

RBG Mgt. Corp. v Compensation Risk Mgrs., LLC

2010 NY Slip Op 30686(U)

March 25, 2010

Supreme Court, New York County

Docket Number: 603058/08

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. CAROL EDMEAD

PRESENT: _____
Justice

PART 35

RBC MANAGEMENT

INDEX NO. 603058/08

MOTION DATE 3/5/10

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

- v -

Compensation Risk Managers, et al.

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

FILED

MAR 29 2010

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

NEW YORK COUNTY CLERK'S OFFICE

ORDERED that the branch of the motion by defendant Compensation Risk Managers, LLC to dismiss the Amended Complaint pursuant to CPLR 3211(a)(7) is granted, the Amended Complaint is hereby dismissed, and the Clerk may enter judgment accordingly; and it is further

ORDERED that the branch of the motion by defendant Compensation Risk Managers, LLC seeking, in the alternative, an order staying this action is denied as moot; and it is further

ORDERED that the branch of the motion by defendant Compensation Risk Managers, LLC to dismiss plaintiffs' Amended Complaint pursuant to CPLR 3211(a)(4), is denied; and it is further

ORDERED that defendant Compensation Risk Managers, LLC shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 3/25/10

[Signature]
HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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: PART 35

-----X
RBG MANAGEMENT CORP., RED & WHITE
MARKETS, INC., DORIA ENTERPRISES INC. and
GRACE'S MARKETPLACE INC.,

Index No.: 603058/08

Plaintiffs,

-against-

COMPENSATION RISK MANAGERS, LLC,
WHOLESALE AND RETAIL WORKERS'
COMPENSATION TRUST OF NEW YORK,
and THE WORKERS' COMPENSATION BOARD OF
THE STATE OF NEW YORK,

Defendants.

-----X
HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action alleging, *inter alia*, breach of fiduciary duty, defendant Compensation Risk Managers, LLC ("CRM") moves pursuant to CPLR 3211(a)(7) and (4), to dismiss plaintiffs' Amended Complaint, or alternatively to stay the action.

Factual Background

Plaintiffs RBG Management Corp. ("RBG"), Red & White Markets, Inc. ("RWM"), Doria Enterprises Inc. ("Doria") and Grace's Marketplace Inc. ("Grace's"), were former members of defendant Wholesale and Retail Workers' Compensation Trust of New York (the "Trust"), a workers' compensation group self-insured trust ("GSIT").¹ Plaintiffs became members of the Trust in order to provide workers' compensation coverage to their employees. CRM served as the Trust administrator pursuant to a Service Agreement and a Trust Agreement and Declaration

¹Section 50 of the Workers' Compensation Law permits employers in a given industry engaged in a related activity to join together and form GSITs to provide self-insurance.

(the "Trust Agreement").

According to a certain Indemnification Agreement, plaintiffs each agreed to be jointly and severally liable for expenses and obligations concerning workers' compensation liability while they remained a "Participating Employer." RBG and RWM were members of the Trust from March 2000, and plaintiffs Doria and Grace's were members from April 2000, until they terminated their memberships in April 2004 and in September 2003, respectively. It is alleged that prior to and at the time plaintiffs withdrew from the Trust, there were no deficits in the accounts of the Trust.

Plaintiffs further allege that starting in July 2007 and continuing into 2008, they were assessed for payment of additional contributions retroactive to the time they were members of the Trust, and that they would be liable for further assessments. Over objection, plaintiffs made the requested payments.

In August 2008, and after the investigation by defendant Workers Compensation Board ("WCB") of CRM, CRM entered into a settlement agreement with the WCB, whereby the WCB assumed administration of the Trust. The WCB transferred all of CRM's administrative duties to S.A.F.E., LLC ("SAFE"), a third-party administrator selected by the WCB.

On October 3, 2008, CRM filed a declaratory judgment action in the Dutchess County Supreme Court against the WCB and eight GSITs, including the Trust herein challenging the WCB's claims and seeking a determination of CRM's nonliability to any of the GSITs (the "Dutchess County action").

Thereafter, plaintiffs commenced this action, claiming that CRM's failure to follow proper accounting procedures caused the Trust to suffer from large operating deficits and

inadequate

reserves. Plaintiffs then filed the instant Amended Complaint against CRM and against the WCB, as the successor to the Board of Trustees of the Trust, and the Trust. Plaintiffs' first cause of action seeks a declaratory judgment against the Trust and the WCB, and their second cause of action is a purported derivative claim for CRM's alleged breach of fiduciary duty. Plaintiffs allege that CRM breached its fiduciary duty by failing to maintain adequate reserves necessary to maintain the solvency of the Trust (Amended Complaint, ¶48). Plaintiffs further allege that CRM engaged in self-dealing, failed to disclose that self-dealing, and maintained low levels of reserves to encourage existing members to remain in the Trust (Id., ¶¶49, 51). Plaintiffs allege that as a result of CRM's breach of fiduciary duty, the Trust is underfunded (Id., ¶53). Plaintiffs also allege that it has not made a demand upon the Trust to bring action against CRM "because the Trust has been terminated" and "such demand would be futile" (Id., ¶55).²

In support of dismissal of the Amended Complaint, CRM argues that contrary to plaintiffs' allegation that a demand on the Trust is futile, other former employer-members have made a demand on the Trust through the WCB, the Trust's successor in interest. Thus, plaintiffs' derivative claim is unnecessary and should be dismissed because the WCB has commenced an action in Albany County against CRM on the Trust's behalf alleging, among other things breach

² In their original complaint, plaintiffs' first cause of action sought a declaratory judgment against CRM, SAFE, and the Trust that plaintiffs are duly terminated members of the Trust and have no further liability for the claimed underfunding of the Trust. Plaintiffs' second cause of action alleged that the CRM, the CRM officers and the trustees breached their fiduciary duty to plaintiffs by failing to maintain adequate reserves and/or failing to determine the adequate level of reserves necessary to keep the Trust solvent. Plaintiffs' third cause of action sought a refund of payments made to the Trust "by reason of the wrongful assessment." On motion by CRM and the CRM officers, the Court dismissed all claims against CRM, with leave to replead the fiduciary duty claim against CRM as a derivative claim. Plaintiffs were required to set forth with particularity their efforts "to secure the initiation of the action by the trustees, or the reasons for not making such effort." Since plaintiffs failed to allege any such demand, the Court dismissed plaintiffs' breach of fiduciary duty claim against CRM with leave to replead.

of fiduciary duty (the “WCB action”). In 2008, these other employer-members commenced an action in Erie County against CRM, entitled *FS Kids, LLC et al., v CRM Managers, LLC* (“FS Kids” or the “Erie County action”). According to the second amended complaint in the Erie County action, plaintiffs alleged, *inter alia*, that CRM breached its fiduciary duty, causing the Trust to have a deficit in more than \$19,000,000. (The second amended complaint in FS Kids was the result of CRM's motion to dismiss the amended complaint). The Court dismissed plaintiffs' breach of fiduciary duty and negligence claims, and held that they were derivative, and held that plaintiffs were required to make a demand on the Trust, through the WCB, or allege why such a demand would be futile. Counsel for plaintiffs in FS Kids wrote to the WCB on July 20, 2009 and requested that it commence an action on the Trust's behalf. The WCB responded, by letter dated August 6, 2009, and advised that it retained the law firm of Rupp, Baase, Cunningham & Cuppola, LLC (“Rupp Firm”) to commence an action against CRM on the Trust's behalf once the Office of the Attorney General and Comptroller approved the retainer agreement.

In the WCB action, the WCB alleges that CRM breached its fiduciary duty to the Trust by engaging in self-dealing, failing to properly maintain the Trust's reserves, and failing to protect the solvency of the Trust. In addition, the WCB alleges that CRM engaged in inadequate underwriting practices and failed to collect sufficient member contributions to cover the Trust's liabilities. Despite the WCB's stated intent to commence an action against CRM on behalf of the Trust, plaintiffs in this action served a second amended complaint alleging that it was futile to make a demand on the Trust. Thus, in light of the WCB's lawsuit, plaintiffs' breach of fiduciary claim should be dismissed.

Alternatively, plaintiffs' derivative action should be stayed in favor of the WCB action

pursuant to CPLR 2201. There is identity of parties, claims and relief sought. Plaintiffs in both actions are acting on behalf of the Trust, and are seeking damages allegedly to offset the Trust's deficit. Further, the WCB is the best party to assert the derivative claims because it can assert a claim that will benefit all the former employer-members, not just plaintiffs.

Further, plaintiffs' breach of fiduciary duty claim must be dismissed because of plaintiffs' failure to make a demand on the Trust through the WCB, as directed. The WCB's filing of a complaint against CRM demonstrates that a demand would not be futile, as plaintiffs claim. Further, plaintiffs' allegation that a demand would be futile because the Trust is "dissolved," mischaracterizes the status of the Trust, as the Trust still exists, albeit in a "wind-down" mode. The Trust is still engaged in legal proceedings to resolve outstanding claims, and is in fact a party to this lawsuit. The WCB has assumed control of the Trust and is successor of the board of trustees of the Trust (as plaintiffs have alleged), and has sued CRM for breach of fiduciary duty in that capacity. Plaintiffs do not dispute that the WCB is the board of trustees' successor, and that it has the authority to commence an action against the former members to collect assessments for the Trust's deficits pursuant to the joinder and indemnification agreements.

CRM also argues that plaintiffs' Amended Complaint should be dismissed, because there is another action pending between the same parties for the same relief in Erie County. Other former employer-members of the Trust commenced a derivative action on behalf of the Trust seeking damages for CRM's alleged breach of fiduciary duty. Since both actions seek to recover on behalf of the Trust from CRM for nearly identical claims of breach of fiduciary duty, and a substantial identity of parties exists, plaintiffs' Amended Complaint should be dismissed to prevent potential conflicts that might arise from different rulings issued by different courts.

In opposition, plaintiffs contend that this is CRM's second motion to dismiss or stay based upon pending actions, which the Court denied. CRM's Dutchess County action against *inter alia*, the Trust formed the basis, in part, of CRM's prior motion to dismiss or for a stay of the within action. CRM sought a declaration that it acted properly with respect to the eight trusts and that the WCB lacked the legal authority to assert claims on behalf of the trusts. WCB's motion to dismiss the action was granted, on the ground that the nature of the dispute between CRM and the WCB was not the proper subject of a declaratory judgment action. The Court made no reference to the assertion of CRM that the WCB lacked the legal authority to assert claims on behalf of the trusts.

Based upon CRM's prior assertions in the Dutchess County action, CRM will likely contest the authority of the WCB in the WCB's Albany County action against CRM. If CRM is successful in dismissing the complaint based upon the WCB's lack of authority to act, plaintiffs, and other members of the Trust, may be rendered without a remedy.

Further, as shown in the WCB's papers in opposition to CRM's motion to dismiss, the WCB claims that this action and the Albany County action should continue independently. That position also addresses the argument of CRM concerning the futility of making a demand on the WCB, which has been properly pled by plaintiffs herein.

The Erie County action commenced by FS Kids against CRM, while similar to the within action, has not even finished the pleadings stage. Like here, CRM has made multiple motions to dismiss the complaint, which has now been amended twice. According to the on-line New York State Uniform Court System, a motion to dismiss the second amended complaint has been made by CRM and is currently subjudice.

CRM has shown no compelling reason to stay this action and, the Court should consider the fact that the agency from which it obtained its license to operate has indicated its belief that the action should proceed. CRM has not addressed the issue of its current burden arising from multiple discovery demands. It appears that no discovery has been had in any of the actions, for CRM has made multiple pre-answer motions. Any prejudice to CRM appears premature at this time.

The WCB also opposes CRM's motion, contending it is awaiting a deficit reconstruction of the Trust from the WCB's forensic accountants to verify the Trust's liabilities as previously reported and to reconstruct the Trust's liability both by year and member. Upon the WCB's receipt of the deficit reconstruction for the Trust, the Board will issue final bills to the members of the Trust for their *pro rata* share of the deficit amount. Any members who, after receiving the final bill, do not acknowledge their joint and several liability for the Trust's workers' compensation obligations and enter into a repayment schedule will be named as defendants in an action brought by the WCB in Albany County to recover the monies needed to satisfy the Trust's workers' compensation obligations.

The WCB commenced an action against CRM seeking damages based upon, *inter alia*, CRM's breach of its fiduciary duties in connection with its administration of, *inter alia*, the Trust. CRM is attempting to use the WCB's action as a shield against this lawsuit brought by the members of the Trust. However, WCB takes the position that both the WCB and the members have standing to commence a lawsuit against CRM for its actions as administrator for the Trust. The fiduciary duties owed by CRM to the Trust derived from, *inter alia*, the Service Agreement entered into between CRM and the Trust. Moreover, section VII of the Trust Agreement

executed by the Trust's trustees sets forth CRM's duties and responsibilities as administrator of the Trust and incorporates by reference the Service Agreement. CRM's duties and responsibilities set forth in the Trust Agreement are virtually identical to those established by the Service Agreement. Finally, the joinder and indemnification agreement incorporates the terms of both the Trust Agreement and the Service Agreement, is a counter-part to the Trust Agreement, and binds the member to "the terms of the Trust Agreement on the same basis as if it were an original signatory thereto"

In reply, CRM contends that as a practical matter, it would be impossible for plaintiffs to plead that a demand upon the WCB would be futile, when the WCB has, in fact, commenced an action on behalf of the Trust in Albany County claiming breach of fiduciary duty and seeking to recover the same damages as plaintiffs seek in this action. Neither the WCB nor plaintiffs cite any authority to support the contention that notwithstanding the Albany County Action, they have "concurrent standing" to bring this claim. This Court has already held that plaintiffs cannot sue directly for CRM's alleged breach of fiduciary duty arising out of the Service Agreement, as plaintiffs' claim against CRM is derivative in nature. Plaintiffs have not appealed from this order, which is the law of the case. Accordingly, plaintiffs' breach of fiduciary duty claim against CRM should be dismissed, because the WCB has already acted on the Trust members' demand by commencing the Albany action.

CRM also adds that plaintiffs ignore the existence of the Albany County action brought by the WCB on behalf of the Trust, and although plaintiffs were required to make a demand on the Trust through the WCB, or allege why such a demand would be futile to maintain their derivative claim, plaintiffs allege only that demand would be futile because the Trust is

"dissolved."

Plaintiffs' argument that it is "likely" that CRM will contest the WCB's authority to sue on behalf of the Trust in the Albany County action, makes little sense, when CRM has consistently argued in both this action and in FS Kids that the WCB has the sole authority to commence an action against CRM on behalf of the Trust. In fact, CRM entered into a stipulation with the Attorney General's Office in which this precise issue was addressed.

Nor do plaintiffs address the case which stayed a derivative action in favor of an action commenced by a trustee under similar circumstances. Permitting both actions to proceed could certainly lead to inconsistent verdicts, or a double recovery against CRM.

Discussion

CPLR 3211(a)(7)

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997]). The pleadings must be liberally construed (*see*, CPLR § 3026), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88,

614 NYS2d 972 [1994]).

On a motion to dismiss for failure to state a cause of action, where the parties have submitted evidentiary material, including affidavits, or where the bare legal conclusions and factual allegations are “flatly contradicted by documentary evidence” the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS2d 532 [1st Dept 1989]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279 [1996]). While affidavits may be considered, if the motion is not converted to a 3212 motion for summary judgment, they are *generally* intended to remedy pleading defects and *not to offer evidentiary support for properly pleaded claims*” (*Nonnon v City of New York*, 9 NY3d 825 [2007] [emphasis added]).

In addressing CRM’s claim that plaintiffs lacked standing because they failed to make a demand to redress a wrong to the trustee, and such demand is refused, or explain in detail why such demand was not made, the Court stated:

. . . In order for plaintiffs to seek redress for wrongs committed against the Trust, plaintiffs must set forth “with particularity” in the Complaint “the efforts of the plaintiffs to secure the initiation of the action by the trustees, or the reasons for not making such effort” (Id.).

It is uncontested that the Complaint does not allege any facts concerning any demands of the Trustee to seek redress against the moving defendants, or explain why such demand would be futile, plaintiffs have standing to seek redress on behalf of the Trust, and in this regard, plaintiffs’ action would be derivative in nature. Therefore, plaintiffs failed to allege sufficient facts to establish standing to maintain a breach of fiduciary claim against the moving defendants.

It is uncontested that a beneficiary of a trust can commence a derivative action on behalf of the trust if it is pleaded with particularity that a demand on the board of trustees would be futile (*Velez v Feinstein*, 87 AD2d 309, 451 NYS2d 110 [1st Dept 1982]). To assess whether the demand would be futile, it is necessary to decide "what the board members would have done had they been presented with the alleged wrongdoing at the time the complaint was filed" (*Miller v Schreyer*, 257 AD2d 358, 360 [1st Dept 1999]). Plaintiffs' Amended Complaint now alleges that they did not make a demand upon the Trust to bring an action against CRM because the "Trust has been terminated and such demand would be futile."

It is noted that a demand was made by the plaintiffs in FS Kids upon the WCB to commence an action against CRM, and the WCB caused a complaint to be filed on behalf of the Trust against CRM. The WCB's complaint in the Albany action brought in connection with the demand made by the other employer-members flatly contradicts the allegation that a demand would be futile. Further, the Trust is engaged in legal proceedings to resolve outstanding claims and has, *via* the WCB, sued CRM for breach of fiduciary duty. Finally, the Stipulation signed by CRM in its Dutchess County action against, *inter alia*, the WCB, indicates that CRM agreed that "CRM shall not seek to obtain a judgment or other judicial determination, in this or in any other court, that the [Workers Compensation] Board does not have legal authority to assert claims on behalf of any of the Trusts" (§1). CRM's first cause of action, which was for a "judgment that the Board does not have the legal authority to assert claims on behalf of the Trusts" was "discontinued with prejudice" (see Stipulation page 2). Such document also flatly contradicts any claim that CRM will contest the WCB's authority to bring an action on behalf of the Trust.

That the Erie County action brought by FS Kids is the subject of a dismissal motion does not deprive plaintiffs of their derivative rights under the Trust or Service Agreement, as such claims can be brought by the WCB on plaintiffs' behalf.

Thus, the mere allegation that a demand to sue CRM would be futile because the Trust dissolved is insufficient to sustain plaintiffs' standing to assert a derivative breach of fiduciary claim against CRM, and dismissal on this ground is warranted. In light of this determination to dismiss the Amended Complaint, CRM's alternative request for a stay of this action is moot.

CPLR 3211(a)(4)

Pursuant to CPLR 3211(a)(4), a party may move to dismiss an action where "there is another action pending between the same parties for the same cause of action in a court of any state . . ."; [however] the court need not dismiss upon this ground but may make such order as justice requires." It is "necessary that there be sufficient identity as to both the parties and the causes of action asserted in the respective actions" (*White Light Productions, Inc. v On the Scene Productions, Inc.*, 231 AD2d 90, 93; 660 NYS2d 568 [1st Dept 1997]). With respect to the parties, the requirement is that there be substantial identity (*id.* at 93-94). "With respect to the subject of the actions, the relief sought must be 'the same or substantially the same'" (*id.* at 94).

CRM's motion is based on the fact that FS Kids is currently pending in Erie County, and that such action allegedly involves the same parties and the same breach of fiduciary duty claim brought in a derivative capacity. Although the named plaintiffs in FS Kids and in this case are different, both actions seek to recover against CRM on behalf of the Trust, the true party in interest. Therefore, a substantial identity of parties exists. Further, plaintiffs in the Erie County action and plaintiffs herein both allege that CRM failed to maintain sufficient reserves, that it

engaged in self-dealing when it procured stop-loss coverage for the Trust, and that failed to determine the adequate level of reserves for the Trust.

However, it is uncontested that the motion to dismiss the Erie County action is pending. Until there is a determination on such motion, to dismiss this action on the premise that the Erie County action is pending is improper.

Therefore, dismissal on this ground pursuant to CPLR 3211(a)(4) is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion by defendant Compensation Risk Managers, LLC to dismiss the Amended Complaint pursuant to CPLR 3211(a)(7) is granted, the Amended Complaint is hereby dismissed, and the Clerk may enter judgment accordingly; and it is further

ORDERED that the branch of the motion by defendant Compensation Risk Managers, LLC seeking, in the alternative, an order staying this action is denied as moot; and it is further

ORDERED that the branch of the motion by defendant Compensation Risk Managers, LLC to dismiss plaintiffs' Amended Complaint pursuant to CPLR 3211(a)(4), is denied; and it is further

ORDERED that defendant Compensation Risk Managers, LLC shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: March 25, 2010

FILED

MAR 29 2010

NEW YORK
COUNTY CLERK'S OFFICE



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD