

**Chazen v Ma**

2023 NY Slip Op 30349(U)

January 27, 2023

Supreme Court, New York County

Docket Number: Index No. 656954/2022

Judge: Arlene P. Bluth

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**

**PRESENT: HON. ARLENE P. BLUTH PART 14**

*Justice*

-----X

LOUISE CHAZEN, CHAIM EDELSTEIN, DERIVATIVELY  
ON BEHALF OF 7THONLINE, INC.

Plaintiffs,

INDEX NO. 656954/2022

MOTION DATE 01/17/2023

MOTION SEQ. NO. 001

- v -

MAX MA, NANCY YAO MAASBACH, SAMAN HONG, DAN  
YIN,

Defendants.

**DECISION + ORDER ON  
MOTION**

7THONLINE, INC. AS NOMINAL DEFENDANT

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for DISMISS.

Defendants' motion to dismiss is denied.

**Background**

In this derivative action, plaintiffs (on behalf of the company and its shareholders) seek damages related to defendants' purported mismanagement of the company. They contend that defendant Ma is the CEO and that he engaged in numerous acts of misconduct, including making over \$750,000 in unauthorized payments to defendant Dan Yin (his wife) who was not working for the company at the time of the transfers. Plaintiffs also argue that Ma transferred the company's subsidiary (7thonline China) to his brother for little or no consideration, that he made

unauthorized payments to this subsidiary and made many unauthorized disbursements to third parties exceeding \$1,000.

Plaintiffs also argue that Edelstein was the chairman of the board of the company and Chazen was the president of the company, and they were wrongfully removed without shareholder or board approval. They insist that defendant Nancy Yao Maasbach was installed as a board member without proper shareholder approval. Defendant Hong is apparently another board member.

In this motion, defendants seek to dismiss the entire complaint. They contend that plaintiffs' relationships with the company (7thonline) ended in 2021. They claim that a new board member was appointed and Edelstein was ousted in accordance with a binding shareholders agreement. Defendants emphasize that the shareholders agreement permitted the appointment of board (up to five members) and that the founders (defendants Ma and Yin) had the right to appoint two board members.

They argue that Edelstein was one of the founders' designees and that if the founders voted him out, the rest of the board was required to vote to remove him under the applicable provision of the agreement. Defendants Ma and Yin claim they sought to remove Edelstein and appoint defendant Hong in August 2021. They claim they told the shareholders of this intention and that if the other shareholders did not vote as required, they would invoke a proxy provision of the shareholders agreement (one that permitted Ma and Yin to go forward if the shareholders did not provide their consent). Defendant observes that defendant Maasbaach was selected by written consent of the majority of the shareholders in June 2021 and that her appointment was proper.

With respect to Chazen's termination, defendants claim that officers can be removed with or without cause. They assert that because the removal and appointment to the board were proper, that renders Chazen's termination as proper.

In opposition, plaintiffs contend that board members Maasbach and Hong have intentionally failed to address Ma's wrongful conduct and have not provided shareholders with relevant information. They allege that defendant Yin has received over \$750,000 in "no-show" benefits. Plaintiffs maintain that they have stated valid causes of action for breach of fiduciary duty, misappropriation and diversion as well as waste and mismanagement. They suggest that they were removed from their positions as a board member and as president as part of a coverup of Ma's purported wrongdoing.

### **Discussion**

"Under CPLR 3211(a)(7), pleadings are to be afforded a liberal construction, allegations are taken as true, the plaintiff is afforded every possible favorable inference, and a determination is made only as to whether the facts as alleged fit within any cognizable legal theory" (*CSC Holdings, LLC v Samsung Elecs. Am., Inc.*, 192 AD3d 556, 146 NYS3d 17 [1st Dept 2021]).

A motion to dismiss pursuant to CPLR 3211(a)(1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326, 98 NY2d 314 [2002]).

### **Breach of Fiduciary Duty**

"A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR 3016(b). The elements of a cause of action to recover damages 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. Members of a board of directors of a corporation “owe a fiduciary responsibility to the shareholders in general and to individual shareholders in particular to treat all shareholders fairly and evenly” (*Deblinger v Sani-Pine Products Co., Inc.*, 107 AD3d 659, 660, 967 NYS2d 394 [2d Dept 2013] [internal quotations and citations omitted]).

Plaintiffs allege a breach of fiduciary duty against defendant Ma (the first cause of action) and against defendants Maasbach and Hong (the second cause of action). They contend that Ma, as a director and officer of 7thonline, owed a fiduciary duty to the company and that he engaged in a series of acts that violated this duty, including the purported \$750,000 in authorized payments to his wife (defendant Yin), an unauthorized transfer of the company's subsidiary to his brother as well as other unauthorized payments to third parties. Plaintiffs allege that Maasbach and Hong breached their fiduciary duties by not investigating Ma's conduct and helping to conceal the conduct.

The Court finds that plaintiffs alleged valid causes of action for both the first and second claims. Defendants' arguments to dismiss these claims rely on their view of the facts and defendants' position that these allegations are simply untrue. On a motion to dismiss, the Court cannot make factual findings. While defendants raise valid questions about how, for instance, a former chairman and president of the company (plaintiffs) have evidence of a subsidiary that defendants claim never existed, that does not permit the Court to dismiss the entire case.

The Court also finds that plaintiffs pled these causes of action with the requisite particularity. The actions purportedly committed by Ma are laid out in great detail—they certainly give defendants the requisite notice about these causes of action. And plaintiffs need not prove their case on a motion to dismiss.

The Court also finds that defendants are not entitled to dismissal of these causes of action because they purportedly followed the proper procedure to remove plaintiffs from their respective roles with the company. Plaintiffs contend that their removal was done to conceal the alleged misconduct—of course, a company and its controlling officers or board members cannot seek to conceal waste of corporate funds and then use corporate procedure as a shield for such conduct. In other words, if the actions were for an improper purpose (here to allegedly hide misconduct), then defendants cannot evade responsibility by claiming they followed the right procedures.

### **Aiding and Abetting Breach of a Fiduciary Duty**

The third cause of action alleges that defendant Maasbach and Hong aided and abetted the breach of a fiduciary duty. “A cause of action for aiding and abetting breach of fiduciary duty merely requires a prima facie showing of a fiduciary duty owed to plaintiff, a breach of that duty, and defendant's substantial assistance in effecting the breach, together with resulting damages” (*Yuko Ito v Suzuki*, 57 AD3d 205, 869 NYS2d 28 [1st Dept 2008] [internal quotations and citations omitted]).

The Court finds, for the reasons stated above, that plaintiffs state a valid third cause of action. They claim that Maasbach and Hong knew about Ma’s purportedly wrongful conduct and helped him conceal it.

### **Misappropriation and Diversion**

The fourth cause of action contends that Ma diverted assets of the company and engaged in self-dealing to the detriment of the company. That states a valid cause of action. That defendants dispute that any of these factual allegations took place does not justify the dismissal of this claim.

### **Faithless Fiduciary**

“The faithless servant doctrine states that an employee or agent who is faithless in the performance of his or her duties is not entitled to recover either salary or commission” (*Two Rivers Entities, LLC v Sandoval*, 192 AD3d 528, 529, 146 NYS3d 1 [1st Dept 2021]).

Plaintiffs stated a cognizable cause of action against defendant Ma under the faithless fiduciary/servant doctrine as they allege that he took advantage of his role with the company to divert assets and misappropriate funds.

### **Sixth, Seventh and Eighth Causes of Action**

These causes of action contend that the appointment of Maasbach as a board member is void under an *ultra vires* theory because the appointment was not made with proper shareholder approval and seek similar relief with respect to the removal of both plaintiffs from their roles with the company.

“The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. A declaratory judgment action thus requires an actual controversy between genuine disputants with a stake in the outcome and may not be used as a vehicle for an advisory opinion” (*Long Is. Light. Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253, 253, 826 NYS2d 55 [1st Dept 2006] [internal quotations and citations omitted]).

Plaintiffs stated valid causes of action with respect to the appointment of Maasbach and their respective removals. Although defendants stress that these actions complied with the provisions of the shareholder agreement, the Court finds that it is simply premature to make that finding. Plaintiffs contend, which the Court must take as true at this point of the litigation, that

these moves were orchestrated to conceal Ma's purported wrongdoing. Discovery is required to investigate the motivations and circumstances for these actions.

### **Unjust Enrichment and Money Had and Received Against Defendant Yin**

“The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. A plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that ‘it is against equity and good conscience to permit the other party to retain what is sought to be recovered’ (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182, 919 NYS2d 465 [2011] [internal quotations and citations omitted]).

“To state a cause of action for money had and received, a plaintiff must allege that (1) the defendant received money belonging to the plaintiff, (2) the defendant benefitted from receipt of the money, and (3) under principles of equity and good conscience, the defendant should not be permitted to keep the money” (*Pacella v RSA Consultants, Inc.*, 164 AD3d 806, 808, 83 NYS2d 630 [2d Dept 2018] [internal quotations and citations omitted]).

The Court finds that plaintiffs stated valid causes of action (claims nine and ten) against defendant Yin. Plaintiffs maintain that Yin received over \$1 million from the company that she did not earn at the direction of Ma. They contend that Yin was not an employee of the company during this time and simply received funds as the wife of Ma.

That defendants characterize this money as salary is simply a factual dispute that the Court cannot resolve on a motion to dismiss. As plaintiff Edelstein points out, Yin allegedly did work for the company in the early 2000s but stopped working for 7thonline in late 2011 or 2012 (NYSCEF Doc. No. 27, ¶ 6). Plaintiff Edelstein claims that Yin did not work for the company after that point and directs the Court to an organizational chart from 2016 for the company that

did not contain Yin's name (*id.* ¶ 8). He also claims he did not learn that Yin was on the payroll until 2020 and observed that the payroll records were completed by an outside service (*id.* ¶ 9).

Clearly, there is a factual dispute about whether Yin still worked for the company (the email from plaintiff Edelstein that defendants claim is documentary evidence that Yin still worked for the company is from 2011 [NYSCEF Doc. No. 21] and does not utterly refute plaintiffs' allegations). Accordingly, the branch of the motion to dismiss these causes of action is denied.

### **Breach of Contract Against Ma**

The eleventh cause of action contend that Ma breached the various corporate agreements, including the shareholders' agreement and the bylaws, by engaging in various wrongdoing. Plaintiffs stated a valid cause of action as they argue that these agreements, as all agreements do, contains an implied duty of good faith and fair dealing. If these allegations are true, which the Court must assume for the purposes of a motion to dismiss, plaintiffs have a cognizable cause of action.

Defendants' insistence that these facts are not true is not a basis to dismiss this claim.

### **Waste and Mismanagement by Ma**

Plaintiffs also stated a cause of action for waste and mismanagement for the purported misconduct committed by Ma.

### **CPLR 3211(a)(4)**

Another basis of defendants' motion to dismiss is that plaintiff Chazen has another pending action. "Under CPLR 3211(a)(4), a court has broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is

substantially the same. It is not necessary that the precise legal theories presented in the first action also be presented in the second action so long as the relief is the same or substantially the same” (*Jaber v Elayyan*, 168 AD3d 693, 694, 93 NYS3d 315 [2d Dept 2019] [internal quotations and citations omitted]).

The Court finds that this is not a valid basis to dismiss this case. The other action involves only plaintiff Chazen and is an employment litigation about her role as president. The Court finds that the two cases are not substantially similar (this is a derivative action brought on behalf of shareholders) and the relief sought is very different.

### Summary

The Court observes that the parties offer divergent accounts of what happened. Defendants characterize the allegations here as “out-of-left field” and that plaintiff Edelstein was removed due to concerns about his behavior. But the Court cannot simply credit defendants’ view on a motion to dismiss. The Court’s task is only to evaluate the allegations in the complaint and assess whether they allege the cognizable causes of action raised by plaintiffs. Assuming those allegations are true, the Court denies the motion.

Discovery may reveal that there was no fraud or abuse. But plaintiffs’ concerns that Ma was funneling money to his wife (who allegedly no longer worked for the company), transferred assets to third parties and transferred a subsidiary to his brother for little or no consideration are serious and specific allegations. And plaintiffs contend that they were removed from their positions as part of a coverup for the various misconduct. Defendants are not entitled to dismissal simply because they think they have reasonable justifications that explain plaintiffs’ allegations.

Accordingly, it is hereby

ORDERED that the defendants' motion to dismiss is denied and defendants are directed to answer pursuant to the CPLR.

Conference: May 30, 2023 at 11:30 a.m. By May 23, 2023, the parties are directed to upload 1) a discovery stipulation signed by all parties, 2) a stipulation of partial agreement or 3) letters explaining why no discovery agreement could be reached. The Court will then assess whether an in-person conference is necessary. The failure to upload anything by May 23, 2023 will result in an adjournment of the conference.

1/27/2023

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE