

Ryba v Levy

2019 NY Slip Op 30377(U)

February 14, 2019

Supreme Court, Kings County

Docket Number: 524188/17

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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SIMCHA RYBA, individually and derivatively
on behalf of LERYNA REALTY LLC, BLUE SPOT
MANAGEMENT CORP., & THUNDERBALL MARKETING
INC.,

Plaintiffs, Decision and order

- against -

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mv # 3

ELY LEVY, JOE LEVY, NISSIM LEVY, MORRIS
NAHMOUD, LERYNA REALTY LLC, BLUE SPOT
MANAGEMENT CORP., THUNDERBALL MARKETING
INC., & THE LERYNA FOUNDATION,

Defendants, February 14, 2019

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved seeking to dismiss the complaint on various grounds pursuant to CPLR §3211. The plaintiff opposes the motion. Papers were submitted by both parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in a prior decision, the plaintiff is a one fifth owner of Leryna Realty LLC, Blue Spot Management Corp., and Thunderball Marketing Inc. The defendants, Ely Levy, Joe Levy, Nissim Levy and Morris Nahmoud each own one fifth of each corporation, thus comprising the ownership of the three entities. The plaintiff has alleged the defendants, who were the directors of the entities, diverted funds from the entities to themselves. Specifically, plaintiff alleges an insurance settlement in the amount of two million dollars to Leryna and

Thunderball were diverted to the defendants. Moreover, plaintiff asserts the profits from a sale of property in Kings County was not disbursed to the plaintiff. In a prior decision dated September 4, 2018 the court granted defendant Leryna Realty LLC's motion seeking dismissal of the action on the grounds that entity must adjudicate any claims via arbitration. The court also denied Thunderball Marketing Inc's motion seeking dismissal based upon the Operating Agreement. Further, the court denied the motion to dismiss six causes of action contained in the complaint which included 1, a breach of fiduciary duty committed by the four defendants, 2, a derivative breach of fiduciary duty committed by the four defendants, 3, a direct claim against the four defendants for conversion, 4, an accounting, 5, a violation of Business Corporation Law §720 arguing the defendants violated their management duties to Thunderball and a violation of Business Corporation Law §720 arguing the defendants violated their management duties to Blue Spot.

The corporate defendants have now moved seeking to dismiss the complaint presenting various arguments. First, the defendants argue the action must be dismissed against Leryna Realty LLC because an arbitration agreement demands arbitration. Although that relief has already been granted that argument comprises the first argument presented (see, Affirmation in

Support of the Motion to Dismiss, ¶¶ 14-18). The defendants further argue the action against Thunderball Marketing Inc., must be dismissed because of language contained in the Operating Agreement. The corporate defendants then proceed to argue the same arguments already presented, which were all denied in the previous decision. Those arguments consist of demand futility and arguments seeking to dismiss each of the six causes of action. The plaintiff did amend the complaint adding a seventh cause of action alleging a violation of the Estate Powers and Trusts Law and the defendants have moved seeking to dismiss that cause of action on the grounds the allegation "lacks specificity" (id at ¶146). The plaintiff has opposed the motion arguing this motion has already been decided.

Conclusions of Law

It is well settled that a defendant may only file one pre-answer motion to dismiss, precluding successive motions (see, Klein v. Gutman, 12 AD3d 417, 784 NYS2d 581 [2d Dept., 2004]). This single motion rule is designed to prevent delay before answering and to protect the plaintiff by being harassed by repeated motions to dismiss (Oakley v. County of Nassau, 127 AD3d 946, 6 NYS3d 646 [2d Dept., 2015]). In reply papers the defendants argue that "this instant Motion to Dismiss the

Supplemental Summons and Amended Complaint (Motion # 3) is brought solely by the Corporate Defendants" (see, Reply Affirmation, ¶ 10). It is true that on the first page of defendant's motion to dismiss a footnote indicates that "this motion is not filed by Defendants Ely Levy, Joe Levy, Nissim Levy and Morris Nahmood" (see, Notice of Motion to Dismiss Complaint and to Strike Complaint and Motion for Sanctions, Footnote 1). However, the actual motion presents arguments advanced by all defendants. Thus, concerning the first cause of action the defendants argue the plaintiff has failed to assert a cause of action against, Ely Levy, Joe Levy, Nissim Levy and Morris Nahmoud (see, Affidavit in Support of Motion to Dismiss Complaint, ¶¶ 49-52, 57-64). Nevertheless, it is true that the court never decided any motions to dismiss regarding the corporate defendants. However, the arguments presented on behalf of the corporate defendants are not materially different from the arguments presented in the first motion which just involved the individual defendants. Indeed, there is no material difference between the arguments previously presented and the current arguments. Thus, there is no basis upon which to deviate from the previous determination.

Furthermore, it is well settled that reply papers are designed to counter arguments made in opposition to the

underlying motion and "not to introduce new arguments or new grounds for the relief requested" (see, Castro v. Durban, 161 AD3d 939, 77 NYS3d 680 [2d Dept., 2018]). The reply papers raise a new argument, namely that the corporate defendants were never served with process. First, as noted, a reply is an improper vehicle in which to seek that relief. Moreover, the plaintiff submitted affidavits demonstrating service of process upon the corporate defendants.

Therefore, based upon the foregoing, the motions seeking to dismiss the complaint as to the corporate defendants is denied.

So ordered.

ENTER:

DATED: February 14, 2019
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC



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KINGS COUNTY CLERK
FILED