Dabidat v Sandoval
2013 NY Slip Op 32940(U)
November 15, 2013
Sup Ct, New York County
Docket Number: 653861/2012
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35
Justice

Index Number : 653861/2012
DABIDAT, MICHAEL VISHOL
vs.
SANDOVAL, FRED
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. ____
MOTION DATE 9/9/13
MOTION SEQ. NO. ____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ____
FOR THE FOLLOWING REASON(S): ____

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that plaintiff's motion to dismiss defendant's counterclaims in the Verified Answer is denied; and it is further

ORDERED that the motion by defendant Fred Sandoval for an order granting him leave to serve plaintiff Michael Vishol Dabidat with the Verified Amended Answer, Affirmative Defenses, and Counterclaims in the form attached to defendant's reply papers as exhibit A, pursuant to CPLR § 3025(b), is granted **except as to as to the tenth and twelfth proposed counterclaims**, and defendant shall serve the Verified Amended Answer, Affirmative Defenses, and Counterclaims within 10 days of entry of this order; and it is further

ORDERED that plaintiff shall serve a reply to the Verified Amended Answer, Affirmative Defenses, and Counterclaims within 20 days of service of the Verified Amended Answer, Affirmative Defenses, and Counterclaim; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

Dated: 11/15/13 ____, J.S.C.
HON. CAROL EDMEAD

1. CHECK ONE: .... [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: [ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE: .... [ ] SETTLE ORDER [ ] SUBMIT ORDER
[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

---X

MICHAEL VISHOL DABIDAT,

Plaintiff,

-against-

FRED SANDOVAL,

Defendant.

---X

Index No.: 653861/2012

DECISION AND ORDER

Motion Seq. 002

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this action for conversion and for dissolution of the corporation in question, plaintiff Michael Vishol Dabidat ("plaintiff") moves pursuant to CPLR 3211(a)(7) to dismiss the counterclaims of defendant Fred Sandoval ("defendant"), and for sanctions, costs and attorneys' fees.

In response, defendant opposes the motion, and in the alternative, cross moves for leave to file a Verified Amended Answer, Affirmative Defenses, and Counterclaims ("Proposed Answer"), pursuant to CPLR 3025(b), should this court decide that the claims asserted against certain third-party defendants should have been alleged in the counterclaims so as to join those parties. In his Proposed Answer, defendant retained his six counterclaims for breach of fiduciary duty, usurpation of corporate opportunity, breach of duty of good faith, civil conspiracy, dissolution of the corporation, and sanctions. Defendant added eight counterclaims, which are identical to the claims in the third-party action recently filed by defendant on August 13, 2013.

Factual Background

Defendant contends that, in 2010, plaintiff and defendant formed a professional services corporation, Sandoval and Dabidat ("S&D"), for the purpose of providing public accounting

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services. Plaintiff secured as S&D's first client, McNulty ("McNulty"), an accounting firm owned by Joseph McNulty ("Mr. McNulty"). Plaintiff focused on S&D's work for McNulty; defendant ran S&D's day-to-day operations and continued to seek out new clients. After securing McNulty as S&D's client, plaintiff never attempted to bring in new business for S&D. Plaintiff ultimately requested that defendant consider merging S&D with McNulty. As a result of defendant's refusal to merge, plaintiff and McNulty allegedly "plotted and conspired to (a) divert business from S&D; (b) exclude S&D and [defendant] from future public accounting business; (c) profit at S&D's expense; and (d) not pay the outstanding balance to S&D for work performed." Defendant further alleges that McNulty agreed to breach its agreement with S&D, and hired plaintiff directly to do public accounting work. And, this new relationship was in direct competition to S&D and in violation of plaintiff's fiduciary duties to S&D and defendant. Moreover, plaintiff and McNulty profited financially, while S&D's business suffered because plaintiff "completely neglected and abandoned S&D." Consequently, defendant interposed in his Verified Answer counterclaims for breach of fiduciary duty, usurpation of corporate opportunity, breach of duty of good faith, civil conspiracy, dissolution of the corporation. Defendant contends plaintiff's claim is frivolous and sanctions against plaintiff are warranted.

Plaintiff, on the other hand, alleges, *inter alia*, that McNulty paid S&D fees for accounting services performed. However, plaintiff did not withdraw his portion of such fees from S&D's bank account, and defendant wrongfully converted and spent defendant's portion on plaintiff's personal expenses, such as tuition for his children.

In support of his motion to dismiss, plaintiff argues that defendant lacks standing to bring the first four counterclaims in defendant's answer (for breach of fiduciary duty, usurpation of

corporate opportunity, breach of duty of good faith, and civil conspiracy). According to plaintiff, defendant's pleadings contain a dispositive admission that these counterclaims allege wrongs against the corporation, S&D, and not defendant personally. Thus, defendant's first four counterclaims must be dismissed as they are derivative claims which defendant lacks standing to bring personally.

In support of his request for sanctions and attorney's fees, plaintiff argues that such counterclaims are frivolous and "egregious to the point of shocking the conscience." Defendant's fourth counterclaim is the most egregious of the counterclaims in that it alleges conspiracy by an individual (Mr. McNulty) who is not a party to the case. Plaintiff points out that "a claim of conspiracy does not constitute a substantive tort and may be alleged only to connect a defendant to an otherwise actionable tort." Thus, "the purpose of conspiracy is to bring in other defendants who aided and abetted in some way the commission of the underlying alleged tort." McNulty, however, is not a defendant. Plaintiff further contends that "all of defendant's actions in this case have been frivolous in the sense that they will not alter the final outcome of the case." And, that "each step taken by the defendant has served no purpose but to drag the case out and waste judicial resources." Therefore, plaintiff requests this court punish the defendant and his attorney's "in the severest way possible by awarding the plaintiff with costs and attorney's fees, and whatever additional sanctions the court deems appropriate."

As for defendant's remaining counterclaims, plaintiff argues that the fifth counterclaim (to dissolve the corporation) is duplicative of plaintiff's claim requesting the same relief. And, the sixth counterclaim (alleging that plaintiff's case is frivolous) is belied by the fact that this

court denied defendant's motion to dismiss.[1] Thus, plaintiff requests this court dismiss the defendant's counterclaims in their entirely.

In response, defendant opposes plaintiff's motion to dismiss and contends he has adequately pleaded his counterclaims. Defendant's claims against plaintiff for breach of fiduciary duty, usurpation of corporate opportunity, and breach of duty of good faith are direct claims pursuant to BCL § 720. According to defendant, particular language of the provision provides support for defendant's contention. Notwithstanding, defendant meets the elements necessary to bring a derivative action. As to defendant's fourth counterclaim (alleging civil conspiracy), defendant contends that "plaintiff may be held liable for his actions." Moreover, on August 13, 2013, defendant filed a third-party action against the alleged co-conspirator, McNulty, which includes a claim for conspiracy. Thus, defendant's counterclaim alleging civil conspiracy has been properly pleaded and plaintiff's motion to dismiss should be denied.

However, defendant requests that in the event this court decides that the claims asserted against the third-party defendants should have been alleged in the Counterclaim so as to join those parties, defendant should be granted leave to file an Amended Counterclaim. In support, defendant contends that plaintiff has not challenged the sufficiency of the conspiracy claim. And, at this stage of the proceedings, before discovery, there is no prejudice to plaintiff or the parties being joined. Since pleadings are to be liberally construed, and his counterclaims are sufficiently pleaded and have merit, leave to amend should "be freely given," pursuant to CPLR § 3025(b).

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[1] In his Proposed Answer, defendant lists the counterclaim to dissolve the corporation as the thirteenth proposed counterclaim; the sixth counterclaim alleging that plaintiff's case is frivolous is listed as the fourteenth counterclaim.

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In reply, plaintiff contends that the provision of BCL § 720 under which defendant brought his counterclaims does not apply because S&D is a professional services corporation and the particular provision cited by the defendant pertains to a "Benefit Corporation." Plaintiff concedes that the counterclaims could be brought in a derivative action under BCL § 626. However, plaintiff urges such an action is "entirely inappropriate as a counterclaim to the complaint at hand, which has nothing to do with S&D, but is rather an individual action against defendant".

Further, in opposition to defendant's cross-motion for leave to amend, plaintiff notes that the motion "can (and must) be denied without reaching the question of the palpable lack of merit of these counterclaims." First, defendant failed to name the new defendants in his Proposed Answer, thus rendering the counterclaims "palpably insufficient [and] patently devoid of merit." Second, defendant failed to move the court to join the unnamed parties under CPLR 1001 or 1002, and defendant's notice of cross-motion did not contain a general request for relief to permit any such relief. Third, defendant "failed to demonstrate that [these unnamed parties] needed to be part[ies] if complete relief is to be accorded between the plaintiff and the defendant." Fourth, defendant's counterclaims against Mr. McNulty have no relation to plaintiff's claim against defendant, and are claims by a non-party (S&D) against another non-party (McNulty).

Also, defendant's remaining counterclaims are against an individual and entity not named as parties in the Proposed Answer or joined to the action. Plaintiff contends that allowing these unnamed parties to be joined would "clearly cause delay, expense, and likely embarrassment" to plaintiff "who asserts no claim against these parties, and who has no claims asserted against him by these parties." Therefore, defendant's cross-motion for leave to amend must be denied.

Plaintiff further argues that "defendant's counterclaims (and proposed amended counterclaims) fail to sufficiently plead any causes of action against the plaintiff" and that "defendant does not allege any cognizable wrongs by the plaintiff." Therefore, the counterclaims must be dismissed for this reason as well.

In his reply, defendant points out that the Proposed Answer did name the counterclaim-defendants. Defendant concedes, however, that the *caption* in the Proposed Answer did not name the counterclaim-defendants nor did it include the new counterclaim-plaintiff, S&D. Defendant contends, however, that this amounts to a mere "defect in the form of a paper" "which shall be disregarded by the court if a substantial right of a party is not prejudiced." And, plaintiff cannot claim prejudice since the Proposed Answer has not been filed. Accordingly, defendant submits for the court's consideration a second proposed answer ("Second Proposed Answer") which, apart from the corrected caption, is identical to the Proposed Answer.

As to defendant's failure to move the court to join the third-parties under CPLR 1001 or 1002, defendant argues that no such requirement exists for the assertion of counterclaims against a third-party. Nor is there a requirement that the counterclaims asserted be related to plaintiff's claim against defendant. Rather, "a counterclaim can be interposed regardless of its subject matter and whether it has any connection with the plaintiff's cause of action."

Discussion

Plaintiff's Motion to Dismiss Defendant's Counterclaims

At the outset, the Court notes that while plaintiff cites to CPLR 3211(a)(7), which permits the Court to dismiss a claim for failure to state a cause of action, plaintiff's arguments pertaining to the failure to state a cause of action are essentially and initially aimed at defendant's fourth,

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fifth and sixth counterclaims.[2] The Court's analysis proceeds accordingly.

Standing

As to plaintiff's claim that defendant lacks standing to bring the first four counterclaims which allege wrongs committed against the corporation, although the particular provision of BCL § 720 that defendant cites as permitting direct claims by a shareholder for wrongs against the corporation specifically pertains to benefit corporations rather than professional services corporations, the remaining provisions of BCL § 720 are not so limiting.

Section (a) of the BCL § 720 provides:

> An action may be brought against one or more directors or officers of a corporation to procure a judgment for the following relief:
> (1) Subject to any provision of the certificate of incorporation authorized pursuant to paragraph (b) of section 402, to compel the defendant to account for his official conduct in the following cases:
> (A) The neglect of, or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his charge.
> (B) The acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect of, or failure to perform, or other violation of his duties.
> (C) In the case of directors or officers of a benefit corporation organized under article seventeen of this chapter: (i) the failure to pursue the general public benefit purpose of a benefit corporation or any specific public benefit set forth in its certificate of incorporation . . . .

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Section (b) of the BCL § 720 provides:

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[2] For example, plaintiff 's initial moving papers do not argue that defendant's first counterclaim for breach of fiduciary duty fails to plead the elements constituting such a claim, that (1) plaintiff owed it a fiduciary duty, (2)plaintiff committed misconduct, and (3) defendant suffered damages caused by that misconduct (*see Burry v Madison Park Owner LLC*, 84 AD3d 699, 924 NYS2d 77 [1st Dept 2011]). Notably, plaintiff argues, for the first time in reply, that the first three counterclaims failed to state the manner in which damages were sustained as a result of plaintiff's alleged conduct. However, defendant's reply was limited by the court (e-file Doc. No. 56) to arguments raised by plaintiff's opposition (to defendant's cross-motion). Therefore, the court does not address plaintiff's new arguments raised in further support of dismissal of the first three counter claims raised for the first time in reply (*Wal-Mart Stores, Inc. v U.S. Fidelity and Guar. Co.*, 11 AD3d 300, 784 NYS2d 25 [1st Dept 2004] (arguments raised for the first time in reply are not to be considered)).

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> An action may be brought for the relief provided in this section, and in paragraph (a) of section 719 (Liability of directors in certain cases) by a corporation, or a receiver, trustee in bankruptcy, officer, director or judgment creditor thereof, or, under section 626 (Shareholders' derivative action brought in the right of the corporation to procure a judgment in its favor), by a shareholder, voting trust certificate holder, or the owner of a beneficial interest in shares thereof.

Here, defendant alleges that he and plaintiff served and continue to serve as officers, directors, and shareholders of S&D. Both plaintiff and defendant acknowledge that S&D is a professional services corporation formed pursuant to BCL § 1503. Given that all articles of BCL apply to domestic professional services corporation, and there being no specific contrary provision excluding the application of Section (a) or (b) of BCL § 720 to professional services corporations, Section (a) and (b) of BCL § 720 both apply to S&D (*see We're Assocs. Co. v Cohen, Stracher & Bloom, P.C.*, 65 NY2d 148, 151, 490 NYS2d 743, 745, 480 NE2d 357 [1985] ("Business Corporation Law § 1513 provides that all articles of the Business Corporation Law apply to domestic professional service corporations, except those articles regulating foreign corporations and foreign professional service corporations, unless there is a specific contrary provision in article 15.").[3] Thus, defendant does have standing to bring the first four counterclaims pursuant to BCL § 720 (*Conant v Schnall*, 33 AD2d 326, 307 NYS2d 902 [3d Dept 1970] ("Section 720 of the Business Corporation Law permits an officer or director of a corporation to bring an action against another officer or director for his 'neglect of, or failure to perform or other violation of his duties in the management and disposition of corporate assets

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[3] Plaintiff concedes that defendant could have brought the first four counterclaims in a derivative capacity under BCL § 626, but argues that such counterclaims would be inappropriate since plaintiff brings claims *individually* against defendant. Although, generally, a defendant's counterclaim against a plaintiff must be made in the same capacity in which it is sued, an exception has been recognized where the party suing in a representative capacity is also a real party in interest (see *Conant v Schnall*, 33 AD2d 326, 307 NYS2d 902 [3d Dept 1970]).

committed to his charge")). Therefore, the branch of plaintiff's application to dismiss defendant's counterclaims based on the lack of standing is denied.

Failure to State a Cause of Action

In determining a motion to dismiss pursuant to CPLR 3211 (a)(7), the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). On such a motion, the "pleading is to be liberally construed" and the court must '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'" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]; *David v Hack*, 97 AD3d 437, 948 NYS2d 583 [1st Dept 2012]).

As to whether defendant's fourth proposed counterclaim against plaintiff adequately states a civil conspiracy claim, as plaintiff correctly points out, there is no substantive tort for civil conspiracy (*Satin v Satin*, 69 AD2d 761, 414 NYS2d 570 [1st Dept 1979] ("[t]here is no tort of civil conspiracy in and of itself. There must first be pleaded specific wrongful acts which might constitute an independent tort."); *see Romano v Romano*, 2 AD3d 430, 432, 767 NYS2d 841 [2003] ("a cause of action sounding in civil conspiracy cannot stand alone, but stands or falls with the underlying tort")). However, a party may plead the existence of a conspiracy in order "to connect the actions" of its adversaries "with an actionable, underlying tort and establish that those actions were part of a common scheme" (*Abacus Federal Savings Bank v Lim,* 75 AD3d 472, 905 NYS2d 585; *see Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968, 969, 510 NYS2d 546 [1986]). Thus, the allegation of conspiracy is allowed only to connect a party to an

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otherwise cognizable tort (*McGill v Parker*, 179 AD2d 98, 105, 582 NYS2d 91, 95 [1st Dept 1992] *citing Monsanto v Electronic Data Systems Corp.*, 141 AD2d 514, 515, 529 NYS2d 512).

Here, defendant alleges that plaintiff and *Mr. McNulty*, who was not initially made a party to the case, "conspired as part of a common scheme to harm [defendant] and S&D through a series of overt and wrongful acts, including acts giving rise to the causes of action set forth in this counterclaim." Defendant alleges that plaintiff and Mr. McNulty each intentionally participated in overt wrongful acts which included: (a) diverting business from S&D; (b) excluding S&D and [defendant] from future public accounting business from McNulty; (c) profiting at S&D's expense; and (d) not paying the outstanding balance to S&D for work performed."

Although Mr. McNulty was not an initial party to this action, in defendant's Proposed Answer, defendant includes additional counterclaims against Mr. McNulty and McNulty, which encompass the overt wrongful acts defendant alleges were committed by Mr. McNulty and McNulty in the fourth counterclaim. In his cross-motion, defendant seeks leave to amend should this court decide that the claims asserted against Mr. McNulty and McNulty as third-party defendants should have been alleged in the Counterclaim so as to join those parties. This court finds that the proposed additional tort-based counterclaims asserted against Mr. McNulty are adequately stated (see *infra*, pp. 14-16), and that as such, joinder of Mr. McNulty and McNulty is proper given the allegations of conspiracy connecting Mr. McNulty and McNulty to the alleged underlying wrongs. There is no prejudice against Mr. McNulty and McNulty in joining them as parties.[4]

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[4] Notably, CPLR 3019(a) provides that a counterclaim may be asserted "against one or more plaintiffs, . . . and other persons alleged to be liable." However, CPLR 3019(c) requires that "Where a person not a party is alleged to be liable a summons and answer containing the counterclaim or cross-claim shall be filed, whereupon he

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Accordingly, the branch of defendant's application to dismiss the cause of action for civil conspiracy is denied.

Fifth Counterclaim for Dissolution of the Corporation (Thirteenth in Proposed Answer)

First, plaintiff cited no authority to support dismissal of defendant's counterclaim for dissolution on the ground of duplicity. Second, a reading of plaintiff's third cause of action in his Amended Complaint for dissolution, and defendant's counterclaim for dissolution reveals that each counterclaim seeks dissolution on entirely different grounds. Plaintiff seeks dissolution on the grounds that defendant allegedly converted plaintiff's funds, has been oppressive toward plaintiff by refusing to disburse plaintiff's funds to him, and has refused to permit plaintiff to examine S&D's books and records, in violation of BCL § 1104(a)(1). And, it is alleged that if the funds are deemed to have belonged to S&D, as opposed to plaintiff, then dissolution is warranted pursuant to BCL § 1104(a)(2) (where the corporation's assets are being wasted or diverted for non-corporate purposes by officers in control thereof). In contrast, defendant's counterclaim for dissolution, alleges that plaintiff diverted business from S&D, excluded defendant from public accounting business from McNulty, profited at the expense of S&D, and caused the non-payment of the outstanding balance to S&D for work performed. In light of the marked differences between both claims for dissolution, and in the absence of any caselaw to the contrary, dismissal of defendant's fifth counterclaim for dissolution on the ground of duplicity is denied.

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footnote 4, cont'd.

or she shall become a defendant. Service upon such a defendant shall be by serving a summons and answer containing the counterclaim or cross-claim. Such defendant shall serve a reply or answer as if he or she were originally a party."

Sixth Counterclaim for Frivolous Claims (*Fourteenth in Proposed Answer*)

Defendant's sixth counterclaim seeks costs of defense and attorneys' fees on the ground that "this action constitutes a frivolous claim." (¶64).

"Pursuant to 22 NYCRR 130–1.1(a), a court 'in its discretion, may award to any party or attorney in any civil action or proceeding before the court ... costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct' and, in 'addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part'" (*Cadlerock Joint Venture, L.P. v. Sol Greenberg & Sons Intern., Inc.*, 94 AD3d 580, 942 NYS2d 497 [1st Dept 2012]). "As defined in subdivision (c) of 22 NYCRR 130–1.1, conduct is frivolous if "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false." (*Id.*)

Defendant's counterclaim is premised on the allegation that plaintiff (and his attorney) knew "or should have known that there is no basis in fact or law upon which to maintain claims in this action against defendant." Defendant also asserts, in opposition, that plaintiff misrepresented his position with McNulty in order to harass defendant and shield himself from liability.

Plaintiff's basis for dismissal, that this Court previously declined to dismiss plaintiff's claims, is insufficient to defeat defendant's claims of frivolous conduct, at this juncture. It has

been held that "[m]aking colorable claims may constitute frivolous conduct if the primary purpose is to delay or prolong the resolution of the litigation, or to harass or maliciously injure the other party (*Kaygreen Realty Co., LLC v IG Second Generation Partners, L.P.*, 78 AD3d 1008, 913 NYS2d 663 [2d Dept 2010]).

Therefore, dismissal of defendant's sixth counterclaim is denied.

Defendant's Motion for Leave to Amend Answer

It is noted that leave to amend a pleading should be "freely given" (CPLR 3025 [b]) "as a matter of discretion in the absence of prejudice or surprise" (*Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590, 591, 550 NYS2d 337 [1990]; *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959, 471 NYS2d 55, 459 NE2d 164 [1983]). To conserve judicial resources however, examination of the underlying merit of the proposed amendment is mandated (*Megaris Furs v Gimbel Bros.*, 172 AD2d 209, 568 NYS2d 581 [1991]). A proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted *(Eighth Ave. Garage Corp. v H.K.L. Realty Corp. et al.*, 60 AD3d 404 [1st Dept 2009]). "On a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500, 901 NYS2d 522 [1st Dept 2010], *internal citations omitted*).

Fifth Counterclaim for Breach of Contract

Defendant's fifth proposed counterclaim alleges that McNulty breached its agreement with S&D. To state a cause of action for breach of contract, the proponent of the pleading must specify the making of an agreement, the performance by that party, breach by the other party, and

resulting damages (*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071, 816 NYS2d 702 [Supreme Court, New York County 2006], *citing Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). Furthermore, a pleading alleging breach of contract must set forth the terms of the agreement upon which liability is predicated by making specific reference to the relevant portions of the contract, or by attaching a copy of the contract to the complaint (*Kraus v Visa Intl. Serv Assn.*, 304 AD2d 408 [1st Dept 2003]; *Matter of Sud v Sud*, 211 AD2d 423, 621 NYS2d 37 [1st Dept 1995]).

Defendant has sufficiently plead a cause of action against McNulty for breach of contract. Defendant alleges the existence of an agreement between S&D and McNulty in which McNulty agreed to pay S&D for services rendered. Defendant further alleges that defendant, on behalf of S&D performed under the agreement, that McNulty breached the agreement by failing to make payment in full for the services rendered, and that S&D and defendant have sustained damages as a result.

Therefore, the branch of defendants application seeking leave to amend his counterclaims to include a cause of action for breach of contract against McNulty is granted.

Sixth Counterclaim Breach of Covenant of Good Faith and Fair Dealing

It is axiomatic that all contracts imply a covenant of good faith and fair dealing in the course of performance (*Forman v Guardian Life Ins. Co. of America*, 76 AD3d 886, 908 NYS2d 27 511 [1st Dept 2010], *citing W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153, 746 NYS2d 131 [2002]), which "embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract'" (*Forman*, 76 AD2d at 888, *quoting Dalton v Educational Testing Serv.*, 87 NY2d 384,

389, 639 NYS2d 977 [1995], *quoting Kirke La Shelle Co. v Armstrong Co.*, 263 NY 79, 87, 188 NE 163 [1933]). Plaintiff sufficiently pleaded that in connection with McNulty's agreement to pay defendant for accounting services rendered by defendant, McNulty (and Mr. McNulty) breached the implied covenant of good faith and fair dealing by diverting business from S&D to itself. Thus, leave to assert this counterclaim is granted.

Seventh Counterclaim for Unjust Enrichment against McNulty

Defendant's seventh proposed counterclaim alleges unjust enrichment against McNulty. To state a cause of action for unjust enrichment, a claimant must plead that he or she conferred a benefit upon defendant and that defendant obtained that benefit without adequately compensating claimant (*Korff v Corbett*, 18 AD3d 248, 794 NYS2d 374 [1st Dept 2005]). Defendant has sufficient plead that McNulty failed to make payment in full for services defendant rendered and that McNulty has been unjustly enriched. Therefore, leave to amend the counterclaims to include a cause of action against Mr. McNulty for unjust enrichment is granted.

Eighth Counterclaim for Aiding and Abetting Breach of Fiduciary Duties

Defendant's eighth proposed counterclaim alleges that Mr. McNulty and McNulty knowingly participated in plaintiff's breach of his fiduciary duty. To state a cause of action for aiding and abetting a breach of fiduciary duty, a claimant must plead (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that claimant suffered damage as a result of the breach (*Kaufman v Cohen*, 307 AD2d 113, 125, 760 NYS2d 157 [1st Dept 2003] *citing S & K Sales Co. v Nike, Inc.*, 816 F2d 843, 847–848 [2d Cir.1987]; *Whitney v Citibank*, N.A., 782 F2d 1106, 1115 [2d Cir 1986], citing *Wechsler v Bowman*, 285 NY 284, 291, 34 NE2d 322). Here, defendant has sufficiently stated a

cause of action against Mr. McNulty and McNulty for aiding and abetting a breach of fiduciary duty by alleging that plaintiff breached his duty to S&D, that McNulty knew that plainitff was an officer of S&D and conspired with plaintiff to divert business from S&D. Therefore, leave to amend the counterclaims to include a cause of action against Mr. McNulty and McNulty for aiding and abetting a breach of fiduciary duty is granted.

Ninth Counterclaim for Piercing the Corporate Veil Against Mr. McNulty

In order state a claim seeking to pierce the corporate veil, a claimant must allege: "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 798 NYS2d 45 [1st Dept 2005] *citing Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141, 603 NYS2d 807, 623 NE2d 1157 [1993]).

Here, defendant sufficiently pleaded that Mr. McNulty exercised complete dominion and control of McNulty with respect to the decision making and funds in question, and that such domination was used to commit the wrongs against defendant and S&D *(see Trans Intern. Corp. v Clear View Technologies, Ltd.*, 278 AD2d 1, 717 NYS2d 146 [1st Dept 2000] (reinstating a claim to pierce the corporate veil where it was alleged that defendants were the company's equitable owners, that the company was their alter ego, that they exercised complete dominion and control over the company and that equity requires that they be held liable for the company's obligations to plaintiff)). Therefore, leave to amend the counterclaims to include, in the alternative, a claim for piercing the corporate veil against Mr. McNulty is granted.

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Tenth and Twelfth Counterclaims

Defendant's tenth and twelfth proposed counterclaims for conversion and unjust enrichment are alleged against Mrs. Ramsaywach ("Ramsaywach") and her company, R&D.

A *conversion* takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]; *State of New York v Seventh Regiment Fund*, 98 NY2d 249, 746 NYS2d 637, 774 NE2d 702 [2002]). "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Dobroshi v Bank of America, N.A.*, 65 AD3d 882, 886 NYS2d 106 [1st Dept 2009] *citing Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50, 827 NYS2d 96, 860 NE2d 713 [2006]).

Contrary to defendant's contentions, joining Ramsaywach and R&D to this action to assert a conversion claim, would "clearly cause delay, expense, and likely embarrassment" to plaintiff "who asserts no claim against these parties, and who has no claims asserted against him by these parties."

Defendant alleges that S&D *paid Ramsaywach* "for the lease S&D's second business office" and as an "investment towards" a business relationship with *Ramsaywach*. Defendant claims that S&D gave *Ramsaywach* $1,000 as working capital for start-up costs. (¶33). After allegedly conspiring with plaintiff, *Ramsaywach* "reneged on the deal, but never returned the monies given to her by S&D." (¶34). Plaintiff and Ramsaywach allegedly formed a company, "R&D," instead, and R&D received the benefits of the $2700.00. As a result, defendant and

S&D demanded the return of the $2,700, which R&D refused.

While defendant's allegations indicate that *Ramsaywach* exercised dominion and control over the $2,700, the same cannot be said as to R&D. That R&D may have received the benefits of the $2,700 is insufficient to state a conversion claim. Thus, the tenth counterclaim as stated against Ramsaywach, who allegedly received the $2,700, is sufficiently stated.

And, to the extent defendant's twelfth counterclaim alleges that both Ramsaywach and R&D received the benefits of S&D's payment toward a business relationship between the parties, which never came to fruition, an unjust enrichment claim was adequately stated.

However, notwithstanding the above, the conversion and unjust enrichment claims against Ramsaywach (individually) and against Ramsaywach (individually) and R&D, respectively, have no bearing on the factual transactions giving rise to plaintiff's conversion and dissolution claims arising from defendant's relationship with *McNulty and Mr. McNulty.* Nor do the tenth and twelfth counterclaims have any bearing on the remaining counterclaims against plaintiff arising from plaintiff's alleged relationship with *McNulty and Mr. McNulty.* Therefore, leave to amend the counterclaims to include the tenth and twelfth counterclaims against Ramsaywach and R&D for conversion is denied.

Eleventh Counterclaim

To the degree this counterclaim is tied to a sufficiently stated tort claim asserted against plaintiff, the eleventh counterclaim against Ramsaywach (individually) for aiding and abetting plaintiff's breach of fiduciary duties is adequately stated. Defendant alleges that plaintiff breached his fiduciary obligation to S&D, (2) that Ramsaywach knew that plaintiff was an officer of S&D and conspired with him to divert S&D's funds and prevent S&D from opening a second

business office as planned, and that defendant suffered damage as a result of the breach (*see Kaufman v Cohen*, 307 AD2d 113 *supra*). Therefore, leave to amend the counterclaims to include the eleventh counterclaim for aiding and abetting plaintiff's breach of fiduciary duties is granted.

In light of defendant's compliance in reply by amending the caption to include the counterclaim defendants, such as, *inter alia*, Dabidat, McNulty, Mr. McNulty, and Ramsaywach, defendant need only comply with CPLR 3019(c)'s requirement of service of a summons and counterclaims upon the counterclaim defendants (*see supra*, p. 9, footnote, 3).

Finally, in light of the above, the branch of plaintiff's motion for sanctions, costs and attorneys' fees against defendant is denied. Contrary to plaintiff's contentions, defendant's counterclaims are neither frivolous, nor egregious.

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion to dismiss defendant's counterclaims in the Verified Answer is denied; and it is further

ORDERED that the motion by defendant Fred Sandoval for an order granting him leave to serve plaintiff Michael Vishol Dabidat with the Verified Amended Answer, Affirmative Defenses, and Counterclaims in the form attached to defendant's reply papers as exhibit A, pursuant to CPLR § 3025(b), is granted **except as to as to the tenth and twelfth proposed counterclaims**, and defendant shall serve the Verified Amended Answer, Affirmative Defenses, and Counterclaims within 10 days of entry of this order; and it is further

ORDERED that plaintiff shall serve a reply to the Verified Amended Answer,

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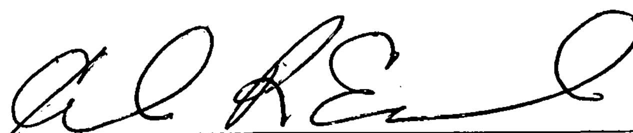
Affirmative Defenses, and Counterclaims within 20 days of service of the Verified Amended Answer, Affirmative Defenses, and Counterclaim; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

Dated: November 15, 2013



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD