

Herczi v Katan

2010 NY Slip Op 33052(U)

October 25, 2010

Sup Ct, Nassau County

Docket Number: Sup Ct, Nassau County

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**ARON HERCZL, individually and as a
member of KGH GROUP, LLC,**

Plaintiff,

-against-

**ITZHAK KATAN, a/k/a ISAAC KATAN,
PARK SLOPE GROUP, LLC, JOHN DOE 1,
JOHN DOE 2, AND JOHN DOE 3,**

Defendants.

**TRIAL/IAS PART: 22
NASSAU COUNTY**

**Index No: 011362-09
Motion Seq. Nos: 5 & 6
Submission Date: 9/20/10**

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The following papers have been read on these motions:

- Notice of Motion, Affirmations in Support (2) and Exhibits.....X**
- Notice of Cross Motion, Affirmation in Opposition and Exhibit...X**
- Affirmation in Opposition/Reply.....X**

This matter is before the Court for decision on 1) the motion filed by Plaintiff Aron Herczl, individually and as a member of KGH Group, LLC ("Plaintiff") on August 26, 2010, and 2) the cross motion filed by Defendants Itzhak Katan, a/k/a Isaac Katan and Park Slope Group, LLC ("Defendants"), on September 10, 2010, both of which were submitted on September 20, 2010. For the reasons set forth below, the Court 1) grants Plaintiff's motion to the extent that the Court hereby consolidates the above-captioned action ("Instant Action") with the pending Kings County action titled *Aron Herczl, individually and as a member of KGH Group LLC and KGH Group LLC v. Itzhak Katan, a/k/a Isaac Katan; K.A.T. - I Family Limited Partnership; K.A.T. - II Family Limited Partnership; K.A.T. - III Family Limited Partnership; K.A.T. - IV Family*

Limited Partnership; K.A.T. - V Family Limited Partnership; Park Slope Group, LLC; Ronald Fatato; Liliya Katan, TD Bank, N.A.; Park Slope Heights, LLC; D.A. Associates Inc. NY; John Doe 1; John Doe 2; and John Doe, LLC, Kings County Index Number 19024-10 (“Kings County Action”); 2) directs that the Kings County Action is transferred to Nassau County for all purposes; 3) denies Plaintiff’s application for injunctive relief, subject to renewal upon consolidation of these two actions; and 4) denies Defendants’ cross motion for sanctions.

BACKGROUND

A. Relief Sought

Plaintiff seeks an Order 1) granting Plaintiff leave of Court to voluntarily discontinue the Instant Action without prejudice; or, alternatively, 2) consolidating this action with the Kings County Action; 3) determining the appropriate venue in which these two actions should be litigated; and 4) granting certain injunctive relief.

Defendants oppose Plaintiff’s motion and cross move for an Order awarding sanctions against Plaintiff and his counsel for their allegedly frivolous conduct in filing this motion.

B. The Parties’ History

The Amended Verified Complaint (“Complaint”) in this action, filed June 12, 2009, describes this case as an action arising as a result of Defendant Itzhak Katan’s (“Katan’s”) breaches of his agreements with Plaintiff regarding the operation of KGH Group, LLC (“KGH”). Plaintiff has sued 1) in his individual capacity to recover sums representing his capital contributions, plus interest, 2) for monetary damages arising from Katan’s allegedly fraudulent misrepresentations and breaches of his fiduciary duties as KGH’s member-manager, 3) for declaratory relief recognizing that KGH is the owner of the disputed property (“Property”) located at 500 4th Avenue, Brooklyn, New York, and 4) for the imposition of a constructive trust on the proceeds from sales of the Property or any part thereof. The Court has conducted numerous conferences in this matter.

By Verified Complaint (“Kings County Complaint”) dated August 2, 2010, Plaintiff Aron Herczl (“Herczl”), individually and as a member of KGH, filed the Kings County Action. In the Kings County Complaint, Herczl alleges, *inter alia*, that Katan fraudulently diverted funds related to KGH and the Property and seeks injunctive relief. On August 6, 2010, counsel for the parties appeared before the Justice assigned to the Kings County Action in connection with an

application for a temporary restraining order in the Kings County Action and Defendants' counsel has provided a transcript of those proceedings (Ex. A to Mollen Aff. In Opp./Supp.). The Assigned Justice in the Kings County Action concluded that it was inappropriate for her to address the application before her in light of the pending action before this Court, stating that "the order to show cause is declined because another action is pending for the same relief in Nassau County" (Transcript at p. 8).

C. The Parties' Positions

Plaintiff affirms that Nassau County was selected as the original venue for this matter as an accommodation to Plaintiff's prior counsel whose office was located in Nassau County. Plaintiff submits that, notwithstanding that initial selection, Kings County is the most appropriate forum in which to litigate this matter for reasons including 1) the Instant Action solely involves Brooklyn properties and Brooklyn business properties; 2) deposition and document production will likely take place in the Brooklyn or Manhattan offices of counsel; 3) Plaintiff resides in Kings County; and 4) the Nassau County defendants will suffer no prejudice if the Court grants Plaintiff's motion to discontinue.

Defendants oppose Plaintiff's motion, characterizing it as a "blatant effort to engage in 'judge shopping'" (Mollen Aff. in Opp./Supp. at ¶ 3). Defendants note the comments of the Justice in the Kings County Action, discussed *supra*, who refused to sign Plaintiff's Order to Show Cause in the Kings County action based on her conclusion that the application should be made in Nassau County, where the Instant Action has been pending for over a year. Defendants note, further, that the Court in the Instant Action has conducted conferences regarding and considered motions filed in the Instant Action.

Defendants also ask the Court to impose sanctions against Plaintiff and his counsel for filing the instant motion, in light of the statements of the Justice in the Kings County action suggesting that Nassau County is the more appropriate forum for this matter, and in light of the extensive involvement by the Court and counsel in the Instant Action.

DECISION OF THE COURT

A. Consolidation

CPLR § 602(a) permits consolidation "when actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial or any or all the

matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.” CPLR § 602(b) provides, *inter alia*, that where an action is pending in the supreme court it may, upon motion, remove to itself an action pending in another court and consolidate it or have it tried together with that in the supreme court.

Consolidation or a joint trial should be ordered when the actions involve common questions of law and fact so as to avoid unnecessary duplication of trials, save unnecessary costs and to avoid the possibility of inconsistent decisions based upon the same facts. *Viafax Corp. v. Citicorp Leasing, Inc.*, 54 A.D.3d 846 (2d Dept. 2008); *Gutman v. Klein*, 26 A.D.3d 464 (2d Dept. 2006). A motion to consolidation rests in the sound discretion of the trial court. *Mattia v. Food Emporium, Inc.*, 259 A.D.2d 527 (2d Dept. 1999).

The party seeking consolidation must establish the existence of common questions of law or fact. *Beerman v. Morhaim*, 17 A.D.3d 302 (2d Dept. 2005). Once the movant has established the existence of common questions of law or fact, the party opposing consolidation must demonstrate that it will suffer prejudice to a substantial right if consolidation is granted. *Mattia v. Food Emporium, Inc.*, *supra*. Absent that showing, consolidation should be granted if the movant meets its burden. *Id.* See also *Viafax Corp. v. Citicorp Leasing, Inc.*, *supra*; and *Mas-Edwards v. Ultimate Services, Inc.*, 45 A.D.3d 540 (2d Dept. 2007).

B. Frivolous Conduct

22 NYCRR § 130-1.1(a) authorizes the court, in its discretion, to award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct. Section 130-1.1(c) provides that conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.

C. Application of these Principles to the Instant Action

The Court concludes that, given Plaintiff's selection of the venue of Nassau County when filing the Instant Action, the common questions of law and fact in the Instant and Kings County

Actions, and the Court's extensive involvement in the Instant Action, consolidation of the Instant Action and the Kings County Action is appropriate. Accordingly, the Court grants Plaintiff's motion for consolidation of the Instant and Kings County Actions, and directs that the Kings County Action be transferred to Nassau County, where the Court will assume responsibility for both matters.

The Court denies Plaintiff's motion for injunctive relief, subject to renewal upon the consolidation of these matters and the Nassau County Clerk's receipt of the file in the Kings County Action.

The Court denies Defendants' motion for sanctions in light of the Court's conclusion that Plaintiff's motion is not baseless, notwithstanding the Court's denial of that motion.

Accordingly, it is hereby:

ORDERED, that the pending Kings County matter of *Aron Herczl, individually and as a member of KGH Group LLC and KGH Group LLC v. Itzhak Katan, a/k/a Isaac Katan; K.A.T. - I Family Limited Partnership; K.A.T. - II Family Limited Partnership; K.A.T. - III Family Limited Partnership; K.A.T. - IV Family Limited Partnership; K.A.T. - V Family Limited Partnership; Park Slope Group, LLC; Ronald Fatato; Liliya Katan, TD Bank, N.A.; Park Slope Heights, LLC; D.A. Associates Inc. NY; John Doe 1; John Doe 2; and John Doe, LLC*, Kings County Index Number 19024-10 is hereby consolidated with the above-captioned action; and it is further

ORDERED, that the pending Kings County matter described in the preceding paragraph is transferred to Nassau County for all purposes; and it is further

ORDERED, that counsel for Plaintiff shall serve a copy of this Order upon the Kings County Clerk within ten (10) days of the date of this Order; and it is further

ORDERED, that upon receipt of a copy of this Order, the Kings County Clerk shall transfer its file to the Nassau County Clerk forthwith.


All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court on October 26, 2010 at 9:30 a.m.

ENTER

DATED: Mineola, NY
October 25, 2010



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED

OCT 28 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE