

<b>Geiser v Midland Elec. Contr. Corp.</b>
2018 NY Slip Op 31511(U)
June 20, 2018
Supreme Court, Richmond County
Docket Number: 151011/2017
Judge: Kim Dollard
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

FRANK GEISER, individually and derivatively as  
shareholder owning 50 percent of the shares of Midland  
Electrical Contracting Corp.,

Plaintiff,

-against-

MIDLAND ELECTRICAL CONTRACTING CORP.,  
KEVIN MCGINLEY, SEAN MCGINLEY, AMANDA  
MCGINLEY, SAMANTHA MCGINLEY, MAC  
FHIONNGHAILE & SONS ELECTRICAL CONTRACTING  
INC., MIDLAND ELECTRICAL CONTRACTING OF NEW  
JERSEY CORP., and "JOHN DOE No. 1 through "JOHN  
DOE No. 10" , the last 10 names being fictitious and  
unknown to the plaintiff,

Defendants.

ORDER

Hon. Kim Dollard

Index No. 151011/2017

motions 003  
004

The following papers numbered 1, 2, 3, 4, 5 and 6 were fully submitted on this 9<sup>th</sup> day of March, 2018:

Notice of Motion on behalf of Defendants, Midland Electric Contracting Corp., Kevin McGinley, and Samantha McGinley, pursuant to CPLR§ 3016 and CPLR §3211(a)(1), (3) and (7), dismissing all claims against them in the Amended Complaint, Affirmation, Exhibits and Memorandum of Law .....1  
(Dated September 29, 2017)

Notice of Motion on behalf of Defendants, Sean McGinley, Amanda McGinley, Mac Fhionnghaile & Sons Electrical Contracting, Inc. and Midland Electrical Contracting of New Jersey, pursuant to CPLR§ 3016 and CPLR §3211(a)(1), (3), (7) and (8), dismissing all claims against them in the Amended Complaint, Affidavit(s), Exhibits and Memorandum of Law .....2  
(Dated September 29, 2017)

Affidavit of Frank Geiser in Opposition to Midland Electric Motion, Exhibits and Memorandum of Law .....3  
(Dated November 27, 2017)

Affidavit of Frank Geiser in Opposition to Sean McKinley motion, Exhibits and Memorandum of Law.....4  
(Dated November 27, 2017)

Reply Memorandum of law on behalf of Sean McGinley, Amanda McGinley, Mac Fhionnghaile & Sons Electrical Contracting, Inc. and Midland Electrical Contracting of New Jersey .....5  
(Dated January 12, 2018)

Reply Memorandum of law on behalf of Midland Electrical Contracting Corp., Kevin McGinley and Samantha McGinley .....6  
(Dated January 12, 2018)

The amended complaint sought to be dismissed alleges that the plaintiff, Frank Geiser, is a 50% owner of Midland Electrical Contracting Corp. It is alleged that Kevin McGinley, the other 50% shareholder of Midland Electrical Contracting Corp. and a director and officer of the company, engaged in a scheme to conceal profits, convert assets and divert funds belonging to Midland Electrical Contracting Corp. to other companies owned by defendant, McGinley and his family, namely Mac Fhionnghaile & Sons Electrical Contracting Corp.

Mac Fhionnghaile & Sons Electrical Contracting Corp. is operated by Kevin McGinley's son and daughter-in-law, Sean McGinley and Amanda McGinley; and Midland Electrical Contracting of New Jersey is operated by his son, Sean McGinley. It is further alleged that defendant, Kevin McGinley, has an interest in and/or controls Mac Fhionnghaile & Sons Electrical Contracting Corp. and Midland Electrical Contracting of New Jersey. The defendant, Samantha McGinley, is stated to be the daughter of Kevin McGinley, and an employee of Midland Electrical Contracting Corp.

It is further alleged that on or about June 24, 2015, plaintiff, Geiser, commenced a dissolution proceeding pursuant to BCL §1104 for the judicial dissolution of Midland Electrical Contracting Corp. The dissolution proceeding resulted in a Dissolution and Winding-Up Agreement dated October 4, 2016. The dissolution agreement is annexed to the amended complaint and states that Midland Electrical Contracting Corp. would complete performance of all New York City public works contracts, including two New York City Housing Authority contracts. It was agreed that Defendant, McGinley would act as winding-up officer responsible for carrying out the terms of the dissolution agreement. The agreement also states that "McGinley, in his capacity as an officer of Midland, shall make all reasonable and necessary business decisions concerning completion of said contracts and may confer with Geiser on certain decisions, if McGinley deems prudent or necessary".

Plaintiff, Geiser, alleges that following execution of the dissolution agreement, the defendant, Kevin McGinley, moved employees from Midland Electrical Contracting Corp. to Mac Fhionnghaile & Sons Electrical Contracting Corp. and fraudulently assigned the two New York City Housing Authority contracts to Mac Fhionnghaile & Sons Electrical Contracting Corp. Plaintiff, Geiser, alleged that transfer of the contracts was a breach of the dissolution agreement, a fraudulent

conveyance and constituted conversion of Midland Electrical Contracting Corp.'s assets.

The amended complaint also alleges that Midland Electrical Contracting Corp. utilized the SAGE accounting and bookkeeping system for all financial transactions, and the defendants established a secondary accounting system to divert funds. Plaintiff, Geiser, further alleges that defendants used equipment of Midland Electrical Contracting Corp. for their own benefit and deposited a check payable to Midland Electrical Contracting Corp. in the sum of \$18,335.27 into an account for Midland Electrical Contracting of New Jersey.

The amended complaint asserts ten causes of action. The amended complaint asserts a first cause of action for breach of the dissolution agreement against Kevin McGinley; a second cause of action for breach of fiduciary duty against Kevin McGinley; a third cause of action for illegally transferring corporate assets pursuant to BCL §720 as against all defendants; a fourth cause of action for aiding and abetting a breach of fiduciary duty as against Sean McGinley, Amanda McGinley, Samantha McGinley, Mac Fhionnghaile & Sons Electrical Contracting, Inc. and Midland Electrical Contracting of New Jersey, Corp.; a fifth cause of action for fraud against the McGinley defendants; a sixth cause of action for conversion against all defendants; a seventh cause of action for tortious interference with contract against all defendants except Kevin McGinley; an eighth cause of action for breach Debtor and Creditor Law § 276 against all defendants; a ninth cause of action for unjust enrichment against all defendants; and a tenth cause of action for a constructive trust against Kevin McGinley.

The defendants move to dismiss the amended complaint on several grounds, first arguing that the plaintiff improperly commingled individual and derivative claims. In opposition, the plaintiff states that he is not asserting any individual claims, but that all claims are asserted solely on behalf of Midland Electrical Contracting Corp.

For a wrong against a corporation, a shareholder has no individual cause of action, though he loses the value of his investment or incurs personal liability in an effort to maintain the solvency of the corporation (See, Citibank v. Plapinger, 66 N.Y.2d 90; 495 N.Y.S.2d 309, 485 N.E.2d 974). A complaint will be dismissed where the allegations confuse a shareholder's derivative and individual

rights (see, Greenfield v. Denner, 6 N.Y.2d 867, 188 N.Y.S.2d 986, 160 N.E.2d 118, revt on dissenting opn of J. Breitel, 6 A.D.2d 263, 175 N.Y.S.2d 918. However, leave to replead may be granted in appropriate cases (Greenfield v. Denner, supra.).

In the instant action, plaintiff asserts that the entire action is derivative and asserted on behalf of the defendant, Midland Electrical Contracting Corp. and that no individual claims are being asserted. Based upon such representation and because plaintiff is consenting to replead and eliminate all language that alludes to potential individual claims, plaintiff is granted permission to replead for purposes of eliminating individual claims.

The defendants next move to dismiss pursuant to Business Corporation Law §626, subdivision c, which requires a shareholder to first demand action from the board of directors before commencing a derivative suit. It is undisputed that a demand was never made, but the plaintiff argues that such a demand would have been futile, because Midland Electrical Contracting Corp. did not have a Board of Directors. Further, the dissolution agreement appoints defendant, Kevin McKinley as sole director in charge of the company and winding-up officer, and it would therefore would have been futile to make a demand to Kevin McGinley, who is the defendant and alleged wrongdoer in the amended complaint.

The requirement in Business Corporation Law § 626(c) that a shareholder first demand action from the board of directors before commencing a derivative suit is excused because of futility, where the complaint alleges with particularity that a majority of the board of directors is interested in the challenged transaction (Marx v. Akers, 88 N.Y.2d 189, 200, 644 N.Y.S.2d 121, 666 N.E.2d 1034). Director interest may either be self-interest in the transaction at issue, or a loss of independence because a director with no direct interest in a transaction is 'controlled' by a self-interested director (id. at 200, 644 N.Y.S.2d 121, 666 N.E.2d 1034).

In the present action, the plaintiff alleged with sufficient particularity facts that would excuse making such a demand, based upon futility. The complaint clearly sets forth that defendant, Kevin McGinley, is a 50% share holder in Midland Electrical Contracting Corp. and that he has been appointed to control Midland during the winding up phase. It would have been futile for Mr. Geiser

to make a demand upon Kevin McGinley under such circumstances, where he is the alleged wrongdoer. Accordingly, the defendants motion to dismiss the complaint on this basis is denied.

Defendants, Midland Electrical Contracting Corp. of New Jersey and Sean McGinley move to dismiss the complaint pursuant to CPLR §3211 on the basis that the court lacks jurisdiction since both are New Jersey residents. In opposition, plaintiff argues that defendant, Sean McKinley is vice president of defendant, Mac Fhionnghaile & Sons Electrical Contracting, Inc., the assignee of the NYCHA contracts. It is further alleged that defendant, Midland Electrical Contracting Corp. of New Jersey deposited a Midland Electrical Contracting Corp. check into its account.

In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7), “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 ” (Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275, 410 N.Y.S.2d 182, 372 N.E.2d 17). “The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference” (Hense v. Baxter, 79 A.D.3d 814, 815, 914 N.Y.S.2d 200).

In addition, a court may consider any factual submissions made in opposition to a motion to dismiss in order to remedy pleading defects (see, CPLR §3211; Ryan v. Cover, 75 A.D.3d 502, 904 N.Y.S.2d 750).

Accordingly, based upon the foregoing, the Court finds that issues of fact exist as to the extent of business these defendants transact in New York, and/or with respect to any alleged tortuous conduct conducted within New York State. Therefore, the amended pleading is sufficient to confer jurisdiction at this early stage of litigation.

The third cause of action pursuant to BCL §720, by its terms, only permits a corporate officer or director to bring action against another officer or director. The plaintiff did not oppose dismissal of this cause of action against defendants, Sean McGinley, Amanda McGinley, Mac Fhionnghaile & Sons Electrical Contracting, Inc., and Midland Electrical Contracting of New Jersey Corp.

Samantha McGinley submits an affidavit stating that she was an employee of Midland Electrical Contracting Corp, and there is no proof that she was an officer of said corporation. Further, the amended complaint alleges only that she is an employee of Midland Electrical Contracting, Corp. According, the third cause of action is dismissed as against defendants, Samantha McGinley, Sean McGinley, Amanda McGinley, Mac Fhionnghaile & Sons Electrical Contracting, Inc. and Midland Electrical Contracting of New Jersey Corp., as they are not officers of Midland Electrical Contracting, Corp.

The defendants, Sean McGinley, Amanda McGinley, Mac Fhionnghaile & Sons Electrical Contracting, Inc. , Midland Electrical Contracting of New Jersey Corp., and Samantha McGinley, further move to dismiss the fourth cause of action for Aiding and Abetting a Breach of Fiduciary Duty, on the basis that it is not plead with sufficient particularity as is required by CPLR §3016(b). All McGinley defendants move to dismiss the fifth cause of action for fraud on the same grounds.

Accepting as true the factual allegations set forth in the amended complaint in support of the fourth cause of action, and according to the plaintiff the benefit of every possible favorable inference to be drawn therefrom (see, Leon v. Martinez, 84 N.Y.2d 83, 614 N.Y.S.2d 972, 638 N.E.2d 511), the complaint sufficiently states causes of action for aiding and abetting breach of fiduciary duty. The plaintiff sufficiently alleges that the defendants, relatives of Kevin McGinley, knew of his fiduciary duty to Midland Electrical Contracting Corp., and assisted in a breach of fiduciary duty by forming two corporations which were used to divert funds and obtain an assignment of NYCHA contracts.

With respect to the fifth cause of action for fraud, the elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the representation, and damages (see, Fromowitz v. W. Park Associates, Inc., 106 A.D.3d 950, 965 N.Y.S.2d 597).

Pleading requirements are met when the facts are sufficient to permit a reasonable inference of the alleged conduct (see, Pludeman v. Northern Leasing Systems, Inc., 10 N.Y.3d 486, 860 N.Y.S.2d 422, 2008).

The plaintiff alleges that the McGinley defendants failed to maintain the “Sage” accounting system, as was agreed to by Kevin McGinley in the dissolution agreement. Plaintiff further alleges that the defendants established a “secondary but presently unknown system of financial record keeping for the purpose of diverting funds”.

In the present case, any reasonable interpretation of the facts plead by the plaintiff, are insufficient to support the allegations of fraud. It is clear from the amended complaint, that plaintiff is not aware of the name of the secondary accounting system or whether there actually is such a system. Accordingly, the fifth cause of action is dismissed for lack of particularity.

The sixth cause of action for conversion is against all defendants. In moving to dismiss this cause of action based on documentary evidence, defendants argue that defendant, Kevin McGinley had authority pursuant to the dissolution agreement to assign the NYCHA contracts to Mac Fhionnghaile and therefore the NYCHA contracts were not converted. It is further stated that the plaintiff does not identify those funds converted. A motion pursuant to CPLR 3211(a)(1) to dismiss based on documentary evidence may be appropriately granted “only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (YDRA, LLC v. Mitchell, 123 A.D.3d 1113, 1 N.Y.S.3d 206, quoting Goshen v. Mutual Life Ins. Co. Of NY, 98 N.Y.2d 314, 746 N.Y.S.2d 858, 774 N.E.2d 1190).

The Court is unable to determine from the documents submitted whether the assignment of the NYCHA contracts by Kevin McGinley was in the best interest of Midland Electrical Contracting Corp. and whether such assignment constituted conversion of funds. Moreover, the plaintiff identifies funds allegedly converted as proceeds of these contracts. Accordingly, the motion to dismiss this cause of action for conversion is denied.

The eighth cause of action asserts breach of Debtor and Creditor Law §276, as against all defendants. A claim of conveyance with intent to defraud pursuant to this provision is established when it is shown that the conveyance was made with “actual intent” to defraud present or future creditors. It is sufficiently alleged where the complaint sets forth in detail allegations of an overall fraudulent scheme, with the fraudulent intent fairly inferred from such details (Marine Midland Bank

v. Zurich Ins. Co., 263 A.D.2d 382, 1st Dept 1999). Actual intent to defraud must be alleged and proved (Spear v. Spear, 101 Misc.2d 341, Sup Ct NY County 1974). Because of the difficulty of alleging and proving actual intent to hinder or defraud a creditor, the plaintiff/creditor may rely on “badges of fraud,” defined as “circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent” (Wall Street Assoc. V. Brodsky, 257 A.D.2d 526, 1st Dept 1999). Such circumstances include a close relationship between the parties to the alleged fraudulent transaction, a questionable transfer not in the usual course of business, inadequacy of the consideration, the transferor's knowledge of the creditor's claim and the inability to pay it, and retention and control of the property by the transferor after the conveyance (*id.*).

The amended verified complaint does not sufficiently allege the elements of fraud that underlie a claim of a conveyance made with intent to defraud. To state a claim for fraud, the plaintiff must allege “a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance ... and damages” (Eurycleia Partners, LP v. Seward & Kissell, LLP, 12 NY3d 553, 559, 2009). In the present case, there are insufficient allegations, and therefore, the eighth cause of action must be dismissed.

The ninth cause of action is for unjust enrichment against all defendants. In order to prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (Citibank, N.A. v. Walker, 12 A.D.3d 480, 787 N.Y.S.2d 48, 2<sup>nd</sup> Dept., 2004). The thrust of plaintiffs' unjust enrichment claim is that the defendants were unjustly enriched by virtue of the assignment of the NYCHA contracts at the expense of Midland Electrical Contracting Corp. The documentary evidence does not utterly refute plaintiff's factual allegations, conclusively to establish this defense as a matter of law (see, YDRA, LLC v. Mitchell, supra,). The court finds that at this initial pleading stage of the litigation, allegations plead are sufficient to state a claim for unjust enrichment.

The tenth cause of action, for a constructive trust, is asserted against Kevin McGinley. The elements of a constructive trust are (1) a fiduciary or confidential relationship; (2) an express or

implied promise; (3) a transfer in reliance on the promise; and (4) unjust enrichment (see, Sharp v. Kosmalski, 40 N.Y.2d at 121, 386 N.Y.S.2d 72, 351 N.E.2d 721).

In the tenth cause of action, plaintiff alleges that a confidential relationship existed between the two fifty percent shareholders; that Kevin McGinley was permitted to act as winding up officer based upon the terms of the dissolution agreement and his good faith compliance with his fiduciary duties; that plaintiff relied upon same; and that there was unjust enrichment when the NYCHA contracts were assigned. In liberally construing the amended complaint and affording plaintiff the benefit of every possible favorable inference, the plaintiff's tenth cause of action states a claim for a constructive trust as against Kevin McGinley.


Lastly, with respect to the demand for punitive damages, such claim cannot be sustained, since the allegations do not rise to a level "of such wanton dishonesty as to imply a criminal indifference to civil obligations" (Weiss v. Lowenberg, 95 A.D.3d 405, 944 N.Y.S.2d 27, 1sst Dept., 2012).

Accordingly, based upon the foregoing, the defendants' motions are granted to the extent of dismissing the third cause of action as against defendants, Sean McGinley, Amanda McGinley, Mac Fhionnghaile & Sons Electrical Contracting, Inc., Midland Electrical Contracting of New Jersey Corp. and Samantha McGinley; dismissing the fifth cause of action as against all defendants; dismissing the eighth cause of action against all defendants; and dismissing the punitive damages claim.

It is further Ordered, that plaintiff is granted leave to replead in order to delete any reference to individual claims within thirty days from the date of this order and in conformity with this order.

Dated: June 20, 2018

ENTER

  
Hon. Kim Dollard  
Acting Justice Supreme Court