

Kliban v Vishnev
2019 NY Slip Op 30150(U)
January 10, 2019
Supreme Court, Kings County
Docket Number: 509495/2014
Judge: Sylvia G. Ash
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At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of January, 2019.

P R E S E N T:

HON. SYLVIA G. ASH,

Justice.

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YURIY KLIBAN...et. al.,

Plaintiff(s),

**NON-JURY TRIAL
DECISION**

- against -

Index # 509495/2014

**SLAVA VISHNEV, VADIM SHAPIRO, SUSANNA
VISHNEV, AGVD ENTERPRISES CORP., ATLANTIC
OCEAN EAGLE, INC., VICTORIYA KOGAN, and
VIP BAY 29 MEDICAL MANAGEMENT, INC.,**

Defendants,

- and -

VIP 174 BAY 29 MANAGEMENT, INC.,

Nominal Defendant.

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Plaintiff, Yuriy Kliban, commenced this action against Defendants alleging that he was swindled out of \$198,450.00 by individual defendants, Slava Vishnev ("Vishnev") and Vadim Shapiro ("Shapiro"), under the guise of becoming a partial owner of Nominal Defendant VIP 174 Bay 29 Management, Inc. ("VIP"). That instead, Vishnev and Shapiro, along with their respective significant other, used VIP as their personal piggy bank to pay for personal expenses while Plaintiff received nothing in return for his investment.

The trial of this action seeking to recover damages for fraud, aiding and abetting fraud, breach of contract, breach of fiduciary duty, and constructive trust took place before this Court on August 14, 15 and 16, 2018. The parties submitted post-trial briefs/letters at the end of November 2018. The trial was scheduled at a pretrial conference held on May 3, 2018, whereby Vishnev and Shapiro appeared pro se. Previously, all defendants herein were represented by counsel but said counsel moved to be relieved, which was granted by short form order dated February 20, 2018. Defendants were thereafter provided approximately ten weeks to obtain new counsel and appear for

the May 3, 2018 pretrial conference. At the pretrial conference, Vishnev and Shapiro indicated to the Court that Defendants would be proceeding pro se. On the date of trial, Vishnev appeared along with Defendants, Susanna Vishnev ("Susanna") and Victoriya Kogan ("Kogan"). Shapiro failed to appear. The Court was informed by Kogan on or around the date of trial that Shapiro's relative had a medical emergency in the Ukraine and that he had flown there on July 24, 2018. Kogan did not know when Shapiro would return. The Court proceeded with trial and deemed Shapiro to be in default. At the trial's conclusion, the parties were given the opportunity to submit post-trial briefs. The Court has received Plaintiff's proposed findings of fact and memorandum of law as well as letters by all four individual defendants dated November 23, 2018.

Upon review of the testimony and documentary evidence adduced at the bench trial (Plaintiff's Exhibits 1 - 68) and the post-trial submissions, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

Plaintiff is a member of 174 Bay 29th Properties, LLC ("Properties LLC"), an entity that owns real property with two medical offices located at 174 Bay 29th Street in Brooklyn, New York (hereinafter referred to as the "Premises"). The Premises was leased to an entity known as Bay 29th Enterprises Corp. ("Bay Tenant") for a lease term commencing on July 1, 2008 and expiring on June 30, 2013. Pursuant to the Consent to Assignment of Lease dated May 5, 2009, Bay Tenant assigned its lease with Properties LLC to Vishnev and Shapiro. Said document also reflected that Vishnev and Shapiro agreed to pay Properties LLC \$17,050.00 in equal monthly installments of \$1,422.91 for the next twelve months. This sum represented a debt due from Bay Tenant to Properties LLC which Vishnev and Shapiro assumed responsibility for as the successor tenant.

In or around June 2009, Plaintiff approached Shapiro about becoming an investor in his business. Shapiro told Plaintiff that \$200,000.00 would be required to become a 33% owner of VIP, the company set up to manage a medical office at the Premises. Ultimately, Plaintiff agreed to invest \$107,050.00 in exchange for 18% ownership of VIP. At Shapiro's direction, Plaintiff gave Shapiro two cashier checks in the amount of \$30,000.00 each. Both checks were made payable to Defendant, AGVD Enterprises Corp. ("AGVD"). Plaintiff also gave Shapiro \$30,000.00 in cash. The remaining \$17,050.00 "investment" came from the monies owed by Vishnev and Shapiro to Properties LLC pursuant to the aforementioned Consent to Assignment of Lease.

One or two days thereafter, Plaintiff and Vishnev signed a stock purchase agreement dated July 1, 2009 ("SPA") whereby Vishnev, as 100% owner of VIP, agreed to sell to Plaintiff, as purchaser, 36 shares of VIP, constituting 18% of total VIP shares. Vishnev also signed two stock certificates dated July 1, 2009, one reflecting that Vishnev held 164 shares out of 200 common shares of VIP and the other reflecting that Plaintiff held the remaining 36 shares. Plaintiff's name on the stock certificate is misspelled as "Klibman" instead of Kliban.

Properties LLC also entered into a new lease with VIP with a lease commencement date of July 1, 2009 and a monthly rent of \$5,000.00. It is unclear whether this lease agreement was executed simultaneously with the SPA or whether the lease was entered into several days or weeks prior.

A few days after the initial investment, Vishnev told Plaintiff that more money was needed to purchase medical equipment for the business or that the initial investment would be lost. Plaintiff provided Vishnev an additional \$91,400.00 comprised of \$49,900 in cash and three cashiers checks totaling \$41,500.00 made out to Defendant; Atlantic Ocean Eagle, Inc. (hereinafter referred to as "Atlantic Ocean"). Based on the foregoing, Plaintiff insisted that VIP's monthly rent for the Premises be increased to \$10,000.00 to which Vishnev and Shapiro agreed.

After paying the initial lease payment in July 2009, VIP failed to tender monthly rent to Properties LLC. As a result, Properties LLC commenced a nonpayment proceeding to evict VIP. By December 25, 2009, VIP had vacated the Premises. All of the medical equipment, furniture, signs and awning were removed from the Premises and moved to a new location. On or around April 28, 2010, Vishnev formed a new corporation called VIP Bay 29 Medical Management, Inc. ("New VIP") which operated the same medical office business at the new location. The nonpayment proceeding was eventually settled pursuant to a stipulation of settlement. The settlement sum was paid by New VIP.

Susanna, who is Vishnev's wife, owns Atlantic Ocean, a beauty and tanning salon. Kogan, who resides with Shapiro, is the sole shareholder of AGVD, which is in the business of buying and selling cars, automobile parts, watches and construction parts. Neither Susanna nor Kogan ever worked for VIP or New VIP. Neither Atlantic Ocean nor AGVD have any relation to VIP or New VIP.

Susanna received a total of \$7,500.00 from VIP in checks and wire transfers during the period August 1, 2009 through July 30, 2010. Atlantic Ocean received a total of \$145,830.00 from VIP in checks and wire transfers during the same period. AGVD received a total of \$1,500.00 from VIP by check dated January 15, 2010. Vishnev received a total of \$94,444.60 from VIP in checks and wire transfers during the period August 1, 2009 through July 30, 2010. Vishnev also withdrew \$290,028.00 in cash from VIP through ATM and cash withdrawals during the same period.

Vishnev also paid personal expenses from the VIP account. Based on the VIP bank account statements, the VIP account was used to pay for purchases from liquor stores, department stores, jewelry stores, and hotels as well as for residential rent.

Based upon the bank records for New VIP, Atlantic Ocean and AGVD also received funds from New VIP. New VIP also paid for expenses not generally associated with operating a business such as department store purchases, airfare, residential rental payments, and college tuition.

The 2009 and 2010 VIP federal tax returns reflect that there was no compensation of officers, no salaries paid, and no repayment of loans. Similarly, the 2010 and 2011 federal tax returns filed for New VIP reflect that there was no compensation of officers, no salaries paid, and no repayment of loans.

Plaintiff's Memorandum of Law

It is Plaintiff's position that, based upon the foregoing, Vishnev and Shapiro committed fraud against Plaintiff. Specifically, that Vishnev and Shapiro misrepresented to Plaintiff that he would obtain an 18% interest in VIP for \$107,050.00 which would be used to buy medical equipment for VIP. That Vishnev and Shapiro further misrepresented to Plaintiff that, unless Plaintiff invested more money, which Plaintiff did in the amount of \$91,400.00, Plaintiff's initial investment would be lost. Plaintiff further argues that Vishnev and Shapiro knew that these representations were false when made because they never purchased medical equipment after Plaintiff provided his initial investment. Rather, Vishnev testified at his deposition that the sums were paid to AGVD because Vishnev owed Shapiro money. Plaintiff contends that, though he was promised to be an 18% owner of VIP who would receive distributions, he never received a penny from VIP. But that Vishnev and his cohorts collectively reaped hundreds of thousands of dollars from VIP and its successor, New VIP.

Plaintiff also argues that the foregoing establishes that Susanna, Kogan, Atlantic Ocean and

AGVD aided and abetted the commission of fraud by knowing about the fraud, providing substantial assistance, receiving fruits of the fraud by accepting checks payable to entities unrelated to VIP and accepting corporate payments for personal expenses. And that accordingly, these defendants should be held jointly and severally liable for Plaintiff's damages.

Plaintiff also contends that Vishnev is liable to Plaintiff for breach of fiduciary duty in the amount of \$97,074.54 plus interest starting from July 1, 2010. Specifically, that Vishnev withdrew \$290,028.00 in cash from VIP and directed the following payments from the VIP account: (1) \$94,445.00 to himself, (2) \$7,500.00 to Susanna, (3) \$145,830.00 to Atlantic Ocean, and (4) \$1,500.00 to AGVD, all of which total \$539,303.00. Plaintiff asserts that, as an 18% shareholder of VIP, he is entitled to 18% of the total sum distributed which equals \$97,074.54.

Plaintiff also contends that he is entitled to a constructive trust against Susanna for amounts paid to her and to her company, Atlantic Ocean, in the amount of \$41,500.00, as Susanna was unjustly enriched by said payment. In addition, that Atlantic Ocean was further unjustly enriched by VIP's payment to Atlantic Ocean in the amount of \$145,830.00 and by New VIP's payment to Atlantic Ocean in the amount of \$11,000.00, and that Plaintiff is entitled to 18% of the total of these payments from VIP/New VIP which amounts to \$28,229.40 (18% of \$156,830.00). By reason of the foregoing, Plaintiff submits that a constructive trust should be imposed on the amount paid to Atlantic Ocean and Susanna in the total amount of \$69,729.40 (\$41,500.00 plus \$28,229.40) with interest accruing from the date of the last payment, which was October 16, 2012.

Similarly, Plaintiff contends that he is entitled to a constructive trust against Kogan for amount paid to her and her company, AGVD, in the amount of \$60,000.00, as Kogan was unjustly enriched by said payment. In addition, that AGVD was further unjustly enriched by VIP's payment to AGVD in the amount of \$1,500.00 and by New VIP's payment to AGVD in the amount of \$5,700.00, and that Plaintiff is entitled to 18% of the total of these payments from VIP/New VIP which amounts to \$1,296.00 (18% of \$7,200.00). By reason of the foregoing, Plaintiff submits that a constructive trust should be imposed on the amount paid to AGVD and Kogan in the total amount of \$61,296.00 (\$60,000.00 plus \$1,296.00) with interest accruing from the date of the last payment, which was May 27, 2011.

Finally, Plaintiff submits that he has established that New VIP is a mere continuation of VIP on the basis that VIP's assets were merely moved and used by New VIP without any evidence that

New VIP purchased the assets of VIP. And further, that Vishnev remained in control of New VIP, as he had controlled VIP. Plaintiff also argues that all of the foregoing evidence establishes that defendants disregarded corporate structure and formalities and exercised complete domination of the various corporations, which were used as personal piggy banks and to commit fraud against Plaintiff. And that accordingly, the Court should pierce the corporate veils and impose personal liability upon all defendants.

Defendants' Letters

Vishnev's letter to the Court states, in essence, that he paid \$200,000.00 to the owners of Bay Tenant, that the Premises were partially furnished but that he had to invest more money to convert the space into a medical office, and that he borrowed \$100,000.00 from Susanna for construction work and medical equipment, \$41,500.00 of which he has paid back. Vishnev also asserts that Plaintiff gave him money to pay for office construction. Vishnev contends that he did not sell any shares and that the stock certificates are fraudulent.

Susanna's letter to the Court states that she gave her husband, Vishnev \$200,000.00 from HSBC Bank in order for him to buy a half-furnished office at the Premises. And that Vishnev borrowed an additional \$100,000.00 thereafter. She further states that, Plaintiff had an agreement with Vishnev that after the office construction was completed, Vishnev would show Plaintiff all of the receipts for the construction work performed and that Plaintiff would reimburse him.

Shapiro also submitted a letter to the Court, despite defaulting in appearing for the trial, stating that the \$60,000.00 received from Plaintiff by AGVD constituted a repayment for the office construction. Shapiro further states that after Plaintiff reimbursed the construction costs, Plaintiff increased the monthly rent to \$10,000.00 per month.

Kogan's letter to the Court states that she recalls Shapiro informing her that Vishnev owed him money for the office construction and that Plaintiff's check to AGVD was reimbursement for same. Further, that despite Plaintiff's testimony at trial that Plaintiff gave Shapiro money for VIP shares, that Shapiro is not a shareholder of VIP. Kogan states that she has no business relationship with VIP.

Conclusions of Law

"The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages" (*Mitchell v Diji*, 134 AD3d 779, 780 [2d Dept 2015] [*citation omitted*]). The elements of a claim for aiding and abetting fraud are the existence of an underlying fraud, knowledge of the fraud on the part of the aiding and abetting party and substantial assistance by the aiding and abetting party in achieving the fraud (*Matter of Woodson (Clarke)*, 136 AD3d 691, 693 [2d Dept 2016]). "Substantial assistance exists "where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated" (*Stanfield Offshore Leveraged Assets, Ltd. v Metro. Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009]).

Here, Plaintiff established that Vishnev and Shapiro committed a fraud against him. While representing that Plaintiff would become an 18% shareholder of VIP and share in the profits, Vishnev and Shapiro merely used Plaintiff's investment for personal purposes, never intending Plaintiff to become a genuine partner. Vishnev and Shapiro failed to even pay the monthly lease payment for the Premises after the initial signing of the lease. Vishnev and Shapiro's contention that the monies paid to them by Plaintiff constituted reimbursement for office construction at the Premises, rather than the purchase of VIP shares, is uncorroborated by any evidence except their self-serving statements. Further, their position is contradicted by the undisputed fact that they took all of the medical equipment, furniture, signs and awning from the Premises when vacating and used them at the new location.

However, Plaintiff failed to establish that Susanna and Kogan aided and abetted the fraud. There was no evidence that Susanna and Kogan substantially assisted in the fraud by the commission of an affirmative act. The fact that Susanna and Kogan knew of the fraud and financially benefitted from it does not equate to "substantial assistance" as that term is defined under caselaw. Accordingly, Plaintiff's cause of action for aiding and abetting fraud against Susanna and Kogan must be dismissed.

With regards to Plaintiff's claim of breach of fiduciary duty against Vishnev, the Court finds that Plaintiff established the existence of a fiduciary relationship, misconduct by Vishnev, and

damages directly caused by Vishnev's misconduct (*see Kurtzman v Bergstol*, 40 AD3d 588, 590 [2d Dept 2007]). As the majority shareholder of VIP, Vishnev owed a fiduciary duty to Plaintiff, a minority shareholder. Further, Vishnev breached his fiduciary duty to Plaintiff by withdrawing funds for himself which he used for personal expenditures. Vishnev also breached his fiduciary duty by giving corporate funds to his wife, his wife's company, and Kogan's company despite their having no relation to VIP nor ever having provided any services to VIP. Accordingly, Plaintiff is entitled to 18% of VIP's "distributions," as set forth in Plaintiff's memorandum of law, which totals \$97,074.54 plus interest from the date of the last "distribution," which is July 1, 2010.

With regards to Plaintiff's claim for a constructive trust against Susanna, Atlantic Ocean, Kogan, and AGVD for the monies paid to them through VIP, the Court finds that Plaintiff has satisfied the elements to impose a constructive trust. "The ultimate purpose of a constructive trust is to prevent unjust enrichment and, thus, a constructive trust may be imposed when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest" (*Cruz v McAneney*, 31 AD3d 54, 58-59 [2d Dept 2006][internal quotations omitted]). The elements of a cause of action to impose a constructive trust are (1) the existence of a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment (*Quadrozzi v Estate of Quadrozzi*, 99 AD3d 688, 691 [2d Dept 2012]). However, these factors serve only as a guideline and should be applied flexibly (*see Rowe v Kingston*, 94 AD3d 852, 853 [2d Dept 2012]). Thus, courts can and will impose constructive trusts "whenever necessary to satisfy the demands of justice" (*Simonds v Simonds*, 45 NY2d 233, 241 [1978]).

Here, Plaintiff established that, due to the misrepresentations by Vishnev and Shapiro, Plaintiff was induced to make checks directly payable to Atlantic Ocean in the amount of \$41,500.00. Further, the evidence indicates that Atlantic Ocean received payments from VIP, during the relevant time period, totaling \$145,830.00 and from New VIP totaling \$11,000.00 despite Atlantic Ocean having no relation to VIP or New VIP's business. Similarly, Plaintiff established that due to the misrepresentations by Vishnev and Shapiro, Plaintiff was induced to make checks directly payable to AGVD in the amount of \$60,000.00. Further, the evidence indicates that AGVD received payments from VIP in the amount of \$1,500.00 and from New VIP in the amount of \$5,700.00 despite AGVD having no relation to VIP or New VIP's business. Based on the foregoing, a constructive trust is imposed on the amount paid to Atlantic Ocean and Susanna in the amount of

\$69,729.40 plus interest thereon from the date of the last payment, October 16, 2012. And a constructive trust is imposed on the amount paid to AGVD and Kogan in the amount of \$61,296.00 plus interest thereon from the date of the last payment, May 27, 2011.

Finally, the Court finds that Plaintiff established that New VIP was a mere continuation of VIP and is therefore liable for the debts of its predecessor (*see Schumacher v Richards Shear Co.*, 59 NY2d 239, 244-45 [1983]). There was no evidence presented that New VIP ever purchased the assets of VIP. Rather, VIP's assets were merely moved to a new location and Vishnev remained New VIP's chief executive officer and, according to New VIP's tax returns, its sole shareholder. In addition, Plaintiff established that the corporate veil should be pierced for VIP, New VIP, Atlantic Ocean and AGVD and that the individual defendants herein should be held personally liable. It is clear that the individual defendants abused the corporate form by disregarding any corporate structure or formality and using the corporate account to pay for all kinds of non-business expenses including vacations, residential rent, college tuition and luxury retail goods. Further, Atlantic Ocean and AGVD were merely used to accept Plaintiff's money, as there was no evidence presented that these monies were exchanged in furtherance of VIP's business. The individual defendants did not treat their corporations as entities separate and apart from themselves but, rather, used them for their own personal purposes and benefit. As such, the individual defendants must be held liable for the wrong committed against Plaintiff by their respective corporation.

Accordingly and for the reasons set forth above, the Court finds in favor of Plaintiff. Plaintiff shall settle judgment on notice to the Defendants in accordance with this decision and submit such judgment directly to chambers.

This constitutes the Decision and Order of the Court.

E N T E R,



SYLVIA G. ASH, J.S.C.