Angel v Strulovich
2020 NY Slip Op 33975(U)
December 2, 2020
Supreme Court, Kings County
Docket Number: 500827/20
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : COMMERCIAL PART 8
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BORUCH ANGEL, DOVID BADDIEL, HANNAH BADDIEL, ALEX BALL, MAURICE BAMBERGER, MEIR BAMBERGER, EFRAIM BINYAMINI, ISRAEL MEIR COHEN, BATSHEVA FRENKEL, YOSEF GLATSTEIN, CHEZKEL GRINFELD, DAVID HALPERN, ISRAEL HIRSCH, TZIVIA HIRSCH, YVONNE HIRSCH-GRUNWALD, PINCHOS KAHN, HAIM SHMUEL KAHNA, ISRAEL J KAPLAN, YINON KATABI, RACHEL BRACHA KEYAK, HINDA KOHEN, ISAAC KONINSKI, MOSHE BUNIM KRAUS, DINA DVORA KRUSKAL, YISRAEL MEIR KRUSKAL, YECHIEL LAVKOVITCH, ELY MERL, ELHANAN MICHAEL, HAIM MENACHEM RUBNITZ, ABRAHAM J. SCHWARZ, ELAZAR DAVID SHLEZINGER, LIONEL SPINGARN, MENACHEM STEIN, MOSHE STEIN, NETANEL STEIN, DEBORA SARA STEINHAUS, ELIYAHU STERN, RACHEL STEWART, SAMUEL STEWART, DAVID SHALOM STRASSER, YEHUDA WINEGARTEN, DAVID YITSHAKI, and YEHOSHUA NATAN ZELIVANSKY,
Plaintiffs, Index # 500827/20

- against - December 2, 2020

YECHEZKEL STRULOVICH a/k/a CHASKIEL STRULOVICH, YECHIEL OBERLANDER, CS CONSTRUCTION GROUP LLC, 945 PARK PL LLC, 1078 DEKALB LLC, 74 VAN BUREN LLC, 454 CENTRAL AVENUE LLC, 980 ATLANTIC HOLDINGS LLC, 720 LIVONIA DEVELOPMENT LLC, PENN CONDOMINIUM LLC, THROOP HOME, LLC, EIGHTEEN PROPERTIES LLC, THE BUSHWICK PARTNERS LLC, BROOKLYN VENTURES LLC, THE HOWARD DAY HOUSE LLC, 196 ALBANY HOLDINGS L.P., CSN PARTNERS LP, KNICKERBOCKER LOFTS LLC, 741 LEXINGTON LLC, 296 COOPER LLC, WILLTROUT REALTY LLC, STAGG STUDIOS LLC, FIRST AVENUE REALTY HOLDINGS L.P., CSY HOLDINGS LLC, CAS MANAGEMENT COMPANY BAYSHORE, INC., 31 BROOKLYN, LLC, 1035 FLUSHING AVE LLC, VICTORY BLVD ASSOCIATE LLC, SOI GROUP LLC, 945 WILLOUGHBY HOLDINGS LLC, 119 HOLDINGS LLC, WALLACE HOLDINGS LLC, 1642 EQUITIES LLC, GOLD CLIFF, LLC, BNH PROPERTIES LLC, HERMAN GREENFELD as trustee of GIVAS OLIM TRUST, MENDEL BRACH as trustee of GIVAS OLIM TRUST, TOMPKINS 420 REALTY LLC, WILLOUGHBY EQUITIES LLC, 186 LENOX LLC, 400 SOUTH 2ND STREET REALTIES L.P., WYKOFF SP LLC, 1428 FULTON ST LLC, DIAMOND GARDEN PARTNERS LLC, PENN & MARCY LLC, 420 TOMPKINS, LLC, 599-601 WILLOUGHBY LLC, CS YH CONDOS LLC, LENOX 186 HOLDINGS LLC, LENOX 186 REALTY LLC, 400 SOUTH 2ND STREET HOLDINGS L.P., R.P.S. PROPERTIES LLC, WOODBINE RESIDENCE LLC, FULTON STREET HOLDNGS LLC, 908 BERGEN STREET LLC, ISRAEL WEISS, GITTEL WEISS, 901 BUSHWICK AVENUE LLC, GATES EQUITY HOLDINGS LLC, 853 LEXINGTON LLC, 348 ST. NICHOLAS LLC, 762 WILLOUGHBY LLC, 855 DEKALB AVENUE LLC, THE BRIDGE TOWER LLC, 619 HOLDINGS LLC, GRAND SUITES

LLC, CATALPA DEVELOPMENT, LLC, SLOPE OFFICES LLC, 41-49 SPENCER LLC, 482-484 SENECA LLC, 1217 BEDFORD LLC, 1266 PACIFIC LLC, MYRTLINO HOLDINGS, LLC, 259 BERRY LLC, and 261 BERRY LLC,

Defendants,

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PRESENT: HON. LEON RUCHELSMAN

The defendant Yechezkel Strulovitch has moved seeking to compel arbitration. The plaintiffs have cross-moved seeking to reargue certain portions of a decision and order dated July 1, 2020. Papers were submitted by the parties and arguments were held. After reviewing all the arguments, this court now makes the following determination.

As recorded in a prior order, this lawsuit alleges, essentially, that defendant Yechezkel Strulovitch obtained investments from the various plaintiffs for the stated reason of investing in specific real estate ventures in New York. However, it is alleged Strulovitch took those funds and invested them in his own ventures, unrelated to any investment properties he promised the plaintiffs he fund. Specifically, the Amended Complaint alleges plaintiffs were informed by Strulovitch that Strulovitch would invest their funds into 'feeder funds' or Investor LLC's which were created with the intent to disburse funds to other corporations, denominated holding companies that owned the investment properties. In the prior order the court held there were allegations Strulovitch never fully funded those

feeder corporations at all and therefore the plaintiff's were individually harmed and could sue in their individual capacities. Further, the feeder funds were then given interests in the holding companies which actually owned the properties in question. Twenty seven plaintiffs signed operating agreements wherein as the owner of a feeder fund, the particular plaintiff also became an owner of the particular holding company that owned the investment property. Each of those operating agreements contain the same clause which states that "in case of any doubt, question or other disagreement among the parties to this agreement, about anything pertaining to this Agreement, all of the parties to the disagreement shall choose a third party that is acceptable to all of them as Arbitrator and ask for his ruling on point, and his ruling shall be accepted by all the parties to the disagreement...In any case, however, all parties to this agreement agree not to bring any matter relating to this Agreement to a secular court for resolution unless instructed to do so by the Arbitrator or to enforce the Arbitrator's ruling" (see, Operating Agreements, §13(d)).

Based upon that clause the defendants have moved seeking to compel arbitration regarding all claims filed by Meir Bamberger, Moshe Bunim Kraus, Eliyahu Stern, Israel J. Kaplan, Elazar David Shlezinger, David Shalom Strasser, Yehoshua Natan Zelivansky, Yvonne Hirsch-Grunwald, Isaac Koninski, Netanel Stein, Menachem

Stein, Rachel Stuart, Samuel Stuart, Hannah Baddiel, Alexander Ball, Yosef Glatstein, David Baddiel, Hinda Kohen, David Itshaki, Haim Menachem Rubnitz, Boruch Tzvi Angel, Israel Meir Cohen, Yisroel Meir Kruskal, Haim Shmuel Kahna, Deborah Steihaus and David Halpern, all plaintiffs who signed such operating agreements which contain that arbitration clause. The plaintiffs oppose the motion arguing the arbitration clauses have not been triggered based upon the facts alleged in the Amended Complaint. Further, the plaintiffs have moved seeking to reargue various portions of the prior decision regarding the claims seeking to impose constructive trusts. The defendants oppose that motion.

Conclusions of Law

"It is firmly established that the public policy of New York State favors and encourages arbitration and alternative dispute resolutions" (Westinghouse Electric Corporation v. New York City Transit Authority, 82 NY2d 47, 603 NYS2d 404 [1993], citing earlier authority). Arbitration has long been shown to be an effective "means of conserving the time and resources of the courts and the contracting parties" (Matter of Nationwide General Insurance Company, 37 NY2d 91, 371 NYS2d 463 [1975]). In Matter of Nationwide, the Court of Appeals noted that "one way to encourage the use of the arbitration forum ... would be to prevent parties to such agreements from using the courts as a

vehicle to protract litigation" as such conduct "has the effect of frustrating both the initial intent of the parties as well as legislative policy" (supra). Indeed, "New York courts interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration" (Smith Barney Shearson Inc. v. Sacharow, 91 NY2d 39, 666 NYS2d 990 [1997]). An examination of the claims and an analysis of whether those claims fall within the arbitration clauses presented is therefore necessary.

In this case the plaintiffs allege they invested funds with the defendants and instead of depositing those investment funds in feeder LLC's took the money for themselves. The court has already determined that such alleged outright theft constituted personal claims and not corporate ones. The subsequent operating agreements whereby the feeder LLC's became owners of the various holding companies do not advance the claims of the plaintiff's at all. Indeed, a review of the Amended Complaint reveals that concerning the causes of action that remain, the various holding companies are not even mentioned as contributing to the alleged improprieties in any way. Thus, the plaintiff's have alleged fraud without regard to any feeder LLC's ownership of any holding company. Consequently, the breach of any holding company operating agreement, which would require arbitration, is not implicated by the Amended Complaint in any way.

The defendant argues that an almost identical issue arose in

a similar Federal Court proceeding and in that proceeding arbitration was ordered. That case, Schonberg et al v. Strulovitch et al, 17-CV-2161, likewise alleged numerous plaintiffs invested funds with Strulovitch wherein Strulovitch did not invest the funds as promised. Like this case, the plaintiffs in that case invested funds into feeder funds and then those feeder funds were given ownership interests in holding companies that owned the particular investment property in question. The operating agreement of each holding company contained the same arbitration clause as the operating agreements in this case. In a decision dated November 2, 2017 the court held the claims arbitable since they were all subject to the arbitration clause contained in the operating agreements. However, a careful review of the complaint in that case reveals that claims were filed based upon a breach of duty on the part of Strulovitch with regard to the management of the various holding companies. Thus, the plaintiffs in that Federal case specifically alleged causes of action that were directly and intimately related to the plaintiff's ownership interests (through the feeder LLC's) in the holding companies. Likewise, the unjust enrichment claim in the Federal action similarly involved allegations that implicated the various holding companies (see, Second Amended Complaint, ¶183).

In this case none of the causes of action involve the

plaintiff's ownership of any of the holding companies, through their ownership of any LLC's, at all. Wile the holding companies are mentioned in the Amended Complaint and provide background, none of the causes of action plead any claims that relate to the holding companies. This is critical because only claims that arise out of the duties and obligations contained in the operating agreements of the holding companies demand arbitration. Indeed, the claims presented in the Amended Complaint would not be changed in the slightest if the feeder LLC's would have never become owners of any holding companies.

The defendants further argue that upon a broad reading of the arbitration clause the clause covers all the acts of impropriety alleged in this case. The defendants assert that the claims "are reasonably related to the subject matter of the Operating Agreements, and are therefore arbitable" (see, Memorandum in Support of Motion to Compel Arbitration, page 9). However, as noted the claims have nothing whatsoever to do with the operating agreements since the claims have nothing to do with the holding companies. Further, defendants argue the 'beneficial interest' the plaintiff's received in the investment properties "arises out of the Operating Agreements" (see, Memorandum in Support of Motion to Compel Arbitration, page 10). However, that is never alleged in the Amended Complaint. The plaintiff's allegation is that they invested money to be used to fund feeder

LLC's and those feeder LLC's would become owners of holding companies. The Amended Complaint alleges the funds were never infused into any feeder funds. There are no allegations in the Amended Complaint that consider any relevant facts beyond the point the funds were provided to the defendants. The subsequent ownership afforded the feeder funds in various holding companies does contain arbitration clauses, however, those clauses are never triggered since no claims are sought through them. Indeed, according to the defendant a party could steal from another and then after the theft enter into business together and sign an agreement calling for all disputes to be subject to arbitration and then such arbitration agreement would govern the earlier theft. There is no broad reading of any arbitration clause that would permit such reach. Therefore, since the arbitration clause does not apply to any claims contained in the Amended Complaint it is inapplicable. Consequently, the motion seeking to compel arbitration is denied.

Turning to the motion to reargue, the plaintiffs contend the court should reconsider its earlier dismissal of the constructive trust claims and reinstate them. The court dismissed the constructive trust claims holding the statute of limitations had passed and in any event improvements to other property was not a basis upon which to impose a constructive trust. Notably, other than the issue whether a constructive trust can be impressed upon

improvements, the court did not analyze the constructive trust claims since the court held the statute of limitations had run. Upon reargument the plaintiffs assert that fifteen properties were purchased within six years of the commencement of this action, thus as to those properties a constructive trust may be imposed. Further, concerning the remaining properties the plaintiffs argue the court should impose an equitable lien since the causes of action fall within that legal expedient.

While it is true that generally a claim for a constructive trust carries a six year statue of limitations (Athanasatos v. Scarpa, 173 AD3d 817, 102 NYS3d 668 [2d Dept., 2019]), there are cases that hold the limitation is three years depending on the underlying claims in the complaint (Dimatteo v. Cosentino, 71 AD3d 1430, 896 NYS2d 778 [4th Dept., 2010]). Thus, where constructive trust claims are really rooted in conversion claims then a three year statute applies "because the legal remedy for conversion would have afforded the plaintiff's full and complete relief" (Gold Sun Shipping Ltd., v. Ionian Transport Inc., 245 AD2d 420, 666 NYS2d 677 [2d Dept., 1997]). There can be little dispute that in this case the constructive trust claims are rooted in and serve as a mechanism to recover claims for conversion. Thus, in any event the claims are time barred.

Even assuming a standard six year statute of limitations the plaintiffs have still failed to adequately plead constructive

trust. First, as noted in the prior decision the six years begin to run upon the occurrence of the wrongful act giving rise to a duty of restitution (Athanasatos, supra). The wrongful act in this case is the alleged impropriety committed by the defendants wherein the plaintiffs supplied funds that were misappropriated. Thus, the moment the funds were not infused into feeder LLC's the defendant's committed the wrongful act which gives rise to a duty of restitution. Consequently, a constructive trust can be imposed over bank accounts of the defendants if all the elements have been satisfied (see, Murphy v. Virda Netco Establishment, 2020 WL 1865537 [S.D.N.Y. 2020]). The mere fact the defendants purchased properties at some later date within six years of the commencement of this lawsuit does not mean the constructive trust claims first arise when the purchase occurred. If that were true then a fraud committed today could enable a constructive trust claim twenty years hence when the fraudster finally decided to purchase property. As the court stated in Two Clinton Square Corp. v. Friedler, 91 AD2d 1193, 459 NYS2d 179 [4th Dept., 1980] "the statute of limitations for the purpose of imposing a constructive trust is six years and the action accrues when the party seeking to impose the trust knows or should have known of the wrongful withholding" (id). Since in this case the "wrongful withholding" occurred more than six years before the commencement of the action all claims for constructive trust are time barred.

Even if the claims were not time barred, substantively, the plaintiffs cannot succeed seeking to impress constructive trusts upon the properties in question. As noted, in the prior decision the court avoided the argument presented that a constructive trust is not applicable where the defendant uses money earmarked for one investment but diverts it to another investment of which the investor was made no promise. That argument will now be explored.

While the court did not directly address that issue it certainly cited authority that utilizing funds given for one investment and applying them to a wholly other property could give rise to a claim for constructive trust (The Restatement (Third) of Restitution and Unjust Enrichment §55 Illustration 23). The case cited by defendants Maiorino v. Galindo, 65 AD3d 525, 883 NYS2d 589 [2d Dept., 2009] does not demand a contrary result. In that case Galindo, a fifty percent partner of a corporation called Demo improperly diverted assets of Demo to purchase property in Bethpage Long Island. In truth the Bethpage property had been purchased by Michael Madia but the complaint alleged Madia purchased it on behalf of Galindo because Madia was able to obtain credit. The plaintiff Maiorino, the other fifty percent owner of Demo sought a constructive trust on the property. The court denied the request concluding that Maiorino failed to allege that any of Demo's assets or Galindo's personal

assets were used to purchase the Bethpage property. Thus, the elements of a constructive trust were lacking. In the prior motion the defendants argued as follows: "plaintiff A invested moneys intended for the acquisition and development of Property A. Defendants allegedly diverted some of that money to acquire and renovate Property B. Because Plaintiff A had no expectations of an interest in Property B, and no promise was made with respect thereto, there can be no cause of action for constructive trust with respect to Property B" (Reply Memorandum of Law in Support of Motion to Dismiss, page 12). That case does not support the argument presented by the defendants that no constructive trust can ever exist if the property acquired was never contemplated by the plaintiffs or promised by the defendants. Nevertheless, there are other grounds upon which to dismiss all constructive trust claims.

A constructive trust claim that is merely duplicative of a breach of contract claim is improper (Northern Shipping Funds I LLC v. Icon Capital Corp., 921 F.Supp2d 94 [S.D.N.Y. 2013]). Further, the constructive trust claim must allege harms that are distinct from the breach of contract claims (Islip U-Slip LLC v. Gander Mountain Company, 2 F.Supp3d 296 [N.D.N.Y. 2014]). In this case the claims upon which constructive trust are based are no different than those of breach of contract which survived the motion to dismiss. Indeed, the only reason the plaintiffs seek a

constructive trust is so they could then file notices of pendency on those properties, something which an ordinary breach of contract claim lacks. However, that is an improper basis upon which to reinstate claims that are sufficiently addressed in other claims, notably breach of contract claims. Consequently, for the foregoing reasons, the motion seeking to reargue and reinstate constructive trust claims is denied.

The plaintiffs next move for the court to convert the constructive trust claims into claims for an equitable lien which the court ruled could be applicable in this case. While a court may sua sponte determine an equitable lien exists where a constructive trust does not, such determination must be justified (Lester v. Zimmer, 197 AD2d 783, 602 NYS2d 711 [3rd Dept., 1993]).

In truth, there are really two distinct types of equitable liens. The first may be imposed if there is an express or implied agreement that there shall be a lien on specific property (M & B Joint Venture Inc., Laurus Master Fund, Ltd., 12 NY3d 798, 879 NYS2d 812 [2009]). This type of equitable lien is primarily intended to prevent unjust enrichment as opposed to a constructive trust which is generally intended to prevent fraud (see, In re Tesmetges, 47 BR 385 E.D.N.Y. 1984]). Therefore, concerning real property this equitable lien can be created "when a party standing in confidential relationship with the legal

owner of the property makes payments from his or her own funds toward the purchase price, reduction of the mortgage or improvements to the real property under circumstances which would entitle that party to restitution" (Reisner v. Stoller, 51 F.Supp2d 430 [S.D.N.Y. 1999]). Further, the party seeking an equitable lien must present "a clear intent between the parties that such property be held, given or transferred as security for an obligation" (US Bank National Association v. Lieberman, 98 AD3d 422, 950 NYS2d 127 [1st Dept., 2012]). It is clear this type of equitable lien is inapplicable to this case.

The second type of equitable lien is where a debt is owed but no agreement is in place and equity demands certain property stand as security for payment for the debt. As explained by one commentator "for example, if *A* defrauds *B* out of $1,000, and uses the money to buy a car, *B* might seek the equitable remedies of constructive trust or equitable lien. If *A*'s wrongdoing was so egregious to merit the imposition of a constructive trust, *A* essentially will be deprived of any right to the car, but will instead be deemed to hold it for *B*'s benefit. Therefore, if *A* sells the car for $2,000, *A* will lose the benefit of the $1,000 appreciation. Conversely, if *B* only gets an equitable lien, if *A* sells the car for $2,000, the first $1,000 goes to *B*, and *A* gets the benefit of the other $1,000" (see, *Advanced Chapter Eleven Bankruptcy Practice* §6.45, Equitable Liens and Constructive

Trusts Asserted Against Real Property as They Relate to the Trustee's Strong-arm Powers, Footnote 14 [2nd EDITION, 2020-2 Cumulative Supplement]).

Therefore, an equitable lien is appropriate where fraudulently obtained funds were used to remove liens or make past due mortgage payments on the property (Schwartz v. Schwartz, 2014 WL 6390316 [E.D.N.Y. 2014]).

Thus, the plaintiff's claims seeking to impose equitable liens may be proper considering the facts and circumstances of the facts in this case. However, the court declines to grant the relief without a formal motion seeking to amend the complaint and with proper briefing on the appropriate standards and criteria for such liens. Therefore, at this time, without prejudice, the motion seeking to convert the claims of constructive trust to equitable lien claims is denied.

So ordered.

ENTER:

Dated: December 2, 2020
Brooklyn, N.Y.

Hon. Leon Ruchelsman
JSC