Lurie v Lurie
2021 NY Slip Op 30338(U)
February 4, 2021
Supreme Court, Kings County
Docket Number: 515908/18
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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NEIL LURIE & LURIE MANAGEMENT CORP.,
Plaintiffs, Decision and order

- against - Index No. 515908/18

ABRAHAM LURIE, NEIL LURIE TRUST, SUSAN LURIE TRUST and LEILA LURIE TRUST,
Defendants, February 4, 2021

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PRESENT: HON. LEON RUCHELSMAN

The Complaint alleges that Neil Lurie is the owner of property located at 924-936 Bergen Street in Kings County. That property is owned by Lurie Management Company [hereinafter 'LMC']. LMC was incorporated in 1989 by defendant Abraham Lurie, Neil's father, as the sole owner and shareholder. In addition, Abraham Lurie originally owned and operated three entities, Bragley Manufacturing Co., Inc., Bragley Shipping & Carrying Case Corp. and Prestige Cases Inc. [hereinafter 'original businesses']. The Complaint further alleges that in 2000 Neil Lurie formed three additional entities, Bragley Carrying Case Corp., Bragley Case Company Inc. and Prestige Case Designs Inc. [hereinafter '2000 businesses']. The Complaint alleges that in 1998 Abraham Lurie transferred all ownership of LMC to Neil and that Neil has maintained uninterrupted ownership since then. In addition, Neil alleges that he is the owner and has always been the owner of the 2000 businesses.

On March 26, 2018 Neil received a letter from Abraham's attorney stating that LMC was owned as follows: 49% by the Neil

Lurie Trust, 25.5% by the Susan Lurie Trust and 25.5% by the Leila Lurie Trust. These trusts are all managed by Susan or Leila Lurie, the sisters of Neil. Further, the attorney advised that Abraham was considering selling the property. Neil objected on the grounds the property is owned by LMC and that Neil is the 100% owner of LMC and thus Abraham has no ownership interest to sell. The plaintiff commenced this action and seeks a declaratory judgement that Neil Lurie is the sole owner of LMC and thus the only person authorized to sell the property. Further, the Complaint seeks a constructive trust and breach of fiduciary duty. The defendant Abraham Lurie asserted two counterclaims, the first seeking a declaratory judgement that Abraham was the owner of LMC until 2015 when he then transferred the property to the Trust defendants. The second counterclaim is for an accounting. Further, the Trust defendants asserted five counterclaims, namely for a declaratory judgement, the wrongful filing of a notice of pendency, abuse of process, malicious prosecution and an accounting.

The defendants have now moved seeking summary judgement arguing that there are no questions of fact that Neil Lurie is not the owner of LMC or any of the above named entities. Specifically, the Trust defendants seek summary judgement on the first and fifth counterclaims and Abraham Lurie seeks summary judgement on the first and second counterclaims. The plaintiff

opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

It is well settled that "the right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (see, Palazzo v. Palazzo, 121 AD2d 261, 503 NYS2d 381 [2d Dept., 1986]).

Concerning LMC, the defendants present three reasons why Neil has not established ownership as a matter of law. First, the stock certificate presented purporting to transfer LMC from Abraham to Neil is a forgery. Second, there is no other evidence in any manner of a gift of the ownership of LMC from Abraham to Neil. Third, Abraham never transferred the deed to the property.

The stock certificate presented is dated February 11, 1998 and it states that Neil Lurie is the owner of two hundred full paid and non-assailable shares of LMC. It is signed by Abraham Lurie twice, once as the secretary/treasurer and once as the president. Further, the plaintiff has presented an affidavit from Jeffrey Luber, a forensic document examiner who is an expert in the field of handwriting, signatures and the authentication of documents. Mr. Luber compared checks undisputedly signed by Abraham Lurie with the signatures that appear on the LMC stock

certificate and concluded the signatures of the stock certificate are those of Abraham Lurie. Mr. Luber explained that "the handwriting conclusion is based upon the combination of significant similarities in the handwriting habit patterns found within the known writing of Abraham Lurie on the checks and the habit patterns found within the two questioned signatures on the Certificate. The two questioned signature entries display the same range of variation, defined as the accumulation of deviations among repetitions of respective handwriting characteristics that are demonstrated in the writing habits of an individual, as those found on the checks. Handwriting habit patterns consist of features such as - but not limited to - fluency of writing, letter construction, height relationships between letters, letter proportions, connecting strokes, slant, speed of writing, beginning and ending strokes and baseline orientation" (see, Affidavit of Jeffrey Luber, ¶9).

In opposition to that evidence, the defendants present three reasons why the stock certificate fails to establish ownership as a matter of law. First, Mr. Luber is a discredited expert and the evidence of forgery is apparent and obvious. Second, Neil Lurie testified that the stock certificate was written or filled out by Mr. Steven Podlas, however, the brother of Mr. Podlas submitted an affidavit wherein he disputed the writing on the stock certificate resembled that of his brother, and in any event

there is no real writing on the certificate at all. Third, Neil had asserted the certificate was lost in a fire yet suspiciously produced it in the beginning of 2020.

In In re Lavender, 2009 WL 367493 [E.D.N.Y. Bankruptcy Court 2009] in a case where Mr. Luber offered his expert testimony, the court stated that it had "no doubts about Mr. Luber's qualifications to act as an expert in this case" (id). It is true that in Felder v. Storobin, 100 AD3d 11, 953 NYS2d 604 [2d Dept., 2011] the court noted the lower court's determination that Luber's testimony had been undermined by a witness who confirmed a signature as authentic. However, that does not mean Mr. Luber's expert testimony carries no weight or that he has lost his particular expertise. Indeed, Mr. Luber's expertise was utilized in numerous cases (see, e.g., Hekking v. Hekking, 2016 WL 3093448 [District of Rhode Island 2016]). A mistake committed, even by an expert, does not thereby foreclose such expertise in the future. Indeed, as true with all expert testimony, a trier of fact or the court is not bound by the expert opinion, even a handwriting expert, and may utilize their own opinions (Lelekakis v. Kamamis, 41 AD3d 662, 839 NYS2d 773 [2d Dept., 2007]).

Further, the defendants have not produced an expert to challenge or dispute the conclusions of Mr. Luber. Rather, the defendants have introduced enlarged pictures of the stock

certificate's signature and has compared it with enlarged pictures of Mr. Lurie's signature on the checks utilized by Mr. Luber. Without expert opinion, the defendants assert that the signatures simply do not match and that a forgery was committed as a matter of law for purposes of this summary judgement motion. Abraham Lurie's name consists of twelve distinct letters and the defendants have submitted forty seven enlarged pictures of the stock certificate signatures with color additions to indicate irregularities of the various letters and combinations of letters. Further, the defendants submitted approximately one hundred and fifty enlarged pictures of Mr. Lurie's signature on various checks to demonstrate the dissimilarity between the signatures on the stock certificate and the signatures of Mr. Lurie on the checks. According to the affidavit of John Afrides, the photographer of the enlarged exhibits submitted, he did not make any of the notations or color additions to the pictures, rather he simply photographed them. Thus, the commentary accompanying the enlargements establishing forgery were provided by counsel. In essence, the defendants are arguing there is no need for expert evidence since the proof of fraud is obvious and apparent. It is certainly true that where the evidence of "clumsory forgeries" is clear even to a layman then the court may make such a conclusion as a matter of law (Townsend v. Perry, 177 AD 415, 164 NYS 441 [4th Dept., 1917]). Further, any witness

familiar with the handwriting of the subject signature may testify as to his or her opinion on the matter. As the court stated "testimony as to handwriting is testimony of opinion. Any person acquainted with it may be permitted to give his opinion of it. The acquaintance need not come from having seen the person write. It may be formed from seeing writing under such circumstances as put it beyond doubt that it was a true signature" (see, Hynes v. McDermott, 82 NY 41, 37 Sickles 41 [1880]). Thus, a layman nonexpert can only provide opinion evidence about the genuineness of a writing if the layman lays a proper foundation the layman is familiar with the handwriting of the person in question (People v. Clark, 122 AD2d 389, 504 NYS2d 799 [3rd Dept., 1986]). However, in Collins v. Wyman, 38 AD2d 600, 328 NYS2d 725 [2d Dept., 1971] the court held that while any witness could testify about someone's handwriting, only an expert could perform a comparison between a disputed writing and a writing conceded to be genuine. As the court stated "it is well settled in this jurisdiction that a witness who is not an expert on handwriting may not express an opinion as to handwriting based upon a comparison between a disputed writing and a writing conceded or proved to be the genuine handwriting of the person whose handwriting is in dispute" (id).

Thus, upon a motion for summary judgement asserting there are no questions of fact necessitating a trial, the plaintiff has

introduced expert testimony the signatures on the stock certificate belong to Abraham Lurie. The defendants did not present any evidence that someone familiar with Abraham Lurie's signature affirms the signature is not that of Abraham Lurie. Rather, the defendant introduced nonexpert comparison evidence to counter the conclusions of Mr. Luber. As noted, that is an improper basis upon which to assert these evidentiary conclusions. Further, even if the court would consider the nonexpert comparisons as an expert opinion about the signatures on the stock certificate the defendant has failed to explain why the differing expert opinions do not, standing alone, create questions of fact that can only be resolved by a jury. It is well settled that "conflicts in the evidence on a factual issue, including dueling expert witness opinions, may not be resolved on summary judgement, as the evaluation of competing expert opinions falls to the jury" (Scanner Technologies Corp., v. Icos Vision Systems Corp., N.V., 253 F.Supp2d 624 [S.D.N.Y. 2003]). The defendant elides this truism by asserting that the defendant's comparison was more thorough than Mr. Luber's perfunctory conclusions and therefore Mr. Luber's opinion is nothing more than his "say-so" which should not be given any weight (see, Memorandum in Reply, page 9). However, the weight of any evidence is to be determined by the jury. If the evidence of defendant can be deemed expert evidence then this case, like so

many others, is "a classic conflict between experts" and as such cannot be decided on a motion for summary judgement (Santiago v. Brandeis, 309 AD2d 621, 766 NYS2d 25 [1st Dept., 2003]).

Next, the stock certificate only contains a few words that are handwritten. Those words are 'NEIL LURIE', 'TWO HUNDRED' and FEBRUARY 11 1998' (see, Stock Certificate, included in NYSCEF No. 153). Neil Lurie testified that he was present when Steven Podlas wrote the handwritten portions himself. Peter Podlas the brother of Steven, who perished in a fire in 2006, has submitted an affidavit wherein he states he was familiar with the handwriting of his brother Steven and that the stock certificate "does not contain the handwriting of my brother Steven" (see, Affidavit of Peter Podlas, ¶6). Thus, there is a dispute between the testimony of Neil Lurie and the affidavit of Peter Podlas whether the handwritten words of the stock certificate are in fact those of Steven Podlas. It should be noted that Teabitha Jenkins, the longtime secretary who worked at LMC testified that Abraham Lurie signed the stock certificate (see, Deposition of Teabitha Jenkins, May 27, 2020, page 39). In any event, matters of credibility are surely matters to be decided by a trier of fact (Art Capital Group LLC v. Rose, 149 AD3d 447, 52 NYS3d 85 [1st Dept., 2017]). Further, there can be no argument that the testimony of one party is "conclusive" while the testimony or evidence that is contrary to those assertions are summarily

dismissed (Memorandum in Reply, page 4). Moreover, even if it is true that Steven Podlas did not insert the handwritten portions on the stock certificate that does not unequivocally establish the signatures, the only real issue of contention, are not those of Abraham Lurie. Indeed, whether Steven Podlas inserted the handwritten portions of the stock certificate surely goes to the credibility of the witnesses but it does not really involve the core issue whether Abraham signed the certificate.

Lastly, the defendant asserts there is inconsistent and contradictory testimony between Neil Lurie and his accountant Ralph Masciovecchio and even between themselves about the discovery of the stock certificate in early 2020 after it had been thought destroyed in the same fire wherein Steven Podlas perished in 2006. All the allegations of fabrication, forgery, inconsistency and outright falsehoods are all credibility issues which should not be resolved on a motion for summary judgement (Hutchings v. Yuter, 108 AD3d 416, 969 NYS2d 447 [1st Dept., 2013]). The fact the defendant believes the testimony of both Neil Lurie and Ralph Masciovecchio to be so fantastic and incredible as to defy belief does not alter the fact that at root they are questions of credibility which must be presented to a trier of fact.

Next, there is no basis to determine as a matter of law that Neil is not the owner of LMC because of recordings made in 2012.

The court has reviewed the transcript of the recordings and while isolated phrases can be interpreted to support the position of any party in the lawsuit there is surely no definitive statement by Neil that he was never the owner of LMC. The defendant points to the following statements of Neil: "I could never talk to Steve and your father or the three of us couldn't have a conversation because it was -- he would talk to Steve, I'd come in the office, he'd stop. And then, I said "Steve what's going on?" "We, we, don't worry about it. Everything's okay, we've got it covered."" (see, Transcript at NYCSEF No. 111, page 5). First, it is difficult to discern exactly what Neil is talking about. More importantly, to the extent Neil is reluctant to talk to Steve, which is presumably Steve Podlas the accountant, there is no time frame in which to constrain Neil's displeasure contained in this statement. Also, it is unclear who Neil is referring to when he says "the three of us", specifically the identity of the other two people. Moreover, it is unclear who Neil refers to when he says "your father" since Abraham is Neil's father as well and throughout the recording he refers to Abraham as "dad" or "daddy" (see, Transcript, pages 6, 8, 10, 11, 14, 15-18). Indeed, the entire thrust of the statement is ambiguous since it cannot be readily determined what if anything Neil is actually saying. The contents of these statements and other statements of the transcript are surely questions that are appropriate to explore

during a trial, however, they do not establish that Neil admitted he was not the owner of LMC.

Moreover, the defendant points to another statement of Neil to further demonstrate Neil admitted he did not own LMC or the other six entities. That statement is as follows: "so, now you have to understand is that [inaudible] paying for it, because when I took over is when Steve died. Up until that time he was, he was the client I was not the client. Anyway, he's not that sharp. He's not [inaudible]. Now, [inaudible]. Now they have three old corporations and now they opened 3 new corporations. There's Bragley Manufacturing, Bragley Shipping Carrying Case, Prestige Cases. The three new ones are Bragley Carrying Case Company, Bragley Shipping Case Company and Prestige Case Design. That's six corporations we now have. Active and running. You gonna bring these down and you gonna bring these up. They're not that smart" (see, Transcript at NYCSEF No. 111, page 8). Likewise, this statement is similarly ambiguous. First Neil asserts that when Steve died, presumably Steve Podlas, he took over. However, Neil is not an accountant and the assertion he "took over" is difficult to understand. Moreover, the statement that Steve was the client is equally ambiguous, Steve was the accountant not a client and Neil does not explain in what way he was not a client. Neil does say that "they" have three corporations, seemingly excluding himself from such ownership,

however, Neil also says that "we now have" these corporations. Again, while these questions are surely avenues to explore at trial and might indeed demonstrate Neil did not own them, it cannot be said with any certainty that Neil admitted he did not own them. The recordings are too incoherent and too confusing to conclude that as a matter of law Neil admitted he did not own the entities in dispute in this lawsuit.

Second, the defendant argues there is no other indicia of Neil's ownership of LMC. However, as noted there are questions of fact whether the stock certificate conveyed ownership. That question, if answered in the affirmative, establishes Neil's ownership and no other indicia are therefore necessary. This question demands the matter be presented to a trier of fact.

Third, concerning the transfer of the deed to the property, any failure to do so does not mean ownership of LMC was likewise not transferred. If Neil owned LMC then he likewise owned the property which LMC owned regardless of the transfer of the deed. In any event, surely questions of fact in this regard have been raised.

Moreover, the plaintiff has submitted tax returns which demonstrate that the 2009, 2010, 2011, 2015, 2016, 2017, 2018 and 2019 tax returns, Part II of Schedule G of Form 1120 which is called 'Information on Certain Persons Owning the Corporation's Voting Stock' for LMC lists Neil Lurie as the 100% owner of the

corporation's stock. The 2012, 2013 and 2014 tax returns state that Neil Lurie is the 75% owner yet there is no other individual listed comprising the remaining 25%. The 2012 and 2013 tax returns in Form 1125-E 'Compensation of Officers' lists Susan Lurie and Leila Lurie as each owning 12.5%. The 2008 tax return in Part b of Schedule K lists Neil Lurie as the 100% owner of the stock of the company. Schedule F of the 2005 and 2006 New York City General Corporation Tax Returns lists Neil Lurie as the only stockholder owning more than 5% of issued capital stock who received any compensation. Schedule E of 2004 tax return for LMC lists Neil Lurie as 75% owner, Suans Lurie as 25% owner and Leila Lurie as 25% owner. Of course that equals more than 100% an obvious error. In any event the 2004 tax return is signed by Abraham Lurie.

The defendant has submitted tax returns for an entity called Lurie Management Inc., for 2007 which lists Abraham Lurie as the 100% owner of LMC. This ownership is found on Schedule K of Form 1120. Further, Abraham has submitted a 2008 tax return for Lurie Management Inc., wherein in Part II of an attachment to Form 1120 it lists Abraham Lurie as the 100% owner of LMC. Further, Abraham has submitted tax returns for 2010, 2011 and 2012 for Lurie Management Inc. Part II of Schedule G of Form 1120 which is called 'Information on Certain Persons Owning the Corporation's Voting Stock' for Lurie Management Inc., for all

three years lists Abraham Lurie as the 100% owner of the corporation's stock.

The defendant asserts that the tax documents presented were in fact prepared for LMC and a "typo" accounts for the reference to Lurie Management Inc., instead of Lurie Management Corp. First, it is curious the defendant asserts that hundreds of tax documents submitted to the Internal Revenue Service over a period of a number of years each contain a typo yet criticizes Neal's tax return of 2004 which contains a single typo concerning the percentages of ownership as a "stupid mistake" (see, Affidavit of Abraham Lurie, December 18, 2020, ¶7). Second, the defendant asserts the Tax Identification Number of Lurie Management Inc., is the same as LMC further demonstrating an innocent typo. However, even if that is true the returns for Lurie Management Inc., provide a different address, 1743 East 28th Street, Brooklyn, NY, which is not the address of LMC which is 924 Bergen Street. No explanation has been provided why an alternative address, one that does not on its face involve LMC, was included on all the tax returns. Moreover, the defendant asserts that "the Internal Revenue Service accepted these returns for LMC" (Reply Affirmation of Dani Schwartz Esq. ¶6). However, the court cannot substantiate that assertion and is it specifically disputed by Neil. Thus, the court is presented with two competing sets of tax returns and each set lists as the owner the

party that produced that set. Besides the serious legal ramifications these competing tax returns imply they surely further raise questions as to the ownership of LMC. While tax documents do not conclusively confirm ownership as will be explained when dealing with the other six entities, the tax documents submitted by Neil unquestionably raise issues of fact as to the ownership of LMC. Therefore, it cannot be concluded as a matter of law that there are no questions of fact that Neil is not the owner of LMC.

Concerning the original businesses, the defendants argue the plaintiff cannot demonstrate ownership over them. Specifically, the defendants argue there is no evidence the ownership over those entities was ever transferred from Abraham to Neil. Regarding the original businesses, Bragley Manufacturing Company Inc., Bragley Shipping and Carrying Case Corp., and Prestige Cases Inc., Neil testified and argues that ownership was conferred to him by Abraham's transfer through Federal Income Tax Returns.

The crux of defendant's arguments seeking summary judgement regarding these businesses is that there is no mechanism whereby gifts can be made through a tax return and that consequently Neil cannot be the owner of the original businesses.

However, concerning Bragley Manufacturing Company Inc., and Bragley Shipping and Carrying Case Corp., the plaintiff has

produced tax returns which demonstrate that Neil was the owner of these two entities as early as 2002, consistent with Neil's assertions in this litigation. In reply the defendants counter that "before plaintiffs can reach any question of control, they must first establish the transfer of ownership by a 1egally cognizable method" (Reply Affirmation of Dani Schwartz Esq., ¶30). The defendants further argue the tax returns submitted which support Neil's ownership were manipulated by Neil and are "self-serving and unauthenticated tax documents that he himself created and that he himself signed as a purported basis for conveying his father's businesses to himself" (id at ¶33). It should be noted the tax returns concerning Bragley Manufacturing Company Inc., only contain the Schedule K-1's, however the tax returns for Bragley Shipping and Carrying Case Corp., are full and complete tax returns which indicate they were prepared by Steven Podlas of Massapequa Park New York. Thus, the defendants accuse the plaintiff of not only creating false tax returns but also falsifying the preparer of such returns. While those allegations may prove true the defendants have not presented any evidence why these discrepancies do not create questions of fact that must be resolved by a jury. Further, the defendants have not presented different and more authentic tax returns which would conclusively establish the plaintiff's as fakes. Thus, the defendants do not sufficiently challenge the ownership interests

raised in the tax returns that demonstrate Neil is the owner of the two entities noted.

To be sure, there is scant authority whether the existence of Schedule K-1's or even complete tax returns conclusively establish ownership as recorded in those documents. The cases that have dealt with this issue have held they do not establish ownership but create an "unsubstantiated claim" (Beacher v. Estate of Beacher, 756 F.Supp2d 254 [E.D.N.Y. 2010]). Further, as noted in Royal Communications Consultants Inc., v. Iviz LLC, 40 Misc3d 1217(A), 975 NYS2d 712 [Supreme Court Kings County 2013] Schedule K-1's do not constitute "incontrovertible proof of ownership" (id). Nevertheless, they are surely evidence of ownership and certainly questions of fact have been created which must be presented to a trier of fact.

Further, although there are no tax returns presented for Prestige Cases Inc., Neil argues he maintains ownership of that entity through his operation of the business as well as expenditures made on behalf of the business. That argument likewise concerns the other two entities as well.

The defendants insist that there are no questions of fact that Neil is not an owner of any of these entities because it cannot be explained how he came to own them. That is surely a compelling argument and the plaintiff has not really provided a satisfactory answer. However, it is equally compelling that

regarding Bragley Manufacturing Company Inc., the Schedule K-1's for 2001, 2003 and 2004 only list Neil Lurie as a shareholder. Further, concerning Bragley Shipping and Carying Case Corp., the 2001 tax return lists three owners, Neil Lurie (40.75%), Abraham Lurie (47%) and L. Lorello (12.25%). However, in 2002 the tax return only lists Neil Lurie as the 100% owner. Concerning Prestige Cases Design Inc., the 2000 and 2003 tax returns only lists Neil Lurie as the 100% owner. Concerning Bragley Case Company Inc., again only Neil Lurie is listed as an owner on Schedule K-1 and other schedules for the years 2012, 2013, 2016 and 2017. It is true that Abraham Lurie submitted a supplemental schedule for Bragley Manufacturing Inc., for the year 2001.

Thus, as noted, while the evidence of an actual transfer of the entities from Abraham to Neil must be explored the tax documents reveal that essentially only Neil received Schedule K-1's and not Abraham. This surely raises questions of fact whether Neil is in fact the owner of the entities. Abraham does not explain why he never received any Schedule K-1's or why he never even demanded one and never prepared a Form 8082, an IRS Form which is a 'Notice of Inconsistent Treatment or Administrative Adjustment Request' concerning a K-1 Form (see, Don't Like Your K-1 Percentages? File a Form 8082!, 111 Journal of Taxation 382 [December 2009]). The IRS instructions regarding the Form indicate they apply when the entity "has not filed a tax

return or given you a Schedule K-1, Schedule Q, or foreign trust statement by the time you are required to file your tax return (including extensions), and there are items you must include on your return" (see, Instructions for Form 8082: Who Must File).

Therefore, based on the foregoing there are questions of fact concerning the ownership of all of the corporations in this case. Thus, all motions seeking summary judgement are denied.

So ordered.

ENTER:

DATED: February 4, 2021
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC