

Janklowicz v Landa

2014 NY Slip Op 31508(U)

June 12, 2014

Supreme Court, Kings County

Docket Number: 501420/12

Judge: David I. Schmidt

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This opinion is uncorrected and not selected for official publication.

4/8/13 app

At an IAS Term, Part Comm-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 9th of Oct

P R E S E N T:

HON. DAVID I. SCHMIDT,
Justice.
----- X
JACK JANKLOWICZ, et ano.,
Plaintiffs,

- against -

Index No. 501420/12

BENJAMIN LANDA, et al.,
Defendants.
----- X

The following papers numbered 1 to 7 read herein:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____
_____ Affidavit (Affirmation) in support
Other Papers _____

Papers Numbered

1 - 2, 3
4 - 5 6
7

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Upon the foregoing papers, defendants Benjamin Landa (Benjamin), Willoughby Rehabilitation and Health Care Center, LLC (Willoughby), Golden Gate Rehabilitation and Health Care Center, LLC (Golden Gate), Brookhaven Rehabilitation and Health Care Center, LLC, (Brookhaven), Woodmere Rehabilitation and Health Care Center, LLC (Woodmere), Golden Gate Nursing Realty, LLC (GGNR), Golden Gate Nursing Home Management, LLC (GGNHM) and 1040 Central Avenue Realty, Inc (1040 Inc.) (collectively, the "Benjamin defendants") move for an order, pursuant to CPLR 3013, 3016(b) and 3024(a), dismissing all causes of action asserted in the complaint except for the twenty-eighth cause of action or directing plaintiffs Jack Janklowicz (Jack) and Leonard Janklowicz (Leonard) to serve an

amended complaint sufficiently particular to give defendants notice of the material elements of the causes of action. Defendants Bent Philipson (Bent), Deborah Philipson (Deborah) and Eastchester Rehabilitation and Health Care Center, LLC (Eastchester) (collectively, the “Bent defendants”) move for an order, pursuant to CPLR 3211(a)(1), (5) and (7) and 3016(b), dismissing the complaint with prejudice as against them.

Plaintiffs commenced this action seeking, in prominent part, accountings from the various defendants in addition to damages for breach of fiduciary duty. Plaintiffs allege that they are members or shareholders in the defendant companies, which operate skilled nursing facilities in the New York Metropolitan area. Plaintiffs further allege that Benjamin is a managing member of all the defendant entities, while Bent and/or Deborah are managing members of Brookhaven, Golden Gate and Eastchester. In the first twelve causes of action asserted in the complaint, plaintiffs allege, in sum and substance, that they have not received distributions of profits from the relevant entities which other members have received and, as a result, plaintiffs are entitled to accountings. In the thirteenth through eighteenth causes of action, plaintiffs seek “accountings” from Benjamin, Bent and Deborah in order to determine whether Benjamin, Bent and/or Deborah are entitled to their purported membership interests in Brookhaven, Golden Gate, Eastchester and certain other nonparty entities. In addition, plaintiffs claim that Benjamin, Bent and/or Deborah breached their fiduciary duties to Jack and/or Leonard, and allege causes of action seeking the removal of Benjamin, Bent and/or Deborah as managing members of Golden Gate, Willoughby, Forest Hills, Woodmere, Brookhaven and Eastchester. Finally, plaintiffs allege that Bent intentionally interfered with plaintiff’s contractual rights to receive distributions.

Motion of Benjamin Defendants

The Benjamin defendants move to dismiss all causes of action except the twenty-eighth (which is directed only at Bent) on the basis that they fail to plead essential facts and the circumstances of the wrongs in detail and, further, are not specific with respect to the dates when the alleged wrongs occurred. CPLR 3013 requires that “[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.” The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest” (*Palazzo v Palazzo*, 121 AD2d 261, 265). “An allegation of wrongdoing is not an indispensable element of a demand for an accounting where the complaint indicates a fiduciary relationship between the parties or some other special circumstance warranting equitable relief” (*Morgulas v Yudell Realty*, 161 AD2d 211, 213–214). Members of a limited liability company may seek an equitable accounting under common law (*Gottlieb v Northriver Trading Co. LLC*, 58 AD3d 550 [2009]). With respect to the first twelve causes of action, the complaint is sufficiently particular to give notice of plaintiffs’ claims that they are members of the relevant companies, that they are owed distributions, that they did not receive distributions even though distributions were paid to other members, and that the defendants should account to plaintiffs as a matter of equity and pursuant to section 1102(b) of the Limited Liability Company (LLC) Law* in order to

*LLC Law § 1102 provides, in part:

(a) Each domestic limited liability company shall maintain the following records, which may, but need not, be maintained in this state:

determine if profits were withheld or distributed wrongfully. The complaint explicitly alleges the existence of a fiduciary relationship by reason of plaintiffs' status as members of the various LLCs and that demands for accountings were made and refused. In addition, the complaint clearly asserts a statutory provision which entitles a member of an LLC to certain information. The court thus finds that the first twelve causes of action are sufficiently particular to give defendants notice that plaintiffs are seeking accountings.

The Benjamin defendants argue that since plaintiffs do not provide any factual allegations concerning the dates on which the wrongs were committed, they are unable to determine whether a statute of limitations defense exists. However, while the provision of dates would be convenient to defendants in such respect, there is nothing in either CPLR 3013 or 3024(a) to imply that factual allegations of wrongdoing without provision of dates renders a complaint defective, so long as the defendants have notice of the occurrences and transactions and the elements of the causes of action, and the complaint is not so vague that

(1) if the limited liability company is managed by a manager or managers, a current list of the full name set forth in alphabetical order and last known mailing address of each such manager;

(2) a current list of the full name set forth in alphabetical order and last known mailing address of each member together with the contribution and the share of profits and losses of each member or information from which such share can be readily derived;

(3) a copy of the articles of organization and all amendments thereto or restatements thereof, together with executed copies of any powers of attorney pursuant to which any certificate or amendment has been executed;

(4) a copy of the operating agreement, any amendments thereto and any amended and restated operating agreement; and

(5) a copy of the limited liability company's federal, state and local income tax or information returns and reports, if any, for the three most recent fiscal years.

(b) Any member may, subject to reasonable standards as may be set forth in, or pursuant to, the operating agreement, inspect and copy at his or her own expense, for any purpose reasonably related to the member's interest as a member, the records referred to in subdivision (a) of this section, any financial statements maintained by the limited liability company for the three most recent fiscal years and other information regarding the affairs of the limited liability company as is just and reasonable.

defendants cannot reasonably respond. Dates of the alleged occurrences giving rise to plaintiffs' claims may be provided in a bill of particulars or during the course of discovery. Assuming defendants raise the statute of limitations in their answer(s), dismissal of untimely claims may be achieved through a future motion for summary judgment.

However, with respect to the causes of action sounding in breach of fiduciary duty, this court agrees with the Benjamin defendants that the factual allegations are not sufficiently pleaded. A breach of fiduciary duty cause of action must be pleaded with the requisite particularity under CPLR 3016 (b) (*see Parekh v Cain*, 96 AD3d 812, 816 [2012]; *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 808 [2011]; *Chiu v Man Choi Chiu*, 71 AD3d 621, 623 [2010]). In this matter, plaintiffs allege in conclusory fashion that Benjamin, Bent and Deborah “mismanag[ed] the business operations” and “wast[ed] the assets” of the defendant companies. These allegations do not contain factual details concerning the acts or omissions attributable to Benjamin, Bent or Deborah which constitute the mismanagement or waste. While plaintiffs allege that their non-receipt of distributions constitute a breach of fiduciary duty on the part of Benjamin, Bent and/or Deborah, plaintiffs do not provide facts detailing how the alleged duty to pay the distributions is a “fiduciary duty” of the managing members separate and distinct from any contractual duty of the companies under the relevant operating agreements.** Furthermore, “allegations of mismanagement or diversion of assets by officers or directors to their own enrichment,

**Section 609 of the LLC Law provides that absent a provision in the operating agreement stating otherwise:

“Neither a member of a limited liability company, a manager of a limited liability company managed by a manager or managers nor an agent of a limited liability company (including a person having more than one such capacity) is liable for any debts, obligations or liabilities of the limited liability company or each other, whether arising in tort, contract or otherwise, solely by reason of being such member, manager or agent or acting (or omitting to act) in such capacities or participating (as an employee, consultant, contractor or otherwise) in the conduct of the business of the limited liability company.”

without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually” (*Abrams v Donati*, 66 NY2d 951, 953 [1985]). A complaint the allegations of which confuse a shareholder's derivative and individual rights will, therefore, be dismissed, though leave to replead may be granted in an appropriate case (*id.*).

As a result, the motion of the Benjamin defendants is granted only to the extent that the 19th, 20th, 21st, 22nd and 23rd causes of action against for breach of fiduciary duty are dismissed with leave to replead in an amended complaint. For the reasons stated in this court’s discussion of the Bent defendants’ motion, the Benjamin defendants’ motion is also granted to the extent of dismissing the 13th and 25th cause of action without prejudice to replead.

Motion of Bent Defendants

In their motion to dismiss the causes of action asserted against them pursuant to CPLR 3211(a)(1), (5) and (7) and 3016 (b), the Bent defendants argue, among other things, that all causes of action concerning Eastchester and Deborah’s involvement in nonparty Split Rock Rehabilitation and Health Care Center, LLC (Split Rock) must be dismissed as Jack is not a member of these entities and thus lacks standing, that Bent is not a managing member of Brookhaven, that Bent and Deborah cannot be sued as individuals, that the causes of action concerning the determination of membership interests of Bent and Deborah are time-barred, and that plaintiffs have not properly stated a cause of action against Bent for intentional interference with a contract.

In determining whether a complaint is sufficient to withstand a motion pursuant to CPLR 3211 (a) (7), “the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any

cause of action cognizable at law a motion for dismissal will fail” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). The court must accept the facts alleged in the complaint to be true and determine only whether the facts alleged fit within any cognizable legal theory (*see Dye v Catholic Med. Ctr. of Brooklyn & Queens*, 273 AD2d 193 [2000]). The court “is not concerned with determinations of fact or the likelihood of success on the merits” (*Detmer v Acampora*, 207 AD2d 477 [1994] *see Stukuls v State of New York*, 42 NY2d 272, 275 [1977]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBCI, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]). Likewise, to succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence which forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim (*see Trade Source v Westchester Wood Works*, 290 AD2d 437 [2002]).

In support of their motion to dismiss Jack’s claims regarding Eastchester and Split Rock for lack of standing, the Bent defendants submit copies of “K1” schedules, copies of documents from the Department of Health (DOH) and operating agreements. The K1 schedules are submitted to show that 100% of the membership interests of Eastchester and Split Rock belong to parties other than Jack. The Bent defendants submit the DOH documents to establish that Jack’s claimed memberships in the companies are precluded under Public Health Law § 2801-a(f), which requires DOH approval for transfers of less than a ten percent interest in a limited liability company operating a hospital. The Bent defendants maintain that the documents demonstrate that no such approval was ever obtained by Jack. However, the failure to obtain such approval does not have any bearing on whether Jack is entitled to contractual rights as a member, including the right to receive distributions (*see Simaee v Levi*, 22 AD3d 559, 561-562 [2005]; *Glatzer v Webster*, 32 Misc 3d 1202[A],

2011 NY Slip Op 51152 [U] [2011]). Further, in light of documentation submitted by Jack in opposition, consisting of correspondence from Eastchester which implies that he was recognized as a “member” of Eastchester as late as 2008, this court cannot find that the documentary evidence submitted by the Bent defendants “conclusively” disposes of Jack’s claims against Eastchester on grounds of standing or statute of limitations. Insofar as the Bent defendants submit the same class of documents with respect to Split Rock, the court cannot find that such documentary evidence is sufficient to conclusively establish that Jack is without an interest in Split Rock.

In the thirteenth through eighteenth causes of action, the crux of plaintiffs’ claims is that Benjamin, Bent and/or Deborah “did not pay for their membership interests” in and “did not perform any services” for the relevant entities. Plaintiffs allege that Benjamin, Bent and Deborah “had a duty to account, have refused to do so, and have never rendered an accounting of their alleged interests.” In their opposing papers, plaintiffs designate these causes of action as ones for “declaratory judgments” to establish the interests of Benjamin, Bent and Deborah in the relevant entities. However, section 610 of the LLC Law provides that “[a] member of a limited liability company is not a proper party to proceedings by or against a limited liability company, except where the object is to enforce a member’s right against or liability to the limited liability company.” Since the object of these causes of action is not to enforce plaintiffs’ rights against the relevant entities, they may not bring such claims as individuals.

As a result, that part of the Bent defendants’ motion for dismissal of the 13th, 14th, 15th, 16th, 17th and 18th causes of action are granted without prejudice to replead in an amended complaint.

The twenty-fourth through twenty-seventh causes of action seek removal of Benjamin, Bent and Deborah from their positions as managing members by reason of the alleged breaches of fiduciary duty. Initially, these claims clearly allege a wrong against the entities and must be brought as part of a derivative action (*see* LLC Law § 610; *Abrams*, 66 NY2d at 953). Further, while plaintiffs allege that the operating agreements of the relevant entities “provide that managing members may be removed from their positions,” there is no factual detail provided as to the grounds for such removal under the operating agreements and what procedures are to be followed to effectuate the removal. For instance, there is no allegation that a majority of members voted for the removal. Unless there is a vote of a majority in interest of the members (LLC Law § 414), this court is unaware of a legal basis for directing, ordering or adjudging that an LLC member be removed from a management position.

As a result, the 24th, 25th, 26th and 27th causes of action are dismissed without prejudice to replead in an amended complaint.

The elements of a cause of action alleging tortious interference with a contract are: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant’s knowledge of that contract, (3) the defendant’s intentional procurement of the third party’s breach of that contract, and (4) damages (*see Foster v Churchill*, 87 NY2d 744, 749-750 [1996]; *Chung v Wang*, 79 AD3d 693, 694 [2010]). The complaint alleges that Bent “refused to permit” Benjamin and/or Deborah from giving distributions to plaintiffs and, with the intent to induce the breach of the operating agreements of Willoughby, Golden Gate, Woodmere, Split Rock, Easstrook and Eastchester, Bent induced the breach of the agreements so that plaintiffs would not receive distributions. Even accepting as true the allegations which comprise the twenty-eighth cause of action, the court finds that plaintiffs have failed to state a cause of action for tortious interference with a contract. “Although on

a motion to dismiss the allegations in a complaint should be construed liberally, to avoid dismissal of a tortious interference with contract claim, a plaintiff must support his claim with more than mere speculation” (*Ferrandino & Son, Inc. v Wheaton Builders, Inc., LLC*, 82 AD3d 1035, 1036 [2011][citations omitted]). Here, plaintiffs merely assert, in a conclusory manner and without the support of relevant factual allegations, that Bent induced the breach of the relevant operating agreements (*id.*). Further, plaintiffs do not allege that Bent had knowledge of the operating agreements to which plaintiff’s were signatories.

As a result, the 28th cause of action is dismissed without prejudice to replead in an amended complaint.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. DAVID I. SCHMIDT

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