

<b>Vashovsky v Zablocki</b>
2022 NY Slip Op 34334(U)
December 21, 2022
Supreme Court, Kings County
Docket Number: Index No. 507373/21
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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CHANA VASHOVSKY, individually and  
derivatively on behalf of  
HUDSON VALLEY NY HOLDINGS LLC,

Plaintiffs, Decision and Order

-against-

Index No. 507373/21

YOSEF ZABLOCKI and NATIONAL JEWISH  
CONVENTION CENTER,

Defendants,

And

December 21, 2022

HUDSON VALLEY NY HOLDINGS LLC,

Nominal Defendant,

-----x  
YOSEF ZABLOCKI and NATIONAL JEWISH  
CONVENTION CENTER,

Counterclaim Plaintiffs,

-against-

CHANA VASHOVSKY and EPHRAIM VASHOVSKY,

Counterclaim-Defendants,

-----x  
YOSEF ZABLOCKI,

Third-Party Plaintiff,

-against-

ELLIOT ZEMEL, EPHRAIM VASHOVSKY, ZVG @  
PALISADES LLC., and VASCO VENTURES LLC,

Third-Party Defendants,

-----x  
PRESENT: HON. LEON RUCHELSMAN

The third party defendants have moved pursuant to CPLR §2221 seeking to reargue a portion of the decision and order dated November 7, 2022 which denied the third party defendant's motion to dismiss two causes of action of the third party complaint. The third party plaintiff has opposed the motion. Papers were submitted by the parties and after reviewing all the arguments

this court now makes the following determination.

In the prior decision the court denied the request seeking to dismiss causes of action for the breach of a fiduciary duty and the breach of the covenant of good faith and fair dealing. The third party defendants seek to reargue those determinations.

Specifically, the court held that there were questions of fact whether Ephraim Vashovsky, as a representative of Chana Vashovsky owed any fiduciary duty.

First, there is little merit to the argument a pleading may not incorporate other pleadings in the same action. The case of Card v. Budini, 29 AD2d 35, 285 NYS2d 734 [3<sup>rd</sup> Dept., 1967] dealt with the incorporation of pleadings from a different action and in any event held that such error did not render the cause of action deficient. Further, Angelis v. Town of New Baltimore, 18 Misc3d 1141(A), 859 NYS2d 892 [Supreme Court Greene County 2005] the court again noted that it is "neither good practice nor proper technical procedure" to incorporate pleadings from other cases, however, held that "it is also the case in New York that civil pleadings must be liberally construed and defects must be ignored if a substantial right is not prejudiced" (id). Considering the history of this case, surely there can be no prejudice to the third party defendant Vashovsky by incorporating other pleadings from this very case.

The third party defendants have not presented any new

evidence or any new arguments that there are no questions of fact Mr. Vashovsky may have maintained a fiduciary duty to the third party plaintiff which he may have breached. This is particularly true when considering the contract entered into between Ephraim Vashovsky and Yossi Zablocki as will be discussed below.

Further, in an affidavit of Ephraim Vashovsky dated January 26, 2022 [NYSCEF Doc. No. 85] Mr. Vashovsky stated that "for years, as Plaintiff's agent, I have assisted, my wife, Mrs. Vashovsky and Mr. Zablocki with the general business dealings of HVNY and also helped generate business and foster potential client relations at the HVR, to the extent allowed by Mr. Zablocki" (id at ¶4). Furthermore, Chana Vashovsky submitted an affidavit dated January 27, 2022 [NYSCEF Doc. No. 84]. Her affidavit states that "since HVNY's inception and at my request, my husband, Ephraim Vashovsky ("Ephraim"), has acted as my agent and nominee with respect to the operation of HVNY. Accordingly, Ephraim has coordinated the lion's share of the communications with Defendants Yosef Zablocki and the National Jewish Convention Center on my behalf" (id., at ¶2). Thus, both the plaintiff and Mr. Vashovsky have admitted Ephraim's role as an agent of the plaintiff. Therefore, the motion seeking to reargue the denial of the dismissal of this cause of action is denied.

Turning to the motion seeking to reargue the denial of the dismissal of the cause of action alleging a breach of the implied

covenant of good faith and fair dealing, the third party defendants argue any contract entered between Ephraim Vashovsky and Yossi Zablocki cannot be enforceable since it was superseded by the HVNY operating agreement which indicated that "this Agreement sets forth the entire agreement among the Members and supersedes all prior discussions and understandings in respect of the Company or of this Agreement, and this Agreement shall not be modified or amended, except as provided in Section 9.8 hereof" (see, Amended and Restated Operating Agreement of Hudson Valley NY Holdings LLC, §9.11 [NYSCEF Doc. No. 3]). It is well settled that a merger clause which states the agreement represents the entire understanding between the parties is "to require full application of the parole evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing" (Primex International Corp., v. Wal-Mart Stores Inc., 89 NY2d 594, 657 NYS2d 385 [1997]). However, it is clearly noted that Ephraim Vashovsky did not sign the HVNY operating agreement at all, thus, the contract between Vashovsky and Zablocki is independent of and creates other duties and obligations that are outside the operating agreement. The contract does state that "Yossi Zablocki and Ephraim Vashovsky will each be 50/50 partners in above LLC" (see, Exhibit 1A [NYSCEF Doc. No. 283]) and that such clause may have been superseded by the operating agreement executed by Chana

Vashovsky. Indeed, it is difficult to understand how Chana Vashovsky can execute a document and thereby supercede a contract entered into by her husband, Ephraim. This issue may cast doubt upon the contract and the operating agreement since they conflict with each other in key respects. However, for purposes of this motion, the contract also states that Ephraim Vashovsky will be responsible for an additional \$350,000, that Ephraim Vashovsky will be responsible for "closing costs of attorney fees, points on mortgage, title insurance, and escrow money for taxes/insurance" and that Ephraim Vashovsky and Yossi Zablocki will split a \$200,000 manager salary (id). The third party defendants insist that "any obligation of good faith and fair dealing that might have been imposed upon Mr. Vashovsky by the April 10 document as a '50/50' partner in HVNY was obviously extinguished by the HVNY Operating Agreement which provides, in substance, that Mrs. Vashovsky - rather than Mr. Vashovsky - is Zablocki's 50/50 partner in HVNY" (see, Memorandum in Support, page 11 [NYSCEF Doc. No. 336]). However, the contract and the operating agreement were not executed by the same individuals, thus, the contract cannot be superseded by the operating agreement. Indeed, the argument that the contract was superseded undermines the argument that Ephraim Vashovsky had nothing whatsoever to do with the hotel and therefore, cannot possibly be found to have breached any fiduciary duties. It is contradictory


to argue Ephraim Vashovsky had no involvement in the hotel and all and yet acknowledge he signed a contract with Yossi Zablocki accepting duties and obligations in the very same hotel. The existence of this contract further supports the argument that Ephraim Vashovsky was quite involved in the hotel and supports the conclusion there are questions of fact whether he breached any fiduciary duty as well as the covenant of good faith and fair dealing.

Therefore, based on the foregoing, the motion seeking reargument is denied.

So ordered.

ENTER:

DATED: December 21, 2022  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC