

**THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

| | | |
|------------------------|---|-----------------------|
| ALEXANDER MOGILYANSKY, | : | June Term, 2000 |
| Plaintiff | : | |
| | : | No. 3709 |
| v. | : | |
| | : | Commerce Case Program |
| SVETLANA SYCH, et al., | : | |
| Defendants | : | Control No. 030939 |

MEMORANDUM OPINION

Defendants Svetlana Sych (“Svetlana”), Yvegeny Sych (“Yvegeny”) and Russian Market, Inc. (“Market”) have filed a motion for judgment on the pleadings (“Motion”), requesting that the Court dismiss certain counts in the amended complaint (“Complaint”) of Plaintiff Alexander Mogilyansky (“Mogilyansky”). The Motion also requests that Mogilyansky compensate the Defendants for their attorneys’ fees because of his arbitrary and vexatious conduct. For the reasons set forth in this Opinion, the Court is issuing a contemporaneous order (“Order”) granting the Motion in part and denying the Motion in part.

BACKGROUND

In December 1993, Mogilyansky and Svetlana entered into a partnership through an oral agreement in which they agreed to publish a newspaper called Russian Market (“Paper”). According to the Complaint, Mogilyansky was to be marketing director and was to provide for initial expenses, equipment and non-Russian communications. Svetlana, in turn, was to be editor of the Paper and was to manage the business once it became stable. The two were to share the Paper’s profits and losses equally and were to receive equal salaries. In exchange for Mogilyansky’s disproportionate initial

contribution, however, he was entitled to take leave from the business to participate in international checkers competitions without a reduction in ownership, profits or salary.

The Paper operated under the terms of the oral arrangement between the Parties until Market's incorporation on October 16, 1995. On that date, Mogilyansky and Svetlana entered into a new oral agreement under which they each received an equal number of shares of Market in exchange for the Paper partnership's assets. The Parties also agreed to name Svetlana as President and Treasurer and Mogilyansky as Vice President and Secretary. In all other respects, Market was to operate under the same terms as the original agreement.

In December 1997, the arrangement between Mogilyansky and Svetlana allegedly began to unravel when Svetlana took funds belonging to Market and used them, in part, to purchase property located at 572 Larkspur Street, Philadelphia, Pennsylvania for herself and Yvegeny. The Complaint further alleges that Svetlana has engaged in racketeering, has improperly withdrawn funds from a Market bank account and has improperly opened up a new bank account in Market's name. Mogilyansky contends that, in February 1998, Svetlana seized Market's assets and locked him out of Market's office. Since then, she allegedly has refused to pay him compensation.

Svetlana sent Mogilyansky a notice of Market's annual shareholders meeting ("Meeting") on February 4, 1999. Mogilyansky responded by asking Svetlana to bring a number of items to the Meeting, including financial information, bank documents and checks for amounts allegedly owed to Mogilyansky. According to the Complaint, Svetlana did not bring any of the requested items to the Meeting.

To date, Svetlana allegedly has refused to deliver Mogilyansky his Market share certificates, to allow Mogilyansky access to corporate records and to pay Mogilyansky sums due to him. In addition, Yvegeny is alleged to have participated and conspired with Svetlana in all of the improper conduct alleged in the Complaint. On the basis of these allegations, Mogilyansky has asserted six separate causes of action against the three Defendants.¹

The Defendants have filed the Motion, which seeks judgment on all Counts asserted against Yvegeny Sych and Market.² The Motion also requests that the Court dismiss the RICO and derivative action Counts against Svetlana and that the Defendants be awarded counsel fees. Mogilyansky concedes that certain Counts should be dismissed.³ He defends his Counts for an accounting,

¹ The headings state that the six Counts are based on the following causes of action: Count I - Possession of Shares, against Svetlana and Market; Count II - Accounting, against Svetlana and Market; Count III - Judicial Supervision of Corporate Election, against Svetlana and Market; Count IV - Constructive Trust, against Svetlana and Yvegeny; Count V - Shareholder's Derivative Action; and Count VI - Violations of the Federal Racketeer Influenced and Corrupt Organizations Statute, 18 U.S.C.A. §§ 1961-1968 ("RICO"), against Svetlana and Yvegeny. As discussed *infra*, the Complaint alleges facts that support extending Counts I and II to include Yvegeny as a Defendant for those Counts.

² Aside from the RICO and derivative action Counts, the Motion does not address those claims brought against Svetlana.

³ Mogilyansky has agreed that the following Counts should be dismissed: all Counts asserted against Market (Counts I, II and III); the RICO Count (Count VI) asserted against Svetlana and Yvegeny; the corporate election Count (Count III) asserted against Yvegeny; and the derivative action Count (Count V) asserted against Svetlana. These Counts will not be discussed in this opinion.

possession of shares and constructive trust asserted against Yvegeny,⁴ however, and argues that an award of counsel fees is not appropriate here.

DISCUSSION

A Pennsylvania court must grant a motion for judgment on the pleadings “where, on the facts averred, the law says with certainty that no recovery is possible.” Lindstrom v. City of Corry, 563 Pa. 579, 763 A.2d 394, 396 (2000). In considering such a motion, “[a]ll material facts set forth in the Complaint as well as all inferences reasonably deducible therefrom are admitted as true for the purpose of . . . review.” Emerich v. Philadelphia Center for Human Dev., Inc., 554 Pa. 209, 213 n.1, 720 A.2d 1032, 1034 n.1 (quoting Kyle v. McNamara & Christie, 506 Pa. 631, 634, 487 A.2d 814, 816 (1985)).

I. The Complaint Alleges Facts to Support Causes of Action for Possession of Shares, Accounting and a Constructive Trust Against Yvegeny

⁴ Although the headings of these Counts state that they are asserted against Svetlana and Market only, Pennsylvania courts faced with a conflict between the allegations of a count and the count’s heading must look at the allegations and not the heading. See, e.g., Zernhelt v. Lehigh County Office of Children and Youth Servs., 659 A.2d 89 (Pa. Commw. Ct. 1995) (treating a count titled “negligent infliction of emotional distress” as a claim for intentional infliction of emotional distress); Maute v. Frank, 441 Pa. Super. 401, 403-04, 657 A.2d 985, 986 (1995) (“since the complaint states a viable mandamus claim, we will treat that portion of the action as such, regardless of the fact that the complaint is not titled properly as one involving mandamus”); Commonwealth ex rel. Saltzburg v. Fulcomer, 382 Pa. Super. 422, 555 A.2d 912 (1989) (although action was titled as one involving habeas corpus relief, petitioner’s action clearly was one for mandamus and was therefore treated as such). Because these Counts seek relief from “the defendants,” Complaint at ¶¶ 35-36, the Court must ignore the Counts’ headings and look to the allegations in the Complaint. Thus, Mogilyansky may proceed against Yvegeny on these Counts if the factual allegations support these causes of action against him.

The Defendants argue that the Counts asserted against Yvegeny for possession of shares and accounting fail to state a cause of action because “there is no allegation that Yvegeny holds any corporate office (nor, indeed, that he is even associated with the Corporation)” Motion at ¶ 10. In addition, they contend, the allegations in the Complaint are insufficient to support a claim for a constructive trust against Yvegeny because there are no allegations that he was unjustly enriched. These arguments are without merit.

A. Count I - Possession of Shares

In Pennsylvania, a person seeking possession of shares is not limited to pursuing an action against holders of a corporate office. See McLaughlin v. McLaughlin, 410 Pa. 1, 187 A.2d 905 (1963) (affirming trial court’s order that directed plaintiff’s husband, who had no affiliation with stock issuer, to deliver share certificates to her). Yvegeny’s association with Market, or lack thereof, thus has no impact on Mogilyansky’s right to pursue an action for possession of shares against him.

B. Count II - Accounting

In requesting an accounting, a complaint “seeks to turn over to the party wrongfully deprived of possession all benefits accruing to defendant by reason of its wrongful possession.” Boyd & Mahoney v. Chevron U.S.A., 419 Pa. Super. 24, 35, 614 A.2d 1191, 1197 (1992). Pennsylvania law does not permit equitable accounting “where no fiduciary relationship exists between the parties, no fraud or misrepresentation is alleged, the accounts are not mutual or complicated, or the plaintiff possesses an adequate remedy at law.” Rock v. Pyle, 720 A.2d 137, 142 (Pa. Super. Ct. 1998). In reviewing a request for an accounting, “it is reasonable for the court to permit some latitude since often times it is

not certain what claims a plaintiff may have until the accounting is completed.” In re Estate of Hall, 517 Pa. 115, 136, 535 A.2d 47, 58 (1987).

The Complaint alleges that Yvegeny aided Svetlana in numerous fraudulent transactions, including withdrawing money from Market’s bank account, opening a new bank account in Market’s name and using Market funds to purchase a new home. Complaint at ¶¶ 6, 16, 21, 23. As a result, although Yvegeny may not be an officer of Market, these allegations of fraud are sufficient to allow Mogilyansky to proceed against him on Count II.

C. Count IV - Constructive Trust

Establishing a constructive trust is an equitable remedy that is applied “when a person holding title to property is subject to an equitable duty to convey it to another on the ground he would be unjustly enriched if he were permitted to retain it.” DeMarchis v. D’Amico, 432 Pa. Super. 152, 166, 637 A.2d 1029, 1036 (1994) (citing Yohe v. Yohe, 466 Pa. 405, 411, 353 A.2d 417, 421 (1976)).

A court’s focus in determining whether a constructive trust should be established is the existence of unjust enrichment:

Generally, an equitable duty to convey property arises only in the presence of fraud, duress, undue influence, mistake or abuse of a confidential relationship. There is, however, no rigid standard for determining whether the facts of a particular case require a court of equity to impose a constructive trust; the test is merely whether unjust enrichment can be avoided.

Koffman v. Smith, 453 Pa. Super. 15, 32, 682 A.2d 1282, 1291 (1996) (citations omitted) (rejecting the argument that establishment of a constructive trust requires a fiduciary relationship). See also Hercules v. Jones, 415 Pa. Super. 449, 458, 609 A.2d 837, 841 (1992) (“[t]he controlling factor in

determining whether a constructive trust should be imposed is whether it is necessary to prevent unjust enrichment”).⁵

Here, Mogilyansky asserts that he provided a benefit to Market in the form of equipment and business expertise. Complaint at ¶¶ 12, 14. In addition, Svetlana’s alleged conduct, and, thus, Yvegeny’s alleged conduct, includes fraudulently taking Market funds, seizing physical control of Market, its assets and records, and refusing to compensate Mogilyansky. *Id.* at ¶¶ 6, 16, 21, 25. If correct, this establishes the inequity of allowing Yvegeny to retain the benefits Mogilyansky allegedly provided to him, and the Complaint supports a cause of action for a constructive trust against Yvegeny.

II. The Motion Does Not Support an Award of Counsel Fees

The Defendants also argue that they are entitled to attorneys’ fees and costs under 42 Pa. C.S. § 2503(9) (“Section 2503(9)”). Section 2503(9) entitles a litigant to counsel fees if “the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith.” Each of these terms has been narrowly defined as follows:

An opponent’s conduct has been deemed to be “arbitrary” within the meaning of the statute if such conduct is based on random or convenient selection or choice rather than on reason or nature. An opponent also can be deemed to have brought suit “vexatiously” if he filed the suit without sufficient grounds in either law or in fact and if the suit served the sole purpose of causing annoyance. Finally, an opponent can be charged with filing a lawsuit in “bad faith” if he filed the suit for purposes of fraud, dishonesty, or corruption.

⁵ Unjust enrichment, in turn, requires “benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.” Wiernik v. PHH U.S. Mortgage Corp., 736 A.2d 616, 622 (Pa. Super. Ct. 1999), app. denied, 561 Pa. 700, 751 A.2d 193 (2000).

By imposing these strict definitional guidelines, the statute serves not to punish all those who initiate legal actions which are not ultimately successful or which may seek to develop novel theories in the law. Such a rule would have an unnecessarily chilling effect on the right to bring suit for real legal harms suffered. Rather, the statute focuses attention on the conduct of the party from whom attorney's fees are sought and on the relative merits of that party's claims.

Thunberg v. Strause, 545 Pa. 607, 615-16, 682 A.2d 295, 299-300 (1996) (citations omitted). See also Township of S. Strabane v. Piecknick, 546 Pa. 551, 559-60, 686 A.2d 1297, 1301 (1996)

("[w]e do not believe that the intent of the rule permitted recovery of counsel fees is to penalize all those who do not prevail in an action").

According to the Defendants, the RICO and derivative actions "are so clearly without merit and so obviously filed for the purpose of harassment as to justify an award of counsel fees pursuant to" Section 2503(9). Motion at ¶ 26. However, the Motion does not allege facts necessary to sustain these conclusions. In the absence of such allegations and supporting evidence, the Court cannot award attorneys' fees under Section 2503(9). Cf. City of Phila. v. City of Phila., Frat. Order of Police, 717 A.2d 609, 611 (Pa. Commw. Ct. 1998) (a court may not award attorneys' fees "absent findings of fact by the trial court that the conduct in question is in violation of Section 2503 of the Judicial Code); In re Estate of Liscio, 432 Pa. Super. 440, 446, 638 A.2d 1019, 1022 (1994) (upholding award of attorneys' fees where there was a basis in the record for the court to find violations of Section 2503(9)).

CONCLUSION

The Complaint alleges facts to sustain the claims against Yvegeny for possession of shares, accounting and a constructive trust. Because the Motion does not support its assertions that Mogilyansky's behavior has been arbitrary and vexatious, the Defendants request for attorneys' fees is denied.

BY THE COURT:

JOHN W. HERRON, J.

Date: April 30, 2001

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| Defendants | : | Control No. 030939 |

ORDER

AND NOW, this 30th day of April, 2001, upon consideration of the Motion for Judgment on the Pleadings of Defendants Svetlana Sych, Yvegeny Sych and Russian Market, Inc. and Plaintiff Alexander Mogilyansky's response thereto, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED that the Motion is GRANTED IN PART and DENIED IN PART as follows:

1. Counts V and VI of the Plaintiff's Amended Complaint are DISMISSED in their entirety;
3. Count III of the Plaintiff's Amended Complaint is DISMISSED as to Defendants Yvegeny Sych and Russian Market, Inc. only;
2. Counts I and II of the Plaintiff's Amended Complaint are DISMISSED as to Defendant Russian Market, Inc. only; and

4. The Defendants's requests for counsel fees and the dismissal of Counts I, II and IV as to Defendant Yvegeny Sych are DENIED.

BY THE COURT:

JOHN W. HERRON, J.