

Landa v Friedman

2023 NY Slip Op 33550(U)

October 11, 2023

Supreme Court, New York County

Docket Number: Index No. 657198/2021

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART 42

Justice

-----X

MARK LANDA, as Trustee for the Golda Landa
2011 Irrevocable Trust,

Plaintiff,

- v -

ALEXANDER FRIEDMAN,

Defendant.

-----X

ALEXANDER FRIEDMAN

Plaintiff,

-against-

MARK LANDA, ELIZABETH FRIEDMAN
and THESO CORPORATION

Defendant.

-----X

INDEX NO. 657198/2021

MOTION DATE 09/28/2023,
10/06/2023,
09/15/2023

MOTION SEQ. NO. 012 013 014

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595676/2022

The following e-filed documents, listed by NYSCEF document number (Motion 012) 227, 228, 229, 230, 231, 280, 281, 282, 283, 284, 285, 286, 287, 288

were read on this motion to/for EXTEND - TIME.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 219, 220, 221, 222, 223, 224, 225, 226, 257, 262, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 289, 290, 291, 292

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

The following e-filed documents, listed by NYSCEF document number (Motion 014) 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 258, 259, 260, 261, 263

were read on this motion to/for ORDER OF PROTECTION.

This is a breach of contract action commenced by Mark Landa, as Trustee for the Golda Landa 2011 Irrevocable Trust (Mark as Trustee), to recover \$196,000.00 plus interest from defendant Alexander Friedman (Alexander), his former son in-law, upon seven promissory

notes executed in 2013. Alexander commenced a third-party action against Mark Landa individually (Mark), Elizabeth Friedman (Elizabeth), his former wife, and Theso Corporation, a company in which the individual third-party defendants are alleged to have an interest.

As way of background, the notes are all dated October 31, 2013, and were executed several months after Mark's parents, Golda Landa and Gersh Landa, provided \$269,287.00 as a down payment on a Manhattan condominium unit for defendant Alexander and his then wife, Elizabeth, Mark's daughter. Alexander assigned all of his rights and interest in the apartment to Elizabeth and Mark by an "Assignment of Contract of Sale" dated May 14, 2013. No payment was demanded on the notes for seven years thereafter, until July 2020, just after Alexander commenced a divorce action. The ownership and possession of the apartment was litigated in the divorce action, and Elizabeth continues to reside there. The parties now dispute whether the funds provided in 2013 by Elizabeth's since deceased grandparents were intended as a loan or a gift. The underlying facts are more fully set forth in this court's order August 5, 2022, in which it denied the plaintiff's motion for summary judgment in lieu of a complaint and converted the proceeding to a plenary action (MOT SEQ 001).

The instant action was commenced by plaintiff Mark as Trustee in December 2021, seeking recovery on the notes from Alexander only. In his third-party complaint, filed in August 2022, Alexander seeks a judgment declaring the parties' respective rights, title and interest in the apartment, a constructive trust in regard to the apartment and contribution from Elizabeth should he be found liable on the notes in the main action. Discovery was conducted for more than a year, several conferences were held, all parties were deposed and the court set the final Note of Issues deadline as August 30, 2023. The plaintiff filed a Note of Issue on that date, representing that all discovery was complete.

By papers filed on August 28, 2023, Alexander now moves pursuant to 22 NYCRR 202.21(d) to extend the Note of Issue deadline until after non-party E*Trade Securities LLC (E*Trade) responds to his subpoena for documents regarding trust assets and after he is provided access to the apartment for inspection and valuation purposes as per his demand (MOT SEQ 012).

Mark as Trustee moves pursuant to CPLR 2304 to quash the subpoena served by Alexander upon E*Trade (MOT SEQ 013) and he moves separately as an individual third-party

defendant pursuant to CPLR 3102(a) for a protective order in regard to Alexander's demand for an inspection of the apartment for valuation purposes (MOT SEQ 014).

Opposition is filed on all three motions.

MOT SEQ 012

Alexander's motion to extend the Note of Issue filing deadline, filed two days before the deadline, is denied. As set forth below, the court is granting the motion to quash the subpoena in regard to the E*Trade accounts and the motion for a protective order in regard to his demand for access to the apartment. Thus, no further documents will be produced and no inspection will be scheduled to warrant any extension. Nor has Alexander identified any additional necessary discovery. Furthermore, Alexander proffers no reasonable excuse for not timely seeking any such discovery. See Tewari v Tsoutsouras, 75 NY2d 1, 12 (1989); Grant v City of New York, 17 AD3d 215, 217 (1st Dept. 2005). Therefore, the Note of Issue filed August 30, 2023, remains. Any additional discovery sought by any party is precluded upon the filing of a Note of Issue absent unusual or unanticipated circumstances, not shown here. See 22 NYCRR 202.21(d).

MOT SEQ 013

A motion to quash a subpoena may be granted when the futility of uncovering anything legitimate is obvious or the information sought is "utterly irrelevant to any proper inquiry." Kapon v Koch, 23 NY3d at 32 (2014). Nor may a subpoena be used as a tool of harassment or for a proverbial "fishing expedition to ascertain the existence of evidence." Reuters Ltd. v Dow Jones Telerate, Inc., 231 AD2d 337, 342 (1st Dept. 1997); see Law Firm of Ravi Batra, P.C. v Rabinowich, 77 AD3d 532 (1st Dept. 2010). Moreover, "[w]here disclosure is sought against a nonparty, more stringent requirements are imposed on the party seeking disclosure." Velez v Hunts Point Multi-Serv. Ctr., Inc. 29 AD3d 104, 108 (1st Dept. 2006). Applying these standards, the motion to quash the subpoena served on E*Trade is granted.

Here, Alexander, who maintains that the Golda Landa 2011 Irrevocable Trust is dissolved, served a subpoena duces tecum upon E*Trade on or about August 10, 2023, demanding information and documents concerning any accounts held in the name of the trust. Mark as Trustee denies that the trust is dissolved, argues that Alexander is, in any event, not entitled to the documents sought and filed this motion to quash on August 25, 2023. No documents have been produced and none need be produced at this juncture.

The essential and dispositive issue presented by the complaint and third-party complaint is whether Mark as Trustee can enforce the promissory notes as against Alexander at all, which is far from certain. Although the parties continue to dispute whether the funds provided were intended as a loan or a gift, this court stated in its order dated August 5, 2022, that the notes themselves and the circumstances surrounding their execution present factual issues in that regard. To the extent Alexander is arguing that Mark as Trustee is without standing as the trust is dissolved, no motion to dismiss was made. The discovery Alexander seeks, account records of the trust, is “utterly irrelevant to any proper inquiry.” Kapon v Koch, *supra* at 32. Moreover, this non-party subpoena seems intended to harass or to serve as a fishing expedition. See Reuters Ltd. v Dow Jones Telerate, Inc., *supra*.

MOT SEQ 014

For reasons similar to those requiring the granting of the motion to quash (MOT SEQ 013), Mark’s motion for a protective order in regard to Alexander’s demand for an inspection and valuation of the apartment is granted. CPLR 3101(a) provides that “there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action” and that this language is “interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.” Osowski v AMEC Constr. Mgt., Inc., 69 AD3d 99, 106 (1st Dept. 2009) quoting Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406-407 (1968). However, here, no inspection or valuation of the apartment is relevant or bears on the issues presented. Indeed, an inspection and valuation would not disclose any facts bearing on the instant controversy and would cause further unnecessary delay rather than “reduc[e] delay and prolixity.” Osowski v AMEC Constr. Mgt., Inc., *supra* at 106.

While Alexander, in his third-party complaint, seeks a judgment declaring the rights of the parties as to the apartment and a constructive trust, he has not shown entitlement to that relief. CPLR 3001 provides that the Supreme Court “may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.” The general purpose of a “declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations” Touro Coll. v Novus Univ. Corp., 146 AD 3d 679, 679 (1st Dept. 2017); citing James v Alderton Dock Yards, 256 NY

298, 305 (1931). Stated otherwise, “a declaratory judgment requires a ‘justiciable controversy’” Touro Coll. v Novus Univ. Corp., *supra* at 680, *citing* Am. Ins. Assn. v Chu, 64 NY2d 379, 383 [1985], *cert. denied* 474 U.S. 803 [1985]) and is only available where there is “a sufficient basis for the invocation of the court’s discretionary power to pronounce judgment declaring the rights and legal relations of the parties.” Am. News Co., v Avon Pub. Co., 283 A.D.1041, 1041-1042 (1st Dept. 1954). A justiciable controversy exists where the plaintiff has “an interest sufficient to constitute standing to maintain the action” and “that the controversy involves present, rather than hypothetical, contingent or remote, prejudice to plaintiffs”. Touro Coll. v. Novus Univ. Corp., *supra*, at 680 *citing* Am. Ins. Assn. v Chu, *supra* at 383; *see* Chanos v MADAC, LLC, 74 AD3d 1007 (2nd Dept. 2010). Furthermore, “[s]ince the remedy of declaratory judgment lies within the sound discretion of the court to grant or withhold, it is essential that the necessity for the relief be shown at the inception of the litigation.” Am. News Co., v Avon Pub. Co., *supra* at 1042.

This showing was not made. Indeed, as stated, Alexander does not dispute that he assigned his rights and interests in the apartment to Mark and Elizabeth in 2013 and that the issue of ownership and possession of the apartment was litigated in the divorce action. As such, there is no justiciable controversy presented here. Nor is there any basis alleged for the equitable remedy of a constructive trust in regard to the apartment, particularly since the legal remedy of money damages would be adequate should Alexander prevail on his contribution claim against Elizabeth. *See generally* Sharp v Kosmalski, 40 NY2d 119 (1976); Evans v Winston & Strawn, 303 AD2d 532 (1st Dept. 2003). As such, any discovery demand seeking an inspection or valuation of the apartment is improper at this juncture. Should Mark as Trustee prevail against Alexander on the promissory notes, and should Alexander then prevail on his third-party claim against Elizabeth for contribution, and should he then obtain a judgment against her and should she then fail to pay the judgment, the apartment or any other asset of Elizabeth may then become relevant in any enforcement proceedings pursuant to CPLR article 52. It is not relevant now.

The court has considered and rejected Alexander’s remaining contentions.

Any relief not expressly granted herein is denied.

Accordingly, upon the foregoing papers, it is

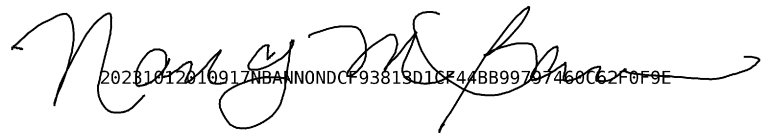
ORDERED that the motion of defendant/third-party plaintiff Alexander Friedman pursuant to 22 NYCRR 202.21(d) to extend the Note of Issue deadline (MOT SEQ 012), is denied, and it is further

ORDERED that the motion of the plaintiff, Mark Landa as Trustee of the Golda Landa 2011 Irrevocable Trust, pursuant to CPLR 2304 to quash a subpoena dated August 10, 2023, served by defendant/third-party plaintiff Alexander Friedman on E*Trade Securities LLC (MOT SEQ 013) is granted, the subpoena is quashed and the subpoenaed party need not produce any documents in response, and it is further

ORDERED that the motion of third-party defendant Mark Landa pursuant to CPLR 3102(a) for a protective order in regard to defendant/third-party plaintiff Alexander Friedman's demand for an inspection and valuation of real property (MOT SEQ 014), is granted and that discovery demand is stricken, and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



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10/11/2023
DATE

NANCY M. BANNON, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE