

Koenig v Koenig

2010 NY Slip Op 32617(U)

September 17, 2010

Supreme Court, Nassau County

Docket Number: 021401-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**STEVEN KOENIG, on Behalf of Himself as a
Director, and as a Shareholder of MEL SOBEL
MICROSCOPES LTD,**

Plaintiff,

**TRIAL/IAS PART: 22
NASSAU COUNTY**

**Index No: 021401-09
Motion Seq. No: 5
Submission Date: 8/9/10**

-against-

**FRED KOENIG, OSSNAT KOENIG, BETTY
KERET, NEW YORK MICROSCOPE
COMPANY, INC., DENNIX, INC., WARD
WOLFF and MEL SOBEL MICROSCOPES
LTD,**

Defendants.

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Papers Read on this Motion:

- Notice of Motion, Affirmation in Support and Exhibit.....x**
- Affirmation in Opposition and Exhibits.....x**
- Reply Affirmation in Support.....x**
- Letter dated July 26, 2010, Affidavit of M. Cardello and
copy of October 8, 2009 Order.....x**
- Letter dated August 6, 2010 and Exhibits.....x**

This matter is before the Court for decision on the motion to renew and reargue filed by Defendant Ward Wolff (“Wolff”) on May 27, 2010 and submitted August 9, 2010. The Court grants Plaintiff’s motion to reargue and, upon that reargument, grants Wolff’s motion to dismiss the verified complaint. The Court further directs that no demand shall be made upon the Receiver prior to the next conference on the related matter of *Koenig v. Koenig*, Index Number 014028-09, currently scheduled before the Court on October 1, 2010 at 9:30 a.m.

BACKGROUND

A. Relief Sought

Wolff moves for an Order, pursuant to CPLR § 2221, granting leave to reargue and renew the Decision and Order of the Court dated April 6, 2010 (“Prior Decision”) and, upon that renewal and reargument, granting Wolff’s motion to dismiss the verified complaint (“Complaint”)

Plaintiff opposes Wolff’s motion.

B. The Parties’ History

The parties’ history is set forth in detail in the Prior Decision, and the Court incorporates the Prior Decision herein by reference. As noted in the Prior Decision, on July 28, 2009, Fred Koenig (“Fred”) commenced a proceeding for judicial dissolution (“Dissolution Proceeding”) of Mel Sobel Microscopes Ltd. (“Company”) on the ground of shareholder deadlock pursuant to Business Corporation Law (“BCL”) § 1104(a)(3) (Nassau County Index Number 14028-09). Steven Koenig (“Steven”) owns 50% of the voting shares of the Company and Fred, Steven’s brother, owns the other 50% of the voting shares. Defendant Ossnat Koenig (“Ossnat”), Fred’s wife, maintains the Company’s financial records. Defendant Wolff is the Company’s accountant.

By Amended Order to Show Cause dated the same date, Fred requested that a temporary Receiver be appointed for the Company. Pursuant to a stipulation (“Stipulation”) dated September 15, 2009, Steven and Fred agreed to the appointment of a receiver of the Company’s property and to proceed with the Dissolution. By Order dated October 8, 2009 (“Appointment Order”), the Court appointed Michael Cardello as temporary Receiver (“Receiver”) of the Company. In addition to the powers granted by Business Corporation Law § 1206(b), the Appointment Order authorized the Receiver to “conduct an audit of all withdrawals and electronic transfers [from] the corporation’s operating account and all other business activities that occurred after the dissolution process began on September 16, 2009, and based on such audit, to take any action [he] deems necessary to preserve, protect or recover the corporation’s assets[.]”

On October 27, 2009, Steven commenced this shareholder derivative action for

conversion and breach of fiduciary duty. Steven purports to sue on his own behalf and also as a shareholder on behalf of the Company.

Wolff moved to dismiss the Complaint, *inter alia*, for lack of standing on the ground that Plaintiff failed to make a demand upon the Receiver to sue the Company. Defendant Dennix, Inc. also argued in its prior motion that Plaintiff lacks standing to bring this action because he does not allege that he made a demand upon the Receiver. The Court held as follows in the Prior Decision:

In this case, Plaintiff has not demonstrated that a demand upon the Receiver would have been futile. The court notes, however, that Defendants have not served their motions to dismiss upon the Receiver or offered any evidence that the Receiver would have a legally cognizable objection to Plaintiff's bringing this action. The Court concludes, under all the circumstances, that demand and notice to the Receiver is unnecessary. Accordingly, the Court denies the motions of Defendants Wolff and Dennix motions to dismiss the Complaint for lack of capacity.

Prior Decision at p.7

Wolff now provides an Affidavit of the Receiver, Michael Cardello III (Ex. to counsel's letter dated July 26, 2010), in which he addresses the issue of whether a demand should have been made on him prior to the filing of the instant action. The Receiver affirms as follows:

Steven filed this action after the Court issued the Appointment Order in the earlier Dissolution Proceeding. Neither Steven nor his attorney made a demand on the Receiver to commence this action prior to Steven commencing this action. In addition, the Complaint does not allege that such a demand would have been futile. The Receiver submits that the relevant statute, Business Corporations Law § 626, and applicable case law require that a demand be made upon a receiver prior to the filing of a derivative action on behalf of a company in receivership. Moreover, if no demand is made, the Complaint should state why such a demand would have been futile. The Receiver submits that, in the instant action, these procedures were not followed and that dismissal of the Complaint is warranted. The claims alleged in the Complaint belong to the Company, and the Company should have been given the opportunity to examine and pursue these claims.

The Receiver affirms, further, that had a demand been made on him prior to filing this

action, that demand would not have been futile. Had Steven or his attorney provided the Receiver with the proposed allegations and evidence supporting those claims, the Receiver would have examined those and responded to Steven and his counsel. Had he received a demand, the Receiver would have provided the shareholders and the Court with an analysis of the claims, and the Receiver would also have made efforts to mediate the dispute in an effort to preserve the Company's assets.

The Receiver submits that the Complaint does not provide him with adequate support for the allegations of misconduct and, therefore, "cannot serve as the demand *nunc pro tunc*" (Aff. of Receiver at ¶ 3). The Receiver also contends that "a formal demand supported by competent evidence should be required" (*Id.*).

The Receiver asks that this action be dismissed without prejudice and that Steven serve him with a proper demand with evidentiary support. The Receiver suggests, however, that prior to any such demand, the Court permit discovery to proceed in the Dissolution Proceeding so that relevant evidence may be secured in that context. In addition, if the parties are able to agree on a settlement of the Dissolution Proceeding, a derivative action may be unnecessary, thereby saving the Company the costs of defending that action. The Receiver submits that dismissal of the instant action, without prejudice, 1) is in the best interests of the Company; and 2) will not prejudice Steven, who can conduct discovery in the Dissolution Proceeding, and retains the right to make a demand in the future.

In light of the Receiver's Affidavit, Defendant Wolff asks the Court to reconsider the Prior Decision.

In his Affirmation in Opposition, counsel for Plaintiff opposes Wolff's motion, submitting, *inter alia*, that 1) the Court should excuse the failure to make a demand because the illness of the Receiver suggests that a demand would have been futile and would have unduly burdened him with additional duties he could not realistically perform; 2) the Receiver had not been appointed as a matter of law prior to the commencement of this action because he had not yet filed his Oath with the Nassau County Clerk accepting the Appointment; and 3) Wolff's motion is procedurally defective.

In his Reply Affirmation, counsel for Wolff submits, *inter alia*, that 1) the Court may

excuse the demand requirement only upon a showing that a demand would have been futile, which Steven has failed to provide; and 2) the Receiver's illness is irrelevant because Plaintiff was not aware of that illness prior to drafting the Complaint.

In his letter to the Court dated July 26, 2010, which the Court permitted as a supplement to the motion, counsel for Wolff expounds on his arguments in support of his motion and reasserts his position that dismissal of the Complaint is warranted due to Steven's failure to make a proper demand supported by competent evidence.

In his responsive letter to the Court dated August 6, 2010, counsel for Steven submits that 1) Steven has provided sufficient evidence to the Receiver to permit him to make a decision now whether to initiate a shareholders derivative action, obviating the need for a formal demand; 2) the Court should consider the Receiver's alleged failure to consider "the months of court appearances, discussions, letters and E mails all evidencing the need for the shareholder's derivative action, and instead purposefully limit[ing] his opinion to the documents attached to the summons and complaint" (Reddola letter at p.1); 3) the instant motion is procedurally defective because it does not include the underlying motion and opposition papers; and 4) the Court should not now consider the Receiver's Affidavit because the Receiver has not acted to protect the Company's assets and "took no part in defending the [C]ompany from the two motions to dismiss" (Reddola letter at p. 3).

C. The Parties' Positions

Wolff submits that the Court should dismiss the Complaint in light of Plaintiff's failure to make a demand upon the Receiver.

Plaintiff opposes Wolff's motion submitting, *inter alia*, that 1) the Court should excuse the failure to make a demand; 2) the Receiver had not been appointed as a matter of law prior to the commencement of this action; and 3) Wolff's motion is procedurally defective.

RULING OF THE COURT

A. Motions to Renew and Reargue

Pursuant to CPLR § 2221(d)(2), 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. Pursuant to

CPLR § 2221(e)(2), a motion for leave to renew shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination.

It is well settled that a motion for reargument is addressed to the sound discretion of the Court, and may be granted upon a showing that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. *McGill v. Goldman*, 261 A.D.2d 593, 594 (2d Dept. 1999). It is not designed, however, to provide an unsuccessful party with successive opportunities to reargue issues previously decided or to present arguments different from those originally presented. *Id.*; *Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dept. 1992).

Although a motion for leave to renew generally must be based on newly-discovered facts, this requirement is a flexible one, and a court has the discretion to grant renewal upon facts known to the movant at the time of the original motion, provided that the movant offers a reasonable justification for the failure to submit the additional facts on the original motion. *Smith v. State of New York*, 71 A.D.3d 866, 867-868 (2d Dept. 2010), quoting *Allstate Ins. Co. v. Liberty Mut. Ins.*, 58 A.D.3d 727, 728 (2d Dept. 2009). Leave to renew, however, is not freely given to a party who has not exercised due diligence in making the initial factual presentation. *Smith v. State of New York*, *supra*, at 868.

B. Application of these Principles to the Instant Action

The Court grants Wolff's motion to renew his motion to dismiss and, upon that renewal, grants Wolff's motion to dismiss the Complaint. Wolff has provided the Affidavit of the Receiver, which provides persuasive support for Wolff's contention that Plaintiff lacks standing to pursue this action because he failed to make a demand upon the Receiver. The Court, like counsel, is aware that the Receiver was experiencing health issues that affected his ability to provide the Court with his position regarding the original motion, and holds that those health issue constitute a reasonable justification for the failure to submit his Affidavit on the original motion. Accordingly, the Court will consider the additional facts contained in the Receiver's Affidavit. Upon consideration of that Affidavit, the Court concludes that Plaintiff lacks standing to pursue this action, in light of his failure to make demand upon the Receiver, and grants the

motion to dismiss the Complaint.

The Court further directs that no demand shall be made upon the Receiver prior to the next conference on the Dissolution Proceeding, currently scheduled before the Court on October 1, 2010 at 9:30 a.m.

All matters not decided herein are hereby denied.

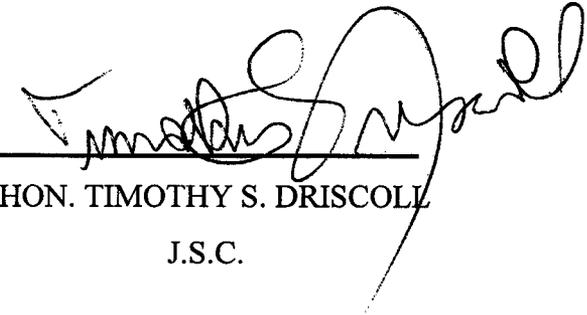
This constitutes the decision and order of the Court.

In light of the foregoing, the Complaint is hereby dismissed.

ENTER

DATED: Mineola, NY

September 17, 2010



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
 SEP 20 2010
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE