

Colarossi v Daly

2009 NY Slip Op 31481(U)

June 29, 2009

Supreme Court, Nassau County

Docket Number: 003334/2008

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:

HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 9

GARY C. COLAROSSO, individually and on behalf
of himself and all other Shareholders and Members
similarly situated of FIVE FOR FIGHTING, INC.,
FULL ENVIRONMENTAL SERVICES, LTD. and
D&M EXCAVATING, LLC,

INDEX NO.: 003334/2008
MOTION DATE: 04/09/2009
MOTION SEQUENCE: 003

Plaintiffs,

-against-

ACTION NO. 1

KENNETH DALY, AQUA-NOVA COMMERCIAL
SERVICES, LLC, AQUA-NOVA, LLC, MARK
PESONEN, KEVIN McGILLOWAY, FIVE FOR
FIGHTING, INC., FULL ENVIRONMENTAL
SERVICES, LTD. and D&M EXCAVATING, LLC,

Defendants.

LYON FINANCIAL SERVICES, INC., d/b/a
US BANCORP MANIFEST FUNDING SERVICES,

ACTION NO. 2

Plaintiff,

- against -

SUFFOLK COUNTY
INDEX NO.: 038058/2008

FULL ENVIRONMENTAL SERVICE, LTD. and
GARY C. COLAROSSO,

Defendants.

CATERPILLAR FINANCIAL SERVICES CORPORATION,

ACTION NO. 3

Plaintiff,

SUFFOLK COUNTY
INDEX NO.: 044476/2008

- against -

GARY COLAROSSO d/b/a D&M EXCAVATING,
LLC and AQUA NOVA COMMERCIAL SERVICES,
LLC,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed	1
Affirmation of Charles A. Gruen in Opposition & Exhibits Annexed	2
Affirmation of Cameron E. Grant in Opposition	3
Reply Affirmation of Inna N. Cordiale in Support of Plaintiff Colarossi's	
Motion Pursuant to CPLR 602 & Exhibits Annexed	4

PRELIMINARY STATEMENT

The Plaintiffs in Action No. 1 move to consolidate the above three actions on the grounds that they contain common questions of law and fact, and that venue is properly in Nassau County. Alternatively, they request a joint trial of the actions in the Commercial Part of Nassau County Supreme Court. Lyon Financial and Caterpillar, the Plaintiffs in Actions No. 2 and 3 oppose the motion, claiming that there are no common questions of law or fact.

BACKGROUND

Action No. 1 is a shareholders' derivative suit commenced by Colarossi as a shareholder of Full Environmental, Five for Fighting and D&M Excavating. The suit, commenced on February 21, 2008, alleges that Defendant Daly induced Colarossi to invest in Daly's Cesspool business, in an effort to make it more desirable to a prospective purchaser. Colarossi advanced

\$300,000 and formed D&M Excavating, the purpose of which was to install septic tanks for customers of Daly's cesspool business. Daly and Colarossi executed an operating agreement calling for equal shares of assets, profits, losses and distributions of D&M Excavating. D&M purchased equipment, the payment for which was personally guaranteed by Colarossi. These guarantees form the basis for actions 2 and 3.

Daly and Colarossi formed another corporation, Five for Fighting, Inc., 100 shares of which went to Daly, 62 7/8 to Colarossi, 18 7/8 to Equity Trust Company, Custodian Gary C. Colarossi IRA, and 18 1/4 shares to Equity Trust Company, Custodian Diane M. Colarossi, IRA. The company was capitalized with \$300,000 advanced from the Colarossi interests, and a \$100,000 intangible asset consisting of the personal guarantees of Colarossi on the D&M equipment loans. Daly pledged \$400,000 in receivables from two of his companies, Full Cesspool Services, Inc. (Full Cesspool) and Ray Service Cesspool Services, Inc. (Ray Service). Colarossi's cash contribution also served as a cash investment in Full Environmental Service, Ltd. (Full Environmental), an existing Daly company. Pursuant to a shareholders' agreement Five for Fighting received 96 shares of Full Environmental. Both Colarossi and Daly became officers of Full Environmental.

The Plaintiff alleges that Daly thereafter diverted cash payments from customers of D&M Excavating to himself, diluted and appropriated receivables of Full Cesspool and Ray Service, and began negotiating the sale of the Cesspool Business to Defendants Pesonen and McGilloway, principals of the Defendant Aqua Nova. They claim that in November 2004, Daly, Pesonen, McGilloway and Aqua Nova conspired to take over the Cesspool Business without the consent of, or compensation to, Colarossi.

The Plaintiffs further allege that Daly agreed with Co-defendants to sell Full Environmental, Five for Fighting, and D&M Excavating for an additional \$1,200,000 payable in four installments, without the knowledge or consent of Colarossi. To the extent that these payments were made, they were diverted by Daly for personal use. Aqua Nova attempted to change the registration on the equipment on which Colarossi was liable on personal loan guarantees, but was unable to do so because of the liens. The equipment, it is alleged, is being

used by the Defendants, who have failed to make loan payments, thereby resulting in Actions Nos. 2 and 3 against, among others, Colarossi, as personal guarantor. In addition, the Plaintiff alleges that accounts receivable of Full Cesspool and Ray Service were manipulated to deprive Full Environmental, Five for Fighting, and D&M Excavation of the funds to which they were entitled. Instead, the monies were diverted to Aqua Nova, in which Daly was now a shareholder, but not Colarossi.

The First Cause of Action calls for the impression of a trust on the assets of Full Environmental, Five for Fighting, and D & M Excavation so received. The Second Cause of Action alleges fraud on the part of the Defendants, and claims damages of \$1.5 million. The Third Cause of Action alleges wrongful receipt of \$500,000.

Action No. 2 is a claim for the unpaid balance on an equipment lease agreement between Full Environmental and Lyon Financial Services, Inc. (Lyon). The agreement called for a monthly rental of \$99.00 for the first six months, and \$1,751.31 for the next 54 months. Colarossi unconditionally guaranteed payment of the obligations of Full Environmental.

Action No. 3 is a bit more complex. It is on behalf of Caterpillar Financial Services Corporation (Caterpillar) arising originally from a lease of equipment to D&M Excavating, personally guaranteed by Colarossi. This action dates back to September 13, 2005, when the Summons and Complaint was filed. Caterpillar, D&M and Aqua Nova thereafter entered into a forbearance agreement, whereby Caterpillar would discontinue collection efforts and replevin so long as Aqua Nova made payments on behalf of D&M. Aqua Nova apparently breached the agreement and Caterpillar, by action commenced in December, 2008, seeks to vacate the forbearance agreement and pursue its rights under its contract with D&M and Aqua Nova.

D&M's original agreement was with H.O. Penn, which assigned its rights under the contract to Caterpillar. The agreement called for the payment of \$116,761.80, plus interest in 60 monthly installments of \$1,956.03. According to the complaint, as of December 1, 2007, D&M owed Caterpillar \$65,204.22, including \$3,057.73 in late charges.

The First Cause of Action seeks a declaratory judgment setting aside the settlement/forbearance agreement. The Second Cause of Action seeks replevin of the equipment

on which it has a perfected security interest. The Third Cause of Action seeks damages of \$65,204.22, and the Fourth Cause of Action alleges conversion.

DISCUSSION

The purpose for consolidation is judicial economy. It is clearly favored by the Courts, but can only be granted where there is a significant legal or factual issue common to the actions. The determination is left to the sound discretion of the court, but absence a showing of prejudice to a party objecting to consolidation, it should be granted. (*Gadelov v. Shure*, 274 A.D.2d 375 [2d Dept. 2000]).

The threshold question is the existence of a common question of law or fact. Colarassi is apparently personally responsible for the loan made by D&M Excavating, but, according to the motion papers, would implead others, including Daly, Full Environmental, and Aqua Nova, for claims of diversion of D&M funds for personal benefit and failure to make payments in accordance with the obligations of D&M. Under such circumstances, the entire panoply of claims by Colarossi in Action No. 1 will be placed before the Court in Suffolk County. There is therefore a significant potential for inconsistent determinations based on what would ordinarily appear to be a straight-forward claim for unpaid lease payments.

Action No. 3, in anticipation of impleader as in action No. 2, will again bring into question whether the assets of D&M have been diverted so as to expose Colarassi to potential exposure on a personal guarantee, undertaken for the joint benefit of others. There is a significant issue whether or not the personal guarantee survives the forbearance agreement involving D&M, Aqua Nova and Caterpillar. Nevertheless, Colarossi, as a shareholder of D&M, is seeking recovery of receivables and other assets which he claims have been diverted at the direction of Daly and other Defendants, the purpose of which was to deprive him of his beneficial interest in the corporation.

It is understandable for the Plaintiffs in Actions Nos. 2 and 3 to seek to avoid entanglement in the multiplicity of issues which have arisen among the parties. Unfortunately, what may well appear on the surface to be a rather mundane action to recover equipment and payments, will quite obviously expand to include the claims raised in Action No. 1. It may well

be that these Plaintiffs will be able to show entitlement to some form of interim relief, such as to minimize the need for their involvement in the underlying issues.

In any event, the opponents of the motion have not established that the consolidation, or joint trial of these actions, will cause substantial prejudice to them.

The Court believes that a joint trial is the appropriate action in this matter. Colarossi is the Plaintiff in Action No. 1 and a Defendant in Actions Nos. 2 and 3. A consolidation would, at least cosmetically, require a reconfiguration of the caption in which Colarossi would appear as both a Plaintiff and Defendant.

Venue is properly in Nassau County, in that this is where the first of the three actions was commenced. *Id.*

The motion by the Plaintiff in Action No. 1 is granted to the extent that the three actions will be tried jointly, under Nassau County Index No. 003334/2008. The Suffolk County Clerk is directed to transfer the files under Suffolk County Index Nos. 038058/2008 and 044476/2008 to the Nassau County Clerk, to be filed under Nassau County Index No. 003334/2008.

To the extent requested relief is not granted, it is denied.

The parties are directed to appear for an amended Preliminary Conference for the purpose of scheduling discovery on July 23, 2009, at 9:30 A.M. The matter is in the Commercial Part and the parties are directed to comply with the Commercial Part Rules as set forth in the Uniform Rules for Trial Courts, §§ 202.70 et seq.

This constitutes the Decision and Order of the Court.

Dated: June 29, 2009


J.S.C.

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**