

Brescia v Silberman

2009 NY Slip Op 30597(U)

March 16, 2009

Supreme Court, New York County

Docket Number: 601336/2007

Judge: Emily Jane Goodman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
EMILY JANE GOODMAN

PRESENT:

PART 17

Justice _____

Index Number : 601336/2007
BRESCIA, MICHAEL
 VS.
SILBERMAN, JOEL AARON
 SEQUENCE NUMBER : # 001
 DISMISS COMPLAINT

INDEX NO. 60/336-01

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

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

*and cross motion
is decided per*

attached

FILED

MAR 20 2009

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/16/09

[Signature]
EMILY JANE GOODMAN J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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: IAS PART 17

-----x
MICHAEL BRESCIA, OLIVER DIRKS, BRYAN DOORISH,
CAROL DOORISH, JAIME DOORISH, PETER OSHIRO,
ROBERT WELLS

Plaintiffs,

Index No.
601336

-against-

JOEL AARON SILBERMAN, JEFF TREZZA, MICHAEL
DOHERTY & ONYX CORPORATION

Defendants.

FILED
MAR 20 2009
NEW YORK
COUNTY CLERK'S OFFICE

-----x
EMILY JANE GOODMAN, J.S.C.:

Defendants Jeff Trezza and Michael Doherty move to dismiss this action, involving a nightclub/restaurant which used to be located at 168 Sullivan Street, on the basis that (1) Plaintiffs (who did not make a demand on the board) allege, in a conclusory fashion, that the demand was excused due to its futility, (2) the action is not a proper derivative lawsuit because the corporation¹ should have been named as a Plaintiff and not as a Defendant, and (3) because the injuries are personal in nature. The complaint alleges causes of action for accounting, unjust enrichment, and conversion against Trezza and Doherty, as directors of the board.

¹Defendant Silberman states in his affidavit in support of the cross motion that "there is no such entity as Defendant Onyx Corp." even though his co-defendants' refer to the corporation's name as "Onyx Corp." Silberman fails to divulge the actual name of the corporation, which appears to be "Onyx Restaurant Corp." which was previously known as "S.T.D. Restaurant Corp." Both corporations are listed with the Department of State website as active domestic business corporations, with the registered agent of Joel Silberman 168 Sullivan Street, New York, New York.

Defendant Joel Aaron Silberman brings a cross motion to dismiss this action on the grounds of lack of personal jurisdiction over him and the corporation, or alternatively, to vacate a default in answering the complaint and allow service of a late answer.² The complaint alleges causes of action against him for accounting, unjust enrichment, and conversion, as well as one cause of action for fraud and one cause of action for fraudulent inducement, based on Silberman's alleged misrepresentations to Plaintiffs that their investment "would be utilized toward full funding of the startup costs" for the corporation, "such that all revenue forthcoming from the nightclub would constitute "pure profit" which would be distributed to the shareholders." The complaint alleges one cause of action against the corporation for breach of contract for failing to keep books and records, prepare tax returns, and prepare and deliver reports and statements concerning the corporation's income and expenses for the fiscal year, within 90 days of the end of the fiscal year.

In maintaining that service was improper, Silberman states that he moved from his residence at 330 East 38th Street Apartment 41 B prior to the date of service, and that when service was made, he resided at the Carter Hotel in Times Square. He attaches a copy

²Plaintiffs also submit a copy of a motion for a default judgment against Defendants Silberman and the corporation. However, it does not appear that this motion was ever properly filed with Room 130, and therefore it is rejected.

of a receipt for the Cartel Hotel indicating a 14 day stay from 5/2/07 to 5/16/07. Silberman also claims that the corporation was improperly served at the address of the nightclub/restaurant because it was already closed at the time that service was made.

The motion to dismiss is denied. The cross motion to dismiss is held in abeyance pending further papers on the issue of personal jurisdiction over Silberman and the corporation. This Court had previously requested reply papers from Plaintiffs on this issue by telephone conference and held the motions in abeyance, but apparently, there was confusion as to who was asked to submit reply papers. Upon further review, all parties should submit papers on the jurisdictional issue. Neither Trezza nor Doherty raise the issue of lack of personal jurisdiction over the corporation. Even if service was improperly made at the address of the restaurant/nightclub, service on the corporation may have nonetheless been properly effectuated by service on Defendants Trezza or Doherty.

Discussion

The motion to dismiss is denied. Although it is true that failure to make a demand on a board of directors will not be excused as futile, if the failure to make a demand is based on conclusory allegations of wrongdoing (see Marx v Akers, 88 NY2d 189 [1996]), the complaint alleges sufficient facts to evidence that a demand on the board would be futile here (see Hu v Shen, 57 AD3d

616 [2d Dept 2008]). Plaintiffs allege they have never received any distribution of income whatsoever, and that have demanded, but have never received, any records regarding the company whatsoever, including income and expense reports and executed copies of their respective stock shareholder agreements and stock purchase agreements (see Bansbach v Zinn, 1 NY3d 1 [2003] [futility of demand was established by conduct of board which indicated that it placed interests of an individual above the interests of the corporation]).

Further, although the corporation should have been named as a Plaintiff to the extent that the action is a derivative one, this error results in no prejudice and may be remedied by amendment of the caption to clarify that Plaintiff Brescia is suing both individually and derivatively on behalf of the corporation (see Hu v Shen, 57 AD3d 616, supra). Although this action does in fact appear to be a hybrid action, alleging both derivative claims on behalf of the corporation against its directors for wrongful acts, as well as causes of actions personal to the individual Plaintiffs (specifically, those claims asserted against Silberman for fraud and fraud in the inducement involving Plaintiffs' initial investments), none of the cases cited by Defendants Trezza and Doherty stand for the proposition that a hybrid action cannot be maintained. Where both derivative and personal claims are properly plead, a hybrid action may in fact be maintained (id.). The

allegations of waste and mismanagement are sufficient to withstand this motion to dismiss because no discovery has taken place and because Plaintiffs have alleged that they have been denied access to the very corporate documents to which they are entitled to review (see BCL §624) which might support their derivative claims.

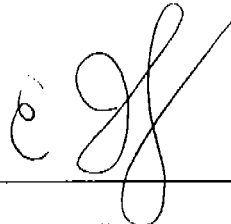
Accordingly, it is

ORDERED that motion to dismiss is denied; and it is further

ORDERED that cross motion to dismiss is held in abeyance pending the additional papers described herein, which should be submitted directly to Chambers (Room 551) within 20 days of receipt of this Decision and Order.

This constitutes the Decision and Order of the Court.

Dated: March 16, 2009

ENTER: 

J.S.C.
EMILY JANE GOODMAN

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MAR 20 2009
NEW YORK
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