

Hopkins v Ackerman
2019 NY Slip Op 33282(U)
November 4, 2019
Supreme Court, New York County
Docket Number: 655010/2018
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

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ROBERT HOPKINS, FUNDING AMERICA LLC, FUNDING AMERICA MANAGEMENT LLC,

INDEX NO. 655010/2018

Plaintiffs,

MOTION DATE 06/20/2019, 06/20/2019

- v -

MOTION SEQ. NO. 001, 002

KENNETH ACKERMAN, SUNRISE CONSULTING LLC, SUNSET CONSULTING LLC, ACKERMAN FINE ARTS, LLC,

DECISION + ORDER ON MOTION

Defendants.

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HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 48, 49, 50, 51, 52, 53, 54, 55, 58, 69

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 56, 57, 62

were read on this motion to/for DISMISSAL

Defendants Kenneth Ackerman (“Ackerman”), Sunrise Consulting, LLC (“Sunrise”), Sunset Consulting LLC (“Sunset”), and Ackerman Fine Arts, LLC (collectively “defendants”), move to dismiss the complaint of plaintiffs Robert Hopkins (“Hopkins”), Funding America LLC (“the Fund”), and Funding America Management LLC (“Management”) (collectively “plaintiffs”) pursuant to CPLR 3211(a)(1), (3) and (7), CPLR 3013 and CPLR 3015(b).

The Fund and Management are an affiliated fund and management company, formed to invest in third-party litigation funding. The Fund was the investment vehicle, *i.e.* it held capital, invested, owned the funding positions and received proceeds once

cases settled. Management managed the Fund, *i.e.* sourced claims, conducted due diligence and managed the operations of the Fund. Hopkins alleges that he was a member of both the Fund and Management and was in charge of the day-to-day operations of both.

Hopkins alleges that the Fund and Management's operating agreements provide that, once members contributed capital to the Fund, such members' initial investment capital was to be first repaid out of profits from litigation funding. Then the Fund would pay Management a profit share, which Management would in turn use to compensate its members and employees. As of November 12, 2013, pursuant to an amendment to Management's Operating Agreement, Ackerman assigned his interest in Management to Sunrise; another member, John Lettera, assigned his interest to Silvermine Holdings, Inc.; and Damon Stevens was added as a member. Plaintiffs allege that, as a result, the membership of Management was Sunrise (25%), Silvermine (25%), Hopkins (25%) and Stevens (25%).

Plaintiffs allege that, by 2015, the Fund was approaching profitability. Around this time, disputes arose between Hopkins and Ackerman. Plaintiffs allege that Ackerman caused the Fund to make distributions to Sunrise that exceeded its capital contribution; Ackerman concealed the books and records from Hopkins; and he diverted Fund payments to separate, private bank accounts. Plaintiffs also allege that Ackerman diverted corporate opportunities to himself and wasted corporate assets.

Hopkins commenced this action, on his own behalf and derivatively on behalf of the Fund and Management against Ackerman and his companies alleging claims for

(i) breach of fiduciary duty (against Ackerman and Sunrise); (ii) conversion (against all defendants); (iii) waste (against Ackerman); (iv) breach of contract (against Ackerman and Sunrise); and (v) declaratory relief.

After service of the complaint, the procedural history of this action becomes unclear. First, in December 2018, defendants moved to dismiss the complaint. Then, in February 2019, defendants answered the complaint and asserted counterclaims, and served an amended answer with counterclaims in March 2019. In the amended answer defendants denied the material allegations of the complaint and, in particular, denied that Hopkins was a member of the Fund. Defendants also asserted counterclaims for: (i) breach of contract for failure to pay Management's operational expenses; (ii) breach of fiduciary duty for failure to pay Management's operational expenses; (iii) breach of fiduciary duty for operating a competing business; (iv) breach of fiduciary duty for stealing funds; (v) tortious interference with contract; (vi) civil theft; (vii) conversion; (viii) money had and received; and (ix) libel per se.

Also, in March 2019 plaintiffs moved to dismiss defendants' counterclaim for civil theft. Defendants' motion to dismiss (although denominated as a pre-answer motion, but now post-answer) and plaintiffs' motion to dismiss the civil theft counterclaim are consolidated for disposition and resolved herein.¹

¹ Neither party objected to the procedural posture of the motions.

Discussion

Viability of Plaintiffs' Derivative Causes of Action

Defendants first assert that the breach of fiduciary duty, conversion, waste, breach of contract and declaratory judgment causes of action asserted by Hopkins on behalf of Management and the Fund must be dismissed because both the Fund and Management are currently cancelled Delaware entities, and under Delaware law derivative claims may not be brought on behalf of cancelled LLCs.² Defendants also argue that Hopkins does not have standing to sue derivatively because he is not a member of the Fund, he cannot overcome the business judgment rule, and the complaint allegations do not satisfy the demand/demand futility requirements of Delaware law.

In opposition, Hopkins claims that the Fund and Management were improperly and illegally cancelled and that he had nullified the cancellations and revived the LLCs. Hopkins also argues that the complaint adequately alleges derivative claims on behalf of the Fund and Management.

In reply, defendants submitted certified documentation from the Delaware Secretary of State to show that, as of March 2019, after the time that Hopkins claims he revived the LLCs, both the Fund and Management had been cancelled and were no longer extant limited liability companies.

² It is undisputed that the Fund and Management were organized under Delaware law and both agreements contain choice of law provisions designating Delaware law as the choice of law.

At oral argument plaintiffs did not dispute the authenticity of the March 2019 Delaware Department of State Certifications showing that the Fund and Management had been cancelled in November 2017 and were, as of the March Certifications, cancelled LLCs. Thus, with respect to Management and the Fund's derivative claims, because the Fund and Management are cancelled LLCs, plaintiffs lack standing to assert claims on their behalf. *See Meissner v Yun*, 150 A.D.3d 455 (1st Dept 2017) ("plaintiff lacked standing to assert derivative claims on behalf of Manhattan Review LLC since he never commenced a proceeding with the Delaware Chancery Court to nullify or revoke the company's certificate of cancellation") (internal citation omitted).³

Plaintiffs argue that even if they lack standing to assert derivative claims, their claims may be considered direct claims. To determine whether a claim is direct or derivative under Delaware law, the analysis turns on "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)." *Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004). Below plaintiffs' causes of action are reviewed under the Delaware standard.

³ To the extent that Hopkins continues to argue that Ackerman's cancellation of the Fund and Management was improper, he must raise that claim in Delaware, the state where the limited liability companies were incorporated.

The Conversion and Waste Claims (Second and Third Causes of Action)

In the complaint, Hopkins alleges that Ackerman converted Management and the Fund's property when Ackerman redirected the Fund's website, www.fundingamerica.net to Ackerman Fine Art, LLC. According to Hopkins, this redirection affected the Fund's ability to collect receivables it was due. Hopkins also alleges that Ackerman engaged in corporate waste by, among other things, diverting Company funds for his own benefit; accepting write-offs of funding contracts; and accepting steep discounts on repayment without any consultation with the Fund's partners.

These allegations plead harm or injury to all of the members of the Fund and Management, not simply to Hopkins. Accordingly, the conversion and waste causes of action are derivative and, because Hopkins lacks standing to pursue them, must be dismissed.

The Breach of Contract Claim (Fourth Cause of Action)

In the breach of contract cause of action, Hopkins alleges that Ackerman breached Management and Fund's operating agreements by failing to maintain appropriate books and records and by failing to properly handle tax matters for Management. Hopkins also alleges that "Ackerman and Sunrise frustrated performance of the [Management and Fund's operating agreements] by interfering with the proper handling of investment proceeds and distributions." (Compl. at ¶ 99).

Part of Hopkin's breach of contract cause of action, concerning the misappropriation and misdirection of investment proceeds, is derivative in nature. The

harm from these alleged actions is to the Fund and Management and recovery would be on behalf of all the members of the LLCs. However, Hopkins also alleges other direct breaches of the Management operating agreement and the Fund operating agreement, *i.e.*, that he was denied the right to inspect/receive the books and records of Management and the Fund. This part of the breach of contract cause of action is unique to Hopkins, and the harm alleged is direct harm to him.

Moreover, while Ackerman argues that Hopkins was never a member of the Fund, for the purposes of this motion to dismiss, I assume the truth of Hopkins' allegations, which are sufficient to show that he was a member of the Fund. For these reasons, Hopkins has sufficiently stated a breach of contract cause of action based on the allegations concerning the breach of his right to inspect the books and records of Management and the Fund.

The Breach of Fiduciary Duty Claim (First Cause of Action)

In the breach of fiduciary cause of action Hopkins alleges that Ackerman and Sunrise controlled Management and the Fund and they breached their fiduciary duties by (i) improperly distributing assets; (ii) neglecting valuable receivables; (iii) withholding the books and records and preventing Hopkins from establishing a new receivable collection account; and (iv) diverting the Fund's website and phone numbers to Ackerman Fine Arts.

Under Delaware law, "[I]n the absence of a contrary provision in the LLC agreement, the manager of an LLC owes the traditional fiduciary duties of loyalty and

care to the members of the LLC.” *Bay Ctr. Apartments Owner, LLC v Emery Bay PKI, LLC*, 2009 WL 1124451 at 8 (Del. Ch. Apr. 20, 2009). Breach of fiduciary duty claims may be direct and/or derivative. *See Gentile v Rossette*, 906 A.2d 91, 100 (Sup. Ct. Del. 2006) (breach of fiduciary duty claim arising from corporate overpayment can be both derivative and direct if the minority shareholders suffered a harm unique to them that was independent of the injury to the corporation).

Here, other than the claims concerning the books and records, Hopkins’ allegations against Ackerman and Sunrise all pertain to the Fund and Management, not solely to Hopkins in his capacity as a co-member. Moreover, the injury alleged is to the Fund and Management, not simply to Hopkins. Here again, because Hopkins has generally not alleged any harm that is unique to him and/or injury that is independent of the injury to the Fund and/or Management, Hopkins’ breach of fiduciary duty cause of action is derivative and must be dismissed. As to that part of the claim relating to books and records, it is duplicative of the breach of contract cause of action and dismissed on this ground as well.

The Claim for a Declaratory Judgment (Fifth Cause of Action)

In his fifth cause of action, Hopkins seeks “a declaratory judgment determining (i) the extent to which distributions made by the Fund to Defendants were invalid, and (ii) the distributions that should have been made by the Fund to Management and Management to Hopkins” (Compl. at ¶ 102). In addition to being derivative, this claim is entirely duplicative of Hopkins’ other causes of action and seeks relief that may be

afforded through the award of money damages. I therefore dismiss the fifth cause of action on both of these grounds.

Viability of Claims Against Sunset and Ackerman Fine Arts

Defendants also seek to dismiss the causes of action plead against Sunset and Ackerman Fine Arts on the ground that, once the derivative causes of action are dismissed, Hopkins has no remaining claim against these entities. Hopkins' breach of contract cause of action is the only direct cause of action plead, and the only claim which survives this motion to dismiss. Because Sunset and Ackerman Fine Arts are not parties to the Fund and Management's operating agreements, Hopkins may not allege breach of contract claims against these entities. Accordingly, the complaint is dismissed in its entirety as to Sunset and Ackerman Fine Arts.

Plaintiff's motion to dismiss

Hopkins moves to dismiss the sixth counterclaim asserted by defendant/counterclaim plaintiff Sunrise pursuant to CPLR 3211 (a)(3) and for attorney's fees. In the sixth counterclaim, Sunrise alleges that Hopkins "has obtained and/or used the Repayment, which constitutes \$103,976.92 of Sunrise Consulting Service LLC's money without permission or right" and "knowingly deprived Sunrise Consulting Services LLC of the Repayment" (Defendants' First Amended Answer at ¶¶ 133-134, Dkt # 43) in violation of Florida Statute §772.11. Hopkins argues that the civil theft counterclaim under Florida Civil Theft Section 772.11 is a derivative claim and Ackerman lacks standing to assert the claim. Sunrise argues in opposition that under

Florida Law, civil theft claims may be brought directly, and Sunrise suffered a direct harm by Hopkins' alleged diversion of funds due to Sunrise.

In the counterclaim, defendant/counterclaim plaintiff alleges that, "in or about November 12, 2013, Sunrise Consulting Services LLC became the sole member of [the Fund]," (Defendants' First Amended Answer at ¶ 68, Dkt # 43) and that, in June 2015, Hopkins absconded with the profits from a litigation funding advance that should have been received by the Fund. At this stage of the litigation I am required to accept that allegation. Thus, as Sunrise has adequately alleged that, at the time of the alleged theft, it was the only member of the Fund, and therefore the only member who was harmed, Sunrise has adequately pled a direct claim for civil theft. Accordingly, I deny the motion to dismiss the sixth counterclaim.

In accordance with the foregoing, it is

ORDERED that the motion of defendants Kenneth Ackerman, Sunrise Consulting LLC, Sunset Consulting LLC, Ackerman Fine Arts, LLC to dismiss the complaint is granted as to the first, second, third and fifth causes of action; and those causes of actions are severed and dismissed; and it is further

ORDERED that the motion to dismiss is denied as to the fourth cause of action, except as set forth above; and it is further

ORDERED that the motion to dismiss is granted as to defendants Sunset Consulting LLC and Ackerman Fine Arts, LLC, and the complaint is dismissed in its entirety as to Sunset and Ackerman Fine Arts.; and it is further

ORDERED that plaintiffs' motion to dismiss the sixth counterclaim is denied; and it is further

ORDERED that counsel for the parties are directed to appear for a compliance conference in Room 208, 60 Centre Street, New York on Wednesday, December 4, 2019 at 2: 15 p.m.

This constitutes the decision and order of the court.

11/4/2019
DATE

Saliann Scarpulla
SALIANN SCARPULLA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE