

Matter of Danzinger v Avtzon
2021 NY Slip Op 32334(U)
November 10, 2021
Supreme Court, Kings County
Docket Number: Index No. 514504/20
Judge: Leon Ruchelsman
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improprieties. The respondents now seek to amend the counterclaims, as noted, and assert additional claims against an entity called Danza Enterprises LLC which the respondent alleges is a company created by the petitioner to divert funds away from Goze. Further, respondents seek to order the petitioner to produce the tax returns of Danza as well as petitioner's and/or Danza's application for "PPP" funding, and documents showing their receipt of such funds. The petitioner asserts these claims have no merit and the motion should be denied.

Conclusions of Law

It is well settled that a request to amend a pleading shall be freely given unless the proposed amendment would unfairly prejudice or surprise the opposing party, or is palpably insufficient or patently devoid of merit (Adduci v. 1829 Park Place LLC, 176 AD3d 658, 107 NYS3d 690 [2d Dept., 2019]). The decision whether to grant such leave is within the court's sound discretion and such determination will not lightly be set aside (Ravnikar v. Skyline Credit-Ride Inc., 79 AD3d 1118, 913 NYS2d 339 [2d Dept., 2010]). Therefore, when exercising that discretion the court should consider whether the party seeking the amendment was aware of the facts upon which the request is based and whether a reasonable excuse for any delay has been presented and whether any

prejudice will result (Cohen v. Ho, 38 AD3d 705, 833 NYS2d 542 [2d Dept., 2007]).

The respondents seek to add Danza and assert a claim for aiding and abetting the breach of a fiduciary duty.

To plead a cause of action for aiding and abetting the breach of a fiduciary duty the party must demonstrate a fiduciary duty was owed, there was a breach of that duty and the party contributed substantial assistance in effecting the breach (see, Yuko Ito v. Suzuki, 57 AD3d 205, 869 NYS2d 28 [1st Dept., 2008]). In Baron v. Galasso, 83 AD3d 626, 921 NYS2d 100 [2d Dept., 2011] the sustainability of the cause of action was defined as whether the other party knowingly induced or participated in the breach.

The petitioner argues there can be no such action for aiding and abetting a fiduciary breach since Danza is not accused of acting in any improper manner other than receiving diverted funds and such inaction cannot support an aiding and abetting claim. In Kaufman v. Cohen, 307 AD2d 113, 760 NYS2d 157 [1st Dept., 2003] the court explained that while there is no requirement that an aider and abettor must intend to cause actual harm "there must be an allegation that such defendant had actual knowledge of the breach of duty" (id). The court in Kaufman acknowledged the "inherent difficulty" discerning intent and state of mind but insisted the allegations cannot be conclusory. Thus, where the aider and abettor is a company owned by the party that actually allegedly

breached the fiduciary duty then the aider and abettor's knowledge of the breach is patent. Consequently, there is more of a reason to allege aiding and abetting the breach of a duty where the company is intimately involved with the facts since, as noted, such intent is obvious. The court therefore declines to follow Verkhoglyad v. Benimovich, 57 Misc3d 1207(A), 66 NYS3d 655 [Supreme Court Kings County 2017]) cited by the petitioners. There is no basis to foreclose actions against a corporation merely since it is owned by the individual accused of breaching duties. Further, there is no merit to the argument that maintaining allegedly diverted funds is merely passive and hence not actionable since the acceptance of those funds is surely active permitting a claim of alleging aiding and abetting the breach of a fiduciary duty.

Next, concerning the claim of conversion. It is well settled that to establish a claim for conversion the party must show the legal right to an identifiable item or items and that the other party has exercised unauthorized control and ownership over the items (Fiorenti v. Central Emergency Physicians, PLLC, 305 AD2d 453, 762 NYS2d 402 [2d Dept., 2003]). As the Court of Appeals explained "a conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession...Two key elements of conversion are (1) plaintiff's possessory right or interest in the property...and (2)

defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (see, Colavito v. New York Organ Donor Network Inc., 8 NY3d 43, 827 NYS2d 96 [2006]). Therefore, where a defendant "interfered with plaintiff's right to possess the property" (Hillcrest Homes, LLC v. Albion Mobile Homes, Inc., 117 AD3d 1434, 984 NYS2d 755 [4th Dept., 2014]) a conversion has occurred. The petitioner argues the respondents have failed to adequately allege conversion because "money belonging to a LLC [sic] paid out to members other than a claimant in excess of what claimant believes to be appropriate cannot support a claim for conversion" (see, Mwmorandum of Law in Opposition, page 4). However, the petitioner has not addressed why allegations that he essentially diverted funds from the jointly owned corporation to a corporation he solely owns cannot support a claim for conversion.

Therefore, based on the foregoing the motion seeking to amend the counterclaims to add Danza and two counterclaims is granted.

The request seeking the PPP loan application filed by Danza is granted. Those materials must be furnished to the respondents. the tax returns of Danza need not be disclosed at this time and the motion seeking their production is denied.

So ordered.

ENTER:



DATED: Novmber 10, 2021.
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC