Time of Request: Wednesday, September 07, 2011 15:29:00 EST
Client ID/Project Name: investorlawyers
Number of Lines: 333
Job Number: 1825:305015116

Research Information

Service: Terms and Connectors Search
Print Request: Current Document: 16
Source: Federal & State Cases, Combined
Search Terms: "niagara" and "scharf"

Send to: GRAY, CHRISTOPHER
CHRISTOPHER J GRAY
460 PARK AVE RM 21
NEW YORK, NY 10022-1825

[*1] **Paul Berger, Plaintiff, v. Michael J. Scharf, GILBERT D. SCHARF, FRANK ARCHER, GERALD L. COHN, ANDREW R. HEYER, DOUGLAS T. TANSILL, AND NIAGARA CORP., Defendants. Spring Partners, L.L.C., ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiffs, Index No. 601004-2005 v. Michael J. Scharf, GILBERT D. SCHARF, FRANK ARCHER, GERALD L. COHN, ANDREW R. HEYER, DOUGLAS T. TANSILL, AND NIAGARA CORP., Defendants.**

600935-2005

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2005 NY Slip Op 51752U*; *9 Misc. 3d 1122A*; *862 N.Y.S.2d 806*; *2005 N.Y. Misc. LEXIS 2397*; *234 N.Y.L.J. 103

October 24, 2005, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

SUBSEQUENT HISTORY: Motions ruled upon by *Berger v. Scharf, 11 Misc. 3d 1072A, 816 N.Y.S.2d 693, 2006 N.Y. Misc. LEXIS 674 (N.Y. Sup. Ct., Mar. 29, 2006)*

HEADNOTES

[**1122A] [***806] Corporations--Business Judgment Doctrine.

OPINION BY: Bernard J. Fried

OPINION

Bernard J. Fried, J.

These two actions have been consolidated with respect to pre-trial matters, as discussed below, because both actions assert similar claims for breach of fiduciary duty and arise from the same occurrences. [1] A determination as to a joint trial will be made once disclosure is complete. Thus, all motions and disclosure issues, including motions such as this one, will be heard jointly. [*2]

1 Both Spring Partners LLC and Paul Berger assert their claims based on the delisting of defendant Niagara Corp.'s ("Niagara") stock from the NASDAQ stock exchange and a subsequent 1 for 200 reverse forward stock split. Plaintiffs in both actions assert breach of fiduciary duty claims against the same defendants. Spring Partners, LLC also asserts an unjust enrichment claim.

However, after submission of motions to dismiss the complaints of both plaintiffs, Paul Berger ("Berger") (Seq. No.001) and Spring Partners, LLC ("Spring Partners") (Seq. # 001), Berger filed an amended complaint. Although the submission of a properly filed amended complaint does not abate a previously filed motion to dismiss, defendants should have the option to apply their motion to Berger's amended complaint. (*Sage Realty Corp. v. Proskauer Rose LLP, 251 A.D.2d 35, 675 N.Y.S.2d 14 [1st Dep't 1998]).* Therefore, this decision will address the motion to dismiss as against the Spring Partners complaint (Index No. # 601004/05) but will be held in abeyance with respect to the original Berger complaint (Index No. # 600935/05), pending the submission of supplementary papers by defendants in response to the amended complaint. Defendants are to serve and file such papers, if so advised, within 30 days.

Both actions seek injunctive relief and money judgments against defendants for losses allegedly resulting from the delisting of defendant Niagara Corporation's ("Niagara") [2] stock from the NASDAQ stock exchange and a subsequent "reverse forward split." Spring Partners

alleges that as a result of the delisting and split, it and members of the class it represents (the "Class"), were cashed out of their positions in Niagara at artificially low prices.

> 2 Plaintiffs argue that Niagara is a proper defendant although corporations are not fiduciaries under Delaware law, "because injunctive relief is sought whose effectuation would require compliance by Niagara. . . ."(*In re MONY Group Inc. S'holder Litig., 852 A.2d 9 [Del. Ch. 2004])*(granting a limited injunction against a corporate entity as well as its directors).

Spring Partner's complaint contains two causes of action: First, that defendants breached their fiduciary duties to Spring Partners and other members of the Class. Second, that defendants were unjustly enriched by their actions at the expense of Spring Partners and other members of the Class.

In motion sequence 001, defendants move to dismiss the complaint: (1) pursuant to *CPLR 327* based on *forum non conveniens*; (2) pursuant to *CPLR 3211(a)(7)* for failure to state a cause of action; and (3) pursuant to *CPLR 3211(a)(8)* for lack of personal jurisdiction over the individual defendants. In support of their motion, defendants submitted, among other documents, affidavits, securities filings, and news releases. Spring Partners submitted a memorandum of law in opposition, arguing that New York is a proper forum, the complaint states a valid cause of action, and there is personal jurisdiction over defendants.

Briefly, the complaint alleges that Niagara, which "produces specialty and commodity steel bar products that are used in a vast number of manufacturing industries." (Spring Partners' Complaint, at P10), is incorporated in Delaware and maintains its principal place of business in Manhattan. During the period before it delisted its stock, Niagara's financial position had shown improvement. Despite the improvement, "on April 28, 2004, Niagara unexpectedly announced [that] it . . . would deregister its stock, and no longer file reports with the SEC, a move some market analysts refer to as 'going dark.'" (*Id.*, at P5). Niagara claimed that cost savings justified the decision to delist. (*Id.*, at P26). It is plaintiff's claim that Niagara's stock price declined because of the delisting.

Spring Partners further alleges that approximately 8 months after the delisting, "without any prior shareholder approval, [Niagara] performed a 1 for 200 reverse split of its stock . . . and paid shareholders (like plaintiff Spring Partners) who had fewer than 200 shares[,] an inadequate [*3] mount of cash in order to eliminate them." Plaintiff claims that shortly thereafter, Niagara performed a 200 for 1 forward split. Spring Partners argues that Niagara's "actions were in breach of their duty of loyalty, and were undertaken in bad faith." (*Id., at P28*).

A. *Forum non Conveniens*

Defendants argue that Delaware is the proper forum in which to resolve this conflict because it involves the internal affairs of a Delaware corporation. They argue that, because Delaware law governs the internal affairs of Delaware corporations, it has a paramount interest in hearing the claims raised in this action.

Plaintiffs respond that Delaware no longer has a greater interest in hearing cases involving the internal affairs of Delaware corporations and that, in addition, New York is the most convenient forum because Niagara and the "primary" individual defendants are located in New York.

Pursuant to *CPLR 327(a)*, a New York court may dismiss an action, "on any conditions that may be just," on a finding that in the interest of substantial justice the action should be heard in another forum. When considering a *forum non conveniens* motion, New York courts consider several factors, including the existence of an adequate alternative forum; the state of incorporation; the existence of a substantial nexus between New York and the action; potential hardship to the defendant; and the burden on New York courts. (*See Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474, 479, 467 N.E.2d 245, 478 N.Y.S.2d 597 [1984]*; *Sturman v. Singer, 213 A.D.2d 324, 325, 623 N.Y.S.2d 883 [1st Dept, 1995]*; *Broida v. Bancroft, 103 A.D.2d 88, 92, 478 N.Y.S.2d 333 [2nd Dep't 1984])*.

The fact that a defendant corporation was incorporated in a foreign state weighs in favor of dismissal but does not by itself necessitate *forum non conveniens* dismissal. Certainly where an action involves the internal affairs of a foreign corporation, the state of incorporation has a "paramount interest" in hearing the claim, (*Sturman v. Singer, 213 A.D.2d 324, 325, 623 N.Y.S.2d 883 [1st Dept, 1995])*(citing *Hart v. General Motors, 129 A.D.2d 179, 185, 517 N.Y.S.2d 490 [1st Dept, 1987])*; however, a "court will exercise jurisdiction over [the] action . . . unless it is an inappropriate or an inconvenient forum for the trial of the action." (*Broida v. Bancroft, 103 A.D.2d 88, 92, 478 N.Y.S.2d 333 [2nd Dep't 1984])*(citing *Restatement, Conflict of Laws 2d, § 313*). Dismissal of an action on *forum non conveniens* grounds in favor of the state of incorporation most often occurs when related actions have already been commenced in the state of incorporation. (*See Sturman v. Singer, supra, 213 A.D.2d 324 at 325*; *Hart v. General Motors, supra, 129 A.D.2d at 185*).

In this case, Niagara was incorporated in Delaware, but there are no related actions involving the same or similar claims have been commenced in that state. A shareholder of Niagara, one Wynnefield, has commenced an action against Niagara in Delaware, but that action involves only a demand to inspect the books and records of the corporation, a claim that is wholly distinct from claims asserted in this action.

The existence of a substantial nexus between the action and New York State weighs against dismissal on *forum non conveniens.* A substantial nexus between New York and the action may arise based on factors such as the location of the defendant's "principal place of business in Manhattan", the location of its books and records in New York, trading of its stock on a stock exchange located in New York, the scheduling of "its stockholders' and directors' meetings in New York," the location of "the majority of [the defendant corporation's] [*4] shareholders and its officers and directors . . . in New York," and defendant's frequent use of New York courts. (*Broida v. Bancroft, 103 A.D.2d 88, 92, 478 N.Y.S.2d 333 [2nd Dep't 1984]).*

A substantial nexus exists between New York and the substance of this action. Niagara's executive office and principal place of business are in New York, and it is likely that a significant amount of evidence is located there. In addition, plaintiff Spring Partners alleges defendants "committed tortious acts" in New York, i.e. that at least some of the directors were in Niagara's New York office when they decided to delist. (Spring Partners' Complaint, at P2). Niagara's stock was traded on the NASDAQ exchange, located in New York. Plaintiff further alleges that defendants, directors Michael Scharf, Gilbert Scharf, and Andrew Heyer, are all located in New York.

Only the fact that Niagara is a Delaware corporation points towards dismissal on *forum non conveniens* grounds . On the other hand, as discussed, several factors weigh against such dismissal, including the lack of related actions in Delaware and the existence of a substantial nexus to New York. Moreover, no action against defendants has already been commenced in Delaware involving the same or similar causes of action. Therefore, the motion to dismiss on *forum non conveniens* grounds is denied.

B. *Failure to State a Cause of Action*

Defendants further argue that Spring Partners has failed to state a valid cause of action, reasoning that the claim for breach of fiduciary duty fails for lack of sufficiently particularized allegations of facts. They argue that pleading of particularized facts is required because claims for breach of fiduciary duty involve the business judgment rule. Plaintiffs argue that their allegations are sufficiently particularized to validly state a claim for breach of fiduciary duty under Delaware law.

In a case, such as this one, where plaintiff brings a claim for breach of fiduciary duty against a corporate entity and the members of its Board of Directors, the law of Delaware applies to the substance of the claims while New York law governs the procedural aspects of the action. [3] (*Lewis v. Dicker, 118 Misc 2d 28, 31, 459 N.Y.S.2d 215 [Sup. Ct. 1982]).*

> 3 While the procedural elements of this action are governed by New York Law, the substantive law of this case must be decided in accordance with Delaware law, because the directors' decision to delist is an issue of corporate governance, and Niagara is incorporated in Delaware. Neither party contests this point.

With regard to procedure, when deciding a motion to dismiss pursuant to *CPLR 3211(a)(7),* the facts as alleged in the complaint and opposition papers must be accepted as true. A court must accord the plaintiff "the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory." (E.g, *Sokoloff v. Harriman Estates Development Corp., 96 N.Y.2d 409, 414, 754 N.E.2d 184, 729 N.Y.S.2d 425 [2001]*; *Leon v. Martinez, 84 N.Y.2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]).* "The motion must be denied, if from the pleadings' four corners, 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" (*Richbell Information Services, Inc. v. Jupiter Partners, L.P., 309 A.D.2d 288, 289, 765 N.Y.S.2d 575 [1st Dep't 2003])*(quoting *511 West 232nd Owners Corp. v. Jennifer Realty Corp., 98 N.Y.2d 144, 151-152, 773 N.E.2d 496, 746 N.Y.S.2d 131 [2002]).* Claims alleging breach of fiduciary duty must "be stated in detail." (*CPLR §* [*5] *3016[b]*)(*Simon v. Becherer, 7 AD3d 66, 72, 775 N.Y.S.2d 313 [1st Dep't 2004])*(dismissing a complaint against particular executives because it did not support with, "specific facts," its assertions that the defendants approved of the transactions at issue).

Turning to the validity of a claim for breach of fiduciary duty under Delaware law, a plaintiff asserting such a claim must make allegations showing an effort to obtain from the Board of Directors the relief sought before bringing a derivative action. (Delaware Court of Chancery Rule 23.1). However, a plaintiff's action may proceed without a prior demand of the Board if the "plaintiff . . . alleges with particularity facts creating a reasonable doubt that (1) the directors are disinterested and independent and (2) whether the transaction at issue resulted from a valid exercise of business judgment." (*Aronson v. Lewis, 473 A.2d 805, 814 [Del., 1984]*; *Brehm v. Eisner,*

746 A.2d 244, 256 [Del. 2000]). Here, because there is no indication that Spring Partners made a prior demand for relief, the *Aronson* test determines whether the complaint is sufficient.

With regard to the first prong of the *Aronson* test, a plaintiff "creates a reasonable doubt that a director is [not] disinterested" by pleading "particular facts to demonstrate that a director 'will receive a personal financial benefit from a transaction that is not equally shared by the stockholders' or, conversely, that 'a corporate decision will have a materially detrimental impact on a director, but not on the corporation and the stockholders.'" (*In re Walt Disney Co. Derivative Litigation, 731 A.2d 342, 354 [Del. Ch. 1998])*(citing *Rales v. Blasband, Del.Supr., 634 A.2d 927, 936 [1993])*.

Niagara argues that plaintiffs' allegations are speculative and, therefore, do not adequately allege that Niagara failed to act in a disinterested manner. Plaintiff's allegations are sufficient to survive this motion to dismiss. Accepting Spring Partners' allegations as true, they raise a plausible case for self-interested activity on the part of defendants, which can only be properly evaluated with discovery.

Plaintiff provides specific reasons supporting their assertion that the delisting was motivated by personal self-interest, rather than by a disinterested decision: "Insiders like Scharf can benefit from a company going dark because they have information the public shareholders do not, and can engage in transactions and receive compensation without revealing the details the SEC would require." (Spring Partners' Complaint, at P5). "The reason given for going dark, i.e., to save money, was pretextual, as it is plain that public shareholders have suffered substantial harm from these actions, while defendant Scharf stands to gain in ways unavailable to non-insiders." (*Id.*, at P7). "Going dark served the interests only of the controlling Scharf family, who can now conduct the affairs of Niagara out of the spotlight of public scrutiny, and can even arrange to buy in shares or take the company private at an unfairly depressed stock price." (*Id.*, at P27). Thus, the complaint pleads, with particularity, that disinterested reasons did not motivate the delisting.

A plaintiff making a claim for breach of fiduciary duty must also assert particularized facts showing that the directors did not act "independently."

> 'Independence' involves an inquiry into whether the director's decision resulted from that director being controlled by another. A director can be controlled by another if in fact he is dominated by that other party, whether through close personal or familial relationship or through force of will. A director can also be controlled by another if the challenged director is beholden to the allegedly controlling entity. A director may be considered [*6] beholden to (and thus controlled by) another when the allegedly controlling entity has the unilateral power (whether direct or indirect through control over other decision makers), to decide whether the challenged director continues to receive a benefit, financial or otherwise, upon which the challenged director is so dependent or is of such subjective material importance to him that the threatened loss of that benefit might create a reason to question whether the controlled director is able to consider the corporate merits of the challenged transaction objectively.

(*Orman v. Cullman, 794 A.2d 5, 25 n.50 [Del. Ch. 2002])*. This requires an allegation that at least half of the Board of Directors lacked independence. (*Orman v. Cullman, supra, 794 A.2d at 24-25*; *In re Walt Disney Co. Derivative Litigation, 731 A.2d 342, 354* [Del. Ch. [1998]).

Here, the complaint adequately alleges that Niagara's Board of Directors lacked independence in deciding to delist. Spring Partners asserts that two members of Niagara's Board had strong connections to the Board's Chair, Michael Scharf, who allegedly made the decision to delist. These connections satisfy the standard set forth in *Orman*. Not only does the complaint allege that Michael Scharf "dominates" the Board, but it also points out that he is the brother of a second director, Gilbert Scharf, and that he is a superior to a third director, Frank Archer, who is the President and a director of two corporate subsidiaries of Niagara, Niagara LaSalle and LaSalle Steel Corp. (Spring Partners' Complaint, at P5). Therefore, plaintiffs adequately allege that these two Board members did not "independently" decided to support Michael Scharf's decision to delist Niagara's stock from the NASDAQ exchange. As a result, the complaint alleges that half of the Board's members did not act independently. [4]

> 4 Plaintiff augments his assertion that the Board did not act "independently" in supporting Michael Scharf's decision to delist, by contending that the combined outstanding shares of Michael and Gilbert Scharf enable them "to control the Company, and its Board of Directors." (Spring Partners' Complaint, at P11).

The second prong of the *Aronson* test requires allegations that are sufficient to show that the action precipitating the suit was not a valid exercise of business judgment. According to Delaware law, it is presumed that, under the Business Judgment Rule, a Board of Directors acts on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the corporation when making a business decision. (*Aronson, supra, 473 A.2d at 812*). Directors' decisions will be respected by courts unless it is particularly alleged that the directors are "interested or lack independence relative to the decision, do not act in good faith, act in a manner that cannot be attributed to a rational business purpose, or reach their decision by a grossly negligent process that includes the failure to consider all material facts reasonably available." (*Brehm v. Eisner, supra, 746 A.2d at 264 n.66*). "Essentially, the duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally."(*Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 [Del., 1993]).* "Classic examples of director self-interest in a business transaction involve either a director appearing on both sides of a transaction or a director receiving a personal benefit from a transaction not received by the shareholders generally." (*Id., at 362*).

[*7] Describing the burden to plead that a Board of Directors has acted beyond the scope of the activity protected by the Business Judgment Rule, the Delaware Court of Chancery held that, "as a general matter, the business judgment rule presumption that a Board acted loyally can be rebutted by alleging facts which, if accepted as true, establish that the Board was either interested in the outcome of the transaction or lacked the independence to consider objectively whether the transaction was in the best interest of its company and all of its shareholders." (*Orman v Cullman, supra, 794 A.2d at 22*).

Regarding the decision by a Board of Directors to delist, "Delaware law . . . recognizes the power of the issuing corporation's directors, in a proper exercise of their business judgment, to cause the corporation to [delist] even if, as an incidental matter, the delisting and deregistration might adversely impact the market for the corporation's securities." (*Hamilton v. Nozko*, 1994 Del. Ch. LEXIS 139 at 17; 1994 WL 413299, at 6 [Del.Ch., 1994]) (citing *Lennane v. Ask Computer Systems, Inc.*, 1990 Del. Ch. LEXIS 164, Del.Ch. C.A. No. 11744, Allen, C. [1990]). However, the court in *Hamilton* held that a plaintiff states a valid claim under Delaware law for breach of fiduciary duty by alleging particular facts showing the decision to delist was for self-interested reasons rather than "to avoid the continuing expense of complying with the reporting requirements of the [Securities] Exchange Act." (*Hamilton v. Nozko*, supra, 1994 WL 413299, at 6). Delisting a corporation's stock, "even where legally permissible, will be proscribed if taken for an inequitable purpose." (*Id.*)(citing *Schnell v. Chris-Craft Industries, Inc., 285 A.2d 437, 439 [Del. Supr. 1971]* and *Rabkin v. Philip A. Hunt Chemical Corp., 498 A.2d 1099, 1107 [Del. Supr. 1985])*.

Spring Partners alleges that Niagara delisted pursuant to a decision of the Board of Directors as dominated by defendant Michael Scharf. Plaintiff further alleges that "insiders like Scharf can benefit from a company going dark because they have information the public shareholders do not, and can engage in transactions and receive compensation without revealing the details the SEC would require." (Spring Partners' Complaint, at P5). The complaint asserts that at the time that the Board decided to delist, the company's finances were improving. (*Id.*, at P6-7). After delisting, Niagara executed a high ratio reverse split, causing plaintiff and other members of the Class to be cashed out of their positions. After the reverse split, the company executed a forward split in the same ratio as the reverse split. These allegations support Spring Partners' argument that defendants suggested motivation for delisting, to eliminate the cost of reporting, was pretextual.

Thus, the Spring Partners complaint survives the motion to dismiss because it provides more than conclusory assertions that the Board of Directors' decision to delist the corporation's stock was not a "valid exercise of business judgment." In addition, as shown above, the complaint asserts, with particularity, that the decision by at least half of Niagara's Board to delist the corporation's stock lacked both independence and disinterestedness.

C. *Lack of Personal Jurisdiction Over the Individual Defendants*

Defendants also move for dismissal, pursuant to *CPLR 3211(a)(8)*, for lack of personal jurisdiction on grounds that plaintiff improperly served the individual defendants. Defendants argue that, although plaintiff attempted service pursuant to *CPLR § 308(2)*, that attempt failed to meet the statutory requirements. They allege that plaintiff handed, to a person of suitable age and discretion at the location of the corporate defendant, one envelope containing seven copies of [*8] the summons and complaint. Defendants argue that the location of the corporate defendant was the actual place of business for defendant Michael Scharf but not for any of the other individual defendants. They also allege that service was improper as to the individual defendants because none received a copy of the summons and complaint in the mail.

Plaintiff opposes, arguing that the defendants' appearance in the action to bring this motion waives any objection to personal jurisdiction based on improper service. In the alternative, plaintiff argues that, regardless of defendants' appearance, plaintiff still had time to serve the individual defendants before this motion was fully submitted.

Plaintiff's argument based on appearance may be easily disposed of: A party does not waive its right to object to personal jurisdiction by first appearing in an action to move to dismiss for lack of personal jurisdiction, so long as that party does so before expiration of the time to answer. (*See CPLR § 3211[e]*; *Iacovangelo v. Shepherd, 5 NY3d 184, 833 N.E.2d 259, 800 N.Y.S.2d 116 [2005]*; *Addesso v. Shemtob, 70 N.Y.2d 689, 512 N.E.2d 314, 518 N.Y.S.2d 793 [1987]) Gelstein v. Lieberman, 182 A.D.2d 487, 581 N.Y.S.2d 799 [1st Dep't 1992])*.

New York requires service to be made upon all defendants within 120 days from the filing of the action. (*CPLR § 306-b*). Here, plaintiffs attempted to serve the individual defendants pursuant to *CPLR § 308(2)*. *Section 308(2)* allows service upon an individual by leaving, at the actual place of business of the defendant, a copy of the summons and complaint with a person of suitable age and discretion and then mailing a copy of the summons and complaint to the defendant, by first class mail, at his or her actual place of business. The section also places certain requirements on the form of the mailing and requires the plaintiff to file proof of service before service may be considered complete.

A successful motion to dismiss for failure to properly serve an individual defendant within the 120 day period leads to dismissal without prejudice so long as the opposing party moves pursuant to *CPLR § 3211* for such relief. (*CPLR § 306-b*). When replying to such a motion, a plaintiff must provide, with its response papers, copies of proof of service. (*CPLR § 3211[e]*). A court can, for good cause shown or in the interest of justice, extend the time for service.

Here, there is no evidence that plaintiff mailed copies of the summons and complaint to the individual defendants at their actual place of business or abode or that they filed proof of service.

However, plaintiff still had time to serve the individual defendant upon the filing of this motion. Furthermore, this motion raised issues that, if decided in favor of the movants, would have mooted the issue of service, e.g., the issue of *forum non conveniens*. Therefore, it is in the interest of justice that Spring Partners shall have an additional 20 days from the filing of this decision to serve the individual defendants.

D. *Motion to Consolidate*

Defendants also move to consolidate the Berger and Spring Partners actions. New York courts have discretion to grant or to deny a motion for consolidation. (*CPLR § 602[a]*; *Progressive Ins. Co. v. Vasquez 10 AD3d 518, 782 N.Y.S.2d 21 [1st Dep't 2004]*;, motion dismissed *Inspiration Enterprises, Inc. v. Inland Credit Corp., 40 N.Y.2d 1014, 359 N.E.2d 1367, 391 N.Y.S.2d 573 [1976]) [1st Dep't 1976]*. Defendants argue that the two actions share common questions of law and fact and the cases should be consolidated to prevent the waste of judicial resources and avoid inconsistent rulings.

[*9] Berger opposes the motion to consolidate, but would not oppose consolidating the actions for pre-trial purposes. Berger argues that consolidation would be inappropriate because its action asserts claims by current shareholders while the Spring Partners action asserts claims by former shareholders. In addition, Berger argues that jurors would be confused if both actions are decided at the same trial.

Recognizing that both actions will require similar disclosure but may require the determination of somewhat different issues and since all parties agree to consolidation for pre-trial purposes, both cases are consolidated for pre trial reasons. The motion to consolidate the two actions for trial is denied without prejudice to renewal.

For the foregoing reasons, the motion to dismiss is denied in all respects. Therefore, I vacate the stay of discovery in these actions.

Accordingly, it is

ORDERED that the motion to dismiss is held in abeyance with respect to Paul Berger, subject to the submission, within 30 days from the filing of this decision, by defendants of supplementary papers addressing Berger's amended complaint, and it is further

ORDERED that the motion to dismiss is denied with respect to Spring Partners, LLC, and it is further

ORDERED that the motion to consolidate actions bearing Index No. 600935/2005 and Index No. 601004/2005 is granted as to pre-trial matters only, and it is further

ORDERED that Spring Partners have leave to serve process on the individual defendants within 20 days from the filing of this decision, and it is further

ORDERED that the stay of disclosure is vacated.

October 24, 2005

********** Print Completed **********

Time of Request: Wednesday, September 07, 2011 15:29:00 EST

Print Number: 1825:305015116
Number of Lines: 333
Number of Pages:

Send To: GRAY, CHRISTOPHER
CHRISTOPHER J GRAY
460 PARK AVE RM 21
NEW YORK, NY 10022-1825