Friedman v Markowits
2017 NY Slip Op 32689(U)
February 23, 2017
Supreme Court, Nassau County
Docket Number: 601153-15
Judge: Timothy S. Driscoll
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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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BARRY FRIEDMAN, individually as a 90.1% membership interest holder and derivatively on behalf of PARKSHORE HOME HEALTHCARE, LLC, and RENAISSANCE HHA, LLC,

Plaintiff,

-against-

ALEXANDER MARKOWITS,

Defendant,

and

PARKSHORE HOME HEALTHCARE, LLC and RENAISSANCE HHA, LLC,

Nominal Defendant.

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TRIAL/IAS PART: 12
NASSAU COUNTY

Index No: 601153-15
Motion Seq. Nos. 7 and 8
Submission Date: 11/7/16

The following papers have been read on these motions:

Notice of Motion, Affirmations in Support and Exhibits.....x
Corrected Memorandum of Law in Support.....x
Plaintiff's Corrected Rule 19-a Statement.....x
Defendants' Counterstatement to Plaintiff's Rule 19-a Statement.....x
Reply Affirmation in Further Support and Exhibits.....x
Memorandum of Law in Further Support.....x
Notice of Cross Motion, Affirmation in Opposition/Support and Exhibits....x
Affidavit in Opposition/Support and Exhibits.....x
Memorandum of Law in Opposition/Support.....x
Affirmation in Opposition to Defendants' Cross Motion and Exhibits.....x
Memorandum of Law in Opposition to Defendants' Cross Motion.....x
Reply Affirmation in Further Support of Defendants' Cross Motion.....x
Reply Memorandum of Law in Further Support.....x
Plaintiff's Correspondence dated February 17, 2017.....x
Defendants' Correspondence dated February 17, 2017 with Exhibits.....x

This matter is before the Court for decision on 1) the motion filed by Plaintiff Barry Friedman ("Friedman" or "Plaintiff"), individually as a 90.1% membership interest holder and derivatively on behalf of Parkshore Home Healthcare, LLC ("Parkshore") and Renaissance HHA, LLC ("Renaissance") (collectively "Company") on July 25, 2016, and 2) the cross motion filed by Defendant Alexander Markowits ("Markowits") and Nominal Defendants Parkshore and Renaissance (collectively "Defendants") on September 16, 2016, both of which were submitted on November 7, 2016. For the reasons set forth below, the Court grants Plaintiff's motion to the extent that the Court 1) directs that Plaintiffs shall be granted immediate access to the records and books of the Company; and 2) dismisses Defendants' Second, Tenth and Thirteenth affirmative defenses. The Court otherwise denies Plaintiff's motion. The Court denies Defendants' cross-motion.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 3212, granting summary judgment in favor of Plaintiff on 1) the fourth cause of action (derivative claim for declaratory judgment), and fifth cause of action (access to Company books and records) asserted in the Complaint, 2) each of the counterclaims asserted by Defendant Markowits and the Nominal Defendants in the amended answer with counterclaims; and 3) the second, fourth, fifth, seventh, eighth, tenth, eleventh, thirteenth, fourteenth and sixteenth affirmative defenses asserted by Markowits and the Nominal Defendants.

Defendants cross move for an Order, pursuant to CPLR § 3025(b), granting Defendant Markowits leave to amend his Amended Answer with Counterclaims to interpose additional counterclaims.

BACKGROUND

B. The Parties' History

As noted in the Court's prior decisions ("Prior Decisions") regarding the above-captioned action ("Instant Action"), Plaintiff commenced the Instant Action, derivatively on behalf of Parkshore and Renaissance, seeking damages for alleged breaches of fiduciary duty by Markowits, as managing member of the Company, and seeking access to confidential and proprietary Company records. On March 16, 2010, Friedman and Markowits entered into a

series of agreements providing Markowits with the right to acquire up to 100% of Friedman's membership interest. Plaintiff contends that Markowits does not own the Company because he has defaulted in making certain payments under the agreements controlling the purchase and sale of the Company. Markowits contends that he could not have defaulted because Friedman was already in material breach of the agreements for failing to disclose several pending investigations by various State-related entities for Medicaid fraud, among other matters. The Court incorporates its Prior Decisions by reference as if set forth in full herein. Those Prior Decisions contain extensive detail regarding the Instant Action, as well as a related pending action in Kings County Supreme Court ("Kings County Action").

Plaintiff is seeking judgment on the fourth and fifth causes of action in the complaint in the Instant Action (Ex. 3 to Scharf Aff. in Supp.). The fourth cause of action seeks a judgment declaring that 1) Markowits is no longer the managing member of the Company; 2) Friedman is the new managing member of the Company; and 3) the operating agreement must be amended accordingly. The fifth cause of action is an individual claim for access to the Company's books and records pursuant to agreement and statute.

Plaintiff is also seeking judgment in favor of Plaintiff on the counterclaims asserted by Defendants in their Amended Answer with Counterclaims (Ex. 4 to Scharf Aff. in Supp.). Defendants assert two (2) counterclaims: 1) a request for a declaration that Plaintiff has no ownership interest in the Company and that Plaintiff has no standing to assert any derivative claims or to inspect Company books and records, and 2) an alternative request for specific performance of the parties' agreement.

Plaintiff also seeks judgment in favor of Plaintiff on certain affirmative defenses asserted by Defendants. Those affirmative defenses are: Second: Plaintiff lacks standing to bring derivative causes of action or to demand access to the Company's books and records; Fourth: Plaintiff fraudulently induced Markowits to sign the 2011 Modification by making material misrepresentations and omissions concerning the Company; Fifth: Plaintiff has unclean hands based on his fraudulent conduct, breaches of contract and breaches of the covenant of good faith and fair dealing; Seventh: Plaintiff has prevented Markowits from performing certain obligations pertaining to the Company; Eighth: Alleged damages, if any, were the result of unrelated, pre-existing or subsequent conditions unrelated to Markowits' conduct, or were the result of

Plaintiff's conduct; Tenth: Plaintiff has failed to satisfy the standing and pleading requirements under New York Business Corporation Law ("BCL") § 626; Eleventh: Plaintiff has failed to satisfy the requirements of BCL § 627[1]; Thirteenth: Plaintiff lacks capacity to sue; Fourteenth: Plaintiff's election to file the confession of judgment, thereby seeking to collect amounts owed pursuant to the MPCA,[2] prevents him from obtaining other forms of relief, including but not limited to re-acquiring control of the Company; and Sixteenth: There is another action pending between the same parties in Kings County Supreme Court involving the same facts and circumstances as this proceeding.

On or about March 23, 2015, Markowits moved to dismiss this action (notice of motion at Ex. 5 to Scharf Aff. in Supp.), arguing, in part, that Friedman lacked standing to sue derivatively on behalf of the Company. On July 21, 2015 (transcript at Ex. 7 to Scharf Aff. in Supp.), the Court ordered a limited-issue hearing on the issue of whether Friedman had standing to sue derivatively on behalf of the Company ("Limited Issue Hearing"). Following the Limited Issue Hearing, the Court issued its decision dated May 5, 2016 ("May 2016 Decision") (Ex. 1 to Friedman Aff. in Supp.). In the May 2016 Decision, the Court held as follows:

> The central question in this case, of course, is whether Friedman remains an owner of the Company. The Court concludes that he is, because the credible evidence before the Court demonstrates that Markowits failed to comply with the terms of the parties' various agreements regarding the transfer of ownership from Friedman to Markowits. Those agreements, while voluminous and the result of a somewhat tortured history of negotiation and re-negotiation, are clear, and are to be interpreted in accordance with their plain meaning. *Lobacz v. Lobacz*, 72 A.D.3d 653, 654 (2d Dept. 2010). Pursuant to the parties' agreements, Markowits was required to pay "in full" the full $5.35 million promissory note. He did not do so. The failure by Markowits to abide by the terms of the parties' agreements renders invalid his assertion that, pursuant to those agreements and his performance under those agreements, Friedman's interests were transferred to Markowits.

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[1] Under BCL § 627, a plaintiff in a derivative action is required to deposit security for reasonable expenses unless, *inter alia*, the plaintiff holds shares representing five percent or more of any class of shares or the shares have a fan value of greater than $50,000. *Concepcion v. 469 West 166th St. Housing Dev. Fund Corp.*, 2009 N.Y. Misc. LEXIS 4663, * 21, n. 2 (Sup. Ct. N.Y. Cty. 2009).

[2] "Membership Interest Put and Call" agreement dated March 17, 2010 (*see* Comp. at ¶ 16)

C. The Parties' Positions

Plaintiff submits that the Court made "several critical rulings" in its May 2016 decision (Plaintiff's Memo. of Law in Supp. at p. 5) including that 1) the evidence at the hearing sufficiently established that Friedman maintains an ownership interest in the Company to permit him to maintain this action; 2) Friedman has the right to assert control of the company as a Manager as part of this action; and 3) Markowits' failure to abide by the terms of the parties' agreements renders invalid his assertion that, pursuant to those agreements and his performance under those agreements, Friedman's interests were transferred to Markowits. Plaintiff contends that the May 2016 decision is the law of the case, warranting summary judgment in favor of Friedman on the fourth and fifth causes of action, as well as Defendant's Counterclaims and Affirmative Defenses, all of which, Plaintiff submits, turn on whether Friedman is a member of the Company.

Defendants oppose Plaintiff's motion submitting that 1) there are genuine issues of material fact surrounding Friedman's alleged fraudulent misrepresentations, specifically his concealment of pending litigation involving a former employee and active government investigations into the Company for Medicaid fraud when he contracted to sell the Company; 2) Friedman is not entitled to summary judgment because there are unresolved questions of fact regarding Markowits' underlying obligation to pay the $5.35 million note, including whether Friedman's fraudulent representations suspended Markowits' obligation to pay; 3) the Partial Decision and Order dated September 13, 2013 in the related Kings County matter titled *Sara Markowits et al. v. Barry Friedman et al.*, Kings County Index Number 502667-13 (Ex. 2 to Scharf Aff. in Supp.), in which the Honorable David I. Schmidt *inter alia* denied the motion by the plaintiffs to vacate the confession of judgment docketed against Markowits on February 7, 2013, does not trigger *res judicata* or collateral estoppel in this action because a) it was not a final judgment, as evidenced by the fact that the Kings County court ultimately did vacate the confession of judgment and permitted Markowits to substitute a letter of credit pending resolution of his claims for damages (*see* Kings County decision dated May 14, 2014, Ex. Q to Gartner Aff. in Opp./Supp.); and b) the principle of collateral estoppel is not applicable because there has not yet been a determination whether Friedman's alleged fraudulent representations

relieved Markowits of his obligation to make payments; and 4) Friedman is not entitled to summary judgment pursuant to provisions in the Third Amended and Restated Operating Agreement, in part because there is a genuine dispute as to whether the Third or Fourth Amended and Restated Operating Agreement of the Company is currently in effect.

With respect to their motion to amend, Defendants submit that Markowits should be granted leave to amend his answer and file and serve his proposed Second Amended Answer with Counterclaims (Ex. R to Markowits Aff. in Opp./Supp.). Defendants submit that the proposed additional counterclaims, which relate to Friedman's fraudulent misrepresentations, violations of covenants not to compete/solicit, breach of the implied covenant of good faith and fair dealing, and interference with the Company's contractual relationships, are meritorious and will not prejudice or surprise Plaintiff.

Plaintiff opposes Defendants' cross motion to amend. Plaintiff asserts that following the May 2016 Decision in which the Court concluded that Friedman has standing in the Instant Action, Markowits, "in a blanket attempt to leave this courthouse" (P's Memo. of Law in Opp. at p. 6), filed a motion in the Kings County Action to consolidate the Instant Action into the Kings County Action. Friedman opposed that motion, submitting that Markowits was attempting to engaged in improper forum shopping (*see* Ex. 19 to Scharf Aff. in Opp.). In its decision dated June 10, 2016 decision (Ex. 20 to Scharf Aff. in Opp.), the Kings County court denied Markowits' motion to consolidate, and Markowits did not move to reargue, renew or appeal from that decision. Markowits then moved, in the Instant Action, for consolidation of the Kings County Action into the Instant Action and "unleashed a variety of procedural maneuvers" (P's Memo. of Law in Opp. at p. 7) including seeking 1) to stay the Instant Action and the Albany County action; and 2) to vacate the June 16, 2014 decision compelling arbitration ("Decision Compelling Arbitration") of the underlying claims in the Kings County Action (Ex. 13 to Scharf Aff. in Supp.).

Plaintiff submits that the Court should deny Defendants' motion for leave to amend on the grounds *inter alia* that 1) it is effectively Markowits' fourth attempt to seek consolidation of the Instant Action and Kings County Action, following prior denials of that application; 2) after obtaining a stay of the Decision Compelling Arbitration, Markowits, "in a complete about-face" (P's Memo. of Law in Opp. at p. 11) is now attempting to assert claims that the Kings County

court ordered to arbitration, thereby seeking to collaterally attack the Decision Compelling Arbitration, in contravention of prior decisions related to the Decision Compelling Arbitration; 3) Defendants' motion constitutes an improper effort to obtain relief that is the subject of matters that are on appeal, specifically the parties' obligation, if any, to arbitrate their disputes; and 4) the proposed counterclaims are patently devoid of merit because they are subject to the Decision Compelling Arbitration, and are untimely because Markowits "needlessly delayed" assertion of his proposed counterclaims (P's Memo. of Law in Opp. at p. 16) as he has been aware of the relevant facts for several years.

Defendants submit that Plaintiff's opposition to Defendants' cross motion does not address the merits of the proposed counterclaims. Defendants dispute Plaintiff's contention that the viability of those counterclaims was addressed in the Decision Compelling Arbitration. Defendants contend, further, that Plaintiff has failed to demonstrate that the proposed amendment would result in surprise, and argue that granting Defendants' cross motion would not result in any significant delay.

Defendants explain their delay in asserting the proposed counterclaims, contending that they were "reluctant to state these claims because similar claims had been asserted in the Kings County proceeding" (Ds' Reply Memo. of Law at p. 5). Defendants assert that they also believed that the Instant Action would be dismissed based on Friedman's lack of standing. Defendants state that many of the proposed counterclaims involve the issue of whether Markowits still owes Friedman money pursuant to the parties' agreements, or whether Frieman, due to his fraudulent conduct and contractual breaches, must return a portion of the $11 million that Markowits has already paid him. Defendants contend that resolution of this payment issue is a "prerequisite" to resolving the other claims in this action (Ds' Reply Memo. of Law at p. 5). Defendants do not dispute that they have been aware, for several years, of the facts on which the proposed counterclaims are based. Defendants argue, however, that mere lateness should not be a barrier to amendment because Friedman cannot demonstrate that he would be prejudiced by the amendment.

At the Court's request, following a conference call with the Court on January 27, 2017, counsel provided the Court with a letter memorandum outlining the parties' respective view of the procedural posture of this case, including how the case is affected by the November 23, 2016

decision of the Appellate Division, Second Department in *Sara Markowits et al. v. Barry Friedman et al.*, 144 A.D.3d 993 (2d Dept. 2016) ("Appellate Decision"). In the Appellate Decision, Second Department affirmed the June 16, 2014 Decision Compelling Arbitration of Kings County Supreme Court Judge Martin Solomon *inter alia* granting the branch of the defendants' motion which was to stay all remaining proceedings in the action and compel arbitration. *Id.* at 996. The Appellate Decision includes the following holding:

> Finally, we reject the plaintiffs' contention that Barry Friedman waived his right to arbitrate by commencing an action against Markowits in Nassau County during the pendency of this appeal [citations omitted]. The majority of the Nassau County action is asserted derivatively on behalf of the companies, and the only cause of action asserted by Friedman personally did not involve an arbitrable issue [citations omitted].
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> 144 A.D.3d at 997-998.

In his correspondence to the Court dated February 17, 2017, counsel for Plaintiff ("Plaintiff's Counsel") submits that denial, or a stay, of Defendants' cross motion is appropriate because the Appellate Division affirmed the Order Compelling Arbitration of certain claims between Friedman and Markowits in their individual capacities, pursuant to an agreement to arbitrate executed by Friedman and Markowits on June 2, 2011 ("Arbitration Agreement"), and there is an ongoing arbitration of those claims before Rabbi Chaim Kohn ("Rabbi Kohn") which commenced on February 2, 2017. Plaintiff contends that the claims being arbitrated by Rabbi Kohn are governed by the Arbitration Agreement and are duplicative of the claims asserted in Defendants' cross motion to amend, as well as Defendants' separate motion in the Instant Action to enforce a purported settlement agreement between Friedman and Markowits allegedly entered into in September of 2016 (motion sequence number 9). [3]

In his correspondence to the Court dated February 17, 2017, counsel for Defendants ("Defendants' Counsel") advises the Court that, as of the date of his letter, there have been two arbitration sessions held before the Rabbinical Court. Defendants submit *inter alia* that 1) in light of this Court's observation, at a conference on the record on June 2016, that the disputes

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[3] The Court will issue a separate decision on motion sequence number 9.

between the parties should be resolved in a single forum, the Court should consolidate all of the parties' disputes before the Court; 2) the Instant Action has been settled by the 2016 settlement agreement executed by the parties and, therefore, the Court should grant Defendants' motion to enforce that settlement agreement, and "[a]nything that remains between the parties after enforcement of the settlement will be addressed in the Rabbinical Court" (Gartner 2/17/17 letter at p. 3); and 3) if the Court decides not to enforce the purported 2016 settlement agreement between the parties, the Court should *sua sponte* reconsider its prior decision and, upon such reconsideration, dismiss the Instant Action pursuant to CPLR § 3211 because Friedman has no further interest in Parkshore or its operations.

RULING OF THE COURT

A. Summary Judgment

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The Court must deny the motion if the proponent fails to make such a prima facie showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Mere conclusions or unsubstantiated allegations will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

B. Leave to Amend

While leave to amend a pleading shall be freely granted, a motion for leave to amend is committed to the broad discretion of the court. *Oh v. Jin*, 124 A.D.3d 639, 640 (2d Dept. 2015), citing CPLR § 3025(b) and *Ravnikar v. Skyline Credit-Ride, Inc.*, 79 A.D.3d 1118, 1119 (2d Dept. 2010). In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts on which the motion was predicated and whether a reasonable excuse for the delay was offered. *Oh v. Jin*, 124 A.D.3d at 640, quoting *Cohen v. Ho*,

38 A.D.3d 705, 706 (2d Dept. 2007). Generally, in the absence of prejudice or surprise to the opposing party, leave to amend pleadings should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit. *Oh v. Jin*, 124 A.D.3d at 640 citing, *inter alia*, *Rodgers v. New York City Tr. Auth.*, 109 A.D.3d 535, 537 (2d Dept. 2013). When leave is sought on the eve of trial, judicial discretion should be exercised sparingly. *Oh v. Jin*, 124 A.D.3d at 641, quoting *Morris v. Queens Long Is. Med. Group, P.C.*, 49 A.D.3d 827, 828 (2d Dept. 2008).

C. Law of the Case

The doctrine of the law of the case is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned. *Clark v. Clark*, 117 A.D.3d 668, 669 (2d Dept. 2014) quoting *Martin v. City of Cohoes*, 37 N.Y.2d 162, 165 (1975).

D. Collateral Estoppel and Res Judicata

The doctrine of collateral estoppel bars relitigation of an issue which has necessarily been decided in a prior action and is decisive of the present action if there has been a full and fair opportunity to contest the decision now said to be controlling. *York v. Landa*, 57 A.D.3d 980, 981 (2d Dept. 2008).

The general doctrine of *res judicata* gives binding effect to the judgment of a court of competent jurisdiction and prevents the parties to an action, and those in privity with them, from subsequently relitigating any questions that were necessarily decided therein. *Serio v. Town of Islip*, 87 A.D.3d 533 (2d Dept. 2011), citing *Landau, P.C. v. LaRossa, Mitchell & Ross*, 11 N.Y.3d 8, 13 (2008), quoting *Matter of Grainger* [*Shea Enters.*], 309 N.Y. 605, 616 (1956).

E. Application of these Principles to the Instant Action

In light of the Court's determinations in the May 2016 Decision, in which the Court determined that Friedman remains an owner of the Company, Friedman may exercise his statutory and common-law rights to inspect the Company's corporation's books and records. Accordingly, the Court directs that Plaintiffs shall be granted immediate access to the records and books of the Company. In light of the May 2016 Decision, the Court also dismisses Defendants' Second, Tenth and Thirteenth affirmative defenses which are based on Defendants' contention that Plaintiff lacks standing to pursue the Instant Action or to demand access to the

Company's books and records. The Court otherwise denies Plaintiff's motion based on the Court's conclusion that there are factual issues regarding the parties' compliance with and conduct regarding their agreements that makes summary judgment inappropriate.

The Court denies Defendants' cross motion to amend. The Court's concludes that Defendants' application to amend constitutes an effort by Defendants to assert claims that the Kings County court ordered to arbitration in its Decision Compelling Arbitration, which the Appellate Decision affirmed in the Appellate Decision.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Certification Conference on March 16, 2017 at 10:30 a.m.

ENTER

DATED: Mineola, NY
February 23, 2017

HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
MAR 01 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE