

Tanna v Lentini

2013 NY Slip Op 30562(U)

March 18, 2013

Supreme Court, Richmond County

Docket Number: 102690/12

Judge: Philip G. Minardo

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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DEBORAH BIVONA TANNA, CHRIS BIVONA,
ANNETTE LENTINI BIVONA, ROSEMARIE LENTINI
SHAW, EDWARD McGLYNN and TRACY ANN McGLYNN,

DCM Part 6
Present:
Hon. Philip G. Minardo

Plaintiffs,

-against-

DECISION AND ORDER

SEBASTIAN JOSEPH LENTINI, individually, and as
Chairman and Chief Executive Officer of Colfax Industries, Inc
and as Chairman and Chief Executive Officer of Colonial Park
Homes, Inc, KEVIN M. KILCULLEN, DARREN LENTINI,
MICHAEL SOTTILE, GREGORY SOTTILE, and
SCOTT LENTINI,

Index No. 102690/12
Motion No. 3419-001

Defendants,

and

COLFAX INDUSTRIES, INC and COLONIAL PARK
HOMES, INC,

Nominal Defendants.

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The following papers numbered 1 to 2 were fully submitted on the 17th day of January, 2013:

	Pages Numbered
Notice of Motion to Dismiss by Defendants, with Supporting Affirmation, Exhibits and Memorandum of Law (dated November 21, 2012).....	1
Affirmation in Opposition, with Exhibits and Memorandum of Law (dated January 6, 2013).....	2

Upon the foregoing papers, the motion to dismiss is granted and the complaint is dismissed.

In this action, inter alia, for damages arising out of the breach of fiduciary duty predicated on acts of fraud allegedly perpetrated from 1976 onward, plaintiffs seek, in essence, (1) an accounting to the shareholders of Colfax Industries, Inc (hereinafter “Colfax”) and Colonial Park Homes, Inc (hereinafter “Colonial Park”), (2) an attachment or imposition of a constructive trust on the profits, businesses and other interests of said defendants, (3) the removal of defendant Sebastian

Joseph Lentini as an officer and member of the Board of Directors of Colfax and Colonial Park, (4) the removal of the balance of the members of the Board of Directors of Colfax and Colonial Park¹, and (5) the dissolution of Colfax and Colonial Park pursuant to “common law” and section 1104-a of the Business Corporation Law (hereinafter “BCL”).

To the extent relevant, on or about April 9, 1968, Joseph Lentini created an Inter Vivos Trust known as the Joseph Lentini Trust. The beneficiaries of said Trust were the children and grandchildren of the settlor, Joseph Lentini, which include but are not limited to plaintiffs and the individual defendants herein. The sole assets of the Trust consist of 16 shares of stock in Colonial Park, a closely-held corporation owned by plaintiffs and the individual defendants, which later changed its name to Colfax.² It is alleged that the combined value of the corporate assets exceeds \$9,100,000.00 (*see* Defendant’s Exhibit “C”). The original trustee of the Trust resigned in 1977, and Joseph Lentini passed away in 1978 (*see* Defendants’ Exhibit “C”). It is alleged that defendant Sebastian Lentini subsequently managed Colonial Park/Colfax and acted as de facto Trustee of the Trust from 1978 until 2004, when his mother, Fay Lentini, the wife of the settlor, passed away (*see* Defendant’s Exhibit “A”). At this point, Sebastian Lentini filed an application in the Probate Court in New Jersey requesting his appointment as substitute Trustee of the Trust (*see* Defendant’s Exhibits “A”, “C”). That application, made upon notice to all of the beneficiaries (including plaintiffs in this action), was granted, without opposition, and letters of substitute trusteeship were issued on April 29, 2005 (*see* Defendant’s Exhibit “A”).

¹The individual defendants constitute both current and past members of the Board of Directors of Colonial Park and Colfax (*see* Verified Complaint, paras 39-40).

²Colfax and Colonial Park are in the business of owning and managing real property, both commercial and residential, as well as owning and managing other businesses (*see* Verified Complaint, paras 25-26). While it appears that Colfax and Colonial Park are not separate entities (*see* above), separate allegations are made with respect to each in the Complaint. Share ownership is divided as follows: plaintiffs are the beneficial owners of 39.06 percent of the shares of Colfax/Colonial Park, defendants control 53.13% (*see* Verified Complaint, paras 122,137). The remainder apparently belonged to a deceased shareholder (*see* Defendants’ Exhibit “C”).

Plaintiffs first commenced litigation against defendant Sebastian Lentini in New Jersey's Probate Court in March 2007 seeking, *inter alia*, an accounting from the latter, and his removal as trustee and the appointment of a successor trustee³ (*see* Defendants' Exhibit "C"). That matter was captioned *In the Matter of the Inter Vivos Trust of Joseph Lentini Dated April 9, 1968* (*see* Defendants' Exhibit "A").⁴ The gravamen of this action was plaintiffs' allegation that, as Trustee, defendant Sebastian Lentini had violated the terms of the Trust by failing to pay or apply its net income to the beneficiaries during the life of the settlor's widow and after her passing (*see* Defendants' Exhibit "C").

The above action was dismissed without prejudice in June of 2008, whereupon plaintiffs filed a second nearly identical action in Probate Court in September of 2008 (*see* Defendants' Exhibit "B"). Annexed to defendants' motion papers is a copy of an Order issued by Judge Peterson on or about August 28, 2009 in the second New Jersey action (*see* Defendants' Exhibit "E"), which, in relevant part, denied plaintiffs' motion for a compulsory accounting without prejudice, but dismissed *with prejudice* all of plaintiffs' claims as to the events that transpired prior to April 29, 2005 (the date of Sebastian Lentini's appointment as Trustee). Plaintiffs' remaining claims were dismissed without prejudice but subject to various conditions (*see* Defendant's Exhibit "E"), including a provision requiring plaintiffs to pay the cost of defending any future action brought for substantially the same relief (*id.*).

Also annexed to defendants' motion papers is a copy of a "Transcript of Judge's Decision"

³The plaintiffs in the New Jersey action also included Josephine Bivona Satili, who is not a party to this action (*see* Defendants' Exhibit "C").

⁴Docket No. 54736, Honorable John A. Peterson presiding.

issued in the second New Jersey action under date of January 11, 2012, regarding defendant's request for an award of costs and counsel fees in that action (*see* Defendant's Exhibit "A"). According to Judge Peterson, plaintiffs had "unnecessarily and unreasonably" prolonged the litigation in his court for over two years (*id.* at 26); had made no effort to take the depositions of, *e.g.*, Sebastian Lentini or any present or former Colfax board member; and had repeatedly failed, *inter alia*, to initiate discovery despite being granted multiple extensions of the court's discovery deadlines (*id.* at 8-10). In addition, the Court took cognizance of plaintiffs' commencement of a case pending in the Supreme Court of Westchester County (discussed below) which included "identical matters" (*id.* at 3), and requested substantially the same relief as that "previously subject to a lengthy discovery timetable and a full litigation process which occurred before [him]" (*id.* at 23-24), "not once, but twice" (*id.* at 25). As a result, the Court found that plaintiffs' Westchester action "was initiated in an attempt to evade this Court's jurisdiction" (*id.* at 33) and, based on the foregoing considerations, directed that plaintiffs be held jointly and severally liable for the payment of counsel fees in the amount of \$272,666.97 (*see* Defendant's Exhibit "A").⁵

Insofar as it appears, plaintiffs had commenced a separate proceeding in Westchester County pursuant to CPLR article 77 against defendant Sebastian Lentini in his capacity as Trustee in or about August of 2011, *i.e.*, during the pendency of defendants' motion for counsel fees before Judge Peterson (*see* Defendant's Exhibit "G", "H").⁶ Annexed as a further exhibit to defendants' motion papers is a copy of a Decision and Order rendered in that proceeding by Justice Scarpino

⁵In January of 2011, plaintiffs commenced a legal malpractice action against their attorneys in the New Jersey actions. That matter, entitled *Chris Bivona, Deborah Ann Bivona Tanna, Annette Lentini Bivona, Rosemarie Lentini Shaw, Edward McGlynn and Traci Ann McGlynn v Danna & Associates, PC & Anthony S. Danna*, is presently pending in the Supreme Court, Richmond County, under Index Number 100078/2011.

⁶ *Matter of the Application of Chris Bivona, Deborah Ann Bivona Tanna, Annette Lentini Bivona, Rosemarie Lentini Shaw, Edward McGlynn and Traci Ann McGlynn Johansen as beneficiaries of the Joseph Lentini Trust v. Sebastian Lentini, as Trustee of the Joseph Lentini Trust* (Index No. 13357/2011), Honorable Anthony A. Scarpino, Jr. presiding.

(Defendants' Exhibit "B") entered on December 14, 2011, wherein the Court (1) granted defendant Sebastian Lentini's motion to dismiss all claims based on defendant's alleged conduct occurring on or before April 29, 2005 based on the doctrine of res judicata (*id.* at 7); (2) concluded that "the petitioners [were] improperly and inexcusably attempting to avoid the consequences of the NJ Probate Court's August 28, 2009 order... despite the fact that the NJ Probate Court dismissed with prejudice their claims related to that conduct " (*id.* at 8); and (3) found that "this [proceeding] constitutes nothing more than blatant 'forum shopping' which is not to be condoned" (*id.*). As a consequence, the Court dismissed the balance of the petition without prejudice, citing both its lack of subject matter jurisdiction over the removal of defendant Sebastian Lentini in his capacity as trustee, and its discretionary authority to reject cases in "appropriate and exceptional procedural circumstances," citing *Nestor v. McDowell* (81 NY2d 410, 415 [1993]).

With all this litigation behind them, plaintiffs commenced the present action in Richmond County in September 2012 (*see* Defendants' Exhibit "D"), claiming that defendant Sebastian Lentini and his co-defendants mismanaged Colonial Park/Colfax, improperly retained profits, and failed to account for the proceeds of sale of Colfax and/or Colonial Park assets from 1976 to the present (*see* Verified Complaint, para 5, 75-83, 102, 108). In addition, the complaint alleges that defendants committed fraud and other oppressive acts, "excluded all plaintiffs-minority shareholders from the Board, looted corporate assets, diverted corporate assets to their own use, wasted corporate assets, [and] diverted business opportunities that should [have] belong[ed] to Colonial Park and Colfax to their own use and benefit" (*see* Verified Complaint, paras 124, 141, 158-159, 175-176).

In moving to dismiss the complaint pursuant to CPLR 3211(a), defendants allege that plaintiffs (1) lack standing to bring their direct claims; (2) will not "fairly and adequately" represent the interests of the nominal defendants and their shareholders; and (3) purport to assert claims for equitable relief which are barred by (a) the doctrine of unclean hands, (b) res judicata, and the Full

Faith & Credit clause, and (c) the applicable statutes of limitations. In addition, defendants maintain that plaintiffs' claims of fraud and breach of trust are not plead with sufficient particularity under CPLR 3016(b).

In the first instance, the Court finds that plaintiffs have the requisite standing to sue directly as the minority shareholders, i.e., the holders of approximately 39.06% of the beneficial interest in the nominal corporate defendants, who are asserting claims against corporate management for the breach of its fiduciary duty by acting in bad faith, fraudulently and/or dishonestly in establishing, inter alia, the dividend policies of the corporations (*see Lewis v. Jones*, 107 AD2d 931, 933 [3rd Dept 1985]; *Kaszirer v. Kaszirer*, 298 AD2d 109, 110 [1st Dept 2002]; *cf. Cashman v. Petrie*, 14 NY2d 426, 427, 429 [1964]; *see also Matter of Goerler*, 227 AD2d 479, 480 [2nd Dept 1996]). Nevertheless, the complaint must be dismissed.

Stripped bare of its Byzantine litigation history, the gravamen of plaintiffs/minority shareholders' claims as stated in their complaint is that defendants, in their various capacities as officers and/or directors of the close corporations lying at the heart of the Lentini Trust, have, over the past 35 years, engaged in a series of fraudulent practices, including self-dealing and the wrongful diversion or misappropriation of corporate assets and opportunities, all of which constitutes a breach of their fiduciary duties. However, the complaint is devoid of even a single identifiable act of fraud and/or breach of fiduciary duty upon which it is alleged to be based, making it impossible to ascertain, e.g., for which acts defendants may be called to account or whether they transpired within or without the six-year statute of limitations applicable to causes of action for fraud-based claims of a breach of trust (*see CPLR 213*[1],[7],[8]; *Klein v. Gutman*, 12 AD3d 417, 419; *Kaufman v. Cohen*, 307 AD2d 113, 122 [1st Dept 2003]) and/or dissolution (*see State of New York v Cortelle Corp*, 38 NY2d 83, 89 [1975]; *Di Pace v. Figueroa*, 223 AD2d 949, 952 [3rd Dept 1996]; *Matter of Paris*, 160 AD2d 541 [1st Dept 1990]), where the period of limitations is similarly measured from the date

of the alleged wrongdoing relied upon as the grounds for dissolution (*see Di Pace v. Figueroa*, 223 AD2d at 952).

It is hornbook law that every pleading “shall consist of plain and concise statements in consecutively numbered paragraphs” (CPLR 3014), and that the “[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved” (CPLR 3013). Moreover, where a cause of action is based upon, inter alia, misrepresentation, fraud or breach of trust, the pleader is statutorily required to state “the circumstances constituting the wrong... in detail” (CPLR 3016[b]; *see Stein v. Doukas*, 98 AD3d 1024, 1025-1026 [2nd Dept 2012]; *Scott v. Field*, 92 AD3d 666, 668 [2nd Dept 2012]; *Armentano v. Paraco Gas Corp*, 90 AD3d 683 [2nd Dept 2011]). Although the foregoing language has been afforded a generally liberal construction (*see generally Colasacco v. Robert E. Lawrence Real Estate*, 68 AD3d 706, 708 [2nd Dept 2009]), a complaint, as here, comprised of 178 numbered paragraphs alleging a pattern of misconduct, both malfeasance and nonfeasance, spanning 35 years without ever once specifying a single date, time, place or act is so-far removed from the statutory norm as to require dismissal (*see Stein v. Doukas*, 98 AD3d at 1025-1026; *Scott v. Field*, 92 AD3d at 668 [2nd Dept 2012]; *Armentano v. Paraco Gas Corp*, 90 AD3d at 684; *Block v. Landegger*, 44 AD2d 671 [1st Dept 1974][complaint asserting 13 causes of action dating back to 1959 based on claims of fraud and breach of trust held insufficiently pleaded to withstand dismissal]).

Similarly, it has been held that a claim for common-law dissolution requires the pleader to allege in sufficient factual detail how the shareholders in control have been looting the company’s assets at the expense of the minority shareholders, continuing the corporation’s existence for the sole purpose of benefitting those in control, or have sought to force and coerce the minority shareholders to sell and sacrifice their holdings to those in control (*see Ferolito v. Vultaggio*, 99 AD3d 19, 28 [1st

Dept 2012]). Alternatively, Business Corporation Law §1104-a gives holders of 20 percent or more of the outstanding voting shares of a close corporation the right to petition for judicial dissolution as a remedy for illegal, fraudulent or oppressive conduct (*see Ferolito v. Vultaggio*, 99 AD3d at 25). However, here, too, specificity is required (*see generally Lemle v. Lemle*, 92 AD3d 494, 499 [1st Dept 2012]; *Matter of Dubonnet Scarfs*, 105 AD2d 339, 342 [1st Dept 1985]).

Due to the vague and conclusory nature of the allegations contained in the complaint, the Court is also unable to determine whether the claims or issues raised herein may be barred by the doctrines of res judicata and/or collateral estoppel (*see generally Tuper v. Tuper* 34 AD3d 1280, 1281 [4th Dept 2006]; *Farren v. Lisogorsky*, 87 AD3d 713, 714 [2nd Dept 2011]).

It is Ordered Adjudged and Decreed the Complaint is dismissed in its entirety with prejudice.

This constitutes the Decision and Order of the Court.

ENTER,

/s/ Philip G. Minardo
J.S.C.

DATED: March 18, 2013