Kimelstein v Kimelstein
2011 NY Slip Op 32949(U)
October 26, 2011
Sup Ct, Suffolk County
Docket Number: 5917/2008
Judge: Emily Pines
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SHORT FORM ORDER

Index Number: 5917-2008

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

Present: **HON. EMILY PINES**
J. S. C.

Original Motion Date: 08-30-2011
Motion Submit Date: 08-30-2011
Motion Sequence No's.: 008 MOTD

[ ] FINAL
[X] NON - FINAL

_____x

LARRY KIMELSTEIN,

Plaintiff,

-against-

JEFFREY KIMELSTEIN and
L & J REALTY, LTD and
THE VAN DEPOT, INC.,

Defendants.
_____x

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Defendants, Jeffrey Kimelstein, L & J Realty, Ltd., and the Van Depot, Inc., ("Jeffrey Kimelstein Defendants") move , by Notice of Motion (motion sequence # 008) for an Order dismissing the Plaintiff's Second Amended Verified Complaint pursuant to CPLR §§ 3211 (a) (1) and (7). Plaintiff, Larry Kimelstein, pro-se, opposes the motion.

Essentially, Plaintiff has alleged that he and Jeffrey Kimelstein as brothers and co-owners of the two Defendant corporations have worked side by side, until Plaintiff left the business based on Jeffery Kimelstein's promise to pay $350,000; that Plaintiff justifiably relied on such promise to his financial detriment. This Court dismissed Plaintiff's causes of action for breach of contract and specific performance, in its Decision and Order of February 24, 2010 based on the statute of frauds, GOL §§5-703

(1) and (2). In that same Decision, the Court denied the motion to dismiss Plaintiff's equitable cause of action to impose a constructive trust and permitted an amendment of Plaintiff's complaint to add a cause of action for unjust enrichment, both of which carried essentially the same required showings. In the same Decision, the Court permitted Plaintiff to add to an amended complaint, a cause of action against the individual Defendant only for breach of a fiduciary duty toward his brother as well as a cause of action for dissolution under BCL § 1104-a and "(t)he concomitant cause of action for an accounting". The Court dismissed the existing cause of action for fraud.

This is the third in a series of motions in which the Defendants seek to dismiss the Plaintiff's various causes of actions, often accompanied by the Plaintiff seeking to amend his complaint. Each time the complaint is amended, it appears to give rise to anther flurry of motions. However, in whatever form the proceeding may take, it is a dispute between brothers concerning the extent of their business relationship and what, if anything the Defendant's brother and the two corporate Defendants, in which Plaintiff claims ownership, owe the Plaintiff for his investment in time and sweat equity, following Plaintiff's departure from what may or may not constitute a closely held family business. The constant amendment of the Complaint as well as the successive motions pursuant to CPLR § 3211 (a) are not helpful to either of the litigants nor to a final disposition of this matter, one way or another. The Court will address the merits of the current set of motions briefly.

The Jeffrey Kimelstein Defendants seeks to dismiss the following causes of action brought by Plaintiff: 1) the newly alleged causes of action for breach of fiduciary duty and an accounting, as such must be brought as derivative claims and Plaintiff has brought them in his individual capacity; 2) the cause of action for dissolution, as Plaintiff lacks standing, since all the documentary evidence and filings demonstrate that only Defendant, Jeffrey Kimelstein, is a shareholder of Van Depot and L&J; and 3) the

equitable causes of action for unjust enrichment and to impose a constructive trust , since the documentary evidence demonstrates that Jeffrey Kimelstein never transferred his sole interest in the Defendant corporations to his brother, Plaintiff Larry Kimelstein.

Plaintiff opposes the motion setting forth that documentary evidence exists contradicting the Defendants' documentary offerings. This is in the form of a check signed by the individual Defendant, setting forth expressly that it was to be applied to the balance owed by the Defendants to the Plaintiff, in order to purchase his interest in the Van Depot, Inc. In addition, Plaintiff sets forth listings of check numbers and dates of payments after that initial check which he states constitute actual payments by Defendants to the Plaintiff for his share of the business. In addition, in opposition to Defendants' current motion, Plaintiff sets forth the affidavits of eight separate individuals, including a wholesale automobile dealer, familiar with the subject business; other family members, such as Larry Kimelstein's ex-wife and a man who dropped off Larry Kimelstein's two sons at the Van Depot for visitation with their father; the owner of a similar business who has worked in the same area as the Plaintiff in such business for over thirty years; a seller of internet advertising for the Van Depot, Inc.; a truck manager for Huntington Chevrolet who used the Van Depot, Inc. to help value his used trucks; a colleague in the same industry from Syosset, who spent two months rehabilitating the Van Depot., Inc., and property owned by Defendant L&J, Ltd.; and a former employee of the Van Depot, Inc., from 2000 through 2007. Each of these persons signed sworn affidavits to the effect that Defendant Jeffrey Kimelstein held Larry Kimelstein out to them as his equal partner in the family business.

Defendants reply that the affidavits set forth are conclusory and are not sufficient to overcome the documents filed by Jeffrey Kimelstein with the Secretary of State, nor the 2001 corporate tax returns.

In considering a motion to dismiss a complaint pursuant to CPLR § 3211 (a)(7), the Court must afford the pleading a liberal construction, accept all the allegations of the complaint as true, and provide the Plaintiff with every possible favorable inference. AG Capital Funding Partners, L P v State Bank & Trust Co, 5 NY 3d 582, 808 NYS 2d 573, 842 NE 2d 471 (2005), Peckler v Health Insurance Plan of Greater New York, 67 AD 3d 758, 888 NYS 2d 196 (2d Dep't 2009). In making this determination, the Court should "(d)etermine only whether the facts, as alleged, fit within any cognizable legal theory". Leon v Martinez, 84 NY 2d 83, 614 NYS 2d 9672, 638 NE 2d 511 (1994). Dismissal sought upon documentary evidence under CPLR § 3211 (a) (1)will only be granted in those instances where the documents presented establish a defense to the claims presented as a matter of law. Leon v Martinez, **supra**; Leibowitz v Impressive Homes, Inc, 43 AD 3d 1003, 843 NYS 2d 120 (2d Dep't 2007).

With regard to Plaintiff's causes of action in equity, i.e., those to impose a constructive trust and for unjust enrichment, Plaintiff has set forth that the Defendants received valuable benefits, including his contributions over the years to the corporate entities and toward the purchase of the real property on which its located; that Plaintiff relied on the same and is justified in doing so to his own detriment. See, State v International Recovery Corp, 56 AD 3d 848, 866 NYS 2d 823 (3d Dep't 2008). Interestingly, the Court already denied a prior motion to dismiss the cause of action to impose a constructive trust, explained why it was akin to that for unjust enrichment and does not appreciate the current motion, to the extent that it reiterates identical arguments. The Plaintiff is warned that the next time this occurs, if at all, it intends to hear why sanctions should not be imposed upon Plaintiff pursuant to 22 NYCRR § 130-1.1. Defendant is also warned that no further requests at this very late

stage will be granted by the Court to amend the Plaintiff's complaint.

The Court, however, agrees with Plaintiff that the causes of action for breach of fiduciary duty and a formal accounting are both to be brought as derivative claims, that Plaintiff has failed to do so and they are, accordingly, dismissed. See Wolf v Rand, 258 AD 2d 401, 685 NYS 2d 708 (1st Dep't 1999). The cause of action for a BCL § 1104-a is not dismissed because, as Plaintiff sets forth, there exists documentary evidence presented on both sides of this issue. While Plaintiff is correct that if such is proved, none of the equitable claims may proceed, Plaintiff is entitled to attempt to prove these claims in the alternative. Thus, the motion to dismiss the cause of action for dissolution is denied. The Court notes that with respect to the cause of action for an accounting, that although the same may not be brought for a formal accounting except in derivative form, that the Court is empowered, should it find that Plaintiff has standing and proves oppression, to order a less drastic remedy than dissolution, such as an accounting. See, Kemp v Beatley, 64 NY 2d 63, 484 NYS 2d 799, 473 NE 2d 1173 (1984). Thus, while the cause of action may not be sought herein as a separate cause of action, it may be treated as the Court already suggested in its February 2010 Decision and Order as "the concomitant action for an accounting".

This is one of the Court's oldest cases; it is time it went to trial.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: October 26, 2011
Riverhead, New York

EMILY PINES
J. S. C.