

Glaubach v Slifkin
2019 NY Slip Op 33242(U)
September 6, 2019
Supreme Court, Queens County
Docket Number: 702987/2015
Judge: Marguerite A. Grays
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS**

IAS PART 4

Justice

FELIX GLAUBACH, derivatively on behalf
of PERSONAL TOUCH HOLDING CORP.,

Index
Number: 702987/2015

Plaintiff(s)

-against-

Motion
Date: June 25, 2019

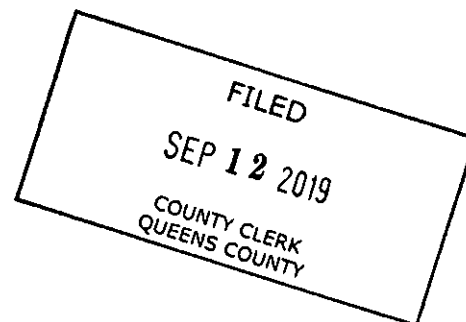
DAVID SLIFKIN, TRUDY BALK, ROBERT
MARX, JOHN L. MISCIONE, JOHN D.
CALABRO, LAWRENCE J. WALDMAN,
ROBERT E. GOFF, JACK BILANCIA,
ANTHONY CASTIGLIONE, NANCY ROA
and JOSEPHINE DIMAGGIO,

Motion
Cal. Number: 5

Motion
Seq. No: 28

Defendant(s)

PERSONAL TOUCH HOLDING CORP., PT
INTERMEDIATE HOLDING, INC. and
PERSONAL TOUCH HOME CARE OF N.Y. INC.



Nominal Defendant(s)

The following papers numbered EF1097-EF1104, EF1111-EF1117 and EF 121 read
on this motion by defendant Jack Bilancia, defendant Anthony Castiglione, defendant Nancy
Roa, and defendant Josephine DiMaggio for leave to renew their prior CPLR §3211 and
CPLR §3212 motions.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits	EF1097-EF1104
Answering Affidavits - Exhibits	EF1111-EF1117
Reply Affidavits	EF1121

Upon the foregoing papers it is ordered that the branch of this motion for leave to renew is granted. Upon renewal: (1) this Court's decision and order dated June 24, 2016 and (entered July 15, 2016) (motion sequence number "5") is vacated as to defendant Jack Bilancia, defendant Anthony Castiglione, defendant Nancy Roa, and defendant Josephine DiMaggio and their prior CPLR §3211 motion sequence number "5" is granted and (2) this Court's decision and order dated August 14, 2018 and (entered August 21, 2018) (motion sequence number "13") is vacated and the CPLR §3212 motion by defendant Jack Bilancia, defendant Anthony Castiglione, defendant Nancy Roa, and defendant Josephine DiMaggio (motion sequence number "13") is granted.

I. Introduction:

This motion (the twenty-eighth in sequence number) is for leave: (1) to renew a prior motion made by defendant Jack Bilancia, defendant Anthony Castiglione, defendant Nancy Roa, and defendant Josephine DiMaggio (collectively "the employee defendants") for an order pursuant to CPLR §3211(a)(7) dismissing the complaint against them and (2) for leave to renew a prior motion by the employee defendants for summary judgment.

Plaintiff Felix Glaubach and defendant Robert Marx established a health care business known as Personal Touch in 1974. Personal Touch provides home health care services, including care by home health aides, social services workers, and physical therapists. Glaubach served as the President of the Company and Chief Executive Officer until 2011. Defendant David Slifkin, a 4.5% shareholder in the company, became the Chief Executive Officer in 2011. Marx serves as the Executive Vice-President, General Counsel, and Special Director of the company. Eventually, Personal Touch did business through over twenty-five S corporations having their own separate articles of incorporation and by-laws.

The complaint alleges that from 2008 to 2011, a period during which Glaubach was incapacitated, Slifkin caused Personal Touch to pay him undeclared and undisclosed income in excess of \$500,000 and that he hid this unauthorized income by classifying it as the reimbursement of educational expenses which he never actually incurred. Slifkin also allegedly caused Personal Touch to pay unauthorized income to defendant Trudy Balk (the Vice-President of Operations), Marx, and others, which he allegedly disguised as reimbursement for educational expenses. Among the others allegedly receiving unauthorized income falsely classified as reimbursement for educational expenses were defendant Anthony Castiglione (Vice-President and Treasurer) who received at least \$88,968, defendant Jack Bilancia (Chief Information Officer) who received at least \$70,000, defendant Nancy Roa (Director of Human Resources) who received at least \$17,500, and defendant Josephine DiMaggio (Executive Assistant) who received at least \$10,000. The

complaint further alleges that Marx, Slifkin, and Balk have conspired to freeze Glaubach out of company affairs.

II. Relevant Procedural History:

Glaubach began this action by the filing of a Summons and a Complaint on March 30, 2015. After much motion practice, little was left of this case except a claim for reimbursement of the expenses incurred by the company in investigating the wrongdoing of certain defendants. Nevertheless, defendant Slifkin and defendant Balk pressed their appeal from an order dated December 7, 2015 which, insofar as appealed from, denied those branches of their motion which were, in effect, pursuant to CPLR §3211(a) to dismiss the first through fourth causes of action in the Amended Complaint insofar as asserted against them and an Order dated July 22, 2016 which, insofar as appealed from, upon reargument, adhered to the determination in the Order dated December 7, 2015. On April 17, 2019, the Appellate Division, Second Department, although affirming another Order rendered by this Court, dismissed the appeal from the Order dated December 7, 2015 as superceded and reversed the order dated July 22, 2016. (*Glaubach v. Slifkin*, 171 AD3d 1019 [2019]).

The nominal defendants appealed from an Order of this Court dated July 22, 2016 which denied their motion pursuant to CPLR §3211(a) to dismiss the amended complaint brought against them, and the Appellate Division, Second Department reversed on the same grounds (*Glaubach v. Slifkin*, 171 AD3d 1024 [2019]).

The Appellate Division determined that the plaintiff had not met a prerequisite of Delaware law for the commencement of a derivative action. Chancery Court Rule 23.1 requires a shareholder who seeks to assert a claim on behalf of a corporation to first exhaust his remedies by making a demand on the directors to take desired action, or to plead with particularity why such a demand is excused (*Glaubach v. Slifkin*, 171 AD3d 1019, citing *Spiegel v. Buntrock*, 571 A.2d [Sup Ct Delaware 1990]). Additionally, the Appellate Division opined that “because the amended complaint indicates that the plaintiff is suing derivatively in his capacity as a shareholder, and not in his capacity as an officer and director, the demand requirement applies” (*Glaubach v. Slifkin*, 171 AD3d 1019, 1024).

By a Decision and Order dated June 24, 2016, this Court, *inter alia*, denied a branch of a motion (sequence number “5”) by the employee defendants for an order dismissing the causes of action for breach of fiduciary duty and employee’s duty of loyalty. These are the only remaining causes of action against the employee defendants. They did not appeal the Order. By a Decision and Order dated August 14, 2018, this Court denied a motion (sequence number 13”) by the employee defendants for summary judgment dismissing the

causes of action for breach of fiduciary duty and the employee's duty of loyalty. They did not appeal the Order.

III. Discussion:

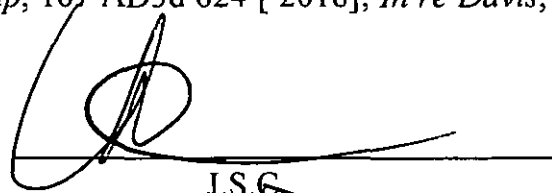
The employee defendants contend on the instant motion to renew that the remaining causes of action asserted against them should be dismissed in light of *Glaubach v. Slifkin* (171 AD3d 1019). A non-appealing defendant may renew a motion to dismiss the complaint insofar as asserted against him because of an appellate court's decision to grant dismissal of the complaint as to a co-defendant. (*Koscinski v. St. Joseph's Med. Ctr.*, 47 AD3d 685 [2008]). "[T]he grant of a dismissal to a co-defendant at the appellate level may form the basis of a renewal motion (in the Court below) by a nonappealing defendant on the ground of 'law of the case' ***" (*Dauria v. Castlepoint Ins. Co.*, 120 AD3d 1016, 1018 [2014]). The employee defendants contend that they are "so similarly situated that [the Appellate] Order with respect to one defendant directly impacts the other defendant" (*Dauria v. Castlepoint Ins. Co.*, *supra*, 1018). The Court agrees that the employee defendants are now entitled to the dismissal of the remaining causes of action against them on the same grounds that the appealing defendants prevailed upon.

In opposition to the instant motion, the plaintiff's attorney writes: "At the Second Department Appellate Division, Plaintiff has filed a motion to reargue or in the alternative for leave to appeal to the New York Court of Appeals ***The Amended Complaint specifically articulates that it is being brought pursuant to BCL §720 *eleven (11) times*" (Emphasis in the original). The plaintiff wants the instant motion to be held in abeyance pending further appellate activity.

The plaintiff's arguments concerning alleged errors made by the Appellate Division in deciding *Glaubach v. Slifkin* (171 AD3d 1019) must be addressed to the Appellate Courts. Despite the possible waste of judicial resources in not holding the instant motion in abeyance, it is not the function of this court to weigh the plaintiff's chances of success at the appellate level. This Court is constrained by the law of the case doctrine to grant the instant motion by the employee defendants, and it must follow the decisions and directives of the Appellate Division (*see, Norton v. Town of Islip*, 167 AD3d 624 [2018]; *In re Davis*, 56 AD3d 553 [2008]).

Dated:

SEP 06 2019


J.S.G.

