

2005 Tomchin Family Charitable Trust v Tremont Partners, Inc.

2009 NY Slip Op 33402(U)

September 11, 2009

Supreme Court, New York County

Docket Number: 600332/09

Judge: Richard B. Lowe III

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

PRESENT: HON. RICHARD B. LOWE, III
Justice

E-FILE PART 56

2005 Tomchen Family Charitable Trust

- v -

Tremont Partners Inc

INDEX NO. 600 332/09
MOTION DATE 4/17/09
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
Sep 16 2009
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

RECEIVED
SEP 16 2009
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NYS SUPREME COURT - CIVIL

Dated: 9/16/09

HON. RICHARD B. LOWE, III

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

Handwritten signature/initials

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 56

-----X
2005 TOMCHIN FAMILY CHARITABLE TRUST,
Derivatively on Behalf of RYE
SELECT BROAD MARKET XL FUND, L.P.,

Plaintiff,

Index No. 600332/09

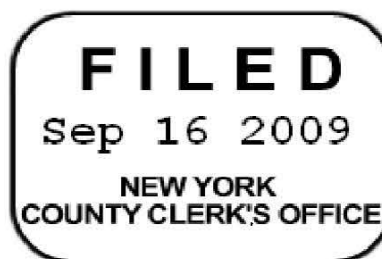
-against-

TREMONT PARTNERS, INC., TREMONT GROUP
HOLDINGS, INC., RYE INVESTMENT
MANAGEMENT, ROBERT SCHULMAN, STUART
POLOGE, PATRICK KELLY, AND KPMG LLP,

Defendants,

RYE SELECT BROAD MARKET XL FUND, L.P.,

Nominal Defendant.



-----X
RICHARD B. LOWE III, J.:

Motion Sequence No. 1 and 2 are consolidated for disposition. In Motion Sequence No. 1, defendant KPMG LLP (KPMG) moves by order to show cause, pursuant to CPLR 2201, for a stay of the instant action pending resolution of multiple related federal actions, which have been filed and consolidated in the United States Court for the Southern District of New York under *In Re Tremont Securities Law, State Law and Insurance Litigation* (Master File No. 08 Civ. 11117) (the Consolidated Federal Action). In Motion Sequence No. 2, defendants Tremont Group Holdings, Inc., Tremont Partners, Inc., Rye Investment Management, Robert Schulman, Stuart Pologe and Patrick Kelly (collectively Tremont Defendants) move for similar relief.

Pursuant to the parties' stipulation dated June 30, 2009, the parties agreed to stay the action against defendant KPMG pending arbitration. Thus, this court need only address the

Tremonts Defendants' application.

Background

This is a shareholder derivative action commenced by Tomchin on behalf of nominal defendant Rye Select Broad Market XL Fund, L.P. (the XL Fund). The complaint asserts breach of fiduciary duty and unjust enrichment claims (Counts I and II) against the Tremont Defendants, and professional malpractice and breach of contract claims against KPMG (Counts III and IV). The gravamen of the complaint against the Tremont Defendants concerns their alleged violation of legal duties owed to the XL Fund, arising from their improper investment of the XL Fund's capital in Bernard Madoff's Ponzi scheme, which ultimately resulted in losses. The Tremont Defendants interposed an answer, dated April 27, 2009, asserting general denials, and four affirmative defenses.

The Tremont Defendants move to stay this action pending resolution of the Consolidated Federal Action, claiming that the instant action is duplicative of derivative claims previously brought on behalf of the XL Fund, and other hedge funds managed by them, that are presently pending in the federal court. Specifically, they argue that the instant action is similar to *Peshkin v Tremont Group Holdings, Inc.* (No. 08 CV 11183) (the Peshkin Action), filed prior to the instant action, and *Laborers Local 17 Pension Plan and Daniel Jackson v Tremont Group Holdings* (No. 09 CV 2505) (the Laborers Local Action), filed shortly after the instant action, in that the derivative claims asserted in the state and federal litigations seek recovery on behalf on the XL Fund against the same defendants. Thus, the Tremont Defendants maintain that a stay is appropriate because the aforementioned actions involve virtually identical factual and legal issues, and would avoid the risk of inconsistent rulings attendant to duplicative litigation.

In opposition, Tomchin disputes that the Peshkin Action was filed prior to the instant action, and instead claims that the instant action was filed before the derivative claims were asserted in the federal actions. Additionally, it argues that a stay should be denied, because the derivative claims raised in the Consolidated Federal Action are allegedly subject to at least three defenses that will hinder their prosecution.

Discussion

CPLR 2201 provides that “[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.” While it has been held that a stay pending determination of a related action should be granted only when the other action shares complete identity of parties, claims and relief sought (*see Asher v Abbott Labs*, 307 AD2d 211 [1st Dept 2003]), a stay may also be warranted when there exists substantial identity between the two actions (*id.*; *see also Goodridge v Fernandez*, 121 AD2d 942 [1st Dept 1986]). A stay in the “latter instance is justified upon due consideration of issues of comity, orderly procedure and judicial economy” (*Asher v Abbott Labs*, 307 AD2d at 211).

A review of the court transcript taken on March 19, 2009 (the Tremont Defendants’ moving papers, Exhibit 21, transcript taken in the Consolidated Federal Action on 3/19/09), and the subsequent order (*id.*, Exhibit 22, the Consolidated Federal Action, Order, J. Thomas P. Griesa, 3/26/09), reflect that the Consolidated Federal Action consists of actions that were consolidated under one master docket and caption (08 Civ, 11117), with three separate divisions thereunder, constituting the Securities Law Actions (08 Civ.11212), the State Law Actions (08 Civ.11183) and the Insurance Actions (09 Civ. 557); that the plaintiffs under each

division were directed to file consolidated amended complaints by April 20, 2009, and the defendants were required to file their answers or motions to dismiss by May 20, 2009.

Subsequent to the submission of this instant motion, this court received copies in each division of the amended consolidated complaints, the memorandums of law in support of the Tremont Defendants' motion to dismiss, the memorandums of law in opposition to the defendants' motion to dismiss, and the reply memorandums of law in further support of the Tremont Defendants' motion to dismiss. Regarding the amended consolidated complaint filed in the State Law Actions division, it sets forth six claims against the Tremont Defendants for breach of fiduciary duty (Count I), unjust enrichment (Count III) and breach of contract (Count IV) on behalf of class plaintiffs, and breach of fiduciary duty (Count VIII), professional negligence (Count X), and unjust enrichment (Count XIII) on behalf of derivative plaintiffs. The amended consolidated complaint in the Securities Actions division, commenced by plaintiffs as a class action, asserts the following claims under federal securities law, common law and state law against the Tremont Defendants: violations of Section 10 (b) of the Exchange Act and Rule 10b-5 of the Securities and Exchange Commission (Count I); violations of Section 20 (a) of the Exchange Act (Count II); common-law fraud (Count III); negligent misrepresentation (Count IV); breach of fiduciary duty (Count V); gross negligence and mismanagement (Count VI); and unjust enrichment (Count VII).

A comparison of the state and federal complaints discloses the assertion of the same derivative claims, seeking the same remedies, based on similar allegations of the Tremont Defendants alleged misconduct in investing the XL Funds' assets with Bernard Madoff. The breach of fiduciary claims seek the recovery of damages consisting of the investment capital lost

as a result of the Tremont Defendant's purported breaches of fiduciary duties, while the unjust enrichment claims seek the recovery of the professional fees, expenses and other pecuniary benefits received by the Tremont Defendants during the time of their alleged misconduct. While the consolidated federal complaints assert class actions and violations of federal law, as well as state claims, it is clear that the issues surrounding the Tremont Defendants' purported misconduct is relevant to all claims asserted. Thus, this court finds that there is substantial identity between the instant action and the consolidated Federal Action, with respect to overlapping issues, parties, relief requested, common questions of law and fact, and similar presentation of proof (*see Belopolsky v Renew Data Corp.*, 41 AD3d 322 [1st Dept 2007]; *see also Goodridge v Fernandez*, 121 AD2d 942, *supra*), thus warranting a stay in this action.

Tomchin disputes the Tremonts Defendants' position that the instant derivative action was filed subsequent to the derivative claims pending in the Federal Court, and instead argues that a stay is not warranted, since the instant action, filed on February 4, 2009, was the first one to assert derivative claims on behalf of the XL Fund. A review of the record discloses that the Peshkin Action was filed on December 23, 2008, prior to the instant action. Although the Peshkin Action was originally brought as a class action, it was subsequently amended on February 25, 2009 to assert derivative claims on behalf of the XL Fund. Thus, the period of time between the filing of the derivative claims in the instant action, and those in the Peshkin Action was approximately three weeks, a minimal period of time. The derivative claims in the Laborers Local Action were filed on March 18, 2009, approximately 6 weeks after the instant action. In any event, the mere fact that the instant derivative action was filed first does not mandate that an application for its stay be denied (*see e.g. Certain Underwriters at Lloyd's London v Pneumo*

Abex Corp., 36 AD3d 441 [1st Dept 2007]).

Tomchin also contends that the derivative claims in the federal actions are subject to the following three defenses, that may result in their dismissal in federal court, consisting of: (1) the derivative plaintiffs' lack of standing, (2) the derivative plaintiffs' inability to simultaneously prosecute class and derivative claims, and (3) the federal court's lack of jurisdiction over the derivative claims.

This court first notes that the federal court shall exercise supplemental jurisdiction over state law claims "that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy ..." (28 USCA § 1367 [a]; *see also Itar-Tass Russian News Agency v Russian Kurier, Inc.*, 140 F3d 442 [2d Cir 1998]). Further, a review of the Tremonts Defendants' motions to dismiss in the State Law Actions and the Securities Actions reflects that they have raised challenges to the federal plaintiffs' claims, including the federal plaintiffs' lack of standing to assert derivative claims, and the viability of their class action claims. Thus, the anticipated defenses described by Tomchin should be addressed and resolved by the determinations of the motions to dismiss. Since the motions to dismiss are currently pending in the federal court, this court directs a stay of the within action pending determinations of the aforementioned motions to dismiss filed in the Consolidated Federal Action. Upon determination of these motions, either party may move for vacatur of the stay.

Conclusion

Accordingly, it is

ORDERED that, in Motion Sequence No. 001, the motion, pursuant to CPLR 2201, by defendant KPMG LLP, for a stay of the within action is resolved in accordance with the

parties' stipulation dated June 30, 2009, granting a stay of the claims against KPMG LLP pending arbitration; and it is further

ORDERED that, in Motion Sequence No. 002, the motion, pursuant to CPLR 2201, by defendants Tremont Group Holdings, Inc., Tremont Partners, Inc., Rye Investment Management, Robert Schulman, Stuart Pologe and Patrick Kelly, for a stay of the within action is granted to the extent of staying all claims asserted against them pending the determination of the pending motions to dismiss filed by the Tremont Defendants in *In Re Tremont Securities Law, State Law and Insurance Litigation*, (Master File No. 08 Civ. 11117).

Dated: September 11, 2009

EXTD
HON. RICHARD B. LOWE, III

J. S. C.

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