

Robbins v Shuvu Bonim
2012 NY Slip Op 30678(U)
March 19, 2012
Supreme Court, New York County
Docket Number: 107862/11
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Saliann Scarpulla
Justice

PART 19

William Robbins

INDEX NO. 107862/11

MOTION DATE _____

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

Shuvy Bonim

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision dated March 19, 2012, which disposes of motion sequence 1004,005.

FILED

MAR 21 2012

NEW YORK

COUNTY CLERK'S OFFICE

Dated: 3/19/12

Saliann Scarpulla
SALIANN SCARPULLA

Check one: ☐ FINAL DISPOSITION

☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

☐ REFERENCE

☐ SUBMIT ORDER/ JUDG.

☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT:

Saliann Scarpulla
Justice

PART

19

Index Number : 107862/2011

ROBBINS, WILLIAM

VS.

BONIM, SHUVU

SEQUENCE NUMBER : 004

AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is and cross-motion are decided in accordance with the accompanying memorandum decision dated March 19, 2012 which disposes of motion sequence no. 002,004, 005.

FILED

MAR 21 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated:

3/19/12

Saliann Scarpulla J.S.C.
SALIANN SCARPULLA

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER - ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT:

Saliann Scarpulla
Justice

PART

19

Index Number : 107862/2011

ROBBINS, WILLIAM

VS.

BONIM, SHUVU

SEQUENCE NUMBER : 005

OTHER RELIEFS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____

No(s). _____

Answering Affidavits — Exhibits _____

No(s). _____

Replying Affidavits _____

No(s). _____

Upon the foregoing papers, it is ordered that this motion is

*decided in accordance
with the accompanying memorandum
decision dated March 19, 2012 which disposes
of motion sequence no. 002, 004, 005.*

FILED

MAR 21 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated:

3/19/12

Saliann Scarpulla
J.S.C.
SALIANN SCARPULLA

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ 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 : IAS PART 19

-----X
WILLIAM ROBBINS,

Plaintiff,

-against-

Index No. 107862/2011

SHUVU BONIM A/K/A THE UNITED FUND
FOR THE EDUCATION OF RUSSIAN
IMMIGRANT CHILDREN IN ISRAEL, INC.
A/K/A AMERICAN FRIENDS OF SHUVU BONIM,

FILED

Defendant.

MAR 21 2012

For the Plaintiff:
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60 East 42nd Street, Suite 4700
New York, NY 10165
(212) 867-9140
By: Cori A. Robinson, Esq.

For the Defendants:
Snitow Kanfer H... & ...
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(212) 317-1308
By: Franklyn H. Snitow, Esq.

**NEW YORK
COUNTY CLERK'S OFFICE**

PRESENT: SALIANN SCARPULLA, J.S.C.:

Motion sequence numbers 002, 004, and 005 are consolidated for purposes of disposition. In sequence number 002, defendant RETURN: The United Fund for the Education of Russian Immigrant Children in Israel, Inc., sued herein as Shuvu Bonim a/k/a the United Fund For the Education of Russian Immigrant Children in Israel, Inc. a/k/a American Friends of Shuvu Bonim ("RETURN"), moves, pursuant to CPLR 3211 (c), for an order dismissing the complaint of plaintiff William Robbins ("Robbins") in its entirety. In sequence number 004, Robbins moves, pursuant to CPLR 3025 (b) and 1003, for an order granting leave to amend the complaint to add as plaintiffs 511186, L.L.C.

("511186") and 45 Tiemann Associates, Inc. ("45 Tiemann"), to add as defendants certain names allegedly used by RETURN as aliases, RETURN fundraisers Abraham Biderman and John Does 1, 2, and 3, and to add an alternative demand for monetary damages. RETURN cross-moves, pursuant to CPLR 2214, for an order dismissing the proposed amended complaint in its entirety. In sequence number 005, Robbins moves for an order lifting the automatic stay on discovery to permit a deposition of a former RETURN executive director.

In this action, Robbins, a philanthropist, alleges that the charitable gift by 511186 of a parcel of real estate on December 5, 2007 to RETURN, a not-for-profit organization, is subject to certain oral restrictions on the distribution of the net profits generated by the sale of the property. The donated property is located at 511 West 186th Street, in Manhattan, and is allegedly valued at \$5.4 million. 511186 is a wholly-owned subsidiary of 45 Tiemann. Robbins is the sole owner and member of 511186, and the sole shareholder and director of 45 Tiemann.

Following the donation, RETURN commenced, pursuant to section 511 of the Not-For Profit Corporations Law (N-PCL), a special proceeding before the Supreme Court, Kings County for an order granting RETURN leave to sell the property, and dispose of the proceeds of the sale (*see Matter of Shuvu/Return: The United Fund for the Education of Russian Immigrant Children in Israel*, Sup Ct, Kings County, Index No.

12549/2011 [“the special proceeding”]). Neither Robbins nor 511186 was joined in the special proceeding.

The court in the special proceeding authorized the sale of the donated property, and directed that the sale proceeds be used to pay off a mortgage and portions of certain loans, and that the remaining proceeds be used by RETURN for its ongoing educational and philanthropic endeavors (*see Matter of Shuvu/Return: The United Fund for the Education of Russian Immigrant Children in Israel*, Sup Ct, Kings County, Jun. 6, 2011, Rosenberg, J., index No. 12549/2011 [“the special proceeding order”]). On May 26, 2011, the state attorney general noted on the special proceeding order that it had no objection to the granting of judicial approval of the order (*see id.*).

Robbins alleges that RETURN fraudulently, and in breach of the oral agreement, failed to advise the special proceeding court that Biderman, a RETURN co-chairperson and fundraiser, orally agreed that the net proceeds from the ultimate sale of the property, an amount estimated to be less than \$250,000, were to be distributed to charitable organizations chosen by Robbins, rather than by RETURN. As of the date of the submission of the motions consolidated herein, the sale of the property had not yet closed.

Robbins commenced this action seeking either rescission of the property donation or specific performance of the alleged oral agreement restricting disbursement of the property sale net proceeds. He asserts causes of action against RETURN for breach of contract, fraud, misrepresentation, rescission, imposition of a constructive trust on the net

proceeds, and a judgment declaring that RETURN must specifically perform the alleged oral agreement.

RETURN now seeks to dismiss this action in its entirety on the grounds that: 1) Robbins lacks legal capacity to prosecute this action; 2) that a court of coordinate jurisdiction has previously ruled on the issues presented here; and 3) that even if the court were to permit Robbins to amend the complaint, the claims asserted fail to state legally cognizable causes of action. In opposition to the motion to dismiss and in support of the motion for leave to amend the complaint, Robbins contends that the proposed amended complaint resolves all the pleading deficiencies in the original complaint cited by RETURN, and seeks to add additional plaintiffs and defendants.

As a threshold issue, the parties dispute whether Robbins has legal capacity to prosecute this action (*see* CPLR 3211 [a] [3]). A plaintiff has standing to assert claims only on behalf of himself, and does not, generally, have standing to assert claims on behalf of another. *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 773 (1991). Here, the documentary record conclusively demonstrates that Robbins is not a real party in interest with respect to the issues raised in this action. The bargain and sale deed evidencing the transfer of the property on December 5, 2007 identifies 511186 as the owner and seller of the property. Robbins executed the deed only on behalf of 511186, as a member of that company, and not in his individual capacity. Similarly, both the State of New York Real Property Transfer Report and the New York City Department

of Finance, Office of the City Register, Recording and Endorsement cover page identify 511186 as the grantor/seller of the property. In addition, Robbins has failed to allege in the complaint or in the proposed amended complaint any facts from which an oral agreement between himself personally and RETURN regarding the gift of the property by 511186 may be inferred.

Moreover, Robbins's sole ownership of the stock of the former property owner, 511186, does not confer standing upon Robbins. "[A] shareholder, even a sole shareholder or one in a closely held corporation, typically does not have standing to sue for injuries to the corporation itself." *Lawrence Ins. Group v. KPMG Peat Marwick*, 5 A.D.3d 918, 919 (3d Dept 2004), citing *Abrams v Donati*, 66 N.Y.2d 951, 953 (1985).

Contrary to Robbins's contention, the addition as plaintiffs of 511186 and its parent company, 45 Tiemann, does not rectify the standing problem. The failure to name the real party in interest as the plaintiff is fatal to a complaint, and such failure cannot be remedied by the substitution or addition of the correct party. While CPLR 305 [c] accords the court the authority to permit an amendment to a summons in certain circumstances, the section cannot be used as a device with which to add or substitute a new party, where an incorrect party was originally named. *Hart v. Marriott Intl.*, 304 A.D.2d 1057, 1059 (3d Dep't 2003). Amendment or substitution is not available where a plaintiff seeks to correct "a fundamental and fatal defect – namely counsel's failure to properly identify the plaintiff in [the] action." *Resurgent Capital Servs., LLC v. Mackey*, 32 Misc. 3d 265, 266

(2d Dist. Ct., Nassau County 2011); *Schneider v. David*, 169 A.D.2d 506, 507 (1st Dep't 1991); *cf.*, *JCD Farms v. Juul-Nielsen*, 300 A.D.2d 446, 446 (2d Dep't 2002) (holding substitution appropriate where no prejudice could accrue). "Proper identification of the plaintiff is not only a statutory requirement, but is a basic requirement of due process." 82 NY Jur 2d, Parties § 19.

As Robbins lacks standing to sue for relief related to the transfer of the property to RETURN, including specific performance of the alleged oral agreement restricting the distribution of the future sale net proceeds, and rescission of the donation, this action must be dismissed in its entirety on lack of standing grounds, and the branches of the cross-motion to amend the complaint and add 511186 and 45 Tiemann must be denied.

Even assuming that Robbins could successfully amend the complaint to substitute in the real party in interest, the remainder of the relief Robbins' seeks in his motion would be nevertheless be denied. Robbins moves to amend the complaint to add as defendants other corporate names allegedly used by RETURN, Abraham Biderman, and John Does 1, 2, and 3, standing for RETURN fundraisers with whom Robbins spoke. Although motions to amend are freely granted, absent surprise or prejudice, it is well settled that "in an effort to conserve judicial resources, an examination of the proposed amendment is warranted, and leave to amend will be denied when the proposed pleading is palpably insufficient as a matter of law." *Ancrum v. St. Barnabas Hosp.*, 301 A.D.2d 474, 475 (1st Dep't 2003) (internal citations omitted); CPLR 3025 [b]).

While an application to amend the caption to correct the misnomer of a defendant's name generally will be granted, *see Fink v. Regent Intl. Hotels*, 234 A.D.2d 39, 41 (1st Dept 1996), the addition of the defendant's alleged corporate aliases is not appropriate, particularly where, as here, the defendant freely admits its true name. While denying any connection with the named defendant, Shuvu-Bonim, RETURN has voluntarily appeared, and admits that it is the recipient of the property donated by 511186, and that it is a proper party to this action (*see* Franklyn H. Snitow, Esq., Aug. 22, 2011 Aff. at 1, n 1).

Therefore, addition of RETURN's numerous alleged aliases would serve no purpose.

As to adding as a defendant Abraham Biderman in his individual capacity, Robbins has wholly failed to allege in the proposed amended complaint that Biderman was acting in a capacity other than as a co-chairperson and fundraiser of RETURN during his alleged contact with Robbins regarding the proposed donation of the property. Robbins has also failed to allege any facts indicating that Biderman and RETURN are alter egos or that RETURN's corporate veil should be pierced.

Moreover, Biderman is shielded by N-PCL § 720-a from legal action, in the circumstances presented here. The section immunizes uncompensated directors and officers of such organizations from individual liability, unless the director's conduct constituted gross negligence toward the plaintiff or was intended to cause the resulting harm to the plaintiff. Robbins does not dispute Biderman's allegation that he does not receive any compensation for the services that he performs as co-chairperson of

RETURN (*see* Abraham Biderman Sept. 14, 2011 Aff., ¶ 2). Robbins's allegation of what is essentially a breach of an oral contract by RETURN acting through its co-chairman, Biderman, is not sufficient to pierce Biderman's statutory immunity.

Likewise, although Robbins seeks to add as defendants John Does 1, 2, and 3, all he has alleged is that these unidentified individuals are RETURN representatives or individuals associated with RETURN at the time RETURN solicited the property donation (*see* Proposed Amended Complaint, ¶ 5). Robbins has wholly failed to allege any wrongdoing by these individuals.

The Merits of the Proposed Amended Complaint

Further, again assuming that Robbins could remedy his pleading defects, the Court addresses the additional grounds asserted by RETURN to dismiss the complaint and proposed amended complaint. RETURN seeks to dismiss the complaint and proposed amended complaint on the ground that, in the special proceeding, a court of coordinate jurisdiction has previously ruled on the disposition of the proceeds of the sale of the property. In opposition, Robbins contends that the special proceeding order is not binding on him, and he seeks to amend the complaint to add an alternative claim for monetary damages.

In the special proceeding, the court authorized the sale of the property, and directed that:

the proceeds to be received from the sale of the aforesaid
realty shall first be used to pay off the mortgage on the

premises held in Signature Bank in the approximate sum of \$950,000; then \$2,000,000 to pay off a portion of certain loans that have been called and **the balance for the on-going educational and philanthropic endeavors of the Petitioner [RETURN]**

Matter of Shuvu/Return: The United Fund for the Education of Russian Immigrant Children in Israel, Sup Ct, Kings County, Jun. 6, 2011, Rosenberg, J., Index No. 12549/2011 [emphasis added].

Here, Robbins seeks specific performance of an alleged oral agreement restricting the distribution of the sale proceeds or, in the alternative, rescission of the gift of the property (*see* Complaint, Ad Damnum; Proposed Amended Complaint, Ad Damnum). Either relief contradicts the specific directives in the special proceeding order regarding sale of the property and distribution of the net proceeds by RETURN, and would, therefore, necessarily require modification of that order. In the interest of the orderly administration of justice, a court may not modify or overrule an order from a court of coordinate jurisdiction. *Public Serv. Mut. Ins. Co. v. McGrath*, 56 A.D.2d 812, 813 (1st Dep't 1977).

Contrary to Robbins's contention, the fact that Robbins, 511186, or 45 Tiemann is not bound by the special proceeding order is irrelevant. Robbins concedes that RETURN was not required by statute or case law to join Robbins, 511186, or 45 Tiemann in the special proceeding or to accord them formal notice of the proceeding (*see* Cori A. Robinson, Esq. Oct. 24, 2011 Aff., ¶¶ 14, 15). The court notes that the donated property

was fully transferred to RETURN on December 5, 2007, and that there is no allegation that 511186 retained an ownership interest in the property.

Further, it appears that Robbins has withdrawn his objection to the sale of the property by RETURN, and is now in favor of such sale (*see* Lawrence I. Garbuz, Esq. Oct. 4, 2011 Opp. Aff. at 9, fn 1). On this independent ground, the branches of the motion to dismiss the third and fifth causes of action for rescission and the demands for specific performance are granted.

RETURN also contends that the second, third, fourth, and fifth causes of action for fraud and misrepresentation, rescission, constructive trust, and a declaratory judgment asserted in the complaint and in the proposed amended complaint are fatally defective on the ground that they are duplicative of the first cause of action for breach of contract. In opposition, Robbins contends that the record includes evidence of the oral agreement, as alleged.

The tort claims are fatally defective to the extent that they arise out of allegations that RETURN did not intend to fulfill its contractual obligations. "It is well settled that where . . . a claim to recover damages for fraud is premised upon an alleged breach of contractual duties and the supporting allegations do not concern representations which are collateral or extraneous to the terms of the parties' agreement, a cause of action sounding in fraud does not lie." *McKernin v. Fanny Farmer Candy Shops*, 176 A.D.2d 233, 234 (2d Dep't 1991). Here, in the first cause of action for breach of contract, Robbins alleges that

RETURN agreed to distribute the net proceeds from the sale of the property to Robbins's intended charities, yet failed to do so. In the tort claims, Robbins similarly alleges that RETURN engaged in fraud when it induced him to donate the property with promises of distributing the net proceeds according to his wishes, when it had no intention of fulfilling those promises.

In the third, fourth, and fifth causes of action, Robbins alleges that RETURN wrongfully acquired the property by intentionally failing to divulge, or fraudulently concealing, information regarding debts and encumbrances that rendered it incapable of fulfilling its obligations under the oral agreement regarding disposition of the net proceeds of the sale of the property. However, Robbins does not allege any facts from which it may be inferred that RETURN owed him, or 511186, any affirmative duty to disclose information about its financial condition.

Mere silence is not actionable, absent a fiduciary or confidential relationship between the parties. *Moser v. Spizzirro*, 31 A.D.2d 537, 537 (2d Dept 1968), *aff'd* 25 NY2d 941 919690; *Mobil Oil Corp. v. Joshi*, 202 A.D.2d 318, 318 (1st Dep't 1994). No such relationship may be found to exist, absent evidence that the parties' relationship was other than arm's length. *Furniture Consultants v. Acme Steel Door Corp.*, 240 A.D.2d 180, 180 (1st Dep't 1997). Where the parties are sophisticated business persons engaged in arm's-length negotiations and represented by attorneys, and the party claiming reliance had an opportunity to discover the true state of facts, reliance is not reasonable as a matter

of law. *See Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495-496 (1st Dept 2006).

No fiduciary or confidential relationship can be found to exist here, inasmuch as the donation was, without dispute, an arm's-length transaction.

The fraud claim is also fatally defective on the ground that Robbins has failed to adequately allege the elements of justifiable reliance and detriment. To state a legally viable claim of fraud, a plaintiff must allege a "representation of a material existing fact, falsity, scienter, deception and injury." *New York Univ. v Continental Ins. Co.*, 87 N.Y.2d 308, 318 (1995) (citation omitted). An essential element of the claim is an allegation that the plaintiff justifiably relied on the fraudulent statement to his/her/its detriment. *Channel Master Corp. v. Aluminum Ltd. Sales*, 4 N.Y.2d 402, 407 (1958). Further, "[i]n order to establish a cause of action to recover damages for fraud based upon misrepresentation, a party must not only establish that it reasonably believed that the representation made was true; it must also establish that it was justified in taking action in reliance upon that representation." *LoGalbo v. Plishkin, Rubano & Baum*, 197 A.D.2d 675, 676 (2d Dep't 1993).

In the complaint and in the proposed amended complaint, Robbins does not allege that, had he known about RETURN's financial status at the time of the donation, he would not have made the donation. Instead, he alleges merely that such information "would have affected his decision" (Complaint, ¶ 35; Proposed Amended Complaint, ¶

41). Robbins does not allege how his decision would have been affected. Therefore, the allegation is not sufficiently detailed to state a legally viable claim of fraud

In view of the dismissal of the complaint, that branch of the motion to amend the complaint to add an alternative demand for monetary damages is denied. Lastly, Robbins's motion for an order lifting the automatic stay on discovery to permit a deposition of nonparty Alan Rosenstock, a former RETURN executive director and board member, is denied. Pursuant to CPLR 3214 (b), the court may lift the automatic stay of discovery; however, no such order is required here.

An individual's testimony, generally, has no relevancy to a pre-answer motion to dismiss the complaint, which is addressed to the sufficiency of the pleadings. Even if, as Robbins represents, Rosenstock's testimony confirms the existence of an oral agreement placing restrictions on the distribution of the net proceeds of the sale of the property donated by 511186, that testimony would not change the disposition of these motions. Such testimony could not confer standing upon Robbins, nor could it provide a basis for the modification of an order by a court of coordinate jurisdiction. In addition, as alleged, Rosenstock's proposed testimony would not render the tort claims legally viable.

Accordingly, it is

ORDERED that motion sequence number 002 to dismiss the complaint is granted, and the complaint is dismissed in its entirety as against defendant, with costs and

disbursement to the defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the defendant; and it is further

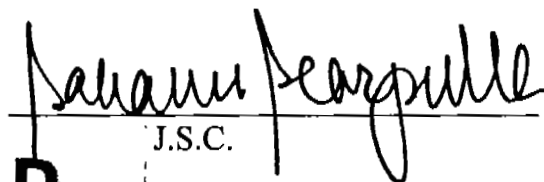
ORDERED that motion sequence number 004 to amend the complaint is denied in its entirety; and it is further

ORDERED that the cross-motion to dismiss the proposed amended complaint is denied as moot, in view of the denial of the motion to amend; and it is further

ORDERED that motion sequence number 005 to lift the stay on discovery is denied in its entirety.

Dated: March 19, 2012

ENTER:


J.S.C.

FILED

MAR 21 2012

NEW YORK
COUNTY CLERKS OFFICE