

Joseph v Joseph

2015 NY Slip Op 32598(U)

August 28, 2015

Supreme Court, Nassau County

Docket Number: 16982/09

Judge: Stephen A. Bucaria

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

ORIGINAL

Present:

HON. STEPHEN A. BUCARIA
Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

INDEX No. 16982/09 ✓

MOTION DATE: July 14, 2015
Motion Sequence # 008, 009

JOSEPH JOSEPH, VIM REALTY LLC,
THE JOSEPH JOSEPH GENERATION
SKIPPING TRUST, THE JOSEPH JOSEPH
2004 IRREVOCABLE TRUST, FAMOUS
HORSE, INC. and KENT REALTY
ASSOCIATES, LLC,

Plaintiffs,

-against-

ELAZAR JOSEPH, THE ELAZAR JOSEPH 1997
IRREVOCABLE LIVING TRUST, THE ELAZAR
JOSEPH 2001 IRREVOCABLE LIVING TRUST,
BROADWAY AND MERMAID ASSOCIATES,
VIM MERMAID, INC., FEJ, LLC, PITKIN REALTY
ASSOCIATES, LLC, 2701 FDOUGLAS TRADING
LLC, THE RINAT JOSEPH 2004 TRUST and
TZACHI JOSEPH 2004 TRUST,

Defendants.

Application of ELAZAR JOSEPH,

Petitioner,

-against-

JOSEPH JOSEPH and FAMOUS HORSE, INC.,

Respondents,

For the Judicial Dissolution of Famous Horse, Inc.
a/k/a V.I.M. and d/b/a VIM Stores, Inc.

INDEX No. 019224/09

The following papers read on this motion:

Order to Show Cause.....	X
Notice of Motion.....	X
Affidavit/Affirmation in Support.....	XX
Affidavit in Opposition.....	XX
Emergency Affirmation in Support.....	X
Reply Affidavit.....	XX
Memorandum of Law.....	XXX

Motion by defendant Elazar Joseph for a preliminary injunction, directing plaintiff Joseph Joseph to reinstate Elazar's salary, and to pay him his share of 2013 Famous Horse income is **granted** in part and **denied**. Motion by plaintiff Joseph Joseph for partial summary judgment is **granted** in part and **denied** in part.

This action arises from a dispute between brothers in a family owned business. Plaintiff Joseph Joseph and his brother, defendant Elazar Joseph, own 32 retail shoe and clothing stores in the New York area. The stores operate under the name VIM Mermaid and carry a brand known as "Famous Horse." Elazar and Joseph each hold a 50 % membership interest in eight limited liability companies which own the real estate on which eight of the stores are located. Six of the stores are located on properties owned by limited liability companies owned by Joseph. Nine of the stores are located on properties owned by a generation skipping trust established by Joseph.

The parties have entered into a series of leases whereby the limited liability companies, as landlord, lease the stores to Famous Horse, Inc. Joseph owns 2/3 of Famous Horse, and Elazar owns 1/3 of Famous Horse, which is operated as a Sub-chapter S corporation. Elazar purchased his 1/3 interest for \$3.5 million on October 1, 1989. Elazar is no longer employed by Famous Horse, and Joseph Joseph has been in control of the corporation since August 2009. However, Elazar is the managing member of Junction Trading, LLC, one of the jointly owned limited liability companies, pursuant to its operating agreement.

After a dispute arose, Joseph Joseph brought the present action for breach of fiduciary duty and an accounting (Index No. 16982/09). Joseph alleges that Elazar, while acting as chief financial officer of Famous Horse, collected a 6 % service charge on rents which were paid by Famous Horse to a trust owned by Elazar. Joseph further alleges that Elazar, as a trustee of Joseph's generation skipping trust, took a 6 % commission on income paid to the trust. Joseph alleges that Elazar used Famous Horse funds to repay Elazar's shareholder loans, also to Joseph's detriment.

In their second amended answer, Elazar and the other defendants assert various counterclaims against Joseph and Famous Horse. The first counterclaim is for breach of

fiduciary duty by allegedly increasing the rents paid under the leases to the affiliated landlords. The second counterclaim is for breach of fiduciary duty by allegedly charging above market interest rates on Joseph's loans to Famous Horse. The third counterclaim is for breach of fiduciary duty by selling the 324 East Fordham Road, Bronx property to the JJ Skipping Trust allegedly for \$2 million below fair market value. Prior to 2003, the property was owned by Famous Horse. The fourth counterclaim is for breach of fiduciary duty by wrongfully refusing to sell a jointly owned property, 302 West 146th Street in Manhattan, to a third party for \$1,250,000. The fifth cause of action is for breach of fiduciary duty by allegedly failing to open a Famous Horse store at 45-47 Main Street in Hempstead from some time in 2005 to August 2009. The sixth counterclaim is for breach of fiduciary duty by allegedly causing Famous Horse to pay excessive rent on a store at 863-865 Broad Street in Newark to Broad Street Trading, Inc., a company owned by Joseph. The seventh counterclaim is for breach of fiduciary duty by allegedly causing Famous Horse to pay excessive rent on a store at 536 Bergen Avenue in the Bronx to VIM Realty, LLC, a company Joseph owns. The eighth counterclaim is for breach of fiduciary duty by allegedly causing Famous Horse to pay excessive rent on a store at 1008-1010 Beach 20th Street in Far Rockaway to RKZ Trading Realty, LLC, a company Joseph owns.

In the ninth counterclaim, Elazar alleges that Famous Horse owns and operates a "franchise" within the meaning of General Business Law § 680. Elazar asserts a claim on behalf of VIM Mermaid, as franchisee, for fraudulent and unlawful practices under General Business Law § 687.

The tenth counterclaim is for breach of fiduciary duty by allegedly refusing to lease property as 686 Broadway in Manhattan to a third party for fifteen years at a substantially increased rent. The eleventh cause of action is for an accounting with respect to Famous Horse and VIM Mermaid. The twelfth counterclaim is for an accounting with respect to the jointly held limited liability companies. The thirteenth counterclaim is for breach of fiduciary duty by reducing the rent paid by Famous Horse on property located at 37-25 Junction Boulevard, Queens to Junction Trading, a jointly owned company. The fourteenth counterclaim is for breach of contract by failing to pay rent on property located at 1750 Pitkin Avenue, Brooklyn to Pitkin Realty Associates, LLC. The fifteenth counterclaim is for breach of fiduciary duty by allegedly causing Famous Horse to spend \$2.5 million to improve a warehouse located at 675 Zerega Avenue in the Bronx, which is owned by Joseph or his family.

Additionally, Elazar Joseph commenced a proceeding seeking the judicial dissolution of Famous Horse, Inc. pursuant to BCL § 1104-a on the ground of oppressive conduct towards the minority shareholder (Index No. 19224/09).

By order dated July 16, 2013, Elazar's motion for a preliminary injunction, directing Joseph to reinstate Elazar's salary from Famous Horse, to resume making payments to Elazar's children, and for other relief was denied on the ground that Elazar had received substantial distributions and failed to establish irreparable harm.

By order to show cause dated November 13, 2014, Elazar moves for an order directing Joseph to reinstate Elazar's salary pending the purchase of Elazar's shares in Famous Horse, directing Joseph to pay Elazar his share of the 2013 income of Famous Horse, granting Elazar summary judgment on his loans to Famous Horse, restraining Joseph from reducing the rent payable to the jointly held real estate companies, and restraining Joseph or Famous Horse from accepting accounting or management fees in excess of those set forth in the operating agreements of the real estate companies.

On October 14, 2014, Joseph issued Elazar a Schedule K-1 for Famous Horse, showing his share of ordinary business income for 2013 as \$384,911 and his share of interest income as \$227,776. Elazar alleges that he has not received the "lion's share" of that money. According to the report of Elazar's forensic accountant, the amount/value of Elazar's shareholder loan to Famous Horse was \$2,947,494 as of September 30, 2009. Elazar alleges that he has been required to pay tax on the attributed interest on that loan, although the interest has not been paid.

Joseph moves for an order granting the JJ Skipping Trust partial summary judgment against Elazar and FEJ, LLC on its first cause of action for improper commissions in the amount of \$901,792, plus accrued interest, and against Elazar on the first and thirteenth causes of action for breach of fiduciary duty in the amount of \$694,753, plus accrued interest, and granting Joseph partial summary judgment against Elazar, defendant VIM Mermaid, and defendant The Elazar Joseph 1997 Irrevocable Trust dismissing their first, second, third, fourth, fifth, tenth, eleventh, and fifteenth counterclaims.

Defendant Elazar's motion for a preliminary injunction directing Joseph to reinstate Elazar's salary from Famous Horse is denied. As the majority shareholder in Famous Horse, Joseph was free to terminate Elazar's employment with the company.

A Subchapter S corporation may retain some of the profit, rather than distributing it to shareholders, if there is a reasonable basis to do so (*Powell v Bernstein*, 262 AD2d 221 [1st Dept 1999]). The burden of proof as to the reasonableness of the dividend policy is on the majority shareholder (Id). However, on defendant Elazar's motion for a preliminary injunction, it is his burden to establish likelihood of success on the merits that the dividend policy is unreasonable. Defendant Elazar has failed to carry that burden. Defendant Elazar's motion for a preliminary injunction directing Joseph to pay Elazar his share of the 2013 income from Famous Horse is **denied**.

The balance outstanding on Elazar's shareholder loan to Famous Horse has been calculated by Elazar's forensic accountant. Thus, it appears that Elazar's claim for the payment of his shareholder loans is merely a disguised form of his claim for payment of the undistributed income of the company. In any event, Joseph's expert, Frank Musacchio, CPA disputes the amount of Elazar's shareholder loan (Aff of Joseph at ¶ 22; plaintiff's ex 1, Joseph affidavit of October 14, 2009, submitted in opposition to Elazar's prior motion seeking reinstatement of his Famous Horse salary, at ¶ 36).

Defendant Elazar's motion for summary judgment on his claim for the repayment of his shareholder loan is **denied**.

By reducing the rent payable by Famous Horse to the jointly owned real estate companies, Joseph may have breached his fiduciary duty to Elazar as a co-owner of the real estate companies. Nevertheless, Elazar has an adequate remedy in the form of money damages. Defendant Elazar's motion for a preliminary injunction restraining Joseph from reducing the rent payable to the jointly owned real estate companies is **denied**.

By causing the real estate companies to pay management or accounting fees to Famous Horse in excess of the fees provided in the real estate companies' operating agreements, Joseph may again have breached his fiduciary duty to Elazar as a co-owner of the real estate companies. Here, however, Elazar does not have an adequate remedy at law because, once paid, the management and accounting fees may not be recoverable from Famous Horse. Defendant Elazar's motion for a preliminary injunction, restraining Joseph or Famous Horse from causing the real estate companies to pay management or accounting fees to Famous Horse in excess of the fees provided in the real estate companies' operating agreements is **granted**.

Joseph argues that Elazar is liable to the generation skipping trust for improper commissions because he failed to provide reports as required by SCPA § 2309(2). Joseph's motion for partial summary judgment with respect to the first cause of action for improper commissions and the thirteenth cause of action for breach of fiduciary duty is **denied** with leave to renew in the Surrogate's Court.

Joseph's increasing the rent for the eight stores which were owned by the jointly held limited liability companies would appear to redound to Elazar's benefit. Nevertheless, by increasing the rent for the six stores owned by Joseph's companies and the nine stores owned by Joseph's trust, Joseph may have breached his fiduciary duty to Elazar as a minority shareholder in Famous Horse. Joseph's motion for partial summary judgment dismissing Elazar's first counterclaim is **denied**.

Similarly, there is a factual issue as to whether Joseph's charging above market interest rates on his shareholder loans to Famous Horse breached his fiduciary duty to Elazar as the minority shareholder. Joseph's motion for partial summary judgment dismissing Elazar's second counterclaim is **denied**.

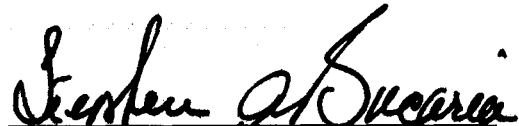
Joseph's arranging for Famous Horse to sell the 324 East Fordham Road, Bronx property to the JJ Skipping Trust allegedly for \$2 million below fair market value may have breached his fiduciary duty to Elazar as the minority shareholder. Joseph's motion for partial summary judgment dismissing Elazar's third counterclaim is **denied**.

However, refusing to sell the jointly owned property at 302 West 146th Street in Manhattan for a favorable price and delaying the opening of the Famous Horse store at 45-47 Main Street in Hempstead was within Joseph's business judgment. The business judgment doctrine bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes (**Consumers Union v New York**, 5 NY3d 327, 372 [2005]). Such matters include questions of policy of management, expediency of contracts or action, adequacy of consideration, and lawful appropriation of corporate funds to advance corporate interests (Id). Similarly, refusing to lease the property at 686 Broadway in Manhattan for fifteen years at an increased rent was within Joseph's business judgment. Accordingly, Joseph's motion for partial summary judgment dismissing Elazar's fourth, fifth, and tenth counterclaims for breach of fiduciary duty is **granted**.

There is a factual issue as to whether Joseph breached his fiduciary duty to Elazar as a minority shareholder of Famous Horse by causing Famous Horse to spend \$2.5 million to improve a warehouse in the Bronx, which is owned by Joseph or his family. Joseph's motion for partial summary judgment dismissing Elazar's fifteenth counterclaim for breach of fiduciary duty is **denied**. Because Joseph has not established that he did not breach his fiduciary duty as to Famous Horse and VIM Mermaid, Joseph's motion for partial summary judgment dismissing the eleventh cause of action for an accounting with respect to those companies is **denied**.

So ordered.

Dated AUG 28 2015



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