

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

.....
BOAZ SPITZ, individually and as a shareholder
suing derivatively on behalf of NEWPORT
SALES, INC., Plaintiff,

- against -

CARL M. KLEIN, NEWPORT SALES, INC.,
AML REALTY LLC, MARILYN SPITZ,
SCHLESINGER & MINTZ CPAs and
BENJAMIN MINTZ, Defendants.

Sequence #015 #016 #017 #18
Index #000973/05
Part 41

8/17/2006

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Preliminarily, the Court notes this action was automatically dismissed on June 21, 2006 for failure to file a note of issue. By So-Ordered Stipulation the matter is now returned to active pre-note status.

Before the Court is a motion by plaintiff for partial summary judgment and three cross-motions by defendants Carl M. Klein, Newport Sales, Inc. and AM Realty LLC, ("Klein") Marilyn Spitz and Schlesinger & Mintz, CPAs, and Benjamin Mintz ("Mintz") for summary judgment pursuant to CPLR §3212 and dismissal of plaintiff's complaint.

The allegations in this action concern breach of an oral contract, breach of fiduciary duty and fraud and are tangentially related to a now-settled matrimonial action involving plaintiff and defendant Marilyn Spitz. All defendants are charged with fraud as set forth in plaintiff's eighth cause of action. The Klein defendants are also charged with, *inter alia*, contract and

fiduciary breaches and the Mintz defendants, as accountants, with accountant malpractice as well as breach of fiduciary duty.

On April 28 and May 27, 2005 this Court rendered decisions on defendants' three CPLR §3211(a)(7) motions to dismiss, which were denied. The Court held that plaintiff's eight cause of action for fraud and deceit was pleaded with sufficient specificity and noted that the discovery process was essential to flush out plaintiff's assertions in the otherwise viable cause of action (*Augoston v. Spry*, 282 AD2d 489).

Thereafter, plaintiff was deposed.

Newport is a family owed business established by defendant Klein. Plaintiff married defendant Marilyn Spitz, Klein's daughter, in 1992. In 1994 plaintiff began working at Klein's company, Newport and they entered into an oral employment agreement, the specifics of which are at issue here. Mintz was both Klein's and the Spitz's accountant.

For the purposes of this motion, plaintiff alleges that while the Spitz marriage began floundering 2001, he was deceived by the defendants into transferring his stock to his three children, presumably for tax purposes. Plaintiff maintains that the oral stock transfer agreement which occurred toward the end of 2001 was a joint effort by defendants to divest him from any interest in the company before the marriage failed.

It is uncontested that plaintiff agreed to the first transfer wherein 1.4% of his stock was gifted to his children as reflected by the 2002 tax return schedule K-1. It is further uncontested that defendant Mintz who prepared the tax returns was notified by letters dated February 4, 2004 and March 24, 2004 from plaintiff and his attorney that Mintz was not authorized to transfer any additional stock in the schedule K-1's attached to the 2003 and 2004 tax returns. The 2003 and 2004 schedule K-1s were nevertheless filed after the letters were received and are subject of plaintiff's motion.

The schedule K-1s were the only documents purportedly evincing plaintiff's intent to gift 6%

of his stock to his children in 2003 and 2004 since Klein did not issue stock certificates or maintain a stock transfer ledger. Although the parties disagree on the amount of stock plaintiff actually owned prior to transfer, plaintiff limits his motion to the 6% transferred after he discovered the alleged fraud and/or against his authority.

Initially, the Court must address the complaint's eighth cause of action against the defendants for fraud and deceit as it permeates virtually all the other claims. Plaintiff's application for a declaration that he owns 6% of Newport's stock relies to great extent on the fraud assertion and the defendants specifically cross-move to dismiss it.

In the case at bar, plaintiff has the burden of proving by clear and convincing evidence that the defendants knew at the 2001 tax planning meeting that the representation the stock transfers to the children would be to his and his wife's benefit on overall tax planning for the family was false (PJI §3:20). This is the only cause of action against defendant Marilyn Spitz who, according to plaintiff, stated that if plaintiff did not agree to the transfer of Newport stock proposed by Klein, she would give up on the marriage and file for divorce.

In a decision dated June 28, 2005 by Justice Ruth Balkin on the matrimonial action relating to a separate constructive trust claim previously dismissed by the undersigned, the Court noted that defendant Marilyn Spitz kept her alleged promise because plaintiff, not defendant, filed for divorce. Furthermore, the Court found that "it is undisputed that the Husband and Wife have, indeed, derived estate tax planning benefits by removing their previously owned shares from their estate and transferring them into the childrens' much lower tax bracket."

This Court is bound through the Doctrine of Collateral Estoppel by Justice Balkin's finding regarding the tax benefits under the 2001 plan realized by plaintiff and his former wife as well as the Court's conclusion that Marilyn Spitz did not break her promise because it was plaintiff who filed for divorce (*Buechel v. Bain*, 97 NY2d 295; *Glenriver, Inc. v. Winchester Global Trust Co.*, 28 AD3rd 517).

Furthermore, even if this Court is not bound by Justice Balkin's determination, in an action to recover for fraud only factual representations are generally actionable (*Roney v. Janis*, 77 AD2d 555). Future expectations or promises are not (e.g., *Fitch v. TMF Systems Inc.*, 272 AD2d 775; *Madison Home Equities, Inc., v. Echeverria*, 266 AD2d 551; *Satler v. Merlis*, 252 AD2d 551).

Moreover, even if a prophecy or promise is to be distinguished from a statement of present intention to do or to refrain from doing a future act with no intention of carrying it out which is actionable as fraud (e.g., *Channel Master Corp. v. Aluminum Ltd. Sales, Inc.*, 4

NY2d 403; *Tangman v. LaPietra*, 8 AD3d 706), here plaintiff presents no other evidence of a present intent to deceive at the 2001 meeting and, therefore, the alleged statement is insufficient to establish a cause of action for fraud against defendant Marilyn Spitz (*Id*).

As to the allegation that defendants knew there was no legitimate tax purpose for the stock transfer, plaintiff cannot claim he relied on Marilyn Spitz' knowledge of tax law. In fact, she also transferred her stock ownership to the children in accordance with the plan and currently owns no Newport stock.

Plaintiff, who admittedly also is not well versed in tax law and accounting, has not produced any evidence by expert affidavit or otherwise indicating the plan as devised was bogus nor has he given any reasons for this Court to discount Justice Balkin's conclusion.

Accordingly, the eight cause of action is dismissed as to Marilyn Spitz and, by the same reasoning, as to her co-defendants. Consequently, defendant Marilyn Spitz' cross-motion is granted and the complaint against her only is dismissed in its entirety.

What remains of plaintiff's motion for partial summary judgment and for a declaration that he still owns at least 6% of Newport's stock are the causes of action against the Mintz defendants for reallocating 6% of plaintiff's shares in Newport against his authority. Mintz cross-moves, in part, for dismissal of this aspect of plaintiff's claim as does Klein who is also charged with breach of fiduciary duty (see *Kaufman v. Cohen*, 307 AD2d 113).

The Court is aware that the K-1 tax forms prepared by Mintz are insufficient as a matter of law to prove plaintiff's donative intent in 2003 and 2004 (*e.g.*, *Matter of Carvel*, 2 AD3d 846). But, it is some evidence.

On the other hand, plaintiff has not sufficiently demonstrated that there were no acts of donative intent as a matter of law (*e.g.*, *Pell Street Nineteen Corp. v. Mah*, 243 AD2d 121 *Matter of Carroll*, 100 AD2d 337).

Now that the fraud and deceit allegations have bee removed from this action, the 2001 stock transfer plan must be examined for facts indicative of plaintiff's initial intent (*e.g.*, *Lichtenstein v. EL Johanan, Inc*, 161 AD2d 397; 38 A.C.J.S. *Gifts* §47). The parties that attended the meeting must be deposed for this purpose.

Additionally, defendants Mitz and Klein have not addressed the legal issue of whether plaintiff has any right to revoke his authority under such a scenario.

For these reasons, this portion of plaintiff's motion is denied as is defendants' cross-motions.

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The causes of action remaining against these defendants involve plaintiff's oral employment contract with Klein. Before any evaluation can be made it must first be determined whether an implied-in-fact oral contract was established and, if so, the extent of its terms. Such a determination involves factual issues regarding the intent of the parties, the surrounding circumstances, and the inferences which arise from them (*Matter of Boice*, 226 AD2d 908; *Parsa v. New York*, 64 NY2d 143).

Furthermore, as this Court has concluded in a prior decision, in a case such as this one wherein either party could opt out of the employment relationship before a year had passed for any reason whatsoever, the Statute of Frauds does not apply (*Cron v. Hargo Fabrics, Inc.*, 91 NY2d 362; compare *D& N Boening, Inc. v. Kirsch Beverages*, 63 NY2d 449; see *General Obligations Law §5-10 (a)(1)*).

In any event, even if the Court is in error in this regard the doctrine of part performance and estoppel constitute exceptions to the Statute of Frauds and are issues of fact (*Messner Vetro v. Aegis Group PLC*, 93 NY2d 299; see *Concordia General Contracting v. Peltz*, 11AD3d 502).

Only after these factual issues are resolved can it be determined what, if any, accounting and/or fiduciary related errors were made by defendants, and if so, how plaintiff may be justly compensated.

Therefore, with the exception of the eight cause of action, defendants Klein and Mintz' cross-motions are denied as is the remainder of plaintiff's application.

Since discovery is not yet completed, all the remaining examinations before trial, including Marilyn Spitz' deposition, are to be scheduled forthwith. All other discovery shall be concluded expeditiously.

Plaintiff is granted until November 24, 2006 to file his note of issue. The Court cautions the parties from bringing additional summary judgment motions once the note of issue has been filed since virtually all the issues discussed above involve factual and credibility determinations and can only be resolved by a jury.

Nevertheless, the Court grants until December 22, 2006 for any further dispositive motions to be made.

Dated: September 25, 2006

J.S.C.

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