

Onyx Asset Mgt., LLC v Sing Fina Corp.

2016 NY Slip Op 31388(U)

July 19, 2016

Supreme Court, New York County

Docket Number: 654423/15

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

ONYX ASSET MANAGEMENT, LLC, MYLES WITTENSTEIN and CHICKEREE CHICK, LLC,
individually and derivatively on behalf of
9th & 10th STREET LLC,

Plaintiff,

- v -

SING FINA CORP., GREGG L. SINGER and SINGER FINANCIAL CORPORATION,

Defendant.

INDEX NO. 654423/ 15

MOTION DATE 06-01-2016

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion by defendants, to dismiss pursuant CPLR 3211(a)(1), (3) and (7), for lack of legal capacity, on documentary evidence and for failure to state a cause of action and pursuant to CPLR 3013 and 3016(b).

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1-2

Answering Affidavits — Exhibits _____

3-4

Replying Affidavits _____

5

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers it is Ordered that defendants' motion for an order dismissing the complaint, pursuant to CPLR 3211(a)(1), (3) and (7) for lack of legal capacity to maintain the action, on documentary evidence and for failure to state a cause of action, and pursuant to CPLR 3013 and 3016(b) for failure to plead with specificity is denied.

Plaintiffs bring this action to recover against the defendants for breach of Fiduciary duties (First, Second, Third and Fourth causes of action), for Aiding and Abetting the breach of Fiduciary duties (Fifth and Sixth causes of action), Derivatively for breach of contract on account of Waste and Mismanagement (Seventh cause of action), Derivatively for a breach of Fiduciary duties (Eighth cause of action), for specific performance on the operating agreement (Ninth cause of action), for breach of the implied covenant of good faith and fair dealing (Tenth, Eleventh and Twelfth causes of action).

Defendants now move, pre-answer to dismiss the complaint as against all defendants under CPLR 3211(a)(1), (3) and (7), as well as CPLR 3013 and 3016(b). Defendants argue that this lawsuit is without merit and should be dismissed for a host of reasons: (1) In accordance with the very complaint paragraphs 106, 111 and 116, the operating agreement does not contain any provision mandating sale of the property and there is no basis or facts pleaded to overcome the Manager's business decision to continue developing the property;

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

(2) The breach of contract claims contained in the Ninth, Tenth, Eleventh and Twelfth causes of action should be dismissed because "Specific Performance" is not a cause of action "Per Se", but an equitable remedy, and plaintiffs, by relying upon the covenant of good faith and fair dealing, improperly seeks to imply into a contract obligations that are inconsistent with the contract terms;

(3) Plaintiff's causes of action for breach of Fiduciary duties (First, Second, Third, Fourth, Fifth, Sixth and Eighth causes of action) are legally insufficient as they are contract claims impermissibly restated in the guise of tort claims;

(4) The Derivative causes of action (Seventh and Eighth) fail because the plaintiffs are not adequate representatives of the company. These same plaintiffs are currently suing the company in separate lawsuits, and are advocates solely on behalf of their own interests and investments to the detriment of the company and may not act on behalf of the company because of their conflicting interests;

(5) All claims against the Manager and his Affiliates should be dismissed because there is no basis upon which plaintiffs could pierce the veil against the Manager and because there is no privity with the Affiliates; and,

(6) Plaintiff Onyx lacks the capacity to bring this action because it is a foreign limited liability company that has conducted business in New York State without being authorized to do so and without complying with the registration requirements of the LLCL.

Plaintiffs oppose the motion and claim that defendants owed plaintiffs fiduciary duties of loyalty and care; That the causes of action are specific, detailed and sufficiently pleaded; That defendants breached their fiduciary duties and cannot hide behind the business judgment rule; That since Plaintiffs are 50% owners of the LLC and defendant Singer is 50% owner of the LLC, Plaintiffs are entitled to Specific Performance removing the Manager for "cause" as contained in section 3.01 of the Operating agreement; That all contracts imply a covenant of good faith and fair dealing in the course of performance and this has been breached by the Manager's refusal to sell the property, thereby failing to protect and preserve the member's return on their investment; That plaintiffs have standing to bring a derivative claim on behalf of the LLC; and that Plaintiff Onyx Asset Management LLC is authorized to do business in the State of New York and has begun the publication process mandated by the LLC Law.

In order to dismiss a complaint for failure to state a cause of action there can be no legally cognizable theory that could be drawn from the complaint. The question is whether the complaint gives rise to a cognizable cause of action. The test of the sufficiency of a complaint is whether liberally construed it states in some recognizable form a cause of action known to the law (Union Brokerage, inc., v. Dover Insurance Company, 97 A.D. 2d 732, 468 N.Y.S.2d 885 [1st. Dept. 1983]). 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 (Quinones v. Schaap, 91 A.D. 3d 739, 937 N.Y.S.2d 262 [2nd. Dept. 2012]). The complaint must be liberally construed, the factual allegations deemed to be true, and the non-moving party granted the benefit of every possible favorable inference. A reading of the complaint does give rise to cognizable causes of action as plead.

In order to dismiss an action on documentary evidence, the documentary evidence must unequivocally contradict plaintiff's factual allegations and conclusively establish a defense as a matter of law, resolve all factual issues and conclusively dispose of plaintiff's claim (*Goshen v. Mutual Life Insurance Company of New York*, 98 N.Y.2d 314, 774 N.E.2d 1190, 746 N.Y.S.2d 858[2002]; 511 West 232nd Owners Corp., v. Jennifer Realty Co., 98 N.Y.2d 144, 773 N.E.2d 496, 746 N.Y.S.2d 131 [2002]; *Fortis Financial Services v. Fimat Futures USA*, 290 A.D.2d 383, 737 N.Y.S.2d 40 [1st. Dept. 2002]).

The documentary evidence, in the nature of the Operating Agreement and Subscription Agreements, does not unequivocally contradict Plaintiffs' factual allegations and conclusively establish a defense as a matter of law, conclusively disposing of Plaintiffs' claims. This evidence does not conclusively contradict Plaintiffs' factual allegations or establish a defense as a matter of law (511 W. 232nd. Owners Corp., v. Jennifer Realty Co., 98 N.Y.2d 144, 746 N.Y.S.2d 131, 773 N.E.2d 496 [2002]).

The Managing member of a Limited Liability Company owes the non-managing members and the company a fiduciary duty (*Pokoik v. Pokoik*, 115 A.D.3d 428, 982 N.Y.S.2d 67 [1st. Dept. 2014]). Thus, a minority member of an LLC can bring an action against a majority member, to assert causes of action for breach of the implied covenant of good faith and fair dealing, breach of a fiduciary duty, and aiding and abetting breach of a fiduciary duty (see 21st. Century Diamond LLC, v. Allfield Trading, LLC, 110 A.D.3d 615, 974 N.Y.S.2d 359 [1st. Dept. 2013]). In addition Members of a limited liability Company may sue derivatively for breach of fiduciary duties, and a complaint will be found to state a cause of action and to be sufficiently pled, when it alleges facts that the actions of the managing member are motivated by economic self interest and wrongful (*Out of the Box Promotions, LLC, v. Koschitzki*, 55 A.D.3d 575, 866 N.Y.S.2d 677 [2nd. Dept. 2008]). These claims will survive even if the claims of the individual member are erroneously joined with the claims of the company. "The fact that the individual member seeks to benefit himself by bringing the action is of no import, since they have a clear legal right to bring a derivative action"(*Baliotti v. Walkes*, 134 A.D.2d 554, 521 N.Y.S.2d 453 [2nd. Dept. 1987]; *Corcoran v. Corcoran*, 192 A.D.2d 503, 596 N.Y.S.2d 86 [2nd. Dept. 1993]).

A Managing member of a limited liability company who is alleged to have acted in bad faith towards the non-managing members and the company with respect to an action for breach of fiduciary duties cannot rely on the business judgment rule with respect to the action. Even if the Business judgment rule could be applied, it does not protect corporate fiduciaries when they make decisions affected by inherent conflicts of interest(*Pokoik v. Pokoik*, Supra). The complaint alleges that the defendants have engaged in self dealing and have protected their financial interest to the detriment of the non-managing members and the company. These allegations are made with sufficient particularity to withstand dismissal for failure to state a cause of action and for failure to plead with particularity

Although Specific Performance is an equitable remedy for a breach of contract instead of a separate cause of action, Plaintiff's cause of action should not be dismissed at this stage, as it is a matter that should be determined by the court on a much fuller record, instead of a motion to dismiss (see *Warberg Opportunitstic Trading Fund, L.P., v. Georesources, Inc.*, 112 A.D.3d 78, 973 N.Y.S.2d 187 [1st. Dept. 2013]).

Plaintiffs' statements in the complaint contained in Paragraphs 55 through 77, comprising the First through Third causes of action- that defendants actions are wrongful, in bad faith and motivated by self interest- sufficiently make out the causes of action for breach of fiduciary duties (see Nathanson v. Nathanson, 20 A.D.3d 403, 799 N.Y.S.2d 83 [2nd. Dept. 2005]).

The statements in the complaint contained in paragraphs 79 through 87, comprising the Fourth through Sixth causes of action - that Singer as the president and shareholder of Sing Fina and the person in control of that entity, and as the Manager of the company and Class B member owning 50% of the membership interest in the company is responsible for knowingly and willfully assisting and thereby aiding and abetting Sing Fina's breaches of its fiduciary duties and obligations- sufficiently makes out the causes of action for aiding and abetting breaches of fiduciary duties (21st. Century Diamond LLC, v. Allfield Trading, LLC, 110 A.D.3d 615, 974 N.Y.S.2d 359 [1st. Dept. 2013]). The derivative causes of action are proper and sufficiently plead as contained in the paragraphs of the complaint 88 through 97 comprising the Seventh and Eighth causes of action (See Baliotti v. Walkes, 134 A.D.2d 554 [2nd. Dept. 1987], and Corcoran v. Corcoran, 192 A.D.2d 503 [2nd. Dept. 1993], Supra).

The claims for specific performance as stated in paragraphs 98 through 102 of the complaint, comprising the Ninth cause of action, is properly pled and should not be dismissed at this stage (see Warberg Opportunistic Trading Fund, L.P., v. Georesources, Inc., 112 A.D.3d 78 [1st. Dept. 2013]). Plaintiff's statements in the complaint contained in paragraphs 103 through 117, comprising the Tenth, Eleventh and Twelfth causes of action -that defendants' failure to market the property for sale to the financial prejudice and detriment of the plaintiffs is a violation of the implied covenant of good faith and fair dealing applicable to all contractual agreements under the laws of the state of New York- sufficiently makes out the causes of action for breach of the implied covenant of good faith and fair dealing.

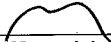
Finally, the Company has been granted authority to do business in New York and has complied with the publication requirements of the Limited Liability Company Law (LLCL §802(b), moving papers Exhibit U, opposing papers Exhibit 10 & 11). As such is has the legal capacity to maintain this action.

Accordingly, it is ORDERED, that defendants' motion to dismiss the complaint for failure to state a cause of action, on documentary evidence and for lack of legal capacity is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: July 19, 2016


Manuel J. Mendez
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE