

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 022934/10

MOTION DATE: May 2, 2011
Motion Sequence # 003, 004

PATRICIA BYRNES-KANE, a/k/a
PATRICIA BYRNES, individually, as a
Member of IT FIGURES! LLC and
GREAT NORTHERN INDUSTRIES, LLC,
and derivatively, on behalf of and for the
benefit of IT FIGURES! LLC and GREAT
NORTHERN INDUSTRIES, LLC,

Plaintiffs,

-against-

RONALD D. STRASSER, PHANTOM
INDUSTRIES INC., SCOTT C. KANE,
IT FIGURES! LLC, GREAT NORTHERN
INDUSTRIES, LLC and SEA/Q OF
AMERICA, INC.,

Defendants.

The following papers read on this motion and cross-motion
(numbered 1-13):

Order to Show Cause of Plaintiff.....	1
Memorandum of Law in Support of Plaintiffs’ Motion for Injunctive Relief and Appointment of a Temporary Receiver.....	2
Order to Show Cause of Defendants.....	3
Reply Affidavit in Further Support of Defendants’	

Order to Show Cause and in Opposition to Plaintiffs’
Order to Show Cause.....4
Reply Affidavit in Further Support of Plaintiffs’
Motion for Injunctive Relief and Opposing
Defendants’ Cross-Motion.....5
Defendants’ Memorandum of Law in Support of their
Cross-Motion for a Preliminary Injunction and for
Summary Judgment Dismissing Plaintiff’s Complaint
and in Opposition to Plaintiff’s Order to Show Cause.....6
Reply Affidavit in Further Support of Plaintiffs’
Motion for Injunctive Relief and Opposing
Defendants’ Cross-Motion.....7
Defendants’ Reply Memorandum of Law Further
Support of their Cross-Motion for a Preliminary
Injunction and in Opposition to Plaintiff’s “Request”
that the Court Appoint a Receiver.....8
Exhibits to the Affidavits in Support of Defendants’
Cross-Motion and in Opposition to Plaintiffs’ Order
to Show Cause.....9
Defendants’ Notice of Motion..... 10
Defendant Kane’s Memorandum of Law in Support
of Motion to Dismiss Plaintiff’s Complaint.....11
Plaintiff’s Memorandum of Law in Opposition to
Strasser Defendants’ Motion for Summary Judgment.....12
Defendants’ Reply Memorandum of Law in further
support of their Cross-Motion for Summary Judgment
Dismissing Plaintiff’s Complaint.....13

Motion by defendant Kane for an order pursuant to CPLR 3211(a), (3), (7) dismissing causes of action numbered 1-6 and 8-12; CPLR 3211(a)(1), dismissing causes of action numbered 1-6 and 11-12; CPLR 3211 (a)(3) dismissing cause of action numbered 10; CPLR 3211(a)(2) dismissing causes of action numbered 13 and 14, as well as dismissing cause of action numbered 7 by reason of a prior matrimonial action and summary judgment dismissing cause of action numbered 10 and cross-motion by defendants Strasser, Phantom Industries Inc., It Figures!LLC and Sea/Q of America, Inc. for summary judgment dismissing all the

causes of action except cause of action numbered 7 is **disposed** of as follows:

1. That branch of the motion and cross-motion seeking summary judgment are **denied** as being premature (CPLR 3212[f]) with leave to renew at the conclusion of discovery.
2. That branch of the motion seeking to dismiss causes of action numbered 13 and 14 pursuant to CPLR 3211(a)(2) is **denied**.
3. That branch of the motion seeking to dismiss cause of action numbered 7 by reason of a pending matrimonial action is **denied**.
4. That branch of the motion seeking to dismiss certain causes of action pursuant to CPLR 3211(a)(1), (3), and (7) are hereby **denied**, except as dismissing causes of action numbered 8 and 9.

This Court *sua sponte* hereby appoints Special Referee Frank Schellace to supervise all remaining discovery in this action pursuant to CPLR 3104.

Individual plaintiff, Patricia Byrnes-Kane, (hereinafter “Byrnes-Kane”) is a well known swimsuit designer and manufacturer. She is the president of plaintiff corporation, It Figures! LLC, (hereinafter “It Figures”), and at least a 50% owner of plaintiff corporation, Great Northern Industries, LLC (hereinafter “Great Northern”) and thereby has at least a 25% interest in It Figures. It Figures is a limited liability Delaware corporation with a principal office in New York State. Great Northern Industries, LLC is a Delaware limited liability company qualified to do business in New York with a principal office c/o Byrnes, 5 Lillian Court, Sands Point, New York.

It Figures is owned equally by Byrnes-Kane’s company, Great Northern Industries, LLC (50%) and by individual defendant, Ronald D. Strasser’s (hereinafter “Strasser”) company, defendant Sea/Q of America, Inc. (hereinafter Sea/Q), (50%). The other 50% interest in Great Northern is apparently held by Scott C. Kane, (hereinafter “Kane”), Byrnes’ estranged husband. Sea/Q is a New York corporation and defendant Phantom Industries Inc., (hereinafter “Phantom”), is a foreign corporation, registered to do business in New York. Phantom is wholly owned by Strasser and acts as the representative, agent and nominee for Strasser in his relations with It Figures. Finally, Kane is an individual, apparently a CPA and an attorney who resided, at all relevant times, at 5 Lillian Court, Sands Point, New York.

The Operating Agreement of It Figures (12/19/03) and the prior Letter Agreement (5/13/96) incorporated by reference, therewith, define the rights and responsibilities of the parties herein. Basically, Byrnes-Kane and Kane, through their company, Great Northern, create concepts for swimwear, run the It Figures sales staff in New York and oversee defendants' design staff in Toronto. Defendants' Sea/Q and its affiliate, Phantom, supply the entire infrastructure for It Figures at defendants' cost (including manufacturing, shipping, credit, customer, service, design, data processing and 100% of the financing and incur 100% of the financial risks). In addition, it is alleged that It Figures' revenue, assets and bank accounts are in the exclusive possession, custody and control of defendants.

Defendants had allegedly refused to fund It Figures' payroll and to discharge its office overhead. And conversely, It Figures had refused to submit a 2012 swimwear design plan, budget and merchandising plan, without which its business will fail, and defendants will solely bear said financial loss. Consequently, both sides have previously applied for preliminary injunctions and the appointment of a temporary receiver (but for different purposes), in order to overcome the present stalemate with its consequent, irreparable harm. In addition, plaintiffs sought an accounting as both sides have alleged financial improprieties: plaintiffs – that defendants have overcharged logistic/management fees and have diverted funds from their mutual undertaking; defendants – that plaintiffs have betrayed their fiduciary relationship by seeking new partners, by lack of cooperation, by personal self-dealing.

While the facts are in contention, both sides, in certain respects, have demonstrated a sufficiently, reasonable probability of potential and irreparable harm. It Figures' business and the 2012 swimwear line, designed by Byrnes, depends entirely on financing solely controlled by Strasser and the other defendants and the production of the swimwear design which is the shared authority by Byrnes and Strasser under the LLC Agreements, the execution of which depends upon their mutual cooperation. Allegedly, defendants will not finance the payroll of It Figures, nor fund the office overhead thereof. Conversely, It Figures has not submitted its budget, its design plan and its merchandising plan, critical to the 2012 swimwear line, absent which It Figures' business will collapse with the consequent losses to be borne, solely by defendants. All of this in a circumstantial context of total non-cooperation and stalemate between these parties.

This Court has jurisdiction over this matter as It Figures, although a Delaware LLC, has a principal office in the State of New York and is authorized to conduct business herein. Likewise, its members as well as individual defendant, Strasser, and his defendant

companies, are all subject to New York's personal jurisdiction; plaintiffs by virtue of the location of their principal office and defendants under the long-arm statute (CPLR 301, 302), as persons who systematically and regularly conduct and solicit business in the State of New York. And in addition, as Phantom is qualified to do business in New York and Sea/Q is a New York Corporation (see Sachs v Adeli, 26 AD3d 52).

Prior to the submission of the instant motion and cross-motion, a number of interim stipulations have been executed by the parties with respect to the appointment of a temporary receiver and the day-to-day operations of It Figures.

At the outset, this Court finds that the plaintiff has properly pleaded the necessary elements of a hybrid action, containing both direct and derivative causes of action.

It cannot be disputed that plaintiff has a direct contractual relationship with the Strasser defendants under the 1996 Letter Agreement and that the LLC Agreement specifically sets forth that the 1996 Letter Agreement was "incorporated by referral" and had the 1996 Letter Agreement attached to it. In addition to being the President of the company pursuant to an employment agreement, defendant Kane has admitted that plaintiff Byrnes-Kane "is a talented swimwear designer who has a unique flair for designing women's swimwear and who has developed a certain following in the design industry." (Kane Affidavit, February 14, 2011 p. 3 ¶ 4). Nor have the defendants demonstrated that the existence of a prior and on-going matrimonial action between plaintiff Byrnes-Kane and defendant Kane disqualifies plaintiff as a fiduciary on behalf of Great Northern to have standing to assert and interpose derivative claims on behalf of It Figures. Moreover, defendants has failed to establish, as a matter of law, that seeking a formal demand upon the corporation would not be futile.

As to the thirteenth cause of action seeking a dissolution of defendant It Figures!LLC, while it is true that the Court lacks subject matter jurisdiction to hear a claim seeking the dissolution of a foreign corporation (Ramawi v Atkins, 42 AD3d 799) dismissal is not warranted. While paragraph 78 of the thirteenth cause of action and section D of the wheretofore clause are inartfully worded, they do seek the alternative relief of directing the parties to commence a dissolution proceeding in the State of Delaware (LLCL § 702). Similarly, the same principles apply to the fourteenth cause of action.

Dismissal is not warranted as to causes of action numbered 5 and 6 as "duty" is alleged in paragraphs 47 and 52. Similarly, defendant Kane's reliance upon the reply affidavit

submitted by the plaintiff in the matrimonial action as documentary evidence warranting dismissal of various causes of action is misplaced. Said affidavit only denies that defendant Kane is a co-owner of Great Northern or an employee of It Figures. Moreover, the plaintiff specifically alleges in said affidavit, "defendant (Kane) has performed some limited legal and accounting work for my company . . . and has drafted some financial statements and legal documents." (*Kane v Kane*, Index No. 201357/2010, Reply Affidavit, Patricia Byrnes-Kane, August 19, 2010, pg. 7).

Unlike the paragraphs contained in causes of action numbered 8 and 9 which allege the existence of a contract as to the defendants other than defendant Kane, no allegation is contained in those two causes of action alleging a contract with defendant Kane. Accordingly, those causes of action must be dismissed.

While the Court would agree that a large number of the causes of action interposed in the complaint contain the minimum amount of facts necessary to avoid dismissal, the voluminous record of affidavits submitted contain very detailed allegations made by the plaintiff as against the defendants creating multiple issues of fact precluding summary judgment. What cannot be disputed by each party is that a swift resolution of the claims made is in the best interest of the continued viability of the party It Figures. Accordingly, it is the finding of this Court that discovery ought to be expedited under the supervision of the Special Referee designated above. Counsel are directed to contact Special Referee Frank Schellace upon receipt of this order.

Dated JUN 29 2011


J.S.C.

ENTERED

JUN 30 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**