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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

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PF2 SECURITIES EVALUATIONS, INC.,

Plaintiff,

—against—

GUILLAUME FILLEBEEN and LEVEL 3 CONSULTANTS, LLC,

Defendants.

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Index No.:151776/2014
Motion Date: Oct. 30, 2014
Motion Seq.: 002, 003 and 004

DECISION AND ORDER

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GUILLAUME FILLEBEEN AND LEVEL 3 CONSULTANS, LLC,

Third-Party Plaintiff

—against—

PF2 SECURITIES EVALUATIONS, INC., GENE PHILLIPS and ROBIN PHILLIPS,

Third-Party Defendants.

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Ellen M. Coin, A.J.S.C.:

Plaintiff PF2 Securities Evaluations, Inc. (hereinafter "PF2") brought this action against Guillaume Fillebeen (Fillebeen) and Level 3 Consultants, LLC ("L3C"), alleging that while employed at PF2, Fillebeen misappropriated PF2's computer algorithms for analyzing complex financial structures, called trust preferred collateralized debt obligations ("TruPS CDOs"), and opened a competing business. According to the complaint, in late 2007 Fillebeen helped found PF2 when he purchased ten shares of its stock and became a managing shareholder. As Fillebeen allegedly began to fail in his business role, PF2 negotiated what it described as a generous buyout and employment contract ("the "Buy-Out"). The Buy-Out, however, was never reduced to a discreet written contract, but instead was encapsulated in oral conversations and emails. The parties do not disclose the negotiated price in the pleadings, but the payment was to be made in ten monthly installments. Fillebeen was to resign his position as a director/partner and officer of PF2, but remain employed until February 2013. The Buy-Out also entitled Fillebeen to share in potential future profits under certain circumstances for a period of three years. PF2's remaining shareholders characterize the agreement as a generous move to avoid imposing a hardship on Fillebeen, as he had no alternative source of income.

Allegedly unbeknownst to PF2, sometime before the Buy-Out, Fillebeen separately had offered competing services through L3C, misappropriating PF2's trade secret mathematical models, scenarios, software, source code and data. After purchasing two shares, in April 2013, PF2 stopped payment to Fillebeen, and demanded that he cease and desist from using its proprietary information. On May 20, 2013, PF2 sent Fillebeen a check for his remaining shares at the price for which he originally purchased them and notified him that he was no longer a shareholder of PF2. The letter also demanded the return of the computer equipment purchased for Fillebeen's use. By letter dated June 2, 2013, Fillebeen rejected PF2's demands. The complaint asserts claims for breach of fiduciary duty, breach of shareholder agreement, breach of the Buy-Out and employment agreements, breach of the covenant of good faith and fair dealing, misappropriation of trade secrets, unfair competition, conversion, fraud in the inducement, fraud, unjust enrichment and declaratory judgment.

In his amended answer and in affidavits in opposition, Fillebeen presents a different account of this dispute (*see* Affidavit of Guillame Fillebeen, dated August 28, 2014, ¶3 *et seq.*). PF2 was formed in February 2008 for the purposes of providing consulting services to various third parties in the financial and legal industries. At formation, the three original shareholders, as well as officers and directors, were Fillebeen, Gene Phillips and Mark Froeba, each with ten shares valued at $3,333.33 per share. In September 2008, Gene's brother Robin Phillips purchased three shares of PF2 at the price of $10,000.00 per share. In May 2010, PF2 purchased Froeba's shares for an undisclosed amount (as alleged in the answer) or for the initial offer price of $3,333.33 per share (*id.* at ¶ 4). Fillebeen contends that "at various time [sic] during the

parties' relationship, the total value of PF2 was set, by agreement between [Gene], [Robin] and [himself] at an approximate sum between $500,000.00 to 1,8000,000.00 [sic]" (*id.* at ¶ 5). No written shareholder or employment agreement or any other similar documentation existed. As Fillebeen was the only shareholder and employee of PF2 trained in the programming, coding and generation of computer models for projecting returns on various investment products, he created PF2's proprietary programming and claims continued ownership thereof.

Sometime in 2012, Gene and Robin allegedly provided Fillebeen with inaccurate valuation of PF2's assets in order to entice him to sell his shares well below their fair market value. They painted a picture of dire financial straits, necessitating a change in PF2's focus from CDO models analysis to litigation consulting, which was outside Fillebeen's expertise. As a result, Fillebeen agreed to sell his shares at a fraction of their true cost and continued working for the company as a consultant for approximately two months at a low rate of pay. Neither side's submissions disclose the Buy-Out offer price.

In the meantime, Fillebeen formed L3C to make a living, using his knowledge of computer models and coding. L3C assisted only one client who had no prior contact with PF2, for which it billed $1,250.00. L3C did not provide services to any of PF2's existing clients. Nor could L3C utilize any CDO models created for PF2, as each CDO model had to be tailored to the details of each particular investment. What PF2 currently possesses and makes full use of is the basic code that Fillebeen personally developed. Further, L3C became inactive in March 2013, when Fillebeen obtained other employment. Fillebeen is willing to return all computer

equipment that PF2 purchased for him and would have done so earlier had PF2 requested its return before the payment dispute arose.

Fillebeen asserts counterclaims for breach of contract (against PF2), an accounting (against PF2), unjust enrichment (against PF2, Gene Phillips and Robin Phillips), conversion (against PF2, Gene Phillips and Robert Phillips), waste (against Gene Phillips and Robin Phillips), director misconduct under Business Corporations Law §720 (against Gene Phillips and Robin Phillips), breach of fiduciary duty (against Gene Phillips and Robin Phillips), rescission of the share sale agreement as fraudulently induced (against PF2, Gene Phillips and Robin Phillips) and fraud (against Gene Phillips and Robin Phillips).

In motion sequence 002, PF2 moves to dismiss the first, fourth and eighth counterclaims pursuant to CPLR 3211 (a) (7), §3013 and 3016 (b). In motion sequence 003, Gene Phillips moves to dismiss the fourth through ninth counterclaims pursuant to CPLR 3211(a) (7), §3013 and 3016 (b). In motion sequence 004, Robin Phillips moves to dismiss the third through ninth counterclaims pursuant to CPLR 3211 (a) (7), (8) and §§3013 and 308. The three motion sequences are identical in the arguments presented for dismissal of the counterclaims under CPLR 3211(a)(7).

Motion sequence 004, however, asserts an additional basis for dismissal of the complaint, alleging lack of personal jurisdiction under CPLR 3211(a)(8). Robin argues that the Court lacks long-arm personal jurisdiction over him, as he is at most a passive shareholder of a New York corporation and resides and practices law in the State of California only. Robin

alleges that he never acted as PF2's attorney. The actions that the amended answer attributes to him are not alleged to have occurred in New York.

Lastly, Robin argues that service of process upon him was defective in that it was not delivered to him personally, but to a receptionist at his law firm stationed on a different floor than where his office is located, who allegedly informed the process server that she was not authorized to accept process. All three motion sequences are consolidated for disposition.

Analysis

When considering a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, 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" (*People v Coventry First LLC*, 13 NY3d 108, 115 [2009], *quoting Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001] [internal quotation marks omitted]). The facts alleged in the complaint are taken to be true; the court may consider affidavits in opposition to remedy any defects in the pleading; and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*See Leon v Martinez*, 84 NY2d 83, 88 [1994][quotation marks and citations omitted]).

Breach of Contract

A claim for breach of contract requires plaintiff to allege existence of the contract, plaintiff's performance under the contract, defendant's breach, and resulting damages (*JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept. 2010]). PF2 faults Fillebeen's breach of contract counterclaim for not specifying the terms allegedly breached and

the manner in which the breach occurred. PF2 also argues that Fillebeen's denial of the paragraph in PF2's complaint asserting existence of a contract by itself precludes any claim arising therefrom. These arguments, however, are unavailing.

Fillebeen has sufficiently alleged a cause of action for breach of the Buy-Out, especially as there is no dispute that PF2 stopped payment after it had purchased two out of ten shares Fillebeen held. Any further specific outline of the terms of the agreement most likely will be disputed in this action, as the parties never executed a separate written agreement. With the terms of the Buy-Out contained in emails and the conflict in the parties' allegations of oral communications, the terms of the agreement, assuming there was a requisite meeting of the minds on a single term, will have to be fleshed out through full disclosure. Finally, as pleading in the alternative is permissible, Fillebeen is not precluded from asserting this counterclaim by also denying existence of the Buy-Out or seeking to rescind it (CPLR 3014; *see also* Siegel, NY Prac § 214 [5th ed 2011]).

Unjust Enrichment

To state a claim for unjust enrichment, "the plaintiff must allege 'that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what it sought to be recovered'" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]) (*quoting Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 182 [2011])). "The existence of a valid and enforceable written contract precludes recovery on a theory of unjust enrichment." (*Cornhusker Farms Inc. v Hunts Point Coop. Mkt., Inc.*, 2 AD3d 201, 206 [1st Dept. 2003], *citing Clark-Fitzpatrick. Inc. v Long Island R. R. Co.*, 70 NY2d

382, 389 [1987]). Fillebeen sufficiently alleged that as the only shareholder with technical skills essential to PF2's operations, he was not compensated fairly. As the parties never executed a discrete written contract, Fillebeen may maintain a claim for unjust enrichment, subject to the Court's eventual fact-finding regarding the existence, enforceability and contents of any contract that might have been properly formed between the parties.

Conversion

A person who, without authority, intentionally exercises control over the property of another person and thereby interferes with the other person's right of possession has committed a conversion and is liable for the value of the property. Conversion has been defined as any unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights (*Thyroff v Nationwide Mut. Ins Co.*, 8 NY3d 283, 288-89 [2007]). A requirement that the property in dispute be tangible or, in case of intangible property rights, sufficiently merged with tangible property, e.g. stock certificates, no longer precludes claims of conversion of intangible electronic information, data or records that are stored on a computer and are indistinguishable from printed documents (Id. [customer information and emails]).

Here, Fillebeen claims ownership of PF's technical know-how and client lists, of which he was allegedly dispossessed when he agreed to sell his shares based on fraudulent valuation, effectively causing his ouster. In his absence, the counterclaim defendants exercised sole dominion and control of the subject proprietary information.

Without deciding whether the software code analyzing CDOs is amenable to a claim of conversion under *Thyroff*, this counterclaim fails to allege demand for return of the converted property. Where a party accused of conversion exercised initial dominion and control of the subject property with claimant's authorization, only the refusal of the demand for the return of the property makes such party a wrongdoer (*J Squared Software, LLC v Bernette Knitware Corp.*, 48 AD3d 351, 351 [1st Dept 2008] [no demand made on licensee of software], citing *Agawam Trading Corp. v Malbin Co., Inc.*, 37 AD2d 946 [1st Dept 1971]). "[U]ntil such a demand and refusal, the possession is deemed to continue as a possession in subordination to the rights of the owner and not in derogation of these rights" (23 NY Jur 2d Conversion, and Action for Recover of Chattels § 47).

Waste and Director Misconduct Under Business Corporation Law §720

"Waste, mismanagement and interference with the corporation's business are wrongs to the corporation, the remedy for which is a stockholder's derivative action, and not a cause of action in favor of the individual stockholders even though they may be indirectly damaged because the value of their stock is depreciated" (20 Carmody-Wait 2d §121:192 [citations omitted]; BCL §720[b]). As Fillebeen asserts his counterclaims in his own behalf and not derivatively on behalf of the corporation, the fifth and sixth counterclaims for waste and director misconduct must be dismissed (*e.g. Smerling Enters., Inc. v Goldstein*, 184 AD2d 480, 480 [1st Dept 1992]).

Breach of Fiduciary Duty

The seventh counterclaim is for breach of fiduciary duty. To plead a breach of fiduciary duty claim, plaintiff must allege that (1) a fiduciary relationship existed; (2) the defendant engaged in misconduct; and (3) that the misconduct directly caused plaintiff's damages (*Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 [2nd Dept 2010]). "A fiduciary relationship arises 'between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation'" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 561 [2009], quoting *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). This fiduciary relationship is associated with a "higher trust" than that required in an arm's length business transaction (*HF Mgt. Servs. LLC v Pistone*, 34 AD3d 82, 84 [1st Dept 2006]).

There is a plethora of authority in New York that a minority shareholder in a closely-held corporation is owed a fiduciary duty by majority shareholders or by those in control of the corporation and must be treated fairly and be free of oppressive conduct or unlawful freeze-out mergers (*see e.g. Gjuraj v Uplift Elevator Corp.*, 110 AD3d 540, 541 [1st Dept 2013] [citations omitted]; *see also Littman v Magee*, 54 AD3d 14, 17 [1st Dept 2008]; *Richbell Info. Serv., Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 300 [1st Dept 2003][citation omitted] [cognizable claim exists where majority shareholder colluded in low bidding ceiling at foreclosure sale of minority shares]). In the context of involuntary corporate dissolution under BCL § 1104-a, the First Department has observed, "While . . . 'oppressive' conduct is not defined in the statute, the Court of Appeals has noted it is distinct from illegality and refers to conduct that substantially defeats

the 'reasonable expectations' held by minority shareholders in committing their capital to the closed corporation" (*Matter of Rambusch*, 143 AD2d 605, 606 [1st Dept 1988], citing *Matter of Kemp & Beatley, Inc.*, 64 NY2d 63, 72-74 [1984]).

Although the pleadings here do not allege a freeze-out or petition for a corporate dissolution, a common theme runs through the weight of legal authority in New York: a minority shareholder in a close corporation must not be unlawfully compelled to sell his shares or be "cashed out," and in the event of a consensual buy-out, he is entitled to receive a fair market value for his stock after fair and complete disclosure and valuation (*Richbell Info. Serv., Inc., supra; Blue Chip Emerald LLC v Allied Partners Inc.*, 299 AD2d 278, 279 [1st Dept 2002] [citation omitted]; see also BCL § 1118[b]).

Here, there is no dispute that PF2 is a closely held corporation. Fillebeen alleges that Gene and Robin together hold the majority of the shares and voiced their intent to vote their shares in concert (Affidavit of Guillame Fillebeen, sworn to September 24, 2014, ¶ 19). Gene and Robin control PF2's day-to-day operations, as well as all of its finances. Fillebeen was responsible for the technical side of PF2's services, and the sole source of his information regarding PF2's financial standing came from Gene. Fillebeen alleges that Gene and Robin wanted to alter PF2's business model and to remove him from its operation. As Fillebeen consensually agreed to sell his shares in PF2, Gene and Robin had a fiduciary duty to make accurate financial disclosures to enable fair valuation of Fillebeen's shares.

Although Fillebeen does not specify the price of the agreed Buy-Out or the amount by which he claims his shares were undervalued, the demand that he sell at least eight of his ten

shares at the initial offering price, together with a unilateral declaration that he was no longer a shareholder, is sufficient to suggest bad faith. Inspection of PF2's books and records will enable the parties to determine the fair value of PF2's shares and whether there is sufficient evidence to support Fillebeen's allegations. Accordingly, Fillebeen has sufficiently stated a cause of action for breach of fiduciary duty regarding valuation of his stock.

However, to the extent that this counterclaim can be viewed as seeking recovery for diminution in the value of PF2's stock as a result of the remaining shareholders' malfeasance, it is dismissed, as such a claim may only be brought derivatively on behalf of the corporation (*O'Neill v Warburg, Pincus & Co.*, 39 AD3d 281, 281-82 [1st Dept 2007][citation omitted]).

Rescission of Contract and Fraud

A contract induced by fraud is subject to rescission (*Wood v Hill*, 214 AD 417, 421-22 [1st Dept 1925]). "To maintain an action based on fraudulent representations, whether it be for the rescission of a contract or . . . in tort for damages, it is sufficient to show that the defendant knowingly uttered a falsehood intending to deprive the plaintiff of a benefit and that the plaintiff was thereby deceived and damaged" (*Channel Master Corp. v Aluminum Ltd. Sales Inc.*, 4 NY2d 403, 406-07 [1958]). Fraudulent inducement warranting a rescission of contract shares overlapping elements with a tort claim of fraud, the only difference being the nature of the relief sought: termination of a contract in case of the former, and compensatory damages for the latter.

The elements of both are representation of a material existing fact, falsity, scienter, deception (made with the intention of inducing reliance), actual reliance and resulting injury (*id.*

at 407; *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 [1st Dept 2005]).

CPLR 3016(b) requires that fraud be pled with particularity. This rule "merely requires that a claim of fraud be pleaded in sufficient detail to give adequate notice" (*Houbigant, Inc. v Deloitte & Touche, LLP*, 303 AD 2d 92, 97 [1st Dept 2003]). Thus, the CPLR 3016(b) pleading requirements "should not be confused with unassailable proof of fraud" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]). If the facts allow for a "reasonable inference" of the purported fraud, then the standard is met, and, "in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009], quoting *Pludeman*, 10 NY3d at 492-493 [internal quotation marks omitted]).

As alternative relief to fair valuation of his shares, Fillebeen seeks rescission of the Buy-Out agreement. It is well settled that unless there is a broad general release negotiated between sophisticated corporate parties with advice of counsel in the atmosphere of mutual distrust, a buy-out agreement marred by lack of full and accurate disclosure of information that could reasonably bear on minority shareholder's consideration of the fiduciary's offer is voidable (*Blue Chip Emerald LLC*, 299 AD2d at 280; *cf. Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 17 NY3d 269, 278 [2011][rejecting attempt to set aside general release given in buy-out transaction]).

Here, no written Buy-Out contract was executed, and neither side alleges that a release of claims was given. Proficient in software computing, Fillebeen may not be presumed

concomitantly experienced in matters of corporate law and governance. Nor did the parties seek the assistance of counsel. Accordingly, the alleged lack of requisite financial disclosure, or inaccurate disclosure, gives rise to a valid cause of action for rescission of the Buy-Out. However, the ninth counterclaim for fraud must be dismissed as duplicative of the breach of fiduciary duty counterclaim, which is also predicated on the alleged fraud (*e.g. Voutsas v Hochberg*, 103 AD3d 445, 446 [1st Dept 2013]).

Personal Jurisdiction

"On this record, made upon a pre-answer motion to dismiss the action under CPLR 3211 (a) (8), [counterclaim] plaintiff need only make a prima facie showing that personal jurisdiction exists" (*Opticare Acquisition Corp. v Castillo*, 25 AD3d 238, 243 [2nd Dept 2005][citation omitted]). However, "[a]s the party seeking to assert personal jurisdiction, the [counterclaim] plaintiff bears the burden of proof on [that] issue but . . . to defeat a motion to dismiss based upon lack of personal jurisdiction, [the counterclaim] plaintiff need only demonstrate that facts exist to exercise personal jurisdiction over the [counterclaim] defendant" (*People v Frisco Mktg. of NY LLC*, 93 AD3d 1352, 1353 [4th Dept 2012] [citations omitted]); *D & R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 90 AD3d 403, 405 [1st Dept 2011]). "In this connection, the court interprets the pleadings and affidavits in the light most favorable to the [counterclaim] [plaintiff]" (*Central Sports Army Club v Arena Assocs., Inc*, 952 F Supp 181, 187 [SDNY 1997] [citations omitted)].

CPLR 302 (a) (1) provides for personal jurisdiction over a non-domiciliary who, in person or through an agent, "transacts any business" within New York, provided that the

plaintiff's causes of action arise out of the transaction of business (*Lebel v Tello*, 272 AD2d 103, 103-104 [1st Dept 2000]). Under the statute, "'proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted'" (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006], citing *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988] [citations omitted]). "Purposeful activities are those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (*Fischbarg v Doucet,* 9 NY3d 375, 380 [2007] [internal quotation marks and citations omitted]).

Determination of whether a party is transacting business in New York does not rest upon a rigid mathematical formula consisting of physical presence, length of time spent in New York and frequency of contacts (*see CPC Intl. Inc. v McKesson Corp.*, 120 AD2d 221, 233-34 [1st Dept 1986], *affd* 70 NY2d 268 [1987]). Instead, it is the quality and nature of the party's interactions inside the state by which he purposefully avails himself of the privilege of conducting activities within New York *(CPC Intl. Inc*, 120 AD2d at 233-34).

Fillebeen's allegations and the supporting materials make a sufficient prima facie case that Robin was not merely a passive minority shareholder, but was involved in PF2's operations in and outside of New York. Fillebeen alleges that Robin regularly acted as PF2's attorney and was consulted regarding legal matters pertaining to the corporation (Affidavit of Guillame Fillebeen, sworn to September 24, 2014, ¶ ¶ 6-15). Fillebeen attaches supporting emails and

draft letters.[1] Specifically, Fillebeen describes that Robin participated in addressing a cease-and-desist demand arising from a claim of trademark infringement. Although the final draft of the response omitted any mention of Robin and was signed by Gene, the intermediate draft listed Robin as PF2's general counsel. The attached emails from 2008, preceding Robin's purchase of the corporation's shares, contain Robin's advice to Gene on issues of corporate name, trademark and copyright law. Robin participated in discussions regarding hiring an intern and offered to post an advertisement for the position in New York City. Certain emails suggest that Robin participated in website creation and the drafting of client retainer agreements. A printout of PF2's corporate listing on the website of the California Secretary of State names Robin as PF2's agent for service of process in California (Exhibit J to Affidavit of Guillame Fillebeen, sworn to September 24, 2014).

As PF2's business model shifted from CDO analysis to litigation support services, Robin became an essential resource in marketing PF2's services to law firms. Robin helped Gene prepare for deposition as an expert witness in a case PF2 worked on, entitled U.S. Bank N.A. v Barclays Bank, No. 11-CV-9199, pending in the United States District Court for the Southern District of New York. Fillebeen alleges that important financial decisions, such as salary increases, required Robin's approval. Robin also appeared in PF2's offices in New York to discuss ongoing business matters. Fillebeen alleges that the last time he saw Robin at PF2's

[1] The documentary evidence that Fillebeen submits in opposition to the motion is not in proper evidentiary form. The Court, however, considers it to determine not whether there is a triable issue of fact warranting a trial, a procedural standard applicable on a motion for summary judgment, but whether Fillebeen has a cognizable claim and whether he makes a prima facie showing that personal jurisdiction exists.

office was in October 2012, when Robin was preparing for an unrelated legal proceeding. At that time, they discussed PF2's corporate affairs (Affidavit of Guillame Fillebeen, dated September 24, 2014, ¶¶ 17-18).

These detailed depictions of Robin's participation in the business operations of a New York corporation sufficiently allege purposeful conduct for the exercise of long-arm jurisdiction (*see Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 72 [2006]; *see also Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467-69 [1988]; *C. Mahendra (N.Y.), LLC v Natl. Gold & Diamond Ctr.*, 125 AD3d 454 [1st Dept 2015] [the "quality of defendant's contacts" is primary consideration]; *Liberatore v Calvino*, 293 AD2d 217, 221 [1st Dept 2002] [telephone calls and written communications by Rhode Island attorney to actively pursue insurance claim in New York]). Fillebeen also sufficiently alleges that his counterclaims arise out of Gene and Robin's joint control of PF2 and Robin's participation in the management of PF2's affairs. Although Robin refutes Fillebeen's allegations in his own supplemental affidavit, at most he raises a factual dispute requiring full discovery, an inadequate basis for dismissal at the pleading stage.

Robin's argument as to the method of service upon him is also unavailing. It is of no consequence that the receptionist at his law firm who received the third-party complaint told the process server that she was not authorized to accept service. "[A]uthority is not a relevant criterion with respect to service on individuals." (*City of New York v VJHC Dev. Corp.*, 125 AD3d 425 [1st Dept 2015], citing *Charnin v Cogan*, 250 AD2d 513, 517-18 [1st Dept 1988]). Similarly, the fact that Robin's work-station was located on a different floor from that of the receptionist also fails to vitiate service (*see Edan v Johnson*, 117 AD3d 528, 529 [1st Dept 2014]

[delivery to a receptionist of a doctor absent from the office on maternity leave] [citations omitted]).

In accordance with the foregoing, it is hereby

ORDERED that the motion of counterclaim defendant PF2 Securities Evaluations, Inc. to dismiss the first, fourth and eighth counterclaims of Guillame Fillebeen pursuant to CPLR 3211(a)(7), § 3013 and 3016(b), motion sequence 002, is granted to the extent of dismissing the fourth counterclaim for conversion, and the motion is otherwise denied; and it is further

ORDERED that motion of counterclaim defendant Gene Phillips to dismiss the fourth through ninth counterclaims of defendant Guillame Fillebeen pursuant to CPLR 3211(a)(7), § 3013 and 3016(b), motion sequence 003, is granted to the extent of dismissing the fourth counterclaim for conversion, the fifth counterclaim for waste, the sixth counterclaim for director misconduct under BCL § 720, the seventh counterclaim for breach of fiduciary duty only to the extent it seeks recovery for diminution in the value of the shares of plaintiff PF2 Securities Evaluations, Inc., the ninth counterclaim for fraud, and the motion is otherwise denied; and it is further

ORDERED that motion of counterclaim defendant Robin Phillips to dismiss the third through ninth counterclaims of defendant Guillame Fillebeen pursuant to CPLR 3211(a)(7), (8), §§ 3013 and 308, motion sequence 004, is granted to the extent of dismissing the fourth counterclaim for conversion, the fifth counterclaim for waste, the sixth counterclaim for director misconduct under BCL § 720, the seventh counterclaim for breach of fiduciary duty only to the extent it seeks recovery for diminution in the value of the shares of plaintiff PF2 Securities

Evaluations, Inc., the ninth counterclaim for fraud, and the motion is otherwise denied; and it is further

ORDERED that the counterclaim defendants shall answer the remaining counterclaims within 20 days of the date of this order.

This constitutes the Decision and Order of the Court.

Date: March 26, 2015

ENTER:

Ellen M.Coin, A.J.S.C.