/06

- v -

MOTION DATE _____

RUTH LEMBERGER

MOTION SEQ. NO. 002

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 ...

PAPERS NUMBERED

1-6

Answering Affidavits — Exhibits _____

7-12

Replying Affidavits _____

14-17

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the enclosed memorandum decision and order.

FILED

JAN 21 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/16/09

JANE S. SOLOMON
J.S.C. 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: IAS PART 55

-----x
ELIEZER SCHOEN, Individually and as Executor
and Co-Trustee of the Estate of Leah Schoen,

Plaintiff,

Index No. 111971/06

-against-

DECISION AND ORDER

RUTH LEMBERGER, Individually and as
Co-Trustee under the Last Will and Testament
of Leah Schoen, deceased, MERRILL LYNCH &
CO., INC. and TOWNSEND & VALENTE, LLP,

Defendants.

FILED
JAN 21 2009
COUNTY CLERK OFFICE
NEW YORK

JANE S. SOLOMON, J.:

In this action to recover monetary damages, as well as for an accounting and to impose a constructive trust, plaintiff moves, by Order to Show Cause, for partial summary judgment (1) directing defendant Ruth Lemberger (Lemberger) and non-party Jefferies Group to transfer the securities and funds held in Jefferies Group Account #NYC-2291 to an account designated by plaintiff; (2) directing Lemberger to deliver to plaintiff a certified or bank check in the sum of \$239,200 plus interest for monies converted and improperly disbursed since March 1, 2005; (3) directing Lemberger to deliver to plaintiff a certified or bank check in the sum of \$209,907 as income earned on the Merrill Lynch Trust Account #830-37L30 and Bear Stearns Account #220-09818 from March 1, 2005 to the present date; and (4) removing Lemberger as co-trustee of the Leah Schoen Trust.

Additionally, plaintiff seeks to restrain Lemberger and any of her agents from transferring, selling, assigning, negotiating or in any way disposing of the securities or their proceeds in any of the accounts with brokers denominated as Merrill Lynch Account # 830-36H56, Bear Stearns Account #220-09446, Bear Stearns Account # 220-09818, Jeffries Group Account #NYC-2291, Washington Mutual Account #64403060934, Citibank Account #02692522, and Citibank Account #33642448.

Defendant Lemberger cross-moves for: (1) leave to amend her answer; (2) an order compelling plaintiff to comply with defendant's discovery demands by appearing for a deposition, submitting to a mental health examination, and producing responses to defendant's document request; (3) an order vacating or modifying this court's August 6, 2008 Order by lifting the preliminary restraints on Citibank Account #02692522, Citibank Account #33642448, and Washington Mutual Account #64403060934; and (4) awarding attorney's fees in this matter.

For the reasons stated below, plaintiff's motion is granted, only to the extent of ordering defendant Lemberger to: (1) determine the amount of income on plaintiff's individual accounts and any accounts for the Leah Schoen Trust from March 1, 2005 forward, and if there is a positive balance, to forward a check for that amount to plaintiff within 30 days of notice of entry of this Decision and Order; and (2) provide plaintiff and

this court with an accounting of how the income was calculated within 30 days of notice of entry of this Decision and Order; and is otherwise denied.

Lemberger's cross motion is granted, only to the extent of: (1) granting leave to amend her answer, and the amended answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; (2) ordering plaintiff to produce any documents showing transfers in and out of plaintiff's individual accounts, his wife's individual accounts, as well as the Leah Schoen Trust accounts from six months prior to his wife's death in 1998 through March 1, 2005; and (3) ordering plaintiff to appear for Examination Before Trial within 60 days of notice of entry of this Decision and Order; and is otherwise denied.

Background

Plaintiff, an Israeli resident, is the surviving spouse of Leah Schoen and the father of defendant Lemberger. Following his wife's death in 1998, plaintiff's wife's will was admitted into probate and, under a May 6, 1999 decree of Surrogate Eve Preminger, plaintiff was named the executor of his wife's estate. At the same time, he and Lemberger were named co-trustees of the Leah Schoen Trust.

According to plaintiff, at the time of his wife's death, he had approximately \$1,560,000 in securities and/or funds

in his own individual Merrill Lynch Account. Plaintiff contends that, in November 1999, Merrill Lynch removed approximately \$882,000 from his individual account, including \$581,163 that was transferred to fund a Merrill Lynch Leah Schoen Trust Account.

Plaintiff additionally asserts that further funds were taken from his account in 2005, following Lemberger's instructions to Merrill Lynch to send all statements regarding plaintiff's personal and the trust accounts to Lemberger's address in New York. Plaintiff has previously proffered evidence that monies were removed from the Leah Schoen Trust Account in early March 2005, just after Lemberger transferred the accounts to her address and instructed Merrill Lynch not to take any further instructions as respects such accounts from her father.

Lemberger, however, avers that she only took this course of action to preserve the trust, as well as her father's personal funds, because a family member in Israel was using plaintiff to attempt to loot the trust and squander plaintiff's personal funds. Lemberger maintains that she was entitled to take these actions, pursuant to the powers granted to her by Surrogate Eve Preminger in 1999 and in two documents, each of which she contends to be a "Durable Power of Attorney" for plaintiff's personal account at Merrill Lynch.

After giving instructions to Merrill Lynch, Lemberger attempted to become plaintiff's guardian in Israel. In December

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2005, an Israeli family court issued a determination that plaintiff was able to take care of his own affairs and dismissed Lemberger's petition (the Israeli determination).

Plaintiff commenced this action in 2006. Although discovery was not completed, plaintiff moved for summary judgment the first time in 2007. Following a March 27, 2008 appearance of the attorneys in this action, that motion was denied. See this Court's March 27, 2008 Decision and Order.¹

On August 6, 2008, this court signed an Order temporarily restraining Lemberger or any of her agents from transferring, selling, assigning, negotiating or in any way disposing of the securities or their proceeds in any of the accounts denominated as Merrill Lynch Account # 830-36H56, Bear Stearns Account #220-09446, Bear Stearns Account # 220-09818, Jeffries Group Account #NYC-2291, Washington Mutual Account #64403060934, Citibank Account #02692522, and Citibank Account #33642448.

Upon an August 25, 2008 motion by Lemberger to vacate and/or modify the temporary restraining order, this court modified its August 6, 2008 Order by: (1) releasing to Lemberger all funds in Citibank Accounts numbered 33642448, 34049929, and 9977499192; (2) ordering Washington Mutual to restrain only a

¹At that time, this court granted defendant Townsend and Valente, LLP's cross motion to dismiss all of plaintiff's claims against it.

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balance of \$12,910 in the account numbered 64403060934, and to release all other funds; and (3) ordering Citibank to restrain a balance of \$86,194 in the account numbered 02692522, and to release all other funds. See September 3, 2008 Order of this court.

Discussion

Plaintiff seeks partial summary judgment ordering Lemberger to return the securities and funds that she allegedly converted from plaintiff's individual Merrill Lynch account #830-69413 and to pay all income earned from the trust accounts since March 1, 2005. Additionally, plaintiff seeks an order removing Lemberger as co-trustee for the Leah Schoen Trust.

To obtain summary judgment, a movant must establish entitlement to a court's directing judgment in its favor as a matter of law. See *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). "[I]t must clearly appear that no material and triable issue of fact is presented" (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; see also *Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]), because summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue or when the issue is even arguable. See *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Plaintiff first seeks to dismiss this action due to the 2005 Israeli determination, which plaintiff contends should be

given comity. However, the Israeli determination was solely concerned with whether or not plaintiff needed a guardian appointed for him, and, if so, if Lemberger should be so appointed. In this action, plaintiff is alleging that some or all of the monies in his individual account as well as that belonging to the Leah Schoen Trust, for which he is the co-trustee, were improperly removed by Lemberger. Because the issues in the two actions differ, using the principle of comity to dismiss this action would be inappropriate.

Plaintiff has not been deposed (even though his counsel agreed to produce him for deposition in a stipulation signed before the court on March 27, 2008), and several necessary documents may not have been produced. Summary judgment may be denied when discovery has not yet been completed, particularly where the moving party has failed to provide significant disclosure. See *Yun-Shou Gao v City of New York*, 29 AD3d 449 (1st Dept 2006); see also *McGlynn v Palace Co.*, 262 AD2d 116 (1st Dept Jun 15, 1999). Therefore, summary judgment ordering a return of the monies at issue or their transfer to another party, as well as the removal of Lemberger as co-trustee, is premature.

However, this court has previously ordered Lemberger to determine the amount of income on plaintiff's individual accounts and the trust accounts since March 2005, and to forward a check for such amounts to plaintiff. It appears that this has

not been done. Failure to do so within 30 days of notice of entry of this Decision and Order will subject Lemberger to appropriate sanctions. Additionally, Lemberger is ordered to, within 30 days of notice of entry of this Decision and Order, provide plaintiff and this court with an accounting of how such interest was figured.

Finally, the temporary restraining order, dated August 6, 2008 as modified by this court's order of September 3, 2008, remains in effect.

Lemberger has cross-moved for (1) leave to amend her answer; (2) an order compelling plaintiff to comply with defendant's discovery demands by appearing for a deposition, submitting to a mental health examination, and producing responses to defendant's document request; (3) an order vacating or modifying this court's August 6, 2008 Order; and (4) an order awarding attorney's fees.

Lemberger first seeks leave to amend her answer to assert affirmative defenses, as well as to include three counterclaims, i.e., for an accounting, conversion and attorneys' fees.²

Amendments to an answer are ordinarily freely given. See CPLR 3025 (b). However, leave "may be denied where the

²The proposed Amended Answer mistitles the sixth affirmative defense and third counterclaim as "Sixth Affirmative Defense and Second Counterclaim (Attorneys' Fees)."

proposed amended cause is plainly lacking in merit" (*Sharon Ava & Co., Inc. v Olympic Tower Assocs.*, 259 AD2d 315, 316 [1st Dept 1999]), or where the lateness of the proposed amendment is prejudicial to another party. See *Suarez v City of New York*, 169 AD2d 540 (1st Dept 1991).

The deposition of plaintiff in this action has yet to occur, and the issues that arise from any allegation that plaintiff converted the trust's funds or an accounting of such funds have been addressed by all parties since the commencement of this action. Therefore, the counterclaims for conversion and an accounting are timely, on point, and not prejudicial.

Lemberger also seeks to add a counterclaim for attorney's fees, to be paid from the trust's monies, should she be successful in her defense. As this is also an appropriate claim (see *Matter of Goldstick*, 177 AD2d 225 [1st Dept], *mod on other grounds on reargument* 183 AD2d 684 [1st Dept 1992]), this court will allow this counterclaim to be added to defendant's answer.

Therefore, that portion of Lemberger's cross motion that seeks leave to amend her answer is granted, and the proposed answer attached to the motion papers will be deemed served upon service of a copy of this Decision and Order with notice of entry thereof.

Lemberger additionally seeks an order compelling

plaintiff to comply with defendant's discovery demands by: (1) appearing for a deposition, (2) submitting to a mental health examination, and (3) producing responses to defendant's document request.

Plaintiff, first, opposes any further document disclosure, objecting that he has already produced more than 10,000 pages of documents, consisting mostly of brokerage account statements, allegedly already in the hands of Lemberger. It is not clear, however, that Lemberger has been given access to all documents, including statements of all accounts of plaintiff and his late wife from six months prior to her death in 1998 through March 1, 2005. Lemberger's request for the production of further documents is granted, only to the extent of requiring the production of those documents showing transfers in and out of plaintiff's individual accounts, his wife's individual accounts, as well as the Leah Schoen Trust accounts from six months prior to his wife's death in 1998 through March 1, 2005. Failure of plaintiff to produce such documents within 90 days of notice of entry of this Decision and Order will result in the dismissal of this action.

Lemberger seeks an examination of plaintiff's mental state, arguing that his mental state is in controversy. A mental

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examination is permitted under CPLR 3121 where the mental condition of a party is in controversy. "In controversy" is defined as "necessary for the alleged impairment-physical or mental-to relate to, contribute to or in some way attempt to mitigate the claims for damage or other relief sought by the plaintiff." *Barclays Bank of New York, N.A. v Tutter*, 137 AD2d 473, 474 (2d Dept 1988) quoting 3A Weinstein-Korn-Miller, NY Civ Prac ¶ 3121.01, at 31-413.

Here, Lemberger's proposed counterclaims do not put plaintiff's mental state in controversy. In connection with her claim for an accounting, Lemberger contends that plaintiff improperly invaded the corpus of the Leah Schoen Trust and handed the money to his granddaughter's husband in a manner suggesting plaintiff is incapable of handling his own affairs. (Affidavit of Ruth Lemberger, paragraph 16). The connection between this counterclaim and plaintiff's mental state is tenuous, although it may be probed at his deposition. She also questions plaintiff's refusal to appear for his own deposition based, at least in part, on health considerations. This issue is obviated by the direction below that plaintiff's deposition be held soon.

Plaintiff has so far resisted all attempts to arrange his examination before trial (EBT). Plaintiff's counsel argues that his EBT is "unnecessary", and is not justified because of his advanced age, and because traveling to New York for a

deposition would be dangerous to his health. Plaintiff's arguments are unavailing -there are factual issues for which his testimony will almost certainly be relevant and material. To the extent that travel may present a hazard, he will be permitted to testify in Israel as follows.

While this motion was sub-judice, plaintiff's counsel wrote to the court requesting that this decision be expedited.³ The letter states that the stress of this lawsuit is detrimental to plaintiff's health. Also troubling, however, is the indication that although plaintiff is described as lucid, he erroneously believes that he is the defendant in this lawsuit. Plaintiff's counsel relies on letters from an Israeli lawyer and a physician. The Israeli lawyer states that plaintiff told him that he believes that his daughters implemented this lawsuit to "speed his demise" and requests that the New York lawyer "activate any procedure that could enable termination of this miserable affair". These letters suggest that plaintiff is unaware that he initiated this lawsuit, or that the conduct of his own counsel has prevented his EBT from going forward. Both to address plaintiff's desire for expedited handling, and his counsel's refusal so far to schedule the EBT, it is directed that the EBT must be held within 60 days of notice of entry of this

³ The letter, dated December 18, 2009, and the response from defendant's counsel, will be filed with the County Clerk.

Decision and Order. No extension of this time will be granted absent extraordinary circumstances.

In the event that plaintiff elects not to travel to New York for his EBT, he shall bear the costs of conducting the EBT in Israel. The EBT may be done either electronically by video, in which case the EBT shall be videotaped in accordance with the CPLR, or alternatively, in person in Israel. If to be conducted electronically, plaintiff shall bear the expenses of the technology. If in person, plaintiff shall pay the travel and accommodation expenses of Lemberger and one of her attorneys.

All other portions of Lemberger's cross motion are denied. Accordingly, it hereby is

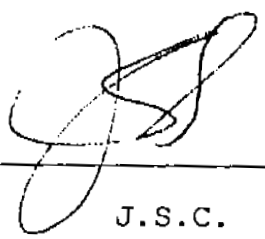
ORDERED that plaintiff's motion is granted to the extent of ordering defendant Ruth Lemberger to: (1) determine the amount of income on plaintiff's individual accounts and any accounts for the Leah Schoen Trust from March 1, 2005 forward, and if there is any income to forward a check for that amount to plaintiff within 30 days of notice of entry of this Decision and Order; and (2) provide plaintiff and this court with an accounting of how such income was calculated within 30 days of notice of entry of this Decision and Order; plaintiff's motion otherwise is denied; and it further is

ORDERED that defendant Ruth Lemberger's cross motion is granted to the extent of: (1) granting Ruth Lemberger leave to

amend her answer, and the amended answer in the proposed form annexed to the moving papers shall be deemed served upon service or a copy of this order with notice of entry thereof; (2) ordering plaintiff to produce any documents showing transfers in and out of plaintiff's individual accounts, his wife's individual accounts, as well as the Leah Schoen Trust accounts from six months prior to his wife's death in 1998 through March 1, 2005; and (3) plaintiff is to appear for Examination Before Trial within 60 days of notice of entry of this Decision and Order, either in New York or in Israel, but if he elects to do the EBT from Israel, he shall pay in advance the reasonable added expense as provided above; and the cross-motion otherwise is denied.

Dated: January 16, 2009

ENTER:



J.S.C.

JANE S. SOLOMON
J.S.C.

FILED
JAN 21 2009
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