

<b>B.D. Estate Planning Corp. v Trachtenberg</b>
2015 NY Slip Op 30351(U)
March 13, 2015
Supreme Court, New York County
Docket Number: 651006/2011
Judge: Shirley Werner Kornreich
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**SHIRLEY WERNER KORNREICH**  
E.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
B.D. ESTATE PLANNING CORP.,

Index No.: 651006/2011

Plaintiff,

**DECISION & ORDER**

-against-

MARCY TRACHTENBERG, as Trustee of the  
Ellis Limquee Family Insurance Trust, and  
CAROLYN LIMQUEE,

Defendants.

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

Defendant Carolyn Limquee (Carolyn) moves, pursuant to CPLR 3025, for leave to amend her answer to add five new affirmative defenses. Plaintiff B.D. Estate Planning Corp. opposes. Carolyn’s motion is denied for the reasons that follow.

*I. Procedural History & Factual Background*

Familiarity with this action is presumed. On February 11, 2014, the court’s March 1, 2013 summary judgment decision (the SJ Order) was affirmed by the Appellate Division. See *B.D. Estate Planning Corp. v Trachtenberg*, 114 AD3d 477 (1st Dept 2014).

Carolyn’s motion to amend is primarily based on criminal proceedings brought and prosecuted against Michael Bindow, the principal of plaintiff, B.D. Estate Planning Corp. Those criminal proceedings have no legal relevance to the issues in this civil action.<sup>1</sup> As noted in the SJ Order, plaintiff, Bindow, and defendant Marcy Trachtenberg conferred a substantial benefit onto Carolyn by engaging in the subject life insurance and loan transactions. Plaintiff’s actions

<sup>1</sup> On July 30, 2014, plaintiff’s principal and associates were sentenced to prison terms and ordered to pay more than \$39 million in restitution. It should be noted, however, that a substantial portion of the criminal proceedings involved transactions and conduct wholly unrelated to the life insurance policy at issue in this case.

made Carolyn far better off – to the tune of \$2 million – than had such actions never occurred.

This obvious proposition is based on the undisputed facts recited in the SJ Order:

In early 2007, Carolyn and her late-husband [Ellis] were solicited by non-party Mark Resnick to purchase a life insurance policy for Ellis pursuant to a “Life Alternative Program” (the Program), whereby no premium payments would be required from the policy holder. Under the Program, an unfunded trust was created to borrow money to make the premium payments. The insurance broker would then attempt to sell the policy. **The worst case scenario from the policyholder’s perspective was that the policy would not be sold or the premium payments would cease being made and the policy would lapse. Critically, however, the policyholder had no risk of loss because he would not pay any money for either the loan or the policy. Moreover, neither the policyholder nor the beneficiary of the trust would be liable to the lender because the trust was the debtor, not any of the policyholders or beneficiaries.**

Ellis agreed to participate in the Program and was issued a \$4 million life insurance policy ... dated[] March 28, 2007 (the Policy). Ellis was 73 years old when the Policy was issued. In July 2007, a trust was established for the benefit of Carolyn called the Ellis Limquee Family Insurance Trust (the Trust). The trustee was defendant Marcy Trachtenberg. Ellis transferred the Policy to the Trust. The Trust then entered into a Life Insurance Premium Financing Agreement (the Financing Agreement) with non-party[] The Brown Investment Fund, L.P. (Brown), whereby Brown loaned \$234,720 at 15% interest to the Trust. This money was used to make premium payments on the Policy for approximately two years. The Financing Agreement provided Brown with the option of lending the Trust more money to make further premium payments. As collateral, Brown held an assignment of the Policy.

Resnick was unable to sell the Policy. Brown decided not to exercise its option to lend more money to the Trust and **Ellis chose not to make the premium payments on his own. As a result, the Policy lapsed on June 28, 2009.** Resnick then approached non-party Michael Bindow and his company, plaintiff BD, to purchase the assignment of the Policy from Brown to reinstate the Policy. ... BD purchased all of Brown’s rights related to the Trust and the Policy for \$1,000. BD then entered into an agreement with the Trust whereby **BD loaned money to the Trust to reinstate the Policy and make further premium payments.** This agreement led to the execution of a Promissory Note dated July 27, 2009 (the First Note), whereby BD would lend \$344,158.02 to the Trust at 15% annual interest. Section 2 of the First Note, entitled Prepayments, provides as follows:

Borrower may prepay this Note, in whole or in part, at any time prior to the Maturity Date [November 27, 2009]. Repaid funds

shall be applied FIRST, to the payment of accrued and unpaid interest under this Note; and SECOND, to the repayment of the outstanding principal balance under this Note. In the case of death a prepayment penalty of 50% of any insurance proceeds [of the Policy], less the loan balance, shall apply; this provision shall extend to any death within 90 days of receipt of prepayment.

... On November 27, 2009 (the maturity date of the First Note), BD and the Trust executed a second Promissory Note (the Second Note), whereby BD would lend \$387,908.54 to the Trust. The Second Note is the note at issue in this case. The Terms of the Second Note are virtually identical to the First Note, including an identically worded Section 2. The Maturity Date of the Second Note was February 27, 20[10].

Ellis died on February 9, 2010. As of that date, BD had only loaned \$26,112.42 to the Trust, which the Trust used to make premium payments on the Policy. On June 24, 2010, the Trust received a \$4 million payment under the Policy. To date, the Trust has not paid BD any money.

SJ Order at 1-3 (emphasis added; footnotes omitted).

The court dismissed all of Carolyn's affirmative defenses with the exception of criminal usury. With respect to Carolyn's argument that it is unconscionable for plaintiff to claim half of the \$4 million policy proceeds, this court held, and the Appellate Division affirmed, that Carolyn receiving half of the life insurance proceeds is not unconscionable because "\$2 million [is] a large sum of money for which she expended no effort and took no financial risk." SJ Order at 7; *see* 114 AD3d at 478:

If [Trachtenberg] had not signed the promissory note on which plaintiff sues, **the policy on Ellis's life would have lapsed for nonpayment of premiums, and Carolyn (the trust's beneficiary) would ultimately have received nothing.** Since the trust executed the note, it received \$4 million after Ellis died, but it will have to give plaintiff approximately half of that amount if the note is enforced. **A decision to get \$2 million, as opposed to nothing, is not a bargain that only a delusional trustee would make.**

(emphasis added). Without further belaboring the point, a win for plaintiff – a result where each side would get \$2 million – is not unconscionable.

Carolyn now seeks to assert five new affirmative defenses: (1) bribery and corruption; (2) aiding and abetting a breach of fiduciary duty; (3) fraudulent concealment; (4) “recovery barred by felon of fruits of his crimes”; and (5) *in pari delicto*. In sum and substance, Carolyn contends that plaintiff’s principals were criminally violating federal law by engaging in the underlying transactions, and that fact along with the attendant fiduciary problems in this case warrant precluding plaintiff from collecting its half of the life insurance proceeds. The court disagrees.

## II. Discussion

“Leave to amend pleadings under CPLR 3025(b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law.” *McGhee v Odell*, 96 AD3d 449, 450 (1st Dept 2012) (citations and quotation marks omitted).

Before the court addresses the reasons why Carolyn’s proposed additional defenses are palpably devoid of merit, it should first be noted that when Carolyn speaks of the alleged malfeasance of plaintiff and Trachtenberg in this case, Carolyn fails to accurately portray the circumstances. Even assuming, *arguendo*, that Trachtenberg breached her fiduciary duties, Carolyn conveniently ignores the fact that but for Trachtenberg’s willingness to accede to plaintiff’s terms, the Policy would have lapsed.

Carolyn’s allegation is that plaintiff’s *modus operandi* was to put captive trustees in place in order to get favorable terms in loan agreements, which, as in this case, would fund the life insurance policies. Carolyn, however, recognizes that but for these terms, plaintiff would not have made the loans. Indeed, notwithstanding the alleged criminality of plaintiff’s actions, it was plaintiff that was taking all of the risk. On the other hand, Carolyn, as a result of plaintiff’s

willingness to do so, became entitled to \$2 million without incurring any cost or risk. To wit, the reason plaintiff demanded a hefty return on his loan was because of this one-sided risk allocation. While plaintiff would be handsomely rewarded, it cannot be fairly averred that plaintiff's entitlement to 50% of the insurance proceeds is either onerous or unfair to Carolyn, the insurance trust beneficiary.

Turning now to Carolyn's five proposed additional defenses, with respect to the first – "bribery and corruption" – she relies on case law supporting the equitable proposition that courts should not "honor claims founded on commercial bribery." *See McConnell v Commonwealth Pictures Corp.*, 7 NY2d 465, 470 (1960). In *McConnell*, the Court of Appeals was clear that "[w]e are not working here with narrow questions of technical law. We are applying fundamental concepts of morality and fair dealing." *Id.* The Court, moreover, explained that it is not the case that:

any small illegality in the performance of an otherwise lawful contract will deprive the doer of all rights, **with the result that the other party will get a windfall and there will be great injustice.** Our ruling does not go as far as that. It is not every minor wrongdoing in the course of contract performance that will insulate the other party from liability for work done or goods furnished. There must at least be a direct connection between the illegal transaction and the obligation sued upon. Connection is a matter of degree. Some illegalities are merely incidental to the contract sued on.

*Id.* at 471 (emphasis added). Hence, the Court held that a contract, even if it has attendant illegality, will nonetheless be enforced unless there is "**gravely immoral and illegal conduct** in accomplishing its performance." *Id.* (emphathies added).

That is simply not the case here. It is not the insurer here who is seeking to assert this defense. Indeed, the insurer paid the \$4 million. Rather, Carolyn asserts the defense. However, Carolyn was not harmed by plaintiff's criminal conduct. She benefited from it. Had plaintiff

followed the law, Carolyn would get nothing. To give her \$4 million instead of \$2 million because plaintiff's actions are illegal in the eyes of the federal government is the very sort of windfall that the Court of Appeals prohibits.

Likewise, Carolyn's second proposed defense, that plaintiff tortiously interfered with Trachtenberg's fiduciary duties to Carolyn, is equally infirm. The elements of this claim (which New York Courts refer to as "aiding and abetting a breach of fiduciary duty")<sup>2</sup> are: "(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." *Kaufman v Cohen*, 307 AD2d 113, 125 (1st Dept 2003). While it cannot be seriously disputed that Trachtenberg failed to live up to her fiduciary obligations as trustee – after all, Trachtenberg admitted she did not review the contracts or hire counsel to do so [*see* SJ Order at 4] – nonetheless, Carolyn did not suffer damages due to Trachtenberg's breach. Again, but for plaintiff's willingness to lend further money to the trust to fund the Policy, which had lapsed after both the prior lender *and the Limquees* chose not to continue to make further premium payments, Carolyn would not have been entitled to any life insurance proceeds when her husband died. Had Trachtenberg not been plaintiff's captive trustee, the transaction would simply have never occurred.

Carolyn's third proposed defense is fraudulent concealment.<sup>3</sup> "The elements of a cause of action for fraud [are] a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v*

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<sup>2</sup> Carolyn cites none of the ample, relevant New York State case law on the topic. Instead, she simply cites an old Second Circuit case, *Whitney v Citibank, N.A.*, 782 F2d 1106 (2d Cir 1986), which is perhaps why she mislabels this cause of action.

<sup>3</sup> A claim, again, for which Carolyn fails to cite to the ample New York state case law setting forth its elements.

*Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009). In addition to these elements, a cause of action for fraudulent concealment requires “an allegation that the defendant had a duty to disclose material information and failed to do so.” *Mandarin Trading, Ltd. v Wildenstein*, 16 NY3d 173, 179 (2011), quoting *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 (1st Dept 2003); see *Jana L. v W. 129th Street Realty Corp.*, 22 AD2d 274, 277 (1st Dept 2005) (“It is well established that, absent a fiduciary relationship between the parties, a duty to disclose arises only under the ‘special facts’ doctrine where ‘one party’s superior knowledge of essential facts renders a transaction without disclosure inherently unfair.’”) (citations omitted).

Leaving aside the myriad problems with this claim (e.g., lack of a fiduciary relationship between plaintiff and Carolyn), the specific claim alleged – that plaintiff failed to offer Carolyn the opportunity to purchase the note and, instead, sold it to plaintiff for only \$1,000 – is belied by the undisputed facts. As noted in the SJ Order, in the summer of 2009, the Limquees were given the option of making the required premium payment to reinstate the Policy. See SJ Order at 2. They declined to do so. The very reason Brown sold its note to plaintiff was because plaintiff offered to lend money to the Trust so the Policy could be reinstated. The nominal purchase price of \$1,000 was not the crux of the deal – rather, it was plaintiff’s agreement to fund the Trust’s premium payments in exchange for half of the policy proceeds. Carolyn’s contention that the opportunity to purchase Brown’s note was concealed from her misses the point, which is her unwillingness to fund the premium payments. Purchasing the Note would have provided Carolyn no benefit if, as is undisputed, she had no intention of paying for the Policy.

Next, Carolyn's fourth proposed additional defense – that plaintiff's recovery is barred because it cannot recover the "fruits of its crimes" – is also unavailing. Again, Carolyn buttresses this defense with sparse, old, and inapposite case law. She exclusively relies on *Barker v Kallash*, 63 NY2d 19 (1984) and *Riggs v Palmer*, 115 NY 506 (1889). *Barker*, however, addresses tort, rather than contract law, concerning contributory negligence, and specifically when illegal activity precludes tort recovery. See *Barker*, 63 NY3d at 24-25. *Riggs*, on the other hand, does stand for the proposition that "a wrongdoer may not profit from his or her wrongdoing." See *In re Edwards*, 121 AD3d 336, 339 (2d Dept 2014), citing *Riggs*, 115 NY at 511. This doctrine is most commonly applied in the trusts and estates context, for instance, to prevent a murderer from inheriting from his victim. See *In re Estates of Covert*, 97 NY2d 68, 74 (2001). Carolyn cites no case in which this doctrine has been applied to the sort of contractual context in this case, nor does Carolyn explain how the doctrine could apply to plaintiff, which, unlike its principals, was not indicted. The argument that plaintiff is a corporation holds little water because corporations, while not actually people, can be charged with crimes for acts committed by its employees. See, e.g., *People v John Galt Corp.*, 113 AD3d 537 (1st Dept 2014) (corporation convicted of reckless engagement).

Finally, Carolyn's fifth proposed additional defense, *in pari delicto*, fares no better. The *in pari delicto* doctrine "mandates that the courts will not intercede to resolve a dispute between two wrongdoers." See *Mosionzhnik v Chowaiki*, 41 Misc3d 822, 830 (Sup Ct, NY County 2013), quoting *Kirschner v KPMG LLP*, 15 NY3d 446, 464 (2010). Again, there are a plethora of post-*Kirschner* cases setting forth how this doctrine works, but Carolyn cites no New York case more recent than 1960. See Dkt. 97 at 20-22. The doctrine, simply put, functions as an affirmative

defense when a claimant is seeking recovery from his co-conspirator or agents to whom the fraud can be imputed, subject to the adverse interest exception. *See Schwartz v Leaf, Salzman, Manganelli, Pfiel, & Tendler, LLP*, 123 AD3d 901 (2d Dept 2014); *see generally In re Bernard L. Madoff Inv. Secs. LLC*, 721 F3d 54, 63-65 (2d Cir 2013). *In pari delicto*, fundamentally, requires that plaintiff and defendant are both wrongdoers. In essence, by asserting this defense, a defendant is claiming that her own wrongdoing, participated in by plaintiff, precludes plaintiff's recovery. Carolyn, however, does not contend she did anything wrong. Nor did she. The relevant claim here is enforcement of a contract – the Second Note. While Trachtenberg, plaintiff, and its principles may have committed wrongdoing, Carolyn's counsel, *of course*, does not mean to suggest that any of this wrongdoing should be imputed to her or the Trust. This is a good thing from a criminal law perspective, but fatal to an *in pari delicto* defense.

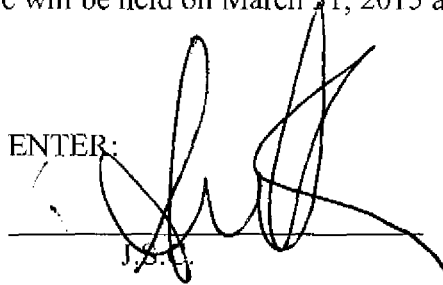
For all of the above reasons, it is evident that Carolyn's proposed defenses are "clearly devoid of merit." *See MBIA Ins. Corp. v Greystone & Co.*, 74 AD3d 499, 500 (1st Dept 2010). Accordingly, it is

ORDERED that the motion by defendant Carolyn Limquee for leave to amend her answer is denied; and it is further

ORDERED that a pre-trial conference will be held on March 31, 2015 at 11:30 am.

Dated: March 13, 2015

ENTER:

A handwritten signature in black ink, appearing to be "J.S.A.", written over a horizontal line. The signature is stylized and somewhat illegible.