

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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ON 3-6 2004
WESTCHESTER
COUNTY CLERK

**SUPREME COURT OF THE STATE OF NEW YORK
COMMERCIAL DIVISION, WESTCHESTER COUNTY**

Present: **HON. KENNETH W. RUDOLPH**
Justice.

-----X
FANO HOLDINGS INC.,
and FANO SECURITIES LLC,

Plaintiffs, : Index No. 377/04
Motion Date: 3/19/04

-against-

DAVID P. STAUDINGER,

Defendant, :
-----X

DECISION

The following papers numbered 1 to 11 were read on this motion by the defendant for an order pursuant to CPLR 3211 (a)(4) dismissing this action on the grounds that there is a prior pending action between the parties or, alternatively, for an order staying this action pending arbitration.

	<u>PAPERS NUMBERED</u>
Notice of Motion/Affidavits	1-2
Memorandum of Law	8
Answering Memorandum of Law	9
Replying Memorandum of Law	10
Pleadings/Exhibits/Stipulations/Minutes	3-7; 11

Upon the foregoing papers, it is ORDERED that this motion is denied.

The plaintiff, Fano Holdings Inc. (hereinafter Fano Holdings), is a company organized and existing under the laws of the State of Connecticut. It owns 97.7 % of the plaintiff, Fano Securities LLC (hereinafter Fano Securities). Fano Securities, a Connecticut limited liability company, is a securities broker-dealer which trades securities for institutional clients. The defendant,

David P. Staudinger, is an officer and managing director of Fano Holdings and he is a member of the managing board of Fano Securities.

The present action for, among other things, breach of fiduciary duty and breach of contract was commenced on January 8, 2004. In the complaint it is alleged that in 1997 a shareholders agreement was entered into among all the shareholders of Fano Holdings including Staudinger. The agreement contained a non-competition clause. Staudinger resigned from Fano Holdings on April 14, 2003. Prior to his resignation, Staudinger entered into an agreement with a competing firm whereby he agreed to transfer a large portion of Fano Securities' clients to it. Before leaving he also solicited other Fano Securities employees to depart with him and he copied documents containing client information. In this action the plaintiffs seek to enjoin Staudinger from competing with them and for monetary damages against him.

In August, 2003, Staudinger had commenced an action in the Superior Court of Connecticut against Fano Holdings, Stephen Garrow (the majority shareholder of Fano Holdings), and Abed Mansoor (one of three owners of stock in Fano Holdings, together with Garrow and Staudinger). In that action, Staudinger asserted that Garrow breached his fiduciary duty to him, to Fano Holdings and to Fano Securities by mismanaging the businesses and wasting assets. He asserted that as a result of Garrow's actions he was forced out of the business in April, 2003. He sought the appointment of a receiver to examine the books and records of Fano Holdings and Fano Securities, a dissolution of Fano Holdings, and monetary damages against Garrow.

Staudinger is currently moving for an order dismissing the New York action insofar as there is a prior, pending action in Connecticut between the same parties arising out of the same cause of action. Alternatively, this action should be stayed because the parties agreed to arbitrate the claims asserted in the present complaint.

The plaintiffs herein note that this action should not be dismissed. They note that the Connecticut action by Staudinger is against not only Fano Holdings but also Garrow and Mansoor, parties who are not present in this action. Fano Securities, although a plaintiff in this action, is not named in the Connecticut action. The plaintiffs assert that the claims in the two cases are completely separate. Additionally, the plaintiffs assert that the action should not be stayed insofar as Fano Holdings is not a member of the National Association of Security Dealers (NASD) and cannot be compelled to arbitrate.

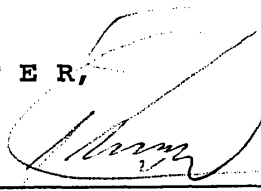
CPLR 3211 (a) (4) authorizes the dismissal of one action on the ground of the pendency of another action involving substantially the same parties (see, Proietto v Donohue, 189 Ad2d 807; JC Mfg., Inc., v NPI Elec., Inc., 178 AD2d 505; Case Capital. Corp. v Morgan Inv, Inc., 154 AD2d 501) and the same causes of action. Although the same subject matter is the basis for both of these actions, there are different claims asserted, the nature of the relief sought is not the same or substantially the same (see, Kent Dev. Co. Inc. v Liccione, 37 NY2d 899; Zirmak Inv., L.P., v Miller, 290 AD2d 552; Equestrian Assocs. v Freidus, 192 AD2d 572) and the plaintiffs herein have not asserted a counterclaim in the Connecticut action (see, Kent Dev. Co. Inc., supra; Brown v Gallaudet, 80 NY 413; Tarbell v Howard, 162 Misc. 606). The defendant's assertion that this action should be stayed because the parties agreed to arbitrate is also without merit. Although Staudinger and Fano Securites are members of the National Association of Securities Dealers, Inc. (NASD) and can be compelled to arbitrate, Fano Holdings is not a member of NASD. In this action, the main issue deals with the non-competition clause in the Fano Holdings shareholders' agreement and Fano Securities' claims are secondary to its' parent's fiduciary and contractual claims against Staudinger.

Accordingly, the defendant's motion is denied in its entirety.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
May 5, 2004

ENTER,



HON. KENNETH W. RUDOLPH
Justice of the Supreme Court

TO:

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