

**Lazar v Dweck**

2022 NY Slip Op 30406(U)

February 1, 2022

Supreme Court, New York County

Docket Number: Index No. 653718/2020

Judge: Jennifer G. Schechter

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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: COMMERCIAL DIVISION**

PRESENT: HON. JENNIFER SCHECTER PART 54

Justice

-----X

INDEX NO. 653718/2020

SARAH LAZAR, SRL INVESTORS LLC,

MOT. SEQ. NOS. 005 006

Plaintiffs,

- v -

**DECISION & ORDER ON  
MOTIONS**

ALBERT DWECK,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 191, 192, 193, 194, 195, 214, 215, 216, 217, 218, 224

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 219, 221, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237

were read on this motion to/for DISMISSAL.

Motion seq. nos. 005 and 006 are consolidated for disposition.

Motion Seq. 5

Sarah Lazar and Ron Lazar (the Lazars) move to dismiss the second, fourth, and sixth through tenth counterclaims and for sanctions.

While of questionable utility, nothing prohibits a mirror-image declaratory judgment claim and the second counterclaim thus survives.

The unjust enrichment (fourth) counterclaim is not entirely duplicative because it does not seek identical damages (the "failure to contribute" is not conversion).

Section 14.9 of the amended operating agreement (the AOA) provides that "This Agreement, together with all Exhibits hereto, constitutes the entire agreement of the Members relating to the Company with respect to the subject matter hereof and supersedes any and all prior contracts or agreements with respect to the subject matter hereof, whether oral or written" (Dkt. 206 at 22). "The parties' subsequent agreement on the same subject matter controls" (Dkt. 61 at 1, citing *Hyuncheol Hwang v Mirae Asset Sec. (USA) Inc.*, 165 AD3d 413 [1st Dept 2018]). Since the AOA governs Duke's internal affairs and the parties' relationship with the Company, it supersedes the 2016 agreement's provisions governing the confidentiality of Duke's information and the sixth counterclaim is dismissed.

The seventh counterclaim seeking recovery for defamation is dismissed as well. Dweck claims that Ms. Lazar's September 24, 2020 email (Dkt. 167) "was false because she was never a managing partner of Duke Properties," "did not commence this action on behalf of the investors" and "did not invest many years of sweat equity into Duke" (Dkt. 165 at 25-26). Even if the statements are false they are not defamatory (*Franklin v Daily Holdings, Inc.*, 135 AD3d 87, 92 [1st Dept 2015]). The October 2, 2020 email (Dkt. 168) cannot support a defamation claim because it is a substantially accurate report of the claims asserted in this action (*Neiman Nix v Major League Baseball*, 189 AD3d 547, 548 [1st Dept 2020]). The March 22, 2021 email (Dkt. 169) also does not support a defamation claim. Whether Dweck is "honest & trustworthy" is an inactionable opinion (*Brian v Richardson*, 87 NY2d 46, 51 [1995]) given the disclosed litigation context and is pertinent to a substantially accurate framing of her claim (that she was improperly not paid for the value of her membership interest) in this non-sham action (*Flomenhaft v Finkelstein*, 127 AD3d 634, 638 [1st Dept 2015]; *see Nix*, 189 AD3d at 548).

The eighth counterclaim for violation of the General Business Law is dismissed. Ms. Lazar's social-media posting of non-deceptive pictures wholly unrelated to consumer-oriented conduct cannot support a claim for deceptive trade practices and false advertising merely because there is an active private dispute between the parties over her membership status. It is implausible that any consumers were deceived or harmed by the postings.

However, since Ms. Lazar no longer may act on behalf of Duke, a claim for injunctive relief under § 43(a) of the Lanham Act to stop her from infringing Duke's unregistered mark (ninth counterclaim) may be viable. While there clearly are questions of fact, for instance, about the protectability of the mark and whether her postings are actionable, the claim is properly pleaded and not conclusively rebutted by documentary evidence. Of course, one would assume Ms. Lazar might want to moot this claim for injunctive relief rather than spend money litigating it.

The malpractice (tenth) counterclaim is baseless. Dweck reviewed the AOA and approved it. In any event, if the parties intended the AOA to read as Dweck interprets it, "then he has no claim; and if . . . the AOA reads as Plaintiffs assert, then that is still what the parties agreed and there can be no malpractice as a matter of law" (Dkt. 224 at 18). The malpractice claim is dismissed for lack of nonspeculative damages (*Sapienza v Becker & Poliakoff*, 173 AD3d 640 [1st Dept 2019]; *see Heritage Partners, LLC v Stroock & Stroock & Lavan LLP*, 133 AD3d 428, 429 [1st Dept 2015], *accord Miami Capital, LLC v Hurwitz*, 174 AD3d 414 [1st Dept 2019]).

The court declines to impose sanctions.

Motion Seq. 6

To the extent the motion seeks dismissal pursuant to CPLR 3211(a)(1), it is untimely (*McMahon v Cobblestone Lofts Condo.*, 161 AD3d 536 [1st Dept 2018]). Defendant conflates whether he waived defenses based on documentary evidence--of course, he has not--with whether his motion on that ground is timely (CPLR 3211[e] ["At any time **before service of the responsive pleading is required**, a party may move on one or more of the grounds set forth in subdivision (a)... Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraph two, seven or ten of subdivision (a) **may be made at any subsequent time**"] [emphasis added]). It is not. In any event, many of the documentary-evidence based arguments go beyond the scope permitted under CPLR 3211(a)(1) and appear to implicate disputed issues of fact prior to discovery being meaningfully completed.

Lazar's individual direct breach-of-fiduciary claims are dismissed for failure to state a claim. The court already held the claims are derivative and that Ms. Lazar was not improperly terminated as COO (Dkt. 62). Dismissal of the declaratory judgment claim related to plaintiffs' membership status is denied based on law of the case (Dkt. 184).

Dweck correctly contends that plaintiffs cannot assert derivative claims based on his use of the LOC before they became members (BCL § 626[b]; see *LNyC Loft, LLC v Hudson Opportunity Fund I, LLC*, 154 AD3d 109, 113 [1st Dept 2017] ["In the years since *Tzolis* was decided, courts have looked to New York statutory and common law on partnerships and corporations in determining certain questions arising in the LLC context"]). Thus, plaintiffs cannot seek recovery for lack of such funding prior to becoming members. Plaintiffs can assert a claim, however, based on Dweck's extensions of the LOC after they became members, which allegedly did not benefit Duke, since Dweck would have had to repay the LOC and Duke would have then had access to the funds. Lazar's contractual right to ensure that the money Dweck owes Duke does not affect her personal stake in Duke is inapposite since the derivative claim belongs to Duke; thus, any injury suffered by Duke is distinct and separately redressable based on the loss of the use of its funds.

The derivative claims based on allegations concerning investors that are not members of Duke or properties that are not owned by Duke are dismissed for lack of damages. At most, plaintiff has pleaded a hypothetical harm that Duke may suffer if these allegations are proven true and are discovered. There is no current redress that can be afforded to Duke at this juncture, so a claim for breach of fiduciary duty is not stated (see *CWCapital Inv. LLC v CWCapital Cobalt VR Ltd.*, 182 AD3d 448, 453 [1st Dept 2020])

Any direct claim for breach of the Purchase Agreement that does not stem from the AOA must be dismissed in favor of arbitration (Dkt. 207 at 5) because Dweck has not waived

his right to arbitrate such claim (Dkt. 99; *see Skyline Steel, LLC v PilePro LLC*, 139 AD3d 646, 647 [1st Dept 2016]).

While some of the derivative breach-of-contract and breach-of-fiduciary claims may be duplicative, the parties' briefs regarding this issue are less than clear. For instance, there are claims that appear to be predicated both on express contractual violations and on the conduct being a breach of the duty of loyalty. Duplication may be addressed more clearly on summary judgment since it will not affect the scope of this action.

Dweck's remaining contentions, such as plaintiffs' supposed failure to plead their claims with particularity, are unavailing.

Accordingly, it is ORDERED that the Lazars' motion to dismiss the counterclaims (005) is GRANTED to the extent that the sixth, seventh, eighth and tenth counterclaims are dismissed, and the motion is otherwise DENIED; and it is further

ORDERED that defendant's motion to dismiss the second amended complaint (006) is GRANTED IN PART to the extent that: (1) damages on the first cause of action (a derivative claim for breach of fiduciary duty) are limited to those incurred after plaintiffs became members of Duke and the portion of the claim concerning investors that are not members of Duke or properties not owned by Duke are dismissed; (2) the second cause of action (a direct claim for breach of fiduciary duty) is dismissed; (3) the portion of the third cause of action (for breach of contract) concerning any discrete breach of the Purchase Agreement is dismissed without prejudice in favor of arbitration and the remaining portion for breach of the AOA is construed as a derivative claim; and the motion is otherwise DENIED.

20220201110609JSCHECTE742725B7AC7044798B05E9D9886C1321  


2/1/2022  
DATE

\_\_\_\_\_  
JENNIFER SCHECTER, 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       |
| <input type="checkbox"/> | DENIED        | <input checked="" type="checkbox"/> | OTHER                 |