

Glaubach v Slifkin
2016 NY Slip Op 31380(U)
June 17, 2016
Supreme Court, Queens County
Docket Number: 702987/2015
Judge: Marguerite A. Grays
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS** IAS PART **4**
Justice

_____^x
GELIX GLAUBACH, derivatively on behalf
of PERSONAL TOUCH HOLDING CORP., Index
Number 702987 2015

Plaintiff(s) Motion
-against- Date May 3, 2016

DAVID SLIFKIN, TRUDY BALK, ROBERT
MARX, JOHN L. MISCIONE, JOHN D
CALABRO, LAWRENCE J. WALDMAN,
ROBERT E. GOFF, JACK BILANCIA,
ANTHONY CASTIGLIONE, NANCY ROA
and JOSEPHINE DIMAGGIO Motion
Cal. Number 53
Motion Seq. No. 6

Defendant(s)

PERSONAL TOUCH HOLDING CORP.; PT
INTERMEDIATE HOLDING, INC. and
PERSONAL TOUCH HOME CARE OF N.Y. INC.

FILED

JUL - 1 2016

**COUNTY CLERK
QUEENS COUNTY**

Nominal Defendant(s)

_____^x

The following papers numbered 1 to 6 read on this motion by defendant Robert Marx for, *inter alia*, an order dismissing the fifth cause of action asserted in the amended complaint, and on this cross-motion by plaintiff Felix Glaubach for, *inter alia*, a default judgment against defendants David Slifkin, Trudy Balk, Robert Marx, John L. Miscione, John D. Calabro, Lawrence J. Waldman, and Robert E. Goff.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1
Notice of Cross Motion - Affidavits - Exhibits	2
Answering Affidavits - Exhibits.....	3
Memoranda of Law	4-6

Upon the foregoing papers it is ordered that the motion and the cross-motion are determined as follows:

Plaintiff Felix Glaubach and defendant Robert Marx established a health care business known as Personal Touch in 1974. Personal Touch provides home health care services, including care by home health aides, social services, and physical therapy. Glaubach served as the President of the Company and Chief Executive Officer until 2011. Defendant David Slifkin, a 4.5% shareholder in the company, became the Chief Executive Officer in 2011. Marx serves as the Executive Vice-President, General Counsel, and Special Director of the company. Glaubach and Marx are now in their eighties. Personal Touch did business through over twenty-five S corporations having their own separate articles of incorporation and by-laws.

The complaint alleges that from 2008 to 2011, a period during which Glaubach was incapacitated, Slifkin caused Personal Touch to pay him undeclared and undisclosed income in excess of \$500,000, and that he hid this unauthorized income by classifying it as the reimbursement of educational expenses which he never actually incurred. Slifkin also allegedly caused Personal Touch to pay unauthorized income to defendant Trudy Balk (the Vice-President of Operations), Marx, and others, which he allegedly disguised as reimbursement for educational expenses. Among the others allegedly receiving unauthorized income falsely classified as reimbursement for educational expenses were defendant Anthony Castiglione (Vice-President and Treasurer) who received at least \$88,968, defendant Jack Bilancia who received at least \$70,000, defendant Nancy Roa (Director of Human Resources) who received at least \$17,500, and defendant Josephine DiMaggio (Executive Assistant) who received at least \$10,000. The complaint further alleges that Marx, Slifkin, and Balk have conspired to freeze Glaubach out of company affairs.

The fifth cause of action alleges: "Marx's actions of accepting payment of reimbursement of educational expenses and other monies he did not incur constitutes a breach of his fiduciary duty to the company ***." The eleventh cause of action alleges: "Slifkin and Marx's ultra vires acts of barring Glaubach from Personal Touch's office constitutes a breach of their fiduciary duty."

On September 3, 2015, defendant Robert Marx submitted a motion for, *inter alia*, an order pursuant to CPLR §3211(a)(1) and (7) dismissing the fifth and eleventh causes of action in the complaint. Pursuant to a decision and Order dated December 2, 2015 (one paper) this Court denied his motion. This Court also granted a cross-motion by plaintiff Felix Glaubach for an Order permitting him to serve a supplemental summons and amended complaint. The plaintiff served his amended complaint on or about January 15, 2016.

That branch of the motion which is for an Order dismissing the fifth cause of action in the amended complaint without prejudice and with leave to re-file pending the completion of the investigation by the Audit Committee of the Board of Directors of Personal Touch Holding Corp. is denied. This Court has already determined that on the present state of the record there are issues of fact concerning whether the investigation purportedly being conducted is “merely a sham” (see the decision and order dated December 4, 2015 [one paper] rendered on Motion Sequence No. 2).

That branch of the motion which is for an Order staying this action until the completion of the investigation by the Audit Committee is denied. “A Court has broad discretion to grant a stay in order to avoid the risk of inconsistent adjudications, duplication of proof, and the potential waste of judicial resources ***” (*Felix v. Law Offices of Thomas F. Liotti*, 129 AD3d 773, 773). A stay is not warranted in this case since the board appointed a committee comprised of independent directors in February, 2015—well over a year ago—to investigate Glaubach’s charges concerning the educational expenses. The investigation still has not been completed.

That branch of the motion which is for an Order permitting defendant Marx to reargue that branch of his prior motion which was to dismiss the fifth cause of action is denied.

That branch of the motion which is for an Order permitting defendant Marx to renew that branch of his prior motion which was to dismiss the fifth cause of action is denied. CPLR §2221 provides in relevant part: “(e) A motion for leave to renew: *** 2. shall be based upon new facts not offered on the prior motion that would change the prior determination ***”. The defendant purports to offer “new evidence [which] definitively establishes that the Audit Committee is actively engaged in investigating Plaintiff’s claims and has spent tremendous resources in doing so.” (Memorandum of law, p7.) However, the establishment of the Audit Committee is not new evidence, and the fact that it has done some work does not suffice to alter the Court’s previous decision.

That branch of the motion which is for an Order permitting defendant Marx to reargue that branch of his prior motion which sought the dismissal of the eleventh cause of action is denied.

That branch of the cross-motion which is for a default judgment against defendants David Slifkin, Trudy Balk, Robert Marx, John L. Miscione, John D. Calabro, Lawrence J. Waldman, and Robert E. Goff is denied. While a motion to reargue does not extend the time to answer pursuant to CPLR §3211(f) (see, *Vigo v. 501 Second St. Holding Corp.*, 100 AD3d 871), and the plaintiff contends that the defaulting defendants brought motions which are essentially such, there was no intent to default in this case (see, *Skutelsky v. JN Nat. Fruit*

Corp., 138 AD3d 1099). Moreover, in order to successfully oppose a motion to enter a default judgment, a party must demonstrate both a reasonable excuse for the default and a meritorious cause of action or defense (*see, Becker v. University Physicians of Brooklyn, Inc.*, 307 AD2d 243). The misunderstanding by the attorneys concerning the effect of their new motions addressed to the amended complaint will be taken by the Court as a reasonable excuse for the default, and the Court can discern potentially meritorious defenses to this case. Defendants shall serve and file answers to plaintiffs amended complaint forthwith.

That branch of the cross-motion which is for an Order declaring that the nominal defendants have no active role in this litigation is denied. The plaintiff did not substantiate his allegation that: "The only reason the individual defendants have caused the Nominal Defendants to have an active role in this litigation is to use them as a tool to delay this action."

That branch of the cross-motion which is for an Order directing the defendants to comply with plaintiff's first request for production of documents is denied with leave to the plaintiff to re-serve his first request within twenty days of the service of a copy of this order with notice of entry. This case has been procedurally snarled by the plaintiff's service of an amended complaint in response to prior CPLR §3211 motions to dismiss, and the use of discovery devices should await the service of answers to the amended complaint.

Dated: June 17, 2016



J.S.C.

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