

SHORT FORM ORDER

**SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

P R E S E N T :

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 8

RODEO FAMILY ENTERPRISES, LLC, in its individual capacity, and derivatively on behalf of OYSTER BAY GROUP, LLC, and SAMIR M. SHAH,

Plaintiffs,

- against -

INDEX NO.: 600378/2010
MOTION DATE: 07/09/2010
MOTION SEQUENCE: 001, 002,
003 and 004

SCOTT MATTE, NEIL MATTE, NMY CORP., S&CM ENTERPRISES, LLC, OYSTER BAY GROUP, LLC, and HERTZ, HERSON & CO. LLP,

Defendants,

- and -

OYSTER BAY GROUP, LLC,

Nominal Defendant.

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PRELIMINARY STATEMENT

There are a series of three motions and a cross-motion before the Court. The matter was transferred to this Court from Supreme Court New York County by Order received May 13, 2010. The first motion is by the Mattes, NMY and S & CM to dismiss the Third, Seventh, Eighth and Tenth Causes of Action contained in the First Amended Complaint. The second is a motion by Oyster Bay for the same relief. Third is a Hertz, Herson motion to dismiss the Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Causes of Action. The Cross-motion is by Plaintiff to strike portions of the affirmations of Gionis and Campolo, and a portion of the Reply affirmation of Gionis.

BACKGROUND

The focus of this action is the claim by plaintiff Rodeo Family Enterprises, the holding company for plaintiff Shah’s 25% interest in Oyster Bay Group, LLC, for a buy-out of Shah’s share in accordance with a formula contained in a 2004 Buy/Sell Agreement. The primary asset of Oyster Bay is an entity known as RJM, which acquires pools of indebtedness at a significant discount off face value, using a \$60,000,000 line of revolving credit. Then “Island”, a collection entity owned by Oyster Bay, sets out to collect as much of the indebtedness as possible. Historically, the valuation of the portfolio of debts owned by RJM utilized the “Curve” which was developed by Shah and James Pellen, an accountant with defendant Hertz, Herson & Co.,

LLP., to estimate the value of the pools of indebtedness which RJM had in its inventory.

The lengthy prologue to the First Amended Complaint provides a historical relationship among the individuals and organizations involved in this action.

Oyster Bay is a holding company which owns 100% interest in three New York limited liability companies, RJM Acquisitions, LLC (RJM), Island National Group LLC (Island), and LTR Support Services, LLC (LTR). RJM is in the business of acquiring large pools of non—performing consumer debt, primarily involving small – balance unsecured credit cards, overdrawn consumer bank accounts and other forms of small balance consumer debt. As an example of its profitability, the complaint alleges that since 2001, RJM has invested \$162 million to acquire 30 million accounts with \$21.6 billion in receivables and, through the end of June 2009, had collected over \$360 million.

Shah and defendants Neil and Scott Matte agreed to become the founding members and managers of RJM in 2001. Shanti Holdings, the predecessor of Rodeo, originally had a 10%, and later a 15% interest in Oyster Bay. In 2001 the parties entered into a buyout formula for Shah's interest in the event he died or the parties were unable to reach agreement on the value of Shah's shares if he resigned or was terminated by the majority holders, the Mattes. In June 2004 the parties agreed to form Island, a collection organization, and transferred their ownership interests in RJM , Island, and LTR to Oyster Bay. The beneficial interest of Shah was increased in 2005 to 25%.

Concurrently with the formation of Oyster Bay 2004 the parties entered into a revised Buy/Sell Agreement (the 2004 Buy/Sell Agreement), which adopted the same language as was contained in the 2001 Agreement. The valuation was not dependent upon market valuation or appraisals but, rather, upon a formula which consisted of the total value of Rodeo's capital account as maintained on the books and records of Oyster Bay, and the product of Rodeo's percentage in Oyster Bay (25%) and the sum of the values of RJM, Island, and LTR. The calculation of the value of RJM was to be based upon the formula, known as the "Curve", a calculation developed experientially based upon past performance of pools of indebtedness.

After a falling out among the parties, Shah ultimately tendered his resignation and demanded a payout of the value of his ownership interest in Oyster Bay. Plaintiffs contend that

the defendants have refused to bargain in good faith, and are now relegated to the formula set forth in the 2004 Buy/Sell Agreement. They now seek to change the methodology by which the value of RJM is calculated, including the use of what is known as DDA Curve, and the treatment of indebtedness of RJM as an expense so as to reduce the amount against which Shah's percentage is to be multiplied. Plaintiff contends that neither of these methodologies, the use of a DDA curve, or the treatment of indebtedness as an expense has been used for any purpose during the existence of RJM or Oyster Bay.

The Complaint

The First Amended Complaint, after setting forth a background and identity of the various parties, contains eleven causes of action as follows:

First: Breach of the 2004 Buy/Sell Agreement on behalf of Rodeo against Oyster Bay Group, LLC;

Second: Breach of Fiduciary Duty on behalf of Rodeo against defendants Scott Matte, Neil Matte, NMY and S& CM (the holding companies for Scott and Neil Matte);

Third: Derivative Claim of Breach of Fiduciary Duty on behalf of Oyster Bay against Scott Matte and Neil Matte;

Fourth: Breach of Oyster Bay's Operating Agreement on behalf of Rodeo and Shah against Oyster Bay, Scott Matte, Neil Matte, NMY and S& CM;

Fifth: Declaratory Judgment against all defendants on behalf of Rodeo;

Sixth: Declaratory Judgment against all defendants on behalf of Shah;

Seventh: Aiding and Abetting Breach of Fiduciary Duty against Hertz Herson on behalf of Rodeo and derivatively on behalf of Oyster Bay;

Eighth: Malpractice and breach of fiduciary duty against Hertz Herson derivatively on behalf of Oyster Bay Group, LLC;

Ninth: Tortious Interference with the 2004 Buy/Sell Agreement by Hertz Herson on behalf of Rodeo;

Tenth: Tortious Interference with the 2004 Buy/Sell Agreement by Hertz Herson derivatively on behalf of Oyster Bay;

Eleventh: Replevin on behalf of Shah and Rodeo against Hertz Herson.

DISCUSSION

Motion No. 1

Defendants Scott Matte, Neil Matte, NMY Corp. And S&CM Enterprises, LLC move for an order dismissing the Third, Seventh, Eighth, and Tenth causes of action in plaintiff's amended complaint to the extent that they allege derivative claims.

The basis for a derivative action is a loss suffered by the corporation, or in this case, the limited liability company. Contrasting a derivative action is one in which a shareholder or member suffers damages which are distinct from those sustained by the business entity. Whether or not grounds asserted may constitute damage to a business entity and is best prosecuted as a derivative claim, is a threshold issue which has attracted considerable attention in the courts of New York. As a general proposition, the courts of this state have taken a less than favorable view toward derivative actions except in those cases where there can be proof of corporate waste, stock price manipulation, fraud, misappropriation, malfeasance or nonfeasance.

The derivative action is one brought by one or more shareholders to remedy or prevent the wrong to the corporation or company itself. This is most common where the board fails or refuses to take appropriate action to protect the corporate or company assets. Claims of this nature are brought in a representative capacity, the beneficiary being the corporation or company, as opposed to the individual. Under other circumstances, the law is clear that only the board of directors or managers of a business entity are authorized to bring an action on behalf of it. New York courts are prone to dismiss derivative claims which are not truly premised on harm to the corporation, but rather, constitute injury or pecuniary damage to an individual or group of shareholders. (*Zletz v. Wetanson*, 209 A.D.2d 337 [1st Dept. 1994]).

In each of the four causes of action sought to be dismissed by movants, plaintiff is seeking to recoup damages allegedly sustained by Oyster Bay as a result of breach of fiduciary duty or aiding and abetting the breach of fiduciary duty by defendants. It is quite clear, however, that the fundamental claim of the plaintiffs is set forth in the other causes of action in which it is claimed that the defendants are seeking to undermine the agreed-upon methodology for evaluating a membership interest in connection with a single buyout. The direct impact of the actions sought to be taken by the defendants is to dramatically reduce the value of the assets of

Oyster Bay by treating indebtedness as an expense, and by changing the curve by which the value of the portfolio of debts owned by RJM is measured.

Plaintiff makes the argument that while this will have a direct and primary effect of reducing the share of Rodeo, it will also require a restatement of the value of Oyster Bay for a variety of purposes, including taxation and authorization for the licensing of debt collection agencies by the state. While it is correct to say that this perhaps unintended consequence will have a detrimental effect on the value of the company, it does not present the type of situation in which a shareholder, or small group of shareholders, must undertake action for the good of the whole. In this case there are, in reality, only three members of the company, each of whom will be equally affected by a reduction in the overall value of the company. But two of those members are the ones seeking to make the changes which, if not revoked, will harm them equally along with plaintiff.

Defendants also challenge the standing of Rodeo to undertake a derivative action based upon the letter of resignation in which plaintiff Shah states that “(e)ffective August 31, 2009, I hereby resign my position as employee, officer, Manager, and fiduciary of RJM Acquisitions LLC, and all of its affiliates, parents and subsidiaries”. They fail to note the second sentence of the correspondence which provides that “(f)or the avoidance of confusion, please be advised that by tendering this resignation I am not withdrawing my membership interest in Oyster Bay Group LLC”. The holding in *Billings v. Bridgepointe Partners, LLC*, 21 Misc.3d 535 (Sup. Ct., Erie Co. 2008) is contrary to the position espoused by movants. As noted in their Memorandum of Law, the Court based its decision upon the fact that plaintiff was not a member of the company at the time the action was instituted. Whereas Billings stated he “considered himself withdrawn from Bridgepoint . . .”, Shah was a member and retains his membership interest in Oyster Bay.

While one could argue that his letter effectively terminated his position as an active member of the company, the Court considers the specific retention of his membership interest as a significant factor in the determination of standing. Nevertheless, the claims propounded in the disputed causes of action are, first and foremost, addressed to Rodeo’s individual claim of an unwarranted reduction in the value of his share of the assets of Oyster Bay, and are not derivative in nature.

Defendants' motion to dismiss the third, seventh, eighth and tenths causes of action in the First Amended Complaint is granted.

Motion by Oyster Bay Group to Dismiss Third, Seventh, Eighth and Tenth Causes of Action

By this motion Oyster Bay Group, LLC seeks the same relief sought by the Mattes, NMYCorp. and S&CM Enterprises. For the same reasons stated in response to their motion, the application of Oyster Bay Group is granted. The four causes of action are uniquely related to the individual claims of Rodeo and Shah that they are entitled to 25% of the value of RJM utilizing the curve and valuation formula as set forth in the 2004 Buy/Sell Agreement. The primary goal of the claims is not to protect the value of the company assets, but to produce a buyout substantially greater than what is proposed by defendants under a modified formula and restatement of value by treatment of indebtedness as an expense to be deducted from income.

Oyster Bay's motion to dismiss the Third, Seventh, Eighth and Tenth derivative causes of action is granted.

Motion by Hertz, Herson & Co. to Dismiss Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Causes of Action

Defendant Hertz, Herson & Co. move to dismiss the derivative causes of action in which they are named as defendants. For the same reasons as previously stated, the motion to dismiss the derivative causes of action is granted.

This defendant also seeks dismissal of the Fifth and Sixth Causes of Action, which call for a Declaratory Judgment against all parties. Plaintiffs, in their Memorandum of Law in Opposition to the Hertz, Herson & Co. Motion to Dismiss acknowledge at fn. 9, page 17 that they never intended to include Hertz, Herson in the Fifth and Sixth Causes of Action and the motion is therefore moot. This is a fair and clearly stated acknowledgment that there is no declaratory relief available against this defendant since Hertz, Herson was not a party to the Agreement under which plaintiff seeks a declaration of their rights. The motion to dismiss the Fifth and Sixth Causes of Action against Hertz, Herson & Co. is granted.

Plaintiffs' Motion to Strike ¶¶ 3 — 9 of the April 30, 2010 Affirmation of Joseph N. Campolo, Esq. and ¶¶ 3 — 10 of the Affirmation of John H. Gionis, Esq. Plaintiffs' additionally seek an Order striking ¶¶ 2 — 20 of the Reply Affirmation of Gionis and ¶ 3 of the Reply Affirmation of

Campolo.

The bases for plaintiffs' motion to strike the foregoing portions of affirmations of counsel are set forth in the Memorandum of Law in opposition to defendants' motion to dismiss and in support of the cross-motion to strike at p. 22, and more fully in their Reply Memorandum, in which they expand the motion to include portions of the Reply Affirmations of Gionis and Campolo. The essence of their complaint is that the language is not based upon personal knowledge of counsel, nor do they reference documents substantiating the allegations. To the contrary, they allegedly contradict the contents of the First Amended Complaint, the veracity of which must be accepted at this early stage of the proceedings.

Paragraphs 3 — 9 of the April 30, 2010 Campolo Affirmation are itemized as "Background". Comprising approximately two full pages, the paragraphs set forth the history of the formation of RJM Acquisitions, the role played by Shah, the creation of Oyster Bay Group, Island National Group and LTR Support Services. It goes on to describe Shah's claimed distancing of himself from the day-to-day operations of RJM, and his affiliation with another debt collection agency which worked with RJM, allegedly in violation of a restrictive covenant in the Managers Agreement. It documents Shah's resignation from his positions with Oyster Bay, and claims that the only remaining dispute is the amount of the buy-out of his interest. After categorizing plaintiffs' position as outrageous and greedy, the paragraphs challenge the validity of the derivative claims, which have been dealt with in the motion on behalf of Oyster Bay.

Paragraphs 3 — 10 of the Gionis Affirmation similarly seek to provide background to the pending motions. They discuss the formation of Oyster Bay, the entering into of Agreements, including an Operating Agreement and a Buy/Sell Agreement, the ultimate resignation of Shah by letter dated August 7, 2009, plaintiffs' efforts to obtain a buyout of the membership interest held by Rodeo on behalf of Shah for \$16 million,

Paragraphs 2 — 20 of the Reply Affirmation of Gionis initially contend that the underlying action is premature because there has not yet been an "audited Special Purpose Report" upon which to base a calculation of Rodeo's interest. The independence of Hertz, Herson has been thwarted by the filing of plaintiffs' malpractice claims against them. Beginning with ¶ 7, Gionis recites a "brief background", specifically stated to be from the point of view of

defendants. The affirmation proceeds to maximize the experience and input of the Mattes, and minimize the efforts of Shah.

The affirmation further alleges Shah's employment with a potentially competing organization, his conduct which could have exposed the company to a sexual harassment action, and communicating to Oyster Bay's lenders that the company was re-stating its financial reports, when this was not true. Gionis further states that Shah proposed that the "DDA curve" be used to value his interest in Oyster Bay, but only on the condition that his share be increased from 25% to 33 1/3%. This despite Shah's awareness that the historical "curve" artificially inflated the true value of Oyster Bay.

¶ 3 of the Reply Affirmation of Joseph N. Capolo, states as follows:

Defendant Oyster Bay incorporates by reference the facts as set forth in the Reply Affirmation in Support of Motion to Dismiss Derivative Claims and in Opposition to Plaintiffs' Cross-Motion to Strike Certain Paragraphs of Matte Defendants' motion papers.

Plaintiffs' argument for striking the foregoing portions of affirmations of defendants' counsel is primarily contained in their Reply Memorandum in Support of their Motion to Strike at page 1. They argue that the designated portions of the Gionis and Campolo affirmations should be stricken because the allegations are not based upon the personal knowledge of the attorneys, and the facts alleged in these documents contradict the First Amended Complaint, which, they contend, must be given the benefit of all doubt in the early stages of the proceeding.

The Court notes at the outset that the First Amended Complaint is not verified, although it does attach and reference documents to which it refers. It does not appear that counsel for defendants challenge the authenticity of the documents, but may dispute the interpretation or significance of them as contained in the complaint. Just as with the unverified complaint, the affirmation of Gionis annexes the First Amended Complaint and all exhibits. To the extent that there are any factual allegations not specifically set forth in an attachment to the complaint, they are not made by any person with personal knowledge.

The motions to strike certain causes of action do not rely upon the truth or falsity of the allegations of the complaint or of the affirmations in support of the motions. The issues presented by the motions were whether or not plaintiff's complaint was direct or derivative. It is

clear to the Court that the essence of the complaint is pecuniary damage to plaintiff as a result of the refusal of defendants to follow the "curve" to which they refer, and to incorporate outstanding indebtedness into a valuation of Oyster Bay. Neither the truth of the allegations in the complaint nor in the affirmations in support of the motions to strike derivative claims need be evaluated to conclude that the claims for derivative damages on behalf of Oyster Bay should be dismissed. The dismissal the declaratory action claims against defendant accountants do not depend upon the personal knowledge of the complainant or the movants. Hertz, Herson & Co. simply was not a party to the Agreement for which plaintiffs seek declaratory relief.

Plaintiffs contend that the reference in the Gionis Reply Affirmation to alleged sexual misconduct by plaintiff which could have resulted in a sexual harassment claim is unnecessary for the pleadings, and violates Civil Practice Law and Rules § 3024 (b). The fundamental test of whether comments should be stricken, is whether or not it would be admissible at trial. The Second Department has been even more liberal in striking material which may in fact be admissible during the course of a trial, but was not necessary for insertion in the pleading. (*JC Mfg., Inc. v. NPI Elec., Inc.*, 178 A.D.2d 505, 506 [2d Dept. 1991]).

Based upon the foregoing, the Court grants the motion of plaintiffs to strike, but only as to the first sentence of ¶ 13 of the Reply of Gionis.

The Court rejects the arguments of the Matte and Matte-related defendants that the underlying action is premature. It is the inclusion of the Hertz, Herson accountants in the action which has resulted in their refusal to provide the "audited Special Purposes Report". Holding plaintiff hostage to this requirement, with defendants in control of the requisition of accounting services, could prevent the matter from ever achieving resolution.

To the extent requested relief has not been granted, it is denied.

This constitutes the Decision and Order of the Court.

Dated: July 19, 2010


J.S.C.

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**