

Mega Funding LLC v Itzkowitz
2017 NY Slip Op 31429(U)
June 29, 2017
Supreme Court, Kings County
Docket Number: 501154/2017
Judge: Sylvia G. Ash
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At an IAS Term, Com 11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th of June 2017.

P R E S E N T:

HON. SYLVIA G. ASH,

Justice.

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MEGA FUNDING LLC, individually and as a member of REMMI SERVICES, LLC,

Plaintiffs,

- against -

MORDECHAI ITZKOWITZ a/k/a MORDY ITZKOWITZ, REMMI INC. individually and as a member, of REMMI SERVICES, LLC, and REMMI SERVICES, LLC,

Defendants.

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Decision / Order

Index No. 501154/2017

The following papers numbered 1 to 4 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

1 - 3
4
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Defendants, Mordechai Itzkowitz and Remmi Services, LLC (collectively, "Itzkowitz"), move to dismiss Plaintiff, Mega Funding, LLC's ("Mega") complaint on the following grounds: (1) pursuant to CPLR §3211(a)(1), based on Mega's supposed lack of standing; (2) pursuant to CPLR §3211(a)(7), for failure to state a cause of action; (3) pursuant to CPLR §3211(a)(10), for failure to join a necessary party; and alternatively(3) pursuant to CPLR §602(a), to consolidate this action with a pending action, titled *Itzkowitz, et al. v Ginsburg, et al.*, Index No. 509504/2016 (the "First Action"). Mega opposes. For the reasons set forth below, Itzkowitz's motion is granted in part and denied in part.

Background

This case relates to the First Action, in which Itzkowitz is a defendant and Mega a Plaintiff. In the instant case, the parties have switched roles, Mega is the plaintiff and Itzkowitz the defendant. In the First Action, Itzkowitz and other plaintiffs accuse Mega and Mega's principal, Alan J. Ginsburg ("Ginsburg") of, among other things, leading a racketeering enterprise.

Itzkowitz and the other plaintiffs further allege that Ginsburg and Mega fraudulently induced them to purchase certain Taxi Permits ("Permits"), from initial Permit holders. Ginsburg and Mega allegedly misrepresented to Itzkowitz and the other plaintiffs that they would earn money by reselling the Permits, renting taxis and obtaining tax credits. However, according to Itzkowitz and the other plaintiffs, Ginsburg and Mega's proposal revealed itself as a money-grabbing scheme. The First Action is currently pending before this Court.

Turning now to the instant action, which was commenced by Mega on January 16, 2017. According to Mega's complaint, Remmi Services, LLC ("RS") was founded for purposes of operating New York City licensed "Green Cabs." RS's founders are Mega, Ryder Partners, LLC ("Ryder") and Remmi Inc. ("Remmi"). As with Ginsburg and Mega, Judah Langer ("Langer") is Ryder's principal and Itzkowitz is Remmi's.

Upon RS's founding, Mega, Ryder and Remmi entered into an operating agreement, signed by Ginsburg, Langer and Itzkowitz. Per the operating agreement, Remmi owns 70 percent of RS, Mega 20 percent and Ryder 10 percent. The operating agreement designates Ryder as RS's managing member, charged with managing RS's day-to-day operations. Remmi is designated as an RS investor and Mega as a broker of Permits, charged with facilitating the purchase of Permits.

Mega's complaint alleges that, without obtaining Ryder or Mega's approval, Itzkowitz took managerial control of RS, sold RS's assets and kept the proceeds to himself. Itzkowitz allegedly further usurped Ryder's managerial duties by arranging for his own accountant to file RS's tax returns. Itzkowitz then refused to provide Mega with any K-1 or other tax forms for the years 2015 and 2016. Among other causes of action, Mega seeks access to RS's books and records, the appointment of a receiver and punitive damages.

In this instant motion, Itzkowitz moves to dismiss Mega's complaint or, in the alternative, to consolidate this case with the First Action. First, Itzkowitz argues that Mega lacks standing to assert its claims because Mega did not provide consideration in exchange for its interest in RS. Itzkowitz further argues that Mega is not a licensed broker in New York and did not procure the Permits as called for by the operating agreement.

Secondly, Itzkowitz argues that Mega's complaint should be dismissed because Mega has failed to join a necessary party to the action, Ryder. Itzkowitz maintains that Ryder is a necessary party because as RS's manager, Ryder retains control over RS's book and records. Third, Itzkowitz argues that Mega's request for the appointment of a receiver is without merit because RS is a defunct company, devoid of assets. And that Mega has failed to demonstrate that a reward of punitive damages is appropriate in this case. Lastly, Itzkowitz argues that, to the extent the Court does not dismiss Mega's claims, this case should be consolidated with the First Action.

In opposition, Mega argues that it has standing to assert its claim because its promise to facilitate the purchase of Permits constitutes sufficient consideration under the operating agreement. Next, Mega argues that Ryder is not a necessary party to this action because Itzkowitz usurped Ryder's role as RS's manager and currently exercises control over RS's books and records. According to Mega, a determination by this Court as to whether to grant Mega access to RS's books and records, will not prejudice the rights or interest of Ryder. Lastly, Mega argues that this case should not be consolidated with the first action because consolidation will serve to confuse the issues and hinder the litigation process.

Discussion

The first basis on which Itzkowitz moves to dismiss Mega's complaint is Mega's alleged lack of standing. Under the traditional principles of contract law, the parties to a contract are free to make their bargain, even if the consideration exchanged is grossly unequal or of dubious value (*see, Spaulding v Benenati*, 57 NY2d 418 [1982]). Absent fraud or unconscionability, the adequacy of consideration is not a proper subject for judicial scrutiny (*id.* at 423). It is enough that something of "real value in the eye of the law" was exchanged (*see Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 464 [1982]).

Here, Mega offered sufficient consideration under the operating agreement because the operating agreement calls for Mega to facilitate the purchase of Permits. Itzkowitz has not established fraud or unconscionability in connection with the operating agreement. Therefore, Itzkowitz's motion to dismiss, on the grounds that Mega lacks standing, is DENIED.

The second basis of Itzkowitz's motion is Mega's alleged failure to state a cause action. On a motion to dismiss pursuant to CPLR § 3211 (a) (7), the pleading is to be afforded a liberal construction (*see, CPLR 3026*). The facts, as alleged in the complaint must be accepted as true; the plaintiff accorded the benefit of every possible favorable inference; and the court must only determine whether the facts as alleged fit within any cognizable legal theory (*see Morone v Morone*, 50 NY2d 481, 484 [1980]; *Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]).

Here, Mega's complaint sufficiently assert claims for access to RS's books and records because Mega alleges that Itzkowitz usurped Ryder's managerial role and exercises controls over RS's books and records. Similarly, Mega sufficiently asserts a claim for the appointment of a receiver because Mega alleges that Itzkowitz sold RS's assets and kept the proceeds to himself. Therefore, Itzkowitz's motion to dismiss based on CPLR §3211(a)(7) also is DENIED.

With respect to Mega's request for punitive damages, punitive damages are available where the wrong complained of evinces a "high degree of moral turpitude" or is "actuated by evil and reprehensible motives", and demonstrates "such wanton dishonesty as to imply a criminal indifference to civil obligations" punitive damages are recoverable if the conduct was "aimed at the public generally" (*Suffolk Sports Ctr. v. Belli Constr. Corp.*, 212 A.D.2d 241, 246 [2d Dept 1995]). Here, Mega's allegations do not rise to the level of warranting the issuance of punitive damages. As such, Itzkowitz' motion to dismiss that portion of Mega's complaint is GRANTED.

The third basis of Itzkowitz's motion to dismiss is that Mega has failed to include a necessary party, Ryder. Pursuant to CPLR §1001(a), persons who might be inequitably affected by a judgment in an action should be made a party to that action. Under CPLR §1001(b), when a necessary party has not been made a party and is subject to the jurisdiction of a court, the court shall order him summoned. If jurisdiction over him can be obtained only by his consent or appearance, the court, when justice requires, may allow the action to proceed without his being made a party.

Here, Ryder is a necessary party to the instant action because disputed issues exist as to whether Ryder retains managerial control of RS and RS's books and records. Further, as a 70 percent interest holder in RS, any judgment entered in this case could potentially affect Ryder's rights. Since Ryder is already subjected to this Court's jurisdiction in the First Action, Itzkowitz is ORDERED to add Ryder as a party in this action.

Lastly, Itzkowitz moves to consolidate this action with the First Action. A motion for a joint trial pursuant to CPLR § 602 (a) rests in the sound discretion of the court. Where common questions of law or fact exist, the motion should be granted absent a showing of prejudice to a substantial right by the party opposing the motion (*see Gadelov v Shure*, 274 AD2d 375 [2d Dept 2000]); *J & A Vending v J.A.M. Vending*, 268 AD2d 505 [2d Dept 2000]).

Here, both the First Action and the instant case share similar questions of law or fact because a central dispute in both cases is whether the Permits were procured and issued as called for by the operating agreement. Mega has not demonstrated that it would be unduly prejudiced by consolidating the cases. Therefore, Itzkowitz's motion to consolidate this action with *Itzkowitz, et al. v Ginsburg, et al.*, Index No. 509504/2016f for discovery and trial purposes, is GRANTED.

Accordingly, it is hereby

ORDERED that Itzkowitz's motion to dismiss, based on Mega's lack of standing is DENIED; it is further

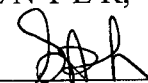
ORDERED that Itzkowitz's motion to dismiss, based on Mega's failure to state a cause of action is GRANTED as to Mega's request for punitive damages, but is otherwise DENIED; it is further

ORDERED that Itzkowitz's motion to dismiss, based on Mega's failure to join Ryder as a party is DENIED, however Mega is ORDERED to add Ryder as a party to this action; it is further

ORDERED that the motion to consolidate is GRANTED, this action is consolidated with *Itzkowitz, et al. v Ginsburg, et al.*, Index No. 509504/2016 for discovery and trial purposes.

This constitutes the Decision and Order of the Court.

ENTER,


Sylvia G. Ash, J.S.C

HON. SYLVIA G. ASH, JSC