Weksler v Wels;er
2014 NY Slip Op 32024(U)
July 30, 2014
Supreme Court, New York County
Docket Number: 603288/2007
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: HON. MARCY S. FRIEDMAN, J.S.C.

LISA J. WEKSLER, individually and as a shareholder of Bruce Supply Corp. and a member of 6015 16th Avenue Realty LLC and in the right of and on behalf of Bruce Supply Corp. and 6015 16th Avenue Realty LLC,

Plaintiff,

-against-

JOSEPH WEKSLER, in his personal capacity and as guardian for Matthew Weksler and Ethan Weksler under the Uniform Gifts to Minors Act, et al.,

Defendants.

Index No.: 603288/2007

DECISION/ORDER

Motion Seq. 016

In the Matter of the Application of LISA J. WEKSLER,

Petitioner,

For the Judicial Dissolution of BRUCE SUPPLY CORP.,

Respondent,

and

For Surcharge against JOSEPH WEKSLER and BRUCE WEKSLER,

Respondents.

Index No.: 652843/2011

DECISION/ORDER

Motion Seq. 002

The above-captioned plenary action and special proceeding are brought by Lisa Weksler against Bruce Supply Corp. (Bruce Supply), Bruce Weksler, and Joseph Weksler for damages

and dissolution of the family business. Bruce and Joseph[1] move to dismiss certain allegations on which the dissolution proceeding is based, on the ground that they are time-barred and/or prejudicial. Lisa moves for a joint trial of the action and proceeding, pursuant to CPLR 602 (a).

The following facts, taken from the verified dissolution petition, are undisputed. Jack Weksler, father to Bruce, Joseph, and Lisa, founded Bruce Supply Corp. (Bruce Supply) in 1969. (Pet., ¶ 2.) Bruce Supply is a closely-held corporation that sells plumbing supplies. (Id., ¶ 4.) Bruce, Joseph, and Lisa are shareholders, and Bruce and Joseph (collectively the brothers) are also officers and directors of Bruce Supply. (Id., ¶¶ 6, 11.) Before a buyout transaction in 2000 (2000 buyout), Bruce, Joseph, and Lisa owned an equal percentage of shares. (Id., ¶¶ 24, 29.) After the buyout, Bruce and Joseph owned a majority of the shares and Lisa became a minority shareholder. (Id., ¶ 24.)

Lisa alleges that the brothers froze her out of Bruce Supply and that their actions escalated after Jack's death in 2007. (Id., ¶¶ 11, 19.) The brothers' alleged wrongful conduct included terminating Lisa's employment with and compensation from Bruce Supply, failing to pay "adequate and fair dividends," paying excessive salaries and other benefits to the brothers, failing to collect on loans made by Bruce Supply to the brothers, diverting Bruce Supply's corporate assets and profits for the benefit of entities owned exclusively by the brothers, and diluting Lisa's ownership stake in Bruce Supply. (Id., ¶ 19.) Some of these claims stem from the 2000 buyout, in which the brothers bought shares of Bruce Supply held by a third party and thereby increased their ownership stake. Lisa claims that she waived her contractual right to

[1]The court refers to the individual defendants by their first names, as they share the same surname.

participate in the buyout, in reliance on representations made by the brothers that "sufficient shares would be transferred to her to restore equality of share ownership" and that such a structure was necessary for tax purposes. (Id., ¶¶ 30-31, 34.) After the buyout, share transfers were in fact made to Lisa by various family members, including the brothers, but were discontinued in 2006 "before parity was reached." (Id., ¶¶ 31, 34.)

Lisa further alleges that, to effectuate the buyout, the brothers wrongfully caused Bruce Supply to borrow $2 million from a bank and then to lend that $2 million to them to purchase the shares. (Id., ¶¶ 30, 32-34.) Finally, Lisa alleges that the circumstances surrounding the 2000 buyout, including that a $2 million loan was made by Bruce Supply to the brothers and that the transaction was originally structured so that she would participate equally in the buyout with her brothers, were concealed from her until May 2010. (Id., ¶ 30.)

These claims, among others, of oppressive conduct, diversion of assets, and waste are the basis for Lisa's petition seeking judicial dissolution of Bruce Supply pursuant to Section 1104-a of the Business Corporation Law (BCL). (Id., ¶ 8.)

Lisa initially pleaded a cause of action in the plenary action for dissolution of Bruce Supply under the Business Corporation Law. This action was filed in this court on October 5, 2007.[2] This cause of action pleaded substantially the same allegations regarding the 2000 buyout as are pleaded in the special proceeding. (P.'s Aff. In Support, Ex. B [2007 Complaint], ¶¶ 25-42.) After obtaining new counsel in 2009, Lisa moved in the plenary action to amend for the purpose of complying with the pleading, service, and publication requirements of Business

[2]A common law cause of action for dissolution was also pleaded in the plenary action, and is still pending.

Corporation Law § 1106, and to sever the cause of action for statutory dissolution. (P.'s Aff. In Opp., Ex. C [Aff. Of Jonathan P. Harvey], ¶¶ 5-7.)

This Court (Lowe, J.) denied the motion by decision dated January 13, 2010, which held that "significant [] substantive and procedural errors in the manner in which the complaint purports to seek judicial dissolution of Bruce Supply" could not be cured through amendment and severance. (Id., Ex. D at 3-4.) The Court did not reach the issue of whether the allegations regarding the 2000 buyout were time-barred, as there were other allegations of oppressive conduct that allegedly occurred at a later date. The Court thus stated: "Although a cause of action accruing then [in 2000] may now be time-barred, the allegations supporting the dissolution claim indicate that the alleged basis for dissolution is ongoing. For example, the proposed petition details alleged oppressive conduct and looting occurring after the death in 2007 of Jack Weksler. . . ." (Id. at 4-5.) The Court concluded that Lisa's "appropriate course of action," if so advised, was to institute a separate proceeding "in compliance with the applicable statutory requirements" of the Business Corporation Law. (Id. at 4.)

The trial court's decision was affirmed by decision of the Appellate Division, dated June 30, 2011, which held that the "Supreme Court's denial of the motion and its directive that [Lisa] may, if she chooses, commence a separate proceeding under BCL 1104-a in compliance with the applicable statutory requirements, was a provident exercise of discretion." (Id., Ex. G.) The Appellate Division also did not reach the issue of whether the separate proceeding would be time-barred.[3]

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[3]After the appeal was decided, and on the brothers' motion for summary judgment in the plenary action, this Court (Fried, J.), by decision and order dated March 28, 2012, dismissed the BCL cause of action for dissolution. This cause of action was dismissed without opposition, and based on the Appellate

Lisa brought the instant special proceeding by order to show cause filed on October 17, 2011, within six months of the Appellate Division's affirmance. The brothers now seek dismissal of Lisa's claims based on conduct that occurred more than six years before the commencement of the special proceeding (that is, prior to October 17, 2005), on the ground that a claim for dissolution based on such conduct is time barred by the applicable six-year statute of limitations.

Lisa does not dispute that the six-year statute of limitations governs (see CPLR 213 [1]; DiPace v Figueroa, 223 AD2d 949, 952 [3rd Dept 1996]), and that some of the complained of acts took place more than six years before commencement of the action. Rather, she advances two alternate theories for the timeliness of the claims in the 2011 petition related to the 2000 buyout: first, that the six-month grace period afforded by CPLR 205 (a) applies to the defectively pleaded cause of action for statutory dissolution in the 2007 complaint; and second, that the harm was ongoing and, alternatively, that she did not discover her brothers' breaches relating to the 2000 buyout until 2006, when the gifts to her of shares following the 2000 buyout ceased, and 2010, when she discovered the $2 million loan to the brothers in connection with the buyout. (P.'s Memo. Of Law In Opp. at 12-17.)

In moving for dismissal of the dissolution proceeding, to the extent that it is based on the 2000 buyout, the brothers counter that CPLR 205 (a) cannot be used "to extend the look-back period" to conduct that occurred 11 years before the dissolution proceeding was commenced. (Resps.' Memo. Of Law in Reply at 4.) They also argue that CPLR 205 (a) does not apply to save the claims for dissolution in the 2007 action because the cause of action for dissolution that

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Division decision. The Court did not consider whether the dissolution claim was based on time-barred conduct. (Resps.' Reply Aff., Ex. E.)

was pleaded in that action was not brought in conformity with statutory requirements for commencement of a dissolution proceeding and was therefore void ab initio. (Id. at 4-5.) The brothers further contend that Lisa took the position before the Appellate Division that an affirmance of the denial of her motion to amend and sever would render her claims time-barred, and that she cannot now take an inconsistent position before this court. (Id. at 7-8.)

Section 205 (a) of the CPLR provides, in relevant part:

> "If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period."

This statute has been described as "remedial," and its function "is to ameliorate the potentially harsh effect of the Statute of Limitations in certain cases in which at least one of the fundamental purposes of the Statute of Limitations has in fact been served, and the defendant has been given timely notice of the claim being asserted by or on behalf of the injured party." (George v Mt. Sinai Hosp., 47 NY2d 170, 177 [1979].) Appeals as of right serve to delay the running of the six-month period under CPLR 205 (a) until the appeals are exhausted. (Andrea v Arnone, Hedin, Casker, Kennedy and Drake, Architects and Landscape Architects, P.C., 5 NY3d 514, 519 [2005] ["For purposes of [CPLR 205 [a], 'termination' of the prior action occurs when appeals as of right are exhausted"]; Lehman Brothers, Inc. v Hughes Hubbard & Reed, L.L.P., 92 NY2d 1014, 1016

[1998] [same].)

Here, it is not disputed that Lisa's appeal of the denial of her motion to amend and sever was as of right and that she brought the special proceeding for dissolution within six months of the Appellate Division's affirmance of that denial. Moreover, the brothers fail to advance persuasive grounds for dismissal of the allegations of the dissolution proceeding based on the 2000 buyout.

In arguing that Lisa in effect seeks an 11 year "look-back period," the brothers misapprehend the operation and effect of CPLR 205 (a). The statute does not extend the statute of limitations to conduct that occurred prior to the statute of limitations for commencement of an action based on such conduct. It permits a new action to based on conduct that would otherwise be barred by the statute of limitations if, but only if, a prior action was timely commenced based on such conduct and was not terminated on any of the grounds specified in the statute. As the Court of Appeals has explained: "The effect of the statute is quite simple: if a timely brought action has been terminated for any reason other than one of the three reasons specified in the statute, the plaintiff may commence another action based on the same transactions or occurrences within six months of the dismissal of the first action, even if the second action would otherwise be subject to a Statute of Limitations defense, so long as the second action would have been timely had it been commenced when the first action was brought." (George, 47 NY2d at 175 [emphasis supplied].)

Contrary to the brothers' further contention, a claimant's failure to comply with statutory pleading and other requirements does not in and of itself bar the application of CPLR 205 (a). (See George, 47 NY2d at 170 [allowing an administratrix to recommence an action under Section

205 [a] after the statute of limitations had passed, where the first action had been improperly commenced in the decedent's own name]; Lambert v Sklar, 30 AD3d 564, 566 [2d Dept 2006] [holding that, where widow commenced first action in her own name, second action in estate's name could be commenced within CPLR 205 [a] because "it is clear that the real party in interest, the estate, was the same in both actions"].) The brothers reliance on Hertz v Schiller (239 AD2d 240 [1st Dept 1997]) is unavailing. In Hertz, the Appellate Division rejected the application of CPLR 205 (a) because the first action was never commenced as required by the plain language of the statute, and the second action therefore could not relate back to it. (Id. at 240-41.) The holding was based on the fact that the Clerk of the Court did not accept the summons and complaint in the first action for filing because the plaintiff had already served it on the defendant in violation of CPLR 306-a (a). (Id.)

In the instant matter, there is no contention that the first action was not properly commenced. Rather, the brothers contend that Lisa's failure to comply with certain pleading and notice requirements of the Business Corporation Law – in particular, section 1105, requiring verification of the petition, and section 1106, requiring publication of the petition and service on the tax commission – rendered her cause of action for dissolution void ab initio. Significantly, however, the failure of a petitioner to comply with these Business Corporation Law provisions is not a jurisdictional defect, and the statute provides that such non-compliance may be cured through amendment by leave of the court. (See Matter of WTB Properties Inc., 291 AD2d 566, 567 [2d Dept 2002] [holding that where required order to show cause "did not provide for publication, was not published, and was not served on the Tax Commission," Court "providently exercised its discretion in permitting the petitioner to amend the petition and comply with the

statutory requirements"]; LaSorsa v Algen Press Corp., 105 AD2d 771, 772 [2d Dept 1984] [same]; BCL § 1107.)[4]

The court is also unpersuaded by the brothers' contention that Lisa is bound by her previous position in the plenary action that if she were not allowed to amend and sever, the allegations related to the 2000 buyout, among others, would be time-barred. (Resps.' Reply Memo. Of Law at 7.) "Judicial estoppel, or the doctrine of inconsistent positions, precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed." (Ford Motor Credit Co. v Colonial Funding Corp., 215 AD2d 435, 436 [2d Dept 1995].) A party is only estopped if it secured a judgment or a ruling in its favor in the prior proceeding. (Baje Realty Corp. v Cutler, 32 AD3d 307, 310 [1st Dept 2006].) Here, Lisa gained no relief from maintaining in the plenary action that if she were not granted leave to amend her dissolution cause of action, a future dissolution petition would be time-barred. Moreover, as discussed above, both this Court and the Appellate Division denied her request for leave to amend without reaching the issue of whether her claims would be time-barred.

The court accordingly holds that the brothers fail to advance grounds which establish that the allegations in dissolution proceeding relating to the 2000 buyout are time-barred. The court notes that the parties entered into an agreement that tolled the statute of limitations effective December 19, 2006. (See Boulia Aff. In Opp., Ex. G [Tolling Agreement].) On the record of this motion, the parties have not addressed whether any of the acts stemming from the 2000

[4]The requirements of publication and of service on the tax commission do not confer personal jurisdiction over the respondents in a dissolution proceeding. Such jurisdiction is acquired by personally serving the respondents, in the manner specified in BCL § 1106.

buyout occurred more than six years prior to the tolling agreement or, if they did, whether they were ongoing and therefore timely. The court accordingly makes no determination as to the effect of the tolling agreement on, or timeliness of, Lisa's dissolution claim based on the 2000 buyout. In the event that any of conduct in connection with the 2000 buyout is time-barred, the allegations regarding such conduct will be subject to dismissal upon a summary judgment motion in the dissolution proceeding or at trial. Whether or not such allegations are timely, the dissolution proceeding is maintainable at this juncture because it is also based on allegations as to oppressive conduct or waste – e.g., allegations that the brothers paid themselves excessive salaries and directed the company to pay for personal expenses (Pet., ¶ 15) – which concededly occurred within the statute of limitations for commencement either of the plenary action or of the dissolution proceeding.

The brothers also move, pursuant to CPLR 3024 (b), to strike as prejudicial the allegations in the dissolution petition that they failed to continue, after the 2000 buyout, to gift Lisa shares in Bruce Supply until her shares were equal to her brothers', and that they made unauthorized withdrawals from certain stock accounts and bank accounts held jointly with Lisa. (Resps.' Memo. Of Law In Support at 11-14.)[5] Lisa contends that these allegations support her claims of oppression. (P.'s Memo. Of Law in Opp. at 20-21.)

Rule 3024 (b) authorizes a court to strike "scandalous or prejudicial matter unnecessarily inserted in a pleading." On a CPLR 3024 (b) motion, "the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action." (Soumayah v Minnelli, 41

[5]The brothers have not identified the particular paragraphs of the petition that they claim should be struck, but do specify the subject matter of the assertedly prejudicial allegations.

AD3d 390, 392 [1st Dept 2007]; New York City Health & Hosps. Corp. v St. Barnabas Comm. Health Plan, 22 AD3d 391, 391 [1st Dept 2005].)

The brothers have failed to show that the allegations in question are prejudicial. On the limited briefing on this motion, the brothers have not demonstrated that their failure to continue gifting shares to Lisa is irrelevant to her "reasonable expectations" as a shareholder. (See generally Matter of Kemp & Beatley, Inc., 64 NY2d 63, 72-73 [1984].) The alleged use of a Bruce Supply employee to forge Lisa's signature on various accounts is also relevant to the alleged attempts of the brothers to freeze Lisa out and to preclude her from exercising any control over Bruce Supply.

The branch of the brothers' motion to dismiss Lisa's cause of action for a receiver is denied. Contrary to the brothers' contention, the allegations of the petition are sufficient to state a claim that a receiver should be appointed for Bruce Supply.

Finally, Lisa moves for a joint trial of the two cases, pursuant to CPLR 602 (a). In the motion papers, the brothers objected to a joint trial on the ground that the cases were at different procedural stages, as the 2007 plenary action was trial ready and discovery was not yet complete in the 2011 special proceeding. (D.'s Memo. Of Law in Opp. to P.'s Motion for a Joint Trial at 9-12; March 7, 2013 Tr. at 3-4.) Although discovery was complete in the plenary action but not the dissolution proceeding as of the date of oral argument of the motion for a joint trial, discovery should now also be complete in the dissolution proceeding. (See Mar. 7, 2013 Compliance Conference Order, providing for completion of discovery by July 2013.)[6]

[6]By stipulation of the parties, ruling on the joint trial motion was deferred between June 24, 2013 and February 4, 2014, pending settlement negotiations, which have proved unsuccessful.

The brothers' further objection to a joint trial based on differences in the causes of action in the two cases is without merit. It is undisputed that the cases involve significant common questions of law and fact. They also involve the same parties.[7] A joint trial "will avoid unnecessary duplication of proceedings, save unnecessary costs, and prevent the injustice that would arise from divergent decisions based on the same facts." (See generally Cummin v Cummin, 56 AD3d 400 [1st Dept 2008] [citing Phoenix Garden Rest. v Chu, 202 AD2d 180 [1st Dept 1994]; see also Shanley v Callanan Industries, Inc., 54 NY2d 52, 57 [NY 1981] ["Where complex issues are intertwined, albeit in technically different actions, it would be better not to fragment trials, but to facilitate one complete and comprehensive hearing and determine all the issues involved between the parties at the same time."].)

It is accordingly hereby ORDERED that the motion of defendants Bruce Weksler and Joseph Weksler to dismiss the dissolution proceeding is denied in its entirety; and it is further

ORDERED that the motion of Lisa Weksler for a joint trial is granted to the extent that Weksler v Weksler, Index No. 603288/2007, shall be jointly tried with Matter of the Application of Lisa J. Weksler, Index No. 652843/2011; and it is further

ORDERED that, within 30 days from entry of this order, Lisa shall serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 158); and it is further

ORDERED that upon payment of the appropriate calendar fees and the filing of the note of issue and statement of readiness in the dissolution proceeding, the Clerk of the Trial Support

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[7]The parties in the 2007 action, who are not Weksler family members or affiliated with Bruce Supply, Alan Nathanson, Mitchell D. Hollander, and Kane Kessler, P.C., have settled that action. (March 7, 2013 Tr. at 9.) The remaining parties in the 2007 action are entities related to Bruce Supply or owned by the brothers. (P.'s Aff. In Opp., Ex. B [Complaint], ¶¶ 28, 40.)

Office shall place the aforesaid actions upon the trial calendar for a joint trial.

This constitutes the decision and order of the court.

Dated: New York, New York
July 30, 2014

MARCY S. FRIEDMAN, J.S.C.