

Greene v Pouchie

2010 NY Slip Op 30933(U)

April 6, 2010

Supreme Court, Nassau County

Docket Number: 18386/09

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

ALAN GREENE,

Plaintiff,

TRIAL/IAS, PART 2
NASSAU COUNTY

INDEX No. 18386/09

MOTION DATE: March 1, 2010
Motion Sequence # 001

-against-

MICHAEL POUCHIE and JOSEPH ELEM,

Defendants.

The following papers read on this motion:

- Notice of Motion..... X
- Reply Affirmation X
- Memorandum of Law..... X

This motion, by defendants, for an order to dismiss the plaintiff's lawsuit, pursuant to CPLR §3211(a)(7), on the grounds that the plaintiff fails to state a cause of action, pursuant to CPLR §3211(a)(10), on the grounds that the Court should not proceed in the absence of a person who should be a party to this lawsuit, and pursuant to CPLR §3211(a)(1), the plaintiff is time-barred from recovering any alleged wrongful distributions that occurred prior to November 2004, together with such other and further relief as this Court deems just and proper, is determined as hereinafter set forth.

FACTS

This is an action for breach of fiduciary duty, conversion, fraud, unjust enrichment

and to impose a constructive trust. Plaintiff holds a 10% membership interest in Mid Atlantic News Distributors, LLC (“MID”). MID is a New Jersey limited liability company, engaged in the business of distributing newspapers, publications, magazines and related products. The other members of MID are Trans Alliance Distributors, Inc., a New York corporation (“TAD”); Red Creek, LLC, a New York limited liability company (“Red Creek”). TAD holds a 58.5% interest in MID, and Red Creek holds a 31.5% interest. TAD and Red Creek are also engaged in the business of magazine and newspaper distribution. The shareholders of TAD are defendant Michael Pouchie, defendant Joseph Elem, and non-party Stephen Dragisics. In addition to being a member of MID, plaintiff was also engaged to perform accounting services for the limited liability company. According to plaintiff, defendant Elem is the sole shareholder of Red Creek.

Plaintiff alleges that defendants improperly caused cost, expenses, and other liabilities of TAD and/or Red Hook to be charged to MID. Plaintiff further alleges that defendants improperly caused revenues and other assets of MID to be “booked,” or diverted to TAD or Red Hook. Plaintiff alleges that in November 2004, defendants effected a merger of MID and TAD.

MID’s operating agreement contains an arbitration provision requiring that any disputes between or among the members of MID be resolved by a single arbitrator under the auspices of the Commercial Division of the American Arbitration Association. On September 8, 2009, served a demand for arbitration which contained all of the claims asserted in the present action. The demand for arbitration was served on TAD and Red Creek as respondents.

DEFENDANTS’ CONTENTIONS

The defendants move this Court for an order to dismiss the plaintiff’s complaint on several grounds.

The defendants’ first contention is that the plaintiff does not have the legal capacity to bring forth this complaint under CPLR § 3211(a)(3). They contend that the plaintiff has no direct cause of action against the defendants, and has improperly brought this case on his own behalf. Rather, the defendant argues that the proper action for the plaintiff to take, if any, would be a derivative suit on behalf of MID, since the plaintiff’s complaint alleges that the defendant’s actions resulted in a decrease in the perceived

value and profits of MID, to the detriment of the plaintiff. Furthermore, the plaintiff has not taken the appropriate actions to maintain a derivative suit, failing to establish legal standing to bring forth such a complaint on behalf of MID.

The defendants further contends that even if the plaintiff has standing to assert this claim, the plaintiff should have sought an action against the other members of MID, which would be TAD and Red Creek, not the individual defendants, who are not themselves members of MID. However, plaintiff has already have taken action against TAD and Red Creek, in accordance with MID's Operating Agreement, in an arbitration proceeding set forth for May 2010. The defendant argues that the instant case is excessive and superfluous.

The defendants further argue that the plaintiff has not alleged, and has no basis for piercing the corporate veils of TAD and Red Creek, the other two members of MID. They argue that, pursuant to CPLR §3211(A)(7), the Plaintiff fails to state a cause of action.

The defendant also contends that pursuant to CPLR § 3211(a)(10), the Court should not proceed in the absence of a person who should be a party to this lawsuit, namely Stephen Dragisics. Defendants argue that, as an officer and and director of TAD, Dragisics is a necessary party. The defendants argue that if the plaintiff alleges he was harmed by the actions of the defendants, then as a shareholder, director and officer of TAD, Stephen Dragisics enjoyed any benefits that the defendants may have enjoyed based on their actions as well, and is a necessary party to this action.

Lastly, the defendant contends that the plaintiff is time-barred from maintaining a cause of action for alleged wrongful distributions to the defendants that the plaintiff acknowledges all occurred prior to November 2004. The defendant cites New York Limited Liability Company Law §508(C) as freeing the defendant from liability for any alleged wrongful distributions "after the expiration of three years from the date of the distribution." The commencement of this lawsuit in September 2009, falls outside of the statute of limitations for wrongful distributions under New York Limited Liability Company Law §508(C).

PLAINTIFF'S CONTENTIONS

The plaintiff contends that the defendants' motion to dismiss ignores the actual claims brought forth by the plaintiff of breach of fiduciary duty, fraud, conversion, and

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unjust enrichment, all arising from the alleged tortious conduct of the defendants that resulted in damages to the plaintiff, in the form of decreased compensation and the true value of his lost ownership interests in MID.

The plaintiff further contends that his complaint is not for breach of contract or a shareholder derivative lawsuit, arising out of the breach of the MID Operating Agreement. Such claims are being brought by the plaintiff in arbitration proceedings that are to take place in May 2010. The arbitration proceeding will address the claims against TAD and Red Creek, as members of MID, for breach of contract.

The plaintiff contends that the complaint in the instant matter addresses only the tortious conduct of the defendants themselves, individually, which has caused damages to plaintiff, separate and apart from any damage to the LLC. The claims here involve the misconduct of the defendants, not a breach of contract claim regarding the operating agreement. Moreover, the complaint does not allege here that these actions were undertaken to further the interests of TAD and Red Creek, but ultimately, for the benefit of the individual defendants. The plaintiff argues that he was not aware of these acts or omissions and thus did not authorize such transactions. Ultimately these actions resulted in loss of value of MID and increased value and profits of TAD and Red Creek, entities which are owned by the defendants.

The plaintiff argues that it has not brought a claim for wrongful distributions, but a claim for fraud and breach of fiduciary duty, alleging that the defendants' fraudulent conduct led to their improper receipt of monies from MID and the improper "booking" of the company's assets to defendant's companies, TAD and Red Creek. Plaintiff argues that the statute of limitation period concerning the return of corporate distributions, relied upon by the defendants, is simply not applicable to the claims brought forth by plaintiff.

DECISION

Pursuant to CPLR §3211, in its evaluation of grounds for dismissal of a complaint, the court's function is to determine only whether the facts as alleged in the plaintiff's complaint, fit within any cognizable legal theory (see Leon v. Martinez, 84 N.Y.2d 83; Rochdale Vil. v. Zimmerman, 2 A.D.3d 827). The court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff ... the benefit of every possible favorable inference' (see AG Capital Funding Partners, LP v. State St. Bank & Trust Co., 808 N.Y.S.2d 573).

Defendants argue that this action should be maintained as a derivative suit and plaintiff lacks standing because he failed to make a demand to sue on the managing member of the limited liability company. Plaintiff's allegations that defendants' wrongfully charged TAD and Red Creek's costs to MID and diverted MID's revenues to the corporations plead a wrong to the limited liability company, for which a member may sue derivatively but not individually." (see Niles v New York Cent. & Hudson Riv. R. Co., 176 N.Y. 119; Carpenter v Sisti, 45 A.D.2d 529; Abrams v. Donati, 66 N.Y.2d 951). However, a serving a demand to sue on TAD or Red Creek would have been futile because the principals of the corporations were allegedly involved in the wrongdoing for which plaintiff sues (Bansbach v Zinn, 1 NY3d 1 [2003]).

Moreover, if the defendant has breached a duty owed to the shareholder, independent of any duty owing to the corporation, the shareholder may maintain an action in his own behalf (see General Rubber Co. v Benedict, 215 NY 18); Hammer v. Werner (239 A.D.38). As members of MID, TAD and Red Creek have fiduciary duties to plaintiff, who is also a member of the LLC. Defendants, as the shareholders of TAD and Red Creek, may have aided and abetted the corporations to breach their fiduciary duties to the plaintiff (See Caprer v Nussbaum, 36 AD3d 176 [2d Dept 2006]). Dragisics, the other officer and director of TAD, is not a necessary party to an action against defendants for aiding and abetting breach of fiduciary duty. Moreover, since this is not an action for wrongful distributions, the statute of limitations contained in Limited Liability Company Law § 508[c] does not apply.

Under the MID Operating Agreement, any dispute between members of MID must be arbitrated before the American Arbitration Association ("AAA"). In accordance with the MID Operating Agreement, the plaintiff has commenced an arbitration action against TAD. These claims will be addressed before the AAA and are scheduled to take place in May 2010. While plaintiff may proceed before the AAA on his claims against TAD and Red Creek and in this court on his claims against defendants, plaintiff, of course, may have only one recovery.

Accordingly, the motion to dismiss is denied.

So Ordered.

Dated 6 April '10

ENTERED
APR 14 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Stephen A. Bucaria
J.S.C.