Kirtchakov v Lyubarsky
2013 NY Slip Op 32143(U)
September 9, 2013
Supreme Court, Kings County
Docket Number: 500320/2010
Judge: Carolyn Demarest
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

At Commercial Division Part 1, 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 6th day of September, 2013.

PRESENT:
HON. CAROLYN E. DEMAREST,
Justice.

---X

IGOR KIRTCHAKOV, individually and derivatively on behalf of Grove Construction & Development, LLC,

Plaintiff,

DECISION

- against -

VLAD LYUBARSKY, ALEX TUKMANIAN, GROVE CONSTRUCTION & DEVELOPMENT, LLC, DOWNTOWN REAL PROPERTIES LLC, DOWNTOWN GROVE STREET PARTNERS LLC and 350 GROVE STREET LLC,

Index No. 500320/2010

Defendants.

---X

DOWNTOWN REAL PROPERTIES, LLC,

Plaintiff,

- against -

Third-party
Index No.-75296/2011

IGOR KIRTCHAKOV and INNA DASHKEVICH,

Defendants.

---X

Three actions, brought by plaintiff derivatively and on his own behalf against the various defendants based upon his relationships with defendants Lyubarsky and Tukmanian, concerning multiple limited liability companies which were formed for the purchase and development of real estate, were tried before this court over a period of three weeks in March, 2013. The first action, *Kirtchakov, Individually and on behalf of 60/1 Central Avenue Partners, LLC v Downtown Real*

Properties, LLC, Index Number 500209/2010, was dismissed at the close of plaintiff's case for failure to make out a prima facie case; however, a purported third-party action, captioned *Downtown Real Properties, LLC v Igor Kirtchakov*, which had been interposed in that action under Index Number 75296/2011 against plaintiff and his wife, Inna Dashkevich, to recover payment upon a promissory note, given in consideration of Downtown Real Properties's (DRP) construction of a home for the personal use of Kirtchakov and Dashkevich at 1258 Briar Way in Fort Lee, New Jersey, was severed and remains to be decided. A second action, *Kirtchakov, Individually and Derivatively on behalf of IBK Enterprises, Inc, v Lyubarsky,* Index Number 500256/2010, together with related third and fourth party actions, was dismissed at the close of the evidence. Upon a third action, *Kirtchakov, Individually and Derivatively on behalf of Grove Construction & Development, LLC v Lyubarsky*, Index Number 500320/2010, decision was reserved at the close of trial. Post-trial briefs have now been received and the following constitutes the decision of the court.

Action on the Note

The four-page Note, which is the predicate for the purported third party action by DRP, was executed by Kirtchakov and Dashkevich on October 31, 2003, and provides for payment of the principal sum of $400,000, without interest, "from Igor Kirchakov's[sic] part of the profits of IBK Construction Co" "within twenty-four (24) months of makers closing on the house". The Note further contains an unconditional promise to repay the principal sum, regardless of the profitability of IBK, and the promise to sell the house in order to satisfy the debt if not otherwise repaid within the time specified, stated to be "of the essence". The Note further contains a waiver of presentment, demand or notice of any kind. While plaintiff Kirtchakov does not

[* 3]

dispute the making of the Note, and his wife Dashkevich admitted the execution of the Note in her answer and did not appear at trial to contest the obligation, Kirtchakov contends it was paid. A deed in evidence establishes that the "closing" occurred on October 31, 2003, apparently simultaneous with the making of the Note, and payment was therefor due, by the terms of the Note, on October 31, 2005. Kirtchakov's belated unpleaded attempt to claim that the statute of limitations bars DRP's recovery is therefore without merit as DRP's third-party summons was filed on April 25, 2011.

However, in an earlier proceeding among the parties, captioned *Matter of Tukmanian v Kirtchakov,* Index Number 35/2008, seeking the dissolution of DRP, on February 12, 2009, a stipulation was executed discontinuing and dismissing with prejudice "all claims and counterclaims that were brought or could have been brought" by and among the parties. Since the alleged debt of Kirtchakov to DRP would clearly have been such a claim at the time, it necessarily was disposed in such stipulation. A Settlement Agreement executed the same day by Igor Kirtchakov, Vladimir Lyubarsky, and Alexander and Zaneta Tukmanian, individually, and by DRP, by Lyubarsky as Managing Member, and by CETEC, LLC, by Kirtchakov as Managing Member, expressly provided that DRP "hereby releases, remises and forever discharges IK [Igor Kirtchakov], and each entity affiliated with IK by common ownership . . . from all actions, causes of action, suits, debts, sums of money, . . . claims and demands, in law or equity, which . . . DRP . . . ever had, now have or hereafter can, shall or may have, for or by reason of any cause, from the beginning of the world to the date of this Agreement".[1]

---

[1]The Settlement Agreement also covered a companion suit brought by Lyubarsky derivatively on behalf of RCS Construction LLC against Kirtchakov and CETEC, LLC (Index No 31433/08).

Thus, regardless of the insufficiency of Kirtchakov's proof of payment of the Note, DRP's recovery is precluded by the unequivocal terms of the Settlement Agreement of February 12, 2009. DRP's claim for recovery on the Note is, accordingly, dismissed.

The Grove Construction & Development, LLC Action

Grove Construction & Development, LLC (GCD) is one of the many limited liability and corporate entities formed by Kirtchakov, Lyubarsky and Tukmanian as part of their overlapping enterprises through which they purchased and developed real property. GCD is the construction company that constructed the condominium property located at 358 Grove Street in Brooklyn, title to which was taken by 350 Grove Street, LLC, in which Downtown Grove Street Partners, LLC (DGS) (owned equally by Kirtchakov, Lyubarsky and Tukmanian) and Motovich Associates were equal 50% members. In 2009, Lyubarsky and Tukmanian bought out Kirtchakov's interest in DGS for $200,000, however, Kirtchakov remained a one-third member of GCD. It is not disputed that the construction of the condominium at 358 Grove Street is the only project of GCD and its sole source of revenue. Kirtchakov now maintains that he was deprived of distributions from GCD and that Tukmanian, as the member responsible for site management and construction of the condominium, took compensation in the total sum of $316,648.57 for his services that was not authorized under the Operating Agreement for GCD. In addition, Kirtchakov claims that 350 Grove Street, LLC failed to make full payment of the balance of approximately $760,000 on the construction contract for 358 Grove Street, that he was charged an unnecessary member contribution of $159,357.64 in 2007, and that "loans" made by GCD in the sum of $345,000 to DGS and $670,000 to DRP remain unpaid.

With respect to the claims against Tukmanian personally, plaintiff relies upon Paragraph 7.5 of GCD's Operating Agreement which provides that a Managing Member shall be "entitled to compensation, in an amount to be determined from time to time by consent of all of the Members". Plaintiff contends that in 2006, 2007 and 2008, Tukmanian withdrew compensation from GCD totaling $358,448,57, of which only $41,800 was authorized by plaintiff, and that this was done in violation of GCD's Operating Agreement requiring unanimous consent. There is no dispute that Tukmanian supervised the construction at 358 Grove Street on a daily basis. Defendants' Exhibit J is a series of 20 checks totaling $44,000, each in the amount of $2200, signed by plaintiff in 2006 and 2007, payable to Alexander Tukmanian for "Rendering Service", clearly impeaching plaintiff's claim that he did not know of, and did not approve of, the payments to Tukmanian. The checks, all in the same amount, are obviously for salary earned, upon which taxes were withheld according to the testimony of the bookkeeper, Lyuba Schwartzman, who also testified that it was plaintiff who was responsible for the "paperwork" associated with the various businesses and instructed her regarding bookkeeping entries. There is thus no basis to award plaintiff recovery of the sums paid to Tukmanian, nor is there any basis to award recovery to GCD upon a derivative claim as GCD clearly benefitted from the services rendered.

The contract between defendant 350 Grove Street, LLC, as owner, and GCD for the construction of 358 Grove Street was for $10,760,000, of which only approximately $10,000,000 has been paid. Plaintiff seeks to recover for GCD the balance due, arguing that the project was completed years ago and a certificate of occupancy issued. A letter from Tukmanian, as managing member, dated September 27, 2010, on the letterhead of GCD, to plaintiff encloses

a complaint regarding the construction of 358 Grove Street, including leaks through walls and roof, pipes leaking in the basement, failure to install an exhaust system in the laundry room and various safety breakers, as well as improper finishing of the floors. The GCD letter projects liabilities of $125,132.50 in order to correct the problems and seeks a contribution from plaintiff of $41,710.83, which he did not make. The merits of these complaints were not addressed at trial and, in any event, would require the litigation of collateral issues with parties not before the Court. Presumably, GCD will be itself pursuing its claims. There is no evidence of a demand made by plaintiff for such action in advance of filing his complaint. Plaintiff's demand for recovery against 350 Grove Street, LLC and its member Downtown Grove Street Partners, LLC is rejected on this record as both premature and unproved.

Plaintiff's remaining claims are also dismissed based on the record before this Court. The evidence is overwhelming that plaintiff was in direct, and largely exclusive, control of the books and records of the several inter-related businesses he shared with Lyubarsky and Tukmanian. Although he contends that he first learned of the suspicious transfer of funds of which he now complains upon receiving the 2007 tax return for GCD in October, 2008, following dissolution of IBK Enterprises, Inc. and plaintiff's relocation to Fort Lee, New Jersey, where he conducted his separate construction business, CETEC, LLC, there was evidence that Mr. Kirtchakov, as managing member of GCD, continued to visit the offices of GCD to sign checks and purchase orders, apparently retained access to the computerized records of GCD up to the time of trial and was able to compile and prepare his own documentation. The credible evidence establishes that plaintiff was the primary manager of GCD's financial records and accounting practices and actually directed many of the financial manipulations among the various

[* 7]

companies in which he held an interest.

Plaintiff takes issue with transfers of funds from GCD to DRP in the amounts of $10,000 by check dated March 31, 2006, denominated "loan", $15,000 by check dated April 28, 2006, denominated "Loan & Exch", $400,000 by check dated March 15, 2007, $195,000 by check dated March 28, 2007, and $50,000 by check dated December 14, 2007. The $645,000 transferred to DRP in 2007 was apportioned among the three members as "distributions" from GCD of $215,000 each, for which they received a credit on the books of DRP. Plaintiff's grievance appears to be that he had to pay taxes on this sum.

Arthur Schwartzman, who served as the certified public accountant for all of the various enterprises of the parties, testified that although the various transfers were characterized on the books of GCD as "loans", at plaintiff's direction, there was no intent to repay the money as the same three people owned all the companies and merely moved money around for their convenience, accordingly, "each got the benefit on the transfers of funds" (Transcript of 3/19/13 at 53). Referring to his e-mail of October 8, 2008, addressed to Andy Dynia, plaintiff's comptroller for his separate business, explaining the use of the word "borrowed" with respect to the transfers of money, Mr. Schwartzman explained: "the three individuals never went into their own pocket on many of these transactions. They borrowed from outside investors and didn't dig into their own pocket for these deals. And then they used that money and they transferred it from one company to another and nothing–it wasn't gonna be repaid." (Transcript of 3/19/13 at 54). Mr. Schwartzman testified that plaintiff was his primary contact in maintaining the business records and filing tax returns and it was plaintiff that had directed the "reclassification" of revenue items so as to avoid taxes. "[T]he transfers were never reported as income" (Transcript

of 3/19/13 at 58). Checks in evidence clearly establish that the $645,000 transferred to DRP in 2007 was used to repay the investors who had contributed the funds for the purchase of 60 Central Avenue in Brooklyn, which project was aborted when the required zoning variance could not be obtained. The property is still owned by DRP, which is now controlled by defendants Lyubarsky and Tukmanian following their buy-out of plaintiff's interest, for which he was duly compensated. While plaintiff did not remember being present at a meeting of the DRP investors in which repayment was discussed, all three individual parties to this action were personally liable to repay the investments. Thus, plaintiff benefitted from the transfer of funds from GCD to DRP by being relieved of what would have been his personal obligation and has suffered no loss. His effort to recoup the taxes he paid on what was clearly income to himself should not be rewarded.

In addition, plaintiff similarly complains of $349,000 transferred to DGS as a "loan", which was paid out to reimburse advances made to DGS to fund the 50% interest of DGS in 350 Grove Street, LLC in order to purchase 358 Grove. Like the $645,000 to DRP, the transfer to DGS was divided among the three members such that $116,333 was reported on their K-1's as distributions. Plaintiff contends he never got this money. However, the checks made payable to DGS from various investors in May 2004, compared with checks payable to these same investors from DGS in May 2006, the day following issuance of GCD's check to DGS for $349,000, confirm that the transferred funds were applied to obligations of plaintiff in that he had guaranteed such repayment. Although the sums given to DGS in 2004 are not equal to the sums paid out in 2006, which total $347,500 rather than $349,000, no explanation was offered to reconcile the discrepancy. The Court finds, however, that plaintiff had actual knowledge of these

payments and has no rightful claim to recovery of any portion of the transfer. Moreover, in light of the evidence that plaintiff was the individual who instructed the accountant to reclassify the various transactions upon the books of the several related business entities, apparently without the approval of the accountant, any derivative claims plaintiff has raised on behalf of GCD are precluded, as the corporate entity is responsible for the acts of its authorized agent (*see Kirschner v KPMG LLP,* 15 NY3d 446, 465 [2010]).

Untangling the complex web of interactions among the several entities created by the parties to this action is a daunting, if not impossible, task. Accountant Schwartzman, testified that his liaison in dealing with the various entities was Kirtchakov, who directed him to reclassify transactions so as to avoid taxes. Lyubov Schwartzman (no relation to the accountant), the bookkeeper for the several entities, testified that plaintiff alone instructed her as to the recording of transactions and was in charge of finances. Both Lyubarsky and Tukmanian testified, through a Russian interpreter, that they deferred to plaintiff with respect to all "paperwork" because he was fluent in English, whereas they were not able to understand the complex tax and financial issues. Even though Tukmanian was designated in the Operating Agreement as the tax member and usually signed the tax returns, he did not understand what the designation meant. What is clear, however, is that all of the parties benefitted from the financial manipulations orchestrated by plaintiff. It may be that the defendants have benefitted through their control of GCD subsequent to plaintiff's removal to New Jersey, but plaintiff's duplicity in bringing the several meritless suits before the Court, and his general lack of credibility and candor, preclude a finding in his favor. He has certainly failed to carry his burden to convince this Court that he has sustained any actual losses.

[* 10]

"The doctrine of in pari delicto mandates that the courts will not intercede to resolve a dispute between ... wrongdoers" (*Kirschner* at 464). This doctrine, a core principle of public policy embedded in our jurisprudence, reflects a fundamental concept of morality and fairness, that a wrongdoer should not profit from his own wrongdoing (*Id.*). In this case, the individual parties created numerous inter-related business entities, presumably to shield themselves from liability. In the process, they also managed to fund their real property acquisitions without contributing their own money. While there is no illegality in forming multiple business entities that transact business among themselves, the evidence suggests that these entities were not, in fact, treated as separate entities, but that their funds were commingled and transferred among themselves so as to confuse the bookkeeping in such a way as to avoid taxes. Defendants may not have understood all the nuances of plaintiff's efforts, but they clearly stood to benefit. Thus, whatever the grievances among the parties, it would be inappropriate for this Court to intercede on behalf of one side or the other.

Accordingly, upon the evidence and the law, the complaint of Igor Kirtchakov, brought both personally and derivatively on behalf of GCD, is dismissed in its entirety.

This constitutes the decision and ~~order~~ judgment of the Court.

ENTER

CAROLYN E. DEMAREST

JUSTICE OF THE SUPREME COURT