

Matter of Russell v Lite

2024 NY Slip Op 34822(U)

July 12, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 606042/2024

Judge: Jerry Garguilo

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX NO. 606042/2024

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY**

PRESENT:

**HON. JERRY GARGUILO
SUPREME COURT JUSTICE**

ORIG. RETURN DATE: 4/24/24
FINAL SUBMITTED DATE: 5/29/24
MOTION SEQ# 004
004-MotD; STAYED

In the Matter of the Application of
FRANK S. RUSSELL, individually and derivatively on
behalf of LITE & RUSSELL, PLLC,

Plaintiffs,

-against-

JUSTIN N. LITE and LITE & RUSSELL, PLLC,

Respondents,

For an Order and Judgment Pursuant to Article 75 of the
Civil Practice Law and Rules.

ATTORNEYS FOR PLAINTIFFS

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Islandia, New York 11749

Weitz & Luxenberg, PC
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New York, New York 10003

ATTORNEYS FOR RESPONDENTS

Law Offices of Richard J. DaVolio, PC
153 Main Street, Suite 10
Sayville, New York 11782

The Court has considered the following in consideration of its determination:

1. Notice of Motion, Affirmation, Exhibits, Memorandum of Law (Doc. 116 – 126)
2. Opposition to Motion, Affidavit and Affirmation, Exhibits, (Doc. 131 – 133, 139, 140)
3. Affirmation in Reply, Exhibits, Memorandum of Law (Doc. 141 – 143)

It is

ORDERED that the Plaintiff's motion to dismiss the counterclaims is granted to the extent that the first, second, and third counterclaims are dismissed; and it is further

ORDERED that the instant action is stayed pending arbitration.

In this action, the Plaintiff derivatively seeks a preliminary injunction against the

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defendants for their roles in providing Mr. Justin Lite, one of the partners of Lite & Russell and Lite & Russell, PLLC, a successor to Lite & Russell, with assistance in violating Lite's fiduciary duties that he owes to Lite & Russell and Lite & Russell, PLLC. This is one of six actions commenced between the partners.

The Pending Proceedings are as follows:

- (1) *Justin N. Lite v Frank S. Russell*, American Arbitration Association ("AAA") Case No.: 01-24-00007972 (the Arbitration"), commenced by Lite against Russell on February 20, 2024, for dissolution of the Firm and breach of fiduciary duty,
- (2) *Justin N. Lite v Frank S. Russell*, Suffolk County Index No.: 604576/2024, a Summons with Notice commenced by Lite against Russell on February 21, 2024, for dissolution of the Firm, breach of fiduciary duty, accounting, and seeking a temporary restraining order and preliminary injunction, no actual pleadings, complaint or answer, have been served;
- (3) The instant action, *Frank S. Russell, et al. v Justin N. Lite, et al.*, Suffolk County Index No.: 606042/2024, Petition commenced by Russell against Lite on March 10, 2024, with order to show cause seeking an injunction in aid of the Arbitration ("Russell's Article 75 Proceeding"), no answer has been served;
- (4) The instant action, *Frank S. Russell, et al. v Lite, Porchia & Fernan, PLLC, et al.*, Suffolk County Index No.: 606098/2024, commenced by Russell on March 10, 2024 derivative action against two entities and various former Firm employees for, *inter alia*, breach of the duty of loyalty and aiding and abetting Justin Lite's alleged breach of fiduciary duty ("Co-Conspirators' Lawsuit");
- (5) *Justin N. Lite, Esq., v Frank S. Russell, Esq.*, Suffolk County Index No.: 610974/2024, Petition commenced by Lite on May 1, 2024, to stay the Arbitration;
- (6) *Frank S. Russell, et al. v Justin N. Lite, et al.*, Suffolk County Index No.: 616343/2024, Petition commenced by Russell on July 8, 2024, for an in injunction to restrain the individual respondents from holding a special meeting of the Higbie Professional Corp., which owns 212 Higbie Lane, West Islip, the Firm's office building.

The Petition seeks a temporary restraining order and injunction in aid of arbitration pursuant to the Lite & Russell Partnership Agreement dated October 1, 1994. The purpose of this application is to prevent Lite from continuing to engage in subversive efforts that are intended to undermine the business of Lite & Russell in favor of a new firm formed by Lite and two former non-member attorneys of Lite & Russell: John M. Porchia III and Jaran M. Fernan. The Petition contains one cause of action: preliminary injunction.

The Defendants served an answer which asserted general denials, sixteen affirmative

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defenses and eight counterclaims. The counterclaims allege 1) failure to pay wages on behalf of both respondents, 2) violation of Labor Law section 740, that Russell terminated the employment of Firm employees, 3) creation of a hostile workplace on behalf of all respondents, 4) Russell breached the duty of loyalty to respondents, 5) tortious interference with the business of Lite & Russell, 6) violation of the Partnership Agreement, 7) breach of fiduciary duty, 8) slanderous statements made about Lite.

While the Court signed the order to show cause on March 21, 2024 (Garguilo, J.), the Court invoked the Inherent Power Doctrine in an addendum, appointing the Hon. (Ret.) Peter H. Mayer as Special Master/Referee to meet and confer with all parties to oversee all business operations of the Firm pending an ultimate resolution. The Special Master shall oversee and direct the lawful disbursement of IOLA funds due clients. The Court restricted solicitation of clients of Lite & Russell and directed the parties to prepare a joint letter to all existing clients disclosing the anticipated dissolution of the firm. In addition, the assets of Lite & Russell shall remain in place, and all parties were directed to place in escrow all legal fees from retainers or other monies received. The remainder of the Addendum related to the Special Master's term and compensation.

At a Hearing on April 17, 2024, Russell agreed to pay the Firm's employees, Ms. Evans and Ms. Albertelli, for hours worked by April 26, 2024, and, on the same day, to disburse moneys held in escrow to pay outstanding counsel fees to attorneys Porchia and Fernan, and to Lite & Russell. In addition, the firm of Lite & Russell agreed to continue to pay referral fees going forward to Mr. Fernan and Mr. Porchia for cases that they referred to Lite & Russell as the cases settle. The Court so-ordered the Hearing transcript on April 19, 2024.

On April 24, 2024, the Plaintiffs served a notice of motion to dismiss the counterclaims pursuant to CPLR 3211 (a) (1), (3), (4), (6) and (7), or, in the alternative, to compel arbitration of the counterclaims under CPLR 7503 (a), (c).

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be liberally construed, the facts alleged in the pleading are accepted as true, and the plaintiff is accorded the benefit of every possible favorable inference to determine whether the facts as alleged fit within any cognizable legal theory (*see, IHC Servs. v Product Safety Mgmt, Inc.*, 268 AD2d 559, 702 NYS2d 831 [2d Dept. 2000]). Where a defendant moves to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Trade Source, Inc. v Westchester Wood Works, Inc.*, 290 AD2d

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437, 736 NYS2d 605 [2d Dept 2002]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 756 NYS2d 94 [2d Dept 2003]).

On a motion to dismiss pursuant to CPLR 3211 (a) (3), the party asserting the cause of action has not legal capacity to sue. The burden is on the moving party to establish, prima facie, the defendant's lack of standing as a matter of law. (*U.S. Bank N.A. v Trulli*, 179 AD3d 740, 116 NYS3d 74 [2d Dept 2020]). CPLR 3211 (a) (4) provides that there is another action pending between the same parties for the same cause of action in a court of any state or the United States. CPLR 3211 (a) (6) provides that a counterclaim may not properly be interposed in the action.

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the pleading is to be afforded a liberal construction (CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]). The court accepts the facts as alleged in the complaint as true, accords plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory (*id.*). In assessing a motion under CPLR 3211(a)(7), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 389 NYS2d 314 [1976])

In support of the motion, the Plaintiffs contend that Lite's counterclaims are identical to claims he has raised in arbitration and that there is no real dispute that the counterclaims are subject to arbitration. In addition, the Plaintiffs contend that Lite has no standing to bring claims on behalf of former Lite & Russell employees or seek damages for alleged retaliation under Labor Law 740, since he is not the aggrieved employee, and also has no standing to bring a hostile work environment claim.

In opposition, the Defendants contend that any claims related to Lite & Russell, PLLC should not be included in the arbitration. The affidavit of Justin Lite reiterates the fact that "the issue of arbitrability has yet to be adjudicated, and the partnership agreement relied upon by the defendant . . . should not have any bearing on this action."

The Court finds that the Plaintiff has sufficiently stated causes of action. The Defendants have failed to oppose the motion. In any event, the parties resolved the wage and referral fee issues alleged in the first, second and third counterclaims at a hearing held on April 17, 2024. Moreover, the Defendants' contentions in opposition were rendered moot when this Court determined in a related action¹, during the pendency of this motion, that Lite & Russell, PLLC is a successor to Lite & Russell, thereby denying the Plaintiff's

¹ *Lite v Russell*, Index No. 610974/2024, in order dated May 23, 2024 (Garguilo, J.)

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application in that action to stay arbitration. Therefore, the motion is granted in this action to the extent that the first, second and third counterclaims are dismissed.

The remaining counterclaims asserted by Mr. Russell are similar to those asserted in the AAA proceeding, and similar to the allegations made in the Petition in the matter captioned *Russell v Lite*, Index No. 606042/2024. Therefore, this action is subject to the Court's Short Form Order at NYSCEF Doc. No. 37 under Index No. 610974/2024 and is hereby stayed pending arbitration.

Accordingly, it is

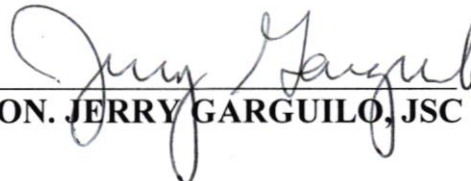
ORDERED that the Plaintiff's motion to dismiss the counterclaims is granted to the extent that the first, second, and third counterclaims are dismissed; and it is further

ORDERED that the instant action is stayed pending arbitration.

The foregoing constitutes the decision and **ORDER** of this Court.

Dated:

July 12, 2024


HON. JERRY GARGUILO, JSC