Patel v Patel
2020 NY Slip Op 31864(U)
June 15, 2020
Supreme Court, New York County
Docket Number: 655348/2018
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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MAYURIBEN PATEL

Plaintiff,

- v -

PARESH PATEL,

Defendant.

INDEX NO. 655348/2018

MOTION DATE 03/28/2019

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 were read on this motion to DISMISS.

This case boils down to a dispute over whether Plaintiff Mayuriben Patel ("Plaintiff") is entitled to a share of the profits generated by the sale and wind-down of M&D Pharmacy, LLC ("M&D"). According to Defendant Paresh Patel ("Defendant"), who is alleged to be the managing member of M&D, Plaintiff is not a member of the LLC and is therefore ineligible to receive any such distribution or to access information about the company's books and records. In her initial Complaint, Plaintiff asserts six causes of action: (1) accounting, (2) breach of fiduciary duty (denominated as a derivative claim), (3) breach of fiduciary duty (an individual claim), (4) wrongful conversion, (5) fraudulent inducement, and (6) judicial dissolution.

Now, Defendant moves to dismiss all of Plaintiff's claims on an assortment of grounds, including documentary evidence, lack of standing to bring a derivative claim, lack of personal jurisdiction, and failure to state a cause of action. Plaintiff opposes the motion but also cross-moves to amend her Complaint, "conced[ing] that she failed to properly plead her Second Cause

of Action, Third Cause of Action, and Fourth Cause of Action" (NYSCEF 33 ¶ 65 [Aff. in Opp. to Def.'s Mot.]).

For the reasons set forth below, Defendant's motion to dismiss is granted in part, and Plaintiff's cross-motion for leave to amend is denied without prejudice.

BACKGROUND[1]

For years, M&D operated a pharmacy, known as Harlem Pharmacy, at 17 West 125th Street in Manhattan (NYSCEF 34 ¶¶ 1, 10 [Compl.]). Plaintiff, who claims to be a Member of M&D, alleges that Defendant improperly reduced her profit share from 20% to 15%, and misappropriated Plaintiff's share of the proceeds generated from the sale of M&D's assets in January 2018 (*id.*). Plaintiff says she was entitled to 20% of the profits from that sale, but has received nothing, despite repeated demands, because Defendant does not consider Plaintiff to be a member of M&D eligible to receive any such distribution (*id.* ¶¶ 3-6).

According to Plaintiff, she became a Member of M&D, with a 20% ownership interest in the company, following a December 17, 2012 transaction (*id.* ¶ 16). Defendant initially held a 40% ownership interest, but acquired a third Member's interest around January 2015, giving him a total of 80% interest (*id.* ¶¶ 17-19). No formal operating agreement was created for M&D (*id.* ¶ 20). However, M&D's Board of Directors and Shareholders allegedly passed resolutions, in January 2015, noting both Defendant's 80% stake and Plaintiff's 20% (*id.* ¶¶ 21-22).

As the controlling Member of M&D, Defendant had the power to direct and implement corporate decisions, including the payment of distributions to Members. Beginning around 2016, Defendant cut Plaintiff's share of the company's dividends and profits, from 20% to 15%,

[1] The recitation of facts is based on the factual allegations of the Complaint, which are accepted as true solely for the purposes of this motion.

while increasing his own share (*id.* ¶ 26). Plaintiff never consented to this reduction, nor did she receive any consideration for it (*id.* ¶¶ 27-28). Between 2016 and 2018, Defendant allegedly withheld about $60,000 of distributions from Plaintiff (*id.* ¶ 29).

In December 2017, Plaintiff and Defendant, as the Members of M&D, entered into a purchase agreement with Rite Aid of New York, Inc. ("Rite Aid"), to sell most of M&D's assets to Rite Aid (*id.* ¶ 30). The purchase agreement identified Plaintiff and Defendant as the sole Members of M&D (*id.* ¶ 31). Under the purchase agreement, Rite Aid agreed to pay M&D $483,000.00 for M&D's files, records, and data (*id.* ¶ 32). In addition, Rite Aid paid Plaintiff and Defendant $191,000.00 in exchange for a restrictive covenant barring them from operating a pharmacy within three miles of M&D's Harlem location for another seven years (*id.* ¶ 33). Rite Aid also agreed to pay an additional $1,000.00 for M&D's "fixed assets" (*id.* ¶ 34), and $94,762.87 for M&D's "saleable inventory" (*id.* ¶ 36-37). The sale was executed on January 16, 2018, at the M&D pharmacy (*id.* ¶ 38).

Defendant, as controlling Member, took possession of all proceeds from the Rite Aid transaction, and promised Plaintiff he would pay her 20% of the profit (*id.* ¶ 41). But Plaintiff alleges that, ever since the transaction closed, Defendant has shut her out of M&D's affairs (*id.* ¶ 44). The sale proceeds were not deposited into M&D's operating bank account (*id.* ¶ 45), and Plaintiff has not been allowed to inspect M&D's financial records (*id.* ¶ 46) or have a say in the management of M&D (*id.* ¶ 47). Defendant has repeatedly refused to give Plaintiff a share of the proceeds from the sale or from winding down M&D and has also refused to provide an accounting of the proceeds (*id.* ¶¶ 51-53). Defendant allegedly informed Plaintiff, through text message, that he had no intention of distributing those proceeds to her, stating, "I cannot pay you for something that's not right full [sic] yours" (*id.* ¶¶ 54-55).

Plaintiff initiated this action by filing a Summons and Complaint on October 26, 2018, asserting a mix of individual and derivative claims against Defendant: (1) accounting, (2) breach of fiduciary duty (derivative claim), (3) breach of fiduciary duty (individual claim), (4) conversion, (5) fraudulent inducement, and (6) judicial dissolution.

Now, Defendant seeks to dismiss all of Plaintiff's claims on the basis of documentary evidence (CPLR § 3211 [a] [1]), lack of legal capacity to sue (CPLR § 3211 [a] [3]), failure to state a cause of action (CPLR § 3211 [a] [7]), and lack of personal jurisdiction (CPLR § 3211 [a] [8]). Plaintiff opposes, and cross-moves for leave to file an amended complaint.

DISCUSSION

I. PLAINTIFF'S CROSS-MOTION FOR LEAVE TO AMEND THE COMPLAINT

CPLR 3025(b) requires that "[a]ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." Here, Plaintiff filed a proposed 152-paragraph "Amended Verified Complaint" (*see* NYSCEF 37) purporting to amend her 94-paragraph original Complaint (*see* NYSCEF 28), but without any document "clearly showing the changes or additions to be made" (CPLR 3025 [b]; *E&B Giftware, LLC v Mauer*, 2016 N.Y. Slip Op. 31569[U], at *2 [Sup Ct, New York County 2016] [Sherwood, J.] [denying leave to amend where, inter alia, "[p]laintiffs attach[ed] a copy of their Proposed Second Amended Complaint, but d[id] not show the proposed changes in their moving papers"]).

Adding to the confusion, the cross-motion equivocates between seeking leave to amend and opposing Defendant's motion to dismiss. While it sets out the applicable legal standard governing a motion for leave to amend (NYSCEF 52 at 1), the cross-motion goes on to argue, as though in opposition to the motion to dismiss, that Plaintiff "has made out a claim" in the

Amended Complaint (*see, e.g.*, *id.* at 4, 6, 8, 9, 11). Moreover, Plaintiff has apparently abandoned three causes of action from the original Complaint – the claims for breach of fiduciary duty (individual and derivative) and conversion – in favor of modified versions that appear in the proposed Amended Complaint but does not explain what new factual allegations are being made there.

The cross-motion for leave to amend is denied without prejudice to renewing the motion, "clearly showing the changes or additions to be made to the pleading", within 20 days of entry of this Order.

II. MOTION TO DISMISS

The Court notes that in response to Plaintiff's cross-motion, Defendant has not expressly elected to apply his motion to the proposed amended pleadings (*see Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35, 38 [1st Dept 1998] [ruling "that the moving party has the option to decide whether its motion should be applied to the new pleadings"]). Rather, Defendant seeks dismissal of the original Complaint on various grounds, discussed *infra*, and also denial of Plaintiff's cross-motion "because the amendments sought by [P]laintiff are patently devoid of merit" (NYSCEF 49 ¶ 1 [Reply Mem. of Law in Further Support of Def.'s Mot.]).

What remains in the original Complaint are Plaintiff's claims for an accounting, fraudulent inducement, and judicial dissolution.[2] As such, the following discussion of Defendant's motion to dismiss focuses on those three claims as they appear in the original

[2] Plaintiff "concedes that she failed to properly plead" her claims of breach of fiduciary duty (both individually and derivatively) and wrongful conversion (NYSCEF 33 ¶ 65 [Aff. in Supp. of Cross-Motion]). Accordingly, the motion to dismiss those claims is granted as unopposed.

Complaint, as well as other arguments advanced by Defendant that apply to the original Complaint as a whole.

On a motion to dismiss pursuant to CPLR §§ 3211 (a)(1) and (7), the Court must "accept the complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within a cognizable legal theory" (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 367, 270-71 [1st Dept 2014] [internal quotation marks and citation omitted]; *see also Leon v Martinez*, 84 NY2d 83, 88 [1994]). However, bare legal conclusions and "factual claims which are either inherently incredible or flatly contradicted by documentary evidence" are not "accorded their most favorable intendment" (*Summit Solomon & Feldman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]).

A. The Complaint is Not Dismissed for Lack of Personal Jurisdiction

Defendant contends that the Court lacks personal jurisdiction over Defendant "because the individual to whom the summons and complaint were allegedly delivered was not a person of suitable age and discretion within the meaning of CPLR 308(2)" (NYSCEF 23 at 1 [Def.'s Mot. to Dismiss]). Specifically, in an accompanying affidavit, Defendant avers that the Summons and Complaint was served on his daughter, who was not "a person of suitable age and discretion" under the service statute because she was "suffering from a number of mental illnesses" and did not show the papers to Defendant. These circumstances were previously brought to the Court's attention when Plaintiff sought to enter a default judgment against Defendant, and Defendant moved to vacate (NYSCEF 22 ¶ 48 [Def.'s Aff.]; *see also* NYSCEF 12-20). The default judgment motion was ultimately withdrawn (*see* NYSCEF 14, 20).

Here, Defendant has not made a sufficient showing to warrant dismissal based on lack of personal jurisdiction over him. Indeed, Defendant's counsel fails to cite any legal authority – other than the text of CPLR 308(2) – in support of this argument. There is also no factual allegation that the process server should have known that service upon Defendant's family member, at Defendant's home, was not reasonably likely to convey the Summons and Complaint to Defendant (*see City of New York v Chem. Bank*, 122 Misc 2d 104, 108-09 [Sup Ct, New York County 1983] ["The person to whom delivery is made must objectively be of sufficient maturity, understanding and responsibility under the circumstances so as to be reasonably likely to convey the summons to the defendant."] [collecting cases]; *see also Dime Sav. Bank of New York v Norris*, 78 AD2d 691, 691 [2d Dept 1980]).

B. Defendant's Documentary Evidence Does Not Conclusively Establish Plaintiff's Lack of Capacity to Sue

Defendant melds two distinct grounds for dismissal – defenses founded on documentary evidence (CPLR § 3211 [a] [1]), and lack of legal capacity to sue (CPLR § 3211 [a] [3]) – to argue that Plaintiff lacks standing to sue derivatively on behalf of M&D because documentary evidence conclusively establishes that she is not a member of M&D (*see, e.g.*, *MFB Realty LLC v Eichner*, No. 653549/2014, 2016 WL 3541398, at *3 [Sup Ct New York County June 24, 2015] ["Only a member of an LLC at the time of the alleged wrong to the LLC has standing to bring a derivative claim on behalf of that company."], *aff'd* 161 AD3d 661 [1st Dept 2018]; *Herman v Herman*, 122 AD3d 506, 507 [1st Dept 2014] [dismissing derivative claims because plaintiffs were not members of LLC when lawsuit was commenced and therefore "lacked standing to bring the derivative claims"]). But this argument is unavailing.

The documentary evidence submitted by Defendant – M&D's Articles of Incorporation and Meeting Minutes, both dating to November 2008 – fail to address, much less refute,

Plaintiff's allegation that she acquired a 20% ownership interest in the company in 2012 (*see* NYSCEF 25-26; CPLR 3211(a)(1) ("A party may move for judgment dismissing one or more causes of action asserted against [it] on the ground that . . . a defense is founded upon documentary evidence."). "A paper will qualify as 'documentary evidence' only if . . . (1) it is 'unambiguous'; (2) it is of 'undisputed authenticity'; and (3) its contents are 'essentially undeniable'" (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). Dismissal under CPLR 3211(a)(1) "is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; *VXI Lux Holdco S.A.R.L.*, 171 AD3d at 193 ["A court may not dismiss a complaint based on documentary evidence unless the factual allegations are definitively contradicted by the evidence or a defense is conclusively established."]).

Further undermining Defendant's argument, Plaintiff submits her own documentary evidence, M&D meeting minutes from January 2015, which state that she "hold[s] twenty (20) units of membership interest in the Company" (NYSCEF 39). Plaintiff also submits M&D's tax return forms from 2015-2017, which identify her as a Member (*see* NYSCEF 40-42). At this stage, therefore, Defendant's documentary evidence is an insufficient basis to dismiss Plaintiff's claims for lack of standing.

C. The Complaint States a Cause of Action for an Accounting

"[M]embers of a limited liability company may seek an equitable accounting under common law" (*Gottlieb v Northriver Trading Co. LLC*, 58 AD3d 550, 551 [1st Dept 2009]; *see Atlantis Mgt. Group II LLC v Nabe*, 177 AD3d 542, 543 [1st Dept 2019] [allowing equitable accounting claim brought by non-managing members of LLCs against the managing members]). Here, Plaintiff alleges that Defendant, as a managing member of M&D, has refused to share any

information concerning M&D's financial records (Compl. ¶¶ 88-89). Defendant's primary argument for dismissing the accounting claim – that "[P]laintiff has failed to provide any documentary proof to support her allegation" that Defendant was a managing member or that Plaintiff herself was a member (NYSCEF 23 ¶¶ 19-20 [Def.'s Mot. to Dismiss]) – merely raises fact questions warranting further discovery, not dismissal.

Therefore, the branch of Defendant's motion seeking to dismiss the accounting claim is denied.

D. The Complaint Fails to State a Cause of Action for Fraudulent Inducement

To state a claim for fraudulent inducement, "there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury" (*GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept. 2010], lv denied, 17 NY3d 782 [2011]; *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]). And under CPLR § 3016(b), these allegations must be stated with particularity (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 558 (2009]). Conclusory allegations will not suffice: "[a]lthough there is certainly no requirement of 'unassailable proof' at the pleading stage, the complaint must allege the basic facts to establish the elements of the cause of action" (*id.* at 559 [dismissing fraud claim]).

The allegations in the Complaint fail to set forth "the basic facts to establish the elements of" a fraudulent inducement claim. Plaintiff alleges that "Defendant represented to [her] that M&D was going to distribute all of the proceeds from the sale of M&D's assets" (Compl. ¶ 81). But the Complaint fails to provide sufficiently specific factual allegations to support this alleged misrepresentation. Plaintiff fails to specify, among other things, (i) when Defendant made this representation (whether it was made before or after the sale to Rite Aid, for example), (ii) how

Defendant made it, (iii) whether the representation included a promise to distribute to *Plaintiff* a particular share of the profits, and (iv) how Plaintiff detrimentally relied upon the representation (the Complaint alleges only that the statement was made "with the intention of inducing reliance" [*see id.* ¶ 82]).

"General allegations of lack of intent to perform are insufficient; rather, facts must be alleged establishing that the adverse party, at the time of making the promissory representation, never intended to honor the promise" (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 449 [1st Dept 2017]; *Meiterman v Corp. Habitat*, 173 AD3d 593, 594 [1st Dept 2019]). Moreover, statements of future intent, without more, are not actionable as fraud claims (*Lincoln Place LLC v RVP Consulting, Inc.*, 16 AD3d 123, 124 [1st Dept 2005] [dismissing counterclaims because "Defendants' claim for fraudulent inducement cites nothing more than statements of future intentions or expressions of hope, which are not actionable"]; *Cronos Grp. Ltd. v XCOMIP, LLC*, 156 AD3d 54, 62-63 [1st Dept 2017]).

Therefore, the fraudulent inducement claim is dismissed.

E. The Complaint Fails to State a Cause of Action for Judicial Dissolution

The Complaint also fails to state a cause of action for judicial dissolution under New York's Limited Liability Company Law § 702, which provides:

> On application by or for a member, the Supreme Court in the judicial district in which the office of the limited liability company is located may decree dissolution of a limited liability company *whenever it is not reasonably practicable to carry on the business* in conformity with the articles of organization or operating agreement.

(emphasis added).

Here, "Plaintiff's allegations that [s]he has been systematically excluded from the operation and affairs of the company by defendant[ ] are insufficient to establish that it is no longer 'reasonably practicable' for the company to carry on its business, as required for judicial

dissolution under Limited Liability Company Law § 702" (*Doyle v Icon, LLC*, 103 AD3d 440, 440 [1st Dept 2013]). Nor does Plaintiff make any showing, other than conclusory allegations, that the sale of M&D's assets to Rite Aid compel judicial dissolution (*see In re 1545 Ocean Ave., LLC*, 72 AD3d 121, 131 [2d Dept 2010] ["hold[ing] that for dissolution of a limited liability company pursuant to LLCL 702, the petitioning member must establish, in the context of the terms of the operating agreement or articles of incorporation, that (1) the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or (2) continuing the entity is financially unfeasible")]).

Therefore, the claim for judicial dissolution is dismissed.

* * * *

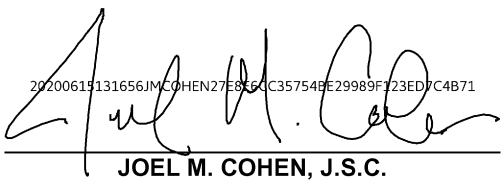
Accordingly, it is

ORDERED that Defendant's motion to dismiss is Denied as to Plaintiff's claim for an accounting (first cause of action) and is otherwise Granted; it is further

ORDERED that Plaintiff's cross-motion for leave to amend is Denied, without prejudice to renewing the motion, in compliance with the provisions of CPLR 3025[b], within 20 days of entry of this Order; and it is further

ORDERED that the parties are to appear for a status conference on July 14, 2020 at 11 a.m.

This constitutes the Decision and Order of the Court.



6/15/2020
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE