

Pharma Consult, Inc. v Nutrition Tech. L.L.C.
2007 NY Slip Op 30973(U)
May 1, 2007
Supreme Court, New York County
Docket Number: 0_30060/1233
Judge: Karla Moskowitz
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ
Justice

PART 03

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PHARMA CONSULT, INC. (f/k/a J.W.S. DELAVAU CO.),
PHARMA CONCEPTS, INC. (f/k/a ACCUCORP., INC.), L&R
REALTY ASSOCIATES, INC., LR PHARMACEUTICALS, L.P.,
LESLIE J. LEFF, RONNIE H. LEFF, THE RICHARD M. LEFF
10-YEAR GRANTOR RETAINED ANNUITY TRUST, THE
RICHARD M. LEFF 12-YEAR GRANTOR RETAINED ANNUITY
TRUST, THE LORRAINE T. LEFF 10-YEAR GRANTOR
RETAINED ANNUITY TRUST, THE LORRAINE T. LEFF
12-YEAR GRANTOR RETAINED ANNUITY TRUST, and JANAK
V. VYAS,

Plaintiffs/Counterclaim-Defendants,

-against-

NUTRITION TECHNOLOGIES L.L.C. (f/k/a DELAVAU
HOLDINGS, LLC), KEVIN LANG, TIM TANTILLO, TIMOTHY
S. COLLINS, GREGORY B. MURPHY, STEPHEN BRYAN,
MICHAEL C. DURAN, ROBERT L. BERNER III, and PETER E.
BERGER,

Defendants,

NUTRITION TECHNOLOGIES L.L.C. (f/k/a DELAVAU
HOLDINGS, LLC),

Counterclaim-Plaintiff,

-and-

JANAK V. VYAS,

Additional Counterclaim-Defendant.

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The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

FILED
JUN 02 2006
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

Dated: May 31, 2006

KARLA MOSKOWITZ

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

-----X
PHARMA CONSULT, INC. (f/k/a J.W.S. DELAVAU
CO.), PHARMA CONCEPTS, INC. (f/k/a ACCUCORP.,
INC.), L&R REALTY ASSOCIATES, INC., LR
PHARMACEUTICALS, L.P., LESLIE J. LEFF, RONNIE
H. LEFF, THE RICHARD M. LEFF 10-YEAR GRANTOR
RETAINED ANNUITY TRUST, THE RICHARD M. LEFF
12-YEAR GRANTOR RETAINED ANNUITY TRUST,
THE LORRAINE T. LEFF 10-YEAR GRANTOR
RETAINED ANNUITY TRUST, THE LORRAINE T.
LEFF 12-YEAR GRANTOR RETAINED ANNUITY
TRUST, and JANAK V. VYAS,

Index No. 601233/2003

Plaintiffs/Counterclaim-Defendants,

DECISION and ORDER

- against -

NUTRITION TECHNOLOGIES L.L.C. (f/k/a DELAVAU
HOLDINGS, LLC), KEVIN LANG, TIM TANTILLO,
TIMOTHY S. COLLINS, GREGORY B. MURPHY,
STEPHEN BRYAN, MICHAEL C. DURAN, ROBERT
L. BERNER III, and PETER E. BERGER,
Defendants,

NUTRITION TECHNOLOGIES L.L.C. (f/k/a DELAVAU
HOLDINGS, LLC),
Counterclaim-Plaintiff,

- and -

JANAK V. VYAS,
Additional Counterclaim-Defendant.

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Karla Moskowitz, J.:

In this commercial action, defendants move to dismiss five of the nine causes of action that are set forth in the amended complaint. Plaintiffs oppose that motion and cross-move for leave to serve a second amended complaint (motion sequence number 007). For the following reasons, the court grants defendants' motion in part and grants plaintiffs' cross motion.

BACKGROUND

The Parties

The facts that are relevant to the disposition of these motions are as follows.¹ Both plaintiffs and defendants are engaged in the business of providing supplies and services to large pharmaceutical companies. (See Notice of Motion, Amended Complaint, ¶¶ 1-2). In particular, plaintiffs Pharma Consult, Inc. and Pharma Concepts, Inc. were the companies that conducted this business, while the remaining plaintiffs were their owners.² (Id., ¶¶ 11-21). Defendant Nutrition Technologies L.L.C. (NT) is a Delaware corporation with its principal place of business in Philadelphia, Pennsylvania. (Id., ¶ 22). The remaining defendants are NT's corporate officers and directors. (Id., ¶¶ 23-30).

On July 12, 2002, plaintiffs (the Sellers) contracted to sell NT all of their business assets (the Asset Purchase Agreement). (Id., ¶ 51). On that same date, NT also executed employment contracts with three of the individual plaintiffs who wished to continue working at NT after the Asset Purchase Agreement's closing date (the Employment Contracts). (See Notice of Motion, Baron Affirmation, Exhibits 1-3). Specifically, NT hired Ronnie Leff as its president, Leslie Leff as vice chairman of its board of directors and Janak Vyas as its chief financial officer. (Id.). Each Employment Contract contained a Pennsylvania choice of law provision. (Id.). Each Employment Contract also contained clauses providing that "[t]he Employment Term and

¹ The court recited the facts of this case at length in its two previous decisions and need not make a similar recitation here.

² The only exception is plaintiff Janak Vyas, who is as the chief financial officer of Pharma Consult, Inc. and Pharma Concepts, Inc. See Notice of Motion, Amended Complaint. (¶¶ 3, 21).

Executive's employment hereunder may be terminated by either party at any time and for any reason," and that "[t]he Employment Term and Executive's employment hereunder may be terminated by the Company [i.e., NT] without Cause." (Id.).

The parties closed the Asset Purchase Agreement on September 20, 2002. (See Notice of Motion, Amended Complaint, ¶ 53). At that time, the total purchase price was \$162.4 million,³ that NT delivered to the Sellers in the form of \$142.4 million in cash, \$12.5 million in junior subordinated debt security (the note) and 7.5 million "membership units" in NT that were worth \$1 dollar each, or \$7.5 million total (the stock).⁴ (Id., ¶ 52).

On September 20, 2002, NT also executed and filed an "Amended and Restated Limited Liability Company Agreement" to take into account certain changes that resulted from its purchase of the Sellers' business assets (the Amended LLC Agreement). (See Notice of Motion, Baron Affirmation, Exhibit 7). Pursuant to Section 8.04 (a)(ii) of the Amended LLC Agreement, the note and stock components of the purchase price (mentioned above) were "deemed held indirectly 50% by Ronnie H. Leff and 50% by Leslie Leff as of the date of this Agreement." (Id.).

The Amended LLC Agreement also provided, in pertinent part, as follows:

Section 8.04. Purchase of Units Upon Termination of Employment.

(a) Generally. (i) Upon the termination of employment with [NT] ... of any Management Employee for any reason, [NT] shall have the option to purchase all (or any portion) of the Units or other Interest held directly or indirectly ... by such Management Employee ... (a "Call Option") (all such Units or other Interest being referred to as the "Callable Units"), at a purchase price (to be paid in cash or in

³ The parties have since acted to modify the purchase price pursuant to the procedures set forth in the Asset Purchase Agreement.

⁴ The parties had initially agreed upon different amounts of each component of the purchase price, but later negotiated changes to arrive at the amounts that NT ultimately paid. (Id., ¶ 51).

one or more subordinated debt securities) equal to the Fair Market Value of such Units or other Interest ... as of the date of such termination of employment, as determined by the Board of Directors in its good faith judgment. [NT] shall have three months from such termination date (... the "Option Period") during which to give notice in writing to such Management Employee ... of its election to exercise or not to exercise such option (an "Exercise Notice"). Such Management Employee shall have no rights of any kind as a Member under this Agreement with respect to the Callable Units after an Exercise Notice is given, including rights to make Capital Contributions or to receive distributions. Subject to Section 8.04 (b), the completion of a transfer pursuant to this Section 8.04 (a) shall take place on the 20th Business Day following the date of receipt by the Management Employee ... of the notice required to be given pursuant to this Section 8.04 (a).

(ii) ...

(b) Certain Restrictions on Payments. (i) Notwithstanding any other provision of this Section 8.04, [NT] shall not be permitted to complete a purchase of any Callable Units or Putable Units from any person if and to the extent (A) ... or (E) [NT], together with its subsidiaries, does not have consolidated EBITDA (earnings before interest, taxes, depreciation and amortization in accordance with GAAP) of at least \$40 million.

(ii) If and to the extent the completion of a purchase otherwise permitted under Section 8.04 (a), and for which an Exercise Notice or ... been properly given by [NT] ... is not permitted under Section 8.04 (b)(i), [NT] shall provide written notice thereof to the applicable Management Employee ... and such purchase will be postponed and will take place without the application of further conditions or impediments (other than as set forth in Section 8.04 (a) or in this Section 8.04 (b)) at the first opportunity thereafter when [NT] has funds legally available therefore and when such purchase is not prohibited by Section 8.04 (b) (i).

(Id).

On September 20, 2002, Ronnie Leff, Leslie Leff and Janak Vyas began working for NT. (See Notice of Motion, Amended Complaint, ¶ 3). NT thereafter terminated Janak Vyas on October 25, 2002 and terminated Ronnie and Leslie Leff on January 20, 2003. (Id., ¶ 55). In its termination letters, NT stated that all terminations were for no cause (the Termination Letters). (See Notice of Motion, Baron Affirmation, Exhibits 4-6). Thereafter, on April 16, 2003, NT sent an "Exercise Notice" to Ronnie and Leslie Leff, pursuant to Section 8.04

(a)(i) of the Amended LLC Agreement (the Exercise Notice). (Id., Exhibit 8). In the Exercise Notice, NT stated that it intended to repurchase the note and stock components of the purchase price from the Leffs for the amount of \$50,000.00, that NT's board of directors had determined was the fair market value of those items as of January 20, 2003 - the termination date of the Leffs' employment. (Id.).

Prior Proceedings

Plaintiffs filed an amended complaint in this action on June 16, 2003. (See Notice of Motion, Amended Complaint). That Amended Complaint contains causes of action for: 1) a shareholders' derivative claim of breach of fiduciary duty (by Ronnie and Leslie Leff as NT shareholders against all of the individual defendants); 2) a direct claim of breach of fiduciary duty (by Pharma Concepts, Inc. and Ronnie and Leslie Leff against all of the individual defendants); 3) a declaratory judgment; 4) a claim under the Pennsylvania Wage Payment and Collection Law (by Leslie Leff against all of the individual defendants except Duran and Berger); 5) breach of contract (by Leslie Leff against NT); 6) a claim under the Pennsylvania Wage Payment and Collection Law (by Ronnie Leff against all of the individual defendants except Duran and Berger); 7) breach of contract (by Ronnie Leff against NT); 8) a claim under the Pennsylvania Wage Payment and Collection Law (by Janak Vyas against all of the individual defendants except Duran and Berger); and 9) breach of contract (by Janak Vyas against NT). (Id.). Rather than answer, the individual defendants move to dismiss the first, second, fourth, sixth and eighth of the foregoing causes of action, pursuant to various provisions of CPLR 3211. Plaintiffs oppose this motion and cross-move for leave to further amend the amended complaint to add individual defendants Duran and Berger to those named in the fourth, sixth and eighth

causes of action and to remove individual defendant Bryan.

DISCUSSION

Defendants' Motion

A) The Derivative Breach of Fiduciary Duty Claim

Plaintiffs' first cause of action charges that "plaintiffs Pharma Concepts, Ronnie Leff and Leslie Leff were shareholders of [NT]," and that NT board member/defendants Berner, Murphy, Collins, Duran and Berger breached the fiduciary duties that they owed to NT's shareholders. (See Notice of Motion, Amended Complaint, ¶¶ 83, 84). Defendants move to dismiss this cause of action, pursuant to CPLR 3211 (a) (3), on the grounds that plaintiffs lack standing. (See Memorandum of Law in Support of Motion, at 5-9).

Defendants first assert that "a plaintiff's standing to sue derivatively is governed by the law of the state of incorporation." (See Memorandum of Law in Support of Motion, at 5). This assertion is correct. (See e.g. Matter of CPF Acquisition Co. v CPF Acquisition Co., 255 AD2d 200 [1st Dept 1998]; Potter v Arrington, 11 Misc 2d 962 [Sup Ct, Monroe County 2006]). Defendants note that NT's Amended LLC Agreement contains a Delaware choice of law provision. (See Memorandum of Law in Support of Motion, at 5). This is also correct. (See Notice of Motion, Baron Affirmation, Exhibit 7, at 55). Defendants next observe that, "[u]nder Delaware law, in order to maintain a derivative suit on behalf of a limited liability company, a plaintiff must be a member of the limited liability company *at the time the suit is commenced* and throughout the litigation [emphasis in original]." (See Memorandum of Law in Support of Motion, at 6). Delaware law actually provides that:

In a derivative action brought by 1 or more shareholders or members to enforce a

right of a corporation ... the complaint shall allege that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law.

DE R CH CT Rule 23.1.

Defendants argue that plaintiffs lacked shareholder status at the time of the complained of transaction. Defendants correctly note that Delaware law recognizes a “continuous ownership requirement” - i.e., “that a derivative plaintiff must be a stockholder at the time he commences suit and must maintain such stockholder status throughout the course of the litigation.” (Ash v McCall, 27 Del J Corp L 213, 229 [Del Ch 2000]). Defendants then assert that plaintiffs here lack standing to bring a shareholders’ derivative claim against NT because “Sellers ceased to be members of [NT] on April 16, 2003, when their equity units were called.” (See Memorandum of Law in Support of Motion, at 6). After reviewing the documentary evidence, however, the court disagrees.

Defendants first cite the language in Section 8.04 (a) (i) of the Amended LLC Agreement that a “Management Employee shall have no rights of any kind as a Member under this Agreement with respect to the Callable Units after an Exercise Notice is given, including rights to make Capital Contributions or to receive distributions.” (See Notice of Motion, Baron Affirmation, Exhibit 7). Defendants then argue that, pursuant to this contractual language, the mere act of sending an exercise notice terminates all of a shareholder’s rights and status. (See Memorandum of Law in Support of Motion, at 8). However, defendants’ construction of Section 8.04 (a) (i) plainly ignores the effect of the immediately following sentence that provides that “[s]ubject to Section 8.04 (b), the completion of a transfer pursuant to this Section 8.04 (a) shall

take place on the 20th Business Day following the date of receipt by the Management Employee” of an exercise notice. (See Notice of Motion, Baron Affirmation, Exhibit 7). Section 8.04 (b) then specifically provides that:

(i) Notwithstanding any other provision of this Section 8.04, [NT] shall not be permitted to complete a purchase of any Callable Units or Puttable Units from any person if and to the extent (A) ... or (E) [NT], together with its subsidiaries, does not have consolidated EBITDA (earnings before interest, taxes, depreciation and amortization in accordance with GAAP) of at least \$40 million.

(ii) If and to the extent the completion of a purchase otherwise permitted under Section 8.04 (a), and for which an Exercise Notice or ... been properly given by [NT] ... is not permitted under Section 8.04 (b)(i), [NT] shall provide written notice thereof to the applicable Management Employee ... and such purchase will be postponed and will take place without the application of further conditions or impediments (other than as set forth in Section 8.04 (a) or in this Section 8.04 (b)) at the first opportunity thereafter when [NT] has funds legally available therefore and when such purchase is not prohibited by Section 8.04 (b) (i) [emphasis added].

Id.

Here, the Leffs argue that Section 8.04 (b) of the Amended LLC Agreement bars NT from completing its purchase of their shares and the note because NT does not have a consolidated EBITDA of at least \$40 million. (See Memorandum of Law in Support of Cross Motion, at 6-8). Defendants do not deny this claim and do not present any documentary evidence to refute it. Instead, they reply that “[w]hether or not [NT] has sufficient EBITDA to complete the purchase of Sellers’ equity Units has no relevance to the effect of the delivery of the exercise notice.” (See Memorandum of Law in Further Support of Motion, at 5). The court disagrees. Defendants cannot prevail on the argument that the mere act of sending an exercise notice is, in and of itself, capable of terminating a shareholders’ rights, because the contract plainly states that the delivery of such a notice is merely a step in a transaction - a “purchase” - that is subject to the restrictions

set forth in Section 8.04 (b). That section provides that NT's purchase of a shareholder's interest will be "postponed" until such time as NT has sufficient EBITDA. Here, because NT does not contest that it lacks sufficient EBITDA, NT is contractually forbidden from completing its purchase of the Leff's stock and note. Because that purchase is not complete, ownership of the stock and note - and the shareholder rights that are attendant on ownership - have not yet passed from the Leffs to NT. Thus, pursuant to the Delaware law discussed above, the Leffs have standing to bring a shareholders' derivative claim against NT. Accordingly, the court denies NT's dismissal motion with respect to plaintiffs' first cause of action.

B) The Direct Breach of Fiduciary Duty Claim

Plaintiffs' second cause of action alleges, in part, that defendants Berner, Berger, Murphy, Duran and Collins breached their fiduciary duties "by terminating the Leffs, thus triggering the call option [on the note and the Leffs' NT stock] at a ridiculously low price." (See Notice of Motion, Amended Complaint, ¶ 89). Defendants argue that this cause of action must fail, as a matter of law, because: 1) they did not owe the Leffs any fiduciary duty with respect to the termination of their employment and the subsequent call on the stock and the note; and 2) the Leffs' cause of action is actually based on the exercise of express contractual rights that cannot support a breach of fiduciary duty claim. (See Memorandum of Law in Support of Motion, at 9-11).

Plaintiffs respond to defendants' first argument that, under Delaware law, defendants owed Pharma Consult and the Leffs, as shareholders, "'constant' duties of 'due care, good faith and loyalty'" and that, where defendants (as officers and/or directors) "caused direct injury 'independent of any injury to the corporation,' the 'stockholders ... may sue on their own

behalf.” (See Memorandum of Law in Support of Cross Motion, at 9). Plaintiffs appear to have correctly stated these two principles of Delaware law. Indeed, defendants do not contest their reply brief. That does not end the inquiry, however. (See Malone v Brincat, 722 A2d 510 [Del Supr 1998] and Parnes v Bally Entertainment Corp., 722 2d 1243 1245 [Del Supr 1999]).

Plaintiffs respond to defendants’ second argument that “the Sellers’ direct fiduciary claim has nothing to do with whether [NT] was entitled to terminate the Leffs and Janak Vyas; the Sellers’ fiduciary claim challenges the individual defendants’ decision to shut out the Leffs and Janak Vyas as contrary to the duties of ‘due care, good faith, and loyalty.’” (See Memorandum of Law in Support of Cross Motion, at 10). Defendants reiterate that “the exercise of a party’s contractual rights cannot serve as the basis for a breach of fiduciary duty claim” under Delaware law. (See Memorandum of Law in Further Support of Motion, at 6). Defendants appear to be correct. Two unreported decisions by the Delaware Court of Chancery do hold, fairly unequivocally, that “[f]iduciary duties are not implicated when the issue involves the rights of the minority stockholder qua employee under an employment contract.” (Dweck v Nassar, unpublished, 2005 WL 3272363, *6 [Del Ch 2005], citing Riblet Prods. Corp. v Nagy, 683 A2d 37 (Del Supr 1996); see also Juran v Bron, unpublished, 2000 WL 1521478, *9 [Del Ch 2000] [If the minority shareholder/partner/employee is injured in his capacity as a shareholder or partner, the acts against him may be a breach of fiduciary duty. Where, however, the person is injured as an employee, such as in a breach of an employment contract situation, his remedy would be under the contract]). However, these holdings appear to be broader than the one that the Delaware Supreme Court enunciated in Riblet Prods. Corp. v Nagy, that recognized exceptions to the foregoing rule where an employee “contend[s] that he was harmed as a

stockholder by being terminated,” and where an employee “attempt[s] to bring a derivative suit ... as a stockholder on behalf of the corporation for actionable injury to it arising out of the termination of the employment agreement.” (683 A2d at 40). Here, plaintiffs allege that both of these exceptions apply. (See Memorandum of Law in Support of Cross Motion, at 8-10). However, the Delaware Supreme Court indicated that the former exception may be invoked only by an employee who was terminated “for cause.” (Riblet Prods. Corp. v Nagy, 683 A2d at 40, n 4). Here, all of the subject employment contracts provided for termination “without cause.” (See Notice of Motion, Baron Affirmation, Exhibits 1-3).

Further, with respect to the second exception, the Delaware Supreme Court in Riblet Prods. Corp. v Nagy, 683 A2d at 40, n 5 referred to its earlier decision in Grimes v Donald (673 A2d 1207 (Del Supr 1996), in which it stated that

To pursue a direct action, the stockholder-plaintiff “must allege more than an injury resulting from a wrong to the corporation.” The plaintiff must state a claim for ““an injury which is separate and distinct from that suffered by other shareholders, ... or a wrong involving a contractual right of a shareholder ... which exists independently of any right of the corporation [internal citations omitted].”

(Id. at 1213, quoting Moran v Household Intl, Inc., 490 A2d 1059, 1070 [Del Ch 1985]) affd 500 A2d 1346 [Del Supr 1985]).

Here, plaintiffs allege only that NT was injured by the Leffs’ and Vyas’ termination because their continued employment by [NT] was considered “essential to [NT]’s best interests and the best interests of its stockholders,” “integral to the success of the business and to certain customer relationships” and their termination “impacted [NT]’s ability to manage and conduct its business leading to a decline in post-closing revenues and the value of the company.” (See Memorandum of Law in Support of Cross-Motion, at 9; Amended Complaint ¶¶ 54, 56, 58).

However, this allegation does not describe “an injury which is separate and distinct from that suffered by other shareholders.” Neither does it implicate a private contractual right, because the Leff’s employment contracts provided for termination without cause. Thus, the court concludes that plaintiffs have failed to demonstrate that they are entitled to claim the benefit of either of the exceptions set forth in Riblet Prods. Corp. v Nagy to Delaware’s rule that fiduciary duties are not implicated when the issue involves the rights of the minority stockholder qua employee under an employment contract.

When evaluating a defendant’s motion to dismiss pursuant to CPLR 3211 (a) (7), the test “‘is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained’.” (Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae, 243 AD2d 168, 176 [1st Dept 1998], quoting Stendig, Inc. v Thom Rock Realty Co., 163 AD2d 46, 48 [1st Dept 1990]). To this end, the court must accept all of the facts alleged in the complaint as true, and determine whether they fit within any “cognizable legal theory.” (See e.g. Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300, 303 [2001]). Here, the court finds that the allegations in plaintiffs’ cause of action for direct breach of fiduciary duty do not fall within any “cognizable legal theory” that is viable under Delaware law. Accordingly, the court grants NT’s dismissal motion with respect to plaintiffs’ second cause of action.

C) The Pennsylvania Wage Payment and Collection Law Claims

Plaintiffs’ fourth, sixth and eighth causes of action allege that defendants Berner, Bryan, Collins, Lang, Murphy and Tantillo violated Pa. St. 43 P. S. § 260 et seq. - the “Pennsylvania

Wage Payment and Collection Law” - by failing to pay certain sums of money after terminating the employment of Leslie Leff, Ronnie Leff and Janak Vyas, respectively. (See Notice of Motion, Amended Complaint, ¶¶ 98-113, 119-134, 140-154). Defendants argue that, “[i]n order for an individual to be subject to liability under the WPCL, he must be an ‘employer’ within the meaning of that statute.” (See Memorandum of Law in Support of Motion, at 12). This is correct. Pa. St. 43 P. S. § 260.9a affords “employees” a private right of action against their “employers” for “civil remedies and penalties” for unpaid wages. Pa. St. 43 P. S. § 260.2a defines “employers” to “[i]nclude[] every person, firm, partnership, association, corporation, receiver or other officer of a court of this Commonwealth and any agent or officer of any of the above-mentioned classes employing any person in this Commonwealth.” Defendants then argue that the court should dismiss the Wage Payment and Collection Law claims against Bryan because he did not join NT until after the Leffs’ termination and was, therefore, never one of their “employers.” (See Memorandum of Law in Support of Motion, at 13). Plaintiffs concede this point; indeed, their cross motion seeks leave to amend the complaint to remove Bryan as a defendant in the fourth, sixth and eighth causes of action, and to replace him with defendants Berger and Duran. (See Memorandum of Law in Support of Cross Motion, at 10, n 3). Accordingly, the court grants defendants’ motion with respect to Bryan on consent of the parties.

Defendants next argue that the court should dismiss plaintiffs’ Wage Payment and Collection Law claims as against Berner and Collins because neither of them was an “employer” within the statute’s definition. (See Memorandum of Law in Support of Motion, at 11-13). Defendants specifically argue that the complaint alleges only that Berner and Collins were members of NT’s board of directors, but does not allege that they were officers of the

corporation. (See Memorandum of Law in Support of Motion, at 13). Plaintiffs respond that, under Pennsylvania law, corporate directors can be deemed “agents” of the corporation, and liable under the Wage Payment and Collection Law, where they are “decision policy makers.” (See Memorandum of Law in Support of Cross Motion, at 11). Plaintiffs are correct. In Yatron v Lydon, 20 Pa D & C 4th 251 [Pa Com Pl 1993], the Pennsylvania Court of Common Pleas observed that:

personal liability under the Wage Payment and Collection Law cannot be imposed merely because the defendants are corporate officers or agents. The defendants must also be decision-makers or policymakers. Absent some indication that the defendant exercised a policy-making function in the company, he is not among the class of persons who may be liable under the Wage Payment and Collection Law. Thus, the plaintiff-employees must present evidence of an active role in decision making to render the defendant-directors liable [internal citations omitted].

(Id. at 271). Here, plaintiffs’ proposed amended complaint alleges that Berner and Collins were “active decision makers and policy makers” of NT. (See Notice of Cross Motion, Exhibit E, ¶¶ 98, 120, 142). Defendants object that this is a conclusory assertion, to which plaintiffs are not entitled to receive the benefit of the doubt. (See Memorandum of Law in Further Support of Motion, at 7-8). This is incorrect. As previously noted, a court reviewing a motion to dismiss must accept all of the alleged facts as true. (See e.g. Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., supra). The only time a plaintiff is not entitled to this presumption is when a defendant presents documentary evidence that utterly refutes a claim. (See e.g. Scott v Bell Atl. Corp., 282 AD2d 180, 183 [1st Dept 2001], affd as mod Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314 [2002], citing Ullmann v Norma Kamali, Inc., 207 AD2d 691, 692 [1st Dept 1994]). Here, however, plaintiffs have presented corporate memoranda that show that Berner and Collins (and Berger and Duran) were involved

in NT management decisions regarding employment, officer appointments and terminations. (See Notice of Cross Motion, Exhibits C, D). Defendants have presented no documentary evidence to refute plaintiffs' assertions. Therefore, the court concludes that Berner and Collins are deemed "employers" within the meaning accorded to that term in the Pennsylvania Wage Payment and Collection Law. Accordingly, the court denies the balance of NT's dismissal motion with respect to plaintiffs' fourth, sixth and eighth causes of action.

Finally, defendants argue that "the amended complaint contains no substantive allegations against defendants Berger, Bryan, Collins and Duran." (See Memorandum of Law in Support of Motion, at 13-14). The court rejects this argument for the reasons discussed in the preceding paragraph, except as regards Bryan. Accordingly, the court grants defendants' motion in part and denies it in part for the reasons, and to the extent, discussed above.

Plaintiffs' Cross Motion

Plaintiffs cross-move, pursuant to CPLR 3025 (b), for leave to serve and file a second amended complaint. "It is well established that leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay," unless "the proposed pleading fails to state a cause of action ... or is palpably insufficient as a matter of law." (Davis & Davis, P.C. v Morson, 286 AD2d 584, 585 [1st Dept 2001]). Here, plaintiffs assert that the inclusion of Bryan as a defendant in the fourth, sixth and eighth causes of action was a "misnomer" that they wish to correct by adding Berger and Duran in his place. (See Memorandum of Law in Support of Cross- Motion, at 12). Defendants object on the grounds that they have been prejudiced because plaintiffs' request to amend comes two years after the commencement of this action, but their request does not contain a reasonable excuse for their delay. (See Memorandum of Law in

Further Support of Motion, at 1-3). The court rejects this argument, however, because it is clear that plaintiffs proposed these amendments to the complaint as a result of documents that they lawfully obtained during the discovery phase of this action. (See Notice of Cross Motion, O'Halloran Affirmation, ¶¶ 4, 5; Exhibits C, D).

The court also rejects defendants' contentions that the documents that plaintiffs rely on are somehow "extraneous," and would be "improper" to consider. (See Memorandum of Law in Further Support of Motion, at 3). Clearly, discovery is still ongoing, and the parties have not yet filed a note of issue - indeed, defendants have not yet filed an answer. In the preceding section of this decision, the court dismissed plaintiffs' claims against Bryan on consent, but declined to dismiss those claims against Berger and Duran. For the same reasons discussed supra, plaintiffs ought to be afforded the opportunity to amend their fourth, sixth and eighth causes of action to name Berger and Duran as defendants. Accordingly, the court grants plaintiffs' cross motion to that extent.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3211, of defendants Nutrition Technologies L.L.C. (f/k/a Delavau Holdings, LLC), Robert L. Berner III, Timothy S. Collins, Stephen Bryan, Michael C. Duran and Peter E. Berger is granted solely to the extent that plaintiffs' second cause of action for direct breach of fiduciary duty is dismissed, and plaintiffs' fourth, sixth and eighth causes of action are dismissed solely as against defendant Stephen Bryan, but is in all other respects denied; and it is further

ORDERED that the cross-motion, pursuant to CPLR 3025, of plaintiffs Pharma Consult,


Inc. (f/k/a J.W.S. Delavau Co.), Pharma Concepts, Inc. (f/k/a Accucorp., Inc.), L&R Realty Associates, Inc., LR Pharmaceuticals, L.P., Leslie J. Leff, Ronnie H. Leff, the Richard M. Leff 10-year Grantor Retained Annuity Trust, the Richard M. Leff 12-year Grantor Retained Annuity Trust, the Lorraine T. Leff 10-year Grantor Retained Annuity Trust, the Lorraine T. Leff 12-year Grantor Retained Annuity Trust and Janak V. Vyas for leave to amend the complaint herein is granted, and plaintiffs shall serve and file a second amended complaint in a form that complies with the foregoing portion of this decision within 20 days of service of a copy of this decision and order with notice of entry; and it is further

ORDERED that defendants shall serve an answer to the second amended complaint within 20 days from service; and it is further

ORDERED that the parties shall contact the Part 03 Clerk for a conference date.

Dated: May 31, 2006

ENTER:



JSC

FILED
JUN 02 2006
COUNTY CLERK'S OFFICE
NEW YORK