

Deane v Brodman

2019 NY Slip Op 33090(U)

October 17, 2019

Supreme Court, New York County

Docket Number: 150373/2017

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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GARY DEANE,

Plaintiff,

- v -

HOWARD BRODMAN, LIGGETT VOGT & WEBB P.A.,
RBSM LLP

Defendant.

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INDEX NO. 150373/2017
MOTION DATE 07/18/2019
MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 58, 60, 61, 62, 63, 64, 65

were read on this motion to/for CONSOLIDATE/JOIN FOR TRIAL

Upon the foregoing documents and for the reasons set forth on the record (10/16/2019), Gary Deane (the Plaintiff)'s motion to consolidate is granted.

The Relevant Facts and Circumstances

Before this action was commenced, the Plaintiff filed a prior action, captioned Gary K. Deane v. Big Machine Agency LLC, Leslie Taylor and Brad Taylor (Index No. 654073/2013, the 2013 Action). The Plaintiff brought the 2013 Action individually and as a minority member of Big Machine Agency, LLC (the Company), asserting claims against the Company and its managing members for breach of contract and breach of fiduciary duty. The Plaintiff filed the note of issue in the 2013 Action on June 26, 2015.

In this action (hereinafter, the 2017 Action), the Plaintiff alleges that the Company's accountants, Howard Brodman and Liggett Vogt & Webb P.A., and RBSM LLP (collectively,

the **Defendants**), improperly advised managing members of their obligations under the Company's operating agreement. The Plaintiff asserts claims against the Defendants for negligence, aiding and abetting breach of fiduciary duty, and breach of fiduciary duty. The Plaintiff now moves to consolidate the 2017 Action and the 2013 Action for trial.

Discussion

The decision to consolidate rests within the sound discretion of the trial court (*Progressive Ins. Co. v Countrywide Ins. Co.*, 10 AD3d 518, 519 [1st Dept 2004]). Pursuant to CPLR § 602 (a), consolidation may be granted in the interests of judicial economy where there are common questions of law or fact (*id.*). However, consolidation will be denied if the opposing party can demonstrate prejudice to a substantial right (*id.*).

The Plaintiff argues that the actions should be consolidated because there are common issues of fact and the Defendants would not be prejudiced by the consolidation. In their opposition papers, relying primarily on *Heydt Contr. Corp. v Tishman Constr. Corp. of N.Y.*, 163 AD2d 196, 197-98 [1st Dept 1990], the Defendants argue that consolidation is inappropriate where one action is for breach of contract and the other action sounds in negligence. However, the argument is unavailing.

In *Heydt*, the First Department reversed the trial court's consolidation of two actions where the first action concerned whether a construction manager's negligence caused a fire and the second action involved breach of an alleged oral agreement regarding reimbursement for a hoist that was damaged in the fire. Although the two actions involved the same parties, the First Department

held that it was inappropriate to consolidate an action in negligence and another in contract.

Moreover, the factual issues did not overlap as the first action involved facts prior to and at the time of the fire, and the second action involved facts that took place after the fire. This is not the case in front of the court.

In contrast to *Heydt*, the 2013 Action and the 2017 Action involve related claims for breach of fiduciary duty and aiding and abetting in the breach of fiduciary duty. Significantly, the defendants in the 2013 Action must be found liable for a breach of fiduciary duty before the Defendants in this 2017 action can be held liable for aiding and abetting that breach of fiduciary duty. Accordingly, there exists a common issue of law in the 2013 Action and the 2017 Action.

In addition, there are common issues of fact in the subject actions because the claims for breach of fiduciary duty involve the alleged misconduct of the Company's managing members and whether the accountant Defendants played any role in any alleged misconduct (*compare* NYSCEF Doc. No. 64, ¶¶ 56-60, *with* NYSCEF Doc. No. 65, ¶¶ 83-87). In particular, the Company's managing members claim that they relied on the advice of the Defendants when conducting Company business (NYSCEF Doc. No. 55, ¶ 9). Thus, the 2013 Action and the 2017 Action concern the same underlying facts at the same point in time and if the matters are consolidated for trial, such trial will require the participation of the same witnesses. Accordingly, the interests of judicial economy would favor consolidation of the 2013 Action with the 2017 Action because of the common issues of fact and law outlined above.

In addition, the Defendants have not demonstrated prejudice to a substantial right. Although there remains some outstanding fact and expert discovery in the 2017 Action, the parties will be permitted to complete the same before the consolidated matter proceeds to trial. To the extent that any delay or prejudice may arise from the different procedural stage of the two actions, such delay may be avoided by completion of additional discovery, if required, on an expedited basis (*see Rogin v Rogin*, 90 AD3d 507, 509 [1st Dept 2011]). As discussed at oral argument, the Defendants may also bring an order to show cause, if there is a basis to do so, requesting the deposition of the third-party, Maurice Dean, and if necessary, requesting a competency hearing. Thus, the Plaintiff's motion to consolidate is granted.

Accordingly, it is

ORDERED that the plaintiff's motion to consolidate is granted and the above-captioned action is consolidated in this Court with *Gary K. Deane v. Big Machine Agency LLC, Leslie Taylor and Brad Taylor*, Index No. 654073/2013, pending in this Court; and it is further

ORDERED that the consolidation shall take place under Index No. 654073/2013 and the consolidated action shall bear the following caption:

Gary Deane, individually and derivatively on behalf of Big Machine Agency LLC,

Plaintiff,

-against-

Big Machine Agency LLC, Leslie Taylor, Brad Taylor, Howard Brodman, CPA, Liggett Vogt & Webb P.A. a/k/a Liggett & Webb, P.A. and RBSM LLP,

Defendants,

And it is further;

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that, within 30 days of this decision and order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the Court (60 Centre Street, Room 141 B), who shall consolidate the documents in the actions hereby consolidated and shall mark the records to reflect the consolidation; and it is further

ORDERED that counsel for the plaintiff shall contact the staff of the Clerk of the Court to arrange for the effectuation of the consolidation hereby directed; and it is further

ORDERED that service of this order upon the Clerk of the Court shall be made in hard-copy format if this action is a hard-copy matter or, if it is an e-filed case, shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that, as applicable and insofar as is practical, the Clerk of this Court shall file the documents being consolidated in the consolidated case file under the index number of the consolidated action in the New York State Courts Electronic Filing System or make appropriate

notations of such documents in the e-filing records of the court so as to ensure access to the documents in the consolidated action; and it is further

ORDERED that, within 30 days of this decision and order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is hereby directed to reflect the consolidation by appropriately marking the court's records.


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10/17/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE