

O'Brien v Schroeder
2022 NY Slip Op 33725(U)
October 31, 2022
Supreme Court, New York County
Docket Number: Index No. 657195/2021
Judge: Lyle Frank
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

CAT O'BRIEN

Plaintiff,

- v -

STEPHANIE SCHROEDER,

Defendant.

-----X

INDEX NO. 657195/2021

MOTION DATE 06/02/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for DISMISS

Upon the foregoing documents, this motion to dismiss he counter-claims is granted in its entirety.

Plaintiff CAT O'BRIEN ("O'brien") commenced this action for breach of contract and indemnification against defendant STEPHANIE SCHROEDER ("Shroeder") after defendant allegedly stopped making contractual payment to plaintiff in connection with a Purchase and Sale Agreement ("PSA") between the parties for shares of the non-party company Alchemy. Defendant counterclaims against plaintiff for breach of contract (Counterclaim #1), tortious interference with business relationships (Counterclaim #2), theft of trade secrets (Counterclaim #3), conversion (Counterclaim #4), indemnification (Counterclaim #5), and contribution (Counterclaim #6).

Plaintiff now moves to dismiss all of defendant's counterclaims pursuant to CPLR 2311(a)(1), (3), and (7), alleging failure to state a cause of action, election of remedies, and lack of standing. The Court will address each argument in turn.

Discussion

When considering a motion to dismiss based upon CPLR § 3211(a)(7), the court must accept the alleged facts as true, accord the plaintiff the benefit of every possible favorable inference, and determine whether the facts alleged fit into any cognizable legal theory. *See Leon v. Martinez*, 84 N.Y.2d 83 (1994). With respect to CPLR§3211(a)(1), a motion to dismiss on the ground that the action is barred by documentary evidence may be appropriately granted only where the documentary evidence utterly refutes a plaintiff’s factual allegations, and conclusively establishes a defense as a matter of law. *See Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 327 (2002). Furthermore, judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are “essentially undeniable,” would qualify as “documentary evidence” in the proper case. *Fontanetta v. Doe*, 73 A.D.3d 78 (2d Dep’t 2010).

Lack of standing

Plaintiff moves to dismiss defendant’s second, third, and fourth counterclaims against defendant, alleging lack of standing and stating that those counterclaims are aimed at the company Alchemy, which is not a defendant to this action. Defendant counterargues by stating that those causes of action seek to address a wrong to defendant directly, and further requests that the court deem at its discretion a derivative claim stated and add Alchemy as an additional defendant.

“[A]n individual shareholder, has no right to bring an action in his own name for a wrong committed against the corporation.” *Schleidt v Stamler*, 106 AD2d 264, 265 (1st Dep’t 1984). Further, section 610 of the New York Limited Liability Law reads: “[a] member of a limited liability company is not a proper party to proceedings by or against a limited liability company, except where the object is to enforce a member’s right against or liability to the limited liability company.”

Here, defendant is the sole shareholder of Alchemy, a limited liability company which is not a party to this action. Defendant counterclaims that Plaintiff tortiously interfered with Alchemy's business relationships, stole trade secrets from Alchemy, and converted documents from Alchemy. It is this Court's opinion that those causes of action do not seek to address a wrong to defendant directly. Further, the Court reviewed defendant's other arguments and requests and found them unavailing, as the cases cited are either completely distinguishable or hold no authority in this Court. Accordingly, this motion to dismiss is granted with regards to causes of action two, three, and four.

Election of remedies

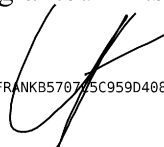
Plaintiff moves to dismiss defendant's first, fifth, and sixth counterclaims against defendant, alleging election of remedies, and stating defendant's failure to complete payments under the PSA amounts to an election of remedies requiring dismissal of these claims. Defendant counterargues by stating that a party need not elect her remedy at the pleading stage.

For an election of remedies to bar the pursuit of alternative relief, legal or equitable, a party must have chosen one of two or more co-existing inconsistent remedies, and in reliance upon that election, that party must also have gained an advantage, or the opposing party must have suffered some detriment. *331 E. 14th St. LLC v. 331 E. Corp.*, 293 A.D.2d 361, 740 N.Y.S.2d 327 (2002).

Here, defendant chose to suspend payments because of plaintiff's alleged breach of contract, and now seeks damages for the alleged breach, as well as indemnity and contribution from the plaintiff. It is undeniable that the plaintiff suffered a detriment from the suspension of payments, and, accordingly, the defendant has elected a remedy. Therefore, this motion to dismiss is granted with regard to causes of action one, five, and six.

Based on the holding above, the Court does not each the issue of whether the counter-claims state a cause of action. Accordingly, it is hereby

ORDERED that plaintiff's motion to dismiss counterclaims is granted in its entirety.


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10/31/2022
DATE

LYLE FRANK, J.S.C.

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