

Pirraglia v Jofsen, Inc.
2018 NY Slip Op 33568(U)
March 7, 2018
Supreme Court, Bronx County
Docket Number: 23247/2015
Judge: Doris M. Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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JOHN PIRRAGLIA,

Plaintiff,

Index No. 23247/2015

-against-

DECISION AND ORDER

JOFSEN, INC., JORGENSON'S LANDING, INC.,
JOHN P. JORGENSON and CARL D. MADSEN,

Defendants.

-----X
GONZALEZ, D.:

Upon: i) the Notice of Motion, dated January 16, 2018, by Victor E. Negron, Esq., attorney for the plaintiff for an Order; a) pursuant to CPLR Rule 3211(a)(3) and CPLR Rule 3211(b), which strikes defendants' amended answer with counterclaims and affirmative defenses, defendants' demand for a deposition and defendants' demand for interrogatories; and b) for such other relief as this Court deems just and proper; ii) the Notice of Cross-Motion, dated January 24, 2018, by Janice I. Goldberg, Esq., attorney for the defendants, for an Order; a) pursuant to CPLR Rule 3124, compelling plaintiff John Pirraglia to produce all documents and information responsive to defendants' First Notice for Discovery and Inspection, dated December 21, 2017, and defendants' First Set of Interrogatories to Plaintiff, dated December 21, 2017; and b) compelling plaintiff to appear for his deposition, pursuant to defendants' Notice of Deposition, dated December 1, 2017; and c) granting defendants such other and further relief as the Court may deem just and proper; and iii) the Affirmation in Opposition, dated January 30, 2018, by Victor E. Negron, Esq.

PROCEDURAL HISTORY

This action was commenced by the filing of a Summons and Verified Complaint, on June 12, 2015. On or about September 9, 2015, the plaintiff filed and served an Amended Complaint. On or about October 16, 2015, the plaintiff filed and served a Second Amended Complaint. Issue

was joined by service of defendants' Answer to the Second Amended Complaint, on or about December 21, 2017.

On or about June 15, 2015, the defendants filed an Order to Show Cause, seeking a preliminary restraining order against the plaintiff. On or about July 9, 2015, the defendants moved to compel arbitration and dismiss the complaint, pursuant to CPLR Rule 3211(a)(1), (a)(3) and (a)(7). By order, dated July 20, 2016, Justice Sharon Aarons denied defendants' motion to compel arbitration as it applies to Jofsen, Inc., and dismissed the second, third, fourth, fifth and sixth causes of action against all defendants and the first cause of action for breach of contract as against defendants Jofsen, Inc. and Carl D. Madsen. On or about July 27, 2015, Justice Aarons denied the defendants' Order to Show Cause for a temporary restraining order.

On November 20, 2015, the defendants moved to compel arbitration and dismiss second amended complaint, pursuant to CPLR Rule 3211(a)(1). By order, dated August 18, 2016, this Court denied defendants' motion in its entirety.

On April 20, 2016, the plaintiff served the defendants Jorgensen's Landing, Inc. and Carl D. Madsen with a 30-day Notice to Quit. On May 18, 2016, the defendants moved by Order to Show Cause for a preliminary restraining order enjoining the plaintiff from enforcing the 30-day Notice to Quit against Jorgensen's Landing, Inc. and Carl D. Madsen. By order, dated August 18, 2016, this Court denied the defendants' motion for a preliminary restraining order in its entirety and recommended that the defendants get separate counsel due to a possible conflict of interest.

On July 29, 2016, the plaintiff filed an Order to Show Cause, seeking a stay of the arbitration. By order, dated August 18, 2016, this Court granted plaintiff's motion in its entirety and permanently stayed the arbitration.

On August 22, 2016, the defendants appealed both of this Court's order, dated August 18, 2016, which denied defendants' motion for a preliminary restraining order enjoining the plaintiff from enforcing the 30-day Notice to Quit, and Justice Sharon Aarons' order, dated July 20, 2016. The Appellate Division, First Department entertained the appeal of both of this Court's decision.

On or about April 4, 2017, the Appellate Division issued a remittitur remanding the matter for a framed issue hearing on the issue of "whether defendant Jofsen, Inc. has a valid agreement to arbitrate." By order, dated November 21, 2017, this Court rendered a findings of fact and conclusion of law on the issue of the framed issue hearing. This Court found no evidence was presented by the defendant's attorney to sustain its burden that Jofsen, Inc. had a valid agreement to arbitrate.

FACTUAL BACKGROUND

It is alleged that on or about February 11, 1986, the plaintiff's parents, Salvatore and Theresa Pirraglia, subdivided and sold a plot of land bearing City of New York tax lot 177, block 5636, in the County of the Bronx, City and State of New York, commonly known as 701 and 703 Minnieford Avenue, to Jofsen, Inc. Simultaneously, the parties entered into an agreement describing the rights and use of the land between 701 and 703 Minnieford Avenue.

It is alleged that on May 3, 1989, the Pirraglias and Jofsen, Inc. filed a correction deed, to correct the description of the property in the deed, dated February 11, 1986. On September 21, 1991, the plaintiff purchased 703 Minnieford Avenue.

On February 11, 2001, the plaintiff as owner and defendants Jofsen, Inc., and John Jorgenson as tenants entered into a lease agreement for a term of one year. The lease agreement provided the tenant Jorgenson access across the Pirraglia parcel to use Pirraglia's dock for the boat known as Riptide III.

On February 11, 2003, the plaintiff, John Pirraglia, as owner, entered into another five-year lease agreement with Jorgensen's Landing, Inc., and John Jorgenson, as tenants, for access across the Pirraglia parcel. The lease expired on February 11, 2008, but the defendants continue with access across the Pirraglia property.

The plaintiff seeks to strike the answer, counterclaims and affirmative defenses of Jofsen, Inc. arguing that defendants Jorgensen's Landing, Inc., John Jorgenson and Carl D. Madsen as a matter of law do not have legal capacity to answer or seek any relief on behalf of Jofsen, Inc. since Jofsen, Inc.'s stockholders are deceased and no letters of administration have been granted to the defendants to act on its behalf. The plaintiff contends that Jorgensen's Landing, Inc., John Jorgenson and Carl D. Madsen are holdover tenants and that Jofsen is a defunct corporation.

The defendants oppose the motion to strike the answer arguing that Jofsen, Inc. is still active and has a right to defend itself. The defendants contend that Jofsen, Inc.'s shareholders are alive and that two-thirds of Jofsen, Inc.'s shareholders appointed a new director to carry out all necessary actions. The defendants cross-move to compel discovery arguing that plaintiff has failed to respond to outstanding discovery demands.

DISCUSSION OF LAW

a) Dismissal

As per CPLR Rule 3211(a)(3), a cause of action may be dismissed where the party asserting the cause of action has no legal capacity to sue. As a general matter, capacity "concerns a litigant's power to appear and bring its grievance before the Court" (*Community Bd. 7 v Schaffer*, 84 NY2d 148, 155 [1994]). Capacity may depend on a litigant's status or, as here, an authority to sue or be sued (*Silver v Pataki*, 96 NY2d 532, 537 [2001]).

It is conceded that the original Jofsen, Inc.'s stockholders are deceased, and no letters of administration have been issued authorizing the defendants to interpose an answer on its behalf. It

is also undisputed from the record and hearing minutes of June 16, 2017, defendants Jorgensen's Landing, Inc., John Jorgensen and Madsen are without authority to act, answer or assert a counterclaim on behalf of Jofsen, Inc. since no letters of administration were ever granted to anyone.

The defendants' attorney asserts in her affirmation in opposition that Jofsen, Inc. is still active and that Jofsen, Inc.'s shareholders are alive. The defendants' attorney claims that Sondra Fetner and Helen Costigan are two-thirds of the Jofsen, Inc.'s shareholders, and that they appointed Thomas Costigan as Jofsen, Inc.'s director on January 23, 2018, to carry out all necessary actions. The defendants' attorney, however, fails to explain how Ms. Fetner and Ms. Costigan received their alleged shares of Jofsen, Inc. in light of defendant Jorgensen's testimony at the framed issue hearing that the Jofsen, Inc. shareholders are deceased. The defendants' attorney also fails to submit evidence that Ms. Fetner and Ms. Costigan are current shareholders of Jofsen, Inc.

It is well settled that a corporation is a separate legal entity from its shareholders, and continues to exist even upon a shareholder's death. (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140 [1993]; see also *Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103 [1st Dept 2002]; *Rohmer Assoc., Inc. v Rohmer*, 36 AD3d 990, 991, 830 NYS2d 356, [2007]; Business Corporation Law § 1510). The defendants, however, have failed to submit evidence in admissible form to show Jofsen, Inc. is active and retained defendants' counsel to assert an answer with counterclaims. While Jofsen, Inc. continues to exist as a separate legal entity as a matter of law, there is no evidence, other than defendants' attorney's affirmation, that two-thirds of Jofsen, Inc.'s shareholders appointed Mr. Costigan to carry out its affairs. In fact, based on the record before the Court, Jofsen, Inc.'s stockholders are deceased and

no letters of administration were granted to the remaining defendants. Therefore, the answer on Jofsen, Inc.'s behalf must be stricken along with any counterclaims

b) Discovery

The defendants cross-move to compel discovery from the plaintiff. However, there has been no preliminary conference held to date nor a request for a preliminary conference order. There are no existing court orders requiring any party to comply with discovery. At this point, issue is joined and the plaintiff is seeking to strike the defendants' answer. Given the issues regarding the defendants' answer, and their possible failure to have authority to answer for Jofsen, Inc., the issues of discovery are premature. Thus, the cross-motion for discovery is denied and the appropriate remedy would be for the parties to enter into a court-ordered discovery schedule for all parties to comply.

Accordingly, based on the record before the Court, the applicable law, and due deliberation; it is hereby

ORDERED, that the plaintiff's motion to strike the answer, counterclaims and affirmative defenses of Jofsen, Inc. is granted; and it is further

ORDERED, that the defendants' cross-motion to compel is denied in its entirety.

This constitutes the Decision and Order of the Court.

Dated: March 7, 2018
Bronx, New York

ENTER:



HON. DORIS M. GONZALEZ, J.S.C.