Wiszniewski v Surge Busy Bee Holdings, LLC
2020 NY Slip Op 33292(U)
October 6, 2020
Supreme Court, New York County
Docket Number: 656110/2019
Judge: Jennifer G. Schecter

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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GRZEGORZ WISZNIEWSKI,

Plaintiff,

-against-

SURGE BUSY BEE PARTNERS LP, SURGE BUSY BEE CV LLC, SURGE BUSY BEE PARTNERS GP LLC, TOM BEAUCHAMP, LEWIS SHARP

Defendants.

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CONSOLIDATED MEMORANDUM DECISION & ORDER

Index No. 656110/2019 (First Action)

Mot. Seq. 001

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GRZEGORZ WISZNIEWSKI, FATIMA WISZNIEWSKI,

Plaintiffs,

-against-

SURGE BUSY BEE HOLDINGS, LLC, SURGE BUSY BEE PARTNERS LP, BUSY BEE CLEANING SERVICE CORP., BUSY BEE CLEANING SERVICE LLC, CLEANING BUILDING SERVICES, INC., JANITORIAL CLEANING SERVICES NEW YORK INC., JANITORIAL CLEANING SERVICES NEW YORK LLC, TOM BEAUCHAMP, LEWIS SHARP

Defendants.

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Index No. 652832/2019 (Second Action)

Mot. Seq. 002

JENNIFER G. SCHECTER, J.:

Motion sequence number 001 in *Wiszniewski v Surge Busy Bee Partners LP*, Index No. 656110/2019 (First Action), and motion sequence number 002 in *Wiszniewski v Surge Busy Bee Holdings, LLC*, Index. No 652832/2019 (Second Action), are consolidated for disposition.

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10/6/2020

In the First Action, defendants Surge Busy Bee Partners LP (Partners LP), Surge Busy Bee CV LLC (CV LLC), Surge Busy Bee Partners GP LLC (GP LLC), Tom Beauchamp, and Lewis Sharp (collectively, First Action Defendants) move to dismiss the complaint in that action (First Action, Dkt. 2 [FC]) in part pursuant to CPLR 3211(a)(1) and (7) or to dismiss or stay pursuant to

CPLR 3211(a)(4) and CPLR 2201. Plaintiff in the First Action, Grzegorz Wiszniewski (Grzegorz), opposes. In the Second Action, defendants Surge Busy Bee Holdings, LLC (Holdings), Busy Bee Cleaning Service Corp. (BBCSC), Cleaning Building Services, Inc. (CBSI), Janitorial Cleaning Services New York Inc. (JCSNYI) (with BBCSC and CBSI, the Cleaning Companies), Busy Bee Cleaning Service LLC (BBC LLC), Cleaning Building Services LLC (CBS LLC) and Janitorial Cleaning Services New York LLC (JCSNY LLC) (collectively, Second Action Defendants) likewise move to dismiss the verified amended complaint in that action (Second Action, Dkt. 32 [SAVAC]) in part pursuant to CPLR 3211(a)(1) and (7), or to dismiss or stay pursuant to CPLR 3211(a)(4) and CPLR 2201. Plaintiffs in the Second Action, Grzegorz and Fatima Wiszniewski (Sellers), oppose.

Background

As these are motions to dismiss, the facts alleged in the pleadings are assumed true.

In 2017, Sellers sought to sell their three New York-based cleaning service companies, the Cleaning Companies, all New York corporations, to a private equity buyer (SAVAC ¶¶ 19-20). Defendants Beauchamp and Sharp formed Holdings, a Delaware LLC, to buy the Cleaning Companies (SAVAC ¶ 22). Sellers, Holdings and the Cleaning Companies executed a Stock Purchase Agreement (SPA) on November 16, 2017 (SAVAC ¶¶ 25, 25; First Action, Dkt. 8 [SPA]). In connection with the sale, Partners LP, a Delaware limited partnership and sole member of Holdings, issued a $300,000 promissory note (Note) to Grzegorz Wiszniewski (FC ¶ 12; SAVAC ¶ 26). The Note, by its terms, allows for its conversion into a membership interest in Partners LP by serving a "Conversion Notice" on Partners LP (FC ¶¶ 13-14). Pursuant to § 1.2[b] of the SPA, $800,000 of the $8 million purchase price was deposited in an escrow account (the Escrow), to be administered in accordance with an agreement (Escrow Agreement [First Action, Dkt. 9]).

In November 2018, Sellers were notified that they had allegedly violated various provisions of the SPA (SAVAC ¶ 56). On November 13, 2018, Holdings filed an action against Sellers in Texas state court alleging breach of provisions of the SPA in which Sellers had allegedly represented and warranted that the Cleaning Companies had maintained appropriate insurance and had no undisclosed liabilities (Second Action, Dkt. 41 [petition in Texas Action] ¶¶ 9-10). The complaint sought a declaratory judgment that the breaches amounted to "Indemnifiable Losses" under the SPA, entitling Holdings to be paid from the Escrow (*id.* ¶¶ 18-21). Holdings reportedly served plaintiffs with process in the Texas Action on December 22, 2018 (Second Action, Dkt. 63 [affidavits of service]). On September 15, 2020, the Texas court granted the Wiszniewskis' motion to dismiss for lack of personal jurisdiction and granted dismissal "with prejudice to refiling in Texas" based on the doctrine of forum non conveniens (First Action, Dkt. 36).

Discussion

Dismissal or Stay Based on Texas Action

The motion to dismiss or stay these actions based on the pendency of the Texas Action is denied as the Texas Action is no longer pending (First Action, Dkt. 36).

Dismissal on Other Grounds

On a motion to dismiss, the facts alleged in the complaint are accepted as true, as are all reasonable inferences in the plaintiff's favor that may be gleaned from them (*see Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]; *Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration" (*Skillgames*, 1 AD3d at 250). Dismissal must be denied if the complaint sets forth a viable cause of action (*see id.*). Deficiencies

in the complaint, moreover, may be remedied by proper affidavits (*see Amaro*, 60 AD3d at 492; *see also Leon v Martinez*, 84 NY2d 83, 88 [1994]). Under CPLR 3211(a)(1), a motion to dismiss will be granted if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002], citing *Leon*, 84 NY2d at 88 [1994]).

First Action

The FC, filed in the First Action on May 10, 2019 (the same date as the summons and complaint in the Second Action), asserts two causes of action: (1) for a declaratory judgment that the Note was never converted into an equity stake in Partners LP and is still in full force and effect (Note Claim); and (2) in the alternative, if Grzegorz has an equity stake in Partners LP, for breach of fiduciary duty insofar as (a) the Texas Action comprises a waste of the corporate resources of Holdings for the benefit of Beauchamp and Sharp and their companies and at the expense of Grzegorz, and (b) CV LLC, GP LLC, Beauchamp and Sharp, who allegedly control the actions of Partners LP, transacted with Partners LP and Holdings without approval of any of the other limited partners of Partners LP, including Grzegorz. In opposition to dismissal, Grzegorz attests (Dkt. 21) that he received no dividends or distributions from Partners LP; that Beauchamp and Sharp "take the profits of the Partnership in the form of salaries, consulting fees, unnecessary loans and other devices to cover up the fact that they are taking money improperly out of the Partnership" and that Partners LP "is using the entity's assets" to fund prosecution of the Texas Action, in which Partners LP hired a lawyer related to Sharp to defend it without his approval (*id.* ¶¶ 7-9).

Plaintiffs' first cause of action seeking a declaration that the Promissory Note was never converted into an equity stake in Partners L.P. is not subject to dismissal. Defendants had argued that the claim was being addressed in Texas. That argument is no longer viable.

Defendants urge that the breach of fiduciary duty claim must be dismissed on the following grounds: (1) there is no nonconclusory allegation of any fiduciary duty owed by those defendants to plaintiff individually; (2) plaintiff does not allege any specific misconduct; and (3) the cause of action alleges not direct damages to plaintiff, but complains of a waste of "corporate resources" and benefits accruing to Beauchamp and Sharp.

Under Delaware and New York law, individuals and entities that exercise control, even indirectly, over the business or property of a corporate entity owe fiduciary duties to that entity (*see Arfa v Zamir*, 75 AD3d 443, 444 [1st Dept 2010]). A claim for "corporate waste" thus belongs to Holdings, an entity in which Grzegorz, though Partners LP, only has an indirect interest (*see Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1037 [Del 2004]; *Yudell v Gilbert*, 99 AD3d 108, 113 [1st Dept 2012]). Such claims may be asserted only as a double-derivative cause of action (*see Lambrecht v O'Neal*, 3 A3d 277, 290 [Del 2010]; *Pokoik v 575 Realties, Inc.*, 143 AD3d 487, 489 [1st Dept 2016]). Allegations that GP LLC, CV LLC, Beauchamp and Sharp "entered into relationships" with Partners LP and Holdings without authorization by the other limited partners are insufficiently specific under CPLR 3016(b). The breach of fiduciary duty cause of action is therefore dismissed.

Second Action

The SAVAC asserts two causes of action: (1) for breach of contract against defendants for $1 million for failure to pay plaintiffs the "Earn-Out Amount" allegedly due under the SPA (Earn-Out Claim); and (2) for breach of contract against defendants for $800,000 for failure to pay the balance due of the "Purchase Price" (Purchase Price Claim). Defendants assert that plaintiffs only have claims against the purchaser Holdings and that the Earn-Out Claim is insufficiently pleaded as plaintiffs failed to establish that an earn-out condition was satisfied; namely, that "EBITDA

Growth [was] equal to or greater than Target EBITDA Growth" (Second Action, Dkt. 9 at §§ 1.4[c][d]).

In opposition to defendants' motion, Grzegorz attests (Dkt. 69) that he "received some quarterly financial figures from Busy Bee Holdings which gives a partial picture of the finances" that "do not provide figures for the entire period relevant to calculating the Earn-Out, which leaves me to extrapolate numbers for the missing months" (*id.* ¶ 20). He further attests that he demanded, and was refused, "a full set of financials so that a precise number could be determined for the Earn-Out provision of the SPA" (*id.* ¶ 21).

Dismissal as to Holdings is denied. At the pleadings stage, Sellers have stated a cause of action for breach of contract against the purchaser alleging that the SPA was breached. Significantly, plaintiffs pleaded that "the Earn-Out Conditions have been met" and Holdings has not refuted the claim through conclusive documentary evidence to the contrary. Likewise, plaintiffs have stated a claim that Holdings had no right to refuse to pay the $800,000 balance due on the purchase price and there are no longer any related Texas proceedings pending.

Plaintiffs' breach of contract claims, however, are only viable as against the party with which it is in privity—Holdings.

Accordingly, it is

ORDERED that the motion of the First Action Defendants is granted in part and plaintiff's second cause of action (breach of fiduciary duty) in the First Action is dismissed, and the motion is otherwise denied; and it is further

ORDERED that the motion of the Second Action Defendants is granted to the limited extent that the claims are dismissed as against the defendants except for Holdings and both causes of action shall proceed as against Holdings; and it is further

ORDERED that a telephonic preliminary conference will be held on October 28, 2020 at 3:00 p.m., and the parties' joint letter shall be e-filed and emailed (to mrand@nycourts.gov) at least one week before the preliminary conference.

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10/6/2020
DATE

JENNIFER G. SCHECTER, J.S.C.