

Lewis v Alcobi

2017 NY Slip Op 30664(U)

April 6, 2017

Supreme Court, New York County

Docket Number: 653179/2012

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 45

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EMILY SARA LEWIS, an Infant over fourteen (14) years
of age, by her natural guardian BOAZ BAG BAG, suing
individually and derivatively on behalf of 122 STREET
SLASH, LLC,,

Plaintiffs,

Index No. 653179/2012

-against-

ASHER ALCOBI, HILLIT MEIDAR AFLI, 122 STREET
SLASH, LLC, and MEP AUTO INC.,

Defendants.

-----X
Anil C. Singh, J.:

In this action, plaintiff Emily Sara Lewis (Emily Sara), who claims to be a one-third owner of defendant 122 Street Slash, LLC (LLC), alleges that defendants Asher Alcobí and Hillit Meidar Alfi, who, she alleges, each have a one-third ownership interest in the LLC, have operated the LLC for their own benefit to the exclusion of her interest, and have prevented her from examining the books and records of the LLC. Emily Sara has discontinued the action against defendant MEP Auto, Inc.

Defendants now move for summary judgment dismissing the complaint on the ground that Emily Sara does not have an ownership interest in the LLC. Emily Sara cross-moves to strike defendants' third affirmative defense.

Factual and Procedural Background

Defendant LLC was formed in May 2007 for the purpose of owning and managing real property located at 122 School Street, Yonkers, New York. The founding members of the LLC, each of whom had a one-third ownership interest, are Boaz Bag Bag, Emily Sara's father, and defendants Alcobí and Afli.

On April 1, 2008, via an amendment to the LLC's operating agreement, Bag Bag transferred his one-third ownership interest to his then infant daughter Emily Sarah.

On February 9, 2009, Bag Bag and Alcobi entered into a "PAYMENT, SETTLEMENT AGREEMENT" (Settlement Agreement). The Settlement Agreement acknowledged that issues had arisen between Bag Bag and Alcobi and that, in settlement of those issues, Bag Bag agreed to pay Alcobi the sum of \$190,000. The terms of payment were as follows: Bag Bag was to tender one payment of \$95,000 on September 10, 2009, and a second payment of \$95,000 on September 10, 2010.

On February 10, 2009, Alcobi and Jackie Lewis, Bag Bag's former wife and the mother of Emily Sara, entered into a transfer agreement (Transfer Agreement), under which Jackie Lewis, as guardian of Emily Sara, transferred Emily Sara's ownership interest in the LLC to Alcobi. The Transfer Agreement referenced the Settlement Agreement. The Transfer Agreement stated that Emily Sara's interest in the LLC was being transferred for "valuable consideration receipt of which to [sic] hereby acknowledged, by all parties" (see Millman aff, Exhibit D). The Transfer Agreement also provided that, if Bag Bag made the two \$95,000 payments in compliance with the Settlement Agreement, Jackie Lewis would have the right to repurchase Emily Sara's former interest in the LLC from Alcobi for \$10. Paragraph seven of the Transfer Agreement provided that, from February 10, 2009 to September 10, 2010, Emily Sara was entitled to one third of the cash flow generated by the LLC.

In June 2012, Bag Bag commenced an action, individually, and on behalf of Emily Sara and the LLC, in Supreme Court, Westchester County. Defendants filed motions in Supreme Court, New York County, to change venue to New York County. This Court granted the motions and directed

the change of venue to New York County.

On September 12, 2012, plaintiffs filed an amended complaint alleging eight causes of action sounding in breach of the LLC's operating agreement, breach of the duty of good faith and fair dealing, unjust enrichment, breach of fiduciary duty, and derivative claims on behalf of the LLC. Plaintiffs also sought a declaratory judgment removing Alcobi as manager of the LLC, and injunctive relief to maintain the status quo of the LLC. The complaint alleged that since 2010, defendants Alcobi and Alfi have managed and operated the LLC for their sole benefit and to the detriment of Emily Sara. The complaint also alleged that Alcobi and Alfi violated the terms of the LLC's operating agreement by distributing profits only to themselves, failing to provide plaintiffs with a K-1 for the tax years 2010-2012, preventing plaintiffs from entering the LLC offices, and preventing plaintiffs from accessing the LLC's financial information. The amended complaint does not reference the Transfer Agreement.

Issue was joined by defendants Alcobi, Alfi, and the LLC.

In September 2013, plaintiffs moved to amend the complaint a second time to, among other things, add a ninth cause of action alleging that Emily Sara did not receive any consideration in exchange for the transfer of her ownership interest in the LLC to Alcobi. Therefore, according to plaintiffs, the Transfer Agreement is void and the transfer invalid because it lacked consideration and violated the Estate Powers and Trust Law (EPTL) § 7-6.14.¹ The proposed second amended

¹EPTL § 7-6.14, entitled **Use of custodial property**, provides:

(a) A custodian may deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the custodian considers advisable for the use and benefit of the minor, without court order and without regard to (1) the duty or ability of the custodian personally or of any other person to support the minor, or (2) any other income or property of the minor which may be applicable or available for the support of the minor.

complaint also removed MEP Auto, Inc. as a defendant, and made other incidental corrections to the amended complaint. Plaintiffs also moved for the appointment of a receiver to preserve Emily Sara's interest in the LLC, and to strike defendants' answer or to compel discovery.

Defendants cross-moved for summary judgment dismissing the first amended complaint, arguing, among other things, that because Bag Bag transferred his interest in the LLC to Emily Sara, he had no standing to bring this action.²

Oral argument on the motion and cross motion was held on March 12, 2014, during which Bag Bag conceded that he had no standing to commence this action, and that Emily Sara is the proper plaintiff. After oral argument, this court, in a decision rendered on the record, denied plaintiffs' motion to amend the complaint and denied defendants' cross motion for summary judgment, deeming it moot (*see* Millman aff, exhibit E). In denying plaintiffs' motion to add a ninth cause of action, this court found that paragraph five of the Transfer Agreement expressly stated that the transfer was for valuable consideration, and that Emily Sara did not submit any evidence to contradict that statement (*see* Millman aff, exhibit E at 24-25). This court noted that plaintiffs did not submit an affidavit from Jackie Lewis, as guardian of Emily Sara, to explain why, despite the

(b) On petition of an interested person or the minor if the minor has attained the age of fourteen years, the court may order the custodian to deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the court considers advisable for the use and benefit of the minor.

(c) A delivery, payment, or expenditure under this section is in addition to, not in substitution for, and does not affect any obligation of a person to support the minor.

²By order dated December 12, 2012, this court adjourned plaintiffs' motion for leave to amend to March 12, 2014, and gave defendants leave to withdraw their cross motion for summary judgment, with leave to renew via an order to show case. On February 24, 2014, defendants refiled their cross motion for summary judgment dismissing the complaint, via an order to show cause.

recitation in paragraph five of the Transfer Agreement, no consideration was received for the transfer (*id.*). With respect to plaintiffs' proposed claim that the transfer violated the EPTL, this court held that section 7-6.14 of the EPTL did not provide a basis upon which a minor could void a transfer (*id.* at 25). This court stated that its determination was without prejudice to Emily Sara seeking to assert a cause of action for breach of paragraph seven of the Transfer Agreement, which entitled her to one third of the cash flow of the LLC from February 10, 2009 to September 10, 2010 (*id.* at 26). [It is important to note that, despite this ruling, Emily Sara did not seek to amend the complaint to assert a claim for breach of paragraph seven of the Transfer Agreement.]

Emily Sara appealed.

On June 30, 2015, the Appellate Division, First Department, in *Bag Bag v Alcobi* (129 AD3d 649 [1st Dept 2015]), affirmed the denial of plaintiffs' motion for leave to add the proposed ninth cause of action, holding that it was a proper exercise of discretion (*id.*). The Appellate Division noted that plaintiffs failed to offer facts in evidentiary form to suggest a lack of consideration, by not submitting an affidavit from Bag Bag, Emily Sara, or Jackie Lewis to controvert the Transfer Agreement's recital of the receipt of valuable consideration (*id.*). The Appellate Division, however, modified this court's decision and order to allow the other proposed amendments, on the ground that they were incidental corrections to the first amended complaint, i.e., they corrected a misspelling and dropped MEP Auto, Inc. as a defendant (*id.* at 650). Thus, the Appellate Division deemed the second amended complaint to be the operative complaint, other than the ninth cause of action (*id.*).

The second amended complaint asserts eight causes of action. Emily Sara, individually, alleges causes of actions, which accrued in 2010, for breach of the LLC's operating agreement, breach of the duty of good faith and fair dealing, unjust enrichment, and breach of fiduciary duty.

Emily Sara also asserts similar claims, derivatively, on behalf of the LLC. The second amended complaint also seeks to remove Alcobi as manager of the LLC, and an injunction preserving the status quo of the LLC. In September 2015, defendants served their answer to the second amended complaint, which asserts, among other things, a third affirmative defense that, pursuant to the terms of the Transfer Agreement, Emily Sara had no interest in the LLC after February 10, 2009.

Defendants now move for summary judgment dismissing the complaint on the ground that Emily Sara cannot maintain this action, because she has no interest in the LLC. Defendants note that since Bag Bag never paid Alcobi the \$190,000, pursuant to the Settlement Agreement, Emily Sara's one third interest in the LLC was not returned to her. Thus, she cannot maintain this action against defendants, and the complaint must be dismissed. Defendants claim, however, that pursuant to paragraph seven of the Transfer Agreement, Emily Sara is entitled to one third of the cash flow from the LLC from February 10, 2009 to September 10, 2010, and therefore, according to their calculations, she is entitled to \$2,965.63, plus statutory interest.

Emily Sara cross-moves for an order striking defendants' third affirmative defense, alleging that she has no interest in the LLC. Emily Sara argues that, although this court denied her motion for leave to add a ninth cause of action, alleging that the Transfer Agreement is void due to lack of consideration and for violation of EPTL § 7-6.14, the denial was not an adjudication on the merits. Emily Sara argues further that since the Appellate Division left the remainder of her second amended complaint intact, she is free to argue that the Transfer Agreement is invalid.

In support of her cross motion, Emily Sara submits an unsigned and unsworn affidavit, in which she states that she lives in Israel, turned 18 years old on December 13, 2014, and did not receive consideration for the transfer of her ownership in the LLC. Emily Sara also submits an

unsigned and unsworn affidavit from Jackie Lewis, who states that she transferred Emily Sara's interest in the LLC at the behest of Bag Bag, in order to pay his debt to Alcobi, and that Emily Sara did not receive consideration for the transfer. Emily Sara also submits the affidavit of Bag Bag, who states that he asked his ex-wife, Jackie Lewis, to transfer Emily Sara's interest in the LLC to Alcobi to prevent Alcobi from suing him. Bag Bag states that Emily Sara did not receive any consideration for the transfer.

Emily Sara does not oppose defendants' claim that, pursuant to the terms of paragraph seven of the Transfer Agreement, she is entitled to \$2,965.63.

In reply, defendants argue that the unsigned and unsworn statements of Emily Sara and Jackie Lewis have no probative value and cannot be considered by this Court. Defendants also argue that Bag Bag's affidavit is of no probative value, because he is neither a party to the Transfer Agreement nor a party to this action. Moreover, they argue that his statements are conclusory and not factual.

Discussion

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law (*see Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once this showing has been made ... the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Here, defendants established prima facie entitlement to summary judgment dismissing the complaint. Defendants have shown that on February 10, 2009, via the Transfer Agreement, Emily Sara's one third ownership interest in the LLC was transferred to Alcobi and, therefore, she no

longer has an interest in the LLC. Moreover, defendants have shown that, although the Transfer Agreement provides that her interest could be repurchased for \$10, if Bag Bag made two timely payments of \$95,000, Bag Bag did not make those payments. Thus, since Emily Sara has no ownership interest in the LLC, she cannot maintain an action against defendants for acts alleged to have occurred after 2009.

Although labeled as a cross motion to strike defendants' affirmative defense that Emily Sara has no ownership interest in the LLC, Emily Sara is, in essence, attempting to create an issue of fact regarding the validity of the Transfer Agreement. In support of her cross motion, Emily Sara argues that this court's March 12, 2014 decision and order, denying her motion to amend, was not an adjudication of this issue on the merits, and, thus, there are issues of fact precluding enforcement of the Transfer Agreement.

Contrary to Emily Sara's argument, the denial of her motion for leave to amend her complaint was an adjudication on the merits of her claim alleging lack of consideration and violation of the EPTL. While, generally, leave to amend a pleading is freely granted (*see* CPLR 3025[b]), where, as here, the proposed amendment is palpably insufficient or patently devoid of merit, leave to amend is denied (*see Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421, 422 [1st Dept 2014][If the proposed amendments to a complaint are totally devoid of merit and legally insufficient, leave to amend should be denied]; *Davis v St. Joseph's Children's Servs.*, 99 AD2d 960 [1st Dept 1984] *aff'd* 64 NY2d 794 [1985]), and such a denial is on the merits (*see Cervini v Zanoni*, 95 AD3d 919, 922 [2d Dept 2012]).

On March 12, 2014, this court, in a decision affirmed by the Appellate Division in *Bag Bag*, (129 AD3d 649), found that Emily Sara's proposed challenge to the Transfer Agreement, on the

grounds that it lacked consideration and violated the EPTL, to be without merit (*see* Millman aff, exhibit E). This court held that there was no factual evidence submitted to contradict the terms of the Transfer Agreement, and that, contrary to Emily Sara's arguments, EPTL § 7-6.14 did not provide a basis for her to void the transfer (*id.* at 22-26). Thus, it is the law of the case that in 2009, Jackie Lewis, as guardian for Emily Sara, transferred Emily Sara's interest in the LLC to Alcobi, for valuable consideration, and that her interest was not repurchased under the terms of the Transfer Agreement (*see Glynwill Invs., v Shearson Lehman Hutton*, 216 AD2d 78, 79 [1st Dept 1995])[In accordance with the doctrine of law of the case, an issue resolved by a prior ruling cannot be relitigated)].³ Accordingly, as of February 2009, Emily Sara had no ownership interest in the LLC.

Based on the foregoing, Emily Sara's claims, accruing in 2010, that defendants breached the LLC's operating agreement, breached their fiduciary duty, breached their duty of good faith and fair dealing, and were unjustly enriched to her detriment, must be dismissed because she had no interest in the LLC in 2010. Further, she has no standing to bring a derivative action, on behalf of the LLC, for any alleged misdeed in 2010. Likewise, her claims for injunctive relief due to defendants' alleged misdeeds, must also be dismissed. In sum, the complaint must be dismissed in its entirety, and Emily Sara's cross motion to strike the third affirmative defense is rendered moot.

In their motion for summary judgment, defendants concede that, pursuant to paragraph seven of the Transfer Agreement, Emily Sara is entitled to receive one third of the cash flow of the LLC

³The unsigned and unsworn affidavits of plaintiff and her mother, Jackie Lewis, were not considered by this Court because they are inadmissible and of no probative value (*see Wunsch v AMF Bowling Ctr., Inc.*, 236 AD2d 467 [2d Dept 1997]; *see generally Horowitz v Kevah Konner, Inc.*, 67 AD2d 38 [1st Dept 1979]). Likewise, the affidavit of Bag Bag, stating that there was no consideration, is also unpersuasive because he is not a party to the Transfer Agreement, and cannot make representations on behalf of Emily Sara or Jackie Lewis.

from February 10, 2009, to September 10, 2010, and seek a declaration that she is entitled to \$2,965.53, plus statutory interest. Defendants' application for such a declaration is hereby granted based on defendants' admission that Sara Emily is entitled to that amount.

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the complaint in its entirety is granted, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of the appropriate bill of costs; and it is further

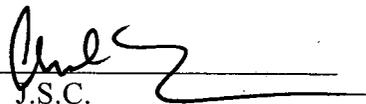
ORDERED that defendants' application for a declaration that, pursuant to paragraph seven of the Transfer Agreement, Emily Sara Lewis is entitled to \$2,965.53, plus interest at the statutory rate of 9% from November 10, 2009, together with costs and disbursements, is granted; and it is further

ORDERED that the cross motion by Emily Sara Lewis to strike defendants' third affirmative defense, is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: April 6, 2017

ENTER


J.S.C.