

Romanoff v Romanoff
2017 NY Slip Op 30461(U)
March 7, 2017
Supreme Court, New York County
Docket Number: 650152/2011
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45

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ROBERT ROMANOFF, as beneficiary, and as co-trustee
of The Sheryl Romanoff Grantor Retained Annuity Trust
and The Sheryl Romanoff Irrevocable Grantor Trust,

Plaintiff,

Index No.: 650152/2011

-against-

Mot. Seq. No. 007

SHERYL ROMANOFF as personal representative of the
ESTATE of GERALD ROMANOFF and
MICHAEL A. ZIMMERMAN,

Defendants.
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ANIL C. SINGH, J.S.C.:

Plaintiff Robert Romanoff (Robert) moves for leave to amend his first amended complaint (FAC), pursuant to CPLR 3025 (b), to add additional claims individually, as a beneficiary of the Sheryl Romanoff Grantor Retained Annuity Trust (GRA trust) and Sheryl Romanoff Irrevocable Grantor Trust (IG trust, and collectively with the GRA trust, the trusts) and derivatively, on behalf of the trusts and proposed defendants New Roads Realty Corp. (New Roads) and GHC NY Corp. (GHC). He also seeks to add his son Nicholas Romanoff (Nicholas) as a plaintiff individually, as a beneficiary of the trusts, and derivatively on behalf of the trusts, New Roads and GHC. Finally, he seeks to add claims against the estate of former defendant Gerald Romanoff (Gerald), former defendant Michael A. Zimmerman (Zimmerman), Sheryl Romanoff (Sheryl), and Frank D. Platt (Platt).

Sheryl, as personal representative of the estate of Gerald (the Estate), cross-moves for the following relief:

1. Summary judgment, pursuant to CPLR 3212, dismissing the first, second, third, sixth, tenth, and eleventh causes of action in the first amended complaint for, inter alia, lack of capacity to sue, lack of standing, collateral estoppel, res judicata, the

statute of limitations, a defense based on documentary evidence, and failure to state a cause of action;

2. An order striking privileged communications from the proposed second amended complaint (PSAC), and sealing it on the New York State Courts Electronic Filing System (NYSCEF); and
3. An order sanctioning Robert and his attorney, pursuant to 22 NYCRR 130-1.1.

Zimmerman cross-moves, pursuant to CPLR 3211 (a) (1), (3), (7), and EPTL § 10-10.7, to dismiss the FAC with prejudice based on documentary evidence, lack of standing or capacity to sue, and failure to state a cause of action.

Background

I. The First Amended Complaint

On November 25, 2009, Sheryl executed the GRA and IG trusts (FAC, ¶ 5).

Zimmerman was retained by Gerald to draft the documents setting up the trusts, as well as related documents (*id.*, ¶ 4). Robert is the “primary income and principle beneficiary” of the IG trust, and the sole beneficiary during his lifetime (*id.*, ¶ 6). The GRA trust’s sole asset at the time it was established, according to the FAC, was 49.5 shares of common stock in New Roads (*id.*, ¶ 7). Another 49.5 shares were among the assets of the IG trust, and Robert’s son, Nicholas, owns the remaining 1% of the company (*id.*, ¶¶ 8-9). Previously, the shares had been owned by Gerald and Sheryl. New Roads itself is the sole owner of GHC (*id.*, ¶ 10), which owns two properties located at 53-61 Gansevoort Street, New York, New York (the Gansevoort property) and 501-511 Church Avenue, Brooklyn, New York (the Church property) (*id.*, ¶ 11).

At the time of the FAC, Robert and Zimmerman were co-trustees of the trusts, and assigned proxies to Gerald to vote the interests of the trusts in New Roads (*id.*, ¶ 12; *see also* affirmation of August C. Venturini, exhibit E, proxy statements). As a proxyholder, Robert alleges that Gerald harmed the trusts, and himself as beneficiary thereof, by failing to pay New

Roads' and GHC's creditors, and converting the assets of both corporations and the trusts for his own use in various ways (*id.*, ¶¶ 16, 19-21). This has allegedly lead to \$20 million in combined debt among Gerald, GHC and New Roads (*id.*, ¶ 17) and a mortgage foreclosure action in the New Jersey Superior Court, Essex County, *Capital One, N.A. v Nebraska Distribution Center, et al.* (New Jersey Foreclosure Action) (*id.*, ¶ 18). In the FAC, Robert specifically alleges that Gerald:

- Executed a promissory note, in his capacity as President of New Roads, for the benefit of his company Nebraska Meat Corp. (Nebraska Meat) for \$1,480,825.92, which was guaranteed by New Roads (*id.*, ¶¶ 22-24). Gerald then defaulted on the note, and Signature Bank obtained a judgment against New Roads on the guarantee, in the Supreme Court, Nassau County (*id.*, ¶¶ 25-26, 31);
- Failed to pay federal and state taxes for GHC and New Roads (*id.*, ¶¶ 34-35);
- With respect to the Gansevoort property, Gerald did not maintain property insurance, failed to obtain a temporary certificate of occupancy for the property as required by GHC's lease with the main commercial tenant in the building, failed to collect the rent and kept some of it for his own use, and failed to repair the roof (*id.*, ¶¶ 35-39);
- With respect to the Church property, Gerald failed to pay water bills or maintain property insurance for the building (*id.*, ¶¶ 40-41).

Robert also alleges that Gerald never informed him about the promissory note and guarantee regarding Nebraska Meat, and that he never authorized Gerald to "incur liability on behalf of New Roads in connection" with the note (*id.*, ¶¶ 27-32).

In response to Gerald's alleged misdeeds, Robert unilaterally revoked the proxies in writing on December 30, 2010 (*id.*, ¶ 42). On January 5, 2011, Zimmerman rejected the revocation (*id.*, ¶ 46). Robert claims that Zimmerman, as the one who drafted the proxies, was aware of what Gerald was doing as the proxy holder (*id.*, ¶¶ 43-45). Further, Robert claims, Zimmerman has refused to stop Gerald's actions, failed to act to protect the trusts and trust

assets, failed to provide Robert with financial information regarding the trusts, and failed to call for shareholder meetings of New Roads, despite Robert's demand for a meeting (*id.*, ¶¶ 47-50). Finally, as a result of Zimmerman's direct legal representation of Gerald, he has "an existing and ongoing conflict of interest" between that representation and his duties as trustee (*id.*, ¶¶ 51-52).

Robert commenced this action on January 20, 2011 (NYSCEF Doc. No. 1). On April 14, 2011, Robert filed the FAC, alleging conversion and breach of fiduciary duty against Gerald and Zimmerman (FAC, ¶¶ 60-88), seeking a declaratory judgment that the proxies were either ineffective or had been revoked (*id.*, ¶¶ 53-59), an accounting from both defendants of the trusts' and corporations' assets (*id.*, ¶¶ 89-96), the appointment of a receiver or a third trustee (*id.*, ¶¶ 97-111), and an order enjoining defendants from declaring a default on Robert's lease of the third and fourth floors of the Gansevoort property (*id.*, ¶¶ 112-136).

II. Initial Proceedings in this Action

In May 2012, Robert moved for the appointment of an independent co-trustee, for an injunction preventing Gerald from taking action in behalf of New Roads or GHC, and a declaration that Robert's unilateral revocation of the proxies was valid (mot. seq. No. 002) (Venturini affirmation dated 7/21/16, ¶ 22). After hearing arguments, the Court denied the motion in its entirety (Venturini affirmation, exhibit G, Court tr dated 6/22/12 at 26-31). Specifically, the court declined to appoint "an independent or neutral trustee" separate from the successor trustee designated in the trust document, as contrary to EPTL § 1502 (2) (*id.* at 27:13-21), and, in accordance with the express terms of the trust, appointed Platt as co-trustee (*id.* at 32:12-14), who was designated therein as successor trustee (*id.* at 27:15-21). The court further held that "Robert cannot act unilaterally and must get consent of his co-trustee with respect to

any actions taken regarding the administration of trust assets (*id.* at 30:20-23).

III. Related Actions

- a. *55 Gans Judgment LLC v Gerald Romanoff, et al.*, Sup Ct, NY County, index No. 106008/2011 (the Fraudulent Conveyance Action)

In seeking to collect on a judgment entered in the New Jersey Foreclosure Action¹ (FAC, ¶ 18), 55 Gans Judgment LLC (Gans Judgment), successor in interest to the original lender Union Center National Bank, became aware of the transfer of New Roads stock from Gerald to Sheryl, and then to the trusts (Venturini affirmation, exhibit M, order dated 1/29/13 [the Fraudulent Conveyance Order] at 2). Gans Judgment commenced an action seeking to set aside the transfers of New Roads stock as fraudulent, and, on December 12, 2012, moved for partial summary judgment on that ground (*id.* at 1). Robert, though not a party to the action, submitted an affidavit opposing the motion, in which he stated that “[i]f the transfer of the New Roads shares [is] voided, the [t]rusts are eliminated and . . . the [t]rust action will be terminated as will the [f]raud [a]ction . . . because the [t]rusts would no longer have standing to continue the actions” (Venturini affirmation, exhibit N, Robert aff dated 12/11/12, ¶¶ 72-73). The actions referred to by Robert are the instant action and *Robert Romanoff and Nicholas Romanoff v Griffon Gansevoort Holding LLC, et al.*, Sup Ct, NY County, index No. 652705/2012 (*Nicholas I*), further described below (*id.*, ¶¶ 24, 36).

In granting Gans Judgment’s motion, the court found that Gerald and Sheryl, the defendants in the Fraudulent Conveyance Action, had admitted that the transfer of New Roads

¹ On February 4, 2011, Capital One obtained a judgment against Nebraska Distribution Center, New Roads, GHC, and Gerald (Venturini affirmation, exhibit M, fraudulent conveyance order at 2).

stock from Gerald to Sheryl rendered Gerald “insolvent, was made without fair consideration and with the actual intent to hinder or delay creditors” (Venturini affirmation, exhibit M, fraudulent conveyance order at 3). Accordingly, the court voided the transfer of New Roads stock to the trusts (*id.*). Robert, on behalf of the trusts, moved to reargue and asked the court to “void only that part of the conveyances to the trust by Sheryl Romanoff that comprise Gerald Romanoff’s transfer of shares” (reply affirmation of August C. Venturini, exhibit 4, order dated 5/22/13 at 1). The court denied the motion (*id.* at 2). On July 17, 2013, the parties entered a stipulation of discontinuance disposing of the remainder of the case (Venturini affirmation, exhibit O, intervention order dated 3/19/14 at 1).

Robert then moved to intervene in the Fraudulent Conveyance Action, and the court denied the motion (*id.*). Robert appealed both the aforementioned orders. On December 4, 2014, the Appellate Division, First Department, unanimously dismissed both appeals (55 *Gans Judgment LLC v Romanoff*, 123 AD3d 452 [1st Dept 2014]). The Court held that “having failed to obtain the consent of the other co-trustee to pursue these appeals, [Robert] lacks standing to appeal” (*id.* at 452). Further, the Court held “[a]bsent a contrary provision in the trust instrument, the consent of all trustees is required to pursue an appeal either on behalf of the Trusts or for the stated purpose of protecting the rights of the Trusts” (*id.* at 453). Robert sought leave to appeal the First Department decision, which was denied by the Court of Appeals on December 15, 2015 (55 *Gans Judgment LLC v Romanoff*, 26 NY3d 1073 [2015]).

b. Nicholas I

On August 3, 2012, Robert individually, as co-trustee and beneficiary of the IG trust, and on behalf of his son, Nicholas, individually and as shareholder of New Roads, commenced

Nicholas I against Gerald, Venturini & Associates, Michael Shah (Shah), and several LLCs related to the sale of the Gansevoort property (Venturini affirmation, exhibit N, Robert aff dated 12/11/12, ¶ 36). On September 14, 2012, Robert filed an amended complaint (Venturini affirmation, exhibit I, *Nicholas I* amended complaint), where he made reference to a separate foreclosure action commenced in the Supreme Court, New York County regarding the Gansevoort property, *Capital One, N.A. v GHC NY Corp., et al.*, Sup Ct, NY County, 850024/2011 (the New York Foreclosure Action) (*id.*, ¶ 78). In April 2012, 55 Gans Lender, LLC (Gans Lender) purchased the mortgage from Capitol One and was substituted as plaintiff (*id.*, ¶¶ 79-80). Robert claimed that in July 2012, GHC sold the Gansevoort property to Griffon Gansevoort Holdings, LLC (Griffon), an alter ego of Gans Lender (*id.*, ¶¶ 82-83). Robert further alleged that, among other things, Gerald, Shah, and the LLC defendants were aware that Robert had the ability to pay off the mortgage, but instead “elected to self-deal to defendant Shah and the [LLC] defendants, and defendant Shah and the [LLC] defendants forced the transfer of title to the property to defendant Griffon” (*id.*, ¶ 97).

The defendants moved to dismiss the amended complaint (Venturini affirmation, exhibit J, Court tr dated 2/28/13 at 4). After oral argument, the court dismissed the complaint for lack of standing, specifically holding that Robert lacked standing to sue as a co-trustee without the other trustee’s consent, pursuant to case law and EPTL § 10-10.7 (*id.* at 39:7-18). Further, the court also acknowledged the Fraudulent Conveyance Order, and held that Robert had no standing as co-trustee of the IG trust, a nonexistent trust, and none, on behalf of GHC derivatively, as all authority was given to Gerald via the proxies for New Roads (*id.* at 39:19-26). Finally, the court held that, because Gerald was vested with control of GHC, Robert could not bring an

action on behalf of Nicholas, as a shareholder of New Roads (*id.* at 40:2-5). The court's decision from the bench was then reduced to a written order, holding that the "entire action be dismissed with prejudice" (Venturini affirmation, exhibit K, decision dated 4/10/13 at 4). Robert has subsequently withdrawn his appeal of the court's order (*Nicholas I*, NYSCEF Doc. No. 213).

c. In the Matter of GHC NY Corp., index No. 12-14031 (REG) (U.S. Bankruptcy Court, SDNY) (the Bankruptcy Action)

On September 25, 2012, while the Fraudulent Conveyance Action and *Nicholas I* were pending, Robert filed a Chapter 11 bankruptcy petition on behalf of GHC in the United States Bankruptcy Court for the Southern District of New York (Venturini affirmation, ¶ 35). Subsequently, Robert sought and obtained removal of the New York Foreclosure Action to the Bankruptcy Court (Venturini affirmation, ¶ 35; exhibit L, Bankruptcy Court tr dated 12/6/12). On December 6, 2012, the Bankruptcy Court heard oral argument, remanded the New York Foreclosure Action back to the Supreme Court, and dismissed the bankruptcy petition for "lack of authority to file it in the first place and also for bad faith filing . . ." (Venturini affirmation, exhibit L, Bankruptcy Court tr dated 12/6/12 at 48). Further, the court held that "[w]ith two trustees in place at all relevant times both trustees were required to act jointly" (*id.* at 56:8-9).

d. Nicholas Romanoff v Gerald Romanoff, et al., Sup Ct, NY County, index No. 151160/2014 (*Nicholas II*)

On February 7, 2014, Robert commenced a derivative action on behalf of his son Nicholas, pursuant to Business Corporation Law (BCL) § 626, as a shareholder of New Roads, and, in the right of New Roads, as sole shareholder of GHC, against Gerald, Sheryl, Zimmerman, Gans Judgment, Gans Lender, Griffon (collectively, the Gans defendants), Platt, the IG trust,

New Roads, and GHC (Venturini affirmation, exhibit S, *Nicholas II* complaint). In the complaint, Nicholas restated the factual allegations contained in the FAC (*id.*, ¶¶ 26-37), and included additional allegations related to motion practice in the related cases and the sale of the Gansevoort property (*id.*, ¶¶ 38-67). Nicholas alleged breach of fiduciary duty against Gerald, aiding and abetting breach of fiduciary duty against the Gans defendants and Zimmerman, an accounting against Gerald and Sheryl, and sought an order setting aside the sale of the Gansevoort property, declaring a right to redeem the property, and removing Gerald as an officer or director of New Roads and GHC.

Platt, Zimmerman, and Gerald, Sheryl, GHC, and New Roads separately moved to dismiss the complaint, and Nicholas moved for leave to file a second amended complaint.² After oral argument, the court granted the defendants' motions and dismissed the complaint against Platt, Zimmerman, Sheryl, and Gerald, with the exception of certain portions of the breach of fiduciary duty and accounting claims against Gerald (Venturini affirmation, exhibit V, *Nicholas II* decision dated 2/3/15 at 31-32). In addressing Nicholas' motion for leave to amend, the court held that Nicholas, as an individual shareholder of New Roads, could not bring a direct cause of action based on the sale of the Gansevoort property or other transactions alleged in *Nicholas I*, because the court in that action had dismissed those claims (*id.* at 28). Further, the court held that because Nicholas was a contingent beneficiary of the trusts and in privity with Robert, he lacked standing to bring claims as a beneficiary or derivatively on behalf of the trusts, because the trusts themselves no longer existed (*id.* at 29-30). Nicholas was equally bound by

² Nicholas had filed a first amended complaint but withdrew it pursuant to stipulation (Venturini affirmation, ¶ 48).

the court's holdings in its decision in the instant action dismissing the FAC against Zimmerman (*id.* at 30).

e. Robert Romanoff and Nicholas Romanoff v The Trustees of the Sheryl Romanoff Irrevocable Grantor Trust, et al., Sup Ct, NY County, index No. 157641/2014 (*Nicholas III*)

On August 8, 2014, Robert commenced another action with Nicholas in their capacities as beneficiaries of the IG trust, derivatively on behalf of the IG trust, GHC, and New Roads, and in Robert's capacity as co-trustee of the IG trust, against Gerald, Sheryl, Zimmerman, Platt, and the Gans defendants (Venturini affirmation, exhibit U, *Nicholas III* complaint). As with *Nicholas II*, the *Nicholas III* action generally re-alleged the same facts regarding the trusts, Gerald's alleged mismanagement/breaches of fiduciary duty, and the sale of the Gansevoort property, as well as prior litigation in this and other cases. Robert and Nicholas alleged claims for breach of fiduciary duty derivatively on behalf of the trusts as beneficiaries, two separate claims for rescission of the sale of the Gansevoort property, breach of fiduciary duty against Gerald on behalf of the IG trust, GHC, and New Roads, aiding and abetting Gerald's breach of fiduciary duty against the remaining defendants, an accounting of GHC and New Roads against Gerald and Sheryl, rescission of the sale in plaintiffs' individual capacities, a right of redemption of the Gansevoort property on behalf of New Roads and GHC, the removal of Gerald as officer and director of New Roads and GHC, a claim for an accounting and rescission of the sale in Nicholas' individual capacity as minority shareholder of New Roads, breach of fiduciary duty against Zimmerman in Nicholas' individual capacity, and a breach of fiduciary duty against Platt.

IV. Further Proceedings in the Instant Action

On October 9, 2013, this court heard argument on defendant Zimmerman's motion to dismiss the FAC alleged against him in the instant action (mot. seq. No. 003) (Venturini affirmation, exhibit P, Court tr dated 10/9/13 [the 10/9/13 Decision]). Robert conceded to withdrawing the eighth through eleventh causes of action alleged against Zimmerman, leaving only the first cause of action for a declaration voiding the proxies, the fifth cause of action for breach of fiduciary duty, and the seventh cause of action for an accounting (*id.* at 4:7-5:16). After oral argument, this court dismissed the complaint against Zimmerman based on a lack of capacity to sue (*id.* at 23:23-24:24). Specifically, this court relied on Robert's statement in the Fraudulent Conveyance Action that "[i]f the transfer of the New Roads shares are voided, the trusts are eliminated," and "if the trusts are terminated, then the trust would no longer have any standing in the action" (*id.* at 24:4-6). Based on that statement, Robert was judicially estopped from "taking a contrary position that the res[] survives based on a hundred-dollar transfer recited in the trust," a position which was not alleged in the complaint or supported by an affidavit from Robert during briefing (*id.* at 24:7-15). Because the court in the Fraudulent Conveyance Action found a fraudulent conveyance, and voided the transfer of the New Roads shares, this court stated that "there's nothing left in the trust for this action to survive" and dismissed the complaint without prejudice against Zimmerman (*id.* at 24:18-24). Robert then filed a motion to reargue and for leave to file a second amended complaint (mot. seq. no. 005).

In briefing his motion to reargue the 10/9/13 Decision, the Estate claimed that Robert publicly filed attorney-client privileged communications among Gerald, Sheryl, and Zimmerman (Venturini affirmation, ¶ 56). On November 27, 2013, Gerald filed a motion by order to show

cause to, among other things, strike the communications from Robert's papers, sealing certain documents related to the motion on NYSCEF, and enjoining further use of the privileged communications (NYSCEF Doc. No. 127). On December 18, 2013, the court granted the motion to the extent of sealing certain documents filed in conjunction with the motion that referenced the communications, and otherwise denied the motion without prejudice (NYSCEF Doc. No. 179). On January 7, 2014, the First Department denied a cross motion filed by Gerald and Sheryl in the New York Foreclosure Action "for a protective order enjoining the use of allegedly privileged e-mails," without prejudice to further action "in Supreme Court" (*55 Gans Judgment LLC v Sheryl Romanoff Irrevocable Grantor Trust, et al.*, 2014 NY Slip Op 60406[U] [1st Dept 2014]).³

On April 4, 2015, Gerald passed away and *Nicholas II*, and *Nicholas III* were stayed. By so-ordered stipulation, the parties agreed to substitute Sheryl into the case as representative of Gerald's estate (NYSCEF Doc. No. 307). On August 5, 2016, this court denied that branch of Robert's motion that sought to reargue the 10/9/13 Decision, and denied leave to amend "without prejudice with leave to renew based upon the rulings of the First Department and the Court of Appeals" (NYSCEF Doc. No. 380, order dated 8/5/16 at 8). Further, this court granted Sheryl's cross motion to renew the motion for a protective order to the extent of enjoining Robert from using the privileged communications, striking references thereto from his motion papers, directing Robert to return any copies thereof within 30 days, and suppressing the contents of the privileged communications pursuant to CPLR 4506 (*id.* at 8-9). On September 14, 2016, Sheryl

³ The motion order available online does not include the full text of the order, which was attached as exhibit X to the Venturini affirmation.

moved to hold Robert in contempt of this court's August 5, 2016 order for failing to return the documents within 30 days. The court denied that motion on November 25, 2016 (NYSCEF Doc. No. 444, order dated 9/14/16).

Discussion

Robert now moves for leave to serve and file a second amended complaint pursuant to CPLR 3025 (b). Defendants subsequently filed their respective opposing papers, and the above described cross motions.

CPLR 3025 [b] provides that leave to amend "shall be freely given upon such terms as may be just." A court must, however, examine the merits of the proposed amendment (*Pier 59 Studios, L.P. v. Chelsea Piers, L.P.*, 40 AD3d 363, 365-66 [1st Dept 2007]). "On a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). Further, "[l]eave to amend will be denied where the proposed pleading fails to state a cause of action" (*Megarix Furs v Gimbel Bros.*, 172 AD2d 209, 209 [1st Dept 1991]).

Robert now moves for leave to amend the FAC, to assert new causes of action and add his son Nicholas as a plaintiff. He asserts that the PSAC "correct[s] the errors in pleading of the prior complaint and [sets] forth viable causes of action against Zimmerman, the Estate, and Sheryl Romanoff (affirmation of James M. Haddad, ¶ 3). He also maintains that the PSAC alleges additional facts, events and transactions that have become relevant to the action (*id.*). While the PSAC contains 339 additional factual allegations, it covers the same alleged breaches of fiduciary duty by Gerald, the sale of the Gansevoort property, prior judgments obtained

against Gerald and New Roads, and the Fraudulent Conveyance Action, as well as additional allegations regarding Zimmerman and Platt's purported breaches of fiduciary duty.

With respect to Zimmerman, the PSAC alleges the following claims: a breach of fiduciary duty to the trusts (second cause of action); breach of trust under the Restatement (Second) of Trusts (third cause of action); breach of trust under the Restatement (Third) of Trusts and the Uniform Trust Code § 813 (fourth cause of action); breach of fiduciary duty by Robert as co-trustee (fifth cause of action); aiding and abetting breach of fiduciary duty to the trusts, GHC, and New Roads (sixth cause of action); fraud by Robert and Nicholas, in their personal capacities (seventh cause of action); malpractice by Robert and Nicholas, in their personal capacities (eighth cause of action); and breach of professional and fiduciary duties by Robert and Nicholas, both personally and derivatively on behalf of the trusts (ninth cause of action).

With respect to the Estate, the PSAC alleges the following claims: breach of fiduciary duty of a proxy-holder by Robert and Nicholas, both as beneficiaries and derivatively on behalf of the trusts, GHC, and New Roads (tenth cause of action); aiding and abetting breach of fiduciary duty by Robert and Nicholas, both as beneficiaries and derivatively on behalf of the trusts, GHC, and New Roads (eleventh cause of action); and fraud by Robert, in his personal capacity (twelfth cause of action).

With respect to Sheryl, the PSAC alleges the following claims: fraud by Robert, in his personal capacity (thirteenth cause of action); fraud, derivatively for the trusts (fourteenth cause of action); and aiding and abetting breach of fiduciary duty, derivatively on behalf of the trusts, GHC, and New Roads (fifteenth cause of action).

With respect to Platt, the PSAC alleges the following claims: breach of fiduciary duty by

Robert and Nicholas, as beneficiaries, and derivatively on behalf of the trusts, GHC, and New Roads (sixteenth cause of action); and aiding and abetting breach of fiduciary duty by Robert and Nicholas, as beneficiaries, and derivatively on behalf of the trusts, GHC, and New Roads (seventeenth cause of action).

The PSAC also alleges a conspiracy among Sheryl, Gerald, Zimmerman and Platt (first cause of action) and seeks an accounting from Zimmerman and Platt by Robert and Nicholas, as beneficiaries, and derivatively on behalf of the trusts (eighteenth cause of action).

Here, defendants oppose Robert's application for leave to amend on several grounds

a. Collateral Estoppel

Collateral estoppel "precludes a party from relitigating an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point" (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985] [internal quotation marks and citation omitted]). "[T]he identical issue necessarily must have been decided in the prior action and be decisive of the present action, and . . . the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination" (*id.*). The Estate and former defendant Zimmerman argue that this court's holdings regarding Robert and Nicholas's standing to bring claims on behalf of the trusts, GHC, and New Roads, as well as rulings on those issues in the related cases, collaterally estop Robert and Nicholas from bringing 14 of the 18 claims alleged in the PSAC, specifically the first through sixth, ninth through eleventh, and fourteenth through eighteenth causes of action, to the extent they are based on the trusts or brought derivatively on behalf of GHC and New Roads by Robert or the trusts. The Estate maintains that these claims are alleged by Robert and Nicholas as beneficiaries of the

trusts, derivatively on behalf of the trusts, GHC, and New Roads, and in Robert's case as co-trustee of the trust. As previously noted, multiple courts, including this one, have now held that both Robert and Nicholas do not have standing to bring these claims on behalf of the trusts in any capacity, and Robert has no standing to bring derivative claims on behalf of the corporations.

In response to the Estate's preclusion argument, Robert raises several arguments. Relying on *Velez v Feinstein* (87 AD2d 309 [1st Dept 1982]), he argues that Nicholas and he may sue derivatively on behalf of the trusts where the trustees have failed to act. Further, he argues that the trusts do, in fact, still exist for purposes of filing these claims, either because he should no longer be judicially estopped from arguing otherwise based on changed circumstances, because a denuded trust still exists for purposes of winding-up its affairs, or because a cause of action can be considered the res of the trust itself. As set forth below, none of these arguments have merit.

It has been held that the trusts were terminated in the Fraudulent Conveyance Action when the court voided the transfers of New Roads shares to the trusts (Venturini affirmation, exhibit M, fraudulent conveyance order at 3; exhibit J, Court tr dated 2/28/13 at 39; exhibit P, 10/9/13 Decision at 24), and as a result neither Robert nor Nicholas may bring a claim as a beneficiary, co-trustee or derivatively thereof (Venturini affirmation, exhibit P, 10/9/13 Decision at 24; exhibit V, *Nicholas II* decision dated 2/3/15 at 29-30). Further, Robert may not bring an action as co-trustee without the other co-trustee's consent (*55 Gans Judgment LLC*, 123 AD3d at 452; Venturini affirmation, exhibit J, Court tr dated 2/28/13 at 39; exhibit L, Bankruptcy Court tr dated 12/6/12 at 56). In addition, and specifically with regard to the sixth, tenth, and fifteenth through seventeenth causes of action, to the extent they are brought derivatively on behalf of

GHC and New Roads, the *Nicholas I* court found that Robert has no standing to sue derivatively, as he was merely the vice president of GHC (Venturini affirmation, exhibit J, Court tr dated 2/28/13 at 39). Finally, because the trusts have been terminated and hold no shares, to the extent that Robert asserts that he may act through the trusts and sue derivatively on behalf of New Roads, those claims would be futile.

Accordingly, the issue of standing was decisive of the litigation in *Nicholas I*, the appeal of the Fraudulent Conveyance Action, the bankruptcy court action, and this court's prior decisions in this action and *Nicholas II*. Robert and Nicholas have had a full and fair opportunity to litigate the various standing issues in several fora, and Robert's moving papers are not to the contrary. While Robert argues that the Fraudulent Conveyance Order fails to determine who owned the shares after the transaction was voided, the Court of Appeals' denial of leave to appeal that order is final as to the trust's lack of ownership of the shares, and Robert is precluded from seeking to reargue that issue here. Further, Robert's affirmation does not, as he contends in his memorandum of law, set forth that the trusts purchased the shares for "less than a fair consideration," therefore, contrary to his argument, Debtor and Creditor Law (DCL) § 278 (2)⁴ does not apply to bar preclusive effect of the fraudulent conveyance order. Thus, Robert is precluded from bringing claims for which he and his son have no standing.

Robert's reliance on *Velez v Feinstein* is unavailing. In *Velez*, the Appellate Division, First Department held that the beneficiaries of a trust could sue derivatively where the trustees fail to enforce a claim of the trust against a third party (*Velez*, 87 AD2d at 314). Robert's

⁴ "A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation, may retain the property or obligation as security for repayment" (DCL § 278 [2]).

reliance on *Velez*, however, begs the question of whether there exists a trust in this action on whose behalf he may sue derivatively. It is axiomatic that a derivative plaintiff must be suing on behalf of an existent entity (*see Tudor v Riposanu*, 93 AD2d 718, 718 [1st Dept 1983] [“Regarding the ninth cause of action, inasmuch as there is no corporation in existence, a derivative cause of action could not be asserted”]). Here, because the trusts have been terminated, Robert and Nicholas have no standing to sue derivatively on their behalf.

As for Robert’s arguments that the trusts still exist regardless of the orders and decisions set forth above, the Court has already denied Robert’s motion to reargue the 10/9/13 Decision (NYSCEF Doc. No. 380, order dated 8/5/16 at 3-4). If Robert believed the court’s initial decision or its decision on reargument was improper, his remedy was a timely motion to reargue the initial decision, pursuant to CPLR 2221, or a timely appeal of either decision, pursuant to CPLR 5513 (*see Benitez v. City of New York*, 2 AD3d 285, 285 [1st Dept 2003]). Robert’s motion for reargument has been denied, and his appeals of the court’s decisions are pending. Until the pending appeals are decided, however, the court’s orders are final (*id.* at 285). Further, as Robert is collaterally estopped from contesting the termination of the trusts and his lack of standing to sue based on the trusts, he is precluded from bringing alternative legal theories in order to attack the above described prior rulings. The court notes that Robert fails to explain why such legal theories were not available to him previously, or why he was prevented from bringing them before. As such, propounding them at this juncture is, at best, misguided. Therefore, the proposed causes of action, specifically the first through sixth, ninth through eleventh, and fourteenth through eighteenth causes of action, to the extent they are asserted by Robert and Nicholas as beneficiaries of the trusts, derivatively on behalf of the trusts, by Robert

as co-trustee of the trusts, by Robert derivatively on behalf of GHC and New Roads, and by the trusts derivatively on behalf of GHC and New Roads are barred by collateral estoppel.

b. CPLR 3211 (a) (4)

The sixth, tenth, and fifteenth through seventeenth causes of action in the PSAC also allege claims for breach of fiduciary duty, and aiding and abetting fraud and breach of fiduciary duty by Nicholas, derivatively on behalf of New Roads and GHC against Zimmerman, Platt, the Estate, and Sheryl. These claims are not collaterally estopped since Nicholas' authority or standing to assert these derivative claims has not been previously decided. The Estate, however, argues that Nicholas cannot bring these derivative claims, because he has already asserted them in both *Nicholas II* and *Nicholas III*. CPLR 3211 (a) (4) provides that a cause of action may be dismissed where "there is another action pending between the same parties for the same cause of action in a court of any state or the United States." In other words, dismissal is proper where "a pending action existed between the same parties for essentially the same relief and involving the same actionable wrong" (*GSL Enters. v Citibank*, 155 AD2d 247, 247 [1st Dept 1989] [internal quotation marks and citation omitted]).

Here, the sixth, tenth, and fifteenth through seventeenth causes of action brought by Nicholas in the PSAC seek the same relief and involve the same actionable wrongs as claims raised against those parties in *Nicholas II* and *Nicholas III* (Venturini affirmation, exhibit S, *Nicholas II* complaint at 12-19; exhibit U, *Nicholas III* complaint at 37-47). Robert does not deny that these actions exist, and offers no other meritorious argument why this action should be amended to include claims that are active in two other litigations. To the extent that such claims have already been dismissed in *Nicholas II*, Robert may not collaterally attack that dismissal by

bringing them in this action (*see Parker & Waichman v Napoli*, 51 AD3d 558, 558 [1st Dept 2008] [“We dismissed all of plaintiff’s fraud-based claims as an impermissible collateral attack on a prior order”]). Accordingly, the proposed derivative claims alleged derivatively by Nicholas in the sixth, tenth, and fifteenth through seventeenth causes of action of the PSAC on behalf of New Roads and GHC are dismissed, pursuant to CPLR 3211 (a) (4).

c. Insufficient Claims

Defendants also allege that the seventh, eighth, ninth, twelfth, and thirteenth causes of action fail to state a cause of action. The proposed seventh through ninth causes of action against Zimmerman, twelfth cause of action against the Estate, and thirteenth cause of action against Sheryl, are all brought in Robert or Nicholas’ personal capacities and thus are not affected by the court’s ruling on collateral estoppel.⁵ However, as set forth below, the PSAC fails to state a cause of action as to any of these claims.

The seventh, twelfth, and thirteenth proposed causes of action purport to state fraud claims against Zimmerman, the Estate, and Sheryl. “The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages . . . [and a] claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b)” (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Representations of future intent are not actionable where the complaint fails to allege “a present intention that they would not be carried out” (*Papp v Debbane*, 16 AD3d 128 [1st Dept 2005]).

⁵ The ninth cause of action is also brought derivatively on behalf of the trusts, and in that capacity it is barred by collateral estoppel.

Here, Robert alleges that Zimmerman misrepresented to him that the trust instruments and Gerald and Sheryl's conveyance of New Roads shares to the trusts were valid and enforceable (PSAC, ¶¶ 468-476). However, the claim regarding the trust instruments cannot be viewed as a misrepresentation, as Robert fails to allege that the trust instruments have ever been found invalid or unenforceable. Further, the PSAC does not contain any non-conclusory allegations that Zimmerman was aware of any falsity regarding the validity of the trusts or the transfer of the shares, or that he had any intention to induce Robert's reliance on his alleged misrepresentations, which are required to state a cause of action for fraud.

With respect to Gerald and Sheryl, Robert alleges that they misrepresented that they would properly transfer the New Roads shares to the trust (*id.*, ¶¶ 530, 536), and that Gerald would manage GHC "properly and honestly" (*id.*, ¶ 529).⁶ Further, the PSAC is devoid of any allegations from which the court could infer that Gerald and Sheryl intended to deceive Robert at the time they made the alleged representations. As such, those statements are not actionable (*Nerey v Greenpoint Mtge. Funding, Inc.*, 144 AD3d 646, 647 [2d Dept 2016]). While Robert argues that the Court should infer that Zimmerman, Gerald, and Sheryl intended that the conveyances were fraudulent when they were made, because they were later found to be fraudulent, the PSAC does not include allegations from which the Court could make such an inference. In order to be actionable, the PSAC must allege "present intentions constitut[ing] statements of material existing fact" and not expressions of future expectations (*Laduzinski v Alvarez & Marsal Taxand LLC*, 132 AD3d 164, 168 [1st Dept 2015]; *see also International Fin.*

⁶ Robert's remaining proposed allegations of fraud are not pled with sufficient particularity pursuant to CPLR 3016 (b).

Corp. v Carrera Holdings Inc., 82 AD3d 641, 642 [1st Dept 2011])). There are no allegations, however, that Gerald and Sheryl intended, at the time that they transferred the shares, for the transfers to be found fraudulent, or that Gerald intended that he would not manage GHC properly. Thus, Robert's reliance on future events after the alleged misrepresentations were made, is insufficient to show an actionable misrepresentation of present fact. Accordingly, Robert's proposed fraud claims fail to state a cause of action.

Robert's eighth proposed cause of action is brought personally on his and Nicholas' behalf against Zimmerman for malpractice. "To state a cause of action for legal malpractice, a complaint must allege the negligence of the attorney, that the negligence was a proximate cause of the loss sustained, and actual damages" (*Federal Ins. Co. v North Am. Specialty Ins. Co.*, 47 AD3d 52, 59 [1st Dept 2007]). "A cause of action for legal malpractice cannot be stated in the absence of an attorney-client relationship" (*Waggoner v Caruso*, 68 AD3d 1, 5 [1st Dept 2009]).

The PSAC alleges that Robert retained Zimmerman to establish an estate plan that would benefit Gerald, Sheryl, Nicholas, and Robert; that Robert was Zimmerman's client for this specific task; and that Nicholas was a "foreseeable claimant also relying on Zimmerman's skill and care (PSAC, ¶¶ 480-481). The allegations clearly provide that Zimmerman was retained to set up *Gerald's* estate. Further, Robert himself previously stated that Zimmerman had been retained by Gerald (FAC, ¶ 4 ["Defendant Zimmerman was also retained by Defendant Romanoff for the purpose of drafting both of the trusts and other documents related to the trusts and their assets"])). Robert may not now affirmatively claim otherwise. In any case, the beneficiaries of an estate plan may not sue the estate-planning attorney for malpractice absent actual fraud (*Estate of Schneider v Finmann*, 15 NY3d 306, 310 [2010] ["strict privity remains a

bar against beneficiaries' and other third-party individuals' estate planning malpractice claims absent fraud or other circumstances"])). As previously discussed, the proposed fraud cause of action against Zimmerman fails to state such a claim. Accordingly, Robert's proposed malpractice claim fails to state a cause of action.

Finally, the ninth cause of action in the PSAC for breach of professional and fiduciary duties against Zimmerman is also brought by Robert and Nicholas personally. "Breach of fiduciary duty requires (1) the existence of a fiduciary duty owed by the defendant; (2) a breach of that duty; and (3) resulting damages" (*Jones v Voskresenskaya*, 125 AD3d 532, 533 [1st Dept 2015]). Such a claim against a professional "requires the underlying relationship between the parties to be one of contract or the bond between them so close as to be the functional equivalent of contractual privity" (*Art Capital Group, LLC v Neuhaus*, 70 AD3d 605, 607 [1st Dept 2010]).

Here, Robert and Nicholas claim in the PSAC that Zimmerman breached his professional and fiduciary duties to them as a co-trustee and also as their attorney. However, as set forth above, there are no allegations of any contractual, attorney-client, or other relationship approaching contractual privity between Zimmerman and Robert or Nicholas that could sustain this claim against Zimmerman. Accordingly, Robert's proposed breach of professional and fiduciary duties claim fails to state a cause of action.

For the foregoing reasons, Robert's motion for leave to amend is denied.

Defendant Zimmerman cross-moves for summary judgment dismissing the claims alleged against him in the FAC with prejudice, in essence seeking to convert this court's prior dismissal of those claims without prejudice into a dismissal with prejudice (*see* Venturini affirmation, exhibit P, the 10/9/13 Decision at 24). In light of the court's denial of Robert's

prior motion to reargue the 10/9/13 decision (NYSCEF Doc. No. 380, order dated 8/5/16 at 8), and of his present motion for leave to amend, there are no claims currently alleged against Zimmerman. Accordingly, the court deems the cross motion moot, and dismisses it as academic.

Defendant Sheryl, in her capacity as personal representative for Gerald's estate, also cross-moves for summary judgment on the first, second, third, sixth, tenth, and eleventh causes of action in the FAC. Summary judgment is appropriate where there are no disputed material facts (*Andre v. Pomerory*, 35 NY2d 361 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a trial (*id.* at 562). However, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assoc. v Victoria's Secret Stores, Inc.*, 256 AD2d 285 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625 [1985]).

Here, the first, second, third, sixth, tenth, and eleventh causes of action in the FAC are brought against Gerald's estate in Robert's capacity as beneficiary and co-trustee of the trusts. As stated above, Robert lacks standing to bring claims against the Estate in these capacities. Such lack of standing is fatal to his remaining claims as a matter of law, and Robert fails to raise a material issue of fact in opposition. Accordingly, the Estate's cross motion for summary judgment is granted and the first through third, sixth, tenth, and eleventh causes of action against the Estate are dismissed with prejudice.

As part of its cross motion, the Estate also seeks an order striking references to certain

privileged communications in the PSAC, and sealing the PSAC on the docket. In opposition, Robert claims that he has not referenced the privileged communications and has independent bases for the allegations that the Estate complains of, and, moreover, that the privileged communications were not privileged as to him. In this court's prior order of August 3, 2016, however, the court rejected Robert's contention that because the emails were sent on behalf of a corporation that he himself was an officer of, and whose email accounts he had access to, they are not privileged (NYSCEF Doc. No. 380, order dated 8/5/16 at 7-8). Specifically, this Court found that Robert had failed to show that he "requested or received permission from Gerald or Sheryl to have copies of the private emails, which are privileged communications" (*id.*). Here, the court finds Robert's present affidavit does not sufficiently establish such showing. Accordingly, the court grants the Estate's cross motion to strike matter from the PSAC and seal it on the NYSCEF docket, to the extent of striking all references to the content of the privileged communications in the PSAC, in accordance with the court's prior order.

Finally, the Estate seeks sanctions against Robert and his counsel, pursuant to 22 NYCRR 130-1.1 (c), for making a motion calculated to harass defendants and delay resolution of the action by bringing claims that are estopped by decisions of this and other courts. "The court, in its discretion, may award to any party or attorney in any civil action or proceeding . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct" (22 NYCRR 130-1.1). Conduct is frivolous if "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts

material factual statements that are false” (22 NYCRR 130-1.1 [c]; see *Premier Capital v Damon Realty Corp.*, 299 AD2d 158, 158 [1st Dept 2002]). The court has discretion as to both the imposition and amount of sanctions (*Seldon v Bruno*, 204 AD2d 180, 180 [1st Dept 1994]), and such discretion should rarely be disturbed (*Matter of Metamorphosis Constr. Corp. v Glekel*, 247 AD2d 231, 231 [1st Dept 1998]).

The Estate argues that Robert’s motion is without merit in law, because the causes of action alleged in the PSAC have been previously raised by him in other actions and are contrary to several prior court orders of this and other courts, and that the motion was brought primarily to harass the Estate and delay resolution of the case. Further, the Estate claims that Robert and his attorney are in contempt of the court’s prior sealing orders, because they referenced the privileged communications in the PSAC. In response, Robert does not appear to directly argue that sanctions are inappropriate, but he does argue that he did not use any of the privileged communications that had previously been sealed, and that he is not precluded from bringing the claims in the PSAC.

The court is troubled by Robert’s insistence on relitigating issues he has already lost multiple times in this and other courts. As set forth above, Robert and Nicholas are both precluded or barred from bringing the claims in the PSAC based on prior court orders stretching back over four years. Indeed, as set forth above, Robert fails to state why the new arguments he is now raising were unavailable to him on any of the numerous chances he has had to relitigate these issues. At this time, however, the court chooses to exercise its discretion not to impose sanctions. Having said that, Robert and his counsel, James M. Haddad, Esq., are hereby put on notice that any further such motion practice may result in sanctions.

Accordingly, it is hereby

ORDERED that Robert's motion for leave to amend is denied; and it is further

ORDERED that branch of the Estate's cross motion for summary judgment is granted and the First Amended Complaint is dismissed as against the Estate with prejudice, with costs and disbursements to the Estate as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that branch of the Estate's cross motion to strike material from the Proposed Second Amended Complaint and seal it on the NYSCEF docket is granted to the extent of striking all references to the content of the privileged communications from the PSAC; and it is further

ORDERED that branch of the Estate's cross motion for sanctions is denied; and it is further

ORDERED that Zimmerman's cross motion for summary judgment is dismissed as academic; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: March 7, 2017

ENTER:



HON. ANIL C. SINGH, J.S.C.