

**Nahoum v Powerhouse Brands, Inc.**

2019 NY Slip Op 34010(U)

February 26, 2019

Supreme Court, Nassau County

Docket Number: 606684/17

Judge: Stephen A. Bucaria

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

FRANK NAHOUM, JOEL KRINGEL BEHZAD PELKARIAN, and HENRY GIMINEZ, individually and derivatively in and on behalf of the Partnership POWERHOUSE BEVERAGE COMPANY, LLC,

TRIAL/IAS, PART 1 NASSAU COUNTY

INDEX No. 606684/17

Plaintiffs,

MOTION DATE: 2/19/19 Motion Sequence 005

-against-

POWERHOUSE BRANDS, INC., REYNOLDS & COMPANY VENTURE PARTNERS, LLC, DANIEL EHRLICH and ANDREW REYNOLDS,

Defendants.

The following papers read on this motion:

- Notice of Motion.....X
- Affirmation in Support.....X
- Memorandum of Law in Support.....X
- Affirmation in Opposition.....X
- Reply Memorandum of Law.....X

Motion by defendant Powerhouse Brands, Inc. to dismiss the amended complaint for lack of jurisdiction, improper joinder, and improper service is **denied**.

This is a derivative action on behalf of a limited liability company. Powerhouse Beverage Company, LLC is a Delaware limited liability company, which is engaged in the juice distribution business. Powerhouse Beverage was formed in December 2012 by

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defendant Daniel Ehrlich who is presently a 29% member. Plaintiff Frank Nahoum is a 27% member of Powerhouse Beverage. Plaintiffs Joel Kringel and Behzad Pelkarian are each 10% members of Powerhouse, and plaintiff Henry Gimenez is a 4% member. Thus, plaintiffs own 51% of the company. Defendant Reynolds & Company Venture Partners LLC is a 20% member of Powerhouse, having acquired its interest for \$150,000 on January 28, 2014. Defendant Andrew Reynolds is a member of Reynolds & Company but not a member of Powerhouse. Powerhouse is operated pursuant to a "limited liability company agreement," dated January 28, 2014 (Doc 3).

Plaintiffs allege that in 2014 Ehrlich disbursed company funds to his wife. Plaintiffs further allege that in 2014 Ehrlich sublet Powerhouse's office space to his friend, or "band mate," Phil Grande, for use as his personal residence. On August 15, 2014, plaintiffs served defendant Ehrlich with a notice of meeting of the members of Powerhouse on August 25, 2014 for the purpose of voting on a proposal to remove Ehrlich as the managing member.

On July 20, 2015, plaintiffs demanded arbitration of their dispute with Ehrlich pursuant to the arbitration provision in a previous operating agreement. On December 3, 2015, Ehrlich commenced a proceeding to stay arbitration in Supreme Court, New York County (Index No. 16239/15) (See, **Ehrlich v Gimenez**, 148 AD3d 657 [1<sup>st</sup> Dept. 2017]). Plaintiffs subsequently withdrew their demand for arbitration.

On March 6, 2017, Ehrlich and Powerhouse Beverage Company, LLC commenced an action against plaintiffs for breach of fiduciary duty, tortious interference with contract, fraudulent inducement of the January 2014 agreement, and dissolution of Powerhouse on the ground of deadlock (Index No. 601910/17) (Doc 8). Ehrlich alleges that in December 2013 Powerhouse entered into a juice distribution agreement with CLS Products NY, Inc. and plaintiffs interfered with the agreement and conspired to remove Ehrlich as a member of Powerhouse. In their answer, plaintiffs asserted counterclaims for breach of the January 2014 limited liability company agreement, breach of fiduciary duty, and an accounting. That action was assigned to Justice Anzalone.

This action was commenced on July 11, 2017. On October 5, 2017, the matter before Justice Anzalone was transferred to this court to proceed jointly with the present action. On December 13, 2017, the court granted the Reynolds defendants' motion to dismiss the complaint with leave to replead. The court noted that, as a 20% member of Powerhouse Beverage, Reynolds & Co. may have assisted Ehrlich to misappropriate Powerhouse's funds, with the knowing participation of Reynolds' individual members.

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A second amended complaint (denominated amended complaint), naming Reynolds & Co. and Andrew Reynolds as defendants, was filed on April 17, 2018 (Doc 65). The second amended complaint also names as a defendant Powerhouse Brands, Inc., a Nevada corporation allegedly owned by defendant Ehrlich.

In the first cause of action in the amended complaint, plaintiffs asserts a claim against defendants Ehrlich and Reynolds & Co. for breach of the January 2014 limited liability company agreement. Plaintiffs allege that Ehrlich breached the agreement by failing to deposit funds into the Powerhouse bank account, making wrongful expenditures, and inflating business expenses.

In the second cause of action, plaintiffs assert a claim against defendants Ehrlich and Reynolds & Co. for breach of fiduciary duty. In the third cause of action, plaintiffs assert a claim against all defendants for an accounting as to the affairs of Powerhouse. In the fourth cause of action, plaintiffs assert a claim against Ehrlich and the Reynolds defendants for breach of fiduciary duty and punitive damages. The fifth cause of action is against all defendants for unjust enrichment. The sixth cause of action is against all defendants for self-dealing, conversion, and misappropriation. The seventh cause of action is for the appointment of a receiver for Powerhouse Beverage Company, LLC and Powerhouse Brands, Inc. The eighth cause of action is against all defendants for fraud. Plaintiffs assert the claims both individually and derivatively on behalf of Powerhouse Beverage Company, LLC. On May 11, 2018, on the court's own motion Index No. 601910/17 was consolidated into Index No. 606684/17.

Defendants Ehrlich and Powerhouse Brands, Inc. served an answer to the second amended complaint in October 2018 (Doc 132). The answer does not raise the defense of improper joinder or lack of personal jurisdiction.

By notice of motion filed January 30, 2019, defendant Powerhouse Brands, Inc. moves to dismiss the amended complaint on the grounds that the court does not have jurisdiction over defendant, on the ground of improper joinder because the court did not grant plaintiff leave to add Powerhouse Brands, Inc. as a defendant, and defendant was not properly served with the summons and amended complaint.

CPLR § 1003 provides, "Parties may be added at any stage of the action by leave of court...." Failure to obtain leave of court before adding a new party is a "jurisdictional defect," requiring dismissal of the action as against the new party (**Crook v Dupont**, 81 NY2d 807 [1993]). Nevertheless, the defense of improper joinder may be waived by failing

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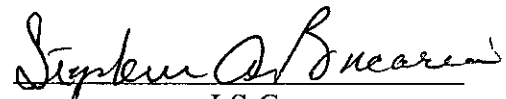
to make a pre-answer motion to dismiss the complaint on that ground or failing to assert that defense in the answer (**Zheng v American Friends**, 67 AD3d 639 [2d Dept. 2009]).

Defendant Powerhouse Brands, Inc. waived the defense of improper joinder by failing to make a pre-answer motion to dismiss the amended complaint and failing to assert the defense of improper joinder in its answer. Defendant's motion to dismiss the amended complaint for improper joinder is **denied**.

Similarly, defendant Powerhouse Brands, Inc. waived the defense of lack of personal jurisdiction by failing to make a pre-answer motion to dismiss on that ground, and by failing to assert the defense of lack of personal jurisdiction in its answer. Defendant's motion to dismiss for lack of personal jurisdiction is **denied**.

So ordered.

Date:           FEB 26 2019          

  
J.S.C.

**ENTERED**  
FEB 26 2019  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE