

Pastreich v Pastreich
2018 NY Slip Op 31062(U)
May 30, 2018
Supreme Court, New York County
Docket Number: 654759/2017
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER
Justice

PART 61

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YITZHAK ARON PASTREICH and MENACHEM MENDL
PASTREICH, as Trustees, and ONE CIVIC CENTER LLC,

INDEX NO. 654759/2017

Plaintiffs,

MOTION DATE 2/13/2018

- v -

MOTION SEQ. NO. 002

MARK PASTREICH, ONE CIVIC CENTER MANAGEMENT LLC,
and LISA ARONSON,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF doc numbers 38, 39, 40, 41, 42, 43, 44, 74, 78
were read on this application to/for DISMISSAL

OSTRAGER, BARRY R., J.S.C.,

Before the Court is a pre-answer motion by defendants Mark Pastreich and One Civic
Center Management LLC to dismiss the Third through Eighth and the Tenth causes of action in
the Amended Complaint based on documentary evidence and failure to state a cause of action
pursuant to CPLR 3211(a)(1) and (7). The Third Amended Complaint (NYSCEF Doc. No. 34)
was filed following this Court's dismissal of the Third through Ninth causes of action in the
original Complaint with leave to replead (NYSCEF Doc. No. 31). Several of the amended causes
of action are similar to the original ones in significant respects, whereas others are new. Based on
the papers submitted and extensive oral argument on the record on May 29, 2018, the motion is
granted in part and denied in part.

Plaintiffs commenced this action seeking relief from defendants' alleged mismanagement and improper diversion of funds from the operation of an office building known as One Civic Center Plaza in Poughkeepsie, title to which is presently held by the three plaintiff irrevocable Trusts. The individual plaintiffs are Trustees and defendant Mark Pastreich is the grantor of the Trust. Defendant Aronson is the Trustee for the Mark Pastreich Irrevocable Trust of 2012. The Trusts grant the Trustees the power to maintain, manage, and disburse Trust property, including all rents received, for the benefit of the beneficiaries. In furtherance of their duties under the Trusts, the Trustees created plaintiff One Civic Center LLC to manage and operate the property.¹

On December 13, 2013, plaintiff One Civic Center entered into a Management Agreement with defendant Civic Center Management LLC whereby defendant Civic Center Management agreed to manage and maintain the property (NYSCEF Doc. No. 11). Defendant Pastreich is the sole managing member and shareholder of Civic Center Management. Under the Management Agreement, Civic Center Management is responsible for collecting rents, enforcing tenant leases, performing all necessary services, maintenance, and repairs, and maintaining complete and accurate records for the property. Pursuant to Section 11 of the Management Agreement, plaintiff One Civic Center sent a Notice of Termination to defendant Civic Center Management terminating the relationship effective January 31, 2017, and this action ensued.

The Third Cause of Action seeks an Accounting against defendant Pastreich individually related to monies due and payable to the defendant LLC. This claim is dismissed. As defendants correctly allege, and plaintiffs do not dispute, a relationship akin to a fiduciary relationship must exist for an accounting to be permitted. *See CIFG Assur. N. Am., Inc. v Goldman, Sachs & Co.*,

¹ During the pendency of this action, Mark Pastreich exercised his right to substitute collateral in the Trust in exchange for re-acquiring One Civic Center. The exchange of property is presently scheduled to take place on or before June 11, 2018.

106 AD3d 437, 438 (1st Dep't 2013). Although plaintiffs have alleged a confidential relationship between defendant Mark Pastreich and the two Pastreich plaintiffs, who are his children, the cause of action seeks an accounting related to the business of One Civic Center Management LLC, and not of Mark Pastreich personally. As the relationship with the LLC is contractual in nature based on the Management Agreement, and not one of a fiduciary, the claim fails.

In the Fourth Cause of Action plaintiffs claim that defendant Pastreich has been unjustly enriched by having collected rents and other monies generated by the Poughkeepsie Property and retaining those funds for his own benefit. The elements of unjust enrichment are that: (1) the defendant was enriched; (2) at plaintiff's expense; and (3) under principles of equity and good conscience, the defendant should not be permitted to retain what is sought to be recovered. As unjust enrichment is a quasi-contract claim, it is barred by the existence of a written agreement for the period during which the written Agreement was in effect. *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 383, 388 (1987).

While recognizing the Management Agreement authorizes One Civic Center to collect rents, plaintiffs claim in their memo of law (at p 20) that they bestowed a benefit on their father personally to act on behalf of One Civic Center because of their trust in him and that the trust was abused and Mark Pastreich unjustly enriched when he transferred funds collected by the LLC to himself personally. However, any "benefit" to collect monies due was in fact bestowed on the defendant LLC pursuant to the Management Agreement, and the quasi-contract claim against Pastreich individually must therefore be dismissed as to any period during which the Management Agreement was in place. The Court notes that defendants have not moved to dismiss the First Cause of Action asserting breach of contract against the LLC, nor the Second seeking a declaratory judgment as to the rights and obligations of the parties.

The Fifth Cause of Action seeks a constructive trust to receive the rents and other monies generated by the Poughkeepsie Property pending the determination of the action. The necessary elements for a constructive trust are: (1) a confidential or fiduciary relationship; (2) a promise; (3) a transfer in reliance on that promise; and (4) unjust enrichment. *Sharp v Kosmalski*, 40 NY2d 119, 121 (1976). As with the two prior causes of action, the Fifth Cause of Action is asserted against defendant Mark Pastreich only and is premised on the claim that, based on the familial relationship, plaintiffs trusted defendant to manage the property for their benefit when he instead took the profits for himself. Thus, the Fifth Cause of Action suffers from the same infirmities as the Third and Fourth Causes of Action and must be dismissed.

The Sixth Cause of Action against Pastreich for conversion survives dismissal at the pleading stage. The elements of conversion are: (1) plaintiff's immediate superior right of possession; (2) to an identifiable fund; (3) defendant's unauthorized dominion over the money in question; (4) to the exclusion of Plaintiff's rights. *Bankers Trust Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 AD2d 384, 385 (1st Dep't 1992). The allegation that Pastreich used the monies collected by the LLC, intended for the benefit of the Trust, for his own personal benefit adequately states a claim, particularly in light of the documentation suggesting that Pastreich used Trust assets to pay personal health and credit card expenses. Contrary to defendant's claim, the fact that the LLC collected the funds pursuant to the Management Agreement does not bar the conversion claim against Pastreich individually, who allegedly took the funds collected by the LLC for his own purposes, as the tort claim against the individual lies even if Pastreich was purportedly acting in the course of official duties. LLC. *Espinosa v Rand*, 24 AD3d 102 (1st Dep't 2005). Nor have defendants established as a matter of law that the claim is time-barred, as issues of fact exist as to whether the alleged conversion is a continuing wrong. The denial of

dismissal is without prejudice to defendants' right to renew the argument in summary judgment or at trial.

The Seventh Cause of Action against Pastreich for Trespass survives dismissal. The theory is that the Management Agreement with the LLC was terminated, yet Pastreich himself has refused to vacate the Poughkeepsie Property and has prevented plaintiffs and their agent from accessing the property under threat of arrest and frivolous litigation, despite plaintiffs' legal ownership of and right to access the Property. While the claim assumes the Court finds the Management Agreement was terminated, and overlaps to a degree with the request for declaratory relief on that point, the allegations suffice to state a claim against Pastreich individually that may yield an award of damages.

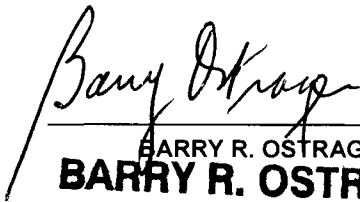
Plaintiffs in the Eighth Cause of Action seek to pierce the corporate veil as to defendant Pastreich to hold him personally liable for the LLC's outstanding debts and wrongdoing. Defendants correctly cite authority for the proposition that "New York does not recognize a separate cause of action to pierce the corporate veil." *Chiomenti Studio Legale, LLC v Prodos Capital Mgt. LLC*, 140 AD3d 635, 636 (1st Dep't 2016), quoting *Fiber Consultants, Inc v Fiber Optek Interconnect Corp.*, 15 AD3d 528, 529 (2d Dep't 2005), lv. dismissed 4 NY3d 882 (2005); see also *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 (1993). Although plaintiffs do not address the *Chiomenti* case, veil-piercing as a theory is well recognized, and *Chiomenti* is distinguishable as the court was reviewing evidence on a summary judgment motion. Here, at the pleadings stage, the allegations suffice to allow plaintiffs to maintain the theory premised on the underlying breach of contract claim against Pastreich's corporation, subject, of course, to defendants' right to challenge the theory on summary judgment or at trial.

Defendants also seek dismissal of the Tenth Cause of Action alleging a conspiracy by defendant Aronson and Pastreich to breach fiduciary duty. It cannot be disputed that Defendant Aronson as a Trustee owed a fiduciary duty to the beneficiaries of the Aronson Trust. Plaintiffs allege that Aronson breached that duty by entering into an agreement with defendant Pastreich to improperly funnel Trust funds from Poughkeepsie Property profits under the pretense that Aronson was being paid a salary when she in fact provided no services. Citing *Oparaji v Yablon*, 126 AD3d 443 (1st Dep't 2015) and other First Department cases, defendants assert that New York Law does not recognize a civil claim for conspiracy. However, civil conspiracy is a cognizable tort when coupled with an underlying claim, which here is the unchallenged Ninth Cause of Action against Aronson for breach of fiduciary duty. Therefore, the Tenth Cause of Action survives dismissal.

Accordingly, it is hereby

ORDERED that defendants' motion pursuant to CPLR 3211(a)(1) and (7) is granted to the extent of severing and dismissing the Third and Fifth Causes of Action and that part of the Fourth Cause of Action that overlaps in time with the existence of a valid Management Agreement, and the motion is otherwise denied. All defendants shall Answer by June 20, 2018, and counsel shall appear in Room 232 for a preliminary conference on June 26, 2018 at 9:30 a.m.

5/30/2018
DATE


BARRY R. OSTRAGER, J.S.C.
BARRY R. OSTRAGER
JSC

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> DO NOT POST		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE