

Schriber v Home Safe Am., Inc.
2011 NY Slip Op 31445(U)
May 16, 2011
Sup Ct, Nassau County
Docket Number: 002344/11
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

SCOTT SCHREIBER, a shareholder of HOMESAFE AMERICA, INC., suing in the right of HOMESAFE AMERICA, INC., and SCOTT SCHREIBER individually, as a creditor of HOMESAFE AMERICA, INC.,

Plaintiffs,

-against-

HOMESAFE AMERICA, INC., GUY SAMUEL and CONSUMER FIRST CORP. d/b/a CONSUMER FIRST LAW GROUP,

Defendants.

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 002344/11

MOTION DATE: March 11, 2011
Motion Sequence # 001, 002

The following papers read on this motion:

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

Motion by plaintiff for injunctive relief is **denied**, except that the temporary relief previously granted is continued pending further order of the court. Cross-motion by defendants to dismiss the complaint on the ground of *in pari delicto* is **granted**. The matter is referred to the New York State Attorney General for appropriate action.

This is a shareholder derivative action seeking an accounting. Plaintiff Scott Schreiber is a 50 % shareholder of Home Safe America, Inc. Defendant Guy Samuel is the

other 50 % shareholder. Home Safe was formed in December 2008. The corporation was engaged in the business of assisting financially distressed homeowners to restructure their loans and avoid foreclosure. Plaintiff alleges that he initially contributed \$18,000 to the capital of the corporation. Although it appears that Samuel did not contribute any initial capital, in July of 2009 he obtained a \$50,000 loan to Home Safe from Leonid and Anna Grossfeld, who are presumably relatives of Samuel.

Plaintiff alleges that between November 29 and December 6, 2010 Samuel withdrew \$181,000 of Home Safe's funds. Plaintiff further alleges that Samuel used this money to form a competing company, defendant Consumer First Corporation.

This action was commenced on February 16, 2011. Plaintiff sues derivatively on behalf of Home Safe. Plaintiff asserts various claims, including waste of corporate assets and breach of fiduciary duty. Plaintiff seeks various forms of relief, including an accounting and the setting aside of fraudulent conveyances.

Plaintiff moves for a preliminary injunction restraining Samuel from disposing of any of the funds diverted from Home Safe, restraining Consumer First Corporation from disbursing assets except in the ordinary course of business, and restraining Consumer First from distributing any funds to Samuel. Plaintiff also seeks an order setting aside the transfer of the \$181,000 as a fraudulent conveyance and removing Samuel as an officer or director of Home Safe. Finally, plaintiff seeks attorney's fees pursuant to § 276-a of the Debtor and Creditor Law.

Samuel admits that he withdrew \$175,000 of Home Safe's funds and took three of the company's personal computers. Samuel asserts that he used the money to pay off loans to the company, pay himself a share of the profits, and retire his "equity interest" in the corporation. Samuel does not identify which loans were paid other than the \$50,000 loan made by the Grossfeld's. While Samuel acknowledges that Home Safe paid the Grossfeld's \$35,000, he insists that the payment was interest rather than principal.

Defendants cross-move to dismiss the complaint for lack of capacity pursuant to CPLR 3211(a)(3) and for failure to state a cause of action pursuant to CPLR 3211(a)(7). Defendants argue that because the parties conducted their business in violation of Real Property Law § 265-b plaintiff seeks to enforce an illegal agreement and does not come to court with clean hands.

Pursuant to Real Property Law § 265-b(2) a “distressed property consultant” is prohibited from charging for or accepting any payment for consulting services before the full completion of such services. Samuel frankly admits that, “We collected fees up front” (Aff at ¶ 5). For his part, Schreiber asserts that he has issued \$28,480 in “customer refunds” (Aff at ¶ 11) but “almost 1,000 families ...prepaid for loan modification services” (Reply aff at ¶ 2). Thus, the parties do not dispute that Home Safe flagrantly violated the statutory prohibition on accepting payment for consulting services before the services were complete.

The doctrine of *in pari delicto* mandates that courts will not intercede to resolve a dispute between two wrongdoers (*Kirschner v KPMG*, 15 NY3d 446, 464 [2010]). The doctrine serves important public policies, i.e. deterring illegality and avoiding entangling courts in disputes between wrongdoers. “No court should be required to serve as paymaster of the wages of crime, or referee between thieves.” The doctrine applies where a willful wrongdoer sues someone who is alleged to be merely negligent and where both parties acted willfully. The doctrine should not be “weakened by exceptions” and applies even in “difficult cases” (Id).

Not every regulatory misstep by an entrepreneur will disqualify him from suing his partner for breach of fiduciary duty. However, where the parties’ method of doing business is in willful violation of a statute designed to protect a class of vulnerable consumers from abuse, public policy requires that the partners each be barred from seeking an accounting. Real Property Law § 265-b became effective September 1, 2008, only two months before Home Safe was formed. However, neither Schreiber nor Samuel denies that he had knowledge of the prohibition on advance distressed home loan consulting fees. Moreover, Samuel worked as a loan officer for mortgage bankers since 2006. Thus, it may be inferred that Samuel was aware of mortgage industry regulations. Samuel’s knowledge of the prohibition on accepting home loan consulting fees in advance must be imputed both to Home Safe and the other 50 % shareholder (15 NY3d at 466). The court concludes that Schreiber’s violation of Real Property § 265-b was willful.

Plaintiff argues that because part of the recovery would accrue to the benefit of homeowners, the class sought to be protected by the statute, the court should allow an exception to the principle of *in pari delicto* for derivative actions. The court notes that Real Property Law § 265-b contains a penalties and remedies provision. Subdivision four provides that if the court finds that a distressed property consultant has violated any provision of the statute, the court may make null and void any agreement between the distressed homeowner and the distressed property consultant. The statute also provides that the homeowner may commence an action against the distressed property consultant to recover

actual and consequential damages and, for an intentional or reckless violation, the court may award treble damages and attorney's fees (Real Property Law § 265-b[4][b]).

In addition to these remedies, the Attorney General may commence a special proceeding and obtain injunctive relief restraining any further violation of the statute (Real Property Law § 265-b[4][d]). In such a proceeding, the court may grant the Attorney General an allowance of up to \$2,000 per defendant and direct restitution to the homeowners (Id). In addition, the court may impose a civil penalty of not more than \$10,000 for each violation. Finally, the penalties of Real Property Law § 265-b[4] are not exclusive and are in addition to any other remedies and penalties provided by law (Real Property Law § 265-b[4][e]).

In view of the availability of an action by the Attorney General, the large number of potential restitution claims, and the parties' interest in retaining Home Safe's funds, the court determines that the present action is not an ideal method for reimbursing defrauded homeowners. Accordingly, there is no reason to depart from the principle of *in pari delicto* in the present case. Defendants' cross-motion to dismiss the complaint on the ground of unclean hands or *in pari delicto* is **granted**. Plaintiff's motion for injunctive relief is **denied**, except that the temporary restraining orders issued by the court in its order to show cause dated February 16, 2011 shall continue pending further order of the court. The matter is referred to the New York State Attorney General for whatever action he deems appropriate.

So ordered.

Dated MAY 16 2011

Stephen A. Bucaria
J.S.C.

ENTERED

MAY 20 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**