

Baron v Rocketboom, LLC

2007 NY Slip Op 32202(U)

July 16, 2007

Supreme Court, New York County

Docket Number: 0601066/2007

Judge: Richard B. Lowe

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PART 56

Index Number : 601066/2007

BARON, FRED

vs

ROCKETBOOM LLC

Sequence Number : 001

LEAVE TO INTERVENE

C

INDEX NO. 601066/07

MOTION DATE 6/25/07.

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JUL 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/16/07

RICHARD B. LOWE III


J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56**

-----x

FRED BARON

Index No: 601066/07

Plaintiff

-against-

DECISION AND ORDER

ROCKETBOOM, LLC

Defendant

-----x

FILED
JUL 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

RICHARD B. LOWE III, J:

Plaintiff Fred Baron ("F.Baron") brings the instant action against Defendant Rocketboom, LLC ("Rocketboom") for payment on a loan. In the instant motion, non-party Amanda Congdon ("Congdon") moves pursuant to CPLR 1012(a) to intervene as a party-defendant, and under CPLR 1001(a) to add non-party Andrew Baron ("A.Baron") as a necessary party. In the alternative, she moves to dismiss the action pursuant to CPLR 3211(a)(10) for F. Baron's failure to name A. Baron as a defendant.

BACKGROUND

Rocketboom is a New York limited-liability company. It was formed in August 2005 to produce and disseminate a daily videoblog on the internet. At the time of its formation, A. Baron owned 51% of the company while Congdon owned 49%. (*See, Notice of Motion, Ex A*)

In June 2006, Congdon's association with Rocketboom ended. She avers that A. Baron abruptly terminated her. (*See, Congdon Aff'd at page 2, ¶ 6*) A. Baron contends that she left voluntarily, which allegedly resulted in her ownership interest's forfeiture. (*Id, ¶ 8*)

F. Baron is domiciled in Texas, and is A. Baron's father. Since Rocketboom's inception, F. Baron began lending capital to Rocketboom in order for it to meet its expenses. (*See, F. Baron Aff'd at page 1, ¶ 2*) Congdon was allegedly cognizant of the fact that F. Baron provided all of Rocketboom's funding, which paid the former's salary. (*Id.*) As of October 2006, Rocketboom was indebted to F. Baron for \$292,322,00. (*Id*) When it sought additional cash from him, F. Baron desired to memorialize the financing in writing. (*Id*) On October 26, 2006, the parties executed a Loan and Security Agreement. (*Id, Ex A*). A. Baron signed the contract on Rocketboom's behalf. (*Id*)

Rocketboom failed to repay the loan's principle and interest. On March 29, 2007, F. Baron commenced the instant action against Rocketboom, seeking the money he avers is owed to him, as well as the collateral that secures the loan. Congdon attests that A. Baron mailed her a copy of the complaint, and that she was unaware that Rocketboom entered into the Loan and Security Agreement with F. Baron. (*See, Congdon Aff'd at page 5, ¶ 14*)

Rocketboom acknowledges that it has no defense to the instant action. (*See, Stipulation at page 1, ¶ 1*) Accordingly, the parties entered into a settlement stipulation dated June 12, 2007, whereas they agreed that Rocketboom owes F. Baron a total of \$810,300.40. (*Id at page 2, ¶ 7*)

Non-party Congdon avers that, as Rocketboom's 49% owner, she has an interest in the instant action and Rocketboom is not adequately protecting it. Accordingly, she moves in the instant motion pursuant to CPLR 1012(a) to intervene as a defendant. In addition, she avers that A. Baron as Rocketboom's 51% owner is also a necessary party, and moves under CPLR

1001(a) to join him as a defendant. Alternatively, she moves to dismiss the complaint under CPLR 3211(a)(10) for F. Baron's failure to name A. Baron as a necessary party.

DISCUSSION

Intervention under CPLR 1012(a)

"Upon timely motion, any party shall be permitted to intervene in any action. . .when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment." (CPLR 1012(a)(2)) A motion to intervene is timely when it will not unduly delay the proceedings and not prejudice the named parties. (See, *Ginsberg v. Lomenzo*, 23 NY 2d 94 [1968].) "Whether the [intervener] will be bound by the judgment. . .is determined by its *res judicata* effect." (*Vantage Petroleum v Board of Assessment Review of the Town of Babylon*, 61 NY 2d 695 [1981].) But a *res judicata* finding alone is insufficient to grant the intervention right; the intervener must also establish that the party in which she/he is in privity with will not adequately represent her/his interests. (See, *New York State Public Relations Board v Board of Ed of City of Buffalo*, 39 NY 2d 86 [1976].)

Here, Congdon's motion to intervene is indeed timely and will not prejudice the other parties. F. Baron filed his complaint in March 2007, and served it on Rocketboom a month later. At the time of the instant motion's filing, which was less than a month after the complaint was filed, Congdon filed her motion. Rocketboom had not yet answered the complaint, nor had any discovery commenced.

Res judicata, meaning "a matter adjudged", is the conclusive establishment of legal relations between parties by virtue of a final judgment. (See, *Fusco v Kraumlap Realty Corp.*, 1 AD 3d 189 [1st Dept 2003].) Congdon avers that she will be bound by the instant action's

resolution because she is the 49% owner of limited-liability-company Rocketboom, and therefore her motion to intervene should be granted. But *res judicata* cannot bind a limited liability company's member to legal determinations affecting the corporate entity's debts.

“[A] member of a limited liability company [is not] liable for any debts, obligations, or liabilities of the limited liability company or each other, whether arising in tort, contract, or otherwise, solely by reason of being such member. . .” (*Limited Liability Company Law* § 609(1)) This general rule's exception is when the member specifically agrees to be bound and such agreement is contained in the limited liability company's articles of incorporation. (*Id.*, § 609(2))

Here, the Loan and Security Agreement was executed between F. Barron and Rocketboom. Indeed, it is the latter who made the promise to repay the debt. Since it failed to do so, F. Barron commenced the instant action against it. Despite A. Baron and Congdon's ownership in the company, New York law does not permit that they can be held liable for their company's debts.¹ Nor were any documents offered to indicate otherwise. Since neither A. Baron nor Congdon can be held liable for Rocketboom's debt to F. Barron, the doctrine of *res judicata* is inapplicable. Congdon will therefore not be bound by the instant action's ultimate outcome.

While CPLR 1012(a)(2) is in the conjunctive, and Congdon has failed to met one requirement, this Court will nonetheless analyze the second part, i.e. whether Rocketboom adequately represents her interests. Congdon has represented that her interests are that A. Baron improperly removed her from Rocketboom and executed a loan agreement with his father, F.

¹ The Court assumes, for purposes of analyzing the instant motion's issues, that the partnership agreement providing Congdon with a 49% interest in Rocketboom remains in effect.

Baron, without her consent and knowledge. (*See, Congdon Aff'd at page 4, ¶ 10*) These interests sound in an action against A. Baron for an alleged wrong done to her with respect to her role in Rocketboom. These do not sound in a defense to the loan's repayment, which is the instant action's subject matter. Moreover, as discussed, *supra*, Rocketboom's interests in this litigation is its own, and not in privity with those of Congdon. It is Rocketboom who is liable for the subject-matter debt, not Congdon.

In addition, "when the action involves the disposition or distribution of . . . property and the person may be affected adversely by the judgment", there is a right to intervention. (*CPLR 1012(a)(3)*) However, despite the fact that a member or majority shareholder may be the equitable owner of the corporate form's assets, the latter has a separate legal existence, and intervention cannot be permitted to essentially disregard the manner in which the former decided to conduct business. (*See, Harris v Stoney Clove Lake Acres, Inc, 202 AD 2d 705 [3rd Dept 1994]*).

Here, F. Barron's collection of the loan apparently will extinguish the majority, if not all of Rocketboom's assets. To be sure, if Congdon indeed remains its 49% owner, her equitable ownership may become extinct, or at least near it. But she assumed that risk when she opted to form Rocketboom with A. Barron under this corporate existence. Her motion to intervene under CPLR 1012(a) is therefore denied.

A. Baron as a Necessary Party under CPLR 1001(a)

"Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." (*CPLR 1001(a)(1)*) The purpose of compulsory joinder is to prevent duplicative litigation, inconsistent judgments, and to protect the rights of those who

may be adversely affected by the outcome. (*See, Saratoga County Chamber of Commerce v Pataki et al*, 100 NY 2d 801 [2003].)

Here, Congdon seeks to join A. Baron as a necessary defendant to this litigation. Her rationale is that the instant action is one that “involves a dispute over [the] right to the possession of property. . .” (*Memo at Law at page 10*) Moreover, she alleges that “. . .A. Barron appears to have breached his fiduciary duty to Congdon by allegedly entering into a loan agreement on behalf of Rocketboom without her knowledge or consent.” (*Id, at page 11*)

To be sure, there is a dispute between A. Baron and Congdon as to whether she remains a 49% member of Rocketboom. It is also Congdon’s contention that A. Barron made decisions regarding Rocketboom, i.e. entering into a loan agreement, without her consent. But, as earlier discussed, this is not the instant action’s subject matter. Congdon’s redress for her allegations against A. Baron are best addressed elsewhere.

Dismissal Pursuant to CPLR 3211(a)(10)

“A party may move for judgment dismissing one or more causes of action against [her/him] on the ground that the court should not proceed in the absence of a person who should be a party.” (*CPLR 3211(a)(10)*) “A member of a limited liability company is not a proper party to proceedings by or against a limited liability company except where the object is to enforce a member’s right against or liability to the limited liability company.” (*Limited Liability Company Law § 610*)

Here, the instant action is the foreclosure on the loan made by F. Barron to Rocketboom. There is no claim that A. Baron is personally liable on said loan, nor can he be under general principals of New York law. (*See, Id, § 609*) Accordingly, he is not a necessary party to the underlying causes of action, and the motion to dismiss is therefore denied.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that non-party Congdon's motion to intervene is denied; and it is further

ORDERED that Congdon's motion to join A. Barron is denied; and it is further

ORDERED that Congdon's motion to dismiss for the failure to join a necessary party is denied.

This shall constitute this Court's decision and order.

Dated: July 16, 2007

Enter


RICHARD B. LOWE III

Richard B. Lowe III, J.S.C.

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