

Radio Drama Network, Inc. v Kay
2020 NY Slip Op 34049(U)
December 3, 2020
Supreme Court, New York County
Docket Number: 655539/2019
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY

PART

IAS MOTION 48EFM

Justice

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RADIO DRAMA NETWORK, INC.,

Plaintiff,

- v -

RICHARD KAY,

Defendant.

-----X

INDEX NO. 655539/2019

MOTION DATE _____

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 150, 151

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

In motion sequence number 003, defendant Richard L. Kay moves, pursuant to CPLR 3212, for partial summary judgment, dismissing plaintiff Radio Drama Network, Inc.'s (RDN) fourth cause of action for breach of fiduciary duty and fifth cause of action for failure to properly administer charitable assets as duplicative of claims filed in the Surrogate's Court of the State of New York, County of New York (Surrogate's Court). Kay also moves, pursuant to CPLR 3214(b), for an order staying discovery relating to such claims pending a determination of this motion.

Background

Nonparty Himan Brown was a successful radio producer who amassed an estate worth in excess of \$100 million dollars in his lifetime. (NYSCEF Doc. No. [NYSCEF] 106 , Kay aff ¶¶ 5, 21.) In 1984, Brown formed RDN as a charitable organization devoted to the "the spoken word and other worthy endeavors." (*Id.* ¶ 6.) Kay served as a director and officer of RDN beginning in the 1990s. (*Id.* ¶ 8). Kay was also Brown's personal attorney for almost 40 years. (NYSCEF 108, Surrogate's Court January 6, 2015 Order at 2).

On November 20, 2002, Brown established a trust for his lifetime (Trust) (*Id.* at 2.) Brown was the sole trustee. (*Id.*) Upon Brown's death, "the lion's share of the trust's remainder ... was to be distributed to [RDN]." (*Id.*) The Trust named Kay and another individual as successor co-trustees. (*Id.*) In December 2002, Brown executed a will leaving the remainder of his estate to the Trust (*Id.*)

On July 8, 2003, Brown executed a restatement to the revocable trust naming Kay sole successor of the Trust. (*Id.*) On October 20, 2004, Brown executed a second restatement to the Trust, whereby Brown replaced RDN with a newly created charitable trust (Charitable Trust) as the remainder beneficiary. (NYSCEF 103, Surrogate's Court July 15, 2019 Order at 3.) On the same day, Brown executed a new will, naming Kay as executor and leaving the remainder of his estate to RDN (Will). (NYSCEF 108, Surrogate's Court January 6, 2015 Order.)

Brown died on June 4, 2010, leaving an estate valued at approximately \$850,000 to RDN (NYSCEF 103, Surrogate's Court July 15, 2019 Order at 2); a probate proceeding was initiated (NYSCEF 108, Surrogate's Court January 6, 2015 Order.) The probate proceeding was contested by Brown's son on the grounds of capacity, due execution, undue influence, fraud, and duress. (*Id.* at 5-7) Kay moved for summary judgment dismissing these objections. (*Id.*) On January 6, 2015, the Surrogate's Court granted Kay's motion for summary judgment, dismissing the objections and admitting the Will to probate. (*Id.*)

Also, in 2010, RDN filed a second proceeding in the Surrogate's Court, alleging that Kay "fraudulently misled the then 94-year old Himan Brown into directing \$100 million away from Radio Drama Network ... divert[ing] [it] to a newly created charitable trust of which Kay serves as sole trustee." (NYSCEF 102, Surrogate's Court Petition ¶ 1.) RDN further alleged that "[t]o prevent discovery of his fraudulent scheme, Kay concealed facts in

violation of his fiduciary duties and exploited his multiple conflicting roles as drafter, sole executor, sole trustee of the revocable trust, trustee of the benefiting charitable trust, and board member of Radio Drama Network.” (*Id.* ¶ 3.)

RDN alleged that Kay falsified meeting minutes purportedly confirming his appointment as a non-removable member of RDN’s board, which allowed him the opportunity to hinder RDN’s ability to pursue its claims. (*Id.*) RDN sought to invalidate the allegedly fraudulently induced provisions of the revocable trust and impose a constructive trust on the Charitable Trust to obtain turnover of its remaining assets. (*Id.* ¶ 4.) It also sought to disgorge improper distributions to Kay, obtain monetary damages from Kay, and secure his removal from the RDN board. (*Id.*) RDN alleged claims for fraud, fraudulent concealment, undue influence, breach of fiduciary duty, violations of Judiciary Law § 487, and unjust enrichment. (*Id.* at 34-46.)

Kay moved to dismiss this petition, and RDN moved for a preliminary injunction suspending Kay from his position as a director of RDN and enjoining him, as trustee of the Charitable Trust, from making any further distributions pending resolution of the proceeding. On July 15, 2019, the Surrogate’s Court granted Kay’s motion to the extent that it dismissed “petitioner’s claims for respondent’s removal as one of petitioner’s corporate directors and for damages under Judiciary Law § 487.” (NYSCEF 103, Surrogate’s Court July 15, 2019 Order at 21.) The Surrogate’s Court otherwise denied Kay’s motion and denied RDN’s request for a preliminary injunction in its entirety. (*Id.*) Specifically, the Surrogate’s Court dismissed RDN’s claim for breach of fiduciary duty, to the extent that it was offered as a ground for removal of Kay as director, for lack of subject matter jurisdiction. (*Id.* at 8.) The Surrogate’s Court also dismissed RDN’s claim for violation of Judiciary Law § 487 for failure to state a claim. (*Id.* at 15.)

On September 4, 2019, RDN's directors voted to remove Kay from its board. (NYSCEF 101, Kramer aff ¶ 6). Kay, believing his removal to be wrongful, notified RDN's financial institutions of his purportedly improper removal. (*Id.*). As a result, BNY Melon issued a freeze on one of RDN's accounts.

On September 23, 2019, RDN commenced this action for a declaratory judgment removing Kay as a director, officer and member of RDN and as a signatory on its financial accounts (first, second, and third causes of action), breach of fiduciary duty (fourth cause of action), failure to properly administer charitable assets (fifth cause of action), tortious interference with contract (sixth cause of action), tortious interference with business relations (seventh cause of action), and prima facie tort (eighth cause of action) (NYSCEF 104, Verified Complaint at 27-39.). On November 14, 2019, this court preliminarily enjoined Kay from interfering with RDN's financial assets, including continuing to purport to act as a signatory on RDN's financial accounts. (NYSCEF 88, Decision and Order on Motion.)

On March 18, 2020, Kay filed this motion for partial summary judgment seeking the dismissal of RDN's fourth cause of action for breach of fiduciary duty on the ground that it is duplicative of the breach of fiduciary duty pending in the Surrogate's Court and the fifth cause of action for violation of EPTL § 8-1.4 to the extent it is based upon the same allegations as the fourth cause of action and the Surrogate's Court petition. (NYSCEF 100, Notice of Motion.)

Since this motion was filed, the Appellate Division, First Department, issued a decision on Kay's appeal of the Surrogate's Court's July 15, 2019 Order. (NYSCEF 148, First Department Decision.)¹ The First Department modified the July 15, 2019 Order to the

¹ The parties were permitted to submit sur-replies addressing the First Department's decision.

extent that the Surrogate's Court denied Kay's motion to dismiss claims seeking compensatory and punitive damages. Specifically, the First Department held that RDN "adequately pleaded that Kay, by fraud, fraudulent concealment and undue influence, tricked [Brown] into making changes to the revocable trust that favored Kay, to petitioner's detriment, and seeks imposition of a constructive trust, among other forms of equitable relief. To the extent these claims seek compensatory and punitive damages, however, they are dismissed." (*Matter of Radio Drama Network, Inc.*, 2020 NY Slip Op 05704, *1 [1st Dept 2020] [citations omitted].) The First Department otherwise affirmed the July 15th Order.

Discussion

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. (CPLR 3212 [b].)

Breach of Fiduciary Duty Claim – Fourth Cause of Action

Here, Kay moves for judgment dismissing the breach of fiduciary duty claim based on his eleventh affirmative defense – RDN's claims are barred by the pending second Surrogate's Court proceeding pursuant to CPLR 3211(a) (4).

Under CPLR 3211(a)(4), the court considers "whether to dismiss an action on the ground that another action is pending between the same parties on the same cause of action." (*Whitney v Whitney*, 57 NY2d 731, 732 [1982].) "With respect to the subject of the actions, the relief sought must be the same or substantially the same." (*White Light Prods. v On the Scene Prods.*, 231 AD2d 90, 94 [1st Dept 1997] [internal quotation marks and citations omitted].)

The petition and the complaint both allege that Kay was conflicted in his dual capacity as executor and trustee of Brown's estate and director at RDN. In both, RDN

alleges that Kay breached his fiduciary duty by (1) misleading Brown to reform his legacy, decreasing the benefit to RDN and increasing the benefit to a charitable trust that Kay would control; (2) substantially increasing his own commissions leaving fewer of Brown's assets remaining for RDN; and (3) abusing his role as a director at RDN to gain advantage in the litigation that commenced regarding Brown's estate. (*Compare* NYSCEF 102, RDN's Surrogate's Court Petition ¶¶ 213-225 *with* NYSCEF 104, RDN Complaint ¶¶ 151-158.) RDN seeks the same damages in both courts – monetary damages and removal of Kay as a director of RDN.

However, the Surrogate's Court dismissed the breach of fiduciary duty claim in so far as it sought removal of Kay as a director, and thus, that claim is partially no longer before the Surrogate because that Court lacked subject matter jurisdiction. (NYSCEF 103, Surrogate's Court July 15, 2019 Order at 8.) The Surrogate's Court held "Petitioner's breach of fiduciary duty claim - to the extent that it is offered as the ground for respondent's removal as a director on petitioner's Board - is clearly an issue between 'living persons,' Respondent's removal would affect only the corporation's internal governance, a matter in which neither the estate nor the Revocable Trust has an interest." (*Id.* at 7.) The Surrogate's Court was very clear that it does not have jurisdiction over claims that do not affect the estate or Trust. While dismissing the breach of fiduciary duty claim to the extent that it is a ground for Kay's removal, the Surrogate's Court retained jurisdiction of this claim as far as it seeks monetary damages, a result which would affect the estate or Trust. Thus, the breach of fiduciary duty, to the extent that it seeks removal of Kay, is properly before this court and will not be dismissed pursuant to CPLR 3211 (a) (4). The portion of the claim seeking monetary damages is dismissed as it is before the Surrogate's Court. The First Department affirmed the Surrogate's Court's July 15th Order dismissing the breach of

fiduciary duty claim, in part, and its modification in regard to dismissing claims, in so far as they seek compensatory or punitive damages, has no bearing on this court's decision.

Failure to Properly Administer Charitable Assets - EPTL § 8-1.4 (Fifth Cause of Action)

Kay also moves to dismiss RDN's claim for failure to properly administer charitable assets to the extent that it is duplicative of the breach of fiduciary duty claim brought both in this court and Surrogate's Court. RDN alleges that Kay, as director of RDN, was a trustee of charitable assets and was responsible for the proper administration of charitable assets. However, it is alleged that Kay failed to properly administer RDN's charitable assets by "failing to discharge his fiduciary duties to Radio Drama Network with the required degree of care, loyalty and obedience, diverted charitable assets for improper purposes, and by using his position as a signatory on financial accounts containing approximately \$20 million to extract a personal advantage in litigation against Radio Drama Network." (NYSCEF 104, Complaint at 34.) Again, to the extent that removal of Kay as a director is ground for this claim, it is properly before this court.

Discovery Stay Under CPLR 3214(b)

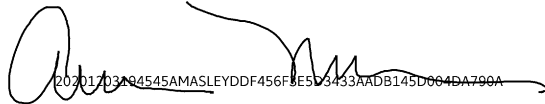
This portion of Kay's motion is moot. The motion is decided and there is no need for a stay of discovery.

All remaining arguments of the parties have been considered and do not yield an alternative result.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted, in part, to the extent that the fourth and fifth causes of action seek monetary damages, those claims are dismissed. These claims go forth to the extent they are the basis for seeking removal of defendant; and it is further

ORDERED that the parties are to email the court (SFC-Part48@nycourts.gov) with a status update as to discovery progress by December 11, 2020.



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<u>12/3/2020</u>		<u>ANDREA MASLEY, J.S.C.</u>	
DATE			
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED ☐ DENIED	☒ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE