

Greenzweig v Kenmare Mott Realty Assoc. Inc.

2013 NY Slip Op 32735(U)

October 23, 2013

Sup Ct, New York County

Docket Number: 152160/12

Judge: Melvin L. Schweitzer

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This opinion is uncorrected and not selected for official publication.

Plaintiff is seeking an accounting, a declaration that he is the rightful owner, and damages, and Kenmare Mott has counterclaimed against plaintiff for Abuse of Process. Bessie has submitted a separate Proposed Answer by her and Kenmare Mott with a Cross-Claim by her against Yaakov for breach of fiduciary duty owed to the corporation, and a Cross-Claim and Counterclaims by Kenmare Mott for, respectively, abuse of process/malicious prosecution, an accounting and for a declaratory judgment. The court will refer to facts as needed in the Discussion below.

Discussion

Disqualification of Counsel

Prior to this action, Stuart Serota, Esq., of the law firm Kaufman & Serota, served as corporate counsel for Kenmare Mott. He signed the Request for Judicial Intervention as counsel for Yaakov, and he also signed Kenmare Mott's Answer and Counterclaims, and Yaakov's separate Answer and Affirmative Defenses. By Substitution of Counsel dated March 22, 2013, Kenmare Mott substituted Serota with Solomon E. Antar, Esq.¹ Also on March 22, Antar filed a Notice of Appearance as counsel for Kenmare Mott and Proposed Intervenor Bessie. At the October 2, 2013 status conference, two different attorneys appeared on behalf of Kenmare Mott – Antar and Mark D. Mermel, Esq. Mermel also appeared on behalf of Yaakov at that conference.

Mermel had earlier sent Serota a letter dated March 1, 2013, notifying him that Mermel had been retained by Yaakov and Kenmare Mott to represent them in the action. Mermel attached a consent and requested Serota's signature. Serota responded that he would sign as to Yaakov but not Kenmare Mott, as his client Bessie Greenzweig was and had long been the sole

¹The Substitution was not filed until May 1st.

shareholder, owner and director of the company. Serota also noted that Yaakov had been fired on March 1st, three days earlier. Thereafter, Mermel submitted a Sur-Reply in further opposition to Bessie's Cross-Motion, on behalf of both Kenmare Mott and Yaakov. There is no reference in the docket to a Notice of Appearance having been filed by Mermel, or a Substitution of Counsel on behalf of Yaakov or Kenmare Mott.

Solomon E. Antar, Esq. is currently counsel of record for Kenmare Mott and for Proposed Intervenor Bessie Greenzweig. The court has not been asked to determine the rightful owner of the Business, nor could it based on the existing record.² Evidently Yaakov no longer wishes to be represented by Serota and prefers the counsel of Mark D. Mermel, a choice the court will honor. However, Mermel must submit a Notice of Appearance forthwith. Under the circumstances, there is no need to disqualify Serota. The court accepts Serota's March 1st letter and earlier February 28th letter withdrawing as Yaakov's counsel, in lieu of a formal substitution.

Nor will the court treat the Notice of Appearance by Antar as a nullity. DR 5-108 (A) requires a party seeking disqualification of an opponent's lawyer to show that there was a prior attorney-client relationship; that the matters involved in both representations are substantially related; and that the present interests of the attorney's past and present clients are materially adverse. *Jamaica Pub. Serv. Co. v AIU Ins. Co.*, 92 NY2d 631, 636 (1998); see *Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 132 (1996) ("where the movant satisfies all three inquiries ... the irrebuttable presumption of disqualification arise(s)"). Yaakov has not shown that he had a prior attorney-client relationship with Antar, or that Antar is in possession of privileged information obtained by Serota when he was representing both Yaakov and Kenmare Mott.

² The submitted evidence does, however, strongly support Bessie's claim of ownership.

However, to the extent that Yaakov's motion seeks Serota's file as to his representation of Yaakov in this action, the motion is granted. The motion is otherwise denied.

Cross-Motion for Intervention, Appointment of a Receiver, and Additional Relief

Morris pleads in the Complaint that: his brother Joseph started Kenmare Mott in 1989 and was its sole shareholder; and Joseph told Morris that his shares in the company, and the building it owned, were being held in trust for his four siblings and would pass to them in equal proportion on Joseph's death. Yaakov affirms that his Uncle Joseph gave him Kenmare Mott outright in 2003 because of their close relationship, and the care Yaakov had taken of him after his heart attack.

Bessie affirms³ that: in 1995, financial problems forced Joseph to assign his shares to his father, Bessie's husband David; David then became the sole shareholder, officer and director of the company; Bessie took out a mortgage on her home to help the Business, and Kenmare Mott has been making the monthly mortgage payments since 1995; in 2002, on Bessie's 76th birthday, her husband David assigned her his shares in Kenmare Mott by handing her the stock certificates in front of family members;⁴ since then Kenmare Mott has paid Bessie \$400 on a weekly basis; David died from cancer in 2003; after David's death, Joseph managed the property and continued his mother's weekly \$400 payments; after Joseph had a heart attack, Yaakov started helping out with management as Joseph's assistant; and after Joseph had a stroke, Yaakov took over the

³ Affirmation of Bessie Greenzweig in support of cross-motion.

⁴ Plaintiff's brother Arthur, sister Ann Shanie, and her husband Aaron Laufer, have submitted Affirmations corroborating Bessie's version of this event. Bessie has not been able to locate the certificates.

management, with assistance from his brother Levi, continuing to pay his grandmother the weekly \$400.

Bessie also affirms that: Yaakov has been pocketing \$9,000 in cash each month; he took out two mortgages on the building amounting to \$1,454,671 without her consent; he has threatened to cut off her monthly payment of \$400; she fired Yaakov and his brother Levi, but they refused to leave; Bessie hired a management company named A.M. Katz Management that notified the tenants that as of April 10, 2013, it would collect the rent and undertake services. In addition, Bessie attaches a translated Yiddish statement by Yaakov that he would abandon his claim if she would give him 25% of the Business, and let him continue to manage the building with his brother.

In response, Yaakov affirms that Bessie's daughter and her husband have been manipulating Bessie, it is unlikely that Bessie has read her own Affirmation, he visits his grandmother weekly, and he has not threatened her. He attaches English translations of statements by Bessie and Arthur in Yiddish stating that Joseph had given the Business to Yaakov. There are no documents memorializing the alleged transfers of the Business included in submissions to the court.

Intervention

CPLR 1013 provides that:

Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

Bessie's claim and the main action involve common questions of law and fact. She is claiming ownership of the same business as Morris and Yaakov. There will be no prejudice to the existing parties, nor will there be any delay if the court permits Bessie to intervene. To the contrary, Bessie could be considered a "necessary" person subject to joinder under CPLR 1001(a): "Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants."

Appointment of a Receiver

CPLR 6401(a) provides that:

Appointment of temporary receiver; joinder of moving party. Upon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed, before or after service of summons and at any time prior to judgment, or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, materially injured or destroyed. A motion made by a person not already a party to the action constitutes an appearance in the action and the person shall be joined as a party.

A party seeking appointment of a receiver pursuant to CPLR 6401 (a) must make a "clear evidentiary showing of the necessity for the conservation of property and the protection of the interests of the litigant." *Glassner v Kaufman*, 19 AD2d 885, 885 (1st Dept 1963) (appointment of receiver characterized as "drastic remedy"); see *Modern Telecommunications, Inc. v D'Allesandro* 185 AD2d 218 (1st Dept 1993) (appointing receiver of corporation where two factions fighting to control corporation).

The record shows that both Yaakov and a management company hired by Bessie are acting as managers of the Business. Bessie has fired Yaakov, but Yaakov continues to function

as a manager. There is also evidence that one of the tenants has been paying its monthly rent of \$9,000 in cash, which Yaakov has been pocketing. In addition, Bessie and Yaakov each claim to own Kenmare Mott. There is “clear” evidence that “the actions of the various antagonists threaten the well-being and continued viability” of the Business. *Id.* The court will issue a separate order appointing a Receiver and specifying the Receiver’s powers and obligations. In the interim, to minimize confusion by the tenants and to preserve the Business. Yaakov shall continue as Manager until such time as the Receiver is appointed.

There are no objections by the other parties to the additional relief requested by Bessie. The court construes the request to amend the Answer and assert Counterclaims as a request to file an Answer. Accordingly, it is hereby

ORDERED that the motion of defendant Yaakov Rooz to disqualify Serota and Kaufman, Esqs. as counsel for defendants, to substitute attorney Mark D. Mermel, Esq. as counsel for defendants, to compel Serota and Kaufman, Esqs. to turn over its file to Mermel, and to treat as a nullity the Notice of Appearance filed by the Law Offices of Solomon E. Antar on behalf of defendant Kenmare Mott, is denied except that the request for turnover of Serota’s file regarding Yaakov Rooz and Kenmare Mott is granted in part in that the Law Offices of Solomon E. Antar shall provide Mark Mermel, Esq. with the file provided by Serota & Kaufman, Esqs. regarding the latter’s representation of Yaakov Rooz in this action; and it is further

ORDERED that attorney Mark D. Mermel, Esq. shall file a Notice of Appearance on behalf of defendant Yaakov Rooz within two weeks of entry of this order; and it is further

ORDERED that Bessie Greenzweig’s motion to intervene in the litigation, for appointment of a receiver for Kenmare Mott and the building it owns, to direct the Receiver to

continue paying her weekly salary of \$400.00 and her monthly mortgage payments, to permit her to amend the Answer to assert Counterclaims, to grant her a trial preference due to her age, and to direct that the Preliminary Conference Order include an expedited discovery schedule, is granted; and it is further

ORDERED that until appointment of the Receiver, Yaakov Rooz shall continue as Manager of Kenmare Mott Realty Associates Inc. and the building it owns that is located at Kenmare and Mott Streets in Manhattan, and Yaakov Rooz shall keep detailed records of all rents paid by the tenants, including amounts, name of tenant, date of payment and deposit information, which records shall be provided to the Receiver on his appointment; and it is further

ORDERED that Bessie Greenzweig shall file and serve an Answer to the Complaint separate and apart from defendant Kenmare Mott, which has already answered the Complaint, and shall do so by November 29, 2013; and it is further

ORDERED that Kenmare Mott may file and serve an Amended Answer no later than November 29, 2013; and it is further

ORDERED that the caption shall be amended to read as follows, and the amended caption shall appear on all future documents filed with the court:

-----X
MORRIS GREENZWEIG,
Plaintiff,
- against -
KENMARE MOTT REALTY
ASSOCIATES INC.; YAAKOV ROOZ; and
BESSIE GREENZWEIG,
Defendants.
-----X

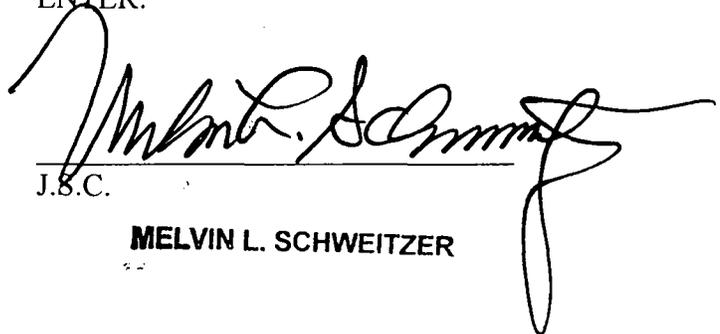
; and it is further

ORDERED that the parties' counsel shall meet and confer regarding an expedited discovery schedule and be prepared to discuss the new schedule at the next status conference on

November ~~14~~, 2013 at ~~10:00~~ A.M.
07 10

DATED: October 23, 2013

ENTER:



J.S.C.
MELVIN L. SCHWEITZER