SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: CCP

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THE ISAAC HERSKO REVOCABLE TRUST WITH MORRIS HERSKO AS TRUSTEE, DENISSI HERSKO, & WE ALL CARE INC. a/k/a WE CARE,

Plaintiffs, Decision and order

- against - Index No. 510953/2022

ABRAHAM WEISEL,

Defendant, August 6, 2024

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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #13

The defendant has moved seeking to reargue a decision and order dated May 16, 2024 which denied the defendant's request to quash subpoenas served. The plaintiffs oppose the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in a prior order, the plaintiff has sued his former attorney alleging a breach of fiduciary duty and malpractice. The complaint alleges the defendant represented the plaintiff in various real estate matters and lending contracts, along with his brother Barry Hersko, since 2007. The complaint alleges the defendant permitted and authorized Barry to withdrawn $45,000,000 million from the joint account managed by defendant without the plaintiff's knowledge or consent. The plaintiff's have served seventeen subpoenas on various financial institutions and other entities and one subpoena upon Flagstar seeking

information relevant to various business transactions allegedly engaged in by Isaac. In the prior decision the court denied the request to quash the subpoenas on the grounds the subpoenas were proper. The defendant now moves seeking to renew and reargue that decision. The basis for the motion is the fact that in a New Jersey action Isaac sued his brother Barry, a non-party in this action, for conversion of the same funds that are the subject of this action. Further, Isaac withdrew the conversion claim and the claim was dismissed by the court in that action. Consequently, the defendant argues that Isaac "no longer maintains a legal claim over the monies that are the basis of this action, and therefore the Subpoenas should not be enforced" (see, Affirmation in Support, ¶6 [NYSCEF Doc. No. 213]). Further, the defendant argues that Isaac is now barred from pursuing any claims based upon those accounts since it has already essentially been determined that Barry did nothing wrong exercising dominion and control over more than half the account. As noted the motion is opposed.

Conclusions of Law

The doctrine of judicial estoppel, also known as estoppel against inconsistent positions prohibits a party from taking a position in a legal proceeding that is contrary to a position

taken in a prior proceeding simply because the interests have changed (Bihn v. Connelly, 162 AD3d 626, 78 NYS3d 243 [2d Dept., 2018]). The doctrine is designed to "estop parties from adopting such contrary positions because the judicial system cannot tolerate this playing fast and loose with the courts" (Ford Motor Credit Company v. Colonial Funding Corp., 215 AD2d 435, 626 NYS2d 527 [2d Dept., 1995]). The rule only applies where the party seeking to advance the inconsistent position obtained a judgement in its favor in the prior proceeding (Re/Max of New York Inc. v. Weber, 177 AD3d 910, 112 NYS2d 769 [2d Dept., 2019]). Thus, for the doctrine to apply Isaac must have asserted a position in the New Jersey action which Isaac prevailed upon and now Isaac is taking a contrary position in this action because his interests have changed (Ghatani v. AGH Realty LLC, 181 AD3d 909, 121 NYS3d 317 [2d Dept., 2020]).

The plaintiff did not obtain a judgement in its favor in the New Jersey action and did not prevail upon that action. On the contrary, any claims for conversion were withdrawn. Thus, the doctrine of judicial estoppel does not prevent this action from proceeding and for Isaac asserting claims against Weisel in this action.

Next, res judicata is a doctrine that comprises both claim preclusion and issue preclusion which is also known as collateral

estoppel (see, Paramount Pictures Corporation v. Allianz Risk Transfer AG, 31 NY3d 64, 73 NYS3d 472 [2018]). "To establish claim preclusion, a party must show: (1) a final judgment on the merits, (2) identity or privity of parties, and (3) identity of claims in the two actions" (id). In this case the prior determination dismissing the conversion claim was not a final judgement on the merits and thus claim preclusion is inapplicable.

Collateral estoppel or issue preclusion generally prevents a party from relitigating an issue in a subsequent action that was clearly raised and decided against that party (Simmons v. Trans Express Inc., 37 NY3d 107, 148 NYS3d 178 2021]). In order for collateral estoppel to apply the issue must have been decided in the previous proceeding, resolves the present litigation and there was a full and fair opportunity to contest the decision that now controls the current action (Davidson v. American Bio Medica Corp., 299 AD2d 390, 748 NYS2d 98 [2d Dept., 2002]). Thus, only matters that were "actually litigated and determined" may be subject to collateral estoppel (Kaufman v. Eli Lilly and Company, 65 NY2d 449, 492 NYS2d 584 [1985]). "If the issue has not been litigated, there is no identity of issues between the present action and the prior determination" (id). Thus, there can be no collateral estoppel barring claims that were

voluntarily withdrawn (see, Putnam County Natrional Bank of Carmel v. Ryan, 162 AD2d 512, 556 NYS2d 711 [2d Dept., 1990]). Indeed, claims that are withdrawn are, in essence, discontinued. As the court observed in Loeb v. Willis, 100 NY 231, 55 Sickles 231 [1881] where the party moved for leave to discontinue, "the foreclosure action was discontinued, and all the proceedings therein thus annulled. There was no longer any record or adjudication in that action which bound any one. By the discontinuance of an action the further proceedings in the action are arrested not only, but what has been done therein is also annulled, so that the action is as if it never had been. If a suit be discontinued at any stage, or the judgment rendered therein be set aside or vacated or reversed, then the adjudication therein concludes no one, and it is not an estoppel or bar in any sense" (id).

In the New Jersey action Isaac voluntarily withdrew claims for conversion and the court subsequently dismissed them with prejudice. However, those claims were never actually litigated (950 Rutland Road Company LLC v. Lord, 71 Misc3d 1229(A), 146 NYS2d 371 [Supreme Court Kings County 2020]). Morever, the withdrawal of the claims without any litigation is not an admission by Isaac that he has no claim to any of the funds contained in the escrow account or any other accounts that were

the subject of the subpoenas and consequently lacks standing to pursue this lawsuit. Regarding any withdrawn claims, the New Jersey action has absolutely no bearing on this action at all.

Therefore, there is no basis upon which to renew or reargue the previous determination. Consequently, the motion seeking reargument or renewal is denied.

So ordered.

ENTER:

DATED: August 6, 2024
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC