

Horizon Asset Mgt., Inc. v Duffy

2012 NY Slip Op 33202(U)

July 2, 2012

Sup Ct, NY County

Docket Number: 602509/08

Judge: Bernard J. Fried

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BERNARD J. FRIED
Justice

PART

Index Number : 602509/2008
HORIZON ASSET MANAGEMENT LLC
vs.
DUFFY, RAYMOND A.
SEQUENCE NUMBER : 005
REARGUMENT/RECONSIDERATION

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/2/2012

HON. BERNARD J. FRIED, J.S.C.

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 60

-----X
HORIZON ASSET MANAGEMENT, INC.,

Plaintiff,

-against-

Index No. 602509/08

RAYMOND V. DUFFY, individually
and derivatively on behalf of
HORIZON ASSET MANAGEMENT
SERVICES, LLC,

Defendants and
Counterclaim Plaintiffs,

-against-

MURRAY STAHL and HORIZON ASSET
MANAGEMENT SERVICES, LLC,

Counterclaim Defendants.

-----X

Appearances:

For Plaintiff:

For Defendants:

Schulte Roth & Zabel, LLP
919 Third Avenue
New York, New York 10022

Collier, Halpern, Newberg, Nolletti & Block, LLP
355 Lexington Avenue, Suite 1400
New York, New York 10017

FRIED, J.:

Defendants/counterclaim plaintiffs Raymond V Duffy (Duffy) and Horizon Asset Management Services, LLC (Services) (together, the Duffy Parties) move, pursuant to CPLR 2221 (d), to reargue this court's decision and order dated October 14, 2011, which directed that the issue of damages be tried by a referee, and which directed the referee to hear and report on Duffy's damages from August 2008 to the present, as well as Duffy's future rights under the Operating

Agreement. Plaintiffs/counterclaim defendants Horizon Asset Management LLC and Murray Stahl (together, the Stahl Parties) cross-move, pursuant to CPLR 2221 (e), to renew the same order, dated October 14, 2011, wherein I dismissed Horizon's breach of contract claim. The Stahl Parties also cross-move to strike the Duffy Parties' jury demand.

A motion for leave to reargue may be made "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221 [d]). Such a motion "may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]) (internal citations omitted).

The motion to reargue is granted only to the extent that the referee is to hear and report on the issue of damages sustained by Duffy, taking into account revenues generated by Horizon Management Services as far back as September 2007, as opposed to August 2008, and continuing to the present, taking into account amounts already paid to Duffy, as well as his future rights under the Operating Agreement.

As to that portion of the motion seeking to have Duffy's damages tried by a jury, the motion is denied. It is well settled that, where a plaintiff asserts equitable causes of action, or asserts both legal and equitable causes of action arising out of the same alleged wrongdoing, or seeks both legal and equitable relief, he waives his right to a jury trial (*see Zimmer-Masiello, Inc. v Zimmer, Inc.*, 164 AD2d 845, 846 [1st Dept 1990]; *O'Rorke v Carpenter*, 125 AD2d 223, 224 [1st Dept 1986]; *Kaplan v Long Is. Univ.*, 116 AD2d 508, 509 [1st Dept 1986]). Here, the breach of contract and conversion claims were asserted derivatively, by Duffy on behalf of Services, making them equitable claims

(*Sakow v 633 Seafood Rest., Inc.*, 25 AD3d 418, 419 [1st Dept 2006], *lv denied*, 7 NY3d 701 [2006]; see also 15 NY Jur 2d Business Relationships § 1234). “[G]enerally, if a matter was historically cognizable at equity, where there were no juries, no right to a jury exists today” (*Hudson View II Assoc. v Gooden*, 222 AD2d 163, 164-165 [1st Dept 1996]). “[T]he derivative action originated at common law as an equitable proceeding by which shareholders could assert claims necessary to protect their interest in a corporation” (*Caprer v Nussbaum*, 36 AD3d 176, 187 [2d Dept 2006]).

With respect to the cross motion, motions for leave to renew are “based upon new facts not offered on the prior motion that would change the prior determination” (CPLR 2221 [e] [2]). They may be granted where they “contain reasonable justification for the failure to present such facts on the prior motion” (*id.*, [e] [3]; see *Grumman Aerospace Corp. v Rice*, 199 AD2d 365 [2d Dept 1993]).

Here, the Stahl Parties have made only vague allegations of “new evidence” in support of their motion to renew. The Stahl Parties do not assert, for example, whether Duffy’s alleged failure to service accounts occurred before, or after September 2007, when Duffy was directed to remain off the Horizon premises and to refrain from any communication with potential or existing clients. Moreover, documents submitted by the Duffy Parties indicates that the Stahl Parties were aware of the alleged new information prior to their motion for summary judgment.

That portion of the cross motion to strike the jury demand is denied as moot.

Accordingly, based upon the foregoing, it is

ORDERED that the motion by the defendants/counterclaim plaintiffs to reargue is granted only to the extent that my original order, dated October 14, 2011 is modified to the extent that the referee is to hear and report on defendants/counterclaim plaintiffs damages from September 2007,

as opposed to August 2008; and it is further

ORDERED that the motion by defendants/counterclaim plaintiffs is otherwise denied; and
it is further

ORDERED that the cross motion by plaintiffs/counterclaim defendants to renew and to strike
the jury demand is denied.

Dated: July 2, 2012

A handwritten signature in black ink, appearing to read "Bernard J. Fried", is written over a horizontal line.

J.S.C.

HON. BERNARD J. FRIED