

This decision generously provided by



Social Law Library members can access a
comprehensive database of
keyword searchable
Business Litigation Session decisions,
at

<http://www.socialaw.com>

Not a member and need access to the BLS databases?

[Join Social Law Today!](#)

Docket: 17-00859-BLS1

Date: December 14, 2017

Parties: FAYE S. GINSBERG[1] & another[2] vs. BRUCE C. GINSBERG & others[3]

Judge: /s/Edward P. Leibensperger Justice of the Superior Court

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS

This case presents a dispute between a sister and brother. The sister disputes (1) the basis of testamentary decisions made by their mother, and (2) the brother's stewardship as a trustee of trusts established by their parents. The threshold issue is whether the sister's act in commencing this litigation is a violation of the "no contest" provision in the relevant trust such that this action

[1] Individually and as legal guardian of her adult son Andrew Blacker.

[2] Taylor Blacker.

[3] International Ice Cream Corporation; New England Ice Cream Corporation; Bliss Restaurant Corporation; Bliss Microcreamery Corporation; Ginsberg Taunton Properties LLC; Ginsberg Norton Properties LLC; The 1010 Broadway LLC; 118 Pleasant Street LLC; LSW Properties LLC; Blodgett Avenue LLC; Bruce C. Ginsberg, as co-trustee of the Manuel and Shirley Ginsberg Irrevocable Trust u/d/t dated December 14, 1991, the Manuel and Shirley Ginsberg Pleasant Street Annuity Trust u/d/t dated February 1, 1992, the Ginsberg Family Trust u/d/t January 1, 2005, the Manuel Ginsberg Revocable Trust, as amended and restated in July 2004, and as trustee of the Ginsberg Grandchildren's u/t/d December 31, 1992, and the Shirley Ginsberg Revocable Trust, as amended and restated July 8, 2015; J. Robert Casey, as co-trustee of the Manuel and Shirley Ginsberg Irrevocable Trust u/d/t dated December 14, 1991 and the Manuel Ginsberg Revocable Trust, as amended and restated in July 2004; Maxwell Ginsberg; Benjamin Ginsberg; and minors Samuel Ginsberg, Zachary Ginsberg.

-1-

should be dismissed. The brother, and other defendants affiliated with him, contend that by this action the sister has forfeited her beneficial interests in the trusts. Thus, defendants move to dismiss for lack of standing.

Plaintiff, Faye S. Ginsberg (Faye)[1], is the sister of defendant, Bruce C. Ginsberg (Bruce). They are the adult children of Manny and Shirley Ginsberg, both of whom are deceased. Faye brings this action on behalf of herself; and as legal guardian of her adult, handicapped son, Andrew Blacker. Faye is joined as a plaintiff by Taylor Blacker, Faye's adult daughter. In this memorandum, plaintiffs' claims will be referred to, collectively, as Faye's claims.

The Third Amended Complaint (Complaint) names Bruce as a defendant, in his individual capacity as well as in his capacity as trustee of certain trusts. A co-trustee, J. Robert Casey, is also sued. Bruce's children, Maxwell, Benjamin, Samuel and Zachary, are also named as defendants. In this memorandum, these defendants will be referred to, collectively, as Bruce, unless the circumstances require more specificity. Finally, the list of defendants includes ten corporations allegedly controlled by Bruce.

BACKGROUND

The following facts are taken from the Complaint or from documents referenced and relied upon in the complaint.[2]

Manny was a successful entrepreneur who created an ice cream distribution company

[1]To avoid confusion, the Ginsberg parties will be referred to by their first names.

[2]Upon a motion to dismiss, the court is entitled to consider materials not appended to the complaint, but referenced or relied upon in the complaint. See *Harhen v. Brown*, [431 Mass. 838](#), 839-840 (2000), citing *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1220 (1st Cir. 1996); *Marram v. Kobrick Offshore Fund, Ltd.*, [442 Mass. 43](#), 45 n.4 (2004).

-2-

which became a multi-million dollar business. Throughout his life, Manny also acquired various real estate holdings in Massachusetts, along with his wife, Shirley. Shirley was an active partner with Manny in his businesses. Manny died in April 2008. Shirley died on September 27, 2015.

Prior to Manny's death, the Ginsbergs established four irrevocable trusts for the benefit of their children and grandchildren. These trusts included the Manuel and Shirley Ginsberg 1991 Irrevocable Trust (the 1991 Trust), the 1992 Grandchildren's Trust (the 1992 Grandchildren's Trust), the Manuel and Shirley Pleasant Street Annuity Trust, dated February 1992 (the 1992 Annuity Trust), and the Ginsberg Family Trust dated January 1, 2005 (the 2005 Ginsberg Family Trust). Faye and her children are beneficiaries under those trusts. Bruce is a trustee of all of these trusts. Faye was a co-trustee of the 1991 Trust, the 1992 Annuity Trust, and the 2005 Ginsberg Trust, at least initially. By their wills and the revocable trusts, Manny and Shirley allegedly intended that their children would receive equal interests in their assets upon the death of the second to die of Manny and Shirley. Complaint ¶ 41. Upon Manny's death, the "bulk of the Ginsberg family wealth was held by Shirley and the trusts established by Shirley and Manny." Complaint ¶ 43.

"After Manny died, Shirley increasingly relied on Bruce's financial experience, and counted on his trustworthiness, to advise her on financial matters affecting her and her family." Complaint ¶ 44. The Complaint alleges that Bruce caused the trusts to make disproportionate distributions to himself and his family. The Complaint also alleges that Bruce exerted undue influence over Shirley as she declined physically and mentally. Complaint ¶ 51. In that regard, Bruce persuaded Shirley to make an inter vivos gift to him of a 50 % interest in Ginsberg Taunton Properties LLC (GTP), the owner of real estate in Taunton.

-3-

Despite requests, Bruce has allegedly refused to provide an accounting for any of the trusts. He allegedly concealed trust transactions from Faye and took steps to remove Faye as co-trustee. Complaint ¶55. Faye was removed as a co-trustee of the family trusts in 2012 and 2014. Complaint ¶56. In 2014 and 2015, Bruce allegedly used trust assets to further his private business interests.

Three months before Shirley died, Bruce allegedly persuaded Shirley to execute new estate planning documents. Shirley executed a will and the Seventh Amendment and Complete Restatement of the Shirley Ginsberg Revocable Trust (the 2015 Shirley Trust) on July 8, 2015. Faye alleges that Bruce persuaded Shirley that she should leave to Bruce and his children real estate assets that Shirley had long promised to Faye. These assets include the family home at 42 Shepard Avenue, Swampscott, and a property called "the Post Office" in Truro. Complaint ¶74. According to Faye, Bruce intentionally misled his mother into making these changes in her plan for disposition of assets. At the same time, Bruce allegedly caused Shirley to change the death beneficiary on her retirement account, as well as other bank accounts, from Faye to Bruce or Bruce's children.

When Shirley died on September 27, 2015, Faye was unaware of Shirley's gifts to Bruce and the new July 2015 estate planning documents. Complaint ¶83. At some date after Shirley's death, Faye learned of the July 2015 estate plan. In October 2015, Faye, through counsel, requested that Bruce and the co-trustee, Casey, provide information relating to Bruce's prior administration of the trusts and Shirley's July 2015 estate plan. The 2015 estate plan documents were produced to Faye on a date not specified in the Complaint, along with a copy of a letter from Shirley, dated July 8, 2015, explaining her testamentary intent. On February 4, 2016, Faye

-4-

received the Petition for Formal Adjudication of the Will of Shirley Ginsberg, and the approval of Bruce as Shirley's personal representative. Faye did not file an objection to the probate proceedings or contest the will. Faye's counsel continued to press for more information regarding the administration of the trusts and the facts surrounding the July 2015 estate plan. According to the Complaint, Bruce refused to provide the information requested. Complaint ¶ 90. Faye pleads, however, that on May 10, 2016, her counsel received "a limited amount of information regarding the wills and trusts established by Shirley and Manny, which information was both incomplete and unclear." Complaint ¶91.

The Complaint asserts a plethora of claims, sometimes tied to a particular trust and sometimes not. The Complaint is not a model of clarity. It is divided into thirteen (13) counts:

Count I Claim for breach of fiduciary duty v. Bruce as trustee of the "Ginsberg Trusts."

Count II Claim for breach of fiduciary duty v. Bruce as trustee for failure to keep accurate records and to inform beneficiaries.

Count III Claim for breach of fiduciary duty v. Bruce for failure to act impartially among beneficiaries.

Count IV Claim that Bruce failed to account to Faye for the sale in 2007 of a property owned by Ginsberg Asset Management, in which she had a 50% interest.

Count V Claim to remove Bruce and Casey as trustees of apparently, all trusts.

Count VI Request to appoint a "special trustee over the Ginsberg Trusts."

Count VII Claim for unjust enrichment against Bruce for using trust assets to fund his business.

Count VIII Claim for Intentional Interference With Expectancy Interest against Bruce for

-5-

exerting undue influence over Shirley to transfer assets to him during her life and to execute the new July 2015 estate plan.

Count IX Claim of undue influence and fraud by Bruce towards Shirley to cause her to make gifts and to execute the new July 2015 estate plan.

Count X Claim of fraudulent representations by Bruce to Faye.

Count XI Declaratory Judgment, a request to declare the beneficiaries of an insurance policy held by the 1992 Grandchildren's Trust.

Count XII Request for reformation of the Shirley Ginsberg 2015 Revocable Trust.

Count XIII Request to reform the death beneficiary designations executed by Shirley.

Bruce moves to dismiss counts VIII, IX and X for failure to state a cognizable claim. He argues that the "no contest" provisions in the will and trust executed by Shirley in July 2015 are triggered by this action. As a result, Faye forfeits her interests as a beneficiary of the 2015 Shirley Trust, and loses her standing to assert claims against Bruce. Bruce also argues that to the extent Faye challenges the 2015 will and the terms of Shirley's Trust, it is too late.

For the same reasons, Bruce and Casey, in their capacities as trustees, also move to dismiss Count XII, the request for reformation of the 2015 Shirley Trust. They also move to dismiss all claims against them in other Counts to the extent the claims are made by Faye and her children as beneficiaries of the 2015 Shirley Trust or the Manuel and Shirley Ginsberg Irrevocable Trust.

Lastly, ten (10) corporations named by Faye in the complaint move to dismiss for failure to state a claim.

-6-

DISCUSSION

A motion to dismiss for failure to state a claim upon which relief may be granted under Mass. R. Civ. P. 12(b)(6) permits "prompt resolution of a case where the allegations in the complaint clearly demonstrate that the plaintiff's claim is legally insufficient." *Harvard Crimson, Inc. v. President & Fellows of Harvard Coll.*, [445 Mass. 745](#), 748 (2006). To survive a motion to dismiss, a complaint must set forth the basis for the plaintiff's entitlement to relief with "more than labels and conclusions." *Iannacchino v. Ford Motor Co.*, [451 Mass. 623](#), 636, quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). At the pleading stage, Mass. R. Civ. P. 12(b)(6) requires that the complaint set forth "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief. . . ." *Id.*, quoting *Bell Atl. Corp.*, 550 U.S. at 557. The court must, however, accept as true the allegations of the complaint and draw every reasonable inference in favor of the plaintiff *Curtis v. Herb Chambers 1-95, Inc.*, [458 Mass. 674](#), 676 (2011). With respect to a statute of limitations defense at the Rule 12(b)(6) stage, the facts in the complaint must "clearly reveal that the action was commenced beyond the time constraints of the

statute of limitations." Epstein v. Seigel, [396 Mass. 278](#), 279 (1985).

The court takes into consideration the allegations in the complaint "although matters of public record, orders, items appearing in the record of the case and exhibits attached to the complaint, also may be taken into account." Schaer v. Brandeis University, [432 Mass. 474](#), 477 (2000). In this action, defendants attach to their motions to dismiss copies of the will, trusts and other documents specifically referenced in the Complaint, but not attached to it. Plaintiffs do not object to the authenticity of the documents submitted by defendants. Therefore, I accept the documents as part of the record for deciding this motion.

-7-

I. The "No Contest" Clause

Whether cast as a claim of intentional interference with an expectancy (Count VIII), undue influence (Count IX), fraud (Count X) or mistake (Count XII), Faye is challenging the donative intent of Shirley as reflected in the 2015 Shirley Trust and in Shirley's gifts to Bruce prior to her death. Faye alleges that Shirley's donative intent was manipulated by Bruce by exerting undue influence and fraud upon Shirley.

The 2015 Shirley Trust contains an in terrorem or "no contest" clause. Article 1.5 of the Trust states as follows:

If any beneficiary under this instrument or any descendant of mine, shall in any way directly or indirectly (i) contest or object to the probate of my will, or dispute any clause or provision hereof or of any other trust created by me and/or my late husband, Manuel Ginsberg, or exercise or attempt to exercise any right to take part or share of my estate, this trust, or any other trust against the provisions of my will, this trust, or any other trust, or be in any way directly or indirectly interested or instrumental in the institution or prosecution of any action, proceeding, contest or objection, or give any notice, for the purpose of setting aside, contesting or invalidating my will, this trust, or any other trust, or any clause or provision of my will, this trust, or any other trust; (ii) claim entitlement by way of written or oral contract to any portion of my estate, whether in probate or under the instrument creating such trust; (iii) unsuccessfully challenge the appointment (or unsuccessfully seek the removal) of any person as Personal Representative or successor Personal Representative of my will or as Trustee or successor Trustee this trust or any other trust; (iv) object in any manner to any action taken or proposed to be taken in good faith by my Personal Representative or the Trustees of any such Trust, whether acting under court order or otherwise; (v) file any creditor's claim (without regard to the validity of any such claim) in the proceedings relating to the settlement of my estate or against the Trustees of any such trust, irrespective of when such claim arose; (vi) attack or seek to invalidate any gift made by me during my lifetime; or (vii) unsuccessfully bring any action against my son, Bruce, for any reason; then and in each such case all provisions for such beneficiary or for his or her ancestors or descendants contained or incorporated by reference in this instrument shall be wholly void and ineffectual, and my estate and this trust shall be disposed of as though such beneficiary had predeceased me leaving no ancestors or descendants who survive me. However, there is expressly excluded from the operation of the foregoing provision any claim for

-8-

reimbursement by Bruce, individually or as trustee of any trust created by me and/or my late husband, for sums advanced by him on my behalf or on behalf of my estate, whether or not advanced under a power of attorney for me.

Bruce contends that this no contest clause is triggered by Faye by commencing this lawsuit. He seeks a draconian result; namely, that Faye and her children forfeit their interests as beneficiaries of the 2015 Shirley Trust. Moreover, he seeks that result upon a motion to dismiss, thereby depriving Faye of the opportunity to prove the alleged fraud and undue influence.

The Massachusetts version of the Uniform Probate Code (UPC) specifically recognizes the enforceability of no contest clauses in a will. G.L. c. 190B, § 2-517 ("A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is enforceable."). This recognition is in contrast to the UPC as adopted in many other jurisdictions. The UPC follows the majority American rule that clauses imposing a forfeiture or other penalty on a person challenging a will are invalid if probable cause existed for the contest. The Massachusetts version, however, retains pre-UPC law providing that in terrorem clauses are enforceable. Kent D. Schenkela, *Planning and Drafting Basics Under the New Massachusetts Uniform Probate Code*, 16 *Roger Williams U. L. Rev.* 536, 563 (2011).

Thus, "[a] provision forfeiting the interest of a beneficiary who contests a will is valid." *Savage v. Oliszczyk*, [77 Mass. App. Ct. 145](#), 147 (2010), quoting *Old Colony Trust Co. v. Wolfman*, [311 Mass. 614](#), 616 (1942). That said, 'because equity does not favor forfeitures, [in terrorem] clauses have been construed narrowly.'" *Id.* at 149, quoting *Bogert, Trusts and Trustees*, § 181 (rev. 2d ed. 2007).

-9-

In this case, however, Faye did not, and does not, challenge Shirley's will[3] Shirley's will simply poured over all of her property, other than tangible personal property, to be administered and distributed in accordance with the terms of the 2015 Shirley Trust. Faye's claims challenge the donative intent of Shirley as described in the 2015 Trust, which has the in terrorem clause quoted above. The first issue is whether the recognition by Massachusetts of in terrorem clauses extends to such clauses in a trust, rather than a will.

In the Restatement (Third) of Property (Wills & Donative Trans.) § 8.5 (2003), the commentary describes the purposes of enforcing a no contest clause. "The starting point for analyzing the validity of no-contest clauses is the policy in favor of the freedom of disposition." *Id.*, Comment b. The Restatement §8.5 states that "[a] provision in a donative document purporting to rescind a donative transfer to . . . any person who institutes a proceeding challenging the validity of all or part of the donative document is enforceable" (Emphasis added).[4] In comment i, the Restatement makes clear that the section applies to all donative documents, not only wills, including, specifically, inter vivos trusts. Citing the Restatement, a panel of the Appeals Court in *Hanselman v. Frank*, [77 Mass. App. Ct. 1104](#), 2010 WL 2507827, *1-*2 (2010), held that a forfeiture provision of a trust is also enforceable." Thus, I conclude that the no contest clause in the 2015 Shirley Trust is enforceable.

What is the effect of concluding that the no contest clause is enforceable? The answer is

[3] Shirley's 2015 will does, in fact, have a no contest provision similar to that in the Shirley 2015 Trust.

[4]The Restatement section, however, follows the UPC qualification for not enforcing a no contest provision where "probable cause existed for instituting the proceeding." Massachusetts has rejected that qualification.

-10-

provided by the seminal case in Massachusetts upholding the validity of a no contest clause: *Rudd v. Searles*, [262 Mass. 490](#) (1928). "Such a clause does not prevent a contest by the beneficiary under the will. . . . If the contest is successful, that clause falls with the rest of the will." *Id.* at 500. In other words, it is an all or nothing venture by the challenging party. If Faye proves the trust instrument was procured by fraud, the entire instrument falls, including the no contest provision. If Faye fails to prove the fraud, she is subject to the no contest clause and she loses all of the interests of her and her children as beneficiaries under the trust. But she is entitled to take the risk and pursue the claim. The validity of Faye's claim cannot be determined on a motion to dismiss. Moreover, to the extent Bruce invokes the no contest clause to defend against a failure to provide accountings of his conduct as trustee, the no contest clause is unenforceable as against public policy. *Briggs v. Crowley*, [352 Mass. 194](#), 200 (1967). In short, defendants are not entitled to dismissal based on the no contest clause in the 2015 Shirley Trust.

II. Statute of Limitations

Bruce and Casey also seek dismissal of Faye's claims against them, individually and as trustees of the 2015 Shirley Trust, because the claims are, allegedly, untimely. As described above, when a motion to dismiss is based on the defense of untimeliness under a statute of limitations, the facts in the Complaint must "clearly reveal that the action was commenced beyond the time constraints of the statute of limitations." *Epstein v. Seigel*, [396 Mass. 278](#), 279 (1985).

Bruce relies upon the limitation period imposed by G.L. c. 203E, § 604 on actions "contesting validity of revocable trust; distribution of property." That statute requires that a person challenging the trust commence a judicial proceeding "within the earlier of (1) 1 year after

-11-

the settlor's death; or (2) 60 days after the trustee sent the person a copy of the trust instrument and notice informing the person of the trust's existence, the trustee's name and address and the time allowed for commencement of the proceeding." In his motion to dismiss, Bruce relies on subsection (1), arguing that Faye's lawsuit was commenced more than a year after Shirley's death. Apparently, Bruce did not provide the notice to Faye that would allow the application of the shorter, 60 days, limitation period. The Complaint reveals that Shirley died on September 27, 2015, and this action was not commenced until March 20, 2017, more than one year after Shirley's death.

Faye relies upon G.L. c. 260, § 12 to save her from the one year statute of limitations. That statute provides that "[i]f a person liable to a personal action fraudulently conceals the cause of such action from the

knowledge of the person entitled to bring it, the period prior to the discovery of his cause of action by the person so entitled shall be excluded in determining the time limited for the commencement of the action." Faye points out that where the alleged wrongdoer is a fiduciary, as was Bruce, as trustee to her, the tolling under c. 260, § 12 extends to when she had "actual knowledge" of the facts with full disclosure. In the Complaint, Faye pleads that at the time of Shirley's death Faye was unaware of the 2015 changes to Shirley's estate plan and Shirley's gifts to Bruce during her life. Starting in October 2015, Shirley requested information from Bruce and Casey relating to the estate plan. At a date not specified in the Complaint, Faye states that she received a copy of the 2015 amendments to Shirley's estate plan, and that her lawyers continued to press for more information regarding the estate plan and lifetime transfers. Faye also alleges that during this period Bruce took affirmative steps to mislead her with respect to what she would receive upon Shirley's death. Then, on May 10, 2016,

-12-

Faye pleads that she "received a binder containing a limited amount of information regarding the wills and trusts established by Shirley and Manny, which information was both incomplete and unclear." Complaint ¶ 91. Faye argues that, at minimum, the statute of limitations should be tolled until May 10, 2016, and possibly longer. She commenced this action within one year of May 10, 2016.

In his Reply brief, Bruce appears to concede that G.L. c. 260, § 12 could operate to toll the one year statute of limitations in G.L. c. 203E, § 604. Bruce then attempts to add a fact that is not in the Complaint. He submits an affidavit from his lawyer^[5] attaching a "true copy" of a letter from Bruce's lawyer at Goulston & Storrs to Faye's lawyer at Todd & Weld, dated November 13, 2015. The letter is an index of documents that were enclosed in the transmittal. Among the documents listed are the will and Seventh Amendment and Complete Restatement of the Shirley Ginsberg Revocable Trust, dated July 8, 2015. Bruce argues that because the affidavit shows that Faye received a copy of the estate planning documents on November 13, 2015, the one year statute of limitations began to run. Thus, Bruce says that the limitations period expired on November 13, 2016, four months before this action was commenced.

As a threshold matter, the affidavit from Bruce's counsel may not be considered on a motion to dismiss. Bruce did not move to have this motion treated as one for summary judgment, pursuant to Mass. R. Civ. P. 12 (b), nor did Faye have a full opportunity to respond to the letter because the affidavit was submitted with the Reply brief. Moreover, the question of when a plaintiff has sufficient information to conclude that she had "actual knowledge" of her cause of action is a fact-bound one. Dismissal at this stage is inappropriate. Bruce's motion (Paper No. 31)

[5] Second Affidavit of Joseph D. Kropp

-13-

will be denied.

III. Other Motions

The motion for partial dismissal by Bruce and Casey (Paper No. 35) raises the same argument as Bruce's motion regarding the no contest provision. The trustees argue that Faye forfeited her inheritance under the

2015 Shirley Trust by commencing this action and, as a result, she has no standing to pursue her claims. As described above, it is premature to dismiss on that basis. In addition, the trustees argue that to the extent that Faye's claims against them are based on the duties arising under the Manuel Revocable Trust, such claims should be dismissed because Shirley, by her will, directed the assets of the Manuel Revocable Trust to the 2015 Shirley Trust. I find that this parsing of the Complaint, on a motion to dismiss is unwarranted and premature. The motion to dismiss by Bruce and Casey will be denied.

Finally, the ten corporations named in the Complaint move to dismiss (Paper No. 34). The corporations note that there are no claims in the Complaint directly against them. Faye concedes that the corporations are named as "necessary parties so that complete relief may be awarded by the court." Plaintiffs' Opposition to Defendants' Motion to Dismiss, p. 18.

I find, with one exception, that the Complaint is grossly vague and conclusory as to how Faye is entitled to relief that might affect the rights of the corporations or would require the corporations to be parties so that relief can be afforded to Faye. See Mass. R. Civ. P. 19 (a). Faye's claims are directed to actions by Bruce, either individually or as trustee, not to actions by the corporations. She claims that Bruce used trust assets to benefit his personal business or himself. There is a lack of specificity, however, with respect to what the relationship is between an identified trust, wherein Bruce is a trustee and Faye is a beneficiary, and each defendant

-14-

corporation. Because the Complaint fails to specify, with respect to each defendant corporation, exactly why the corporation is a necessary party, the basis for Faye's standing to assert the claim, and the theory of relief affecting the corporation, the Complaint must be dismissed as to most of the corporations. This dismissal is without prejudice to Faye filing an amended complaint providing the required detail for each corporation, separately, as to how it is alleged to be a necessary party.

The exception to this conclusion is the following. The Complaint does detail a transaction where trust property (an LLC called 1010 Broadway) sold the real estate owned by the LLC that had been productively rented to a Walgreen's. The LLC then used the proceeds to obtain ownership of another parcel of real estate. Faye alleges that the acquired real estate was then leased to Bruce's company (New England Ice Cream Corporation) at a below market rent. Faye alleges that Bruce, as trustee of the family trusts that own 1010 Broadway LLC, wrongfully approved and executed these alleged self-serving transactions. Faye seeks to void the below market lease from 1010 Broadway LLC to Bruce's company. I find that the Complaint adequately pleads a basis for holding 1020 Broadway LLC and New England Ice Cream Corporation as necessary parties. The motion to dismiss by these two corporations will be denied.

-15-

ORDER

For the reasons stated above, the motions to dismiss by Bruce, his children, and Casey, Papers Nos. 31 and 35, are DENIED. The motion to dismiss by defendant corporations (Paper No. 34) is DENIED, in part, and ALLOWED, in part. The motion is denied with respect to 1020 Broadway LLC and New England Ice Cream Corporation. The motion is allowed with respect to the other eight defendant corporations, without prejudice to re-pleading in an

amended complaint, as described above.

By the Court,

/s/Edward P. Leibensperger Justice of the Superior Court

-16-