

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,

Acting Supreme Court Justice

TRIAL/IAS, PART 37
NASSAU COUNTY

RITA FRIEDMAN,

Plaintiff(s),

MOTION DATE: 8/11/08

INDEX NO.: 5491/08

-against-

SEQ. NO. 1,2,3

CREATIVE LIGHTING FIXTURE CO., INC., ESTATE
OF BERT FRIEDMAN, and MARC FRIEDMAN,
Defendant(s)

The parties' respective applications are determined as hereinafter provided.

On August 10, 1982 the plaintiff and her late husband, Bertram R. Friedman, purchased a parcel of property located at 460-468 Jericho Turnpike in Mineola (see defendants Creative Lighting Fixture Co. and Marc Friedman's Exhibit F). The primary tenant within the small strip mall is a retail store, the defendant Creative Lighting Fixture Co., which, prior to December 31, 2002, was solely owned by the late Mr. Friedman (see id., Exhibit F). Thereafter, the store was owned by the plaintiff's stepson, the defendant Marc Friedman, and the mall was operated by he and/or his father. Following Bert Friedman's December 20, 2007 passing, the plaintiff commenced the within action alleging, inter alia, that on or about May 1, 2003, without her authority, her husband and stepson entered into a "sweetheart" lease between Creative Lighting and Fixture Co. and the mall. Conversely, the defendants rely upon a July 19, 1999 power of attorney the plaintiff had previously issued to her husband (see id., Exhibit H).

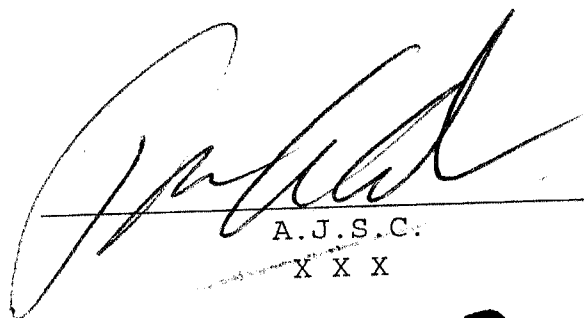
More specifically, the plaintiff's March 24, 2008 complaint (see id., Exhibit A) purports to plead three separate causes of action i.e., declaring the aforementioned lease a nullity, for an accounting and conversion. Prior to joinder of issue, the defendants have moved to dismiss based upon an alleged lack of jurisdiction (see CPLR 3211[a][8]), failure to state a cause of action (see CPLR 3211[a][7]) and upon documentary evidence (see

CPLR 3211[a][1]) i.e., the July 19, 1999 power of attorney. In the alternative, removal of the action to Surrogate's Court is requested after the May 20, 2008 issuance of preliminary letters testamentary to Bert Friedman's other son, Kenneth Friedman, a non-party (see Estate of Bert Friedman's Exhibit N; Matter of Friedman, Surrogate Court File No. 350988). The plaintiff has also moved, albeit prematurely, for summary judgment (see CPLR 3212[a]).

"While the Supreme Court and the Surrogate's Court have concurrent jurisdiction in all matters involving decedent's estates (NY Const. art. VI; Matter of O'Hara, 85 AD2d 669,670), it is the general rule that "whenever possible, all litigation involving the property and funds of a decedent's estate should be disposed of in the Surrogate's Court'" (Rosvold v Rosvold, 29 AD3d 669 quoting McCoy v Bankers Fed. Sav. & Loan Assn., 131 AD2d 646,648). Here, since the disputed property is apparently the estate's primary asset, the parties' dispute should be resolved within the pending Surrogate Court proceeding (see Rosvold supra at 670; Cipo v Van Blerkum, 28 AD3d 602; cf. Gaentner v Benkovich, 18 AD3d 424,428).

Accordingly, that branch of the defendants' motion, pursuant to CPLR §325(e), which seeks removal of the action to Surrogate's Court is granted and the parties' remaining requests for relief are dismissed as academic.

Dated: SEP 03 2008



 A.J.S.C.
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ENTERED
 SEP 05 2008
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE