

WCINY LLC v 366 Capital LLC
2021 NY Slip Op 30440(U)
February 16, 2021
Supreme Court, New York County
Docket Number: 654918/2019
Judge: Barry Ostrager
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW
YORK NEW YORK COUNTY**

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

-----X

WCINY LLC, individually and on derivatively on behalf of
366 MANHATTAN AVENUE LLC and 366A LLC,

Plaintiff,

- v -

366 CAPITAL LLC, JOHNNY DIN, MATTHEW CHUA,
ERIC CHAN, SEAN COHANE, JOSHUA COHANE, 321
STOCKHOLM, LLC, 321 STOCKHOLM STREET, LLC
and SOONG & LIU, ESQS.,

Defendants.

-----X

HON. BARRY R. OSTRAGER

INDEX NO.	654918/2019
MOTION DATE	
MOTION SEQ. NO.	001 & 002

DECISION + ORDER ON MOTIONS

This action arises from a real estate investment of approximately \$500,000 made by plaintiff WCINY LLC (“WCINY”) into two LLCs, 366 Manhattan Avenue LLC (“366 MA”) and 366A LLC (collectively the “366 Entities”), both managed by Defendant 366 Capital LLC (“366 Capital”). The 366 Entities were formed to purchase two single parcels of real property located at 366 and 366A Manhattan Avenue in Brooklyn (“the Properties”), to renovate the multi-family residences located on the Properties, and to then sell the Properties for a profit after about five years. WCINY commenced this action individually and derivatively on behalf of the 366 Entities, asserting ten causes of action in the Complaint, six of which are derivative in whole or in part and four of which are asserted individually (NYSCEF Doc. No. 1).

Before the Court are two motions to dismiss the Complaint pursuant to CPLR 3211(a)(1) and (7) based on documentary evidence and failure the state a cause of action. The first motion (seq. 001) is made on behalf of defendants 366 Capital, Johnny Din, Matthew Chua and Eric Chan to dismiss all the derivative claims (the First, Third, Fourth, Ninth and Tenth Causes of Action, and a

portion Seventh Cause of Action), as well as the two direct causes of action for fraud against defendants Din and 366 Capital (the Fifth and Sixth Causes of Action). The second motion (seq. 002) is made on behalf of defendants 321 Stockholm, LLC and 321 Stockholm Street, LLC (“the Stockholm Defendants”) to dismiss the only two causes of action asserted against them, both of which are asserted derivatively (the Ninth and the Tenth Causes of Action), as well as the cross-claims asserted by the co-defendant escrow agent Soong & Liu, Esqs. The Cohane Defendants have answered the Complaint and have not moved to dismiss. After the motions were orally argued in 2020, the Court reserved decision pending a referral to JHO Eileen Bransten for mediation. The parties spent considerable time trying to resolve the case, but ultimately were only able to resolve the claims involving defendant Soong & Liu, Esqs., and a Stipulation of Discontinuance was filed as to all claims and cross-claims involving that party on December 3, 2020 (NYSCEF Doc. No. 139). Counsel for the remaining parties asked the Court to determine the motions without further argument, which this decision does.

Some understanding of the factual allegations and the parties is necessary to evaluate the claims. According to the Complaint, Jacob Wang, the principal of WCINY, was solicited by his professor defendant Din in 2016 to co-invest in the 366 Entities, along with defendants Sean and Joshua Cohane. The \$500,000 investment made by WCINY represents about 21.28% of the equity interest in the properties. The remaining 78.72% interest was held by approximately nineteen other investors. Defendants Matthew Chua and Eric Chan also became involved in the deal, and Chua is presently the managing member of 366 Capital, which is the Manager of the 366 Entities (see Chua Aff., NYSCEF Doc. No. 13). A written Operating Agreement was executed for each of the 366 Entities (NYSCEF Doc. Nos. 15 and 16), and the Properties were purchased for a total of approximately \$4,675,000, some of which was funded with a loan

(NYSCEF Doc. 13). By early 2018, the renovations had been completed and all the residences at the Properties had been rented. *Id.*

At some point in time, WCINY became dissatisfied with the management of the 366 Entities, including the decision to buyout the interest of the Cohane brothers and to purportedly invest in a deal to acquire real property located at 321 Stockholm Street in Brooklyn, which allegedly led to the commingling of funds between the 366 Entities and the Stockholm Defendants. This suit was commenced on August 2, 2019, and the Complaint asserts ten causes of action, two of which (the Seventh and Eighth against Soong & Liu) will not be discussed due to their discontinuance: (1) Breach of Contract *derivatively* against 366 Capital; (2) Breach of Contract (Information Rights) directly against 366 Capital (not challenged in these motions); (3) Breach of Fiduciary Duty *derivatively* against 366 Capital related to 321 Stockholm; (4) Breach of Fiduciary Duty (Cohane Buyout) *derivatively* against Chua, Din, Chan, the Cohane Brothers, and 366 Capital; (5) Fraud (Co-Investment) directly against Din and 366 Capital; (6) Fraud (Valuations) directly against 366 Capital; (9) Constructive Trust (321 Stockholm) *derivatively* against the Stockholm Defendants; and (10) Quiet Title (321 Stockholm) *derivatively* against the Stockholm Defendants. In the prayer for relief, WCINY seeks damages in excess of \$1 million, a constructive trust over defendants' membership interests in the 366 Entities, a constructive trust over funds invested in the Stockholm Defendants or the real property and assets acquired with those funds, removal of 366 Capital as Manager of the 366 Entities, rescission of the Cohane transaction, and a determination of the interest held by the 366 Entities in 321 Stockholm.

It is undisputed that no demand was made on the 366 Entities' individual members to commence suit before the derivative claims were filed. Indeed, WCINY specifically alleges in its Complaint (at ¶¶ 95-97) that it did not demand that 366 Capital, the Manager of the 366 Entities,

commence suit because 366 Capital and the individual defendants who effectively control that entity are the targets of the wrongdoing alleged in the Complaint. But Defendants assert the derivative claims must be dismissed for failure to plead demand futility in accordance with Delaware law which, among other things, requires allegations of demand futility as to all the individual members of the 366 Entities, a claim vigorously disputed by WCINY.

The Delaware Limited Liability Company Act allows a member, such as WCINY, to pursue claims derivatively on behalf of the company (here, the 366 Entities) only if the member can demonstrate that “managers or members with authority to do so have refused to bring the action or if an effort to cause those managers or members to bring the action is not likely to succeed.” 6 Del. C. § 18-1001. To successfully plead demand futility, a plaintiff must allege particularized facts sufficient to raise a reasonable doubt that (1) the directors are disinterested and independent, or that (2) the challenged transaction was otherwise the product of a valid exercise of business judgment. Defendants assert WCINY has failed to satisfy these pleading requirements and that, in any event, WCINY is not an adequate derivative plaintiff because it and its principal Jacob Wang are acting in their own self-interest to secure a buy-out similar to the Cohane buy-out, and not for the good of the Capital Entities consistent with the member’s fiduciary duties. *See Youngman v. Tahmoush*, 457 A.2d 376, 379 (Del. Ch. 1983) (“the plaintiff in a derivative action must be qualified to serve in a fiduciary capacity as a representative of a class, whose interest is dependent upon the representative’s adequate and fair prosecution”).

In opposition, WCINY first asserts the demand need only be made as to 366 Capital as the “sole Manager”, and not to all the individual members. Citing 6 Del. C. §§ 18-1001, 18-1003 and *Obeid v. Hogan*, C.A. No. 11900-VCL, 2016 WL 3356851 (Del. Chanc. June 10, 2016), WCINY argues that, in a member-managed LLC, decisions regarding a derivative action must be

made by the “members with authority to do so,” and in a manager-managed LLC, by “managers ... with authority to do so.” WCINY also cites Section 8.01 of the Operating Agreement which provides that 366 Capital “shall be the sole Manager” of the 366 Entities with authority to “make decisions with respect to” the Entities.

A demand to 366 Capital would be futile here, WCINY asserts, because 366 Capital and the individual defendants are facing liability for actions taken in bad-faith in their own self-interest and for their own economic benefit, such as the Cohane buyout and the investment in 321 Stockholm, which allegedly compromised the ability of the 366 Entities to pay their debt. Further, WCINY is an adequate plaintiff, as it seeks to restore to the 366 Entities monies that were misused and related relief.

Although the decision is a close one, this Court finds the allegations by WCINY relating to demand futility suffice to survive the dismissal of the derivative claims at this stage of the litigation. However, the derivative claims do not fare as well on the merits. While the derivative breach of contract claim in the First Cause of Action against 366 Capital has been adequately stated, the Court finds that the Third and Fourth Causes of Action for breach of fiduciary duty relative, to the Stockholm deal and the Cohane buyout, respectively, are dismissed as duplicative of the breach of contract claim insofar as they relate to 366 Capital because the conduct at issue is within the scope of the Operating Agreement. The Fourth Cause of Action stands as against the individual defendants, but barely. Defendants argue that Section 13.02 of the Operating Agreements, the “Exculpation” provision, exculpates defendants for all conduct, including breaches of the traditional fiduciary duty of loyalty, that do not rise to the level of bad faith, gross negligence, willful misconduct, or a willful breach of the operating agreement. However, when the allegations by WCINY are accepted as true and liberally construed, as the Court must

do, they suffice to state a claim at the pleading stage where no dispositive documentary evidence has been submitted mandating dismissal. *Leon v Martinez*, 84 NY2d 83, 87-88 (1994).

As indicated earlier, WCINY also asserts two direct claims sounding in fraud. The Fifth Cause of Action against 366 Capital and Din relate to representations made as to the nature of investments to be made by the co-investors. The alleged misrepresentations are overly vague, and plaintiff's sophisticated principal cannot fairly claim justifiable reliance when the information was available for his review prior to the investment. The same holds true for the Sixth Cause of Action alleging fraud by 366 Capital relative to the valuation of the Properties. However, to the extent the allegations may also fall within the surviving claims for breach of contract and Din's breach of fiduciary duty, they may be addressed in that context. Thus, motion sequence 001 is granted to the extent of dismissing the Third, Fifth and Sixth Causes of Action in their entirety, and the Fourth is dismissed as to 366 Capital.

The Court now turns to the motion by the Stockholm Defendants relating to the Ninth and Tenth Causes of Action. To the extent both claims are derivative in nature, the above ruling controls. But again, the result differs as to the merits. The Ninth Cause of Action seeks a constructive trust over the funds 366 Capital allegedly invested into the Stockholm LLCs wrongfully to purchase 321 Stockholm Street. As money damages against 366 Capital suffice and are fully secured by the Properties, no basis exists for the equitable remedy of a constructive trust over the assets of the Stockholm Defendants, LLCs which are themselves comprised of multiple members. Nor does WCINY have a direct relationship with the Stockholm Defendants to justify giving WCINY an ownership interest in 321 Stockholm, as urged in the Tenth Cause of Action. Therefore, that cause of action is dismissed as well. Since the cross-claims were discontinued by Stipulation, the Stockholm Defendants are no longer parties to this action.

Accordingly, it is hereby

ORDERED that motion sequence 001 is granted to the extent of dismissing the Third, Fifth and Sixth Causes of Action in their entirety, and the Fourth Cause of Action is dismissed as to defendant 366 Capital LLC; and it is further

ORDERED that motion sequence 002 is granted to the extent of dismissing the Ninth and Tenth Causes of Action, and all cross-claims, against defendants 321 Stockholm, LLC and 321 Stockholm Street, LLC in their entirety, and the Clerk is directed to sever and dismiss those defendants from this action; and it is further

ORDERED that the Clerk is directed to sever and dismiss the Seventh and Eighth Causes of Action and to sever and dismiss defendant Soong & Liu, Esqs. from this action by Stipulation (NYSCEF Doc. No. 139); and it is further

ORDERED that counsel shall meet and confer to ascertain what discovery remains outstanding and to agree on a reasonable schedule for the completion of discovery and to file a Proposed Stipulation and Order to be discussed with the Court during the compliance conference scheduled for February 24, 2021 at 10:00 a.m.

Dated: February 16, 2021


BARRY R. OSTRAGER, 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 checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE