

Geik v Geik

2014 NY Slip Op 30319(U)

January 31, 2014

Sup Ct, New York County

Docket Number: 650911/11

Judge: Barbara R. Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **BARBARA R. KAPNICK**
Justice

PART 39

Index Number : 650911/2011
GEIK, ALAN
vs
GEIK, SUSAN
Sequence Number : 002
AMEND CAPTION / PARTIES

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-motions are

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 1/31/14


_____, J.S.C.
BARBARA R. KAPNICK
JAC

- 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
COUNTY OF NEW YORK: IA PART 39**

-----x
ALAN GEIK and IRIS GEIK, Individually
and as Executors of the Estate of
REBA GEIK

DECISION/ORDER
Index No. 650911/11
Motion Seq. No. 002

Plaintiffs,

-against-

SUSAN GEIK, Individually and as
Executrix of the Estate of
BERNARD GEIK,

Defendant.

-----x
BARBARA R. KAPNICK, J.:

Before the Court is plaintiffs' motion for an order (1) granting leave to serve an amended complaint pursuant to CPLR 3025 (and to amend the caption to conform to the amended complaint and to serve a supplemental summons on defendant Susan Geik in her capacity as Trustee of the Bernard Geik Irrevocable Trust and on Mall Star Inc.); and (2) compelling defendant, pursuant to CPLR 3126, to produce unredacted copies of the correspondence produced in redacted form by defendant dated October 16, 2008 and November 4, 2008, regarding a buy-out under the shareholder's agreement, and dated May 11, 2001 regarding insurance purchased to set up and fund the American Consolidated and Affiliates Buy Trust.

Defendant cross-moves, pursuant to CPLR 3211(a)(7), to partially dismiss the Complaint on the grounds that the tort claims asserted therein (second, third, fourth and eighth causes of action) fail to

state a cause of action for which relief may be granted as to defendant Susan Geik.

At oral argument held on the record on December 18, 2013, this Court granted defendant's cross-motion to dismiss only as to plaintiffs' second cause of action for breach of fiduciary duty, and third and fourth causes of action for conversion asserted in the Complaint. This Court also granted plaintiffs' motion to amend the Complaint only to the extent of allowing plaintiffs to assert one new cause of action for common law actual and constructive fraud, and two new causes of action for breach of contract. Plaintiffs' motion to compel was adjourned to a status conference scheduled for February 5, 2014, which the Court now adjourns without a date pending reassignment of this case to a new Judge. Finally, decision was reserved as to the eighth cause of action (breach of fiduciary duty) asserted in the original Complaint which defendant moved to dismiss, and as to plaintiffs' proposed fourteenth (fraudulent conveyance under Debtor & Creditor Law ["DCL"] § 273), fifteenth (fraudulent conveyance under DCL § 276) and sixteenth (voiding of Bernard Geik's trust under Estates, Powers and Trusts Law ["EPTL"] § 7-3.1) causes of action.

After further reviewing the papers, the Court now decides the remaining issues. As to the eighth cause of action for breach of fiduciary duty, plaintiffs allege that Susan, as Executrix of Bernard's Estate, had a fiduciary duty to Bernard's creditors, including Reba. They further allege that Susan breached this duty

by failing to provide funds to discharge Bernard's obligation to pay for Reba's medical care and health insurance as required under the parties' Settlement Agreement.

What plaintiffs allege is, in essence, a breach of contract claim based on the failure of Bernard's Estate to perform its contractual obligation to pay for Reba's healthcare. Given that this Court has already granted plaintiffs' request to amend the Complaint to assert such a breach of contract claim, defendant's motion to dismiss this cause of action is dismissed as duplicative.

The Court will next consider plaintiffs' motion for leave to amend the Complaint. DCL § 276 provides that "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed by law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." Since a claim under DCL § 276 is fraud-based, it must be pleaded with particularity. See *United Nat'l Funding, LLC v. Volkmann*, 25 Misc.3d 1233(A), *14 (Sup Ct, NY Co Nov. 17, 2009); *Fromer v. Yogel*, 50 F.Supp.2d 227, 247 (SDNY 1999); *In re Sharp Int'l Corp.*, 403 F.3d 43, 56 (2d Cir. 2005). Here, because plaintiffs make their allegations upon information and belief, their motion to amend the Complaint to add a claim for violation of DCL § 276 is denied. See *United Nat'l Funding*, *supra* at *14.

Plaintiffs also seek to amend the Complaint in order to assert a claim under DCL § 273. That statute provides that “[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.” Violations of DCL § 273, unlike claims under DCL § 276, need not be pleaded with particularity because an allegation of actual intent to defraud is not required; the allegation is based on the transferor’s financial condition and the sufficiency of the consideration provided by the transferee. *Menaker v. Alstaedter*, 134 AD2d 412, 413 (2d Dep’t 1987); *In re Sharp Int’l Corp.*, 281 B.R. 506, 518 (EDNY 2002). Plaintiffs allege in their proposed Amended Complaint that Bernard conveyed certain assets without fair consideration and that such conveyances rendered Bernard and his Estate insolvent. As such, plaintiffs’ motion for leave to amend the Complaint is granted with respect to this claim under DCL § 273.

Finally, EPTL § 7-3.1 provides that “[a] disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator.” Plaintiffs allege in the proposed Amended Complaint that Bernard transferred assets into his Irrevocable Trust for his own use, and that plaintiffs were existing and subsequent creditors of Bernard. Accordingly, plaintiffs’ motion

for leave to amend the Complaint is granted to the extent of allowing plaintiffs to assert this claim.

Since plaintiffs fail to assert any cause of action directly against Mall Star,¹ which was purportedly dissolved in 2007 (Tr. 20:3-4), their request to amend the caption is denied insofar as it seeks to add Mall Star as a defendant, but is granted to the extent of amending the caption to add Susan Geik in her capacity as Trustee of the Bernard Geik Irrevocable Trust, and allowing plaintiffs to serve a Supplemental Summons upon her in that capacity.

The caption of this action shall be amended to read as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:**

-----x
ALAN GEIK and IRIS GEIK, Individually
and as Executors of the Estate of
REBA GEIK

Index No. 650911/11

Plaintiffs,

-against-

SUSAN GEIK a/k/a SANDRA GEIK,
Individually and as Executrix of the
Estate of BERNARD GEIK, and as Trustee
of the BERNARD GEIK IRREVOCABLE TRUST,

Defendant.
-----x

¹ While plaintiffs generally allege that Mall Star was the beneficiary of the alleged fraudulent conveyances, they do not allege that Mall Star in any way "participated in" the fraudulent transfers. As such, plaintiffs have not sufficiently pled a cause of action against Mall Star pursuant to DCL §§ 273 or 276. See *Sullivan v. Kodsi*, 373 F.Supp.2d 302, 309-311 (SDNY 2005).

Plaintiffs are directed to serve a copy of this order with notice of entry on both the New York County Clerk and the Trial Support Office (Room 158), who are hereby directed to mark their records to reflect the amendment.

Plaintiffs are further directed to file and serve their Amended Complaint in accordance with the directives herein within 30 days, and defendant shall have 30 days to file and serve an Answer or otherwise move with respect thereto. Counsel for the parties shall notify the Judge to whom this case is reassigned when they are ready to schedule a conference.

This constitutes the decision and order of this Court.

Date: January 31, 2014



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.