

Hersko v Hersko

2024 NY Slip Op 32608(U)

July 29, 2024

Supreme Court, Kings County

Docket Number: Index No. 520492/2021

Judge: Wayne Saitta

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of July 2024.

P R E S E N T:

HON. WAYNE SAITTA, Justice.

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ISAAC HERSKO a/k/a YITZCHOK SHLOMO
HERSKO,

Plaintiff,

Index No 520492/2021

-against-

BARRY HERSKO a/k/a ZEV DOV HERSKO
a/k/a BEREL HERSKO, BELLA HERSKO,
WILSON-HINS ASSOCIATES, INC, CLARK
WILSON, INC., WILSON PROPERTIES &
EQUITIES, INC., WILSON FLAT, INC., WILSON
HAN ASSOCIATES, INC., WILSON-MER
ASSOCIATES, INC., B. CLARK ASSOCIATES, INC.,
516 KINGSTON, LLC and ABRAHAM WEISEL,
as escrow agent,

DECISION AND ORDER

MS #18

Defendants.

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The following papers read on this motion:

NYSCEF Doc Nos

Notice of Motion/Order to Show Cause/
Petition/Affidavits (Affirmations) and
Exhibits

378-390

Cross-motions Affidavits (Affirmations)
and Exhibits

Answering Affidavit (Affirmation)

505-509

Reply Affidavit (Affirmation)

512

Supplemental Affidavit (Affirmation)

This case involves a dispute between two brothers' ownership of nine properties in Brooklyn (the Properties) and other investments. The Properties are all in the name of corporations or LLC's in the name of BARRY HERSKO.

Plaintiff ISAAC HERSKO moves to reargue the decision denying his motion for an order directing Defendant BARRY HERSKO to deposit rental income from the Properties in an escrow account held by his attorneys, and to renew an order denying his motion to appoint a receiver for the properties. Plaintiff also seeks access to the books and records of the Defendant Corporations.

The Properties are all in the name of corporations or LLC's that are owned or controlled by Defendant BARRY HERSKO. Plaintiff claims that he is entitled to an equal interest in these properties, as well as to 50% of the monies generated from the Properties that have been deposited in an attorney escrow account of Defendant ABRHAM WEISEL.

The complaint alleges that Plaintiff and his brother BARRY HERSKO were business partners and that they entered into an agreement that they would invest in real properties and that separate and distinct entities would be formed to purchase and hold title to each Property, but that BARRY HERSKO would be listed as the sole shareholder of these companies.

The brothers entered into a written agreement which provided among other things that ISAAC HERSKO and BARRY HERSKO were equal partners in their business dealings related to the Properties, including, but not limited to, profits from the Properties.

By decision and order dated April 21, 2022, Justice Rothenberg granted Plaintiff's motion for leave to enter a default judgment finding that Plaintiff submitted "proof of the facts constituting the claims in a factually detailed affidavit" and the Defendants did not "dispute the allegations contained in the complaint or provide any factual support to establish a defense to the claims".

In the same decision, Justice Rothenberg denied Plaintiff's motion to appoint a receiver to manage the Properties, finding that Plaintiff did not demonstrate a danger of irreparable loss or material injury to the Properties, and that the value of the Properties provide sufficient security to protect Plaintiff's interests.

By decision and order dated October 7, 2022, Justice Rothenberg denied Plaintiff's motion for an order directing Defendant to deposit rental income from the Properties in an escrow account held by his attorneys.

Plaintiff moves to reargue the motion to have rental income deposited with his attorneys, and to renew Justice Rothenberg's denial of the appointment of a receiver. This motion has been stayed pending appeal of Justices Rothenberg's order.

In a decision dated February 21, 2024, the Appellate Division affirmed that part of the order which granted Plaintiff leave to file a default judgment. The stay has now lapsed now that the appeal has been decided.

Motion to Reargue

In the part of his motion seeking to reargue the denial of an order to deposit income from the Properties in an escrow account held by his attorneys, Plaintiff argues that Justice Rothenberg misapprehended the facts in finding that the Defendants' equity in the Properties was sufficient to satisfy any likely judgment in this action.

The complaint alleges that BARRY HERSKO converted approximately \$45 million that rightfully belonged to ISSAC HERSKO, and in the motion to reargue Plaintiff alleges that with further rents from the Properties that he has not received since commencement of the action he is now owed approximately \$55 million dollars.

However, Plaintiff has not demonstrated that Justice Rothenberg erred in finding that the equity in the Properties was sufficient to fund a potential judgment.

Defendants estimate the value of the properties at \$345 million, while Plaintiff estimates the value at approximately \$110 million.

There has been no evidence presented on which to make a determination of the actual value of the Properties. Plaintiff was unable to provide an appraisal of the Properties due to lack of access to information regarding the income and expenses of the Properties. For the same reason, Plaintiff was not able to submit evidence to corroborate his estimates of the amount of money he is owed.

Motion to Renew

Plaintiff seeks to renew the denial of his motion to have a receiver appointed to manage the Properties. Justice Rothenberg denied the motion for a receiver finding that Plaintiff failed to make a clear and convincing showing of loss or waste to the Properties and that the value of the subject real properties provides sufficient security to protect Plaintiff's interests. Justice Rothenberg further found that HPD violations, that were open against the properties, were not so significant as to present an imminent danger of irreparable loss or waste.

A pre-judgment temporary receivership should be granted only where the moving party has made a "clear and convincing" evidentiary showing of "irreparable loss or waste to the subject property and that a temporary receiver is needed to protect their interests" (*Cyngiel v Krigsmann*, 192 AD3d 760, 762 [2d Dept 2021], citing *Magee v. Magee*, 120 AD3d 637, 638 [2d 2014] [internal quotation marks omitted]).

The new fact on which Plaintiff bases his motion to renew is an email from Defendant BARRY HERSKO to Plaintiff on November 2, 2022, in which he stated:

“As you know, we have a disagreement about the nature of what you refer to as “joint funds.” Your request to review books and records has no legal basis and is denied. To the extent such exist they will not be made available for your review tomorrow. Given the ongoing litigations the attorneys can talk about records requests if there is an outstanding request.”

Plaintiff argues that the phrase “to the extent that they exist” indicates that Defendant BARRY HERSKO is not keeping corporate books and records of the partnership. However, the use of this boilerplate phrase is insufficient to demonstrate that BARRY HERSKO is not in fact keeping business records.

Further, the fact the Defendant BARRY HERSKO has denied Plaintiff access to their business office and records is not a newly discovered fact but was raised in the original motion for a receiver.

For these reasons the motion to renew must be denied.

Lastly, those portions of the motion to grant Plaintiff immediate access to the books and records of the corporations, and to compel other discovery are denied without prejudice to seeking such relief before the Special Master, the Hon. Leonard Austin.

WHEREFORE, it is hereby ORDERED that that portion of the motion to renew the portion of the order of Justice Rothenberg dated April 21, 2022 which denied Plaintiff’s motion to appoint a receiver, is denied; and it is further,

ORDERED that that portion of the motion to reargue Justice Rothenberg’s order of October 7, 2022, denying the motion for an injunction directing Defendant BARRY HERSKO to deposit income from the Properties in his attorneys’ escrow account, is denied; and it is further,

ORDERED that that portion of the motion for access to the books and records of the corporations and for other discovery is denied without prejudice to moving for such relief before the Special Master, the Hon. Leonard Austin.

This constitutes the Decision and Order of the Court.

ENTER:

A handwritten signature in black ink, appearing to be 'JSC', is written above a horizontal line.

JSC