

**Quazzo v 9 Charlton St. Corp.**

2012 NY Slip Op 33366(U)

July 16, 2012

Supreme Court, New York County

Docket Number: 652002/11

Judge: Bernard J. Fried

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

PRESENT: HON. BERNARD J. FRIED

PART 60

Justice

Index Number : 652002/2011
QUAZZO, CRISTINA
vs.
9 CHARLTON STREET CORPORATION
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 652002/11
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO. 10

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

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

Answering Affidavits — Exhibits

Replying Affidavits

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

A status conference will be held on September 27, 2012 @ 9:30 a.m., in Part 60.

SO ORDERED

Dated: 7/16/2012

HON. BERNARD J. FRIED 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: IAS PART 60

-----X  
CRISTINA QUAZZO, both individually and  
derivatively on behalf of 9 CHARLTON  
STREET CORPORATION, PEARLBUD REALTY  
CORPORATION, and ORBIS INTERNATIONAL  
CORPORATION,

Plaintiff,

Index No. 652002/11

-against-

9 CHARLTON STREET CORPORATION, et al.,

Defendants.

-----X

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**APPEARANCES:**

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**FRIED, J.:**

Motions bearing sequence numbers 001 and 002 are consolidated for disposition.

This is an action by plaintiff Cristina Quazzo (Cristina) for breach of fiduciary duty,

conspiracy to breach a fiduciary duty, aiding and abetting a breach of fiduciary duty, an accounting and a declaratory judgment, arising from a dispute over ownership of defendants 9 Charlton Street Corporation (9 Charlton), Pearlbud Realty Corporation (Pearlbud) and Orbis International Corporation (Orbis) (collectively, Corporations). In motion sequence 001, defendants Stephen Quazzo (Stephen) and Marco Quazzo (Marco) move, pursuant to CPLR 3211(a) (1), (7) and (8), for an order dismissing the complaint as against them. In motion sequence 002, defendants Ugo Quazzo (Ugo), 9 Charlton, Pearlbud and Orbis move, pursuant to CPLR 3211(a) (4) and (5), for an order dismissing the complaint, in part, as against them.

According to the complaint, Cristina is a resident of the United Kingdom. Ugo is her father and Stephen and Marco are her brothers. Pearlbud, Orbis and 9 Charlton are New York corporations with their principal place of business in New York City.

Plaintiff alleges that she is a one-third owner of each company and a director of 9 Charlton and Pearlbud. Plaintiff further alleges that Stephen is a Director and Vice-President of 9 Charlton, a Director and Vice-President of Pearlbud, and a one-third shareholder of Pearlbud, 9 Charlton and Orbis. Plaintiff alleges that Marco is a director and one-third shareholder of each company.

According to the complaint, plaintiff sought a distribution from a family trust of which she is a beneficiary and Ugo is the Protector. Plaintiff alleges that Ugo orally assured her that she would receive the requested distribution, but thereafter refused to approve the distribution unless plaintiff agreed to sign a General Release (Release). The Release stated

that Ugo had previously advanced over \$800,000 to Cristina over the years and set forth that he would give her an additional \$800,000 in exchange for her releasing any interest that she had in any personal or real property owned by Ugo or acquired by him thereafter.

According to the complaint, the Release listed only Stephen and Marco Quazzo as shareholders of the Corporations, even though Cristina alleges that she was also a shareholder. Plaintiff asserts that the Release was drafted by Stephen's attorneys, and reviewed and approved by both Stephen and Marco.

Cristina states that, after being presented with the Release, she sought to inspect the books and records of the Corporations to determine why she was not listed as a shareholder, but was refused access by defendants. Thereafter, she filed a petition in this court, titled *Matter of Cristina Quazzo v 9 Charlton Street Corp., et al*, 652282/2010. The petition seeks dissolution of the corporations, an accounting of each corporation, production of corporate books and records, appointment of a receiver, a preliminary injunction and a declaration that Cristina is a shareholder of the corporations and a director of 9 Charlton and Pearlbud.

In the instant action, the complaint alleges that, during discovery in the Special Proceeding, Cristina learned that, in 2003, Ugo, Stephen, and Marco Quazzo signed various documents purporting to alter the ownership of the Corporations by eliminating plaintiff's one-third shareholder status. Plaintiff claims that her signature was forged on some of the documents at issue.

In July 2011, Cristina commenced this action, asserting claims for breach of fiduciary duty, conspiracy to breach a fiduciary duty, aiding and abetting a breach of fiduciary duty

and an accounting. The complaint also seeks a declaratory judgment stating that Cristina is a shareholder of each of the Corporations and a director of 9 Charlton and Pearlbud. Finally, the complaint also sets forth derivative claims against the individual defendants on behalf of the corporations arising from the individual defendants alleged breaches of fiduciary duty.

As an initial matter, Stephen and Marco move to dismiss the complaint for lack of personal jurisdiction over them. “To successfully oppose a pre-answer motion to dismiss a complaint pursuant to CPLR 3211 (a) (8), ‘the plaintiff need only make a prima facie showing that personal jurisdiction exists.’” *Bill-Jay Mach. Tool Corp. v Koster Industries, Inc.*, 29 AD3d 504, 505 (2d Dept 2006), quoting *Opticare Acquisition Corp. v Castillo*, 25 AD3d 238, 243 (2d Dept 2005). However, jurisdiction is a threshold issue and the court must adjudicate that issue before deciding any other issues in the action related to the moving defendant. *Wyser-Pratte Mgt. Co., Inc. v Babcock Borsig AG*, 23 AD3d 269, 269 (1st Dept 2005); *MediaXposure Ltd. (Cayman) v Omnireliant Holdings, Inc.*, 29 Misc 3d 1215(A), 2010 NY Slip Op 51835(U)(Sup Ct NY).

Plaintiff alleges that Stephen and Marco are subject to jurisdiction under CPLR 302(a) (1), (2) and (3), based on business conducted by them in New York and actions taken outside of New York related to the Corporations. Among other things, plaintiff states that Stephen is a Director and Vice-President of 9 Charlton, a Director and Vice-President of Pearlbud, and a one-third shareholder of Pearlbud, 9 Charlton and Orbis. She states that Stephen frequently visited Ugo at the Corporations’ New York headquarters to discuss

corporate business. Plaintiff asserts that Marco is a director and one-third shareholder of each company.

Plaintiff also alleges that, as recently as June 2010, Stephen and Marco attended shareholder meetings in New York for each of the corporations, either in person or by proxy. She further states that Stephen and Marco are signatories on the Corporations' bank accounts, and she submits signature cards for such accounts in support of this assertion. Finally, plaintiff alleges that defendants signed various corporate resolutions and documents which wrongfully attempted to deprive her of her ownership interest in the Corporations.

Defendants assert that neither of them is a New York resident and that they are rarely in New York. They state that Marco is no longer an officer or director of the Corporations and that neither of them has ever attended shareholder or board meetings in New York or signed any documents related to the Corporations in New York. They do not deny that they are signatories on the Corporations' bank accounts. However, they contend that plaintiff has not demonstrated that they actually exercised such authority.

It is evident that questions of fact exist as to whether Stephen Quazzo and Marco Quazzo are subject to jurisdiction in New York. The parties each put in affidavits and documentary evidence to support their positions and they sharply dispute the amount and nature of defendants contacts with New York. As such, the issue is referred to a Special Referee to hear and report.

Ugo and the Corporations move, pursuant to CPLR 3211(a)(4), to dismiss all or part of the complaint on the grounds that identical causes of action are currently pending in this

court in the special proceeding.

“Pursuant to CPLR 3211 (a) (4), a court has broad discretion in determining whether an action should be dismissed on the ground that there is another action pending between the same parties for the same cause of action.” *Cherico, Cherico & Assoc. v Midollo*, 67 AD3d 622, 622 (2d Dept 2009), citations omitted. It is not required that the precise legal theories present in the first action also be present in the second action. *Id.* Instead, it is enough if the two actions are sufficiently similar and the relief sought is the same or substantially the same. *Id.*, citations omitted. “The critical element is that both suits arise out of the same subject matter or series of alleged wrongs.” *Id.* (citations and internal quotation marks omitted).

Here, plaintiff’s fourth cause of action seeks a declaration that she is a director of 9 Charlton and Pearlbud. The fifth cause of action seeks a declaration that plaintiff is a one-third shareholder in each of the Corporations. The sixth cause of action seeks an accounting from the Corporations.

It is undisputed that plaintiff has previously asserted identical claims in the special proceeding against the same parties. The petition specifically requests a declaration that Cristina is a director of 9 Charlton and Pearlbud and a declaration that she is a one-third shareholder in each of the Corporations. The petition also seeks an accounting from the Corporations. Therefore, the fourth, fifth and sixth causes of action in the complaint are dismissed.

Plaintiff’s first, second and third causes of action are for breach of fiduciary duty, conspiracy to breach a fiduciary duty, aiding and abetting a breach of fiduciary duty,

respectively. Plaintiff seeks money damages, as well as a declaration that she is a one-third shareholder in the Corporations, and a preliminary injunction restraining defendants from denying plaintiff's status as a shareholder or any of the benefits connected to such status, including a share in any distributions made by the Corporations.

To the extent that plaintiff seeks a declaration as to her shareholder status, i.e. that she is a one-third shareholder, such a claim has already been asserted in the special proceeding. Therefore, that portion of the first three claims is dismissed.

Plaintiff's request for a preliminary injunction is also dismissed. The special proceeding already seeks a preliminary injunction restraining Ugo, Stephen, Marco or the Corporations from transferring, selling or manipulating the assets of the Corporations, as well as the appointment of a temporary receiver to manage the Corporations. Therefore, that portion of the first, second and third causes of action are dismissed.

The special proceeding does not contain any claims for money damages. Therefore, those claims cannot be dismissed on account of a prior pending action and that portion of defendants' motion is denied.

The complaint sets forth sixteen derivative causes of action against the individual defendants arising from alleged breaches of fiduciary duty. Business Corporation Law 626(c) states that, in a derivative action, "the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort." However, the demand requirement is excused "when the complaint's specific allegations support the conclusion that '(1) a majority of the directors

are interested in the transaction, or (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgment in approving the transaction.” *Wandel v Eisenberg*, 60 AD3d 77, 80 (1st Dept 2009), quoting *Marx v Akers*, 88 NY2d 189, 198 (1996).

Here, the complaint adequately asserts that plaintiff is excused from first making a demand on the board to initiate an action against Ugo, Stephen and Marco because such a demand would have been futile. The complaint adequately demonstrates that those parties should be treated as interested in the various transactions at issue here, thus rendering a demand futile. Therefore, the motion to dismiss on this ground is denied.

Defendants move for dismissal of the first three causes of action on the grounds that they are untimely. As set forth above, those claims are for breach of fiduciary duty, conspiracy to breach a fiduciary duty, aiding and abetting a breach of fiduciary duty. Defendants argue that these claims are subject to a three year statute of limitations and that they accrued, at the latest, in 2003, when plaintiff alleges that defendants attempted to exclude her from ownership or participation in the Corporations, as described above. As such, they contend that such claims had to be asserted in 2006 and should therefore be dismissed because the instant action was commenced in 2011.

Plaintiff argues that the claims are subject to a six year statute of limitations. She further argues that they are timely because she was not able to discover the facts underlying her claims until 2010, when she conducted discovery in the special proceeding.

“New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Rather, the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks.” *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 (2009). “Where the remedy sought is purely monetary in nature, courts construe the suit as alleging ‘injury to property’ within the meaning of CPLR 214 (4), which has a three-year limitations period.” *Id.*, quoting *Yatter v Morris Agency*, 256 AD2d 260, 261 (1st Dept 1998). “Where, however, the relief sought is equitable in nature, the six-year limitations period of CPLR 213 (1) applies.” *Id.* “Moreover, where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213 (8).” *Id.*

Here, plaintiff’s claims seek both monetary damages and equitable relief. However, the equitable portion of those claims have been dismissed. Thus, defendants seek application of a three year limitation period. However, underlying plaintiff’s claims are allegations of fraud, i.e. that defendants forged her name on documents in an attempt to remove her from ownership of the corporations. Therefore, plaintiff is entitled to application of a six-year limitation period.

Defendants argue that these claims are untimely even under a six-year limitation period. However, questions of fact exist as to when plaintiff could have discovered the alleged fraud.

As set forth above, plaintiff states that she could not discover the fraud until she received documents during discovery in the special proceeding, which was commenced in

2010. Defendants assert that she knew of the alleged fraud in 2007, based on a letter plaintiff wrote in which she states to a third-party that Ugo had told her at some point she had been divested of ownership in the family's assets, including the Corporations. However, the letter does not clearly indicate that plaintiff knew or could have known of the alleged fraud underlying her claims. At most, it raises questions of fact on that issue. Therefore, the court declines, at this point, to dismiss the first three causes of action as untimely.

The court also declines to dismiss plaintiff's derivative claims. Questions of fact exist as to when those claims accrued which preclude a finding as to whether those claims are timely.

Finally, plaintiff seeks punitive damages in connection with the direct and derivative claims for breach of fiduciary duty and aiding and abetting a breach of fiduciary duty.

In order to recover punitive damages, a plaintiff must demonstrate that the defendant's wrongdoing was not only intentional, but that it evinced a high degree of moral turpitude and demonstrated such a wanton dishonesty as to imply a criminal indifference to civil obligations. *Sample v Yokel*, 94 AD3d 1413, 1416 (4th Dept 2012). Here, the complaint does not allege any facts to support such a claim. Therefore, plaintiff's request for punitive damages is dismissed.

Accordingly, it is

ORDERED that, in motion sequence 001, the issue of jurisdiction with respect to defendants Stephen Quazzo and Marco Quazzo is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation

of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that the motion by defendants Stephen Quazzo and Marco Quazzo to dismiss the complaint, sequence 001, is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

ORDERED that the motion to dismiss by defendants 9 Charlton Street Corporation (9 Charlton), Pearlbud Realty Corporation (Pearlbud) and Orbis International Corporation (Orbis), sequence 002, is granted to the extent that the first, second and third causes of action are dismissed in part and the fourth, fifth and sixth causes of action are dismissed; and it is further

ORDERED that plaintiff's requests for a preliminary injunction and for punitive damages are dismissed; and it is further

ORDERED that the motion, sequence 002, is otherwise denied.

DATED: 7/16/2012

ENTER:



J.S.C.

**HON. BERNARD J. FRIED**