

Varkonyi v TS Multi-Strategy Fund, LP

2011 NY Slip Op 32629(U)

September 30, 2011

Sup Ct, Nassau County

Docket Number: 3817-11

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**ROBERT VARKONYI; OLGA VARKONYI;
THE KREMER FAMILY FOUNDATION;
CHARLES RUFUS FRANKLIN KREMER;
RICHARD LEVY; BARBARA LEVY;
ANDREW LOFT; THOMAS A. MASBRUCH AND
KAREN S. MASBRUCH AS TRUSTEES OF THE
T.A. AND K.S. MASBRUCH TRUST;
JAMES P. SMITH, JR., AS TRUSTEE OF THE
JAMES P. SMITH JR., LIVING TRUST;
ELENDOW FUND LLC; OSCAR D. WILLIAMS
AS TRUSTEE OF THE OSCAR D. WILLIAMS
SEPARATE PROPERTY TRUST;**

**TRIAL/IAS PART: 20
NASSAU COUNTY**

**Index No: 3817-11
Motion Seq. No. 3
Submission Date: 8/25/11**

Plaintiffs,

-against-

**TS MULTI-STRATEGY FUND, LP,
THINKSTRATEGY CAPITAL MANAGEMENT LLC,
CHETAN KAPUR, JOHN CORREIA,
KBC FINANCIAL PRODUCTS USA, INC.,
O'CONNOR DAVIES MUNNS & DOBBINS, LLP,
K&L GATES, LLP f/k/a KIRKPATRICK &
LOCKHART PRESTON GATES ELLIS LLP,
PRICewaterhouseCOOPERS (BVI) LIMITED,
NICHOLAS CARTER, PWC CORPORATE FINANCE
& RECOVERY (CAYMAN) LIMITED,
DAVID A.K. WALKER,
PRICewaterhouseCOOPERS, LLP,
PRICewaterhouseCOOPERS INTERNATIONAL
LTD.,**

Defendants.

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The following papers having been read on this motion:

Notice of Motion, Affirmation in Support and Exhibits.....X
Memorandum of Law in Support.....X
Affirmation in Opposition and Exhibits.....X
Memorandum of Law in Opposition.....X
Reply Affirmation in Further Support and Exhibit.....X
Reply Memorandum of Law.....X
Affirmation of G. Raicht.....X
Correspondence dated August 18, 2011.....X

This matter is before the Court for decision on the motion filed by Plaintiffs Robert Varkonyi, Olga Varkonyi, Charles Kremer, Richard Levy, Andrew Loft, Tom Masbruch, Karen Masbruch, James P. Smith, Jr. and Oscar D. Williams (“Plaintiffs”) on April 14, 2011, which was submitted on August 25, 2011, following oral argument before the Court.¹ For the reasons set forth below, the Court denies Plaintiffs’ motion.

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order, pursuant to CPLR § 602(a), 1) consolidating the above-captioned action (“Instant Action”) with a related action (“Related Action”) pending in the Supreme Court of New York County titled *In the Matter of the Application of Nicholas F. Carter of PricewaterhouseCoopers (BVI) Limited and David A.K. Walker of PwC Corporate Finance & Recovery (Cayman) Limited, solely in their capacities as Liquidating Trustees, Petitioners, For the Appointment of Receivers for TS Multi-Strategy Fund, LP, Respondent, A New York Limited Partnership*, New York County Index Number 650646-11; and 2) upon consolidation, transferring the Related Action to the Supreme Court of Nassau County.

Milton Mollen, the Receiver (“Receiver”) of TS Multi-Strategy Fund, LP (“Partnership”) pursuant to an Order in the Related Action, opposes Plaintiffs’ motion.

B. The Parties’ History

In his Affirmation in Support, counsel for Plaintiffs outlines the procedural history of the Instant and Related Actions. Although counsel for the parties disagree as to which Action was commenced first, they agree that the two Actions were filed very close in time.

¹ The named plaintiffs in the initial Verified Complaint (Ex. A to Schlesinger Aff. in Supp.) were Robert Varkonyi and Olga Varkonyi. Plaintiffs subsequently filed an Amended Verified Complaint (Ex. A to Schlesinger Reply Aff.) which named all the Plaintiffs listed.

Plaintiffs describe the Instant Action as involving a number of claims against Defendants involved with the TS Multi-Strategy Fund, LP (“Fund”), including fraudulent inducement, breach of contract and breach of fiduciary duty. The Instant Action was commenced “to preserve the assets of the Fund, and to ensure that the Class B Investors received the benefit of their investment” (Ps’ Memorandum of Law in Supp. at p. 2). Plaintiffs also summarize the relief sought by the Liquidators in the Related Action, as set forth in their Order to Show Cause and Verified Petition, which included appointment of a Receiver and an Order preliminarily enjoining any party in interest from commencing or continuing any action against any asset in which the Fund has an interest (*id.* at pp. 3-4).

In March of 2011, Plaintiffs made a motion in the Related Action seeking to intervene and, upon that intervention, dismissing the Verified Petition. On April 5, 2011, the Court in the Related Action granted Plaintiffs the right to intervene in the Related Action but denied their application to dismiss the Verified Petition.

The Receiver affirms that the Partnership, which was formed in 2004, maintained its office at 150 East 52nd Street, 11th Floor, New York, New York 10022 in New York County. The Partnership’s general partner, Lilaboc LLC d/b/a ThinkStrategy Capital Management LLC (“ThinkStrategy”) managed the Partnership’s daily affairs until its withdrawal (“Withdrawal”) from the Partnership. The Partnership invested in private equity and hedge funds, with its limited partners providing capital in exchange for units representing a limited partner’s interest in the Partnership.

Following the Withdrawal, ThinkStrategy executed a Consent and Appointment (Ex. A to Mollen Aff. in Opp.) which, *inter alia*, appointed Nicholas Carter of PricewaterhouseCoopers (BVI) Limited and David A.K. Walker of PwC Corporate Finance & Recovery (Cayman) Limited as joint liquidating trustees (“Liquidating Trustees”). The Consent and Appointment also provides that, upon appointment of the Liquidating Trustees, the General Partner shall effect dissolution of the Partnership by withdrawal in accordance with the Partnership Agreement. As a result, the Partnership is now in dissolution.

By Order dated July 5, 2011 (Ex. B to Mollen Aff. in Opp.), the Honorable Barbara R. Kapnick of the Supreme Court of New York County appointed the Receiver and directed that the Receiver was “authorized and empowered to wind up the business affairs of the Partnership with the assistance of the Petitioners” and was vested with power and authority to perform numerous acts which are set forth on pages 3-5 of Judge Kapnick’s Order. Those acts include, but are not

limited to, 1) taking possession of the Receivership estate, including all property of the Partnership; 2) assuming control of, and becoming the authorized signatory for, all accounts at any bank or other financial institution which has possession, custody or control of Partnership assets and funds; 3) prosecuting suits brought on behalf of the Partnership; and 4) defending suits brought against the Petitioners and/or the Receiver.

In his Affirmation in Opposition, the Receiver affirms that he intends to file a motion in the Related Action to consolidate the Instant Action before Justice Kapnick in New York County. By letter dated August 18, 2011, counsel for the Receiver advised the Court that the Receiver filed that motion, and provided the Court with a copy of the motion.

C. The Parties' Positions

Plaintiffs submit that consolidation of the Instant and Related Actions is appropriate, given that a) the two Actions involve common questions of law and fact relating to the assets of the Fund and the rights of certain parties to the remaining assets in the Fund; b) consolidation of the Actions will avoid unnecessary duplication of trials, save unnecessary cost and expense; c) consolidation will prevent an injustice that might result from a divergent decision based on the same facts; and d) the Liquidators will not be prejudiced by consolidation. Plaintiffs also argue that the two Actions should be consolidated in Nassau County because the Instant Action was commenced prior to the Related Action.

The Receiver agrees that the Actions should be consolidated, but opposes Plaintiffs' motion to consolidate the Actions in Nassau County. The Receiver submits that the Court lacks jurisdiction over the Related Action because, pursuant to New York Revised Limited Partnership Act § 121-803(a), an action for the appointment of a receiver to conduct the wind-up of a limited partnership can be heard only in the court in the judicial district where the limited partnership resides. The Receiver is pursuing a motion to consolidate in the Related Action, so that both Actions will be tried in New York County, "so that all actions taken by such court are legally binding on all parties and cannot be vacated on appeal for want of jurisdiction on a later date" (Receiver's Memorandum of Law in Opp. at p. 2). The Receiver contends that the Supreme Court of New York County is the only court with proper subject matter jurisdiction.

RULING OF THE COURT

CPLR § 602(a) permits consolidation "when actions involving a common question of law or fact are pending before a court." CPLR § 602(b) provides, *inter alia*, that where an action is pending in the supreme court it may, upon motion, remove to itself an action pending in another

court and consolidate it or have it tried together with that in the supreme court.

Consolidation or a joint trial should be ordered when the actions involve common questions of law and fact so as to avoid unnecessary duplication of trials, save unnecessary costs and to avoid the possibility of inconsistent decisions based upon the same facts. *Viafax Corp. v. Citicorp Leasing, Inc.*, 54 A.D.3d 846 (2d Dept. 2008); *Gutman v. Klein*, 26 A.D.3d 464 (2d Dept. 2006). A motion to consolidation rests in the sound discretion of the trial court. *Mattia v. Food Emporium, Inc.*, 259 A.D.2d 527 (2d Dept. 1999).

The party seeking consolidation must establish the existence of common questions of law or fact. *Beerman v. Morhaim*, 17 A.D.3d 302 (2d Dept. 2005). Once the movant has established the existence of common questions of law or fact, the party opposing consolidation must demonstrate that it will suffer prejudice to a substantial right if consolidation is granted. *Mattia v. Food Emporium, Inc.*, *supra*. Absent that showing, consolidation should be granted if the movant meets its burden. *Id.* See also *Viafax Corp. v. Citicorp Leasing, Inc.*, *supra*; and *Mas-Edwards v. Ultimate Services, Inc.*, 45 A.D.3d 540 (2d Dept. 2007).

The Court concludes that consolidation of the Instant Action and the Related Action may well be appropriate, but that any such consolidation should nevertheless occur in New York County, rather than in this Court. The Court's decision is guided by (1) the fact that the Related Action has progressed further than the Instant Action, in that a Receiver with vast experience was appointed several months ago in the Related Action, and that Receiver has already fully immersed himself in the facts and issues of the parties' dispute, as well as (2) the strong legal argument made by the Receiver that the jurisdictional issues may well preclude consolidation before this Court in any event. In short, any application for consolidation should be made before the judge presiding over the Related Action, inasmuch as the parties appear to agree that both the Instant Action and the Related Action could be heard in New York County.

All matters not decided herein are hereby denied.

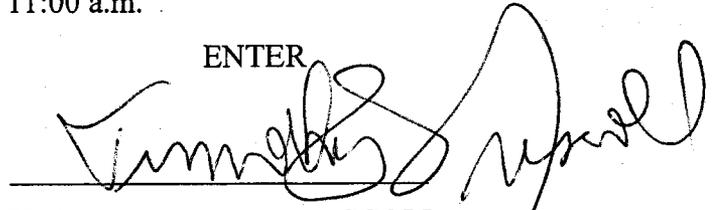
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Preliminary Conference on November 16, 2011 at 11:00 a.m.

DATED: Mineola, NY

September 30, 2011

ENTER

A handwritten signature in black ink, appearing to read 'Timothy S. Driscoll', written over a horizontal line.

HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

OCT 05 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**