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Glatzer v Webster
2011 NY Slip Op 51152(U) [32 Misc 3d 1202(A)]
Decided on June 23, 2011
Supreme Court, Kings County
Demarest, J.
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Decided on June 23, 2011

Supreme Court, Kings County

Jay Glatzer, Plaintiff,

against

Helen Webster, Barry Webster, Rose Glatzer, Crown Geriatric Supply Corp., Rapid Medical and John and Jane Does 1-10, Defendants, - and - woodmere rehabilitation and health care center, inc., garden care center, inc., and west lawrence care center, inc./llc, Nominal Defendants.

39025/06

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Carolyn E. Demarest, J.

The following papers numbered 1 to 14 read on this motion:

Papers Numbered

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed*1-4*

Opposing Affidavits (Affirmations)*5-9*

Reply Affidavits (Affirmations)*10-11*

Affidavit (Affirmation)

Other Papers*Memoranda of Law12-14*

In this action by plaintiff Jay Glatzer (plaintiff) against defendants Helen Webster (Helen), Barry Webster, Rose Glatzer (Rose), Crown Geriatric Supply (Crown Geriatric), Rapid Medical, and John and Jane Does 1-10 (collectively, defendants) and the nominal defendants Woodmere Rehabilitation and Health Care Center, Inc. (Woodmere), Garden Care Center, Inc. (Garden Care), and West Lawrence Care Center, LLC (West Lawrence), seeking a declaratory judgment that he has ownership interests in Woodmere, Garden Care, and West Lawrence, damages, an accounting, imposition of a constructive trust, and recovery of attorneys' fees, plaintiff moves, pursuant to CPLR 3212 (e), for partial summary judgment on his first cause of action for a judicial determination: (1) that he is the owner of a two (2.0%) percent ownership interest in West Lawrence, (2) that he is entitled to a pro rata share of all distributions made by West Lawrence from September 17, 2003 forward, (3) that the dollar amount owed to him for his pro rata share of all distributions made by West Lawrence from September 17, 2003 forward shall be severed for later determination by the court, (4) that Rose renounced and denied having any partnership interest with him in Woodmere, Garden Care, and West Lawrence, and (5) that Rose is obligated to pay his legal fees and costs.

BACKGROUND

This action arises from plaintiff's claim that beginning in 1996, he and his then wife, Rose, through Helen (who is Rose's sister), as their nominee, purchased ownership interests in Garden Care, West Lawrence, and Woodmere, which are all in the business of operating [*2]skilled nursing home facilities in the New York metropolitan area. Plaintiff alleges in his Verified Amended Complaint dated May 15, 2007, that Helen wrongfully retained his and Rose's ownership interests in these skilled nursing home facilities, and denied them the income and profits derived from such ownership interests.

Specifically, with respect to Woodmere, plaintiff claims that he and Rose invested a total of $90,000 ($50,000 of which was paid by Rose's father as a gift) through Helen, and that Helen represented to him that he and Rose owned an interest in 2.85 beds, which was being held by her as part of the eight percent interest which she holds in Woodmere solely in her name, on their behalf. Plaintiff asserts that Helen told him that because he and Rose were

purchasing a small percentage of ownership in Woodmere (less than one percent), they needed to purchase a larger percentage jointly through her. Plaintiff alleges that from 1996 up until 1998, he and Rose received no income or profit through Helen for his shares, but that in 1998, Helen began making distributions to them from Woodmere, which were first paid by personal checks, and then paid by having Home Consulting, a partnership owned by plaintiff, invoice Crown Geriatric and Rapid Medical, two companies owned by Helen and her husband, Barry Webster, for amounts allegedly represented by Helen to equal the distributions to which he and Rose were entitled for their investment. Plaintiff asserts that an accounting provided to him from Woodmere revealed that the total distributions paid by Woodmere to Helen each year from 1998 through 2002 was greater than the amounts used to calculate his and Rose's pro rata share of the distributions due to them, and that Helen improperly retained distributions and profits from his and Rose's share. In addition, plaintiff alleges that since 2003, when his marriage to Rose began to deteriorate, Helen no longer paid any distributions to him and Rose, and either kept them for herself or paid them to Barry Webster, Crown Geriatric, Rapid Medical, or another person or entity.[FN1]

With respect to Garden Care, plaintiff alleges that in or about 2000, he and Rose paid Helen approximately $150,000 to purchase, on their behalf and as their nominee, a percentage in Garden Care equal to 3.75 beds. Plaintiff claims that Helen represented to him that he and Rose would be purchasing a portion of a 50% ownership interest in Garden Care that she would be purchasing jointly with Israel Sherman, who, due to licensing regulations, would hold the nursing home license for the entire 50% ownership interest. While Helen would hold 50% of the entire underlying real estate interest, pursuant to an agreement between her and Israel Sherman, each of them would actually be 25% owners of both the nursing home and the underlying real estate. Plaintiff alleges that in 2002, Helen began to make periodic payments to him and Rose, representing to them that these payments were the entire distributions of income and profits to which they were entitled by virtue of their 3.75 [*3]bed ownership interest in Garden Care. According to plaintiff, such payments, which continued to be made in 2003 and 2004, were made by checks payable to Rose, signed by Helen or Barry Webster from their personal account, and deposited by Rose into plaintiff and Rose's joint marital account. Plaintiff alleges that since 2004, when plaintiff's marriage to Rose was deteriorating, he has received no payments from Helen representing distributions for his and Rose's interest in Garden Care, and that Helen has either kept all distributions owed to them or transferred them.

With respect to West Lawrence, plaintiff alleges that in 2003, he and Rose agreed to invest again through Helen, as their nominee, paying her $142,000 to purchase and hold a two percent interest in West Lawrence in her name, for their beneficial interest. According to plaintiff, Helen informed him that, instead of tendering a check payable to her, he was to wire his $142,000 payment, and that she would provide him with full wiring instructions and account information. Plaintiff states that pursuant to Helen's instructions, on September 17, 2003, he made a wire transfer in the amount of $142,000 from his joint marital account with Rose to Abrams, Fensterman, Fensterman, Flowers & Eisman, LLP (Abrams, Fensterman), the attorneys for Woodmere, Garden Care, and West Lawrence. Plaintiff admits that of this $142,000 sum, his adult son, Akiva Glatzer, contributed 25%, and, therefore, owns one half of one percent of this two percent ownership interest in West Lawrence.

In 2005, after more than 24 years of marriage, plaintiff and Rose decided to obtain a civil and religious divorce, and, on August 31, 2005, they entered into a contract of arbitration with the Beth Din of Zabla (the Beth Din), pursuant to which they empowered a panel of three rabbis to hear and decide all issues arising from their matrimonial dispute, including equitable distribution of marital assets. In 2006, the Beth Din heard evidence and made findings of fact incorporated in a written decision dated October 6, 2006. The Beth Din's decision, in relevant part, provided:

"Decided, During the course of the marriage, [plaintiff] presented evidence that [plaintiff and Rose] acquired an interest in three limited partnerships; namely: Woodmere . . . West Lawrence . . . and Garden Care . . . and that [plaintiff and Rose's] joint interests in [these] limited partnerships are held in the name of [Rose Glatzer's] sister, [Helen] Webster. [Rose Glatzer] denies ownership. However, credible evidence was presented to this Beth Din including wire transfers of significant money showing that the Glatzers have a clear partnership interest. [Rose Glatzer] renounced and denied having any partnership interest in the above mentioned nursing homes, claiming that any money transferred to them by her sister were gifts or donations. [Helen] Webster did not participate in these proceedings, and therefore this tribunal has no jurisdiction and cannot determine the exact nursing home shares owned by the parties. [Rose Glatzer] denied ownership. Therefore, any interest belonging to the Glatzers in the above mentioned three limited partnerships shall be decided by a competent jurisdiction and . . . [plaintiff] is entitled to his share of legal fees and expenses as well as any monies taken from nursing home distributions since the signing of the arbitration agreement." [*4]

A May 3, 2007 "final decision"[FN2] was later handed down by the Beth Din, which provided:

"Decided: That [Rose Glatzer] has renounced any possible interest in the three limited partnerships, namely: Woodmere . . . West Lawrence . . . and Garden Care . . . Therefore, any interest actually owned by the parties shall be retained solely and exclusively by [plaintiff]. If [plaintiff] proves in a court of competent jurisdiction, that [Rose Glatzer] intentionally refused to admit the parties' ownerships, [he] may recover legal fees from [Rose Glatzer], which he actually expended in order to prove ownership.

"Decided: any past due, income or rent which [plaintiff] shall recover from Woodmere . . . West Lawrence . . . or Garden Care . . . shall remain the exclusive and separate property of [plaintiff]."

In a decision and order dated May 8, 2008, Justice Delores J. Thomas of the Supreme Court, Kings County, confirmed the Beth Din's October 6, 2006 decision, and vacated the Beth Din's May 3, 2007 decision. The Beth Din's May 3, 2007 decision was vacated based upon a finding that the Beth Din was without authority to issue it due to the fact that the Beth Din's October 6, 2006 decision was a final and definite award upon the subject matter submitted, and no modification of that decision was requested, nor did the May 3, 2007 Beth Din's decision constitute a correction of the October 6, 2006 award. Justice Thomas' May 8, 2008 decision and order was affirmed by a May 25, 2010 decision and order of the Appellate Division, Second Department.

On December 20, 2006, plaintiff filed a summons and complaint against defendants and Woodmere, Garden Care, and West Lawrence, and on May 16, 2007, plaintiff filed an amended complaint against them. Plaintiff's amended complaint contains 24 causes of action. Plaintiff's first cause of action seeks a judgment declaring that he has a 2.85 bed ownership interest in Woodmere, a 3.75 bed ownership interest in Garden Care, and a two percent ownership interest in West Lawrence, and that he is entitled to such pro rata share of all distributions made by each of these skilled nursing home facilities.

Plaintiff's second, third, and fourth causes of action request damages from Helen based upon her alleged breach of fiduciary duties with respect to Woodmere, Garden Care, and West Lawrence, respectively. Plaintiff's fifth, sixth, and seventh causes of action seek damages against the other defendants for allegedly aiding and abetting Helen's alleged breach

of fiduciary duties with respect to Woodmere, Garden Care, and West Lawrence, respectively. Plaintiff's eighth, tenth, and eleventh causes of action seek damages for an alleged breach of contract by Helen with respect to Woodmere, Garden Care, and West Lawrence, respectively, and plaintiff's ninth cause of action alleges a breach of contract claim [*5]against Crown Geriatric and Rapid Medical with respect to Woodmere. Plaintiff's twelfth, thirteenth, and fourteenth causes of action request an accounting from Helen and Woodmere, Helen and Garden Care, and Helen and West Lawrence, respectively. Plaintiff's fifteenth, sixteenth, and seventeenth causes of action seek to impose a constructive trust against Helen and Woodmere, Helen and Garden Care, and Helen and West Lawrence, respectively. Plaintiff's eighteenth, nineteenth, and twentieth causes of action request damages for fraud against Helen with respect to Woodmere, Garden Care, and West Lawrence, respectively. Plaintiff's twenty-first, twenty-second, and twenty-third causes of action seek damages against the other defendants for allegedly aiding and abetting fraud with respect to Woodmere, Garden Care, and West Lawrence, respectively. Plaintiff's twenty-fourth cause of action requests attorneys' fees from Rose. In July 2007, defendants and Woodmere, Garden Care, and West Lawrence interposed their answers to plaintiff's amended complaint. Discovery has been completed, and plaintiff filed his note of issue on November 30, 2010.

DISCUSSION

In support of his instant motion, plaintiff asserts that he is entitled to partial summary judgment declaring that he is the owner of a two percent ownership interest in West Lawrence and entitled to a pro rata share of all distributions made by West Lawrence from September 17, 2003 forward based upon the uncontroverted fact that on September 17, 2003, he wired $142,000 from a joint marital account with Rose, to Abrams, Fensterman for the purpose of purchasing a two percent ownership interest in West Lawrence. Plaintiff has submitted a copy of this wire transfer from JP Morgan Chase Bank. Plaintiff has also submitted excerpts from Helen's deposition, wherein she testified that in September 2003, plaintiff had wired $142,000 to Abrams, Fensterman for the purpose of making an investment in West Lawrence (Helen's Dep. Transcript at 60, 62), and that she had told plaintiff to contact Mark H. Zafrin, Esq., an attorney with the law firm of Abrams, Fensterman and counsel for West Lawrence, and provided plaintiff with Mark H. Zafrin, Esq.'s contact information (*Id.* at 62). In addition, plaintiff points out that Benjamin Landa, who appeared for a deposition on behalf of Woodmere, Garden Care, and West Lawrence, acknowledged, at

such deposition, that plaintiff had made a wire transfer of $142,000, and that this transfer was intended to purchase an interest in West Lawrence (Benjamin Landa's Dep. Transcript at 53). Plaintiff also notes that Benjamin Landa testified, at his deposition, that he believed that the $142,000 which plaintiff wired on September 17, 2003 was attributed and credited to Helen (*Id.* at 50-52).[FN3] [*6]

Plaintiff annexes a copy of a May 19, 2005 letter from Mark H. Zafrin, Esq., (Ex. 7 to Plaintiff's Motion) in which he stated, in pertinent part:

"As you recall, [plaintiff was] not [an] initial subscriber[] in this project. The promoters [Benjamin] Landa and [Bent] Philipson, solicited a subscription from Helen Webster for a certain number of percentage points in West Lawrence Care Center which [Helen] Webster subsequently turned around and sub-sold without our knowledge or consent to [Shelly] Nakdimen[FN4] and [Jay] Glatzer.

"I have discussed this matter carefully with my clients and it is our position that inasmuch as we accepted on behalf of West Lawrence . . . a payment for those shares directly from . . . [plaintiff], then West Lawrence . . . will recognize [his] ownership interest.

"Since [plaintiff] ha[s] not, as of yet, been established as [a] member[] in this entity by the New York State Department of Health, until such time as the application is processed and [he] is officially recognized by the New York State Department of Health, [his] status vis a vis West Lawrence . . . is that of a lender to Benjamin Landa and/or the Facility. That loan, upon establishment, automatically converts to an equity interest."

Plaintiff further points to the fact that Mr. Zafrin confirmed, at his deposition, that he had discussed the contents of his May 19, 2005 letter with his client, West Lawrence, and that plaintiff was to receive his interest in West Lawrence (Mark H. Zafrin, Esq.'s Dep. Transcript at 124-125).

In his motion, plaintiff also seeks partial summary judgment declaring that Rose is not entitled to share in his ownership interests in West Lawrence, Woodmere, and Garden Care based upon the fact that she renounced and denied having any interest in them before the Beth Din. Plaintiff claims that Rose must also pay his legal fees and costs based upon the Beth Din's October 6, 2006 decision.

Defendants oppose plaintiff's motion, arguing that plaintiff is not entitled to a declaratory judgment that he is the owner of a two percent interest in West Lawrence unless he agrees that he never had a claim to Helen's ownership interest in West Lawrence, that the interest in dispute is also owned by Rose, and that Akiva Glatzer is entitled to a share of all distributions made by West Lawrence after such time as their interests are approved by the [*7]New York State Department of Health (the DOH). Defendants also contend that plaintiff is not entitled to recover attorneys' fees and costs from Rose.

Abrams, Fensterman has submitted an attorney's affirmation in response to plaintiff's motion on behalf of Woodmere, Garden Care, and West Lawrence. This affirmation states that West Lawrence is prepared to acknowledge an ownership interest in it by either plaintiff, Rose, or both, as determined by the court, subject to approval by the DOH. West Lawrence has taken no position as to whether Rose is entitled to a share in plaintiff's alleged two percent interest.

In addressing plaintiff's motion, the court notes that there is no dispute that plaintiff purchased a two percent ownership interest in West Lawrence by the September 17, 2003 wire transfer in the amount of $142,000.Notably, the stipulation dated April 14, 2008, resolving the related action in Nassau County before Justice Austin, involving a dispute as to Helen's interests in the nursing home facilities (*Willoughby Rehabilitation and Health Care Ctr., LLC v Webster*), provided that Benjamin Landa (who purchased Helen's interest in West Lawrence) and Bent Philipson (who was also involved in that litigation) agreed to "[d]eposit the sum of $151,000 heretofore paid from the account of Jay and Rose Glatzer to Abrams, Fensterman . . . for the purchase of a Membership Interest in the West Lawrence Nursing Home and Real Estate Company, plus accrued interest computed at the rate of nine (9%) percent per annum, which interest shall be computed retroactive to the date the Abrams, Fensterman Firm received the funds, into an interest bearing Escrow Management Account . . . to be held until such time as [the present lawsuit] bearing Index Number 39025/2006 is finalized by the entry of a final non appealable court order or pursuant to a stipulation in such action signed by all parties and their counsel" (Ex. D to Matthew Dollinger's Affirmation in Opposition).

Thus, in view of West Lawrence's admission of plaintiff's purchase and the absence of any dispute as to this fact, it would appear that plaintiff is entitled to an ownership interest in West Lawrence. However, Woodmere, Garden Care, and West Lawrence point out that such

a transfer of an ownership interest in West Lawrence is subject to the approval of the DOH, citing Public Health Law § 2801-a (4) (b) (ii) which provides:

"(ii) With respect to a transfer, assignment or disposition involving less than ten percent of an interest or voting rights in such partnership or limited liability company [which operates a hospital] to a new partner or member, no prior approval of the public health and health planning council shall be required. However, no such transaction shall be effective unless at least ninety days prior to the intended effective date thereof, the partnership or limited liability company fully completes and files with the public health and health planning council notice on a form, to be developed by the public health and health planning council, which shall disclose such information as may reasonably be necessary for the public health and health planning council to determine whether it should bar the transaction for any of the reasons set forth in item (A), (B), (C) or (D) below. Within ninety days from the date of receipt of such notice, the public health and health planning council may bar any transaction [*8]under this subparagraph: (A) if the equity position of the partnership or limited liability company, determined in accordance with generally accepted accounting principles, would be reduced as a result of the transfer, assignment or disposition; (B) if the transaction would result in the ownership of a partnership or membership interest by any persons who have been convicted of a felony described in subdivision five of section twenty-eight hundred six of this article; (C) if there are reasonable grounds to believe that the proposed transaction does not satisfy the character and competence criteria set forth in subdivision three of this section; or (D) if the transaction, together with all transactions under this subparagraph for the partnership, or successor, during any five year period would, in the aggregate, involve twenty-five percent or more of the interest in the partnership . . . ."

There has been no demonstration that plaintiff possesses the qualifications for approval by the DOH, and plaintiff appears to concede that any award of ownership to him in West Lawrence is legally subject to such review, which apparently has not taken place.

West Lawrence also argues that insofar as plaintiff demands a pro rata share of all distributions made by West Lawrence from September 17, 2003 forward, West Lawrence cannot be required to make any retroactive distribution payments to plaintiff based upon 10 NYCRR 600.9 (c) of the DOH regulations, which provides that "[a]n individual, partnership or corporation which has not received establishment approval may not participate in the total gross income or net revenue of a medical facility." West Lawrence contends, therefore, that

plaintiff is not entitled to any distributions from West Lawrence unless and until his participation as a member of West Lawrence has been approved by the DOH.

West Lawrence's argument that plaintiff is not entitled to participate in the return on his investment is not supported by law. While the nominal defendants cite *Matter of Benedictine Hosp.* (21 Misc 3d 1142[A], 2007 NY Slip Op 52581[U], *4 [Sup Ct, Ulster County 2007]), in support of their argument, in *Matter of Benedictine Hosp.*, the Ulster County Supreme Court actually determined in that case involving rights to Medicaid underpayments, that upon termination of a receivership, any remaining profit from Medicaid reimbursement could be distributed to the prior owner who had never obtained approval as the established operator by the DOH pursuant to 10 NYCRR § 600.9.

In *Simaee v Levi* (22 AD3d 559, 561-562 [2005]), the Appellate Division, Second Department, addressed a violation of Public Health Law § 2801-a (4) (b) (i), requiring the approval of the Public Health Council for "[a]ny transfer, assignment or other disposition of ten percent or more of an interest or voting rights in a partnership or limited liability company, which is the operator of a hospital to a new partner or member." In construing Public Health Law § 2801-a (4) (b) (i) and the consequences of its violation on contractual obligations, the Appellate Division held, in *Simaee,* that a defendant's failure to obtain the Public Health Council's approval to transfer a one-third ownership interest in an ambulatory surgical center to the plaintiff did not render the alleged contractual transfer ineffective as a matter of law since Public Health Law § 2801-a (4) (b) (i) does not provide that the failure [*9]to obtain approval of the Public Health Council renders a transfer made without such approval ineffective.

The Appellate Court in *Simaee* expressly held: "[I]t has been recognized that an ownership interest in an entity which operates a hospital can be transferred despite the fact that such transfer may subject the facility to the loss or suspension of its operating license" (22 AD3d at 561-562). In so holding, the court noted that "the violation of a statute that is merely malum prohibitum will not necessarily render a contract illegal and unenforceable," citing *Benjamin v Koeppel*, 85 NY2d 549, 553 [1995]; *Lloyd Capital Corp. v Pat Henchar, Inc.*, 80 NY2d 124, 127 [1992]; *R.A.C. Group, Inc. v Board of Educ. of City of NY*, 21 AD3d 243, 248 [2005] (22 AD3d at 562). Quoting *Rosasco Creameries, Inc. v Cohen*, 276 NY 274, 278 [1937]), the *Simaee* Court ruled that " [i]f the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the

denial of relief is wholly out of proportion to the requirements of public policy . . . the right to recover will not be denied'" (22 AD3d at 562). Finding that the conduct proscribed under Public Health Law § 2801-a (4) (b) (i) is not illegal, quoting *Lloyd Capital Corp.*, 80 NY2d at 128 (quoting *Charlebois v Weller Assoc.*, 72 NY2d 587, 595 [1988]), the Appellate Court further ruled that " forfeitures by operation of law are disfavored, particularly where a defaulting party seeks to raise illegality as "a sword for personal gain rather than a shield for the public good" . . . Allowing parties to avoid their contractual obligation is especially inappropriate where there are regulatory sanctions and statutory penalties in place to redress violations of the law'" (22 AD3d at 562; *see also Specialty Rests. Corp. v Barry*, 262 AD2d 926, 928 [1999]).

Here, the conduct proscribed by Public Health Law § 2801-a (4) (b) (ii) (which applies where there is a transfer of less than 10%) is similarly not illegal, the statute does not expressly provide that its violation will deprive parties to a contract of the right to sue for enforcement, and regulatory sanctions are in place in the event that a violation occurs (*see Simaee*, 22 AD3d at 562). Moreover, 10 NYCRR 600.9 (c) does not expressly provide that its violation will deprive parties of their right to sue on a contract. The denial of relief to plaintiff here would be wholly out of proportion to the requirements of public policy such that it appears that West Lawrence may be attempting to raise illegality as "a sword for personal gain rather than a shield for the public good" (*id.*). Under these circumstances, as in *Simaee* (22 AD3d at 562), West Lawrence may not raise Public Health Law § 2801-a (4) (b) (ii) or 10 NYCRR 600.9 (c) as a bar to performance of its acknowledged contractual obligation to recognize plaintiff's purchase of a membership interest in September 2003. Since the payment of all accrued distributions will be deferred to a time when plaintiff has been reviewed by DOH in compliance with Public Health Law § 2801-a (4) (b) (ii), West Lawrence would appear not to be at risk as a consequence of making such retroactive distributions.

With respect to plaintiff's argument that, based upon the October 6, 2006 decision of the Beth Din, Rose has renounced her interest in Woodmere, Garden Care, and West [*10] Lawrence, and is thereby precluded from litigating against plaintiff's claims here, it is noted that " [t]he doctrine of collateral estoppel bars relitigation of an issue which has necessarily been decided in a prior action and is determinative of the issues disputed in the present action, provided that there was a full and fair opportunity to contest the decision now alleged to be controlling'" (*Ippolito v TJC Development, LLC*, __ AD3d __, 2011 NY Slip Op 02354,

*8, 2011 WL 1088097, *10 [2d Dept 2011], quoting Mahler v Campagna, 60 AD3d 1009, 1011 [2009]; see also Tydings v Greenfield, Stein & Senior, LLP, 11 NY3d 195, 199 [2008]). " The doctrine[] of . . . collateral estoppel appl[ies] to arbitration awards with the same force and effect as they apply to judgments of a court'" (*Ippolito*, 2011 NY Slip Op 02354, *8, quoting *Mahler*, 60 AD3d at 1011; *see also QDR Consultants & Dev. Corp. v Colonia Ins. Co.*, 251 AD2d 641, 642 [1998]; *Allstate Ins. Co. v Toussaint*, 163 AD2d 444, 445 [1990]).

In its October 6, 2006 decision, the Beth Din specifically found that, in the face of evidence presented by plaintiff of his and Rose's interest, Rose "renounced and denied having any partnership interest" in Woodmere, West Lawrence, and Garden Care. Defendants, however, argue that Rose simply denied that the two percent interest in West Lawrence was purchased through Helen and that Helen was holding her and plaintiff's interests in West Lawrence in Helen's name. Although in her deposition testimony in this action, Rose did assert a claim to a joint interest with plaintiff in West Lawrence and denied that she had denied ownership interests in West Lawrence at the Beth Din proceeding, her response regarding her prior disclaimer was obfuscatory: "I don't — to my knowledge, again, that's a conclusion of law. I don't know if I own anything in West Lawrence or not now" (Ex. 18 to Plaintiff's Motion). There is no indication in such response that the earlier denial was limited to the claims against Helen. Defendants' present argument must therefore be rejected since, according to the Beth Din's October 6, 2006 decision, confirmed by Justice Thomas and affirmed by the Appellate Division, Rose disclaimed before it that she had "any partnership interest" in West Lawrence or any of the other nursing home facilities, whether obtained through her sister or otherwise; rather, the Beth Din's October 6, 2006 decision explicitly stated that Rose expressly denied any ownership interest.

The Beth Din was charged with determining virtually all issues pertaining to the Glatzers' divorce, including equitable distribution. It was, therefore, incumbent upon the parties to present evidence and take positions with respect to all marital assets. Plaintiff did this with respect to the partnership interests in Woodmere, West Lawrence and Garden Care which are the subject of the instant litigation. Thus, there was an identity of issue that was necessarily decided in the Beth Din's October 6, 2006 decision regarding such interests. There was clearly a full and fair opportunity provided to Rose before the Beth Din to present her own evidence and assert her position. Since Rose took the position that the partnership [*11]interests, of which the Beth Din found there was credible evidence, were non-existent,

such position precludes her from taking an inconsistent position in this action.[FN5]

"The doctrine of judicial estoppel or estoppel against inconsistent positions precludes a party from taking a position in one legal proceeding which is contrary to that which he or she took in a prior proceeding, simply because his or her interests have changed" (*Festinger v Edrich*, 32 AD3d 412, 413 [2006]; *see also Ford Motor Credit Co. v Colonial Funding Corp.*, 215 AD2d 435, 436 [1995]; *Kimco of NY v Devon*, 163 AD2d 573, 574 [1990]; *Environmental Concern v Larchwood Constr. Corp.*, 101 AD2d 591, 594 [1984]). In this case, Rose's claim of an ownership interest in West Lawrence is manifestly at odds with her representation to the Beth Din denying and renouncing any such ownership, which was adopted by the Beth Din in rendering its October 6, 2006 decision. The application of the doctrine of judicial estoppel here is essential to avoid a fraud upon the court and a mockery of the truth-seeking function (*see Festinger*, 32 AD3d at 413; *Mantia v Squire*, 289 AD2d 304, 305 [2001]; *Perkins v Perkins*, 226 AD2d 610, 610 [1996]; *Karasik v Bird*, 104 AD2d 758, 758-759 [1984]; *Houghton v Thomas*, 220 App Div 415, 423 [1927], *affd* 248 NY 523 [1928]). The court will not tolerate Rose's attempt "to play fast and loose" with the court by adopting contrary positions in different proceedings (*see also Perkins*, 226 AD2d at 610; *see also Prudential Home Mtge. Co.* v *Neildan Constr. Corp.*, 209 AD2d 394, 395 [1994]; *Environmental Concern*,101 AD2d at 594). Rose cannot be permitted to simply change her position so as to frustrate plaintiff's recovery of interests which were proved before the Beth Din merely because her interests have changed. The application of judicial estoppel in the instant litigation concerning claims against persons and entities not party to the matrimonial dispute heard by the Beth Din does not, however, prevent the matrimonial judge from determining the rights of the two Glatzers under equitable distribution in light of the Beth Din's finding that marital property included interests in Woodmere, West Lawrence and Garden Care.

However, while the purchase of a two percent interest in West Lawrence has been established, before summary relief can be awarded to plaintiff, the court must consider the fact that plaintiff has admitted that his son, Akiva Glatzer, contributed 25% of the monies given toward this purchase and that Akiva Glatzer owns one-half of a percent interest in this two percent interest in West Lawrence which plaintiff seeks to recover in this action. Despite this fact, Akiva Glatzer is not a party to this action.

"A court may always consider whether there has been a failure to join a necessary

party" (*City of New York v Long Is. Airports Limousine Serv. Corp.*, 48 NY2d 469, 475 [*12][1979]; *see also Matter of Lezette v Board of Educ., Hudson City School Dist.*, 35 NY2d 272, 282 [1974]; Censi v Cove Landings, Inc., 65 AD3d 1066, 1068 [2009]). Necessary parties are defined as "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action" (CPLR 1001 [a]). "When a person who should be joined under [CPLR 1001 (a)] has not been made a party and is subject to the jurisdiction of the court, the court shall order him [or her] summoned" (CPLR 1001 [b]).

Since Akiva Glatzer would be bound by a determination rendered in this action, he is a necessary party to it. While plaintiff states that he will make the appropriate transfer giving Akiva Glatzer his share of his interest, there is no assignment or authorization from Akiva Glatzer giving plaintiff the authority to do so, and, therefore, plaintiff has no standing to represent the interest of Akiva Glatzer, who (albeit plaintiff's son) is an adult. Thus, in light of plaintiff's acknowledgment that a portion of plaintiff's two percent interest belongs to his adult son, Akiva Glatzer must be joined as a party to this action before any final relief can be awarded to plaintiff. The court, therefore, directs that plaintiff serve an amended summons and complaint, joining Akiva Glatzer as a party in this action (*see Indursky v Indursky*, 7 AD2d 709, 709 [1958]). If Akiva does not wish to pursue his own claim as an additional plaintiff, he must be joined as a defendant.

Insofar as plaintiff seeks partial summary judgment declaring that Rose must pay his legal fees and costs in this action, plaintiff asserts that Rose's claim of joint ownership with him in West Lawrence is causing him to have to further litigate his claim of a West Lawrence ownership interest and is preventing him from obtaining the DOH's approval. Contrary to this assertion, however, Rose did not create the need to bring this action as the action was brought to resolve plaintiff's own dispute with Helen over his claimed interests in the nursing home facilities. Plaintiff's pleadings actually include the representation that Rose and he both acquired such interests. It was apparently Rose's disclaimer of direct ownership that required her joinder as a defendant, rather than as a plaintiff. Under the well established general rule, attorneys' fees and disbursements are incidents of litigation and parties are responsible for paying their own attorneys' fees unless an award of such fees is authorized by an agreement between the parties or by a statute or court rule (*see Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]; *Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 21-22 [1979]).

Here, plaintiff predicates his right to recover his attorneys' fees and costs from Rose on the language in the October 6, 2006 decision by the Beth Din that "any interest belonging to the Glatzers in [Woodmere, West Lawrence, and Garden Care] shall be decided by a competent jurisdiction and . . . [plaintiff] is entitled to his share of legal fees and expenses . . . since the signing of the arbitration agreement." This language in the October 6, 2006 Beth Din decision pertaining to attorneys' fees incurred in the matrimonial action and arbitration, cannot, however, be construed to encompass this Supreme Court action, which is independent of the divorce litigation, and is primarily being litigated by plaintiff as against [*13]Rose's sister, Helen. Since Rose renounced any direct interest in the nursing home facilities, she cannot be required to pay plaintiff's attorneys' fees and costs in an action in which she has now been determined to have no interest.

CONCLUSION

Accordingly, plaintiff's motion, pursuant to CPLR 3212 (e), for partial summary judgment is granted to the extent that it is declared that Rose renounced and denied having any present ownership interest in Woodmere, Garden Care, and West Lawrence and that such renunciation is binding upon her in the instant litigation. The motion is denied, however, insofar as plaintiff seeks a judicial determination that Rose is obligated to pay his legal fees and costs in this action and plaintiff's twenty-fourth cause of action is dismissed. *See* CPLR 3212 (b) and (e).

Insofar as plaintiff's motion seeks a judicial determination that he is the owner of a two percent ownership interest in West Lawrence, West Lawrence has admitted that plaintiff has an ownership interest based on the $142,000 payment made, subject to the approval of the DOH. However, since plaintiff has acknowledged that a portion of the money tendered for this purchase belonged to Akiva Glatzer, Akiva Glatzer must be joined in this action before relief can be awarded to plaintiff. Plaintiff is, therefore, directed to serve a supplemental summons and amended complaint joining Akiva Glatzer as a party in this action. Only following such joinder and amendment can plaintiff's pro rata share of distributions made by West Lawrence be determined. However, an assessment of plaintiff's distributions will relate back to the date of purchase, September 17, 2003, as this court rejects defendants' claim that plaintiff's right to recover such distributions is prohibited under Department of Health regulations, NYCRR 600.9 (c), because plaintiff has not yet been approved pursuant to Public Health Law § 2801-a (4) (b) (ii). Defendant West Lawrence is directed to immediately

file the forms required under Public Health Law § 2801-a (4) (b) (ii) to obtain approval of plaintiff's membership participation. All parties are directed to appear for conference before the court at 10 AM on July 19, 2011.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

Footnotes

Footnote 1: In a settlement of *Willoughby Rehabilitation and Health Care Center, LLC v Webster*, entered in Nassau County under Index No. 012431/04 before Justice Leonard Austin on or about April 14, 2008, to which plaintiff was not a party, Helen agreed to sell 100% of her and her "family members'" membership interest in Woodmere.

Footnote 2: Plaintiff refers to and quotes from this May 3, 2007 decision by the Beth Din in his amended complaint dated May 15, 2007, but he relies upon the Beth Din's October 6, 2006 decision in support of this motion.

Footnote 3: Helen, in her affirmation in opposition to plaintiff's motion, points out that in the stipulation dated April 14, 2008, in the related action in the Supreme Court, Nassau County (*Willoughby Rehabilitation and Health Care Ctr., LLC v Webster*, Sup Ct, Nassau County, index No. 012431/04) before Justice Leonard B. Austin, involving a dispute as to Helen's interests in the nursing home facilities, which was resolved by the stipulation, Benjamin Landa agreed to provide an affirmation, in a form prepared by counsel for Helen, asserting that "he has no knowledge of, nor approved of, any agreement between [Helen] Webster and [plaintiff] wherein and whereby [Helen] Webster was acting as a nominee to hold an interest of any type in any of the [nursing home facilities]."

Footnote 4: The issue of Ms. Nakdimen's interest has apparently been resolved and she is not a party to this litigation.

Footnote 5: The evidence is undisputed that plaintiff's interest in West Lawrence was purchased with marital assets. Accordingly, upon the adjudication herein, Rose may apply to Justice Thomas for a determination "as to how such interest shall be divided pursuant to the equitable distribution laws", as directed by Justice Thomas in her decision of October 9, 2009 in *Glatzer v Glatzer*, Index No. 27235/06.

Return to Decision List