

<b>Holdrum Invs. N.V. v Edelman</b>
2011 NY Slip Op 33889(U)
September 6, 2011
Supreme Court, New York County
Docket Number: 650950/2011
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
HON. ANIL C. SINGH

PRESENT: SUPREME COURT JUSTICE  
*Justice*

PART 61

Index Number : 650950/2011  
HOLDRUM INVESTMENTS NV  
vs.  
EDELMAN, ASHER B  
SEQUENCE NUMBER : 001  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

Dated: 9/6/11

Anil C. Singh  
HON. ANIL C. SINGH  
SUPREME COURT JUSTICE *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 JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

-----x

HOLDRUM INVESTMENTS N.V., individually  
and derivatively on behalf of MUSEUM  
PARTNERS L.P.,

Plaintiffs,

Index No.: 650950/11

-against-

ASHER EDELMAN,

DECISION

Defendant.

-----x

**ANIL SINGH, J.:**

Defendant moves, pursuant to CPLR 3211 (a) (5) and (7), to  
dismiss the verified complaint. Plaintiff opposes the motion.

**BACKGROUND**

The alleged claims in this action relate to Museum Partners,  
L.P. (Museum), a limited liability company organized pursuant to  
the laws of the state of Delaware. Defendant is the general  
partner of Museum and, according to the complaint, defendant  
allegedly breached his fiduciary duties to the limited partners  
of Museum by misappropriating assets.

Museum was formed for the purpose of acquiring a substantial  
position in Société du Louvre (Louvre), a French publicly-traded  
company controlled by the Taittinger family. Defendant is a  
widely-recognized investor known for his ability to acquire

interests in undervalued publicly-traded companies. Plaintiff Holdrum Investments N.V. (Holdrum), a Netherlands Antilles corporation, alleges that defendant represented to it that Louvre was undervalued and Holdrum states that it relied substantially on defendant's reputation in deciding to invest in Museum.

Defendant's investment strategy to acquire a controlling interest in Louvre proved not to be successful and he instituted a derivative suit against the Taittinger family in France, which eventually failed. Thereafter, defendant began selling Museum's holdings and distributing cash to Museum's partners, and then decided to commence a lawsuit against the Taittinger family in New York federal court, allegedly based on the same theories as in the French litigation. The New York federal lawsuit was opposed by Museum's limited partners, and the New York suit also resulted in failure for Museum.

The complaint alleges that defendant, without the consent of Museum's limited partners, instituted another lawsuit on behalf of Museum against Starwood Hotels, an entity whose assets were owned by Louvre, alleging fraud, breach of confidentiality and conversion. Holdrum asserts that these lawsuits were not congruent with the purposes for which Museum was formed, and were a waste of Museum assets.

Section 8.1 (d) of the limited partnership agreement states that the limited partnership will dissolve and terminate on June

30, 1998, unless extended by the general partner, in his discretion, to December 31, 1998. Motion, Ex. B. The complaint alleges that defendant failed to terminate Museum in accordance with this provision of the limited partnership agreement and continued to operate Museum and, allegedly, diverted funds from Museum for a period of nine months subsequent to July of 2010. Moreover, Holdrum asserts that, although Museum has long been dissolved pursuant to the operating agreement, defendant continues to use Museum assets for his own personal benefit and has failed to wind down Museum's affairs.

The complaint asserts seven causes of action: (1) injunction enjoining defendant from using Museum assets; (2) dissolution and winding up of Museum; (3) breach of duty and the partnership agreement; (4) accounting; (5) conversion; (6) derivative action pursuant to Partnership Law § 115-a; and (7) prima facie tort. Motion, Ex. A.

In 2004, another group of Museum's limited partners sued the partnership in Delaware and said lawsuit was settled in 2007. Motion, Ex. C. At the time of the settlement, all of Museum's partners, including Holdrum, were notified of the settlement and offered the right to join in the agreement. *Id.* Holdrum elected not to participate.

Defendant maintains that, by the nature of the lawsuit in Delaware, Holdrum was put on notice as to any alleged breach of

fiduciary duty on the part of defendant, and Holdrum's failure to participate in the settlement commenced the running of the statute of limitations for any of those alleged breaches. Defendant contends that the statutory period in which to file suit is governed by Delaware law, which imposes a three year period in which to institute actions based on a breach of fiduciary duty, and that Holdrum failed to commence the instant litigation within that time frame. Therefore, states defendant, the present lawsuit is time-barred.

In addition, defendant claims that, under Delaware law, allegations that a general partner in a limited partnership breached his fiduciary duties is a derivative cause of action, not personal. Therefore, avers defendant, all of the personal causes of action asserted against him are derivative, not personal as pled, and must be dismissed.

Defendant also states that the present action is barred by the application of the doctrine of res judicata, since all of the matters complained of by Holdrum were part and parcel of the Delaware action that was settled in 2007 and in which Holdrum elected not to participate.

Lastly, as an alternative, should the court deny his motion, defendant requests that plaintiff be required to post security for costs since it is an out-of-state plaintiff.

In opposition to the instant motion, Holdrum alleges that

the action is not barred by the statute of limitations because the acts complained of occurred within the last three years: the nine month period from July, 2010, to the institution of the current action.

Holdrum also contends that the doctrine of res judicata is inapplicable because the earlier Delaware case was not decided on the merits, did not involve Holdrum, concerned different causes of action, and was dismissed without prejudice as to the nonparty limited partners. Opp., Ex. D.

Holdrum maintains that its causes of action are personal and not derivative, and that the Delaware unjust enrichment exception to derivative claims applies to the case at bar. Further, Holdrum states that, even if the claims are deemed to be derivative, demand would have been futile. Holdrum argues that the complaint alleges sufficient facts to substantiate the futility of making a demand on Museum. Holdrum also requests that, should the court determine that the complaint is insufficient with respect to alleging futility, it be allowed to amend the complaint.

Lastly, Holdrum asserts that it need not post security because it is authorized to do business in New York.

In reply, defendant argues that, although Holdrum states that the actions complained of occurred within nine months of July, 2010, most of the actions detailed in the complaint

occurred more than three years before the instant action was commenced and, therefore, the suit is time-barred.

Further, defendant maintains that all of the causes of action are derivative because no individual harm has been alleged and, in order to assert a derivative claim a plaintiff must allege futility with specificity in the complaint, which Holdrum failed to do.

Defendant also states that the action is barred by res judicata because, regardless of whether the Delaware action was dismissed without prejudice because of the settlement, it does not abrogate the fact that Holdrum could have participated in the lawsuit even if it did not wish to participate in the settlement.

Lastly, defendant urges that, should his motion be dismissed, Holdrum be required to post security because a search of New York records by defendant's attorney does not reveal Holdrum as authorized to do business in New York (Aff. of Davida S. Scher, Esq.), and Holdrum has failed to supply any evidence to support its conclusory assertion that it is so authorized.

**DISCUSSION**

CPLR 3211 (a), "Motion to dismiss cause of action," states that:

"[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

- \*   \*   \*
- (5) the cause of action may not be maintained because of ... res judicata, statute of limitations ...; or
- \*   \*   \*

(7) the pleading fails to state a cause of action . . . ."

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. *Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188 (1<sup>st</sup> Dept 1999). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action. *Guggenheimer v Ginzburg*, 43 NY2d 268 (1997); *Salles v Chase Manhattan Bank*, 300 AD2d 226 (1<sup>st</sup> Dept 2002).

That portion of plaintiff's motion seeking to dismiss the complaint based on the application of the statute of limitations and the doctrine of res judicata is denied.

Both parties agree that the Delaware statute of limitations is applicable to the case at bar. Pursuant to Delaware law, the statutory period for instituting a claim based on a breach of fiduciary duty is three years. 10 Del C § 8106; *Fike v Ruger*, 754 A2d 254 (Del Ch 1999), *affd* 752 A2d 112 (Del Supr Ct 2000). Although defendant asserts that the acts complained of in the complaint all occurred prior to 2007, the complaint clearly states that the actions, which are admittedly unspecified in the complaint, all occurred in the nine months subsequent to July of 2010, thereby falling well within the statutory period.

Similarly, defendant's claim that the causes of action are barred by *res judicata*, based on the 2007 settlement in the Delaware court proceeding, is found to be without merit, since the complaint states that the acts for which Holdrum is seeking redress occurred after July, 2010. The doctrine of *res judicata* only bars relitigation of claims that were either actually litigated or could have been litigated in an earlier proceeding. *Union Street Tower, LLC v Richmond*, 84 AD3d 784 (2d Dept 2011); *Source Enterprises, Inc. v Windels Marx Lans & Mittendorf*, 83 AD3d 556 (1<sup>st</sup> Dept 2011). Since the alleged wrongs only transpired after the Delaware litigation terminated, they cannot be considered barred by the application of the doctrine of *res judicata*.

In addition, the earlier Delaware proceeding was dismissed according to the terms of a settlement agreement, but the court specifically stated that the action was dismissed without prejudice as to the limited partners that did not participate in the settlement, which include Holdrum. "[A] dismissal 'without prejudice' lacks a necessary element of *res judicata* - by its terms such a judgment is not a final determination on the merits." *Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 13 (2008).

Therefore, based on the foregoing, the branch of defendant's motion seeking to dismiss the complaint pursuant to CPLR 3211 (a)

(5) is denied.

That portion of defendant's motion seeking to dismiss the complaint based on Holdrum's failure to state a cause of action is granted.

The thrust of the arguments posited by both parties turns on whether the causes of action asserted in the complaint are deemed to be personal or derivative claims. If they are derivative causes of action, the complaint must be dismissed.

"Delaware courts have long recognized that actions charging 'mismanagement which depress[] the value of stock [allege] a wrong to the corporation; i.e., the stockholders collectively, [and are] to be enforced by a derivative action' [citations omitted]."

*Burghart v Landau*, 821 F Supp 173, 176-177 (SD NY), *affd* 8 F3d 1538 (2d Cir 1993) (New York courts look to Delaware law to determine the right of a plaintiff to bring an action against a Delaware entity).

"The distinction between derivative and individual actions rests upon the party being *directly* injured by the alleged wrongdoing." *Kramer v Western Pacific Industries, Inc.*, 546 A2d 348, 351 (Del Supr 1988).

"Whether a cause of action is individual or derivative must be determined from the 'nature of the wrong alleged' and the relief, if any, which could result if plaintiff were to prevail. In determining the nature of the wrong alleged, a court must look to 'the body of the complaint, not to the plaintiff's designation or stated intention' [internal citations omitted]."

*Id.* at 352; *Feldman v Cutaia*, 951 A2d 727 (Del Supr 2008); *Tooley*

*v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031 (Del Supr 2004).

If the action is derivative, an individual limited partner or shareholder may not institute it as a direct action. However, an exception exists with respect to instituting actions based on mismanagement and breach of fiduciary duty, referred to as the "special injury exception," which allows an individual limited partner or shareholder to maintain a cause of action that is primarily derivative in nature, provided that the plaintiff alleges a disproportionate injury to itself. *Elster v American Airlines, Inc.*, 34 Del Ch 94 (1953). This Holdrum has failed to do.

In the case at bar, Holdrum has not articulated any injury separate and distinct from the injuries suffered by the other limited partners as a class. Therefore, despite Holdrum's characterization of the causes of action, with one exception, as being individual rather than derivative, the court finds them all to be derivative in nature.

In support of its contention that the claims are individual, not derivative, Holdrum cites to *Matter of Cencom Cable Income Partners, L.P. Litig.*, 2000 WL 130629, 29000 Del Ch LEXIS 10 (Del Ch 2000), which held that an action between all of the limited partners against all of the general partners of a defunct limited partnership was individual in nature, because the limited

partnership was terminated and the suit basically involved one class of partners against another class of partners. However, that case was distinguished in *Agostino v Hicks* (845 A2d 1110 [Del Ch 2004]), which stated that the *Cencom* decision was limited to those particular facts.

In the case at bar, Holdrum is not the entire class of limited partners, and the complaint also alleges a derivative claim on behalf of Museum, indicating that, in some context, Museum is still sufficiently extant to be able to maintain a lawsuit.

Further, despite the fact that Holdrum argues that there is another exception for causes of action based on unjust enrichment, it has not provided either statutory or decisional support for that contention.

In addition, Holdrum cannot maintain a derivative suit on behalf of Museum because the complaint fails to allege with particularity that making a demand on Museum would be futile, a requirement under Delaware law. *American International Group, Inc. v Greenberg*, 965 A2d 763 (Del Ch 2009).

However, despite the preceding, the court is inclined to condition its dismissal of this action upon granting leave to Holdrum to amend its complaint to conform to the dictates of this decision. Further, should Holdrum amend the complaint with sufficient particularity to withstand dismissal, it will be

required to post security as an out-of-state corporation that has failed to provide evidence that it is authorized to do business in this state. CPLR 8501 (a); *Small v Stern*, 65 AD3d 1326 (2d Dept 2009).

#### **CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that the defendant's motion to dismiss is granted, and the complaint is dismissed; and it is further

ORDERED that plaintiffs are granted leave to serve an amended complaint so as to replead the causes of action within 20 days after service on plaintiffs' attorney of a copy of this order with notice of entry; and it is further

ORDERED that, should plaintiffs serve and file such amended complaint, within 30 days from the date of service of a copy of this order with notice of entry, plaintiff shall wither (i) pay into the Court the sum of \$500.00 (payable in cash, credit card (Mastercard or Visa), certified check or bank check) to be applied to the payment of costs, if any, awarded against plaintiffs, or (ii) at their election, file with the County Clerk (Room 141B) an undertaking with sufficient surety in a like amount to be applied to the payment of costs, if any, awarded against plaintiffs in this action; and it is further

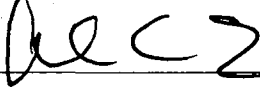
ORDERED that, within said 30-day period, plaintiffs serve upon the attorneys for the defendant a written notice of the

aforesaid payment or of the filing of such undertaking; and it is further

ORDERED that, in the event that plaintiffs fail to serve and file an amended complaint in conformity herewith within such time, leave to replead shall be deemed denied, and the Clerk, upon service of a copy of this order with notice of entry and an affirmation/affidavit by defendant's counsel attesting to such non-compliance, is directed to enter judgment dismissing the action, with prejudice, and with costs and disbursements to the defendant as taxed by the Clerk.

Dated: September 6, 2011

ENTER:



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Anil Singh, J.S.C.  
**HON. ANIL C. SINGH**  
**SUPREME COURT JUSTICE**