

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1057

CA 16-00344

PRESENT: CARNI, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

MARK D. WELLS, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

THE HURLBURT ROAD COMPANY, LLC, ANTHONY CILIBERTI AND ANN G. KLEIN, TRUSTEES OF THE ANN G. KLEIN MARITAL TRUST, RICHARD M. KLEIN, NANCY L. KLEIN, LAURIE KLEIN-COLETTI AND RICHARD W. COOK, TRUSTEES OF THE HURLBURT TRUST, AND RICHARD W. COOK, TRUSTEE OF THE MANLIUS-KLEIN CHILDREN'S TRUST, DEFENDANTS-RESPONDENTS.

LINDENFELD LAW FIRM, P.C., CAZENOVIA (JANA K. MCDONALD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (JULIAN B. MODESTI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered May 19, 2015. The order, inter alia, granted defendants' motion to dismiss plaintiff's second cause of action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion and reinstating the second cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking, among other things, equitable relief pursuant to his second cause of action alleging a breach of trust or fiduciary duty on the part of Richard W. Cook (defendant) in his capacity as trustee of the Manlius-Klein Children's Trust (trust), in which plaintiff has a 25% beneficial interest. Plaintiff appeals from an order that, inter alia, granted defendants' CPLR 3211 (a) (7) motion to dismiss the second cause of action and denied that part of plaintiff's cross motion seeking to alter the priority in conducting depositions.

We agree with plaintiff that Supreme Court erred in granting defendants' motion. In considering a motion to dismiss pursuant to CPLR 3211, the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every favorable inference, and determine only whether the facts alleged fit within a cognizable

legal theory (see *Leon v Martinez*, 84 NY2d 83, 87-88). Here, we conclude that plaintiff's second cause of action sufficiently stated a claim against defendant for breach of fiduciary duty, namely, the duty to treat all beneficiaries of the trust impartially (see *Redfield v Critchley*, 252 App Div 568, 573, *affd* 277 NY 336, *rearg denied* 278 NY 483; *Matter of George Goldberg Irrevocable Trust*, 159 Misc 2d 1107, 1108; see also *Zim Israel Nav. Co. v 3-D Imports, Inc.*, 29 F Supp 2d 186, 192). Plaintiff has adequately alleged the elements of a cause of action for breach of fiduciary duty, including the existence of a fiduciary relationship, misconduct by defendant, and damages directly caused by that misconduct (see *Matter of Lorie DeHimer Irrevocable Trust*, 122 AD3d 1352, 1352-1353; *Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777), and it cannot be determined as a matter of law that the loan transaction engaged in by defendant treated all of the beneficiaries equally (see generally *Leon*, 84 NY2d at 87-88). We modify the order accordingly.

Contrary to plaintiff's contention, the court did not abuse its discretion in denying that part of his cross motion seeking to alter the usual priority of depositions. There are no " 'special circumstances' " or other grounds in the record warranting such an alteration (*Serio v Rhulen*, 29 AD3d 1195, 1196-1197; see generally *Kenna v New York Mut. Underwriters*, 188 AD2d 586, 588).