

OM Investments v E.S.P. Das

2012 NY Slip Op 33486(U)

May 16, 2012

Sup Ct, New York County

Docket Number: 650936/11

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CE Ramos

PART 53

Index Number : 650936/2011

OM INVESTMENTS

vs

E.S.P.

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with
~~accompanying~~ accompanying memorandum decision and order.

Dated: 5/16/12


CHARLES E. RAMOS
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X

OM INVESTMENTS and RAVI AKHOURY,
Individually, and Derivatively on Behalf
of Banyan Real Estate Fund and Banyan Real
Estate Company, and Representatively on
Behalf of all Similarly Situated
Shareholders,

Plaintiffs,

Index No. 650936/11

-against-

E.S.P. DAS, BANYAN REAL ESTATE SPONSOR
SUBSIDIARY LLC, LANDMARK REAL ESTATE
SPONSOR LLC, and BANYAN REAL ESTATE
VENTURES,

Defendants.

-and-

BANYAN REAL ESTATE FUND and BANYAN REAL
ESTATE COMPANY,

Nominal Defendants.

-----X

Charles E. Ramos, J.S.C.:

In motion sequence 001, defendants E.S.P. Das (Das), Banyan Real Estate Sponsor Subsidiary LLC (Banyan LLC), Landmark Real Estate Sponsor LLC (Landmark Sponsor), and Banyan Real Estate Ventures (Banyan Ventures) (collectively, Defendants) move, pursuant to CPLR 3211(a)(1), (3), and (7) and CPLR 3016(b), to dismiss the complaint. In motion sequence 002, plaintiffs OM Investments and Ravi Akhoury (collectively, Plaintiffs) move to disqualify Shearman & Sterling LLP (S&S) from acting as Defendants' counsel in this action.

Motion sequence numbers 001 and 002 are consolidated for

disposition.

Background

The following factual allegations are set forth in the complaint, and for the purposes of Defendants' motion to dismiss, are accepted as true.

This action arises out of Plaintiffs' investment in nominal defendant Banyan Real Estate Fund (the Banyan Fund), a Mauritius company established for the purpose of investing in real estate in India. Prior to the formation of the Banyan Fund, Das formed nominal defendant Banyan Real Estate Company (Banyan Company), allowing investors to begin the process of investing in real estate in India before the Banyan Fund was officially established under Mauritius law.

In July 2006, Plaintiffs were solicited by Das to invest in the Banyan Fund through an initial investment in Banyan Company. Das provided the Plaintiffs with copies of a Private Placement Memorandum for the Banyan Fund (the PPM). The PPM was circulated to potential investors for the purposes of evaluating an investment in the Fund. Relying on the PPM, and representations made by Das, OM Investments purchased a \$2 million interest in Banyan Company, and Akhoury purchased a \$1 million interest, both through subscription agreements.

In November 2006, Banyan Company merged into the Banyan Fund, pursuant to a Scheme of Amalgamation. As a result,

Plaintiffs became owners of shares in the Banyan Fund, pursuant to a shareholders' agreement, dated November 29, 2006 (the Shareholders' Agreement). The Shareholders' Agreement provided that the Fund's shares would be issued in five classes, Classes A, B, C, D, and E. Classes A through D shares were issued to investors, including the Plaintiffs, who were issued Class A shares. Class E shares were specifically reserved for the Fund's sponsor, Banyan LLC, which is controlled by Das through his control of Landmark Sponsor, the company which controls Banyan LLC. Class E shares are the only shares that carry voting rights. Thus, Plaintiffs allege that Das has complete control over all matters of the Banyan Fund's governance that are subject to a shareholder vote or approval.

In addition, Plaintiffs allege that Das controls all management functions of the Banyan Fund, because Landmark Sponsor is also the owner of Banyan Ventures, and Banyan Ventures is the manager of the Banyan Fund. Banyan Ventures has a \$500,000 per year management agreement with the Fund. Further, non-party Landmark Banyan Real Estate Advisors LLC, whose principal is Das, was retained by Banyan Ventures as an outside advisor, providing investor services to the Fund.

Plaintiffs allege that Das, Landmark Sponsor, Banyan LLC, and Banyan Ventures, have not acted in the best interests of the Banyan Fund and its shareholders, and have mismanaged the Fund by

using it as a source of fees and payments to Das and his companies, rather than as a vehicle to achieve the best possible investment return for the Fund and its shareholders. Plaintiffs allege that, due to Das' mismanagement and self-dealing, the Banyan Fund has not paid certain groups who were retained to navigate the Indian regulatory environment and advise on investment strategies.

Plaintiffs also allege that Das diverted Banyan Fund assets to certain favored shareholders, such as XE Capital Management (XE), by contracting for services with these insiders without proper disclosure or authority to contract with them, giving a select few shareholders preferred access to company information and influence on the operation of the Fund.

On October 18, 2010, Plaintiffs requested that Das, and his affiliated entities provide them with all records regarding the Banyan Fund since its inception. By letter, dated November 8, 2012, S&S responded to this request, stating that the Banyan Fund's "book and records" were available for viewing, as per the Shareholders' Agreement, and that to the extent that such were available in the New York management office, a viewing in that location could be arranged. A viewing was never arranged.

On April 8, 2011, Plaintiffs commenced this action individually, as well as derivatively on behalf of the Banyan Fund, for an accounting, breach of fiduciary duty, breach of

loyalty, and oppression.

Analysis

Motion to Disqualify Defendants' Counsel

Plaintiffs move to disqualify defense counsel S&S on the grounds that a conflict exists due to the fact that S&S was corporate counsel to the Banyan Fund and Banyan Company up until November 2011. Plaintiffs argue that the Banyan Fund's shareholders have an interest in not only seeing that the Fund is appropriately represented by its new counsel, Reed Smith LLP (Reed Smith), but also, that the Fund is not damaged by S&S's representation of Das. While the court agrees with this argument, Plaintiffs still must establish "that the former and current representations are both adverse and substantially related" (*Matter of Dream Weaver Realty, Inc.*, 70 AD3d 941, 943 [2d Dept 2010] [internal quotation marks and citations omitted]).

At this early stage, Plaintiffs have not established an actual conflict created by S&S's representation of Das in this action. There is no longer a dual representation of Das and the Banyan Fund by S&S. The Banyan Fund is adequately represented by Reed Smith, and there are no allegations that the Fund is not protected by its new independent counsel. Further, the Banyan Fund, itself, is not suing or being sued by Das. Therefore, there are technically no adverse claims between these two parties. Thus, this court will not, at this stage, deprive Das

of his right to choose counsel. If, at any point, Plaintiffs uncover evidence of an actual conflict in regard to S&S's representation of Das, they can seek disqualification again. Therefore, this motion is denied without prejudice.

Defendants' Motion to Dismiss

Choice-of-Law

Section 10.2 of the Shareholders' Agreement states,

"[t]his Agreement shall be governed by and construed in accordance with the laws of the State of New York applicable to contracts executed and to be performed wholly within the State of New York, except to the extent that the application of [Mauritian] Law¹ is mandatory under the Law [of Mauritius].

Plaintiffs argue that this provision requires the application of the laws of New York, and not the laws of Mauritius. This court disagrees.

While it is the policy of New York courts to enforce choice-of-law contractual provisions, whether Plaintiffs, first and foremost, have standing to bring a derivative action is governed by the state of incorporation (*Matter of CPF Acquisition Co. v CPF Aquisition Co.*, 255 AD2d 200, 200 [1st Dept 1998]; see also *Adams v Banc of Am. Sec. LLC*, 7 Misc 3d 1023[A], 2005 NY Slip Op 50714[U], *12 [Sup Ct, NY County 2005]). "One of the abiding principles of the law of corporations is that the issue of

¹ "Law" is a defined term within the Shareholders' Agreement, meaning the laws of Mauritius (see Shareholders' Agreement, Schedule A; Shareholders' Agreement, Preamble).

corporate governance, including the threshold demand issue, is governed by the law of the state in which the corporation is incorporated" (*Adams v Banc of Am. Sec. LLC*, 7 Misc 3d 1023A, *5 citing *Hart v General Motors Corp.*, 129 AD2d 179, 182 [1st Dept 1987], app den 70 NY2d 608 [1987]). As the Banyan Fund is incorporated in Mauritius, and the claims asserted in this action involve issues of corporate governance and management, the laws of Mauritius apply.

It is undisputed that Section 170 of the Mauritius Companies Act 2001 (the Companies Act) requires that a shareholder seeking to bring a derivative suit on behalf of the company must apply for and obtain leave of the Commercial Court in Mauritius. However, Plaintiffs assert that, if this action were brought in Mauritius, the Mauritian courts would apply New York law pursuant to the Shareholders' Agreement, and not the requirements of Companies Act. To support their position, Plaintiffs submit an affidavit by their expert, Marie Angelo Clarel Benoit, a barrister practicing in Mauritius.

In regard to the pre-suit requirements for commencing a derivative suit, Benoit concludes that, if the laws of New York do not conflict with Mauritius' statutory requirement to obtain leave to bring a derivative suit under the Companies Act, the debate will not arise as to whether this requirement under Mauritian law must be satisfied. However, if the laws of the

State of New York and Mauritius do not impose similar requirements in bringing a derivative suit, which they do not, it may be open for Defendants to argue that these requirements under Mauritian Law are mandatory and cannot be avoided (Benoit Affidavit, ¶¶ 48-49). Benoit makes no clear conclusion that New York law would be applied in this action. He leaves the question open. Thus, his affidavit in regard to this issue is unpersuasive. It is undisputed that the requirement to apply for and obtain leave to file a derivative action has not been met by Plaintiffs. Thus, Plaintiffs' derivative claims are dismissed without prejudice.

Plaintiffs have brought four causes of action. First, Plaintiffs, individually and derivatively, seek an accounting. Under Section 226 of the Companies Act, after serving the company with written notice of an intention to inspect, a shareholder is entitled to review the minutes of meetings and resolutions of the shareholders; copies of written communications to all shareholders or to all holders of a class of shares during the preceding 7 years, including annual reports, financial statements, and group financial statements; certificates given by directors under the Companies Act; and the interests registered of the company. Under Sections 227 and 228, a shareholder may either inspect such documents at the place where the company's records are kept, or may make a written request to have copies of

such documents sent to him. If a shareholder requests that the documents be sent, they must be sent within 7 days of the shareholder's written request. The shareholder may be required to pay a reasonable copying and administrative fee set by the company.

As shown by the documentary evidence submitted by the parties, on October 18, 2010, Plaintiffs' counsel requested, in writing, that Plaintiffs be provided with certain documents. On November 8, 2010, Defendants' counsel responded that they would only provide the documents that Plaintiffs were entitled to, and could arrange such a viewing in the Banyan Fund's New York management office.

There is no dispute that Plaintiffs, as shareholders, are entitled to the documents listed above. However, this claim has been brought prematurely. While Plaintiffs did make a written request to be provided with certain documents, some of the documents requested appear to be outside the scope of what they are entitled to. Further, Plaintiffs' letter does not specifically state how they wish to be provided with these documents, if via mail or physical inspection in New York. If by mail, there is no indication that Plaintiffs arranged to pay any associated fees. There was a response by Defendants in regard to

physically inspecting some records² at the New York location, but there was no further action from either party. This cause of action is dismissed without prejudice to give the parties an opportunity to comply with the Companies Act before litigating this issue.

Second, Plaintiffs, individually, bring a cause of action for breach of fiduciary duty against Defendants. Under Section 172(1) of the Companies Act, a shareholder may bring a personal action against the company's director or secretary for breach of duty owed to him as a shareholder. However, Section 174(3) limits a cause of action for breach of a fiduciary duty by a shareholder to those duties set forth in Sections 94, 148, and 156. Section 94 sets forth the secretary's duty to maintain the share register, Section 148 sets forth the director's duty to disclose the director's interest in a transaction or proposed transaction with the company (with exceptions), and Section 156 sets forth a duty of disclosing share dealings by directors.

Even if the court assumes that Das is a director of the Banyan Fund, the Plaintiffs have not stated an individual claim for breach of fiduciary duty, as the complaint fails to allege a breach of (1) the duty to maintain the share registry, (2) the

² It should be noted that the letter by Defendants' counsel was not clear as to what records, if any, which the company is required to provide for inspection, are available in the New York office.

duty to disclose an interest in a transaction, or (3) the duty to disclose share dealings. While Plaintiffs allege that Das diverted Banyan Fund assets to XE, by contracting for services with this "insider shareholder" without proper disclosure or authority, there are no allegations how Das has an interest in this transaction between the Banyan Fund and XE. Plaintiffs merely allege that the Fund's contract with XE gave XE preferred access to the Fund's information and influence on the operation of the Fund, but not that Das had an interest in this transaction. The court also notes that neither Plaintiffs' counsel, nor their expert, addresses these requirements when pleading an individual claim for breach of fiduciary duty. Thus, this cause of action is dismissed without prejudice to give Plaintiffs an opportunity to comply with Section 174(3).

Third, Plaintiffs' derivative claim for breach of loyalty is dismissed without prejudice, as Plaintiffs have failed to meet the pre-suit requirements as discussed above.

Finally, Plaintiffs assert an individual claim for oppression. Section 178 of the Companies Act permits a shareholder to complain of unfairly prejudicial conduct by petition to the court for relief. However, it is undisputed that Section 178 does not apply to companies, such as the Banyan Fund, holding a Category 1 Global Business License, pursuant to the Thirteenth Schedule of the Companies Act. Benoit's belief that

this provision of the Companies Act does not exclude Plaintiffs' right to bring this claim under common law is speculative and unpersuasive, especially in light of his statement that parties are free to "opt-out" of Section 178. Therefore, this cause of action is dismissed.

Accordingly, it is

ORDERED that Plaintiffs' motion to disqualify Defendants' counsel is denied without prejudice; and it is further

ORDERED that Defendants' motion to dismiss the complaint is granted. Plaintiffs' First (accounting), Second (breach of fiduciary duty), and Third (breach of loyalty) causes of action are dismissed without prejudice.

Dated: May 16, 2012

ENTER:



CHARLES E. RAMOS
J.S.C.