

**Zuckerman v Goldstein**

2009 NY Slip Op 32494(U)

October 28, 2009

Supreme Court, New York County

Docket Number: 113633/2007

Judge: Carol R. Edmead

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

HON. CAROL EDMEAD

PART 35

Index Number : 113633/2007  
**ZUCKERMAN, MYRON**  
 vs.  
**GOLDSTEIN, SYDELL**  
 SEQUENCE NUMBER : 013  
 PARTIAL SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
 MOTION DATE 10/13/09  
 MOTION SEQ. NO. 013  
 MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

**FILED**  
 OCT 27 2009  
 COUNTY CLERK'S OFFICE  
 NEW YORK

PAPERS NUMBERED \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_  
 Answering Affidavits — Exhibits \_\_\_\_\_  
 Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

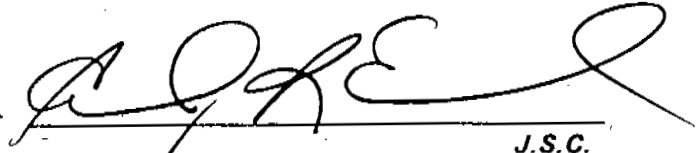
Upon the foregoing papers, it is ordered that this motion

Motion sequence 013 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the application of defendants Sydell Goldstein, Audrey Siller, Barbara Zuckerman, Lance Landers and Sam-Fay Realty, Corp., for an order, pursuant to CPLR 3212 granting partial summary judgment dismissing all of the claims of plaintiff Myron Zuckerman for punitive damages is granted and said cause of action is dismissed; and it is further

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

Dated: 10/15/09



J.S.C.

HON. CAROL EDMEAD

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):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

\_\_\_\_\_  
MYRON ZUCKERMAN,

Plaintiff,

-against-

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

Defendants.  
\_\_\_\_\_

EDMEAD, J.S.C.

Index No. 113633/2007

DECISION/ORDER

**FILED**  
OCT 27 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

**MEMORANDUM DECISION**

Defendants Sydell Goldstein, Audrey Siller, Barbara Zuckerman, Lance Landers and Sam-Fay Realty, Corp. (defendants) move for an order, pursuant to CPLR 3212 granting partial summary judgment dismissing all of the claims of plaintiff Myron Zuckerman (plaintiff) for punitive damages on the grounds that all of the actions complained of by plaintiff and taken by defendants were not only taken in good faith, for the benefit of the corporation and to fulfill their fiduciary duties to all, but regardless, in no way provide the grounds for an award of punitive damages and do not evince a high degree of moral turpitude and demonstrate such wanton dishonesty as to imply a criminal indifference to civil obligations.

This motion (sequence 013) is the latest in a series of motions in this action, as well as two related actions<sup>1</sup>, familiarity with which 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

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

(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.

*Defendants Contentions*

The gravamen of plaintiff's complaint concerns actions taken at a Shareholders and Directors meeting on August 30, 2007. Plaintiff's complaint is that a share of the proceeds from the sale of the real property formerly owned by Sam-Fay Realty Corp. (Sam-Fay) was not voted to be immediately disbursed to him, though the vote was to disburse a pro-rata amount to the other shareholders. Plaintiff was present at the meeting and did not vote against the disbursement to the other shareholders.

After the Shareholders and Directors meeting, defendants promptly made an application to the court to reactivate the dissolution proceeding, and for instructions with respect to the monies not disbursed from the sale of the Sam-Fay property. Once the court determined an amount to be disbursed to plaintiff, after working through the complex financial issues involved, the amount was disbursed to plaintiff.

Landers states that he never encouraged his clients to act out of malice, hatred or hostility towards plaintiff, and to his knowledge, his clients have not acted out of malice, hatred or hostility towards plaintiff, nor are there any facts that would demonstrate such. Landers adds that he never was motivated by malice, ill will or hostility towards plaintiff.

Sydell, Audrey and Barbara state that their vote at the Shareholders and Directors meeting in August 2007, was not motivated by malice, ill will or hostility - but only by their sincere desire to fulfill their responsibilities as directors of Sam-Fay, which fact is evidenced by all that was

done to protect the rights and obligations of not just Sam-Fay, but also the plaintiff and other shareholders - by placing the money in issue in trust or escrow, by making sure that sufficient funds were disbursed to plaintiff to pay any tax due, and by going to court to ask for instructions as to how to handle said funds. They add that as they understood their fiduciary duty owed to Sam-Fay as directors at the time of the vote in issue, it would have been a breach of that duty to have voted to disburse the money to plaintiff, and that the only proper vote, until such time as the issues could be resolved as to what monies were owed by plaintiff, was to vote against the distribution of money to plaintiff at that time.

Audrey adds that as President of Sam-Fay, she retained a certified public accountant to look into the books and records of that corporation, and because the assets and income of Sam-Fay, while being managed and controlled by Myron Zuckerman, were used to pay the debts of I.M.S.A Realty Inc., Myron Zuckerman Sewing Machine & Equipment Corp, and Spreading Machine Exchange, Inc., into the books and records of those corporations also. The accountant found and reported on a great many improprieties. Defendant Landers at the same time was independently conducting his own investigation, and he too found a great many improprieties. During the relevant time period, plaintiff refused to cooperate with Audrey's attorneys or to provide her with financial information regarding the corporations.

*Plaintiff's Opposition*

Defendants ganged up on plaintiff, in breach of their fiduciary obligations to plaintiff, to deprive plaintiff of his share of the proceeds of the sale of the property owned by Sam-Fay, based on claims which they knew to be invalid, and they used Sam-Fay to prosecute merit less claims against plaintiff. Malice was the motivating factor. Defendant Lance Landers was the instigator

and the inventor of the claims, which he knew were frivolous.

As appears from the record herein, in 1988 Plaintiff agreed to the transfer of funds from Sam-Fay for the acquisition of a building by a newly-organized family corporation named IMSA Realty, Inc. The building was acquired to house the operations of Spreading Machine Exchange, Inc. Funds were transferred over the years from Sam-Fay to pay expenses of IMSA. All of the family members agreed to this, in writing. Spreading Machine was the source of livelihood of the families of Ira and Barbara Zuckerman and Hyman and Sydell Goldstein. Plaintiff sacrificed his interest in receiving distributions from Sam-Fay in order to provide support for his siblings.

In 1993, there was a bitter contest between plaintiff on the one hand, and Audrey and Sydell, on the other hand, over their mother's will. This resulted in hostility and ill will by Audrey and Sydell against plaintiff. They have admitted this. Barbara developed hostility and ill-will towards plaintiff because she claims that plaintiff accused her of killing her husband and fired her sons from the business. She has also admitted to her hostility and ill-will against Plaintiff.

In 2002 the parties negotiated an agreement containing mutual releases of claims. In 2006 defendants commenced a proceeding in this Court for the dissolution of Sam-Fay and used it to prosecute baseless claims against plaintiff, which were also asserted in Counterclaims in this action, even though those claims had been released. Although defendants argue that they sought instructions from the Court, that application was a cover for their design to cause injury to plaintiff. The sacrifices made by plaintiff to support his siblings, with the consent of all family members, were transmogrified by defendants to "illegal, fraudulent and oppressive actions

towards the other shareholders," and claims were asserted against plaintiff to recover all of the moneys transferred by Sam-Fay. Even after this Court gave instructions to defendants in its June 23, 2008 Memorandum Decision to distribute funds to Plaintiff (p. 13), defendants disregarded those instructions.

Defendants never had any intention of complying with such instructions. Instead, after this Court held that the releases were valid, defendants concocted a series of demonstrably frivolous claims against plaintiff to replace the claims which had been released, in order to justify their continued refusal to distribute to plaintiff his share of the proceeds of the sale of the property owned by Sam-Fay, and to continue to cause him injury. Defendants even asserted a claim against plaintiff for making monthly payments on the mortgage on Sam-Fay's property, rather than risk losing the property through foreclosure proceedings. With the exception of two immaterial claims, those claims were found to be totally without merit and were dismissed. Defendants also caused Sam-Fay to hire an accountant to search for claims against plaintiff by Sam-Fay and by the other family corporations.

In support of their motion for partial summary judgment, defendants make the same arguments they made on the summary judgment motions which they lost. The cases they cite on releases of claims are the same cases they cited on those motions and on their unsuccessful appeal to the Appellate Division. The affidavits submitted on this motion by Sydell, Audrey and Barbara are remarkably similar to the affidavits which they submitted on the prior summary judgment motions, except that their admissions of hostility and ill-will have been deleted. The corporations which Landers refers to in his affidavit as "plaintiff's own corporation" (~ 12) and "his brother's business" (~ 14) were both family corporations, and as noted above, all of the

[\*7]

siblings agreed to the transfer of funds from Sam-Fay. Moreover, although the company managed by Plaintiff signed a sublease in 1988 as part of the financial transactions relating to the acquisition of property by IMSA, it did not actually move to the new premises until the early 2000's (Defendants' Ex. I, ~ 22). The tax distribution to plaintiff does not show good faith. It was only made after plaintiff complained that Sam-Fay was an S corporation and that defendants had left plaintiff in the position of having to pay tax on his share of the income from the sale of the Sam-Fay property, but that they had deprived him of the funds with which to pay the tax -- a position which defendants knew was indefensible.

By the Complaint herein, plaintiff has alleged that for several years, Sydell, Audrey and Barbara, with the encouragement and assistance of Landers, have acted out of hatred and hostility towards plaintiff, have aligned themselves against him, and have repeatedly made baseless charges against him of wrongdoing. Plaintiff has also alleged that after the sale of the Sam-Fay property, the majority shareholders of Sam-Fay have used the assets of Sam-Fay to promote litigation against plaintiff and to continue to make baseless charges against him, in breach of their fiduciary obligations to Plaintiff.

#### *Discussion*

In his Complaint, plaintiff sought to recover his *pro-rata* share of the proceeds of the sale of the 29<sup>th</sup> Street property and punitive damages against defendants "for their willful and wanton violations of Plaintiff's rights and their [fiduciary] duties to him."

#### Punitive Damages: Tort Case

"Punitive damages are awarded in tort actions '[w]here the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with

crime" (*Prozeralik v Capital Cities Communications, Inc.*, 82 NY2d 466, 605 NYS2d 218, 626 NE2d 34 [1993], quoting Prosser and Keeton, Torts § 2, at 9 [5th ed. 1984]). That author also teaches that: "Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton" (Prosser and Keeton, Torts § 2, at 9-10 [5th ed.1984]).

Thus, the harmful conduct must be "intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence" (*McDougald v Garber*, 73 NY2d 246, 538 NYS2d 937, 536 NE2d 372 [1989]). Furthermore, an award of punitive damages must be supported by "clear, unequivocal and convincing evidence" (*Munoz v Puretz*, 301 AD2d 382, 753 NYS2d 463 [1st Dept 2003]).

Further, it is well settled that the purpose of punitive damages is not to remedy private wrongs but to vindicate public rights (*see Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 358 [1976]). Thus, a private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he was aggrieved and which is actionable as an independent tort, but also that such conduct was part of a pattern of similar conduct directed at the public generally (*see New York University v Continental Ins. Co.*, 87 NY2d 308, 315-316 [1995]; *Rocanova v Equitable Life Assurance Society of United States*, 83 NY2d 603, 613 [1994]; *RTC Industries, Inc. v Goodtimes Home Video Corp.*, 1997 WL 35524 [SDNY 1997]).

"Punitive damages are available only in those limited circumstances where it is necessary

[\* 9]

to deter defendant and others like it from engaging in conduct that may be characterized as 'gross' and 'morally reprehensible' and of 'such wanton dishonesty as to imply criminal indifference to civil obligations' " (*New York University v Continental Ins. Co.*, *supra*, at 316.

Such damages, however, may be recovered in addition to compensatory damages upon a showing that conduct complained of was part of a pattern of similar conduct directed at the public generally, aggravated by evil or a wrongful motive or that there was wilful and intentional misdoing, or a reckless indifference equivalent intentional wrongdoing (*Walker v Sheldon*, 10 N.Y.2d 401, 404-405 [1961]; see, also *Rocanova v Equitable Life Assur. Soc.*, *supra*.)

"Even where there is gross negligence, punitive damages are awarded only in 'singularly rare cases' such as cases involving an improper state of mind or malice or cases involving wrongdoing to the public" (*Karen S. "Anonymous" v Streitferdt*, 172 AD2d 440, 441, quoting *Rand & Paseka Mfg. Co. v Holmes Protection*, 130 AD2d 429, 431, *lv denied* 70 NY2d 615).

In sum, plaintiff argues that he did all of the work managing the family corporations while Sydell, Audrey and Barbara made false accusations against him; that they have for several years acted out of hostility and ill-will towards plaintiff; that they falsely accused plaintiff of using corporate assets for an improper purpose; that defendants knew that the allegations against him were false; that Landers had examined the documents showing that his clients consented to the mortgage alleged in this action to be improper; and that Landers knew that his clients had released plaintiff from pre-October 17, 2002 claims against him, but sued Plaintiff anyway.

However, this court finds that plaintiff has failed to establish that defendants made false accusations out of spite and ill will. Plaintiff correctly states that as majority stockholders and

directors of Sam-Fay, Audrey, Sydell and Barbara had fiduciary obligations to plaintiff. However, plaintiff has failed to show that they breached those obligations, motivated by hostility and ill-will, or that the alleged wrongdoing has been intentional and deliberate.

More importantly, there is no showing that the actions taken by defendants evinces a high degree of moral turpitude and demonstrates such wanton dishonesty as to imply a criminal indifference to civil obligations.

Finally, plaintiff failed to raise a triable issue of fact regarding the issue of whether the defendants' conduct warranted punitive damages.

And, the "ill will" detailed by plaintiff arising from the 1993 bitter contest between plaintiff on the one hand, and Audrey and Sydell, on the other hand, over their mother's will, and the alleged ill will that Barbara developed towards plaintiff because she claims that plaintiff accused her of killing her husband and fired her sons from the business, are not at issue herein. Even if taken as true, plaintiff has failed to link the alleged ill will from the 1993 family dispute to the instant basis for punitive damages.

#### Conclusion

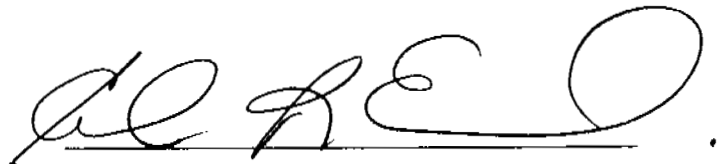
Plaintiff have failed to sufficiently support an award for punitive damages, sufficient to overcome the instant motion, through specific evidentiary allegations, that the alleged conduct was of an egregious nature, and aimed not solely at this plaintiff, but at the public, generally (*American Transitions. Co. v Associated International Ins. Co.*, 261 AD2d 251 [1<sup>st</sup> Dept 1999]).

Based on the foregoing, it is hereby

ORDERED that the application of defendants Sydell Goldstein, Audrey Siller, Barbara Zuckerman, Lance Landers and Sam-Fay Realty, Corp., for an order, pursuant to CPLR 3212 granting partial summary judgment dismissing all of the claims of plaintiff Myron Zuckerman for punitive damages **is granted and said cause of action is dismissed**; and it is further

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

Dated: October 15, 2009



Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**

**FILED**  
**OCT 27 2009**  
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