

Follman v Gruber

2023 NY Slip Op 34197(U)

November 30, 2023

Supreme Court, Kings County

Docket Number: Index No. 508865/2023

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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AHRON N. FOLLMAN AS TRUSTEE AND BENEFICIARY
OF THE LAZAR FOLLMAN 2011 FAMILY TRUST,
AHRON N. FOLLMAN AS TRUSTEE AND BENEFICIARY
OF THE ESTHER FOLLMAN 2011 FAMILY TRUST,

Plaintiffs, Decision and order

- against -

Index No. 508865/2023

EUGENE GRUBER AS TRUSTEE OF THE LAZAR FOLLMAN
2011 FAMILY TRUST, EUGENE GRUBER AS TRUSTEE OF
THE ESTHER FOLLMAN 2011 FAMILY TRUST, AVRAHAM
MEIR FOLLMAN AS TRUSTEE OF THE LAZAR FOLLMAN
2011 FAMILY TRUST, AVRAHAM MEIR FOLLMAN AS TRUSTEE
OF THE ESTHER FOLLMAN 2011 FAMILY TRUST, AVRAHAM
MEIR FOLLMAN AS TRUSTEE OF THE LAZAR FOLLMAN 2017
FAMILY TRUST, AVRAHAM MEIR FOLLMAN AS TRUSTEE OF
THE ESTHER FOLLMAN 2017 FAMILY TRUST, MELTZER,
LIPPE, GOLDSTEIN & BREITSTONE, LLP,

Defendants, November 30, 2023

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #3 & #4

The plaintiff has moved seeking to hold the pending summary judgement motion in abeyance to enable the parties to engage in discovery. The defendant has cross-moved seeking sanctions. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

This lawsuit was commenced on March 22, 2023. The lawsuit concerns trusts executed by Lazar and Esther Follman on June 28, 2011. Those trusts named four trustees including Lazar and Esther's son, the plaintiff Ahron and his brother the defendant Avraham Meir. The complaint alleges that Eugene Gruber a non-relative, and another trustee of those trusts, together with

Avraham Meir as well as the law firm Meltzer, Lippe, Goldstein & Breitstone LLP [hereinafter 'Meltzer'] misappropriated the assets of those trusts by establishing new trusts in 2017. The complaint alleges a cause of action for a declaratory judgement that Avraham Meir and Gruber unlawfully transferred the assets of the 2011 trusts to the 2017 trusts. Further, the complaint alleges causes of action against Gruber and Avraham Meir for an accounting, conversion, breach of a fiduciary duty and a constructive trust. The complaint alleges two cause of action against Meltzer, for malpractice and aiding and abetting the breach of a fiduciary duty. Further, the cause of action for aiding and abetting the breach of a fiduciary duty is also filed against Avraham Meir. Meltzer filed an answer on April 24, 2023. Thereafter, on May 1, 2023 the defendant Meltzer, filed a motion seeking summary judgement. The plaintiff opposed the motion and on June 16, 2023 the parties stipulated to adjourn the motion until September. The remaining defendants served their answer on June 23, 2023. Three days later on June 26, 2023 the plaintiff served notices to conduct depositions of all defendants including defendant Meltzer. Further, on July 18, 2023 the plaintiff served a discovery demand upon the defendants including defendant Meltzer. On August 9, 2023 the plaintiff notified the defendant Meltzer that their discovery responses had not been produced. Meltzer opposed the production of any discovery on the grounds

the summary judgement filed served to stay the engagement of any discovery pursuant to CPLR §3214(b). This motion has now been filed by plaintiffs where they seek discovery from Meltzer so that they can then be able to more fully oppose Meltzer's summary judgement motion. The basis for the discovery sought here is CPLR §3212(f) which generally states that summary judgement should be denied where discovery is necessary to adequately oppose the motion and that without such discovery opposition is not really possible.

Conclusions of Law

It is well settled that a trial court maintains broad discretion to deny summary judgement and to afford parties the opportunity to engage in discovery (CPLR §3212(f)). Thus, "the court has discretion to deny a motion for summary judgment, or to order a continuance to permit affidavits to be obtained or disclosure to be had, if facts essential to justify opposition to the motion may exist but cannot then be stated. For the court to delay action on the motion, there must be a likelihood of discovery leading to such evidence. The mere hope that evidence sufficient to defeat the motion may be uncovered during the discovery process is insufficient" (Spatola v. Gelco Corp., 5 AD3d 469, 773 NYS2d 101 [2d Dept., 2004]).

Meltzer's motion seeking summary judgment was based upon one premise, namely the causes of action for malpractice and aiding and abetting breaches of any fiduciary duty are time-barred by a three year statute of limitations. It is true that a motion for summary judgment should not generally be granted before any discovery has taken place (Fazio v. Brandywine Realty Trust, 29 AD3d 939, 815 NYS2d 470, [2d Dept., 2006]). This is especially true where discovery is necessary to ascertain whether the plaintiff can establish the contentions found in the complaint and whether the defendant can establish any valid defenses (See, generally, Manufacturer's and Trader's Trust Company v. Norfolk Bank, 16 Ad3d 467, 791 NYS2d 599 [2d Dept., 2005]). In any event, there is no prohibition to filing a motion for summary judgment before any discovery has taken place in an appropriate case and the opposing party, the plaintiff in this case, bears the burden demonstrating further discovery is required (Northfield Insurance Company v. Golob, 164 AD3d 682, 82 NYS3d 192 [2d Dept., 2018]). Thus, upon receipt of the motion the plaintiff submitted a memorandum in opposition and raised three arguments. First, the plaintiff argued that the lawsuit was not time-barred. Specifically, the plaintiff argued the complaint asserts claims that are equitable in nature and therefore the applicable statute of limitations is six years. Second, the plaintiff argued the legal representation of Meltzer

did not conclude in 2017 but continued through 2022 making the malpractice claim viable. Third, the plaintiff also argued the causes of action against Meltzer were not time-barred because they were all based on fraud and therefore, subject to a six year statute of limitations. The plaintiff has now filed the instant motion and asserts, essentially, that in addition to the reasons the motion has already been opposed the plaintiff requires discovery so that the above reasons, and especially the reason the causes of action are based upon fraud, can be further buttressed and supported with specific evidence.

Generally, a party should be afforded an opportunity to conduct discovery before a summary judgement determination is made (Salameh v. Yarkovsky, 156 AD3d 659, 64 NYS3d 569 [2d Dept., 2017]). Therefore, "a party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated" (Brea v. Salvatore, 130 AD3d 956, 13 NYS3d 839 [2d Dept., 2015]). "A party contending that a summary judgment motion is premature must demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (Rutherford v. Brooklyn Navy Yard Development Corporation, 174 AD3d 932, 105 NYS3d 518 [2d Dept., 2019]).

The plaintiff argues that there is information they seek which would enable them to oppose the motion seeking summary judgement on the grounds there is evidence of fraud which would then carry a statute of limitations of six years. Whether in fact such allegations will then carry a six year statute will be determined in any decision regarding summary judgement, however, such discovery could prove valuable. Specifically, the plaintiff asserts that "important emails in Defendants' exclusive possession as well as Meltzer Lippe's memoranda, memos, and communications with Defendants and Lazar Follman are necessary to establish that Plaintiff's claim for aiding and abetting breach of fiduciary duty against Meltzer Lippe sounds in fraud and is supported by the documentary evidence we seek" (see, Affirmation in Support, pages 3,4 [NYSCEF Doc. No. 80]). Consequently, the plaintiff is required to submit an affidavit sufficient to establish that facts exist that are essential to oppose the motion but to which it has no access since there has been no discovery (Williams v. Spencer-Hall, 113 AD3d 759, 979 NYS2d 157 [2d Dept., 2014]). Clearly, the plaintiff has submitted an affidavit that such facts exist. Indeed, the plaintiff submitted an affidavit in opposition to the motion seeking summary judgement (NYSCEF Doc. No. 23). In that affidavit the plaintiff details facts which surely demonstrate the trusts were changed in 2017 to the detriment of the plaintiff. Whether any impropriety

took place by the defendant Avraham Meir or Meltzer is the subject of this lawsuit. Meltzer has moved seeking summary judgement before the exchange of any discovery on the grounds the lawsuit is time-barred. While a premature summary judgement need not be denied simply because it is premature (Valencia v. Glinski, 219 AD3d 541, 194 NYS3d 111 [2d Dept., 2023]) in an appropriate situation, discovery must be exchanged prior to its consideration.

In this case the plaintiff has presented an evidentiary basis that it should be entitled to discovery prior to the submission of summary judgement. Thus, while Meltzer may move for summary judgement at any time, discovery must be exchanged if it could assist the plaintiff. The plaintiff is required to present non-speculative and non-conclusory assertions the discovery is necessary. The plaintiff has met that burden.

Meltzer raises two further arguments that must be addressed. First, Meltzer maintains that the plaintiff never argued further information was necessary pursuant to CPLR §3212(f) when it opposed the motion and cannot do so at this juncture. It is true the plaintiff did not so argue in its opposition, however, that merely technical infirmity is not a basis upon which to deny vital discovery that could enable the plaintiff to more fully oppose the summary judgement motion. Second, Meltzer argues that even if discovery were provided the plaintiff would be unable to

utilize any of that discovery since the summary judgement motion has already been submitted. That argument can surely be raised before the judge that will decide the summary judgement motion. Again, that argument is not a basis upon which to oppose this vital discovery request.


Therefore, based on the foregoing, the motion seeking discovery is granted. Reviewing the actual discovery demand, only information relating to Meltzer and its alleged impropriety is necessary to properly oppose the motion for summary judgement. Therefore, Meltzer need not furnish to the plaintiff, at this juncture, information that does not involve allegations Meltzer engaged in fraud. Consequently, concerning the discovery demand dated July 18, 2023 (NYSCEF Doc. No. 71) Melzter need only furnish, at this juncture information for request numbers 1-12, 16-19, 23-25, 33, 35, 38-45, 47-49, 56-64, 66, 67-73, 80 and 106. The remaining requests do not concern any alleged fraud by Meltzer and are not necessary for the opposition to the motion seeking summary judgement.

The motion seeking sanctions is consequently denied.

So ordered.

ENTER:

DATED: November 30, 2023
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC