

Fortunatas Grex Intl., Inc. v Bakhshi

2015 NY Slip Op 31380(U)

July 15, 2015

Supreme Court, New York County

Docket Number: 153337/2012

Judge: Nancy M. Bannon

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - PART 42**

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FORTUNATAS GREX INTERNATIONAL, INC.,
individually and as shareholder of and in the right
of 539 JB ENTERPRISES LTD.

Plaintiff

DECISION AND ORDER

-against-

INDEX NO.: 153337/2012

JON BAKHSHI and FRANK PORCO

Defendants

-----x
JON BAKHSHI

Third-Party Plaintiff

-against-

VINCENT MICELI and DMITRY SHEYKHAMETOV

Third-Party Defendants

-----x

NANCY M. BANNON, J.

In this action to recover damages for, inter alia, breach of contract and for an accounting, the plaintiffs, corporations that own and operate nightclubs, move (seq. 005), pre-answer, pursuant to CPLR 3211(a)(7) to dismiss the counterclaims asserted against them by defendant Bakhshi, a nightclub investor, for breach of contract, fraud, breach of fiduciary duty, negligence, unjust enrichment, an accounting, and for contractual indemnification. The third-party defendants, individual shareholders of plaintiff corporation Fortunatas, separately move (seq. 004), pre-answer, pursuant to CPLR 3211(a)(7) to dismiss the third-party complaint seeking damages for breach of contract, fraud, negligence, unjust enrichment, and for contractual indemnification, as well as for a judgment declaring that the third-party defendants are obligated indemnify defendant/third-party plaintiff Bakhshi pursuant to a contract of sale. Both motions are granted.

I. Background

In 2004, Bakhshi founded 539 JB and was the sole owner. In 2008, Bakhshi planned to open a nightclub called Juliet Supperclub. That year, defendant Porco introduced him to the principals of Fortunatas and he agreed to partner with Fortunatas to develop, construct, and

operate Juliet Supperclub. In early 2009, Fortunatas and Bakhshi entered into a Subscription Agreement and a Shareholders Agreement, whereby Fortunatas purchased a 49% interest in 539 JB for \$1,300,000, \$600,000 of which was to be spent on the renovation of the nightclub, with any costs incurred over \$600,000 to be paid by Bakhshi. Bakhshi was to be responsible for the budget and expenditures of the renovation of the nightclub and for managing the day-to-day operations of 539 JB for a weekly salary of 3% of the gross income, with a minimum salary of \$4,000 per week. Porco was separately hired to manage the renovation of the nightclub, which began in May 2009, but soon went over budget. In September 2009, Fortunatas provided extra funds for its completion in exchange for an increase in its interest in 539 JB to 50%. Juliet opened for business in late 2009.

The plaintiffs commenced this action in 2012 alleging that, throughout 2009 and 2010 Bakhshi mismanaged Juliet, caused it to incur \$300,000 in unpaid construction and operating debts, and misappropriated Juliet funds. The plaintiffs allege that, due to Bakhshi's mismanagement, at a duly called Board of Directors and Shareholders meeting, Bakhshi was removed as President of 539 JB. The defendants separately moved, pre-answer, to dismiss the complaint pursuant to CPLR 3211(a)(7). By two orders, dated April 15, 2013 and July 11, 2013, this Court (Scarpulla, J.) dismissed the complaint against all defendants except the causes of action for breach of contract and for an accounting against Bakhshi, the derivative claims for breach of fiduciary duty and breach of the duty of loyalty against Bakhshi, and the cause of action for breach of the duty of loyalty against Porco.

Thereafter, Bakhshi interposed an answer, asserting seven counterclaims against the plaintiffs and commenced a third-party action, asserting six causes of action against the individual principals of Fortunatas. Bakhshi alleges, inter alia, that he was not paid in accordance with the Shareholder's Agreement and that he was fraudulently removed as President of 539 JB. Specifically, Bakhshi alleges that in November 2010, third-party defendant Miceli, as secretary of 539 JB, removed Bakhshi as signatory on 539 JB's bank account and that the third-party defendants then held a special meeting outside the presence of and without notice to all shareholders, wherein Bakhshi was removed as President of 539 JB. Bakhshi alleges that these actions "forced" him to then sell his 49% ownership in 539 JB to the third-party defendants. Although Fortunatas and Bakhshi executed the contract of sale, the closing of the sale of Bakhshi's shares never occurred. The parties do not make clear the identity of the owner of the other 1% ownership interest in 539 JB.

II. Discussion

In considering a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). At a minimum, a valid complaint must include “all material elements of the cause[s] of action.” CPLR 3013; see MatlinPatterson ATA Holdings LLC v Federal Express Corp., 87 AD3d 836 (1st Dept. 2011) *lv denied* 21 NY3d 853 (2013). Moreover, where the allegations contained in the pleadings consist of bare legal conclusions, they are not entitled to such consideration. See Beattie v Brown & Wood, 243 AD2d 395 (1st Dept. 1997).

A. Plaintiffs’ Motion to Dismiss Counterclaims (seq. 005)

In his answer, Bakhshi asserts seven counterclaims against the plaintiffs breach of contract, fraud, breach of fiduciary duty, negligence, unjust enrichment, an accounting, and contractual indemnification. However, the facts alleged are insufficient to sustain the counterclaims.

Bakhshi’s first counterclaim for breach of contract alleges the existence of three valid contracts between the parties, however, he fails to allege any breach of the subscription agreement and fails to plead any facts tending to show that he performed under the shareholder’s agreement or the contract of sale. As the claim for breach of contract fails to allege all material elements of the cause of action, Bakhshi’s first counterclaim for breach of contract must be dismissed. See Elisa Dreier Reporting Corp. v Global Naps Networks, Inc., 84 AD3d 122 (2nd Dept. 2011); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010).

Bakhshi also fails to plead all material elements for a cause of action for fraud. Although he contends that his removal as President of 539 JB was fraudulent, Bakhshi fails to allege a material representation on the part of the plaintiffs in removing him as President which they knew to be false, their intent to induce Bakhshi’s reliance, and Bakhshi’s justifiable reliance and resulting damages. Therefore, the second counterclaim is dismissed. See Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553 (2009).

“A minority shareholder in a close corporation is owed a fiduciary duty by the majority shareholders.” O’Neill v Warburg, Pincus & Co., 39 AD3d 281 (1st Dept. 2007). However, a shareholder, even in a closely held corporation, has no individual cause of action for a wrong

against a corporation. See Abrams v Donati, 66 NY2d 951 (1985); Barbaro v Spinelli, 121 AD3d 727 (2nd Dept. 2014). To the extent that Bakhshi alleges harm to 539 JB, he failed to bring this action in a derivative capacity and, thus, has no individual claim against Fortunatas for a wrong against the corporation. See Bansbach v Zinn, 1 NY3d 1 (2003); Abrams v Donati, *supra*; Barbaro v Spinelli, *supra*; Yudell v Gilbert, 99 AD3d 108 (1st Dept. 2012). Bakhshi also alleges individual harm, including that Fortunatas damaged Bakhshi's reputation, kept him involved in litigation, and concealed facts which were material to his decisions concerning his own business interests. However, even if true, any such harm does not fall within the ambit any fiduciary relationship between Fortunatas and Bakhshi as shareholders of 539 JB. In addition, Bakhshi fails to allege any advisory relationship that was independent of the shareholder's agreement. See EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 1 (2005). Bakhshi, therefore, fails to state a cause of action for breach of fiduciary duty against Fortunatas. In addition, as "it is well settled that a corporation does not owe fiduciary duties to its members or shareholders" (Hyman v New York Stock Exchange, 46 AD3d 335, 337 [1st Dept. 2007]; see Stalker v Stewart Tenants Corp., 93 AD3d 550 [1st Dept. 2012]), Bakhshi fails to state a cause of action for breach of fiduciary duty against 539 JB.

With regard to the fourth, fifth, and sixth counterclaims for negligence, unjust enrichment, and for an accounting, each also allege damage to the corporation rather than to Bakhshi individually and are, thus, derivative in nature. As Bakhshi is not suing in a derivative capacity, the fourth, fifth, and sixth counterclaims for negligence, unjust enrichment, and for an accounting are dismissed. See Abrams v Donati, *supra*; Barbaro v Spinelli, *supra*; Berardi v Berardi, 108 AD3d 406 (1st Dept. 2013); Yudell v Gilbert, *supra*. Additionally, as Bakhshi pleads the existence of valid and enforceable contracts and fails to allege facts supporting his contention that the plaintiffs were enriched at Bakhshi's expense, the fifth counterclaim for unjust enrichment also fails for these reasons. See Georgia Malone & Co. v Reider, 19 NY3d 511 (2012); IDT Corp. v Morgan Stanley Dean Witter & Co., 12 NY3d 132 (2009); Saunders v AOL Time Warner, Inc., 18 AD3d 216 (1st Dept. 2005).

In Bakhshi's seventh counterclaim for contractual indemnification, he alleges that, pursuant to the contract of sale, the plaintiffs were to replace him on all personal guaranties executed with creditors or vendors of business and agreed to indemnify him from any liability resulting from those personal guaranties. However, any such liability resulting from any personal guaranties is not the subject of this action. Bakhshi alleges that he was required to defend against multiple lawsuits, but does not provide any further specificity, including the details of any such actions or any determination of liability. See generally Navarreto v 995 Westchester Ave. LLC, 35 AD3d 267 (1st Dept. 2006). As there are no facts pled suggesting that any of these lawsuits or other liabilities were embraced by the indemnification provision or

contemplated by the contract of sale, the counterclaim for contractual indemnification fails to state a cause of action on which relief may be granted and is dismissed. See Hooper Associates, Ltd. v AGS Computers, Inc., 74 NY2d 487 (1989); Alayev v Juster Associates, LLC, 122 AD3d 886 (2nd Dept. 2014).

B. Third-Party Defendants' Motion to Dismiss Third-Party Complaint

Bakhshi commenced the third-party action against the individual shareholders of plaintiff Fortunatas, alleging six causes of action for breach of contract, fraud, negligence, unjust enrichment, contractual indemnification, and for a declaratory judgment. However, the facts alleged are insufficient to sustain the third party complaint.

Bakhshi fails to state a cause of action for breach of contract, as the third-party defendants are not alleged to be parties to the contracts at issue here in their individual capacities and any allegations of a breach pertain to plaintiff Fortunatas. See Bremond Houses, Inc. v Lemle & Wolfe, Inc., 129 AD3d 584 (1st Dept. 2015); Elisa Dreier Reporting Corp. v Global Naps Networks, Inc., *supra*; Harris v Seward Park Housing Corp., *supra*. Furthermore, as above, Bakhshi fails to allege all material causes of action on his cause of action for fraud (see Eurycleia Partners, LP v Seward & Kissel, LLP, *supra*), failed to assert his negligence claim in a derivative capacity (see Abrams v Donati, *supra*; Barbaro v Spinelli, *supra*), and alleged the existence of valid and enforceable written contracts. See Georgia Malone & Co. v Reider, *supra*; IDT Corp. v Morgan Stanley Dean Witter & Co., *supra*; Saunders v AOL Time Warner, Inc., *supra*. Accordingly, the first through fourth causes of action for breach of contract, fraud, negligence, and unjust enrichment are dismissed.

Also, as discussed above, Bakhshi's fifth cause of action for contractual indemnification and sixth cause of action for a judgment declaring that the third-party defendants must indemnify him do not contemplate any liabilities arising out of this action and contain insufficient facts to allege a duty to indemnify him in any other action based on the contract of sale. See Hooper Associates, Ltd. v AGS Computers, Inc., *supra*; Alayev v Juster Associates, LLC, *supra*. Therefore, the fifth and sixth causes of action fail to state a cause of action and are dismissed.

III. Conclusion

The plaintiffs' motion to dismiss Bakhshi's counterclaims and the third-party defendants' motion to dismiss the third-party complaint are granted.

The parties shall proceed with discovery on the plaintiffs' causes of action for breach of contract and for an accounting against Bakhshi, the derivative claims for breach of fiduciary duty and breach of the duty of loyalty against Bakhshi, and the cause of action for breach of the duty of loyalty against Porco.

Accordingly, it is

ORDERED that the plaintiffs' motion to dismiss defendant Jon Bakhshi's counterclaims pursuant to CPLR 3211(a)(7) is granted, and it is further,

ORDERED that the third-party defendants' motion to dismiss the third-party complaint pursuant to CPLR 3211(a)(7) is granted, and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: July 15, 2015

 JSC

HON. NANCY M. BANNON