

Frangioudakis v Makkos

2014 NY Slip Op 31690(U)

June 30, 2014

Supreme Court, New York County

Docket Number: 103643/12

Judge: Richard F. Braun

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23**

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SOHO SNACKS INC., THOMAS MAKKOS,
and GEORGE MAKKOS,

Index No. 103643/12

Plaintiffs,

OPINION

-against-

MICHAEL FRANGIOUDAKIS and GEORGIOS ROUKAS,

Defendants.

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MICHAEL FRANGIOUDAKIS, GEORGIOS ROUKAS
and SOHO SNACKS INC.,

Index No. 590847/12

Counterclaim and
Third Party Plaintiffs,

-against-

THOMAS MAKKOS and GEORGE MAKKOS,

FILED

Counterclaim and
Third Party Defendants.

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NEW YORK
COUNTY CLERK'S OFFICE

RICHARD F. BRAUN, J.:

This is an action raising direct and derivative claims against the majority shareholders in plaintiff Soho Snacks Inc. (Soho Snacks) for the alleged loss, misappropriation, and dissipation of assets by diverting business opportunities to a separate entity owned by defendants, and for breach of an agreement to purchase supplies from an entity controlled by the individual plaintiffs, with causes of action based upon Business Corporation Law § 720, and for conversion, an equitable accounting, imposition of a constructive trust and application of the commingling doctrine, recovery of illegally transferred assets, and breach of contract. Defendants move to dismiss and for summary judgment contending that plaintiffs failed to comply with Business Corporation Law § 626(c), which

requires a pre-suit demand before bringing derivative claims; for failure to state a cause of action by confusing the direct and derivative claims; and for summary judgment based upon the business judgment rule.

Defendant Soho Snacks runs a commissary for food carts in lower Manhattan and is a distributor of food products. The individual plaintiffs are minority shareholders in Soho Snacks, and have independent business interests in other food cart companies and food product distribution. They contend that defendants, who manage the day-to-day operations of Soho Snacks, have been allowing a competing concern, Unlimited Nuts Inc. (Unlimited Nuts), which defendants own, to operate out of the same premises; have been diverting business opportunities to Unlimited Nuts; and have been obtaining supplies from other distributors rather than from New York One, LLC, which is owned by the individual plaintiffs, contrary to the parties' agreement.

On a motion to dismiss, pursuant to CPLR 3211(a)(7), the court must determine whether factual allegations from the four corners of the pleading taken together manifest any cause of action cognizable at law (*Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). The allegations in the complaint are deemed true and given every inference in favor of the pleader (*Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 [1998]; *Residence on Madison Condominium v Gallagher & Assocs., Inc.*, 271 AD2d 209 [1st Dept 2000]), except "where the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted" (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]). A court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint insofar as the criterion is whether the proponent of the pleading has a cause action, not whether he or she has stated one (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]). Where the defendant submits affidavits in support of a motion

to dismiss (which a defendant may do under CPLR 3211[c]), plaintiff may choose to stand on the facial sufficiency of the pleading (*see Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d at 351; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

A party moving for summary judgment must demonstrate his, her, or its entitlement thereto as a matter of law, pursuant to CPLR 3212 (b) (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Horizons Invs. Corp. v Brecevich*, 104 AD3d 475 [1st Dept 2013]; *see Hoover v New Holland North America, Inc.*, 23 NY3d 41 [2014]). To defeat summary judgment, the party opposing the motion has to show that there is a material question(s) of fact that requires a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. (DE) v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]; *see Hoover v New Holland North America, Inc.*, 23 NY3d 41 [2014]).

It is clear that the first through fifth causes of action are derivative claims on behalf of the corporation, while the sixth cause of action is in plaintiffs' individual capacities (*see Yudell v Gilbert*, 99 AD3d 108, 114 [1st Dept 2012] [for a court to determine whether claims are derivative or individual, "[a] court should consider (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)" (internal quotation marks omitted)]). Here, plaintiffs' first five causes of action are derivative, and plaintiffs confuse individual claims therein with the derivative claims, but plaintiffs' sixth individual cause of action is not "embedded in an otherwise derivative claim for partnership waste and mismanagement" (*id.* at 115; *see Abrams v Donati*, 66 NY2d 951, 953 [1985]), but rather arises out of a purported separate obligation running to the individual plaintiffs.

As to the derivative claims, plaintiffs have not satisfied BCL 626 (c) (*see Marx v Akers* (88 NY2d 189, 193 [1996] ["section 626 (c) codified a rule of equity developed in early shareholder

* 5] derivative actions requiring plaintiffs to demand that the corporation initiate an action, unless such demand was futile, before commencing an action on the corporation's behalf"). The three letters that plaintiffs rely upon merely complained about defendants operating Unlimited Nuts out of the same premises; demanded an inspection of book and records and that Unlimited Nuts leave the premises; and threaten "appropriate legal action" and "institution of legal proceedings." None of the letters demanded that the corporation initiate an action against defendants so as to satisfy BCL 626 (c).

As to the individual claim, defendants have made a prima facie showing that they had legitimate business reasons to choose not to continue using plaintiffs' distributor based upon price, reliability and quality, so that defendants are protected by the business judgment rule (*see Auerbach v Bennett*, 47 NY2d 619, 629 [1979]). Plaintiffs have failed to raise an issue of fact to the contrary (*see North Fork Preserve, Inc. v Kaplan*, 68 AD3d 732, 733 [2nd Dept 2009]; *Bennett v Instrument Sys. Corp.*, 66 AD2d 708, 709 [1st Dept 1978]). Plaintiffs claim that they and defendants in forming Soho Snacks "had agreed that, to the *maximum extent feasible*, [Soho Snacks] would purchase food and beverage products from New York One" (emphasis added). That language and the circumstances that occurred thereafter do not raise a triable question of fact.

Of course, plaintiffs request for sanctions and attorneys' fees will not be granted because defendants have not been shown to have acted frivolously (22 NYCRR 130-1.1 [c]). Furthermore, plaintiffs did not move for such relief (22 NYCRR 130-1.1 [d]).

Accordingly, by separate decision and order, dated June 27, 2014, the complaint was dismissed. The remaining claims were severed and shall continue.

Dated: New York, New York
June 30, 2014

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NEW YORK
COUNTY CLERKS OFFICE


RICHARD F. BRAUN, J.S.C.