

Matter of Parness v Saul
2011 NY Slip Op 31879(U)
July 6, 2011
Supreme Court, New York County
Docket Number: 603497/09
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

In the Matter of the Application of Michael PARNESS, a holder of a 50% interest in WT VENTURES, LLC, for the Judicial Dissolution of WT VENTURES, LLC pursuant to Article 7 of the New York Limited Company Law, TRENDFUND CORP., and MICHAEL PARNESS, individually on behalf of himself and as a member of WT VENTURES, LLC,

Plaintiffs,

- v -

MICHAEL "TINY" SAUL, PHYLLIS BARKER, and SEIDMAN & PINCUS, LLC,

Defendants.

Index No.: 603497/09

Motion Date: 09/03/10

Motion Seq. No.: 03

FILED

JUL 08 2011

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The following papers, numbered 1 to 12 were read on this motion for contempt.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No (s) .	1
Answering Affidavits - Exhibits	No (s) .	2 - 7
Replying Affidavits - Exhibits	No (s) .	8 - 12

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is

The court shall grant the cross-motion of defendant Saul seeking dismissal of the complaint and compelling arbitration of the claims arising out of an operating agreement. As a result the court shall deny the plaintiff's Order to Show Cause.

With respect to the causes of action asserted on behalf Trendfund Corp., defendant asserts that the corporation was

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

- CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- CHECK AS APPROPRIATE: .. MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

dissolved on June 25, 2003 and submits a copy of the Secretary of State's certification to that effect. Plaintiff concedes the dissolution but argues that Trendfund LLC succeeded to the business of the dissolved corporation.

"Upon dissolution, the corporation's legal existence terminates. A dissolved corporation is prohibited from carrying on new business and does not enjoy the right to bring suit in the courts of this state, except in the limited respects specifically permitted by statute." Moran Enterprises, Inc. v Hurst, 66 AD3d 972, 975 (2d Dept 2009) (citations omitted). Generally the right of dissolved corporation to bring suit is limited to winding up its affairs and causes of action arising before the dissolution. See Business Corporation Law 1006. Neither of those exceptions applies here. Trendfund LLC is a separately constituted entity from the dissolved corporation and under the facts asserted in the complaint has no right to sue upon contracts or agreement made with Trendfund Corp. Therefore, pursuant to CPLR 3211 (a) (3) the court shall dismiss the causes of action in the complaint asserted against defendants based upon contractual obligations owed to dissolved Trendfund Corp.

The court shall also dismiss the claims against WT Ventures, LLC, pursuant to CPLR 3211 (a) (5) under the broad arbitration clause in Section 8.6 of the Operating Agreement which provides

Any controversy of claim arising out of or relating to this Agreement, or the breach thereof, shall be settled

by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, including the Optional Rules for Emergency Measures of Protection, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Contrary to plaintiffs' argument, this broad arbitration provision governs all claims asserted here with reference to WT Ventures including the issue of corporate dissolution. See Application of Herrero, 168 AD2d 343, 344 (1st Dept 1990) (petition for judicial dissolution dismissed where "subject arbitration clause is sufficiently broad to reach the present controversy which, despite petitioner's mischaracterization, arises in connection with a shareholder agreement . . . broad arbitration clauses should be given full effect"); Spatz v Ridge Lea Associates, LLC., 309 AD2d 1248, 1249 (4th Dept 2003) ("the subject matter of plaintiffs' amended complaint, including the request for dissolution . . . is encompassed by the broad arbitration agreement. . . it is for the arbitrator to determine in the first instance whether plaintiffs are entitled to dissolution"); Dissolution of Princeton Information, Ltd., 235 AD2d 234 (1st Dept 1997). The court shall therefore dismiss the causes of action with respect to WT Ventures except that as to the petition for judicial dissolution the court's dismissal is without prejudice to seeking further judicial action to carry out the arbitrator's ruling with respect thereto.

The court shall also dismiss, pursuant to CPLR 3211 (a) (7), plaintiffs' cause of action for defamation because the statements cited in the complaint are merely non-actionable opinion.

Plaintiffs' causes of action for negligent and/or intentional infliction of emotion distress shall also be dismissed pursuant to CPLR 3211 (a) (7) as the conduct alleged in the complaint does not rise to the level of outrageousness required to support these claims. See Murphy v American Home Products Corp., 58 NY2d 293, 303 (1983) ("Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community").

This aforesaid dismissal of the other causes of action renders moot plaintiffs' 17th and 18th causes of action asserting violation of the non-disparagement provisions of the standstill agreement so-ordered by this court, and so they are likewise dismissed.

It should be noted that the court here reaches the merits of defendant's cross-motion, determining that defendants' application for dismissal under CPLR 3012 (b) is inapposite as they have not shown that a proper demand was made. See Ardila v Roosevelt Hospital, 55 AD2d 557 (1st Dept 1976) ("The record does not contain the demand required by CPLR 3012 [b]").

Accordingly, there could be no default in service of the complaint. Therefore, the court is without the power to grant the motion to dismiss and plaintiff is not required to offer an excuse for the delay and an affidavit on the merits."). Moreover, it appears that plaintiffs promptly served their complaint' after the breakdown of 'settlement negotiations engaged in by the parties pursuant to the standstill agreement dated February 10, 2010.

While that papers on both sides contain much invective toward their adversaries, the court determines that no sanctions against plaintiffs are warranted.

Accordingly, it is

ORDERED that the plaintiffs' order to show cause for contempt is DENIED; and it is further

ORDERED that the cross-motion of defendant MICHAEL "TINY" SAUL to dismiss the complaint is GRANTED and the complaint is DISMISSED except as to any further proceedings requiring judicial action to carry out a dissolution of WT VENTURES, LLC; and it is further

ORDERED that plaintiffs shall arbitrate their claims against defendant MICHAEL "TINY" SAUL concerning WT VENTURES, LLC in accordance with the relevant Operating Agreement; and it is further

ORDERED that the cross-motion of defendant MICHAEL "TINY" SAUL to the extent that it seeks sanctions against the plaintiffs is denied.

This is the decision and order of the court.

Dated: July 6, 2011

ENTER:

~~Debra A. James~~
DEBRA A. JAMES J.S.C.

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