SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : COMMERCIAL PART 8

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LOUANN LARSEN, as Trustee of the LARSEN 2021 FAMILY TRUST, SUBTRUST A, and the LARSEN 2021 FAMILY TRUST, SUBTRUST C; KATERINA VOUMVOURAKIS, as Trustee of the LARSEN 2021 FAMILY TRUST, SUBTRUST A, and the LARSEN 2021 FAMILY TRUST, SUBTRUST B; and LYDIA LARSEN, as Trustee of the LARSEN 2021 FAMILY TRUST, SUBTRUST B, and the LARSEN 2021 FAMILY TRUST, SUBTRUST C, as trustees and derivatively on behalf of POWER COOLING, INC. and RELIANCE MACHINING, INC.,

Plaintiffs, Index # 512169/2022

- against - May 9, 2023

LAUREN LARSEN,

Defendant,

and

POWER COOLING, INC., and RELIANCE MACHINING, INC.,

Nominal Defendants,

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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #3

The plaintiffs have moved pursuant to CPLR §3211 seeking to dismiss counterclaims filed by the corporate defendants. The defendants have opposed the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

According to the complaint, the nominal defendant corporations, which are engaged in cooling and heating services were owned by Lloyd Larsen. On December 1, 2002 Lloyd placed 51% of the shares of common stock of the corporations into a trust and his daughter Lauren, the defendant herein, was named as

trustee along with a non-party. Further, Lloyd and his wife and Lauren executed an agreement wherein they were the only shareholders with voting rights. Lloyd passed away in 2011 and Lauren was gifted 29% of the company and purchased another 20% from her mother, leaving her with 49% of the company. In 2021 the 2002 Trust was reformed into a new trust with three subdivisions, two (Subtrusts A and B) maintaining 19.40% each and Subtrust C maintaining 9.4%. The 2002 trust still maintained 2.75%. The trustees of Subtrusts A, B and C are Lloyd's other three children, the plaintiffs herein, Louann, Lydia and non-party Linnea and other non-parties.

The Complaint alleges that since Lloyd's death Lauren has mismanaged the corporations, failing to provide distributions and paying her children salaries and benefits for providing no work. Further, the Complaint alleges the defendant has diverted income from the corporation for her own personal gain. The corporate defendants have asserted two counterclaims, a claim for the breach of a fiduciary duty by Lydia Larsen and a claim for the breach of a fiduciary duty by Louann Larsen. The plaintiffs have moved seeking to dismiss the counterclaims on the grounds the corporations have no standing and that in any event they fail to state any cause of action. As noted, the motion is opposed.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the counterclaims as true, whether the defendant can succeed upon any reasonable view of those facts (Davids v. State, 159 AD3d 987, 74 NYS3d 288 [2d Dept., 2018]). Further, all the allegations in the counterclaim are deemed true and all reasonable inferences may be drawn in favor of the defendant (Dunleavy v. Hilton Hall Apartments Co., LLC, 14 AD3d 479, 789 NYS2d 164 [2d Dept., 2005]).

The counterclaims allege that both Lydia and Louann received money from the corporations without providing any services (see, Amended Answer, ¶¶ 207, 218 [NYSCEF Doc. No. 93]). The remainder of the counterclaims enumerate the specific payments they received without providing any work. The counterclaims note that Lydia and Louann are trustees of the corporations and therefore owed fiduciary duties as trustees.

However, the receipt of those funds, even if true, does not allege a breach of any fiduciary duty at all. To succeed on a claim for breach of a fiduciary duty, a party must establish the existence of the following three elements: (1) a fiduciary relationship existed between plaintiff and defendant, (2) misconduct and (3) damages that were directly caused by the misconduct (Kurtzman v Bergstol, 40 AD3d 588, 835 NYS2d 644, 646 [2d Dept., 2007], see, Birnbaum v. Birnbaum, 73 NY2d 461, 541

NYS2d 746 [1989]).

It is true that a non-managing member of a corporation does not owe any fiduciary duty to the corporation, except to the extent he or she participates in such management (see, In re FK3, LLC, 2018 WL 5292131 [S.D.N.Y. 2018], see, also, Kalikow v. Shalik, 43 Misc3d 817, 986 NYS2d 762 [Supreme Court Nassau County 2014]). However, a manager, whether or not a member owes a duty to act "in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances" (see, 1 N.Y. Prac., New York Limited Liability Companies and Partnerships § 1:8). Moreover, even an employee maintains a fiduciary duty to an employer. As the court noted in Nielson Co. (US) LLC v. Success Systems Inc., 2013 WL 1197857 [S.D.N.Y. 2013] "as a matter of law, an employee owes a fiduciary duty to his employer and is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost faith and loyalty in the performance of his duties" (id).

Neither Lydia or Louann participated in the management of the corporation at all. They did not participate in any management and could not have owed any traditional duty of care noted above. They merely accepted gifts from the corporation, a decision made by the defendants not the plaintiffs. They crux of the breach of fiduciary claims is the fact they accepted the

gifts at all. First, the defendants only have themselves to blame for bestowing those gifts upon Lydia and Louann. More importantly, those gifts underscore the familial nature of the business and the relationship between all the parties. The counterclaims really assert that Lydia and Louann should have rejected the gifts on the grounds they were undeserved. While that particular assertion is the root of the counterclaims, the acceptance of such gifts, given freely by the defendants do not constitute a breach of any fiduciary duty. Indeed, no fiduciary relationship even existed.

Moreover, even if such relation did exist, there could still be no breach of any fiduciary duty. The second element of misconduct must now be examined. Misconduct by a fiduciary constituting a breach of duty can take one of two forms, either breach of loyalty or breach of care (Higgins v. New York Stock Exch., Inc., 10 Misc3d 257, 806 NYS2d 339 [Supreme Court New York County 2005]). Generally, a breach of loyalty will be established where the movant can show the other party participated in both sides of a transaction. "This is a sensitive and 'inflexible' rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty" (Birnbaum, supra). "The duty of care refers to the responsibility of a...fiduciary

to exercise, in the performance of his or her tasks, the care that a reasonably prudent person would use under similar circumstances" (In re Ticketplanet.com, 313 BR 46 (S.D.N.Y. Bankruptcy Court, 2004), citing Norlin Corp. v. Rooney, Pace, Inc., 744 F2d 255,[2d Cir. 1984]). In turn, the fiduciary duty of due care, "obligates [fiduciaries] to act in an informed and 'reasonably diligent' basis in 'considering material information'" (Higgins, supra).

As noted, Lydia and Louann did not act in any way that was contrary to the business other than to receive gifts from the defendants. The mere fact the parties are now in litigation and the defendants regret their previous generosity does not mean the plaintiffs committed any breach of any fiduciary duty.

Lastly, concerning damages, the movant must demonstrate that they did in fact suffer financial injury caused by the fiduciary's breach of duty (105 East Second St. Assocs. v. Bobrow, 175 AD2d 746, 573 NYS2d 503 [1st Dept., 1991]). To establish the damages component of a claim for a breach of fiduciary duty, the movant is required to show at a minimum, that the fiduciary's actions were "a substantial factor" in causing an "identifiable loss" (see, (105 East Second St. Assocs. v. Bobrow, supra). Of course, the actions of the defendants providing those gifts was the true substantial factor causing any losses to the corporation.

Consequently, there can be no breach of any fiduciary duty committed by the plaintiffs for receiving money and perks from the defendants. Therefore, based on the foregoing, the motion seeking to dismiss both counterclaims is granted.

So ordered.

ENTER:

Dated: May 9, 2023
Brooklyn, N.Y.

Hon. Leon Ruchelsman
JSC