

**Simon v Kyrejko**

2015 NY Slip Op 31075(U)

June 19, 2015

Supreme Court, New York County

Docket Number: 15677/2014

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 45 **ANIL C. SINGH**

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PETER SIMON, as a minority shareholder in :  
The City Foundry Inc. and Industry City Distillery, Inc. :  
and DR. DOUGLAS SIMON, :

Plaintiffs, :

-against- :

DAVID KYREJKO, ZACHARY BRUNER, :  
together, Majority Shareholders in The City Foundry Inc. :  
and Industry City Distillery, Inc., THE CITY FOUNDRY :  
INC. and INDUSTRY CITY DISTILLERY, INC., :

Defendants. :  
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Index No. 156277/2014

DECISION AND ORDER

Motion Sequence No. 001

**ANIL C. SINGH, J.**

Defendants move to dismiss the complaint pursuant to CPLR 3211(a)(1), (3), and (7).

For the reasons discussed below, defendants' motion to dismiss causes of action two, three, four, and five is granted. Defendants' motion to dismiss the first cause of action is denied. Plaintiffs' request to amend is denied.

**Background**

The following facts are drawn from the complaint, and are taken as true with all reasonable inferences drawn in favor of the plaintiffs for the purposes of this motion to dismiss.

*Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003).

In 2011 Peter Simon (Simon) and David Kyrejko (Kyrejko) founded a spirits business, The City Foundry (City Foundry). Simon was in charge of the business operations and Kyrejko was in charge of the distillery process. City Foundry hired Richard Watts (Watts) to design a website and market the product, and Zachary Bruner (Bruner) to be the head machinist. At this

point, a new entity, Industry City Distillery, was created and owns the technology and know-how used in distilling vodka. City Foundry, now a minority owner of Industry City Distillery, focuses on research and development.

The Industry City Distillery Founders Agreement and The City Foundry Founders Agreement (collectively, The Founders Agreements) were both signed by Simon, Kyrejko, Bruner, and Watts. Simon, Kyrejko, Bruner, and Watts were each named as founders and board members of each business entity with equal voting power. Important decisions such as terminating employees, selling the company, and increasing the size of the board required three out of four votes. In the event that the board was reduced to three members, The Founders Agreements mandated that a vote of two out of three would be deemed controlling.

City Foundry owned 1,000 shares, Kyrejko owned 2,000 shares, Simon owned 1,200 shares, Bruner owned 490 shares, and Watts owned 400 shares of the Industry City Distillery. Simon, Kyrejko, Bruner, and Watts each owned 50 shares of City Foundry. Under The Founders Agreements, each owner stood to increase his share ownership under a vesting schedule, which was based on the amount of time served at the company.

On August 31, 2012 Dr. Douglas Simon (Dr. Simon) purchased a \$150,000 Convertible Promissory Note from Industry City Distillery (the Note), which was signed by each of the founding members. The Note is due on August 31, 2017 but became convertible into Industry City Distillery Shares at Dr. Simon's option starting on February 28, 2014. In November of 2013, Dr. Simon gave notice that he intended to exercise his conversion right. Kyrejko and Bruner met this notice with hostility.

Simon and Dr. Simon (plaintiffs) allege that there was a strong demand for vodka but that Kyrejko was unable to, and refused to, produce enough vodka to meet the demand. Kyrejko refused to work with a lab assistant and a production manager that were both hired to help him meet demand. Due to Kyrejko's inability and refusal to meet demand, Industry City Distillery lost a significant contract.

Additionally, plaintiffs allege that due to Kyrejko's tyrannical personality, an argument ensued between Kyrejko and Watts causing Watts to be asked to leave the business. Kyrejko then made threats to leave the business with its secret formula for vodka and to destroy the distillery's machines.

On December 24, 2013, Kyrejko and Bruner (defendants) sent Simon a proposal, which called for defendants to take control of City Foundry, transferring all intellectual property from Industry City Distillery to City Foundry. Simon did not accept the proposal.

Plaintiffs bring this action to stop defendants from taking over the business. Plaintiffs allege (i) breach of fiduciary duty against defendants, (ii) fraud in the inducement against Kyrejko, (iii) fraud against Defendants, (iv) civil conspiracy to commit fraud and breach of fiduciary duty against Defendants, and (v) quantum meruit against City Foundry and Industry City Distillery. Defendants move to dismiss the complaint pursuant to CPLR 3211 (a) (1), (3), and (7). For the reasons discussed below, the court grants defendants' motion to dismiss all causes of action, except for the claim of breach of fiduciary duty, which is denied.

### **Discussion**

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 Dept 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 Ginzberg*, 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).

### **Breach of Fiduciary Duty**

(i) Simon

Defendants’ motion to dismiss Simon’s cause of action for breach of fiduciary duty pursuant to CPLR 3211 (a) (7) is denied for the following reasons.

To state a claim for breach of fiduciary duty, the plaintiffs must allege that (1) the defendants owed them a fiduciary duty; (2) the defendants committed misconduct; and (3) they suffered damages as a result of the misconduct. *See Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 (1st Dept 2011); *Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 (2d Dept 2010). A derivative action seeks to recover for a wrong done to the corporation while a direct action seeks to recover for a wrong done to the plaintiff, individually. “New York does not have a clearly articulated test, but approaches the issue on a case by case basis depending on the nature of the allegations. For instance, where shareholders suffer solely through depreciation in the value of their stock, the claim is derivative, even if the diminution in value derives from a breach of fiduciary duty. Allegations of mismanagement or diversion of corporate assets also plead a wrong to the corporation as is a diversion of a corporate opportunity.” *Yudell v Gilbert*, 99 AD3d 108, 113-14 (1st Dept 2012) (internal citations omitted).

Plaintiffs allege that defendants put their own personal interest ahead of the corporate interests of all shareholders, that defendants mismanaged the companies, and that defendants engaged in corporate waste. Defendants argue that plaintiffs' claims are derivative in nature. This is debatable, as the harm here seems to be absorbed particularly by plaintiffs. Nonetheless, for purposes of the court's analysis, we will assume that it is, in the first instance, property pled as a derivative, not direct, action. However, due to the likelihood that a demand in a derivative action would be futile, the cause of action for breach of fiduciary duty will be allowed to proceed as a direct claim. Demand futility is established if "(1) a majority of the directors are interested in the transaction, or (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgment in approving the transaction" *Marx v Akers*, 88 NY2d 189, 198 (1996). In this case, defendants and Simon are the only remaining board members. Simon's allegations in the complaint indicate that a majority of the directors are self-interested. Demand obviously would be futile, and it would be a waste of scarce judicial resources to dismiss this cause of action on an imagined technicality, and then review a redrafted derivative complaint made without a prior demand, due to obvious futility.

(ii) Dr. Simon

Defendants' motion to dismiss Dr. Simon's cause of action for breach of fiduciary duty pursuant to CPLR 3211 (a) (3) and (7) is granted for the following reasons.

"A director does not owe a fiduciary duty to the creditors of a solvent corporation." *Semi-Tech Litig., L.L.C. v Ting*, 13 AD3d 185, 188 (2004). There is no allegation in the complaint that either City Foundry or Industry City Distillery is insolvent. Additionally, there are

no allegations in the complaint or the briefs that Dr. Simon is owed a fiduciary duty for any reason other than being a creditor. Dr. Simon's breach of fiduciary duty claim is dismissed.

### **Fraud In the Inducement & Fraud**

Defendants' motion to dismiss the causes of action for fraud in the inducement against Kyrejko and fraud against both Kyrejko and Bruner pursuant to CPLR 3211 (a) (7) is granted for the following reasons.

When a cause of action is based on fraud, "the circumstances constituting the wrong shall be stated in detail" according to the heightened pleading requirement pursuant to CPLR 3016 (b), with the purpose "to inform a defendant of the complained-of incidents." CPLR 3016 (b); *High Tides, LLC v DeMichele*, 88 AD3d 954, 957 (2d Dept 2011). "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009). Where a fiduciary relationship exists, "the mere failure to disclose facts which one is required to disclose may constitute actual fraud, provided the fiduciary possesses the requisite intent to deceive." *Whitney Holdings, Ltd. v Givotovsky*, 988 F Supp 732, 748-49 (SDNY 1997).

Plaintiffs fail to meet the heightened pleading standard that a cause of action for fraud requires. Plaintiffs do not set forth the contents of any fraudulent representations made, the time and manner in which the alleged fraud was committed, or intent to deceive on the part of the defendants. Instead, plaintiffs make conclusory statements that Kyrejko misrepresented his ability to produce the vodka to meet demand. A claim that a person was unable to produce the work product that they had submitted they could is not properly brought as a claim for fraud.

Plaintiffs also fail to allege facts with the requisite specificity to warrant their allegations of fraud supported by the arguments that defendants drove out Watts in order to gain a majority, that defendants concealed their plan to transfer Industry City Distillery's intellectual property to City Foundry, and that defendants were raising money to continue the business without Simon. All three arguments are pleaded as mere conclusory statements. Defendants' actions as alleged do not constitute fraud. The causes of action for fraud in the inducement against Kyrejko and fraud against both Kyrejko and Bruner are dismissed.

### **Civil Conspiracy**

Defendants' motion to dismiss the cause of action for civil conspiracy pursuant to CPLR 3211 (a) (7) is granted for the following reasons.

"[I]t is well settled that New York does not recognize an independent civil tort of conspiracy. While a plaintiff may allege, in a claim of fraud or other tort, that parties conspired, the conspiracy to commit a fraud or tort is not, of itself, a cause of action." *Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457 (1st Dept 2011). Plaintiffs argue that while New York does not recognize an independent cause of action for civil conspiracy, a cause of action for civil conspiracy can be used "to connect the actions of separate defendants with an otherwise actionable tort." *Am. Baptist Churches of Metro. New York v Galloway*, 271 AD2d 92, 101 (1st Dept 2000). In order to properly plead a cause of action of civil conspiracy in New York, plaintiffs must allege "a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement. A bare conclusory allegation of conspiracy is usually held insufficient." *Blanco v Polanco*, 116 AD3d 892, 896 (2d

Dept 2014). In this case, plaintiffs have not alleged any facts indicating an agreement to such effect between defendants. The cause of action for civil conspiracy is dismissed.

### **Quantum Meruit**

Defendants' motion to dismiss the cause of action for quantum meruit pursuant to CPLR 3211 (a) (1) and (7) is granted for the following reasons:

Dismissal is warranted pursuant to CPLR 3211 (a) (1) where the documentary evidence "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." *Fortis Fin. Serv. v Fimat Futures USA*, 290 AD2d 383 (1st Dept 2002) (internal quotation marks and citation omitted)).

A "plaintiff is precluded from recovery on a theory of unjust enrichment by the existence of a contract." *Polo Elec. Corp. v New York Law School*, 114 AD3d 419 (1st Dept 2014). The Founders Agreements govern the terms of any compensation owed to Simon for any work provided to either company. Simon argues that the parties abandoned the Founders Agreements and therefore the cause of action for quantum meruit should not be dismissed. Nowhere in the complaint are there any facts supporting the argument that the Founders Agreements have been abandoned. Nor is there even any allegation in the complaint that the Founders Agreements have been abandoned. The cause of action for quantum meruit is dismissed.

### **Request to Amend**

Plaintiffs' request to amend is denied. "Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." CPLR 3025 (b). Plaintiffs make only a

cursory request for leave to amend and do not include a proposed amended pleading. Their request is denied.

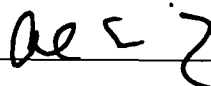
ORDERED that causes of action two, three, four, and five are dismissed; and it is further

ORDERED that defendants' motion to dismiss the first cause of action is denied; and it is further

ORDERED that plaintiffs' request to amend is denied.

Dated: 6/19/15

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ANIL C. SINGH J.S.C.