

**Wolf v Shapiro**

2020 NY Slip Op 34335(U)

December 11, 2020

Supreme Court, Kings County

Docket Number: 503553/2017

Judge: Lara J. Genovesi

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2020 DEC 22 AM 10:41

At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 11<sup>th</sup> day of December 2020.

PRESENT:

HON. LARA J. GENOVESI,  
J.S.C.

-----X

RAQUEL WOLF, as Executrix of the  
ESTATE OF HIRSCH WOLF,

Index No.: 503553/2017

Plaintiff,

DECISION & ORDER

-against-

NATHANIEL SHAPIRO,

Defendant.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

Notice of Motion/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_

NYSCEF Doc. No.:  
107-130, 133-149  
150-152, 154  
155-158

**Introduction**

Defendant, Nathaniel Shapiro, moves by notice of motion, sequence number eight, pursuant to CPLR § 3212 for summary judgment. Plaintiff, Raquel Wolf, as Executrix of the Estate of Hirsch Wolf, cross-moves, sequence number nine, for summary judgment.

### ***Background and Procedural History***

Plaintiff commenced the instant action, inter alia, to hold defendant, an attorney, liable for aiding and abetting his clients alleged breach of fiduciary duty. Hirsch Wolf and Sol Wahba owned Richmond Properties LLC. Sol Wahba owned 51% of the company and Hirsch Wolf owned 49%, each with equal voting rights. The sole asset of Richmond Properties LLC was the premises located at 1145 Broadway, New York, NY. Michael Wahba, Sol Wahba's son, assisted in the day to day operations of the company.

Hirsch Wolf passed away in June 2011. After Wolf's death, the relationship between the Wolf and Wahba families broke down and the business relationship became strained. According to an appraisal of the property in 2014, the property was valued at approximately \$6,000,000.00. Plaintiff procured a buyer who offered \$6,100,000.00 for the property, which was rejected by Wahba. After it became clear that the parties could not agree on a purchaser for the property, the parties agreed instead to sell Wolf's 49% share of the company to Michael Wahba for \$2,750,000.00.

Wahba hired Defendant Nathaniel Shapiro to represent him in this transaction. Shapiro was formerly employed by Hirsch Wolf in a different company from 1998-2004. He assisted Wolf and Wahba prepare the original operating agreement for Richmond Properties, LLC (*see* NYSCEF Doc. # 109, Shapiro Affidavit). Shapiro was not involved in the negotiation of the terms of the sale of Wolf's interest to Michael Wahba. He was approached by both purchaser and seller to draft the Member Interest Purchase Agreement (MIPA) (*see id.*). When getting involved in this transaction, Shapiro advised plaintiffs to retain counsel (*see id.*). The parties waived any potential conflict related to

Shapiro's representation (*see id*; *see also* NYSCEF Doc. # 121 at ¶ 7.9). Shapiro stated that he "did not solicit or negotiate any offers to purchase the property or act in any way outside of my role as an attorney" (*id.* at ¶ 45).

49. At some point after my initial engagement by Michael, and prior to the closing for the MIPA, Michael informed me that he had found a satisfactory buyer for the Property.

50. I believe that all parties knew that Michael intended to sell the Property or remedy the certificate of occupancy issue, or undertake other steps to increase the value of a Property whose value was artificially depressed, just like any other investor would seek to do.

51. I do not believe that Michael personally owed fiduciary duties to any member of Richmond Properties.

52. I do not believe that Michael had any obligation to tell Mr. Penn, Plaintiff or Mr. Wolfs family that he had found a buyer for the Property while he was finishing a deal to purchase Mr. Wolfs interest in Richmond Properties and after the parties had already agreed on a price.

53. At no point did anyone ask me: (1) what Michael's intentions for the Property were; (2) whether the price that Plaintiff and Mr. Wolf's family sought and Michael agreed to was a good price (and nor would I be qualified to render an opinion as to the fairness of any such price); or (3) whether Michael received any other offers for the Property

(*id.*).

The Member Interest Purchase Agreement was executed on December 31, 2014.

At some point in this process, Wahba procured a buyer for the property who offered approximately \$8,900,000.00 (*see* NYSCEF Doc. # 136, Contract of Sale). The contract of sale appears to be undated, merely stating "December \_\_\_, 2014". However, plaintiff contends that this contract of sale was signed by Michael Wahba and defendant

Shapiro prior to the execution of the MIPA on December 31, 2014. There was a wire transfer of \$890,000.00 sent on December 18, 2014, which purportedly represents the 10% contract deposit. It is undisputed that Wahba did not inform plaintiffs of this higher offer to purchase the property. Plaintiff alleges that defendant knew and failed to disclose that his client found a buyer to purchase the property for a much higher price than that Appraisal price used by the parties to determine the monetary value of Wolf's 49% interest in the business. Paragraph 13.1 of the original operating agreement for Richmond Properties, LLC, required Sol Wahba and Hirsch Wolf to disclose any bona fide offers to purchase the company's interest in the real property (*see* NYSCEF Doc. # 112).

This Court notes that plaintiff's only remaining cause of action herein, against Shapiro, is for aiding and abetting breach of fiduciary duty. In a decision dated February 16, 2018, the Hon. Lawrence Knipel dismissed plaintiff's claims sounding in fraud, breach of fiduciary duty and violation in attorneys' rules of ethics (*see* NYSCEF Doc. # 135).

#### *Discussion*

"The elements of a cause of action to recover damages for breach of fiduciary duty 'are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct'" (*Celauro v. 4C Foods Corp.*, 187 A.D.3d 836, 132 N.Y.S.3d 159 [2 Dept., 2020], quoting *Litvinoff v. Wright*, 150 A.D.3d 714, 54 N.Y.S.3d 22 [2 Dept., 2017]).

A fiduciary relationship “exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation” (Restatement [Second] of Torts § 874, Comment *a* ). Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions (*see Northeast Gen. Corp. v. Wellington Adv.*, 82 N.Y.2d 158, 162, 604 N.Y.S.2d 1, 624 N.E.2d 129 [1993] ). Generally, where parties have entered into a contract, courts look to that agreement “to discover ... the nexus of [the parties'] relationship and the particular contractual expression establishing the parties' interdependency” (*see id.* at 160, 604 N.Y.S.2d 1, 624 N.E.2d 129). “If the parties ... do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them” (*id.* at 162, 604 N.Y.S.2d 1, 624 N.E.2d 129). However, it is fundamental that fiduciary “liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation” (Restatement [Second] of Torts § 874, Comment *b* ).

(*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 832 N.E.2d 26 [2005]).

“A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach” (*Wallkill Med. Dev., LLC v. Catskill Orange Orthopaedics, P.C.*, 178 A.D.3d 987, 115 N.Y.S.3d 67 [2 Dept., 2019], quoting *AHA Sales, Inc. v. Creative Bath Prods., Inc.*, 58 A.D.3d 6, 867 N.Y.S.2d 169 [2 Dept., 2008] [internal quotation marks omitted]).

“Knowing participation in a breach of fiduciary duty occurs when the defendant provides substantial assistance to the primary violator (*see Yuko Ito v. Suzuki*, 57 A.D.3d 205, 208, 869 N.Y.S.2d 28). “ ‘Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to

occur.... However, the mere inaction of an alleged aider or abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff ” (*Monaghan v. Ford Motor Co.*, 71 A.D.3d at 850, 897 N.Y.S.2d 482, quoting *Kaufman v. Cohen*, 307 A.D.2d at 126, 760 N.Y.S.2d 157).

(*Smallberg v. Raich Ende Malter & Co., LLP*, 140 A.D.3d 942, 35 N.Y.S.3d 134 [2 Dept., 2016]).

In the instant case, plaintiff’s causes of action for fraud and breach of fiduciary duty against Shapiro were dismissed by the Hon. Lawrence Knipel. The theory of plaintiff’s case against Shapiro on the only remaining claim for aiding and abetting a breach of fiduciary duty, hinges on findings that (1) Michael Wahba owed a fiduciary duty to plaintiff; and (2) Michael Wahba breached that duty by failing to disclose the offer to sell the building at a higher purchase price prior to finalizing his purchase of Wolf’s 49% interest in the business. Plaintiff also attempts to bridge this gap by arguing that Michael Wahba aided and abetted Sol Wahba in Sol’s breach of fiduciary duty. As Michael Wahba purchased Wolf’s shares of the business, it is clear that Michael was never a member of the business at the same time as plaintiff. Plaintiff maintains that Michael owed plaintiff a fiduciary duty nonetheless, as he was an “active managing member” of the business. However, Michael Wahba was not a member of the business prior to execution of the MIPA on December 31, 2014. There is no evidence that he was a fiduciary of the business. Michael performed tasks to aid his father in management of the business. At best, he was an employee or de facto member of the business.

Notwithstanding the convoluted background of this case, the question before this court is exclusive to defendant Nathaniel Shapiro. Even assuming, arguendo, that

plaintiff is correct that Michael and Sol Wahba breached a fiduciary duty to plaintiff, she failed to establish that Shapiro aided and abetted Wahba's breach of fiduciary duty. It is undisputed that Shapiro failed to advise plaintiff of the second offer to sell the property. However, Shapiro's mere inaction, can only rise to the level of substantial assistance if he owed plaintiff a direct duty. Given the fact that Shapiro never had a business relationship with plaintiff, the fact that the parties waived any potential conflict in the MIPA, and plaintiff retained separate counsel for the transaction, there is no evidence that Shapiro owed plaintiff a direct duty. Therefore, the question remains whether Shapiro "knowingly participated" in Wahba's alleged breach.

In his affidavit, Shapiro stated that he knew of the offer, but he believed all parties were aware of Wahba's intention to sell the property. Notably, his affidavit does not state that he believed plaintiff knew that Wahba had lined up a buyer or that the purchase offer was significantly higher than the previous appraisal. Rather, it states that no one asked him Michael's intentions, whether plaintiff agreed to a good price, or whether Michael received any subsequent offers. Shapiro further stated in his affidavit that he "was not involved in any of the conduct at issue in this action, in any capacity, other than [his] role in preparing the Operating Agreement... and as an attorney for Michael" (NYSCEF Doc. # 109 at ¶ 57). However, he was clearly involved in the sale as his signature appears on the contract of sale.

Based on the foregoing, neither plaintiff nor defendant met their burden and established prima facie entitlement to summary judgment as a matter of law.

*Conclusion*

Accordingly, defendant's motion for summary judgment, sequence number eight and plaintiff's cross-motion for summary judgment, sequence number nine, are denied.

Questions of fact exist as to whether Shapiro "knowingly participated" in Michael Wahba's alleged breach of fiduciary duty.

The foregoing constitutes the decision and order of this Court.

ENTER:

  
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Hon. Lara J. Genovesi  
J.S.C.

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