

Vann v Roth

2024 NY Slip Op 32285(U)

July 2, 2024

Supreme Court, New York County

Docket Number: Index No. 651175/2021

Judge: Judy H. Kim

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDY H. KIM PART 04

Justice

-----X

AVROM R. VANN individually and in his capacity as an
officer and director derivatively on behalf of the HARRIET
AND ELI COOPER FOUNDATION, INC.,

Plaintiff,

- v -

ELAINE ROTH,

Defendant.

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INDEX NO. 651175/2021

MOTION DATE 04/15/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 9, 10, 11, 12, 13

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, defendant’s motion to dismiss is granted, in part, to the extent set forth below.

FACTUAL BACKGROUND

Plaintiff’s amended complaint alleges that Plaintiff and defendant are officers, directors, and/or trustees of the Harriet and Eli Cooper Foundation, Inc. (the “Foundation”), a not-for-profit corporation incorporated by Eli Cooper and his wife Harriet Cooper, in 1997. Eli and Harriet Cooper served as the Foundation’s sole members until their deaths in 1997 and 2014, respectively. Upon Eli Cooper’s death, his membership interest in the Foundation was devised to a testamentary trust, of which plaintiff and defendant serve as co-trustees.

Plaintiff asserts that, from 2019 to 2021, defendant frustrated the ability of the Foundation to make charitable grants, as had been its practice up until that point, and instead distributed these funds to a “donor-advised fund” without plaintiff’s consent. Plaintiff also alleges that defendant

has utilized Foundation funds for personal expenses, including attorneys to pressure plaintiff to appoint Scott Cooper and Iles Cooper as officers, directors and/or trustees of the Foundation. Plaintiff believes that these acts were part of an effort to pressure plaintiff to consent to the appointment of defendant's nephews, Scott Cooper and Iles Cooper, as directors, officers and/or trustees of the Foundation. Plaintiff's amended complaint asserts claims against defendant, both individually and derivatively on behalf of the Foundation, for breach of fiduciary duty and seeks her removal as an officer, director, and trustee of the Foundation as well as money damages.¹

Defendant now moves to dismiss the complaint, arguing that he may not bring these claims individually because the harms alleged in the complaint are harms to the Foundation, and that he lacks standing to bring derivative claims on behalf of the Foundation. As to this latter point, defendant notes that an action to remove a director for cause may only be brought by “the attorney-general or by ten percent of the members whether or not entitled to vote” (N-PCL §706[d]) while an action to on behalf of a domestic corporation may only be brought by “five percent or more of any class of members or by such percentage of the holders of capital certificates or of the owners of a beneficial interest in the capital certificates of such corporation” (N-PCL §623[a]) and asserts that plaintiff is not a member of the Foundation but only an officer, director, or trustee.

In opposition,² plaintiff maintains that he has a membership interest in the Foundation as trustee of the testamentary trust created by Eli Cooper such that the requirements of N-PCL §§623(a) and 706(d) are satisfied.

¹ While plaintiff's claim lists causes of action for: (1) “breach of fiduciary duty; removal of Elaine Roth as an officer, director and trustee of the foundation”, (2) “injunctive relief”, and (3) “money damages”, injunctive relief and money damages are remedies rather than independent causes of action (See e.g. Men Women N.Y. Model Management, Inc. v Elite Model Management—New York LLC, 183 AD3d 501, 502 [1st Dept 2020]).

² To the extent defendant argues plaintiff's opposition was untimely, the Court excuses any delay in light of the absence of any prejudice to defendant resulting from same (CPLR 2004).

In reply, defendant notes that plaintiff has not identified this testamentary trust or stated the percentage of membership interests in the Foundation such trust currently holds. Defendant also notes that defendant is allegedly a co-trustee of this trust and asserts that, as a result, plaintiff is unable to act unilaterally on behalf of the trust without defendant's consent, precluding him from bringing the instant action.

DISCUSSION

As an initial matter, the Court exercises its discretion and grants defendant's request to treat her motion as addressed to plaintiff's amended complaint, filed during the pendency of this motion (See e.g., Ferguson v Sherman Sq. Realty Corp., 30 AD3d 288, 288 [1st Dept 2006]).

On a motion to dismiss for lack of standing pursuant to CPLR 3211(a)(3), "the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing, rather than on the plaintiff to affirmatively establish its standing in order for the motion to be denied. To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff's submissions raise a question of fact as to its standing" (Phoenix Grantor Trust v. Exclusive Hospitality, LLC, 172 AD3d 923, 925-26 [2nd Dept 2019] [internal citations and quotations omitted]).

Defendant's motion to dismiss is granted to the extent plaintiff's claims asserted on his own behalf are dismissed; all of the harms alleged by plaintiff—defendant's refusal to make distributions and misuse of Foundation funds—are directed to the Foundation rather than plaintiff individually (See e.g., Broome v ML Media Opportunity Partners L.P., 273 AD2d 63, 64 [1st Dept 2000]). The motion is otherwise denied, however. While there is no dispute that this action falls within the purview of N-PCL §§623(a) and 706(d) (See e.g., Tae Hwa Yoon v New York Hahn Wolee Church, Inc., 56 AD3d 752, 755 [2d Dept 2008]), defendant has not established that plaintiff

cannot satisfy the requirements of these statutes but only pointed to unresolved questions of fact on this point.

Plaintiff's failure to identify the trust which allegedly holds Eli Cooper's membership interest in the Foundation in the complaint is not grounds for dismissal. Whether plaintiff, as a trustee of this trust, can be considered a member of the Foundation cannot be determined on the present record. Under the Not-for-Profit Corporation Law, a "member" is defined as "one having membership rights in a corporation in accordance with the provisions of its certificate of incorporation or by-laws" (N-PCL §102[a][9] [emphasis added]) and therefore resolution of this issue requires reference to the Foundation's certificate of incorporation and/or its bylaws, as well as Eli Cooper's will and the testamentary trust's formation documents.³ Similarly, whether defendant's status as a co-trustee of the testamentary trust in question precludes plaintiff from bringing this action will also require review of these documents. In short, given the outstanding issues of fact that must be resolved prior to the determination of plaintiff's standing, dismissal under CPLR 3211(a)(3) is not appropriate (See e.g., BAC Home Loans Servicing, LP v Rychik, 161 AD3d 924, 925-26 [2d Dept 2018] ["defendants failed to establish, prima facie, the plaintiff's lack of standing, as they failed to eliminate questions of fact regarding the plaintiff's standing as the holder or assignee of the note on the date of commencement of the action"]).

³ Defendant's observation, in an uninvited sur-reply, that NPCL §601(e) provides that "membership [in a not-for-profit corporation] shall be terminated by death," (implying, presumably, that Eli Cooper could not transfer his membership interest in the Foundation to a testamentary trust) relies on a selective reading that statute, which actually provides that "[e]xcept as otherwise provided in this chapter or the certificate of incorporation or the by-laws, membership shall be terminated by death, resignation, expulsion, expiration of a term of membership or dissolution and liquidation under articles 10 and 11."

Accordingly, it is

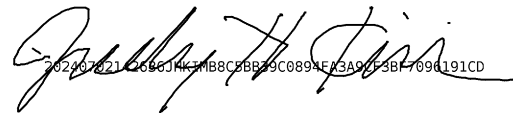
ORDERED that defendant’s motion to dismiss the complaint is granted to the limited extent that plaintiff’s claims asserted in his individual capacity are dismissed, and is otherwise denied; and it is further

ORDERED that plaintiff shall, within ten days from the date of this decision and order, serve a copy of this decision and order with notice of entry upon defendant as well as upon the Clerk of the Court; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at www.nycourts.gov/supctmanh); and it is further

ORDERED that the parties are to appear for a preliminary conference on August 16, 2024 in Part 4 (80 Centre Street, room 308) at 10:00 am.

This constitutes the decision and order of the Court.



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7/2/2024
DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: