

Freidman v Yakov
2011 NY Slip Op 34039(U)
October 19, 2011
Sup Ct, New York County
Docket Number: 650106/11
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN

PART 3

Justice

Index Number : 650106/2011
 FREIDMAN, NAUM
 vs
 FAYENSON, YAKOV A/K/A JACOB
 Sequence Number : 001
 DISMISS

INDEX NO. 650106/11
 MOTION DATE 6/29/11
 MOTION SEQ. NO. 001
 MOTION CAL. NO. _____
 Motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
 Answering Affidavits — Exhibits _____
 Replying Affidavits _____

PAPERS NUMBERED	
_____	1
_____	2
_____	3


Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 10-19-11


 HON. EILEEN BRANSTEN *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 3

-----X

NAUM FREIDMAN,
Plaintiff,

INDEX NO. 650106/11
MOTION SEQ. NO. 001
MOTION DATE: 6/29/11

-against-

YAKOV a/k/a JACOB FAYENSON,
JACOB FAYENSON REVOCABLE TRUST,
Defendants,

and

KORM REALTY INC.,
as Nominal Defendant.

-----X

JACOB FAYENSON REVOCABLE TRUST,
Counterclaim-Plaintiff,

-against-

NAUM FREIDMAN, EVGENY FREIDMAN,
TENENBAUM & BERGER, LLP,
Counterclaim-Defendants,

and

KORM REALTY INC.,
as Nominal Defendant.

-----X

BRANSTEN, J.:

In this derivative action, counterclaim defendants Naum Freidman (“plaintiff”), Evgeny Freidman (“Evgeny”), and Tenenbaum & Berger, LLP (the “Firm”, and, together, counterclaim defendants) move: (1) pursuant to CPLR 3019 (d) and 3211 (a) (1), (6), (7), and (8), to dismiss the verified counterclaims; and (2) pursuant to 22 NYCRR 130-1.1,

for an award of costs and sanctions. Defendant Yakov a/k/a Jacob Fayenson (“Fayenson”) and defendant/counterclaim plaintiff Jacob Fayenson Revocable Trust (the “Trust”) cross-move, pursuant to 22 NYCRR 130-1.1, for sanctions.

BACKGROUND

Plaintiff and the Trust are each 50% shareholders in nominal defendant Korm Realty Inc. (“Korm”). Fayenson is also Korm’s president and co-director, whereas plaintiff is Korm’s vice president and co-director. Fayenson is the trustee of the Trust. It appears that there is no partnership or shareholder agreement between plaintiff and the Trust with respect to Korm. Evgeny is plaintiff’s son.

Korm owns and operates a three-tenant commercial building located at 33-01 37th Avenue, Long Island City, New York (the “Premises”). The current tenants are non-parties Mike Auto Repair, Chelsea II Autobody a/k/a I. K. Classic Auto Body, and Eduard R. Yagudayev a/k/a Miami Hand Car Wash (collectively, the “Tenants”). The rental payments from the Tenants are Korm’s sole source of income. It is alleged that Fayenson collected rent payments and gave plaintiff his share so that plaintiff and the Trust received approximately \$3,800 each in profits every month. Counterclaim, ¶ 33.

In the complaint, plaintiff alleges that Fayenson, as a trustee of the Trust holding a 50% ownership interest in Korm, breached a fiduciary duty to plaintiff by failing to account for funds, withholding rents and allowing the Premises to fall into disrepair. Plaintiff also seeks to have Fayenson account to him for Korm’s income, assets and expenditures.

In the answer, the Trust counterclaims against plaintiff, Evgeny and the Firm. The Trust alleges that Evgeny and Fayenson share a tense relationship, and, at some point, Evgeny began discouraging the Tenants from paying rent to Fayenson. In December 2009, plaintiff allegedly closed Korm's corporate bank accounts, appropriated the funds to himself and failed to communicate with Fayenson or to account to him or the Trust for the funds seized.

Plaintiff allegedly hired the Firm and, in December 2009 the Firm commenced eviction actions on behalf of Korm against all three Tenants. The Firm moved in Queens County Housing Court, under L&T Index Nos. 085687/09, 085688/09 and 085689/09 (the "Eviction Actions"), for the alleged failure to pay rent since February 2009. Fayenson, as Korm's president, allegedly did not authorize either Plaintiff or the Firm to commence the Eviction Actions.

The Trust claims that the Eviction Actions were baseless because: (1) until November 2009, the Tenants made their rent payments to Fayenson who, in turn, allegedly gave plaintiff his share of rent payments collected; and (2) the Tenants stopped paying apparently because Evgeny urged them to do so. Fayenson allegedly informed the Firm in writing that the Eviction Actions were unfounded and injurious to Korm.

In February 2010, the Eviction Actions were settled, pursuant to stipulations that provided that the Tenants were current on their rent through December 31, 2010¹ and that

¹ At an oral argument, the Firm represented that the stipulations contain a typographical error regarding this date, and that the correct year was 2009 (*see* 06/14/11 Oral Arg. Tr., at 9).

future rent would be deposited into an escrow account of the Tenants' attorney, non-party Roman V. Gambourg, Esq. *See* 03/22/11 Berger Aff., Ex. C. The Tenants' attorney allegedly confirmed that no rent payments were made to settle the Eviction Actions. It appears that since the settlement, the Tenants have not deposited any money into the escrow account as rent payments. *See* 06/14/11 Oral Arg. Tr., at 17.

In 2009, by order to show cause, Fayenson commenced an action in Supreme Court, Suffolk County, Index No. 49765/09, against plaintiff and Evgeny, seeking injunctive relief. Fayenson sued as a director of non-party Grom Realty Inc. ("Grom") and Korm, as a trustee of the Trust, and as a shareholder of Grom and of Korm.

On January 8, 2010, the court (Pines, J.) in the Suffolk County action issued a temporary restraining order (the "TRO") against plaintiff and Evgeny, enjoining and restraining them from taking any action on behalf of Grom and/or Korm, except in the ordinary course of business. *See* 03/22/11 Berger Aff., Ex. F. Pursuant to a court order dated April 14, 2010, Fayenson's motion for injunctive relief, brought by the order to show cause, was denied for lack of personal jurisdiction due to improper service, and the TRO was vacated. *See* 03/22/11 Berger Aff., Ex. D. At an oral argument in the instant matter, the Firm represented that the Suffolk County Action had been dismissed. *See* 06/14/11 Oral Arg. Tr., at 9, 10.

On these facts, Fayenson, on behalf of Korm, interposed the following counterclaims: (1) against plaintiff for breach of fiduciary duty to Korm; (2) against the

Firm for breach of fiduciary duty to Korm; (3) against the Firm for legal malpractice; (4) against the Firm and Evgeny for aiding and abetting plaintiff's breach of fiduciary duty; (5) against all counterclaim defendants for tortious interference with contract; and (6) against the Firm for violation of the Judiciary Law Section 487.

On behalf of the Trust, Fayenson interposed two counterclaims: (1) against plaintiff for breach of fiduciary duty to the Trust; and (2) against the Firm and Evgeny for aiding and abetting plaintiff's breach of fiduciary duty.

Counterclaim defendants now move to dismiss the counterclaims and seek an award of costs and sanctions against Fayenson, the Trust and their counsel, Val Mandel, P.C. The Trust cross-moves for sanctions. At an oral argument, held on June 14, 2011, counsel for the Trust withdrew the cross motion for sanctions. *See* 06/14/11 Oral Arg. Tr., at 21. Accordingly, the court will only consider counterclaim defendants' motion.

DISCUSSION

A motion to dismiss, pursuant to CPLR 3211 (a) (1), "may be appropriately granted only where 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 N.Y.2d 314, 326 (2002).

On a motion to dismiss, pursuant to CPLR 3211 (a) (7), the court "assumes the truth of the complaint's material allegations and whatever can be reasonably inferred

therefrom [citation omitted]. The motion should be denied if ‘from [the pleading’s] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law.’” *McGill v. Parker*, 179 A.D.2d 98, 105 (1st Dep’t 1992), quoting *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977).

CPLR 3211 (a) (6) provides a ground for dismissal of a counterclaim where “it may not properly be interposed in the action.”

CPLR 3211 (a) (8) provides for dismissal of a cause of action where “the court has not jurisdiction of the person of the defendant.”

I. Counterclaims on Behalf of Korm

Counterclaim defendants argue that the first six counterclaims, asserted on behalf of Korm, must be dismissed because plaintiff did not assert any claims against Korm in the main action.

The issue is the nature of this action. It is undisputed that plaintiff and the Trust are each 50% shareholders, co-directors, and officers of Korm.

[W]here there are only two stockholders each with a 50% share, an action cannot be maintained in the name of the corporation by one stockholder against another with an equal interest and degree of control over corporate affairs; the proper remedy is a stockholder’s derivative action.

Executive Leasing Co. v. Leder, 191 A.D.2d 199, 200 (1st Dep’t 1993); *see also L.W.*

Kent & Co. v. Wolf, 143 A.D.2d 813, 814 (2d Dep’t 1988).

“[A] shareholders’ derivative suit seeks to vindicate a wrong done to the corporation through enforcement of a corporate cause of action,” and “any recovery obtained is for the benefit of the injured corporation.” *Glenn v. Hoteltron Sys.*, 74 N.Y.2d 386, 392 (1989); *see also Wolf v. Rand*, 258 A.D.2d 401, 403 (1st Dep’t 1999) (in a derivative action, “the claims belong to the corporation”).

In the main action, plaintiff alleges that the Trust failed to account for funds, withheld rents and allowed the Premises to fall into disrepair. Complaint, ¶ 18. Plaintiff “was injured only to the extent that he was entitled to share in those profits[, and h]is injury was ... derivative, not direct.” *Glenn*, 74 N.Y.2d at 392. Therefore, this is a derivative action, and all claims, as well as any potential recovery, belong to Korm.

Just as plaintiff may assert claims only derivatively, the Trust may also assert counterclaims only derivatively. As a result, the last two counterclaims, asserted by the Trust for damages that counterclaim defendants caused it, do not lie, because they are not derivative in nature. *See Executive Leasing Co.*, 191 A.D.2d at 200. Accordingly, the counterclaims asserted directly by the Trust for breach of fiduciary duty as against plaintiff and for aiding and abetting breach of fiduciary duty as against the Firm and Evgeny are severed and dismissed.

Counterclaim defendants further argue that the counterclaims against the Firm and Evgeny have no bearing on the counterclaims asserted against plaintiff, in violation of CPLR 3019. They point out that the counterclaims against the Firm and Evgeny pertain

to the Eviction Actions, whereas the counterclaim against plaintiff is for breach of fiduciary duty based on taking corporate monies.

Pursuant to CPLR 3019 (a), defendant may assert counterclaims against “a plaintiff and other persons alleged to be liable.” *See Mamunes v. Szczepanski*, 70 A.D.2d 684, 684 (3d Dep’t 1979). When the counterclaim is against a third party, the issue is whether it “is, in some measure, related to the main action, or its outcome would affect the plaintiff in any way.” *Id.* Here, the Trust alleges that the Firm and Evgeny, together with plaintiff, either encouraged the Tenants to stop making rent payments or secured a settlement, as part of the Eviction Actions, which provides that no rent payments are made to Korm. The Trust’s claims against the Firm and Evgeny are related to the main action and would affect plaintiff. Hence, these counterclaims are proper under CPLR § 3019. *See Mamunes*, 70 A.D.2d at 684.²

1. First Counterclaim

The first counterclaim alleges that plaintiff, as vice president and a director of Korm, breached his fiduciary duty to the corporation.

It is undisputed that plaintiff, as a director and an officer, owed a fiduciary duty to Korm. *See, e.g., Global Mins. & Metals Corp. v. Holme*, 35 A.D.3d 93, 98 (1st Dep’t

² The court notes that a third-party derivative action by the Trust against the Firm and Evgeny would not be appropriate here, because the Trust does not claim that the Firm or Evgeny is liable to it for all or part of plaintiff’s derivative claims against the Trust. *See CPLR § 1007; see also Galasso, Langione & Botter, LLP v. Liotti*, 81 A.D.3d 880, 883 (2d Dep’t 2011) (a third-party defendant’s liability is based on indemnity or contribution).

2006]). “This is a sensitive and inflexible rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary’s personal interest possibly conflicts with the interest of those owed a fiduciary duty.” *Id.*

The Trust alleges that, in December 2009, plaintiff unilaterally: (1) closed corporate accounts, appropriated all funds and failed to account for them; and (2) caused the allegedly baseless Eviction Actions to be commenced, which resulted in a stipulation that precludes rent payments from flowing to Korm. Counterclaims, ¶¶ 16-18. The Trust also claims that the settlement stipulations can be construed as allowing the Tenants not to pay rent for a whole year. *See* 06/14/11 Oral Arg., at 15.

Plaintiff has not disputed the allegation that he appropriated and failed to account for corporate funds. Plaintiff’s only argument is that he, as a 50% owner of Korm, was entitled to commence the Eviction Actions. Plaintiff, however, has failed to offer any evidence that would counter the allegation that the Tenants were making rent payments, and that, therefore, the Eviction Actions were baseless as well as injurious to Korm. Accordingly, this counterclaim survives.

2. Second Counterclaim

This counterclaim alleges that the Firm breached a fiduciary duty to Korm as a result of commencing the Eviction Actions and entering into settlement agreements, all of which were damaging to Korm. Counterclaims, ¶¶ 44-45.

It is undisputed that the Firm, as Korm's attorney, owed a fiduciary duty to Korm. *See, e.g., Graubard Mollen Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112, 118 (1995) ("an attorney stands in a fiduciary relation to the client").

"The duty to deal fairly, honestly and with undivided loyalty superimposes onto the attorney-client relationship a set of special and unique duties, including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the lawyer's." *Matter of Cooperman*, 83 N.Y.2d 465, 472 (1994).

Assuming the facts as pleaded to be true, a claim that the Firm: (1) was hired by plaintiff without the Trust's consent to represent Korm; (2) instituted the Eviction Actions when the Tenants were making rent payments; (3) entered into questionable settlement agreements that provide for rent payments to be deposited into an escrow account and without a mechanism for releasing the funds to Korm, except by a court order; and (4) consented to institute the Eviction Actions and entered into the settlements in order to deprive the Trust of its share of the corporate profits would constitute a valid claim for breach of fiduciary duty. *See Matter of Cooperman*, 83 NY2d at 472.

The settlement stipulations and Suffolk County Supreme Court orders, which the Firm offers in support of its motion, do not utterly refute the allegations such that they "conclusively establish[] a defense as a matter of law." *See Goshen*, 98 N.Y.2d at 326. Therefore, this counterclaim survives.

3. Third Counterclaim

This counterclaim alleges that the Firm committed legal malpractice.

“To sustain a cause of action for legal malpractice, ... a party must show that an attorney failed to exercise the reasonable skill and knowledge commonly possessed by a member of the legal profession.” *Arnav Indus., Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner*, 96 N.Y.2d 300, 303-304 (2001).

The tripartite test governing the establishment of a prima facie case for legal malpractice includes sufficient allegations that the attorneys were negligent, that their negligence was the proximate cause of the plaintiff's damages, and that the plaintiff suffered actual damages as a direct result of the attorneys' actions.

Plentino Realty v. Gitomer, 216 A.D.2d 87, 88 (1st Dep't 1995) (internal quotation marks and citation omitted).

As previously discussed, the Trust alleges that: (1) the Firm was negligent in commencing and settling baseless Eviction Actions; (2) the Firm's negligence was the proximate cause of Korm's damages; and (3) as a result, Korm suffered actual damages by not receiving rent payments. The documentary evidence offered by the Firm, in the form of the settlement stipulation and Suffolk County Supreme Court orders, does not establish a conclusive defense as a matter of law. *See Goshen*, 98 N.Y.2d at 326. Accordingly, this counterclaim survives as well.

4. Fourth Counterclaim

In the fourth counterclaim, the Trust alleges that the Firm and Evgeny aided and abetted plaintiff's breach of fiduciary duty to Korm.

"A cause of action [alleging the] aiding and abetting [of a] breach of fiduciary duty merely requires a prima facie showing of a fiduciary duty owed to plaintiff . . . a breach of that duty, and defendant's substantial assistance . . . in effecting the breach, together with resulting damages." *Monaghan v. Ford Motor Co.*, 71 A.D.3d 848, 850 (2d Dep't 2010) (internal quotation marks and citation omitted). "Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur." *Id.* (quotation marks and citation omitted).

The Trust alleges that Evgeny encouraged the Tenants to withhold their rent payments from Korm. Counterclaims, ¶¶ 13-15. The Trust further alleges that the Firm assisted plaintiff in commencing the allegedly baseless Eviction Actions and entering into the bogus settlement stipulations. Counterclaims, ¶¶ 17-30. The documentary evidence, consisting of the settlement stipulations and the court orders, does not establish a conclusive defense as a matter of law. *See Goshen*, 98 N.Y.2d at 326. Accordingly, this counterclaim survives as well.

5. Fifth Counterclaim

In this counterclaim, the Trust alleges that counterclaim defendants tortiously interfered with the lease agreements between Korm and the Tenants.

The tort of ... interference with contractual relations[] consists of four elements: (1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff.

Kronos, Inc. v. AVX Corp., 81 N.Y.2d 90, 94 (1993); see also *White Plains Coat & Apron Co., Inc. v. Cintas Corp.*, 8 N.Y.3d 422, 426 (2007). "[T]he plaintiff must allege that the contract would not have been breached 'but for' the defendant's conduct." *Washington Ave. Assoc. v. Euclid Equip.*, 229 A.D.2d 486, 487 (2d Dep't 1996).

It is undisputed that the Tenants were obligated to make monthly rent payments to Korm and that all three counterclaim defendants knew about the Tenants' obligation to Korm. The Trust alleges that counterclaim defendants encouraged the Tenants to stop paying rent to Korm, commenced the Eviction Actions and reached settlement agreements with the Tenants that precluded Korm from collecting rent payments. The Trust also claims that the settlement stipulations can be construed as allowing the Tenants not to pay rent for a whole year. These allegations state a cause of action for tortious interference with an existing contract. See *Kronos, Inc.*, 81 N.Y.2d at 94. The aforementioned documentary evidence offered by the Firm does not establish a conclusive defense as a matter of law. See *Goshen*, 98 N.Y.2d at 326. Accordingly, this counterclaim survives as well.

6. Sixth Counterclaim

In the sixth counterclaim, the Trust alleges that the Firm violated Judiciary Law Section 487.

Judiciary Law section 487, in relevant part, provides:

An attorney or counselor who:

1. [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party ...

[i]s guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

Judiciary Law § 487 (1). “[S]ection 487 of the Judiciary Law provides for a cause of action against an attorney where the alleged deceit or collusion with the intent to deceive any party, occurred in a pending judicial proceeding.” *Singer v. Whitman & Ransom*, 83 A.D.2d 862, 863 (2d Dep’t 1981); *see also Savattere v. Subin Assoc.*, 261 A.D.2d 236, 236-237 (1st Dep’t 1999). However, “civil relief and the imposition of treble damages is warranted only where the ... attorney has engaged in a chronic, extreme pattern of legal delinquency.” *Schindler v. Issler & Schrage*, 262 A.D.2d 226, 228 (1st Dep’t 1999) (internal quotation marks and citation omitted).

The Trust alleges that the Firm violated Judiciary Law Section 487, “by commencing, continuing, and fraudulently settling” the Eviction Actions. Counterclaims, ¶ 66. The Firm is alleged to have: (1) agreed to represent Korm without Fayenson’s authorization; (2) proceeded with the Eviction Actions after Fayenson informed the Firm

that the actions were baseless; and (3) entered into the bogus settlement agreements in violation of the TRO issued by the Suffolk County Supreme Court. *See* Counterclaims, ¶¶ 21-30; *see also* 03/22/11 Berger Aff., Exs. C, D, F. The Trust has stated a cause of action for violation of Judiciary Law Section 487, and the aforementioned documentary evidence offered by the Firm does not establish a conclusive defense as a matter of law. *See Goshen*, 98 N.Y.2d at 326. Accordingly, this counterclaim survives as well.

II. Punitive Damages

Counterclaim defendants claim that the Trust's request for punitive damages is not warranted.

The Trust seeks punitive damages: (1) against plaintiff, for breach of fiduciary duty; (2) against the Firm, for breach of fiduciary duty and aiding and abetting breach of fiduciary duty; and (3) against Evgeny, for aiding and abetting breach of fiduciary duty. *See* Counterclaims, ad damnum clause, at 19-20.

“[A] private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally.” *Rocanova v. Equitable Life Assur. Socy. of U.S.*, 83 N.Y.2d 603, 613 (1994).

Here, the aforementioned causes of action pled by the Trust may establish that counterclaim defendants' conduct was egregious enough to warrant the imposition of punitive damages. *See id.* Specifically, the Trust alleges that plaintiff and the Firm:

(1) commenced baseless Eviction Actions, misrepresenting to court that the Tenants were not making rent payments, and (2) entered into settlements pursuant to which rent payments are diverted away from Korm and by which the Tenants were possibly allowed not to pay rent for a year. As to Evgeny, he allegedly encouraged rent-paying Tenants to violate their obligations to Korm.

However, the conduct alleged is not directed at the public as a whole, but at particular parties in this case. The claim for punitive damages is therefore dismissed.

Rocanova v. Equitable Life Assur. Socy. of U.S., 83 N.Y.2d at 613.

II. Personal Jurisdiction Over Evgeny

Counterclaim defendants assert that the court lacks personal jurisdiction over Evgeny because, as of the date of their motion, he was not served with a summons and the answer with the counterclaims.

CPLR § 3019, in relevant part, provides:

[w]here a person not a party is alleged to be liable a summons and answer containing the counterclaim or cross-claim shall be filed, whereupon he or she shall become a defendant. Service upon such a defendant shall be by serving a summons and answer containing the counterclaim or cross-claim.

CPLR § 3019 (d); *see also State of New York v. International Asset Recovery Corp.*, 56 A.D.3d 849, 854 (3d Dep't 2008). CPLR § 3012 (a) provides that “[a] subsequent pleading asserting new or additional claims for relief shall be served upon a party who has not appeared in the manner provided for service of a summons.” *See, e.g., Linzer v.*

Bal, 184 Misc. 2d 132, 137 (Civ. Ct. NY County 2000). Article 3 of the CPLR provides for the methods of service of a summons. *See Linzer*, 184 Misc. 2d at 137. Just as “CPLR 306-b[] requires filing of proof of service within 120 days of filing the original summons of an action,” “fil[ing of] proof of service of the counterclaim papers [should be done] in a similar manner and within a similar time.” *Weinstein-Korn-Miller*, NY Civ. Prac. ¶ 19.11 (3d ed.).

Court records indicate that the answer with counterclaims as well as a supplemental summons for Evgeny were filed with the County Clerk’s office on March 2, 2011. There is no allegation that the answer was interposed or filed untimely. Counterclaim defendants’ instant motion was filed on March 22, 2011. Court records further indicate that three days later, on March 25, 2011; the summons and the answer with the counterclaims were served on Evgeny’s housekeeper. 03/31/11 Bozarth Aff. The same day, these papers were mailed to what appears to be Evgeny’s home address. *Id.* An affidavit of service was filed with the County Clerk’s office on April 7, 2011. *Id.* Accordingly, the filing of proof of service was completed within 120 days of the filing of the supplemental summons. Therefore, Evgeny was timely and properly served, *see* CPLR §§ 3019, 3012 (a), 308 (2)), and the court has personal jurisdiction over him.

In light of the court’s determination, the request by counterclaim defendants for an award of costs and sanctions is denied.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Jacob Fayenson Revocable Trust's cross-motion was withdrawn by the movant at oral argument on June 14, 2011, and is therefore denied as moot; and it is further

ORDERED that the motion of counterclaim defendants to dismiss the counterclaims is granted only to the extent that the last two counterclaims (styled as causes of action) asserted directly by Jacob Fayenson Revocable Trust against Naum Freidman for breach of fiduciary duty and against Evgeny Freidman and Tenenbaum & Berger, LLP for aiding and abetting breach of fiduciary duty and the claim for punitive damages is dismissed, and the motion is otherwise denied; and it is further

ORDERED that counterclaim defendants are directed to serve and file a reply within 20 days of service upon them of a notice of entry of this decision and order.

This constitutes the decision and order of the court.

Dated: New York, New York
October 19, 2011

ENTER


Hon. Eileen Bransten, J.S.C.