

**Tal v Tal**

2015 NY Slip Op 30012(U)

January 8, 2015

Supreme Court, Queens County

Docket Number: 12639/13

Judge: Allan B. Weiss

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## MEMORANDUM

SUPREME COURT : QUEENS COUNTY  
IA PART 2

HON. ALLAN B. WEISS

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MICHAL TAL,

INDEX NO. 12639/13

Plaintiff,

MOTION DATE: 11/26/14

- against -

MOTION SEQ. NO. 2

BENNY TAL, KURA RIVER MANAGEMENT  
LTD. SHALOM HELETZ and DAVID  
KHOUKHACHVILI,

Defendants.

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Plaintiff Michal Tal has moved for, inter alia, an order imposing sanctions upon the defendants for failure to make disclosure.

I. The Allegations of Plaintiff Michal Tal

Plaintiff Michal Tal, the wife of defendant Benny Tal, began an action for divorce on or about November 18, 2009 in the New York State Supreme Court, County of Queens (*Tal v. Tal*, Index No. 30166/09). Prior to the commencement of the divorce action, defendant Benny Tal, defendant David Khoukhachvili, and defendant Shalom Heletz owned defendant Kura River Management, Ltd., the operator of a parking garage near the Wall Street area. The business generated a substantial cash income, most of which went undeclared for tax purposes.

On March 29, 2010, the matrimonial court issued an order which (1) directed the appraisal of all of Benny Tal's businesses, including defendant Kura, (2) directed the appointment of Steven Moss CPA, a forensic accountant, as the appraiser, and (3) directed Benny Tal to pay the entire cost of the appraisal. During the initial stages of the appraisal, Moss discovered that at least \$100,000 in cash received by defendant Kura was not accounted for. Defendant Khoukhachvili prevented Moss from conducting an adequate appraisal by denying him access to the company's books and records. Moss has by now

retired, and he has referred his open cases to Dennis Lish, a forensic accountant who has received multiple court appointments.

On February 24, 2011, the matrimonial court issued an order holding the defendant husband in contempt for failure to obey support orders, including the order to pay the appraiser.

In or about July, 2011, the defendant owners met with Samuel Racer, an attorney under suspension, to discuss a method of depriving the plaintiff wife of her equitable share in defendant Kura. Although an automatic restraining order was in effect and the matrimonial court had declared the defendant husband's interest in the corporation to be a marital asset, the owners agreed that Tal would sell his shares to Khoukhachvili and Heletz for \$250,000. This sum was far less than the true value of the shares— more than \$1,600,000. The defendant husband received the \$250,000 in July, 2011 and absconded with money. Although the defendant husband was subsequently arrested pursuant to a warrant issued in the matrimonial action, no portion of the \$250,000 has been recovered. The plaintiff wife learned of the sale of her husband's shares when she served a subpoena on Racer, Khoukhachvili, and Heletz in May, 2012.

The matrimonial court signed an order to show cause seeking a preliminary injunction blocking all Chase bank accounts under the names of defendant Tal, defendant Heletz, defendant Khoukhachvili, and defendant Kura in order to prevent further dissipation of assets. However, the defendants drained the Chase accounts before a restraining order took effect.

The plaintiff wife began the instant action on or about July 1, 2013, asserting causes of action to set aside a fraudulent conveyance, for conspiracy to commit fraud, for a permanent injunction “directing that the fraudulent sale of July 25, 2011 be set aside,” and for conversion.

## II. Consolidation

CPLR 602(a) provides: “When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of 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.” (*See, In re New York City Asbestos Litigation*, 121 AD3d 230.) In the case at bar, consolidation of the instant action and the matrimonial action is proper because of the common issue pertaining to the extent of the plaintiff wife's interest in defendant Kura,

if any, and because of the absence of prejudice to the defendants. (*See, U.S. Bank, N.A. v. Westwood, LLC*, 115 AD3d 935.) The court notes that an action triable by jury may be consolidated or tried jointly with one triable without a jury. (*See, O'Brien v. Jeffs*, 3 AD2d 787; *1202 Realty Assoc. v. Evans*, 126 Misc2d 99.)

Accordingly, that branch of the plaintiff's motion which is for an order consolidating *Tal v. Tal*, Index No. 30166/09 with the instant action is granted, and the two actions are consolidated for all purposes under Index No. 30166/09. The caption of the action is amended to reflect the consolidation.

### III. The Preliminary Injunction

A party moving for a preliminary injunction must establish (1) a likelihood of success on the merits, (2) irreparable injury if provisional relief is withheld and (3) a balance of the equities in his favor. (*Aetna Ins. Co. v. Capasso*, 75 NY2d 860; *Stockley v. Gorelik*, 24 AD3d 535.) Insofar as the plaintiff wife seeks a preliminary injunction "restraining" all bank accounts in the names of David Khoukhachvili, Shalom Heletz, Kura River Management, and Michael Heletz, the plaintiff failed to establish irreparable injury, since her injury is compensable in money. (*See, Family-Friendly Media, Inc. v. Recorder Television Network*, 74 AD3d 738.) Moreover, the ownership interests of defendant Khoukhachvili and defendant Heletz in defendant Kura provide the plaintiff with security in the event that she recovers judgment against them. The plaintiff wife also failed to establish the third element since (1) the preliminary injunction that she seeks is overly broad (*see, Mitchell v. Barrios-Paoli*, 253 AD2d 281) in that it would affect all of the personal bank accounts of the individuals and (2) the preliminary injunction would substantially interfere with an ongoing business. Insofar as the plaintiff wife seeks a preliminary injunction prohibiting defendant Khoukhachvili and defendant Heletz from transferring their shares in defendant Kura, the plaintiff has adequately established her entitlement to a preliminary injunction.

Accordingly, that branch of the plaintiff's motion which is for a preliminary injunction is granted to the extent that defendant Khoukhachvili and defendant Heletz are prohibited from transferring, selling, encumbering, or otherwise disposing of their shares in defendant Kura. The parties may submit affidavits concerning the proper amount of the undertaking at the time of the settlement of the order to be entered hereon.

#### IV. The Appointment of Another Forensic Accountant

There is a legal basis for an order appointing an appraiser and directing the payment of his fees in the context of a matrimonial action. (*See*, Domestic Relations Law § 237; 22 NYCRR 202.18; *Moran v. Moran*, 77 AD3d 443.) The plaintiff wife did not show that there is a legal basis for the appointment of an appraiser in this action, and her reliance on *In re P.J. Lynch Food Service, Inc.* (31 AD3d 561) is misplaced because that case held that the appointment of a forensic accountant to direct discovery between the parties and, in effect, to hear and determine a minority shareholder's liability impermissibly delegated adjudicatory powers to an improper person. Moreover, the matrimonial court has already issued an order appointing an appraiser, and if a successor is required, application should be made to that court.

Accordingly, those branches of the motion which seek an order directing the appointment of a forensic accountant and the payment of his fees are denied.

#### V. Samuel Racer

The plaintiff wife seeks an order directing Samuel Racer to comply with a subpoena to appear for a deposition and to produce records. However, the service provision of the order to show cause makes no provision for service upon Samuel Racer, and the plaintiff submitted no proof showing that he was served.

Accordingly, that branch of the motion which seeks an order pertaining to Samuel Racer is denied.

#### VI. Sanctions

Defendant Kura, defendant Khoukhachvili and defendant Heletz have failed to appear for their depositions on three occasions, including once in violation of a court order. A willful failure to comply with a discovery order can result in the dismissal of a pleading pursuant to CPLR 3126. (*See*, *Myers v Community General Hosp. of Sullivan County*, 51 AD3d 1359; *Martel v Chupka*, 26 AD3d 474.) Inadequate excuses or a pattern of disregard for discovery demands and court orders permits an inference of willfulness. (*See*, *Martel v Chupka, supra*; *Mendez v City of New York*, 7 AD3d 766; *Montgomery v City of New York*, 296 AD2d 386.) A conditional order of dismissal is an appropriate remedy in this case so that the defendants may have one final opportunity to avoid the dismissal of their pleadings. (*See*, *Casas v Romanelli*, 232 AD2d 445.)

Accordingly, the branch of the plaintiff's motion which is for an order imposing sanctions upon the defendants is granted to the extent that the answers of defendant Khoukhachvili, defendant Heletz, and defendant Kura are dismissed unless they appear for their depositions at a time, date, and place to be fixed in the order to be entered hereon.

Settle order.

Date: January 8, 2015

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J.S.C.