

Schorr v Steiner

2005 NY Slip Op 30283(U)

March 7, 2005

Supreme Court, New York County

Docket Number: 0605647/2000

Judge: Joan A. Madden

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

0605647/2000

PART 11

SCHORR, PETER
VS
STEINER, STUART

SEQ 3

DISMISS ACTION

IDEX NO. _____

OTION DATE 8/12/04

OTION SEQ. NO. _____

OTION 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 denied in accordance with the annexed memorandum Decision and order.*

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

FILED
MAR 11 2005
NEW YORK
COUNTY CLERK'S OFFICE

Dated: March 7, 2005

J

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

-----X

PETER SCHORR, ALLEGRA SCHORR FITCH and
ANDREW SCHORR, as assignees of certain interests
of the shareholders and derivatively on
behalf of STAR METH CORP., and STAR METH
CORP.,

Index No. 605647/00

Plaintiffs,

-against-

STUART STEINER,

Defendant.

-----X

Joan A. Madden; J.:

Defendant Stuart Steiner moves for an order dismissing plaintiffs second amended
complaint. Plaintiffs oppose the motion, which is granted for the reasons below.

Plaintiffs Peter Schorr, Allegra Schorr Fitch, and Andrew Schorr, originally sued in the
individual capacity as assignees of certain interests of the shareholders of Harmour Management
Corp., Has Meth Corp., and Star Meth Corp (together "the management corporations"). The
shareholder assignors of plaintiffs' respective interests in the management corporations are
Harold Schorr (Peter's father), Theodore Schorr (Andrew's father), and Seymour Schorr
(Allegra's father), the founders of the corporations (hereinafter "the Schorr brothers").

The management corporations operated two methadone maintenance programs.
Specifically, it is alleged that Star Meth was established to operate a clinic known as the East
Harlem Clinic while Harmour Corp, which later became Has Meth Corp, was established to run
when became known as the Koepfel Clinic. Steiner was employed as administrative director of

two methadone maintenance treatment programs owned and operated by the management corporations for nearly 25 years, until 1997.

This action arises out of Steiner's admitted embezzlement of funds from the management corporations by padding the clinics' payrolls and stealing cash receipts over a period of years. Plaintiffs allege that, as a result of Steiner's embezzlement, plaintiffs' assignors suffered personal, professional and financial hardship and, in 1993, Harmour Management and its successor, Has Meth, were forced into bankruptcy. In 1994, Star Meth was dissolved by proclamation for failure to pay taxes.

Steiner alleges that Peter Schorr discovered the scheme in January 1993 and confronted Steiner, who explained that he stole the money because Seymour Schorr had not arranged for pay raises that he had promised to Steiner. Steiner further alleges that, in January 1993, Peter Schorr ratified the fraud and agreed to give pay raises to Steiner and another employee involved in the scheme. Steiner alleges that he testified to these events in 1997 before a federal grand jury investigating tax fraud allegations involving plaintiffs' assignors and the management corporations.

In spring of 2000, more than two years after Steiner ceased his employment, plaintiffs retained a former Internal Revenue Service special agent, to investigate, among other things, whether, and to what extent, Steiner was involved in a fictitious employee or other fraud scheme involving the clinics' payrolls. The investigation allegedly revealed evidence that the payrolls included the names of more than 18 fictitious employees, that Steiner was directly involved in the scheme, and that Steiner terminated the positions "held" by the fictitious employees in January 1993. The investigation also allegedly revealed that the management corporations paid a

total of \$1,521,950 in wages to fictitious employees.

Based on the investigator's findings, plaintiffs commenced this action against Steiner on allegations of fraud, breach of fiduciary duty and unjust enrichment. Plaintiffs sought to recover compensatory damages consisting of \$1,521,950 in compensation paid to fictitious employees and \$660,265.64 in compensation paid to Steiner, together with \$500,000 in punitive damages, reasonable attorneys' fees, and prejudgment interest.

After the completion of discovery and the filing of plaintiffs' Note of Issue, the parties filed their respective motions for summary judgment. By decision and order dated April 10, 2004, this court denied plaintiffs' motion, and granted in part Steiner's cross motion. After reviewing the allegations in the complaint and the evidence in the record, the court found that the individual plaintiffs lacked standing to sue since the injuries were committed against the management corporations and not the plaintiffs individually. See Wolf v. Rand, 258 AD2d 401, 403 (1st Dept 1999). The court also found that the plaintiffs lacked the legal capacity to sue on behalf of Harmour Management and its successor, Hath Meth, as each had separately filed for bankruptcy, so that the claims brought in this action on their behalf could only be pursued by the trustee appointed in the bankruptcy proceedings. See Weiss v Goldfeder, 201 AD2d 644, 645 (2d Dept 1994); 11 USC § 541[a][1]).

Plaintiffs sought leave to replead and submitted a second proposed amended complaint. However, the court found that the proposed pleading, like the previous version, did not allege any wrongs committed against any of the individual plaintiffs, and that "as the action is on the trial calendar it is too late to allege new theories of liability." Nonetheless, leave to replead was granted to the extent of permitting plaintiffs to assert derivative claims on behalf of Star Meth.

Plaintiffs filed a second amended verified complaint on or about May 12, 2004.

The Motion

Steiner now moves to dismiss the second amended verified complaint, arguing that the new pleading fails to allege a derivative claim under New York law on behalf of Star Meth, as the individual plaintiffs are not shareholders, and that the complaint does not sufficiently allege that a demand was made on the corporation to bring this action. In addition, Steiner argues that contrary to the court's prior order, the new pleading asserts claims on behalf of plaintiffs' individually, and the bankrupt management corporations and raises new theories of liability.

Plaintiffs counter that the alleged deficiencies of the derivative claims asserted on behalf of Star Meth were not previously raised, and the court's prior order permitting the assertion of these claims is the law of the case. Plaintiffs also maintain that as assignees of certain interests of the shareholders, they have standing to bring a derivative action on behalf of Star Meth, and in support of this contention plaintiffs submit the affidavits of each of the Schorr brothers in which they each state that they agreed to assign their "respective interests and rights, as shareholders to certain of their respective children," and that the assignment was "unlimited" and included the right to bring a derivative action. Plaintiffs also assert that the second amended complaint adequately pleads the demand requirement

Plaintiffs alternatively argue that Star Meth is entitled to maintain an action directly against Steiner under the Business Corporation Law, which permits a dissolved corporation to bring an action to wind up its affairs to collect assets after dissolution. See BCL § 1005(a); 1006; 1009.

Plaintiffs also deny that the complaint sets forth new theories of liability, or that it asserts

claims on behalf of the individual plaintiffs or Has Meth.

Derivative Claims

Section 626(a) of the Business Corporation Law (“BCL”) provides that a derivative action may be brought on behalf of a corporation “by a holder of shares or voting trust certificates or of a beneficial interest in such shares or certificates.” Under BCL section 626(b), the holder of shares, or of a beneficial interest in shares, must be a holder at the time of bringing the action and at the time of the transaction of which he or she complains. See Independent Investor Protection League v. Time, Inc., 50 NY2d 259, 263 (1980). This doctrine known as contemporaneous ownership rule seeks to “foster public policy by inhibiting speculation in litigation [and]...must, as a general matter be rigorously enforced.” Id. at 264.

The second amended verified complaint alleges that in or about early 1992, the Schorr brothers “assigned [to the plaintiffs] their rights and interests in Star Meth... to pursue and to retain the proceeds of any and all claims, known and unknown, in favor of Star Meth.” Notably, the pleading does not allege that the plaintiffs received an interest in the shares of Star Meth. In fact, plaintiffs, by their own admission, are not shareholders of the corporation but, instead, are the purported assignees of certain undefined rights of their respective parent shareholders.

Plaintiffs nonetheless argue that they have a “beneficial interest” in the shares for the purposes of BCL section 626(a). However, during their depositions, plaintiffs admitted that they were not shareholders of Star Meth, and plaintiffs Peter Schorr and Andrew Schorr specifically stated that they were not assigned the stock, but only an unspecified interest. Indeed, even the carefully worded affidavits submitted by the Schorr brothers demonstrate that the shares themselves were not assigned to the plaintiffs, and statements that their intent was to give

plaintiffs the right to bring a derivative action on behalf of Star Meth is insufficient to avoid the requirement that plaintiffs own the shares or a beneficial interest in such shares. Thus, as plaintiffs have failed to set forth a sufficient basis upon which to assert an actual or a beneficial interest in shares of Star Meth, they do not have standing to bring this action. See Tal v. Malekan, 305 AD2d 281, 282 (1st Dept), lv denied, 100 NY2d 523 (2003); Cavanagh v. L&R Trucking & Warehouse Co., Inc., 29 Misc2d 576 (NY Co. 1961); compare Hirsch v. Lehman, 65 AD2d 523 (1st Dept 1978).

In addition, the court notes that Steiner's misconduct allegedly occurred between 1987 and early 1993, and that the alleged assignment to plaintiffs of the rights and interest Star Meth, was in 1992. Thus, under the contemporaneous ownership rule, even if plaintiffs had been able to show a beneficial interest in the shares, they would have no standing to bring a derivative action with respect to any wrongs committed before the assignment in 1992.

Furthermore, the second amended verified complaint, which alleges that "Star Meth has failed despite due demand, to pursue the claims and cause of actions alleged herein in its own corporate capacity," does not satisfy Business Corporation Law section 626(c), which requires that the complaint in a shareholder derivative action "set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort." See Marx v. Akers, 88 NY2d 189, 193 (1996).

Next, contrary to plaintiffs' position, the law of the case doctrine does not bar the dismissal of the derivative cause of action. Although plaintiffs were granted leave to amend under CPLR 3025(b) to include the assertion of a derivative cause of action by plaintiffs on behalf of Star Meth, such leave was granted upon the court's finding that the proposed cause of

action was not “plainly lacking in merit.” Thomas Crimmins Contracting Co., Inc. v City of New York, 74 NY2d 166 (1989). However, on this motion, a review of the complaint in light of the evidence provided by the parties demonstrates that plaintiffs do not have standing to assert a derivative cause of action, and that the demand requirement has not been satisfied. See Baskin and Sears, P.C. v. Lyons, 188 AD2d 307, 307-308 (1st Dept 1992); Mehlman v. Gutterman Homes Corp., 121 AD2d 523 (2d Dept 1986).

Direct Claims By Star Meth

In the event that derivative claims are not permitted by the court, plaintiffs alternatively request that an action be permitted by Star Meth directly, arguing that a dissolved corporation may bring an action to collect assets to wind up its corporate affairs. This request is denied. While the court recognizes that a corporation, like Star Meth, which was dissolved for failure to pay taxes retains the ability to sue to wind-up its corporate affairs (Metered Appliances, Inc. v. 75 Owners Corp., 225 AD2d 338 (1st Dept 1996)), the record contains no evidence or indication that the action was brought for this purpose. Notably, Star Meth was dissolved in 1994, or approximately six years before the commencement of this action, which was not brought by Star Meth, but by the plaintiffs’ assignees seeking to recovery on their own behalf. Moreover, plaintiffs first requested that Star Meth be made a plaintiff only as a final effort to salvage claims that this court found to be improperly brought by individual plaintiffs. Under these circumstances, plaintiffs’ request to assert a direct claim by Star Meth is denied.


Finally, to the extent the second amended complaint contains claims on behalf of the individual plaintiffs, or the bankrupt management corporations, and/or seeks to add new theories of liability, it must be dismissed as contrary to the court’s prior order.

In view of the above, it is

ORDERED that the motion to dismiss the second amended complaint is granted; and it is further

ORDERED that the second amended complaint is dismissed in its entirety, and the Clerk is directed to entered judgment accordingly.

DATED: March 7th, 2005


J.S.C.

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