

Barbaro v Spinelli

2009 NY Slip Op 32106(U)

September 10, 2009

Supreme Court, Richmond County

Docket Number: 100155/09

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

NICHOLAS BARBARO,

**Index No: 100155/09
Calendar No: 1761-001
2261-002**

Plaintiffs,

-against-

**DECISION & ORDER
HON. JOSEPH J. MALTESE**

**THOMAS SPINELLI, DONNA SPINELLI a/k/a
DONNA MAZZAFERRO, ALLSTATE FUNDING
SERVICES, INC., MATIZ MALDONADO, BUSINESS
CLUB NETWORK, INC., HOWARD TAPS and
ILLUMILUNA, INC. d/b/a PLI,**

Defendants.

The following papers numbered 1 to 5 were marked fully submitted on the 24th day of July, 2009:

	Pages Numbered
Notice of Motion for Summary Judgment by Defendants Thomas Spinelli and Donna Spinelli with Supporting Papers (dated June 2, 2009).....	1
Notice of Cross Motion to Strike Answer by Plaintiff Nicholas Barbaro, with Supporting Papers and Memorandum of Law (dated July 6, 2009).....	2
Affirmation in Opposition by Plaintiff Nicholas Barbaro, with Affidavit (dated July 13, 2009).....	3
Affirmation in Opposition by Defendants Thomas Spinelli and Donna Spinelli (dated July 16, 2009).....	4
Reply Affirmation (dated July 17, 2009).....	5

Upon the foregoing papers, the motion (No. 1761) of defendants Thomas Spinelli and Donna Spinelli to dismiss the complaint as against them pursuant to CPLR 3211(a)(7) and CPLR 3212 is granted, in part, and denied, in part; plaintiff’s cross motion (No. 2261)

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to strike the moving defendants' answer pursuant to CPLR 3126 is denied.

This action arises out of a certain written Joint Venture Agreement dated March 2008 which provided, *inter alia*, for the formation of a corporate entity named Lifebulb International, Inc. (hereinafter "LI") to distribute and sell high-efficiency light bulbs throughout the United States, Mexico and Latin America. Insofar as it is pertinent to the motion, defendant Thomas Spinelli executed the agreement as president of defendant Allstate Funding Services, Inc.(hereinafter "Allstate"). His wife, defendant Donna Spinelli, a/k/a Donna Mazzaferro, did not execute the contract, and maintains that her only involvement in this joint venture was to assist in drafting the terms of the parties' original business agreement. Pursuant to that Agreement, plaintiff Nicholas Barbaro and defendants Matiz Maldonado and Howard Taps, each of whom executed the contract in their individual capacities, were the sole and equal shareholders of LI. As is relevant, the Agreement further provided that LI's revenues were to be deposited with defendant Allstate, which financed the venture and was required thereby to collect LI's revenues and distribute the net proceeds back to LI after payment of its debts and expenses.

In the complaint, plaintiff asserts as a first cause of action solely against the Spinellis, their wrongful conversion of business revenues in the amount of \$188,900, which allegedly represents plaintiff's one-third share of the net profits of LI's business transactions in Villahermosa, Mexico. The second cause of action, also asserted solely against the Spinellis, is for reasonable attorney's fees of not less than \$150,000.00. The remaining causes of action are asserted as against all of the named defendants as follows: the third, for their tortious interference with plaintiff's contract rights; the fourth, for their wrongful usurpation of corporate opportunities that were created and developed solely by plaintiff; the fifth, for their joint and individual false representations to plaintiff pertaining to the formation, operation and conduct of the joint business venture; the sixth, for their collective conspiring to deprive plaintiff of the fruits, benefits and profits of the joint venture; the seventh, for their unjust enrichment; and the eighth, for their breach of fiduciary duty to plaintiff and the covenant of good faith and fair dealing.

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In moving to dismiss the complaint as against them, the Spinelli defendants maintain that the plaintiff/shareholder lacks standing in his individual capacity to challenge the non-party corporation's payment of corporate proceeds in the amount of \$188,900.00 to defendant Thomas Spinelli (hereinafter "Spinelli"). More specifically, it is argued that an individual shareholder may only sue derivatively, e.g., to recover corporate assets and profits that have been wrongfully misappropriated and diverted. Therefore, plaintiff, in his individual capacity, has no standing to dispute LI's corporate "Resolution" dated May 12, 2009 to pay the sum of \$188,900.00 to Spinelli in partial satisfaction of a certain judgment he obtained against plaintiff Barbaro in an unrelated action. Moreover, since LI authorized the payment, there can be no claim that said defendant exercised unauthorized dominion over these funds. In any event, movants maintain that plaintiff lacks standing since he assigned "the right to receive" these designated funds to a non-party individual by a written "Irrevocable Limited Assignment" dated January 29, 2009.

In further support of dismissal and/or summary judgment, defendants allege that a viable cause of action does not exist as against defendant Donna (Mazzaferro) Spinelli, since her only role in the subject transaction was the preparation of the March 2008 Agreement. According to movants, no attorney-client relationship existed between this defendant and any other party to the action, therefore, she owed him no fiduciary duty. Finally, with respect to the remaining causes of action, the moving defendants particularize the deficiencies and/or lack of specificity of each, i.e., insufficient facts supportive of the required elements of the causes of action have not been alleged.

In opposition to the motion, it is alleged that defendant Spinelli had no right to "unilaterally execute" against the proceeds of the joint venture that were not yet in plaintiff's possession. The plaintiff/shareholder further maintains that he was not required to commence a derivative action since the claims he asserts are not on behalf of the corporation; rather, the acts alleged in his first cause of action pertain to a separate and distinct wrong against him individually. With respect to defendant Donna (Mazzaferro) Spinelli, plaintiff continues to maintain that she was the attorney for the parties' joint venture, and notes that she wrongfully used her personal residence in Florida as the business address for LI. It is also claimed that she set up business accounts under which her husband

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could unilaterally withdraw joint venture funds, thereby assisting the wrongful retention of plaintiff's share of the profits by the other defendants. In this regard, plaintiff claims that a viable conversion claim exists as a result of defendant Spinelli's retention and refusal to return the funds at issue, which undeniably represent plaintiff's share of LI's profits.

As for the remaining causes of action, it is alleged that dismissal at this early stage of the proceedings would be "grossly premature". More particularly, plaintiff claims that certain necessary disclosure is vital to enable him to procure critical information and financial documentation within defendants' exclusive possession, pertaining to, *inter alia*, the "Villahermosa Project" (where it is alleged that the individual defendants unilaterally failed to provide an accounting for his purported net profits of \$188,900.00), and defendants' further failure to account for the proceeds of various other business ventures involving the sale of light bulbs which they purportedly negotiated in direct contravention of the non-competition clause in the Joint Venture Agreement. To further justify the need for disclosure regarding defendants' covert business ventures distributing light bulbs, plaintiff claims that defendant Spinelli "is using a warehouse located at the Industrial Park in Staten Island for the purpose of assembling, storing and distributing the very same high efficiency light bulbs from the very same manufacturers for future contracts that were originally intended for the sole benefit of LI."

In considering a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, it is well established that the complaint is to be afforded a liberal construction, the allegations therein are accepted as true; and the pleadings viewed in the light most favorable to plaintiff (*see* CPLR 3026; Doria v Masucci, 230 AD2d 764, 765 *lv denied*, 89 NY2d 811). In any such inquiry, the sole criterion is whether "from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (Guggenheimer v Ginzburg, 43 NY2d 268, 275; Doria v Masucci, 230 AD2d at 765). Moreover, while the court on such a motion may freely consider affidavits submitted by plaintiff to remedy defects in the complaint, when this occurs, the relevant criterion shifts to whether the pleader has a cause of action, not whether he or she has stated one. Moreover, such a motion must be denied unless it has been shown that a material fact as claimed by the pleader is not a fact at all and no significant dispute exists regarding same (*see* Leon v Martinez, 84 NY2d 83, 88;

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Guggenheimer v Ginsburg, 43 NY2d at 275; Rovello v Orofino Realty Co., 40 NY2d 633, 635-636).

Applying the foregoing principles to the case at bar, it is the Court's opinion that viewed in the light most favorable to plaintiff and taking into account his affidavit and other evidentiary material submitted in support of his claims (*see* Rovello v Orofino Realty Co., 40 NY2d at 636), the allegations in the complaint are legally sufficient to sustain the third, fourth, fifth, sixth, seventh and eighth causes of action, each of which is predicated upon the Joint Venture Agreement and represent plaintiff's personal claims rather than being derivative in nature (*see generally* Hu v Ziming Shen, 57 AD3d 616). More specifically, in his affidavit, plaintiff attests that *he* prepared the business plan for the joint venture and shortly thereafter, introduced his "long time friend" Spinelli into the venture to finance it; that Spinelli, Taps and Maldonado excluded him from LI's operations and prevented him from having any access to its books and records; and that they calculated the net profits of the corporation without his input, arriving at a sum which was less than half of those projected as evidenced by a certain "Operation, Cost and Profit" statement prepared by Taps and Maldonado. Plaintiff further attests that Spinelli has continued to wrongfully utilize plaintiff's skills, resources, prior efforts, work plans and manufacturing connections for his own personal benefit by conspiring with Taps and Maldonado to procure other distribution contracts subsequent to the Villahermosa project in violation of the non-competition provision in the Joint Venture Agreement, and that Spinelli, together with his wife (1) intentionally interfered with the parties' joint venture and usurped corporate opportunities created solely by plaintiff, and (2) directed Taps and Maldonado to exclude plaintiff from all of LI's future transactions. However, since the conflicting affidavits of, e.g., the Spinelli defendants are sufficient to raise triable issues of fact, the dismissal of these causes of action at this early stage of the proceedings would be premature (*see* CPLR 3211[d] and 3212[f]).

The same cannot be said, however, for the first and second causes of action for the wrongful conversion of business revenues in the amount of \$188,900, and for reasonable attorney's fees.

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With regard to the latter, since there is no express provision in the parties' agreement, nor a statute or court rule which authorizes such a remedy in this case (*see* TAG 380, LLC v ComMet 380, Inc., 10 NY3d 507, 515; Hooper Assoc., Ltd. v GS Computers, 74 NY2d 487, 491), the second cause of action is legally insufficient even at this stage of the proceedings and must be dismissed.

With regard to the plaintiff's claim of conversion, he lacks the requisite standing to recover the sum of \$188,900.00 inasmuch as it is undisputed that he assigned his right to receive said proceeds from the corporation in a written irrevocable assignment to a third party. As such, plaintiff's assignee is the sole party with standing to seek the recovery of these funds. Notably, however, if it is determined that plaintiff's one-third share of the business profits attributed to the Villahermosa project exceeded \$188,900.00, then plaintiff's claim to any excess profits would become a proper subject of a shareholders derivative suit, e. g., to vindicate his rights as a shareholder for the alleged conversion or diversion of corporate profits (*see* Albany-Plattsburgh United Corp. v Bell, 307 AD2d 416, 419, *lv denied* 1 NY3d 620; Elenson v Wax, 215 AD2d 429).

Turning to the cross motion to strike defendants' answer for failure to comply with plaintiff's Notice for Discovery and Inspection and Combined Demands dated March 19, 2009, since there has been no showing that defendants willfully or contumaciously refused to comply with this Court's Preliminary Conference Order dated March 31, 2009, the cross motion is denied (*see* Athnasiou v First Natl. City Bank US Corp., 225 AD2d 726).

Accordingly, it is hereby:

ORDERED, that the motion of defendants Thomas Spinelli and Donna Spinelli, a/k/a Donna Mazzaferro, to dismiss the complaint as against them is granted solely to the extent that the first and second causes of action are hereby severed and dismissed; and it is further

ORDERED, that the balance of their motion is denied; and it is further

ORDERED, that plaintiff's cross motion to strike defendants' answer is denied; and it is further

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ORDERED, that defendants are directed to respond to plaintiff's Notice for Discovery and Inspection and Combined Demands dated March 19, 2009, a copy of which is annexed to the cross motion within thirty days of the service upon them of a copy of this Decision and Order with notice of entry; and it is further

ORDERED, that the Clerk enter judgment accordingly.

All parties shall appear for in DCM Part 3 on **September 30, 2009** at **9:30 a.m.** for a status conference.

E N T E R,

DATED: September 10, 2009

Joseph J. Maltese
Justice of the Supreme Court