

Felsher v Felsher

2015 NY Slip Op 30964(U)

June 2, 2015

Supreme Court, New York County

Docket Number: 159124/12

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

-----X
MICHAEL FELSHER,

Plaintiff,

-against-

GARY FELSHER, et al.,

Defendants.
-----X

DECISION AND
ORDER

Index No.
159124/12

HON. ANIL C. SINGH, J.:

Defendants move: a) to strike plaintiff’s demand for a jury trial, contending that plaintiff has joined legal and equitable claims together in this action; and b) to expedite the trial, contending that this protracted “family feud” is having negative emotional repercussions on defendant Gary Felsher’s grandchildren who are “caught in the crossfire.” Plaintiff opposes the motion.

Plaintiff Michael Felsher is the beneficiary of a spendthrift trust created by his father defendant Gary Felsher. The trust is set up in such a way that only the trustees have discretion to make or withhold distributions to plaintiff.

In 1992, Michael Felsher began working for his father at FGHP Capital Limited Partnership (“FGHP”). Michael Felsher and Gary Felsher, among others, entered into a partnership agreement in 1993 providing Michael Felsher with Class

B interests of 30% in FGHP. In or around 1994, Michael Felsher began receiving K-1's indicating that the trust was the holder of the Class B interest formerly held personally by Michael Felsher. While Gary Felsher asserts Michael Felsher assigned his Class B interest to the trust, Michael Felsher denies this and claims he, not his trust, is a limited partner in FGHP and is personally owed FGHP distributions that have been directed into the trust.

Michael Felsher filed four separate lawsuits against Gary Felsher beginning in 2006. In each of the four actions, Michael Felsher alleged that Gary Felsher, as trustee, wrongfully refused to return FGHP distributions that were made to the trust instead of Michael Felsher. The first action was filed by Michael Felsher in Palm Beach County, Florida against Gary Felsher and the other trustees. The 2006 action was dismissed in September 2010.

The second action was filed by Michael Felsher in 2010 in Palm Beach County, Florida. In the complaint in the 2010 action Michael Felsher asserted that Gary Felsher, as trustee, wrongfully refused to return FGHP Class B distributions that were made to the trust as opposed to Michael Felsher. Michael Felsher voluntarily discontinued the 2010 action in 2013 "with prejudice."

The third action, the 2011 action, was filed by Michael Felsher in New York against Gary Felsher and another trustee. Michael Felsher asserted largely the

same claims in the 2011 action as in the 2006 action. Michael Felsher voluntarily discontinued the 2011 action in 2012.

Michael Felsher filed the fourth, and present, action on December 21, 2012.

The first section of the complaint under the heading "Nature of this Action" summarizes the allegations as follows:

1. Michael is owed substantial sums, believed to be in excess of \$20 million, as a Class B shareholder of FGHP and as a beneficiary of the trust created for his benefit.
2. The FGHP defendants, however, led by Gary, improperly have deprived Michael of monies due and owing to him by (i) wrongfully diverting distributions from FGHP, arising out of Michael's ownership interest therein, into the trust, and (ii) refusing since the third quarter of 2004 to make distributions to Michael of the monies he is owed as a result of his ownership of Class B shares of FGHP.
3. The FGHP defendants have breached their obligations under the governing agreement by failing to make distributions rightfully owed to Michael pursuant to his ownership of Class B shares of FGHP. The FGHP defendants also have failed to provide Michael with information regarding FGHP to which he is entitled.
4. In addition, despite his designation of Michael's grandparents and subsequently Ihor as trustees, Gary, as settlor of the trust, usurped the role of the trustee of the trust from the outset, and he has mismanaged the trust and its assets. Moreover, improperly acting as the sole trustee, Gary baselessly rejected Michael's request for distributions from the trust to satisfy legitimate financial obligations and he has refused to distribute to Michael from the trust the FGHP distributions which wrongfully have been diverted to the trust.
5. The trustees wrongfully have co-mingled the trust's money and

Michael's money from FGHP with Gary's money and FGHP's money, have failed to place into the trust assets and proceeds which rightfully should be property of the trust, and wrongfully have withdrawn trust assets without replenishing or replacing or compensating the trust thereafter. In general, Gary has used the trust as his personal piggy-bank, while flouting the terms of the trust agreement and Florida law, which govern the administration of the trust. Moreover, in an effort to hide their misconduct with respect to managing the trust and their abuse thereof, the trustees have not maintained required paperwork to document trust assets and transactions.

6. Accordingly, Michael brings this action to force defendants to account for their wrongful conduct, and to obtain significant damages, believed to be no less than \$20 million.

(Complaint, pp. 2-3).

The complaint asserts nine causes of action. The first, second, third, fourth, fifth, and sixth causes of action are against the trustees for breach of trust under Florida statutes.

The seventh cause of action is against the FGHP defendants for breach of contract.

The eighth cause of action is against all defendants for conversion.

The ninth cause of action seeks specific performance pursuant to Florida statute section 736.0706 – specifically, a court order that the trustees be removed from the trust and that a special fiduciary be appointed to take control of the trust property and administration.

In terms of remedies, plaintiff asks the Court to direct the defendants to provide a full and complete account of their proceedings as trustees of the trust from January 1, 1983, through the present; an award of damages in the amount of no less than \$10,000,000, representing the Class B distributions owed to plaintiff for 1994, 1995, 2000 and from the fourth quarter 2004, and the value of plaintiff's 20% ownership in the Class B limited partnership interests in FGHP; an order removing the trustees and appointing a special fiduciary to take control of the trust property and administration; and an award of attorneys' costs and fees, plus interest.

On November 17, 2014, plaintiff filed the note of issue demanding a jury trial. Defendants move to strike the note of issue, contending that, by joining equitable and legal claims together based upon the same alleged transactions, plaintiff has waived his right to a trial by jury on any and all of his claims.

Discussion

CPLR 4101 allows a trial by jury in any action "in which a party demands and sets forth facts which would permit a judgment for a sum of money only." However, the deliberate joinder of claims for legal and equitable relief arising out of the same transaction may amount to a waiver of the right to demand a jury trial (Hebranko v. Bioline Laboratories, Inc., 149 A.D.2d 567, 567 [2d Dept., 1989]).

“[T]he right to a jury trial is to be determined by the facts alleged in the complaint and not by the prayer for relief” (Hebranko, 149 A.D.2d at 568). “The critical question is whether the facts stated show that the action is equitable or legal in nature” (Kaplan v. Long Island University, 116 A.D.2d 508, 509 [1st Dept., 1986]). “The fact that the complaint demands a money judgment does not necessarily establish that there is a right to a jury trial” (id.). It is proper for the court to deny a motion to strike the jury demand where plaintiff’s claims are primarily legal in nature and plaintiffs, under the facts alleged, could obtain full relief by means of a monetary award (Miller v. Epstein, 293 A.D.2d 282, 282 [1st Dept., 2002]).

The cases cited by the plaintiff and the defendants are not helpful. None of the cases involve a situation like we have here, where the plaintiff is seeking the removal of a trustee and the appointment of special fiduciaries. Likewise, the instant action involves a spendthrift trust, not a testamentary trust. Nor has the court’s independent legal research unearthed any analogous case law.

Here, it does not appear that plaintiff could obtain full relief by means of a monetary award alone. In addition to the causes of action for breach of contract and conversion, the complaint alleges equitable causes of action for an accounting, removal of the trustees, appointment of a special fiduciary, and specific performance. Paragraphs 53, 59, 66, 72, 78, and 86 of the complaint state:

As a result of the trustees' breach of trust, Michael requests that the trustees be removed as trustees pursuant to Florida statute section 736.1001(2)(g) and that a special fiduciary be appointed to take possession of the trust property and administer the trust pursuant to Florida statute section 736.1001(2)(g).

In light of such allegations, it is clear that something more than financial compensation may be required to resolve the dispute once and for all. Because the facts stated in the complaint show that the action is both equitable and legal in nature, the Court finds that plaintiff's demand for a jury trial must be stricken.

Next, we turn to defendant's request for an expedited trial due to the alleged negative effect this dispute is having on the family.

"CPLR 3403(a)(3) provides that special preferences shall be granted in 'an action in which the interests of justice will be served by an early trial'" (Roman v. Sullivan Paramedicine, Inc., 101 A.D.3d 443, 443 [1st Dept., 2012]). The granting of a preference amounts to favoring one case over many others awaiting trial, so it should be granted only where unusual or extraordinary hardship is demonstrated (Bernard v. Hyman, 155 A.D.2d 403 [2d Dept., 1989]).


The Court has read the affidavit of Gary Felsner that was submitted under seal. In short, the Court in its discretion finds that defendant has not demonstrated unusual or extraordinary hardship sufficient to justify a special preference.

Accordingly, it is

ORDERED that the motion is granted only to the extent that plaintiff's demand for a jury trial is stricken.

The foregoing constitutes the decision and order of the court.

Date: 6/2/15
New York, New York



Anil C. Singh