

Kutsak v Slivko

2022 NY Slip Op 33848(U)

November 1, 2022

Supreme Court, Kings County

Docket Number: Index No. 510886/2022

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS ; CIVIL TERM: COMMERCIAL 8

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MAKS KUTSAK, derivatively on behalf of
nominal Defendant Global Health Pharmacy
Corp., and directly,
Plaintiff,

- against -

Index # 510886/2022

IRINA SLIVKO,
Defendant,

and

November 1, 2022.

GLOBAL HEALTH PHARMACY CORP.,
Nominal Defendant,

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PRESENT: HON. LEON RUCHELSMAN

The defendant has moved pursuant to CPLR §3211 seeking to dismiss the second, fourth and seventh causes of action. The plaintiff opposes the motion. Papers were submitted by all parties and arguments held. After reviewing the arguments of all parties this court now makes the following determination.

According to the Amended Verified Complaint the parties are each half owners of a pharmacy located in Staten Island. During 2021 the defendant insisted the plaintiff could not prove he was an owner of the pharmacy and eventually removed the plaintiff as a signatory of the pharmacy's bank account and ceased paying the plaintiff his monthly distributions. This lawsuit was filed wherein the plaintiff asserts causes of action for declaratory relief he is an owner, a breach of a fiduciary duty, an accounting, oppression, claims pursuant to BCL §706 and

§716, conversion and alternative claims for breach of contract, constructive trust and unjust enrichment.

The defendant has now moved seeking to dismiss the fourth cause of action of shareholder oppression which seeks the appointment of a receiver, the removal of the defendant as an officer and director of the pharmacy and that the defendant sell her share to the plaintiff and enter into a non-compete and a non-disclosure agreement. Without any opposition filed the motion is granted.

The defendant has also moved seeking to dismiss the second and seventh causes of action as they relate to the faithless servant doctrine. The plaintiff has opposed that relief.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Strujan v. Kaufman & Kahn, LLP, 168 AD3d 1114, 93 NYS3d 334 [2d Dept., 2019]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Weiss v. Lowenberg, 95 AD3d 405, 944 NYS2d 27 [1st Dept., 2012]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course,

plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Moskowitz v. Masliansky, 198 AD3d 637, 155 NYS3d 414 [2021]).

The faithless servant doctrine was first coined in Herman v. Branch Motor Express Co., 67 Misc2d 444, 323 NYS2d 794 [Civil Court of the City of New York, 1971] where the court stated "a servant who is faithless to his master on Tuesday thereby forfeits the wages he earned on Monday" (id). The doctrine states that an agent who owes a duty of fidelity to a principal and is faithless in that duty thereby forfeits compensation due (see, Phansalkar v. Anderson Weinroth & Company L.P., 344 F3d 184 [2d Cir. 2003]). Further, pursuant to the doctrine the employer is entitled to a return of any compensation paid to an employee during the period of her disloyalty (CARCO GROUP, Inc., v. Maconachy, 718 F3d 72 [2d Cir. 2013], see, also, Torres v. Gristede's Operating Corp., 628 F.Supp2d 447 [S.D.N.Y. 2008]).

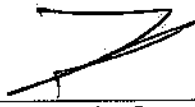
The defendant argues the Amended Verified Complaint fails to adequately plead a claim under the faithless servant doctrine. The defendant argues that "Plaintiff's Verified Amended Complaint fails to allege in what context Defendant has acted as a faithless servant, how Defendant's alleged disloyal activity was related to the performance of Defendant's duties, how Defendant benefitted from such actions, and that said alleged disloyalty permeated Defendant's service in its most material and

substantial part" (see, Memorandum of Law, page 11 [NYSCEF Doc. No. 35]). However, the Amended Verified Complaint contains sufficient allegations the defendant forfeited her compensation by acting in a faithless manner. Thus, the Amended Verified Complaint asserts the defendant improperly took negative actions against the plaintiff (see, Verified Amended Complaint, ¶ 31, ¶ 60 [NYSCEF Doc. No. 29]). While those allegations will be the subject of discovery, at this stage of the litigation they adequately allege the elements of the faithless servant doctrine. Further, these allegations harm not just the plaintiff but the pharmacy as a whole since they necessarily undermine the efficient and smooth operation of the business. The mere fact the allegations of faithlessness all relate to harms against the plaintiff does not mean the pharmacy was not harmed as well. As noted, at this juncture the Amended Verified Complaint adequately alleges a violation of the faithless servant doctrine. Further discovery will surely narrow and sharpen these issues. Therefore, the motion seeking to dismiss that cause of action is denied.

So ordered.

ENTER:

DATED: November 1, 2022
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC