

**Hirschfeld v Czaja**

2013 NY Slip Op 32756(U)

October 25, 2013

Sup Ct, New York County

Docket Number: 114340/09

Judge: Barbara R. Kapnick

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK  
J.S.C. Justice

PART 39

Index Number : 114340/2009  
HIRSCHFELD, ELIE  
vs.  
CZAJA, RICHARD F  
SEQUENCE NUMBER : 006  
REARGUE/RECONSIDER

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 10/25/13

  
\_\_\_\_\_, J.S.C.  
**BARBARA R. KAPNICK**

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IA PART 39**

-----x  
ELIE HIRSCHFELD, individually and  
derivatively on behalf of STAHL  
ASSOCIATES CO.,

Plaintiff,

**DECISION/ORDER**  
Index No. 114340/09  
Motion Seq. No. 006

-against-

RICHARD F. CZAJA and GREGG WOLPERT, as  
Co-Executors of the Estate of Stanley  
Stahl, deceased, and RICHARD F. CZAJA,  
as Successor Trustee for the Benefit  
of Lillian Schlossberg, under the Will  
of Sonia Schlossberg, deceased,

Defendants,

- and -

STAHL ASSOCIATES CO.,

Nominal Defendant.

-----x  
**BARBARA R. KAPNICK, J.:**

On this motion, plaintiff moves by Order to Show Cause asking the Court to reconsider its ruling on plaintiff's motion for partial summary judgment on the second and third causes of action in the First Amended Complaint (motion sequence number 005), which was dictated on the record on February 5, 2013 and memorialized by Order dated February 25, 2013. Upon reconsideration, plaintiff asks this Court to (1) grant that prong of plaintiff's motion for summary judgment that seeks profits on account of his 33-1/3% interest in Stahl Associates Co. (the third cause of action); (2) disallow discovery concerning defendants' forgery allegations; and

(3) grant such other and further relief as the Court may deem proper.

The facts of this case were discussed in detail in a prior Decision and Order of this Court, dated March 6, 2012 (the "March 2012 Decision"). As such, the facts will be presented herein only to the extent necessary to address the current motion.

#### *Procedural History*

Plaintiff's motion for partial summary judgment on his first cause of action<sup>1</sup> (motion sequence number 002) was decided by the March 2012 Decision and was "granted only to the extent of declaring that defendants did not have standing to disaffirm, void or otherwise cancel the 2003 Transaction on the grounds of the assignor's mental incompetence or that it was otherwise procured by fraud, duress or undue influence." (March 2012 Decision at 10 (emphasis in original)). The Court reserved decision on the issue of whether plaintiff is a "full-rights" or only "profits-rights" partner, which was an issue raised by defendants. (*Id.* at 9.)

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<sup>1</sup> The first cause of action seeks a declaratory judgment against defendants declaring "among other things, that plaintiff is a partner with a 50% interest [in] the Partnership, and is entitled to all of the rights and benefits accorded to such a partner under the Partnership Agreement and New York law, including, without limitation, his right to receive 50% of distributable Partnership profits." (Amended Complaint ¶ 35.)

Plaintiff then moved for summary judgment on the second and third causes of action<sup>2</sup> in the First Amended Complaint (motion sequence number 005) and this Court decided, *inter alia*, that plaintiff's motion was granted as to the second cause of action (Tr. 32:16-18, Dec. 10, 2012; Tr. 45:2-5, Feb. 5, 2013) and that the motion was premature as to third cause of action, since there had been no discovery. (Tr. 42:5-10; 45:6-12, Feb. 5, 2013). Specifically, defendants urged that discovery was warranted on the issue of whether or not the underlying documents in the 2003 Transaction were forged (Tr. 19:16-25, Feb. 5, 2013) and the Court stated that the forgery issue was a proper subject of discovery. (Tr. 45:23-26, Feb. 5, 2013). Before engaging in any discovery, plaintiff brought the instant motion.

#### *Discussion*

Plaintiff argues, much like he did on motion sequence number 002, that defendants simply do not have standing to raise forgery as a defense to the third cause of action because they are strangers to the 2003 Transaction. (Tr. 17:11-20, April 24, 2013.) Plaintiff urges that the Court should treat the forgery defense

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<sup>2</sup> The second cause of action is for breach of the Partnership Agreement for failure to make partnership distributions based on plaintiff's 16-2/3% interest, which is not disputed by the defendants. The third cause of action is for the same relief, with respect to plaintiff's alleged 33-1/3% interest.

exactly like it did the other defenses discussed in the March 2012 Decision, because forgery is a species or subset of fraud. (Tr. 15:6-18, April 24, 2013.) To support this, plaintiff cites to authority from this State, which holds that in the context of applying the Statute of Limitations, "'forgery' is considered a species of 'fraud.'" *Shelley v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.*, 24 Misc. 3d 1223A, at \*3 (Sup. Ct. NY Co. 2009) (citing *Piedra v. Vanover*, 174 AD2d 191, 194 (2d Dep't 1992)). Plaintiff also cites to *Montoya v. Branch Banking & Trust Co.*, 2012 WL 826993, n.3 (N.D. Ga. March 9, 2012), which notes that the plaintiff there lacked standing to challenge an assignment based on forgery because she was a stranger to that agreement.

Defendants argue that forgery is different than fraud because forgery renders a document *void ab initio*, see, e.g., *Orlosky v. Empire Sec. Systems, Inc.*, 230 AD2d 401 (2d Dep't 1997). However, defendants do not directly address the issue of standing.

In light of the case law cited by plaintiff on the standing issue and the lack of authority cited to the contrary, the instant motion to reconsider is granted only to the extent of disallowing discovery concerning defendants' forgery allegations, as the Court now finds that defendants here do not have standing to raise the forgery defense. There is no dispute, however, that Abraham

Hirschfeld would have had, and his estate has, standing to raise such a challenge to the 2003 Transaction, but that no such challenge had been made by the Public Administrator, on behalf of of Abraham Hirschfeld's estate. (Tr. 17:22-18:12, April 24, 2013.)

However, this Court has been made aware that third-party defendant Rachel Hirschfeld has recently filed a petition in Surrogate's Court to be substituted for the Public Administrator as the representative of Abraham Hirschfeld's estate for the purposes of challenging the 2003 Transaction. This Court also understands from the parties that the petition was argued before Surrogate Judge Nora Anderson sometime in May 2013 and that the application is currently *sub judice*. In light of this pending application and the fact that defendants have raised serious forgery allegations which could render the transaction *void ab initio*, and which can only be adjudicated in Surrogate's Court, this Court in the interest of justice and to avoid conflicting results, will deny, without prejudice, that portion of plaintiff's motion which seeks reconsideration of plaintiff's prior motion for summary judgment on plaintiff's third cause of action.

Counsel are directed to notify this Court immediately once Surrogate Anderson has rendered her decision.

This constitutes the decision and order of this Court.

Dated: *Oct. 25,* 2013

  
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BARBARA R. KAPNICK  
J.S.C.

**BARBARA R. KAPNICK**  
**J.S.C.**