DOC # 81

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WEIZMANN INSTITUTE OF SCIENCE,

Plaintiff,

-against-

JANET C. NESCHIS, individually and in her capacities as Trustee of the Jacques and Natasha Gelman Trust dated November 18, 1997, and as Trustee of the Trust Created Under the Last Will and Testament of Natasha Gelman dated April 23, 1993, ROBERT R. LITTMAN, individually and in his capacity as Successor Trustee of the Trust Created Under the Last Will and Testament of Natasha Gelman dated April 23, 1993, and MARILYN G. DIAMOND, in her capacity as Trustee of the Jacques and Natasha Gelman Trust dated November 18, 1997, and as Trustee of the Trust Created Under the Last Will and Testament of Natasha Gelman dated April 23, 1993,

Defendants.

DECISION AND ORDER

00 Civ. 7850 (RMB)

ALICE ANN JUNG on her own behalf, as Executrix of the Estate of MIROSLAV JUNG, Deceased, et al.,

Plaintiffs,

-against-

JANET C. NESCHIS, et al.,

Defendants.

01 Civ. 6993 (RMB)

I. Introduction

On October 16, 2000, plaintiff Weizmann Institute of Science ("Weizmann") filed a complaint against Janet Neschis ("Neschis"), Robert Littman ("Littman") and Hon. Marylin Diamond ("Diamond") (collectively, "Defendants") alleging that Defendants had engaged in a scheme fraudulently or illegally to obtain the assets of the estate of elderly Natasha Gelman ("Mrs. Gelman"), including the assets of Anturia Foundation ("Anturia" or "Foundation"), a

Liechtenstein "stiftung" (or foundation) created by Mrs. Gelman and her late husband Jacques.[1] On July 30, 2001, Alice Ann Jung ("on her own behalf, as Executrix of the Estate of Miroslav Jung"), Josef Jung, Michelle Jung, and Jaroslav Jung, a/k/a Jerry Jung (collectively, the "Jungs"), who are relatives of Mrs. Gelman, filed a separate complaint containing similar allegations as those made by Weizmann against Defendants. (See Jung Amended Complaint, dated October 30, 2002, ¶ 1 (Defendants conspired to defraud Mrs. Gelman, "an elderly widow who became mentally incompetent in the last years of her life," in order to "obtain control over Mrs. Gelman's substantial assets and divert them to [Defendants'] personal use and benefit.").) On September 26, 2001, the Court consolidated the Weizmann and Jung actions for pre-trial purposes, including motion practice.[2]

On October 19, 2001, Defendants moved jointly, pursuant to Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 12(b)(6) and 12(b)(7), to dismiss Plaintiffs' claims, alleging, among other things, that Plaintiffs' claims were collaterally estopped by the final 53-page arbitration award, dated June 8, 2001 ("Award"), issued following arbitration proceedings conducted on or about September 13, 2000 and November 30, 2000 in Liechtenstein ("Liechtenstein Arbitration") between and among Anturia, Neschis, Diamond, Weizmann, and all of the Jungs except Jerry Jung. The arbitration tribunal ("Tribunal") determined, inter alia, that by-laws adopted by the Anturia board of directors ("Anturia Board") on or about October 19, 1992 ("1992 By-laws") and on or about January 27, 1998 ("1998 By-laws") "are legally valid" because "at the time [Mrs. Gelman] signed her instructions" directing the adoption of those By-laws, she "possessed

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[1] "A stiftung is a creation of the laws of Liechtenstein . . . , resembling a trust, but not limited to specific lives in being. A stiftung can own property and is controlled by an administrator (known as a stiftungerat) whose powers and duties are comparable to a trustee." Kraus v. Comm'r, 59 T.C. 681, 685 (Tax Court, 1973).

Weizmann is a charitable organization located in Rehovot, Israel whose scientists and graduate student members perform research and development in the areas of disease and hunger, environmental protection, and economic growth. (Weizmann Compl. ¶ 6.)

[2] Weizmann and the Jungs are referred to collectively as "Plaintiffs."

testamentary capacity" and was not "unduly influenced by a third party." (Affidavit of Edward C. Crouter, dated Dec. 20, 2004 ("Crouter Aff."), Ex. 42: Award at 34-35; accord id. at 39; see id. at 17-18 ("all the circumstances . . . clearly indicate that [Mrs. Gelman's 1992 instructions to the Anturia Board] reflect her true wishes and intentions")). Defendants also moved to dismiss on the grounds that Plaintiffs were collaterally estopped by a probate decree, dated October 16, 2001 ("Probate Decree"), entered in Surrogate's Court, New York County ("Probate Proceedings"), which admitted to probate Mrs. Gelman will, dated April 23, 1993 ("1993 Will"), over the objections of Alice Jung and Jerry Jung. The Probate Decree had concluded that: (1) "the [1993] Will was duly executed;" (2) "the Testatrix, at the time of executing it, was in all respects competent to make a Will, and not under restraint;" and (3) "the Court [is] satisfied of the genuineness of the [1993] Will and the validity of its execution." (Probate Decree at 2.)

On October 3, 2002, the Court granted in part and denied in part Defendants' motion to dismiss on collateral estoppel grounds, holding, among other things, that (1) "[a]t this stage of the litigation (i.e, absent further discovery) it is inappropriate for the Court to make a determination of whether or not Plaintiffs had a full and fair opportunity to participate in the Liechtenstein Arbitration"; and (2) "the admission of the 1993 Will to probate precludes the Jungs from re-litigating the validity of the 1993 Will, including Mrs. Gelman's testamentary capacity to execute the will." Weizmann Institute of Science v. Neschis, 229 F. Supp. 2d 234, 248-49 (S.D.N.Y. 2002) ("Dismissal Order"). The Court also, among other things: (1) held that "[i]f Plaintiffs wish to pursue declaratory relief claims as presently plead, joinder of Anturia is warranted," and "[i]f joinder is not feasible, then Plaintiffs must show why the declaratory judgment claims should not be dismissed," id. at 251; (2) "reache[d] no conclusion as to compliance with the applicable limitations periods at this time" regarding Plaintiffs' claims of conversion and tortious interference with contract, id. at 252; (3) held that, applying New York law, "Plaintiffs have adequately plead a conversion claim premised upon their future interest in the Foundation's funds pursuant to the August 10, 1989 By-Laws and/or the August 13, 1991

By-Laws," id. at 253; (4) denied Defendants' motion to dismiss Plaintiffs' claim of tortious interference with contract because "the Court is not in a position, at this time, to resolve the issue of whether or not a [valid, enforceable] contract existed" between the Gelmans and Anturia under Liechtenstein law, id at 253-54; see id. at 253 n.26 ("the Court does not here determine whether the Anturia by-laws formed a 'valid enforceable contract' as alleged in the Complaints"); (5) dismissed Plaintiffs' claim of tortious interference with prospective inheritance because "'New York . . . has not recognized'" such a claim, id. at 254 (citation omitted); (6) dismissed Plaintiffs' RICO claims against Littman and Neschis because "Plaintiffs have failed to plead two predicate acts of racketeering activity by Littman" and "fail[ed] to plead that Neschis' alleged predicate acts constitute either a closed-ended or an open-ended pattern," id. at 254-57 ("[N]one of the . . . indicia of closed-ended continuity -- i.e., a large number and variety of predicate acts, a large number of either participants or victims, and the presence of separate schemes--is present in this case. The Complaints plead four predicate acts of mail fraud, committed by one participant (Neschis) against a limited number of victims (Weizmann and the Jungs) in furtherance of a single fraudulent scheme (to gain control of Mrs. Gelman's assets)."); (7) dismissed the Jungs' constructive trust claim because "the Jungs have failed to allege either a promise or a transfer of any property in reliance on a promise," id. at 257-58; and (8) denied the Jungs' claim for injunctive relief because "[t]here is absolutely no basis in law for an injunction to issue to remedy [their] alleged monetary damages," id. at 258-59.

On October 30, 2002, the Jungs filed an amended complaint ("Jung Compl.") seeking a declaratory judgment against all Defendants that the Jungs are entitled to 27% of Anturia's assets, and asserting claims for: (1) conversion against Neschis and Littman; (2) tortious interference with contractual relations against Neschis and Littman; (3) violations of the Racketeering Influenced and Corrupt Organization Act of 1970 ("RICO"), 18 U.S.C. § 1962(c) and (d), against Neschis and Littman; and (4) unjust enrichment against all Defendants; and (5) constructive trust

against all Defendants.[3] Jung sued each of the Defendants both individually and in their capacities as trustees of the "Jacques and Natasha Gelman Trust," dated November 18, 1997 ("Inter Vivos Trust"), and/or of the trust created under the Last Will and Testament of Natasha Gelman, dated April 23, 1993 ("Testamentary Trust").[4] (Jung Compl. ¶¶ 26, 28, 29.)

On October 30, 2002, Weizmann filed an amended complaint ("Weizmann Compl.," together with the Jung Complaint, the "Complaints"), asserting claims for: (1) conversion against Neschis and Littman; (2) tortious interference with contractual relations against Neschis and Littman; (3) RICO violations, 18 U.S.C. § 1962(c) and (d), against Neschis and Littman; and (4) constructive trust against all Defendants.[5] Weizmann sued: (1) Neschis both individually and in his capacities as trustee of the two trusts; (2) Littman both individually and in his capacity as trustee of the Testamentary Trust; and (3) Diamond "solely in her capacities as Trustee" of the two trusts. (Weizmann Compl. ¶¶ 7- 9 ("No allegations of unlawful conduct herein are directed against Diamond.").)

On December 20, 2004, Defendants jointly moved for summary judgment pursuant to Fed. R. Civ. P. 56(c), arguing that "[b]ecause the issues Plaintiffs seek to litigate here are identical to those actually litigated, decided, and necessary to the [Liechtenstein Arbitration] Award, and because the evidence demonstrates that Plaintiffs had a full and fair opportunity to

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[3] The Jung Complaint also included claims against Anturia and the members of Anturia's Board, Dr. Martin Escher ("Escher"), Dr. Conrad Schulthess, and Dr. Peter Sprenger. These claims were dismissed with prejudice on April 7, 2003. See Jung v. Neschis, 01 Civ. 6993, 2003 WL 1807202, at *3 (S.D.N.Y. Apr. 7, 2003) ("Plaintiffs have failed properly to serve the Defendants in Liechtenstein").

[4] Littman was (successor) trustee of the Testamentary Trust, not the Inter Vivos Trust.

[5] "[S]olely for purposes of preserving plaintiff's right to appeal," the Weizmann Complaint also replead two claims that the Court had dismissed in the Dismissal Order (i.e., Count VI, seeking a declaratory judgment against all Defendants that Weizmann is entitled to 20% of Anturia's assets, and Count VII, asserting a claim for tortious interference with expectancy of inheritance against Neschis and Littman). (Weizmann Compl. ¶¶ 169-79 & nn.1-2.)

litigate such issues in the Arbitration, collateral estoppel . . . warrants dismissal of the Amended Complaints with prejudice." (Defendants' Memorandum of Law, dated Dec. 20, 2004 ("Def. Mem."), at 1.) Defendants also moved, alternatively, under Fed. R. Civ. P. 12(b) to dismiss: (1) "the Jungs' claim for declaratory judgment . . . because Anturia is an 'indispensable' party under Fed. R. Civ. P. 19(b)" (Def. Mem. at 12-13); (2) Plaintiffs' conversion claims with respect to the 1992 By-laws because "Liechtenstein law does not recognize a claim for conversion" and "New York does not recognize a claim for conversion that is premised on a potential beneficiary's 'contingent interest'" (id. at 13-15); (3) Plaintiffs' claims for tortious interference with contractual relations because, among other things, "Liechtenstein law would not recognize a valid contract between the Gelmans and Anturia" (id. at 15-16); (4) the Jungs' claims for conversion and tortious interference because they are time-barred under New York's three-year limitations period (id. at 16-17); (5) Plaintiffs' RICO claims because, among other things, "Plaintiffs still allege a discrete, limited scheme by two participants (Neschis and Littman) against two victims (Weizmann and the Jungs) in furtherance of a single fraudulent goal (to gain control of Mrs. Gelman's assets)" (id. at 18-22); (6) the Jungs' unjust enrichment claim because it would "not be recognized under Liechtenstein law" and because the Jungs failed to prove under New York law that "they performed services for Defendants or that Defendants benefitted from such services" and that the Jungs and Defendants shared a "contractual or quasi-contractual relationship" (id. at 17-18); and (7) Plaintiffs' constructive trust claims because Liechtenstein law "would not recognize" such claims, and because under New York law "Plaintiffs do not allege the existence of a promise or a transfer made in reliance on that promise" and "Plaintiffs have not alleged facts demonstrating that a legal remedy . . . is inadequate here" (id. at 22-25).

Plaintiffs opposed summary judgment, arguing that "the Liechtenstein arbitration decision is not entitled to recognition in the United States for any purpose, including collateral estoppel" because: (1) Liechtenstein is not a signatory to the Convention on Recognition and Enforcement

of Foreign Arbitral Awards of June 10, 1958 ("Convention"), and (2) the Arbitration "failed to meet minimum standards of fundamental fairness." (Plaintiffs' Joint Memorandum in Opposition to Summary Judgment Or In The Alternative to Dismiss, dated Feb. 22, 2005 ("Pl. Mem."), at 1, 5.) Plaintiffs also opposed Defendants' motion to dismiss. (Pl. Mem. at 17-25.) Defendants filed a Reply Memorandum of Law, dated March 18, 2005 ("Def. Reply"), and the parties declined oral argument.

For the reasons set forth below, the Court grants in part and denies in part Defendants' motion for summary judgment, and grants in part and denies in part Defendants' motion in the alternative to dismiss.

II. Background

Jacques and Natasha Gelman, a married couple with no children, amassed a large fortune, principally as a result of Mr. Gelman's successful career as an entertainment agent and film producer. In 1985, the Gelmans contributed a substantial portion of their assets to Anturia, a Liechtenstein "stiftung" or foundation, which was governed by a Charter, dated May 9, 1985 ("Charter," Crouter Ex. 1).[6] (See Defendants' Rule 56.1 Statement ("Def. 56.1") ¶ 1; Jungs' Rule 56.1 Statement ("Jung 56.1") ¶ 1; Weizmann's Rule 56.1 Statement ("Weizmann 56.1") ¶ 1.) KPMG Fides ("Fides") administered Anturia, and Anturia's funds were invested with Credit Suisse Trust ("Credit Suisse"). (Def. 56.1 ¶¶ 2-3.) Based upon instructions from the Gelmans, the Anturia Board enacted by-laws from time to time, which provided for the distribution of Anturia's assets upon the death of the Gelmans.

The Charter contains a mandatory arbitration clause, stating, in relevant part as follows:

> Any disputes that may arise during the existence of the Foundation or upon its liquidation and that involve matters pertaining to the Foundation, the Board of Trustees, or the beneficiaries of the Foundation, shall be resolved **exclusively** by

[6] Anturia is alleged to have held more than $36 million in assets as of June 1998. (Weizmann Compl. ¶ 12.)

> an arbitral tribunal. The arbitral tribunal shall consist of two arbitrators and a third arbitrator [or referee]. **The arbitral tribunal's decision shall be final, any recourse to courts of law being thereby excluded.**
>
> The arbitration tribunal shall be appointed as follows: Each party shall select one arbitrator, and these arbitrators shall then appoint a third arbitrator.

(Charter Article 13 (emphasis added).) The By-laws contain a so-called "in terrorem" clause, as follows:

> No one of the beneficiaries has an enforceable claim against the Foundation. If a beneficiary judicially attacks the Foundation or any clauses of the Articles [Charter] or the By-Laws, said beneficiary immediately loses its or his or her interest as beneficiary of the Foundation in favour of the then remaining beneficiaries of the Foundation.

(Crouter Ex. 3: 1992 By-laws, ¶ 4.)

After Mr. Gelman's death on July 23, 1986, Mrs. Gelman instructed the Board to make several (sets of) changes to Anturia's by-laws. That is, pursuant to her instructions, the Board adopted by-laws, dated August 10, 1989 ("1989 By-laws"), which provided that, in the event of Mrs. Gelman's death, Anturia's assets would be divided as follows: (1) 20% to Weizmann; (2) 34% (collectively) to the Jungs; and (3) 46% (collectively) to other named charities and beneficiaries. (Crouter Ex. 3.) And, pursuant to Mrs. Gelman's instructions, the Board adopted by-laws, dated August 13, 1991 ("1991 By-laws"), which modified the asset distributions as follows: (1) 20% to Weizmann; (2) 37% (collectively) to the Jungs; (3) 1% to Littman; and (4) 42% (collectively) to other named charities and beneficiaries. (Crouter Ex. 3.) Of principal significance here, on or about October 19, 1992, new by-laws were adopted which changed the asset distributions (to the disadvantage of Plaintiffs) as follows: (1) reducing the Jungs' allocation from 37% to 5% of Anturia's assets, (2) increasing Littman's share from 1% to 31% of the assets, (3) adding Diamond as a 3% beneficiary, (4) replacing all charitable bequests (including bequests to Weizmann) with a (single) gift of 57% of Anturia's assets to the Testamentary Trust established under Mrs. Gelman's "New York Last Will and Testament dated

April 6, 1990, or any later Last Will and Testament . . . ," and (5) awarding a total of 4% to five other non-charitable beneficiaries. (Crouter Ex. 3; Def. 56.1 ¶¶ 7-8.)

Plaintiffs claim that the 1989 By-laws and/or the 1991 By-laws "were the last by-laws executed in accordance with Mrs. Gelman's instructions while Mrs. Gelman remained of sound mind and free of duress and undue influence," and that "some time in late 1991, Mrs. Gelman began to suffer from Alzheimer's disease." (Weizmann Compl. ¶ 20-21; Jung Compl. ¶ 55-56.)[7] Plaintiffs argue that, thereafter, and at a time when Mrs. Gelman was no longer of sound mind, her attorney (Neschis) and her art advisor (Littman) conspired to take advantage of Mrs. Gelman by "fraudulently obtaining" the 1992 By-laws (Crouter Ex. 3).[8]

In the Spring of 1992, Mrs. Gelman traveled to Zurich, accompanied by Neschis and Littman, to meet with representatives of Credit Suisse and/or Fides, the asset management company responsible for administering Anturia. (Crouter Ex. 2: Affidavit of Dr. Madeline-Claire Levis, dated April 12, 1999 ("Levis Aff."), ¶ 7.) According to Dr. Madeline-Claire Levis ("Levis"), a Fides employee who had assisted in creating Anturia and was "the person at Fides principally responsible for dealing with Anturia and the Gelmans" (Def. 56.1 ¶ 2), Mrs. Gelman "hardly spoke" at the Spring 1992 meeting with representatives of Credit Suisse and/or Fides, but "stared into space with a vacant look." Levis concluded that Mrs. Gelman "was no longer mentally competent." (Levis Aff. ¶ 8.) Later in 1992 (on June 5, 1992, see Affidavit of Jerry

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[7] The Jungs claim 27% of Anturia's assets (Jung Compl. at 62) rather than the 37% under the 1991 By-laws because Elizabeth Jung, who was allotted a 10% share in the 1991 By-laws, predeceased Mrs. Gelman, and the 1991 By-laws provide that "[s]hould one of the beneficiaries mentioned under this clause . . . predecease the first beneficiary [Mrs. Gelman,] his/her part shall go to the [charitable] beneficiaries . . . ." (1991 By-laws at 2.) Accordingly, if, as Plaintiffs assert, the 1991 By-laws governed the distribution of Anturia's assets, Elizabeth Jung's 10% share would devolve to Anturia's charitable beneficiaries.

[8] Mrs. Gelman was represented by Diamond, a partner in the law firm of Leavy, Rosensweig & Hyman, until 1990, when Diamond left the firm to become a Civil Court judge of the City of New York, at which time Neschis (also a partner at the firm) became Mrs. Gelman's attorney. (Def. 56.1 ¶¶ 9-10.)

Jung, dated Feb. 17, 2005 ("Jerry Jung Aff."), Ex. G), Neschis presented Levis with "typed instructions, which [Neschis] said had been signed by Mrs. Gelman, to change the beneficiary provisions of the Anturia Foundation bylaws" to eliminate Weizmann as a beneficiary and reduce the Jungs' share. (Id. ¶ 10.) Levis asserts that after she informed Neschis and Escher (one of Anturia's Board members) that she "could not accept the written instructions without some explanation as to why the changes were being requested," Neschis "grew very angry" and "threatened to withdraw the Anturia Foundation's funds from Credit Suisse Bank if the changes were not made immediately." (Id. ¶ 12.) Levis also received supplemental written instructions, dated September 29, 1992, and signed by Mrs. Gelman, directing that the By-laws be modified. (Award at 15.) Based upon Mrs. Gelman's written instructions, dated June 5, 1992 and September 29, 1992, the Board adopted, on or about October 19, 1992, the 1992 By-laws.

Mrs. Gelman's non-Anturia assets were bequeathed by her 1993 Will which was probated in Surrogate's Court in New York. Prior to executing the 1993 Will, Mrs. Gelman had executed five earlier wills between February 8, 1988 and April 6, 1990. (Crouter Ex. 5.) The earlier wills, executed at a time (even according to Plaintiffs) that Mrs. Gelman was competent and not subject to duress or undue influence, appear to acknowledge Defendants' involvement in Mrs. Gelman's