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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 7

ERNEST E. NORRIS, III, KELLY F. NORRIS,
Individually and as beneficiary of a trust u/w/o
John Bell f/b/o Kelly Norris, JANE R. BRADURY
AS GUARDIAN OF MACKENZIE B. NORRIS,
as beneficiary of a trust u/w/o John Bell, f/b/o
Mackenzie Norris, and on behalf of Shibley Day
Camp, Inc., and Shibley Management Corp. by
their 100% shareholders,

Petitioners-Plaintiffs,

- against -

INDEX NO.: 022499/2010
MOTION DATE: 5/24/2011
SEQUENCE NO.: 01, 02, 03

HARVEY S. KULCHIN, RAYMOND O. GERSHEN,
GARY KISSIN, BARBARA R. KULCHIN, and
ROBERT KULCHIN

Respondents-Defendants

The following documents were read on this motion:

Motion Sequence # 1

Order to Show Cause for Injunctive Relief	1.
Summons	2.
Affirmation in Opposition on behalf of Kulchin Defendants	3.
Affidavit of Gary Kissin in Opposition to Order to Show Cause	4.
Reply Affidavit of Ernest E. Norris, III	5.
Reply Memorandum of Law in Further Support of Motion	6.
Sur-reply Affirmation of Jeffrey G. Stark	7.

Motion Sequence # 2

Motion to Dismiss the First, Second, Third, Eighth, Ninth, Tenth, Eleventh, Thirteenth, Fourteenth and Fifteenth Causes of Action	1.
Memorandum of Law on behalf of Gershen and Kissin in Support	2.
Affidavit of Ernest E. Norris in Opposition to Motion	3.
Memorandum of Law in Opposition to Motion to Dismiss	4.

Motion Sequence # 3

Motion by Kulchin Defendants to Dismiss Complaint in Entirety	1.
Opposition of Plaintiffs as set forth in Opposition to Motion # 2	
Reply Affirmation on behalf of Gershen and Kissin in Support	2.
Reply Affirmation on behalf of Kulchin Defendants in Support	3.

PRELIMINARY STATEMENT

Motion No. 1 by Plaintiff asks for all relief sought in the Verified Petition/Complaint; enjoining Respondents-Defendants from transferring property, assets or funds from or belonging to Shibley Day Camp; enjoining payment of compensation to Respondent/Defendants Barbara and Robert Kulchin; granting immediate access to books and records of Shibley Day Camp and Shibley Management Corp.; directing Respondents/Defendants to produce all documents reflecting withdrawals, transfers, payments, deposits, paid to, or withdrawn by Respondents/Defendants from accounts of Shibley Day Camp, Inc. and Shibley Management Corp.; and production of all books and records of Shibley Day Camp, Inc. and Shibley Management Corp.

Motion No. 2 seeks dismissal of eleven of the fifteen causes of action in the Petition/Complaint. The causes of action sought to be dismissed are:

- First: Breach of Fiduciary Duty;
- Second: Negligent Misrepresentation;
- Third: Accounting - The Trusts;
- Eighth: Unjust Enrichment;
- Ninth: Conspiracy to Commit Conversion;

Tenth: Accounting - Shibley Day Camp;
Eleventh: Accounting - Shibley Management;
Thirteenth: Declaratory Judgment;
Fourteenth: Declaratory Judgment;
Fifteenth: Declaratory Judgment.

Motion No. 3 on behalf of Harvey, Barbara and Robert Kulchin seeks dismissal of the Petition/Complaint in its entirety. Movant contends that the Complaint/Petition improperly merges individual and derivative claims, mandating dismissal of all causes of action.

BACKGROUND

This action challenges the continued operation of the Shibley Day Camp as a violation of the obligations of the trustees under the will of John Bell to provide for the beneficiaries of the trust. Ernest E. Norris, III and Kelly F. Norris bring the action on behalf of Kelly Norris and Mackenzie B. Norris, the beneficiaries under the will and 100% owners of Shibley Day Camp, Inc. and Shibley Management Corp.

Harvey Kulchin, Raymond O. Gershen and Gary Kissin are named as Trustees under the will. Harvey Kulchin is also an officer and director of Shibley Day Camp and Shibley Management. Raymond O. Gershen is the long-standing accountant for the Trusts, Shibley Day Camp and Shibley Management. Barbara Kulchin is an officer and director of Shibley Day Camp and Shibley Management, while Robert Kulchin, the son of Harvey and Barbara Kulchin, apparently operates his law office on the premises of Shibley Day Camp.

The essence of this action is whether or not the continued use of the 19.2 acres of land in Roslyn as a Day Camp produces a fair return to the beneficiaries of the trust under the will of John Bell, which will was dated November 21, 1995. Under the terms of that will, Respondents H. Kulchin, Gershen and Kissin were selected as trustees of the trusts created for the benefit of Kelly Norris and Mackenzie Norris. In their capacity as

Trustees, they control the majority shares of both Shibley Day Camp and Shibley Management. The minority balance of 41.525% is held by Ernest E. Norris, III.

Petitioners assert that the assessment of the property in use as a day camp has varied between \$7,000,000 and \$9,400,000; but that the highest and best use of the property would be for residential development, which would produce a greater value. H. Kulchin is the director of the Day Camp, while B. Kulchin is an employee. R. Kulchin, their son, operates a law practice from the premises. Petitioners allege that the employment of the Kulchins has been without the consent of the 100% owners of the corporations, and constituted a breach of the fiduciary duty owed by trustees to the beneficiaries of the trusts.

The Petition asserts that H. Kulchin has diverted more than \$1,000,000 of funds belonging to the Shibley Day Camp to himself.

DISCUSSION

Motion Sequence No. 1

Movant essentially seeks all of the relief demanded in the Petition. To the extent that injunctive relief is designed to maintain the status quo during the pendency of the action, much of the relief requested would preclude the continued operation of the day camp and reduce to \$0 the income which has served as the contribution to the trust funds for Kelly and Mackenzie Norris. Letters (d) — (f) call for the production of books, records and banking records of Shibley Day Camp, Inc. and Shibley Management Corp.

Petitioners comprise the owners of 100% of the interest in these corporations. As such, they are obviously entitled to the requested materials. Respondents are directed to make available to Petitioners the requested corporate and bank records for viewing and copying at a mutually convenient time and place within 20 days of receipt of a copy of this Order. Petitioners' applications for relief as set forth in paragraphs (a) — (c) are denied.

Motion Sequence Nos. 2 and 3.

Defendants Gershen and Kissin, two of the three Trustees, move pursuant to CPLR §§ 3211 (a)(1), (a)(7) and 3016 (b) to dismiss the First, Second, Third, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth and Fifteenth of the Petition.

The first basis upon which they claim entitlement to dismissal of the claims against them is that the petition mingles personal as well as derivative claims, thereby subjecting all claims to dismissal under *Abrams v. Donati*, 66 N.Y.2d 951 (1985). The Court there pointed out that a shareholder does not have an individual right against a corporation, despite the fact that he loses the value of his investment or incurs personal liability in an effort to maintain corporate solvency.

Exceptions to that rule have been recognized when the wrongdoer has breached a duty to the shareholder which is independent to any duty owed to the wronged corporation. Allegations of mismanagement or diversion of funds by officers or directors for their own enrichment, without more, constitute a wrong to the corporation, for which the shareholder may sue derivatively but not individually. "A complaint the allegations of which confuse a shareholder's derivative and individual rights will, therefore, be dismissed". (*Greenfield v. Denner*, 6 N.Y.2d 867 [1959]; adopting dissenting opinion in 6 A.D.2d 263 [1st Dept.1958, Breitel, J.]).

The motion to dismiss on the foregoing grounds is denied. Petitioners Kelly and Mackenzie Norris claim a breach duty independent of the general duty of corporate managers to their shareholders. The claims are based not only upon claims of corporate mismanagement and diversion of funds, but also upon violations of the obligations of the directors of the corporations in their capacities as Trustees of the trusts. There is not an improper commingling of individual and corporate claims so as to warrant dismissal of the petition.

Movant contends that the First, Second, Third, Eighth, Ninth, Tenth, and Eleventh causes of action fail to state a claim against defendants Gershen and Kissin, who are

neither directors or operators of either corporation. The First Cause of Action alleges breaches of duties as Trustees. There is no obligation of these defendants to Ernest, who is not a beneficiary of the trust. But even as to Kelly and Mackenzie, they allege that the allegations of wrongdoing are so general as to fail to meet the specificity requirements of CPLR 3016 (b); rather, the allegations are merely conclusory, failing to assert what defendants did wrong in their capacity as trustees. The allegation that the Kulchins were hired as operators of the day camp without the permission of the shareholders fails to assert any evidence that their approval was required; the general allegations of diversion of funds exceeding \$1,000,000 by the Kulchins states nothing to implicate them in such activity. There is no basis, they assert, for the claimed punitive damages, in that there is no claim of conduct by these defendants constituting a high degree of moral turpitude or wanton disregard for the rights of plaintiffs.

While Gershen and Kissen move for dismissal of selected causes of action, The Kulchin defendants move for the dismissal of the complaint in its entirety. Plaintiffs have submitted a single memorandum of law in which they oppose both motions.

CPLR § 3211 (a)(1) provides as follows:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded upon documentary evidence;

In order to succeed in a claim based upon documentary evidence, “. . . the defendant must establish that the documentary evidence which form the basis of the defense be such that it resolves all factual issues as a matter of law and conclusively disposes of the plaintiff’s claim”. (*Symbol Technologies, Inc. v. Deloitte & Touche, LLP*, 69 A.D.3d 191, 194 [2d Dept. 2009]); (*DiGiacomo v. Levine*, 2010 WL 3583424 (N.Y.A.D. 2d Dept.)).

Defendants have not produced documents which finally resolve the issues in this action. The fact that trustees unanimously agreed upon the Kulchin management contracts does not in any

way conclude that the determination to continue to operate the camp under the directorship of Kulchin was an exercise of the best judgment of the Trustees.

When determining a motion pursuant to CPLR § 3211 (a)(7) to dismiss for failure to state cause of action, the pleadings must be afforded a liberal construction, facts as alleged in the complaint are accepted as true, and the plaintiff is accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable legal theory. (*Uzzle v. Nunzie Court Homeowners Ass', Inc.* 55 A.D.3d 723 [2d Dept. 2008]). A pleading will not be dismissed for insufficiency merely because it is inartistically drawn; rather, such pleading is deemed to allege whatever can be implied from its statements by fair and reasonable intendment; the question is whether the requisite allegations of any valid cause of action cognizable by the state courts can be fairly gathered from all the averments. (*Brinkley v. Casablanco*, 80 A.D.2d 815 [1st Dept. 1981]).

The First Cause of Action alleges a breach of fiduciary duty on the part of the Trustees Kulchin, Gershen and Kissin in that they failed to perform their fiduciary duty to the beneficiaries of the trust by failing to insure that Shibley Day Camp was operated as a prudent investment. Specifically, they are alleged to have acted in bad faith by consistently selecting the Kulchins as directors of the Day Camp, with knowledge of their failure to operate the camp in the best interests of the shareholders. In addition, Trustee Kulchin is alleged to have breached his fiduciary duty by engaging in self-dealing.

The allegations are general in nature, but are not simply conclusory. The assertion is that the land could be put to a more productive use than the operation of a Day Camp, that the Kulchins have not maximized the benefit to the shareholders if, for no other reason, that they have, with the cooperation of the Trustees, arranged for benefits for themselves which are excessive for the amount of money which they generate for the beneficiaries. The Court concludes that as to all moving defendants, the allegations of the First Cause of Action are sufficient and the Motion to dismiss it is denied.

The Second Cause of Action asserts claims of negligent misrepresentation on the part of the Trustees in that they represented to the beneficiaries of the Trust that they were actively managing the Trusts for their benefit, that such representation were known by them to be false, that the beneficiaries relied upon the representations, and that as a result of such representations the Trusts have sustained substantial losses believed to not less than \$1,000,000.

New York recognizes a cause of action for negligent misrepresentation in circumstances where the defendant owes a duty to plaintiff to exercise care in giving information and the plaintiff is injured from their reasonable reliance upon such information. (*International Products Co. V. Erie Railroad Co.*, 244 N.Y. 331 [1927], cert. denied, 275 U.S. 527 [1927]). The issue, of course, is whether the allegations state a cognizable cause of action, not whether or not plaintiff is likely to succeed. In this instance, plaintiffs, to whom a fiduciary duty is owed by the trustees, assert that the trustees misrepresented the efficacy of the operation of the Day Camp as a reasonable and prudent investment of the corporate assets for the benefit of the beneficiaries; that they reasonably relied upon the misrepresentation; and that they did so to their economic detriment.

The Second Cause of Action asserts a claim upon which relief may be granted, and the motion to dismiss the Second Cause of Action is denied.

The Third Cause of Action calls for an accounting by the Trustees of all transactions undertaken with regard to the Trusts since their inception. Defendants Gershen and Kissin object to the timing of the accounting, asserting that the appropriate time would be when Mackenzie reaches her majority, when an accounting would be provided as was done when Kelly Norris reached 18 years of age. The right to an accounting is premised on the existence of a confidential relationship and a claimed breach of the duty imposed by that relationship respecting property in which the party seeking accounting has an interest. (*Palazzo v. Palazzo*, 121 A.D.2d 261 [1st Dept.1986]).

Plaintiffs properly assert a confidential relationship with the Trustees of the Trusts

for their benefit, respecting the land operated as a day camp. Plaintiffs are entitled to an accounting with respect to the operation of the Trusts from the date of inception to the present.

For the same reasons, the claims asserted in the Tenth and Eleventh Causes of Action, for an accounting with respect to Shibley Day Camp, and Shibley Management, based upon an alleged breach of a fiduciary duty by the Trustees, state a viable cause of action against the Trustees. The motions by the Trustees to dismiss the Third, Tenth and Eleventh Causes of Action are denied.

The Fourth Cause of Action alleges a breach of fiduciary duty by defendants H. Kulchin and B. Kulchin with respect to the operation of the Shibley Day Camp. The complaint asserts that these defendants are majority directors of the day camp, and that H. Kulchin is an officer of the corporation, with day-to-day control of the operation; and that as officers and directors, they owed a fiduciary duty to plaintiffs, which they breached by misappropriating property and/or funds belonging to plaintiffs, and wrongfully used the day camp and its assets for their own personal benefit; all of which caused damage to plaintiffs.

“Directors and officers of a corporation stand in a fiduciary relationship to the corporation, must act in good faith and ‘owe the corporation their undivided loyalty and are not permitted to derive personal profit at the expense of the corporation’.” (770 *Owners Corp. v. Spitzer*, 25 Misc.2d 1204(A) [Sup.Ct.Kings Co. 2009]), quoting *Schachter v. Kulik*, 96 A.D.2d 1038, 1039 [2d Dept.1983]). The complaint, however, fails to itemize a single act of misconduct on the part of the Kulchins which constitute a breach of a fiduciary duty, alleging, only as it does, that they have done so. In the absence of any specific claim of misconduct or self aggrandizement on the part of the Kulchins, the Fourth Cause of Action against them must be, and is, dismissed.

The Fifth and Sixth Causes of Action claim that the Kulchin respondents-defendants have been unjustly enriched by their involvement in Shibley Day Camp. The Fifth Cause of Action asserts “misappropriation of funds and assets”, while the Sixth Cause

of Action claims that their employment at Shibley Day Camp was without the consent of the petitioners-plaintiffs. The motion to dismiss both causes of action is granted. There is no claim in the pleadings that the Kulchins obtained anything more than the salaries which they contracted for; and there is no evidence that the consent of the petitioners-plaintiffs, as opposed to that of the Trustees, was required.

The Seventh Cause of Action alleges conversion by the Kulchin defendants in connection with their employment at Shibley Day Camp. The essence of this claim is that the salaries which they received rightly were assets of the petitioners, and that the control of the premises for the operation of the day camp was contrary to the rights of petitioners to the use and occupancy of the premises. This is a rather audacious stretch of the imagination.

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. (*State of New York v. Seventh Regiment Fund*, 98 N.Y.2d 249 [2002]). Two key elements of conversion are (1) plaintiff's possessory right or interest in the property (*Pierpoint v. Hoyt*, 260 N.Y.26 [1932]; (*Seventh Regiment Fund*, 98 N.Y.2d at 259) and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights. (*Employers' Fire Ins. Co. v. Cotten*, 245 N.Y. 102 [1927]); see also Restatement [Second] of Torts §§ 8A, 223, 224; Prosser and Keeton, Torts § 15, at 92, 102 [5th ed]).

The claim that the owners of the corporate shares of Shibley Day Camp were entitled to the possession of the salaries paid to the operator and manager of the facility is implausible. Someone had to operate the camp in order to generate the income necessary to preserve the institution and provide a return to the plaintiffs, beneficiaries of the trusts. The Kulchins have been awarded repeated contracts by the Trustees, the parties charged with the supervision of the trust assets. While plaintiffs may claim that the operation of a day camp was an unreasonable choice from among available uses of the real estate, the operation of the day camp, and the approved salaries for doing so, do not constitute a conversion of any personal property, including the salaries paid

the Kulchins for their services. The motion to dismiss the Seventh Cause of Action for conversion against the Kulchin defendants is granted.

The Eighth Cause of Action alleges unjust enrichment against all defendants-respondents. The term “unjust enrichment” does not constitute a single well-defined cause of action. It is based upon an equitable principle that a person should not be permitted to unjustly enrich himself at the expense of another. (*Waldman v. Englishtown Sportswear, Ltd.* 92 A.D.2d 833 [1st Dept.1983]). An action to recover on the theory of unjust enrichment is for restitution or on quasi contract and is based on the equitable principles that a person shall not be allowed to enrich himself unjustly at the expense of another. (50 NY Jur. Restitution and Implied Contracts § 3). An allegation that a defendant received a benefit, standing alone, is insufficient. (*Old Republic Nat. Title Ins. Co. v. Cardinal Abstract Corp.*, 14 A.D.3d 578 [2d Dept.2005]).

The Eighth Cause of Action is asserted against all Respondents-Defendants. There is no indication that the defendants Gershen and Kissin received any benefits. Where there is no showing as to what benefit was conferred upon a defendant, there can be no claim for unjust enrichment. (*Prospect Plaza Tenant Ass'n., Inc. v. New York City Housing Authority*, 11 A.D.3d 400 [1st Dept.2004]). The motion to dismiss the Eighth Cause of Action on behalf of Gershen and Kissin is granted.

Neither does the complaint allege benefits to the Kulchins, except the amounts they have been paid as a director and employee of the Shibley Day Camp. While the complaint essentially contends that the Trustees should discontinue the operation of a day camp, since it is allegedly not the most productive use of the land, the fact that the Kulchins, pursuant to written contracts approved by the Trustees as well as plaintiff Ernest Norris, III, were paid for their efforts, does not create a cause of action that they have been unjustifiably enriched at the expense of the plaintiffs-petitioners. The motion to dismiss the Eighth Cause of Action is granted on behalf of all defendants-respondents.

The Ninth Cause of Action asserts a claim of conspiracy to commit conversion with respect to the assets of Shibley Day Camp. For the same reason that the Seventh Cause of

Action for conversion fails to state a claim against the Kulchin defendants, the claim of a conspiracy to commit conversion must also fail. All defendants-respondents are lawfully in custody and control of the assets of Shibley Day Camp as a result of their designation of Trustees, and approved contracts of employment. The claim that the Trustees have not maximized the return on the property constituting the day camp does not render their management or control of the properties held by the Trust a conversion.

The *Tenth and Eleventh Causes of Action*, claiming a right to an accounting, were previously determined, in conjunction with the Third Cause of Action, to state a cause of action and the motion to dismiss those claims has been denied.

The *Twelfth Cause of Action* seeks injunctive relief against Shibley Day Camp. “To establish entitlement to a preliminary injunction, a movant must establish (1) a likelihood or probability of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of granting the injunction.” (*De Fabio v. Omnipoint Communications, et al.*, 2009 WL 3210142 [N.Y.A.D. 2d Dept., 2009]); citing, CPLR 6301, *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988), *W.T. Grant v. Srogi*, 52 N.Y.2d 496, 517 (1981); *See also, Automated Waste Disposal, Inc., v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1072 — 1073 (2d Dept. 2008).

“Irreparable injuries for the purpose of equity, has been held to mean any injury for which money damages are insufficient”. (*Walsh v. Design Concepts*, 221 A.D.2d 454, 455 (2d Dept. 1995). On the contrary, “(e)conomic loss, which is compensable by money damages, does not constitute irreparable harm”. (*EdCia Corp. v. McCormack*, 44 A.D.3d 991, 994 (2d Dept. 2007). Failure to enunciate non-economic loss constitutes a failure to demonstrate irreparable harm so as to warrant equitable relief in the form of an injunction (*Automated Waste Disposal* at 1073).

Likelihood of ultimate success on the merits does not import a predetermination of the issues, and does not constitute a certainty of success. The requirement is a protection against the exercise of a court’s formidable equity power in cases where the moving party’s

position, no matter how emotionally compelling, is without legal foundation (*Tucker v. Toia*, 54 A.D.2d 322, 326 [4th Dept. 1976]).

In balancing the equities, the court must weigh the harm each side will suffer in the absence or in the face of injunctive relief. (*Washington Deluxe Bus, Inc. v. Sharmash Bus Corp.*, 47 A.D.3d 806 [2d Dept. 2008]). This is, by definition, a fact-sensitive inquiry. Thus, for example, where a pharmaceutical manufacturer of a non-prescription product was seeking to enforce exclusivity agreement and preliminarily enjoin defendant from importing and marketing the same product, the balance of equities favored defendant, since plaintiff could recover damages, while defendant would have to remove product from the shelves for an indeterminate length of time. (*OraSure Technologies, Inc. v. Prestige Brands Holdings, Inc.*, 42 A.D.3d 348 [1st Dept. 2007]).

To the extent that injunctive relief is designed to maintain the status quo pending a determination of the underlying action, the relief sought by movant is inimicable to that concept. The relief sought is a freeze on all payments made by or on behalf of the day camp for any purpose. The end result will be the lack of any productivity of the property until there is a final determination of the issues.

The claimed damages which plaintiffs are experiencing, an inadequate cash return on the assets held in trust for them, can be remedied by an award of financial damages. Without delving into the issue of likelihood of success on the merits, or the balancing of equities, the fact that there is no claim for irreparable damages is adequate to defeat the claim. The motion to dismiss the Twelfth Cause of Action against all defendants is granted.

The *Thirteenth, Fourteenth and Fifteenth Causes of Action* request declaratory relief. The Thirteenth seeks a declaration removing Respondent-Defendant Trustees and directing that new trustees be appointed for the Trusts. The Fourteenth asserts that the Kulchin Agreement was entered into by wrongful and improper actions of the Respondents-Defendants for the purpose of misappropriating the assets of funds of the day

camp, thereby rendering the agreement null and void, a declaration of which is sought. In similar vein, the Fifteenth Cause of Action alleges that the employment of the Kulchins constitutes self-dealing, waste, fraud and mismanagement by the Trustees, and that this entitles plaintiff-respondents to a judicial declaration that the employment of the Kulchins is null and void and that the Kulchins should be removed as employees of Shibley Day Camp.

Declaratory judgments are a means to establish the respective legal rights of the parties to a justiciable controversy (*see* CPLR § 3001; *see generally* 43 N.Y.Jur2d Declaratory Judgments §§ 4.22. “The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations”. (*James v. Alderton Dock Yards*, 256 N.Y.298 [1931]). *see* Siegel, N.Y. Prac. § 436 at 738 [4th ed.] While fact issues certainly may be addressed and resolved in the context of a declaratory judgment action (*see* Siegel, New York Practice, citing *Rockland Power & Light Co. v. City of New York*, 289 N.Y. 45 [1942]). the point and the purpose of the relief is to declare the respective legal rights of the parties based on a given set of facts, not to declare findings of fact. Consideration of some typical types of declaratory judgments, such as declarations regarding the validity of a foreign divorce, the applicability of an insurance policy to a claim, and the constitutionality of a statute (*see* Siegel, N.Y. Prac. § 437, at 740—741, helps illustrate both the value of declaratory judgments in appropriate circumstances and their inapplicability in the present context.

Professor Siegel has remarked that the declaratory judgment action has been employed as a way to resolve a relatively unique dispute where the plaintiff is “unable to find among the traditional kinds of action one that will enable her to bring it to court” (*see id.* at 742, citing *Kalman v. Shubert*, 270 N.Y.375 [1936]). In *Kalman*, the plaintiff, who had composed five operettas, sought a judgment declaring that the defendant did *not* have a contractual right to perform the operettas. The issue arose because, although he had not yet performed plaintiff's operettas, the defendant claimed to have a contractual right to perform them, based on the plaintiff's written offer to enter into a contract allowing the defendant to perform the operettas upon payment of a royalty of \$100 per week for each week an operetta was performed. The

plaintiff contended that the offer had never been accepted, so there was no contract . *Id.* at 376—377. The Court of Appeals reversed the dismissal of the action, explaining that while most forms of relief would not be available unless the defendant actually performed the works, the plaintiff needed the affirmative relief of a declaratory judgment “to quiet a disputed jural relation as to both present and prospective obligations”. *Id.* at 378.

In this case, the requests for declaratory relief are nothing but a duplication of the request for the requested relief; a determination that the Trustees have acted inappropriately, and contrary to the best interests of the beneficiaries, in contracting with the Kulchins to operate Shibley Day Camp. Plaintiff-respondents are not in a position where they are unable to otherwise frame a claim so as to bring the issue before the Court. They have alleged breaches of fiduciary obligations by the Trustees, specifically, the provision of employment contracts to the Kulchins, allegedly in violation of their obligations to maximize the benefits to the beneficiaries of the Trust. If they succeed on these claims, plaintiffs-petitioners will be entitled to the relief which they ask the Court to declare as their entitlement.

The motions to dismiss the Fourteenth and Fifteenth Causes of Action for declaratory relief are granted.

This constitutes the Decision and Order of the Court.

Dated: July 26, 2011


J.S.C.

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NASSAU COUNTY
COUNTY CLERK'S OFFICE