

Jobar Holding Corp. v Halio

2018 NY Slip Op 31982(U)

August 14, 2018

Supreme Court, New York County

Docket Number: 655689/2017

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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JOBAR HOLDING CORPORATION,
ROBERT BUCK, individually, and ROBERT BUCK,
as Executor of the Estate of JOAN BUCK, and
ROBERT BUCK, individually, and ROBERT BUCK,
as Executor of the Estate of JOAN BUCK, derivatively
as shareholders on behalf of JOBAR HOLDING
CORPORATION,

Plaintiffs,

Index No.: 655689/2017

-against-

Mot. Seq. Nos. 001, 002

BARBARA HALIO, TURMAN & EIMER LLP, and
YESKOO HOGAN & TAMLYN, LLP,

Defendants.

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SALIANN SCARPULLA, J.S.C.:

Defendant Barbara Halio (“Halio”) moves to dismiss the complaint of plaintiffs Jobar Holding Corporation (“Jobar”) and Robert Buck (“Buck”), in his individual capacity, in his capacity as executor for the estate of Joan Buck, and derivatively in his individual and executory capacities as shareholder of Jobar (collectively, “plaintiffs”), on the ground that the summons with notice did not comply with CPLR 305 (b).

In a separate motion, plaintiffs seek the following pre-judgment relief:

1. Pursuant to CPLR 6201, *et seq.*, an order attaching certain property belonging to Halio to insure payment of any judgment;
2. Pursuant to CPLR 6301 and Debtor and Creditor Law (DCL) §§ 273, 276, and 279, an order restraining Halio from removing assets from New York; and,
3. Pursuant to CPLR 6401, as an alternative to the prior two grounds, appointment of a receiver to manage Halio’s affairs.

Plaintiff Jobar Holding Corporation is a small family owned corporation organized in 1958, which owned and operated commercial property at 120 West 72nd Street. Jobar was owned and managed by Otto and Kitty Buck, the parents of Halio and Joan Buck. Until the 1980s, the Buck family operated a bakery at the property known as Cake Masters. After the bakery closed, Jobar continued to operate the property. Upon Kitty Buck's death in 2001, Halio and Joan Buck served as co-presidents of Jobar until Joan Buck's death in 2005, when Halio became the sole president.

In May 2006, Jobar sold the property for \$22,000,000 and began winding down under Halio's supervision. At the time of the sale, Buck, in his personal and executory capacities, owned 38 shares of common stock in Jobar, equal to a 38% ownership interest. Buck alleges that, following the sale, Halio embezzled \$1,500,000 from Jobar's bank accounts, by misappropriating funds in a variety of ways, including disguising the embezzlement as "bogus management fees, officer compensation, or as fake loans which were never intended to be repaid." (*complaint*, ¶¶ 27-29).

Buck avers that, in March 2007, Halio and defendant Yeskoo Hogan & Tamblyn (Yeskoo) arranged for \$1,500,000 of the sale proceeds to be held in a "reserve" (Buck affidavit 11/22/17, ¶ 9).¹ Plaintiffs allege that Halio then used the funds for personal expenditures for herself and her son, nonparty David Halio. Buck alleges that, as

¹ Plaintiffs have discontinued their case against Yeskoo (NYSCEF Doc No. 84, stipulation of discontinuance).

holders of 38% of Jobar's interest, he and Joan Buck's estate are owed a total of \$570,000 from the reserve.

In contrast, Halio avers that the withdrawals were for proper purposes, including the recoupment of loans made to Jobar by Halio from her husband's pension and a home equity loan, payment of fees for same, executory and management fees, deferred salary, and payment of other post-closing fees (Halio aff dated 12/2/17, ¶ 6).

On July 26, 2016, Buck filed a petition in Nassau County Supreme Court to inspect Jobar's books and records (*Matter of Buck v Jobar Holding Corp.*, Sup Ct, Nassau County, July 26, 2016, Libert, J., index No. 605 680/2016). Buck alleges that he was able to obtain partial bank and financial records as part of this proceeding, which he claims revealed that Halio had embezzled at least \$1,500,000 from Jobar (*id.*, ¶¶ 32-33). He also alleges that, by the time he had access to these records, Halio had already embezzled all remaining funds from Jobar (*id.*, ¶ 34).

Plaintiffs commenced this action in 2017 against Halio, her accountants, and her attorneys. Against Halio, plaintiffs allege causes of action for fraudulent conveyance, conversion, unjust enrichment, breach of fiduciary duty and accounting. Plaintiffs allege aiding and abetting claims against her accountants and attorneys.

Halio's Motion to Dismiss

Halio now moves, pursuant to CPLR 3211 (a) (8), to dismiss the complaint, claiming that plaintiffs' summons with notice is defective. CPLR 305 (b) provides that a

summons served without a complaint must include “a notice stating the nature of the action and the relief sought, and . . . the sum of money for which judgment may be taken in case of default.” Failure to provide sufficient notice is a jurisdictional defect (*Roth v State Univ. of N.Y.*, 61 AD3d 476, 476 [1st Dept 2009] [“In thus failing to comply with the notice requirements of CPLR 305(b), the summons was jurisdictionally defective”]).

Halio argues that the summons with notice lists five causes of action related to unspecified conduct over a ten-year period, and, thus, is insufficiently specific to state the nature of the action against her. In opposition, plaintiffs argue that the notice lists the causes of action asserted against Halio, and states an amount of damages sought, which would be recovered against her upon default. Plaintiffs claim that the notice is, therefore, sufficient to satisfy the statutory requirements.

“[As] the purpose of the notice is simply to provide the defendant with at least basic information concerning the nature of plaintiff's claim and the relief sought, absolute precision is not necessary” (*Viscosi v Merritt*, 125 AD2d 814, 814 [3d Dept 1986] [internal quotation marks and citations omitted]; *see also Bal Court Empl. Project*, 73 AD2d 69, 71[1st Dept 1980] [“CPLR 305 (b) was intended as a shield to protect an unwary defendant from default judgment without proper notice, not a sword to trap a tardy or inattentive plaintiff into dismissal”]). A broad description of the action is generally sufficient (*Grace v Bay Crane Serv. of Long Is., Inc.*, 12 AD3d 566, 566 [2d Dept 2004] [notice stating action was for personal injury and sought \$3,000,000 in

damages “complied with statutory requirements”]). A general description of the nature of the case has been found sufficient even where multiple theories of liability may arise out of the same fact pattern (*Tello v Mental Health Assn. of Westchester, Inc.*, 52 AD3d 499, 500 [2d Dept 2008] [summons stating that nature of the action was “causes of action sounding in tort/negligence in connection with injuries sustained by Decedent . . . resulting in his death . . . as a result of Defendant’s negligence” was sufficient to provide notice of both claim for conscious pain and suffering and claim for wrongful death]).

Here, the summons with notice lists five causes of action against Halio (fraud, unjust enrichment, conversion, breach of fiduciary duty, and an accounting), and states that the action seeks monetary damages of \$1,500,000. Thus, the summons with notice complies with the statutory requirements, and Halio’s motion to dismiss the complaint is denied.

Plaintiffs’ Motion for Pre-judgment Injunctive Relief

Plaintiffs move, pursuant to CPLR 6201, 6301, and 6401, and DCL §§ 273, 276, and 279, for various forms of injunctive relief. Specifically, plaintiffs seek an order attaching certain property of Halio’s, and restraining Halio from transferring property outside of New York. In the alternative, plaintiffs seek an order appointing a receiver to manage Halio’s affairs. Plaintiffs fail to make any arguments in support of any potential ground for relief, except for the attachment of Halio’s property pursuant to CPLR 6201.

Accordingly, to the extent that plaintiff's motion is premised on CPLR 6301, CPLR 6401, or DCL §§ 273, 276, and 279, it is denied as abandoned.

CPLR 6201 provides that the court may order property attached where a "plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants" and "the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts" (CPLR 6201 [3]).

"Attachment is considered a harsh remedy and CPLR 6201 is strictly construed in favor of those against whom it may be employed" (*Grafstein v Schwartz*, 100 AD3d 699, 699 [2d Dept 2012]). As the Appellate Division, First Department has held, "[f]raud cannot be inferred, it must be proved. The fact that the affidavits in support of an attachment contain allegations raising a suspicion of an intent to defraud is not enough; it must appear that such fraudulent intent really existed in the mind of the defendants" (*Rosenthal v Rochester Button Co.*, 148 AD2d 375, 376 [1st Dept 1989] [internal quotation marks and citations omitted]). "In addition to proving fraudulent intent, the plaintiff must also show probable success on the merits of the underlying action in order to obtain an order of attachment" (*Mineola Ford Sales v Rapp*, 242 AD2d 371, 371 [2d Dept 1997]). "Moreover, the issuance of an order of attachment is within the discretion

of the trial court” (*First Natl. Bank of Downsville v Highland Hardwoods*, 98 AD2d 924, 926 [3d Dept 1983]).

Plaintiffs argue that Jobar’s bank records show that Halio has removed the entirety of the reserve from Jobar’s bank accounts since the property was sold. They argue further that this removal of funds meets the requirement under CPLR 6201 (3) that Halio has disposed of or encumbered property to frustrate a potential judgment in plaintiffs’ favor and demonstrates the likelihood of their success on the merits. Further, they assert that Halio listing her house in Water Mill, NY for sale is further proof of her intent to disburse or hide assets from judgment, requiring that the court issue an order of attachment.

In opposition, Halio argues that Jobar’s funds were all properly withdrawn from Jobar’s accounts and properly spent. Specifically, she states that Jobar frequently operated in the red and that she loaned Jobar money from a home equity loan and withdrawals from her husband’s pension, for which she had to pay taxes and withdrawal penalties. Further, she claims that the funds were used to pay outstanding salary, fees, and commissions, and other post-closing obligations of Jobar, as well as loans to Halio that were carried on Jobar’s books. Halio asserts that there are factual disputes as to whether any of this activity is improper, and thus plaintiffs are not entitled to an order of attachment.

Ultimately, the record here does not support the grant of an order of attachment at this time. The parties hotly dispute the propriety of Halio's financial activity, but the record does not adequately show fraudulent intent, or that Halio intended to frustrate a potential judgment.²

Buck's affidavit in support of the motion for an attachment does no more than raise "a suspicion of an intent to defraud," and in the face of such disputed issues of fact, plaintiffs are not entitled to an order of attachment (*Rosenthal*, 148 AD2d at 376).

Accordingly, plaintiffs' motion for an order of attachment is denied at this time. I have considered the parties' remaining arguments and find them unavailing.

Accordingly, it is hereby

ORDERED that the motion of defendant Barbara Halio (mot. seq. No. 001), to dismiss the complaint against her is denied; and it is further

ORDERED that defendant Halio is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

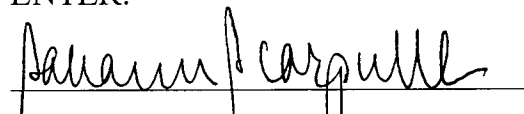
² Indeed, the documents submitted by plaintiffs lend partial support to both sides' positions. For example, the account activity submitted with Buck's reply affidavit shows that Halio's home equity loan was repaid sometime between April and December 2006 (Buck reply aff dated 12/5/17, exhibit A, Jobar Holding Corp. Activity [4/1/06 – 4/30/07]). However, the bank records also show several checks made out to Yeskoo and Turman, as well as payments for State corporation taxes, and to the New York City Department of Finance, supporting Halio's averment that the withdrawn funds were used, in part, to pay Jobar's remaining expenses, and to pay taxes (Buck aff, exhibit H, bank statements for Chase account ending in 1185).

ORDERED that the motion of plaintiffs Jobar Holding Corporation and Robert Buck, in his individual capacity, in his capacity as executor for the estate of Joan Buck, and derivatively in his individual and executory capacities as shareholder of Jobar Holding Corporation (mot seq. No. 002), for an order pursuant to CPLR 6201, 6301, and 6401, and Debtor and Creditor Law §§ 273, 276, and 279 is denied without prejudice; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 208, 60 Centre Street, on September 19, 2018 at 2:15 p.m.

Dated: August 14, 2018

ENTER:



HON. SALIANN SCARPULLA, J.S.C.