

Unger v Klyacchman
2013 NY Slip Op 32301(U)
September 23, 2013
Supreme Court, New York County
Docket Number: 150171/2013
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH
SUPREME COURT JUSTICE
Justice

PART 61

Index Number : 150171/2013
UNGER, STEVEN
vs
KLYACHMAN, YAKOV
Sequence Number : 001
DISMISS ACTION

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 *decided in accordance with the annexed order*

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

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

Dated: 9/23/13

Beck, J.S.C.
HON. ANIL C. SINGH
SUPREME COURT JUSTICE

- 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: PART 61

-----X
STEVEN UNGER, ROMAN VCHERASHANSKY, and
OLEG YEVDOSIN,

Plaintiffs,

-against-

YAKOV KLYACCHMAN,

Defendants.
-----X

DECISION AND
ORDER
Index No. 150171/2013

HON. ANIL C. SINGH, J.:

Plaintiff moves for an order dismissing the complaint, pursuant to CPLR § 3211(a)(4), on the grounds that there are other actions pending between the parties for the same causes of action. Defendants oppose the motion.

The complaint alleges that the parties entered into agreements wherein the Defendant would receive a 25% interest in two LLCs, ARYS PROPERTIES, LLC (Arys agreement) and 971 REMSEN, LLC (Remsen agreement). In consideration for this ownership interest Defendant was obligated, among other things (not specified in the complaint), to contribute monies to the Plaintiffs "at times and in amounts determined by the Plaintiffs."

There are several actions pending in other Courts between the parties to this action. The first of these actions was brought in Kings County Supreme Court (Kings action I), brought by Mr. Klyacchman, the defendant in this case, involves the Remsen agreement. The counterclaims in the Kings action I allege that Mr. Klyacchman failed to provide services and additional capital when needed. (*See* Exhibit C, twelfth paragraph).

The second action between the parties was filed in Nassau County Supreme Court (Nassau action) by the plaintiffs in the present action and Arys Properties, LLC. The complaint in this action alleges that each of the parties are “required to contribute monies to the Company as needed and in amount determined by a majority of the Shareholders.” (See Exhibit E, paragraph 6).

The third action between the parties was brought in Kings County Supreme Court (Kings action II) by the plaintiffs in the present action and 971 Remsen, LLC. This cause of action alleges that the defendant, Mr. Klyachman, was required to devote his time and energy to 971 Remsen, LLC and that he failed to do so.

“CPLR 3211 (subd [a], par 4) authorizes dismissal of an action when another action is pending involving the same parties and cause. Dismissal is warranted if there is a substantial identity of the parties in the two actions and of the two causes of action.” *Forget v. Raymer*, 65 A.D.2d 953, 954 (4th Dep't 1978). *See also Josephs v. Bank of N.Y.*, 302 A.D.2d 318 (1st Dep't 2003) (Dismissal was warranted when the two actions involved “substantially the same parties, issues and underlying facts.”)

Plaintiffs contend that the agreements at issue in the present law suit are different from those at issue in the ongoing litigation in other courts. Plaintiffs contend that the actions in other courts concern specific parcels of real property and are based on breach of specific written shareholder agreements whereas the present case is based upon separate oral agreements. Plaintiffs further contend that the present case differs from the others in that the complaint herein seeks payment to the individual plaintiffs, not to shareholders of various companies. These contentions are without merit.

The complaints and/or counterclaims in each action only specify that there is a contract or agreement, none of them specify whether the contract is written or oral. Furthermore, each of the actions deal with ownership interests in either ARYS PROPERTIES, LLC or 971 REMSEN, LLC.

The complaint states that Defendant was to receive a 25% interest in ARYS PROPERTIES, LLC and 971 REMSEN, LLC in exchange for consideration and that Defendant has failed to furnish such consideration. The same companies are the subject of the ongoing litigation in Kings and Nassau Counties. In each of the other actions it is alleged that Mr. Klyachman was to have a 25% interest in one or another of the above named companies and that he failed to provide the agreed to consideration. There is a substantial identity of the parties, issues and facts in the various actions.

The only evidence that the agreements the actions pending in other courts may be different from those in the present action is the sworn Affidavit of Steve Unger, which states, in pertinent part, that:

- In 2006 the parties had several meetings in New York County;
- “During these meetings, it was agreed by all four individuals that the Defendant would begin to pay monies to the Plaintiffs individually, and not through any company, nor in their capacity as members of any company or corporation. In consideration thereof, Plaintiffs agreed to refrain from further ousting the Defendant from certain other business enterprises.”

However, the statements made in Mr. Unger’s affidavit do not appear to support the allegations in the complaint. The complaint alleges that Defendant was to provide Plaintiffs with

[* 5]
monies so that Plaintiffs could continue to perform and conduct the business of certain companies and that in exchange, Defendant would receive a 25% ownership interest in such companies. Mr. Unger's sworn affidavit refers to monies to be paid in exchange for Plaintiffs not ousting Defendant from certain businesses. Accordingly, Plaintiffs have failed to rebut Defendants prima facie showing of entitlement to judgment as a matter of law.

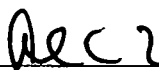
Upon the affirmation of Robert Stone, the affidavit of Steve Unger, and all other papers submitted in support of and opposition to the present motion it is hereby

ORDERED that defendant's motion for is granted and the complaint is dismissed, pursuant to CPLR § 3211(a)(4), with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of the court.

Date: 9/23/13
New York, New York



Anil C. Singh
HON. ANIL C. SINGH
SUPREME COURT JUSTICE