

Alsaedi v Alsaede

2022 NY Slip Op 31519(U)

April 27, 2022

Supreme Court, Kings County

Docket Number: Index No. 512191/20

Judge: Leon Ruchelsman

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

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KAMAL ALSAIDI, individually and derivatively
on behalf of MOUNTAIN OF SABER, LLC,

Plaintiffs, Decision and order

- against -

Index No. 512191/20

ALI ALSAEDA, CAPITAL A MANAGEMENT INC,
ABDO ALSAEDA, AHMED NASSER, and ABDO M.
NASSER,

Defendants,

and

MOUNTAIN OF SABER, LLC

Nominal Defendant,

April 27, 2022

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §3211 seeking to dismiss the amended complaint on the grounds a derivative action is improper since the plaintiff does not represent the shareholders. The plaintiff opposes the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

As recorded in a prior orders, property located at 797-815 Stanley Avenue in Kings County was owned by Abdo Alsaede. In 2005 an entity, Mountain of Saber LLC, became the owner of the property. That entity is equally owned as follows: the plaintiff Kamal Alsaedi owns a third, Abdo Alsaede owns a third and Ahmed Nasser owns the final third. The defendant Ali Alsaede is the son of Abdo and the cousin of the plaintiff. Thus, the plaintiff is a one third minority owner of Mountain of Saber LLC. The

defendants have managed and maintained the properties since 2005. The plaintiff has alleged the defendants have engaged in various improprieties since then including failing to collect rents, misappropriating funds and awarding themselves unearned fees. The amended complaint alleges derivative claims for breach of contract, breach of a fiduciary duty an accounting and declaratory relief. The defendants now move seeking to dismiss the amended complaint on the grounds the plaintiff cannot possibly represent the corporation where the actual members of the corporation actually oppose the relief plaintiff seeks.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Strujan v. Kaufman & Kahn, LLP, 168 AD3d 1114, 93 NYS3d 334 [2d Dept., 2019]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Weiss v. Lowenberg, 95 AD3d 405, 944 NYS2d 27 [1st Dept., 2012]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Moskowitz v. Masliansky, 198 AD3d 637,

155 NYS3d 414 [2021]).

In order to assert any derivative claims the person must be a shareholder of the corporation (Marx v. Akers, 88 NY2d 189, 644 NYS2d 121 [1996]). There is no requirement the shareholders of the corporation have to agree with the derivative lawsuit. Indeed, the purpose of a derivative action "is to place in the hands of the individual shareholder a means to protect the interests of the corporation from the misfeasance and malfeasance of 'faithless directors and managers'" (see, Espinoza ex rel. JPMorgan Chase & Company v. Dimon, 797 F3d 229 [2d Cir. 2015]). It is for this very reason the interests of the corporation and the interests of the individual defendants are generally not aligned to permit the same counsel to represent them (Nineteen Twenty Four Inc., v. Parchini, 2015 WL 682814 [Supreme Court New York County 2015]).

Of course, a shareholder cannot assert derivative claims when the individual merely maintains individual claims not shared by all the shareholders. In Serino v. Lipper, 123 AD3d 34, 994 NYS2d 64 [1st Dept., 2014] the court explained that to distinguish a derivative claim from an individual claim the court must engage in two inquiries. First, whether any harm was suffered by the corporation or an individual stockholder and whether the corporation or the individual stockholder would receive the benefit of any recovery. As the court stated "if

there is any harm caused to the individual, as opposed to the corporation, then the individual may proceed with a direct action...On the other hand, even where an individual harm is claimed, if it is confused with or embedded in the harm to the corporation, it cannot separately stand" (id). Thus, where the alleged injury affects all shareholders not just the plaintiff then the action is derivative and not direct (Vaughan v. Standard General L.P., 154 AD3d 581, 63 NYS3d 44 [1st Dept., 2017]).

In this case the allegations are filed on behalf of the corporation assert the individual defendants engaged in self-dealing, misappropriated funds of the corporation and breached duties owed to the corporation. These allegations are proper despite the fact the individual defendants approved of their own conduct. Indeed, if the individuals accused of wrongdoing had an obligation to approve of any suits before they could be filed there would hardly be any derivative lawsuits at all.

The case cited by the defendants, Jakob v. Gershwin Partners Inc., 2011 WL 11076579 [Supreme Court New York County 2011] merely confirms this understanding. In that case the court dismissed a derivative action because the individual plaintiff was really suing for individual harms that did not benefit, and were contrary to, the interests of the corporation. That case does not stand for the proposition that consent of the parties being sued is required, an untenable assertion.

Further, any motion seeking to dismiss the complaint on the grounds such action is barred by the statute of limitations is denied.

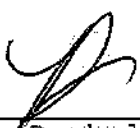
Lastly, no party can file any further motion in this case without prior court approval.

Therefore, based on the foregoing, the motion seeking to dismiss the amended complaint is denied.

So ordered.

ENTER:

DATED: April 27, 2022
Brooklyn NY



Hon. Leon Ruchelsman
JSC