

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

ROBERT JEAN, et al.,

Plaintiffs,

v.

THE STANLEY WORKS, et al.,

Defendants.

CASE NO. 1:04 CV 01904

JUDGE O'MALLEY
MAGISTRATE JUDGE PERELMAN

**MEMORANDUM IN SUPPORT OF
DEFENDANT AMERICAN EXPRESS COMPANY'S
MOTION TO DISMISS COMPLAINT**

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PRELIMINARY STATEMENT

Defendant American Express Company (“American Express”) respectfully submits this memorandum in support of its motion to dismiss the Complaint as against American Express pursuant Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Nearly all of the allegations and claims for relief in the Complaint are directed at the Mac Tools division (“Mac”) of co-defendant The Stanley Works (“Stanley”). The only claim directed at American Express is for an equitable accounting. Because the Complaint fails to allege any of the required elements for an equitable accounting, the Complaint must be dismissed as against American Express.

The few allegations in the Complaint concerning American Express address certain obligations of Plaintiffs that Mac assigned to American Express Business Finance Corporation (“Amex Business Finance”). As alleged in the Complaint, Amex Business Finance is a wholly owned subsidiary of American Express. Based on the allegations in the Complaint, the entity involved with Stanley and Plaintiffs is Amex Business Finance, not its parent American Express, and thus in accordance with well-settled principles of corporate liability, the Complaint against American Express must be dismissed.

Finally, while the declaratory judgment count of the Complaint states that it is brought against “all defendants,” no allegations are directed at, nor is declaratory relief sought against, American Express. Thus, it does not appear that Plaintiffs actually intended to direct this claim against American Express. In any event, because there is no “actual claim or controversy” between Plaintiffs and American Express alleged in the Complaint, the declaratory judgment claim must be dismissed as against American Express.

PLAINTIFFS' ALLEGATIONS

According to the Complaint, Plaintiffs are “contract distributors and/or employees” of Mac, which is a division of co-defendant Stanley. Complaint at ¶¶ 1 and 12. Plaintiffs “buy tools from Mac” and then in turn “sell them to mechanics at a markup.” Complaint at ¶ 17.

Plaintiffs allege that “Mac recruits new distributors, even though they are doomed to failure at the beginning,” because Mac “realizes more profits when its distributors fail, so long as Mac can replace failed distributor[sic] with a new one.” Complaint at ¶ 20. Going back to activities that occurred in 1993, Plaintiffs contend that “Mac’s business model” for dealing with distributors amounted to “fraud-in-the-inducement.” Complaint at ¶ 21. Much of the Complaint goes on to address Mac’s business model, its evolution over time, and its alleged effect on distributors and employees. See Complaint at ¶¶ 21-107.

The Complaint contains almost no allegations directed towards American Express. No allegations address any actual conduct of American Express. According to the Complaint, “[i]n or about September 2003, Mac assigned to American Express Business Finance Corporation certain obligations of Plaintiffs, Class Representatives and absent class members. Plaintiffs are informed and believe that American Express Business Finance Corporation is a wholly-owned subsidiary of defendant Amex.” Complaint at ¶ 2. Plaintiffs offer no explanation regarding why American Express Company is named as a defendant when, according to the Complaint, the obligations at issue were assigned to a subsidiary.

According to the Complaint, during 2002 the software that Mac used to track balances in accounts relating to distributors was defective, Complaint at ¶ 82, and thus “tainted the amounts Amex claims are owed by plaintiffs on loans assigned to Amex. Because neither

Mac nor Amex can validate the amounts they claim are owed by the distributors, Plaintiffs are bringing a claim for an accounting.” Complaint at ¶ 83. The above are the only factual allegations directed at American Express in the Complaint.

The Complaint identifies certain Plaintiffs as “Class Representatives,” who are seeking certification of a class of “all present and former Mac mobile tool distributors in the United States who were engaged in such activities during the period September 18, 1989 to the present (the ‘Class’).” Complaint at ¶ 108. Moreover, “Class Representatives Michael Brown and Glenn Perkinson bring a class action on behalf of a subclass consisting of all present and former Distributors in the United States whose alleged debt to Mac was assigned by Mac to Amex (the ‘Amex Debt Subclass’).” Complaint at ¶ 109.

The following claims are asserted in the Complaint against Stanley: 1) declaratory judgment challenging alternate dispute resolution (“ADR”) provision in certain distributorship agreements; 2) breach of fiduciary duty; 3) conversion; 4) unjust enrichment; 5) breach of contract; 6) legal or constructive fraud; 7) tortious interference with business relations; 8) equitable accounting; 9) actual fraud and fraud-in-the-inducement; 10) defamation; 11) false imprisonment; and 12) fraudulent concealment.

The Complaint only raises one claim against American Express, which seeks an equitable accounting. Only the equitable accounting claim contains allegations directed at American Express. The claim contains the following allegations:

182. As set forth therein, Mac’s accounting records were incredibly inaccurate.

183. When Mac assigned its loans to members of the Amex Debt Subclass to Amex for collection, the amounts involved were not accurate.

184. Equity requires that Stanley account to Plaintiffs and Class members for the monies and property that Mac held for them and failed to account therefor.

185. Equity requires that Amex provide members of the Amex Debt Subclass with a detailed accounting (including all documents forming the bases therefore) and provide legitimate bases for Amex attempting to collect the loans, and money “owed” from the Amex Debt Subclass members.

That the Complaint only states an equitable accounting claim against American Express is further supported by the claim for relief in the Complaint. American Express is only addressed in a separate claim for relief concerning the Amex Debt Subclass:

WHEREFORE, Class Representatives, Glenn Perkinson and Michael Brown, individually and on behalf of the Amex Debt Subclass further request the following relief:

- a. an accounting from Stanley and Amex as to the bases for any alleged debt, lien, loan, mortgage, or encumbrance, owed to Stanley or Amex;
- b. an order awarding Plaintiffs’ such other and further relief as may be just and proper.

Complaint at p. 58.

However, the caption in the first claim for relief in the Complaint, which concerns declaratory relief regarding the ADR provisions in Mac distributorship agreements, states that it is brought “AGAINST ALL DEFENDANTS.” Complaint at p. 41. Despite that statement in the caption, the declaratory relief claim is not addressed to American Express.

The declaratory relief claim does not contain any allegations directed towards American Express. While the Complaint alleges that “an actual controversy exists between the Declaratory Judgment Plaintiffs and Mac” based on positions each side has taken with the other

regarding the ADR provisions, Complaint at ¶ 126, no such claim is made regarding American Express. There simply is no allegation of an actual controversy with American Express.

Moreover, the declaratory relief claim is brought by numerous named Plaintiffs defined as the “Declaratory Judgment Plaintiffs.” Complaint at ¶ 120. The Declaratory Judgment Plaintiffs allegedly signed “Mac distributorship agreements” with ADR clauses. Complaint at ¶ 122. There are no allegations that the Declaratory Judgment Plaintiffs had their obligations assigned to American Express. Instead, the Complaint defines an Amex Debt Subclass, but the Amex Debt Subclass does not seek the declaratory relief.

In light of the above, despite the reference to “ALL DEFENDANTS” in the caption, the declaratory relief claim cannot rationally be viewed as being directed at American Express.

ARGUMENT

To withstand a Rule 12(b)(6) motion for failure to state a claim upon which relief can be granted, “a complaint must contain either direct or inferential allegations with respect to all the material elements of the claim.” Wittstock v. Mark A. Van Sile, Inc., 330 F.3d 899, 902 (6th Cir. 2003). Moreover, a complaint must contain more than “bare assertions of legal conclusions.” DeLorean Motor Co. v. Weitzman, 991 F.2d 1236, 1240 (6th Cir. 1993). Because the Complaint at issue fails to allege either directly or by inference any of the required elements of an equitable accounting, the Complaint must be dismissed.

I. THE COMPLAINT FAILS TO STATE A CLAIM AGAINST AMERICAN EXPRESS FOR AN EQUITABLE ACCOUNTING

To be entitled to an equitable accounting, courts, including those in Ohio, require a plaintiff to demonstrate four elements: 1) no adequate remedy is available at law; 2) a fiduciary relationship exists between the plaintiff and the party from whom an equitable accounting is sought; 3) plaintiff is, or may become, entitled to property held by the party from whom an equitable accounting is sought; and 4) plaintiff made a prior demand for an accounting upon the defendant and the defendant refused.

A. Plaintiffs Do Not Lack an Adequate Remedy at Law

An equitable accounting “is an extraordinary remedy, and like other equitable remedies, is available only when legal remedies are inadequate.” Bradshaw v. Thompson, 454 F.2d 75, 79 (6th Cir.), cert. denied, 409 U.S. 878, 93 S. Ct. 130 (1972); see also Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478, 82 S. Ct. 894, 900 (1962) (holding that absence of adequate remedy at law is fundamental “prerequisite to the right to maintain a suit for an equitable accounting”). Thus, to maintain such a claim “the plaintiff must be able to show that the ‘accounts between the parties’ are of such a ‘complicated nature’ that only a court of equity can satisfactorily unravel

them.” Dairy Queen, 369 U.S. at 478, 82 S. Ct. at 900 (quoting Kirby v. Lake Shore & Michigan Southern R. Co., 120 U.S. 130, 7 S. Ct. 430, 432 (1887)). The Supreme Court has recognized that it is “a rare case in which” that burden can be met. Id.

Plaintiffs have not alleged that the accounts at issue are so complex that they may only be addressed by a court of equity. To the contrary, to the extent that plaintiffs have any claim at all, it is in law, not equity. In fact, plaintiffs have alleged extensive legal claims, including, among others, conversion, breach of contract, and tortious interference with business relationships, against Stanley. See Complaint at ¶¶ 135-138, 148-170, and 173-180. Each claim seeks damages in amounts to be proven at trial. See Complaint at ¶¶ 138, 170, 180. Thus, through their own Complaint, Plaintiffs admit that they have ample and adequate remedies at law. See Talcott Communications Corp. v. Coles, 1993 WL 50717, *3 (N.D. Ill. Feb. 24, 1993) (holding that where party “is seeking money damages” it thereby “admits that it has an adequate remedy at law precluding the need for an equitable accounting”).

Moreover, the Court should not permit Plaintiffs to use the extraordinary remedy of an equitable accounting as a substitute for the standard discovery procedures provided by the Federal Rules of Civil Procedure. In Bradshaw, the Sixth Circuit affirmed the District Court’s rejection of a request for an equitable accounting where the District Court concluded “that the procedures of the Federal Rules for causes at law were fully adequate to provide the relief sought.” 454 F.2d at 79. The Sixth Circuit reasoned that the “appellant obtained by discovery all information to which he could have been entitled in an accounting.” Id.; see also Complete Bldg. Show Co. v. Albertson, 99 Ohio St. 11, 16, 121 N.E. 817 (1918) (holding that although plaintiff alleged that it did “not know the extent of the claims which defendant has failed to pay,” equitable accounting was not proper because “now that adequate means of obtaining discovery

from parties to actions at law are afforded by our statute, suits for discovery, as previously prosecuted in equity, are no longer necessary, and it is elementary that, where an adequate remedy is afforded at law, equity may not be resorted to”).

Here, the equitable accounting claim seeks from American Express “all documents forming the bases” of loans assigned to Amex Business Finance. See Complaint at ¶ 185. To the extent Plaintiffs have alleged a viable underlying claim, such material can be pursued through discovery afforded by the Federal Rules of Civil Procedure. Accordingly, the equitable accounting claim must be dismissed.

B. No Fiduciary Relationship Exists Between Plaintiffs and American Express

A fiduciary relationship between the plaintiff and the defendant from whom an equitable accounting is sought is a required element of a claim for an equitable accounting. Complete Bldg., 99 Ohio St. at 16, 121 N.E. 817 (“No facts are alleged which would entitle the plaintiff to the equitable action of accounting. The parties did not sustain a fiduciary relation”); Hughes Tool Co. v. Meier, 489 F. Supp. 354, 374 (D. Utah 1977) (“Before an order for an accounting is entered, a plaintiff must show . . . that a fiduciary relationship between the plaintiff and the defendant exists”) (citing Rosenak v. Poller, 290 F.2d 748, 750 (D.C. Cir. 1961)); Zucker v. Katz, 708 F. Supp. 525, 535 (S.D.N.Y. 1989) (reasoning that to state claim for equitable accounting, among other elements, “plaintiff must prove a confidential relationship which induced him to entrust [the defendants] with money or property”) (internal quotation omitted).

Plaintiffs completely fail to allege the existence of a fiduciary relationship with American Express as required for the granting of an equitable accounting. Plaintiffs in fact do

not allege any relationship with American Express, other than certain obligations of Plaintiffs being transferred by Mac to American Express. As a result, the claim must be dismissed.

C. American Express Does Not Hold Any Money or Property to Which Plaintiffs are or may Become Entitled

To state a claim for an equitable accounting, the plaintiff must demonstrate that it is or may become entitled to money or property that has come into the defendant's hands. Hughes Tool, 489 F. Supp. at 374 (“Before an order for an accounting is entered, a plaintiff must show . . . that plaintiff is or may become entitled to the money or property of the plaintiff that has come into the defendant's hands.”) (citing Rosenak, 290 F.2d at 750).

Plaintiffs do not allege that American Express is holding, or ever held, any money or property of Plaintiffs. As a result, the claim must be dismissed.

D. Plaintiffs Never Made a Prior Demand Upon American Express for an Accounting

Before a claim for an equitable accounting may be brought, the plaintiff must have demanded an accounting, which the defendant in turn rejected. Lee Way Holding Co. v. Banner Indus., Inc., 118 B.R. 544, 553. (Bankr. S.D. Ohio 1990) (holding that “a prior demand by the plaintiff for an accounting and a refusal by the defendant to account is a prerequisite to bring an action for an accounting. The plaintiff must allege such prior demand in his pleading.”) (citing Keller Research Corp. v. Roquerre, 99 F. Supp. 964 (S.D. Cal. 1951)).

Because Plaintiffs did not allege a prior demand for an accounting in their Complaint, the claim must be dismissed.

II. THE COMPLAINT MUST BE DISMISSED BECAUSE PLAINTIFFS HAVE NAMED THE WRONG AMERICAN EXPRESS ENTITY

According to the Complaint, “[i]n or about September 2003, Mac assigned to American Express Business Finance Corporation certain obligations of Plaintiffs, Class Representatives and absent class members. Plaintiffs are informed and believe that American Express Business Finance Corporation is a wholly-owned subsidiary of defendant Amex.” Complaint at ¶ 2. Consistent with this allegation, the only connection American Express has with the various matters raised in the Complaint is its status as the parent of its wholly owned subsidiary, Amex Business Finance.

It is a universally recognized and well-settled principle that the “separate corporate entities of a parent and subsidiary corporation will not be disregarded and the parent will not be held liable for the acts and obligations of its subsidiary corporation, notwithstanding the fact that the latter was controlled by the parent.” Belvedere Condo. Unit Owners’ Ass’n v. R.E. Roark Cos., 67 Ohio St. 3d 274, 287, 617 N.E.2d 1075, 1085 (1993) (emphasis added) (quoting North v. Higbee Co., 131 Ohio St. 507, 3 N.E. 391 (1936), cert. denied, 300 U.S. 655, 57 S. Ct. 432 (1937)). While in certain extraordinary circumstances the above principle may be disregarded and the corporate veil pierced, Plaintiffs make no such allegations. The Complaint seeks to hold American Express responsible for the obligations of Amex Business Finance based solely on the parent-subsidary relationship. As the above principle makes clear, such an effort fails as a matter of law and the Complaint must be dismissed as against American Express.

While Plaintiffs offer no explanation for their decision in naming American Express, not Amex Business Finance, as a defendant, the decision has significance beyond the above analysis. As alleged in the Complaint, American Express is a New York corporation

having its principal place of business in New York. Complaint at ¶ 2. Amex Business Finance, however, is a Utah corporation having its principal place of business in Texas. Plaintiffs alleged diversity of citizenship as a basis for jurisdiction. Complaint at ¶ 8. As there are several Plaintiffs domiciled in Texas and Utah, there would be no diversity jurisdiction if Plaintiffs named Amex Business Finance as a defendant. See Keller v. Honeywell Protective Services, 742 F. Supp. 425, 428 (N.D. Ohio 1990) (stating in context of diversity jurisdiction that “[t]he general rule is that a subsidiary corporation has its own ‘citizenship’ different from the parent corporation”).

Plaintiffs also alleged federal question jurisdiction pursuant to the Federal Arbitration Act. Complaint at ¶ 7. This allegation as a legal matter is completely without merit. See American Federation of Television & Radio Artists v. WJBK-TV (New World Communications of Detroit, Inc.), 164 F.3d 1004, 1007 (6th Cir. 1999) (holding that “it is well established that the Federal Arbitration Act does not create any independent federal question jurisdiction”) (citing Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32, 103 S. Ct. 927 n.32 (1983) (same))

Accordingly, had Plaintiffs named Amex Business Finance as a defendant, there would have been subject matter jurisdiction. For the reasons set forth above, Plaintiffs cannot avoid this jurisdictional pitfall by naming the parent corporation of Amex Business Finance. As a result, the Complaint against American Express must be dismissed.

III. THE COMPLAINT FAILS TO STATE A CLAIM AGAINST AMERICAN EXPRESS FOR A DECLARATORY JUDGMENT

While the caption in the claim for a declaratory judgment regarding the ADR provisions in Mac distributorship agreements states that it is brought “AGAINST ALL DEFENDANTS,” Complaint at page 41, no allegations are directed towards American Express. While the Complaint alleges that “an actual controversy exists between the Declaratory Judgment Plaintiffs and Mac” based on positions each side has taken with the other regarding the ADR provisions, Complaint at ¶ 126, no such claim is made regarding American Express.

Moreover, the declaratory relief claim is brought by numerous named Plaintiffs defined as the “Declaratory Judgment Plaintiffs,” Complaint at ¶ 120, but there are no allegations that the Declaratory Judgment Plaintiffs had their obligations assigned to American Express. Instead, the Complaint defines an Amex Debt Subclass, but the Amex Debt Subclass does not seek the declaratory relief. In light of the above, despite the reference to “ALL DEFENDANTS” in the caption, the declaratory relief claim cannot rationally be viewed as being directed at American Express, and the claim should be dismissed as to American Express.

In any event, the Declaratory Judgment Act only provides a remedy in “a case of actual controversy.” 28 U.S.C. 2201(a). See also Cardinal Chemical Co. v. Morton Int’l, Inc., 508 U.S. 83, 95, 113 S. Ct. 1967, 1974 (1993) (holding that “of course, a party seeking a declaratory judgment has the burden of establishing the existence of an actual case or controversy”). Moreover, the “case or controversy” jurisdictional requirement of Article III of the Constitution applies to declaratory judgment actions. See Kelly v. E.I. DuPont de Nemours & Co., 17 F.3d 836, 844 (6th Cir. 1994) (holding that “Congress cannot create a right of action where no case or controversy otherwise exists”). It is thus well settled that “[c]ourts should not render decisions absent a genuine need to resolve a real dispute.” Brown v. Ferro Corp., 763

F.2d 798, 801 (6th Cir.) (quoting C. Wright, A. Miller & E. Cooper, 13A Federal Practice & Procedure § 3532.1, at p. 114 (2d ed. 1984)), cert. denied, 474 U.S. 947, 106 S. Ct. 344 (1985).

Consistent with the above principles, to the extent the Court determines that the claim for declaratory relief is actually directed towards American Express, it should be dismissed. The Complaint fails to allege any actual controversy between the Plaintiffs and American Express.

Moreover, a “request for declaratory judgment must accompany the substantive claim for which the declaratory judgment is sought.” Days Inn Worldwide, Inc. v. Sai Baba, Inc., 300 F. Supp. 2d 583, 592-93 (N.D. Ohio 2004) (dismissing pursuant to Rule 12(b)(6) claim seeking declaration that agreement was void because of failure “to link the[] request for declaratory judgment to an underlying substantive claim”) (citing International Ass’n of Machinists & Aerospace Workers v. Tennessee Valley Auth., 108 F.3d 658, 668 (6th Cir. 1997) (“a declaratory judgment is a procedural device used to vindicate substantive rights”)). As no underlying substantive claim has been asserted against American Express herein, the declaratory judgment claim must be dismissed.

CONCLUSION

For the reasons set forth above, Defendant American Express requests that the Court dismiss the Complaint in its entirety as against American Express, award costs, and grant whatever further relief the Court deems just.

Respectfully submitted,

s/ David A. Wallace

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