

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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BUFFALO FERMENTATION INC.,  
JEFFREY EMPRIC, and HEATHER LUCAS,

Plaintiffs,

vs.  
Bench Memorandum Decision

TODD SALANSKY,

Index #: 812478/2019

Defendants.

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TODD SALANSKY, individually and  
derivatively on behalf of BUFFALO  
FERMENTATION INC.,

Plaintiffs,

vs.  
Index #: 814865/2019

JEFFREY EMPRIC,  
HEATHER LUCAS, and  
BUFFALO FERMENTATION INC.,

Defendants.

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There are three motions before the Court. With respect to index number 812478/2019, Defendant Salansky has moved to dismiss the complaint filed by Buffalo Fermentation, Heather Lucas, and Jeffrey Empric. Also, the second

motion is made by Plaintiff Buffalo Fermentation, Heather Lucas and Jeffrey Empiric, who cross-move seeking to amend their complaint against Defendant Salansky. With respect to index number 814865/2019, Defendant Empric, Lucas and Buffalo Fermentation have moved to dismiss the complaint filed by Plaintiff.

While somewhat in dispute, the facts in both actions are quite similar. The parties to this action were shareholders in Buffalo Fermentation Inc., a kombucha brewery. Kombucha, while a non-alcoholic beverage, generates an alcoholic by-product that had previously been drained and discarded. It had been suggested that the alcoholic product could be drained and sold. In order to do so, a license was needed. It is alleged that Salansky purposefully refused to complete his license application. Empric, Lucas and Buffalo Fermentation allege that Salansky, who had been terminated from the company, withhold his application in order to gain leverage in order to secure a higher market price for his shares. In doing so, Empric, Lucas and Buffalo Fermentation maintained that Salansky breached his fiduciary obligation. Salansky contests these allegations, insisting that Empric and Lucas have no standing and that they may not assert individual and derivative damages. Further, Salansky insists that Plaintiff's suit fails to comply with the Business Corporation Law. Salansky filed his own action wherein he alleges that Empric, Lucas and Buffalo Fermentation improperly terminated his employment and in doing so breached their fiduciary duties, an employment agreement, and in the process, unjustly enriched themselves.

All the moving papers attached the applicable complaints and each cause of action need not be repeated, as the issues before the court require a legal analysis.

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), "[w]e accept the facts as alleged in the complaint as true, accord plaintiff[ ] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Leon v. Martinez, 84 N.Y.2d 83 (1994). "At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration." Simkin v. Blank, 19 N.Y.3d 46 (2012). Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery. Basis Yield Alpha Fund [Master] v. Goldman Sachs Group, Inc., 115 A.D.3d 128 (1st Dept 2014). "(T)he CPLR 3211 [a] [7] motion is useful in disposing of actions . . . in which the plaintiff has identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action". Connaughton v. Chipotle Mexican Grill, Inc., 29 N.Y.3d 137, 141-142 (2017).

In Buffalo Fermentation Inc., Empric and Lucas complaint, Plaintiff's allege a breach of fiduciary duty and prima facie tort. "To state a claim for breach of fiduciary duty, a plaintiff must allege that the defendant owed him [or

her] a fiduciary duty, that the defendant committed misconduct, and that the plaintiff suffered damages caused by that misconduct." Cohen & Lombardo, P.C. v Connors, 169 A.D.3d 1399 (4<sup>th</sup> Dep't 2019). A cause of action for *prima facie* tort consists of four elements: (1) intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be lawful. Curiano v. Suozzi, 63 N.Y.2d 113, 117 (1984). It is noteworthy that in the 812478 index number, Plaintiff seeks to amend its complaint, more specifically its second cause of action, to address the first element.

In the second action, Plaintiff Salansky alleges a breach of a fiduciary duty, unjust enrichment, breach of a shareholder agreement, and breach of employment agreement. While the fiduciary cause of action has already been addressed, "The elements of an unjust enrichment cause of action are that (1) the defendant was enriched; (2) the enrichment was at the expense of the plaintiff; and (3) it would be inequitable to allow the defendant to retain that which is claimed by the plaintiff." Onewest Bank, FSB v. Spencer, 145 A.D.3d 1488 (4<sup>th</sup> Dep't 2016). "Unjust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff. Typical cases are those in which the defendant, though guilty of no

wrongdoing, has received money to which he or she is not entitled... [it] is not available where it simply duplicates or replaces a conventional contract or tort claim." Corsello v. Verizon New York Inc. 18 NY 3d 777 (2012). To sustain the causes of action for breach of the shareholders and employment contracts, Plaintiff must demonstrate the applicable parties, the existence of the agreement, performance under the terms, a breach and damages.

Turning first to Plaintiff's cross-motion in the initial action, in asking for leave to amend its complaint, Generally, "[l]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit' and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court; Anderson v. Nottingham Vil. Homeowner's Assn., Inc., 37 A.D.3d 1195 (4<sup>th</sup> Dept. 2007); Edenwald Contr. Co. v. City of New York, 60 NY2d 957, 959, 459 NE2d 164, 471 NYS2d 55 [1983]; see also CPLR 3025 [b]). The Court agrees with Plaintiff that the Defendants would indeed suffer no prejudice in amending the complaint in what is otherwise technical and not substantive. As such, the Plaintiff's cross-motion is hereby GRANTED.

The essence of Defendants motion to dismiss in action #1 is that the causes of action can not be both individually and derivatively pled and that each fail to state a cause of action and show that one exists. Again, the Court is restricted in weighing the competing motions to dismiss and accept the facts as alleged in

the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. A motion pursuant to CPLR 3211 (a) (7) will be granted if the plaintiff does not have a cause of action.

With respect to the derivative and individual arguments made, the Court of Appeals has repeatedly stated that claims are derivative in nature where: "[t]he remedy sought is for wrong done to the corporation; the primary cause of action belongs to the corporation; recovery must enure to the benefit of the corporation." Billings v. Bridgepoint Partners, LLC, 21 Misc. 3d 535 quoting Isaac v. Marcus, 258 NY 257 (1932); Tzolis v. Wolff, 10 N.Y.3d 10 (2008); Marx v. Akers, 88 N.Y.2d 189 (1996). The parties acknowledge that the determination of whether a claim is direct or derivative turns on who was harmed first, the member or the entity. Where a member is harmed independent of the entity or is the only member harmed, the claim is direct. Interestingly, Salansky in his motion to dismiss and Buffalo Fermentation, Empric, and Lucas both argue against and defend their causes of action brought individually and derivatively. "A derivative action proceeds not on the basis of any individual right, but as an assertion of the interest of the entity by one or more of its owners or members when the management of the entity fails to act to protect that interest." Caprer v. Nussbaum, 36 A.D.3d 176 (2<sup>nd</sup> Dept. 2006). It allows the shareholder to "protect his or her interest by asserting the cause of action on the corporation's behalf."

The Court finds no basis to dismiss based on what has been alleged by each Plaintiff in both actions. Finding the remaining contentions raised by each moving party, the Court finds that the Plaintiff in Action #1 and Action #2 have stated a cognizable claim and a cause of action. As such, the motions to Dismiss are hereby DENIED.

Buffalo Fermentation, Empric and Lucas shall submit an Order together with a transcript of this decision on notice.