SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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MICHAEL FELSHER,

Plaintiff,

-against-

GARY FELSHER, individually and as the Trustee of Gary Felsher Trust No. 2, IHOR G. KUPCHYNSKY, individually and the successor Trustee to HERMAN and BERTHA FELSHER, as Trustee of the Gary Felsher Trust No. 2, FGHP CAPITAL LIMITED PARTNERSHIP, a Delaware limited partnership, GARMONT CAPITAL, INC., a Delaware corporation, and W. MONSEES STUBBS, Jr., individually,

Defendants.

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DECISION AND ORDER

Index No. 159124/2012

HON. ANIL C. SINGH, J.:

In this non-jury trial, plaintiff Michael Felsher ("Michael") sues his father defendant Gary Felsher ("Gary") and others for breach of trust, breach of contract and conversion. The parties Michael, Gary and Ihor Kupchynsky ("Ihor") testified. Joseph Tafuro was called as a nonparty witness. The parties stipulated to the computation of damages (Court Ex. 3).

Michael is Gary's oldest child. In 1982, Gary created a trust for the benefit of his four children, including Michael ("the Trust"). The Trust is a spendthrift trust and is governed by an indenture ("the Trust Indenture"). The original trustees were

Michael's grandparents Herman and Bertha Felsher. The Felshers resigned as trustees in 2006 and are now deceased. Defendant Ihor Kupchynsky was named as successor trustee.

Michael graduated with an MBA from the University of Michigan in 1992. He went to work for Gary, who was a real estate investor and developer. In addition, Gary owned 100% of DiFama Concrete and 50% of a related company, DFC [November 28, 2016 Tr. at 25: 19-20].

Defendant FGHP Capital Limited Partnership ("FGHP") was formed in 1992 as the vehicle for acquiring a portfolio of real estate and loans from Nations Bank. Defendant Garmont Capital, Inc., was the general partner. The Class A partners consisted of the investors who put money into the deal, which included Gary and the Trust. The Class B investors were limited partners and were "promote interest participants" who received a percentage of the profits after certain milestones were met. Gary had a 50% Class B interest. He gave Michael 40% of the interest as an inducement to come into the business [November 28, 2016 Tr. at 111:13-26, 112:2-20]. Michael received his FGHP Class B distributions either directly or indirectly from 1994 to 2004 (Court Ex. 3, para. 4).

Michael was married in 1995 to his now ex-wife Marcela Alejandra Soto Malig ("Marcela"). The couple entered into a prenuptial agreement dated June 2,

1995 [Ex. 57]. They had three children, Samuel, Leah and Molly.

In 2000, Michael left Gary's business to pursue his own business interests. He set up a hedge fund, Frontera Capital Partners. He received funds from Gary. MMJP, the family partnership, invested $1 million. Initially, the hedge fund was successful. However, Michael lost all the capital in the fund [November 29, 2016 Tr. at 263: 7-26, 112:2-20].

He then moved to Florida for health reasons. Michael's relationship with his father, which had been close, began to cool [Id., 265: 5- 24]. Gary offered Michael a job with DiFama Construction in New York. Michael did not accept the opportunity because his father told him that the FBI was looking into the company and two of his partners had been indicted on racketeering charges [Id., 266: 5- 24, 267: 2-6].

Michael began to experience marital problems in Florida. He commenced divorce proceedings in 2001. The couple reconciled in that same year. Their third child, Molly, was born. In 2003, Marcela sued for divorce, which was finalized in March 2004 [Id., 268: 12- 25]. While the proceeding was pending, Michael viewed his father as pushing for settlement and taking his estranged wife's side. Gary became close to his wife and would make plans with her regarding the children. This became a point of contention with his father [Id., 268: 12- 25].

According to Michael, after the divorce his father continued to interfere with plans Michael would make with respect to his children. After one incident that occurred in South Hampton in 2004, Michael told his father that if his wishes were not followed, Gary could not see the children. Gary responded that Michael would not receive his money [Id., 270: 9- 22]. Michael testified that after 2004, he personally stopped receiving his Class B interest. Instead, Class B distributions were paid directly to the Trust (Ct. Ex. 3, para. 4). Michael attempted through intermediaries to have his father resume the distributions. His attempts were not fruitful [Id., 272: 14- 22, 273: 1-26, 274: 2-26, 275: 2- 26].

By 2006, Michael had no other source of income. He also began to have debilitating health problems, which resulted in cervical spinal surgery [Id., 282: 12-21]. That same year, the IRS determined that Michael owed taxes [Id., 308: 22-26,309: 2]. On April 4, 2006, Michael made a written request to his grandparents for a distribution to pay his outstanding tax obligations for 1998, 1999 and 2004. Michael did not receive a distribution [November 29, 2016 Tr. at 283: 19]. He spoke to his father about the issue. Gary was not "interested" in allowing it [Id., at 284: 6-9].

As a result, Michael brought a series of lawsuits against Gary and the Trustees. The first action was filed in Florida on May 30, 2006, and dismissed in

2010. Michael obtained a full accounting from the inception of the Trust to 2010 pursuant to the Florida Court's order dated April, 7, 2010. The second lawsuit was also filed in Florida in 2010 and voluntarily discontinued with prejudice in 2013. The third lawsuit was brought in New York and voluntarily discontinued in 2012. This action was commenced on December 21, 2012. All four actions raised similar claims relating to breach of trust and the failure to disburse FGHP Class B distributions to Michael.

For many years, Michael has threatened his father of criminal and financial wrongdoing. Gary attributes to Michael anonymous web postings charging Michael and DiFama Concrete with mob association and union misconduct. Michael attempted unsuccessfully to get the Manhattan District Attorney's Office to investigate Gary's alleged criminal conduct. These actions form the basis of Gary's counterclaims sounding in abuse of process, prima facie tort and defamation.

As parties to the action, Gary and Michael are interested witnesses. Both have a substantial financial interest in the outcome of this case. I find Gary to be a credible witness. While emotional at times, his demeanor and testimony were forthright.

I do not find Michael to be credible. His testimony contradicted contemporaneous documents. While the numerous e-mails to his father show a high

degree of hostility and resentment, it is Michael's conduct as the Trustee of the Felsher Family Trust No. 1 that raises serious questions of credibility. This trust was set up by Gary for the benefit of Michael and his siblings. The trust proceeds consisted of life insurance policies. Michael, as Trustee, cashed the polices for the sum of $360,907.00. On September 14, 2010, Melissa and Pia Felsher sued Michael in Florida for theft, conversion and breach of fiduciary duty (Ex. AF). On October 7, 2014, the Court granted plaintiffs summary judgment on default and entered a judgment against Michael in the sum of $630,748.97, which included an award of treble damages (Ex. AH).

While Michael blames his father for the litigation and has an excuse for his failure to oppose, his default is an admission that, as Trustee, he breached his fiduciary duties owed to his siblings by converting the proceeds of the trust (Rokina Opt. Co. v. Camera King, 63 NY2d 728, 730 [1984] (default by defendant is an admission of all allegations in the complaint, including liability)).

I. Whether Michael's Claims are Time Barred

Michael alleges in his complaint that Gary wrongfully diverted his distributions from FGHP since the third quarter of 2004 (para. 2). Gary improperly usurped the role of trustee and baselessly rejected Michael's request for distributions for legitimate financial obligations (para. 3). The Trustees wrongfully

co-mingled the Trust's assets with Michael's FGHP distributions. Gary wrongfully withdrew assets from the Trust and failed to replenish the Trust. In order to hide their misconduct, the Trustees failed to maintain records that documented Trust assets and transactions (para. 5).

The first through sixth causes of action allege breach of trust under Florida law. The first cause of action alleges that the Trustees breached Florida statute section 736.0801 by failing to administer the Trust in good faith in accordance with its terms and in the interest of its beneficiary Michael. Gary improperly failed to make distributions to Michael for legitimate financial obligations.

The second cause of action alleges breach of Florida statute section 736.0802, which requires the trustee to administer a trust in the sole interests of the beneficiaries. Michael contends that the Trustees improperly permitted his individual ownership interest in FGHP to reside in the Trust.

The third cause of action alleges that the Trustees failed to administer the Trust as a prudent person under Florida statute section 736.0804. Michael contends that the 2010 accounting revealed that the Trustees permitted unauthorized distributions to persons other than Michael. Further, Michael maintains that Ihor improperly delegated to Gary the authority to make distributions in violation of the Trust Indenture.

The fourth through sixth causes of action seek an accounting under Florida law. Michael alleges that the Trustees have failed to keep accurate records in breach of Florida statute section 736.0810. The Trustees have failed to provide Michael with an annual accounting pursuant to sections 736.0813 and 736.08135. In addition, Michael seeks a demand for information under Florida law regarding, inter alia, the Trust's assets and their values.

The seventh cause of action sounds in breach of contract based on the FGHP defendants' failure to make distributions and failure to provide Michael with K-1s for his Class B distributions. The eighth cause of action is for conversion predicated upon the FGHP defendants' transfer of distributions that belong to Michael in his individual capacity. These distributions are alleged to have been wrongfully disbursed to the Trust.

The ninth cause of action seeks removal of the Trustees for a serious breach of trust pursuant to Florida statute section 736.0706.

The parties agree that New York law applies as to the applicability of the statute of limitations. A breach of trust claim is subject to a six year statute of limitations where the "substantive remedy sought" is equitable in nature (Kaufman v. Cohen, 307 AD3d 113, 118 (1st Dept. 2003). A three year statute of limitations applies to trust claims seeking only money damages (Id. at p.119). Here, the Trust

claims seek both legal and equitable relief. A breach of fiduciary duty claim accrues when the trustee repudiates his or her fiduciary obligation (Lebedev v. Blavatnik, 144 A.D.3d 24, 28 [1st Dept., 2016]).

Michael's breach of trust claims accrued in May 2006, when he commenced a lawsuit in Florida against the original trustees, his grandparents, Bertha and Herman Felsher, and Gary, alleging breach of fiduciary duty. The allegations made in the Florida action are substantially similar to the claims in this lawsuit. The first count in the May 2006 Florida action demanded an accounting. The second count sought to obtain trust information, including a list of Trust assets. The third count sought a declaration of beneficiary rights. Michael alleged that he had not received distributions since 2005 for legitimate financial obligations, including the federal income tax bills. Defendants made unauthorized disbursements of Michael's individually owned FGHP distributions. The Trustees had improperly delegated decision making to Gary.

Here, Michael's first cause of action alleging that the Trustees improperly failed to make distributions to Michael for legitimate financial obligations – i.e., the IRS tax claim – is time barred under both the three year and six year statute of limitations. This cause of action accrued in May 2006 after the Trustees failed to make the payment and Michael sued in Florida for breach of trust.

The second cause of action alleging that the Trustees improperly permitted his individual ownership interest in FGHP to remain in the Trust accrued in May 2006. The claim seeks money damages only and is untimely as it is subject to a three year statute of limitations. The branch of this cause action alleging that Gary breached the Trust and violated Florida law by requiring the Trust to pay his tax obligations is timely. The record supports Michael's assertion that he did not have knowledge of these disbursements until 2010 when the accounting was performed (Sadwith v. Lantry, 219 F.Supp. 171, 176 [SDNY 1963]).

Michael's third cause of action alleging that Gary was taking monies from the Trust for his personal use as repayment of loans is timely. This cause of action accrued in 2010 upon performance of the accounting. The claim that Ihor improperly delegated to Gary the authority to make distributions in violation of the Trust Indenture and permitted the payment of Gary's taxes from the Trust is primarily equitable. It is timely as to those actions taken within the last six years.

The fourth through sixth causes of action relating to accountings and the ninth cause of action for removal of the trustees are time-barred to the extent they are based on claims that occurred more than six years from the date of the commencement of this lawsuit.

New York's six-year statute of limitations applies to the seventh cause of

action alleging breach of contract based on the FGHP defendants' failure to make distributions and refusal to provide Michael with K-1s for his Class B distributions. The claims for distributions between 2006 and 2012 are timely. This claim accrued on the dates the limited partners were entitled to distributions and Michael did not receive payments.

However, Michael's FGHP claims for distributions in 1995, 1999 and 2000 are time-barred. Michael's argument that he did not learn that the FGHP distributions were being held by the Trust until the accounting was completed in 2010 is not supported by the record (see infra, at pp. 12 to 16).

Michael's demands for distributions in 2004 and 2005 are time barred. The claims may have been timely in the 2010 Florida action. However, Michael voluntarily discontinued that action with prejudice in 2013. There is no toll on the statute of limitations as the prior action was commenced and terminated in Florida and is outside the reach of CPLR 205 (Midwest Goldbuyers, Inc. v. Brink's Global Servs., 120 AD3d 1150 [1st Dept. 2014]). In addition, relief under CPLR 205 may not be granted where the action was voluntarily discontinued (Boulhosa v. Rivera, 269 AD2d 181 [1st Dept. 2000]).

The statute of limitations for a conversion claim runs from the date the conversion occurred (Vigilant Ins. Co. of Am. v. Housing Auth. of City of El Paso,

Tex., 87 NY2d 36, 44 [1995]). The eighth cause of action is for conversion arising from the FGHP defendants' transfer of distributions that belong to Michael in his individual capacity. These distributions are alleged to have been wrongfully disbursed to the Trust. The cause of action is untimely to the extent it is based on actions that occurred outside the three-year statute of limitations.

II. Whether Michael is Entitled to Personal Payment of the FGHP Class B Distributions

The parties stipulated that Michael directly or indirectly received the following FGHP Class B distributions: $492,655 in 1994; $448,000 in 1995; $608,000 in 1996; $912,000 in 1997; $280,000 in 1998; $264,000 in 1999; $360,000 in 2001; $112,000 in 2002; $112,000 in 2003; and $56,000 in 2004. The total amount of distributions in dispute is $1,843,923.

Michael's claim that the FGHP Class B interest was wrongfully distributed to the Trust stems from the fact that he signed the FGHP Agreement dated January 8, 1993, in his individual capacity as a Class B limited partner. The FGHP Agreement provides that Class B limited partners are entitled to distributions in accordance with "their respective Class B Percentage Interests." [Ex. 3]. Michael reasons that since he was the personal holder of the Class B interest, he was entitled to a distribution and not the Trust.

The evidence adduced at trial establishes that in 1992 and 1993 the K-1s reflecting Michael's Class B interest were issued to him. However, in 1994 the K-1 was issued to the Trust and sent to his grandparents' Florida address, who were the Trustees at the time [Ex. 13]. Michael testified that he did not recall when he first saw that the K-1s were issued to the Trust. It may have been in 1995 or 1996 [November 29, 2016 Tr. at 277:5-18]. Michael questioned his father why the K-1s were issued directly to the Trust and was advised by Gary that it was for "accounting purposes" and did not make a difference as he was the owner of the interest [Id., at 277: 25-26, 278: 1-2]. Michael stated that he continued to individually receive Class B distributions directly from the partnership through 2004 [Id., at 278: 18-19].

Gary testified that he was president of the general partner, Garmont. At Michael's request, Garmont permitted the transfer of his Class B interest to the Trust. No writing authorizing transfer was prepared by Garmont [November 28, 2016 Tr. at 41: 6-19]. Michael wanted to put his interest in the Trust [Id., at 44: 7-8]. The reason Michael gave for the change was that he did not want to disclose the interest in his prenuptial agreement [Id., at 128: 9-10].

According to Gary, Michael became irresponsible and irrational in 2004. As a result, it was decided that monies would not be distributed directly to Michael.

Instead, the FGHP Class B distributions were made to the Trust. Gary acknowledged that Garmont did not have the right to decide whether to pay a limited partner in the event a Class B distribution was made. The distributions were made to the Trust which owned the interest. [Id., at 54: 13-17, 55: 1-7].

I credit Gary's testimony that Michael's Class B distributions were assigned to the Trust in 1994 at Michael's request. During the time Michael worked for Gary, the two had a good relationship [November 28, 2016 Tr. at 119:15-17]. Gary and/or Garmont did not have a business purpose to change who received the distributions. The accounting of the distribution would remain the same except that the partnership books would reflect a change in the recipient of the interest.

On the other hand, Michael had a reason for requesting that the distributions be assigned to the Trust. He entered into the prenuptial agreement and had a pecuniary interest to protect his Class B distributions made to him after the couple was married. Michael represented in the prenuptial agreement that he made full disclosure to Marcela of all property owned by him in Schedule B [Article II, section B]. He disclosed that he had $40,000 and the Trust. The Trust was valued at $3.6 million. The FGHP Class B partnership interest and distributions were not listed as personal property. At trial, Michael explained that he did not list his interest in FGHP because he had not been "paid anything" [November 30, 2016 Tr.

347: 19]. He acknowledged that the $3.6 million value of the Trust equaled the sum of the distributions received from the Trust [Id., at 347: 23-25].

Nor do I find credible Michael's testimony he did not recall when he first saw that the K-1s were issued to the Trust. Michael has an MBA. He knew from 1994 onwards that he was no longer personally obligated to pay taxes on the distributions as the K-1s were being issued to the Trust.

In the 2001 divorce proceeding, Michael executed a sworn document entitled "Family Law Financial Affidavit" dated May 22, 2001 [Exhibit F]. The affidavit was served on his spouse's counsel. The affidavit discloses Michael's business interests as Frontera Capital Inc., his hedge fund, and a Class B interest in FGHP. Footnote 10 explains that "both A and B partnership interests are held in a trust named Gary Felsher Trust No. 2 ...." While the initial divorce proceeding was abandoned, Michael in a sworn affidavit acknowledged that the FGHP partnership B interest was held in trust.

Michael's understanding that the Trust was the owner of the FGHP Class B interest is also reflected in sworn testimony given at a deposition during his 2003 divorce proceedings. He testified that Frontera Capital was the only partnership he had been affiliated with since 1998 [Id., at 348:10]. Michael acknowledged that an investment of the Trust pays him directly on occasion. He attributed these direct

payments as "bookkeeping errors" [Id., at 348:14].

The representation made by Michael in his prenuptial agreement is an admission. "An admission is a voluntary acknowledgment made by a party of the existence of certain facts which are inconsistent with the position that he or she is attempting to establish in the case and, therefore, amounts to proof against such party" (8 Carmody-Wait 2d Section 56:76). Here, Michael's representation in the 1995 prenuptial agreement that the FGHP Class B partnership interest distributions were not personal property is inconsistent with his trial testimony. The 1995 representation made before there was any litigation is deserving of greater weight than Michael's trial testimony.

Informal judicial admissions are statements made in judicial proceedings, depositions or affidavits. While not conclusive, it is evidence of an admitted fact (see Prince, Richardson on Evidence (11th ed.) Section 8-219). Michael's sworn affidavit given within the context of a judicial proceeding in 2001 and his deposition testimony in 2004 is evidence that he did not personally own the FGHP Class B interest. Rather, it was owned by the Trust.

In short, Michael reaped the benefit of receiving distributions directly or indirectly from 1994 to 2004 while holding out to his spouse and the IRS that he did not personally own the Class B partnership interest. After receiving substantial

benefits from the Trust – a discretionary spendthrift trust – protected from his creditors, Michael changed his position when the Trust stopped making payments to him.

I hold that Michael has admitted that his Class B interest was transferred to the Trust at his request and for his benefit.

Gary maintains that Michael is equitably estopped from seeking direct payment of the FGHP distributions at this juncture. In order to invoke this defense, Gary must establish:

> (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than and inconsistent with, those which the party subsequently seeks to assert; (2) intention, or at least expectation, that such conduct will be acted upon by the other party; (3) and, in some situations, knowledge, actual or constructive, of the real facts
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> (BWA Corp. v. Alltrans Express U.S.A., 112 AD2d 850, 853 [1st Dept. 1985] (other citations omitted).

Courts in New York hold that estoppel "is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought" (Nassau Trust Co. v. Montrose Concrete Products Corp., 56 NY2d 175, 184 [1982]). Estoppel requires

evidence that "a party was misled by another's conduct or that the party significantly and justifiably relied on that conduct to its disadvantage ..." (Fundamental Portfolio Advisors, Inc. v. Tocquerville Asset Management, L.P., 7 NY3d 96, 107 [2006] (other citations omitted).

Here, Michael is equitably estopped from disputing the validity of the assignment of the Class B interest to the Trust. Michael's statements and conduct between 1995 and 2004 with respect to how the FGHP Class B interest was to be distributed is completely inconsistent with the position he subsequently asserted. He understood that Gary and Garmont would act upon his request to make the partnership distributions to the Trust. Michael acted with the knowledge that, under the partnership agreement, he was entitled to distribution but nevertheless permitted the distributions to the Trust.

Gary and Garmont justifiably relied upon Michael's request to assign the distributions to the Trust. Revocation of the assignment would be an injustice requiring Gary and Garmont to make an additional distribution in the sum of $1,843,923 after making the distribution to the Trust at the request of and for the benefit of Michael.

Nor am I persuaded that oral assignment of Michael's partnership interest to the Trust is void under the FGHP agreement. The agreement provides in Section 9.6

as follows: "Any purported transfer of an interest in the partnership that is not in compliance with this agreement is hereby declared to be null and void and of no force and effect whatsoever." However, the agreement gives the general partner discretion to treat the assignor as the owner in the absence of a writing [Section 9.5]. Accordingly, Garmont as the general partner has the right to waive the requirement of written consent. Moreover, the 1994 K-1 issued by the partnership documented the assignment in a writing stating that "Gary Felsher Trust #2 FBO Michael Felsher" was the holder of the Class B interest.

Based on my finding that Garmont, Gary and FGHP did not breach the partnership agreement by making distributions to the Trust, the second cause of action for breach of trust, the seventh cause of action for breach of contract and the eighth cause of action for conversion are dismissed with prejudice.[1]

III. Whether there was a breach of trust by permitting Gary to take monies from the Trust as loans

The parties stipulated that Gary received $1,820,322 in disbursements from the Trust (Court Ex. 3, para. 5). Michael maintains that these monies were wrongfully diverted to Gary. He contends that Gary's justification for taking these funds – as repayment of loans made to the Trust – was fabricated after the 2010

[1]The conversion claim in any event does not allege independent facts and is redundant of the breach of contract cause action (Fesseha v. TD Waterhouse Investor Services, 305 AD2d 268 [1st Dept. 2003]).

accounting.

Gary testified that he created the Trust for his four children in the early 1980s for two purposes. First, he established the Trust for estate planning purposes in the event of his death. Second, he wished to provide security for his children by creating an irrevocable spendthrift trust to protect the corpus from creditors. The original Trustees were his parents, Herman and Bertha Felsher. Gary understood that, as settlor, he had controlled the Trust, except that decisions regarding the distribution of monies were to be made by the Trustees [November 28, 2016 Tr. at 99: 3-24, 100: 1-3].

Gary testified that he funded the Trust by selling securities. The proceeds were placed in the Trust as loans to be utilized as investments. The Trust would receive a percentage of the investments. Gary would take back the monies lent to the Trust. Monies were not gifted to the Trust as it would not be prudent tax or estate planning. Gary stated that he wanted to grow the Trust for the benefit of his four children by giving them an opportunity to invest with him as his family partners. If the investment made money, Gary would take back the loan. If the transfers were not loans, he would have had to pay gift taxes [Id., at 103: 3-24]. Gift tax returns were not filed because the monies he placed into the trust were not gifts [Id., at 104: 11-17].

Joseph Tafuro, a certified public accountant, prepared the initial accounting ordered by the Court in Florida for the period January 1, 1992, through April 30, 2010. Mr. Tafuro had a prior professional relationship with Gary and his companies. Mr. Tafuro testified that he never saw any documents evidencing a loan by Gary to Michael's Trust. The only evidence of loans was Gary's statement to him in 2010. Based on Gary's statement, all contributions to the Trust were identified as loans [November 30, 2016 Tr. at 386: 23-26, 387: 2-4].

While there are no contemporaneous records of loans, I credit Gary's testimony that he intended to fund the Trust with loans, not gifts. The Indenture authorizes the Trust to borrow money [Ex. 1, para. Ninth (7)]. His intent in setting up the Trust was to transfer money to his children outside his estate. No gift taxes were paid on the transfer. In fact, Michael understood and acknowledged that Gary set up the Trust for "tax benefits" [November 29, 2016 Tr. at 386: 22-26].

Gary's testimony is corroborated by the amount he used to fund a premium for a life insurance policy, $40,000 per year for the benefit of his children. This amount met the $10,000 gift tax exemption per individual [November 28, 2016 Tr. at 99: 3-24, 104: 18-26].

I reject Michael's claim that the repayment of loans to Gary's businesses, High Peak and Atrium, did not benefit the Trust. In total, Michael received

$3,657,655 in distributions from the Trust. This sum includes $1,005,027 in payments to Marcela for spousal and child support (Court Ex. 3, paras. 2 & 3).

Accordingly, I find that the sums of $1,820,322 were properly disbursed by the Trust to Gary as repayment of loans made by Gary to the Trust to make investments that benefitted the Trust.

The third cause of action alleging that Gary and Ihor breached Florida statute Section 736.0804 and the Trust by permitting unauthorized distributions to persons other than Michael is dismissed with prejudice.

IV. Whether Gary Exercised Improper Control Over the Trust

Michael maintains that Gary controlled the Trust and made all decisions regarding distributions. The appointment of his grandparents, Herman and Bertha Felsher and Ihor Kupchynsky as successor Trustee violated Section 672[c] of Internal Revenue Code. This provision prohibits a Grantor from appointing a related party or subordinate employee as Trustee.

On April 4, 2006, Michael made a written request to his grandparents for a distribution to pay his outstanding tax obligations for 1998, 1999 and 2004. Michael did not receive a distribution [November 29, 2016 Tr. at 283: 19]. He spoke to his father about the issue. Gary was not "interested" in allowing it [Id., at 284: 6-9].

Michael contends that Gary and Ihor breached the Trust by declining to make a distribution to pay his mounting tax obligation. Michael maintains that an impartial trustee would have made the disbursement or would have paid the IRS directly. Gary's refusal to make the payment has substantially increased the amount due to the IRS in penalties and interest. Accordingly, Gary is responsible for damages in the amounts due to the IRS that have accrued since April 2006.

These claims accrued in May 2006 – when Michael sued his grandparents and father in the Florida action alleging breach of Trust based on Michael's allegation that he had not received distributions since 2005 for legitimate financial obligations, including the federal income tax bills – and are untimely (see supra, at p. 9).

Even assuming that the breach of trust claim relating to the IRS debt is not subject to the statute of limitations, it is barred by the doctrine of res judicata. In dismissing the 2006 action in September 2010, the Florida Court made a finding of fact that the Trustees "have advised Michael that they stand ready to make payments to satisfy the tax lien if Michael will negotiate a settlement with the IRS, but Michael has failed to do so."[2]

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[2]Plaintiff argues that defendants wrongfully withheld evidence in the 2006 Florida litigation that Ihor was not appointed until after six months after Michael made his request for the distribution to pay his tax liability. Therefore, defendants may not invoke res judicata. I disagree. The 2006 case was pending for four years. Michael had more than sufficient time to obtain

The record establishes that Michael's tax lien – which is now well in excess of $1 million – is a self-inflicted wound. Michael filed an amended return for the tax years 1998 to 2000 which resulted in a refund from the IRS. The refund amounts were spent trading. As a result, Michael did not have the capital to repay the IRS after it determined that the refunds were not properly taken [November 29, 2016 Tr. at 308: 9-26, 309: 2-12]. In 2004, Michael did not file a tax return. Nor was there any attempt on his part to compromise the tax lien with the IRS [Id., 353: 10-23].

In fact, Michael does not intend to settle with the IRS until after this lawsuit is resolved [November 30, 2016 Tr. at 354: 2-4]. He instructed his father by e-mail dated September 23, 2013, not to utilize Trust proceeds to pay off the tax lien. Instead, Michael took the position that Gary should utilize his own monies to pay off the lien [Id., 354: 11-23; Ex. CF].

I find that Michael is responsible for the tax lien asserted by the IRS.

Finally, Michael has failed to prove that Ihor improperly delegated to Gary the authority to make distributions in violation of the Trust instrument. On this record, it cannot be said that Ihor abused his discretion as a Trustee in not making a distribution to Michael to pay the IRS lien. Ihor, after consulting with Gary, had a

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discovery and bring this fact to the attention of the Florida Court.

good faith basis not to make the payment. The Trust was established as a spendthrift trust to protect the corpus from creditors. Payment from the Trust defeats the purpose of setting up the spendthrift trust, especially where Michael fails to seek a compromise of the tax lien prior to obtaining a distribution.

The first cause of action alleging that Gary and the Trustees failed to administer the Trust in the interest of Michael is dismissed with prejudice.

V. Whether the Trust is a Grantor Trust

Michael contends that the Trust should be considered a grantor trust and that Gary, as settlor, is responsible for all taxes paid by the Trust. This claim is predicated upon Section 675(3) of the Internal Revenue Code, which states that where a grantor of a trust borrows from the corpus of a trust without providing adequate security, the grantor is treated as owner of a portion of the trust and is responsible for taxes if the loan is not repaid before the beginning of the taxable year.

Michael maintains that the Trust accountings establish that in 1998, 2002-2010 and 2015 Gary owed money to the Trust without providing adequate security. Gary acknowledged that the Trust accountings as of the end of 2015 showed that he owed the Trust the sum of $20,410 [November 28, 2016 Tr. at 90: 23-26, 91: 2; Ex. 35]. Gary testified that while there was no document memorializing the debt, the

security for the debt was his personal verbal guarantee [Id., at 91: 8-14].

I credit Gary's testimony and find that there was adequate security for the loans from the Trust. Moreover, based on my finding that Gary loaned the Trust the sum of $1,820,322 to make investments, at all times there was adequate security. The accountant Joseph Tafuro's testimony was uncontradicted that at no point in the life of the Trust has Gary owed money to the Trust. The totals of the "net number" were always due to Gary [November 30, 2016 Tr. at 412: 15-21]. The sum due to Gary from the Trust is approximately $665,500 [Id., at 413: 11].

Accordingly, the branch of the second and third counts that Gary and Ihor breached the Trust and Florida statutes Sections 736.0802 and 736.0804 by having the Trust pay the taxes is dismissed with prejudice.

VI. Whether Gary Must Reimburse the Trust for Legal and Accounting Fees

Michael seeks to compel the Trustees to replenish the Trust in the sum of $1,753,771, which represents monies utilized by the Trustees to defend against the various lawsuits brought by Michael alleging breach of trust and to pay for accounting fees.

Florida law permits a trustee to pay costs and/or attorneys' fees incurred in a proceeding from the assets of a trust without approval of any person or court authorization (Fla. Stat. Ann. Section 736.0802(10)). However, this provision also

provides that a court has the authority to require the return of costs and legal fees upon a finding that the trustee is in breach of trust. Where a cause of action for breach of trust is dismissed or judicially resolved without a determination that the trustee was in breach of trust, the trustee is authorized to pay attorneys' fees and costs from trust assets (Fla. Stat. Ann. Section 736.0802(10)(g)).

Here, the Florida court in 2010 did not make a finding that a breach of trust occurred. The Trust accounting it had ordered was completed on July 13, 2010. Accordingly, all monies expended for attorneys' fees and accounting fees through September 2010, when the case was dismissed, are authorized.

On this record, I find that Michael has failed to prove the defendants are in breach of trust. Accordingly, I decline to order return of the monies expended from the trust for legal and accounting fees. Monies used from the Trust to defend the FGHP claims are inextricably intertwined with the breach of trust claims as the FGHP monies were proper distributions to the Trust. While the statute does not specifically refer to accounting fees, I find that these expenditures fall within the plain meaning of the word "costs" and were necessarily incurred based on Michael's request for an accounting.[3]

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[3]Michael's remaining claims that are not specifically addressed, including the fourth to sixth accounting claims and the ninth cause of action seeking removal of the Trustees for a serious breach of trust, are dismissed for failure of proof. A trust accounting has been conducted (Ex. 30). There have been yearly accountings since 2010. Nor have any grounds for removal of

VII. Whether Gary has Asserted Valid Counterclaims Against Michael

By order dated June 20, 2014, Gary was given leave to amend his answer to interpose counterclaims.

Gary's first counterclaim sounds in abuse of process. The e-mail threats of criminal prosecution and wrongdoing made by Michael to Gary between October 29, 2007, and February 21, 2012, fall outside the one-year statute of limitations for an intentional tort (Beninati v. Nocotra, 239 AD2d 242 [1st Dept. 1997]) (Exs. AV, AY, BA, BB, BC, BD, BH, BI, BK, BL, BK and CJ).

Similarly, the e-mails Michael wrote to the Executive District Attorney Adam Kaufmann in 2012 (Exs. AI, AK, AM and AN) accusing Gary of financial crimes and urging prosecution between January 27, 2012, and April, 24, 2012, are also time barred as the first counterclaim was interposed in 2014.

Nor for that matter do these threats make out a claim for abuse of process. The elements of the tort are: (1) regularly issued legal process; (2) by a person motivated to do harm without economic or social justification; (3) seeking some collateral advantage; and (4) actual or special damages (Curiano v. Suozzi, 63 NY3d 113 [1984]). Here, the process issued were the four civil lawsuits. Michael was not seeking to inflict harm on Gary or obtain a collateral advantage. Rather,

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the Trustee been proved.

Michael was seeking monies he believed that were due him. Nor has Gary shown any actual or special damages.

The second counterclaim sounds in prima facie tort. Gary has failed to establish the intentional infliction of harm that resulted in special damages (Curiano v. Suozzi, supra).

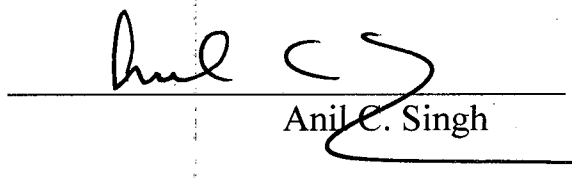
The third counterclaim is for defamation. Even assuming that the anonymous comments accusing Gary and DiFama of mob association and union corruption were posted by Michael (Exs. AO and AP), the counterclaim is untimely as beyond the one-year statute of limitation.

Accordingly, the counterclaims are dismissed with prejudice.

In view of the above, it is

ORDERED AND ADJUDGED that the complaint and counterclaims are dismissed after trial with prejudice without costs and disbursements.

Date: February 3, 2017
New York, New York



Anil C. Singh