

Matter of Teplitsky

2011 NY Slip Op 33079(U)

November 18, 2011

Supreme Court, Nassau County

Docket Number: 014841/2010

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 7

Application of IDA TEPLITSKY,

Petitioner,

INDEX NO.: 014841/2010

For the Judicial Dissolution of,
PHYSICIAN'S CHOICE, INC.,

IDA TEPLITSKY, both individually and on behalf
of the shareholders of PHYSICIAN'S CHOICE, INC.,

Plaintiff,

INDEX NO.: 014840/2010

- against -

STEPHAN KARIAN and LORI KARIAN,

Defendants.

STEPHAN KARIAN and PHYSICIAN'S CHOICE,
INC.,

Plaintiffs,

INDEX NO.: 016539/2010
MOTION DATE: 11/17/2011
SEQUENCE NO.: 005

- against -

IDA TEPLITSKY and MICHAEL TEPLITSKY,

Defendants.

The following documents were read on this motion:

Karian Notice of Motion to Amend Caption in 016539/2010 1.
 Affirmation of Michael G. Mangan, Esq. in Support of Motion 2.
 Affirmation of Marc A. Stein, Esq. in Partial Opposition 3.
 Cross-motion for leave to reargue Order of January 31, 2011 4.
 Affirmation in Opposition to Cross-motion to reargue 5.

PRELIMINARY STATEMENT

Stephan Karian moves for leave to amend the caption in Index No. 016539/2010 Motion Sequence #4 to add Lori Karian as a plaintiff, and to clarify that the plaintiffs in that action bring only derivative claims on behalf of Physician’s Choice Inc. (PCI). This relief was previously sought in Motion Sequence 003, which has been withdrawn.

Counsel for Ida Teplitsky and Dr. Michael Teplitsky opposes the application to the extent that it seeks to add Lori Karian as a plaintiff; but does not oppose the request to drop PCI as a direct plaintiff against the Teplitskys, since, they claim, that Karian was never authorized to bring an action on behalf of PCI, particularly against Ida Teplitsky, the owner of 50% of the shares of PCI.

Motion Sequence 005 is a cross-motion on behalf of the Teplitskys to reargue the Decision and Order dated January 31, 2011, entered February 4, 2011, which denied the motion to dismiss the action entitled *Karian and Physician’s Choice Inc. v. Ida Teplitsky and Michael Teplitsky*, Index No. 016539/2010, on the ground that Lori Karian, a necessary party, was not named as plaintiff.

BACKGROUND

PCI was founded in 1996 for the purpose of formulating, marketing, and selling nutritional supplements to the general public. Stephan Karian and Lori Karian, his wife, are 50% owners as tenants by the entirety, and Ida Teplitsky is the owner of the other 50%. The Karians have managed and operated PCI from 1996 through 2010, and claim that the Teplitskys have received approximately \$7 million in distributions over that period.

as a spokesperson over the years.

In May 2010 there arose a dispute with respect to the management of the company. On June 30, 2010, Stephen Karian, on behalf of himself, Lori, and PCI derivatively, commenced an action in Supreme Court, New York County. The Summons with Notice in that action is annexed as Exh. 1 to the motion. The Summons with Notice was amended by document dated July 9, 2010. (Exh. 2). The Teplitskys deny receipt of service of the Amended Summons with Notice.

Ida Teplitsky commenced two actions in Supreme Court, Nassau County on August 4, 2010 relating to the ownership and dissolution of PCI. The first of these, under Index No. 014840/2010, is captioned "IDA TEPLITSKY, both individually and on behalf of the shareholders of PHYSICIANS CHOICE, INC. against STEPHAN KARIAN and LORI KARIAN. The second action, under Index No. 014841/2010 is captioned "Application of IDA TEPLITSKY, Petitioner, For the Judicial Dissolution of PHYSICAN'S CHOICE, INC.".

Stephan Karian served a Supplemental Summons (Exh. 4) in the New York County Action dated September 9, 2010. The caption in this action eliminated PCI entirely. The annexed complaint asserts a claim for relief, in part, against Ida Teplitsky, on behalf of the Corporation. The First Cause of Action is for dissolution of P.C. pursuant to BCL § 1104. The Second Cause of Action alleges breach by Ida Teplitsky of the fiduciary duty owed to "the Corporation and the shareholders". In the Third Cause of Action, Mr. Karian claims a breach of fiduciary duty and breach of contract against Michael Teplitsky.

The three actions are joined for the purpose of discovery, but have not been consolidated. The present motion seeks to add Lori Karian as a plaintiff in Index No. 016539/2010 and clarify that Physician's Choice was intended to be a nominal plaintiff, and that the Karians are now proceeding to enforce derivative claims on behalf of PCI. The Teplitskys have previously asserted that the action on behalf of Stephan Karian was subject to dismissal for failure to include Lori Karian, the owner as tenant by the entirety

STEPHAN KARIAN and LORI KARIAN, on behalf of
PHYSICIAN'S CHOICE, INC.,

Plaintiffs,

INDEX NO.: 016539/2010

- against -

IDA TEPLITSKY and MICHAEL TEPLITSKY,

Defendants.

The Teplitskys assert in their cross-motion that the Karians first learned not later than November 29, 2010, that Lori Karian was a necessary party for them to proceed as the owners of a 50% interest in PCI. It was as of that date that the Teplitskys moved to dismiss the Karian complaint, alleging in Point V that the “complaint should be dismissed as Lori Karian, who jointly owns Karian’s shares as a ‘tenant by the entirety’, is not a party to the action”. They further claim that the Court did not directly deal with the issue, and that no effort to rectify this deficiency was undertaken by the Karians for a period of 10 months, until the making of the current motion. They then conclude that the current motion establishes the fact that the original complaint was deficient and that granting leave to add Lori Karian at this time would be a circumvention of statute of limitations considerations.

The action on behalf of Stephan Karian was commenced by Summons with Notice dated June 30, 2010, with an Amended Summons with Notice dated July 9, 2010. Karian served an Amended Verified Complaint dated December 30, 2010. Counsel for Teplitsky accurately points out that the Court failed to deal with the Fifth Claim in the motion to dismiss, that Lori Karian, the owner with her husband as tenant by entirety of 50% of the shares of PCI. Lori Karian was, in fact, a necessary party. (*Loree v. Barnes*, 59 A.D.3d 965 [4th Dept.2009]). Were the Court to have dismissed the complaint on that ground, it would have done so without prejudice, and the action could have been recommenced.

An action in which damages are sought by, or derivatively on behalf of, a corporation for misconduct by corporate officers and directors is subject to a six year statute of limitations. (*JSC Foreign Economic Ass'n. Technostroyexport v. International Development and Trade Services, Inc.*, 295 F.Supp. 366, 373 [S.D.N.Y. 2003]) C.P.L.R. § 213 (7). The Karians are entitled to claimed damages against Ida Teplitsky for alleged failure to perform her duties as treasurer for a period beginning six years prior to October 31, 2011, the date upon which the Court granted Motion Sequence No. 4 to amend the caption to add Lori Karian as an additional plaintiff.

Motion Sequence No. 5, to reargue, is granted, and upon reconsideration, the Court determines that the action commenced by Stephan Karian and Physician's Choice failed to state a cause of action until the action was amended to include Lori Karian, a necessary party, as a plaintiff in the action.

This constitutes the Decision and Order of the Court.

Dated: November 18, 2011


J.S.C.

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**