

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D32457  
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Argued - September 19, 2011

REINALDO E. RIVERA, J.P.  
RUTH C. BALKIN  
L. PRISCILLA HALL  
JEFFREY A. COHEN, JJ.

2010-02662

DECISION & ORDER

Ari Yemini (also known as ArieH Yemini), individually, plaintiff/counterclaim defendant-appellant-respondent, Ari Yemini (also known as ArieH Yemini), in his capacity as a member of Peninsula Holdings, LLC, et al., plaintiffs-appellants-respondents, v Oded Goldberg, et al., defendants/counterclaim plaintiffs-respondents-appellants, et al., defendant; ANO, Inc., et al., additional counterclaim defendants-respondents (and a third party action).

(Index No. 12402/05)

Steven Cohn, Esq., P.C., Carle Place, N.Y. (Susan E. Dantzig of counsel), for plaintiff/counterclaim defendant-appellant-respondent and plaintiffs-appellants-respondents.

Ruskin Moscou Faltischek, P.C., Uniondale, N.Y. (Douglas J. Good and Adam L. Brower of counsel), for defendants/counterclaim plaintiffs-respondents-appellants.

In an action, inter alia, to recover damages for breach of contract, the plaintiff/counterclaim defendant and the plaintiffs appeal, as limited by their brief, from so much an order of the Supreme Court, Nassau County (Bucaria, J.), entered February 24, 2010, as, upon granting their cross motion for leave to reargue their opposition to the motion of the defendants Oded Goldberg and Goldberg Commodities, Inc., for summary judgment on the first, second, and third counterclaims asserted by those defendants, which had been determined in an order dated November 17, 2009, adhered to the prior determination in the order dated November 17, 2009, granting those branches of the motion of the defendants Oded Goldberg and Goldberg Commodities, Inc., which were for summary judgment on the first, second, and third counterclaims asserted by those

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defendants, and the defendants Oded Goldberg and Goldberg Commodities, Inc., cross-appeal, as limited by their brief, from so much of the order entered February 24, 2010, as denied that branch of their separate motion which was to invalidate all elections conducted and actions taken by the officers and directors of the additional counterclaim defendants ANO, Inc., and Candlewood Holdings, LLC, since August 5, 2005.

ORDERED that the appeal by the plaintiffs from so much of the order entered February 24, 2010, as, upon reargument, adhered to the prior determination in the order dated November 17, 2009, granting those branches of the motion of the defendants Oded Goldberg and Goldberg Commodities, Inc., which were for summary judgment on the first, second, and third counterclaims asserted by those defendants, is dismissed, without costs and disbursements, as the plaintiffs are not aggrieved by that portion of the order; and it is further,

ORDERED that the order entered February 24, 2010, is affirmed insofar as appealed from by the plaintiff/counterclaim defendant and insofar as cross-appealed from, without costs or disbursements.

The plaintiff/counterclaim defendant, Ari Yemini (also known as Arieh Yemini), individually (hereinafter Yemini), and the plaintiffs Peninsula Holdings, LLC, and Ari Yemini (also known as Arieh Yemini), in his capacity as a member of Peninsula Holdings, LLC (hereinafter together the LLC plaintiffs), commenced this action alleging, inter alia, that the defendants Oded Goldberg and Goldberg Commodities, Inc. (hereinafter together the defendants), failed to make certain required capital contributions to the plaintiff Peninsula Holdings, LLC. In their second amended answer, the defendants counterclaimed against Yemini and joined ANO, Inc. (hereinafter ANO), among others, as an additional counterclaim defendant. ANO was formed in 1999 for the purpose of purchasing an interest in the additional counterclaim defendant Candlewood Holdings, LLC (hereinafter Candlewood). This appeal concerns the defendants' contention, which is the subject of their first three counterclaims, that they own 50% of ANO, and, through ANO, one third of Candlewood. At the time of the formation of ANO, Yemini and the defendant Oded Goldberg (hereinafter Goldberg), entered into a nominee agreement in which Goldberg, as the principal, appointed Yemini as his nominee with respect to his 50% ownership interest in ANO. At some point after entering into the nominee agreement, Goldberg assigned his interest in ANO to Goldberg Commodities, Inc. (hereinafter GCI). This Court previously held that the defendants established their entitlement to a preliminary injunction preventing Yemini from taking any unilateral action concerning ANO without the defendants' consent (*see Yemini v Goldberg*, 60 AD3d 935).

In an order dated November 17, 2009, the Supreme Court granted those branches of the defendants' motion which were for summary judgment on their first three counterclaims, and severed and continued the fourth through twelfth counterclaims. Subsequently, the defendants moved to compel Yemini and the LLC plaintiffs, inter alia, to comply with its order dated November 17, 2009. Yemini, along with the LLC plaintiffs, cross-moved for leave to reargue Yemini's opposition to those branches of the defendants' initial motion which were for summary judgment on the first, second, and third counterclaims. Upon granting reargument, the Supreme Court correctly adhered to its original determination, in which it concluded that the defendants established their prima facie entitlement to judgment as a matter of law on the first three counterclaims, based on their showing

that GCI owns 50% of ANO (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). In opposition, Yemini failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324). Moreover, Yemini failed to establish that the defendants' motion should have been denied pending discovery (*see CPLR 3212[f]; Lambert v Bracco*, 18 AD3d 619, 620).

However, with respect to their contention that Yemini and the LLC plaintiffs failed to comply with certain court orders, including the order of the Supreme Court dated November 17, 2009, the defendants identify no particular acts undertaken by ANO or Candlewood that were beyond the powers granted to those entities in their respective corporate charters. Accordingly, in its order entered February 24, 2010, the Supreme Court correctly denied that branch of the defendants' motion which was to invalidate all corporate elections conducted by, and all actions taken by, ANO and Candlewood since August 5, 2005 (*see Business Corporation Law § 203; Lorisa Capital Corp. v Gallo*, 119 AD2d 99, 113; *Jemison v Citizens' Sav. Bank of Jefferson, Tex.*, 122 NY 135, 140-141).

RIVERA, J.P., BALKIN, HALL and COHEN, JJ., concur.

ENTER:

  
Matthew G. Kiernan  
Clerk of the Court