D'Angelo v Watner
2018 NY Slip Op 32324(U)
September 17, 2018
Supreme Court, New York County
Docket Number: 651492/2018
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

- X

JAMES D'ANGELO, individually and derivatively as Managing Member on behalf of Sycamore Lane Partners, LLC and Sycamore Lane Partners GP, LLC,

Plaintiffs,

-against-

CREGG WATNER and "JOHN DOE NO. 1" through "JOHN DOE NO. 25," the last names being fictitious And Unknown to Plaintiff, the intended persons or entities being certain unjustly enriched recipients of misappropriated confidential and/or proprietary information belonging to Nominal Defendants,

Defendants,

-and-

SYCAMORE LANE PARTNERS, LLC, and SYCAMORE LANE PARTNERS GP, LLC,

Nominal Defendants.

- X

DECISION AND ORDER
Index No.: 651492/2018

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

I. FACTS

As this is a motion to dismiss, these facts are taken from the Complaint (NYSCEF Doc. No. 1).

Plaintiff James D'Angelo and defendant Gregg Watner are 50% members and co-Managing Members of Sycamore Lane Partners LLC (Sycamore) and Sycamore Lane Partners, GP, LLC (Sycamore GP, and together, The LLCs). The LLCs are headquartered in NY and exist under the laws of Delaware. The LLCs are in the business of managing and operating investment funds (the Funds). Sycamore is the investment manager. Sycamore GP is the general partner of the Funds. The members' obligations are governed by the Limited Liability Company Agreement of Sycamore Lane Partners, LLC (the Sycamore Agreement) and the Limited Liability Company Agreement of Sycamore Lane Partners GP, LLC (the Sycamore GP Agreement), and a written Strategic Relationship Agreement (the SRA) with their investment

partner. Sycamore's obligations to the Funds and to Sycamore GP are governed by a written Investment Management Agreement (the IMA).

Sycamore started out as expected, but due to the overhead of running a hedge fund, incurred operational losses in 2012 through 2014. D'Angelo and Watner had to make periodic capital infusions. Sycamore had a profit of about $47,000 in 2015, when it no longer employed its senior analyst.

In 2015, Watner started neglecting his responsibilities to the LLCs and sought other employment, in violation of the agreements. In July 2015, Watner redeemed $25,000 from his capital investment in Sycamore GP, leaving only $8,000 in his account, below the required level. Watner made the request of the Sycamore GP CFO, and did not receive the required approval from D'Angelo.

After an investor redeemed in November 2015, the partners decided to wind up the business. The LLCs no longer do business. The process began in 2015 but is not yet complete. Watner was not involved significantly with the wind up, and made little effort to do any work on it. Watner tried to convince D'Angelo to bill various expenses to the Funds, rather than to Sycamore. Watner was also required to make payments to cover the LLCs expenses during the wind up period, but did not make them.

On or about April 1, 2016, Watner was hired by a competing hedge fund. Later that month, a suit against Sycamore, which that entity had thought abandoned, was revived. The LLCs and Funds could not complete the winding up until the litigation was resolved. Watner did not respond to a notification about the dispute and the likely future related costs. D'Angelo eventually hired Pryor Cashman LLP to contact Watner about the litigation and about the unreimbursed personal expenses Watner had charged to Sycamore. Watner replied in August 2016 and claimed not to have been made aware of the dispute before, as well as other misrepresentations, and claiming to be unable to make payments to cover the extravagant personal expenses for which he charged Sycamore (Complaint 10-11). Watner owes Sycamore about $433,000. He promised to pay $10,000, but has not.

At the end of August 2016, D'Angelo had an investigation performed. It brought Watner's improper activities to light, including the distribution of Sycamore research and confidential

information to Watner's friends and associates, some of which were Sycamore competitors (*id.* at 13).

D'Angelo brings this action individually and as a derivative action on behalf of the LLCs. D'Angelo concedes that he has not made demand on Watner to bring an action because such a demand would be futile (*id.* at 17). Unanimous consent of the Managing Members is required to hire attorneys, and Watner, the other Managing Member, is not able to make an independent, disinterested decision.

D'Angelo brings the following claims:

1) Individually- Breach of Contract (the LLC agreements) for Watner's failure to pay his portion of the wind-up expenses;

2) Individually – Breach of Contract for Watner's failure to pay his portion of the wind up expenses;

3) Derivatively for Sycamore- Breach of Contract (Sycamore LLC Agreement non-competition clause) for providing competing businesses with confidential information and going to work for a competitor;

4) Derivatively for Sycamore GP- Breach of Contract (Sycamore GP LLC Agreement non-competition clause) for providing competing businesses with confidential information and going to work for a competitor;

5) Derivatively for Sycamore – Breach of Contract (Sycamore LLC Agreement confidentiality clause) for using Sycamore's confidential information for his own use;

6) Derivatively for Sycamore GP – Breach of Contract (Sycamore GP LLC Agreement confidentiality clause) for using Sycamore GP's confidential information for his own use;

7) Derivatively for Sycamore – Breach of Fiduciary Duty, Waste and Misappropriation, for abandonment of the company, failing to participate in the business and winding up, and misappropriation and improper distributions of capital;

8) Derivatively for Sycamore GP – Breach of Fiduciary Duty, Waste and Misappropriation, for abandonment of the company, failing to participate in the business and winding up, and misappropriation and improper distributions of capital;

9) Directly and Derivatively for Sycamore- accounting;

10) Directly and Derivatively for Sycamore GP- accounting;

11) Derivatively for Sycamore- Unjust Enrichment- John Doe defendants were enriched by receiving confidential or proprietary information belonging to Sycamore; and

12) Derivatively for Sycamore GP- Unjust Enrichment- John Doe defendants were enriched by receiving confidential or proprietary information belonging to Sycamore GP.

II. ARGUMENTS

A. Defendants' Arguments to Dismiss

Watner moves to dismiss claims 3-12 based on CPLR 3211(a)(3) (lack of legal capacity); (a)(7), (failure to state a cause of action); and (a)(8) (lack of jurisdiction).

1. Plaintiff Lacks Standing to Bring a Derivative Action

Watner argues D'Angelo cannot bring the derivative claims pursuant to Delaware law, or New York law because of the "high degree of hostility and animus between D'Angelo and Defendant" (Memo at 5). Because of that animus, he cannot fairly represent the interests of all members (*id.*). He relies upon *Youngman v Tahmoush* (457 A2d 376, 379–80 [Del Ch 1983]), which states:

> "Among the elements which the courts have evaluated in considering whether the derivative plaintiff meets Rule 23.1's representation requirements are: economic antagonisms between representative and class; the remedy sought by plaintiff in the derivative action; indications that the named plaintiff was not the driving force behind the litigation; plaintiff's unfamiliarity with the litigation; other litigation pending between the plaintiff and defendants; the relative magnitude of plaintiff's personal interests as compared to his interest in the derivative action itself; plaintiff's vindictiveness toward the defendants and, finally, the degree of support plaintiff was receiving from the shareholders he purported to represent."

Plaintiff has accused Watner of inappropriate behavior and abandoning his duties, complains that D'Angelo had to do all of the wind up work, and has cut Watner out of the business. The "relative magnitude of D'Angelo's personal interests and [his] vindictiveness . . . clearly demonstrate that D'Angelo is really driven by personal animus" (Memo at 7).

2. Counts 3-6, Alleged Insufficiency of Pleadings

The derivative claims brought by Sycamore and Sycamore GP (claims 3-6) fail because the allegations of anti-competitive conduct and breach of the confidentiality provisions are conclusory (*id.*). The specific conduct which plaintiff alleges breached the non-competition agreement is that Watner pursued other employment. The non-competition agreement only prohibits the following unauthorized conduct: "advise or participate in the management of, establish, organize, hold an ownership interest in, exercise a significant degree of control over, serve as an employee of, or be associated in any similar way with, any firm . . . that . . . competes . . . with the Funds" (*id.* at 8, citing Complaint, ¶ 108). No detail about the allegedly competing firm is provided in the Complaint. The allegations are vague and conclusory. Even the allegation that Watner provided confidential information is insufficient, as that is not, by itself, anti-competitive conduct, and the nature of the confidential information is not specified (Memo at 8-10). The Complaint does not name any particular piece of confidential information which was disclosed to a third party (*id.* at 10).

3. Accounting Claims

Defendants argue the plaintiff has failed to allege facts supporting an accounting claim. Further, plaintiff has an adequate remedy at law (*id.* at 11). Plaintiff does not allege Watner is in possession of financial records or LLC funds. The relevant records are in plaintiff's possession and control (*id.*). Nor does plaintiff allege he has demanded an accounting. Finally, plaintiff is seeking money damages, showing plaintiff has an adequate remedy at law (*id.* at 12).

4. John Doe Allegations

Defendants argue the claims against the John Doe defendants (11 and 12) should fail because no basis for jurisdiction against them is alleged (*id.*). They also fail to state a claim for which relief can be granted because they fail to allege any facts to support the unjust enrichment claim (*id.* at 12-13).

B. Plaintiff's Arguments in Opposition to the Motion

1. Standing

Plaintiff agrees Delaware law controls the question of standing, and there is no Delaware law disqualifying a member from suing derivatively based on hostility toward another member (Opp at 3). While defendant relies on *Youngman*, that case does not apply. *Youngman* was a class action. If *Youngman* were to apply to this situation, where there are two 50/50 partners, no such partner would ever be an appropriate derivative representative (*id.* at 4). And even in *Youngman*, the plaintiff was found to have standing. Defendant has not identified any cases in which a similar plaintiff was deemed not to have standing (*id.*). Several New York Commercial Division cases have considered *Youngman* and rejected the argument that "hostility" or "economic antagonism" could divest a plaintiff of standing to sue (*see* Opp at 5). As an example, plaintiff points to *Delta Fin. Corp. v Morrison*, in which the court explained that:

> "the LLC claims that the vindictiveness by DFC toward Mr. Morrison and the LLC is so intense that it would impede DFC's ability to pursue adequately the interests of the other LLC members. This Court finds that DFC may have hostile feelings toward Mr. Morrison, however, those hostile feelings are not dispositive of the issue of whether DFC is a fair and adequate representative of the class. The fact that DFC may lack the affirmative support of all the other LLC members, is not dispositive either. There is no requirement that DFC must have full support of the other members. The true measure of adequacy of representation is not how many members the derivative plaintiff represents, but rather, how well DFC advances the interests of the other similarly situated members. *Id.* The Court finds that the LLC has failed to show that DFC is an inadequate member representative"

(13 Misc 3d 1232(A) [Sup Ct 2006] [citations omitted]).

Plaintiff also disputes that Watner was ever locked out of his e-mail account or prevented from accessing the LLCs information. He observes that Watner even provided e-mail from his account dated after the alleged lockout (Opp at 7). D'Angelo acknowledges he had Watner's corporate e-mail account copied, which he was allowed to do (*id.* at 7-8).

2. Whether Claims are Properly Stated

The third through sixth claims, for breach of contract, are sufficiently stated (*id.* at 10). Each alleges the existence of a contract, Watner's breach thereof, and damages (*id.* at 10- 14). The claims allege facts in support, that Watner had provided Sycamore and Sycamore GP assets and

information to competing hedge funds, and others (*id.* at 14-15). The Complaint acknowledges plaintiff may have to amend, after some discovery is provided (*id.* at 15). Further, plaintiff alleges Watner breached the non-competition agreement by going to work for a competitor (*id.* at 16, citing Complaint ¶ 41). Watner was simultaneously a Managing Member of the LLCs and an employee of a competing company. No specific allegations about the competing company, its business, assets, or activities are required for the claim to survive, and no heightened pleading standard applies (*id.* at 17). While Watner argues a functioning fund cannot compete with a liquidated fund, the LLCs have not yet been liquidated, and Watner's conduct precedes their dormancy. Also, the language of the noncompete agreement prohibits conduct which would have competed, but for the winding down of the Funds (*id.* at 18).

The Accounting claim is also properly stated. While plaintiff seeks money damages, plaintiff may, in the alternative, seek an accounting. There are questions as to who is in possession of the relevant documents, so this claim should also survive (*id.* at 21). As far as Watner argues plaintiff failed to allege plaintiff demanded an accounting, D'Angelo did allege the demand (Complaint, ¶¶ 146, 152). Nor is there a requirement such a demand be made to allow the claim (Opp at 22).

3. Jurisdiction over the John Does

The court should allow the 11th and 12th claims to proceed against the John Doe defendants (*id.* at 23). The motion does not state that counsel for Watner also represents the John Doe defendants. Nor does Watner cite any authority that a complaint must include specific jurisdictional facts regarding such unnamed defendants (*id.* at 23). D'Angelo has not yet identified the John Does, and may not until discovery has been provided (*id.*). He should not be penalized for being cautious (*id.*). He nonetheless alleges, in his supporting affidavit, upon information and belief, that the John Does are present and doing business in New York, and that the wrongful acts resulting in their enrichment by Watner occurred in NY (*id.* at 24)

C. Defendants' Reply

Defendant claims plaintiff has admitted to a disqualifying animus by acknowledging he copied Watner's e-mail account and directed people to send communications to him, rather than to Watner. Watner also points to D'Angelo's use of adjectives in the Complaint, arguing that

"[w]hile this type of hyperbolic rhetoric is common in disputes between members of an LLC, they demonstrate that D'Angelo is simply pursuing a personal vendetta against" Watner, and the court should order a hearing on his bias (Reply at 3-4). Watner also cites cases from other jurisdictions for the premise that the derivative action is not available to address partner deadlock (Reply at 5-6).

Watner also reiterates the argument that the allegations in the Complaint are vague conclusory, and insufficient (*id.*at 6-7). He argues that the Complaint's allegations are insufficient to provide the required notice about how his new employer is alleged to be competing with the LLCs (*id.* at 8). Watner also contends that, even if he sent information from his company email account, that does not mean the communications were confidential or proprietary (*id.* at 9).

Watner argues that the accounting claim fails because, while the Complaint states that plaintiff made a demand for an accounting, no specific details about the demand are provided (*id.* at 10). Watner points to plaintiff's allegations about having demanded payment, and argues that demands for payment are not demands for an accounting. Further an accounting is a form of relief, not a cause of action, and the availability of a legal remedy is fatal to a claim for an accounting, under Delaware law (*id.* at 11, citing *Seiden v Kaneko*, CV 9861-VCN, 2015 WL 7289338, at *15 [Del Ch Nov. 3, 2015] ["as with all equitable remedies, a necessary prerequisite to a successful accounting claim is the lack of an adequate remedy at law"]).

Defendant further contends, without citing a binding case, that the John Doe claims must fail for the lack of sufficient jurisdictional allegations (Reply at 12). Also, the attempts to fill in the allegations with D'Angelo's affidavit fail because it also fails to provide specific facts. This is merely a fishing expedition and the John Does should be dismissed, with D'Angelo able to replead, if he discovers actual facts (*id.* at 13).

III. DISCUSSION

A. Failure to State a Claim

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v*

Alexander's, Inc., 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

B. Standing to Bring Derivative Claims

Defendant argues that plaintiff lacks standing to bring a derivative claim due to animus between him and the individual defendant. While the Complaint alleges bad acts by Watner, that is common in a litigation. There is nothing indicating any extreme degree of animus. As in *Delta Fin. Corp. v Morrison*, *supra*, the defendants have failed to show plaintiff is not an adequate member representative. To find otherwise would mean that no derivative claim could be brought on behalf of a two-member entity, except under the most civil of circumstances.

C. Breach of Contract Claims

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). There is no heightened specificity of pleading, as for fraud. Each of the breach of contract claims alleges the existence of an agreement. It is not disputed that plaintiff performed pursuant to the agreements. Plaintiff also alleges breaches by the defendant by providing confidential information to competitors or misappropriating confidential information for his own purposes. The details of that confidential information or competition is in defendant's control, but the allegations provide sufficient information at this pre-answer stage to provide the required notice.

D. Accounting Claims

"The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (*Palazzo v Palazzo*, 121 AD2d 261, 265 [1st Dept

1986]). "To be entitled to an equitable accounting, a claimant must demonstrate that he or she has no adequate remedy at law" (*Unitel Telecard Distrib. Corp. v Nunez*, 90 AD3d 568, 569 [1st Dept 2011], *see Kastle v Steibel*, 120 AD2d 868, 869 [3d Dept 1986]).

Defendant argues that the facts pled do not support a claim for an accounting, as Watner is not alleged to have either pilfered funds or financial records in his possession (Memo at 11). Plaintiff contends that the existence of records in Watner's possession is beyond the scope of a motion to dismiss, but that he may have relevant records related to his use of the LLCs' proprietary information, among other topics (Opp at 21-22). In *Seiden*, while "a necessary prerequisite to a successful accounting claim is the lack of an adequate remedy at law," that accounting claim survived, as documents in the possession of the defendant were necessary to evaluate the various dispositions of assets at issue, and the motion to dismiss the claim for an accounting was denied (2015 WL 7289338, at *15).

Further, the allegations support possible claims other than those based on the breaches of contract, so plaintiff has alleged claims which may lack a remedy at law (*see Kastle v Steibel*, 120 AD2d 868, 870 [3d Dept 1986] ["Since these transactions are not evidenced by writings, plaintiff does not have an adequate remedy at law"]).

E. John Doe Allegations

CPLR 3211 [a] [8] provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the court has not jurisdiction of the person of the defendant." When presented with a motion under CPLR 3211 [a] [8], "the party seeking to assert personal jurisdiction, the plaintiff[,] bears the ultimate burden of proof on this issue" (*Marist Coll. v Brady*, 84 AD3d 1322, 1322-1323 [2d Dept 2011]). The party opposing a motion to dismiss need not state all the facts necessary to establish jurisdiction. If evidence of the facts establishing jurisdiction are in the exclusive control of the moving party, CPLR 3211 [d] only a requires a "sufficient start," demonstrating that such facts "may exist" (*see HBK Master Fund L.P. v Troika Dialog USA, Inc.*, 85 AD3d 665 [1st Dept 2011], citing *Peterson v Spartan Industries, Inc.*, 33 NY2d 463, 467 [1974]).

The language of CPLR 3211 does not contemplate moving to dismiss a claim against a different party. Nor does defendant cite any law suggesting he may do so.

Accordingly, it is hereby

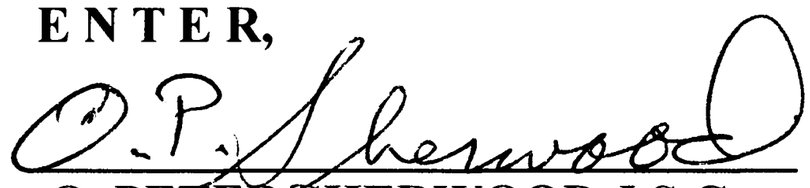
ORDERED that the motion to dismiss of defendants (Motion Sequence Number 001) is DENIED; and it is further

ORDERED that defendants answer the complaint within twenty (20) days of the date of this Decision and Order and that counsel for the parties shall appear at a preliminary conference at Part 49, Room 252, 60 Centre Street, New York, New York on December 11, 2018 at 9:30 am.

This constitutes the decision and order of the court.

DATED: September 17, 2018

E N T E R,



O. PETER SHERWOOD J.S.C.