Z & C Lucky House Inc. v Chun Wajua Xie
2022 NY Slip Op 35183(U)
March 7, 2022
Supreme Court, Queens County
Docket Number: Index No. 716606/20
Judge: Allan B. Weiss

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IAS Part 2
Justice

Z & C LUCKY HOUSE INC.,

Plaintiff,

-against-

CHUN JUA XIE, YONG HUA DONG a/k/a HUA LI, et al.,

Defendants.

Index No. 716606/20

Motion Date: 10/13/21

Motion Seq. No. 1

The following papers EF numbered below read on this motion by defendant Chun Hua Xie, defendant Yong Hua Dong and defendant Hua Yuan Development, LLC for, inter alia, an order pursuant to CPLR 3211(a)(7) dismissing the complaint against them

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	17-23
Answering Affidavits - Exhibits	24-42
Reply Affidavits	
Memoranda of Law	19,26

Upon the foregoing papers it is ordered that the motion is granted to the extent that the third, fifth, seventh, eighth, tenth, and eleventh causes of action are dismissed.

I. The Plaintiff's Allegations

Yang Jun Li is the principal of plaintiff Z&C Lucky House, Inc. (Lucky House or the plaintiff), which made an investment in defendant Hua Yuan Development, LLC (the defendant LLC or defendant company). The investors have suffered substantial losses because of fraud in the management and administration of the defendant LLC by defendant Chun Hua Xie (Xie) and defendant Yong Hua Dong (Dong), the managing members of the defendant LLC. The managing members (1)made an alleged 2015 capital call and then diluted the value of the plaintiff corporation's shares in the defendant LLC by 50% without notice, (2) have engaged in self-dealing, (3) have received excessive and unexplained income in violation of the defendant LLC's operating agreement, and (4) have not complied with their disclosure obligations to investors in the defendant LLC.

Defendant Xie and Defendant Dong made fraudulent statements to Li and fraudulently concealed material facts from Li to induce her to make an initial investment in the defendant LLC through the plaintiff corporation and to keep the corporation as an investor. These material misrepresentations include (1) making false statements about the finances of the defendant LLC and the value of the plaintiff's membership interest, (2) falsely representing to her that she would obtain one of the commercial units in the condominium to be developed by the defendant LLC, (3) falsely stating that the plaintiff corporation owed the defendant LLC money because of a 2013 lawsuit, a debt that would essentially cancel the plaintiff corporation's $1,200,000 investment, and (4) falsely representing that the plaintiff was only entitled to a net gain of seventy cents per dollar invested over an eleven year period.

Defendant Xie and defendant Dong are in the process of winding up the affairs of the defendant LLC and of distributing its assets to members of the company. The defendants have repeatedly refused to allow the plaintiff to examine the defendant LLC's full set of books and records

II. Discussion

A. The First Cause of Action (An Accounting)

The plaintiff's first cause of action is for an accounting. The elements of a cause of action for an accounting include, inter alia, (1) possession by a party of the books, records, profits, or other assets of the alleged enterprise (2) a demand on the party for an accounting, and (3) a failure or refusal to provide such an accounting. (*See, Mawere v. Landau*, 130 AD3d 986 [2nd Dept 2015]; *NAB Constr. Corp. v New York City Paper Mill*, 265 AD2d 312 [2nd Dept 1999].) "The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest ***. " (*Palazzo v. Palazzo*, 121 AD2d 261, 265 [2nd Dept 1986]; *Lawrence v. Kennedy*, 95 AD3d 955 [2nd Dept 2012].) A managing member of a limited liability company owes a nonmanaging member a fiduciary duty. (*Pokoik v. Pokoik*, 115 AD3d 428, [1st Dept 2014].) The plaintiff adequately stated a cause of action for an accounting.

B. The Second Cause of Action (Breach of Fiduciary Duty)

1. CPLR 3211(a)(7)

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), a court generally will generally " accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v. Martinez*, 84 NY2d 83, 87–88 [1994]; *Nonnon v. City of New York*, 9 NY3d 825 [2007],) "Moreover, the court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and upon considering such an affidavit, the facts alleged therein must also be assumed to be true ***. (*Benjamin v. Yeroushalmi*, 178 AD3d 650, 653 [2nd Dept [2019].)

The second cause of action is for breach of fiduciary duty. The elements of a cause of action for breach of fiduciary duty are (1)the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct. (*See, Daly v. Kochanowicz*, 67 AD3d 78 [2nd Dept 2009] ; *Fitzpatrick House III, LLC v. Neighborhood Youth & Family Services*, 55 AD3d 664 [2nd Dept 2008]; *Kurtzman v. Bergstol* 40 AD3d 588 [2nd Dept 2007].) A managing member of a limited liability company owes a nonmanaging member a fiduciary duty. (*Pokoik v. Pokoik, supra*.)

While a cause of action to recover damages for breach of fiduciary duty must be pleaded with the particularity required under CPLR 3016(b) (*Benjamin v. Yeroushalmi*, 178 AD3d 650[2nd Dept2019]), the intent of section 3016(b)'s pleading requirement is only to inform a defendant about the incidents complained of (*Pludeman v. N. Leasing Sys., Inc*., 10 NY3d 486 [2008]), and here the complaint and supplemental affidavit meet that standard.

2. CPLR 3211(a)(5)– Statute of Limitations

Generally a cause of action for breach of fiduciary duty is controlled by CPLR 213(1), a six year statute of limitations, where the relief sought is equitable in nature, or by CPLR 214(4), a three-year statute of limitations where the only relief sought is money damages. (*Wiesenthal v. Wiesenthal*, 40 AD3d 1078 [2nd Dept 2007].) It is true that the three year limitations period, rather than the six-year limitations period, applies to causes of action for breach of fiduciary duty brought against the manager of limited liability company by a member of the company alleging acts of looting, waste, and self-dealing. (See, *LMEG Wireless, LLC v. Farro,* 190 AD3d 716 [2nd Dept 2021].) "However, where an allegation of fraud is essential to a breach of fiduciary duty claim, courts will apply the six-year statute of limitations applicable to fraud under CPLR 213(8) ***." (*Carbon Cap. Mgmt., LLC v. Am. Exp. Co.*, 88 AD3d 933, 939 [2nd Dept 2011]; *see, McDonnell v. Bradley,* 109 AD3d 592 [2nd Dept 2013].) The moving defendants had the burden of showing that the statute of limitations expired on the numerous claims of breach of fiduciary duty allegedly committed by them (*see*, *Quantum Health Res. v. De Buono*, 273 AD2d 730 [3rd Dept 2000]), and on this motion they failed to carry that burden by, among other things, failing to recognize that a six year period may apply to at least some of the plaintiff's claims.

3. The Third Cause of Action (A Derivative Claim)

The third cause of action is brought on the basis of the plaintiff's calculation that after taking into account, inter alia, the money invested into the company by investors and the reception of mortgage proceeds, the company should have a large surplus available for distribution to members. The plaintiff further alleges that the defendant managing members have diverted those surplus funds for their own personal benefit and that they falsely represented to Li " that each investor only gets a net return of $0.70 for each dollar invested because the Defendant LLC is 'in debt.'" A derivative cause of action does not lie because the plaintiff seeks a recovery which is personal to it and not for the benefit of the limited liability company. (*See, Najjar Grp., LLC v. W. 56th Hotel LLC*, 110 AD3d 638 1st Dept 2013].) Although the plaintiff tries to distinguish *Najjar* on the ground that she is not seeking a distribution of surplus funds, her demand for judgment on the third cause of action is for "in excess of $7,000,000" which she calculates as the approximate amount of the entire surplus. The third cause of action is dismissed.

4. The Fourth Cause of Action (Fraud)

The fourth cause of action alleges that the defendants committed fraud by falsely representing to Li that " there had been a capital call in 2015, and that notice of the capital call had been sent prior to the capital call in 2015, that because Mrs. Li did not pay the capital call, her shares had been reduced." The elements of a cause of action for fraud include (1) that the defendant made material representations that were false or concealed a material existing fact, (2) that the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) that the plaintiff was deceived, (4) that the plaintiff justifiably relied on the defendant's representations, and (5) that the plaintiff was injured as a result of the defendant's representations. (*See, Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 31 NY3d 569 [2018].) *Lama*

Holding Co. v. Smith Barney, 88 NY2d 413 [1996]; *New York Univ. v. Continental Ins. Co.*, 87 NY2d 308 [1995]; *Tsinias Enterprises Ltd. v. Taza Grocery, Inc.*, 172 AD3d 1271 [2nd Dept. 2019].) The fourth cause of action is adequately stated.

5. The Fifth Cause of Action (Conversion)

The fifth cause of action alleges that the defendant managing members converted 50% of the plaintiff's membership interest. Conversion is the unauthorized assumption and exercise of the right of ownership over property belonging to another to the exclusion of the owner's rights. (*See, State v. Seventh Regiment Fund, Inc.*, 98 NY2d 249, 259 [2002].) The statute of limitations for conversion is three years (*see,* CPLR 214 [3]), and the cause of action accrues when the conversion or taking occurred. (*Harlem Cap. Ctr., LLC v. Rosen & Gordon, LLC*, 145 AD3d 579 [1st Dept 2016].) The complaint alleges that the defendants converted part of the plaintiff's membership interest and that in 2016, defendant Dong refused Li's demand for the return of her converted 5.20833% membership interest. . This cause of action, asserted in 2020, is time-barred.

6. The Sixth Cause of Action (Fraud)

The sixth cause of action alleges that in or about September 2009, defendant Dong represented to Li that her investment in the company would allow her "to get" the most valuable commercial unit on the ground floor of the building within one year. According to the plaintiff, from 2009 through 2020, defendant Dong continuously represented to the plaintiff that she would be entitled to purchase commercial unit 1B at the conclusion of the project. These false representations allegedly induced Li into both making an initial investment and then keeping her investment in the company. Li allegedly discovered that Dong's representations were fraudulent on or about July 1, 2020, when he informed her that Unit 1B was no longer available because defendant Dong and defendant Xie"drew straws" and defendant Xie "took Unit 1B for his investors." The sixth cause of action is adequately pleaded. Whether Li justifiably relied on defendant Dong's representations presents an issue of fact which cannot be determined on this motion. (*See, Brunetti v. Musallam*, 11 AD3d 280 [1st Dept 2004].) Insofar as the statute of limitations is concerned, CPLR 213 provides in relevant part: " The following actions must be commenced within six years: ***8. an action based upon fraud; the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it." (*See, Sargiss v. Magarelli*, 12 NY3d 527 [2009]; *Nyahsa Servs., Inc. v. Recco Home Care Servs., Inc.*, 141 AD3d 792 [3rd Dept 2016]; *Elhannon, LLC v. Brenda J. DeLuca Trust*, 108 AD3d 911[3rd Dept 2013]; *Squitieri v. Trapani*, 107 AD3d 688 [2nd Dept 2013].) Whether Li could have discovered the alleged fraud earlier than July 1, 2020 presents an issue of fact which cannot be determined on this motion. (*See, DiRaimondo v. Calhoun*, 131 AD3d 1194 [2nd Dept 2015].)

7. The Seventh Cause of Action (Fraud)

The seventh cause of action alleges that on July 1, 2020, defendant DONG told Li that the value of the plaintiff's shares had been reduced by a 2013 lawsuit and losses caused by delays to the completion of the project. The seventh cause of action does not adequately allege that the plaintiff relied on these statements and suffered damages from them and is dismissed.

8. The Eighth Cause of Action (Fraud)

The eighth cause of action alleges that in or about November 2009, defendant Dong DONG fraudulently induced. Li to sign the company's operating agreement on the plaintiff's behalf by falsely representing to her that the agreement would be modified at her request. The plaintiff allegedly has sustained damages because the operating agreement gives complete powers to the defendant managing members to control the company. The eighth cause of action is barred by the statute of limitations.

9. The Ninth Cause of Action

The ninth cause of action seeks a judgment declaring that the plaintiff is the owner of 10.41667% of the total membership interest in the defendant company because there was no capital call or the company never received proper notice of the capital call. The plaintiff has adequately stated a cause of action for a declaratory judgment by showing that there is an actual controversy between adversarial parties who have a stake in the outcome. *(See, Long Island Lighting Co. v. Allianz Underwriters Ins. Co.*, 35 AD3d 253 [1st Dept 2006].) As for the statute of limitations, as a general rule a declaratory judgment action is generally subject to CPLR 213(1), a six-year statute of limitations (the catch all provision) . (*Grocholski Cady Rd., LLC v. Smith*, 171 AD3d 102, 107 [4th Dept 2019].) But " in order to determine the statute of limitations applicable to an action for a declaratory judgment, a court must examine the substance of the action. Where it is determined that the parties' dispute can be, or could have been, resolved in an action or proceeding for which a specific limitation period is statutorily required, that limitation period governs ." (*Vill. of Islandia v. Cty. of Suffolk*, 162 AD3d 715, 716 [2nd Dept 2018].) The substance of the ninth cause of action involves fraud for which a six year statute of limitations also applies. The fourth cause of action alleges that the defendants committed fraud by falsely representing to her that " there had been a capital call in 2015, and that notice of the capital call had been sent prior to the capital call in 2015, that because Mrs. Li did not pay the capital call, her shares had been reduced."

10. The Tenth Cause of Action (Piercing the Corporate Veil)

"The doctrine of piercing the corporate veil is typically employed by a third party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation ***." (*Morris v. New York State Dept. of Taxation and Finance*, 82 NY2d 135, 141 [1993] .) However, it appears from the plaintiff's memorandum of law in opposition that the actual intent of the tenth cause of action is to hold the defendant managing members personally liable for their own allegedly wrongful acts, and in that regard, the tenth cause of action for piercing the corporate veil is not adequately stated, is duplicative in view of the other causes of action asserted in the complaint and is dismissed.

11. The Eleventh Cause of Action (Constructive Trust)

The eleventh cause of action seeks to impose a constructive trust on the company and its assets "until this lawsuit is fully adjudicated." The imposition of a constructive trust is not a provisional remedy and is dismissed.

Dated: March 7, 2022

J.S.C.