

**Bruno v Gerber**

2010 NY Slip Op 32685(U)

September 20, 2010

Sup Ct, Nassau County

Docket Number: 024915/2009

Judge: Ira B. Warshawsky

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**SHORT FORM ORDER**

**SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. IRA B. WARSHAWSKY,**

**Justice.**

**TRIAL/IAS PART 8**

LAWRENCE BRUNO, JASON REDDISH,  
DEBRA S. MINUTO and WDD HOLDINGS, INC.,

Plaintiffs,

-against-

INDEX NO.: 024915/2009  
MOTION DATE: 07/23/2010  
MOTION SEQUENCE: 003 and 004

LINWOOD GERBER, MICHELE JACONELLI,  
ROSS GIGLIOTTI and INFINITY HOME  
MORTGAGE COMPANY, INC.,

Defendants.

The following papers were read on this matter:

Notice of Motion & Affirmation of Thomas A. Blumenthal, Esq. in Support .....	1
Notice of Cross-Motion .....	2
Affirmation of Adam J. Schultz, Esq. in Opposition to Plaintiffs' Motion to Discontinue and in Support of Defendants' Motion for Summary Judgment & Exhibits Annexed .....	3
Affirmation of Thomas A. Blumenthal, Esq. in Opposition to Defendants' Motion for Summary Judgment & Exhibits Annexed .....	4
Plaintiffs' Memorandum of Law in Opposition to Motion by Defendants for Summary Judgment .....	5
Memorandum of Law in Opposition to Plaintiffs' Motion to Discontinue and in Support of Defendants' Motion for Summary Judgment .....	6
Reply Memorandum of Law in Support of Defendants' Motion for Summary Judgment ..	7

**PRELIMINARY STATEMENT**

Plaintiff moves for voluntary discontinuance of the action and for transfer of \$310,000 in escrow from David Legdin, Esq. to Thomas A. Blumenthal, Esq., acting as counsel for the plaintiffs. Defendants oppose the motion on the grounds that the application to discontinue the

action is for the sole purpose of re-instituting the action in the Federal Court, and that the underlying reason is to avoid a continuation of determinations which are unfavorable to plaintiffs. They also object to the request for the transfer of the escrow funds in the absence of a fully executed substitution of attorney form.

#### BACKGROUND

This action arises from a thus-far failed effort to form a corporation under a Shareholders' Agreement for the purpose of consolidating the parties' individual companies into a single entity involved in the home mortgage business.

The agreement called for Infinity to electronically wire the sum of \$310,000 to David H. Ledgin, Esq., as escrow agent for WDD Holdings, Inc., ("WDD"). The agreement further provided that upon the transfer of \$310,000, three things were to occur each of which was described as being a material term of the agreement. (1) All assets of Infinity and 100% of the net profits and income of Infinity are deemed to be pledged to the new Corporation. (2) Title to the building and real property at 139 N. Central Ave., Valley Stream was to be transferred into the names of all shareholders and/or to the Corporation to be formed by them. (3) 35% of the profits and assets of the corporation known as MSI were to be deemed pledged to the newly formed corporation. The "non— Infinity shareholders" represented that they have and control such interest in MSI and will cause the pledge to be carried out, as a condition subsequent.

Three hundred ten thousand dollars (\$310,000) was wired by Infinity to the escrow agent. Defendants contend that the plaintiffs have not undertaken to transfer title to the property, pledged the assets of WDD, or, more importantly, pledged the assets of MSI; primarily because they do not have control over MSI, and are in no position to pledge 35% of the shares.

Plaintiffs request for a preliminary injunction was denied, with this Court concluding that plaintiff did not establish a likelihood of ultimate success on the merits. The matter also received the attention of the Superior Court of the State of New Jersey (Hon. Michelle M. Fox) in which plaintiffs in this action were directed to refrain from interfering with the business of Infinity Home Mortgage Company.

Plaintiff now seeks to prosecute this action in the United States District Court for the

District of New Jersey. A copy of a complaint filed June 24, 2010 is annexed as Exh. "C" to the affirmation in opposition to the motion for summary judgment. This document includes all the plaintiffs and defendants in this action, but adds one plaintiff and six defendants.

The complaint seeks enforcement of a Stock Sales Agreement in which Anthony Minuto, the additional plaintiff, and two other persons who are not parties, agreed to purchase 35% of the interest of Robert Pena, a newly-added defendant, in MSI. The complaint alleges that Pena needed to sell these shares in order to comply with the liquidity requirements applicable to mortgage banks in both Massachusetts, in which MSI operates, and New Jersey. Pena allegedly has disavowed the agreement and refuses to convey the stock to Minuto and his associates.

#### DISCUSSION

Discontinuance of actions is governed by CPLR § 3217, which provides in part as follows:

**(b) By order of court.** Except as provided in subdivision (a), an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper. After the cause has been submitted to the court or jury to determine the facts the court may not order an action discontinued except upon the stipulation of all parties appearing in the action.

Whether or not a court grants an application to voluntarily discontinue pursuant to CPLR § 3217 is left to the sound discretion of the Court. (*White v. County of Erie*, 309 A.D.2d 1299 (4<sup>th</sup> Dept. 2003)). Plaintiff is entitled to discontinue its action at any time, unless "substantial rights have accrued or his adversary's rights would be prejudiced thereby". (*Louis R. Shapiro, Inc. v. Milsempes Corporation*, 20 A.D.2d 857 [1<sup>st</sup> Dept. 1964]).

In *Schimansky v. Moduline Industries*, 79 Misc.2d 888 (Sup.Ct., Columbia Co. 1974) plaintiff sought voluntary discontinuance on the eve of trial to enable the wrongful death claim to be re-instituted in the U.S. District Court for the Southern District of New York, where the only contention of the plaintiff was that the action in that venue would produce a significantly greater verdict than in Columbia County. Defendants contended that the backlog of civil cases in the Southern District was the greatest in the United States, and the accumulation of interest during the three or four year delay would prejudice defendants. In granting the motion for voluntary

discontinuance, the court cited *DeLaurentis v. Bercowitz*, 27 A.D.2d 869 (3d Dept. 1967) stated that plaintiff was not required to allege special circumstances to warrant a voluntary discontinuance.

In this case, defendants contend that they will be prejudiced because of the “effort and expenses that has been expended over six months of litigation”. Instead, they contend that they are entitled to summary judgment because they have shown that it was impossible for plaintiff to perform under the Joint Venture Agreement because they had no control over the shares of MSI, 35% of which they pledged as condition of the Agreement. The expenditure of funds over a six-month period is not equivalent to the accrual of substantial rights so as to justify denial of the motion. A trial court, in exercise of its discretionary powers, may condition the dismissal without prejudice upon the payment of statutory costs, disbursements, and expenses incurred in the discontinued action. (*Schimansky*, 79 Misc.2d at 891).

Defendants’ Cross-motion for summary judgment is denied. Defendants correctly state that plaintiffs were incapable of compliance with the terms of the contract since the shares of MSI were 100% owned by Robert Pena, a named defendant in the recently commenced action in District Court. Plaintiff contends that Pena was under a contractual obligation to the newly inserted plaintiff, Anthony Minuto, to convey a 35% interest in MSI, which would have permitted them to fully comply with the terms of the Shareholders’ Agreement.

Under these circumstances, the Court determines that defendants have not shown that they will be unduly prejudiced by the grant of leave to voluntarily discontinue the action. The plaintiffs’ motion to file a voluntarily discontinuance without prejudice is granted, with leave to defendants to apply to this Court, on five days notice, within thirty days from receipt of a copy of this Order with Notice of Entry, with supporting affidavits, for an order fixing terms as to statutory costs, disbursements, legal fees and additional expenses incurred from the inception of this action to the date of this Order.

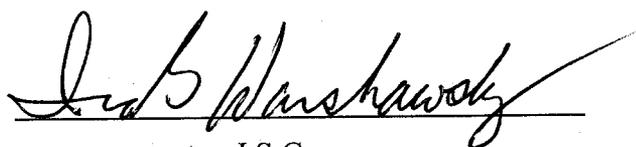
David Ledgin, Esq., is holding the \$310,000 funds wired by Infinity, but he no longer appears to be the attorney record for the plaintiffs. There is no reason for his involvement as an escrow agent. Counsel apparently representing plaintiffs, Thomas A. Blumenthal, Esq., has not

filed a Substitution of Attorney, but has appeared as the attorney representing plaintiffs in the action commenced by filing of a Complaint in the District of New Jersey. Under these circumstances, the Court concludes that the escrow funds should be maintained by Thomas A. Blumenthal, Esq., maintaining an office within the jurisdiction of the District of New Jersey.

Within thirty (30) days of the receipt of a copy of this Order with Notice of Entry, David Ledgin, Esq. is directed to issue a check from his attorney escrow account payable to Thomas A. Blumenthal, Esq. at 143 Main Street, Ridgefield Park, New Jersey 07660.

This constitutes the Decision and Order of the Court.

Dated: September 20, 2010

  
J.S.C.

**ENTERED**  
SEP 23 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE