

Ferolito v Vultaggio

2011 NY Slip Op 31700(U)

June 22, 2011

Supreme Court, New York County

Docket Number: 100568/11

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN
J.S.C.

PART 1

Index Number : 100568/2011
FEROLITO, JOHN M.
vs.
VULTAGGIO, DOMENICK J.
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 100568/11
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to dismiss complaint

Motion of Motion/ Order to Show Cause — Affidavits — Exhibits A-2
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAGES NUMBERED
<u>1</u>


Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED

JUN 24 2011

NEW YORK
COUNTY CLERK'S OFFICE



Dated: June 22, 2011

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION CASE IS RESPECTFULLY REFERRED TO JUDGE FOR THE FOLLOWING REASON:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
JOHN M. FEROLITO and the JOHN FEROLITO, JR.
GRANTOR TRUST (John M. Ferolito and Carolyn
Ferolito as Co-Trustees), both individually and
derivatively on behalf of Beverage Marketing USA, Inc.,

Index No. 100568/11

Decision & Order

Plaintiffs,

-against-

DOMENICK J. VULTAGGIO and DAVID MENASHI,

Defendants.

-----X
DOMENICK J. VULTAGGIO, DAVID MENASHI,
and BEVERAGE MARKETING USA, INC.,

FILED

JUN 24 2011

Counterclaim-Plaintiffs,

NEW YORK
COUNTY CLERK'S OFFICE

-against-

JOHN M. FEROLITO, and the JOHN FEROLITO, JR.
GRANTOR TRUST (John M. Ferolito and Carolyn
Ferolito as Co-Trustees),

Counterclaim-Defendants.

-----X
SHULMAN, J.:

This action involves a power struggle between two competing groups who own a beverage business, referred to herein as the AriZona Entities, which manufactures and distributes the AriZona Iced Tea brand of beverages. Plaintiffs John M. Ferolito ("Ferolito") and the John Ferolito, Jr. Grantor Trust (the "Trust") bring this action (also referred to as the "New Action") individually and derivatively on behalf of Beverage Marketing USA, Inc. ("BMU") against defendants Domenick J. Vultaggio ("Vultaggio") and David Menashi ("Menashi"), alleging that they breached their fiduciary duties and duties of loyalty and engaged in corporate waste, mismanagement and other

misconduct in their roles as officers and directors of BMU. Plaintiffs also assert a cause of action for common-law dissolution. This action is related to a previously pending consolidated action, entitled *John M. Ferolito et al. v Domenick J. Vultaggio et al.*, New York Court Index Nos. 590967/08 and 600396/08, which includes a Business Corporation Law ("BCL") § 1118 valuation proceeding to determine the fair value of Ferolito's shares (the "Valuation Proceeding", and together with all claims there pleaded, the "Main Action"). Virtually all of the claims asserted in this action have been asserted in the Main Action. Both plaintiffs are parties to the Main Action as well.

Motion Sequence Nos. 001 and 002 are consolidated for disposition. In Motion Sequence No. 001 defendants Vultaggio and Menashi move, pursuant to CPLR 3211 (a) (3), (5) and (7) and BCL § 626 (b) and (c), for an order dismissing the complaint in its entirety or, alternatively, pursuant to CPLR 3211 (a) (4) and 3016 (b) dismissing or staying counts I, II and III.

In Motion Sequence No. 002, plaintiffs/counterclaim-defendants move pursuant to CPLR 3211 (a) (2), (4), (6) and (7) for an order dismissing defendants' counterclaims. Defendants/counterclaim-plaintiffs cross-move for an order deeming the counterclaims in this action asserted in the Main Action, approving the simultaneous withdrawal of the counterclaims in this action and denying plaintiffs' motion to dismiss the counterclaims as moot.

For the reasons set forth below defendants' motion to stay this action pursuant to CPLR 3211 (a) (4) is granted. Defendants' cross motion is granted and plaintiffs' motion to dismiss the counterclaims is denied as moot.

BACKGROUND

The underlying facts are set forth in this court's prior decisions, orders and judgments and will be referred to herein only as necessary for clarification. Ferolito and the Trust bring this action as individuals and derivatively as shareholders on behalf of BMU, which generates and holds most of the profits for the AriZona Entities. Ferolito owns 26% of the outstanding shares of BMU, is a voting BMU shareholder and is a director of BMU (Amended Complaint, ¶¶ 2, 10). The Trust, of which Ferolito and his wife are the Trustees, owns 24% of the outstanding shares of BMU and is a non-voting BMU shareholder (*id.*, ¶¶ 2, 20).

Vultaggio owns, with his family, 50% of the outstanding shares of BMU, is a voting BMU shareholder, and an officer and director of BMU (*id.*, ¶¶ 2, 21). Menashi is the Chief Executive Officer and a director of BMU (*id.*, ¶ 22).

In 1991, Vultaggio and Ferolito formed the AriZona Iced Tea business (*id.*, ¶ 24). The AriZona Entities are business entities which are owned jointly by the Ferolito Owners Group and the Vultaggio Owners Group (*id.*, ¶ 2). During the 1990's, relations between Ferolito and Vultaggio became strained and Vultaggio assumed primary responsibility for the day-to-day management of the AriZona business. Ferolito maintained his ownership interest and right to vote in the AriZona Entities.

In 1998, Ferolito, Vultaggio and the shareholder-members of their respective families entered into an Owners' Agreement governing the management and ownership of the AriZona Entities (*id.*, ¶¶ 29-30). After the Owners' Agreement was executed, disputes arose between Ferolito and Vultaggio regarding the management of the

AriZona Entities, including BMU, and Ferolito's ability to sell his shares in those entities (*id.*, ¶ 35).

In 2009, the Ferolito Owners Group brought an action against the Vultaggio Owners Group in this court seeking (1) a declaration that the Owners' Agreement provision that purports to preclude Ferolito from selling his stock is unenforceable; (2) a declaration that no Employee Separation Event occurred; and (2) damages for the Vultaggio Owners Group's breach of the Owners' Agreement. In late 2010, Ferolito filed a petition for dissolution of BMU under BCL § 1104-a, on the grounds of oppression. Those actions were consolidated and comprise the Main Action.

In this action, plaintiffs allege that defendants have utilized and diverted tens of millions of dollars of corporate funds through various acts, which allegedly constitute breaches of their fiduciary and legal duties to Ferolito, the Trust and BMU (*id.*, ¶ 39). Plaintiffs further allege that Vultaggio has also engaged in multiple acts of self-dealing and corporate waste to the detriment of plaintiffs and BMU (*id.*, ¶ 60).

The amended complaint alleges three instances of self-dealing, alleged to be violations of defendants' fiduciary duties. With respect to Vultaggio, plaintiffs allege self-dealing via the interest rate Vultaggio earns on loans to BMU (*id.*, ¶ 54) and as a result of Vultaggio's purchase and lease to AriZona of an Edison, New Jersey property (*id.*, ¶ 60 [d-e]). With regard to Menashi, plaintiffs allege that he is overpaid for serving as BMU's CEO (*id.*, ¶ 62). Plaintiffs also allege four instances of corporate waste: (1) placing Menashi on the BMU payroll in 1994 (*id.*, ¶ 60 [a]); (2) paying David Petshaft, an accountant and attorney, \$60,000 in monthly fees for services (*id.*, ¶ 60 [c]); (3)

expending too much in the build-out and renovation of corporate offices (*id.*, ¶ 42); and (4) placing Wesley and Spencer, Vultaggio's sons, in jobs beyond their qualifications at salaries that are too high (*id.*, ¶ 60 [b]).

The amended complaint contains four causes of action. In Count I, plaintiffs assert breach of fiduciary claims in their individual capacities. In Count II, plaintiffs assert breach of fiduciary duty claims in a derivative capacity as shareholders of BMU. In Count III, plaintiffs assert, in a derivative capacity, officer/director misconduct claims pursuant to BCL § 720. In Count IV, the Trust asserts, in its individual capacity, a claim for common-law dissolution of BMU.¹

The remaining causes of action – Counts I, II and III – are based on the same alleged operative facts. Virtually all of the operative facts underlying these causes of action for breach of fiduciary duty, waste and mismanagement have previously been raised in the Main Action – i.e., the failure to conduct audits (*see* New Action, Amended Complaint, ¶¶ 40-41; Main Action, Amended Verified Petition, ¶ 42); denial of access to company records and financial statements (*see* New Action, Amended Complaint, ¶ 42; Main Action, Amended Verified Petition, ¶¶ 95-99); bank accounts without Ferolito as signatory (*see* New Action, Amended Complaint, ¶ 43; Main Action, 2/25/09 Ferolito Memorandum of Law, at 11); discontinuance of distributions (*see* New Action, Amended Complaint, ¶ 47; Main Action, Amended Verified Petition, ¶ 55); corporate documents created without Ferolito's consent (*see* New Action, Amended Complaint, ¶

¹ During oral argument on May 17, 2011, this court granted defendants' motion to dismiss Count IV for common-law dissolution, which is memorialized in the decretal paragraphs herein below.

51; Main Action, Amended Verified Petition, ¶ 87); interest rate on loans (see New Action, Amended Complaint, ¶ 54; Main Action, Amended Verified Petition, ¶ 103); Menashi's place on the BMU payroll (see New Action, Amended Complaint, ¶ 60 [a]; Main Action, Amended Verified Petition, ¶ 110 [i]; Vultaggio's sons on payroll (see New Action, Amended Complaint, ¶ 60 [b]; Main Action, Amended Verified Petition, ¶ 110 [iv]); Edison, NJ property and improvements to Vultaggio Properties (see New Action, Amended Complaint, ¶ 60 [d-e]; Main Action, Amended Verified Petition, ¶ 110 [vi]); and Menashi's salary (see New Action, Amended Complaint, ¶ 62; Main Action, 11/30/10 letter from R. Dwyer to the court, at 3).

DISCUSSION

Motion to Dismiss or Stay (Motion Sequence No. 001)

Pursuant to CPLR 3211 (a) (4), a court may dismiss or stay an action where "there is another action pending between the same parties for the same cause of action in a court" of another state. A court has broad discretion as to the disposition of an action when another is pending (*Whitney v Whitney*, 57 NY2d 731 [1982]; *Certain Underwriters at Lloyd's, London v Hartford Acc. & Indem. Co.*, 16 AD3d 167 [1st Dept 2005]). In considering whether to dismiss or stay a later-filed action in deference to an earlier-filed action, the court should determine whether there is a "substantial identity" of the parties (*White Light Prods., Inc. v On the Scene Prods., Inc.*, 231 AD2d 90, 94 [1st Dept 1997]; see also *Montalvo v Air Dock Sys.*, 37 AD3d 567 [2d Dept 2007]). Further, to warrant dismissal or a stay, the two actions must be sufficiently similar and the relief sought must be "the same or substantially the same" (*White Light Prods., Inc. v On the*

Scene Prods., Inc., 231 AD2d at 94, quoting *Kent Dev. Co., Inc. v Liccione*, 37 NY2d 899, 901 [1975]; see also *National Union Fire Ins. Co. of Pittsburgh, Pa. v Jordache Enters., Inc.*, 205 AD2d 341 [1st Dept 1994]). “It is not necessary that the precise legal theories presented in the first proceeding also be presented in the second proceeding,” but “[r]ather, it is necessary that ‘both suits arise out of the same subject matter or series of alleged wrongs (citation omitted)’” (*Simonetti v Larson*, 44 AD3d 1028, 1029 [2d Dept 2007]). Accordingly, a motion made pursuant to CPLR 3211 (a) (4) should be granted where an identity of parties and causes of action in two simultaneously pending actions raises the danger of conflicting rulings relating to the same matter (see *White Light Prods., Inc. v On the Scene Prods., Inc.*, 231 AD2d 90, *supra*).

It is clear that this action must be dismissed or stayed in deference to the Main Action as: the relief sought in this action and the Main Action is “the same or substantially the same”; both actions arise out of the same operative facts; and there is a substantial identity of the parties. Plaintiffs’ claims here – allegations regarding breach of fiduciary duty, self-dealing, waste and mismanagement with respect to BMU – are the same claims that Ferolito presses for resolution in the context of the Main Action and the Valuation Proceeding. As such, the Main Action and the Valuation Proceeding will necessarily resolve all of the issues raised by these causes of action, as the claims of waste and self-dealing will obviously affect the fair value of the Ferolito Owners Group’s shares. Indeed, all of plaintiffs’ claims of waste will be adjudicated in the Valuation Proceeding to determine whether the claims are true and if so, the appropriate measure of harm (see *Gerzof v Coons*, 168 AD2d 619 [2d Dept 1990]

[question of whether plaintiffs' misconduct was proven and, if so, its adverse impact on share value, was to be determined in course of BCL § 1118 valuation hearing]).

Resolving these claims in the consolidated action will thus eliminate the need for duplicative hearings and the possibility of inconsistent rulings.

In addition, duplicative proceedings concerning dissolutions have been barred where the issues raised in the second action could be resolved in the prior one (*Raik v Clindent Devs., LLC*, 282 AD2d 513, 514 [2d Dept 2001] [pendency of divorce action where husband's interests in "family businesses will be determined as part of the equitable distribution" required dismissal without prejudice of husband's subsequent action to dissolve those businesses]; *Juron v Minzner*, 261 AD2d 586 [2d Dept 1999] [conversion action regarding distribution of corporate assets dismissed in favor of prior corporate dissolution proceeding]).

Moreover, in considering whether to dismiss or stay an action pursuant to CPLR 3211 (a) (4), courts also consider the comprehensiveness of the different actions (*Kerotest Mfg. Co. v C-O-Two Fire Equip. Co.*, 342 US 180, 183 [1952] [courts must give regard to "comprehensive disposition of litigation"]; *see, e.g., Fleet Capital Corp. v Mullins*, 2004 WL 548240, *5, 2004 US Dist LEXIS 4425, * 14 [SDNY 2004] [court deferred to litigation that "contain(ed) issues broader than in this action"]; *ACE Fire Underwriters Ins. Co. v ITT Indus., Inc.*, 14 Misc 3d 1211[A], 2006 NY Slip Op 52487[U], *10 [Sup Ct, NY County 2006], *affd* 44 AD3d 404 [1st Dept 2007] [court deferred to New York action on the ground that it was "more comprehensive than the

West Virginia Action with respect to the claims asserted against [defendant], as it seeks to globally resolve all coverage claims under all provisions of the policies at issue”).

Here, it is clear that the Main Action is more comprehensive than this action, as it encompasses the Valuation Proceeding, which is the most important aspect of this case, because it will ultimately resolve the issue at the heart of this litigation – the amount to which Ferolito is entitled for his shares in BMU. This action, which now contains only three causes of action for damages, is much more limited. Thus, in contrast to the instant action, the Main Action includes, and will likely globally resolve, all aspects of the dispute between the parties.

Additionally, plaintiffs Ferolito and the Trust are both parties to the Main Action, as are defendants Vultaggio and BMU. Although plaintiffs argue that a dismissal or stay pursuant to CPLR 3211 (a) (4) is not appropriate because Menashi is not a party to the Main Action, this factor is not determinative as there is substantial identity of the parties. “Substantial, not complete, identity of parties is all that is required to invoke” CPLR 3211 (a) (4) (*Barringer v Zgoda*, 91 AD2d 811, 811 [3d Dept 1982]). “Substantial identity” of the parties “generally is present when at least one plaintiff and one defendant is common in each action” (*Proietto v Donohue*, 189 AD2d 807, 807-808 [2d Dept 1993], quoting *Morgulas v J. Yudell Realty, Inc.*, 161 AD2d 211, 213 [1st Dept 1990]). This is obviously present here.

Accordingly, defendant’s motion is granted to the extent of granting a stay of this action. Although defendants seek either a dismissal or stay of this action, a stay, pending the outcome of the Main Action, is more appropriate than dismissal (see

Somoza v Pechnik, 3 AD3d 394 [1st Dept 2004] [It is appropriate to stay an action in deference to another where the determination in the other will resolve all of the issues in the stayed action and the judgment on one trial will dispose of the controversy in both actions]; see also *Epstein v Epstein*, 211 AD2d 968 [3d Dept 1995]). In light of this determination, it is unnecessary to reach defendants' remaining arguments for dismissal.

Plaintiffs' Motion to Dismiss Counterclaims (Motion Sequence No. 002)

Plaintiffs move to dismiss defendants' 12 counterclaims on the grounds that they lack legal merit. Defendants cross-move for an order deeming the counterclaims in this action asserted in the Main Action, approving the simultaneous withdrawal of the counterclaims in this action and denying as moot plaintiffs' motion to dismiss the counterclaims.

In support of the cross-motion, defendants assert that, as the counterclaims significantly rely on facts previously asserted in the Main Action, the Main Action is the more appropriate proceeding for the counterclaims to proceed. This court agrees. Defendants' counterclaims for breach of contract, breach of fiduciary duty, fraud and a declaratory judgment that Ferolito acted in bad faith in instituting the dissolution proceeding, all arise from the claims Ferolito makes in the Main Action and the facts underlying those claims. Under these circumstances, granting the cross-motion will eliminate the need to replead duplicative facts and similar allegations in separate actions. Additionally, all of the parties in this case, except Menashi, are also parties to the Main Action. Indeed, defendants assert that they intend to amend their answer to

the first amended complaint, counterclaims and third-party complaint in the Main Action for the limited purpose of asserting the counterclaims.

Accordingly, the cross-motion is granted and plaintiffs' motion to dismiss the counterclaims is denied as moot, as the counterclaims are no longer pending in this action. The court has considered the remaining arguments, and finds them to be without merit.

Accordingly, it is

ORDERED that the portion of defendants' motion to dismiss Count IV of the complaint is granted for the reasons stated on the record on May 17, 2011; and it is further

ORDERED that defendants' motion to dismiss the amended complaint's remaining counts or to stay this action is granted to the limited extent that this action is stayed, pending the resolution of the consolidated action entitled *John M. Ferolito et al. v Domenick J. Vultaggio et al.*, and bearing Index Nos. 590967/08 and 600396/08, and is denied in all other respects; and it is further

ORDERED that defendants' cross motion for an order deeming the counterclaims in this action asserted in the consolidated action entitled *John M. Ferolito et al. v Domenick J. Vultaggio et al.*, and bearing Index Nos. 590967/08 and 600396/08, and approving the simultaneous withdrawal of the counterclaims in this action, is granted; and it is further

ORDERED that plaintiffs' motion to dismiss the counterclaims is denied as moot.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been provided to counsel for the parties.

Dated: New York, New York
June 22, 2011



Hon. Martin Shulman, J.S.C.

FILED

JUN 24 2011

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