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Park v Song
2018 NY Slip Op 28343
Decided on November 1, 2018
Supreme Court, New York County
Schecter, J.
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Decided on November 1, 2018

Supreme Court, New York County

<p>Stephen Park, THOMAS YANG, PAUL LEE and ANDREW CHANG, individually and on behalf of KORILLA BBQ, LLC, Plaintiffs,</p> <p>against</p> <p>Edward Song, DAVID IM, KORILLA EAST VILLAGE TRUCK, INC., WHITE TIGER NAMED KORILLA, LLC, LET GROUP, LLC, AEGIS 233 LLC, and HARDY CHUNG, Defendants, and KORILLA BBQ, LLC, Nominal Defendant.</p>

ST 650186/2017

Plaintiffs appeared pro se.

Thomas Kwon, Esq., for defendant David Im.

O'Donoghue PLLC, for all other defendants.

Jennifer G. Schechter, J.

Plaintiffs are allegedly members of Korilla BBQ, LLC (the Company), a New York limited liability company (LLC), and they principally assert derivative claims concerning wrongdoing by the Company's managing member (Dkt. 138 [MTD Decision] at 10 n 16 [explaining that most of plaintiffs' claims are derivative]).^[FN1] At the inception of this action, plaintiffs were represented by counsel but since December 2017, they have been representing themselves (*id.* at 11).

On August 14, 2018, while defendants' first motion to dismiss was still under consideration, defendants made this second motion, urging that plaintiffs' derivative claims must be dismissed because derivative plaintiffs must be represented by counsel.^[FN2]

Whether a derivative plaintiff can maintain claims without being represented by counsel [*2] is a question of first impression under New York law.^[FN3] The answer is well settled in Delaware and in the Second Circuit; shareholders are required to have counsel (*Kelly v Fuqi Int'l, Inc.*, 2013 WL 135666, at *7 [Del Ch Jan. 2, 2013], citing *Parfi Holding AB v Mirror Image Internet, Inc.*, 2006 WL 903578, at *2 [Del Ch Apr. 3, 2006] [Strine, V.C.]; *United States v Flaherty*, 540 F3d 89, 92 [2d Cir 2008], citing *Phillips v Tobin*, 548 F2d 408, 411-15 [2d Cir 1976]; see *Pinnavaia v J.P. Morgan Chase & Co.*, 2015 WL 5657026, at *1 [Del Ch Sept. 11, 2015] ["Delaware is not unique in requiring lawyers to prosecute a derivative claim on behalf of a corporation"]). The rationale underlying those courts' determinations applies with equal force in New York State; therefore, plaintiffs must retain counsel to prosecute their derivative claims.^[FN4]

In New York, as in Delaware, it "is black letter law that a stockholder has no individual cause of action against a person or entity that has injured the corporation" (*Serino v Lipper*, [123 AD3d 34](#), 39 [1st Dept 2014]; see also *Abrams v Donati*, 66 NY2d 951, 953 [1985]). Rather, if demand requirements have been satisfied (unless futile), a stockholder can assert a derivative claim "to recover for injury to the business entity" (*Yudell v Gilbert*, [99 AD3d 108](#), 113 [1st Dept 2012]). Because a derivative plaintiff is really seeking to vindicate the rights of the corporation, and not simply its own rights, derivative claims are considered "to belong to the corporation itself" (*Auerbach v Bennett*, 47 NY2d 619, 631 [1979]).

Additionally, in New York, like in Delaware, corporations and LLCs cannot be represented by individual shareholders or members; they must be represented by counsel (CPLR 321[a]; *Mail Boxes Etc. USA, Inc. v Higgins*, 281 AD2d 176 [1st Dept 2001]; [see *Michael Reilly Design, Inc. v Houraney*, 40 AD3d 592](#), 593 [2d Dept 2007]; *see also Pinnavaia*, 2015 WL 5657026, at *1). "When the party to an action is a fictional person—a legal entity with limited liability—the general rule is that it cannot represent itself but must be represented by a licensed practitioner . . . answerable to the court and other parties for his or her conduct in the matter" (*Matter of Sharon B.*, 72 NY2d 394, 398 [1988]; *Mail Boxes Etc. USA, Inc.*, 281 AD2d at 176 ["no merit" to argument that corporation could appear through an authorized officer]).

The Delaware Court of Chancery has held that because a "derivative plaintiff seeks to 'enforce a right of a corporation,' and corporations appearing in this Court may only do so through counsel" the derivative plaintiff who asserts the rights of the corporation must also be represented by counsel" (*Pinnavaia*, 2015 WL 5657026, at *1; *see Parfi*, 2006 WL 903578, at *2 n 4 ["In Delaware, artificial entities must be represented by counsel. A logical extension of this requirement is that a derivative plaintiff, who steps into the shoes of the corporation, also must be represented by counsel"]). The Second Circuit concurs (*see Phillips*, 548 F2d at 411 ["Since a corporation may not appear except through an attorney, likewise the representative shareholder cannot appear without an attorney"]). There is no reason for a different conclusion [*3]here.

The concern, of course, is that a derivative action implicates the rights of all shareholders and members who will ultimately be bound by the findings made and the outcome reached in the litigation. It is therefore essential that one pursuing derivative claims be capable of doing so on behalf of all who would be affected (*see Pinnavaia*, 2015 WL 5657026 at *1 [pointing out that Rule 23.1 of the Federal Rules of Civil Procedure's requirement that a "derivative plaintiff must 'fairly and adequately represent the interests of the shareholders'" has been construed as "mandating that derivative plaintiffs be represented by lawyers"]). A plaintiff who is unfamiliar with corporate law and unrepresented by counsel runs the risk of losing an otherwise meritorious case due to lack of familiarity with well settled, yet complex rules applicable to derivative litigation, imperiling the rights of others with ownership in the entity (*see id.* [requirement that derivative plaintiff retain counsel is "necessary to ensure that the rights of the corporation are fairly protected and properly asserted"]; [see also *Wietschner v Dimon*, 139 AD3d 461](#), 462 [1st Dept 2016] [res judicata precludes derivative action based on

claims having the same origin as those already litigated]; *see also California State Teachers' Ret. Sys. v Alvarez*, 179 A3d 824, 829 [Del 2018]; *Phillips*, 548 F2d at 413 ["This suit will involve large scale litigation and the result will be res judicata barring any other litigation on behalf of the corporation"]).

Any inconvenience to the plaintiffs here is heavily outweighed by the general policy concerns requiring that a business organization be represented by counsel. A successful derivative plaintiff, moreover, is entitled to an award of attorneys' fees (*cf.* BCL § 626[e]). Thus, if plaintiffs' derivative claims have merit—and many have already survived a motion to dismiss—and there is a possibility of collecting damages, there should be no shortage of lawyers in New York City willing and capable of representing them.

In the interests of judicial efficiency, this action will be stayed to enable plaintiffs a reasonable opportunity to secure counsel to proceed with their derivative causes of action. If plaintiffs fail to retain counsel as required, the derivative claims will be dismissed and the action will proceed solely as to the direct causes of action.

Accordingly, it is ORDERED that this action is stayed until December 3, 2018, at 11:30 am, at which time either the parties or their counsel must appear for a status conference and, if plaintiffs do not retain counsel by that time, their derivative claims will be dismissed.

Dated: November 1, 2018

ENTER:

Jennifer G. Schechter, J.S.C.

Footnotes

Footnote 1: References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system.

Footnote 2: The other grounds for dismissal contained in defendants' order to show cause were the subject of their first motion to dismiss, which has been decided (*see* Dkts. 122 and 138).

Footnote 3: A stockholder's right to bring a derivative action on behalf of a corporation is expressly permitted by statute (BCL § 626[a]). The Court of Appeals concluded that the same rule applies to an LLC as a matter of common law (*Tzolis v Wolff*, [10 NY3d 100](#), 109 [2008]).

Footnote 4: New York courts often look to Delaware law for guidance when there is no binding precedent on an issue of corporate law (*see Ficus Invs., Inc. v Private Capital Mgt., LLC*, [61 AD3d 1](#), 9 [1st Dept 2009]).

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