

Lubel v Shiloach

2011 NY Slip Op 30612(U)

March 2, 2011

Supreme Court, Nassau County

Docket Number: 020501/10

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

BARBARA LUBEL, Individually and on Behalf
of the Members of THE SHIBELL GROUP,
L.L.C. as a Derivative Action and on behalf of
the Members of JENNA AND MOLLY OF
PLAINVIEW, LLC, as a Derivative Action,

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 020501/10

MOTION DATE: Jan. 20, 2011
Motion Sequence # 001, 002

Plaintiffs,

-against-

ABRAHAM SHILOACH, JOSEPH SHILOACH,
OCEAN DRIVE, INC., JENNA AND MOLLY
OF PLAINVIEW, LLC, THE SHIBELL GROUP,
LLC and JOHN/JANE DOE No. 1-4,

Defendants.

The following papers read on this motion:

- Order to Show Cause..... X
- Cross-Motion..... X
- Reply Affidavit..... X
- Memorandum of Law..... X

Motion by plaintiff for a commission to conduct an out of state deposition is **denied**.
Motion by plaintiff for a preliminary injunction directing defendants to provide goods to
stores operated by the Shibell Group is **denied**. Cross-motion by defendants to dismiss the
complaint for failure to state a cause of action is **granted**.

This is an action for breach of the operating agreement of a limited liability company. Plaintiff Barbara Lubel holds a 50% membership interest in plaintiff The Shibell Group, LLC. Defendants Abraham and Joseph Shiloach each own a 25% membership interest. Shibell Group was formed to operate retail clothing stores under the trade name "Jenna and Molly." Abraham and Joseph also own a corporation, defendant Ocean Drive, Inc, which is engaged in the business of design, manufacture, and wholesale distribution of junior and children's apparel.

Shibell Group's operating agreement provides that plaintiff and Joseph Shiloach are the "managers," but plaintiff is in charge of the day to day operation of the company. Shibell's operating agreement further provides that Abraham and Joseph "shall supply merchandise, including to junior and children's goods to the company stores...at their cost plus commercially reasonable overhead...." The operating agreement provides that no member shall engage in any business which competes with Shibell, except with the consent of the other members.

During 2010, plaintiff began negotiations to lease a store in Plainview in order to operate a Jenna and Molly store at that location. Plaintiff then formed a company, Jenna & Molly of Plainview, LLC, which entered into a lease for the premises. However, in August 2010, Abraham and Joseph announced that they were opposed to opening a Jenna and Molly store at the Plainview location. Plaintiff then opened the store under a different name, but defendants have refused to supply it with merchandise.

On October 29, 2010, plaintiff commenced the present action both individually and as a derivative action on behalf of The Shibell Group and Jenna and Molly of Plainview, the LLC's. Plaintiff alleges that defendants' refusal to cooperate in the opening of the Plainview store, and supply it with merchandise, constitutes a breach of Shibell Group's operating agreement. Plaintiff further alleges that defendants' conduct constitutes a breach of their fiduciary duties to the company.

By order to show cause dated December 10, 2010, plaintiff moves pursuant to CPLR § 3108 for a commission to conduct an out of state deposition of Skye Associates, LLC, a Maryland limited liability company. Plaintiff alleges that defendants have entered into competition with Shibell through a partnership with Skye Associates. Plaintiff also requests a preliminary injunction, directing defendants to supply goods to the Shibell stores. The branch of plaintiff's motion requesting an order directing The Shibell Group to assign its rights under the lease has been withdrawn.

CPLR 3108 provides that a commission or letters rogatory may be issued where necessary or convenient for the taking of a deposition outside the state. Where information is sought from a nonparty witness, which is material and necessary for the prosecution of plaintiff's claims, an open commission may be granted (*Meckert v Sears Roebuck & Co.*, 275 AD2d 308 [2d Dept 2000]). Plaintiff alleges that defendants breached the Shibell operating agreement, not by engaging in a competitive business, but by failing to cooperate with the opening of the Plainview store. Thus, the discovery which plaintiff seeks to obtain by open commission is not necessary to the prosecution of the action and is more in the nature of pre-action discovery. Plaintiff's motion for an open commission is **denied**.

In order to be entitled to a preliminary injunction, plaintiff must show a likelihood of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of the equities in her favor (*Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]). The granting of a mandatory injunction is an extraordinary remedy and the court must weigh the conflicting considerations of benefit to the party seeking the injunction and harm to the party subject to the injunction which would follow the granting of such a drastic remedy (*Nat Holding Corp. v Banks*, 22 AD3d 471,474 [2d Dept 2005]).

By requesting a preliminary injunction that defendants be required to supply Shibell stores, plaintiff is seeking a mandatory injunction. Shibell's operating agreement requires defendants to supply junior and children's clothing to Jenna and Molly stores. However, plaintiff has not established that her opening of the Plainview store was authorized. Nor has plaintiff established that the Ocean Drive line of apparel is sufficiently unique as to require the granting of a mandatory injunction. Plaintiff's motion for a preliminary injunction that defendants be required to supply clothing to all Shibell stores is **denied**.

Defendants cross move to dismiss the complaint on the grounds of a defense founded upon documentary evidence, plaintiff lacks legal capacity to sue on behalf of the limited liability companies, statute of frauds, another action pending, and failure to state a cause of action. Defendants argue that plaintiff lacks standing to sue on behalf of Shibell because she does not hold a majority interest of the company. However, a member of a limited liability company may bring a derivative action on behalf of the company, even though there is no provision governing such suits in the Limited Liability Company Law (*Tzolis v Wolff*, 10 NY3d 100 [2008]). Accordingly, defendants' motion to dismiss the complaint for lack of capacity to sue is **denied**.

On September 16, 2010, defendants commenced an action against plaintiff Lubel in

Supreme Court, Kings County. In the Kings County action, defendants allege that plaintiff breached Shibell's operating agreement by hiring her son, and by leasing space for a Jenna and Molly store in Westfield, New Jersey, without their consent. Defendants argue that the present action should be dismissed because of the pendency of the Kings County action.

CPLR 3211(a)(4) provides that a party may move for judgment dismissing one or more causes of action asserted against him on the ground that there is another action pending between the same parties for the same cause of action in a court of any state or the United States. The court need not dismiss upon this ground but may make such order as justice requires (Id). A court has broad discretion as to the disposition of an action when another action is pending (Simonetti v Larson, 44 AD3d 1028 [2d Dept 2007]). The court may dismiss one of the actions where there is a substantial identity of the parties and causes of action (Id). The two actions must be sufficiently similar and the relief sought must be the same or substantially the same. It is not necessary that the precise legal theories presented in the first proceeding also be presented in the second proceeding, provided that both suits arise out of the same subject matter or series of alleged wrongs (Id). See also (City Line Auto v Citicorp. Leasing, 45 AD3d 716 [2d Dept 2007]).

While there is identity of parties in the Kings County action and the present case, there is not substantial identity of causes of action. The Kings County action deals with plaintiff's authority to open a store in Westfield, New Jersey, while the present action deals with defendant's responsibility to supply merchandise to a store on Long Island. Defendants' motion to dismiss the complaint based on another action pending is **denied**.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction....[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 within any cognizable legal theory"(Arnav Industries, Inc. v. Brown, 96 NY2d 300, 303 [2001]).

Giving plaintiff the benefit of every possible favorable inference, it is nonetheless clear that without the approval of Joseph Shiloach, the co-manager, plaintiff was not authorized to open a Jenna and Molly store in Plainview. Thus, defendants were not required to supply plaintiff's Plainview store with merchandise. Defendants' motion to dismiss the complaint for failure to state a cause of action is **granted**.

So ordered.

Dated MAR 02 2011

ENTERED  J.S.C.

MAR 04 2011

KINGS COUNTY
COUNTY CLERK'S OFFICE