

M.T. Packaging, Inc. v Fung Kai Hoo

2016 NY Slip Op 32155(U)

October 21, 2016

Supreme Court, New York County

Docket Number: 652579/2014

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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M.T. PACKAGING, INC.,

Plaintiff,

DECISION/ORDER
Index No. 652579/2014

-against-

FUNG KAI HOO, individually and as an officer of VN
K'S INTERNATIONAL JOINT STOCK COMPANY,
VN K'S INTERNATIONAL JOINT STOCK COMPANY
and MAIDENBAUM & ASSOCIATES P.L.L.P.,

Defendants.

-----X
HON. CYNTHIA KERN, J.:

Plaintiff M.T. Packaging, Inc. ("M.T.") commenced the instant action against defendants seeking recovery for the alleged fraud of defendants Fung Kai Hoo ("Hoo"), individually and as an officer of defendant VN K's International Joint Stock Company ("VN K's"), and VN K's in connection with their sale of packaging and bags to M.T. and for the alleged violation of Judiciary Law § 487(1) by defendant Maidenbaum & Associates P.L.L.P. ("Maidenbaum"). Maidenbaum now moves pursuant to Civil Practice Law and Rules ("CPLR") § 603 for an Order severing plaintiff's Judiciary Law § 487(1) claim against Maidenbaum from plaintiff's fraud claims against Hoo and VN K's. For the reasons set forth below, Maidenbaum's motion is granted.

The relevant facts are as follows. Beginning in or around February 2008 and continuing until approximately July 2009, M.T. purchased and received packaging and bags manufactured and sold by VN K's that allegedly contained levels of lead and chromium that exceeded the legal limits, despite the execution of an allegedly fraudulent certificate of compliance by defendant Fung Kai Hoo ("Hoo"), an officer of VN K's. On or about July 10, 2012, K's International Polybags Mfg. Ltd. ("K's") commenced an action against M.T. asserting causes of action for breach of contract, quantum meruit and an account stated based on M.T.'s nonpayment of invoices for the packaging and bags (the "related action"). On or about

August 20, 2014, M.T. commenced the instant action asserting causes of action for fraud against Hoo and VN K's in connection with the sale of packaging and bags. Maidenbaum represents K's in the related action and represents Hoo and VN K's in the instant action. By a decision and order of the court dated June 23, 2016, the court granted M.T.'s motion to amend its complaint to add a cause of action for the violation of Judiciary Law § 487(1) against Maidenbaum premised on Maidenbaum's alleged misconduct in its representation of K's in the related action and of Hoo and VN K's in the instant action. Specifically, plaintiff alleges that Maidenbaum engaged in deceitful conduct by withholding documents, including documents that allegedly controverted its client's claim, during discovery in the related action and submitting perjurious affidavits of Hoo stating that he only travelled to New York to attend a deposition, which was relevant to the question of the court's personal jurisdiction over Hoo, in the instant action.

Pursuant to CPLR § 603, "[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue." It is well settled that while it is preferable to try related causes of action together in the interest of judicial economy and consistency of verdicts, "severance may be appropriate where there are no issues of fact or questions of law to be determined that are common to the two causes of action." *Herskovitz v. Klein*, 91 A.D.3d 598, 599 (2^d Dept 2012).

In the present case, Maidenbaum's motion for an Order severing plaintiff's Judiciary Law § 487(1) claim against Maidenbaum from plaintiff's fraud claims against Hoo and VN K's is granted as the claims do not involve common factual and legal issues and Maidenbaum has demonstrated that its codefendants would be prejudiced in the absence of severance. Plaintiff's fraud claims against Hoo and VN K's and its Judiciary Law § 487(1) claim against Maidenbaum do not involve any common factual or legal issues. The facts underlying plaintiff's fraud claims against Hoo and VN K's relate to the sale of packaging and bags in 2008 and 2009, while the facts underlying plaintiff's Judiciary Law § 487(1) claim against Maidenbaum relate to its representation of its codefendants in the related action, which was commenced in 2012, and the instant action, which was commenced in 2014.

Further, Maidenbaum has demonstrated that Hoo and VN K's would be prejudiced in the absence of severance. A defendant has the right to be represented by counsel of its choice and thus a court should avoid disqualifying a defendant's counsel unless necessary. *See Melcher v. Greenberg Traurig LLP*, 135 A.D.3d 547, 554-55 (1st Dept 2016) (noting that a court should not grant a motion for leave to amend a complaint to add a Judiciary Law § 487 claim in the action in which the violation occurred if adding that claim would require the disqualification of counsel on the ground that a defendant has the right to choose its counsel), citing *360 W. 11th LLC v. ACG Credit Co. II, LLC*, 90 A.D.3d 552, 553-54 (1st Dept 2011). It is a near certainty that Maidenbaum, Hoo's and VN K's' counsel, will be called as a witness with regard to plaintiff's Judiciary Law § 487(1) claim against it and thus will likely be disqualified from representing Hoo and VN K's at trial under the advocate-witness rule in the absence of severance. *See* Rules of Professional Conduct [22 NYCRR § 1200.00] rule 3.7(a). Therefore, as the right of Hoo and VN K's to be represented by counsel of their choice would likely be impaired in the absence of severance, severance is appropriate. Moreover, Hoo and VN K's may be prejudiced in the absence of severance for the additional reasons that trying plaintiff's unrelated claim against Maidenbaum premised on the alleged misconduct of Hoo's and VN K's' counsel alongside plaintiff's claims against Hoo and VN K's may cause jurors to become confused or form a negative impression of Hoo and VN K's.

Plaintiff's argument that Maidenbaum's motion to sever must be denied because case law requires it to bring its Judiciary Law § 487(1) claim against Maidenbaum in the same action in which the alleged misconduct was committed is without merit. The First Department has specifically held that a Judiciary Law § 487(1) claim where a plaintiff seeks to recover excess legal fees and expenses, rather than to collaterally attack a prior adverse judgment on the ground that it was procured by fraud, may be brought as a separate action. *Melcher*, 135 A.D.3d at 554. In the present case, plaintiff seeks to recover excess legal fees and expenses, not to collaterally attack a prior adverse judgment, and thus may maintain a separate action for the violation of Judiciary Law § 487(1) against Maidenbaum.

Plaintiff's argument that Maidenbaum's motion to sever should be denied because the factual allegations underlying its claims against Hoo and VN K's and against Maidenbaum are intertwined is also

without merit. Plaintiff's allegation that Maidenbaum's misconduct in the related and instant actions furthered the fraud of Hoo and VN K's fails to establish that the claims involve any common issues of fact. All of the facts underlying plaintiff's fraud claims against Hoo and VN K's as alleged in the amended complaint occurred before the related and instant actions were commenced and thus before Maidenbaum allegedly committed any misconduct.

Plaintiff's argument that Maidenbaum's motion to sever should be denied in the interest of judicial economy because the same witnesses will be required to testify at trial regarding plaintiff's claims against Hoo and VN K's and against Maidenbaum is also without merit as the claims are factually and legally distinct and thus there is unlikely to be any benefit to judicial economy in trying the claims together. Moreover, the prejudice Hoo and VN K's would suffer in the absence of severance outweighs any claimed benefit to judicial economy.

Plaintiff's argument that Maidenbaum's motion to sever should be denied because Hoo will be required to testify at trial with regard to plaintiff's Judiciary Law § 487(1) claim but will not be subject to the non-party subpoena jurisdiction of the court as a resident of Vietnam, preventing Hoo from giving necessary testimony, is without merit. The prejudice Hoo and VN K's would suffer in the absence of severance outweighs any prejudice plaintiff may suffer by being unable to question Hoo at trial. Moreover, communications between Hoo and his counsel, which would likely form the basis of his testimony, may be protected by the attorney-client privilege. Further, even if Hoo were required to testify, plaintiff may be able to obtain his deposition testimony through the court's issuance of a commission or letter rogatory pursuant to CPLR § 3108 and subsequently use said testimony at trial pursuant to CPLR § 3117(3)(ii).

Plaintiff's argument that Hoo and VN K's will not be prejudiced in the absence of severance because Maidenbaum will be required to testify with regard to plaintiff's fraud claims against Hoo and VN K's and thus will be disqualified as their counsel regardless of the severance is also without merit. Although it is a near certainty that Maidenbaum will be required to testify with regard to plaintiff's Judiciary Law § 487(1) claim, it is not clear that Maidenbaum will be required to testify with regard to plaintiff's fraud claims as plaintiff has failed to show that Maidenbaum has knowledge of the facts underlying plaintiff's fraud claims.

Moreover, plaintiff never sought to take the deposition of Maidenbaum with regard to plaintiff's fraud claims, despite the fact that discovery has been nearly completed with regard to said claims.

Based on the foregoing, Maidenbaum's motion to sever is granted. Accordingly, it is

ORDERED that the complaint's fourth cause of action against defendant Maidenbaum is severed and the action shall continue as to the remaining causes of action; and it is further


ORDERED that Maidenbaum is directed to serve a copy of this order with notice of entry upon all parties and upon the Clerk of the Court with proof of service thereof within 30 days of the entry date of this order; and it is further

ORDERED that upon such service, plaintiff shall purchase a new index number for the severed cause of action against Maidenbaum and shall file an RJI and pay the RJI fee in the severed action.

This constitutes the decision and order of the court.

DATE :

10/21/16



KERN, CYNTHIA S., JSC
HON. CYNTHIA S. KERN
J.S.C.