

Margaret Loves Peter, Inc. v Dichtenberg

2005 NY Slip Op 30234(U)

September 26, 2005

Supreme Court, New York County

Docket Number: 0601693/2005

Judge: Jacqueline W. Silbermann

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

PRESENT: HON. JACQUELINE W. SILBERMANN

PART 50L

Index Number : 601693/2005
MARGARET LOVES PETER, INC.

vs
DICTENBERG, MARGARET

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

_____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-2 (3) memo of law

4

(5) memo of law

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the accompanying memorandum decision.

FILED
OCT 23 2005
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9-26-05

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

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

-----X
**MARGARET LOVES PETER, INC., by Peter
DICTENBERG, as a Shareholder of Margaret Loves
Peter, Inc.,**

Plaintiffs,

Index No. 601693/05

-against-

M.S. 001

**MARGARET DICTENBERG, 42 NAMES, LLC d/b/a
Margaret Loves Peter, 42 Names LLC d/b/a Fortune,
Fortune, Inc., Electric Wonder d/b/a Showroom Seven
International, and Karen Erickson,**

Defendants.

-----X
Jacqueline W. Silbermann, J:

In this shareholder derivative action, defendants Margaret DICTENBERG, 42 Names, LLC d/b/a Margaret Loves Peter, 42 Names, LLC d/b/a Fortune, Fortune, Inc., move to dismiss the first 14 causes of action of plaintiff's complaint on the ground of *res judicata*. The plaintiff opposes the motion.

For the reasons hereinafter set forth, the motion is denied.

BACKGROUND

The defendant, Margaret DICTENBERG, commenced a divorce action against Peter DICTENBERG, plaintiff-shareholder herein, in September, 2004. Margaret DICTENBERG's complaint alleged three grounds for divorce, to wit: constructive abandonment, adultery and cruel and inhuman treatment. Thereafter, Peter DICTENBERG filed an amended answer and counterclaim for divorce on the ground of cruel and inhuman treatment. The allegations supporting Peter DICTENBERG's cruel and inhuman treatment claim are similar to those alleged in the instant lawsuit.

A trial on the issue of grounds was scheduled to commence on March 31, 2005, in accordance with this Court's practice of resolving the issue of grounds at the outset of a matrimonial action in which the financial discovery is likely to be protracted and costly. In order to avoid a grounds trial, the Dichtenbergs executed a Stipulation on March 24, 2005, whereby Peter withdrew his amended answer and counterclaim and permitted Margaret to proceed on her claim for divorce on the ground of constructive abandonment. Peter reserved his right to litigate all remaining issues between the parties in the divorce action. An inquest was held on March 31, 2005, after which the Court reserved its decision on the issue of grounds for divorce pending the completion of discovery and the resolution of the remaining issues.

This derivative action was commenced on May 11, 2005 against Margaret Dichtenberg and her companies asserting numerous causes of action for breach of fiduciary duty in taking a business opportunity for herself, conversion, a restraining order, common law trade mark infringement, deceptive business practices, and conversion of books and records. A conspiracy claim also was filed against each of the defendants in separate causes of action. Upon the instant motion, Margaret Dichtenberg and certain corporate defendants move to dismiss the 14 causes of action against them on the ground of *res judicata*. Specifically, they assert that the instant derivative action is barred by Peter Dichtenberg's withdrawal of his counterclaim for divorce in the matrimonial action and his failure to assert his tort claim therein.

LEGAL ANALYSIS

In the case at bar, defendants assert plaintiff's complaint must be dismissed because Peter DICTENBERG's withdrawal of his counterclaim for cruel and inhuman treatment in the DICTENBERG matrimonial action, and the subsequent inquest thereon, represents a final resolution of the issues raised in the counterclaim and, as such, cannot be re-litigated herein. Plaintiff opposes the application and asserts that defendants have failed to establish the necessary elements of claim preclusion, to wit: that there has been a final judgment in the matrimonial litigation, and that there is an identity of parties in the two actions.

The doctrine of claim preclusion, or *res judicata*, stands for the proposition that a valid final judgment bars future actions between the same parties on the same cause of action (*Matter of Reilly v. Reid*, 45 N.Y.2d 24, 27; *Schuylkill Fuel Corp. v. Nieberg Realty Corp.*, 250 N.Y. 304, 306-307). The Court of Appeals has held that the doctrine of *res judicata* bars a subsequent plenary action which could have been but was not raised in a matrimonial action. *Baronow v. Baronow*, 71 N.Y.2d 284 (1988).

In the case at bar, however, it is clear that defendants cannot prevail on the ground of *res judicata*, because there has been no final adjudication in the matrimonial action between Peter and Margaret DICTENBERG, and because there is no identity of parties in the two cases.

As to the issue of the need for a final judgment, the defendants submit that the parties' Stipulation withdrawing Peter DICTENBERG's cause of action for cruel and inhuman treatment, together with the subsequent inquest thereon, is tantamount to a final resolution

of the issue grounds for divorce, and, as such, plaintiff's derivative suit based largely on the same set of facts and circumstances is barred. In support of this assertion, defendants rely heavily on the persuasive authority of *Chen v. Fisher*, (12 A.D.3d 43 [2d Dept. 2004]), wherein the Court, citing the *Baronow* case, *supra*, held that the wife's action against the husband for personal injuries brought subsequent to the commencement of the matrimonial action was barred by *res judicata*.

In the case at bar, however, plaintiff asserts – and the Court agrees – that there has been no final adjudication in the matrimonial action which would satisfy the elements of *res judicata*. Indeed, the Dichtenberg's Stipulation withdrawing the counterclaim for cruel and inhuman treatment specifically acknowledged that “ ... [t]he judgment of divorce will be deferred until the resolution of equitable distribution and counsel fees.” Moreover, at the conclusion of the inquest, the Court “reserved decision” pending the final resolution of the issues arising out of the parties' marriage.

The *Chen* case is distinguishable from the case at bar. First, it is clear that in *Chen* there was a “final judgment” issued after a trial on the merits of the parties' divorce claims, after which the Court granted a dual divorce. There, the Court, citing the *Baronow* case, noted that “a party to a concluded matrimonial action, who had a full and fair opportunity to contest title to the former marital home, is barred by *res judicata* principles from subsequently and separately reopening that issue.” *Chen*, citing *Borownow*, 71 N.Y.2d at 286. (emphasis added)

Conversely, in the case at bar, there has been no adjudication of anything -- as evidenced by the Dichtenberg's stipulation deferring judgment until the entire case is

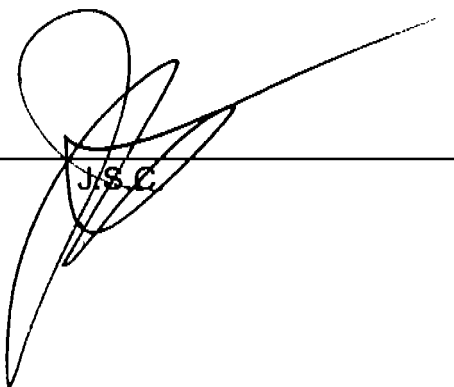
resolved.

The defendants' claim of *res judicata* must also fail because there is no identity of parties between the matrimonial action and the derivative action. Here, the plaintiff is the corporation Margaret Loves Peter, Inc. – a separate entity which can sue and be sued on its own behalf – and the defendants are the President of the plaintiff corporation (Margaret Dichtenberg), and other corporate entities formed by her. While it is true that Margaret Loves Peter, Inc. is a closely held corporation with Margaret and Peter Dichtenberg as its sole shareholders, the defendants have cited no authority which stands for the proposition that a close corporation cannot maintain a suit in its own name, and the Court is unaware of any such authority.

In light of the foregoing, defendants have failed to establish entitlement to dismissal of plaintiff's complaint on the ground of *res judicata*. The motion to dismiss is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
September 28, 2005



J.S.C.

FILED

OCT 3 2005

**COUNTY CLERK'S OFFICE
NEW YORK**