

Herman v Herman

2014 NY Slip Op 31591(U)

June 20, 2014

Sup Ct, New York County

Docket Number: 650205/2011

Judge: Shirley Werner Kornreich

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This opinion is uncorrected and not selected for official publication.

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

-----X
ROSEMARIE A. HERMAN, et al,

Plaintiffs,

DECISION & ORDER

-against-

Index No. 650205/2011

JULIAN MAURICE HERMAN et al.,

Defendants.

-----X
JULIAN MAURICE HERMAN,

Third-Party Plaintiff,

-against-

JOSEPH ESMAIL and SOLITA HERMAN,

Third-Party Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.

Plaintiffs and third-party defendant Joseph Esmail (Joseph) move (Motion Seq 006) to dismiss the counterclaims of Julian Maurice Herman (Maurice) against Rosemarie Herman (Rosemarie) and the third party complaint against Joseph, Rosemarie’s husband. At oral argument, Maurice withdrew: 1) the first counterclaim for tortious interference with contract against plaintiff Rosemarie and 2) the portion of the first third-party claim for aiding abetting tortious interference with contract against Joseph. Tr 5/21/14, Doc¹ 655, pp 22-23. What remains is : 1) the second counterclaim against Rosemarie for fraud on the court; 2) a third-party

¹ References to “Doc” followed by a number refer to documents filed in the New York State Electronic Filing System.

claim against Joseph for aiding and abetting fraud on the court; and 3) a third-party claim against Joseph for conspiracy to tortiously interfere with contracts and defraud the court.

Factual Background

The facts relating to this action are set forth in detail in this court's decisions and orders, dated June 4, 2012 (Dismissal Decision) and February 8, 2013 (Renewal Decision), on defendants' motions to dismiss and plaintiffs' motion to renew and reargue, respectively. Docs 60 & 420. Additional relevant facts are contained in this court's decision and order dated April 2, 2014 (Gramercy Decision) in the related action entitled *Herman v 36 Gramercy Realty Assoc.*, Index No. 652700/2012 (Gramercy Action), Doc 109 therein. The reader's familiarity with these decisions is assumed. As this is a motion to dismiss, the facts alleged in the counterclaims and third-party complaint are accepted as true and entitled to the benefit of every favorable inference. *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 (1976); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 (1st Dept 2005).

Briefly, the gravamen of the action is plaintiffs' claim that in 1998, Maurice's entity, Consolidated Realty Holdings, LLC (Consolidated), for the grossly unfair price of \$8 million, bought 50% of six limited liability companies that were held in two trusts, of which Rosemarie was the income beneficiary (1998 Transaction). Rosemarie and Maurice are brother and sister. The six limited liability companies each owned a Manhattan apartment building. Rosemarie and Maurice inherited the buildings from their father, Harold. At the time of the 1998 Transaction, one trust, created by Rosemarie in 1991 (1991 Trust), owned 50% of five of the limited liability companies, while another trust (1990 Trust with 1991 Trust, Trusts), purportedly owned 50% of

the limited liability company that owned the sixth building.² Four years after the 1998 Transaction, Maurice sold five of the limited liability companies to a third-party³ for \$100 million (2002 Transaction).

Defendant Michael Offit (Offit), as trustee, signed the 1998 Transaction's contract of sale on behalf of the Trusts. Offit had been Maurice's friend since boyhood. Although the complaint alleged that Maurice was the sole trustee of the 1990 Trust until he resigned on March 2, 1997, in the Gramercy Action, plaintiffs submitted proof that Maurice designated Rosemarie a co-trustee on April 12, 1990, in an instrument acknowledged by Rosemarie, Maurice and Harold, which was recorded in 1990. In 1990, Harold was the sole income beneficiary of the 1990 Trust.

After the complaint was filed, Maurice moved to dismiss, largely on statute of limitations grounds. In the Renewal Decision, the court ruled that there were issues of fact as to whether Rosemarie knew or should have known about the 1998 Transaction within the prescriptive period, and whether Maurice was estopped to assert the statute due to affirmative misrepresentations and concealment, when he had a fiduciary duty to disclose.

In Maurice's counterclaim for fraud on the court, he alleges that Rosemarie perpetrated a fraud by denying that she knew about the 1998 and 2002 Transactions. Maurice alleges that Rosemarie knew about them "at all relevant times," but lied to avoid dismissal on statute of limitations grounds. In addition, the counterclaim alleges that Rosemarie misrepresented her

² As noted in the Gramercy Decision, the 1998 Transaction was not effective to convey the 1990 Trust's interest in one of the buildings, 36 Gramercy Park East (36 Gramercy). Maurice attempted to transfer the building to Mayfair York, LLC (Mayfair) in April 1997. However, the deed was a nullity because Maurice resigned as trustee prior to the conveyance and Rosemarie, as co-trustee, did not execute the deed. When Maurice resigned, Offit and Rosemarie became the trustees.

³ Defendant Cosmopolitan Property Acquisition Company, LLC, an entity owned by Maurice Mann.

obligations and those of Offit and Maurice under the Trusts, in particular, failing to disclose that she was co-trustee of the 1990 Trust. Maurice says that although she was co-trustee, Rosemarie renounced or repudiated her office by failing to participate in managing the 1990 Trust when Harold was the income beneficiary.

Further, Maurice alleges that Rosemarie has “coerced or extorted” their mother, Solita Herman (Solita) to remain silent by hiring counsel to represent her and preventing her from testifying. The reason, Maurice alleges, is that Solita told Rosemarie about the 1998 Transaction and Solita’s testimony would be the “death knell” of Rosemarie’s claims in this action. In the third-party complaint, Maurice alleges that Joseph aided and abetted (1st cause of action) and conspired (2d cause of action) with Rosemarie. Maurice argues that, as a result, he was damaged “by the natural and proximate consequences” of Rosemarie’s and Joseph’s actions and seeks damages, attorneys’ fees and costs. Counterclaim, ¶107 & ad damnun clause (b); Third-Party Complaint, ¶¶ 104 & 122 & ad damnum clause (e).⁴

As noted in the Renewal Decision, Maurice never said that he or Offit told Rosemarie about the 1998 or 2002 Transactions. Consistent with that, his counterclaim alleges Rosemarie’s knowledge of the salient facts concerning the 1998 Transaction on information and belief and states that Rosemarie knew or should have known about the 2002 Transaction by virtue of circumstantial evidence. Counterclaim, ¶¶ 22, 31, 54 & 60. The counterclaim contends that Solita negotiated the 1998 Transaction and, on information and belief, told Rosemarie about it. Counterclaim, ¶¶ 22, 31 & 54. In addition, Maurice claims that in 1999, he and Offit told

⁴ In the third-party claims, but not in the second counterclaim, Maurice alleges that his damages are not less than \$25 million. As the third-party complaint claims against Joseph lump together the withdrawn cause of action for tortious interference and the extant claim for fraud on the court, it appears that the \$25 million related to tortious interference.

Rosemarie's lawyer "of the change in Rosemarie's investment portfolio as a result of the 1998 Transaction, specifically that the trusts no longer owned the real property and that most of Rosemarie's assets were now held in marketable securities and notes." Counterclaim, ¶51; Third-Party Complaint, ¶58. It is unclear from this allegation whether Maurice and Offit told the lawyer that Maurice's entity, Consolidated, bought out the Trusts' interests in the limited liability companies. However, in the third-party complaint, but not the counterclaim, Maurice alleges that Maurice and Offit "disclosed the sale" to Rosemarie's lawyer. Third-Party Complaint, ¶2.

Maurice further alleges that, in early 2009, he discovered that Solita's "cognitive issues were at an all time low." Counterclaim, ¶70. He then brought an Article 81 proceeding to protect Solita from her brothers (Maurice's uncles), and alleges that Rosemarie and Joseph took advantage of Solita's impaired mental state.⁵ After Maurice brought the Article 81, Rosemarie and Joseph allegedly had Solita transfer assets to themselves and their children, hired a lawyer to represent Solita, and liquidated her assets to prevent Offit from obtaining an indemnification judgment against her. Counterclaim, ¶¶ 71-83. In a 2002 Indemnification Agreement, Solita and Maurice had agreed that they would indemnify Offit if Rosemarie sued him over the 1998 Transaction. *Id.*

Maurice contends that after Rosemarie and Joseph took steps to protect Solita's assets, Rosemarie "launched an attack upon Maurice and Offit for the 1998 Transaction," although Rosemarie "had known about [it] for over a decade." Counterclaim, ¶¶ 84-85. Rosemarie and Joseph retained the same attorney that represented Solita in the Article 81 proceeding to represent Solita in this action. Counterclaim, ¶87. Maurice claims that Rosemarie and Joseph

⁵ Maurice says that he withdrew the Article 81 proceeding, although the court found that he had sufficient basis to commence it. Counterclaim, ¶73.

then made a deal with Solita's lawyer to ensure that Solita does not testify or take a position adverse to Rosemarie. Counterclaim, ¶90. Maurice alleges that as a result of the fraudulent scheme, this court did not dismiss the complaint based upon the statute of limitations.

Rosemarie and Joseph move to dismiss on the ground that Maurice has not stated a claim for fraud on the court because there is no allegation that Maurice was deceived. Maurice opposes on the ground that fraud can rest upon a fraudulent representation made to a third-party, which in this case would be the court.

In a recent case, the Court of Appeals described fraud on the court as:

willful conduct that is deceitful and obstructionist, which injects misrepresentations and false information into the judicial process "so serious that it undermines ... the integrity of the proceeding"

CDR Creances S.A.S. v Cohen, 2014 NY LEXIS 1002; 2014 NY Slip Op 3294 (nor). To sustain the claim the non-offending party must establish by clear and convincing evidence that a party has acted knowingly in an attempt to hinder the fact finder's fair adjudication of the case and his adversary's defense of the action. *Id.* Fraud on the court can involve perjury and witness tampering. *Id.* Damages are recoverable, including damages for time and money spent to prove a defense, i.e., attorneys' fees. *Id.*⁶

⁶ As a general proposition, fraud lies where a representation made to a third-party injures the plaintiff. *Desser v Schatz*, 182 AD2d 478, 479-480 (1st Dept 1992) (defendant falsely told bank that plaintiff's mortgage was paid and bank issued satisfaction); *Buxton Mfg. Co. v Valiant Moving & Storage*, 239 AD2d 452, 453-454 (2d Dept 1997) (defendant misrepresented to government that plaintiff had been paid with result that government did not withhold funds to pay plaintiff). It is not necessary that the plaintiff is deceived if the third-party relies on the misrepresentation to the plaintiff's detriment. *Id.*

The court concludes that Maurice has stated a valid counterclaim against Rosemarie for fraud on the court. Assuming that Rosemarie has known about the 1998 Transaction since 1998 or 1999, either because Solita or her lawyer told her, then Rosemarie submitted false affidavits in opposition to the statute of limitations motion. In addition, if Rosemarie and Joseph made a deal with Solita's lawyer to prevent Solita from testifying that Rosemarie knew, that would be witness tampering. Maurice's damages would include attorneys' fees and costs incurred in proving the true facts.

The aiding and abetting and conspiracy third-party claims against Joseph allege that he hired his friend to represent Solita and, with Rosemarie, made the deal that Solita would not testify or take a position adverse to Rosemarie. Aiding and abetting a fraud means knowingly engaging in a scheme and providing substantial assistance to the primary perpetrator of the fraud. *CPC Int'l Inc. v McKesson Corp.*, 70 NY2d 268, 285 (1987). A claim for fraudulent conspiracy must allege a corrupt agreement, intentional participation in furtherance of the plan and resulting damage. *Weinberg v Mendlow*, 113 AD3d 485, 487 (1st Dept 2014). Conspiracy lies to connect separate defendants who might escape liability with defendants who commit an actionable tort, but should be dismissed as redundant when the conspiracy is among defendants that aided and abetted the tortfeasors. *American Baptist Church v Galloway*, 271 AD2d 92, 101 (1st Dept 2000). Where the underlying tort claims are dismissed, conspiracy and aiding and abetting claims fall as well. *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 (1999); *Linden v Moskowitz*, 294 AD2d 114 (1st Dept 2002).

The first third-party claim against Joseph sufficiently alleges aiding and abetting fraud. Maurice contends that Joseph schemed with Rosemarie to hide her knowledge of the 1998 Transaction from the court, a fraud; that Joseph intentionally participated or provided substantial

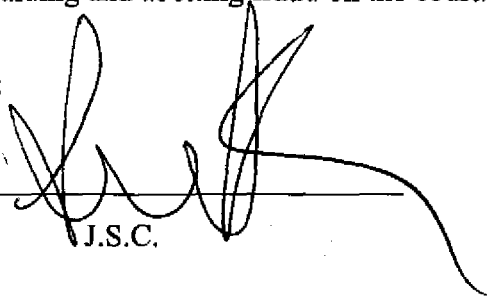
assistance by hiring his friend as a lawyer for Solita and obtaining his agreement to prevent her from testifying about the true facts or contradicting Rosemarie's fraudulent position; and that, as a result, Maurice was damaged because he lost the motion to dismiss on statute of limitations grounds and has to defend the action. Thus, the motion to dismiss the first third-party cause of action against Joseph is denied to the extent that it rests on aiding and abetting a fraud on the court. As previously noted, the claim for aiding and abetting interference with contract was withdrawn.

The second, third-party counterclaim against Joseph for conspiracy is dismissed. The underlying claim for tortious interference was withdrawn. Hence, to the extent that the third-party complaint alleges that Joseph conspired to interfere with contracts, it is dismissed. *Small v Lorillard Tobacco Co.*, *supra*. With respect to the remaining tort, fraud on the court, as Joseph is accused of aiding and abetting the fraud, conspiracy to defraud the court is dismissed as redundant. *See American Baptist Church v Galloway*, *supra*. Accordingly, it is

ORDERED that the motion by Rosemarie A. Herman and Joseph Esmail to dismiss the counterclaims and third-party claims asserted against them by J. Maurice Herman is: 1) granted on consent with respect to the first counterclaim and the portion of the first third-party claim for aiding and abetting tortious interference with contract; 2) granted with respect to the second third-party claim for conspiracy; and 3) denied as to the second counterclaim for fraud on the court and the portion of the first third-party claim for aiding and abetting fraud on the court.

Dated: June 20, 2014

ENTER:



J.S.C.