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

PRESENT: JUDITH J. GISCHE, J.S.C. PART 10

Index Number : 602898/2005
PERL, SHARI
VS.
ANDREA PERL
SEQUENCE NUMBER : 036
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this 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

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED
JUN 25 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 6/23/09

JUDITH J. GISCHE, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

Supreme Court of the State of New York
County of New York: IAS Part 10

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Martin Evans, as guardian of the property of Shari Perl, individually and on behalf of Shari Perl as trustee of the Shari Perl Family Trust and derivatively on behalf of Perl Properties, Inc.

Plaintiff,

-against-

Andrea Perl, individually and as a trustee of the Shari Perl Family Trust, Gerald Shallo, 145-147 Mulberry Realty Co. LLC, Perl Properties Inc.. 495 Broadway Realty Co., LLC, 256-258 West 36th Street Realty Co., LLC, Perlrose Realty Co., Mulberry Realty Co., LLC and Conrad Roncati,

Defendants,

Bridget Hannah Herman, a minor, and Rebecca Perl,

Nominal Defendants.

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Decision/Order

Index # 602898/05

Motion Seq.#036

Hon. Gische, J:

Pursuant to CPLR 2219(A) the following numbered papers were considered in connection with the submitted motions:

PAPERS	NUMBERED
Notice of Motion, ME affd., exhibits	1
JP affd	2
IR affirm. I-in opp., exhibits	3
AP affd. in opp., exhibits	4
ME reply affd	5
ME suppl. Reply affd.,	6
IR Supp Affirm in opp., exhibits	7
JP rebuttal affd	8
ME rebuttal affd	9
RRH affirm in Opp., exhibits	10

ME affd, exhibits.....11
IR supp. Affirm.....13
ME affd. in response, exhibits.....14

Upon the foregoing papers the decision and order of the court is as follows:

Plaintiff is the court appointed article 81 financial guardian for Shari Perl ("Shari Perl"). Plaintiff is moving for "interlocutory judgment" judgment on his Eighth, Ninth, Tenth, Eleventh and Thirteenth Causes of Action in the Third Amended Complaint, which seek equitable accountings. Although the requested relief is styled as seeking interlocutory judgment, plaintiff is actually arguing that he can establish his *prima facie* right to relief as a matter of law. His relief is, therefore, the legal equivalent of summary judgment. [1] Issue has been joined and no note of issue has been filed. The motion is, therefore, properly before the court for consideration on the merits. CPLR §3212; Brill v. City of New York, 2 NY3d 648 (2004).

Plaintiff's Eighth, Ninth, Tenth, Eleventh and Thirteenth Causes of Action in the Third Amended Complaint respectively seek an accounting from Andrea Perl concerning the businesses known as Perl Properties, Inc. ("Perl Inc.");145-147 Mulberry Realty Co., LLC ("Mulberry"); 494 Broadway Realty Co. LLC (494 Broadway"); 256 W.

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[1]The common law on equitable accountings used to require that a party seek an "interlocutory judgment" establishing entitlement to the relief before there could be any discovery about the underlying financial matters. See: Adam v. Cutner & Rathkopf, 238 AD2d 234 (1st dept. 1997). Although liberal discovery rules now permit financial discovery regardless of a right to an accounting, the historical reference to "interlocutory judgment" on causes of action for accountings still remains. The heart of the claim for an interlocutory judgment, however, is that the right to an accounting can be established as a matter of law. Consequently, the court will consider the motion under the legal standards applicable to summary judgment relief.

36th St., LLC ("256 W") and Perlrose Realty Co. LLC ("Perlrose")(collectively "business entities") covering the period from March 31, 1998 until the present[2]. The motion is opposed by defendant Andrea Perl and also by the relevant defendant business entities.

On plaintiff's motion for summary judgment he bears the initial burden of setting forth evidentiary facts to prove his *prima facie* case that would entitle him to judgment, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if he meets this burden, does the burden then shift to defendants, who must then establish the existence of material issues of fact, through evidentiary proof, in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the plaintiff fails to make out his *prima facie* case for summary judgment, however, then his motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 AD2d 459 (2nd dept. 2003).

While the parties dispute a great many facts in this case, certain facts are not disputed. Shari Perl and Andrea Perl are sisters (collectively "sisters'). Through

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[2]Although in paragraph 3 of his January 5, 2009 affidavit, plaintiff states that he seeks an accounting from the time the entities were formed, he also states in that same paragraph that he seeks an accounting from 1998. In the memoranda of law submitted by plaintiff he claims that he seeks an accounting from March 31, 1998, which is the date that Shari Perl resigned as co-manager of the LLCs and Andrea Perl became the sole manager. The court, therefore considers plaintiff's request from March 31, 1998.

testamentary trusts and individually, Shari Perl and Andrea Perl acquired interests in the business entities which either owned and/or managed real estate. The LLC's owned real estate and Perl, Inc. was set up to manage the properties. On March 31, 1998, Shari Perl resigned as co-manager of the business entitles. Shari Perl's participation in the business entities since her resignation remains a disputed factual issue. It is not disputed, however, that Andrea Perl continued to control the entities. The underlying real estate owned by the LLC's that are the subject of this motion has been sold. The parties dispute whether the sales violated Shari's rights of ownership. Plaintiff has raised other issues about Andrea's management of the business entities and whether business funds were improperly used to pay personal expenses of Andrea Perl and the sisters' mother. Andrea Perl has raised issues about whether Shari Perl improperly used credit cards of the business entities to pay Shari Perl's own personal expenses. At some point, Perlrose succeeded to the interest of 256 W. 494 Broadway was dissolved on December 21, 2004. Mulberry and Perlrose were dissolved, while this action was pending, on December 29, 2008. Of the business entities that are part of this motion, only Perl Inc. still exists.

The parties are in the midst of discovery about their underlying disputes of misconduct and breaches of fiduciary duty. That discovery is currently being supervised by Referee Louis Crespo. Discovery has been protracted and prolix. While the parties have myriad discovery disputes, it is conceded that Andrea Perl produced the entire Quickbooks program that was used to keep the books of account for the business entities. In fact, plaintiff has included in this motion many examples of what

he believes are unexplained entries in the Quickbooks.[3]

Plaintiff argues that a *prima facie* case for an accounting requires only a showing of: [1] the existence of a fiduciary relationship, [2] the entrustment of money or property to the fiduciary, [3] the lack of another adequate remedy[4] and [4] a prior demand for an accounting that has been refused. Plaintiff claims while wrongdoing was once an element of a claim for an accounting, it is no longer. He claims that he has made the requisite showing in this motion that would entitle him to accountings form each of the business entities.

Defendants argue that this motion is barred by the doctrine of law of the case; the application of the statute of limitations and the business judgment rule. They argue that an accounting requires the court to make a finding of actual wrongdoing, which cannot be made at this time. They also argue that plaintiff has an adequate remedy at law, ie: a cause of action for breach of fiduciary duty which precludes any right to an

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[3]Notwithstanding that plaintiff argues that he does not have to show wrongdoing in order to succeed on this motion (see decision, *infra*), he identifies examples of what he believes constitutes wrongdoing by Andrea Perl. Defendants, particularly Andrea Perl, then spends a great deal of effort in this motion denying any wrongdoing and explaining the circumstances of some of her actions. Andrea Perl also claims that there wrongdoing by her sister, plaintiff's ward. If plaintiff is correct that as a matter of law, no showing of wrongdoing is required to succeed on a claim for an equitable accounting, then the court need not reach the disputed issues on this motion. If wrongdoing is a required element, then the court finds that there are a plethora of factual disputes that would otherwise preclude summary judgment. The claims made, however, are serious, possibly implicate tax issues and, if established, might require further court action.

[4]Although plaintiff initially argues that no adequate remedy at law is a required element of a cause of action for an accounting, he later argues that this is not a required element. The legal discussion of this issue occurs later in this decision.

equitable accounting. Finally defendants argues that, in any event, there is no right to an accounting from Perl Inc.

DISCUSSION

Preliminary, the court holds that its prior decisions in this case do not foreclose consideration of the issues raised by plaintiff in this dispositive motion. While the court previously held that any claim for monetary damages is limited to a three year statute of limitations, the court also expressly held that the claim for an accounting was subject to a six year statute of limitations (see: Gische , J. Order dated April 9, 2008). Thus plaintiff may proceed on his claim to an accounting even where monetary recovery may be barred.

The court also does not believe that its prior decision indicating that wrongdoing is required element of a cause of action for an equitable accounting is law of the case precluding consideration of the issue presented by this motion (see Gische , J. Order dated April 9, 2008). Law of the case is an intra action *res judicata* which prevents re-litigation of issues that have already been decided in the same case. It directs a court's discretion, but it does not a limit the trial court's authority, to make rulings. People v. Evans, 94 NY2d 499 (2000). At bar, the court's decision that "wrongdoing" was a required element of an action for an equitable accounting, was made in the context of the defendants' prior motion to dismiss. The motion to dismiss was denied because the plaintiff had pled proper causes of action for an accounting, all of which contained allegations of wrongdoing.[5] This motion for partial summary judgment, however,

[5]The parties on the motion to dismiss argued about the sufficiency of the allegations of wrongdoing, in the context of plaintiff's overall claims against defendants.

squarely raises the issue of whether wrongdoing is even a necessary element of the claim. Consequently, regardless of whether wrongdoing is or is not an element of a claim for an equitable accounting, the court's decision on the motion to dismiss would have been the same. Thus the court can and will address this issue of law on the motion currently before the court. While the court did say that "no accounting will be ordered unless and until Guardian Evans prevails at trial," suffice it to say that summary judgment is the functional equivalent of trial. Consequently, consideration of such relief on this motion for summary adjudication is not inconsistent with the court's prior rulings.

Although claims for equitable accountings have existed for hundreds of years, the nature of the claim, the proof required to prove the claim, the legal justification for the claim and what form the accounting should take have changed over time. See: Malone v. Sts Peter and Paul's Church, Brooklyn, 64 NE 961(1902); . Schreier v. Mascola, 81 AD2d 909 (2nd dept. 1981); Wood v. Cross Properties, 5 AD2d 853 (2nd dept. 1958); In re Beare's Estate, 122 Misc 519 (Surr. Ct. 1924). The body of law on equitable accountings is conflicting and muddled. Sometimes the right to an accounting is fixed by statute. Partnership Law §§ 43; 44; 74. In such cases the statute itself sets forth the triggering events for an accounting. Thus, in a partnership the right to an accounting is triggered by dissolution. An accounting can also be triggered by other statutory criteria. Scholastic, Inc. v. Harris, 259 F3d 73 (USCA, 2nd Cir., 2001). Common law provides for the right to an equitable accounting where a fiduciary relationship or some other special circumstance exists. Palazzo v. Palazzo, 121 Ad2d

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They did not expressly argue about whether wrongdoing is a required element of an accounting.

261 (2nd dept. 1986). Recently, the Appellate Division of this department held that an equitable accounting was a right that was available to a member of an LLC against a managing member. Gottlieb v. Northriver Trading Co. LLC, 58 AD3d 550 (1st dept. 2009).

Many cases hold that wrongdoing by a fiduciary is the triggering event in order for the court to order a common law equitable accounting. See eg: AHA Sales, Inc. v. Creative Bath Products, Inc., 58 AD3d 6 (2nd dept., 2008); Brigham v. McCabe, 27 AD2d 100(3rd dept. 1966); Wilde v. Wilde, 576 F Supp 595 (SDNY 2008).

Since the 1990's, however, The Appellate Division of this department (first) has taken a contrary view. While it used to require a finding of wrongdoing (see: Palazzo v. Palazzo, *supra*) it no longer does. Adam v. Cutner & Rathkopf, 238 AD2d 234 (1st dept. 1997); CCG Associates I v. Riverside Associates, 157 AD2d 435 (1st dept. 1990); Morgulas v. J. Ydell Realty, Inc., 161 AD2d 211 (1st dept., 1990). In Morgulas the court expressly held that

> "wrongdoing is not an indispensable element of a demand for an accounting where the complaint indicates a fiduciary relationship between the parties or some other special circumstances warranting equitable relief."

Certainly, a breach of a fiduciary duty may be a triggering event to compel an equitable accounting (see: Don Buchwald & Associates, Inc. V. Marber-Rich, 11 AD3d 277 [1st det. 2004]), but it is not a necessary event. It is significant that the four LLC's which have been dissolved never had final accountings rendered. In this court's opinion, dissolution alone would be a sufficient triggering event for a right to an equitable accounting from a fiduciary. See eg: Corcoran v. Jospeh M. Corcoran, Inc.,

135 AD2d 531 (2nd dept. 1987)(court appointed receiver rendered accounting upon winding up corporate affairs); Toeg v. Margolis, 280 AD 319 (1st dept. 1952)(only way a partnership or joint venture can be wound up is through an accounting).

Defendants argue that an equitable accounting requires a showing that plaintiff has no adequate remedy at law. Plaintiff argues that he has no adequate remedy at law. Alternatively, he argues that no such showing is required. In the case of Koppel v. Wien Lane & Malkin, 125 AD2d 230 (1st dept. 1986) the Appellate Division of this department held that the existence of an adequate remedy at law is not a bar to an accounting, whenever a fiduciary relationship exists. Consistent with the Koppel case, this court will not require a showing by plaintiff that he has no adequate legal remedy before ordering accountings.

The business judgment rule is not a defense to plaintiff's claims for accountings. While the business judgment rule prohibits inquiry into actions taken by members of a Board of Directors that are taken in good faith on behalf of a corporation, it does not protect a party that has breached its fiduciary duty. Van Der Lande v. Stout, 13 AD3d 261 (1st dept. 2004); Jones v. Surrey Corp., 263 AD2d 33 (1st Dept 1999); Higgins v. New York Stock Exchange, 10 Misc.3d 257 (NY Co. Sup. Ct. 2005). The court has already held that the accountings are required regardless of any showing of wrongdoing. Whether the business judgment rule is a defense that may ultimately protect defendants in the underlying disputes about breaches of fiduciary duties need not be addressed at this time.

Finally, defendants argue that because Perl, Inc. is a corporation, under the authority of Weisman v. Awnair Corp.(3 NY2d 444 [1957]) no accounting can be

ordered. The issue of whether an accounting is warranted does not necessarily turn on the issue of the business structure, but rather upon whether there is an identifiable relationship, such as a fiduciary relationship, that serves as a predicate for the accounting.

Andrea Perl on this motion identifies herself as "president" of Perl Inc. Each sister is a 50% shareholder. The parties acknowledge that Perl Corp. was set up to manage the properties owned by the other business entities. Shareholders in closely held corporations have a fiduciary duty to one another. Littman v. Magee, 54 AD3d 860 (1st dept. 2008); Global Minerals and Metals Corp. v. Holme, 35 AD3d 93 (1st dept. 2006). In this case, Andrea Perl was responsible for the management of Perl, Inc. during the applicable period and for handling the property and finances thereof.

The plaintiff has established on this motion that Andrea Perl is a fiduciary to Shari Perl with respect to the business entities, and that property has been entrusted to Andrea Perl in her fiduciary capacity. He has further claimed that, pursuant to this court's April 9, 2008 decision, no prior demand for an accounting is necessary before proceeding on a court claim for an accounting. Defendants do not contest the issue of prior demand.[6] Consequently, plaintiff has established a *prima facie* right to an accounting from Andrea Perl concerning the business entities that are the subject of this motion.

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[6]In the earlier decision the Court was actually discussing whether a prior demand on the business entity to bring a derivative suit was required before actually bringing the suit. It did not address the issue of a prior demand for an accounting. Since the parties do not contest this issue, however, the court need not decide whether the issue should be decided differently.

The further issue before the court is what it means to render an accounting. Plaintiff's position has changed over the course of this motion. In his moving papers, he claimed that Andrea Perl should be required to give testimony on the unexplained items in the books of account. At oral argument, however, plaintiff's attorney wanted Andrea Perl to provide the documentary back up and explanation for the expenses claimed. At all times, the plaintiff has asked the court to have Andrea Perl certify the accounting under oath. In plaintiff's April 20, 2009 affidavit, he states that if Andrea Perl swears to the accuracy of the General Ledgers to the business entities for the requisite period, he will accept such a procedure as satisfying her *prima facie* obligation to provide an accounting.

Defendants have always taken the position that the Quickbooks should suffice as an accounting because they constitute all of the financial information available for the business entities. They further claim that because the records are on an electronic database, any reports of profits and losses, debits and credits can be easily generated. In this regard it is uncontested that plaintiff received not only the information contained on Quickbooks, but an actual duplicate of the information recorded in its electronic form so that it can be retrieved on Quickbooks software. Thus plaintiff can at this point produce the reports as easily as Andrea Perl.

In view of plaintiff's willingness to accept the Quickbooks as the accountings, the only remaining issue for the court to decide is whether Andrea Perl should be required to swear to it under oath. The court holds that certifying the information under oath is required for Andrea Perl to fulfill her obligation to account. In so determining the court considers that accountings were historically made before referees who swore in the

fiduciary. See: Malone v. Sts Peter and Paul's Church, Brooklyn, *supra* at 963 (in reviewing the history of actions for accountings the court noted that arbitrators who heard the proceedings were given the power to administer oaths to witnesses); Ackroyd v. Ackroyd, 2 AbbPr NS 380 (1866); see also: Matter of Judicial Settlement of Final Account of Mfrs. & Traders Trust, 20 Misc 3d 1143 (A) (Surr. Ct. On Co., 2008). Defendants acknowledged in oral argument that if objections are made to the account and otherwise in the course of financial discovery in this case Andrea Perl will be required to testify under oath about the financial information. No legal justification has been offered by defendants why Andrea Perl should not stand by her accounting in the first instance and/or what undue burden would be placed upon her to do so.

Defendants have requested that plaintiff be sanctioned for bringing a frivolous motion. Since the court has found that the motion for accountings should be granted, there is no basis for a finding that the motion is frivolous within the meaning of Part 130 of the Rules of Court. This aspect of the requested relief is denied.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that plaintiff is granted partial summary judgment on the ,Eighth, Ninth, Tenth, Eleventh and Thirteenth Causes of Action in the Third Amended Complaint to the extent that they seek equitable accountings from defendant Andrea Perl and it is further

ORDERED that Andrea Perl may satisfy her obligation to account by otherwise certifying under oath the information contained in the Quickbook records maintained for the entitles known as Perl Properties, Inc.;145-147 Mulberry Realty Co., LLC; 494

Broadway Realty Co. LLC ; 256 W. 36th St., LLC and Perlrose Realty Co. LLC within 30 days hereof, and it is further

ORDERED that defendants' request for sanctions is denied, and it is further

ORDERED that any requested relief not expressly addressed herein is denied and that this constitutes the decision and order of the court.

Dated: New York, NY
June 23, 2009

SO ORDERED:

J.G. J.S.C.