SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

SHOLOM KESTENBAUM and MILKA KESTENBAUM, as Trustee of the Bnei Chail Trust,

Plaintiffs, Decision and order

- against - Index No. 519211/2024

SOLOMON MERTZ, individually and as Trustee of the Bnei Chail Trust, and ABRAHAM MERTZ, individually and as Trustee of the Bnei Chail Trust,

Defendants, December 23, 2024

PRESENT: HON. LEON RUCHELSMAN Motion Seq. #1 & #2

The plaintiff's have moved seeking an injunction. The defendant's have cross-moved seeking to dismiss the complaint. 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.

According to the verified complaint, the plaintiff Milka Kestenbaum and the defendants Abraham and Solomon Mertz and non-party David Mertz are siblings. The plaintiff and the defendants are the trustees of a trust dated November 30, 2000 and all four siblings are the beneficiaries of the trust. Thus, the plaintiff Milka and defendant Abraham and David are each twenty percent beneficiaries and Solomon is a forty percent beneficiary. The trust owns various properties which, according to the verified complaint were managed by Milka's husband Sam "for many years" (see, Verified Complaint, ¶10 [NYSCEF Doc. No. 2]). The verified complaint alleges that in 2024 Solomon sought to manage the

property located at 4424 10th Avenue in Kings County.

The verified complaint further alleges that concerning another property owned by the trust located at 27 Walton Street Unit 16-C in Kings County, Solomon, essentially, deeded that property to himself.

The verified complaint further concerns a third property located at 15 Schunnemunk Road (a/k/a 10 Mordche Scher Blvd), Unit 303 and Unit 305 located in Monroe, New York. One unit was owned by the trust and a second unit was owned by Solomon. Solomon commingled his unit with the trust's and engaged in construction to enlarge the units. A dispute arose between the builder and Solomon and it is alleged Solomon used trust funds to defend the action.

The verified complaint alleges causes of action for quiet title, conversion, an accounting, breach of fiduciary duty, waste and tortious interference. The following motions have now been filed.

Conclusions of Law

CPLR §3211(a)(4) provides that a motion to dismiss a lawsuit on the grounds another lawsuit is pending should be granted when "both suits arise out of the same subject matter or series of alleged wrongs" (id, Aurora Loan Services LLC v. Reid, 132 AD3d 778, 17 NYS3d 894 [2d Dept., 2015]). Thus, where the reliefs

sought in the two actions are "substantially the same" then dismissal is proper (Scottsdale Insurance Company v. Indemnity Insurance Corp., RRG, 110 AD3d 783, 974 NYS2d 476 [2d Dept., 2013]). The term "substantially the same" is defined as a cause of action as sufficiently similar to a simultaneously pending cause of action, when the ruling of one may directly conflict with the ruling of the other (see, Diaz v. Philip Morris Companies, Inc., 28 AD3d 703, 815 NYS2d 109 [2d Dept., 2006]). Thus, a motion to dismiss made in this case should be granted where an identity of parties and causes of action in the pending action raises the danger of conflicting rulings. "CPLR 3211(a)(4) vests a court with broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties on the same cause of action" (Whitney v. Whitney, 57 NY2d 731, 454 NYS2d 977 [1982]). Further, arbitration can be considered another action barring the present action (see, Kung v. Farinella, 277 AD2d 427, 716 NYS2d 891 [2d Dept., 2000]).

A prior decision in a related action vacated the arbitration agreement (see, Mertz v. Kestenbaum, 514929/2024 [NYSCEF Doc. No. 40]). Thus, that is not a basis upon which to dismiss this action.

CPLR §6301, as it pertains to this case, permits the court to issue a preliminary injunction "in any action...where the

plaintiff has demanded and would be entitled to a judgement restraining defendant from the commission or the continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (id). A party seeking a preliminary injunction "must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of the injunction and a balance of the equities in its favor" (Nobu Next Door, LLC v. Fine Arts Hosing, Inc., 4 NY3d 839, 800 NYS2d 48 [2005], see also, Alexandru v. Pappas, 68 Ad3d 690, 890 NY2d 593 [2d Dept., 2009]). Further, each of the above elements must be proven by the moving party with "clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010]).

Considering the first prong, establishing a likelihood of success on the merits, the plaintiff must prima facie establish a reasonable probability of success (Barbes Restaurant Inc., v. Seuzer 218 LLC, 140 AD3d 430, 33 NYS3d 43 [2d Dept., 2016]). In this case the basis for the injunction is that Sam is the manager of the property and any other party should be enjoined from asserting management rights. However, the issue of management is entirely contested. Solomon asserts he had been the manager for many years and had to relinquish such duties when he became ill. Thus, there are no agreements at all establishing the management rights of any party. Indeed, neither party has presented any

evidence demonstrating who should be the manager. Surely, the plaintiff has failed to present a likelihood of success that Sam is the authorized manager.

Thus, while it is true that a preliminary injunction may be granted where some facts are in dispute and it is still apparent the moving party has a likelihood of success on the merits, (see, Borenstein v. Rochel Properties, 176 AD2d 171, 574 NYS2d 192 [1st Dept., 1991]) some evidence of likelihood of success must be presented. Therefore, when "key facts" are in dispute and the moving party cannot satisfy the necessary elements then an injunction must be denied (Digestive Liver Disease P.C. v. Patel, 18 AD3d 423, 793 NYS2d 773 [2d Dept., 2005]).

In this case, as noted, the key fact of management duties is heavily disputed by the defendants. Of course, the continuation of discovery and a trial, if necessary, will determine whether the plaintiff will be able to prove the claims alleged and prevail on the allegations asserted against the defendants. However, at this juncture, the plaintiff has only raised contested and disputed claims.

Even if the plaintiff's allegations were sufficient to demonstrate a likelihood of success on the merits, concerning the central allegation of the complaint, namely that defendant's management of the property will result in harm, that is a mere money claim, without any accompanying emergency application. In

order to satisfy the second prong of irreparable harm it must be demonstrated that monetary damages are insufficient (Autoone Insurance Company v. Manhattan Heights Medical P.C., 24 Misc3d 1229(A), 899 NYS2d 57 [Supreme Court Queens County, 2009]). The plaintiff does not even allege anything other than money damages. The plaintiff does assert that if the defendant manages the property it may adversely affect rental incomes. However, even if true, those are merely claims for damages which can be satisfied with money damages. Thus, while the plaintiffs may prevail in all their claims against the defendants, the plaintiffs has failed to establish that the denial of the injunction will affect anything other than economic or financial matters. Thus, any alleged loss which can be compensated by money damages is not irreparable harm (Family Friendly Media Inc., v. Recorder Television Network, 74 AD3d 738, 903 NYS2d 80 [2d Dept., 2010]). An injunction based upon purely monetary damages is improper even if the passage of time will render any judgement obtained ineffectual (Rosenthal v. Rochester Button Company, 148 AD2d 375, 539 NYS2d 11 [st Dept., 1989]). As noted, the entire injunction sought is merely to protect financial concerns. This is not irreparable harm and is an improper basis upon which to obtain an injunction.

Consequently, the motion seeking an injunction is denied.

Turning to the motion to dismiss on other grounds, the

motion seeking to dismiss the first four causes of action is denied. There are questions in this regard that require discovery.

The motion seeking to dismiss the fifth cause of action is duplicative of the cause of action of breach of a fiduciary duty and consequently the motion seeking to dismiss that cause of action is granted.

The motion seeking to dismiss the tortious interference claim is granted. The verified complaint has failed to allege any contracts Sam maintains with third parties that Solomon has interfered with in a tortious manner.

Lastly, at this juncture, there are questions whether the statute of limitations bars the four surviving claims. Further discovery will sharpen this issue.

Thus, the motion seeking an injunction is denied and the first four causes of action survive.

So ordered.

ENTER:

DATED: December 23, 2024
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC