

Berlin v Jakobson

2015 NY Slip Op 32311(U)

December 8, 2015

Supreme Court, New York County

Docket Number: 152263/2015

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

DOUGLAS BERLIN, suing individually and in the rights of
WAVERLY PROPERTIES, LLC, 110 GREENWICH STREET
ASSOCIATES, LLC, 27-37 ASSOCIATES, LLC, and 27-37
MANAGEMENT, LLC,
Plaintiff,

Index No.: 152263/2015

Motion Date: 12/08/2015

Motion Seq. No.: 001

- v -

THOMAS JAKOBSON, PETER JAKOBSON, JR., JAKOBSON
PROPERTIES, LLC, JAKPAY, LLC and ELEVEN WAVERLY
ASSOCIATES, LLC,
Defendants.

The following papers, numbered 1 to 4 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No (s) .	1, 2, 3
Answering Affidavits - Exhibits	No (s) .	4
Replying Affidavits - Exhibits	No (s) .	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion shall be granted in part.
On a motion to dismiss pursuant to CPLR 3211(a)(5) (cause of action may not be
maintained because of statute of limitations), defendants bear the initial burden of
establishing the untimeliness of the complaint. See Sparcino v Winner, M.D., 82 AD2d 753 (1st
Dept 1981). In his supporting affidavit, defendant Thomas A. Jakobson does not state when any
of the distributions were made to plaintiff from any of the entities in which plaintiff owns or
owned shares or when such entities entered into any of the challenged management

- CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART
 OTHER
- CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

agreements. Thus, where as here the complaint is “susceptible of construction” so “as to state causes of action the prosecution of which is not barred by any statute of limitations” (Erbe v Lincoln Rochester Trust Co, 3 NY2d 321, 325 [1957]), defendants have failed to meet their prima facie burden with respect to their statute of limitations defense pursuant to CPLR 3211(a)(5).

However, pursuant to CPLR 3211(a)(1), defendants have come forward with irrefutable documentary evidence that by two agreements, each entitled Surrender of Interest in Limited Liability Company Interest dated October 17, 2014, plaintiff released his interest as a member of 110 Greenwich Street Associates, LLC. Defendants are correct, therefore, that plaintiff has no standing to bring derivative claims on behalf of such entity. See Tzolis v Wolff, 10 NY3d 100, 109 (2008). Therefore, to the extent that plaintiff’s derivative third cause of action for breach of contractual and fiduciary duty, derivative fourth cause of action for unjust enrichment, and fifth cause of action for an accounting assert wrongs under the operating agreements that govern 110 Greenwich Street Associates, LLC such claims do not lie.

Plaintiff comes forward with nothing that refutes defendants’ documentary evidence, in the form of the operating agreement appended to plaintiff’s complaint, that plaintiff is not a member of 27-37 Associates, LLC. As plaintiff has no standing to bring a derivative action on behalf of 27-37 Associates, LLC (see Tzolis, supra), his derivative third cause of action for breach of fiduciary duty and derivative fourth cause of action for unjust enrichment on behalf of 27-37 Associates, LLC must be dismissed. Nor has plaintiff pled a cognizable claim for an accounting against Jakobson Properties, LLC, Jakpay, LLC, or Eleven Waverly Associates, LLC,

since he alleges no basis for such entities owing any duty of accounting either to him, individually or derivatively with respect to either Waverly Properties, LLC or 27-37 Management, LLC.

Since defendant Thomas Jakobson does not append a copy of the management agreement between Waverly Properties, LLC and (1) defendant Jakobson Properties, LLC; (2) and defendant Jakpay; and (3) defendant Eleven Waverly Associates, LLC; and between 27-37 Management, LLC and (4) defendant Jakobson Properties, LLC; (5) defendant Jakpay, LLC, pursuant to CPLR 3211(a)(1), there is no irrefutable evidence that rebuts plaintiff's derivative fourth cause of action on behalf of Waverly Properties, LLC and 27-37 Management, LLC for unjust enrichment against defendants Jakobson Properties, LLC Jakpay, LLC and Eleven Waverly Associates, LLC. Pappas v Tzolis, 20 NY3d 228, 234 (2012).

Finally, the first cause of action in which plaintiff, in his individual capacity, sues the individual defendants for breach of their operating agreement with respect to Waverly Properties, LLC and 27-37 Management, LLC, states no cognizable claim since plaintiff "actually seeks vindication of [his] rights as a shareholder, and recovery of corporate assets and profits diverted from [him] in that status" (Wolf v Rand, 258 AD2d 401, 403 [1st Dept 1999]).

Accordingly, it is

ORDERED that the motion of defendants to dismiss the complaint is granted to the extent that (i) the first cause of action is dismissed in its entirety pursuant to CPLR 3211(a)(7), (ii) the third cause of action on behalf of 110 Greenwich Associates, LLC, 110 Greenwich Management, LLC, and 27-37 Associates, LLC is dismissed pursuant to CPLR 3211(a)(5) (release)

and 3211(a)(7) (failure to state a cause of action); (iii) the third cause of action is dismissed pursuant to CPLR 3211(a)(5) and 3211(a)(7) to the extent brought on behalf of 110 Greenwich Associates, LLC and 27-37 Associates, LLC; (iv) the fourth cause of action on behalf of 110 Greenwich Associates, LLC is dismissed pursuant to CPLR 3211(a)(5) and on behalf of 27-37 Management, LLC pursuant to CPLR 3211(a)(7); and (v) the fifth cause of action as against defendant Jacobson Properties, LLC, Jakpay, LLC and Eleven Waverly Associates is dismissed pursuant to CPLR 3211(a)(7), LLC; and it is further

ORDERED that the motion of defendants to dismiss with respect to the derivative second cause of action on behalf of Waverly Properties, LLC and the derivative third cause of action on behalf of 27-37 Management, LLC for breach of fiduciary duty, the fourth cause of action for unjust enrichment on behalf of Waverly Properties, LLC and 27-37 Management, LLC and the fifth cause of action for an accounting, respectively, against defendants Thomas Jakobson and Peter Jakobson, is denied; and it is further

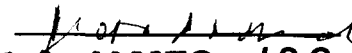
ORDERED that the defendants shall serve and file [an] answer[s] to the foregoing remaining causes of action pursuant to CPLR 3211(f); and it is further

ORDERED that the parties are directed to appear for a preliminary conference in IAS Part 59, 71 Thomas Street, Room 103, on February 9, 2016, 9:30 AM.

This is the decision and order of the court.

Dated: December 8, 2015

ENTER:


DEBRA A. JAMES J.S.C.