

<b>Lam v Mamacha LLC</b>
2020 NY Slip Op 31530(U)
May 22, 2020
Supreme Court, New York County
Docket Number: 653320/2019
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

*Justice*

-----X

DAN LAM,

Plaintiff,

- v -

MAMACHA LLC, THE HOLE NYC LLC, ERIC CAHAN,  
RAYMOND GRAJ, YANIV SCHULMAN, LAURA  
PERLONGO, DOES 1-10, FICTITIOUS NAMES, TRUE  
NAMES UNKNOWN, PARTIES INTENDED BEING THE  
OTHER MEMBERS AND/OR MANAGERS OF MAMACHA  
LLC

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 38

were read on this motion to/for

DISMISSAL

The motion by defendants Cahan, Schulman, and Perlongo (“Movants”) to dismiss is denied.

**Background**

Plaintiff is a sculptor who purportedly entered into a consignment agreement with defendants to exhibit her work in their business (Mamacha). Plaintiff characterizes the store as a “hybrid café and art gallery” located on the Bowery. Plaintiff contends that defendant the Hole NYC LLC (the “Hole”) is an art gallery that shared storage and exhibition space at the same location on the Bowery.

Plaintiff alleges that in December 2017, defendant Cahan asked plaintiff to exhibit her work at Mamacha for its inaugural exhibition. Plaintiff says she provided at least sixty original sculptures for the show, which was put on in conjunction with the Hole. Plaintiff points to an

alleged consignment agreement the parties entered into with respect to this exhibition. Plaintiff contends she also agreed to deliver other pieces of art to replace the items sold during the exhibition. She insists she was to receive fifty percent of any items sold during the exhibition and any items not sold would be returned to her. Plaintiff also insists that Cahan told her that her airfare to New York would be covered.

Plaintiff claims that after the exhibition she found numerous discrepancies between the defendants' records and her own. She claims she found that several pieces were damaged or missing and that these were omitted from defendants' records. Plaintiff contends that after some back and forth with Cahan, he eventually agreed to pay her \$10,000 as an "initial payment" but she only received \$6,000 and that is the only money she has received out of this exhibition.

Plaintiff argues that after requesting the remaining artwork back, four of the pieces were damaged and another nine were missing. After contacting the Hole, she received \$500 but claims the Hole (which apparently sold some of her items online) never provided her with a full accounting. Plaintiff speculates that the Movants decided to shut down Mamacha in order to avoid paying plaintiff (and other creditors) the funds she was owed.

Plaintiff brings claims against defendants for violations of the Arts and Cultural Affairs Law, breach of fiduciary duties, aiding and abetting breach of fiduciary duties, violations of the Estates, Powers and Trusts Law and an accounting.

On January 14, 2020, the Court entered a default judgment against non-appearing defendants Mamacha LLC, the Hole NYC LLC and Raymond Graj (NYSCEF Doc. No. 35).

## **Discussion**

A Court considering a motion to dismiss for failure to state a cause of action "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every

possible favorable inference. We may also consider affidavits submitted by plaintiffs to remedy any defects in the complaint” (*Chanko v American Broadcasting Companies Inc.*, 27 NY3d 46, 52, 29 NYS3d 879 [2016]).

A motion to dismiss based on documentary evidence “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]).

Movants move to dismiss the only claim against them—aiding and abetting the breach of fiduciary duties (the third cause of action). Movants insist that there was no fiduciary duty owed to plaintiff that could give rise to an aiding and abetting cause of action. Movants claim that plaintiff only dealt with Perlongo and Schulman in a social capacity at the opening of Mamacha and that Schulman purchased art from plaintiff but that there were no discussions about the consignment agreement. Movants contend that Schulman and Perlongo are named in this action only due to their purported roles as members or managers of Mamacha and that they had nothing to do with the allegations in the complaint.

They assert that the only allegations about Perlongo and Schulman concern the purported vote to cease Mamacha’s operations without setting aside property that should have been held for plaintiff and by paying creditors with money with that should have been used to pay plaintiff. Movants assert that these conclusory assertions do not satisfy the elements of an aiding and abetting claim. They emphasize no actual knowledge is alleged, no substantial assistance was claimed, and that allegations based on information and belief are not sufficient to state this claim.

Movants also point to purported documentary evidence—the operating agreement for Mamacha and the records from the Delaware Secretary of State. They point out that under the terms of the operating agreement, a vote is not required to dissolve Mamacha and that Mamacha is still an active corporation according to the state of Delaware. Movants insist that Schulman and Perlongo had no power over the company’s operations, including to dissolve the company.

Movants also argue there was no fiduciary duty between the parties because Mamacha is not an art merchant. They claim that under the Arts and Cultural Affairs Law, Mamacha does not qualify as an art merchant and instead was a café or tea shop. Movants also contend that selling plaintiff’s artwork was a “one-off experiment.”

They also argue that the aiding and abetting claim arises under the common law and, therefore, plaintiff cannot be awarded attorneys’ fees. Movants also insist the alleged conduct does not satisfy the standard for plaintiff to seek punitive damages.

In opposition, plaintiff claims that the Movants rely on false assertions and potentially fraudulent documentary evidence. She also insists that as discovery proceeds, the evidence will show that Movants are liable. Plaintiff maintains that Mamacha is an art merchant under the statute and owes a fiduciary duty to plaintiff. She disputes Movants’ reading of the applicable statute and points out that social media posts by Mamacha included hashtags promoting art shows, including one on January 16, 2019. Plaintiff also attaches the affidavit of Valerie Trump (Mamacha’s former operations manager) who claims that Mamacha was operating, at least in part, as an art gallery and plaintiff’s exhibit was one of many (NYSCEF Doc. No. 29, ¶ 4).

With respect to Schulman and Perlongo, plaintiff asserts that there are numerous factual disputes that compel the Court to deny the instant motion. She claims that there are issues concerning whether Schulman and Perlongo directed the unlawful disposition of plaintiff’s

proceeds held in trust, whether they took the proceeds and how they were involved in this alleged scheme. She points out they were active investors in Mamacha and references an email from June 19, 2019 from defendant Cahan in which he noted that Mamacha was going out of business because the investors were pulling funding and creditors (such as plaintiff) would be out of luck.

Plaintiff reads the operating agreement of Mamacha to suggest that if Schulman and Perlongo were holders of Class A Units, their consent would be required before Mamacha liquidated assets and distributed property held in trust. Plaintiff points to numerous news articles that reference Schulman and Perlongo as owners of Mamacha. She also points out that the operating agreement provided by Movants identifies the entity as MoMaCha IP LLC rather than the entity involved in this action: Mamacha LLC. Plaintiff further argues that it would be premature to dismiss punitive damages at this stage of the litigation.

In reply, Movants insist plaintiff failed to specify allegations against Schulman and Perlongo although they do acknowledge that “there may have been some administrative mistakes that led to some minimal harm to Plaintiff but certainly no evil wrongdoing” (NYSCEF Doc. No. 30 at 4).

### **Art Dealer**

The Arts and Cultural Affairs Law § 11.01(2) provides that

“Art merchant” means a person who is in the business of dealing, exclusively or non-exclusively, in works of fine art or multiples, or a person who by his occupation holds himself out as having knowledge or skill peculiar to such works, or to whom such knowledge or skill may be attributed by his employment of an agent or other intermediary who by his occupation holds himself out as having such knowledge or skill. The term “art merchant” includes an auctioneer who sells such works at public auction, and except in the case of multiples, includes persons, not otherwise defined or treated as art merchants herein, who are consignors or principals of auctioneers.”

At this stage of the litigation, there is no doubt that plaintiff has sufficiently alleged that Mamacha was, at the very least, a non-exclusive art dealer based on the exhibition of plaintiff's work and through the affidavit of Ms. Trump. Mamacha routinely offered artwork for sale at the café. News reports support that assertion (NYSCEF Doc. No. 28, exh D) as well as social media posts (*id.* exhs E, F, G). That is enough, at the motion to dismiss stage, to fall under the definition of "art dealer" under the Arts and Cultural Affairs Law and plaintiff has sufficiently alleged that Mamacha owed a fiduciary duty to plaintiff.

### **Aiding and Abetting**

"To prevail on this claim, plaintiffs must allege: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach. A defendant knowingly participates in the breach of fiduciary duty when he or she provides 'substantial assistance' to the fiduciary, which occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur" (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 24-25, 17NYS3d 678 [1st Dept 2015] [internal quotations and citation omitted]).

"An essential prerequisite to proving this cause of action is that the defendant must have known of the fiduciary duty. Indeed, actual knowledge of the breach of the duty is required, and constructive knowledge will not suffice. Further, a plaintiff must plead this cause of action with particularity; conclusory allegations are insufficient" (*id.* at 25).

Despite the parties' voluminous briefs and name-calling, the fact is that this case is about plaintiff entrusting her sculptures to Mamacha and plaintiff's claim that she did not get compensated in accordance with a consignment agreement and that certain pieces of artwork

were either never returned or were returned with damage. There is no dispute that Movants were all involved with Mamacha. The question, of course, is the extent to which Schulman and Perlongo were involved in the shutdown of Mamacha, the winding up of assets and the return (or failed return) of plaintiff's sculptures.

Plaintiff claims that Mamacha was acting as an agent for plaintiff with respect to the artwork and for the proceeds from pieces that sold (NYSCEF Doc. No. 4, ¶ 76). She contends that the Movants had complete dominion and control over Mamacha and knew that Mamacha was a fiduciary concerning the artwork and proceeds from their sale (*id.* ¶ 77). Plaintiff argues that Mamacha breached its fiduciary duty to her by treating her property held in trust (the artwork retained by Mamacha) as its own property and by not setting those assets aside (*id.* ¶ 79).

She then alleges that "On information and belief, Individual Defendants knowingly, induced and participated in Mamacha's breach of fiduciary duties to Plaintiff by voting to dissolve Mamacha while treating Plaintiff's trust funds as property of Mamacha and not property held for Plaintiff's benefit" (*id.* ¶ 80). She also claims Movants voted to make payments to themselves using commingled funds, a portion of which belonged to plaintiff and that they should be personally liable (*id.* ¶¶ 82-85). This states a cause of action for aiding and abetting a breach of a fiduciary duty.

The affidavit from Cahan does not require the Court to dismiss the case as to Schulman or Perlongo. Cahan claims that Schulman only owned a 0.71 percent interest in Mamacha and that Perlongo did not have any ownership stake in the company (NYSCEF Doc No. 32, ¶¶ 6, 10). He even attaches a capitalization table which purportedly shows the ownership percentage (NYSCEF Doc. No. 34).

But the affidavit of Veronica Trump (former Operations Manager at Mamacha) compels the Court to deny the motion. She claims that she is “familiar with the operations of Mamacha, its corporate structure, and the conduct of the company generally throughout its existence” (NYSCEF Doc. No. 29, ¶ 3). Trump alleges that “Yaniv Schulman and Laura Perlongo were both active investors in Mamacha. In addition to investing capital in Mamacha, they each were actively involved in the art gallery aspect of Mamacha, including promoting Mamacha and artists shows at Mamacha and overseeing gallery events at Mamacha” (*id.* ¶ 5).

These disputed factual allegations compel the denial of the motion. Attaching a document about ownership interest is certainly compelling but it does not rise to the level of documentary evidence required to dismiss the case, especially given Trump’s affidavit. Moreover, there is no requirement that Schulman and Perlongo need to be majority owners or even owners at all in order to aid and abet the breach of a fiduciary duty.

Trump claims that Schulman and Perlongo were very familiar with plaintiff, were involved in gallery events and knew about Mamacha’s financial troubles. That means that there may be emails, documents or other evidence discussing what to do with plaintiff’s artwork or commissions involving Schulman and Perlongo. It may be that Cahan is correct that Schulman and Perlongo were only around to promote through their social media presences and had only minor roles. But the Court cannot jump to that conclusion on these papers, and contrary to Cahan’s request, the Court cannot disregard Trump’s affidavit because Cahan claims she is biased or her claims are false. That Trump was fired by Cahan is a valid argument to make before a jury, not on a motion to dismiss. The Court cannot make credibility determinations on a motion to dismiss.

It is simply too early to dismiss the case against the Movants. In an email from Cahan to plaintiff's attorney (Plaintiff is cc'ed), he observes that "Insofar as your claim of lost/damaged items, we really do not know how any of that could have happened and genuinely feel bad about that . . . ultimately, the location and sales could not sustain operation of the store and our investors have decided to pull the plug" (NYSCEF Doc. No. 28, exh A). Discovery is needed to explore who Cahan meant by "we" and who made the decision to close the store.

### **Summary**

Of course, businesses in Manhattan fail all the time and creditors are often forced to confront the fact that it may be impossible to recover from an insolvent company. You can't get blood from a stone. But this case is different. Plaintiff alleges that she gave custody of pieces of her art to defendants so that her art could be sold at the store and then defendants failed to account for that art, failed to account for the proceeds from sales, failed to compensate her for missing or damaged artwork or reimburse her airfare costs (NYSCEF Doc. No. 4, ¶ 63).

Understandably, plaintiff does not have a lot of information about Mamacha's failure because she was not involved with its operation. She merely agreed to conditionally entrust her artwork. The Court recognizes that Cahan's affidavit, submitted in reply, attempts to explain what really happened. At this stage of the case, those are merely allegations. And despite offering more purported facts, Cahan conspicuously omits certain key details.

Cahan did "not deny the presence of a consignment agreement with [plaintiff]" (NYSCEF Doc. No. 32, ¶ 42 [Cahan's affidavit]). The Court is not sure what to make of this statement. Either there was a consignment agreement or there wasn't; alternatively, Cahan might not remember. But to argue that he does not deny that there was one is not a convincing argument. Moreover, he does not mention anything about what he did with plaintiff's artwork

that was not sold or proceeds from the sale of plaintiff’s art. Cahan’s claims that Mamacha did not sell a lot of plaintiff’s pieces is beside the point. Discovery is clearly needed to explore what happened to plaintiff’s artwork and proceeds from the sales.

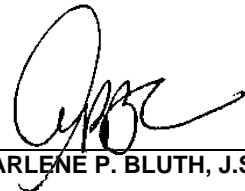
Similarly, it is too early to dismiss plaintiff’s demand for punitive damages or to deny her claim for attorneys’ fees. The purported consignment agreement is not part of the record; therefore, it is too early to dismiss a claim for legal fees. And while the parties discuss Mamacha’s operating agreement at length, that is also not dispositive. As stated above, the issue is what happened to the proceeds earned from the sale of plaintiff’s artwork, what happened to pieces that were not sold and who participated in that decision-making process.

To the extent that Movants request a finding that certain statutes do not apply to Mamacha, that request is denied as moot given that the Court already entered a default judgment against that entity.

Accordingly, it is hereby

ORDERED that the motion by defendants Cahan, Schulman and Perlongo to dismiss is denied and these defendants are directed to answer pursuant to the CPLR.

05/22/2020  
DATE

  
ARLENE P. BLUTH, J.S.C.

CHECK ONE:

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

APPLICATION:

CHECK IF APPROPRIATE: