

<b>Epmmy LLC v Nycanna LLC</b>
2020 NY Slip Op 32228(U)
July 6, 2020
Supreme Court, New York County
Docket Number: 655480/2018
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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EPMMNY LLC,  
  
Plaintiff,

INDEX NO. 655480/2018

MOTION DATE N/A

- v -

MOTION SEQ. NO. 010

NYCANNA LLC, TERRADIOL MANAGEMENT COMPANY  
LLC, TERRADIOL OHIO LLC, NYCI HOLDINGS LLC, NEW  
AMSTERDAM DISTRIBUTORS LLC, IMPIRE STATE  
HOLDINGS LLC, JOHN VAVALO, DOMINIC FALCONE,  
DENNIS DUVAL, DINO DIXIE, PATRICK HARVEY,  
PHILLIP HAGUE, JEFFREY SCHEER, BOND,  
SCHOENECK & KING PLLC, ACREAGE NEW YORK,  
LLC, NY MEDICINAL RESEACRH & CARING, LLC

**DECISION + ORDER ON  
MOTION**

Defendants.

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 010) 257, 258, 259, 260,  
261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 275, 283, 284, 285, 286, 287, 288,  
289, 290, 291, 299

were read on this motion to/for STAY

Upon the foregoing documents, it is DENIED.

In a decision regarding defendants' motions to dismiss, the court directed a hearing on the issue of plaintiff's standing to bring this action while the motions to dismiss are held in abeyance. (NYSCEF Doc. No. [NYSCEF] 245.) Plaintiff EPMMNY, LLC (EPMMNY) objects.

Plaintiff moves for an Order (a) staying this action pursuant to CPLR 2201 and 2214(d); (b) suspending the Order of Reference contained in this court's Decision and Order of January 6, 2020 (NYSCEF 247, Decision and Order on Motion 09); (c) canceling the Notice of Hearing of January 24, 2020 (NYSCEF 255); (d) staying this action during the pendency of plaintiff's appeal of the January 6, 2020 Decision and Order; (e) granting

plaintiff<sup>1</sup> leave to reargue pursuant to CPLR 2221 and to reconsider that part of the Order that directed the parties to proceed with a hearing in the Special Referee's Part to hear and determine whether David Feder, on behalf of EPMMNY, has standing to bring this action; and (f) denying the motions to dismiss instead.

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221 [d] [2].) The asserted misapprehensions of fact or law claimed by plaintiff on this motion are defendants, not plaintiff, have the burden "to establish prima facie that plaintiff has no standing to sue." (*Credit Swisse Fin. Corp. v Reskakis*, 139 AD3d 509, 510 [1st Dept 2016].) "To defeat defendants' motion, the plaintiff has no burden of establishing it has standing as a matter of law; rather, the motion will be defeated if the plaintiff's submission raises a question of fact as to its standing." (*Deutsche Bank Tr. Co. Americas v Vitellas*, 131 AD3d 52, 59 [2d Dept 2015].)

Plaintiff's recitation of the law is correct. However, that is not the end of the story. The CPLR authorizes the court to "when appropriate for the expeditious disposition of the controversy," to order an immediate trial of an issue of fact arising on a 3211 motion. (See CPLR 2218.) Indeed, the Commercial Division is encouraged to use such trials to dispose of cases or materially dispose of cases. (Commercial Division Rule 9-a<sup>2</sup>.) Here, the

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<sup>1</sup> Plaintiff asks for leave for defendant which appears to be a typo.

<sup>2</sup> "Rule 9-a. Immediate Trial or Pre-Trial Evidentiary Hearing. Subject to meeting the requirements of CPLR 2218, 3211(c) or 3212(c), parties are encouraged to demonstrate on a motion to the court when a pre-trial evidentiary hearing or immediate trial may be effective in resolving a factual issue sufficient to effect the disposition of a material part of the case. Motions where a hearing or trial on a material factual issue may be particularly useful in disposition of a material part of a case, include, but are not limited to:

(a) Dispositive motions to dismiss or motions for summary judgment;

complaint consists of 29 causes of action: (1) and (2) breach of contract; (3) breach of implied covenant of good faith and fair dealing; (4) and (6) breach of fiduciary duty; (5) diversion of corporate opportunity; (7) and (8) aiding and abetting breach of fiduciary duty; (9) unjust enrichment; (10) conversion; (11) quantum meruit; (12) accounting; (13) fraud; (14) promissory estoppel; (15) and (16) de facto merger; (17) illegal freeze-out merger; (18) misappropriation of trade secrets; (19) fraudulent conveyance; (20) declaratory judgment; (21) injunction to bar defendants from conveying or encumbering the assets; (22) constructive trust; (23) minority shareholder oppression and freeze out; (24) legal malpractice; (25) tortious interference with potential business opportunity; (26) tortious interference with contract; (27) specific performance of the contract; (28) unfair competition under GBL §340(1); and (29) derivative action on behalf of NY Canna for waste and mismanagement of corporate assets.

Plaintiff describes this action as

one "seek[ing] a judgment of this court awarding Plaintiff EPMMNY legal damages and equitable relief based on Defendants' concerted efforts to, *inter alia*, breach their agreements and to fraudulently obtain Plaintiff's right and title to equity in defendant NYCANNA, LLC f/k/a NEW YORK CANNA, INC. (NY Canna), a successful applicant for a New York State medical cannabis business license to cultivate, manufacture medical cannabis products and dispense same through four (4) self-owned retail locations throughout the State; and derivatively on behalf of

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- (b) Preliminary injunction motions, including but not limited to those instances where the parties are willing to consent to the hearing being on the merits;
  - (c) Spoliation of evidence motions where the issue of spoliation impacts the ultimate outcome of the action;
  - (d) Jurisdictional motions where issues, including application of long arm jurisdiction, may be dispositive;
  - (e) Statute of limitations motions; and
  - (f) Class action certification motions.

In advance of an immediate trial or evidentiary hearing, the parties may request, if necessary, that the court direct limited expedited discovery targeting the factual issue to be tried."

NYCANNA to restore to it the full ownership of, and benefits from, the New York State medical cannabis business license that was awarded to it... .”

(NYSCEF 48, Amended Complaint ¶1.) If plaintiff lacks authority to bring many of the claims in this action, then the nature of this action significantly changes. However, it will not dispose of all the claims, merely streamline the case. Therefore, the court will vacate the stay pending the referee hearing and address the motions to dismiss. Simultaneously, when the referees return to in court hearings or if the parties agree to a virtual hearing, then the issue of plaintiff’s standing to bring certain of its claims shall be determined.


Accordingly, it is

ORDERED, that plaintiff’s motion is granted to the extent that plaintiff’s request (e) is granted and upon reargument, the motions to dismiss will be addressed by written decision while the case simultaneously goes to a referee on the issue of standing and all stays are lifted and the motion is otherwise denied. The TRO continues pending decision; and it is further

ORDERED that counsels for plaintiff and defendants are directed to jointly inform the court (by email to [SFC-Part48@nycourts.gov](mailto:SFC-Part48@nycourts.gov)) within 10 days of this court’s entry of this decision and order on NYSCEF whether they agree to a virtual hearing before this court on the issue of capacity. Discovery may proceed as soon as this issue is resolved.

Motion Seq. No. :

7.6.2020  
DATE

  
ANDREA MASLEY, J.S.C.

CHECK ONE:

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