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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BRANSTEN PART 8

Justice

Index Number : 601973/2007
MOYAL, DAVID
vs.
GROUP IX, INC.
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. 601973/07
MOTION DATE 4/16/08
MOTION SEQ. NO. 002
MOTION CAL. NO. ____

this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2,3
Answering Affidavits — Exhibits	4,5
Replying Affidavits	6,7

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM

FILED

JUN 30 2008

COUNTY CLERK'S OFFICE
NEW YORK

IN ALL OTHER CASES REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/27/08

HON. EILEEN BRANSTEN 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: PART THREE
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DAVID MOYAL, both individually and derivatively on behalf of GROUP IX, INC d/b/a DOTCOM HOTEL OF NY,

Plaintiff,

Index No.: 601972/07
Motion Date: 4/16/08
Motion Sequence No.: 002

-against-

GROUP IX, INC d/b/a DOTCOM HOTEL OF NYC, SHTARKERCOM, LLC, STU SLEPPIN, BOB TEEMAN, PETER GOLOMB, TELECOM SWITCHING INC., SOLEGY, INC., "XYZ CORP.", and "JOHN" and "JANE" DOE,

Defendants.

----------X

PRESENT: EILEEN BRANSTEN, J:

Defendants Group IX, Inc d/b/a Dotcom Hotel of NYC ("Group IX"); Shtarkercom, LLC ("Shtarkercom"), Stu Sleppin ("Mr. Sleppin"), Bob Teeman ("Mr. Teeman"), Peter Golomb ("Mr. Golomb"), Telecom Switching, Inc. ("Telecom Switching"); and Solegy, Inc. ("Solegy") move for dismissal pursuant to CPLR 3211. Plaintiff David Moyal ("Mr. Moyal") opposes the motion.

BACKGROUND

In the late 1990's, Mr. Moyal controlled non-party One Two One on Varick, LLC ("Varick"), which owned a commercial cooperative unit in Manhattan. Messrs. Sleppin,

Teeman, and Golomb approached him in 1997 and suggested that the space would be ideal as a "Dotcom Hotel," or a collocation for businesses to house and operate their computer and telecommunications equipment.

Mr. Moyal alleges that Messrs. Sleppin, Teeman, and Golomb proposed the following terms for a joint venture: a) they would operate the premises as a dotcom hotel; b) Varick would lease the premises to them at a below-market rate; c) Mr. Moyal would finance the necessary capital improvements on the premises; d) Mr. Moyal would receive 50% of any revenue received from the Dotcom Hotel's operation; and e) Mr. Moyal would receive 50% of any other business or investment opportunities that the others operated from the premises. He further alleges that he expended approximately $400,000.00 in capital improvements. The Dotcom Hotel went into operation in 1999.

Shtarkercom is a New York-organized corporation owned or controlled by Messrs. Sleppin, Teeman, and Golomb. In October 2000, Mr. Moyal and Shtarkercom formed Group IX as equal shareholders to operate the Dotcom Hotel. Pursuant to the terms of the shareholder's agreement, Varrick was to lease it the premises; Mr. Moyal was to have access to the books and records, and Mr. Moyal could cause the lease's surrender if the Dotcom Hotel's monthly gross revenue did not exceed certain periodic thresolds (*see* Golomb Aff'd, Ex.A, Shareholder's Agreement, at 12-16). The agreement does not specify the profit

distributions between the two shareholders, and sets forth: "[t]he parties agree that they have not relied upon any representations. . . except for those representations contained herein" (*Id.*, at 16).

Mr. Moyal alleges that after Group IX was formed, he was denied access to the company's records, was not allowed to participate in board meetings, and never received the profits to which he was entitled to. Furthermore, he alleges that Telecom Switching and Solegy, other companies owned or controlled by the individual Defendants, used the premises without compensating Group IX.

Mr. Moyal commenced this action against Defendants in June 2007. In October 2007, the Court (Moskowitz, J.) granted Defendants' motion to dismiss without prejudice and allowed Mr. Moyal to replead within 30 days. One month later, he filed the first amended complaint individually and on behalf of Group IX. Plaintiffs assert claims for breach of the shareholder's agreement, breach of the joint venture, breach of fiduciary duty, fraud, and unjust enrichment. In this motion, Defendants move for dismissal pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7).

DISCUSSION

In a motion to dismiss, the court takes the facts as alleged in the complaint as true and accords the benefit of every possible favorable inference to the non-movant (*see AG Capital Funding Partners, LP v. State Street Bank and Trust Co,* 5 N.Y.3d 582 [2005]). "The

sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" (*Ackerman v. 204 East 40th Owners Corp.*, 189 A.D.2d 665 [1st Dept. 1993]).

First Cause of Action: Individual Claim for Breach of the Shareholder's Agreement Against Shtarkercom and Group IX

In order to state a claim for a breach of contract, the plaintiff must allege that: 1) a contract exists; 2) the non-breaching party performed under the contract; 3) the other party breached; and 4) the breach caused damage to the non-breaching party (*see Najjar Indus. Inc v. New York,* 87 A.D.2d 329 [1st Dept. 1982]). Mr. Moyal alleges the existence of the shareholder's agreement; that Shtarkercom and Group IX breached it by refusing to permit Mr. Moyal to attend the board meetings, allow him to review the financial statements and the books and records; and distribute the net profits due to him; and that he suffered damages as a result (*see,* Hirsch Aff., Ex.C, First Amended Complaint, ¶¶ 54-57). The complaint certainly satisfies the liberal pleading standards.

Defendants argue that a July 2002 letter from Mr. Moyal's accountant requesting access to the books and records (*see* Golomb Aff'd, Ex. I) and a October 2001 email from Mr. Moyal acknowledging receipt of Group IX's monthly reports (*id.,* Ex. II) are sufficient documentary evidence to dismiss this claim pursuant to CPLR 3211(a)(1). Neither suffice to completely refute this allegation.

First, these correspondences only pertain to one out of several contractual provisions that were allegedly breached. Second, while the October 2001 email indicates receipt of the August 2001 report, there is no documentary evidence that Group IX complied with the July 2002 letter. Moreover, there are other time periods in which documentary evidenced was not proffered to support Defendants' contention that the claim lacks merit. At this stage of the litigation, the court is only concerned if Mr. Moyal cognizably states a claim, not whether one factually exists. Mr. Moyal satisfies his pleading requirement, and the motion to dismiss is denied.

Second, Third, Sixth, and Eighth Causes of Action: Claims Relating to the Alleged Joint Venture

"The *indicia* of the existence of a joint venture are: acts manifesting the intent of the parties to be associated as joint venturers, mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses" (*Richbell Information Services, Inc v. Jupiter Partners, LLP*, 309 A.D.2d 288 [1st Dept. 2003]).

Here, Mr. Moyal pleads that Varrick leased the property, he would supply the capital investment, and that he would share in the profits generated and losses sustained pursuant to an oral joint-venture agreement (*see,* Hirsch Aff., Ex.C, First Amended Complaint, ¶¶ 59-

60; Moyal Aff'd ¶ 9). He further pleads that this agreement was breached when he was excluded from sharing in the profits generated from the Dotcom Hotel's creation. (*see,* Hirsch Aff., Ex.C, First Amended Complaint, ¶¶ 64-65).

A joint venture ceases to exist when a corporation is subsequently formed to carry out the endeavor's purpose and the parties' rights under the venture are not in conflict with the corporation's functioning (*see, Richbell Information Services, Inc,* 309 A.D.2d 288, *supra*). There can be no dispute that the purpose of both the joint venture and Group IX is to manage the collocation facility. The only difference between the two with respect to Mr. Moyal's alleged rights is his pleading that he was to receive 50% of any other business or investment opportunities that the individual defendants operated from the premises under the joint venture agreement. This purported profit-sharing agreement is not in conflict with Group IX's stated purpose because it does not affect the core of its business or how Mr. Moyal and Shtarkercom receive income from its actual function. The joint venture therefore ceased to exist after Group IX's creation.

It cannot escape from this Court's analysis that the parties here are sophisticated businesspeople who negotiated a merger clause that disavowed any prior discussions when Group IX was formed. Moreover, Mr. Moyal fails to articulate in his complaint what, if any,

additional opportunities the individual defendants derived from the Dotcom Hotel separate and apart from its normal profits. All claims related to the alleged joint venture agreement are dismissed.

Fourth Cause of Action: Derivative Claim for Breach of Fiduciary Duty Against the Individual Defendants

The threshold issue to address is whether Mr. Moyal has standing to assert this claim on behalf of Group IX. "[A] member of a limited-liability company retains the common-law right to bring a derivative suit on behalf of the company" (*Bischoff v. Boar's Head Provisions Co., Inc.*, 38 A.D.3d 440 [1st Dept. 2007]). Mr. Moyal adequately pleads that making any sort of demand on the individual defendants, who control his co-shareholder Shtarkercom, would be futile because they are the alleged perpetrators of the malfeasance. Accordingly, Mr. Moyal has standing.

In order to establish a breach of fiduciary duty, plaintiff must plead the existence of a fiduciary relationship, misconduct by the defendants, and damages that were directly caused by the misconduct (*see Kaufman v. Cohen,* 307 A.D.2d 113 [1st Dept. 2003]). "The circumstances constituting the wrong shall be stated in detail" (CPLR 3016(b)).

The individual Defendants, who control Shtarkercom, owe Group IX a fiduciary duty. Mr. Moyal alleges that they "usurped corporate opportunities for themselves at the expense of Group IX" (Hirsch Aff., Ex.C, First Amended Complaint, ¶¶ 84) by "permitting the

premises to be utilized [by Telecom Switching and Solegy] for free or for a low charge so that the Individual Defendants could personally profit therefrom . . ." (*Id.*, ¶ 85) Finally, he pleads that this conduct damaged Group IX because they caused it not to receive the fees it should have. He facially satisfies his burden of pleading a breach of fiduciary duty.

Defendants' argument that documentary evidence exists that utterly refutes this claim has no merit. A general ledger written in code that purportedly reflects payments by Telecom Switching and Mr. Golomb's affidavit where he attests that Solegy never utilized the premises do not moot the allegations. This form of documentary evidence necessitates an examination of the underlying merits that goes well-beyond the pleading's review, which is all that is required in a CPLR 3211 motion to dismiss. The motion to dismiss this claim is denied.

Fifth Cause of Action: Individual Claim for Fraud Against the Individual Defendants

In order to sustain a claim for fraud, "there must be a knowing misrepresentation of material fact, which is intended to deceive another party and to induce them to act upon it, causing injury" (*Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher,* 299 A.D. 2d 64 [1st Dept. 2003]). A claim for fraud, however, cannot be sustained if the alleged misrepresentations "consisted of mere puffery, opinions of value, or future expectations" (*Sidamonidze v. Kay,* 304 A.D. 2d 415 [1st Dept 2003]).

Mr. Moyal pleads that the Shareholder's Agreement provided him with a right to terminate the lease if Group IX failed to meet certain gross-revenue expectations and that it in

fact failed to meet those goals in 2001 (Hirsch Aff., Ex.C, First Amended Complaint, ¶¶ 90-91). He further alleges that when he moved to terminate the lease, the individual Defendants represented to him that their management would generate substantial profits, additional business would lead from it, they were not using the premises for their own benefit, and that they were working to maximize profits (*Id.*, ¶¶ 92-93). These statements were allegedly false because they were in fact operating the Dotcom Hotel for their own benefit and excluding Mr. Moyal from these opportunities (*Id.*, ¶ 94). Moreover, Mr. Moyal pleads that he relied on these statements to his detriment (*Id.*, ¶ 95). A claim for fraud is sufficiently pled.

During his deposition, Mr. Moyal acknowledged that he previously stated that the individual Defendants paid him an additional $10,000.00 monthly in rent in consideration for not canceling the lease (*see,* Golomb Aff'd, Exs. E & F). While this demonstrates that Mr. Moyal may have had a pecuniary incentive to keep the lease intact, it does not negate the allegation that he was duped into this. Defendants' statements that they would generate substantial profits and additional business are indeed vague and can be interpreted as a business person's puffery in the hope of securing a deal. But their purported promise that they would not operate the Dotcom Hotel exclusively for their benefit when they may have in fact done that is a concrete statement, not one of a hopeful aspiration, that could support a fraud claim. Accordingly, the motion to dismiss it is denied.

Seventh Cause of Action: Derivative Claims for Unjust Enrichment Against Telecom Switching and Solegy

To plead a claim for unjust enrichment under New York law, the complaint must allege that 1) the defendant was enriched; 2) that the enrichment was at plaintiff's expense; and 3) that equity and good conscience requires that the defendant compensate the plaintiff (*see State v. Barclay's Bank,* 76 N.Y.2d 533 [1990]). Here, Mr. Moyal pleads that Telecom Switching and Solegy "accepted the benefits of Group IX's premises. . . without paying for [it]. . ." and that this "conferred a substantial benefit upon [them]" (Hirsch Aff., Ex. C, First Amended Complaint, ¶¶ 104-105). This benefit was allegedly their use of the Dotcom Hotel without compensating Group IX for it (*Id.*, ¶¶ 46-47). The pleading standard is indeed satisfied because Mr. Moyal identifies how these Defendants were enriched, that they were so enriched at Group IX's expense, and that equity necessitates compensation for the services that were allegedly rendered. The motion to dismiss this claim is therefore denied.

Accordingly, it is hereby

ORDERED that the Defendants' motion to dismiss the first, fourth, fifth, and seventh causes of action is DENIED; and it is further

ORDERED that the Defendants' motion to dismiss the second, third, sixth, and eighth causes of action is GRANTED.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
June 27, 2008

ENTER

HON. EILEEN BRANSTEN
Hon. Eileen Bransten