

Benishai v BMC LLC
2013 NY Slip Op 32969(U)
November 20, 2013
Sup Ct, New York County
Docket Number: 650385/2013
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: SHIRLEY WERNER KORNREICH
J.S.C.
Justice

PART 54

Benishai
- v -
BMC LLC et al

INDEX NO. 650385/13
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

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	
23-34	_____
37-56	_____
7, 8, 9, 90	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is denied in accordance with the amended motion

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

Dated: 11/20/13

Shirley Werner Kornreich
SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X

DAVID BENISHAI, individually and as a shareholder
of Ilan Properties, Inc.,

Plaintiff,

Index No: 650385/2013

DECISION & ORDER

-against-

BMC LLC, BMC REALTY, LLC, JACK BENISHAI,
ISAAC BENISHAI, and ILAN PROPERTIES, INC.,

Defendants.

-----X

SHIRLEY WERNER KORNREICH, J.:

Defendants BMC Realty LLC and Isaac Benishai move: (1) to dismiss the Complaint;
and (2) for sanctions against plaintiff David Benishai. Defendants' motion is denied for the
reasons that follow.

I. Factual Background & Procedural History

This case is one of many disputes, spanning years, amongst the Benishai brothers, David
and Jack,¹ regarding their company, nominal defendant Ilan Properties, Inc. (IPI), which owns
two buildings on West 76th Street in Manhattan (the Building). IPI has no shareholder
agreement, and its board of directors is made up of David and Jack, each owing 50%.² The prior
litigation settled in 2009 when the parties executed a Settlement Agreement, in which it was
agreed that defendant BMC LLC (BMC) would manage the Building and disputes would be
resolved by a particular arbitrator, Richard Cohn (the Arbitrator). The individual defendants,

¹ For clarity, the court refers to the Benishais by their first names.

² Plaintiff's counsel averred at the argument on this motion, that he believed Jack had recently
sold his half interest to a third-party.

Jack and his son Isaac, are the sole members of BMC. BMC's management contract with IPI expired in 2011 and was not renewed. IPI is currently being managed by another company.

BMC's contract was not renewed because it allegedly acted improperly. As a result, IPI has not been able to file tax returns for 2009, 2010, and 2011, which led to IPI being dissolved by the New York Secretary of State on January 25, 2012. Moreover, among other things, the inability to file its tax returns has interfered with IPI's ability to refinance the Building's mortgage. To remedy these issues, David has attempted, on occasions too numerous to recount in detail, to obtain the complete set of IPI's financial records from defendants. Indeed, despite defendants' repeated assurances in front of the Arbitrator, they have refused to produce these records, and BMC has maintained that it is not subject to the Arbitrator's jurisdiction.

Thus, David commenced this action on February 4, 2013. The Complaint seeks the full set of IPI's financial records, asserts derivative claims for corporate mismanagement and breach of contract, and a direct claim for defamation. The instant motion seeks dismissal of the derivative claims due to failure to plead demand futility and other myriad arguments, most of which the court will not discuss.³ After oral arguments were held on October 29, 2013, the court issued an interim order compelling production of the requested records by November 4, 2013. *See* Dkt. 89.

II. Discussion

³ It should be noted that defendants' contentions about which BMC entity is the proper defendant misses the mark. It is defendants who apparently conflated the BMC entities when serving as IPI's management company. Discovery will determine how these companies were operated, where they were licensed to do business, and how such conduct might create personal liability for Jack and Isaac.

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); see also *Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames, id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if “the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

Plaintiff has established demand futility on his derivative claims. Jack controls 50% of IPI and “the challenged transaction[s] [are] so egregious on [their] face that [they] could not have been the product of sound business judgment of the directors.” *Marx v Akers*, 88 NY2d 189, 201 (1996); *In re Comverse Technology, Inc.*, 56 AD3d 49, 53-54 (1st Dept 2008). This case, at its core, is about alleged bad conduct of defendants allegedly leading to the downfall of

IPI. Plaintiff, in this action, seeks to take the necessary steps to allow IPI to get its finances in order so that the Building's new management can do their job properly. To be sure, plaintiff has attempted to resolve these problems with the Arbitrator. But, as the record before the Arbitrator makes clear, defendants' refusal to provide IPI and its new management company with the full set of financial records has undermined plaintiff's efforts and imperils the existence of IPI. Defendants, now, must produce all of the records pursuant to this court's order. The court will not tolerate noncompliance, gamesmanship, or any further delays – which has the potential to cause plaintiff and IPI irreparable harm.

As for the defamation claim, it is properly pled pursuant to CPLR 3016(a), because the Complaint describes conversations between defendants and third-parties in which Jack called David a “criminal”. This qualifies as defamation *per se* because it “impugns” David’s professional reputation. *See Glazier v Harris*, 99 AD3d 403, 404 (1st Dept 2012), citing *Lieberman v Gelstein*, 80 NY2d 429, 434-35 (1992). Accordingly, it is

ORDERED that the motion by defendants BMC Realty LLC and Isaac Benishai to dismiss the Complaint is denied, defendants’ motion for sanctions is denied, and compliance with the court’s October 29, 2013 interim order (Dkt. 89) and repercussions, if any should compliance not occur, will be determined at a preliminary conference, which will be held on December 16, 2013 at 10:00 am.

Dated: November 20, 2013

ENTER:



J.S.C.