Index No.: 507186/2020

At Part 13 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof located at 320 Jay Street, Brooklyn, New York, on the 17th day of May 2023.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 13

AVROHOM D. SCHWARTZ, YECHEZKEL S. SCHWARTZ, and YAKOV Y. SCHWARTZ,

Plaintiffs,

-against-

MENDY GOLDSTEIN,

Defendant.

Motion Seq. Nos.: 3 & 4
Cal. Nos.: 44 & 45

Index No.: 507186/2020

DECISION/ORDER

Recitation, as required by CPLR § 2219(a), of the e-filed documents considered in the review of Defendant's motion for summary judgment and Plaintiff's cross-motion to amend the complaint:

Document	NYSCEF Document Number
Notice of Motion	61
Attorney Affirmation in Support	62
Affidavit	63
Exhibits A-Q	64-80
Statement of Material Facts	81
Notice of Cross-Motion	92
Affidavit in Opposition to Motion	93
Exhibits A-E	94-98
Affirmation of Eliezer Schwartz	99
Exhibits A-B	100-101
Affirmation of Avraham D. Schwartz	102
Affirmation of Clara Schwartz	103
Memorandum of Law in Opposition	104
Response to Statement of Material Facts	105
Affidavit in Support of Cross-Motion	106

Exhibits A-E	107-111
Affirmation of Eliezer Schwartz	112
Exhibits A-B	113-114
Affirmation of Avraham D. Schwartz	115
Affirmation of Clara Schwartz	116
Memorandum of Law	117
Affirmation in Opposition to Cross-Motion and in Further Support of Motion	119
Exhibits A-C	120-122
Memorandum of Law	123
Affidavit of Herschel Fisch	124

Upon the foregoing cited papers, and after oral arguments on the record held on May 17, 2023, the decision and order of this Court on this motion for summary judgment and cross-motion to amend the complaint is as follows: The motion for summary judgment is GRANTED and the motion to amend the complaint is DENIED.

BACKGROUND

This action was commenced by Plaintiffs alleging two causes of action. The first cause of action is for conversion and the second cause of action is for breach of fiduciary duty. Both are related to the same transaction.

Plaintiffs are three sons of Clara Schwartz. Clara Schwartz is the Grantor and beneficiary of the MC-4-12 Trust ("the Trust"). The Trust was at one time the owner of a fifty percent interest in the real property located at 761 East Second Street, Brooklyn, New York (the "Premises"). The other fifty percent interest in the Premises was owed by Yacov D. Kiwak and Sarah Z. Kiwak, Clara Schwartz's former some-in-law and daughter, respectively. No portion of the Premises was owned by any of the named plaintiffs.

A dispute arose between Clara Schwartz and the Trust on the one hand and Yacov D. Kiwak and Sarah Z. Kiwak on the other hand over a proposal to sell the Premises which they owned together. Since the Trust was a fifty percent owner and Yacov D. Kiwak and Sarah Z. Kiwak were fifty percent owners, a sale without the consent of the other party was not practicable. Clara Schwartz and Yacov D. Kiwak agreed to arbitrate their dispute over the sale of the Premises. This arbitration occurred before a religious arbitration panel, also known as a beth din. Defendant

Mendy Goldstein is a *toen,* or advisor in rabbinical arbitration, who was hired by Clara Schwartz to assist her in the religious arbitration.

In or about September or October 2018, the beth din determined that a compromise should be made where, *inter alia*, the Premises would be sold, and the proceeds split equally between the Trust and the opposing party, Yacov D Kiwak.

Plaintiffs claim that as parties to the arbitration they became intitled to "settlement funds." However, the settlement approved and ordered by the beth din arbitrators was that the Premises owned by the Kiwaks and the Trust should be sold and split between them; neither Plaintiffs nor their mother Clara Schwartz had any ownership interest in the Premises.

In order to carry out the mandate of the beth din, Defendant agreed to serve in the role of Trustee and do the necessary work for the closing. The current trustee of the Trust appointed Defendant successor trustee of the Trust and resigned to empower him to conduct the closing. As successor Trustee, Defendant was bound by the terms of the Trust which included spendthrift provisions, non-assignability provisions and other restrictions on distribution of the assets. He was also granted broad discretion in certain discretionary payments.

On or about March 2019, the Premises was sold for approximately one million, two hundred thousand dollars ($1,200,000.00), before adjustments and closing costs. Plaintiffs allege that Defendant received $575,000.00 in proceeds from the closing, that he was entitled to keep $30,000 for his fees, and that $545,000.00 was due to them.

Plaintiffs apparently assumed that because the funds were not delivered to them that Defendant misappropriated the funds. However, they do not dispute that under the terms of the Trust they were not beneficiaries entitled to the funds. Of additional noteworthiness, Plaintiffs admit that they do not seek and have never sought an accounting in regard to proceeds from the closing.

Plaintiffs allege two causes of action. The first is for conversion based on Defendant not giving Plaintiffs funds from the Trust. The second is for beach of fiduciary duty. Notably, the alleged fiduciary duty is based on Defendant acting as their *toen*, and not on his role as a Trustee. Plaintiffs were explicit in limiting their claim both in their complaint and opposition papers.

Plaintiffs now allege that Clara Schwartz assigned her rights in the proceeds from the sale of the Premises to them. Alternatively, they seek to amend the complaint to add her as a party and provide an affidavit that she consents to such joinder.

CONCLUSIONS

Defendant is entitled to summary judgment based on the undisputed facts and the documentary evidence in the form of the deeds and Trust agreement.

"Summary judgment permits a party to show, by affidavit or other evidence, that there is no material issue of fact to be tried, and that judgment may be directed as a matter of law, thereby avoiding needless litigation cost and delay" *(Brill v. City of New York*, 2 NY3d 648, 651 [2004]). "As a rule, in determining a motion for summary judgment (CPLR 3212, subd. [b]), the court's function is limited to the ascertainment of the existence of any genuine issues of material fact in the proofs laid bare by the parties' submissions of affidavits based on personal knowledge and documentary evidence, rather than in their conclusory or speculative averments" (*Behar v. Ordover*, 92 AD2d 557, 558 [2d Dept 1983]).

An opponent to a motion for summary judgment must present evidentiary facts sufficient to raise a triable issue of fact, and averments merely stating conclusions of fact or law are insufficient (*see Reagan v. Hartsdale Tenants Corp.*, 27 AD3d 716 [2d Dept 2006]; *STED Tenants Owners Corp. v. Chumpitaz*, 23 AD3d 373 [2d Dept 2005]; *Callahan Industries, Inc. v. Micheli Contracting Corp.*, 124 AD2d 960 [3d Dept 1986]).

Defendant is Entitled to Summary Judgment on the First Cause of Action:

Defendant has established his entitlement to summary judgment as a matter of law on the first cause of action for conversion.

Conversion was explained by the Court of Appeals:

> "A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights."

(*Colavito v. New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006] [internal citations omitted]).

The elements of conversion are "(1) intent, (2) interference 'to the exclusion of the owner's rights,' and (3) possession, or the right to possession in plaintiff" (*Meese v. Miller*, 79 AD2d 237 [4th Dep. 1981]).

In the instant case, there could not be conversion of Plaintiffs' assets because Plaintiffs do not have any possessory interest in the assets of the Trust, and furthermore, Plaintiffs do not standing to plead such a cause of action. Additionally, Clara Schwartz has no ability to assign her rights from the Trust or demand their disbursement, so her alleged assignment is of no moment.

Plaintiffs argue in opposition that since they never received the money Defendant must have converted it. This argument ignores the clear mandates from the Trust and their lack of entitlement to have the funds disbursed to them.

Defendant is Entitled to Summary Judgment on the Second Cause of Action:

The second cause of action is for breach of fiduciary duty. Plaintiff advances a legal theory that as a *toen* Defendant owed a fiduciary duty to Plaintiffs.

First, it must be noted that there is no reported case that upholds this theory. Plaintiffs cite to *Y.G. v. T.K.*, 2018 N.Y. Misc. LEXIS 1946 [Sup. Ct. Kings Co. 2018] (describing a toen as "i.e., rabbinical lawyer") and *Tal Tours (1996) Inc. v. Goldstein*, 9 Misc. 3d 1117(A) [Sup. Ct. Nassau Co. 2005] (describing a *toen* as "agent"). Based on these definitional descriptions Plaintiff argues that a *toen* has a fiduciary duty much like a lawyer does. However, these cases do not support such a conclusion. In *Y.G. v. T.K.*, the subject matter was a divorce proceeding and the wife claimed that her *toen* did not have access to the building of the beth din. In *Tal Tours*, the court dealt with what type of arbitration the parties had agreed to submit to have their matter adjudicated. The courts did not discuss fiduciary duty in either of those cases. Moreover, it would be inappropriate for this Court to determine the duties of a *toen* in religious arbitration as it would necessarily require this secular court to investigate into religious principles (see *Matter of Ming Tung v China Buddhist Assn*, 124 AD3d 13 [1st Dept 2014]).

Moreover, even if a fiduciary duty existed, Defendant could not ignore the clear mandates of the Trust and deliver money to Plaintiffs in contravention of his duties as trustee merely because he owed them a fiduciary duty as a *toen*.

Index No.: 507186/2020

Leave to Amend the Pleading is Denied as Moot:

Plaintiff seeks to amend his complaint in opposition to this motion. The amendment seeks to add Clara Schwartz as a Plaintiff. However, this would do nothing to change the analysis leading to summary judgment in Defendant's favor. On the first cause of action, there is still no evidence of conversion and no current right to distributions from the Trust. On the second cause of action, there is still no fiduciary duty or basis to force a distribution.

"Although leave to replead or amend pleadings should be 'freely given'[,] a court should deny such a motion when the proposed amendment or repleading is palpably insufficient or patently without merit. Here, inasmuch as the plaintiff may not maintain causes of action [...] the repleading of those causes of action, the amendment of the complaint with respect to them, or the addition of new claims similarly barred [...] would be palpably insufficient" (*Boakye-Yiadom v Roosevelt Union Free Sch. Dist.*, 57 AD3d 929, 931 [2d Dept. 2008] [internal citations omitted].

Further, "[a] proposed amendment that cannot survive a motion to dismiss should not be permitted" (*Scott v Bell Atl. Corp.*, 282 AD2d 180, 185 [1st Dept. 2001]).

As the infirmities of the complaint would not be cured by the proposed amendment. Accordingly, it is

ORDERED, that Defendant's motion for summary judgment is GRANTED and the complaint is DISMISSED. It is further

ORDERED that, considering the above ruling, Plaintiff's cross-motion to amend the complaint is DENIED as Moot.

This constitutes the decision, order of this Court.

Dated: May 17, 2023

ENTER:

HON. RUPERT V. BARRY, A.J.S.C.