SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 39

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HELEN DANIAL,

Plaintiff,

DECISION/ORDER
Index No. 154784/2015

-against-

ALBERT MONASEBIAN, NADER HAKAKIAN, QUARTZ TECHNOLOGY, INC. D/B/A QUARTZ REALTY, 260 WEST 36 MANAGING MEMBER CORP.

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action to recover damages for, *inter alia*, breach of fiduciary duty, defendants Albert Monasebian ("A. Monasebian"), Nader Hakakian ("N. Hakakian"), Quartz Technology, Inc. d/b/a Quartz Realty ("Quartz") and 260 West 36 Managing Member Corp. ("260 Manager") (collectively "Defendants") move to dismiss the complaint.

Plaintiff Helen Danial ("Plaintiff" or "Danial") has a 30% membership interest in 260 West 36 Associates, LLC, a New York limited liability company (the "LLC"), that was organized in 1997.[1] The LLC owns approximately 81,375 square feet of office space

[1] In addition to Helen Danial, the LLC's original members are defendant Albert Monasebian, defendant Nader Hakakian, Simone Monasebian, Dalya Monasebian, Marc Monasebian, Syrus Sedge, Babak Hakakian, Seemak Hakakian, and Daniel Hakakian.

in a building on 260 West 36th Street in New York. The LLC's 1997 Operating Agreement (the "Operating Agreement") provided, among other things, that:

> The Members hereby designate Albert Monasebian, having an address at 47 Beverly Road, Great Neck, NY 11021, and Nader Hakakian, having an address at 34 Elmridge Road, Kingspoint, NY 11024 to serve as Managing Members for the Limited Liability Company.
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> The Managing Members shall have responsibility for the day-to-day management of the business and affairs of the Limited Liability Company and shall devote such time and attention as the Managing Members deem necessary to the conduct and management of the business and affairs of the Limited Liability Company. Notwithstanding anything contained herein to the contrary, the managing members may designate either manager as a managaing [sic] agent who will be compensated at rates competitive or superior to the general rate for such services in the locality.

The Operating Agreement was amended on or about January 22, 2007. The amendment (the "Amendment") replaced Articles 3 (Purposes), 11 (Management of the Limited Liability Company), and 21 (Amendments), modified part of Article 8 (Allocations and Distributions), as well as added a new paragraph to Article 22 (Miscellaneous). In addition, the Amendment decreased the ownership percentages of two members by .25% to grant a .5% percentage interest to a new member, 260 West 36 Managing Member Corp.

Regarding the management of the LLC, the Amendment stated that,

> The Members hereby designate 260 West 36 Managing Member Corp. having an address at 47 Beverly Road, Great Neck, New York, to serve as Managing Member(s) for the Limited Liability Company.
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> The [260 Manager] shall have the responsibility for the day-to-day management of the business and affairs of the Limited Liability Company and shall devote such time and attention as the [260 Manager] deems necessary to the conduct and management of the business and affairs of the Limited Liability Company. Notwithstanding anything contained herein to

> the contrary, the [260 Manager] may designate a manager as a Managing Agent who will be compensated at rates competitive or superior to the general rate for such services in the locality. It is the intent of the [260 Manager] to designate Quartz Realty as the Managing Agent.

The Amendment changed the LLC's managing members from the individual Defendants Albert Monasebian and Nader Hakakian to 260 Manager. 260 Manager is owned by N. Hakakian and Marc Monasebian ("M. Monasebian"), Albert Monasebian's son.

Although the Amendment bears the signatures of the LLC members, Plaintiff alleges that she "does not believe that she ever agreed to the terms of the Amendment or put her original signature on that document." Accordingly, Plaintiff disputes the validity of any action taken pursuant to the Amendment.

At the time of the 2007 Amendment, there was also a Unanimous Written Consent to Actions Taken by the Members of 260 West 36 Associates, LLC (the "Unanimous Consent") in which the LLC members agreed that:

> [260 Manager], a New York Corporation, in its capacity as Managing Member of the Company, be, and hereby is, authorized and empowered to execute any and all instruments and documents necessary and proper in order to consummate the placing of the Loan, including, but not limited to, the execution of the mortgage loan documentation referred to in the immediately preceding paragraph of this Consent, and to execute all instruments, documents and certificates necessary and proper for the purpose of carrying out the foregoing actions.

The Unanimous Consent was signed by all of the LLC's members and also listed 260 Manager as the "Managing Member" of the LLC on the signature page.

Contemporaneously with the Amendment and Unanimous Consent, the LLC entered into an agreement with Quartz (the "Management Agreement"), in which Quartz was appointed as the building's exclusive renting and managing agent. Quartz is owned by A. Monasebian.[2] The Management Agreement provided, in relevant part, that:

> [LLC] hereby appoints [Quartz Realty] as the sole and exclusive renting and managing agent of the Premises...
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> [Quartz Realty] shall endeavor to rent vacant space and to keep the Premises rented to desirable tenants.
> [Quartz Realty] may advertise the Premises and use rental service companies and brokers and attorneys to draft or reviews [sic] leases. The costs of such advertisements and the fees and commissions of such rental service companies and brokers shall be borne by [LLC].
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> [LLC] appoints [Quartz Realty] as its attorney-in-fact to collect rents and to enforce the leases of the Premises. [Quartz Realty] may engage collection agencies and legal counsel to assist in such collection of rents and enforcement of the leases.
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> [Quartz Realty] is authorized to enter into contracts for electricity, gas, water, telephone, cleaning, extermination and other utilities and services required to be delivered to the tenants of the Premises pursuant to their leases or customarily provided with respect to property similar to the Premises.
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> [LLC] agrees to pay [Quartz Realty] each month during the term of this Agreement, a basic management fee equal to 3% of the Gross Receipts [] plus reimbursement of Extraordinary Services [] from the Premises Manager is authorized to pay its management fees from the account for the Premises.

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[2] Plaintiff's Complaint claims that "[u]pon information and belief, Quartz is owned by Nader and/or Marc Monasebian." However, in his affidavit Nader Hakakian states that he has never owned any interest in Quartz and Albert Monasebian states in his affidavit that he is Quartz's sole owner and CEO. In Plaintiff's Memorandum of Law in Opposition to Motion to Dismiss, Plaintiff concedes that Quartz is "wholly owned by Albert."

In December 2013, Plaintiff demanded access to several years of financial information and company agreements from 260 Manager and the LLC. According to Plaintiff, A. Monasebian allegedly requested $15,000 to comply with Plaintiff's request, even though Plaintiff asserted that she was entitled to such documents under Article 9 of the Operating Agreement. The parties, through counsel, then exchanged letters regarding the document request and Plaintiff was given access to inspect the LLC's financial records. Plaintiff paid $500 to LLC's accountant for its collection and copying of the general ledgers for viewing.

Plaintiff received a notice from Quartz notifying the LLC partners of management fee and fee increases. Plaintiff rejected the fee increases, claiming that they violated the Operating Agreement, via letters dated February 26, 2014 and March 5, 2014. The letters also stated that the fees sought were "excessive and unreasonable" and that Quartz was not a licensed real estate broker and therefore not entitled to collect any fees.

In a letter dated July 25, 2014,[3] Plaintiff informed Defendant Albert Monasebian that based on her review of the financial records, Quartz must either refund $554,879.21 to the LLC or Defendant must make a showing that the money was properly paid to Quartz.

Plaintiff commenced this lawsuit on May 12, 2015 and asserts causes of action for breach of fiduciary duty, conversion, unjust enrichment, and misrepresentation. Plaintiff

[3] The letter was from Plaintiff's attorney, Daniel Morman, and was addressed to Albert Monasebian, CEO, 260 West 36 Managing Member, Corp., Albert Monasebian, 260 West 36 Associates, LLC, and Quartz Realty, Attn.: Albert Monasebian.

also seeks an order: 1) directing A. Monasebian, N. Hakakian and 260 Manager to provide documents and records to Plaintiff; 2) directing Defendants to furnish Plaintiff with a list of all payments that the LLC made to Quartz from January 22, 2007 to date; 3) dissolving the LLC pursuant to Section 702 of the Limited Liability Company Law; 4) imposing a constructive trust on all monies paid to Quartz by the LLC; and 5) requiring Quartz to return the monies paid to it by the LLC in the approximate amount of $554,879.21 plus interest. Finally, Plaintiff asks the court for a declaration that the Amendment was not adopted properly and any action taken pursuant to the Amendment is therefore null and void.

On this motion, defendants move to dismiss the complaint for failure to state a cause of action and based upon documentary evidence, statute of limitations and lack of standing.

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a), the court must accept the facts alleged in the complaint as true and grant the plaintiff every favorable inference, deciding only "whether the facts as alleged fit within any cognizable legal theory." *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 (2001); *See also Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994); *Cabrera v. Collazo*, 115 A.D.3d 147, 150-151 (1st Dept. 2014). However, under CPLR 3211(a)(3), a complaint must be dismissed where a plaintiff lacks the legal capacity to sue. *See Omansky v. Lapidus & Smith, L.L.P.*, 273 A.D.2d 110, 111 (1st Dept. 2000) (dismissing causes of action because individual plaintiffs lacked authority to sue on partnership's behalf).

The causes of action alleged here are brought derivatively on behalf of the LLC. A limited liability company's members "may bring derivative suits on the LLC's behalf." *Tzolis v. Wolff*, 10 N.Y.3d 100, 101 (2008) however, the complaint in an LLC shareholder's derivative complaint must explain the attempt made by plaintiff "'to secure the initiation of such action by the board or the reasons for not making such effort.'" *Bansbach v. Zinn*, 1 N.Y.3d 1, 8 (2003) (citation omitted). This demand requirement "relieves courts of unduly intruding into matters of corporate governance by first allowing the directors themselves to address the alleged abuses." *Id.* at 9.

Demand is deemed futile and thus excused in the following three situations when alleged with particularity by a plaintiff: 1) a majority of the board of directors either has a self-interest in the challenged transaction or is controlled by a self-interested director; 2) the board of directors did not fully inform themselves about the challenged transaction to a "reasonably appropriate" extent; and 3) the challenged transaction was so egregious that "it could not have been the product of sound business judgment." *Id.* (citation omitted).

Here, Plaintiff commenced this derivative action without first making a demand upon the LLC to institute an action in the LLC's favor. She alleges that demand would have been futile "[b]ecause Albert, and his family, and Nader, and his family, control the affairs of the LLC." Although this is the only explicit ground stated in the Complaint upon which futility of demand is based, Plaintiff argues, in her Memorandum of Law in Opposition to Motion to Dismiss ("Memo in Opposition"), that she also alleges facts that

plead futility on the grounds that "Defendants' egregious acts were not the product of sound business judgment."

Defendants argue that Plaintiff's allegation of demand futility is not pled with particularity and "does not even allege that 260 LLC's decision-makers had an interest in the challenged transaction."

Plaintiff's first demand futility argument is that the majority of 260 Manager's board either was self-interested in the challenged transactions or was controlled by a self-interested director thereby excusing demand. For purposes of demand futility analysis, the relevant board is the LLC's board at the time the action was commenced. *Matter of Comverse Tech., Inc. Derivative Litig.*, 56 A.D.3d 49, 54 (1st Dept. 2008) (finding that the complaint failed to allege that a majority of "the board as it existed at the time the action was commenced" was interested and therefore demand could not be excused on that ground). And, [d]irectors are self-interested in a challenged transaction where they will receive a direct financial benefit from the transaction which is different from the benefit to shareholders generally." *Marx v. Akers*, 88 N.Y.2d 189, 202 (1996).

The board members relevant to the demand futility analysis in this case are N. Hakakian, M. Monasebian and Jeanette Kudla ("Kudla").[4] Despite naming N. Hakakian as a defendant, the Complaint is devoid of any factual allegations of self-interest by N.

[4] Affidavits submitted by N. Hakakian and A. Monasebian reveal that 260 Manager has a 3-member board consisting of N. Hakakian, M. Monasebian and an "independent director" who is neither affiliated with 260 Manager nor Quartz. The Refinance Closing Statement from 2007 lists Kudla as 260 Manager's "independent director."

Hakakian. The Complaint's only reference to M. Monasebian is to identify him as an owner of 260 Manager and A. Monasebian's son. It makes no reference whatsoever to Kudla. Indeed, the only person in the Complaint who is alleged to have a self-interest in the challenged transactions is A. Monasebian, based on his receipt of excessive compensation via his ownership of Quartz.[5] Even assuming arguendo that these allegations are sufficient as to A. Monasebian, they do not show self-interest by a board member as he is not a member of the current 260 Manager board.

Because Plaintiff fails to allege that any board member was interested in a challenged transaction, she must provide sufficient factual allegations to show that at least two of the three members of the board are under A. Monasebian's control. *See Bansbach*, 1 N.Y.3d at 9. As stated above, the Complaint lacks any substantive allegations concerning M. Monasebian. In her memorandum in opposition, Plaintiff argues that "the fact that a son owns 260 Manager and his father owns Quartz" establishes self-interest. Additionally, Plaintiff implies that because the LLC is run by "a cabal of close friends and family," the board is therefore under A. Monasebian's control.

Without more, these conclusory allegations against M. Monasebian and N. Hakakian, devoid of any underlying factual basis, fail to satisfy the particularity requirement for demand futility. In fact, "[t]here is no New York case law holding that a mere assertion of familial relationship amongst the majority of managers of a company excused the demand requirement in a shareholder derivative suit." *Schachter v.*

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[5] The Complaint alleges that the LLC "was being mismanaged with improper self-dealing" by A. Monasebian.

Kaminsky, 2012 WL 10006990 at *1 (N.Y. Sup. Aug. 1, 2012). Accordingly, I find that Plaintiff's first basis for asserting demand futility lacks the requisite particularity. *See Health-Loom Corp. v. Soho Plaza Corp.*, 209 A.D.2d 197, 198 (1st Dept. 1994) (finding demand futility insufficiently plead in the absence of "specific and detailed allegations that the defendant directors have coercive powers over the other directors, or that the defendant directors constitute a majority") (citations omitted).

Plaintiff's second demand futility argument is based on the "egregious" nature of the contested Quartz fees. To establish demand futility on this ground, a plaintiff must plead facts which indicate that the challenged transactions were so egregious that they "could not have been the product of sound business judgment of the directors." *Marx*, 88 N.Y.2d at 200-201.

The basis for Plaintiff's accusations of "excessive and unreasonable" fees stem from her review in 2014 of LLC financial information. In a letter from Danial's attorney, Daniel Morman, to A. Monasebian, counsel states that Quartz "may not charge fees in excess of market rates." This assertion is contradicted by the clear language of the Operating Agreement and Amendment. The Operating Agreement, which expressly named A. Monasebian and N. Hakakian as the LLC's managers, states that either of them may act as the property's managing agent, for which they may be "compensated at rates competitive *or superior* to the general rate for such services in the locality." (Emphasis added.)

Ten years later, in the Amendment[6], when 260 Manager replaced A. Monasebian and N. Hakakian as the managing member of the LLC, it was also given the authority to "designate a manager as a Managing Agent who will be compensated at rates competitive *or superior* to the general rate for such services in the locality." (Emphasis added.)

Moreover, the Management Agreement provided that the LLC would pay a monthly basic management fee equal to 3% of the Gross Receipts plus reimbursement of Extraordinary Services (as defined in the Managing Agreement) to Quartz. Plaintiff's bare allegations that Quartz's fees were excessive, without additional facts to substantiate, and in light of the express language in the Operating Agreement, Amendment and Management Agreement permitting fees "competitive or superior" to the general fees for such services, fail to establish demand futility on the grounds that the Quartz transactions were so egregious that they could not have been within the sound business judgment of 260 Manager's directors.

Further, Plaintiff erroneously suggests that Defendants' alleged refusal to provide additional financial information to Plaintiff establishes demand futility. A refusal to provide financial information does not excuse demand. *See Barone v. Sowers*, 128 A.D.3d 484, 485 (1st Dept. 2015) (holding that allegations of "concealment of financial information does not warrant a finding that demand was futile."); *Wyatt v. Inner City*

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[6] Plaintiff asserts the conclusory allegation that she does not recall signing the Amendment. However, "[s]omething more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature." *Banco Popular North America v. Victory Taxi Management, Inc.*, 1 N.Y.3d 381, 384 (2004).

Broadcasting Corp., 118 A.D.3d 517, 517 (1st Dept. 2014) (finding that "[a] corporation's refusal to provide information to its shareholders is not on the [] list of circumstances where demand is excused."

Plaintiff asserts for the first time in her Memorandum in Opposition that "although the Complaint amply demonstrates the futility of making a demand on The LLC, Danial did in fact make such a demand" and points to various letters included as exhibits to Danial's Affidavit that "should serve as an adequate demand to sustain this derivative suit." These letters – dated February 26, 2014, March 5, 2014 and July 25, 2014 (collectively the "Letters") – are all addressed to "Albert Monasebian, CEO, 260 West 36 Managing Member, Corp." and "Albert Monasebian, 260 West 36 Associates, LLC." The final letter adds the following addressee: "Quartz Realty, Attn.: Albert Monasebian."

The letter dated February 26, 2014 states that Quartz's fees violate the Operating Agreement and demand that Quartz "cease and desist charging or collecting" the fees referenced in the letter and refund "improper fees." The March 5, 2014 letter repeats the allegation about Quartz's fees and states that "[i]f those in control of the Company's manager persist in allowing Quartz Realty to charge these excessive and outrageous fees, my client will have no recourse but to litigate the matter." Finally, the July 25, 2014 letter again challenges the Quartz fees and concludes that if A. Monasebian fails to "either demonstrate Quartz Realty's entitlement to these payments or otherwise refund them… to the Company, my client shall have no recourse but to file suit."

None of the Letters are addressed to the board of 260 Manager (*i.e.* N. Hakakian, M. Monasebian and Kudla). The Letters do not contain any request that the board of 260

Manager institute a lawsuit against Quartz on the LLC's behalf. These Letters are plainly insufficient to constitute demand on the board.

In sum, I find that demand should have been made on 260 Manager prior to Plaintiff's commencement of this derivative action, and that Plaintiff has neither made a demand nor demonstrated the futility of demand.

Plaintiff has requested leave to amend if this Court finds that Plaintiff failed to plead futility. "Leave to amend the pleadings 'shall be freely given' absent prejudice or surprise resulting directly from the delay." *See Fahey v. Cnty. of Ontario*, 44 N.Y.2d 934, 935 (1978) (citing CPLR § 3025(b)). A plaintiff seeking leave to amend "need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." MBIA Ins. Corp. v. Greystone & Co., Inc., 74 A.D.3d 499, 500, 901 N.Y.S.2d 522 (1st Dep't 2010) (citation omitted). I grant Plaintiff to amend the Complaint, but only if she is fully able to remedy the substantial defects set forth above.

Accordingly, it is hereby

ORDERED that Defendants' motion to dismiss is granted and Plaintiff's complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly in favor of Defendants; and it further

ORDERED that Plaintiff is granted leave to serve an amended complaint within twenty (20) days of the date of this Decision and Order.

This constitutes the decision and order of the Court.

DATE : **10/11/2016**

SALIANN SCARPULLA, JSC