

**Craig v Cimini**

2023 NY Slip Op 31977(U)

May 31, 2023

Supreme Court, New York County

Docket Number: Index No. 652521/2022

Judge: Lucy Billings

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  
 COUNTY OF NEW YORK: PART 41

-----x  
 DAVID CRAIG, individually and on behalf  
 of ARCHWAY STATION LLC,

Plaintiff

Index No. 652521/2022

-against-

DECISION AND ORDER

KEVIN CIMINI and RANDI SONG,

Defendants

-----x  
 LUCY BILLINGS, J.S.C.:

Defendants' motion to dismiss the complaint pursuant to C.P.L.R. § 3211(a)(1) relies on their version of the Operating Agreement for Archway Station LLC, a company in which plaintiff and defendants claim a membership interest. Since plaintiff disputes that defendants' version of the Operating Agreement is the company's valid Operating Agreement, however, defendant's document is not the conclusive, irrefutable, admissible evidence required to support dismissal. Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc., 37 N.Y.3d 169, 175 (2021); Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc., 30 N.Y.3d 572, 601 (2017); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); VXI Lux Holdco S.A.R.L. v. SIC Holdings, LLC, 171 A.D.3d 189, 193 (1st Dep't 2019). Since the other documentary evidence on which defendants rely, the company's application to the New

craig523

1

York State Liquor Authority and plaintiff's surrender of its liquor license are unauthenticated, Clarke v. American Truck & Trailer, Inc., 171 A.D.3d 405, 406 (1st Dep't 2019); Kenneth J. v. Lesley B., 165 A.D.3d 439, 440 (1st Dep't 2018); B & H Florida Notes LLC v. Ashkenazi, 149 A.D.3d 401, 403 n.2 (1st Dep't 2017); AQ Asset Mgt. LLC v. Levine, 128 A.D.3d 620, 621 (1st Dep't 2015), these documents likewise fail to support dismissal. These two documents, moreover, show only plaintiff's admission of the company's membership, as including both defendants as well plaintiff, and not the validity of defendants' Operating Agreement. Therefore the court denies defendants' motion to dismiss the complaint to the extent their motion is based on their version of the Operating Agreement or other documentary evidence. C.P.L.R. § 3211(a)(1).

In support of defendants' motion to dismiss plaintiff's claim for defendants' breach of their fiduciary duties, defendants maintain that they owe plaintiff no fiduciary duty. Plaintiff, however, alleges that he is a member of Archway Station LLC, as defendants maintain they are as well. Each member owes a fiduciary duty to the other members. As a member of the company, plaintiff also is entitled to an accounting from the other members of the company's assets and liabilities. Aff. of David Craig Ex. A (Operating Agreement), at 21-22; N.Y. Lim. Liab. Co. (LLC) Law § 1102(b).

Plaintiff's remaining claims, in contrast, fail to state a claim. C.P.L.R. § 3211(a)(7). His allegations that defendants operated Archway Station LLC without the required permits and without insurance do not demonstrate how these omissions damaged the company or him. His allegations that defendants funnelled Archway Station LLC's funds to another limited liability company lack the requisite detail regarding the transaction's purpose, impropriety, or other circumstances and fail to demonstrate a series of events so as to amount to waste of corporate assets. E.g., M&M Country Store, Inc. v. Kelly, 159 A.D.3d 1102, 1104 (3d Dep't 2018). Although these allegations may show a breach of the Operating Agreement, in that event they duplicate plaintiff's breach of contract claim. Likewise, plaintiff's claim for a declaratory judgment merely duplicates his claim that defendants breached the Operating Agreement. Moghtaderi v. Apis Cap. 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).

Plaintiff's claim for defamation also lacks the requisite details: the particular defamatory words; the time, place, and manner of their publication; and the persons to whom defendants published their defamatory statements. C.P.L.R. § 3016(a); Offor v. Mercy Med. Ctr., 171 A.D.3d 502, 503 (1st Dep't 2019); Shawe v. Kramer Levin Naftalis & Frankel LLP, 167 A.D.3d 481, 483 (1st

Dep't 2018); Glazier v. Harris, 99 A.D.3d 403, 404 (1st Dep't 2012). Finally, plaintiff's claim for dissolution of Archway Station LLC fails under LLC Law § 702, which requires plaintiff to seek dissolution in Kings County where the complaint alleges Archway Station LLC maintains its principal place of business. C.P.L.R. § 3211(a)(2).

Consequently, the court grants defendants' motion to dismiss plaintiff's claims for waste, a declaratory judgment, defamation, and dissolution, C.P.L.R. § 3211(a)(7), but otherwise denies defendants' motion. C.P.L.R. § 3211(a)(1) and (7). Defendants shall answer the remaining claims in the complaint within 10 days after service of this order with notice of entry. C.P.L.R. § 3211(f).

DATED: May 31, 2023

  
LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
J.S.C.