

<b>Loeb Enters. II, LLC v Florence</b>
2019 NY Slip Op 32442(U)
August 14, 2019
Supreme Court, New York County
Docket Number: 653521/2018
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

INDEX NO. 653521/2018
MOTION DATE 03/27/2019, 07/12/2019
MOTION SEQ. NO. 002 004

LOEB ENTERPRISES II, LLC,
Plaintiff,

- v -

DAVID FLORENCE, STEVEN MARCUS
Defendant.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 34, 40, 43
were read on this motion to/for DISMISS DEFENSE.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 46, 47, 48, 49, 50,
51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67
were read on this motion to/for DISCOVERY.

Motion sequences 002 and 004 are consolidated for disposition. Upon the foregoing documents
and for the reasons set forth on the record (8/14/2019), (1) Loeb Enterprises II, LLC (Loeb)'s
motion to dismiss (Mtn. Seq. 002) the third and fifth affirmative defenses of David Florence and
Steven Marcus (collectively, the Defendants) is granted without prejudice, and (2) the
Defendants' motion to compel (Mtn. Seq. 004) is granted and Loeb is to respond within 30 days
of this order or produce an appropriate privilege log.

The Relevant Facts and Circumstances

Reference is made to a promissory note (the Note), dated June 26, 2014, by and between David
Florence and Steven Marcus, as borrowers, in favor of Loeb Enterprises II, LLC, as lender
(NYSCEF Doc. No. 5). Loeb commenced this action by summary judgment in lieu of
complaint, which this court denied in a decision and order dated December 13, 2018, because

there existed an issue of fact regarding the amount of money issued under the Note (NYSCEF Doc. No. 20). In particular, the schedule attached to the Note indicated the amount of \$5,000, but the following page laid out a payment plan of an additional \$100,000 (NYSCEF Doc. No. 5). Notably, there was no Allonge as it relates to the additional “amendments” was included in the papers submitted to the court. Loeb subsequently filed a complaint alleging two causes of action against the Defendants: (1) breach of the Note (first cause of action), and (2) unjust enrichment (second cause of action).

In their answer, the Defendants alleged certain conduct that formed the basis for five affirmative defenses raised against Loeb. The Defendants alleged that Loeb and MobiSave Corp. (**MS Corp**), a company in which the Defendants are 71% shareholders, entered into a joint venture LLC – MobiSave LLC (**MS LLC**). MS LLC was meant to leverage MS Corp’s existing mobile coupon business. Loeb issued the Note to the Defendants so that the Defendants could hire attorneys to negotiate the MS LLC Operating Agreement on behalf of MS Corp. The Defendants argue that the loan made by Loeb, pursuant to the Note, was to be paid off from the cash flow generated by MS LLC over an approximately three-year period, and that Loeb caused the failure of MS LLC.

Loeb now moves to dismiss the Defendants’ third and fifth affirmative defenses (Mtn. Seq. 002) and the Defendants move to compel responses to their outstanding document demands (Mtn. Seq. 004).

## Discussion

### A. Motion Sequence 002 (Plaintiff's Motion to Dismiss the Defendants' Third and Fifth Affirmative Defenses)

The Defendants' third affirmative defense alleges that Loeb and its alter-egos (none of which are parties to this case) engaged in wrongful conduct that constituted a breach of their fiduciary duties in relation to MS LLC (NYSCEF Doc. No. 24, ¶¶ 112-119). The Defendants' fifth affirmative defense asserts that Loeb and its alter-egos intentionally procured a breach of the MS LLC Operating Agreement (*id.*, ¶¶ 173-177).

When moving to dismiss an affirmative defense under CPLR § 3211(b), the plaintiff bears a “heavy burden” of showing that an affirmative defense is without merit as a matter of law (*Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479, 481 [1st Dept 2015]). The allegations in the answer are liberally construed and must be viewed in the light most favorable to the defendant (*id.*). However, a defense will be dismissed where it does not defeat, mitigate or reduce the plaintiff's remedy (*Walsh v Judge*, 223 AD 423, 425 [1st Dept 1928]).

Loeb argues that the third and fifth affirmative defenses should be dismissed because the Defendants lack standing as individuals to allege breach of fiduciary duty and estoppel claims against Loeb. The Defendants argue that their affirmative defenses should be sustained because there remain unresolved factual issues and that the defenses simply allege wrongful conduct by Loeb that impeded the Defendants' ability to repay their obligations pursuant to the Note.

To the extent that the Defendants attempt to raise Loeb's alleged improper conduct as a defense to claims for breach of contract or unjust enrichment, the Defendants cannot assert an affirmative defense for breach of fiduciary duty *vis-à-vis* MS LLC because the Defendants are not members of MS LLC; only MS Corp. is. The Defendants, as individual shareholders of MS Corp., simply do not have standing to argue that wrongs were committed against MS LLC (*see Abrams v Donati*, 66 NY2d 951, 953 [1985] [explaining that a shareholder does not have an individual cause of action for a wrong against a corporation]). Accordingly, the Defendants' third affirmative defense is dismissed, without prejudice.

The Defendants' fifth affirmative defense alleges wrongful conduct by Loeb's alleged alter-egos: Loeb Enterprises, LLC, LOMO, LLC, and Michael Loeb. The fifth affirmative defense is improper because these alleged alter-ego entities, whose conduct the Defendants argue are a defense to the claim for unjust enrichment, are necessary parties not joined in this action. Accordingly, the Defendants' fifth affirmative defense is dismissed, without prejudice.

#### **B. Motion Sequence 004 (Motion to Compel)**

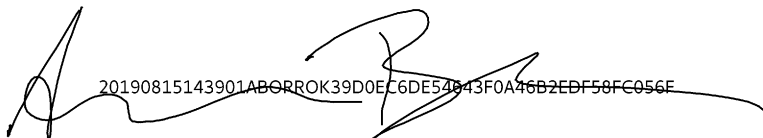
The Defendants' answer alleges wrongful conduct by Loeb, which is said to preclude Loeb's recovery under breach of contract and/or unjust enrichment. Notwithstanding the foregoing motion to dismiss, the materials sought by the Defendants on discovery are relevant to their defense of the action. Accordingly, the Defendants motion to compel Loeb's response to their document requests numbered 18-41 (NYSCEF Doc. No. 49) and to disclose unredacted copies of certain documents listed under section (B) of the signed order to show cause (NYSCEF Doc. No. 55, at 2) is granted to the extent that Loeb shall produce said responses, with appropriate

redactions if necessary, or otherwise an appropriate line-by-line privilege log within 30 days of this order. If the parties have further disputes about the discovery, they are directed to meet and confer before returning to this court for the status conference scheduled on October 4, 2019.

Accordingly, it is

ORDERED that plaintiff's motion to dismiss the defendants' third and fifth affirmative defenses is granted without prejudice; and it is further

ORDERED that defendants' motion to compel plaintiff's response to outstanding document demands is granted and plaintiff shall produce the documents set forth above within 30 days of this order or provide an appropriate privilege log.



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8/14/2019

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE