

Hudmor Corp. v Mickey
2014 NY Slip Op 31042(U)
April 18, 2014
Sup Ct, New York County
Docket Number: 158732/12
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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HUDMOR CORP.,

Plaintiff,

- v -

LENORA MICKEY and TERENCE MICKEY,

Defendants.

-----X

LENORA MICKEY,

Third-party Plaintiff,

-v-

MARYBETH DUFFY,

Third-Party Defendant.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

Index No.
158732/12

**DECISION
and ORDER**

Mot. Seq. 3

In this action, plaintiff, Hudmor Corp. ("Plaintiff" or "Hudmor"), seeks damages and an accounting from defendant Lenora Mickey ("Lenora"), Hudmor's former President, treasurer, and director for her alleged breach of fiduciary duties owed to Hudmor. Hudmor owns properties located at 447 Hudson Street and 73 Morton Street. Defendant Terence Mickey ("Terence") is Lenora's son.

The Complaint alleges that Lenora, in her capacity as Hudmor's President, Treasurer, and Director, breached her fiduciary duties to Hudmor by, among other things, failing to advise Marybeth Duffy ("Duffy") and the other shareholders of

Hudmor's business interests, failing to provide access to Hudmor's business records and documentation, and "after evicting the paying tenant from apartment 3F ("3F"), plac[ing] her son Terence in 3F, which is the nicest and largest apartment at Hudson from in or about August 2007 through 2012, with a sweetheart deal whereby the rent was \$700 a month although the fair market rental value of 3F was substantially higher," "allow[ing] Terence to sublet 3F at a profit, which, upon information and belief, was kept by Terence and/or Lenora," and "permitt[ing] Terence to operate plaintiff's business and make business decisions in connection therewith." The Complaint further alleges that Lenora entered into a brokerage agreement with Art State LLC, in which Hudmor paid an excessive commission, made an overpayment with respect to the mortgage on Hudson instead of making distributions to Plaintiff's shareholders, used approximately \$135,000 of Hudmor's funds to pay for the renovations of Village Restaurant Group LLC, a tenant of Hudson's, and unilaterally approved substantial payments to various contractors.

The Complaint further alleges that as a result of the breach of her fiduciary duties, on February 13, 2012, Lenora was removed as President of Hudmor and as a member of Hudmor's board of directors, and Duffy was elected as Hudmor's President, Vice President, Secretary, Treasurer and sole Director. Duffy had previously served as Vice President and Secretary of Hudmor.

Lenora filed a third party Complaint against Duffy for contribution for Lenora's alleged breaches of fiduciary duty to Hudmor in the event that Hudmor is successful in recovering from Lenora, on the basis that Duffy knew of and consented to Terence's rental of 3F and other alleged breaches.

On September 18, 2013, Duffy interposed an Answer to Lenora's Third Party Complaint, with counterclaims against Lenora for breach of fiduciary duty, fraud, defamation intentional infliction of emotional distress, and negligent infliction of emotional distress.

Lenora now moves for an Order, pursuant to CPLR §§3013, 3016(a) and (b), 3211(a)(3), 3211(a)(5), and CPLR 3211(a)(7), for an Order dismissing the counterclaims asserted against Lenora by Duffy.

While Lenora moves to dismiss Duffy's counterclaims, after the filing of Lenora's motion, Duffy filed an Amended Answer to Lenora's Third Party Complaint with Amended Counterclaims. Lenora objects to Duffy's filing of the amended pleading on the basis that it is untimely served and filed; however, Lenora further submits opposition regarding the merits of the amended counterclaims.

In the interest of judicial economy, this Court will deem the amended pleading timely served and filed, and will review the motion as it relates to the amended pleading.

The Amended Answer asserts amended counterclaims for breach of fiduciary duty (first and second counterclaims), fraud (third counterclaim) and contribution (fourth and fifth counterclaims). The Amended Answer omits the counterclaims for defamation, intentional infliction of emotional distress, and negligent infliction of emotional distress.

CPLR §3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

The Amended Counterclaims is based on the following allegations:

21. Prior to Lenora's removal as President of Hudmor, Lenora exercised dominant control over Hudmor's financial information.
22. Prior to Lenora's removal as President of Hudmor, Lenora withheld substantial financial information from Duffy and other Hudmor shareholders.
23. Prior to Lenora's removal as President of Hudmor, Lenora exercised dominant control over all of Hudmor's managerial decisions.
24. Prior to Lenora's removal as President of Hudmor, Lenora excluded Duffy from participation in and knowledge of significant areas of Hudmor management such the hiring of real estate brokers to maximize rental income and contractors to work on capital improvement and repairs to Hudmor properties.
25. Prior to Lenora's removal as President of Hudmor, Lenora sought to use her position for personal gain to the detriment of Hudmor, damaging Hudmor's finances and prospects for profitability in the future.
26. More specifically, Lenora (a) concealed from Duffy and the other shareholders substantial business activities in which she had used or committed Hudmor funds notwithstanding Duffy's and other shareholders' protests; (b) failed and refused to provide Duffy and other shareholders access to Hudmor's business records and documentation which recorded Lenora's misuse of Hudmor funds; (c) used Hudmor's funds and incurred excessive charges on behalf of Hudmor for personal expenses which were unrelated to Hudmor's business; (d) refused to perfect the Testamentary Trusts on behalf of Patrick Duffy and Timothy Duffy after the issuance of letters testamentary from the Surrogate's Court, effectively blocking these shareholders' receipt of income distributions from Hudmor; (e) refused to establish bank accounts for Patrick Duffy and Timothy Duffy which are required for the receipt of their distributions from Hudmor; (f) closed bank accounts that Duffy had opened for Patrick Duffy and Timothy Duffy to receive Hudmor income; (g) attempted to intimidate and sever Hudmor's

relationships with Chase Bank in 2011 to prevent the proper administration of trust accounts; (h) refused to fund the Testamentary Trusts in accordance with Robert Duffy's will, causing the cessation of distributions to the other Hudmor shareholders for a period of approximately two years; (i) refused to sign documents prepared by Hudmor's accountant to avoid the loss of Hudmor's S Corp. status and accompanying beneficial tax benefits to Hudmor and the shareholders; (j) adamantly refused to execute IRS form 2553 entitled "Election by a Small Business Corporation," on behalf of herself and Patrick Duffy, in order to maintain Hudmor's S Corp. status unless Duffy resigned as the co-trustee for Patrick Duffy; (k) after evicting a paying tenant from apartment 3F ("Apartment 3F") of the Hudson Street Property, placed her son Terence Mickey ("Terence") in Apartment 3F, which is the largest and most desirable apartment in the Hudson Street Property from in or about August 2007 through July 2012, with a sweetheart deal whereby the rent was \$700 a month although the fair market rental value of Apartment 3F was substantially higher; (l) secretly allowed Terence to sublet Apartment 3F at a profit which, upon information and belief, was kept in whole or in part by Terence and/or Lenora; (m) permitted Terence to advertise falsely to other tenants of the Hudson Street Property that he was employed by Hudmor and had authority to make business decisions in connection therewith; (n) entered into a brokerage agreement with an entity known as Art State LLC ("State") dated September 5, 2009 whereby as a result of the leases between Hudmor and Village Restaurant Group LLC ("Restaurant") at the Hudson Street Property, and Hudmor and the Art Gallery at the Morton Street Property, Hudmor paid an exorbitant and excessive commission to State; (o) at the end of 2011, made a substantial overpayment with respect to the mortgage on the Hudson Street Property instead of making distributions to Hudmor's shareholders; (p) unnecessarily and wastefully used approximately \$135,000 of Hudmor's funds to pay for renovations by the Restaurant, a tenant at the Hudson Street Property; (q) unilaterally approved unnecessary and exorbitant payments to various contractors, architects and engineers for work on the Hudson Street Property; and (r) unnecessarily gave Restaurant a \$2,000 per month rent abatement for approximately six months totaling not less than \$12,000.

27. Each of these actions on Lenora's part imperiled the agreed long term plan, maintenance of Hudmor's S status for tax relief, conservation and

growth of Hudmor's assets, generation of income to fund periodic distributions to the shareholders of Hudmor, and funding of the Testamentary Trusts on behalf of shareholders Patrick Duffy and Timothy Duffy.

28. As a result of the foregoing breaches of fiduciary duties, at a special meeting of the Hudmor shareholders on February 13, 2012 attended in person or by proxy by Duffy, Michael Duffy, Robert Duffy, Jr. and Karen Benesch, constituting a quorum, Lenora was removed as Hudmor President and as a member of the Hudmor board of directors, and Duffy was elected Hudmor President, Vice President, Secretary, Treasurer and the sole director of Hudmor.

29. After removal as an officer and director of Hudmor, Lenora continued to withhold certain information from Hudmor management necessary to Hudmor's successful and profitable operation, generation of income and distribution of income to Hudmor's shareholders and devisees of the Robert Duffy Estate.

30. After removal as an officer and director of Hudmor, Lenora continued to interfere with the budgeting and distribution of Hudmor income to the Testamentary Trusts on behalf of shareholders Patrick Duffy and Timothy Duffy by refusing to provide Duffy with documentation of expenses Patrick Duffy and Timothy Duffy had incurred so that their expenses could be paid out of Hudmor funds and interfered with Duffy's efforts to obtain information necessary for the filing of income tax returns on behalf of Patrick Duffy.

31. After removal as an officer and director of Hudmor, Lenora attempted to block the creation of a Self-Settled Supplemental Needs Trust on behalf of Michael Duffy (the "Supplemental Needs Trust") necessary for Michael's receipt of Hudmor income by preventing Duffy's mother from signing documents necessary to the creation of this Trust and slandering Duffy to Michael Duffy in an attempt to dissuade him from cooperating in the establishment of the Trust.

32. In retaliation for the Hudmor Board's decision to remove Lenora, Lenora undertook a campaign of harassment against Duffy and other Hudmor shareholders, which included personal attacks directed at Duffy in an attempt to humiliate her and cripple her ability to channel Hudmor income to the Testamentary Trusts for the benefit of Patrick Duffy and Timothy Duffy or to establish the Supplemental Needs Trust so that Michael Duffy could receive Hudmor income.

The first counterclaim alleges that "Lenora had fiduciary responsibilities to Hudmor and its shareholders by virtue of her position as a director and officer of Hudmor, "Lenora was neglectful of, and failed to perform, and otherwise violated her duties to Hudmor and its shareholders . . ." "in the management and disposition of Hudmor's assets" and "in diverting corporate opportunities as more fully set forth above in these Counterclaims relating to the under market lease of Apartment 3F to Terence, allowing Terence to sublease and retain income rightfully belonging to Hudmor and/or colluding with Terence to divert to herself sublease income rightfully belonging to Hudmor." It alleges that based on these allegations, "Pursuant to NYBCL §720, Lenora is liable to Hudmor for an accounting with respect to the matters complained of in these Counterclaims, for damages for the diversion of corporate opportunity, mismanagement and waste of Hudmor assets and to set aside unlawful conveyances, transfers or assignments of Hudmor assets."

Business Corporation Law ("BCL") §720(a)(1) permits an action to be brought against directors or officers to compel an accounting "for his official conduct" and specifically, for 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" and 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." Such an action may be brought "by a corporation, or a receiver, trustee in bankruptcy, officer, director or judgment creditor thereof ..."

Lenora seeks to dismiss Duffy's first amended Counterclaim on the basis that it duplicates Hudmor's claims against Lenora. Hudmor's first cause of action alleges that Lenora breached her fiduciary duties to Hudmor and its shareholders,

the second seeks an accounting from Lenora for “among other things, her dereliction of duty, (b) her failure to perform her job responsibilities, (c) her disposition of plaintiff’s assets which were committed to her charge, (d) her waste of plaintiff’s assets, and (e) her diversion of acquisition of plaintiff’s assets.”

Duffy, in her capacity as Director of Hudmor, is permitted to bring an action under BCL §720(a)(1), and Duffy has plead additional allegations concerning Lenora’s alleged misconduct that are not referenced in Hudmor’s Complaint against Lenora. Hudmor’s first cause of action therefore does not bar Duffy’s first amended Counterclaim.

The second amended Counterclaim alleges breach of fiduciary duty by Lenora to Duffy. More specifically, it alleges that “Lenora owed Duffy a fiduciary duty to refrain from conduct that interfered with Duffy’s fulfillment of her responsibilities to Hudmor, including the exclusion of Duffy from knowledge of and participation in essential aspects of Hudmor’s business” and “a duty to refrain from conduct that interfered with Hudmor’s administration of its assets to fund the Testamentary Trusts and the Supplemental Needs Trust.” It alleges that Lenora breached those duties to Duffy, and as a result, “Duffy has been compelled to expend substantial personal monies and divert substantial time from her profession to repair the damage Lenora caused to Hudmor’s finances and to support the beneficiaries of the Testamentary Trusts and the Supplemental Needs Trust, and has thereby been damaged in an amount to be determined at trial, for which Lenora is liable.”

The third amended Counterclaim alleges fraud. More specifically, the third Counterclaim alleges that “Lenora owed Duffy a duty to refrain from deceiving and misleading her with respect to Hudmor’s business and financial matters,” Lenora breached this duty when she represented to Duffy that she would make up the rent difference between Terence’s actual below market rental payments for Apartment 3F and the full market value rental and would require that Terence abide by a lease agreement.” It further alleges that at the time that Lenora made these representations, “she did not intend to pay to Hudmor the difference between Terence’s actual rental payments for Apartment 3F and the full market value rental” and “did not intend to require that Terence abide by the No Sublet Clause.” The third Counterclaim further alleges, “As a direct and proximate result of

Lenora's misrepresentations, to satisfy her duties to Hudmor and to the trust beneficiaries, Duffy has been compelled to expend substantial personal monies and divert substantial time from her profession to repair the damage Lenora caused to Hudmor's finances and to support the beneficiaries of the Testamentary Trusts and the Supplemental Needs Trust and has thereby been damaged in an amount to be determined at trial, for which Lenora is liable."

Shareholders of a closely held company owe a fiduciary duty to the other shareholders. *Global Mins. & Metals Corp. v. Holme*, 35 A.D.3d 93, 98 [1st Dept 2006]

As set forth in *Abrams v. Donati*, 66 N.Y.2d 951, 953 [1985],

For a wrong against a corporation a shareholder has no individual cause of action, though he loses the value of his investment or incurs personal liability in an effort to maintain the solvency of the corporation *Exceptions to that rule have been recognized when the wrongdoer has breached a duty owed to the shareholder independent of any duty owing to the corporation wronged* But allegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually.

Here, the second and third amended Counterclaims fail to plead allegations demonstrating that Lenora had a duty to Duffy independent of any duty owing to Hudmor.

The fourth and fifth amended Counterclaims seek contribution against Lenora to the extent that Terence succeeds on any of his cross-claims as against Duffy.

With regard to a claim for contribution, CPLR §1401 provides that "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought." To state a contribution claim, the

“critical requirement” is an allegation that “the breach of duty by the contributing party ... had a part in causing or augmenting the injury for which contribution is sought.” (*Raquet v Braun*, 90 N.Y.2d 177, 183 [1997] (citation omitted).

BCL §717(a) provides, “A director shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may serve, in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances.” BCL 715(h) imposes the same obligation on corporate officers. See BCL 715(h) (“An officer shall perform his duties as an officer in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances.”)

Here, Duffy’s fourth and fifth amended counterclaims state a claim as against Lenora based on allegations that Lenora breached her duties to Hudmor and its shareholders as an officer and director of Hudmor, conspired with Terence in furtherance of the breaches for which Hudmor has brought suit against Terence, and concealed the same, and is therefore liable for the resulting damages.

Wherefore, it is hereby

ORDERED that defendant/third party plaintiff Lenora Mickey’s motion to dismiss is granted only to the extent that Marybeth Duffy’s second and third amended counterclaims are dismissed as against Lenora Mickey.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: APRIL 18, 2014


EILEEN A. RAKOWER, J.S.C.