

Malick v 302 E. 105th St. LLC

2023 NY Slip Op 34417(U)

December 12, 2023

Supreme Court, New York County

Docket Number: Index No. 651250/2021

Judge: Verna L. Saunders

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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. VERNA L. SAUNDERS, JSC PART 36

Justice

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INDEX NO. 651250/2021

IBRAHIM MALICK, individually and derivatively as a member
on behalf of 302 EAST 105TH STREET LLC and 304 EAST
105TH STREET LLC,

MOTION SEQ. NO. 001

Plaintiffs,

- v -

DECISION + ORDER ON
MOTION

302 EAST 105TH STREET LLC, 304 EAST 105TH STREET
LLC, and PRAMILLA MALICK,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15,
16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46,
47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to/for

DEFAULT JUDGMENT

Plaintiff Ibrahim Malick, individually and derivatively as a member on behalf of 302 East
105th Street LLC and 304 East 105th Street LLC. ("plaintiff") commenced this action for
judicial dissolution, as well as recovery for damages relating to wrongful acts allegedly
undertaken by his wife, defendant Pramilla Malick ("Malick"), with respect to two real estate
ventures involving 302 East 105th Street LLC and 304 East 105th Street LLC ("the LLCs"), for
which plaintiff and his wife are allegedly the sole shareholders and for which Malick serves as
managing member. Plaintiff claims that Malick mismanaged and misappropriated the LLCs'
assets, and he alleges breach of her fiduciary duty, waste, unjust enrichment, and other
malfeasance. Additionally, plaintiff seeks an accounting of the books and records and all
relevant information relating to the LLCs and injunctive relief to prevent further waste and abuse
by Malick as managing member.

Plaintiff filed the instant motion seeking a default judgment as against defendants,
pursuant to CPLR 3215, based on defendants' failure to interpose an answer or otherwise appear
in this action. Defendants cross-moved, pursuant to CPLR 306-b; CPLR 3211(a)(1), (a)(3),
(a)(4) and (a)(7); GOL § 5-701 [a] [1]; GOL § 5-703 [1]; CPLR 3211(a)(8); or, alternatively,
consolidating this action into the pending divorce action; or staying the instant action until
resolution of the divorce action; and or, denying plaintiff's motion for default judgment;
canceling the Notices of Pendency filed in connection with the defendant LLCs pursuant to
CPLR 6501, 6512 and 6514 or, in the alternative, compelling plaintiff to give an undertaking to
secure defendants against damages they may incur by virtue of the outstanding notices of
pendency, pursuant to CPLR 6515; and/or, in the event this Court does not dismiss the action in
its entirety, granting them an extension of time to prepare, serve and file a verified answer and
compelling plaintiff to accept service of same, pursuant to CPLR 2004 and/or 3012 (NYSCEF
Doc. No. 18, notice of cross-motion).

That branch of the motion seeking a default judgment was deemed withdrawn on the record on March 1, 2023 (NYSCEF Doc. No. 59, *transcript*).

By memorandum of law in support of the cross-motion, defendants argue, among other things, that Malick commenced a divorce action against plaintiff in Supreme Court, New York County, in a matter styled *Pramilla Srivastava Malick v Ibrahim Sajid Malick*, under Index No. 365061/2021 (Chesler, J.), which involves the identification and distribution of assets, including the LLCs referenced here, among other marital disputes. Defendants maintain that the divorce action concerns the very allegations plaintiff has raised here, to wit, that he owns buildings with Malick that she has assumed control of, but has allowed to fall into disrepair, and that she has denied him access to the properties. Similarly, in this action, plaintiff claims that he owns the two LLCs, together with Malick, which Malick has failed to maintain. In 2019, plaintiff commenced an action against Malick in which he sought, *inter alia*, a partition and sale of the subject properties. That matter, however, was ultimately discontinued in or about January 2021. According to defendants, the instant action seeks information regarding Malick's companies, defendants 302 LLC and 304 LLC, alleging that he is entitled to fifty (50%) percent ownership of said LLCs pursuant to an oral agreement with Malick. He also seeks an accounting of said defendants, the removal of Malick as managing member, and the dissolution of 302 LLC and 304 LLC. Defendants, however, argue that plaintiff has commenced this action, in bad faith, to harass Malick, his soon to be ex-wife, and to obtain control over two LLC's that he has never had any individual connection with whatsoever. According to defendants, the divorce action should make the determination of whether the properties are marital or separate property.

Plaintiff filed notices of pendency encumbering the properties owned by 302 LLC and 304 LLC — 302 East 105th Street New York, New York Block 1676, Lot 148 and 304 East 105th Street New York, New York Block 1676, Lot 0048, respectively — which defendants argue must be canceled since the verified complaint does not affect title to, possession of, or use of, real property, and plaintiff does not contend that title is in his name. Defendants also argue that the notices of pendency must be canceled pursuant to CPLR 6501, 6514(a), (b) and (c) and 6512, given that this matter does not comport with the type of cases that would be subject to notices of pendency. In the event the court declines to cancel the notices of pendency, defendants maintain that the court, at the very least, should issue an order directing plaintiff to give an undertaking relating to any damages defendants may incur by virtue of the outstanding notices of pendency.

In reply, plaintiff argues, *inter alia*, that the claims premised on CPLR 3211(a)(4) should be rejected because the divorce action and this case are entirely different. Specifically, plaintiff argues that the complaint provides unique relief distinguishable from the divorce such as: removal of defendant from managing membership of the LLCs, judicial dissolution, punitive damages for conversion, accounting, and constructive trust. Additionally, plaintiff contends that there is not a substantial identity of the parties given that the LLCs are not parties in the divorce action. Plaintiff relies on the Court of Appeals case *Xiao Yang Chen v Fischer*, 6 NY3d 94, 101 (2005) arguing that where a case involves interspousal tort claims, as it does here, it is not convenient for those claims to be addressed in the divorce action. In addition to dissolution of the LLCs, plaintiff asserts a claim for conversion and demands \$1.5 million in punitive damages,

as well as, specific equitable relief and judicial dissolution, which he claims is not subject to the divorce action. Additionally, plaintiff argues that Malick is not credible, that she is defrauding the court and that she should be judicially estopped from arguing that she is the sole owner of the LLCs, given that, in the divorce action, Malick affirmed that she was only a partial owner of the LLCs with “her children”. Plaintiff argues that here in contrast, Malick asserts that she is the sole owner of the subject LLCs, thus she must be judicially estopped from advancing contradicting positions.

Although defendants submit a sur-reply in further support of their cross-motion, defendants’ sur-reply is not allowed as of right in the CPLR and, thus, shall not be considered when determining the instant motion.

CPLR 3211(a)(4) provides that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires.”

CPLR 6501 provides, in relevant part:

“A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, incumbrance of, or the possession, use or enjoyment of, real property, except in a summary proceeding brought to recover the possession of real property. The pendency of such an action is constructive notice, from the time of filing of the notice only, to a purchaser from, or incumbrancer against, any defendant named in a notice of pendency indexed in a block index against a block in which property affected is situated or any defendant against whose name a notice of pendency is indexed. A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as a party.”

Here, upon a review of the arguments advanced and the relevant case law, this court grants that branch of the cross-motion seeking dismissal of the action pursuant to CPLR 3211(a)(4). Resolution of the issues raised in this dissolution action would be duplicative and counterproductive given the pending divorce action in this court insofar as plaintiff’s alleged interest in the properties owned by defendants 302 LLC and 304 LLC would be subject to equitable distribution in the matrimonial action. (See *Raik v Clindent Developers, LLC*, 282 AD2d 513, 514 [2d Dept 2001]; *Juron v Minzner*, 261 AD2d 586, 586-587 [2d Dept 1999]; *Ferolito v Vultaggio*, 2011 NY Slip Op 31700[U], **9 [Sup Ct, NY County 2011].) To the extent it is later determined that any of the plaintiff’s alleged business interests are not subject to the matrimonial action, this court, in its discretion and in the interest of justice (see CPLR 3211[a][4]) grants said dismissal without prejudice to recommencement of this action after final resolution of the equitable distribution issues (see *Raik v Clindent Developers, LLC*, 282 AD2d at 514). Although plaintiff has asserted tort claims in this action that he maintains amount to “interspousal tort claims” separate from the issues litigated in the divorce action, this court nevertheless finds that the claims raised here are substantially intertwined with the determination

of ownership of the properties and the parties' respective interests in the LLCs, an inquiry that is within the purview of the divorce action.

This court also vacates the notices of pendency filed with respect to the subject properties. Dissolution of an LLC would not support a notice of pendency, as "[a] membership interest in the limited liability company is personal property," and "[a] member has no interest in specific property of the limited liability company" (see *Sealy v Clifton, LLC*, 68 AD3d 846, 847 [2d Dept 2009], quoting Limited Liability Company Law § 601; *Gross v Neiman*, 147 AD3d 505, 507 [1st Dept 2017].) All other arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that plaintiff's motion, pursuant to CPLR 3215, was withdrawn on the record; and it is further

ORDERED that defendants' cross-motion, is granted to the extent it seeks dismissal of this action pursuant to CPLR 3211(a)(4), and the action is hereby dismissed; and it is further

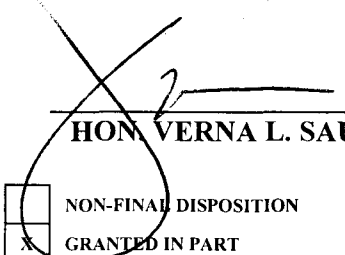
ORDERED that that branch of the cross-motion seeking to vacate the notices of pendency in this action (NYSCEF Doc. Nos. 2-3) is granted and the County Clerk is directed upon service of a copy of this order with notice of entry, to vacate the notices of pendency; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendants shall serve a copy of this decision and order with notice of entry upon all parties, as well as the Clerk of the Court; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/suptmanh).

This constitutes the decision and order of this court.

December 12, 2023



HON. Verna L. SAUNDERS, JSC

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART
		<input type="checkbox"/>	OTHER