

Yampolsky v Tsaryuk

2023 NY Slip Op 31692(U)

May 18, 2023

Supreme Court, Kings County

Docket Number: Index No. 505323/2021

Judge: Leon Ruchelsman

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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 : CIVIL TERM: COMMERCIAL 8

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ALEXANDER YAMPOLSKY, suing individually
and derivatively on behalf of SUPREME TRUCKING
GROUP LLC,

Plaintiffs, Decision and order

- against -

Index No. 505323/2021

DMITRY TSARYUK, MOLDTRANS EXPRESS INC.,
TD BANK

May 18, 2023

Defendants,
-----x

PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #4

The plaintiff has moved pursuant to CPLR §3212 seeking summary judgement on the cause of action for an accounting. The defendant has opposed the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

As recorded in a prior order, the plaintiff Alexander Yampolsky is a ten percent owner and the defendant Dmitry Tsaryuk is a ninety percent owner of Supreme Trucking Group LLC, a company engaged in the trucking business. The plaintiff commenced this lawsuit alleging the defendant has failed to give him the distributions due and has essentially stolen money from the company and has diverted the funds of the company to another entity, defendant Moldtrans Express Inc. The plaintiff sought discovery which included the business records of the company as well as an equitable accounting. The plaintiff asserts the defendant failed to provide any such discovery. The plaintiff now moves seeking summary judgement that he is entitled to an

accounting. He asserts there are no questions of fact he is entitled to a summary determination concerning this cause of action. As noted the defendant opposes the motion.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021]).

It is well settled that an accounting is an equitable remedy that a party may seek where the party can establish "the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (see, Rozenberg v. Perlstein, 200 AD3d 915, 158 NYS3d 233 [2d Dept., 2021]). Thus, to obtain an accounting the plaintiff must demonstrate "some wrongdoing on the part of a defendant with respect to the fiduciary relationship" (Pacella v. RSA Consultants Inc., 164 AD3d 806, 83 NYS3d 630 [2d Dept., 2018]). Indeed, while the First Department seems to dispense

with the showing of wrongdoing to obtain an accounting (see, Morgulas v. J. Yudell Realty Inc., 161 AD2d 211, 554 NYS2d 597 [1st Dept., 1990]) the Second Department requires that showing (Benedict v. Whitman Breed Abbot & Morgan, 110 AD3d 935, 973 NYS2d 341 [2d Dept., 2013]). Moreover, in Owen v. Blumenthal, 280 NY 96, 19 NE2d 977 [1939] the Court of Appeals explained that "in so far as an accounting is based upon wrongdoing thus alleged, it may not be had unless such wrongdoing is first established" (id, see, also, Barry v. Clermont York Associates LLC, 50 Misc3d 1203(A), 28 NYS3d 647 [Supreme Court New York County 2015]). Therefore, in Soley v. Wasserman, 2013 WL 526732 [S.D.N.Y. 2013] the court denied a motion for summary judgement on an equitable accounting claim where any underlying wrongdoing had not yet been established.


In this case there has been no determination whether the defendant breached any fiduciary duty or committed any wrongdoing sufficient to conclude the plaintiff is thus entitled to an accounting. The plaintiff argues that "Tsaryuk's conduct in relation to his partner Yampolsky was neither honorable nor honest" (see, Memorandum of Law, page 14 [NYSCEF Doc. No. 92]). The plaintiff further asserts that "Tsaryuk committed wrongful and fraudulent acts to convert the Plaintiff's share of the Supreme's distributions, as well as Plaintiff's investments and contributions to the business, and even Plaintiff's 10% interest

all to himself" (id). While those allegations require resolution, there has been no conclusive determination the defendant committed any wrongdoing. Therefore, there can be no summary determination concerning the claim for an equitable accounting. Consequently, the motion seeking summary judgement is therefore denied.

So ordered.

ENTER:

DATED: May 18, 2023
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC