

**Miller v Miller**

2012 NY Slip Op 31572(U)

June 7, 2012

Supreme Court, Suffolk County

Docket Number: 11-22141

Judge: Daniel Martin

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 9 - SUFFOLK COUNTY

**PRESENT:**

Hon. DANIEL MARTIN  
Justice of the Supreme Court

MOTION DATE 10-12-11  
ADJ. DATE 11-15-11  
Mot. Seq. # 001 - MD

-----X  
SCOTT MILLER and STEVEN MILLER,  
  
Plaintiffs,

WITHERS BERGMAN, LLP  
Attorney for Plaintiffs  
430 Park Avenue, 10th Floor  
New York, New York 10022

- against -

WOLFE MILLER, RICHARD KOLSCH, FOUR  
BOYS I, LLC, FOUR BOYS II, LLC, FOUR  
BOYS III, LLC, FOUR BOYS IV, LLC, FOUR  
BOYS V, LLC, FOUR BOYS VI, LLC, FOUR  
BOYS VII, LLC, FOUR BOYS VIII, LLC,  
FOUR BOYS HAMPDEN VILLAS, LLC,  
MILLER FAMILY PARTNERSHIP I, MILLER  
FAMILY PARTNERSHIP II, MILLER FAMILY  
PARTNERSHIP III, MILLER FAMILY  
PARTNERSHIP IV, WOMARK  
CORPORATION,

CERTILMAN, BALIN, ADLER & HYMAN, LLP  
Attorney for Defendants  
90 Merrick Avenue, 9th Floor  
East Meadow, New York 11554

Defendants.  
-----X

Upon the following papers numbered 1 to 32 read on this motion to dismiss or stay the action; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers 14 - 24; Replying Affidavits and supporting papers 25 - 32; Other     ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion by defendants for an order pursuant to CPLR 3211 (a) (4) dismissing this action with respect to causes of action numbered one to 35 of the complaint on the ground that there is another action pending concerning these parties in South Carolina, and dismissing or staying this action on the ground that the action should be heard in another forum in the interest of substantial justice pursuant to CPLR 327 is denied.

This is an action to recover damages for alleged breach of fiduciary duty and fraud, and to obtain an accounting of nine foreign limited liability companies organized under the laws of South Carolina and Colorado. The nine foreign limited liability companies are: Four Boys I, LLC, Four Boys II, LLC, Four Boys III, LLC, Four Boys IV, LLC, Four Boys V, LLC, Four Boys VI, LLC, Four Boys VII, LLC, and Four

Miller v Miller  
Index No. 11-22141  
Page No. 2

Boys VIII, LLC, and Four Boys Hampden Villa, LLC (Four Boys Companies).

The 94-page complaint of the instant action alleges 37 causes of action. The first 35 causes of action relate to the Four Boys Companies. They allege violations of South Carolina and Colorado laws and include claims that defendants forged plaintiffs' signatures on certain operating agreements of the Four Boys Companies, failed to provide any information to plaintiffs concerning the business activities of the companies, and took out personal loans without the knowledge of plaintiffs then commenced an action against plaintiffs to recover amounts due.

The complaint indicates that plaintiff Scott Miller resides in Nesconset, Suffolk County, New York, plaintiff Steven Miller resides in North Haven, Connecticut, their father, defendant Wolfe Miller, resides in St. James, Suffolk County, New York, and defendant Richard Kolsch resides in Port Jefferson, Suffolk County, New York. All of the Four Boys Companies have their principal place of business located at 595 Route 25A, Suite 1, Miller Place, Suffolk County, New York.

Causes of action numbered 36 and 37 of the instant action relate to the domestic limited partnerships of Miller Family Limited Partnership I, Miller Family Limited Partnership II, Miller Family Limited Partnership III, and Miller Family Limited Partnership IV organized under the laws of New York (Miller Family Limited Partnerships), and a corporation organized under the laws of New York, Womark Corporation. The Miller Family Limited Partnerships and Womark Corporation have their principal place of business located at 595 Route 25A, Suite 1, Miller Place, Suffolk County, New York.

The instant action was commenced on July 29, 2011. A pending South Carolina action, commenced prior to the instant action, seeks the dissolution of one of the nine foreign limited liability companies, Four Boys III, and includes the same individual parties, Richard Kolsch, Wolfe Miller, Steven Miller, and Scott Miller, as in this action. There are also pending Colorado actions for the dissolution of Four Boys V, Four Boys VI, and Four Boys Hampden Villa.

Defendants now move to dismiss pursuant to CPLR 3211 (a) (4) the first 35 causes of action relating to the foreign Four Boys Companies on the ground that another action is pending concerning these parties in South Carolina, and to dismiss or stay this action pursuant to CPLR 327 on the ground of forum non conveniens, that is, that the action should be heard in another forum in the interest of substantial justice. In support of their motion, defendants submit, among other things, the supporting affidavit dated September 19, 2011 of defendant Wolfe Miller, the summons and complaint of the instant action, the motion papers to amend the complaint in the South Carolina action, the amended summons and complaint of the South Carolina action, the complaint and request for judicial dissolution of the Colorado action, and Colorado and South Carolina Secretary of State records for the Four Boys Companies.

By his affidavit in support dated September 19, 2011, defendant Wolfe Miller (defendant Miller) states that he is the father of the plaintiffs Scott and Steven Miller, that as part of his estate planning he arranged for his sons Scott and Steven to receive 20 percent interests in each of the Four Boys Companies except for Four Boys VII and VIII, and that each of the Four Boys Companies own real estate primarily in South Carolina and Colorado, although one parcel is located in Georgia and one parcel in New York. He asserts that his sons Scott and Steven contributed nothing to the capital or payment of expenses of any of the Four Boys Companies, nor have they loaned any money or made any contributions, including labor, to

Miller v Miller  
Index No. 11-22141  
Page No. 3

any of the Four Boys Companies. Defendant Miller claims that plaintiffs refused in August and September 2011 to guarantee any loans or to consent to additional collateral being posted for the extension of a mortgage loan on certain Colorado realty owned by Four Boys V.

Defendant Miller asserts that given the condition of the real estate market, the Four Boys Companies have not prospered and given the deterioration in the relationship between himself and his sons, maintaining the Four Boys Companies is no longer feasible and they need to be dissolved. He informs that the South Carolina dissolution proceeding for Four Boys III has been pending since January 20, 2011 and that Four Boys III has recently moved to amend the complaint in the South Carolina action to include the other South Carolina Four Boys Companies (Four Boys I, II, IV, VII, VIII) in the dissolution proceeding. He adds that the three Colorado Four Boys Companies (Four Boys V and VI and Four Boys Hampden Villa) have also filed for dissolution in the State of Colorado. According to defendant Miller, and contrary to the allegations of the instant complaint, Four Boys V and VI were organized under the laws of Colorado.

Defendant Miller argues that New York does not have jurisdiction to dissolve any of the nine Four Boys Companies as they were formed in either South Carolina or Colorado and that the claims in the instant action should be litigated in those states as part of the winding up and dissolution of the Four Boys Companies and in the interest of judicial economy. He further argues that to fail to do so will result in duplicative litigation, the risk of conflicting decisions, and vexatious and duplicative discovery. Defendant Miller emphasizes that it would be appropriate for this Court to defer to South Carolina and Colorado in this dispute concerning the internal affairs of the foreign liability companies which involve issues of South Carolina and Colorado law.

In opposition to the motion, plaintiffs contend that New York is the proper venue and this action should not be dismissed inasmuch as there is no other action pending in another court raising the same legal issues as alleged herein and the Four Boys Companies are managed in New York, all records for the Four Boys Companies are maintained in the companies' office in Miller Place, New York, all or substantially all of the witnesses are New York residents, plaintiffs' claims arise out of actions in New York, and New York is a more convenient forum for the parties.

In support of their opposition, plaintiffs submit, among other things, their affidavits in opposition dated October 26, 2011, and responses to interrogatories in the South Carolina action including a copy of a December 2010 bank statement of a local New York bank addressed to Four Boys III at the Miller Place address, copies of operating agreements for the Four Boys Companies, and tax returns for the Four Boys Companies indicating the Miller Place address. Plaintiffs also submit the summons and complaint of a prior related action commenced on December 14, 2009 in the Supreme Court, Suffolk County, entitled, Four Boys II, LLC, Four Boys III, LLC, Four Boys IV, LLC, Four Boys V, LLC, and Four Boys Hampden Villa, LLC, plaintiffs, against, Steven Miller and Scott Miller, defendants, under Index number 48843-2009. In said action, the named Four Boys Companies alleged breach of contract and sought to recover required capital contributions from Steven and Scott Miller pursuant to the companies' operating agreements.

By their affidavits in opposition dated October 26, 2011, plaintiffs contend that contrary to their father's assertions, they did contribute monetarily to the Four Boys Companies inasmuch as their father used a significant sum of money given to them by their grandmother in the 1960's to invest in real estate

Miller v Miller  
Index No. 11-22141  
Page No. 4

and other ventures. In addition, they contend that their father installed defendant Richard Kolsch (Kolsch) as a “puppet” manager of the companies, that the companies are being operated primarily for the benefit of defendants Miller and Kolsch, that plaintiffs have been excluded from not only the benefits of the companies but also from information concerning, and participation in, the operation of said companies, and that plaintiffs have been exposed to substantial financial liability.

Plaintiffs state that since they have been denied information concerning the business of the Four Boys Companies, they cannot say whether the companies should continue operating. They explain that they did not oppose the dissolution of Four Boys III in the pending South Carolina action and instead requested that defendant Kolsch provide an accounting relating to the dissolution but that said request was met with needless discovery in an attempt to force plaintiffs to withdraw their requests due to costly litigation.

Plaintiffs inform that from interrogatory responses in the South Carolina action they learned that all records for Four Boys III were kept in the company office in Miller Place, New York, that the company was governed by a written operating agreement containing an exclusive New York jurisdiction and venue clause, and that defendants Miller and Kolsch were persons with knowledge of facts relevant to this matter. Plaintiffs also contend that based on this information, it appears that the Four Boys Companies were operated from New York, all, or substantially all, of the witnesses with relevant information are located in New York, and all records are in New York. They add that bank statements provided indicate that the accounts of Four Boys III are held at a local New York bank. Plaintiffs indicate that their counsel was provided with copies of operating agreements specifying exclusive jurisdiction in the United States District Court, Eastern District of New York or any New York State court over the matters in dispute.

According to plaintiffs, their refusal to provide information to the mortgage bank, to pledge ownership interests and to agree to Four Boys VI pledging all of its assets for the benefit of Four Boys V was based on a lack of information provided by Four Boys V and an apparent lack of management planning. They argue that the request to amend the complaint in the South Carolina action to include claims for dissolution of all the other Four Boys Companies formed in South Carolina and the actions to dissolve the Four Boys Companies formed in Colorado are obvious attempts to influence the venue of the subject action and to cause plaintiffs to incur the expense of litigating in multiple jurisdictions.

The operating agreements for Four Boys II dated February 1, 2005, for Four Boys III dated March 1, 2005, Four Boys IV dated March 1, 2005, Four Boys V dated March 2, 2005, Four Boys VI dated December 1, 2005, Four Boys VII dated January 5, 2006, Four Boys VIII dated January 30, 2007 all signed by plaintiffs and defendants Miller and Kolsch contain the following exclusive jurisdiction and venue clause:

Any suit involving any dispute or matter arising under this Agreement may only be brought in the United States District Court, Eastern District of New York, or any New York State court having jurisdiction over the subject matter of the dispute. All members hereby consent to the exercise of personal jurisdiction by any such court with respect to any such proceeding.

In reply, defendants inform that the prior Supreme Court, Suffolk County, action was discontinued, without prejudice, pursuant to a stipulation dated March 18, 2010 signed by counsel for all the parties, and

Miller v Miller  
Index No. 11-22141  
Page No. 5

that the decision to add the other Four Boys Companies to the South Carolina dissolution proceeding was made prior to the commencement of the instant action as evidenced by correspondence between the parties. Defendants contend that plaintiffs should be estopped from arguing that New York is a convenient forum inasmuch as they made the opposite argument in their motion to dismiss the prior proceeding. In their reply, defendants submit a copy of the aforementioned stipulation, notice of motion and attached papers, correspondence, and the answer dated March 22, 2011 filed in the South Carolina action by Steven and Scott Miller.

Under New York law, the laws of the jurisdiction under which a foreign limited liability company are organized govern the liability of the members and managers of a limited liability company (*see* Limited Liability Company Law § 801; *Treeline I OCR, LLC v Nassau County Indus. Dev. Agency*, 82 AD3d 748, 918 NYS2d 128 [2d Dept 2011]). A claim for dissolution of a foreign limited liability company is one over which the New York courts lack subject matter jurisdiction (*see MHS Venture Mgt. Corp. v Utilisave, LLC*, 63 AD3d 840, 881 NYS2d 452 [2d Dept 2009]; *Rimawi v Atkins*, 42 AD3d 799, 840 NYS2d 217 [3d Dept 2007]; *Matter of Porciello v Sound Moves*, 253 AD2d 467, 675 NYS2d 903 [2d Dept 1998]; *Matter of Warde-McCann v Commex, Ltd.*, 135 AD2d 541, 522 NYS2d 19 [2d Dept 1987]). New York courts lack subject matter jurisdiction over claims for dissolution and an ancillary accounting (*see Rimawi v Atkins, supra*; *In re Dissolution of Hosp. Diagnostic Equip. Corp.*, 205 AD2d 459, 613 NYS2d 884 [1st Dept 1994]).

A party may move to dismiss one or more causes of action asserted against him pursuant to CPLR 3211 (a) (4) 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 (*see* CPLR 3211 [a] [4]). CPLR 3211 (a) (4) is inapplicable to the circumstances of this action inasmuch as the pending actions are not for the same causes of action. The instant action is one for breach of fiduciary duty, fraud, and an accounting whereas the South Carolina action seeks the dissolution of one, and possibly more, of the Four Boys Companies. Thus, defendants failed to demonstrate that the relief sought in South Carolina action is the same or substantially the same such that dismissal of this action is appropriate (*see* CPLR 3211[a] [4]; *Goldman v A & E Club Props., LLC*, 89 AD3d 681, 932 NYS2d 136 [2d Dept 2011]). Therefore, defendants' request for dismissal of this action pursuant to CPLR 3211 (a) (4) is denied.

The doctrine of forum non conveniens allows a court to stay or dismiss an action when, although it may have jurisdiction over a claim, the court determines that "in the interest of substantial justice the action should be heard in another forum" (CPLR 327 [a]). The defendant bears the burden on a motion to dismiss on the ground of forum non conveniens to "demonstrate relevant private or public interest factors which militate against accepting the litigation" (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479, 478 NYS2d 597 [1984], *cert. denied* 469 US 1108, 105 SCt 783 [1985]; *see Koskar v Ford Motor Co.*, 84 AD3d 1317, 1317, 923 NYS2d 901 [2d Dept 2011]).

A motion pursuant to CPLR 327 (a) on the ground of forum non conveniens is addressed to the sound discretion of the trial court, and the resulting determination will not be set aside absent an improvident exercise of that discretion or a failure by the court to consider the relevant factors (*see National Bank and Trust Co. of North America, Ltd. v Banco De Vizcaya, S.A.*, 72 NY2d 1005, 534 NYS2d 913 [1988], *cert. denied* 489 US 1067, 109 SCt 1343 [1989]; *McGuire v W.R. Schmidt, LLC*, 75 AD3d 538, 903 NYS2d 918 [2d Dept 2010]). The factors to be considered on the motion include the

Miller v Miller  
 Index No. 11-22141  
 Page No. 6

residence of the parties, the burden on the New York court, the jurisdiction where the underlying acts occurred, the location of evidence and nonparty witnesses, the potential hardship to the defendants, and the availability of an alternative forum, with no one factor being dispositive (*see Islamic Republic of Iran v Pahlavi, supra; McGuire v W.R. Schmidt, LLC, supra*).

The records of the Secretary of State of South Carolina submitted by defendants indicate that Four Boys I, Four Boys II, Four Boys III and Four Boys IV, Four Boys VII, and Four Boys VIII were organized under the laws of South Carolina. The records of the Secretary of State of Colorado show that Four Boys V, Four Boys VI, and Four Boys Hampden Villa were organized under the laws of Colorado. The submissions indicate that currently one action is pending in South Carolina for the dissolution of one Four Boys Company with perhaps five more to be added, and that there are three actions pending in Colorado for the dissolution of three other Four Boys Companies. Thus, there are multiple related actions pending concurrently.

The parties do not dispute that the individual parties to this action and the other related actions all reside in New York or Connecticut, that the principal place of business of all the Four Boys Companies are located at 595 Route 25A, Suite 1, Miller Place, Suffolk County, New York, and that the business records and bank accounts of all the Four Boys Companies are located in New York. Thus, New York is the location of the parties, evidence and witnesses. It is unclear at this juncture where all of the underlying acts occurred, whether in New York or in the states where property was purchased or both. Inasmuch as a portion of this action cannot be dismissed because it involves New York entities, the burden on this Court of the additional claims against the foreign entities is not great. Likewise, the potential hardship to defendants is minimal given the residences of the individual defendants and the continuing claims against the New York entities. Finally, the availability of multiple alternative forums rather than one does not support defendants' argument of the risk of duplicative litigation, conflicting decisions, and vexatious and duplicative discovery. Based on the foregoing, the Court determines that defendants failed to meet their burden of establishing that New York is an inconvenient forum for this action against the Four Boys Companies (*see Koskar v Ford Motor Co., supra*).

As for the estoppel argument, the Court notes that the prior related action in Supreme Court, Suffolk County, involved an alleged breach of an operating agreement which agreement contained a forum selection clause that did not allow an action in New York State Courts. The circumstances of that prior action are quite different than this action, which does not seek damages based on an alleged breach of an operating agreement. Therefore, defendants' request to dismiss or stay this action pursuant to CPLR 327 on the ground of forum non conveniens is denied.

Accordingly, the instant motion is denied.

Dated:

JUNE 7, 2012.



J.S.C.

         FINAL DISPOSITION

  X  

NON-FINAL DISPOSITION