1993 Trust of Joan Cohen v Baum
2017 NY Slip Op 30894(U)
May 2, 2017
Supreme Court, New York County
Docket Number: 150058/2015
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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1993 TRUST OF JOAN COHEN, by their Trustees, Joan Cohen & Ellen Hakim, and 1993 TRUST OF ELLEN HAKIM, by their Trustees, Joan Cohen & Ellen Hakim,

Index No.: 150058/2015

DECISION & ORDER

Plaintiffs,

-against-

E. RICHARD BAUM and ANCHIN, BLOCK & ANCHIN LLP,

Defendants.

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E. RICHARD BAUM and ANCHIN, BLOCK & ANCHIN LLP,

Third-Party Plaintiffs,

-against-

LANGHAM MANSIONS LLC and ALAN MANOCHERIAN (as the Tax Matters Partner of Langham Mansions LLC and as the managing Member of Langham Mansions LLC),

Third-Party Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Third-party defendants Langham Mansions LLC (Langham) and Alan Manocherian (collectively, the Langham Parties) move, pursuant to CPLR 3211, to dismiss the Third Party Complaint (the TPC). Defendants/third-party plaintiffs E. Richard Baum and Anchin, Block & Anchin (ABA) (collectively, the Baum Parties) oppose the motion. The Langham Parties' motion is granted for the reasons that follow.

I. Factual Background & Procedural History

As this is a motion to dismiss, the facts recited are taken from the TPC (*see* Dkt. 141)[1] and the documentary evidence submitted by the parties.

On January 5, 2015, the plaintiffs in the main action, the 1993 Trust of Joan Cohen and the 1993 Trust of Ellen Hakim (collectively, the Trusts), filed a complaint against Baum and his employer, ABA, in which the principal allegation is that Baum, a former[2] trustee of the Trusts who provided the Trusts with tax and accounting services, engaged in the *ultra vires* act of signing, on behalf of each of the Trusts, an IRS Form 870-PT (the Waivers) (Dkt. 63 & 64), which foreclosed the Trust's ability to contest a particular tax matter with the IRS. To explain, the Trusts are members of Langham, a Delaware LLC that owns a building located at 135 Central Park West. As members of an LLC, the Trusts pay taxes on a pass-through basis. In October 2011, the IRS determined that a May 2005 charitable tax deduction taken by Langham's members was improper. The deduction related to Langham's non-cash $86 million charitable contribution of a conservation easement to the National Architectural Trust, which was based on the value of the building's façade being preserved. The Trusts' respective pro rata deductions were $5,848,000. Langham's members would go on to challenge the IRS's position regarding the propriety of their charitable deduction, and in the end, settled for about half of the deduction, without the imposition of penalties or interest. In other words, if the Trusts participated in the settlement, they would have been able to maintain a deduction of $2,924,000.

The Trusts, however, were not permitted to participate in the settlement because Baum waived their right to do so by signing the Waivers. The principle issue in the main action is

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[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

[2] Baum has not been a trustee of either of the Trusts since June 11, 2013. *See* TPC ¶ 7.

whether Baum had the authority to do so. Baum was one of three trustees. Joan Cohen and Ellen Hakim were the other trustees. It is undisputed that under section 5 of the agreements governing Baum's role as co-trustee, Trust Agreements dated as of February 4, 1993, Baum lacked the unilateral authority to sign the Waivers; agreement by a majority of the trustees was required. *See* Dkt. 33 at 13 & Dkt. 34 at 13. It also is undisputed that he signed the Waivers without obtaining such majority consent. Baum, who always prepared and signed the tax returns, did not even notify the other trustees of the IRS's deficiency notices or that he had received the Waivers, let alone that he intended to sign them.

Baum's defense is that, based on the parties' course of conduct, he was permitted to sign the Waivers, notwithstanding the Trust Agreements' express requirement that he first procure majority consent from his co-trustees. The merits of that defense are not at issue on this motion and will not be addressed. The Baum Parties filed an answer to the complaint on January 26, 2015. *See* Dkt. 8. Discovery is ongoing.

On July 21, 2016, the Baum Parties filed the TPC, which contains two causes of action. *See* Dkt. 141. The first is a claim that Manocherian, the "Tax Matters Partners of Langham",[3] breached sundry duties to the Trusts. For instance, Baum complains that Manocherian failed to disclose the IRS's audit of Langham. As explained below, a detailed merits analysis of Manocherian's alleged wrongdoing is unwarranted because, even assuming the claims made against him are well pleaded, the Baum Parties lack standing to maintain such claims. Simply put, as a former trustee, Baum has no right to prosecute these derivative claims on behalf of the Trusts.

[3] The TPC erroneously claims that Manocherian was, at the relevant time, a managing member of Langham. This error is of no moment because it does not change the relevant standing inquiry.

The TPC's second cause of action is for contribution under Article 14 of the CPLR. The Baum Parties take the position that in the event they are held liable by the Trusts in the main action, the Langham Parties must contribute their proportionate share of the Baum Parties' responsibility. This claim fails because the Langham Parties' alleged wrongdoing is unrelated to the reason Baum faces liability, which turns exclusively on Baum's alleged *ultra vires* actions as trustee. As explained below, whether Baum's decision to sign the Waivers would have been informed by knowledge of the audit has no legal relevance to the question of his authority to sign the Waivers (either by virtue of the terms of the Trust Agreements or the parties' course of conduct). The wisdom (i.e., business judgment) of signing the Waivers is not at issue; it is only Baum's authority that is relevant.

On September 30, 2016, the Langham Parties filed the instant motion to dismiss the TPC. The court reserved on the motion after oral argument. *See* Dkt. 173 (2/22/17 Tr.).

II. Discussion

A. Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted

by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

B. Claims Against Manocherian

The First Department has adopted Delaware's *Tooley* test for determining whether a claim is direct or derivative, which requires the court to examine "the nature of the wrong and to whom the relief should go." *Yudell v Gilbert*, 99 AD3d 108, 114 (1st Dept 2012), quoting *Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1033 (Del 2004). For a claim to be direct, "[t]he stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder ***and that he or she can prevail without showing an injury to the corporation***." *Id.* (emphasis added). "Thus, under *Tooley*, a court should consider '(1) who suffered the alleged harm (the corporation or the stockholders); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders individually).'" *Id.*; *see NAF Holdings, LLC v Li & Fung (Trading) Ltd.*, 118 A3d 175, 180 (Del 2015) (an "important initial question has to be answered: does the plaintiff seek to bring a claim belonging to her personally or one belonging to the corporation itself?"). "[E]ven where an individual harm is claimed, if it

is confused with or embedded in the harm to the corporation, it cannot separately stand." *Serino v Lipper*, 123 AD3d 34, 40 (1st Dept 2014).

The Baum Parties' claims against Manocherian are derivative. They are all based on Manocherian's duties to Langham as its "Tax Matters Partner". While the precise meaning of "Tax Matters Partner" is somewhat unclear, there is no dispute (and the court assumes for the purpose of this motion) that Manocherian had contractual and fiduciary duties to Langham and the Trusts with respect to the tax matters he handled on their behalf. A successful claim for breach of such duties would result in recovery going to Langham or the Trusts. Baum, to be clear, was not a beneficiary, and thus a loss suffered by the Trusts is not a loss that affects Baum. Baum, personally, could not recover from Manocherian.

Nor is there any basis to assert that Manocherian owed any duties directly to Baum, whose role was co-trustee of the Trusts (in which he prepared the Trusts' taxes). Baum cites no authority for the proposition that a trustee is personally owed a duty by a fiduciary of an LLC of which the trust is a member. There is no logical reason for such a duty to exist, and more importantly, there is no legal basis for this court to conclude otherwise.

Under these circumstances, the claims asserted against Manocherian clearly are derivative. Leaving aside the question of whether Baum could have pursued these claims while serving as trustee, Baum cites no authority for the proposition that a ***former*** trustee may maintain a derivative action on behalf of the trust. Since Baum is not a beneficiary of the Trusts, and absent current authority to act on behalf of the Trusts, Baum has no basis to prosecute claims belonging to the Trusts. To wit, the typical threshold analysis on a derivative claim – whether the plaintiff has properly pleaded either demand on the board or demand futility [*see Marx v Akers*, 88 NY2d 189 (1996)] – would be nonsensical when the plaintiff is not a shareholder or, in

this case, a beneficiary of the Trusts. Under "the continuous share ownership requirement governing derivative actions," someone without any rights in a company or rights to act on behalf of a company has no right to demand that the board take action, let alone take action on the company's behalf. *See Korsinsky v Winkelreid*, 143 AD3d 427 (1st Dept 2016).[4]

For these reasons, the court finds that the Baum Parties lack standing to sue Manocherian on the claims in the TPC's first cause of action. Those claims are dismissed.[5]

C. Contribution

CPLR 1401 provides that "two or more persons **who are subject to liability** for damages for the **same** personal injury, **injury to property**[6] or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought" (emphasis added). CPLR 1402 further provides that "[t]he equitable shares shall be determined in accordance with the relative culpability of each person liable for contribution."

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[4] To the extent Baum's claims can be interpreted as alleging that Manocherian breached duties to Langham (instead of to the Trusts), the conclusion would be no different. Baum is neither a member or manager of Langham, and therefore lacks standing to prosecute claims belonging to Langham.

[5] The dismissal is with prejudice as against the Baum Parties, but without prejudice to the actual owners of the claims.

[6] "[P]urely economic loss resulting from a breach of contract does not constitute 'injury to property' within the meaning of [CPLR 1401]." *Lehr Assocs. Consulting Engineers, LLP v Daikin AC (Americas) Inc.*, 133 AD3d 533, 534 (1st Dept 2015), quoting *Bd. of Ed. of Hudson City Sch. Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26 (1987). While this rule might justify dismissing the Baum Parties' contribution claims, since Baum's alleged breach of the Trust Agreements also is styled by the Trusts as a duplicative cause of action for breach of fiduciary duty, the court does not rely on this principle. *17 Vista Fee Assocs. v Teachers Ins. & Annuity Ass'n of Am.*, 259 AD2d 75, 81 (1st Dept 1999) (contribution actions arising out of contractual breaches require predicate tort liability); *see Millennium Import, LLC v Reed Smith LLP*, 104 AD3d 190, 193 (1st Dept 2013) (professional malpractice claim subject to contribution under CPLR 1401). Rather, as explained herein, the court relies on the fact that the Langham Parties are not "subject to liability" within the meaning of CPLR 1401.

It is well settled that "[c]ontribution is available only where the party seeking contribution and the party from whom contribution is sought **are liable for the same injury**." *Lopez v N.Y. Life Ins. Co.*, 90 AD3d 446, 449 (1st Dept 2011) (emphasis added); *see Am. Home Assur. Co. v Nausch, Hogan & Murray, Inc.*, 71 AD3d 550, 552 (1st Dept 2010) ("brokers are subject to liability for the 'same' injury because the brokers stand accused **of the same misrepresentations** for which the insurer-plaintiffs were held responsible in the underlying arbitration.") (emphasis added); *see also Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 (1988) ("It is this essential requirement—that the parties must have contributed to the same injury—which defeats Celotex's third-party claim here.").

In this case, the Langham Parties are not "subject to liability" for the "same injury" for which Baum is being sued in the main action. The Langham Parties' alleged wrongdoing was failure to sufficiently apprise Baum of Langham's IRS audit. Even assuming this is an issue for which Baum has standing to complain (as discussed above, he does not), neither Langham nor Manocherian have liability to the Trusts for Baum's alleged offense – signing the Waivers without authority. If the relevant inquiry was the wisdom of signing the Waivers (i.e., the merits of giving up the Trusts' deductions as opposed to litigating with the IRS), Baum's complaint about not being kept in the loop might have mattered to his defense. But that is not what Baum is accused of. He is sued because, regardless of whether it was wise at the time for Baum to sign the Waivers, and regardless of how that decision looks in hindsight, Baum's alleged liability stems not from his strategic decision, but from his alleged lack of authority. In seeking contribution based on Manocherian's actions (really his inaction), Baum conflates his authority and his business judgment. The former is at issue; the latter is not.

Indeed, a significant portion of the TPC is devoted to the claim that Manocherian's alleged accounting malpractice led to the IRS disallowing the charitable deduction taken by Langham's members. The viability of Baum's contribution claims is not impacted by the question of whether Manocherian could be held liable by Langham or its members for such alleged malpractice. The Trusts' claims against Baum do not stem from the Trusts' complaint about not being allowed to take the full deduction. Rather, their qualm is that they could not participate in the IRS settlement, which resulted in the other members' ability to keep half of the deduction. Baum, nonetheless, complains that Manocherian should have made sure that Baum had more knowledge about the status of the IRS audit. Manocherian replies that Baum should not have signed the Waivers without making sure he understood their implications, and certainly should not have done so without consulting the other trustees.[7]

To be sure, the propriety of Baum signing the Waivers may turn on the parties' course of conduct. Manocherian, however, did not cause Baum to allegedly exceed his authority as trustee. Baum does not allege that Manocherian or Langham knew that Baum had received the Waivers, and thus they cannot be faulted for Baum signing them. Baum signed the waivers of his own volition, without inducement by anyone. Baum provides no legal basis to hold Manocherian and Langham liable to the Trusts for his conduct. Simply put, Manocherian has nothing to do with the reason Baum faces liability in this action. Under CPLR 1401, this precludes Baum from seeking contribution from Manocherian and Langham.

In sum, since Manocherian faces no liability to the Trusts for Baum's actions, and since Manocherian's alleged wrongdoing (failure to notify) is unrelated to and did not cause Baum's

[7] There is no question of fact that if Baum did not sign the Waivers, the Trusts would have been permitted to participate in the settlement, and would have been able to avail themselves of the benefits Langham's other members received (i.e., $2,924,000, half of their deduction).

alleged wrongdoing (exceeding the scope of his authority as trustee), the "subject to liability" and "same injury" prongs of CPLR 1401 are not present. The Baum Parties, therefore, are not entitled to seek contribution from the Langham Parties.[8] Accordingly, it is

ORDERED that the motion by third-party defendants Langham Mansions LLC and Alan Manocherian to dismiss the Third Party Complaint is granted, and the Clerk is directed to enter judgment (1) dismissing the first cause of action in Third Party Complaint with prejudice as against third-party plaintiffs and without prejudice as against any other party that actually has standing to assert such claims; and (2) dismissing the second cause of action with prejudice; and it is further

ORDERED that the judgment in the third-party action shall be severed from the claims in the main action, which shall continue.

Dated: May 2, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.

[8] In their brief, the Baum Parties also claim a right to contribution under Restatement (Second) of Trusts § 258 and Restatement (Third) of Trusts § 10, but do not support this claim with citation to controlling authority. *See* Dkt. 159 at 22-23. Even assuming such claims exist, contribution under these Restatements are only available when co-trustees "are liable for a breach of trust." *See id.* at 23. This makes sense under normal principles of joint and several liability and Article 14, discussed herein. However, the co-trustees, Joan Cohen and Ellen Hakim, are not alleged to have committed any breaches of trust and the Baum Parties do not assert a claim for contribution against them. And while the Baum Parties cite a single, non-binding federal district court case suggesting that a co-fiduciary, and not just co-trustees, can be subject to a contribution claim, Baum and Manocherian are not co-fiduciaries. Baum was the trustee for the Trusts, while Manocherian was (at most) a fiduciary of Langham. As discussed herein, Baum's alleged malfeasance is not related to Manocherian's alleged wrongdoing.