

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

PRESENT: BERNARD J. FRIEDPART 60**HON. BERNARD J. FRIED** Justice

MUTUAL BENEFITS OFFSHORE FUND,

INDEX NO.

E-FILE650438-2009

Plaintiff,

MOTION DATE

- v -

MOTION SEQ. NO.

007

EMANUEL ZELTSER, ET AL.,

Defendants.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: ☐ Yes ☐ No

Plaintiff Mutual Benefits Offshore Fund ("MBOF") has moved to dismiss the counterclaims brought by defendant Joseph Kay and defendant Sternik & Zeltser "as Trustee for the assets of Kayley Investments, Ltd.," pursuant to C.P.L.R. § 3211(a)(7).

Plaintiff contends that Sternik & Zeltser ("S&Z"), which is a defendant, may not assert counterclaims on behalf of Kayley Investments, Ltd. ("Kayley")¹, because Kayley is not a party to this action and has not obtained permission to intervene; S&Z was not sued as a representative of Kayley, but for its own conduct; and S&Z has failed to plead the elements of a trust. Plaintiff further contends that Kay's counterclaims must be dismissed because they fail to allege that Kay invested with MBOF or that Kay suffered any injury in connection with Kayley's investment in MBOF.

For purposes of this motion, I presume the allegations of the counterclaim to be true and

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I will not now resolve the parties' disagreement over whether Kayley Investments, N.V. is a different entity from Kayley Investments, Ltd. For purposes of this decision, I will refer to them interchangeably as "Kayley."

accord them “every favorable inference,” except insofar as they “consist of bare legal conclusions” or are “inherently incredible or flatly contradicted by documentary evidence.” *Beattie v. Brown & Wood*, 243 A.D.2d 395, 395 (1st Dep’t 1997).

The counterclaim asserts that Kayley “was” (at some unspecified time) owned by a wealthy Georgian investor, Arcady Patarkatsishvili (“Badri”). Joseph Kay (“Kay”) was Badri’s business partner and agent for most of his business affairs, including by “acting for Kayley” in investing \$15 million in MBOF. (Counterclaim ¶¶ 13, 36, 39.) In early 2003, persons including Christopher Samuelson made fraudulent misrepresentations that persuaded Badri and Kay to invest \$15 million of Kayley’s money in MBOF, a Virgin Islands entity, for subsequent reinvestment in Mutual Benefits Corporation (“MBC”), a company that invested in viatical settlements. (Counterclaim ¶¶ 3, 13, 15, 36, 39.) The counterclaim refers to the \$15 million in invested assets as “Kayley’s and Badri’s assets” and “Kayley’s and Badri’s investment,” (Counterclaim ¶ 44), and also as “Kayley’s assets,” (Counterclaim ¶ 47.) Throughout the counterclaim, Badri and Kay are referred to as “Kayley’s principals.” (See, e.g., Counterclaim ¶ 53.)

In 2004, MBC was sued by the Securities & Exchange Commission and shut down for multiple violations of U.S. securities laws. It was placed in receivership pursuant to an Order by the U.S. District Court for the Southern District of Florida. (Counterclaim ¶¶ 40-41.) The counterclaim alleges that MBOF was actually an offshore appendage and alter ego of MBC. (Counterclaim ¶ 30.)

According to the counterclaim, in December 2006, Badri instructed that Kayley’s assets pertaining to its investment in MBOF be transferred in trust to S&Z as trustee. Badri died on February 12, 2008. (Counterclaims ¶¶ 1-2, 12.) The counterclaim does not assert that S&Z represents Badri’s estate.

The counterclaim alleges that, in late 2006 and in 2007, MBOF’s principals cooperated with Kayley and its counsel, Emanuel Zeltser, Esq., and Alexander Fishkin, Esq., in order to recover Kayley’s investment.² (Counterclaim ¶¶ 44-45.) After Badri died, and while Zeltser was detained for some time in Byelorussia, around February 12, 2009, MBOF’s principals “purported to revoke” S&Z’s authority as Kayley’s escrow agent and appointed Samuelson and a person named Kurt Gubler as escrow agents instead of Zeltser and Fishkin. (Counterclaim ¶¶ 46-47.) MBOF then

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The opposition brief on behalf of the counterclaim plaintiffs was submitted by Emanuel Zeltser, Esq. of S&Z. Since that time, it has been represented to me that Kay is represented not by S&Z or Zeltser, but exclusively by Bruce D. Katz, Esq. Furthermore, Badri is deceased. Therefore, I disregard all references in the opposition brief to Badri and Kay as S&Z’s current clients.

brought this action, in order to regain control of Kayley's assets, "which are vested in Sternik & Zeltser." (Counterclaim ¶ 47.) The counterclaim brings five causes of action seeking to recover Kayley's purported investment in MBOF: fraudulent misrepresentations, conversion, unjust enrichment, constructive trust, and permanent injunction.

As a preliminary matter, I address first the allegation in the counterclaim that S&Z is bringing the counterclaim as trustee of an investment in MBOF that belonged or belongs to Badri. Badri is not a party to this case, much less to the instant motion, and is in any case deceased and therefore cannot own anything. While S&Z claims to be Badri's long-time counsel, it has not represented that it is counsel to Badri's estate, and I will not assume that it is. Therefore, S&Z's claim to be trustee of assets once belonging to Badri cannot be credited.

Insofar as the counterclaims are brought by S&Z as a trustee or representative of Kayley, they are dismissed. Kayley is not a party to this action and did not obtain—or even seek—permission to intervene. According to the same logic by which, in an action brought by a plaintiff trustee, a counterclaim is allowed only against the person beneficially interested, *see* CPLR § 3019(c), here a counterclaim may not be brought by S&Z as trustee for a beneficially interested non-party, when S&Z has been sued not as a trustee or representative but in its own right. Therefore, the counterclaims, insofar as they are brought by S&Z as a trustee or representative of Kayley, are dismissed.

Finally, I address the sufficiency of the counterclaim insofar as it is brought by Kay. The counterclaim alleges that Kayley was owned by Badri, not by Kay. It alleges that the investment in MBOF was made by Kayley and belonged to Kayley and Badri, not to Kay. It alleges that Kay was authorized to act as an agent of Kayley, and that he did act as an agent of Kayley in making the \$15 million investment in MBOF. (See Counterclaim ¶¶ 13, 36-39.) The counterclaim is evidently made on behalf of Kayley, not on behalf of Kay; the counterclaim alleges that it is Kayley's or Badri's money, not Kay's, that is at stake. The counterclaim does not allege that Kay is acting as an authorized agent of Kayley in bringing this counterclaim, and even if he were, he would not be allowed to bring it, as Kayley is not a party to this action and has not obtained permission to intervene. There is no allegation in the counterclaim of an oral agreement giving Kay ownership of Kayley's investment. If the Kay's argument is really an equitable claim of ownership, he has not alleged facts in support of that theory. Insofar as the counterclaim plaintiffs attempt to supplement the allegations in their counterclaim with assertions in their memorandum of law, I disregard them.

Therefore, the counterclaim, insofar as it is brought by Kay, is also dismissed.

Incidentally, I disregard all references to MBOF's "purported counsel" in the opposition

papers; Gusrae Kaplan is the only attorney of record for plaintiff in this case.

For the foregoing reasons, it is

ORDERED that Motion Seq. No. 007 is granted; the counterclaims are dismissed with prejudice.

Dated: 11/1/2010


J.S.C.

HON. BERNARD J. FRIED

Check one: ☐ FINAL DISPOSITION

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