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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 113633/2007
ZUCKERMAN, MYRON
VS.
GOLDSTEIN, SYDELL
SEQUENCE NUMBER : 006
PARTIAL 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

FILED
JUL 01 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

ORDERED that plaintiff's motion is granted to the extent that plaintiff is awarded a portion of his pro rata share of the proceeds of the sale in 2007 of the property owned by defendant Sam-Fay Realty Corp., and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants in the amount of $2,010,953.94 ($2,037,499.64, less $26,545.70 in disputed amounts), together with interest as prayed for allowable by law at the rate of 9% per annum from the date of August 30, 2007, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that so much of plaintiff's claim as seeks an additional $26,545.70 is severed and shall continue; and it is further

Dated: _____ J.S.C.

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

Check one: FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on all counsel; and it is further

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

ORDERED that the parties shall appear in Courtroom 438 at 60 Centre Street on September 2, 2009 at 3:00p.m. for a compliance conference.

Dated 6/29/09 ENTER: _____, J.S.C.
HON. CAROL EDMEAD

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: IAS PART 35
----------X

MYRON ZUCKERMAN,

Plaintiff,

Index No. 113633/07

-against-

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

Defendants.

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CAROL EDMEAD, J.:

In this action between family members regarding the distribution of proceeds from the sale of real property that was owned by defendant Sam-Fay Realty Corp. (Sam-Fay), a family-owned business, plaintiff Myron Zuckerman (Myron) moves, pursuant to CPLR 3212, for partial summary judgment to the extent that he seeks an award of his pro-rata share of the proceeds of the sale, for dismissal of Sam-Fay's counterclaims, an order in his favor based upon defendants' failure to respond to combined discovery requests, and sanctions against defendants' lawyer on the ground that he engaged in frivolous conduct.

FACTS

This motion is the latest in a series of motions in this action, as well as two related actions[1], familiarity with which

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[1] *Zuckerman v Sam-Fay Realty*, index No. 100912/08, and *Matter of Goldstein*, index No. 600054/06.

is presumed. Therefore, the court will not repeat the facts here at length.

The individual family members are Myron, his two sisters, defendants Sydell Goldstein (Sydell) and Audrey Siller (Audrey), his late brother, Ira Zuckerman (Ira), who died in 1996, and Ira's widow, Barbara Zuckerman (Barbara), who succeeded to Ira's interest in each of the family businesses.

The family businesses involved in this dispute are Sam-Fay, in which each of the four siblings owned a 25% interest; I.M.S.A. Realty Inc. (IMSA), in which they each owned 25%; Spreading Machine Exchange, Inc. (Spreading Machine), in which Ira Zuckerman owned 50%, Myron owned 20%, Sydell owned 25%, and Audrey owned 5%; and Myron Zuckerman Sewing Machine & Equipment Corp., which was primarily Myron's business.

Sam-Fay is the former owner of a property on West 29th Street in Manhattan (West 29th St. Property), which was sold for approximately $12 million in 2007. Defendant Lance Landers (Landers) was the managing agent for the West 29th Street Property, and is Sydell and Audrey's attorney.

At a meeting of the Sam-Fay 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 Myron (in other words, to themselves).

Myron was president of Sam-Fay until April 2006, at which

time Audrey became president. Defendants contend that Myron was responsible for losses to the company while it was under his management, and that, as a result, they determined that it was necessary to withhold his share of the sale proceeds in order to recoup monies that were improperly disbursed from Sam-Fay. Among the disbursements that defendants challenge are Sam-Fay's payments of the mortgage on the West 29th Street Property. After Audrey became president, she continued to have Sam-Fay pay the mortgage payments on the West 29th Street Property until its sale. There has not been any challenge to Audrey's actions in so doing, nor has any of her share of the disbursements been withheld. The other major dispute centers around a promissory note from Spreading Machine to Sam-Fay, which defendants contend should have been repaid by Spreading Machine. Defendants further argue that plaintiff's failure to obtain repayment should result in his having to pay the outstanding amount of the loan to Sam-Fay. There are, in addition, many other smaller disputed amounts that defendants contend should be charged to Myron, as well as a pending action against Sam-Fay and the siblings.

There have been disputes among the parties dating back many years. Myron, Sydell, Audrey and Barbara entered into a release on October 17, 2002 (the Release), in which the parties agreed to release all claims against each other and the family businesses that arose from anything involving the family businesses. The

Release included a resolution of the manner in which IMSA would sell the property that it had purchased in Maspeth (the Maspeth Property), and how the proceeds from that sale would be distributed. The Release also provides that the family corporations all released any claims against each other, and against Myron, Sydell, Audrey and Barbara. Sydell, Audrey and Barbara disputed the import of that release, and, in a prior motion, argued that the release did not affect any claims that they had as beneficiaries of the trust that had held their interests in the family businesses[2]. This court determined that such claims were covered by the Release, and that no claims between the parties could be raised that had any connection with the family businesses. Decision and Order dated October 27, 2008. Defendants appealed that determination, and the Appellate Division, First Department, affirmed, stating specifically that any "claims for breach of fiduciary duty and as beneficiaries of a family trust" were extinguished by the Release. *Zuckerman v Goldstein,* 61 AD3d 594, 595 (1st Dept 2009).

In another prior motion, this court stated that the proceeds of the sale owed to Myron in excess of the amount that defendants claim that Myron owes them, resulting from alleged actions that he took after October 17, 2002, should be distributed to him.

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[2] Although Barbara was not a beneficiary of the trust, Ira was.

Order of June 23, 2008, at 13. Thus, the only amounts that defendants have any legitimate ground to retain are those limited to their claims that arose after October 17, 2002 that pertain solely to Myron.

DISCUSSION

Initially, this court notes that defendants' attorney did not respond to this motion in a timely manner. After filing the opposition papers late, he stated that defendants "have no objection to an adjournment for plaintiff to submit reply papers to this opposition if plaintiff so desires." Affirm. in opposition, ¶ 73. This seemingly generous offer merely masks defendants' failure to abide by the time constraints established by the CPLR. Defendants were required to file and serve their papers on plaintiff seven days in advance of the return date, in order to allow plaintiff time to reply before the return date. CPLR 2214 (b). Defendants failed to do so. Plaintiff has, in fact, responded. However, should defendants engage in such behavior again, their papers will be rejected. CPLR 2214 (c).

Myron's Share of the Disbursement Being Withheld

Defendants contend that Myron's share of the disbursement is being withheld in order to ensure that any amounts that he is determined to have owed Sam-Fay will be recovered. However, defendants must demonstrate a reasonable basis for withholding Myron's share of the proceeds, and any amount for which there is

no such reasonable basis must be distributed forthwith. Thus, each of defendants' assertions must be evaluated. Contrary to defendants' argument, this motion by plaintiff does not seek to reargue previous court orders. Defendants posit that this court ordered that no funds should be disbursed before the validity of Sam-Fay's claim was determined. That is inaccurate. Rather, defendants' failure to support their continuing withholding of any distribution is contrary to this court's order dated June 23, 2008. It is only legitimately disputed amounts that can be withheld. To the extent that defendants declined to brief or further respond to any aspect of the motion, and request leave to submit a response if the court considers plaintiff's motion, that request is denied. Defendants were required to respond and lay bare their evidence (CPLR 3212; *Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; *Micciola v Sacchi*, 36 AD3d 869 [2d Dept 2007]), and are not entitled to another opportunity to further delay resolution of this matter.

Spreading Machine Promissory Note

Defendants maintain that Myron is responsible for the failure of Spreading Machine to repay Sam-Fay on a promissory note that was entered into in 1988, and which loan was subordinated to a loan made by the New York City Industrial Development Agency (IDA). The loan was made in order to purchase the Maspeth Property to house Spreading Machine. The Maspeth

property was owned by IMSA. After the Maspeth property was sold, the loan to IDA was paid in full. The release of the subordination agreement is dated September 9, 2003. Defendants assert that after that date, Myron was obligated to collect on the note from Spreading Machine, and is responsible to Sam-Fay for the amount of the note, plus interest.

Defendants contend that the promissory note from Spreading Machine was transferred away from Sam-Fay by plaintiff, when he subordinated the loan to the IDA, and again became an asset of Sam-Fay only after the signatories were released from their obligations under the Subordination Agreement, and the loan to the IDA was repaid. Therefore, they conclude that it was not covered by the Release. Myron states that the Note was dated December 1, 1988, and is, therefore, covered by the Release. Further, he contends that Landers knew and agreed to the manner in which the promissory note was paid, in full, in 2003. He also notes that all the siblings agreed to subordinate the loan, and signed the Subordination Agreement.

Landers denies having consented to paying off the promissory note in full from the proceeds of the IMSA sale of the Maspeth property. While he clearly received the communications regarding the method in which the proceeds of the sale would be handled, he denies having been told that the debt under discussion was a Spreading Machine debt, and claims that he was told that IMSA

owed this money to Sam-Fay. Further, defendants contend that there is no evidence that the debt was paid in full; rather, it appears that the debt was reduced by accounting entries by having Sam-Fay pay this debt back to itself through an offset against a management fee paid by Sam-Fay. It appears that the management fee was part of the arrangement made between the various entities, and agreed to by all four siblings, to enable Spreading Machine and IMSA to pay the carrying charges on the Maspeth Property.

There is no question that the financial transactions among the various family corporations were somewhat complex. It is clear, however, that all family members agreed to subordinate the loan to Spreading Machine in order to enable it to obtain the IDA financing. As part of the transaction, and with the consent of all the family members, the note from Spreading Machine was transferred to the trustee as security for the payment of the senior debt. However, that does not mean, as defendants argue, that the note ceased to exist. Although Sam Fay had no right to collect on the note, or otherwise make use of it, it appears that Sam-Fay had a future contingent interest in the note, as evidenced by the fact that the note was included on the books and records of Sam-Fay. Defendants have not presented any evidence that such inclusion was improper.

Further, upon reviewing the Release, it is apparent that the

parties all envisioned the sale of the Maspeth property, to be followed by a distribution of the sale proceeds in the manner set forth in the Release, while simultaneously having both the corporations and the individuals waiving any claims against each other that arose from any matters involving the businesses. Therefore, even if the bookkeeping entries are, in some manner, faulty, the parties all agreed, pursuant to the Release, to waive any claim that Sam-Fay might have had against Spreading Machine based upon the note, and further, agreed to sell the Maspeth Property and distribute the proceeds in accordance with the provisions included in the Release. Release, Ex. 15 to Notice of Motion, ¶¶ 5, 8.

Moreover, even if the claim based on the note had not been extinguished by the Release, it is far from clear how Myron would be required to pay whatever amount remained owing on that note. Rather, it would have to be paid from all the owners of Spreading Machine in the appropriate proportion. That would mean that Barbara would be required to return some of the monies that she received in order to make up for the disparity in the ownership. Sydell owned a 25% interest in all three companies involved in this matter, so her position would not have been altered regardless of whether or not the Spreading Machine note were paid. Audrey and Myron are the only ones who are in a worse position as a result of Spreading Machine not repaying the note.

Under these circumstances, defendants have failed to demonstrate any basis for withholding Myron's share of the proceeds of the sale based upon the Spreading Machine note.

Contested Management Fees

Defendants contend that plaintiff had no authority to pay, or expense, a management fee in 2003 to Spreading Machine or IMSA. Defendants rely on the affidavit of David I. Weiss (Weiss), an accountant, to establish that plaintiff reduced the debt owing to Sam-Fay in the amount of $32,500.00 through improper journal entries, reclassifying such debt. They further maintain that the corporations had the ability to pay the debt in 2003, and that plaintiff had a duty to collect upon the debt, rather than allowing it to be wiped out.

Plaintiff points out that Weiss acknowledges that the elimination of $22,500 debt from IMSA to Sam-Fay in 2003 is academic, because Sam-Fay was equally owned by the shareholders of IMSA. Further, the Release authorized plaintiff to continue paying expenses associated with the Maspeth Property, owned by IMSA, from income generated by Sam-Fay. Thus, there is only $10,000 at issue.

Plaintiff notes that the reclassification of the remaining $10,000 debt from Spreading Machine to Sam-Fay was not something that benefitted plaintiff, so Landers' characterization of that entry as plaintiff's looting of the assets of Sam-Fay is totally

unwarranted.

There is no evidence from which the court can, at this time, determine the validity of the $10,000 reclassification. Therefore, that amount may be withheld from Myron's distribution. In addition, there is another $662.70 that Myron does not dispute, so that amount may also be withheld.

Mortgage

Defendants maintain that the mortgage payments made on the West 29th Street Property after October 17, 2002 are not covered by the Release, and therefore Myron is responsible for reimbursing Sam-Fay for those amounts. This argument is devoid of merit.

The mortgage represents a pre-existing legal obligation, and plaintiff's paying that obligation after the date of the Release does not subject him to any liability. Further, defendants have not offered any explanation of why plaintiff would be responsible for those payments when his presidency, and control, over Sam-Fay ended in April 2006, and apparently Audrey continued to make mortgage payments. Defendants are not seeking any reimbursement from Audrey, which makes their position with respect to Myron all the more suspect. Additionally, it is obvious that if Sam-Fay had discontinued paying the mortgage, the building would have gone into foreclosure, and Sam-Fay would have lost the building, rather than being in a position to sell it, which it did in 2007.

Accordingly, defendants have failed to demonstrate how paying the mortgage constituted corporate waste, and any claim premised on Myron's causing Sam-Fay to pay its mortgage obligation is without merit.

Thales Litigation

In 2006, Thales Management Corporation (Thales) commenced an action against Sam-Fay, Myron, and Myron's sisters, seeking damages based upon alleged fraudulent misrepresentations which caused Thales to invest substantial amounts of money into renovating the space that it leased from Sam-Fay. Thales was a tenant in the West 29th Street Property, whose lease was terminated in 2006. Thales was eventually evicted for nonpayment of rent. Defendants contend that the Thales litigation is still pending against Sam-Fay, and that Thales seeks at least $500,000 in damages. They maintain that plaintiff is an out-of-state resident who has shown a willingness to fraudulently convey assets. Further, they aver that plaintiff has refused to cooperate with Sam-Fay in the defense of the action, and that they must withhold an amount sufficient to cover the judgment should Thales succeed.

As plaintiff points out, the Thales complaint does not restrict its claims to any acts by Myron. Rather, it specifically alleges that not only Myron, but Myron's sisters, assured Thales that the lease would be extended and that Thales

could continue and increase its renovations. Thus, there is no legitimate basis upon which Sam-Fay can distinguish between Myron and defendants in the distribution of the proceeds of the sale based upon the Thales action. Further, Thales was not told that its lease would not be extended until Audrey was president of Sam-Fay. Similarly, it was evicted while Audrey was president. Therefore, defendants have not demonstrated any basis upon which Myron should be held more accountable than his sisters with respect to any possible judgment. Since no funds were withheld from Myron's sisters, his funds cannot be withheld. *Matter of Cawley v SCM Corp.*, 72 NY2d 465, 473-474 (1988).

It also bears noting that defendants do not dispute plaintiff's assertion that the Thales action has not been pursued since it was transferred to the Civil Court, pursuant to CPLR 325 (d), on February 11, 2008, and that it was subsequently marked off the calendar.

Union Welfare Payments

Defendants contend that they have not had an opportunity for discovery, and, therefore, do not have complete information on this issue. Nonetheless, they dispute Myron's claim that Sam-Fay's building was a union building, because from April 2006 until the building was sold in June 2007, Sam-Fay did not receive any bill or correspondence from any union, nor did it pay for any union welfare benefits or union dues during that time.

Defendants allege that Myron paid these dues and welfare payments to benefit himself and his son rather than for the benefit of the corporation. Defendants conclude that the $7,032.00 paid for union welfare benefits by Sam-Fay, in 2003, went to the benefit of Myron's son. In addition, in 2004, $3,270.00 was paid for union welfare benefits, and in 2005, $5,581.00 was paid for union welfare benefits.

Myron maintains that the building was a union building, that union benefits for various family members were paid for over the years to satisfy union requirements, and that whether or not his son received a salary from Sam-Fay is irrelevant - his name was used to satisfy union requirements. He also points out that Barbara has not denied receiving $200,000 in proceeds from a union life insurance policy on Ira. Additionally, he notes that defendants have not pleaded any counterclaims based upon the union fees.

It is clear that, even if defendants are correct about the union fees, the amount involved is small (totaling $15,883), and does not justify withholding Myron's $2 million share of the distribution. However, since there appears to be a question as to whether the union dues were appropriately paid by Sam-Fay, $15,883.00 may be withheld from the distribution to Myron.

Failure to Answer Combined Discovery Requests

Plaintiff contends that the issues on both his claim for his

distributive share, and Sam-Fay's counterclaims, should be deemed resolved in his favor because defendants refused to respond to his combined discovery requests. Even when he obtained an order compelling disclosure, defendants submitted a reply that was not signed by any of the parties, but was signed only by Landers as an attorney, and is unsworn.

Defendants contend that the discovery requests were "patently improper," and that plaintiff does not allege which documents he did not receive. Affirm. in opposition, ¶¶ 64-65. Defendants concede that the answers to interrogatories should have been verified "had the requests themselves been proper" (*id.*, ¶ 67), and they will provide verifications if the court requires.

This is another instance of defendants failing to take the requirements of the court seriously. Defendants acknowledge that the interrogatories should have been verified, but purportedly failed to do so due to oversight, but also failed to correct their oversight upon being informed of that oversight. This flouting of legal procedure is unacceptable.

In order to resolve any outstanding issues regarding the combined discovery requests, the parties are directed to appear in the courtroom on September 2, 2009 at 3:00p.m. for a compliance conference. Defendants are directed to serve a verified reply to the combined discovery requests prior to the

conference.

Sanctions and Costs

Plaintiff maintains that the contentions in defendants' reply to the discovery requests are frivolous, Landers knew they had no merit, and defendants have asserted anything they can in order to deprive Myron of his share of the proceeds of the sale of the West 29th Street Property.

A determination of what responses in the reply to the discovery requests may be frivolous cannot be determined at this time. Not all the disputed issues have been resolved, and, in any event, the reply was not verified. Thus, a determination regarding the propriety of sanctions is premature.

Prejudgment Interest

Plaintiff contends that he is entitled to prejudgment interest based on the breach of fiduciary duty claim. He points out that defendants have not disputed such an entitlement.

Prejudgment interest is authorized by CPLR 5001, at the statutory rate of 9%. *Eighteen Holding Corp. v Drizin*, 268 AD2d 371, 372 (1st Dept 2000). Myron seeks interest from August 30, 2007, the date that defendants voted to deprive him of his share of the proceeds of the sale of the West 29th Street Property.

Since defendants have neither disputed Myron's right to prejudgment interest, nor to the date from which he seeks prejudgment interest, the court will accept August 30, 2007 as

the date from which interest should be calculated.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted to the extent that plaintiff is awarded a portion of his pro rata share of the proceeds of the sale in 2007 of the property owned by defendant Sam-Fay Realty Corp., and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants in the amount of $2,010,953.94 ($2,037,499.64, less $26,545.70 in disputed amounts), together with interest as prayed for allowable by law at the rate of 9% per annum from the date of August 30, 2007, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that so much of plaintiff's claim as seeks an additional $26,545.70 is severed and shall continue; 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 all counsel; and it is further

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

ORDERED that the parties shall appear in Courtroom 438 at 60 Centre Street on September 2, 2009 at 3:00p.m. for a compliance conference.

Dated: June 29, 2009

ENTER:

J.S.C.

HON. CAROL EDMEAD