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DOCKET NO.: CV-01-0450989-S	:	SUPERIOR COURT
NEATO, LLC	:	JUDICIAL DISTRICT OF NEW HAVEN
v.	:	AT NEW HAVEN
SOUNDVIEW PARTNERS	:	November 23, 2001

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

Defendant Soundview Partners ("Soundview") respectfully requests that the court dismiss the above-captioned action for declaratory judgment on the ground that plaintiff Neato, LLC has failed to comply with the requirements of Connecticut Practice Book § 17-56(b) in that it has failed to (1) certify that it has joined or given notice to all persons with interest in the subject matter; (2) identify the nature of the interest of the individuals whom it certified that it did provide notice to; and (3) join parties whose interest is direct, immediate and adverse to the interest of the defendant.

STATEMENT OF FACTS

On October 13, 2000, the parties entered a Letter Agreement pursuant to which the parties agreed to negotiate in good faith to reach a "definite agreement" for Soundview to purchase Neato ("the Agreement"). Complaint, Exhibit A. The Agreement was subject to a right of first refusal by Neato's distributor, Fellowes, Inc. ("Fellowes"). The Agreement provided that, "[i]f Fellowes exercises their right to purchase Neato within 50 days from the date of notification, Neato will pay SP a breakup fee of $500,000. Id., p.3.

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The parties amended the Agreement on February 12, 2001 ("the Amended Agreement") to extend the deadline for reaching a "definite Agreement" to March 14, 2001. Id., Exhibit B. The Amended Agreement renewed the 50 day period of Fellowes' right of First Refusal, required Soundview to pay a $50,000 good faith deposit, and provided that the deposit would not be refundable unless, among other things, Neato refused to consumate the transction or breached the Agreement. Id., p.2, ¶ 6. The Amended Agreement also provided, however, that "[n]otwithstanding the foregoing, in the event that Fellowes purchases Neato upon exercising their right of first refusal, Neato will refund the Initial Deposit . . . to Soundview plus pay Soundview the break-up fee of $500,000." Id., p.2, ¶ 6. On April 2, 2000, Fellowes exercised its right, and offered to purchase Neato. See Affidavit of Peter Fellowes, dated October 9, 2001, attached hereto as Exhibit 1, ¶ 7. The parties struck a basic deal on April 3, 2001. Id.

On April 29, 2001, Neato filed the above-captioned action, seeking a judgment that Soundview breached the Agreement; that Neato did not breach the Agreement; and that Neato is thereby entitled to retain Soundview's $50,000 good faith deposit. Complaint, prayer for relief. Pursuant to the Amended Agreement, Soundview is entitled to a return of the $50,000 deposit if the court determines that Neato was responsible for the parties' failure to consummate the agreement. Complaint, Exhibit B, ¶ 6. However, Soundview is also entitled to a return of the deposit, in addition to the $500,000 "break-up fee" in the event that the court determines that Fellowes purchased Neato upon exercising its right of first refusal. Id.

On September 24, 2001, Soundview initiated action in New York against Neato and Fellowes, among others, based on Neato's breach of the parties' contract, and sought

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an injunction to preclude the sale of Neato's business to Fellowes. However, unbeknownst to Soundview, by September 7, 2001, Fellowes had already purchased a "substantial amount" of Neato's assets. Exhibit 1, ¶ 8. Fellowes had subsequently integrated Neato•s distribution facilities and banking and financial management with its own, and put those Neato employees whom Fellowes retained on Fellowes• payroll. Exhibit 1, •9. In opposition to the injunction, Neato represented that •...the only assets of Neato essentially consist of cash and receivables. These assets have already been earmarked for payment of severance benefits, payment of legal fees in connection with patent litigation that is pending in Europe, and certain other liabilities.• See, Affidavit of Patricia Cecchi, •61, attached hereto as Exhibit 2. Accordingly, on October 11, 2001, the New York court denied Soundview's application for an injunction, noting that Neato has been sold a month earlier. See _____, attached hereto as Exhibit 3.

As the facts set forth above reveal, there are a number of individuals, including Fellowes, who have a direct interest in the subject matter of the requested declaratory judgment whom Neato has not certified that it has provided notice to and who have not been made parties to this action, as required by Practice Book 17-56.

ARGUMENT

A. STANDARD FOR DISMISSING DECLARATORY JUDGMENT ACTION

Practice Book § 17-56 establishes the procedures for seeking a declaratory judgment. Subsection (b) provides that "all persons who have an interest in the subject matter of the requested declaratory judgment that is direct, immediate and adverse to the interest of one or more of the plaintiffs or defendants in the action shall be made parties to the action or shall be given reasonable notice thereof." Practice Book § 17-56(b).

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"[W]hen the persons having a direct interest in the subject matter of a declaratory judgment action are reasonably within the reach of process and are not so numerous that it would impose an unreasonable burden upon the plaintiff they should be made parties." Napoletano v. CIGNA Healthcare of Connecticut, Inc., 238 Conn. 216, 228, n.12, 680 A.2d 127 (1996). "Moreover, the notice requirement of § 309(d) [now § 17-56(b)] is not limited to adverse parties. . . . Anyone with an interest in the subject matter is entitled to reasonable notice and an opportunity to be heard, whether he [or she] supports the [plaintiff's] or the [defendant's] position. . . ." Cavalli v. McMahon, 174 Conn. 212, 384 A.2d 374 (1978).

Although Section 17-56(b) provides that a challenge to compliance with the notice requirements must be made by motion to strike, a party may raise the failure to provide notice after answering the complaint and by a motion to dismiss. 37 Huntington Street H, LLC v. Hartford, 62 Conn.App.586, 591-592, 772 A.2d 663 (2001), citing, Napoletano, supra.

A. NEATO HAS FAILED TO JOIN PARTIES WHOSE INTEREST IS DIRECT, IMMEDIATE AND ADVERSE

Practice Book § 17-56 requires that a party seeking a declaratory judgment not only give notice to, but actually join, parties with an interest in the subject matter of the action where their number is limited and their interest is direct, immediate and adverse to any of the parties. Napoletano, supra; Connecticut Ins. Guaranty Assoc. v. Raymark Corp., 215 Conn. 224, 575 A.2d 693 (1990); Clough v. Wilson, 170 Conn. 548, 555, 368 A.2d 231 (1976). In this case, there are a limited number of individuals or entities who have such an interest and, accordingly, must be joined: plaintiff's successor in interest,

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Fellowes, as well as the individuals whom Neato has represented have a claim to all of its remaining assets, namely those allegedly entitled to severance benefits, payment of legal fees in connection with patent litigation that is pending in Europe, and "certain other liabilities." Exhibit 2, hereto.

First, Fellowes has a palpable interest that is direct, immediate, and adverse to defendant's because, to the extent that defendant prevails in the action, Fellowes may be subject to a substantial liability as the successor in interest of Neato. Pastornick v. Lyn-Lad Truck Racks, 1999 Conn.Super.LEXIS 2083 (August 3, 1999) (Sullivan, J.); Sullivan v. A.W. Flint Co., 1996 Conn.Super.LEXIS 2060 (August 5, 1996); Water Pollution Control Auth. v. Comm'r of Labor, 1992 Conn.Super.LEXIS 2410 (August 4, 1992) (Lewis, J.)

Second, the individuals that Neato identified in its affidavit in opposition to the New York injunction have an interest that is direct, immediate and adverse to defendant's interest because they apparently have a claim to some of the very same assets which are at stake in this litigation. Exhibit 2, hereto; See e.g. Raymark, 215 Conn. at 228. In Raymark, the Court held that individuals with a claim to insurance proceeds were "interested parties" in an action that would affect the distribution of those proceeds. Similarly, in this case, those with a claim to Neato's limited remaining assets have a direct interest in this action, which would determine not only whether $50,000 of those assets belongs to defendant rather than Neato, but whether defendant is entitled to an additional $500,000 "break-up" fee.

B. NEATO'S CERTIFICATE OF NOTICE IS DEFICIENT

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Dismissal is also appropriate because Neato's "Certificate of Notice Pursuant to Connecticut Practice Book § 17-56(b)" is deficient. First, even assuming *arguendo* that Neato was not obligated to join Fellowes and the other individuals with a claim to its assets to whom it referred in its affidavit, Section17-56(b) required, at minimum, that Neato provide those entities and individuals with notice of the action. Neato failed to certify that it gave notice to either Fellowes or the other individuals. Exhibit 2; Neato's "Certificate of Notice Pursuant to Connecticut Practice Book § 17-56(b)." Second, Neato failed to identify the "nature of the[] interest" of the individuals to whom it certified that it did provide notice. Id.

CONCLUSION

For the foregoing reasons, defendant respectfully requests that the Court dismiss the above-captioned action.

C. NEATO HAS FAILED TO IDENTIFY THE NATURE OF THE INTEREST OF THE INDIVIDUALS WHOM IT CERTIFIED IT DID PROVIDE NOTICE TO.