

Weinstein v W.W.W. Assoc., LLC
2018 NY Slip Op 31794(U)
July 26, 2018
Supreme Court, New York County
Docket Number: 652365/2014
Judge: Jennifer G. Schechter
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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JEFFREY WEINSTEIN,

Plaintiff,

-against-

W.W.W. ASSOCIATES, LLC, LEON WEINSTEIN
and KENNETH WEINSTEIN,

Defendants.
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JENNIFER G. SCHECTER, J.:

Defendants W.W.W. Associates, LLC (WWW), Leon Weinstein (Leon) and Kenneth Weinstein (Kenneth) move to dismiss the original complaint (OC) of plaintiff Jeffrey Weinstein (Jeffrey) pursuant to CPLR 3211 and/or for summary judgment pursuant to CPLR 3212. Plaintiff opposes and cross-moves to amend and supplement the OC pursuant to CPLR 3025(b) and to amend and supplement the summons to add Bale Corp. (Bale) as a defendant pursuant to CPLR 305. Defendants oppose the cross-motion. Defendants' motion is denied and plaintiff's cross-motion to amend is granted.²

Jeffrey, Kenneth and their father, Leon, are members of WWW, a New York LLC formed by Leon in early 1998 to own and operate real property in New Jersey (Dkts. 95-96 [Feb. 5, 1998

¹ Defendants' motion papers additionally include the caption for a related case pending before this court, *Weinstein v Metropolitan Homestead Co.*, Index No. 161961/2014 [Sup Ct NY County, complaint filed Dec. 3, 2014]. Their motion, however, was not filed in that case.

² The facts are taken from the OC (Dkt. 1), plaintiff's affidavit (Dkt. 87) and documentary evidence submitted by the parties. References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Page numbers refer to the e-filed PDF.

and Mar. 4, 1998 Articles of Organization]; OC ¶¶ 5-8). WWW was previously governed by an operating agreement dated March 1998 (Dkt. 63), which was replaced by an amended and restated operating agreement dated May 2015 (Dkt. 99). Plaintiff and Kenneth each hold a 25% membership interest in WWW, and Leon holds a 49% membership interest (Dkt. 99 at 10). The remaining 1% membership interest is presently held by Bale, a sole-purpose New York corporation formed on January 25, 2013 (*id.*; Dkt. 175 [Bale certificate of incorporation]; Dkt. 107 [NYS Department of State Division of Corporations Entity Database]). Plaintiff attests that Leon and Kenneth run WWW and are the only persons with authority to sign checks on its behalf (Dkt. 87 [Jeffrey Weinstein Aff.] ¶¶ 48, 50-51, 131).

On January 29, 2013, Bale was appointed managing member of WWW pursuant to a consent signed by Leon and Kenneth as members of WWW, by Leon as President of Bale, and by Kenneth as “Secretary Treasurer” of Bale (Dkt. 104 [consent]). 553 Shore Road Corp. (553) preceded Bale as managing member and holder of the same 1% membership interest (Dkt. 101 [consent dated Apr. 2, 2008]). 553 had been dissolved in 2011 (*see* Dkt. 106 [NYS Department of State Division of Corporations Entity Database]).

On July 31, 2014, plaintiff initiated this suit against WWW, Leon and Kenneth by filing the OC (Dkt. 1). Plaintiff alleged that he had been deprived of access to WWW’s books and records since 2012 and that WWW’s accountant and defendants’ then-counsel had denied specific requests for access (OC ¶¶ 13-21; *see also* Dkts. 92-94 [correspondence]). The OC asserted the following causes of action, numbered here as in the complaint: (1) for a declaratory judgment establishing plaintiff’s entitlement to an accounting and to reasonable access to WWW’s books and records; (2) for a permanent injunction enjoining defendants from dissipating WWW’s assets without plaintiff’s participation and/or wasting such assets, and directing defendants to provide plaintiff

with access to books and records and to account for amounts transferred and obligations incurred since August 1, 2008; (3) for breach of fiduciary duties owed to plaintiff by Leon and Kenneth; (4) for breach of fiduciary duties against Leon and Kenneth derivatively on behalf of WWW; and (5) for appointment of a receiver to carry on the business and affairs of WWW.

Discovery in this action has proceeded amid various related side agreements.³ Leon's deposition was completed in 2016, while plaintiff's deposition remains open. One month before defendants made this motion, the court issued a discovery order that extended the deadline for fact discovery to April 30, 2018, ordered defendants to comply with certain outstanding discovery demands and delayed the deposition of defendants' bookkeeper, Rena Walsh, until after plaintiff received outstanding discovery (*see* Dkt. 60 [Dec. 22, 2017 order]). The court subsequently ordered a 45-day adjournment of discovery (*see* Dkt. 84 [Mar. 7, 2018 order]).

On January 30, 2018, defendants made this motion, arguing that (1) the OC fails to include Bale and 553 as necessary parties under CPLR 1001(a); (2) WWW owes no fiduciary duties to plaintiff, its member; (3) neither Leon nor Kenneth owe fiduciary duties to plaintiff; (4) the OC fails to plead the breach of fiduciary duty causes of action with the specificity required by CPLR 3016(b); (5) the cause of action for appointment of a receiver should be dismissed because defendants have not wronged plaintiff; and (6) defendants do not have a duty to allow plaintiff access to WWW's books and records.

On March 22, 2018, plaintiff opposed defendants' motion and cross-moved for leave to amend and supplement the OC and summons to add Bale as a defendant, to include three new

³ These include a consent (Dkt. 71) and an agreement (Dkt. 72), both dated November 2014, regarding the sale of real property owned by WWW; May 2015 amendments to WWW's articles of organization (Dkt. 98) and operating agreement (Dkt. 99) in connection with WWW's purchase of two new properties in 2015; and May 2015 agreements as to the management of those properties (Dkts. 109-110).

causes of action, including breach of contract, and to add more factual allegations. Plaintiff submitted a proposed amended complaint (PAC, Dkt. 91) in connection with his motion.

Defendants' Motion

Defendants' motion is denied, both on the merits and because it is rendered moot by the PAC. Because Leon and Kenneth allegedly handle WWW's assets and conduct its affairs—including by way of their control of, or authority to act on behalf of, its managing member—Leon and Kenneth owe fiduciary duties to WWW and its members, including plaintiff (*see Arfa v Zamir*, 75 AD3d 443, 444 [1st Dept 2010] [fiduciary of LLC manager owes fiduciary duties to LLC]; *Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014] [LLC managing member owes fiduciary duties to non-managing members]; *see also* Dkt. 63 [March 1998 Operating Agreement] at 5 ["The Members shall be under a duty as described herein to conduct the affairs of the Company in the best interests of the Company and of the Members including the safekeeping and use of all Company funds and assets and the use thereof for the exclusive benefit of the Company"]; *accord* Dkt. 99 [May 2015 Operating Agreement] at 4).⁴ Moreover, Leon and Kenneth are alleged to control access to WWW's books, records and assets—including through its accountants and attorneys—and are properly named as defendants for causes of action for access to books and records and for an equitable accounting (*see Gottlieb v Northriver Trading Co. LLC*, 58 AD3d 550, 551 [1st Dept 2009] [LLC members entitled to common law accounting]; *cf. Kaufman v Cohen*, 307 AD2d 113, 124 [1st Dept 2003] [cause of action for accounting of partnership requires

⁴ As acknowledged by the case cited by defendants, even a member who is *not* a manager may owe duties to the LLC and other members "to the extent he or it *participates* in the management of the LLC" (*Kalikow v Shalik*, 43 Misc 3d 817, 825 [Sup Ct Nassau Cty 2014] [emphasis added], quoting Karon S. Walker, NY LLCs and Partnerships § 1:8 [West's NY Prac Series]) or to the extent that such duties are imposed on members by the operating agreement (*id.*, quoting 51 Am Jur 2d, Limited Liability Companies § 11).

showing of rejection of demand by fiduciary in possession of entity's books, records, profits or other assets)).⁵

Defendants further complain that the OC failed to plead breach of fiduciary duty with particularity as required by CPLR 3016(b)—indeed, the court agrees—or to allege any “wrong done” to support appointment of a receiver. The PAC, however, corrects any arguable deficiency by alleging specific instances of wrongdoing, including dated monetary transactions, to support the causes of action sounding in breach of fiduciary duty. These and other circumstances pled in the PAC might ultimately demonstrate a danger of loss to WWW's property sufficient to support the appointment of a receiver (*see* CPLR 6401[a]; *Dolgoft v Projectavision, Inc.*, 235 AD2d 311, 312 [1st Dept 1997]).

Finally, Defendants fail to articulate why 553—a dissolved corporation—is a necessary party to this action, apart from baldly stating that 553 would be “hurt financially” or would “have its rights affected.” The court need not reach the issue of Bale's necessary party status because in the PAC, plaintiff has added Bale as a party.

Plaintiff's Cross-Motion

The PAC asserts the following causes of action, numbered here as in the PAC: (1) for a declaratory judgment that plaintiff has been, since at least August 1, 2008, a member of WWW with a 25% membership interest; (2) for a declaratory judgment that plaintiff is entitled to reasonable access to WWW's books and records from August 1, 2008 to the present; (3) for an

⁵ Neither the OC nor the PAC alleges that WWW breached any fiduciary duty. WWW does not owe fiduciary duties to plaintiff, its member, and thus cannot be held liable for breach of such duties or be named as a defendant in an accounting cause of action (*see Hyman v New York Stock Exch., Inc.*, 46 AD3d 335, 337 [1st Dept 2007]; *Castellotti v Free*, 138 AD3d 198 [1st Dept 2016]). In any event, WWW is properly named as a defendant pursuant to LLC Law § 1102(b) (*see Gartner v Cardio Ventures, LLC*, 121 AD3d 609, 610 [1st Dept 2014]) and for nominal purposes as to the derivative claim against Leon and Kenneth for breach of fiduciary duty.

order establishing plaintiff's entitlement to an accounting from August 1, 2008 to the present; (4) for a permanent injunction enjoining defendants from dissipating WWW's assets without plaintiff's participation or wasting such assets, and directing defendants to provide plaintiff with access to books, records and property management reports and to account for amounts transferred and obligations incurred since August 1, 2008; (5) for breach of fiduciary duties owed to plaintiff by Leon, Kenneth and Bale; (6) for breach of fiduciary duties against Leon, Kenneth and Bale, derivatively on behalf of WWW; (7) for breach of WWW's operating agreement; and (8) for appointment of a receiver to carry on the business and affairs of WWW.

Defendants oppose plaintiff's cross-motion for leave to amend, arguing that the unexplained delay prejudiced them by depriving them of the opportunity to "properly structure their discovery strategy" until discovery came "very close to an end." Defendants, moreover, complain that plaintiff failed to explain the delay by affidavit, citing *Volpe v Good Samaritan Hosp.*, 213 AD2d 398, 398-99 (2d Dept 1995), a case in which the plaintiff first moved to amend his bill of particulars *after* trial began and almost *10 years* after filing the action.

It is well settled that "mere lateness is not a barrier to amendment, unless coupled with *"significant* prejudice to the other side" (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983] [emphasis added]; see *Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 22 [1st Dept 2003]). To find prejudice, "there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]). Defendants fail to identify any specific prejudice stemming from the purported lateness of the proposed amendment. Fact discovery has not closed, defendants' deposition of plaintiff remains open and the parties do not even have a trial date yet.

Nevertheless, the court will not grant leave to amend as to the proposed first, second, and third causes of action seeking declaratory relief. Per CPLR 3001, “[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.” However, “[a] cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action ...” (*Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 54 [1st Dept 1988]).

As plaintiff’s membership interest in WWW is not in controversy—indeed, the May 2015 Operating Agreement explicitly confirms it (*see* Dkt. 99 at 10)—leave is denied as to the proposed first cause of action. However, the court will grant plaintiff leave to amend in order to plead, in lieu of the proposed second cause of action and the related request for injunctive relief in the proposed fourth cause of action, a cause of action for inspection of books and records under LLC Law § 1102(b) against Leon, Kenneth, Bale and WWW (*see Gartner v Cardio Ventures, LLC*, 121 AD3d 609, 610 [1st Dept 2014] [member has statutory right to inspect LLC books and records]). Similarly, the court will grant plaintiff leave to amend in order to plead, in lieu of the proposed third cause of action and the related request for injunctive relief in the proposed fourth cause of action, a cause of action for an accounting against Leon, Kenneth and Bale (*see Gottlieb v Northriver Trading Co. LLC*, 58 AD3d 550, 551 [1st Dept 2009]; *cf. Sriraman v Patel*, 761 F Supp 2d 7, 17 [EDNY 2011] [“Once a plaintiff establishes that he has a right to an accounting, the second step is for the Court to ‘true-up’ the partners’ individual accounts to make sure that each has been allocated his fair share of partnership distributions ...”], *amended* 761 F Supp 2d 23 [EDNY 2011]).

In addition, the court will not grant leave as to the proposed fourth cause of action seeking permanent injunctive relief. “To plead a cause of action for a permanent injunction, a plaintiff must allege, inter alia, ‘[a] violation of a right presently occurring, or threatened and imminent’” (*Lemle v Lemle*, 92 AD3d 494, 500 [1st Dept 2012], quoting *Elow v Svenningsen*, 58 AD3d 674, 675 [2d Dept 2009]). “[A]n injunction order or decree must define *specifically* what the enjoined person must or must not do, in language so *clear and explicit that a layperson can understand* what he or she is expected to do or refrain from doing, without placing the one enjoined in the position of acting at his or her peril” (67A NY Jur 2d Injunctions § 179 [May 2018] [emphasis added]; accord *Xerox Corp. v Neises*, 31 AD2d 195, 197–98 [1st Dept 1968]). Section 7(a) of the May 2015 Operating Agreement prohibits action without the members’ affirmative unanimous vote (Dkt. 99 at 4). The PAC states no facts supporting an inference that defendants imminently threaten to violate this provision and the request for an injunction against waste lacks specificity. As to the property management reports, the relevant agreements oblige LEBA Inc. (Leba), a separate entity allegedly controlled by Leon and Kenneth, to supply such reports to plaintiff (*see* PAC ¶¶ 104-06; Dkts. 109-110 [property management agreements]). Plaintiff cannot, without more, sue Leon or Kenneth personally—much less WWW or Bale—to compel them to satisfy *Leba’s* contractual obligation.⁶

As to the proposed fifth, sixth, seventh, and eighth causes of action in the PAC, defendants fail to establish that “the proposed amendment is palpably insufficient or patently devoid of merit” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499-500 [1st Dept 2010]). The claims against Bale—an entity formed in 2013—are not all clearly time-barred, at least insofar as plaintiff

⁶ If Leba has already prepared for WWW any of the property management reports sought by plaintiff, then access to them would, in any event, be encompassed in plaintiff’s cause of action pursuant to LLC Law § 1102(b).

seeks equitable rather than monetary relief (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009] [where “relief sought is equitable in nature, the six-year limitations period of CPLR 213(1) applies” to breach of fiduciary duty claims]). Thus, the court need not address, at this time, the potential applicability of the relation-back doctrine as to Bale based on the claims in the OC. Accordingly, it is

ORDERED that defendants’ motion to dismiss and/or for summary judgment is denied; and it is further

ORDERED that plaintiff’s cross-motion for leave to amend the complaint is granted in part, as follows: within 21 days of the entry of this order on the NYSCEF system, plaintiff shall file an amended complaint that may include up to six causes of action, as follows: (1) the fifth, sixth, seventh, and eighth causes of action set forth in the proposed verified amended complaint annexed to plaintiff’s motion papers; (2) a cause of action for books and records pursuant to LLC Law § 1102(b); and (3) a cause of action for an accounting; and plaintiff’s cross-motion is otherwise denied; and it is further

ORDERED that the amended complaint shall be deemed served upon all appearing parties once it is e-filed; and it is further

ORDERED that the amended complaint and a supplemental summons shall be served, in accordance with the Civil Practice Law and Rules, upon Bale Corp. within 30 days of the entry of this order on the NYSCEF system; and it is further

ORDERED that the action shall bear the following caption:

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JEFFREY WEINSTEIN,

Plaintiff,

-against-

W.W.W. ASSOCIATES, LLC, LEON WEINSTEIN,
KENNETH WEINSTEIN and BALE CORP.,

Defendants.

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And it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the parties being added pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in Section J of the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (available at <https://www.nycourts.gov/courts/1jd/supctmanh/Efil-protocol.pdf>).

Dated: July 26, 2018

ENTER:

J.S.C.

HON. JENNIFER G. SCHECTER
J.S.C.