Marcus v Antell

2013 NY Slip Op 32986(U)

November 21, 2013

Sup Ct, NY County

Docket Number: 650942/2013

Judge: Melvin L. Schweitzer

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

PRESENT: MELVIN L. SCHWEITZER PART 45
Justice

ANDREW MARCUS

INDEX NO. 650942/2013

MOTION DATE

- v -

MOTION SEQ. NO. 001

CRAIG ANTELL, et al

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion by Defendants to dismiss the complaint is GRANTED in part and DENIED in part per the attached Decision and Order.

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

Dated: November 21, 2013

[signature], J.S.C.
MELVIN L. SCHWEITZER

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

ANDREW MARCUS, derivatively on behalf of CAAM LLC and MACC PAYROLL PROCESSING INC., Plaintiff, -against- CRAIG ANTELL, CRAG ANTELL, D.O., P.C., and STEVEN MASLOW, Defendants, -and- CAAM,LLC and MAAC PAYROLL PROCESSING, INC., Nominal Defendants.	Index No. 650942/2013 DECISION AND ORDER Motion Sequence No. 001

MELVIN L. SCHWEITZER, J.:

This is a derivative action brought by Andrew Marcus (Mr. Marcus), as a fifty percent owner/member of CAAM, LLC (CAAM) and MAAC Payroll Processing Inc. (MAAC) on behalf of the two companies against Craig Antell (Mr. Antell), Craig Antell, D.O., P.C. (Antell PC, a New York corporation owned by Mr. Antell), and Steven Maslow (Mr. Maslow), along with nominal defendants, CAAM and MAAC. The case arises from the breakup of a profitable medical services venture between Mr. Marcus and Mr. Antell.

Defendants move for an order, pursuant to CPLR 3025 (b) and 3211 (a) (4), dismissing the complaint in its entirety, for failure to seek leave to re-plead and on the basis of another action pending. Defendants move for an order pursuant to CPLR 3211 (a) (3) and Business Corporation Law (BCL) § 626 (c) dismissing the complaint in its entirety as to Mr. Maslow,

with prejudice, for failure to make a pre-suit demand. Defendants move for an order pursuant to CPLR 3211 (a) (7) dismissing the Second through Eleventh Causes of Action in their entirety for failure to state a cause of action. For the reasons discussed below, the defendants' motion is granted in part and denied in part.

Background

The following facts are drawn from the complaint, and are taken as true with all reasonable inferences drawn in favor of the plaintiff.

In February 2001, Mr. Antell, a doctor of Osteopathy, and Mr. Marcus, a licensed chiropractor, began the business relationship that is the subject of this litigation. In the venture, Mr. Antell continued his physiatry practice and Mr. Marcus continued his chiropractic services, while managing both his and Mr. Antell's practice to maximize revenue and profit. They formed CAAM (Craig Antell and Andrew Marcus), in which each was a 50% owner.

In April 2001, a written license agreement was entered into between CAAM and Antell PC which had Antell PC engage CAAM (with Mr. Marcus as President of CAAM) to manage the day to day administrative and non-professional operations of Antell PC at 274 Madison Avenue. Under the license agreement, CAAM provided all supplies, employees, and facilities for a monthly fee. Section 12 of the license agreement provides that upon termination of the agreement, Antell PC must immediately vacate the premises. Upon termination, Section 3(c) of the license agreement causes all money owed by Antell PC to CAAM to be immediately due and payable. Two subsequent license agreements were entered into in 2004 and 2006. Each had substantially the same terms as the original license agreement, with the addition of a second set of premises at 1776 Broadway and increased fees payable for

services. The agreements were to be valid through the expiration of CAAM's lease of the two premises.

In January 2012, Mr. Antell began negotiating with Mr. Marcus for a buy-out of Mr. Marcus' interests in the venture. In May 2012, Mr. Antell brought in Mr. Maslow, who was Chief Financial and Operating Officer of Antel PC, to provide a smooth transition once the buy-out took place. Defendants allegedly began a clandestine scheme to oust Mr. Marcus from the business instead of going through with the buyout. As part of the scheme, in June 2012, Mr. Antell and/or Mr. Maslow allegedly changed the contact information on the venture's American Express account, and changed the address to which statements were mailed from the venture's offices to Mr. Antell's home, all without consulting Mr. Marcus. Defendants had mail for the two offices re-directed to a new PO Box that Mr. Antell opened without Mr. Marcus' knowledge. In July 2012, Mr. Maslow signed a contract with ADP to change all of CAAM's computer systems software in such a way as to bar Mr. Marcus from having access to any information on the computer systems. Other alleged actions by defendants include: (i) barring and attempting to bar Mr. Marcus' entry into 1776 Broadway and 274 Madison Avenue; (ii) intimidating CAAM and MAAC employees into resigning from those companies and becoming employees of Antell PC; and (iii) unilaterally transferring in excess of $300,000 from CAAM and MAAC bank accounts to accounts under the control of Mr. Antell or Antell PC.

In addition, at the time of defendants' alleged breaches, Antell PC owed CAAM in excess of $2,000,000 under the 2006 license agreement.

Discussion

This action will be consolidated with the prior pending action as requested by plaintiff, and defendants' motion to dismiss pursuant to CPLR 3025 (b) and 3211 (a) (4) is denied.

Defendants' motion to dismiss claims against Mr. Maslow pursuant to CPLR 3211 (a) (3) and Business Corporation Law ("BCL") § 626(c) due to the lack of a pre-suit demand is denied. The motion to dismiss for failure to state a cause of action is granted only to the extent that the fifth, sixth, seventh (as to defendants Mr. Antell and Mr. Maslow only), eighth and ninth causes of action are dismissed. The motion as it relates to the second through fourth causes of action is denied.

I. Consolidation

Prior to the instant action, Mr. Marcus commenced an action against the defendants alleging the same facts as here. In that case, the court dismissed the claims against CAAM and MAAC because Mr. Marcus failed to sufficiently plead derivative claims. Defendants argue that Mr. Marcus' failure to seek leave to amend after dismissal invalidates the reassertion of those claims on the basis of circumvention of the dismissal order, CPLR 3025 which requires leave to amend, and CPLR 3211 (a) (4), which provides for dismissal when a pending action exists. Plaintiff argues that the dismissal was without prejudice, that the court invited them to re-plead, and that CPLR 3211 (a) (4) does not mandate dismissal.

Defendants' assertion with respect to CPLR 3025 (b) fails, as an order of dismissal without prejudice does not preclude the filing of another action in an attempt to remedy the problems in the first complaint.

Furthermore, CPLR 3211 (a) (4) provides: "[A party may move to dismiss causes of action] on the ground that: . . . there is another action pending between the same parties for the same cause of action in a court of any state of the United States; the court need not dismiss upon this ground but may make such order as justice requires . . ." The rule "vests a court with broad discretion in considering whether to dismiss an action on the ground that another action is

pending between the same parties on the same cause of action." *Whitney v Whitney*, 57 NY2d 731 (NY 1982).

When ruling on a motion to dismiss under CPLR 3211 (a) (4), the court can *sua sponte* order the consolidation of the actions in order to "serve the interests of judicial economy while still preserving the rights of the parties." *See Campagna, Jr., Inc. v Dune Alpin Farm Assocs.*, 438 NYS2d 132, AD2d 633 (2d Dept 1981). The claims in the instant case are brought derivatively on behalf of both CAAM and MAAC, while the pending case has claims brought by Mr. Marcus, in his individual capacity. Due to the parallel nature of the claims, the court consolidates the two cases.

II. Demand Futility as to Mr. Maslow

The next issue is whether there was demand futility such as to make a pre-suit demand unnecessary to bring the derivative action claims against Mr. Maslow. A shareholder's derivative action is one "brought in the right of a domestic or foreign corporation to procure a judgment in [the corporation's] favor, by a holder of shares or of voting trust certificates of the corporation or of a beneficial interest in such shares or certificates." (BCL 626 [a]).

To proceed with a derivative action, plaintiff must make a demand on the corporations' board of directors, and "set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort" in the complaint. (BCL 626 (c)). When the demand proves to be futile because the directors are unable to make a disinterested decision on whether or not to bring the suit, the demand requirement will be waived. *See Danzy v NIA Abstract Corp.*, 835 NYS2d 738 (2d Dept 2007). The purpose of demand futility is for the "court to chart the course for the corporation which the directors should

have selected, and which is presumed that they would have chosen if they had not been actuated by fraud or bad faith." *Gordon v Ellman*, 306 NY 456, 462 (1954).

In Delaware, the applicable jurisdiction here, demand futility is characterized by a two-pronged test that requires that a plaintiff allege facts that create a reasonable doubt that: (1) the directors are disinterested and independent; and (2) the challenged transaction was the product of a valid exercise of business judgment. *Aronson v Lewis*, 473 A2d 805, 814 (Del Supr 1984).

Defendants argue that Mr. Maslow's status as a third party would have enabled Mr. Antell to make a disinterested decision on a demand to bring suit against him. Consequently, they say, demand futility does not exist. Plaintiff raises the counterargument that the conspiratorial nature of Mr. Antell's relationship with Mr. Maslow means that Mr. Antell would need to approve a demand to sue himself in approving a demand to sue Mr. Maslow.

The second prong of the demand futility test concerns the inapplicability of the business judgment rule to the actions taken by defendant. The business judgment rule is "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v Lewis*, 473 A2d 805, 812 (Del. 1984) The alleged actions taken by Mr. Antell in concert with Mr. Maslow implicate bad faith as they had the effect of leaving CAAM and MAAC, corporations of which Mr. Antell was a 50% shareholder, without value.

The court gives every possible favorable inference to plaintiff's allegations on a motion to dismiss. Consequently, Mr. Maslow's position as Antell PC's chief financial and operating officer and his role in the alleged scheme creates serious doubt that Mr. Antell could make a disinterested decision on a demand to bring suit. This cannot be remedied by application of the business judgment rule. The motion to dismiss for failure to make a pre-suit demand is denied.

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III. Sufficiency of Pleadings

On a motion to dismiss for failure to state a cause of action, the court accepts all factual allegations pleaded in plaintiff's complaint as true, and gives plaintiff the benefit of every favorable inference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dep't 2004). The court must determine whether "from the [complaint's] four corners[,] 'factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

A. Trespass

The second cause of action for trespass states a cause of action. A plaintiff need only allege that his right of possession is injured by the defendants unlawful encroachment on that right. *Bloomingdales, Inc. v New York City Transit Authority*, 13 NY3d 61 (NY 2009). Defendants argue that this claim is duplicative of the breach of contract claim. That is not the case as this claim runs from the violation of a legal duty that is extraneous to the disputed license agreements. The allegation that plaintiff holds lease agreements for the premises and that the premises were allegedly unlawfully occupied and used by defendants is sufficient to state a claim.

B. Breach of Fiduciary Duty

The third and fourth causes of action for Mr. Antell's breach of fiduciary duty to both CAAM and MAAC state causes of action. To state a breach of fiduciary duty claim, a plaintiff must allege: (1) a confidential or fiduciary relationship; (2) misconduct by the defendant; and (3) resulting damages to the plaintiff. *Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-

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700 [1st Dept 2011]; *Phillips Gold & Co. v Speiser*, 2011 NY Slip Op 32555[U], 2011 WL 4707074 (Sup Ct, NY County 2011).

Defendants argue that Mr. Antell cannot have a fiduciary duty as a shareholder who did not have management control of either MAAC or CAAM. *See Sager Spuck Statewide Supply Co. v Meyer*, 710 NYS2d 429, 432-33 (3d Dept 2000). Plaintiff points out that courts have found fiduciary duties to lie against shareholders of a close corporation on a theory that shareholders in close corporations owe each other a duty of good faith. *See Cassata v Brewster-Allen-Wichert*, 670 NYS2d 552 (2d Dept 1988). Good faith is implicated in the carrying out of fiduciary duties, in this case most applicably the duty of loyalty, which requires that fiduciaries do not "assume and engage in the promotion of personal interests which are incompatible with the superior interests of their corporation." *Foley v D'Agostino,* 248 NYS2d 121 (1st Dept 1964).

While Mr. Marcus had control of the corporations, the alleged actions taken by Mr. Antell highlight that he was not a mere shareholder that had no fiduciary duties to the corporations. Mr. Antell's alleged transfer of $285,400 from the CAAM account and $94,500 from the MAAC account to a newly created Antell PC account demonstrates that he was not a mere shareholder, as he had access to and could manage corporate funds. The existence of that type of control by Mr. Antell rebuts the defendants' argument that he could not have a fiduciary relationship to either CAAM or MAAC as a shareholder. Mr. Antell's 50% ownership of both CAAM and MAAC further supports the existence of a fiduciary relationship. The breach of the fiduciary duty of loyalty is implicated due to a lack of good faith as his actions benefited his own corporation, Antell PC, at the expense of both CAAM and MAAC. As Mr. Antell made these transfers without consulting Mr. Marcus, this constitutes misconduct and the loss of the money

results in substantial damages. Plaintiff clearly alleges all three elements of a breach of fiduciary duty.

C. Tortious Interference

The fifth and sixth causes of action for tortious interference are dismissed. Plaintiff must allege the following to state a tortious interference claim: (1) a valid contract between the plaintiff and a third party; (2) defendant's knowledge of that contract; (3) defendant's intentional procurement of a breach of that contract without justification; (4) actual breach; and (5) damages. *NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 620-21 (1996); *Lama Holding Co. v Smith Barney*, 88 NY2d 413 (1996); *accord Vigoda v DCA Prods. Plus*, 293 AD2d 265 (1st Dept 2002). Defendants argue that plaintiff has not sufficiently plead the existence of a valid contract with a third party that defendants allegedly interfered with. The court agrees with this position, as the plaintiff has only alleged the existence of the license agreements, which are contracts between the parties in the action.

D. Conversion

The seventh cause of action for conversion is dismissed as to defendants Mr. Antell and Mr. Maslow. To state a claim for conversion, a plaintiff must allege legal ownership, or an immediate superior right of possession, to a specific identifiable thing, and that the defendant exercised unauthorized dominion over the property to the exclusion of the plaintiff's rights. *See Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 (2006); *State of New York v Seventh Regiment Fund*, 98 NY2d 249, 259-60 (2002); *Aetna Cas. & Sur. Co. v Glass*, 75 AD2d 786 (1st Dept 1980). Plaintiff alleges that defendants unlawfully have taken possession of furniture, fixtures, equipment and property of CAAM, as well as money of CAAM, and have refused to relinquish them. This is sufficiently alleged as to the Antell PC as it is exercising

possession over the allegedly converted property, but cannot lie against the individual defendants as that would require piercing the corporate veil. No allegations are made which support this legal theory.

E. Unjust Enrichment

The eighth and ninth causes of action for unjust enrichment are dismissed. To state an unjust enrichment claim, a plaintiff must allege that it conferred a benefit upon the defendant who was enriched, and that the defendant obtained the benefit without adequately compensating the plaintiff. *MT Property, Inc. v Ira Weinstein and Larry Weinstein, LLC*, 50 AD3d 751, 752 (2d Dept 2008); *Nakamura v Fujii*, 253 AD2d 387, 390 (1st Dept 1998). Here, plaintiff alleges that there was unjust enrichment by the defendants without specifying the benefit conferred and conduct of the defendant that would be necessary to establish that they obtained the benefit and did not compensate plaintiff.

F. Implied Covenant of good faith and fair dealing

The part of the eighth cause of action relative to the implied covenant of good faith and fair dealing is dismissed. To state a cause of action of breach of an implied covenant of good faith and fair dealing, a plaintiff must allege a valid contract from which such a duty can run. Plaintiff makes only conclusory allegations about an amorphous implied covenant of good faith and fair dealing without specifying the valid contract that this duty would run from. This is fatal to this claim.

G. Aiding and Abetting Breach of Fiduciary Duty

The tenth and eleventh causes of action for aiding and abetting a breach of fiduciary duty state valid causes of action. Under New York law, a claim for aiding and abetting a breach of fiduciary duty consists of the following elements: (1) a breach of fiduciary duty, (2) that the

defendant knowingly induced or participated in the breach, and (3) that the plaintiff suffered damages as a result of the breach. *See BBS Norwalk One, Inc.*, 60 F Supp 2d at 130 n. 2 (citing *S & K Sales Co. v Nike, Inc.*, 816 F2d 843 (2d Cir1987)). Here plaintiff, has alleged specific breaches of fiduciary duty by Mr. Antell, and has also alleged numerous ways in which Mr. Maslow and Antel PC aided and abetted those breaches. Therefore, the motion to dismiss these causes of actions is denied.

ORDERED that the motion to dismiss is granted to the extent that the fifth, sixth, eighth and ninth causes of action, and the seventh cause of action is dismissed only as against defendants Craig Antell and Steven Maslow. The motion to dismiss the second, third, fourth, tenth and eleventh causes of action is denied.

Dated: November 21, 2013

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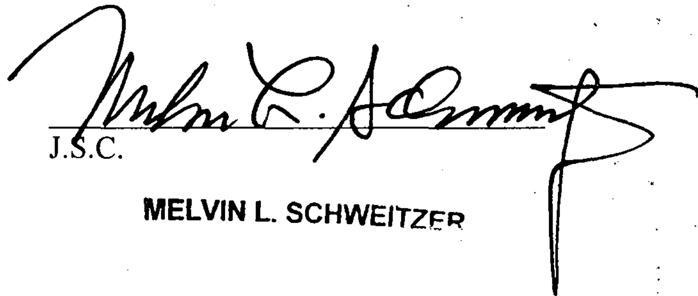

J.S.C.

MELVIN L. SCHWEITZER