

<b>Huldisch v Mermelstein</b>
2019 NY Slip Op 32216(U)
July 24, 2019
Supreme Court, New York County
Docket Number: 651034/2018
Judge: Andrew Borrok
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ANDREW BORROK** PART IAS MOTION 53EFM

*Justice*

\_\_\_\_\_X

EVENGIA HULDISCH, ANTHONY ABDY,

Plaintiff,

- v -

JEFFREY MERMELSTEIN, MICHAEL FOX, JEFFREY STEIN  
SALON NORTHEAST, INC., JEFFREY STEIN SALON NORTH,  
INC., JEFFREY STEIN SALON SOUTH, INC., JEFFREY STEIN  
SALON NYC EAST 78, INC.

Defendant.

\_\_\_\_\_X

INDEX NO. 651034/2018  
MOTION DATE 04/15/2019  
MOTION SEQ. NO. 002

**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 52, 53, 54, 55, 56, 57

were read on this motion to/for

DISMISS

Upon the foregoing documents, and for the reasons set forth on the record (7/24/2019), Evengia Huldisch and Anthony Abdy's (the **Plaintiffs**) motion to dismiss Jeffrey Mermelstein, Michael Fox, Jeffrey Stein Salon Northeast, Inc., Jeffrey Stein Salon North, Inc., Jeffrey Stein Salon South, Inc., and Jeffrey Stein Salon NYC East 78, Inc.'s (collectively, the **Defendants**) first through six counterclaims is granted.

**The Relevant Facts and Circumstances**

This action arises from the parties' dispute over the management of the Jeffrey Stein Salon NYC East 78, Inc. (the **Salon**). The Salon was shut down permanently on May 30, 2018.

Reference is made to a certain Promissory Note (the **Note**), dated July 12, 2016, by and between Jeffrey Stein Salon East 78, Inc., Jeffrey Mermelstein, and Michael Fox, as borrowers, and Anthony Abdy, as lender, pursuant to which Mr. Abdy provided a \$60,000 interest free loan in

exchange for the assignment of 49.9% of equity in the Salon to be made under a separate agreement (NYSCEF Doc. No. 42).

Pursuant to an undated Stock Purchase Agreement (the **Stock Purchase Agreement**), by and between Jeffrey Stein Salon NYC East 78, Inc., Jeffrey Mermelstein, and Michael Fox, in favor of Anthony Abdy and Evengia Huldisch, the Plaintiffs each received 49 shares of the Salon in exchange for the purchase price of \$60,000, which Mr. Abdy previously lent under the Note, and a commitment by the Plaintiffs to pay up to \$70,000 for the cost of renovations to the Salon (NYSCEF Doc. No. 43).

The parties also entered into a Shareholder Agreement (the **Shareholder Agreement**), dated April 6, 2017, by and between Jeffrey Stein Salon, Jeffrey Mermelstein, Michael Fox, Anthony Abdy and Evengia Huldisch, to address such issues as dividends, marketing costs, and the capital requirements of a corporation (NYSCEF Doc. No. 44). Although the Shareholder Agreement submitted in support of the instant motion was unsigned, at oral argument, the Plaintiffs' counsel provided a copy of the executed signature page of the Shareholder Agreement.

On May 25, 2018, the Salon's landlord commenced an action captioned *301 E. 78 St. Owners Corp. v Jeffrey Mermelstein*, Index No. 154944/2018 (the **Prior Action**) against Mr. Mermelstein, pursuant to a certain guaranty, dated April 23, 2008, that was executed by Jeffrey Mermelstein in favor of 301 E. 78 St. Owners Corp., wherein Mr. Mermelstein guaranteed payment of the Salon's rent upon any default under the Salon's lease (NYSCEF Doc. No. 46). In his Answer in the Prior Action, Mr. Mermelstein asserted crossclaims against Ms. Huldisch and

Mr. Adby for: (1) breach of contract (first cross claim), (2) indemnification (second cross claim), and (3) contribution (third cross claim) (NYSCEF Doc. No. 40).

The Plaintiffs filed their complaint in this action on September 7, 2018. On April 18, 2019, the Defendants filed a Verified Answer and Counterclaims (NYSCEF Doc. No. 47). In their Answer, the Defendants asserted counterclaims for: (1) breach of contract (first counterclaim), (2) indemnification (second counterclaim), (3) contribution (third counterclaim), (4) breach of contract (fourth counterclaim), (5) breach of fiduciary duty (fifth counterclaim), (6) fraud (sixth counterclaim), and (7) an accounting and judicial dissolution (seventh counterclaim).

The Plaintiffs now move to dismiss the Defendants' first through six counterclaims.

#### **Discussion**

The Plaintiffs move to dismiss the Defendants' counterclaims pursuant to CPLR § 3211 (a)(1), (a)(3), (a)(4), and (a)(7). On a motion to dismiss, the pleadings are to be afforded a liberal construction and the facts as alleged in the complaint are accepted as true (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). Under CPLR § 3211 (a)(1), the court may dismiss a cause of action where the documentary evidence conclusively establishes a defense to the claims as a matter of law (*id.*, 88). Under CPLR § 3211 (a)(3), dismissal may be justified if a party lacks the legal capacity to sue. Under CPLR § 3211 (a)(4), dismissal is warranted where there is another action pending between the same parties for the same cause of action. Dismissal under CPLR § 3211 (a)(7) requires the court to assess whether the proponent of the pleading has a cause of action and not whether he has stated one (*id.*).

### A. The Defendants' First and Fourth Counterclaims (Breach of Contract)

The Defendants' first and fourth counterclaim allege that the Plaintiffs, in their individual capacity, defaulted in their contractual obligations to Mr. Mermelstein and Mr. Fox by failing to pay for: (i) the share price balance, (ii) the construction upgrade to the Salon, (iii) rent, employee payroll, and (iv) for Mr. Mermelstein's services. The Plaintiffs argue that the counterclaims for breach of contract fail because the Defendants fail to specify which contracts have been breached, and that in any event, Ms. Huldisch and Mr. Abdy cannot be individually liable to the Defendants.

The elements of a claim for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance, (3) the defendant's breach and (4) resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). With regard to the Plaintiffs' alleged obligation to pay the \$70,000 stock sale balance to the individual Defendants (NYSCEF Doc. No. 35, ¶ 3), the Stock Purchase Agreement simply states that the Plaintiffs "shall fund the renovations at the Salon for a maximum amount of Seventy Thousand (\$70,000.00) Dollars" (NYSCEF Doc. No. 43, § 4). Thus, the Stock Purchase Agreement utterly refutes the Defendants' allegation that they are personally entitled to receive the \$70,000 for Salon renovations. There is no such obligation in the Stock Purchase Agreement.

With regard to the Plaintiffs' alleged obligation to pay rent, employee payroll and for Mr. Mermelstein's services, these obligations do not appear in the Note, the Stock Purchase Agreement, or the Shareholder Agreement. Further, the Stock Purchase Agreement contains a merger clause that makes clear that the Stock Purchase Agreement "shall supersede any other or

prior agreements or understandings between the parties relating to the stock of the Company” (*id.*, § 11). In short, the agreements submitted by the Plaintiffs utterly refute the Defendant’s allegations. The Defendants do not identify any other existing contract that might contain said obligations (*see Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995] [dismissing a claim for breach of contract in the absence of allegations regarding essential terms of the relevant contract, specific provisions that were breached, and whether the contract was oral or written]). In any event, to the extent that the Plaintiffs were to pay rent, this portion of the counterclaim is also duplicative of the first crossclaim asserted in the Prior Action. Accordingly, the Plaintiffs’ motion to dismiss the Defendants’ first and fourth counterclaims for breach of contract is granted.

**B. The Defendants’ Second, and Third Counterclaims (Indemnification and Contribution)**

The Defendants’ second and third counterclaims are for indemnification and contribution regarding any rent owed to the Salon’s landlord in the Prior Action. The Plaintiffs argue that the second and third counterclaims should be dismissed under CPLR § 3211 (a)(4) because they are duplicative of claims already asserted by the Defendants in the Prior Action. The court agrees. The second and third crossclaims in the Prior Action seek the same relief against the same parties as the Defendants’ second and third counterclaim in this action (*compare* NYSCEF Doc. No. 40, ¶¶ 9-14, *with* NYSCEF Doc. No. 35, ¶¶ 5-12). Accordingly, the Plaintiffs’ motion to dismiss the second and third counterclaims is granted.

### C. The Defendants' Fifth Counterclaim (Breach of Fiduciary Duty)

The Defendants allege that the Plaintiffs mismanaged the Salon by changing bank accounts, failing to pay salon staff, failing to pay Mr. Mermelstein, failing to pay contractors, refusing to communicate with the Defendants, causing checks to bounce, and hiring relatives that were incompetent (NYSCEF Doc. No. 35, ¶¶ 9-14). The Plaintiffs argue that the counterclaim for breach of fiduciary duty fails because (i) the claim belongs to the corporation alone, (ii) it was not pled with particularity, and (iii) the business judgment rule bars this claim without allegations of bad faith or fraud. A breach of fiduciary duty requires the existence of a fiduciary relationship, misconduct by the opposing party, and damages directly caused by that party's misconduct (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). CPLR § 3016 (b) imposes a heightened pleading standard for breach of fiduciary duty claims and requires that "the circumstances constituting the wrong ... be stated in detail." A shareholder does not have an individual cause of action for a wrong against a corporation (*Abrams v Donati*, 66 NY2d 951, 953 [1985]).

Here, the Defendants' allegations may plead a wrong to the Salon, but not to the individual Defendants. The Defendants, however, do not assert these counterclaims derivatively. To the extent that the Defendants base their claim for breach of fiduciary duty for failure to pay Mr. Mermelstein, any such claim must be dismissed as duplicative of the Defendants' claims for breach of contract (*see AG Capital Funding Partners v State St. Bank & Trust Co.*, 40 AD3d 392, 394 [1st Dept 2007]). Accordingly, the Plaintiffs' motion to dismiss the fifth counterclaim for breach of fiduciary duty is granted.

#### **D. The Defendants' Sixth Counterclaim (Fraud)**

The sixth counterclaim alleges that the Plaintiffs' fraud began at the time of contract negotiations, the Plaintiffs knew that they did not intend to honor their obligations, that they falsely induced the Defendants to sell stock resulting in the Defendants' reasonable reliance and damages (NYSCEF Doc. No. 35, ¶¶ 21-23). The Plaintiffs argue that the counterclaim for fraud fails because (i) the allegations encompass promises of future performance rather than a representation of existing fact and (ii) the claim is not pled with particularity. A claim for fraud is also subject to the heightened pleading standard under CPLR § 3016 (b) and requires a representation of a material existing fact, falsity, scienter, deception, and injury (*Edison Stone Corp. v 42nd St. Dev. Corp.*, 145 AD2d 249, 257 [1st Dept 1989]).

The bare allegations concerning the Plaintiffs' representation of their "skill, experience and contacts to support the salon" are insufficient to meet the heightened pleading standard for fraud (*id.*, ¶ 3). In this regard, the Defendants fail to identify any statements made by the Plaintiffs that would constitute a material misrepresentation. Further, the Defendants' allegation that the Plaintiffs promised to bring new staff and clientele to the Salon does not constitute a viable basis for fraud (*see Tribune Print. Co. v 263 Ninth Ave. Realty, Inc.*, 88 AD2d 877, 879 [1st Dept 1982] ["[r]epresentations are not actionable if they are promissory in nature or relate merely to future expectations"]). Accordingly, the Plaintiffs' motion to dismiss the Defendants' sixth counterclaim for fraud is granted.

**E. The Defendants Jeffrey Stein Salon Northeast, Inc., Jeffrey Stein Salon North, Inc., and Jeffrey Stein Salon South, Inc.**

Finally, the Plaintiffs argue that Jeffrey Stein Salon Northeast, Inc., Jeffrey Stein Salon North, Inc., and Jeffrey Stein Salon South, Inc. (the **Salon Defendants**) have no standing under CPLR § 3211 (a) (3) to assert counterclaims because there are no factual allegations that (i) the Salon Defendants were parties to any contract with the Plaintiffs, (ii) were shareholders or directors in the Salon, or (iii) that the Plaintiffs made any representations to the Salon Defendants. The court agrees. There is no basis in the pleadings or the record for the Salon Defendants to assert counterclaims against the Plaintiffs. Accordingly, the Salon Defendants are not proper counterclaimants and to the extent that the counterclaims are alleged on their behalf, they are dismissed.

Accordingly, it is

ORDERED that the Plaintiffs' motion to dismiss is granted and the Defendants' first, second, third, fourth, fifth, and sixth counterclaims are dismissed; and it is further

ORDERED that the Plaintiffs are directed to serve an answer to the seventh counterclaim within 45 days after service of a copy of this order.

7/24/2019  
DATE

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  SETTLE ORDER  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE

ANDREW BORROK, J.S.C.