

Mainzer v Packer

2007 NY Slip Op 33025(U)

September 17, 2007

Supreme Court, New York County

Docket Number: 0524-07/

Judge: Stephen A. Bucaria

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

BARRY MAINZER, RON MAINZER,
ALFRED MAINZER, INC., GALLERY
GREETINGS, LTD. and ALMA
PUBLISHING CORP.,

TRIAL/IAS, PART 6
NASSAU COUNTY

INDEX No. 010524/07

MOTION DATE: July 31, 2007
Motion Sequence # 002

Plaintiffs,

-against-

BRAD PACKER, LYNN PACKER and
MANHATTAN POSTCARDS, INC.,

Defendants.

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Opposition..... X
- Reply Affirmation X

This motion, by defendants, for an order pursuant to CPLR § 602(a) transferring this case to the New York Supreme Court, Queens County, where it can be tried jointly with **Packer v. Alfred Mainzer, Inc., Index et al no. 25428/06** and **In re Dissolution of Alfred Mainzer Inc., et al Index no. 4451/07** now pending in Queens County and for such other and further relief as to the Court may seem just and proper, is determined as hereinafter set forth.

FACTS

This is an action in which plaintiff alleges that Brad Packer, as Chief Financial Officer of Alfred Mainzer, Inc.'s ("AMI"), Alma Publishing Corp. ("Alma"), and Gallery Greetings, Inc. ("Gallery") and his wife Lynn, used Brad's unfettered access to the Companies' records and bank accounts for: 1) conversion of corporate assets and diversion of corporate funds to benefit themselves; 2) fraud; 3) breach of fiduciary duties; and 4) intentional interference with AMI's assets causing the shareholders to sustain a significant loss of profits. The complaint also seeks to enjoin the defendants from using any information they have received from AMI's records, from destroying materials that could be used in this proceeding, from taking any further part in the operation of the Corporation and to return any materials in their possession that are part of AMI's records. This action was commenced on June 14, 2007 in Nassau County, New York.

This action involves a dispute among family members relating to the operation of AMI, Alma and Gallery. Lynn and her brother Barry Mainzer ("Barry") each own 50% of the common stock of Alma and Gallery. Lynn and her brother each own 24.9% of the common stock of AMI and her father, Ronald Mainzer ("Ronald"), owns the remainder of the stock. Alma owns a warehouse in Long Island City, New York in which AMI operates its business as well, rent-free.

On or about November 17, 2006, Lynn on behalf of Alma, brought a derivative suit against AMI, Barry and Ronald seeking, *inter alia*, rent for Alma from AMI. That action entitled, **Packer v. Alfred Mainzer, Inc., et al** is pending before Judge Oren Kitzes in Queens Supreme Court, bearing index number 25438/06. On February 15, 2007, Lynn, in her capacity as a minority shareholder, brought a special proceeding seeking the dissolution of AMI. That action, entitled **In re Dissolution of Alfred Mainzer, Inc., et al**, is also pending before Judge Kelly in Queens Supreme Court, bearing index number 4451/07. Pursuant to a consent order entered on June 26, 2007, that action is in the process of being transferred to Judge Kitzes.

While discovery was proceeding in both of those cases, AMI, Gallery, Alma, Barry and Ronald brought this action seeking to enjoin Brad and his new company Manhattan Postcards, Inc. ("MPI") from engaging in what they characterized as unfair competition. A temporary restraining order and preliminary injunction motion were resolved in accordance with the consent order.

DEFENDANT'S CONTENTIONS

The defendants contend that the issues in this case bear directly on the facts and legal issues that are pending in the two Queens County actions. The defendants assert that if Judge Kitzes grants Lynn's petition to dissolve AMI, there will be no basis to allow any of the damages claims in this case against Brad for unfair competition and breach of fiduciary duty because the alleged wronged party is AMI. In addition, it is argued that the complaint, brought by Lynn on behalf of Alma, also contains claims against Barry for breach of fiduciary duty. This case presents the other side of the same coin: claims of breaches of fiduciary duty against Brad. All of these claims arise out of the same facts and circumstances; involve the same conduct and the same corporation, and counsel argues that the claims should all be heard in the same forum to avoid inconsistent results. Furthermore, the defendants assert that the law is clear that absent special circumstances, the proper venue is the county in which the first-filed action is pending. The defendants contend that there are no special circumstances presented here. AMI, Gallery and Alma are, or were operating in Queens. There is no connection to Nassau other than the individuals in the case live there. That is certainly no reason to burden this court by moving two cases from Queens to Nassau that are already in the discovery stage. For all the above reasons, they argue that this case should be transferred to Queens County and tried jointly with the actions pending there.

PLAINTIFFS' CONTENTIONS

The plaintiffs assert that the Queens County actions are patently separate and distinct from one another and from the matter currently pending before this Court. The plaintiffs argue that a court must deny a motion to consolidate where the issues presented in two (or more) actions sought to be joined could be confusing to the jury. The plaintiffs argue that the actions are at very different stages of the litigation process and that the transfer of this matter to Queens and any consolidation of all three actions herein would waste judicial resources and potentially place undue burden on the litigants to engage in unnecessary and/or protracted motion practice.

They contend that the action before this Court involves different parties and causes of action and seeks distinctly different remedies than the Queens actions; that neither MPI nor Brad are parties to either of the Queens County actions, and plaintiff Gallery is not named in the Queens actions. Furthermore, Ronald is not personally involved in the Queens Country Derivative Action and is only named party to the

Dissolution Proceeding. They feel transfer of this case to Queens would prejudice the plaintiffs and result in undue hardship to plaintiff Ronald, a Nassau County resident, who is seventy-five years old and suffers from health ailments that negatively impact his mobility. Based on the foregoing, plaintiffs argue that defendants' motion to transfer the instant action to Queens County should be denied.

DECISION

In the case at bar the defendants have properly requested transfer of this case to Queens County where it can be tried jointly with the above named actions per CPLR § 602(a). When considering defendants' motion for joint trials, per CPLR § 602(a), it has been established that the actions bear common questions of law and fact.

All three of these actions involve AMI, ALMA or the owners and operators of the corporations. At issue in all three actions are the assets and operation of AMI. The first action was brought by Lynn on behalf of Alma seeking rent from AMI (owned by Barry and Ronald). The second action seeks to dissolve AMI and the current action seeks to prevent MPI from essentially stealing business from AMI. As of June 26, 2007 the second action was being sent to Judge Kitzes who was handling the original action, and a determination of that action necessarily impacts this instant case. The actions, therefore, necessarily involve common questions of law and fact, as well as the same parties and witnesses. Despite the fact that the Queens actions are at a different stage of litigation than this action, it has been established that the cases are related and therefore discovery in the earlier actions would have produced information that would be relevant in this action. It is consequently in the interest of judicial economy to have a joint trial of these three actions.

Complete consolidation of these actions may cause confusion to the finder of fact, especially if the finder of fact were a jury of lay persons, because there are parties herein which, upon merger of the cases, would find themselves on both sides of the action. However, joint trials would allow the actions to be kept separate, each requiring their own verdict and judgment. (Padilla v. Greyhound Lines, 29 A.D. 2d 495, 1st Dept., 1968).

With respect to the claim of special circumstances on behalf of the plaintiff Ronald, no affidavit of a physician was provided as to the extent of his physical incapacity, and Nassau County is directly adjacent to Queens, and no real hardship has been demonstrated. In addition, Ronald as partial owner of AMI, visits the Long Island

MAINZER, et al v PACKER, et al

Index no. 010524/07

City office and may be expected to be called as a witness in the already existing Queens County actions. However, even were Ronald required to take a longer car ride to the Queens County Court it would not outweigh the judicial economy that would be served by having these cases tried jointly.

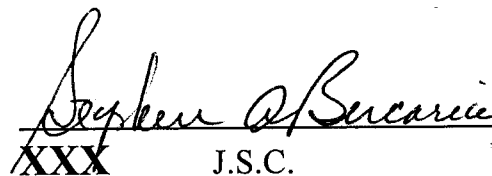
Accordingly, the Court directs that the actions be tried jointly, without consolidation on the condition that the Presiding Trial Justice, on his/her motion or upon the application by any party, direct separate trials only in the event of a note of issue and statement of readiness is not filed in each action. Further, a separate judgment and bill of costs shall be rendered in each action. The right to open and close shall be determined by the Presiding Trial Justice.

Upon service of a copy of this order, with any fees required, upon the Clerk of the County of Nassau, she is ordered to transfer and/or transmit the within file to the County Clerk of Queens County.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

Dated SEP 17 2007


XXX J.S.C.

ENTERED
SEP 21 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE