

**Passarella v Klein**

2020 NY Slip Op 31527(U)

May 21, 2020

Supreme Court, New York County

Docket Number: 652904/2017

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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ADAM PASSARELLA,  
  
Plaintiff,

INDEX NO. 652904/2017

MOTION DATE 12/05/2019

- v -

MATTHEW KLEIN,  
  
Defendant.

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

were read on this motion for SUMMARY JUDGMENT.

In Motion Sequence No. 001, defendant moves for summary judgment dismissing Plaintiff’s Complaint. The parties were friends who began a business venture, All Bueys Club, LLC (“ABC”), a business development entity formed under the laws of Delaware.

The Court presumes the parties’ familiarity with the facts and only a brief recitation of necessary background is included in this Decision and Order.

**Background**

The parties, the sole managers and members of ABC, agreed to split the profits and losses evenly. Neither party drew a salary from ABC. Instead, both parties apparently used ABC’s business credit card account for assorted personal and professional purposes. ABC was created in May 2014 and “closed” in May 2016. Neither party has submitted an operating agreement or a certificate of dissolution/cancellation for ABC in connection with this motion.

Plaintiff asserts that Defendant misappropriated more than his 50% share of ABC's profits and used ABC funds to form a new business for himself without Plaintiff. Plaintiff seeks, in the Complaint, the following: to recover \$593,215.82 for breach of the duty of loyalty based on Defendant's alleged personal use of ABC funds (First Cause of Action); compensatory damages to be determined at trial for breach of the duty of loyalty based on Defendant's use of ABC assets to form a new business from which Plaintiff was excluded (Second Cause of Action); and an equitable accounting of ABC (Third Cause of Action) (NYSCEF Doc. 1 [Compl.]).

### DISCUSSION

Defendant argues, among other things, that the fiduciary duty claims must be dismissed because they are derivative, not direct. Defendant further argues that the accounting is barred because Plaintiff, having unclean hands, is not entitled to an equitable remedy.

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993] [internal quotation marks and citation omitted]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant makes the requisite showing, the burden shifts to the opposing party to present evidentiary facts sufficient to raise triable issues of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court is required to examine the evidence in the light most favorable to the opposing party (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]), and summary judgment “should not be granted where there is any doubt as

to the existence of a triable issue” of fact (*American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 [1st Dept 1994]).

ABC is a Delaware limited liability company. Accordingly, the court applies the law of New York to procedural matters and Delaware law to substantive matters in addressing the breach of fiduciary duty claim (*Royal Park Investments SA/NV v Stanley*, 165 AD3d 460, 461 [1st Dept 2018]).

### **Breach of Fiduciary Duty (First and Second Causes of Action)**

Plaintiff concedes that the fiduciary duty causes of action are individual but asserts that the fiduciary duty claims are adequately pleaded because the parties were the only two members of ABC, they shared the losses and profits evenly, and ABC is “no longer in business” (*see* NYSCEF Doc. 66 at 6-7 [Mem. Opp.]). The Court disagrees.

Regardless of whether a formal operating agreement was ever entered or ABC was formally cancelled in the Delaware courts, Defendant has made a prima facie demonstration that Plaintiff’s fiduciary duty claims are derivative in nature and must be dismissed.

Absent a valid operating agreement, plaintiff’s fiduciary duty claim is wholly derivative. Under *Tooley v Donaldson, Lukin & Jenrette, Inc.* (845 A2d 1031 [Del. 2004]), “[t]he inquiry ‘must turn *solely* on the following questions: (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)?’ ” (*Reith v Lichtenstein*, 2019 WL 2714065, at \*10 [Del Ch June 28, 2019], quoting *Tooley*, 845 A2d at 1033; *see also* *Yudell v. Gilbert*, 99 AD3d 108, 113-114 [1st Dept 2012]). The court looks to the nature of the wrong and to whom or to what entity the relief would be awarded (*Reith*, 2019 WL 2714065, at \*10). A direct claim is that in which the plaintiff “demonstrate[s] that the duty breached was

owed to the [member] and that he or she can prevail without showing an injury to the [company]" (*id.* [internal quotation marks and citation omitted]).

Here, Plaintiff's alleged breaches of fiduciary duty (primarily misappropriation of ABC assets and potentially diversion of business opportunities from ABC) constitute injuries sustained directly by ABC, not Plaintiff. Any relief for the harm Plaintiff asserts in the Complaint would necessarily be awarded to ABC, initially, then redistributed as appropriate under Delaware law and/or an operating agreement, should one exist (e.g., to ABC's creditors, if any, and/or to its members). Therefore, Plaintiff has failed to establish any harm to himself distinct from that which may flow indirectly to him through some harm that ABC allegedly sustained and cannot maintain these derivative claims individually.<sup>1</sup> Plaintiff cites no authority supporting his response that a 50% member in a closely held, two-member LLC may raise these claims directly.

Accordingly, Defendant's motion is granted and the First and Second Causes of Action are dismissed.

#### **Accounting (Third Cause of Action)**

Defendant has not met its burden of demonstrating *prima facie* entitlement to summary judgement dismissing Plaintiff's Third Cause of Action. Regardless of certain apparent factual inaccuracies in Plaintiff's spreadsheet calculations and interrogatory responses, or Plaintiff's use of ABC assets to pay for personal expenses, Defendant has not eliminated all issues of fact as to

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<sup>1</sup> If ABC was formally dissolved, a Certificate of Nullification from the Court of Chancery is a condition precedent to seeking any derivative relief on behalf of the LLC (*see Otto v Otto*, 110 AD3d 620, 620 [1st Dept 2013], citing Del. Code Ann. Tit. 6, § 18-805; *Matthew v Laudamiel*, 2012 WL 605589, \*21-22, 2012 Del.Ch. LEXIS 38, \*76 [Del.Ch., 2012]). Plaintiff does not assert that he obtained such nullification.

his use of ABC’s funds or demonstrated that Plaintiff is barred from this relief as a matter of law under the doctrine of unclean hands.

Therefore, Defendant’s motion is denied as to Plaintiff’s Third Cause of Action.

\* \* \* \* \*

The Court has considered the parties’ remaining arguments and finds them unavailing.

Accordingly, it is

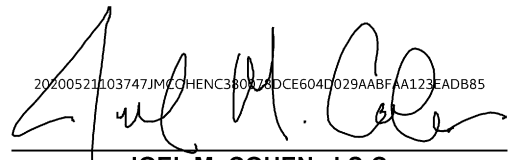
**ORDERED** that Defendant’s motion is **granted in part** and the First and Second Causes of Action are **dismissed**; it is further

**ORDERED** that Defendant’s motion is **denied** as to the Third Cause of Action; and it is further

**ORDERED** that the parties shall appear for a conference on June 3, 2020 at 10:00 AM (the Court will contact the parties through NYSCEF regarding scheduling details).

This constitutes the Decision and Order of the Court.

5/21/2020  
DATE

  
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JOEL M. COHEN, J.S.C.

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