

Original Homestead Rest., Inc. v Seibel
2019 NY Slip Op 30829(U)
March 27, 2019
Supreme Court, New York County
Docket Number: 650145/2018
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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THE ORIGINAL HOMESTEAD RESTAURANT,
INC., individually and derivatively on behalf of DNT
ACQUISITION, LLC, MARC SHERRY and GREG
SHERRY,

Plaintiffs,

Index No.: 650145/2018

-against-

Motion Seq. No. 001

ROWEN SEIBEL, R SQUARED GLOBAL
SOLUTIONS, LLC, THE SEIBEL FAMILY 2016
TRUST, BRIAN K. ZIEGLER individually and as a
Trustee of THE SEIBEL FAMILY 2016 TRUST, and
CRAIG GREEN, individually and as a Trustee of
THE SEIBEL FAMILY 2016 TRUST,

Defendants.

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Masley, J.:

On January 10, 2018, plaintiff The Original Homestead Restaurant, Inc. (OHR), individually and derivatively on behalf of DNT Acquisition, LLC (DNT), Marc Sherry, and Greg Sherry, commenced this action against defendants Rowen Seibel, R Squared Global Solutions, LLC (RSG), The Seibel Family 2016 Trust (Trust), Brian K. Ziegler and Craig Green individually, and Ziegler and Green in their capacities as trustees of the Trust. In motion sequence number 001, Seibel, RSG, the Trust, Ziegler, and Green move pursuant to CPLR 3211 (a) (1) and (a) (7) to dismiss (1) the complaint in its entirety for failure to distinguish direct and derivative claims, (2) plaintiffs' derivative claims for failure to allege demand futility, (3) the first through fifth causes of action for failure to allege damages, (4) the third and fourth causes of action as duplicative of the first cause of action, (5) the fifth cause of action for failure to state a claim, and (6) the

sixth cause of action due to prior pending actions and for failure to state a claim. Alternatively, defendants move to dismiss (1) the first, second, and fourth causes of action as to Green and the Trust, and the third cause of action as to Green. Lastly, defendants move pursuant to CPLR 3211 (a) (2) and (a) (10) to dismiss the sixth cause of action on the grounds that the court lacks subject matter jurisdiction and because plaintiffs failed to join a necessary party, Caesars Palace, Las Vegas (Caesars).

Background

The following facts are alleged in the complaint and accepted as true for the purposes of this motion. In 2004, defendant Seibel and his mother, a nonparty, traveled to Switzerland where Seibel opened a bank account with the Union Bank of Switzerland (UBS). (NYSCEF Doc. No. 1, Complaint ¶ 51.) Although the account opened with an initial cash deposit of \$25,000, Seibel's mother deposited cash and checks in the subsequent year bringing the balance to \$1,011,279. (*Id.* at ¶ 52, 56.) As beneficiary and account holder, Seibel actively monitored and approved the selection and investment of assets maintained in the account. (*Id.* at ¶ 57.) By 2008, the account balance totaled \$1,300,200 as a result of capital gains, dividends and interest. (*Id.*) However, on his 2007 IRS Form 1040, Seibel failed to report any dividend, interest, or other income received by him in any account at UBS. (*Id.* at ¶ 64.) He also failed to report that he had an interest in or a signature authority over a financial account in a foreign country. (*Id.*) On his 2008 IRS Form 1040 filed in 2009, Seibel also failed to report this information. (*Id.* at ¶ 67.)

That same year, 2009, Seibel began a business relationship with Caesars. (*Id.* at ¶ 35.) In connection with this relationship, and pursuant to Nevada's gaming

regulations, Seibel submitted a Business Information Form (BIF) to Caesars. (*Id.*) In completing the BIF, Seibel was aided and advised by his attorney, Ziegler, who knew of Seibel's failure to disclose information to the Internal Revenue Service (IRS). (*Id.* at ¶ 36-37.) On the BIF, Seibel knowingly misrepresented, under oath, that he had not been a party to a felony in the last ten years and that "there was nothing "that would prevent [him] from being licensed by a gaming authority." (*Id.* at ¶ 35.)

As a result of his business relationship with Caesars, Seibel set out in 2011 to approach and propose an opportunity to the Sherrys. (*Id.* at ¶ 28.) The Sherrys are the sole shareholders of OHR, a corporation that owns and develops proprietary systems, trademarks, copyrights, trade secrets, and other marks and materials for operating steakhouses under the Old Homestead Steakhouse tradename. (*Id.* at ¶ 2-3, 8-9.) Accordingly, Seibel approached them with the opportunity of establishing an Old Homestead Steakhouse at Caesars. (*Id.* at ¶ 28.) Seibel, at the time, was the sole member and manager of RSG, a limited liability company. (*Id.* at ¶ 17.) The Sherrys agreed to the opportunity and the parties formed a limited liability company, DNT. (*Id.* at ¶ 30-31.) On July 11, 2011, OHR and RSG entered into an LLC agreement whereby the parties agreed to each hold a 50 percent member interest in DNT (DNT Agreement). (*Id.* at ¶ 31.) The DNT Agreement provided for each member to appoint 2 managers. (*Id.*) OHR appointed the Sherrys and RSG appointed Seibel and Ziegler. (*Id.*) The Sherrys, Seibel, and Ziegler signed the DNT Agreement as managers, and with the exception of Ziegler, in their individual capacities as to certain provisions. (NYSCEF Doc. No. 30 at 26.) The DNT Agreement also contained a Delaware choice-of-law clause and a New York forum selection clause. (*Id.*) It further provided that OHR would

license its systems, marks and materials to DNT and DNT, in turn, would sublicense the systems, marks and materials to Caesars. (*Id.*) The terms of the sublicense arrangement were memorialized in the June 21, 2011 sublicense agreement entered into by DNT, OHR, the Sherrys, Seibel, and Caesars (DNT Sublicense Agreement). (NYSCEF Doc. No. 31.)

In connection with the DNT Sublicense Agreement, OHR and RSG were required to submit a BIF to Caesars with respect to Seibel, Ziegler and the Sherrys. (*Id.* at ¶ 39-40.) Seibel submitted another BIF to Caesars, and also to OHR, DNT, and the Sherrys, with the advice and assistance of Ziegler, who knew that Seibel knowingly misrepresented on the BIF that he had not been a party to any felony within the last ten years and that there was nothing in his past that would prevent him from being licensed by a gaming authority. (*Id.* at ¶ 40-42; 35.)

By letter dated May 16, 2014, Seibel unilaterally entered into an agreement, purportedly on behalf of DNT, with Caesars, amending the DNT Sublicense Agreement (Letter Agreement). (*Id.* at ¶ 79.) The Letter Agreement permitted DNT, and each person holding an interest in DNT, to issue, sell, assign or transfer interests in DNT to any person or assign any of the Agreements without the consent of but with notice to Caesars. (*Id.* at ¶ 80-81.) Seibel, RSG and Ziegler did not disclose the Letter Agreement to the Sherrys, who did not ratify it at any point. (*Id.* at ¶ 81.)

Pursuant to the Letter Agreement, Seibel, with the assistance of Ziegler, informed Caesars that he was assigning the performance and obligations of his duties concerning DNT to J. Jeffrey Frederick. (*Id.* at ¶ 87.) This assignment was memorialized in a letter prepared by Ziegler dated April 8, 2016. (*Id.*) Included with this

letter was a membership interest assignment agreement drafted by Ziegler or his firm and signed by Seibel, as assignor, and Ziegler and Green, Ziegler's son-in-law, on behalf of the Trust, as assignee (Assignment Agreement). (*Id.* at ¶ 88.) Pursuant to the Assignment Agreement, Seibel resigned as RSG's sole manager and designated Green as his replacement; and Seibel assigned his membership interest in RSG to the Trust, which was created by Seibel for the benefit of his wife with Green and Ziegler as Trustees. (*Id.*)

On April 18, 2016, as the result of a criminal investigation, Seibel pled guilty to one count of a corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws, 26 U.S.C. § 7212(a), a felony (Seibel Plea). (*Id.* at ¶ 73.) Seibel admitted that he had knowingly provided incorrect answers on his IRS Form 1040. (*Id.*) In the months between the Seibel Plea and Seibel's sentencing on August 19, 2016, Seibel, Green and Ziegler did not disclose the Seibel Plea or his conduct to the plaintiffs or Caesars. (*Id.* at ¶ 74.)

On June 15, 2016 and June 23, 2016, meetings of the DNT members and managers were held at the behest of OHR and the Sherrys because Caesars had filed for bankruptcy protection in the United States Bankruptcy Court for the Northern District of Illinois. (*Id.* at ¶ 95, 100.) In connection with the bankruptcy proceeding, Caesars had proposed to DNT to assume the DNT Sublicense Agreement on modified financial terms, including a reduction of the license fees payable to DNT. (*Id.* at ¶ 91.) Although DNT had retained bankruptcy counsel to negotiate a proposed modification of the DNT Sublicense Agreement, OHR, the Sherrys, and Seibel were in disagreement about the

proposed terms. (*Id.* at ¶ 95.) There was no discussion at this meeting about Seibel's tax fraud or the Seibel Plea. (*Id.* at ¶ 101.)

On August 19, 2016, Seibel was sentenced to 30 days in prison, six months of home confinement, and 300 hours of community service. (*Id.* at ¶ 75.) On August 20, 2016, Seibel's sentencing made headlines in the media, at which time plaintiffs became aware of his conduct. (*Id.* at ¶ 76.) The Sherrys' counsel contacted Ziegler, who, for the first time, disclosed in part Seibel's illegal conduct. (*Id.* at ¶ 105.) Despite providing certain documents, Ziegler did not provide or disclose the Letter Agreement. (*Id.* at ¶ 109.) Defendants additionally failed to keep plaintiffs apprised of their subsequent discussion with Caesars. (*Id.* at ¶ 107.)

In a letter dated September 2, 2016, Caesars stated that the Seibel Plea rendered Seibel an "Unsuitable Person" under the DNT Sublicensing Agreement. (*Id.* at ¶ 116.) Caesars, therefore, demanded that DNT and OHR terminate any relationship with Seibel, otherwise, Caesars would terminate the DNT Sublicense Agreement. (*Id.*) On September 12, 2016, Caesars contacted Ziegler, informing him that Caesars declined to approve the Assignment Agreement insofar as RSG, the Trust and its associates had direct or indirect contact with Seibel. (*Id.* at ¶ 121.)

On September 21, 2016, Caesars terminated the DNT Sublicense Agreement because DNT and OHR had failed to disassociate with an "Unsuitable Person." (*Id.* at ¶ 122.) As a result, the Sherrys' counsel emailed Ziegler and demanded that the defendants agree to a voluntary dissolution of DNT. (*Id.* at ¶ 123.) Defendants refused. (*Id.* at ¶ 124.) OHR subsequently entered into a direct licensing agreement with Caesars without defendants' participation. (*Id.* at ¶ 126.) OHR directly licensed

the Old Homestead system, marks, and materials for the continued operation of the Restaurant to Caesars (New License Agreement). (*Id.*) The New License Agreement was entered into on September 21, 2016, the same day that the DNT Sublicense Agreement was terminated. (NYSCEF Doc. No. 41, New License Agreement.)

Plaintiffs assert causes of action for breach of contract against all of the defendants, breach of the implied covenant of good faith and fair dealing against all of the defendants, breach of fiduciary duty against RSG, Seibel, Ziegler and Green, aiding and abetting breaches of fiduciary duty against the Trust and Green, fraud in the inducement against RSG and Seibel, and for a declaratory judgment that the New License Agreement does not violate the DNT Agreement or the DNT Sublicensing Agreement.

Discussion

DNT is a limited liability company, and therefore, this court begins with the LLC agreement, the DNT Agreement. It is undisputed that the DNT Agreement provides that it

“shall be governed by and construed in accordance with the laws of the State of Delaware ... All parties consent to the personal jurisdiction of the State of New York and agree that any action, suit or proceeding arising out of or relating to this Agreement shall be brought in a State Supreme Court located in New York.”

(NYSCEF Doc. No. 30 at 20.) “[W]hen parties include a choice-of-law provision in a contract, they intend application of only that state’s substantive law ... Unlike substantive law, matters of procedure are governed by the law of the forum state.”

(*Royal Park Investments SA/NV v Stanley*, 165 AD3d 460, 461 [1st Dept 2018] [internal quotation marks and citations omitted].) Accordingly, the court applies CPLR 3211,

New York's "procedural rules" for a motion to dismiss (*Davis v Scottish Re Group Ltd.*, 30 NY3d 247, 257 [2017]), but decides the substantive legal issues pursuant to Delaware law. (*Project Cricket Acquisition, Inc. v FCP Investors VI, L.P.*, 159 AD3D 600, 599 [1st Dept 2018].)

However, applying the law, procedural or substantive, to this complaint is impossible. It is unclear which claims are being asserted directly, derivatively or perhaps both because the plaintiffs have not delineated any of the causes of action or specified which alleged facts apply to each cause of action. Indeed, a complaint the allegations of which confuse a shareholder's derivative and individual rights will be dismissed, though leave to replead may be granted. (*Abrams v Donati*, 66 NY2d 951, 953 [1985].) Even when the substantive law of another state or country applies in a derivative action, a complaint, the allegations of which confuse derivative and individual rights, must be dismissed, generally with an opportunity to replead. (*Davis v Scottish Re Group, Ltd.*, 138 AD3d 230, 234-235, 236 [1st Dept 2016] [applying the substantive law of the Cayman Islands and the procedural law of New York] *revd on other grounds* 30 NY3d 247.) Here, the causes of action are a "confusing hodge-podge of ... personal claims [and] claims derivative in nature." (*Barbour v Knecht*, 296 AD2d 218, 228 [1st Dept 2002].) Plaintiffs' argument, in opposition to this motion, that Delaware law allows for dual natured claims is not a shield behind which the plaintiffs may circumvent their obligations to submit a well pleaded complaint with delineated claims. In this action, the court cannot even discern the nature of the claims under *Tooley v Donaldson, Lufkin, & Jenrette, Inc.*, (845 A.2d 1031, 1036 [Del 2004]) because the complaint fails to specify nonconclusory damages and the harm allegedly suffered by each plaintiff, especially

after plaintiffs allege that the New License Agreement was entered on the same day as the termination of the DNT Sublicense Agreement. Indeed, each of the causes of action here end the same vague way: that "Plaintiffs have suffered substantial monetary damages" or "Plaintiffs have suffered damages." (See NYSCEF Doc. No. 1 at ¶¶ 129, 133, 140, 144, 151, 157.) The court urges plaintiffs to clearly plead, delineating each claim as either derivative or direct, and address the deficiencies outlined in this decision.

Accordingly, it is

ORDERED that the complaint is dismissed with leave to replead within 60 days of entry of this order on NYSCEF.

Dated:

3/27/19

ENTER:

J.S.C.

HON. ANDREA MASLEY