

Fischetti v Guillen

2013 NY Slip Op 30363(U)

February 6, 2013

Supreme Court, Suffolk County

Docket Number: 26061-2012

Judge: Emily Pines

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX NO. 26061-2012

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

COPY

Present:

HON. EMILY PINES
J. S. C.

Motion Date: 10-09-12; 10-23-12 &
09-23-12

Submit Date: 11-13-12

Motion No.: 001 MD

002 MG

003 MD

[] Final

[X] Non Final

_____ X

JOHN FISCHETTI,

Plaintiff,

- against -

**LUIS GUILLEN, LISA KEENEN and DUTCH
PETALS, INC,**

Defendants.

_____ X

Attorney for Plaintiff

Peter S. Samaan, Esq.
Westerman Sheehy
Keenan Samaan & Aydelott LLP
333 Earle Ovington Boulevard
Suite 702
Uniondale, New York 11553

Attorney for the Defendant Guillen

Katheryn Dali, Esq.
Twomey, Latham, Shea, Kelly,
Dubin & Quartararo, LLP
33 West Second Street
Riverhead, New York 11901

Attorney for the Defendant Keenan

Andrew Towner, Esq.
Caleca & Towner, Esq.
257 Pantigo Road
East Hampton, New York 11937

Dutch Petals, Inc.

1 Leecon Court
Southampton, New York 11968

ORDERED that the plaintiff's motion (001) for an order appointing a receiver, a temporary injunction, to restore the plaintiff to his former position, and other relief, is denied; and it is further

ORDERED that the motion (002) by defendant Luis Guillen seeking to dismiss the complaint is granted to the extent that the second, third, and fourth causes of action are dismissed; and it is further

ORDERED that the motion (003) seeking an order vacating the temporary restraining order is denied as academic; and it is further

ORDERED that defendant Guillen is directed to serve and file an answer pursuant to CPLR 3211 (f); and it is further

ORDERED that the parties are directed to appear at a preliminary conference on March 12, 2013, at 9:30 a.m. in Part 46, One Court Street, Riverhead, New York; and it is further

ORDERED that counsel for defendant Guillen shall serve a copy of this Order with Notice of Entry upon counsel for plaintiff and other defendants, pursuant to CPLR 2103(b)(1), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

In this action, the plaintiff seeks damages for breach of a shareholder agreement. The complaint asserts four causes of action: breach of contract, breach of an implied contract, breach of fiduciary duty, and theft of corporate opportunity. The record reveals that the Dutch Petals, Inc. (Hereinafter, "the defendant corporation") was incorporated on August 21, 2003. The plaintiff, defendant Luis Guillen, and defendant Lisa Keenan were elected to the board of directors. Defendant Guillen was elected president of the Board of Directors, and Lisa Keenan was elected secretary of the Board of Directors. The shareholders agreement reveals that the plaintiff and defendant Guillen loaned the defendant corporation \$60,000, and received 45 and 50 shares of corporate stock respectively. Defendant Lisa Keenan provided no loans to the defendant corporation and received 5 shares of corporate stock. The plaintiff's attorney affirms that the three shareholders had a disagreement which led to an accounting and a financial appraisal of the corporate assets. The record reveals that the parties reached a standstill agreement at a shareholder's meeting on June 7, 2012, which provided for a forensic accounting and that the parties would stay any further action pending negotiations. However, on August 21, 2012, defendant Guillen called a special shareholders meeting to be held on August 22, 2012, at which time, the board of directors voted unanimously to remove the plaintiff as a director, officer and employee of the corporation. This action was subsequently commenced.

The plaintiff now moves for an order appointing a temporary receiver, restraining defendants from operating the corporation outside the normal course of business, reinstating the plaintiff as an officer, director and employee, and other relief. Defendant moves for an order dismissing the complaint pursuant to CPLR 3211 (a) (7), and cross-moves separately for an order vacating the prior order which granted the temporary relief to the plaintiff.

The Court now turns to the motion seeking a preliminary injunction and the cross motion which seeks to vacate the temporary relief granted by this Court by order dated August 23, 2012. The party seeking a preliminary injunction must establish (1) a likelihood of success on the merits, (2) the movant will suffer irreparable harm in the absence of an injunction and (3) a balancing of the equities favors the granting of an injunction. **Aetna Ins. Co. v Capasso**, 75 NY2d 860, 552 N.Y.S.2d 918 (1990); **Doe v Axelrod**, 73 NY2d 748, 536 N.Y.S.2d 44 (1988); **Olabi v Mayfield**, 8 AD3d 459, 778 NYS2d 311 (2d Dept 2004). The party seeking the preliminary injunction must present evidence establishing the likelihood of success on the merits. **Ying Fung Moy v Hoho Umeki**, 10 AD3d 604, 781 NYS2d 684 (2d Dept 2004); **Terrell v Terrell**, 279 AD2d 301, 719 NYS2d 41 (1st Dept 2001). “Conclusory statements lacking factual evidentiary detail warrant denial of a motion seeking a preliminary injunction” (*Id.*). As for the element of irreparable harm, the key determinant is whether or not that harm may be compensated by money damages if the motion is not granted. **WHG CS, LLC v LSREF Summer REO Trust 2009**, 79 AD3d 629, 915 NYS2d 36 (1st Dept 2010; **EdCia Corp. v McCormack**, 44 AD3d 991, 845 NYS2d 104 (2d Dept 2007). Here, the plaintiff has submitted the affirmation of counsel who fails to submit evidence which would meet the necessary elements for a preliminary injunction. In addition, the Court is not convinced that the plaintiff may not be made whole by the payment of money damages, as alleged in the complaint. Accordingly, the motion seeking a preliminary injunction is denied, and the temporary relief granted by order dated August 23, 2012 has hereby expired. As a result, defendant Guillen’s cross motion to vacate the temporary restraining order is denied as academic.

Turning to the motion to dismiss the complaint, “in considering a motion to dismiss a pleading for failure to state a cause of action, the court must accept the allegations of the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” CPLR 3211 [a][7]; **Munger v Board of Educ. of the Garrison Union Free School Dist.**, 85 AD3d 747, 748, 924 NYS2d 578, 580 (2d Dept 2011); *accord*, **Leon v Martinez**, 84 NY2d 83, 614 NYS2d 972 (1994). If the court can determine that the plaintiff is entitled to relief on any view of the facts stated, its inquiry is complete and the complaint must be declared legally sufficient. **Symbol Tech., Inc. v Deloitte & Touche, LLP**, 69 AD3d 191, 193-195, 888 NYS2d 538 (2d Dept 2009). Whether a plaintiff can ultimately establish its allegations is not part of the determination. **Sokol v Leader**, 74 AD3d 1180, 904 NYS2d 153 (2d Dept 2010).

Turning to the second cause of action alleging that the defendants breached an implied contract to operate the company in good faith and in a reasonably prudent manner, accepting the factual allegations contained in the complaint and the submissions in opposition to the motions, as

true, and giving them every favorable inference, the Court finds that the plaintiff has failed to state a cause of action. The Court construes this allegation to mean that the defendants breached their duty of good faith and fair dealing. Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance. **Dalton v Educ. Testing Serv.**, 87 NY2d 384, 389, 639 NYS2d 977 (1995). Inasmuch as the plaintiff has alleged a breach of contract in the first cause of action, the instant cause of action is duplicative of that claim. Therefore, the second cause of action is dismissed.

With regard to the third cause of action alleging that the defendants breached their fiduciary duty, accepting the factual allegations contained in the complaint and the submissions in opposition to the motions, as true, and giving them every favorable inference, the Court finds that the plaintiff has failed to state a cause of action. A cause of action alleging breach of fiduciary duty which is merely duplicative of a breach of contract claim, cannot stand. *See* **Celle v Barclays Bank P.L.C.**, 48 AD3d 301, 302, 851 NYS2d 500 (2008); **Brooks v Key Trust Co. Natl. Assn.**, 26 AD3d 628, 630, 809 NYS2d 270 (2006); **William Kaufman Org., Ltd. v Graham & James**, 269 AD2d 171, 173, 703 NYS2d 439 (2000). Here, the cause of action fails to allege conduct by defendants in breach of a duty other than, and independent of, that contractually established between the parties and is thus duplicative. **Kaminsky v FSP Inc.**, 5 AD3d 251, 252, 773 N.Y.S.2d 292 [1st Dept 2004]

Turning to the fourth cause of action, accepting the factual allegations contained in the complaint and the submissions in opposition to the motion, as true, and giving them every favorable inference, the Court finds that the plaintiff has failed to state a cause of action. An action for fraud must be pled “with particularity, including specific dates and items, if necessary and insofar as practicable” (CPLR 3016 [b]), which the Plaintiff failed to do. Conclusory allegations of fraud will not be sufficient. **Robertson v Wells**, 95 A.D.3d 862, 944 NYS2d 19 (2d Dept 2012); **Sargiss v Magarelli**, 50 AD3d 1117, 858 NYS2d 209 (2d Dept 2008); **Dumas v Fiorito**, 13 AD3d 332, 786 NYS2d 106 (2d Dept 2004). In order to make a prima facie showing of fraud, a Plaintiff must establish “a representation of fact, which is either untrue and known to be untrue or recklessly made, and which is offered to deceive the other party and to induce them to act upon it, causing injury.” **Jo Ann Homes at Bellmore, Inc. v Dworetz**, 25 NY2d 112, 119, 302 NYS2d 799 (1969). In any event, it is well settled that a cause of action for fraud does not arise when the only fraud charge relates to a breach of contract. *See* **Breco Env'tl. Contrs., Inc. v Town of Smithtown**, 307 AD2d 330, 332, 762 NYS2d 822 (2d Dept 2003); **Melissakis v Proto Constr. & Dev. Corp.**, 294 AD2d 342, 343, 741 NYS2d 731 (2d Dept 2002). In the case at bar, the plaintiff has failed to allege the actual facts surrounding the fraud. In any event, a cause of action alleging fraud does not lie where the only fraud claimed relates to a breach of contract. *See* **Tiffany at Westbury Condominium by**

Its Bd. of Mgrs. v Marelli Dev. Corp., 40 AD3d 1073, 1076, 840 NYS2d 74 (2d Dept 2007); **Rocchio v Biondi**, 40 AD3d 615, 835 NYS2d 401 (2d Dept 2007); **Mendelovitz v Cohen**, 37 AD3d 670, 830 NYS2d 577 (2d Dept 2007). Therefore, the fourth cause of action is dismissed.

Accordingly, the plaintiff's motion (001) seeking, *inter alia*, a temporary receiver, a temporary injunction and to restore the plaintiff to his former position, and the defendant's cross motion (003) seeking, *inter alia*, to vacate the order which granted temporary injunctive relief to the plaintiff, are denied without prejudice to renew upon the completion of all discovery. The defendant's motion (002) to dismiss the second, third and fourth causes of action is granted. Defendant Guillen is directed to serve and file an answer pursuant to CPLR 3211 (f).

Dated: February 6, 2013
Riverhead, New York



EMILY PINES
J. S. C.

[] Final
[x] Non Final