SHORT FORM ORDER

INDEX
NO.: 27366-98

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 12-3-07
SUBMITTED: 12-5-07
MOTION NO.: 020-MD

SAMUEL J. KLEIN, Suing as a Director of CELLULAR DESIGN CORP.,

Plaintiff,

-against-

STEPHEN B. AUERBACH, CENTRAL RADIO COMMUNICATIONS CORP., and CELLULAR DESIGN CORP.,

Defendants.

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Upon the following papers numbered 1 to 87 read on this motion for summary judgment ; Notice of Motion and supporting papers 1-13 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 14-84 ; Replying Affidavits and supporting papers 85-87 ; it is,

ORDERED that this motion by the plaintiff for summary judgment dismissing the defendants' counterclaims is determined as follows:

The plaintiff, Samuel Klein, and the defendant Stephen Auerbach are each 50% shareholders of the defendant Cellular Design Corp. (hereinafter "CDC'), and they are its only officers and directors. CDC was engaged in the business of providing two-way radio (repeater) services to customers like taxicab companies and other businesses with vehicles in the field that needed to communicate with each other and with their home base. CDC did not sell radios, telephones, or other equipment. Rather, it obtained licenses from the Federal Communications Commission (hereinafter "FCC") for the operation of communication stations on 900 MHz frequencies and then constructed and maintained those stations.

The defendant Central Radio Communications Corp. (hereinafter "CRCC'), of which the defendant Stephen Auerbach is the sole shareholder, was in the business of selling, installing, and servicing two-way radio systems, security video systems, pagers, mobile telephones,

office telephone systems, and cellular telephones. CRCC did not provide its customers with repeater services, but referred them to such third-party providers as AT&T, CellularOne, and NorComm. After the formation of CDC, Auerbach referred his CRCC customers to CDC for repeater services.

On April 1, 1990, Klein and Auerbach entered into a stockholders agreement, which provides, in pertinent part, as follows:

> No Stockholder shall devote any time or attention to or have any financial involvement in any remunerative or non-remunerative activity, except those in which he is currently involved (and only to the extent that he is currently involved), and except for passive investments and/or non-remunerative activities the management of which is not likely to interfere with or to divert such Stockholder's attention or energies from his performance hereunder (whether as Stockholder, Director, Officer or otherwise); unless, in each case, the circumstances are made known to the Board of Directors and each other member of the Board votes (or executes a Written Consent to Action) to permit such Stockholder to engage in same. Klein agrees that Auerbach may continue to be a shareholder, director and officer of Central Radio Communications Corp. and devote such time as Auerbach may determine to the business and operation of Central Radio Communications Corp. without limiting or diminishing Auerbach's rights and profits hereunder. The business of Central Radio Communications Corp. shall not be deemed or considered a diversion away from the Corporation of any corporate opportunity by Auerbach.

Auerbach was primarily responsible for obtaining users for CDC's repeater system through his sales and service activities at CRCC. Klein, on the other hand, was primarily responsible for obtaining FCC licenses and for constructing and maintaining CDC's licensed repeater facilities. This arrangement continued until the mid-1990's. By 1996, although CDC had approximately 70 FCC licenses at nine separate sites and hundreds of customers, the relationship between Auerbach and Klein had begun to deteriorate. According to Klein, Auerbach was advancing his own business at the expense of CDC. In 1996, Auerbach (through CRCC) was designated as a authorized Nextel representative. Nextel was a competitor of CDC. Because Auerbach was paid for placing and keeping customers on Nextel's radio communications network, Klein claimed that Auerbach promoted the sale of Nextel's services rather than those of CDC, thereby competing with CDC. The parties discussed a buy-out, but could not agree to mutually satisfactory terms. They eventually sold most of CDC's assets, which primarily consisted of FCC radio licenses, to Nextel. By an order of this court (Klein, J.) dated July 9, 2001, CDC was judicially dissolved.

In 1998, Klein commenced this action pursuant to Business Corporation Law § 720 alleging, inter alia, breach of fiduciary duty, unjust enrichment, tortious interference with contract,

and tortious interference with prospective economic advantage. In their answer, the defendants asserted 18 counterclaims sounding in breach of fiduciary duty, conversion, and unjust enrichment, among other things. The plaintiff now moves for summary judgment dismissing the counterclaims.

The first counterclaim alleges that the plaintiff breached his fiduciary and contractual duties as a director and shareholder of CDC by failing to devote sufficient time and effort to advancing CDC's business interests, by failing to properly service CDC's customers, by failing to promote CDC's business, by failing to bring business opportunities to the attention of CDC's Board of Directors, by diverting business opportunities to CDC's competitors, by disclosing CDC's confidential business information to third-parties, and by secretly forming a separate corporation with CDC's funds. The plaintiff contends that this counterclaim fails to meet the minimum pleading requirements of CPLR 3013. The plaintiff contends that its allegations are vague and conclusory, without factual assertions of specific wrongdoing, and that it fails to apprise him of the transactions, occurrences, or series of transactions or occurrences that the defendants intend to prove. The plaintiff, therefore, contends that the first counterclaim should be dismissed as legally insufficient.

The remedy for failing to meet the pleading requirements of CPLR 3013 is either a motion to dismiss under CPLR 3211(a)(7) for failure to state a cause of action or a corrective motion under CPLR 3024 (see generally, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3013:7). A motion to make a pleading more definite and certain must be served within 20 days from the service of the pleading to which the motion is addressed (*see*, **Matter of Suffolk Pines v Harwood**, 14 Misc 2d 826, 829, *affd* 10 AD2d 867). Here, 20 days have long since expired since service of the defendants' answer. Furthermore, the motion, if timely made, must be made before answering, replying, or moving to dismiss the pleading (**Id**. at 829). The plaintiff replied to the defendants' counterclaims in November 1999. By replying, the plaintiff elected to take the defendants' counterclaims as formulated and waived his right to move pursuant to CPLR 3024 (**Id**. at 829; **Commercial Trading Co. v Little N. Parkway Realty Corp**., 41 Misc 2d 472, 473; *see also*, **Albemarle Theatre v Bayberry Realty Corp**., 27 AD2d 172, 177-178). Moreover, to the extent that the plaintiff wants an amplification of the allegations contained in the first counterclaim, rather than their clarification, his remedy was to seek a bill of particulars (*see*, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3024:2).

While the defense of failure to state a cause of action has not been waived by the defendants (*see*, CPLR 3211[e], **McLearn v Cowen & Co.**, 60 NY2d 686, 689; **Rich v Lefkovits**, 56 NY2d 276, 281-282; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:20), pleadings should not be dismissed (or ordered amended) unless the allegations contained therein are not sufficiently particular to apprise the court and the parties of the subject matter of the controversy (*see*, **Albemarle Theatre v Bayberry Realty Corp**., *supra* at 177-178). The court need not look to see if the claim has been proven in the pleadings. Rather, the court will only look to see if the pleader states a cognizable cause of action, despite how poorly drafted it may be (*see*, **Bones v Prudential Fin. Inc**., 17 Misc 3d 656, 660, *citing* **Mandelblatt v Devon Stores**, 132 AD2d 162). Construing the first counterclaim liberally and accepting the facts alleged therein as true (*see*, **Minelli v Soumayah**, 41 AD3d 388, 389), the court finds that it states legally cognizable claims for breach of fiduciary duty and breach of the shareholders agreement.

Accordingly, the motion is denied as to the first counterclaim.

The plaintiff contends that the second through fifteenth counterclaims were resolved by a voluntary, mutual accounting on March 21, 1997, which was reduced to writing and signed by the individual parties. The defendants do not dispute that the second through fifteenth counterclaims were included in the March 21, 1997, settlement agreement. Accordingly, the motion is granted as to the second through fifteenth counterclaims, and they are dismissed.

There are triable issues of fact that preclude dismissal of the seventeenth counterclaim. Accordingly, the motion is denied as to the seventeenth counterclaim.

Since the remaining counterclaims are derivative in nature, the defendants may be entitled to recover their reasonable expenses, including reasonable attorney's fees, if they are successful (*see*, Business Corporation Law § 626[e]). Accordingly, the motion is denied as to the eighteenth counterclaim.

In sum, the plaintiff's motion for summary judgment is granted solely to the extent that the second through fifteenth counterclaims are dismissed, and the motion is otherwise denied.

DATED: February 5, 2008

HON. ELIZABETH HAZLITT EMERSON

J. S.C.