

R&R Capital LLC v Merritt

2010 NY Slip Op 30778(U)

March 31, 2010

Supreme Court, New York County

Docket Number: 604080/05

Judge: Charles E. Ramos

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

Index Number : 604080/2005
R&R CAPITAL LLC
 vs.
MERRITT, LINDA
 SEQUENCE NUMBER : 019
 PRECLUDE

PART _____

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

~~IS DISPOSED OF IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.~~

FILED
 APR 05 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

Dated: 3/31/2010

HON. CHARLES E. RAMO J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X
R&R CAPITAL LLC and FTP CAPITAL LLC,

Index No. 604080/05

Plaintiffs,

-against-

LINDA MERRITT, a/k/a LYN MERRITT,

Defendant.

FILED
APR 05 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----X
Charles Edward Ramos, J.S.C.:

Motion sequence numbers 019-022 are consolidated for disposition.

In motion sequence 019, plaintiff R&R Capital LLC and FTP Capital LLC (together, R&R) move for an order in limine to preclude defendant Linda Merritt, a/k/a Lyn Merritt (Merritt) from offering any additional evidence or witnesses, and from asserting any new claims.

In motion sequence 020, Merritt moves for an adjournment of the counterclaim trial.

In motion sequence 021, Merritt moves for a clarification of this Court's rulings and orders, and a finding that R&R committed fraud on the court and acted in bad faith by filing actions outside the jurisdiction.

In motion sequence 022, Merritt moves to amend her counterclaims.

Factual Background

The parties' tortured and tangled dispute is now in its fifth year before this Court. This protracted dispute has since spread to five jurisdictions in three states, involving much

motion and appellate practice, including a meritless motion to recuse this Court following a claim of a "tainted" mediation, that prompted this Court's strong recommendation to the authorities that an investigation into perjury be conducted. That investigation is still pending.

In the motions currently before this Court, Merritt makes serious allegations that R&R and its counsel have committed fraud on the court which resulted in the reversal of certain orders that had been favorable to Merritt and traceable to the alleged fraud.

R&R originally commenced this action in New York in November 2005 seeking to remove Merritt as the managing member of nine Delaware limited liability corporations (the Entities) that the parties formed to invest and manage horses and real estate, and sought damages stemming from fraud, mismanagement, commingling of funds and an accounting.

R&R and Merritt were purportedly introduced by a mutual acquaintance, Leonard Pellulo, a convicted felon. The parties formed the Entities to invest in horse farms located in Pennsylvania, and to raise and breed racehorses allegedly for the purpose of maintaining certain agricultural tax benefits. In addition, the Entities purchased properties in Philadelphia with the intent of refurbishing and selling them.¹

¹ The Entities jointly owned by Merritt and R&R are Merritt Land LLC (Merritt Land), that owns and operates the Apple Grove property located in Chester County, Pennsylvania, Knick the Knack Farms, LLC, a wholly owned subsidiary of Merritt Land LLC, that initially owned six steeplechase horses; Moore Street LLC

Merritt and R&R were equal members of the Entities, and Merritt was the managing member, charged with the day-to-day operations of the properties and horses.

R&R's commencement of this action coincided with Pellulo's re-incarceration. It was then for the first time that R&R accused Merritt of improperly commingling the Entities' funds, failing to maintain proper books and records, and improperly using the Entities' funds for personal benefit.

In addition, R&R asserted a claim for breach of contract based upon the allegation that the parties negotiated an agreement obligating Merritt to buy R&R out of its interest in the jointly-owned racehorses in exchange for Merritt's execution of a note secured by her interest in another entity (Horse Buyout Agreement). Simultaneous with the negotiation of the Horse Buyout Agreement, Merritt offered to sell to R&R three of her personally owned "pinhooking horses" (Pinhooking Horses²) allegedly as a "sure thing" guarantee of profit.

Merritt allegedly breached the Horse Buyout Agreement by failing to pay down the note, failing to pay revenue that she

that owns a commercial warehouse in Philadelphia; Hope Land LLC that owns a warehouse in Philadelphia; PDF Properties LLC f/k/a Pandora Farms, LLC, (PDF) owns two parcels of land in Highland County, Pennsylvania and a herd of racehorses; Grays Ferry Properties LLC owned several properties in Philadelphia; Unionville Land LLC owns three parcels of land in Unionville, Pennsylvania; and Buck & Doe Run Valley Farms, LLC owns a farm in Chester County, Pennsylvania.

² The names of the Pinhooking Horses are Lipstick/Pulpit, Splashing Wave (a.k.a. Mr. Greely or Wave Warrior) and Mambo-Jambo.

received from the race or sale of certain of the jointly-owned racehorses, and allegedly inflated the price of the Pinhooking Horses and concealed that one was of "inferior quality."

In her answer to R&R's amended complaint,³ Merritt alleged that R&R and its principal, Ira Russack, made disparaging remarks about her resulting in the seller of certain property to refuse to close on a contract to sell property to Merritt, impaired her ability to manage the Entities and wrongfully withheld cooperation and funding. Merritt asserts counterclaims for tortious interference with contract, slander, lender liability and seeks rescission of the Horse Buyout Agreement, including R&R's purchase of the Pinhooking Horses.

Procedural Background

On November 17, 2005, this Court granted R&R's motion for a preliminary injunction with a temporary restraining order (TRO) to remove Merritt as managing member of the Entities.

The TRO was thereafter modified, to the extent of requiring Merritt to provide 48 hours of notice of her intention to sell or encumber any assets of the Entities, in order to provide R&R an opportunity to seek relief from this Court (48 Hours Rule) (2/23/06 Tr 23:9-20).

Throughout December 2005 to October 2006, this Court conducted evidentiary hearings to consider whether cause for removal existed, in connection with R&R's motion for preliminary

³ R&R amended its complaint in February 2006.

injunction.⁴

In October 2006, this Court denied R&R's motion for preliminary injunction on the ground that it had failed to demonstrate cause for removal (10/4/06 Tr 74:25-26, 75:2-6), and subsequently denied its interim motion to require Merritt to prepare and submit a formal accounting (5/1/07 Decision).⁵

In February 2007, the trial of R&R's case-in-chief commenced and spanned five days. This Court heard testimony from, amongst others, accounting experts, Merritt and the brother of R&R's principal.

⁴ The Court determined that the Operating Agreements required removal for cause, as opposed to mere notice of removal (12/13/05 Tr 70:9-21).

⁵ The Court additionally heard several motions relating to other interim relief and challenges to the pleadings.

In October 2006, Merritt moved to amend her counterclaims, which was granted without opposition (10/4/06 Tr 2:4-16).

In April 2007, the Court heard argument on R&R's motion for a preliminary injunction seeking to bar Merritt from borrowing money on behalf of the LLC. She purportedly sought financing in order to meet funding obligations of the Entities under the Operating Agreements. The Court denied the motion (4/17/07 Tr 25:9-18).

In the 5/1/07 Decision, the Court determined that the Operating Agreements did not provide members the right to demand a formal accounting absent a finding of wrongdoing, which had, thus far, not been proven.

In August 2007, the Court heard argument on Merritt's motion seeking to hold R&R and its counsel in contempt for violating the 48 Hour Rule by commencing concurrent litigation in other jurisdictions and for permission to dispose of jointly-owned properties. The Court denied the motion for contempt but permitted Merritt to dispose of certain properties to satisfy the primary obligations of the Entities and their indemnity obligations to Merritt (1/17/08 Decision). R&R did not appeal or seek a stay of this order.

After R&R rested its case-in-chief, Merritt requested this Court direct a verdict pursuant to CPLR 4401 (2/26/07 Tr 119:9-11). This Court granted the application and dismissed all of R&R's claims for damages.

As this Court began to hear testimony on Merritt's counterclaims, R&R requested that the parties be sent to mediation. Mediation was unsuccessful, and R&R replaced its counsel, for the third time.

Thereafter, R&R made a motion to recuse this Court alleging that the neutral mediator assigned to this action had purportedly confessed that he had been asked by Merritt's attorney to "fix" the case against R&R's interests.

In May 2008, this Court denied the motion, primarily on the ground that there was no allegation of any impropriety on the part of this Court (Recusal Order). As to the alleged confession by the mediator - to which no factual support was offered - this Court forwarded the file to the New York County District Attorney's Office, the administrative judge of the Supreme Court of New York County, the Commission on Judicial Conduct, the Departmental Committee on Discipline, and the Office of Court Administration with the recommendation that an investigation be conducted. This Court's denial of recusal was affirmed by the First Department (*R&R Capital LLC v Merritt*, 56 AD3d 370 [1st Dept 2008]).

Adjudication of Merritt's counterclaims has been delayed several times by the parties' failed attempt at mediation and

subsequent motion practice, in part, relating to pending actions in other jurisdictions.

Multi-forum Litigation

Since this action was first commenced in November 2005, R&R commenced five additional actions against Merritt, in three states and four jurisdictions,⁶ each of which included a multitude of motions, hearings and appeals all arising out of the parties' failed business relationship.

First, in April of 2006, while this Court was in the midst of conducting a hearing on R&R's motion for a preliminary injunction for removal of Merritt, R&R commenced an action against her in the United States District Court for the Eastern District of Pennsylvania seeking replevin of two of the Pinhooking Horses and rescission of its purchase of the third Pinhooking Horse (Pennsylvania Pinhooking Action)⁷ (Exhibit O, annexed to the Sweeney Aff.).

Merritt moved to stay, dismiss or transfer the Pennsylvania Pinhooking Action, which was denied (Exhibit 21, annexed to the Fioravanti Aff.). The court in the Pennsylvania Pinhooking Action conducted a trial on October 25-26, 2006, and issued decisions in April and June 2009, which are discussed below.

⁶ PA, DE, etc., the details of which will be discussed below.

⁷ The three horses at issue in the Pennsylvania Pinhooking Action are the same Pinhooking Horses that formed the basis, in part, of R&R's claim for removal and damages for fraud, asserted in R&R's amended complaint at paragraphs 99-102 and 147-151.

On July 12, 2007, R&R commenced a second action against Merritt in the Eastern District of Pennsylvania. At the time, R&R represented to this Court that this new action concerned properties located in Pennsylvania and events that "occurred just recently" (7/19/07 Letter from R&R's then counsel, Jonathan Wagner). In October 2007, that action was stayed pending resolution of this action (Exhibit 22, annexed to the Fioravanti Aff.).

The Chester County Action

In May 2008, R&R filed an action against Merritt in Chester County, Pennsylvania (Chester County Action), seeking, in part, entitlement to the proceeds of the sale of the Scott Farm (PDF Proceeds), a parcel of property located in Pennsylvania and owned by PDF.⁸ The court in the Chester County Action placed the PDF Proceeds in escrow pending a determination by this Court as to disbursement.⁹

In August 2008, this Court granted Merritt's motion for disbursement of the PDF Proceeds (PDF Distribution Order) (8/12/08 Order), at issue in the Chester County Action.¹⁰

⁸ The Chester County Action was filed shortly after Merritt entered into an agreement to sell the Scott Farm.

⁹ During the trial of R&R's case-in-chief, Merritt had placed the Scott Farm on the market and negotiated a contract of sale. R&R sought to enjoin the sale, which was denied by this Court on 8/3/07. R&R did not appeal that order.

¹⁰ The First Department subsequently reversed the PDF Distribution Order on the ground that this Court did not have jurisdiction over R&R's claim for a final accounting of the proceeds of the sale, because the relief sought did not relate to a claim raised in the initial complaint, or an issue previously

Delaware Removal Action

In June 2008, R&R commenced a dissolution proceeding in the Court of Chancery of the State of Delaware, that was ultimately dismissed (Delaware Dissolution Action).

On the same day that R&R applied to the First Department for a stay of the PDF Distribution Order, which was denied (Exhibit 34, annexed to the Fioravanti Aff.), R&R filed a second action in the Court of Chancery of the State of Delaware seeking Merritt's removal as managing member of the Entities, for reasons set forth in a removal notice dated August 20, 2008 (2008 Removal Notice).¹¹

The cause for removal set forth in the 2008 Removal Notice was based, in part, upon Merritt's failure to submit a final accounting after sale of certain LLC property, unauthorized purchase of horses with R&R and the Entities' funds, the Pinhooking Horses transaction, and allegations that she improperly used the Entities' assets for personal benefit (Delaware Removal Action).

In the Delaware Removal Action, R&R sought and obtained a "status quo order" that barred the transfer of any of the Entities' funds, including the PDF Proceeds that this Court had days earlier ordered to be disbursed (Exhibit 16, annexed to the Fioravanti Aff.).

litigated in this action (*R&R Capital LLC v Merritt*, 60 AD3d 528 [1st Dept 2009]).

¹¹ The 2008 Removal Notice was dated the day after the Delaware Dissolution Action was dismissed.

In October 2008, Merritt moved before this Court to enjoin the Chester County and Delaware Removal Actions on the ground that they were brought in bad faith. This Court granted the motion, and ordered R&R to withdraw claims asserted in those actions that are related to claims pending before this Court or that could have been brought here (Injunction Order).

The First Department subsequently reversed the Injunction Order on the ground that the relief sought in the Chester County and Delaware Removal actions did not relate to claims raised in the initial pleadings in this action, or issues previously litigated in this action (*R&R Capital LLC v Merritt*, 63 AD3d 565 [1st Dept 2009]).

Pennsylvania Pinhooking Action

In April 2009, the court in the Pennsylvania Pinhooking Action ruled in favor of R&R on its claims for replevin of two of the Pinhooking Horses, and rescission of its purchase of the third horse on the finding that Merritt had concealed the physical condition of one of the horses (Exhibits 19-23, 31, annexed to the Fioravanti Aff.). Additionally, the court ruled in favor of Merritt on her counterclaim for expenses that she incurred for care of the Pinhooking Horses (*Id.*).¹²

Current Posture

In June 2009, the court in the Delaware Removal Action granted R&R's motion for summary judgment on its claim seeking

¹² In June 2009, Merritt sought to vacate that court's findings on the ground that they were mooted by this Court's decision at trial. That application was denied.

Merritt's removal as managing member of the Entities based upon the finding in the Pennsylvania Pinhooking Action that Merritt concealed the physical condition of one of the Pinhooking Horses at the time of their sale to R&R in 2004 (Exhibit 27, annexed to the Fioravanti Aff.). Merritt opposed the motion pro se, after the court denied her application for advancement of legal fees. The removal was granted notwithstanding the fact that the Pinhooking Transaction was an independent transaction between Merritt and R&R and not part of the management of the LLCs.

Thereafter, the court in the Delaware Removal Action appointed a receiver to wind up the Entities' affairs (Receivership Order).

In August 2009, Merritt moved for summary judgment to dismiss R&R's remaining claims on the ground that they were either decided or dismissed by this Court, which was denied in September 2009.

In September 2009, Merritt moved to vacate or stay the determination of the Delaware Removal Action pending clarification by this Court of its rulings and orders, and for certification of an interlocutory appeal, which was denied (Exhibit 29, annexed to the Fioravanti Aff.).

Shortly thereafter, Merritt moved before this Court (motion sequences 20-22).

Discussion

Merritt seeks clarification that, as part of the evidence submitted by R&R in support of its claim for fraud and removal of

Merritt for cause, this Court considered the Pinhooking Horses Transaction, and that when this Court determined that the Horse Buyout Agreement was not an enforceable contract and that Pandora Farms LLC is the owner of the jointly-owned racehorse stock, that these findings encompassed all of R&R's claims with respect to the Pinhooking Horses.

In addition, Merritt seeks a finding that R&R and its counsel have committed fraud on this Court and the Appellate Division, enabling it to obtain the reversal of this Court's PDF Disbursement and Injunction Orders by representing that all of its claims in the Chester County and Delaware Removal Actions arose in 2008 as the result of "new" alleged misconduct by Merritt, and that PDF's sale of the Scott Farm constituted a sale of "all or substantially all" of the entity's assets.

I. Clarification

R&R's amended complaint in this action includes a claim for fraud and removal of Merritt for cause based upon Merritt's sale of the Pinhooking Horses, and was one of the bases upon which it sought her removal by motion for preliminary injunction (see 11/05 Aff. of H. Russack, ¶ 63). Merritt's amended answer includes a counterclaim for rescission relating to her sale of the Pinhooking Horses to R&R.

Nonetheless, despite the pending claims and counterclaim relating to the Pinhooking Horses in this action, R&R commenced the Pennsylvania Pinhooking Action asserting a nearly identical claim for rescission on the basis of Merritt's misrepresentation

as to one of the horse's physical conditions, as well as for replevin (Complaint in Pennsylvania Pinhooking Action, Exhibit O, annexed to the Sweeney Aff.).

The rule against claim splitting provides that a plaintiff cannot prosecute a claim piecemeal, and will generally result in forfeiture of the residue of a claim that was impermissibly split, unless good cause is shown for suing in parts instead of at one time (see generally *Emery Roth and Sons v National Kinney Corp.*, 44 NY2d 912, 914, rearg denied 45 NY2d 776 [1978]; *Century Factors, Inc. v New Plan Realty Corp.*, 41 NY2d 1040 [1977]; *Sannon Stamm Assocs., Inc. v Keefe, Bruyette & Woods, Inc.*, 68 AD3d 678 [1st Dept 2009]; Siegel, NY Practice § 220 [4th ed]). The rule is designed to prevent unreasonable harassment of a defendant who is forced to defend overlapping claims in multiple suits (*Id.*).

Merritt objected to R&R's attempt to maintain separate actions based upon parts of the same claim, and she promptly moved before the court in the Pennsylvania Pinhooking Action to dismiss, stay or transfer the action to this Court (compare *American Intl. Group, Inc. v Greenberg*, 23 Misc3d 278, 286 [Sup Ct, NY County 2008, Ramos, J.], affirmed 60 AD3d 483 [1st Dept 2009]; *Brown v Lockwood*, 76 AD2d 721, 740-71 [2d Dept 1980]).

However, that court denied her application (Exhibit 31, annexed to the Fioravanti Aff.), and conducted a two-day bench trial on October 25-26. At that time, Merritt was defending herself before this Court in evidentiary hearings on R&R's motion

for preliminary injunction for her removal for cause, based, in part, upon R&R's assertion that she fraudulently inflated the price of the Pinhooking Horses and concealed that one the horses was of "inferior quality." R&R's motion for a preliminary injunction was ultimately denied (10/4/06 Tr 74:25-26, 75:2-6).

During the trial of its case-in-chief before this Court, R&R elected not to present evidence on its claims as to its purchase of the Pinhooking Horses. At several points during the trial, counsel for both parties indicated that, notwithstanding that R&R had asserted a claim for damages and removal of Merritt for fraud based upon the Pinhooking Horses transaction and Merritt's counterclaim for rescission remained pending, over Merritt's objection, R&R was already pursuing its adjudication of its claim in Pennsylvania, in the Pennsylvania Pinhooking Action (2/22/07 Tr 75:16-26, 76:2-11; 2/26/07 Tr 120:12-18, 124:11-12).

Having failed to demonstrate cause for Merritt's removal on its motion for preliminary injunction and at trial, and on its claims for damages before this Court, R&R elected, not merely to split its claim relating to the Pinhooking Horses, but to strategically remove it from this Court's jurisdiction altogether.

Thereafter, on the basis of the Pennsylvania court making an adverse finding against Merritt on the improperly split claim (the issue pending before this Court) as to R&R's purchase of the Pinhooking Horses in 2004, R&R succeeded in having Merritt removed in the Delaware Removal Action in 2009. It appears that

Merritt was forced to defend herself against overlapping and repetitive claims in multiple jurisdictions that constituted unreasonable harassment and the waste of precious judicial resources (*compare Barrett v Delma Properties, Inc.*, 35 AD3d 279 [1st Dept 2006]).

This Court cannot review the determinations of the Pennsylvania Pinhooking Action or the Delaware Removal Action with respect to the Pinhooking Horses. Nonetheless, it will not validate R&R's conduct.

Therefore, although the portion of Merritt's motion that seeks clarification that this Court ruled on R&R's claim for fraud and removal of Merritt relating to its purchase of the Pinhooking Horses when it dismissed R&R's claims for damages and removal must be denied on res judicata grounds, R&R's allegedly abusive conduct is potentially so egregious as to require a hearing to determine, if in this Court's discretion, the imposition of costs, sanctions and attorney's fees to Merritt is warranted (22 NYCRR 130-1.1; *Pickens v Castro*, 55 AD3d 443, 444 [1st Dept 2008; *East New York Sav. Bank v Sun Beam Enterprises, Inc.*, 256 AD2d 78, 78 [1st Dept 1998]).

Merritt also seeks clarification and/or a finding that the Mer-Lyn Farms and Merritt Litigation Support Inc. agreements to manage the Entities constitute amendments to the Entities' Operating Agreements, and are valid and enforceable. In addition, Merritt seeks clarification and/or a finding that Mer-Lyn Farms and Merritt Litigation are authorized to pay the

Entities' bills as necessary, that Mer-Lyn Farms has a valid agreement to manage Buck & Doe under its operating agreement, and that Merritt and Mer-Lyn have the right to use the Buck & Doe property and is not obligated to pay rent.

This portion of the motion is denied without prejudice. Merritt does not articulate a basis for the assertion that she is entitled to such a clarification or finding, or point to those portions of the record where determinations concerning these Entities were made.

II. Fraud on the Court

R&R's August 2008 amended complaint in the Delaware Removal Action contains the following representation:

"R&R previously sought the removal of Merritt in a complaint filed in 2005 in State of New York, Supreme Court, Index No. 605080/05, based entirely on conduct by Merritt occurring prior to November 2005. That claim was dismissed by the New York Court on October 6, 2006. None of the allegations set forth in this action were present in the New York action. All of the allegations set forth herein have occurred since the prior removal claim was dismissed in October 2006, and since all of R&R's claims asserted in the New York Action were dismissed in December 2007" (R&R's Complaint, Delaware Removal Action at fn 4, Exhibit 34, annexed to the Fioravanti Aff.).

R&R's complaint in the Delaware Removal Action references the 2008 Removal Notice as setting forth the basis for removal of Merritt for cause. However, the 2008 Removal Notice identifies the 2004 Pinhooking Horses transaction and incorporates by reference all of the allegations set forth in R&R's complaint in the Pennsylvania Pinhooking Action, namely, Merritt's alleged fraudulent concealment of the physical condition of one of the Pinhooking Horses at the time of their sale to R&R in 2004 (see

2008 Removal Notice at 4). As aforesaid, this was the very issue pending before this Court, (Merritt's actions in 2004), which issue was the sole basis for her removal.

In October 2008, in response to Merritt's motion to this Court to enjoin the Delaware Removal and Chester County Actions on the ground that they were brought in bad faith, Mr. Sweeney represented, "We did not split the claims," and that all of the claims asserted in the Delaware removal action were based upon "all new facts" (10/16/08 Tr:21-22, 79:7).

Mr. Rollo¹³ made the following representation to this Court:

"Your Honor, the facts that underline both of the actions in Delaware [Delaware Dissolution and Removal Actions] are different facts than the facts that were at issue before your Honor" (10/16/08 Tr 31:26, 32:2-4).

In its appeal of the Injunction Order to the Appellate Division, Mr. Sweeney stated that "the only matters pending before Justice Ramos were Merritt's wholly unrelated counterclaims," and that the Chester County and Delaware Removal Actions are "based entirely on wrongful activities by Merritt in 2008 that caused new injuries that did not arise until 2008," with the exception of the claim for dissolution (emphasis in original) (R&R's Appellate Brief at 3-4). It was upon this representation that the Appellate Division reversed this Court's Injunction Order.

According to the Appellate Division, this Court lacked jurisdiction to order R&R to withdraw claims pending in the

¹³ Mr. Rollo, R&R's Delaware counsel, was admitted pro hac vice to New York (10/16/08 Tr 213-23).

Delaware Removal Action, because "the relief sought did not relate to a cause of action raised in the initial complaint, nor was the issue involved previously litigated in this action" (R&R Capital LLC, 63 AD3d at 565).¹⁴

However, as aforesaid, it appears that the challenged conduct at issue in the Pinhooking Horses transaction occurred in 2004, and was part of the pleadings in this action and R&R's 2005 motion for preliminary injunction to remove Merritt (see R&R's Amended Complaint, ¶¶ 99-102, 147-151; Merritt's Amended Answer; Aff. H. Russack, ¶ 63, dated 11/05, submitted in support of R&R's motion for preliminary injunction).

Moreover, R&R pursued Merritt's removal in Delaware, and succeeded, on the basis of the findings of the court in the Pennsylvania Pinhooking Action concerning R&R's Pinhooking Horses claim, that arose in 2004 (Exhibit 24, annexed to the Fioravanti Aff., R&R's Motion for Summary Judgment, 9).

The foregoing is the basis for Merritt's claim that the Delaware Removal Action was clearly not limited to "new 2008 conduct," as it had been represented.

In opposition to Merritt's motion for a finding of fraud, Mr. Sweeney, R&R's New York counsel, attempts to justify what has occurred - "while Merritt is technically correct that the words

¹⁴ Incidentally, Mr. Rollo made the identical representation to the court in the Delaware Removal Action in its reply brief submitted in support of its motion for summary judgment, that "the claims being litigated in Delaware were entirely different and distinct from those litigated in the New York action (Exhibit 9, annexed to the Fioravanti Aff., 23-24).

chosen were not entirely accurate, the import of the statements—that the Delaware [Removal Action] was not duplicative of the New York action — was and is truthful and accurate” (R&R's Memo. in Opp., 3). Mr. Sweeney further states that his previous representations to the court were “intended to emphasize the entirely accurate fact that the claims being litigated in Delaware were different and distinct from those litigated in the New York action” (*Id.* at 8). Obviously, this Court cannot agree without a trial of the issues that need to be resolved.

In addition to the issue of the Pinhooking Horses, Merritt seeks a finding that R&R and its counsel committed fraud on the court and the Appellate Division with respect to its assertion that the Scott Farm was PDF's sole asset.

This Court previously permitted the disbursement of the proceeds of the sale of the Scott Farm in the PDF Disbursement Order. In support of its appeal of the PDF Disbursement Order, Mr. Sweeney stated in R&R's appellate brief dated August 2008 that the “proceeds at issue are from the sale of PDF's sole piece of real property and upon that sale, according to the applicable LLC agreement (...), dissolution ‘will occur ... upon the sale of all or substantially all of the Company's assets’” (Exhibit 36, annexed to the Fioravanti Aff., 2, 16).

The Appellate Division reversed the PDF Distribution Order that permitted the disbursement of the proceeds of the Scott Farm sale, in part, based upon the finding that this Court “did not have jurisdiction over plaintiff's claim for a final accounting

of the proceeds of the sale of the Pennsylvania property at issue, which was the sole asset of a limited liability corporation" (*R&R Capital LLC*, 60 AD3d 528).

However, among the factual issues before this Court during the trial of R&R's case-in-chief was the ownership, inventory and value of a herd of thoroughbred racehorses, on which this Court heard extensive testimony (12/10/07 Tr:13-34, 38-39, 45-50). This Court made factual findings that PDF LLC, in addition to owning the Scott Farm, owned a herd of racehorses valued at approximately \$1.3 million.¹⁵ This Court heard this issue over an objection from R&R (12/10/07 Transcript 13-14, 48-49, 105:5-6, 110:114-117). There has been no adverse finding of fact by the Appellate Division.

Judiciary Law § 487

An attorney has a special obligation to protect the integrity of the courts and foster their truth-seeking function, and the courts have a compelling interest in supervising the conduct of attorneys admitted before its bar (*Amalfitano v Rosenberg*, 12 NY3d 8 [2009]). Judiciary Law § 487 permits injured parties to recover where an attorney engages in conduct designed to mislead or attempt to mislead the court or a party (*Id.* at 14; *Cinao v Reers*, AD3d, 2010 WL 118212 [2d Dept 2010];

¹⁵ Inexplicably, R&R's 2008 Removal Notice, authored by Mr. Rollo, and the amended pleadings in the Delaware Removal Action, signed by both Mr. Rollo and Mr. Sweeney, reference approximately thirty horses owned by PDF and/or other PDF Entities that are valued at approximately \$1,300,000 (Delaware Removal Action Amended Complaint, ¶ 4E-K).

see also *Art Capital, LLC v Neuhaus*, AD3d, 2010 WL 6533118, *5, dissent [1st Dept 2010]). Violation of Judiciary Law § 487 provides for treble damages and the criminal penalty of a misdemeanor.

The party seeking relief under Judiciary Law § 487 must demonstrate proximate cause (*Jaroslawicz v Cohen*, 12 AD3d 160 [1st Dept 2004]). However, recovery under the statute does not depend upon the court's belief in a material misrepresentation of fact, where the opposing party is obligated to defend or default, and necessarily incurs legal expenses (*Amalfitano*, 12 NY3d at 15). In such a case, the opposing party's legal expenses in defending the lawsuit may be treated as the proximate result of the misrepresentation (*Id.*).

On her motion for a finding of fraud, Merritt seeks damages and, in effect, sanctions incurred as a result of R&R's and its counsels' fraud on the court. Further, her thirteenth proposed counterclaim mirrors these allegations and includes allegations that R&R's conduct in this action, including its failed effort to recuse this Court, its forum shopping and bad faith filing of the Chester County and Delaware Removal and Dissolution Actions, was designed to impede the proceedings in this Court, and harass Merritt in order to deprive her of her interests in the Entities.

Although she does not expressly cite to Judiciary Law § 487, to the extent that Merritt alleges that R&R's counsel, Mr. Sweeney and Mr. Rollo, attempted to intentionally deceive this Court and the Appellate Division, and have purportedly conducted

this litigation in a manner so as to harass and maliciously injure her, this Court will permit Merritt to plead a counterclaim for violation of Judiciary Law § 487 against R&R's counsel.

Further, Mr. Sweeney's acknowledgment that its repeated representations to this Court as to the nature of its multi-jurisdictional onslaught were "not accurate" but "truthful" raises credibility determinations that must be evaluated.

Under these circumstances as well, this Court determines, in its discretion, that a hearing regarding the possible awarding of sanctions, costs and attorneys fees to Merritt is appropriate (22 NYCRR 130-1.1 [d]; *Gassab v R.T.R.L.L.C.*, 69 AD3d 511, 513 [1st Dept 2010]).

R&R's conduct, including a meritless motion to recuse, and its less than truthful (and potentially fraudulent) representations concerning the nature of its claims in related actions, has needlessly prolonged this litigation, wasted precious judicial resources, and strongly suggests bad faith (see *Sorenson v 257/117 Realty, LLC*, 62 AD3d 618, 619 [1st Dept 2009], *lv dismissed* 13 NY3d 935 [2010]; *Burr v Burr*, 51 AD3d 433 [1st Dept 2008]).

This Court rejects R&R's claim of surprise or prejudice, where it acknowledges that Merritt's allegations of misconduct and fraud were previously brought to the courts' attention (R&R's Memo. in Opp., 1), and is largely premised upon the same facts, transactions and occurrences alleged in Merritt's counterclaims

(see *Cinao*, 2010 WL 118212 at *2-3).

III. Motion to Amend

Merritt moves to amend her counterclaims to address wrongful conduct that allegedly occurred subsequent to the last trial session on her counterclaims.

In opposition, R&R asserts that the proposed counterclaims are within the exclusive jurisdiction of the court in the Delaware Removal Action, and otherwise lack merit because they belong to the Entities and not to Merritt individually. R&R additionally contends that it would be prejudicial to permit the amendment on the eve of the counterclaim trial.

Under principles of comity, the court which has first taken jurisdiction is the court in which the matter should be determined and it is a violation of the rules of comity for a subsequent court to interfere (*Ace Property & Cas. Ins. v Federal-Mogul Corp.*, 55 AD3d 479, 480 [1st Dept 2008]; *White Light Productions, Inc. v One the Scene Productions, Inc.*, 231 AD2d 90, 93-94 [1st Dept 1997]).

At the time that R&R commenced the Delaware Removal Action, its claims had been dismissed and the trial of Merritt's counterclaims remained pending. Nevertheless, the Delaware Court removed Merritt on the basis of R&R's Pinhooking claims, which were determined by the Pennsylvania Court.

By the 9/3/09 order of the court in the Delaware Removal Action, Merritt was removed as managing member of the Buck & Doe, Grays Ferry, Hope Land, Merritt Land, Unionville, Moore Street,

Knick the Knack (KTK) and PDF Entities (Exhibits 1-2, annexed to the Sweeney Aff.). The court appointed a receiver to conduct an accounting of the Entities, wind up their affairs and dissolve the Entities. Pursuant to the Receivership Order, the court reserved jurisdiction "over all matters arising from or relating to the above-discussed accounting, winding up and dissolution of the Entities and KTK. To the extent that Merritt or Plaintiffs [R&R] are purportedly (i) owed debts by the Entities or KTK, or (ii) owe debts to the Entities or KTK, such debts shall be submitted exclusively to the Receiver to be resolved in connection with the accounting" (*Id.*).

Consequently, notwithstanding that this Court first took jurisdiction of the parties' dispute arising out of their membership in the Entities, and that Merritt's counterclaims remain pending before this Court since February 2006, in light of the reservation of jurisdiction in the Receivership Order, until the Delaware court rules otherwise, this Court must respectfully defer to the that court under principles of comity those proposed counterclaims that relate to the accounting, winding up and dissolution of the Entities (*see Boudreaux v State, Dept. Of Trans.*, 11 NY3d 321, 326 [2008]).

For these reasons, Merritt's motion to amend is denied without prejudice as to the sixth through twelfth and fourteenth proposed amended counterclaims.¹⁶ However, in the event that

¹⁶ In the sixth proposed amended counterclaim, Merritt alleges that R&R breached the Entities' Operating Agreements by commencing the Delaware Dissolution Action that waived R&R's

the court in the Delaware Removal Action declines to exercise jurisdiction over Merritt's proposed claims, Merritt may move to renew its motion to amend, if so advised.

right to pursue dissolution (Proposed Third Amended Counterclaims, exhibit A, annexed to the Fioravanti Aff, ¶¶ 214-222).

In the seventh proposed amended counterclaim, Merritt alleges that R&R breached its lending agreements with the PDF Properties, Unionville and Moore Street entities by commencement of the Delaware Dissolution and Removal Actions, thereby entitling her to the declaration that her personal guarantees in favor of R&R are void (*Id.*, ¶¶ 223-232).

In the eighth proposed amended counterclaim, Merritt alleges that R&R fraudulently induced her to sell a fifty percent membership interest in Merritt Land by representing that it would fund a portion of Merritt Land's operating expenses and mortgage payments, but failed to fund resulting in the institution of bankruptcy proceedings against the real estate that Merritt Land owns (*Id.*, ¶¶ 234-259). Merritt seeks a declaration that R&R's purchase of her interest in Unionville and Merritt Land be declared void (*Id.*).

In the ninth proposed counterclaim, Merritt alleges breach of contract and bad faith stemming from its attempt to remove Merritt as managing member and its commencement of the Delaware Removal Action, entitling her to the rescission of R&R's membership interest in Hopeland (*Id.*, ¶¶ 260-283).

In the tenth proposed counterclaim, Merritt alleges that R&R breached the Buck & Doe operating agreement by its bad faith filing of the Delaware Petition and Dissolution Actions that violates the leases that Buck & Doe entered into (*Id.*, ¶¶ 283-290).

In the eleventh proposed counterclaim, Merritt alleges that R&R's filing of the Delaware Dissolution and Removal Actions caused a breach of Buck & Doe's agreements with MerLyn Farms, to act as the primary contractor to provide improvements at the property (*Id.*, ¶¶ 291-296).

In the twelfth proposed counterclaim, Merritt alleges that R&R effectively exercised its put right under Buck & Doe's operating agreement and seeks a declaration that R&R is obligated to sell its interest in Buck & Doe to Merritt (*Id.*, ¶¶ 297-307).

In the fourteenth proposed counterclaim, Merritt alleges that R&R's refusal to fund PDF Properties together with the representation that R&R will no longer participate in the horse racing business constitutes an event of withdrawal under the applicable provisions of PDF Properties' operating agreement and has committed perjury, entitling her to a declaration that R&R's membership interests in the Entities is rescinded, and that she is the sole owner of the Entities' assets.

However, comity does not require this Court to defer to that jurisdiction Merritt's proposed counterclaims that relate to conduct at issue in the long-pending and first-filed counterclaims in this action (*Certain Underwriters at Lloyds, London v Millenium Holdings, LLC*, 44 AD3d 536, 536 [1st Dept 2007]).

Those counterclaims are breach of contract relating to withholding of cooperation, funding and disrupting of her employment relationships, slander, tortious interference leading to the impairment of Merritt's credit, rescission of the Horse Buyout Agreement, lender liability¹⁷ and indemnification (First Amended Counterclaims; 2/26/07 Tr 223:4-9; 224:3-4; 12/11/07 Tr 6: 2-4).

Accordingly, this Court permits amendment of Merritt's answer to add the thirteenth claim for fraud (discussed above), the fifteenth claim for indemnification, and to the extent of conforming the pleadings to the evidence (CPLR 3025 [c]).

To the extent that the fifth proposed counterclaim for rescission of the Horse Buyout Agreement includes a declaration that the Pinhooking Horses be restored to PDF/Pandora, the motion is denied on the ground of res judicata (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347-48 [1999]).

¹⁷ The Court rejects R&R's contention that this Court already rejected Merritt's lender liability claim. Rather, the Court permitted Merritt to introduce into evidence the documents that Merritt intended to rely upon to demonstrate her claim, subject to R&R's objections, and reserved adjudicating the merits of the claim (12/11/07 Tr 37:10-12, 39:1-8, 17-18, 41:25, 42:1-10).

IV. Motion for an Order In Limine

Finally, R&R's motion for an order in limine to preclude Merritt from offering any additional evidence and calling additional witnesses not previously identified is denied as moot with respect to those proposed counterclaims that this Court denied amendment, and otherwise denied as to her new counterclaims.

It is this Court's conclusion that the record reveals substantial evidence that this Court and the Appellate Division were intentionally misled by the plaintiff and its counsel, and that there is evidence which could support a finding of a pattern of bad faith conduct.

Nonetheless, the Court is mindful that the law of the case doctrine requires it to adhere to the determinations of the Appellate Division as to the relationship between the issues and claims raised and litigated in this action and the Delaware Removal Action, the assets owned by PDF LLC and the consequence of the sale of the entity's real property, and the reversal, on the law, of this Court's finding of bad faith on R&R's part (R&R Capital LLC, 63 AD3d at 565; 60 AD3d at 528).

Notwithstanding permitting Merritt to amend her counterclaims to address the alleged fraud on the court and bad faith of the plaintiff and its counsel, this Court is constrained from proceeding absent an opportunity for reconsideration by the Appellate Division of these new factual circumstances (*Frankson v Brown & Williamson Tobacco Corp.*, 67 AD3d 213, 218 [2d Dept

2009]). Therefore, this Court will stay implementation of this Order for thirty days to enable R&R to make application for a stay to the Appellate Division, First Judicial Department.

Accordingly, it is

ORDERED that R&R's motion (019) for in limine is denied; and it is further

ORDERED that Merritt's motion (020) for a continuance is denied as moot; and it is further

ORDERED that Merritt's motion (021) for a clarification and for a finding of fraud is granted, in part, and denied, in part; and it is further

ORDERED that Merritt's motion (022) for leave to amend is granted, in part, as to the thirteenth and fifteenth proposed counterclaims and to this extent the third amended answer in the form proposed as annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry, and the motion is otherwise denied; and it is further

ORDERED that plaintiffs shall reply the third amended answer within 20 days from the date of said service; and it is further

ORDERED that the parties are directed to participate in a pre-trial conference on May 5, 2010 at 10:30 AM for the purpose of scheduling the counterclaim trial.

Dated: March 31, 2010

FILED
APR 05 2010
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:



J.S.C.
HON. CHARLES E. RAMOS