

Hersko v Hersko

2022 NY Slip Op 31377(U)

April 21, 2022

Supreme Court, Kings County

Docket Number: Index No. 520492/21

Judge: Karen B. Rothenberg

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART 35 X
ISAAC HERSKO A/K/A YITZCHOK SHLOMO HERSKO,

Plaintiff(s),

Index No: 520492/21

-against-

DECISION AND
ORDER

BARRY HERSKO A/K/A ZEV DOV HERSKO A/K/A
BEREL HERSKO, BELLA HERSKO, WILSON-HINS
ASSOCIATES, INC., CLARK WILSON, INC., WILSON
PROPERTIES & EQUITIES, INC., WILSON FLAT, INC.,
WILSON HAN ASSOCIATES, INC., WILSON-MER
ASSOCIATES, INC., B. CLARK ASSOCIATES, INC.,
516 KINGSTON, LLC and ABRAHAM WEISEL, as escrow
agent,

Defendant(s)

X

Recitation as required by CPLR 2219(a), of the papers considered in the orders to show cause, motions and cross-motion before the court.

Papers	NYSCEF Doc. Nos.
Order to Show Cause/Motion and Affidavits Annexed.	26-42, 50-59, 94, 108-111
Cross-motion and supporting papers.....	63-74
Answering Affidavits.....	43-49, 90, 116-143, 171, 173
Reply Papers.....	93, 172, 174-175

After argument and upon review of the foregoing cited papers, the Decision/Order on these motions is as follows:

In this action, inter alia, for a judgment declaring that the plaintiff is a fifty-percent (50%) owner in the real properties in dispute in this matter, to impose a constructive trust, and for an accounting, the parties seek the following relief: (1) defendants move by order to show cause [seq. no. 1] for an order (a) quashing the judicial subpoena duces tecum dated August 12, 2021, and the subpoena ad testificandum and duces tecum dated August 30, 2021, served upon Mr. Aaron Benzion Mandel, a non-party, pursuant to CPLR § 2304; (b) granting a protective order regarding subpoenas pursuant to CPLR §3103; and (c) awarding sanctions against plaintiff and plaintiff’s counsel pursuant to 22 NYCRR 130-1.1; (2) plaintiff moves by order to show cause [seq. no. 2] for an order (a) appointing a temporary receiver to collect the rents and profits, if any, for the several real properties that are the subject of this lawsuit; and

(b) directing that a default judgment be entered against defendants Wilson-Hins Associates, Inc., Clark Wilson, Inc., Wilson Properties & Equities, Inc., Wilson Flat, Inc., Wilson Han Associates, Inc., Wilson-Mer Associates, Inc., B. Clark Associates, Inc. and 516 Kingston, LLC [collectively the corporate defendants] pursuant to CPLR 3215, and setting this matter down for an inquest and assessment of damages including costs, attorney's fees and sanctions; (3) plaintiff also moves [seq. no. 3] for an order (a) directing a default judgment against defendants Barry Hersko a/k/a Zev Dov Hersko a/k/a Berel Hersko [Barry] and Bella Hersko [Bella] for their failure to answer or appear in this matter pursuant to CPLR 3215; and (b) for an award of actual damages based on documentary evidence; (4) Plaintiff further moves [seq. no. 4] for an order disqualifying Kucker Marino Winiarsky & Bittens, LLP and Nativ Winiarsky, Esq. [collectively KMWB] as attorneys for defendants because of their previous representation of plaintiff; (5) defendants' cross-move [seq. no. 5] for an order (a) extending their time to respond to the complaint pursuant to CPLR §§2004 and 3012; (b) dismissing plaintiff's constructive trust cause of action pursuant to CPLR 3211(a)(1), (5), and (7); (c) cancelling and/or vacating the notices of pendency pursuant to CPLR § 6501; and (c) awarding costs pursuant to CPLR § 6514(c).

First, as Aaron Benzion Mandel has produced the document he held in escrow and appeared for a deposition as directed by this court's interim order dated January 6, 2022, the relief sought in defendants' order to show cause, under seq. no. 1, for an order quashing the non-party subpoenas and for a protective order is denied as moot. Additionally, the request for sanctions is denied.

The portion of plaintiff's order to show cause, under seq. no. 2, for the appointment of a temporary receiver for the subject properties is also denied. CPLR 6401(a) permits the court, upon a motion by a person with an "apparent interest" in property, to appoint a temporary receiver of that property, "where there is danger" that the property will be "materially injured or destroyed." However, the appointment of a receiver "is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits" (*Manning-Kranes v Manning-Franzman*, 175 AD3d 1403, 1403 [2d Dept 2019] [citations omitted]). "Therefore, a motion seeking such an appointment should be granted only where the moving party has made a "clear and convincing" evidentiary showing of "irreparable loss or waste to the subject property and that a temporary receiver is needed to protect their interests" (*Cyngiel v Krigsman*, 192 AD3d 760, 762 [2d Dept 2021] [citations omitted]). Here, plaintiff fails to make the required evidentiary showing. The plaintiff's allegation of wrongdoing against Barry is insufficient to demonstrate that there is a danger of irreparable loss or material injury to the properties (*id.*). In any event, the value of the subject real properties provides sufficient security to plaintiff to enable him to protect his interests (*see Kristensen v Charleston Square Inc.*, 273 AD2d 312 [2d Dept 2000]). Furthermore, the open HPD violations, which may result in civil penalties, are not so significant as to present an imminent danger of irreparable loss or waste.

The portion of plaintiff's order to show cause, under seq. no. 2, for an order pursuant to CPLR 3215 for leave to enter a default judgment against the corporate defendants, as well as that portion of plaintiff's motion, under seq. no. 3, for leave enter a default judgment against Barry is granted. However, the portion of plaintiff's motion, under seq. no. 3, for leave to enter a default judgment against Bella is denied. The defendants' cross-motion, under seq. no. 5, for an order extending their time to answer the complaint, to dismiss the constructive trust cause of action, to cancel and/or vacate the notices of pendency, and for costs is also denied.

“On a motion for leave to enter a default judgment against a defendant based on the failure to answer or appear, a plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting the cause of action, and proof of the defendant's default” (*Deutsche Bank National Trust Company v Hall*, 185 AD3d 1006, 1008 [2d Dept 2020]). “To demonstrate the facts constituting the cause of action, the plaintiff need only submit sufficient proof to enable a court to determine if the cause of action is viable” (*Loughran v Giannotti*, 160 AD3d 709, 710 [2d Dept 2018]). Here, by submitting proof of service of the summons and complaint, proof of the facts constituting the claims in a factually detailed affidavit, and proof that, although defendants served a notice of appearance through counsel, they did not serve an answer, plaintiff satisfied all of the requirements for demonstrating his entitlement to enter a default judgment against the corporate defendants and Barry (*see Mortgage Electronic Registration Systems, Inc. v Holmes*, 131 AD3d 680 [2d Dept 2015]). Plaintiff, however, fails to demonstrate his entitlement to the entry of a default judgment against Bella. The complaint, which was verified by counsel, and the plaintiff's affidavit, which fails to set forth any specific factual allegations against Bella, are insufficient to support the entry of a default judgment against her (*see CPS Group, Inc. v Gastro Enterprises, Corp.*, 54 AD3d 800 [2d Dept 2008]).

In order to avoid the entry of the default judgment, Barry and the corporate defendants must provide a reasonable excuse for their default in answering and a potentially meritorious defense to the action (*see HSBC Bank USA, Nat. Ass'n v. Traore*, 139 AD3d 1009, 1011 [2d Dept 2016]). A similar showing must be made for defendants to succeed on their cross-motion for an extension of time to file an answer in this matter (*see Sargsyan v Kaieteur Construction, Inc.*, 171 AD3d 826 [2d Dept 2019]). Here, however, defendants' proffered excuses for failing to timely serve an answer to the complaint, including a delay in retaining counsel and in prioritizing moving to quash the non-party subpoenas over serving a timely answer to the complaint, are not reasonable excuses to avoid the entering of a default judgment or to extend the time to answer. Moreover, even assuming a reasonable excuse for the default in serving an answer was proffered, these defendants fail to establish a potentially meritorious defense to the action. A proposed answer is not submitted, and Barry's affidavit does not dispute the allegations contained in the complaint or provide any factual support to establish a defense to the claims (*see generally Soffer v Montanez*, 198 AD3d 606 [2d Dept 2021]).

Defendants also fail to demonstrate any legal basis for dismissal of the cause of action

to impose a constructive trust under CPLR 3211. The plaintiff sets forth sufficient facts to state a viable cause of action for the imposition of a constructive trust over the subject properties. “The usual elements of a constructive trust are (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment” (*Harounian v Harounian*, 198 AD3d 734, 737 [2d Dept 2021]). “The ultimate purpose of a constructive trust is to prevent unjust enrichment, and, thus, a constructive trust may be imposed when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest” (*id.* at 737-738) [internal quotations and citations omitted]. Here, the complaint, as amplified by plaintiff’s affidavit, indicates that plaintiff and his brother Barry entered into a business arrangement for the funding and purchase of distressed real estate wherein plaintiff would provide the money to purchase the properties and Barry would hold (through separate holding corporations) title to each of the purchased properties, with each 50% equitable owners of the properties and sharing equally in the profits, but that Barry violated the agreement by withdrawing \$45,000,000 more than his share of profits and by arranging, on his own, to sell one of the properties. The plaintiff sufficiently states a cause of action for constructive trust in that he alleges a transfer in reliance upon a fiduciary relationship, and unjust enrichment (*see Toobian v Golzad*, 193 AD3d 784 [2d Dept 2021]).

Moreover, defendants fail to demonstrate that the cause of action to impose a constructive trust is time-barred. A cause of action for the imposition of a constructive trust is governed by the six-year statute of limitations of CPLR 213(1), “which starts to run upon the occurrence of the wrongful act giving rise to a duty of restitution (*Barone v Barone*, 130 AD3d 765, 766 [2d Dept 2015] [citations omitted]). Here, the basis for the plaintiff’s cause of action for the imposition of a constructive trust is not, as argued by defendants, that Barry wrongfully acquired the properties in 2007, but that beginning in 2020 he breached the parties’ agreement to be equal partners with respect to those properties (*id.*).

Furthermore, as the complaint seeks to impose a constructive trust on the various properties, it is a proper basis upon which to impose a notice of pendency (*see Klein v Gutman*, 12 AD3d 348 [2d Dept 2004]).

Finally, plaintiff’s motion, under seq. no. 4, for an order disqualify KMWB as attorneys for defendants is granted. “A party seeking disqualification of its adversary’s counsel based on counsel’s purported prior representation of that party must establish (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse” (*Gjoni v Swan Club, Inc.*, 134 AD3d 896, 897 [2d Dept 2015] [internal quotation marks omitted]). “A party’s entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted, and the movant bears the burden on the motion” (*Matter of Rovner v. Rantzer*, 145 AD3d 1016, 1016

[2d Dept 2016] [internal quotation marks omitted]). “Any doubts as to the existence of a conflict of interest must be resolved in favor of disqualification” (*Halberstam v. Halberstam*, 122 AD3d 679, 679 [2d Dept 2014]). “[E]ven when an actual conflict of interest may not exist, disqualification may be warranted based on a mere appearance of impropriety (*id.* at 679-680).

Here, the submissions establish that KMWB represented plaintiff in a prior action involving the subject properties, that the issue of plaintiff’s ownership interest in the properties was raised in the prior representation and is the subject of the instant action, and that the interests of the plaintiff and the defendants are materially adverse (*see Gjoni*). Further, “regardless of whether the firm in fact obtained and disseminated confidential information in connection with its former representation, the plaintiff is entitled to freedom from apprehension and to certainty that [his] interests will not be prejudiced due to the firm’s representation of [defendants] in this action” (*Columbus Const. Co., Inc. v Petrillo Builders Supply Corp.*, 20 AD3d 383, 384 [2d Dept 2005]). Accordingly, disqualification is warranted.

In conclusion, the defendants’ order to show cause, under seq. no. 1, to quash non-party subpoenas, for a protective order, and for sanctions is denied as moot. The portion of plaintiff’s order to show cause, under seq. no. 2, for the appointment of a temporary receiver for the subject properties is denied. However, the portion of plaintiff’s order to show cause, under seq. no. 2, for the entry of a default judgment against the corporate defendants is granted. Plaintiff’s motion, under seq. no. 3, for the entry of a default judgment against Barry is granted but is denied as to Bella. The defendants’ cross-motion, under seq. no. 5, for an order extending their time to answer the complaint, to dismiss the constructive trust cause of action, to cancel and/or vacate the notices of pendency, and for costs is also denied.

The action shall be stayed for thirty (30) days from the service of a copy of this order with notice of entry to allow for substitution of counsel. Thereafter, upon the filing of a note of issue, the matter shall proceed to inquest for an assessment of damages.

Any request for relief that has not been addressed has nonetheless been considered and is denied.

This constitutes the decision/order of the Court

Dated: April 21, 2022

Enter,



Karen B. Rothenberg, J.S.C.