

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : IAS PART 10
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DONALD GINSBERG, As Executor of the
Estate of ROBERT L. GINSBERG and
Derivatively on Behalf of PALACE
MANAGEMENT, INC.,

Index # 602446/98
POST TRIAL
DECISION

Plaintiff,

-against-

JOHN RUDEY, GARRIN PROPERTIES, INC.,
PALACE MANAGEMENT, INC., and BUENA VISTA
INVESTMENT CORP.,

Defendants,

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JOHN M. RUDEY,

Plaintiff,

-against-

DONALD G. GINSBERG, PALACE MANAGEMENT,
INC. and BUENA VISTA INVESTMENT CORP.,

Defendants.

----- X

BEATRICE SHAINSWIT, J.:

This is a family dispute. Donald Ginsberg and John Rudey are bitterly hostile brothers-in-law who are 50-50 owners of two Florida corporations set up 20 years ago, after family investment in a Florida hotel, solely to receive fees from a third Florida corporation that managed the hotel. Those interests in the hotel were sold three years ago. Despite the 50-50 ownership, Rudey forcefully compelled Ginsberg to agree that all payments on the sale price be paid first into the corporate structure. Rudey then, instead of promptly distributing the funds, as had always been the

practice, refused to make any distribution whatever and, further, refused Ginsberg all access to the corporate books.

Instead, he secretly proceeded to use all of the sale price for his own legal expenses -- (a) in litigation resulting from his (unsuccessful) attempt to obtain several hundred thousand dollars more from the hotel buyers for his own personal benefit, (b) in a related interpleader action, and (c) for the instant suit in its various ramifications. None of these expenses benefitted -- or could possibly have benefitted -- either corporation or Ginsberg. Nor was Ginsberg -- the corporate treasurer, a director, and the other 50% stockholder -- ever informed of Rudey's diversion of the corporate funds. Indeed, Rudey spent many thousands of dollars of corporate monies battling Ginsberg's attempt to gain discovery as to what had happened to the sale price.

Rudey has proffered absolutely no meaningful defense of his actions, either in his own complaint (consolidated for trial with Ginsberg's complaint) or on the trial itself -- other than his long standing, unconcealed hatred of Ginsberg. He has, moreover, in his brief and in proposed findings of fact, defied two orders of this Court barring references to the past history of the parties in connection with other family disputes. Finally, he not only concealed his misuse of corporate funds, but committed perjury, in affidavits presented to the Court, affirmatively stating that the sale price remained in the corporate treasury.

On this record, the Court will order sanctions, in addition to reimbursement to Ginsberg of the funds wrongfully appropriated by

Rudey.

Findings of Fact

On May 15, 1998, Donald Ginsberg, as executor of his brother's estate, and derivatively on behalf of one of the corporations, brought this suit against his brother-in-law, John M. Rudey, for corporate waste and breach of fiduciary duty. Six months later, on October 13, 1998, Rudey sued Ginsberg, primarily on the ground that Ginsberg had no right to sue Rudey, but also contending that Ginsberg had improperly collaborated in the litigation against Rudey, and, finally, devoting pages to references to family quarrels over the father's and brother's estates -- all of this struck by the Court, on February 24, 1999, as scandalous and irrelevant. At the joint trial before me, Rudey presented no meaningful support for any of the allegations in his complaint, other than an attempt to raise again the family quarrels (an attempt that was again struck down by this Court).

The facts here are not in dispute. In addition to being equal owners and directors of the two Florida corporations -- Palace Management Inc. ("Palace") and Buena Vista Investment Corp. ("BVIC") -- Rudey is President, and Ginsberg is Vice President and Secretary Treasurer, of each. The two companies had invested in, and collected a share of management fees from, a third Florida corporation -- Buena Vista Investment Fund ("BVIF") -- that acted as a general partner of the Buena Vista Palace Hotel in Orlando, Florida. Most of the activities in the case involved primarily the Palace company.

Between 1986 and 1993, the relevant management fees averaged; yearly, \$500,000 to \$600,000, and were evenly split between Ginsberg and Rudey. Both Palace and BVIC were Internal Revenue Code Subchapter S corporations, existing solely to receive and pay over those management fees; the corporations had no offices or employees, and paid no rent or income taxes (each of the two shareholders was required to pay income tax on his share of the corporate receipts.) After 1993 the hotel became unprofitable, and it was sold in 1997. The sale of the Palace and BVIC interests in the hotel was spread out over several stages, beginning in July 1997 and finishing in January 1998.

When the first part of the sale price, \$347,000, was actually paid, in August 1997, Ginsberg attempted to have his half sent to him directly. There was an immediate and sharp protest made by Rudey (despite the fact that Rudey himself had moved his own \$174,000 share into his own separate personal account, the very same day Ginsberg acted). Nevertheless Ginsberg acceded to Rudey's demands that both shares go into the Palace account, under Rudey's control.¹

Of the rest of the sale price, in October 1997, \$298,000 was paid to Palace and BVIC. Since then, although Palace has no

¹ Rudey has attempted to justify all of his subsequent actions on the basis of this one attempt by Ginsberg to short-cut collection of monies that were ultimately due him. In view of the subsequent record of Rudey's activities, the Court sees little need to waste time on the matter.

activities or liabilities, and no need to accumulate any surplus² - particularly once the hotel was sold -- Rudey has continually refused to pay out any of the funds resulting from the sale to Ginsberg. This instant action was brought, initially, to compel such a payout.

It developed - after a bitter, year-long discovery battle -- that almost no funds were left in the corporate accounts for any such payment, because Rudey had paid for years of personal litigation from the corporate funds. Thus:

First of all, there is no question that Rudey, at the time of the sale of the hotel, had demanded of one Mike Frost [who ran the Florida corporation -- Buena Vista Palace Management ("BVP") - that actually managed the hotel] that Rudey and his personal company, Garrin Properties Holdings, Inc. ("Garrin"), secretly be paid an additional \$750,000 for agreeing to sign the contract of sale of the hotel. Eventually, Frost agreed that Rudey would receive one third of the future hotel management fees, to be paid -- pursuant to an undisclosed side agreement, dated January 9, 1998 -- to Rudey's company (in which neither Palace nor BVIC nor Ginsberg had any interest).

After the completed payment of the sale price to Palace, however, Frost and his company sued to rescind the Garrin side agreement, on the ground of fraud and failure of consideration. The suit was against Garrin, and Palace and Ginsberg had no

² Rudey admitted on his deposition that he was "not aware of any" ongoing business activities at Palace for which there was need to develop a surplus.

interest; it was fought solely by Rudey's counsel, paid by Palace funds. Despite extensive (and expensive) litigation for over a year in Florida, ultimately a final judgment was entered for Frost on default on March 4, 1995. The Florida court ruled: "Based on the record the Court finds by clear and convincing evidence that the ... (Garrin side agreement) imposes no enforceable obligations on ... (Frost's company), based on imposition, unconscionability, fraud on the part of Garrin through the acts and misrepresentations of John Rudey, duress and failure of consideration."

Thereafter, an action brought by Rudey, in the name of Palace, in the federal court for the Southern District, seeking to enforce the side agreement, was dismissed on res judicata grounds by virtue of the Florida default judgment.

An interpleader action by Frost in Florida, understandably seeking guidance in distributing the sale price, was, like the other two actions, fought solely by Rudey, using Palace funds. Finally, when the instant action was filed by Ginsberg, and Rudey then brought his own suit against Ginsberg, all of his attorneys' fees in both actions were charged to the companies.

In the course of preparation for the instant suit, Ginsberg demanded the production of Palace's books and records. Rudey flatly refused to turn over a single document. On the subsequent discovery motion, Rudey, in an affidavit dated October 23, 1998, swore that "the corporate funds are safely in the corporate accounts ... where they belong," and that Ginsberg was required to deposit his share of the sale money in the Palace account "where it

belonged and where it has remained ever since". This Court granted the discovery motion and ordered the production of all Palace books and records; the order was not obeyed until many months later, in May 1999.

At that point, it became apparent that the sale monies -- far from lying "safely in the corporate accounts" -- had been largely spent by Rudey on his own attorneys' fees, in the litigation with Frost and the instant suits. Rudey had never advised Ginsberg of any of this, or obtained Palace board approval for the use of attorneys or the payment of their fees.

This information was amplified at the trial, when it was finally admitted by Rudey that he had caused Palace to spend \$516,195.03 on his attorneys in Florida and New York (in addition, \$5,154 of Palace funds were spent to fly witnesses and counsel to Florida in the Garrin action). Rudey personally paid nothing in legal fees, nor did he post a bond at any time.

Not a single one of those actions on which Rudey used Palace funds benefitted, or could have benefitted, Palace in any way, nor was Palace even a party to any of them (except nominally in the rescission action, from which it was voluntarily dismissed).

Conclusions of Law

Rudey, despite submitting 21 pages of proposed findings, and a 21-page memorandum of law - not to mention a two-day bench trial -- has submitted not a single serious defense of his conduct. On the trial, the Court found him to be a self-righteous, wholly

unbelievable witness, devoured by hatred of Ginsberg. He harped constantly on Ginsberg's attempt to do the same thing he himself did -- move his share of the sale price into his own account. As we have seen, when Rudey objected, Ginsberg promptly ordered the money paid into the Palace account, where Rudey proceeded to spend almost every penny on his own lawyers' fees in seeking to defend his attempt to wring huge additional benefit for himself from the hotel sale. Half of the sale money was in any event ultimately to be paid to Ginsberg; he has paid income taxes on his share, and the legal concept of the intervening Palace ownership is just that -- a technical concept, which cannot negate Ginsberg's clear ultimate right to half of the company receipts.

The only other defense raised by Rudey is offered in deliberate defiance of two orders of this Court -- one, dated February 24, 1999, striking scandalous pleadings, and the other in the course of this trial itself. Both orders barred reference to various family quarrels, with relatives not here involved, over the deceased father's and brother's estates, having nothing whatever to do with the instant matter. At the trial, on February 8, 2000, Rudey and his counsel were expressly directed -- after considerable argument in open Court - to stop seeking to justify Rudey's actions here by reference to these past hatreds. Nevertheless, in his proposed findings, Rudey devotes almost two pages to these same references to family history, designed solely to poison the Court proceedings, directly in violation of the Court's two orders, and with no bearing of any kind on this case.

Moreover, Rudey greatly complicated the instant lawsuit by bringing the baseless separate proceeding against Ginsberg, ultimately consolidated for trial with Ginsberg's action. His conduct in so doing was frivolous within the meaning of 22 NYCRR § 130 - 1.1(c), as was his defiance of the two Court orders. And, as we have seen, Rudey committed perjury in court affidavits.

Nothing at the trial, or in Rudey's papers, justifies his claims against Ginsberg, or his use of Palace funds to pay his own legal expenses in the various Florida and New York lawsuits involving only Rudey's selfish personal interests.

Moreover, Rudey's repeated references to ongoing Palace interests, other than the Florida hotel and its sale, have no basis in the record whatever. The Palace corporation, as a Chapter S corporation, did nothing whatever, and contemplated doing nothing whatever, beyond distributing, first, the hotel management fees, and, ultimately, the sale price.

Apart from anything else, Rudey's own actions, in stripping Palace of almost all its funds, make clear the absurdity of his claim that he was fighting to protect its treasury for some future investment or other use.

Finally, Rudey's actions have from the start directly violated Florida Statute Section 6070850 (6), expressly requiring an undertaking and directors' approval, where an officer or director seeks to use corporate funds to defend a civil proceeding. New York BCL § 723 (c) makes the same provision.

Accordingly, the Court directs that judgment be entered

against Rudey as follows:

(1) awarding Palace damages in the sum of \$521,349.03, plus interest of 9% from May 15, 1998;

(2) directing Rudey to account to Palace and BVIC for all additional corporate funds spent after January 21, 2000;

(3) removing Rudey as an officer and director of Palace and BVIC;

(4) removing Rudey from having any further control over the funds of Palace and BVIC;

(5) appointing a receiver of the funds of Palace and BVIC, who is directed ultimately to liquidate both corporations;

(6) awarding the estate of Robert Ginsberg reasonable attorneys' fees, in prosecuting derivative claims on behalf of Palace and BVIC, in the sum of \$30,000;

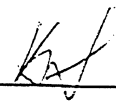
(7) imposing sanctions against Rudey, for his misconduct in bringing a baseless proceeding, defying Court orders, and committing perjury in court affidavits, in the amount of \$10,000, payable in the manner directed in 22 NYCRR § 130-1.3.

(8) The Court finds that Rudey did not proffer any evidence that Ginsberg, in any way, violated any of his duties to Palace and/or BVIC, and, therefore, Rudey's complaint seeking Ginsberg's removal as an officer and director of the two companies is dismissed with prejudice.

Settle order and judgment.

Dated: April 7, 2000

ENTER:



J.S.C.

280 A.D.2d 267, 720 N.Y.S.2d 123, 2001 N.Y. Slip
Op. 00794

Donald Ginsberg, as Executor of Robert L.
Ginsberg, Deceased, and on Behalf of Palace
Management Inc., Respondent-Appellant,
v.

John M. Rudey, Appellant-Respondent, et al.,
Defendants.

John M. Rudey, Appellant-Respondent,
v.

Donald Ginsberg, Respondent, et al., Defendants.

Supreme Court, Appellate Division, First
Department, New York
(February 1, 2001)

CITE TITLE AS: Ginsberg v Rudey

Order and judgment (one paper), Supreme Court, New York County (Beatrice Shainswit, J.), entered June 15, 2000, which, in a derivative action, *inter alia*, directed defendant Rudey to return to Palace Management Inc. moneys he misappropriated from it, removed Rudey as an officer and director of Palace Management and Buena Vista Investment Corp., sanctioned Rudey \$10,000, and awarded attorneys' fees of \$30,000 to plaintiff estate, unanimously affirmed, without costs.

The trial court properly precluded Rudey from offering evidence of, or conducting cross-examination concerning,

plaintiff executor Ginsberg's alleged mishandling of plaintiff estate as irrelevant to the issue at trial, namely, whether Rudey, Ginsberg or both breached fiduciary duties owing to Palace Management and Buena Vista Investment Corp. Rudey's contention that the award of attorneys' fees was improper under [Florida Statutes Annotated § 607.07401 \(6\)](#) is raised for the first time in his reply brief, and we decline to consider it. In any event, *268 under Florida law, an award of attorneys' fees is within the court's discretion if the right vindicated by the derivative suit inheres primarily in the corporation and not the shareholders as individuals (*see, Lane v Head, 566 So 2d 508, 510 [Fla]*). Here, the right vindicated is clearly that of Palace Management to the funds improperly used by Rudey to pay legal fees he incurred in furtherance of his own self-interest in a family dispute over the distribution of the sales proceeds of a family-owned business. The record does not support Ginsberg's contention that he requested a hearing on attorneys' fees. We have considered and rejected the parties' remaining arguments for affirmative relief.

Concur--Rosenberger, J. P., Nardelli, Ellerin, Saxe and Friedman, JJ.

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