

Schmerler v J Synergy Green, Inc.
2022 NY Slip Op 34458(U)
December 23, 2022
Supreme Court, New York County
Docket Number: Index No. 650659/2022
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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MARC SCHMERLER,

Index No. 650659/2022

Plaintiff

- against -

DECISION AND ORDER

J SYNERGY GREEN, INC., SOLAR DONE
RIGHT, LLC, AVROHOM Y. SOROTZKIN, and
YAAKOV MILSTEIN,

Defendants
-----x

LUCY BILLINGS, J.S.C.:

I. INTRODUCTION

According to the complaint, plaintiff loaned defendant J Synergy Green, Inc., \$182,500 on October 17, 2017, when plaintiff also agreed to work for that corporation. A convertible promissory note dated October 17, 2017, memorialized the loan, with a maturity date of October 15, 2020. Neither J Synergy Green nor any other defendants made any of the required payments. Plaintiff seeks damages in the amount of the note or a declaratory judgment for and specific performance of an alternate remedy specified in the note, the transfer to him of shares representing a 5% interest in J Synergy Green. If the court determines plaintiff is entitled to the shares, plaintiff seeks an accounting and access to J Synergy Green's books and records.

Defendants move to dismiss the first six causes of action.

On the record at oral argument of the motion, plaintiff discontinued his second cause of action for breach of the covenant of good faith and fair dealing, Tr. of Proceedings at 4 (July 1, 2022), NYSCEF Doc. 13, and any claim for attorneys' fees or punitive damages pursuant to New York Civil Rights Law § 70-a. Id. at 2. Defendants do not move to dismiss plaintiff's seventh cause of action for unjust enrichment. Nor do they independently move to dismiss the claims against the three defendants other than J Synergy Green based on allegations that those other defendants are its alter egos.

Upon a motion to dismiss claims, the court considers the factual allegations as true. Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc., 37 N.Y.3d 169, 175 (2021); Connaughton v. Chipotle Mexican Grill, Inc., 29 N.Y.3d 137, 141 (2017); Seaman v. Schulte Roth & Zabel LLP, 176 A.D.3d 538, 538 (1st Dep't 2019). Defendants move to dismiss the six causes of action pursuant to C.P.L.R. § 3211(a)(7), so defendants bear the burden to establish that the complaint "fails to state a viable cause of action." Connolly v. Long Island Power Auth., 30 N.Y.3d 719, 728 (2018). Dismissal is warranted if the complaint fails to allege facts that "fit within any cognizable legal theory." Sassi v. Mobile Life Support Servs., Inc., 37 N.Y.3d 236, 239 (2021).

II. FIRST CLAIM - BREACH OF THE PROMISSORY NOTE

Defendants' challenge to the breach of contract claim is based on the terms of the convertible promissory note, Exhibit 1 to the Complaint. NYSCEF Doc. 2. Defendants acknowledge the loan and the note's enforceability, but maintain that ¶ 8 of the note automatically, without further action by either party, converts the repayment obligation to shares in the event of nonpayment and provides that the note then terminates and is of no further effect, barring plaintiff's action to enforce the note. Defendants ignore ¶ 9, which requires plaintiff to endorse and surrender the note to J Synergy Green after nonpayment on the maturity date and the corporation then to provide plaintiff certificates for the shares. J Synergy Green is released from its payment obligation only once the corporation provides the shares. Since the complaint does not allege compliance with ¶ 9 of the note, its terms do not establish a failure to allege a claim for breach of the note. Therefore the court denies defendants' motion to dismiss plaintiff's first cause of action.

III. THIRD CLAIM - DECLARATORY JUDGMENT

Plaintiff asks the court for a declaratory judgment that ¶ 6 of the promissory note is enforceable, in the event ¶ 6 and ¶ 8 create an ambiguity or conflict. In adjudicating plaintiff's other claims, either damages for breach of the note or its

specific performance, the court will determine which provisions of the note are applicable and enforceable and how they are interpreted. Thus these other claims provide an adequate remedy, and the claim for a declaratory judgment is unnecessary and duplicative. Moghtaderi v. Apis Capital Advisors, 205 A.D.3d 504, 506 (1st Dep't 2022); Nationstar Mtge., LLC v. Ocwen Loan Servicing, LLC, 194 A.D.3d 490, 493 (1st Dep't 2021). Therefore the court grants defendants' motion to dismiss plaintiff's third cause of action.

IV. FOURTH CLAIM - SPECIFIC PERFORMANCE

Plaintiff pleads the fourth cause of action, for specific performance of ¶ 8 of the promissory note, in the alternative, in the event the court concludes that ¶ 8 provides plaintiff his only available relief in this action, requiring defendants to tender to him J Synergy Green's shares representing his 5% interest in the corporation. Defendants maintain that the note's terms automatically convert the debt into shares and terminate the note, so it is now void. As discussed above, defendants ignore ¶ 9, which requires plaintiff to endorse and surrender the note to J Synergy Green and it then to provide plaintiff certificates for the shares, to release J Synergy Green from its payment obligation. Again, since the complaint does not allege that ¶ 9's process for conversion has been completed, the note does not establish the failure to allege a claim for specific

performance of the note. Therefore court denies defendants' motion to dismiss plaintiff's fourth cause of action.

V. FIFTH CLAIM - ACCOUNTING

In the event ¶ 8 of the promissory note controls, so that plaintiff owns shares representing a 5% interest in J Synergy Green, he has demanded an accounting, including the corporation's balance sheets and profit and loss statements from 2017 through the present, pursuant to New York Business Corporation Law § 624(e). Compl. Ex. 3, NYSCEF Doc. 4. Defendants refused his demand, id. Ex. 4, NYSCEF Doc. 5, and move to dismiss this claim because plaintiff has not pleaded defendants' fiduciary relationship with him. According to the authority on which defendants rely, either a fiduciary relationship or a judicial determination of entitlement is required to obtain an accounting. Darlagiannis v. Darlagiannis, 48 A.D.2d 875, 875 (2d Dep't 1975); Wood v. Cross Props., 5 A.D.2d 853, 853 (2d Dep't 1958). This authority also does not apply to a shareholder seeking documents pursuant to Business Corporation Law § 624(e), which entitles any shareholder to annual balance sheets and profit and loss statements, without requiring a fiduciary relationship or other qualification.

Defendants also insist that plaintiff's requests for documents, in this and his sixth claim, circumvent the disclosure process, but plaintiff seeks both an accounting and inspection of

corporate books and records as ultimate relief, not before any disclosure. Since plaintiff pleads that he is a 5% shareholder as an alternative to his breach of contract claim, the court denies defendants' motion to dismiss his fifth cause of action.

VI. SIXTH CLAIM - BOOKS AND RECORDS

Pleading again in the alternative, plaintiff seeks to inspect J Synergy Green's books and records, including tax filings, bank statements, board meeting minutes, and stock ownership records, which he also has demanded, pursuant to Business Corporation Law § 624(b). Compl. Ex. 3, NYSCEF Doc. 4. Defendants also refused this demand, *id.* Ex. 4, NYSCEF Doc. 5, and move to dismiss this claim because plaintiff fails to allege that he seeks those documents for a proper purpose. Again the authority on which defendants rely, dealing with a shareholder's common law right to review corporate books, is inapplicable. Ochs v. Washington Hgts. Fed. Sav. & Loan Ass'n, 17 N.Y.2d 82, 86 (1966). Plaintiff seeks information pursuant to Business Corporation Law § 624(b), which requires that his purpose be reasonably related to his interest as a shareholder, but does not require that he affirmatively state his purpose. J Synergy Green may require a statement of purpose pursuant to Business Corporation Law § 624(c), but the complaint does not indicate that defendants made such a demand or, if they did, that plaintiff refused to comply. In any event, plaintiff's purposes

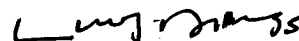
are to assess the value of his shares, how his 5% interest was calculated, and the profits to which his percentage interest entitles him: all unquestionably related to his interests as a shareholder.

To the extent plaintiff also seeks documents outside the parameters of Business Corporation Law § 624(b), plaintiff states a claim within the statute's scope, so the claim survives. Therefore the court denies defendants' motion to dismiss plaintiff's sixth cause of action.

VII. CONCLUSION

For the reasons explained above, the court grants defendants' motion to dismiss the complaint's third cause of action, for a declaratory judgment, but otherwise denies their motion. C.P.L.R. § 3211(a)(7). The first and fourth through seventh causes of action remain. Defendants shall serve an answer to the complaint's remaining claims within 20 days after entry of this decision and order. The parties shall appear for a Preliminary Conference by Microsoft Teams on January 31, 2023, at 11:00 a.m.

DATED: December 23, 2022



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.