

Yampolsky v Tsaryuk
2023 NY Slip Op 32722(U)
August 3, 2023
Supreme Court, Kings County
Docket Number: Index No. 505323/2021
Judge: Leon Ruchelsman
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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

August 3, 2023

Defendants,
-----x

PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #4

The plaintiff has moved pursuant to CPLR §2221 seeking to reargue a decision and order denying 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 prior orders, 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

moved seeking summary judgement regarding the cause of action for an accounting arguing there are no questions of fact he is entitled to a summary determination concerning this cause of action. The court denied that motion holding that in order to prevail upon an action for an accounting there must be a determination of wrongdoing. Since any questions of wrongdoing have not been conclusively established no summary judgement was possible.

Upon reargument the plaintiff argues that in fact evidence of wrongdoing had been presented and therefore the court should revisit the issue and upon consideration of all the evidence conclude that the plaintiff is entitled to summary judgement on the cause of action seeking an accounting.

Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at in its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS2d 617 [2d Dept., 2019]).

In order to assert a cause of action seeking an accounting the movant must 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, the movant 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]). Therefore, to assert a cause of action for an accounting there must have been "some wrongdoing" committed. However, to obtain summary judgement, the assertion of wrongdoing must be established wherein all questions of fact have been eliminated. Consequently, the court did not err requiring a conclusive determination of some wrongdoing since that is the summary judgement standard.

Next, concerning the specific evidence presented in the prior motion, the affidavit of the plaintiff does not eliminate all questions of fact. Rather, it is merely the plaintiff's version of events that occurred. Specifically, the plaintiff argued and continues to argue that the defendant removed his ownership interest in Supreme without his consent. However, the defendant asserts the plaintiff used thousands of dollars belonging to the company for his own personal uses and therefore expelled him from the company (see, Affidavit of Dmitry Tsaryuk, ¶2 [NYSCEF Doc. No. 110]). Whether such expulsion was proper is a legal question that requires analysis (see, Garcia v. Garcia, 187 AD3d 859, 133 NYS3d 631 [2d Dept., 2020]). Indeed, there are

surely questions whether a member's improper conduct, if true, constitutes a breach of the operating agreement which acts as a forfeiture of any further rights (see, Tradesman Program Managers LLC v. Doyle, 202 NYS3d 456, 163 NYS3d 10 [1st Dept., 2022]).

This is particularly true in this case where the plaintiff is accused of stealing funds from the corporation and Therefore, there are numerous facts that are in dispute that compel a denial of any summary determination whether the plaintiff is entitled to an accounting. Consequently, the motion seeking reargument is denied.

So ordered.

ENTER:

DATED: August 3, 2023
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC