Sheridan Broadcasting Corp. v Small
2004 NY Slip Op 30315(U)
July 30, 2004
Supreme Court, New York County
Docket Number: 603681/03
Judge: Helen E. Freedman
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SCANNED ON 8/5/2004

[* 1]

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

PRESENT: Helen E. Freedman
Justice

PART 39

Sheridan Broadcasting Corporation, et al,
Plaintiffs,

- v -

Sydney Small, et al.
Defendants

INDEX NO. 603681/03

MOTION DATE

MOTION SEQ. NO. 1

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 IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

RECEIVED
AUG - 2 2004
IAS MOTION SUPPORT OFFICE

FILED
AUG - 5 2004
NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 7/30/04

HEF
J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39
--------------------------------------X
SHERIDAN BROADCASTING CORPORATION,
SHERIDAN BROADCASTING NETWORKS, INC.,
and AMERICAN URBAN RADIO NETWORKS,

Plaintiffs,

-against-

Index No.: 603681/03

SYDNEY SMALL, NBN BROADCASTING, INC.,
ACCESS.1 COMMUNICATIONS CORP.-NY
a/k/a ACCESS.1-NEW YORK f/k/a UNITY
BROADCASTING NETWORK-NEW YORK,
INC., SUPERADIO LLC f/k/a ACCESS.1
COMMUNICATIONS-SUPERADIO LLC, and
ACCESS.1 COMMUNICATIONS CORP. a/k/a
ACCESS.1 Del.,

Defendants.
--------------------------------------X

HELEN E. FREEDMAN, J.:

In this action, a general partnership, one of its two partners, and the partner's corporate parent allege that defendant Sydney Small, who controls the other partner, covertly acquired a company that directly competes with the partnership's business. That competition breaches contractual and fiduciary duties to the plaintiffs, they claim. Defendants move for an order (1) dismissing six of the seven causes of action and (2) disqualifying plaintiffs' counsel for conflicts of interest. For the reasons set forth below, that branch of the motion seeking partial dismissal is granted and that branch seeking disqualification is denied as moot.

Background – In their Complaint, plaintiffs allege that American Urban Radio Networks ("AURN") is a Pennsylvania general partnership formed pursuant to a Partnership Agreement dated December 13, 1991 (the "Partnership Agreement") between plaintiff Sheridan

Broadcasting Networks, Inc., a Delaware corporation ("SBN"), and defendant NBN Broadcasting, Inc., a New York corporation ("NBN"). Both SBN and NBN own radio networks, and AURN markets the partners' original programming to radio stations nationwide. At all relevant times, Small was the co-chairman of AURN and a member of its management committee, and the chairman of NBN.

Plaintiffs claim that in 2001, Small formed a new Delaware corporation, defendant Access.1 Del. ("Access DE"), which then acquired 100% of the stock of NBN's parent, defendant Access.1 - New York ("Access NY").[1] Small has a 94.5% interest in Access DE, according to plaintiffs, and is the Chairman of both Access DE and Access NY. Small allegedly structured these transactions so that, without SBN's knowledge, he could sell a minority interest in NBN to outside investors, and use the proceeds to indirectly buy another company, Superadio LLC ("Superadio"). Access NY purchased Superadio's stock, so that NBN and Superadio are now sister corporations. Plaintiffs contend that Superadio directly competes with AURN's business and also vies for the same radio "personalities" that are or could be featured in AURN's programming.

The Partnership Agreement contains a number of relevant definitions and provisions. The "Partners" are defined as SBN and NBN. Section 5.1 of the Partnership Agreement prohibits the Partners from competing with AURN:

> Each Partner may have other business interests and may engage in any other business whatsoever, on its own account, or in partnership with, or as a shareholder of, any other person, firm or corporation, except where such business interests or other business is a competitor of, or competes with, the partnership.

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[1]Access NY was formerly known as Unity Broadcasting Network – New York, Inc., and executed the First Refusal Agreement, described below, by that name.

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Article 7(a) of the Partnership Agreement further restricts the Partners' outside business:

> SBN and NBN shall provide such product ("Product") of their respective Network Programming (as defined herein) to the partnership as the Partners may agree. The Partners agree that they shall not sell or provide Product to any radio network in competition with SBN, NBN or any network or networks which may be formed as a result of the formation of the partnership . . . .

"Network Programming" is defined as including "equipment, employees, agreements, correspondence and contacts used in the production of . . . programs, all rights to entertainment produced, and all copyrights and other intellectual property rights . . . ." Finally, section 14.3 provides that the Partnership Agreement "represents the entire understanding of the parties with respect to the subject matter hereof."

Plaintiffs further allege that the defendants breached another agreement dated December 13, 1991 (the "First Refusal Agreement") between SBN's corporate parent, plaintiff Sheridan Broadcasting Corporation ("SBC") and NBN's parent, Access NY, which granted the parties certain reciprocal rights of first refusal:

> 1.1. If SBC or [Access NY] (the "Offeror") wishes to sell, transfer or otherwise dispose of all or any part of its shares in SBN or NBN, respectively, to a [t]hird [p]arty, the Offeror shall first give written notice to [Access NY] or SBC, as the case may be (the "Offeree"), of its intention to do so. . . .The Offeree shall give the Offeror written notice of its election to purchase such interest within thirty (30) days following receipt of the Offeror's notice . . . .

In November 2003, the plaintiffs commenced this action. The Complaint sets forth seven purported causes of action: (1) AURN alleges that Small, its principal, breached his fiduciary duty to the partnership by acquiring Superadio and conducting business through that company that directly competes with AURN's. (2) SBN and AURN allege that NBN breached its fiduciary duty as a partner by "directly and/or indirectly" acquiring Superadio and competing

with AURN . (3) SBN alleges that NBN breached the Partnership Agreement by competing through Superadio. (4) All three plaintiffs allege that NBN, Access NY, Access DE and Superadio (collectively, the "Corporate Defendants") and Small have been unjustly enriched by wrongfully competing with AURN and SBN. (5) The plaintiffs allege that they "are entitled to an injunction" against the Corporate Defendants and Small for their breach of the Partnership Agreement. (6) The plaintiffs seek to have the "corporate veils" of the Corporate Defendants pierced, have them "consolidated as if all were the same entity and [have] the contractual obligations of NBN and [Access NY] . . . considered [as] the contractual obligations" of the other Corporate Defendants, and also hold Small liable for those obligations. (7) The plaintiffs allege that Access NY breached the First Refusal Agreement by transferring warrants in NBN to a third party without first offering them to SBC.

Discussion – In lieu of answering, the defendants moved for partial dismissal of the Complaint and to have plaintiffs' counsel disqualified. Defendants do not dispute the viability of the first cause of action, which alleges that Small violated his personal fiduciary duty as AURN's principal by acquiring Superadio through companies he controls and using it to compete with the partnership.

Piercing of corporate veil: The second, third, fourth, fifth, and sixth causes of action are each, at least in part, founded on the claims that the Corporate Defendants and Small are alter egos of each other, and accordingly (1) the boundaries among the Corporate Defendants should be disregarded to hold them jointly liable for contractual and fiduciary obligations as an AURN partner, and (2) the corporate form should be disregarded to hold Small personally liable for the Corporate Defendants' liabilities. To simplify the discussion, these common issues will be

addressed before the causes of action are considered singly.

The plaintiffs fail to allege any basis for disregarding the corporate form among the Corporate Defendants. Parent, subsidiary, and sister corporations are treated as separate and independent legal entities, and one corporation will not be found liable for the contractual obligations of another unless it completely dominated and controlled the obligee. *Alexander & Alexander of N.Y., Inc. v. Fritzen*, 114 A.D.2d 814, 815 (1985). Likewise, one corporation is not liable for another's torts without complete dominion and control. *Garcia v. Union Carbide Corp.*, 176 A.D.2d 219, 219 (1st Dept. 1991). "The fact . . . that . . . two corporations have identical controlling shareholders, officers and directors does not, by itself, warrant disregarding the separate corporate entities." *Ioviero v. Ciga Hotels, Inc.*, 101 A.D.2d 852, 853 (2d Dept. 1984). In this case, the Complaint lacks any factual allegations that NBN dominated or controlled Superadio or any of the other Corporate Defendants, or vice versa. The plaintiffs merely allege that Small directly or indirectly controls the Corporate Defendants. That does not provide grounds for holding them jointly liable.

Plaintiffs also fail to state any basis for holding Small individually liable. "[P]iercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Morris v. Dept. of Taxn. & Fin.*, 82 N.Y.2d 135, 141 (1993). An allegation that the defendant dominated a corporation does not suffice to state grounds for piercing the veil: a plaintiff must also set forth "particularized statements detailing fraud or other corporate misconduct." *Sheinberg v. 177 E. 77, Inc.*, 248 A.D.2d 176, 177 (1st Dept. 1998). Here, plaintiffs allege that

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> [b]y virtue of his position as sole stockholder, controlling stockholder, direct or indirect owner or majority stockholder of the [Corporate Defendants], Mr. Small has controlled and managed the activities and operations of the [Corporate Defendants] for his own purposes, plans and benefit and in order to evade the contractual obligations and restrictions involving the Plaintiffs and certain of the [Corporate Defendants], specifically the non-competition and programming clauses in the Partnership Agreement and the terms of the [First Refusal Agreement].

These allegations do not satisfy the element of fraud or other corporate misconduct. In essence, plaintiffs claim that Small skirted the obligations of the Partnership Agreement by acquiring Superadio and using it to compete with AURN, and caused Access NY to breach the First Refusal Agreement. However, the Partnership Agreement only prohibited NBN, as a "Partner," from competing with AURN; Superadio, a separate corporation, was free to compete. Accordingly, that competition did not constitute fraud or corporate wrongdoing.

Moreover, plaintiffs' claim that Small made Access NY breach the First Refusal Agreement does not suffice as grounds for piercing the corporate veil, inasmuch as the claim sounds in breach of contract, not fraud or corporate wrongdoing. *See Morris*, 82 N.Y.2d at 141-42 (citing cases).

In summary, plaintiffs do not make out any basis for piercing the corporate veil, either to hold any Corporate Defendant liable for another's obligations or to hold Small personally liable for a Corporate Defendant's obligations.

Breach of fiduciary duty and contract: Turning to the individual causes of action, the second and third causes of action are dismissed for failure to state causes of action. Plaintiffs allege that NBN breached both the Partnership Agreement and its fiduciary duty to the partnership by competing with it through Superadio, but as discussed above, NBN and Superadio are separate corporations and NBN is not liable for Superadio's actions. Plaintiffs do not allege

that NBN itself took any actions that violated its fiduciary duty or the Partnership Agreement.

Plaintiffs argue that, for the sake of equity, the term "Partner" in the Partnership Agreement should be deemed to encompass all of the Corporate Defendants and Small, and not just NBN. The Partnership Agreement is governed by the law of Pennsylvania, under which the Court preliminarily determines if the language of a contract is ambiguous (*see Royal Indem. Co. v. Security Guards, Inc.*, 255 F Supp 2d 497, 501 [ED Pa. 2003])(applying Pennsylvania law). If there is no ambiguity, the words of the contract are interpreted according to their ordinary meaning (*Amoco Oil Co. v Snyder*, 505 Pa. 214 [1984]). Here, the Partnership Agreement is unambiguous: the term "Partner" refers only to NBN and SBN. Accordingly, the claims fail.

Unjust enrichment: "To state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor." *Smith v Chase Manhattan Bank, U.S.A., N.A.*, 293 A.D.2d 598, 600 (2d Dept. 2002). Here, plaintiffs fail to allege that they conferred any benefit on the defendants. Moreover, the Partnership Agreement between SBN and NBN governs the subject matter of the dispute, and thereby precludes a claim sounding in quasi-contract. *See Clark-Fitzpatrick, Inc. v Long Isl. R.R. Co.*, 70 N.Y.2d 382, 388 (1987). Accordingly, the cause of action is dismissed.

Injunctive relief – Defendants improperly style their application for an injunction as a separate cause of action, *see Reuben H. Donnelley Corp. v Mark I. Marketing Corp.*, 925 F.Supp. 203, 207 (S.D.N.Y. 1996), and accordingly it is dismissed. Inasmuch as plaintiffs seek injunctive relief elsewhere in the Complaint, they are not precluded from that remedy if they prevail.

"Alter ego" claim – As discussed above, plaintiffs' factual allegations fail to state

grounds for disregarding the corporate form. Also, this "cause of action" is improper because "an attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation." *Morris*, 82 N.Y.2d at 141.

Breach of First Refusal Agreement – Plaintiffs claim that the defendants breached the First Refusal Agreement by issuing warrants in shares of NBN to a third party in 1993. Defendants move for dismissal on the ground that the cause of action is time-barred. Plaintiffs commenced this lawsuit in November 2003, some ten years after the breach of contract claim accrued. The First Refusal Agreement is governed by Pennsylvania law, and under the laws of the Commonwealth, claims for breach of a written contract must be commenced within four years of their accrual. 42 Pa. Consol. Stat. § 5525. Accordingly, the claim is untimely.[2]

Moreover, inasmuch as plaintiffs' alter ego claim is rejected, plaintiffs could only sue Access NY for breach of the First Refusal Agreement.

Disqualification of plaintiffs' attorneys – Finally, defendants move for an order disqualifying plaintiffs' counsel, Thacher Proffitt & Wood LLP ("Thacher Proffitt") on the ground that conflicts of interest bar an attorney from representing a general partnership in its lawsuit against one of its general partners.[3] However, all claims by AURN or against NBN are dismissed, and the only remaining claim is against Small for breach of his personal fiduciary duty to AURN. The defendants have not suggested that conflicts of interest bar Thacher Proffitt from

[2]It would also be untimely under New York six-year statute of limitations for breach of contract claims.

[3]The parties do not address whether a partnership, which is not a legal entity separate from those who compose it, can sue one of its partners for breach of contract and fiduciary duty. *See Svetik v. Svetik*, 377 Pa. Super. 496, 547 A.2d 794 (1988).

representing the plaintiff organizations in a lawsuit against one of the plaintiff's principals. Accordingly, the motion is denied.

For the reasons set forth above, it is

ORDERED that the defendants' motion to dismiss the second, third, fourth, fifth, sixth and seventh causes of action is granted and those causes of action are severed and dismissed; and it is further

ORDERED that the remainder of the action of the action shall continue, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly, and it is further

ORDERED that the defendants' motion for an order disqualifying plaintiffs' counsel is denied, and it is further

ORDERED that defendant Sydney Small is directed to serve an answer to the complaint within ten days after plaintiffs serve a copy of this order, and it is further

ORDERED that the parties are directed to appear for a preliminary conference before the Court (Room 208, 60 Centre St., NY, NY) on September 14, 2004 at 9:30 a.m.

Dated: July 30, 2004

ENTER:

FILED
AUG - 5 2004
NEW YORK
COUNTY CLERK'S OFFICE

J.S.C