

Karibzhanova v 212 Fifth Ave. Unit 3B LLC

2023 NY Slip Op 31737(U)

May 22, 2023

Supreme Court, New York County

Docket Number: Index No. 650242/2022

Judge: Melissa A. Crane

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. MELISSA A. CRANE PART 60M

Justice

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INDEX NO. 650242/2022

MOTION DATE N/A

MOTION SEQ. NO. 003

MAKHPAL KARIBZHANOVA, INDIVIDUALLY, AS A
MEMBER OF 212 FIFTH AVENUE UNIT 3B LLC, AS
CUSTODIAN UNDER THE NYS UTMA CREATED F/B/O
IMAN AINEK KARIBZHANOVA, AND DERIVATIVELY AS A
MEMBER AND MANAGER OF 212 FIFTH AVENUE UNIT
3B LLC

Plaintiff,

- v -

212 FIFTH AVENUE UNIT 3B LLC,

Defendant.

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**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 61, 62, 65

were read on this motion to/for

DISMISSAL

This dispute involves plaintiff Makhpal Karibzhanova, individually, as a member of 212 Fifth Avenue Unit 3B LLC, as custodian under the NYS UTMA created f/b/o Iman Ainek Karibzhanova, and derivatively as a member and manager of 212 Fifth Avenue Unit 3B LLC (“Makhpal”), and defendant 212 Fifth Avenue Unit 3B LLC (“212 Fifth Ave.”).

On June 1, 2016, Makhpal entered into an agreement to purchase Unit #3B in the 212 Fifth Avenue Condominium (the “Unit”) located in Manhattan, New York (the “Purchase Agreement”) (Doc 29 [Third Amended Complaint] ¶ 10). Makhpal later assigned her rights in the Unit, and under the Purchase Agreement, to defendant 212 Fifth Ave. on March 10, 2017 pursuant to an Assignment and Assumption Agreement (the “Assignment Agreement”) (*id.*, ¶ 12).

Defendant 212 Fifth Ave. later acquired title to the Unit by an April 7, 2017 dated deed (*id.*, ¶ 13). Defendant’s internal affairs, which are governed by an operating agreement (Doc 56

[Operating Agreement]) (the “Operating Agreement”), designate Makhpal as defendant’s manager (Doc 29 [Third Amended Complaint] ¶ 4). Additionally, Defendants’ only members are Makhpal’s two daughters, Iman Ainek Karibzhanova (“Iman”) and Jasmin Karibzhanova (“Jasmin”), under the Operating Agreement. Each daughter holds a 50% interest (*id.*, ¶¶ 5-6).

When the Operating Agreement was created, Iman was a minor. Thus, the Operating Agreement designated Makhpal as custodian of Iman under the Uniform Trust to Minors Act (“UTMA”), and also of her membership interest in Defendant, until such time as she had legal capacity, under the UTMA, to take personal ownership of her membership interest herself (*id.*, ¶ 7; *see also id.*, Ex. A – “UTMA Account” [establishing account for “Iman Ainek Karibzhanova by Makhpal Karibzhanova, as custodian under the New York UTMA”).

In its November 5, 2021 dated letter, defendant set forth several allegations of misconduct against the Makhpal in hopes of removing her as manager (*id.*, ¶ 16). About a month later, in their December 22, 2021 dated letter, Iman and Jasmin informed Makhpal that she had purportedly been removed as manager (*id.*, ¶ 17). At that time, Iman was not yet 21, the age of majority for the purposes of UTMA accounts in New York. Section 3.9 of the Operating Agreement permits removal of the manager only for gross negligence or willful misconduct, and by a vote or written consent of at least a majority of Defendant’s Members (*id.*, ¶ 18). Makhpal’s only remaining causes of action in this case challenge her daughters’ and the defendants’ actions prior to Iman reaching majority age.

Specifically, Makhpal seeks declarations that: (1) the December 2021 removal was invalid and Makhpal remains the manager [first cause of action in the third amended complaint]; and (2) that the December 2021 Resolution is invalid and Makhpal remains the manager [second cause of action in the third amended complaint] (Doc 29 [Third Amended Complaint], Doc 45 [MS 02

Decision)). The court dismissed Makhpal's third and fourth causes of action in the operative third amended complaint when the court resolved Motion 2.

Since the third amended complaint was filed, Iman turned 21 years old. 21 is the age of majority in New York State (*see* EPTL § 7-6.1). When a minor reaches the age of majority, the custodianship of UTMA assets terminates automatically (*see id.*). After Iman's 21st birthday, defendant, through its only members, Jasmin and Iman, issued a unanimous resolution removing Makhpal as manager (Doc 58 [2/6/23 Resolution]).

Defendant now moves, in Motion Sequence No. 03, pursuant to CPLR 3211(a)(1) and (a)(3), to dismiss the first and second causes of action for declaratory judgments in Makhpal's Third Amended Complaint (Doc 50 [Notice of Motion]). This motion was fully submitted on 4/27/23. Plaintiff's counsel then moved, by order to show cause, to withdraw its representation (*see* Doc 67 [MS 04]). The court granted that application and stayed the case temporarily (Doc 70 [decision and order resolving MS 04]). The stay expired on May 19, 2023 (*see id.*), and the court now grants defendant's motion, as set forth below.

Discussion

On a motion to dismiss under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Chen v Romona Keveza Collection LLC*, 208 AD3d 152, 157 [1st Dept 2022]). "On a defendant's motion pursuant to CPLR 3211(a)(3) to dismiss the complaint based upon the plaintiff's alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law" (*U.S. Bank N.A. v Guy*, 125 AD3d 845, 847 [2d Dept 2015]; *see HSBC Mtge. Corp. [USA] v MacPherson*, 89 AD3d 1061, 1062 [2d Dept 2011]).

Furthermore, New York's Uniform Transfers to Minors Act ("UTMA") applies to minors up to the age of 21 (*see* EPTL 7-6.1 [k]). Thus, a custodianship under the UTMA terminates once the minor turns age 21 (EPTL 7-6.20 [a]), unless the creator elects to terminate at the age 18 (*see* EPTL 7-6.21).

Here, defendant has satisfied its burden in establishing, *prima facie*, Makhpal's lack of standing to sue in this matter as a matter of law, which requires dismissing the remaining claims seeking declaratory relief (first and second causes of action) in the Third Amended Complaint.

First, Iman turned 21 on December 23, 2022. At that time, the UTMA account expired as a matter of law (*see* EPTL 7-6.20 [a]), Makhpal's custodianship ended, and the assets [a 50% membership interest in the defendant entity] were transferred to Iman. As of Iman's 21st birthday, Jasmin and Iman were the only members of defendant, there was no custodianship in place, and Jasmin and Iman issued the February 2023 resolution properly.

Makhpal's two remaining claims set forth in the Third Amended Complaint seek declarations concerning events that have been superseded by the February 2023 resolution, and Makhpal lacks standing to challenge the 2023 resolution as her custodianship of Iman's assets ended in December 2022.

The court rejects Makhpal's waiver argument submitted in opposition to this motion (Doc 62 [Opposition] ¶¶ 5-12). A waiver did not occur here given that defendant has not yet answered the Third Amended Complaint (Doc 29 [Third Amended Complaint]). Additionally, Makhpal's lack of capacity to maintain what remains of this action did not arise until December 2022, when Iman turned 21. Nevertheless, even if she had standing, or if defendant had waived the issue of standing, the relief that plaintiff seeks is moot as a result of the February 2023 unanimous resolution to remove Makhpal as manager. If the court were to award Makhpal the declarations

she seeks in her third amended complaint, they would be irrelevant and ineffectual advisory opinions.

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that defendant 212 Fifth Avenue Unit 3B LLC's motion to dismiss [MS 03] the first cause of action for declaratory judgment and second cause of action for declaratory judgment, as set forth in plaintiff Makhpal's Third Amended Complaint, is granted, and the third amended complaint is dismissed with prejudice; and it is further

ORDERED, ADJUDGED, and DECLARED that plaintiff is not entitled to the declaratory judgments that she seeks in the first and second causes of action in her third amended complaint because those causes of action are moot and would result in unenforceable and irrelevant advisory declarations; and it is further

ORDERED that the clerk is directed to mark this case as disposed; and it is further

ORDERED that there shall be no further motion practice without a pre-motion conference with the court (see Part Rule 10 [a]).

5/23/2023
R/M/2023

DATE


MELISSA A. CRANE, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE