

**Interventure 77 Hudson LLC v Falcon Real Estate
Inv. Co., LP**

2014 NY Slip Op 31878(U)

July 10, 2014

Supreme Court, New York County

Docket Number: 653913/13

Judge: Melvin L. Schweitzer

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This opinion is uncorrected and not selected for official publication.

CPLR 2201 on the grounds that there is a parallel proceeding filed in arbitration and the claims in the arbitration proceeding factually overlap the claims brought in this action. The three defendants' motions to stay are denied.

Background

The facts are taken from the complaint.

Plaintiffs are Delaware limited liability companies, corporations, or limited partnerships that own or hold real estate interests in various commercial properties in the United States.

Falcon is a Delaware company that provides advisory and management services for real estate located in the United States. Mr. Hallengren and Mr. Miller are the principals, owners and officers of Falcon.

By way of background, commencing on or before September 1996, Falcon was engaged to manage the commercial properties of plaintiffs. As asset manager, Falcon was granted broad powers to act for the plaintiffs, including the power to make all decisions on behalf of the plaintiffs in connection with the day-to-day management and operation of the properties. Falcon was granted the authority to hire and fire property managers, leasing brokers, professional advisors, and vendors for the properties plaintiffs owned. Falcon was also integrally involved in, and was paid substantial fees in connection with, the management of plaintiffs' properties, plaintiffs' initial acquisitions and financing of the properties, as well as refinancing and dispositions thereof. Falcon agreed that it would act at all times in performance of its duties to plaintiffs as a fiduciary.

Mr. Hallengren and Mr. Miller each were officers of Falcon and directors and officers of plaintiffs. Falcon and the individual defendants had full custody and discretionary authority over plaintiffs' bank accounts, and they each owed fiduciary duties as plaintiffs' asset manager and as

directors and/or officers of plaintiffs themselves. Plaintiffs allege that the individual defendants breached their fiduciary duties to plaintiffs and caused Falcon to breach its fiduciary duties and its management agreements by, among other things: (i) misappropriating, misallocating and/or failing to appropriately safeguard plaintiffs' funds; (ii) causing the plaintiffs to hire third party vendors who, pursuant to arrangements that were concealed from the disinterested directors and shareholders of plaintiffs, were required to secretly pay a portion of their compensation to the individual defendants and/or the companies they owned and controlled, all at plaintiffs' expense, and (iii) approving, or negligently failing to stop, the payment of unauthorized and unearned compensation and fees to the individual defendants, the companies they owned and controlled, and/or third parties.

In short, plaintiffs entrusted Falcon and the individual defendants to manage more than \$1 billion of commercial real estate, for which defendants received tens of millions of dollars in compensation. From at least 2006 through 2011, defendants allegedly betrayed that trust and breached their fiduciary duties by extracting illicit payments from vendors, transferring to themselves unearned fees, and in several cases, blatantly misappropriating plaintiffs' funds without any basis.

On or about February 10, 2012, plaintiffs commenced arbitration before the American Arbitration Association alleging breach of contract claims against Falcon, as well as various tort claims against the defendants in this action, including breach of fiduciary duty, fraud, negligent misrepresentation, tortious interference, conversion and unjust enrichment. In their Demand For Arbitration (the Demand), plaintiffs allege, among other things, that defendants misappropriated plaintiffs' funds, approved the payment of unauthorized and unearned compensation and fees to

the individual defendants and their companies, and engaged in a massive kickback scheme in connection with the hiring of third party vendors.

In the Demand, plaintiffs assert claims against Falcon for (i) breach of the asset management agreements, (ii) breach of fiduciary duty, (iii) fraud, (iv) negligent misrepresentation, (v) conversion, (vi) unjust enrichment, and (vii) accounting. Plaintiffs assert claims against Mr. Hallengren for (i) breach of fiduciary duty, (ii) fraud, and (iii) negligent misrepresentation. Mr. Miller was not named in the Demand.

On or about March 6, 2012, Mr. Hallengren commenced a proceeding in this court seeking to stay the arbitration as to him. In a decision and order dated September 18, 2012, the court (Sherwood, J.) ordered that the petition to stay the arbitration was granted with respect to Mr. Hallengren. In the meantime, while the petition to stay the Arbitration was *sub judice*, on August 27, 2012, Falcon moved to dismiss certain plaintiffs from the arbitration on the ground that there are no arbitration agreements between some of the plaintiffs and Falcon.

On December 5, 2012, the arbitration was stayed in favor of mediation. Due to numerous scheduling issues and delays, the mediation was not held until May 9, 2013. Following the mediation, the parties continued to negotiate with the assistance of the mediator. The matter has not been resolved, and the arbitration is still stayed.

On January 22, 2014, plaintiffs filed their original complaint in this action. On March 3, 2012, plaintiffs amended their complaint, which contains causes of action that arise from similar misconduct to that asserted in the arbitration Demand. The amended complaint alleges causes of action against Mr. Hallengren and Mr. Miller for (i) breach of fiduciary duty, (ii) aiding and abetting breach of fiduciary duty, (iii) fraud and conspiracy to defraud, (iv) misappropriation, (v) interference with contract, (vi) negligence, (vii) negligent supervision, (viii) tortious

interference, and (ix) unjust enrichment, (x) breach of fiduciary duty, and (xi) accounting. Notably, the claims against Falcon that were added to the amended complaint are those that Falcon itself sought to dismiss from the arbitration as non-arbitrable.

Shortly after plaintiffs served the amended complaint, they also served a Notice of Plaintiffs' First Request for Production of Documents and Information on Mr. Hallengren (the Requests). The Requests include both jurisdictional discovery regarding contacts with New York and merits-based discovery. Plaintiffs requested responses to the Requests by March 31, 2014. However, Mr. Hallengren has not responded to the Requests, and Mr. Miller filed objections.

On April 11, 2014, plaintiffs sent a letter to defense counsel demanding production of all documents by April 18, 2014 and asserting their waiver of objections. Defendants then filed a letter with this court seeking to stay discovery pending the court's decision on defendants' motions to dismiss and motions for a stay.

Discussion

The court may grant a stay under CPLR 2201 in a proper case. CPLR 2201:7. When the decision in one action will determine all the questions in the other action, and the judgment in one trial will dispose of the controversy in both actions, a case for a stay is presented. *Abrams v Xenon Indus., Inc.*, 145 AD2d 362 (1st Dept 1988). Where a party seeks the stay of an action pending the outcome of another action, complete identity of parties, causes of action and judgment sought are required. *See e.g. Simoni v Napoli*, 101 AD3d 487 (1st Dept 2012); *American Intern. Grp., Inc. v Greenberg*, 2008 WL 4972901 (2008). Although these elements are not specifically set forth in CPLR 2201, they are generally adhered to. *American Intern. Grp., Inc. v Greenberg*, 2008 WL 4972901 (2008).

I. Mr. Hallengren's Motion to Stay

Mr. Hallengren's motion to stay the current action is denied because there is not complete identity of the parties between the current action and the arbitration. In the arbitration proceeding, although Mr. Hallengren was initially a named party to the arbitration, he has successfully moved to be permanently stayed from the arbitration. Accordingly, the only way for the plaintiffs to claim against Mr. Hallengren is through this action. Among the defendants in the current action, Mr. Hallengren and Mr. Miller are not parties to the arbitration, and Falcon is the only defendant that currently remains in arbitration. Complete identity of the parties does not exist.

In addition, although the twenty-eight claimants in the current action are the same claimants in the arbitration, the defendants sought to dismiss thirteen of the twenty-eight claimants from the arbitration since these thirteen claimants did not enter into arbitration agreements with defendants. The issue has not been decided in the arbitration proceeding. If the issue were decided in favor of the defendants and the thirteen claimants were dismissed from the arbitration, these thirteen claimants still would have claims against defendants in this court.

Mr. Hallengren argues that the plaintiffs have sued certain defendants as alter egos of Falcon, and that if the allegations that Mr. Hallengren is an alter ego were adjudicated in this court, and allegations against Falcon were adjudicated in arbitration, there could be inconsistent outcomes. The court does not consider this to be a meaningful argument. The court has reviewed the amended complaint and other submissions, and has found no indication that Mr. Hallengren was an alter ego of Falcon. The complaint contains only two conclusory statements regarding Mr. Hallengren being an alter ego of Falcon. The plaintiffs have not properly pled that

Mr. Hallengren or any other of the defendants are alter egos of Falcon. Consequently, it is clear that the parties to the arbitration are not the same as the parties to this action.

II. Mr. Miller's Motion to Stay

Mr. Miller's motion to stay the current action is denied because there is not complete identity of the parties between this action and the arbitration. Mr. Miller is not a defendant in the arbitration. Falcon is the only defendant in the arbitration. Complete identity of the parties does not exist.

Mr. Miller attempts to avoid this result by arguing that the plaintiffs have sued certain defendants as alter egos of Falcon, and that if the allegations that Mr. Miller is an alter ego were adjudicated in this court, and allegations against Falcon were adjudicated in arbitration, there could be inconsistent outcomes. The court also does not consider this to be a meaningful argument. The court has reviewed the amended complaint and other submissions, and has found no indication that Mr. Miller was an alter ego of Falcon. The complaint contains only two conclusory statements regarding Mr. Miller being an alter ego of Falcon. The plaintiffs have not properly pled that Mr. Miller or any other of the defendants are alter egos of Falcon. Consequently, it is clear that the parties to the arbitration are not the same as the parties to this action.

III. Falcon's Motion to Stay

Falcon's motion to stay the current action is denied because there is not complete identity of the parties between this action and the arbitration. Although Falcon remains as a defendant in the arbitration, Mr. Hallengren has won a stay with respect to that proceeding, and Mr. Miller is not a party in the arbitration. Complete identity of the parties does not exist.

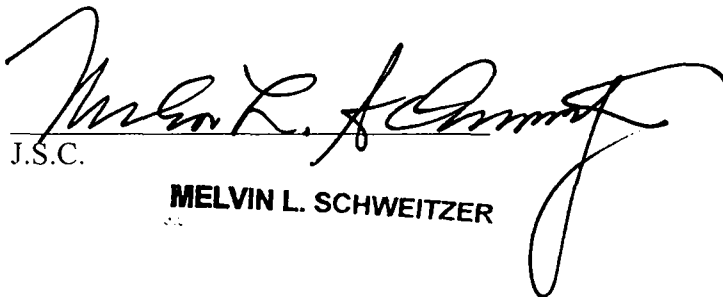
Conclusion

Accordingly, it is hereby

ORDERED that ordered that the motions of Mr. Hallengren, Mr. Miller and Falcon for a stay are denied.

Dated: July 10, 2014

ENTER:


J.S.C.
MELVIN L. SCHWEITZER