

<b>Oesterheld v Shepard</b>
2010 NY Slip Op 31649(U)
June 24, 2010
Supreme Court, New York County
Docket Number: 109280/09
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN  
J.S.C. Justice

PART 11

Osterheld, D

INDEX NO. 109280/09

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 01

Shepard, E

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is deferred in accordance with the annexed decision and order.*

**FILED**  
JUL 01 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: June 24, 2010

J  
**HON. JOAN A. MADDEN**  
J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

-----X  
DAVID ARTHUR OESTERHELD, as Administrator  
of the Estate of Susan Bergholtz, Deceased,

Plaintiff,

-against-

Index No.109280/09

EILEEN SHEPARD,

Defendant.

-----X  
JOAN A. MADDEN, J.S.C.:

Defendant Eileen Shepard moves, pursuant to CPLR 3211 (a) (5) and (7), for an order dismissing the complaint. The complaint alleges: (1) breach of contract, and, in the alternative, breach of contract implied by conduct; (2) breach of fiduciary duty and (unspecified provisions of) the Business Corporation Law; (3) discrimination on the basis of disability, and retaliation, in violation of the New York State Human Rights Law, Executive Law § 292, *et seq.*; (4) tortious interference with business relations; and (5) intentional infliction of emotional distress.

This action arises out of the disintegration of the more than 20-year professional relationship between Shepard and the late Dr. Susan Bergholtz, after the latter became ill in mid-2003 and was initially diagnosed as suffering from multiple sclerosis. Dr. Bergholtz died on September 22, 2008, from hemorrhagic dementia. In 1980, Shepard and Bergholtz had formed, and were equal shareholders in, Shepard & Bergholtz Physical Therapists, P.C. (the P.C.).

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On March 21, 2005, Bergholtz commenced a special proceeding to dissolve the P.C., on the grounds of irreconcilable differences between herself and Shepard. She subsequently commenced a second action for partition of the cooperative apartment that she and Shepard owned, and that was used by the P.C. as its office. Both of those actions were settled by a so-ordered stipulation, dated October 25, 2005, which, among other things, provided for the dissolution of the P.C. as of December 31, 2005, and for the listing and sale of the apartment. Pursuant to the stipulation, the parties negotiated, and this court signed, an Order of Dissolution, dated December 8, 2005. That order provided for the P.C.'s long-time accountant, Nate Fink, to prepare an accounting of the P.C.'s affairs, and for the parties thereafter to file any objections that they might have to the accounting.

Mr. Fink distributed his accounting in or about February 2006, and, in March 2007, Bergholtz served her objections thereto and moved for an accounting. By order, dated January 4, 2008, this court referred the matters relating to the P.C.'s financial issues, from January 1, 2004 to the date of dissolution, to Special Referee Marilyn Dershowitz to hear and determine. Referee Dershowitz entered her decision on July 7, 2008. Bergholtz served a notice of appeal. Subsequent to her death and the appointment of her husband as administrator of her estate, the appeal was deemed withdrawn. *Matter of Application of Oesterheld for the dissolution of Shepard & Bergholtz Physical Therapists, P.C.* (Appellate Division, First Dept., July 7, 2009). Plaintiff commenced this action on or about

June 30, 2009.

Inasmuch as the P.C. was dissolved on December 31, 2005, and inasmuch as the complaint does not allege any wrongdoing by Shepard subsequent to that date, the second through the fifth causes of action are time-barred. Where, as here, only money damages are sought, a claim alleging breach of fiduciary duty is governed by a three-year limitations period. *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132 (2009). Similarly, a three-year limitations period governs a claim alleging the violation of a duty imposed by statute. CPLR 214 (2); *Zeides v Hebrew Home for Aged at Riverdale, Inc.*, 300 AD2d 178 (1st Dept 2002). A claim of tortious interference, whether with contract, or with economic relations, is governed by the three-year limitations period set out in CPLR 214 (4). *H&P Research, Inc. v Integra Realty, Inc.*, 258 AD2d 270 (1st Dept 1999). Similarly, a claim of violation of the New York State Human Rights Law is governed by a three-year limitations period. *Koerner v State of N.Y., Pilgrim Psychiatric Center*, 62 NY2d 442 (1984); *Mascola v City Univ. of New York*, 14 AD3d 409 (1st Dept 2005). A claim of intentional infliction is governed by the one-year limitations period applicable to all intentional common-law torts. *Gary v New York Univ.*, 48 AD3d 235 (1st Dept 2008).

Citing *Goodwin v MAC Resources* (149 AD2d 666 [1st Dept 1989]), plaintiff contends that because Bergholtz and Shepard were partners, Bergholtz could not sue Shepard in an action at law until July 7, 2008, when Referee Dershowitz entered her decision. However, Bergholtz and Shepard were equal shareholders in the P.C.,

not members of a partnership.

Plaintiff's breach of contract claim is timely, but it is barred by collateral estoppel. The stipulation between the parties provided that, in connection with the dissolution of the P.C., Mr. Fink would "prepare financial statements and balance sheets showing compensation, expenses and benefits paid or received in any form for the period January 1, 2004 until the date of dissolution ... ." Lesser Affirm., Exh. E, at 2. The January 4, 2008 order of reference provided that the issues to be determined by Referee Dershowitz would be limited to the objections that one or the other party would make to Mr. Fink's financial reports, and to the issues raised in the October 23, 2007 affirmation of Bergholtz's then-attorney Gary Stahl, Esq., in the October 24, 2007 affidavit of Bergholtz's husband, David Oesterheld, and in the petition for dissolution.

Mr. Stahl's October 23, 2007 affirmation refers to the following:

Shepard's attempt to exclude Dr. Bergholtz from the Corporation after Dr. Bergholtz was diagnosed with multiple sclerosis, in order to obtain exclusive control of the Corporation and its revenues;

Shepard's cancellation of Dr. Bergholtz's patient appointments, and her subsequent efforts to take over the care of those patients;

Shepard's attempts to cap Dr. Bergholtz's salary to avoid incurring pension obligations for Dr. Bergholtz; and

Shepard's unilateral decision to provide herself with a 50% raise and additional director's fees while ceasing payment of Dr. Bergholtz's salary altogether, in violation of the Corporation's "rule of equivalence."

Lesser Affirm., Exh. G, at 4 (footnotes omitted). In addition, Mr.

Stahl cites the following allegations:

Shepard attempted to force Dr. Bergholtz to pay for her own business-related expenses -- while capping Dr. Bergholtz's salary;

Shepard refused to pay Dr. Bergholtz for patients that Dr. Bergholtz treated;

Shepard attempted to remove Dr. Bergholtz from further participation in the Corporation's business in November 2004 -- and then attempted to terminate Dr. Bergholtz's benefits while Shepard was increasing her own salary by 50%;

Shepard refused to submit a disability claim for Dr. Bergholtz.

*Id.* at 4-5 (footnotes omitted).

These allegations, as somewhat amplified by Mr. Oesterheld's October 24, 2007 affidavit (as to reductions in Dr. Bergholtz's fringe benefits and director's fees, and failure to pay interest, and then defaulting on, certain promissory notes written by the P.C. to Bergholtz), were the matters litigated before Referee Dershowitz, and they are the sum and substance of plaintiff's current breach of contract claim. In her petition for dissolution, Bergholtz alleged that Shepard had

divert[ed] funds and revenues that rightfully belong to the [P.C.] or Bergholtz; deliberately fail[ed] to make payments to Bergholtz for salary, distributions and benefits, including health-related benefits; and ... wrongfully attempt[ed] to force Bergholtz from the [P.C.], despite the fact that Bergholtz holds 50% of the [P.C.]'s stock.

Lesser Affirm., Exh. C, at 10. The referee heard evidence and ruled that Bergholtz was not entitled to any recovery, other than two sums totalling \$7,119.68, as to which Shepard had stipulated.

Plaintiff abandoned his appeal of that order. He may not re-litigate those matters here.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is granted, and the complaint is dismissed in its entirety, and the Clerk is directed to enter judgment in favor of defendant dismissing the complaint in its entirety, with costs and disbursements to defendant as taxed by the Clerk upon presentation of a bill of costs.

DATED: June *24*, 2010

ENTER:

  
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U.S.C.

**FILED**  
JUL 01 2010  
NEW YORK  
COUNTY CLERK'S OFFICE