

860 Nostrand Assoc., LLC v G. Willi-Food Intl., Ltd.

2010 NY Slip Op 30030(U)

January 5, 2010

Supreme Court, New York County

Docket Number: 602504/08

Judge: Richard B. Lowe

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

PRESENT: HON. RICHARD B. LOWE, III
Justice

PART 56

860 Nostrand Associates

INDEX NO. 602504/08
~~59007-109~~

MOTION DATE 6/2/09

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

G. Willi-Food, Inc.

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 _____

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PAPERS NUMBERED
MOTION SUPREME COURT OFFICE
NYS SUPREME COURT - CIVIL

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED
DATE 11/11/2010 BY 60322 UCBAW/STP/STP

FILED
JAN 11 2010
NEW YORK
COUNTY CLERK'S OFFICE

W. Allen

[Signature]
HON. RICHARD B. LOWE, III

Dated: 1/5/10

J.S.C.

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Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

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860 NOSTRAND ASSOCIATES, LLC,

Plaintiff,

-against-

G. WILLI-FOOD INTERNATIONAL, LTD.,

Defendant-Third Party Plaintiff,

-against-

ELI BIRAN and ARIE STEINER,

Third-Party Defendants.
-----X

Hon. Richard B. Lowe, III:

Third-party defendants Eli Biran (Biran) and Arie Steiner (Steiner) (collectively, Movants) move, pursuant to CPLR 3211 (a) (4) and (a) (7) and CPLR 3016, for an order dismissing the third-party complaint, and, pursuant to 22 NYCRR 130-1.1, for reimbursement of their costs in defending against frivolous allegations in the third-party complaint. Defendant/third-party plaintiff G. Willi-Food International, Ltd. (Willi) cross-moves for an order consolidating this matter with *WF Kosher Food Distributors, Ltd. v Laish Israeli Food Co., Ltd.*, Sup Ct, NY County, Lowe, J., index No. 602005/08 (the WF Action) for discovery purposes and directing a joint trial.

Background

The third-party complaint contains two causes of action: the first sounds in fraud as against Movants, and the second alleges breach of fiduciary duties by Biran. On January 31, 2008, WF Kosher Food Distributors, Ltd. (WF), a subsidiary of Willi, entered into a lease with

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plaintiff 860 Nostrand Associates, LLC (860 Nostrand) for the premises at which WF was then conducting its business (the 2008 Lease). The 2008 Lease expanded the area that WF had previously been renting from 860 Nostrand. Willi explains that, at all relevant times, Steiner was 860 Nostrand's principal and Biran was WF's chief executive officer.

In the main action, 860 Nostrand seeks to enforce a purported guaranty of the 2008 Lease by Willi. Willi states that it commenced the third-party action because Movants, among other things, committed fraud as to the procurement of the 2008 Lease and the guaranty. Willi alleges that Movants should therefore be found liable to Willi if Willi is found liable to 860 Nostrand.

Movants maintain that Willi's allegations are not only false but also have been raised in the past, including in the WF Action. They contend, upon information and belief, that Willi brought the third-party action in an attempt to stall eviction proceedings that were pending in Housing Court in Kings County with respect to WF's failure to pay rent to 860 Nostrand. Movants further believe that Willi hopes to convince 860 Nostrand to forgo the rent owed under the 2008 Lease.

Movants argue that the falsity of allegations that Steiner engaged in wrongdoing is proven by the efforts of Willi's chief executive officer, Tzvi Williger (Williger), to hire Steiner as WF's chief executive officer in June 2008. Steiner submits a draft employment agreement that he says Williger provided to him, which Steiner declined to execute. Steiner opines that Williger would not have offered him the position as WF's C.E.O. if there were any truth to the allegations of wrongdoing by Steiner against Willi.

Movants also assert that the allegations and damages being sought herein are the same as those alleged in the WF Action. CPLR 3211 (a) (4) states that a party may move to dismiss an action if "there is another action pending between the same parties for the same cause of action

...; the court need not dismiss upon this ground but may make such order as justice requires.” Movants maintain that, pursuant to CPLR 3211 (a) (4), Willi should not be allowed to seek damages from them based on the same allegations in two separate lawsuits. Movants further contend that the causes of action rely on Willi’s allegations of fraudulent inducement, yet the claims fail to satisfy the heightened pleading requirements under CPLR 3016 (b).

According to Movants, Willi’s claims are based on two alleged facts, which they claim are frivolous: (a) that Biran acted without authority in entering into the 2008 Lease; and (b) that Movants knew that Willi did not really need the additional space provided for under the 2008 Lease. They maintain that the first argument is belied by the 2008 Lease itself and related documentary evidence which shows that Willi knew of the existence of the 2008 Lease. Movants argue that the assertion that Willi did not really need the additional space is frivolous and is not a valid claim under New York law.

Willi cross-moves for an order consolidating this matter with the WF Action for discovery purposes and directing a joint trial. It argues that the pendency of the WF Action does not support dismissal of the third-party complaint. Willi asserts that the claims are not identical and that it is not a party in the WF Action. It further points out that the guaranty of the 2008 Lease is not at issue in the WF Action. Willi explains, however, that the issues in the two actions are related and that many of the parties are the same.

Willi explains that the allegations in the WF Action include that 860 Nostrand and others defrauded WF with regard to, among other things, the sale of a business to WF, the management of WF’s business, the entry into a settlement agreement and the execution of two leases, including the 2008 Lease.

In the WF Action, WF sought consolidation with the instant action. At a January 6, 2009

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preliminary conference in the WF Action, this court granted WF leave to file a motion to consolidate, but stated that such motion should be deferred until the court rendered a decision on a then-pending motion to dismiss. The court in the WF Action stated that, once that motion to dismiss was decided, WF could then file the motion to consolidate within 14 days of service of the order with notice of entry.

On June 5, 2009, subsequent to the filing of the instant motion and cross motion, this court issued its decision on the motion to dismiss in the WF Action. This court in the WF Action did not dismiss any of the causes of action brought against Steiner or Biran. On December 11, 2009, based on provisions in an employment agreement between Biran and WF, this court found the claims against Biran in the WF Action to be arbitrable. Thus, in the WF Action, this court ordered WF to commence an arbitration of its claims against Biran, and stated that a failure by WF to do so would result in dismissal of those claims as against Biran.

Willi argues that the reasons for consolidation for discovery and a joint trial include the identity of some parties in the two suits and the similarity of some issues. It contends that a joint trial will allow for judicial economy in conducting discovery and will preserve the integrity of the captions for entry of judgment. Willi asserts that the issues and the parties in this case and in the WF Action are in many respects the same. Willi notes that an exception is that it is not a party to the WF Action and the guaranty is not at issue in that action. There are, otherwise, common question of law and fact and common witnesses, according to Willi.

Movants reply that consolidation of this action with the WF Action would not be appropriate. They assert that the WF Action deals primarily with claims arising from an alleged fraud perpetrated by Laish Israeli Food Company, Ltd. (Laish), a company for which Steiner was the sole shareholder, in the sale of its assets to WF. Movants state that 860 Nostrand and Laish

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are separate and distinct entities. They further maintain that, although Willi and WF are related as a parent/subsidiary, they are separate corporate entities. Movants assert that Willi's motion for consolidation should be denied because there is not an identity of parties or of issues.

Movants argue that the instant action is a simple lease case in which Willi has refused to pay its outstanding rent. They assert that Willi is improperly trying to bootstrap this matter to the WF Action, which is a complicated commercial dispute. Movants point out that the WF Action has 12 causes of action, of which only two relate to the issue of WF's outstanding rent. They maintain that Willi's motion to consolidate is an attempt to delay the instant action.

In the event that the court grants Willi's consolidation motion, Movants ask the court to sever the sixth cause of action for rescission of the lease and the seventh cause of action for fraud from the WF Action and consolidate those issues with the instant case, pursuant to CPLR 602 and 603. They argue that the issues raised by Willi and the outstanding rent can be resolved prudently and quickly.

Discussion

"CPLR 3211 (subd [a], par 4) vests a court with broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties on the same cause of action" (*Whitney v Whitney*, 57 NY2d 731, 732 [1982]). "While complete identity of parties is not a necessity for dismissal under CPLR 3211 (a)(4), there must at least be a 'substantial' identity of parties 'which generally is present when at least one plaintiff and one defendant is common in each action' [citation omitted]" (*Proietto v Donohue*, 189 AD2d 807, 807-08 [2d Dept 1993]).

There is not a substantial identity of parties between the third-party action and the WF Action. Willi is not a party to the WF Action, such that there is not at least one plaintiff and one

defendant in common in each action. Thus, there third-party action is not dismissed under CPLR 3211 (a) (4).

On a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a claim, in assessing the adequacy of a complaint, the court must construe the allegations therein liberally, giving plaintiff the benefit of all inferences (*Leon v Martinez*, 84 NY2d 83 [1994]).

In its June 5, 2009 decision in the WF Action, this court, among other things, denied that part of the motion that sought dismissal of the fraudulent inducement claim relating to the 2008 Lease as against Steiner. This court pointed out that the requirement under CPLR 3016 (b) for a plaintiff to set forth the circumstances constituting the fraud in detail is not to be construed so strictly as to prevent an otherwise valid claim from going forward, especially where plaintiff cannot provide details that may be in the possession of defendants (*Lanzi v Brooks*, 43 NY2d 778 [1977]). This court in the WF Action further noted that discovery had not yet begun, and that the allegations were sufficient to state claims for fraudulent inducement at this stage in the action.

In the WF Action, this court further stated that issues as to the sufficiency of the fraud claim could be revisited on a future summary judgment motion, if the parties later decide to file such a motion. The same reasoning applies herein, given that Willi's fraud allegations regarding the 2008 Lease in the instant action are basically the same as WF's allegations as to the 2008 Lease in the WF Action.

The cross motion is also denied. While courts generally favor consolidation in the interest of judicial economy where there are common questions of law and fact, and where the party opposing the motion does not show that consolidation will prejudice a substantial right (*see Amtorg Trading Corp. v Broadway & 56th St. Assoc.*, 191 AD2d 212, 213 [1st Dept 1993]), this

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court finds that, given the current posture of this action and the WF Action, consolidation is not appropriate at this time.

Although there are some common questions of fact and law regarding some of the causes of action in the WF Action and those in the third-party complaint herein, the particular circumstances weigh in favor of denying consolidation at this time. The WF Action has been stayed pending arbitration of the claims against Biran. Therefore, so that the instant action will not be unduly delayed, the cross motion is denied, without prejudice to Willi's bringing a similar motion in the future, at the conclusion of arbitration, or, if WF fails to commence such arbitration, upon the resulting dismissal of the claims against Biran in the WF Action.

Conclusion

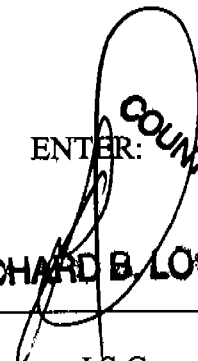
Accordingly, it is

ORDERED that the motion to dismiss the third-party action is denied; and it is further

ORDERED that third-party defendants are directed to serve an answer to the third-party complaint within 10 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the cross motion is denied.

Dated: January 5, 2010

ENTER: 
HON. RICHARD B. LOWE, J.S.C.
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