

Ennab v Sawwan

2023 NY Slip Op 33251(U)

September 18, 2023

Supreme Court, Kings County

Docket Number: Index No. 536310/2022

Judge: Joy F. Campanelli

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At an IAS Term, Part 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 18th day of September 2023.

P R E S E N T:

HON. JOY F. CAMPANELLI,
Justice.

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MAHMUD ENNAB, MAHMUD ENNAB
REVOCABLE TRUST, AND SUPER ACE CORP,

Plaintiffs,

Motion Sequence 4

- against -

Index No. 536310/2022

DONIA THABIT SAWWAN, AKA, DONIA
THABIT FARHOUD, HIAM FARHOUD TRUST,
JOHN AND JANE DOES 1-20, XYZ
CORPORATIONS/LLCs 1-20,

Defendants,

SUPER ACE CORP., AMJAD T. FARHOUD, AND
DINA FARHOUD,

Nominal Defendants,

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The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	82-91
Opposing Affidavits (Affirmations) _____	127-140
Affidavits/ Affirmations in Reply _____	153
Other Papers: <u>Affidavits/Affirmations in Support</u> _____	_____

Upon the foregoing papers, defendants Donia Thabit Sawwan a/k/a Donia Thabit Farhoud (Donia) and Hiam Farhoud Trust (Farhoud Trust) (collectively, defendants) move in motion (mot.) sequence (seq.) number (no.) four for an order: (1) pursuant to CPLR 3211

(a) (1), (a) (3), (a) (7), (a) (8) and (a) (10), dismissing plaintiffs Mahmud Ennab (Ennab), Mahmud Ennab Revocable Trust (Ennab Trust), and Super Ace Corp.'s (collectively, plaintiffs) amended verified complaint; (2) striking the appearance of Super Ace Corp. as a plaintiff in this action; (3) disqualifying Aymen A. Aboushi, Esq. from representing Super Ace Corp.; (4) enjoining the expenditure of assets of Super Ace Corp.; (5) requiring plaintiffs to provide a more definite statement pursuant to CPLR 3024 (a); (6) dropping nominal defendants pursuant to CPLR 1003 for misjoinder; and (7) dismissing fictitious parties John and Jane Does 1-20 and XYZ Corporations/LLCs 1-20 pursuant to CPLR 1024.¹

BACKGROUND

Plaintiffs commenced the instant action, inter alia, for a declaratory judgment by electronically filing a summons and verified complaint on December 13, 2022. Thereafter, plaintiffs filed an amended summons and verified complaint on February 18, 2023. According to the amended complaint, the instant action stems from Donia's alleged misrepresentation as the owner of 50% of the shares of a corporation that owns real property. Ennab and his former business partner, Thabit Farhoud (former business partner), created Super Ace Corp. in 1973 to own mixed-use real property located at 180

¹ The notice of motion states that Abrams Fensterman, LLP are the attorneys for the Farhoud Trust while the affirmation of service of the amended summons and complaint affirms that Amjad T. Farhoud was served, individually and as trustee of the Farhoud Trust, upon counsel for Mr. Farhoud and the Trust, who affirmed that she is authorized to accept same (NYSCEF Doc Nos. 82, 139). The court will refer to the defendants to include the Farhoud Trust only for purposes of this decision. However, this classification does not determine which counsel is counsel of record for the trust as the issue is not presently before the court on the instant motion.

Berkeley Pl., aka 75-77 7th Avenue (subject property) in Brooklyn, New York (NYSCEF Doc No. 65 at ¶ 1). The subject property consists of several apartments and a commercial unit (*id.*).

Ennab and his former business partner each owned 50% of Super Ace Corp. Ennab was elected as a director of Super Ace Corp. and appointed to an officer position (*id.* at ¶ 2). Ennab recently moved his shares of Super Ace Corp. to the Ennab Trust where he is the trustee (*id.* at ¶ 3). Ennab claims he was elected as a director and officer of Super Ace Corp. during the first meeting held on October 15, 1973 (NYSCEF Doc No. 66). At the meeting, Ennab was selected to be the secretary and his former business partner was chosen as president. Ennab avers that while his business partner was also an officer of Super Ace Corp., Ennab managed the day-to-day operations of the corporation and its asset, the subject property (NYSCEF Doc No. 65 at ¶ 9). Ennab alleges that he successfully managed the affairs of Super Ace Corp. and the subject property for roughly 50 years which included filing taxes, tending to the needs of the tenants, hiring, and firing contractors, signing contracts and leases, and collecting and disbursing funds (*id.* at ¶ 10). Ennab asserts that he and his former business partner were successful, worked well together, and had no issues (*id.* at ¶ 11).

According to the amended complaint, the former business partner passed away and his shares were passed on to his wife, Hiam Farhoud (Hiam) (*id.* at ¶ 13). After his death, Ennab continued to run Super Ace Corp. for years without issue as its sole director and officer, and he and Hiam worked well together, generating returns until her death (*id.* at ¶¶

15-18). The complaint asserts that after Hiam's death, Donia appeared and proclaimed to be owner of the 50% interest in Super Ace Corp. held by the Farhoud Trust and declared that she was a director and an officer despite having no proof of being a shareholder or ever being elected or appointed as a director or officer as mandated by the Business Corporation Law (*id.* at ¶ 19). Ennab contends that Donia's claim to ownership of the shares of the corporation is undermined by her sibling Amjad T. Farhoud (Amjad), who claims to be both a trustee and owner of the shares as evidenced by a trust document (Farhoud Trust) executed by Hiam Farhoud on September 12, 2019, annexed to the amended complaint as an exhibit (*id.* at ¶ 67).² The amended complaint asserts that Amjad contested any purported change to the Farhoud Trust and has said that any change was illegal, fraudulent, unauthorized, and/or took advantage of Hiam who was incapacitated to make such a decision (*id.* at ¶¶ 23-25).

After Hiam's passing, it is alleged that Donia immediately sought to unlawfully take control of Super Ace Corp. and the property in violation of the Farhoud Trust (*id.* at ¶ 28). Ennab contends that Donia began communicating with the tenants at the property, collecting rent, meeting with tenants, advising them to call her husband directly with any issues as they were the new owners, excluding Ennab from managing the property, and unilaterally engaging in construction projects without permission or authority to do so (*id.*

² Although Donia has yet to file an answer due to her pending pre-answer motion to dismiss, it is evident from the filings that Donia contends that the controlling document for the Farhoud Trust is the First Amendment to the Farhoud Irrevocable Inter Vivos Trust dated January 15, 2021, appointing Donia as the Trustee and amending the distribution of the subject property in the trust (NYSCEF Doc No. 84 at ¶ 20).

at ¶¶ 29-34). The amended complaint claims that Donia's actions caused a significant devaluation to Super Ace Corp., and Donia continues to collect rent without providing an accounting to Ennab (*id.* at ¶¶ 35-39). Ennab asserts that Donia has tried to install a new management company without Ennab's consent and continues to unlawfully engage in Super Ace Corp.'s matters despite not being a shareholder, officer, or director (*id.* at ¶¶ 42-48).

Ennab further alleges that he has discovered that Donia and the Farhoud Trust do not have possession of the shares of Super Ace Corp. and their professed ownership and authority is disputed (*id.* at ¶ 49). The amended complaint claims that documents reveal that Donia's brother and sister, Amjad and Dina, are to inherit shares of Super Ace Corp. upon the death of Hiam and Amjad has filed documents with the Surrogates Court to claim his ownership of the shares (*id.* at ¶¶ 52-55). The amended complaint asserts nine causes of action: (1) declaratory judgment; (2) violation of New York Business Corporation Law; (3) misrepresentation; (4) interference with business organization and tortious interference with contractual relations; (5) unjust enrichment; (6) conversion; (7) accounting; (8) corporate waste; and (9) misappropriation of funds.

On April 3, 2023, Amjad, a nominal defendant, filed an answer (NYSCEF Doc. No. 92). In his answer, Amjad agrees with the bulk of the allegations in the amended complaint. He notes that his father (the former business partner) and his mother Hiam, had several children: Amjad, Dina Farhoud (Dina), Donia, Amani Thabit Farhoud, and Mageda Thabit Farhoud (*id.* at ¶ 134). When their father, the former business partner, passed away in

March 2019, he left everything to his wife, Hiam, including his shares of Super Ace Corp. until her death on January 21, 2021 (*id.* at ¶¶ 135-136). According to the answer, Donia was very aggravated that her father did not leave anything to his children but everything to their mother, Hiam (*id.* at ¶ 137). Amjad claims that Donia was very aggressive, and their mother was very intimidated by her, ultimately deciding to execute estate planning documents to protect her assets from Donia (*id.* at ¶¶ 138-140). Amjad alleges that his mother created the Farhoud Trust and placed several assets into the Trust, including shares of Super Ace Corp. Amjad asserts that his mother designated him as the trustee, and his sister Dina as the successor trustee (*id.* at ¶¶ 141-142). Amjad contends that none of the Trust documents listed Donia as the successor trustee as his mother voluntarily left her out since she did not trust her (*id.* at ¶¶ 143-145).

The answer alleges that upon the death of Hiam, the shares of Super Ace Corp. would be devised to Amjad and Dina (*id.* at ¶ 147). Although Donia claims to be a trustee of the Farhoud Trust, the answer disputes this contention and states that it is an impossibility as the Trust documents were prepared with the assistance of counsel and Hiam's wishes were well known as the entire family was involved (*id.* at ¶¶ 148-150). In March 2020, Hiam was hospitalized and was ultimately diagnosed with multiple myeloma (*id.* at ¶ 151). Amjad claims that after the diagnosis, he noticed his mother was extremely pale and seemed unwell. He asked his sister Amani Farhoud to take their mother to Urgent Care but Donia and her husband decided to take their mother without informing the other family members (*id.* at ¶ 154). Amjad alleges that he was unable to reach his mother for days and when she finally answered her phone, she was confused, did not know where she

was, and could only discern that she was in a hospital (*id.* at ¶¶ 155-157). Amjad asserts that he was unable to get updates as to his mother's condition because he was advised by a nurse that Donia was their mother's health care proxy. He notes that he was finally able to get updates about his mother's condition after he faxed his medical proxy to the hospital (*id.* at ¶¶ 158-159).

Amjad claims that after her diagnosis and subsequent hospitalization, Hiam's health continued to deteriorate, including her cognitive abilities which included early onset of dementia, encephalopathy, and other impairments that Amjad contends would have impeded her from making any lawful changes to the Farhoud Trust (*id.* at ¶ 160). Shortly thereafter, it is alleged that Donia removed Hiam from the hospital without informing any of the siblings, secluded their mother from all her kids, prevented her from speaking to any of her children, took away all her means of communication, and refused to return phone calls or text messages (*id.* at ¶¶ 161-163). Amjad asserts that after their mother was removed from the hospital, Donia refused to let her sibling Dina check up on their mother and told Dina that she would call the police if she showed up (*id.* at ¶¶ 164-165).

Amjad contends that after her removal from the hospital, their mother did not have the mental capacity to make any changes to the Farhoud Trust as she was unable to take care of herself and could not make informed decisions (*id.* at ¶¶ 167-168). Thus, any changes to the Farhoud Trust were contradictory to Hiam's prior wishes. When their mother passed away on January 21, 2021, Donia did not inform anyone and Amjad became aware when he was notified in March 2021, that his joint account with Hiam was frozen

because of her death (*id.* at ¶¶ 171-173). The answer claims that Donia is fraudulently interfering with Hiam's estate, including the corporation's affairs. Amjad asserts several cross-claims against Donia.

Several motions and orders to show cause have been filed in the instant action. By order dated February 15, 2023, the court granted plaintiffs' order to show cause (mot. seq. no. one) to enjoin defendants from acting on behalf and/or interfering with the management of the corporation reasoning that defendant did not provide any evidence in writing of her [Donia's] entitlement to act as president or director of the corporation, or that she was elected by the shareholders as the president (NYSCEF Doc No. 61).³ In lieu of answering the amended complaint, Donia filed the instant pre-answer motion to dismiss.⁴

DISCUSSION

CPLR 3211 (a) (8)

Since the defendants are seeking dismissal on multiple grounds, the court must first resolve the issue of personal jurisdiction over the moving defendants before addressing the

³ The court struck the interim relief sought in defendants' order to show cause (mot. seq. no. eight) seeking to stay the court's February 15, 2023, decision and order pending the hearing and determination of the underlying motion. Mot. seq. no. eight has not yet been decided and is currently calendared for September 27, 2023.

⁴ Although Donia filed an answer to the original summons and complaint, no answer has yet been filed to the amended complaint (NYSCEF Doc Nos. 24 and 25). In her original answer, Donia claims, among other things, that Ennab has been homebound for several years due to a medical condition and that Donia has been helping her father, the former business partner, since about 2000 with the management of the subject property (NYSCEF Doc No. 24 ¶¶ 136-142). Donia asserts that as an attorney, she has been helping her parents run the corporation and handling landlord tenant issues that arose (*id.* at ¶ 144). Donia avers that in January 2021, Hiam created an amendment to the Trust documents with the assistance of separate counsel, discharging Amjad as trustee and appointing Donia as trustee in his place (*id.* at ¶¶ 147-149). The original answer asserted several counterclaims.

remaining arguments (*see Wilmington Savings Fund Society, FSB v Zabrowsky*, 212 AD3d 866, 868 [2d Dept 2023]; *Rattner v Fessler*, 202 AD3d 1011, 1015 [2d Dept 2022]; *U.S. Bank N.A. v Giraldo*, 192 AD3d 720, 721 [2d Dept 2021]). Defendants contend that the instant action must be dismissed for lack of service of process upon the Farhoud Trust and nominal defendants Amjad, Dina, and Super Ace Corp. “The burden of proving that personal jurisdiction has been acquired over a defendant in an action rests with the plaintiff” (*U.S. Bank N.A. v Logan Estates, LLC*, 213 AD3d 792, 793 [2d Dept 2023]; *see JPMorgan Chase Bank, N.A. v Grinkorn*, 172 AD3d 1183, 1185 [2d Dept 2019]). “A process server’s affidavit of service constitutes prima facie evidence of proper service” (*id.*; *see JPMorgan Chase Bank, N.A.*, 172 AD3d at 1185). “In order to warrant a hearing to determine the validity of service of process, the denial of service must be substantiated by specific, detailed facts that contradict the affidavit of service” (*see JPMorgan Chase Bank, N.A.*, 172 AD3d at 1185, quoting *Washington Mut. Bank v Huggins*, 140 AD3d 858, 859 [2d Dept 2016]). Here, in response to defendants’ motion, plaintiffs annex the affirmation of service which avers that the amended summons and complaint were served upon Amjad, individually and as trustee of the Farhoud Trust, upon counsel for Amjad and the Farhoud Trust, who affirmed that she is authorized to accept same (NYSCEF Doc. No. 139). In their reply, defendants fail to respond to plaintiffs’ claim that jurisdiction was obtained on the trust by serving the purported trustee of the Farhoud Trust, Amjad, through counsel. Thus, the portion of the motion seeking dismissal of the amended complaint for lack of personal jurisdiction over the Farhoud Trust is denied.

The portion of the motion seeking dismissal for lack of jurisdiction over the nominal defendants is likewise denied as the defense of improper service of process is personal in nature and the moving defendants lack standing to contest the validity of service of process upon the nominal defendants (*see Rhoades v Westchester County Bd. of Elections*, 115 AD3d 958, 960 [2d Dept 2014]). In any event, plaintiffs submit affidavits of service upon the nominal defendants and defendants fail to provide sufficient evidence to contradict such service (*see generally U.S. Bank N.A. v Cadoo*, 197 AD3d 588, 590 [2d Dept 2021]).

CPLR 3211 (a) (3)

On a motion to dismiss pursuant to CPLR 3211, “the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83 [1994]). The court must “accept the facts as alleged in the [amended] 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” (*id.* at 87-88; *Morone v Morone*, 50 NY2d 481, 484 [1980]). Defendants contend that the plaintiffs lack standing to challenge the validity of the Farhoud Trust as they are total strangers to the trust. Plaintiffs respond by asserting that Super Ace Corp. is entitled to know who its shareholders, officers, and directors are since there are competing claims as to who is the trustee of the Farhoud Trust, and thus owner of the shares of Super Ace Corp.

“On a defendant's motion to dismiss the [amended] complaint based upon the plaintiff's alleged lack of standing, the burden is on the moving defendant to establish,

prima facie, the plaintiff's lack of standing" (*Golden Jubilee Realty, LLC v Castro*, 196 AD3d 680, 680 [2d Dept 2021]; see *BAC Home Loans Servicing, LP v Rychik*, 161 AD3d 924, 925 [2d Dept 2018]; CPLR 3211 [a] [3]). "To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff's submissions raise a question of fact as to its standing" (*id.*; *Deutsche Bank Trust Co. Americas v Vitellas*, 131 AD3d 52, 60 [2d Dept 2015]).

Here, defendants failed to meet their burden. Defendants did not establish that Ennab and the Ennab Trust do not have standing to ascertain who is the trustee of the Farhoud Trust authorized to bind the Farhoud Trust, a shareholder of Super Ace Corp. (see *Magid v Sunrise Holdings Group, LLC*, 160 AD3d 941, 942 [2d Dept 2018] [noting that persons dealing with a trustee must take notice of the scope of the trustee's authority, if any]. Since there are competing claims as to who the trustee of the Farhoud Trust is, a shareholder of plaintiff Super Ace Corp. has standing to sue to ascertain the scope of the trustee's authority. Additionally, where there is a dispute as to who the duly appointed trustee of a trust is, the failure to name the trustee in such capacity as a defendant does not warrant dismissal (see *Connery v Sultan*, 129 AD3d 455, 455 [1st Dept 2015] [holding that a trustee can maintain an action against another even if he or she does not describe themselves as trustee]). Furthermore, Ennab's failure to name himself as trustee of the Ennab trust in the caption does not require dismissal (*id.*).

Next, defendants contend that Super Ace Corp. did not authorize this action. "[A]s a general rule, the business of the corporation is to be managed by its board of directors

(see *TJI Realty, Inc. v Harris*, 250 AD2d 596, 597 [2d Dept 1998]; Business Corporations Law § 701). Additionally, “absent a provision in the by-laws or actions by the board of directors prohibiting [a person] from instituting suits in the name of and in behalf of the corporation, he [or she] must be deemed, in the discharge of his [or her] duties, to have presumptive authority to so act” (*TJI Realty, Inc.*, 250 AD2d at 598; *West View Hills v Lizau Realty Corp.*, 6 NY2d 344, 348 [1959]). “While in the normal course the implied authority vested in an actively functioning president will not devolve upon a secretary or treasurer, such officer will be deemed to have authority to act and speak on behalf of the corporation where he [or she] has been the one actually managing the business” (*Heights Properties 1388, LLC v Make Realty Corp.*, 151 AD3d 825, 827 [2d Dept 2017]; see *Rothman & Schneider, Inc. v Beckerman*, 2 NY2d 493, 498 [1957]).

In the amended complaint, Ennab asserts that he is the only director of Super Ace Corp., is an officer of the corporation, and has been the day-to-day manager (NYSCEF Doc No. 65 at ¶¶ 5-6). At the heart of the issue in this litigation is whether the amendment to the Farhoud Trust appointing Donia as trustee in place and stead of Amjad is effective and binding on the parties. At this early juncture in the litigation, and without the submission of any By-Laws indicating otherwise, defendants’ motion to dismiss on the basis that Super Ace Corp. cannot maintain this action must be denied as from the allegations in the amended complaint, Ennab appears to have actual and presumptive authority to act on behalf of Super Ace Corp.

Defendants further argue that plaintiffs are barred under the contemporaneous ownership doctrine from asserting any derivative claims on behalf of the corporation. “A shareholder derivative action is a lawsuit brought by one or more shareholders on behalf of a corporation to remedy or prevent a wrong to the corporation” (*Kame v Kemper Financial Services, Inc.*, 500 US 90, 95 [1991]). “In a proper shareholder derivative suit, although the shareholder initially brings the derivative claim, he acts solely in a representative capacity; ultimately, the claim belongs to the corporation, and any recovery—either by way of judgment or settlement—belongs to the corporation” (*id.*). In such action, “the remedy sought is for wrong done to the corporation; the primary cause of action belongs to the corporation; [and] recovery must enure to the benefit of the corporation” (*Harounian v Harounian*, 198 AD3d 734, 736 [2d Dept 2021]; *see Isaac v Marcus*, 258 NY 257, 264 [1932]).

“In the context of a corporation, the standing of the shareholder is based on the fact that...he [or she] is defending his [or her] own interests as well as those of the corporation” (*id.*; citing *Tenney v Rosenthal*, 6 NY2d 204, 2011 [1959]). “[I]n order to assert a derivative cause of action, shareholders must set forth with particularity their efforts to secure the initiation of such action by the board of directors or the reasons for not making such effort” (*Torres v Lindsay Park Board of Directors*, 2023 NY Slip Op 04227, *1 [2d Dept 2023]). Here, contrary to the defendants’ claims, plaintiffs may maintain this action as the shares of Super Ace Corp. were transferred to the Ennab Trust where Ennab is the trustee. As Ennab is the trustee, he cannot be said to be a stranger to the corporation, and thus does not

lack standing to institute or continue the instant suit. Additionally, it is evident from the allegations in the amended complaint that a demand to bring suit would be futile as the only other officer or director of Super Ace Corp. is deceased and there is a claim that Donia's appointment as trustee was invalid due to Hiam's compromised physical and mental state at the time of the amendment.

CPLR 3211 (a) (7)

In determining a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), a court's role is deciding “whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). “On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), a court must 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” (*Eskridge v Diocese of Brooklyn*, 210 AD3d 1056, 1057 [2d Dept 2022]; *see Leon*, 84 NY2d at 83; *Boyle v North Salem Central School District*, 208 AD3d 744 [2d Dept 2022]). “Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss” (*id.*; *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11 [2005]). It is the movant who has the burden to demonstrate that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (*see Leon*, 84 NY2d at 87-88; *Guggenheimer*, 43 NY2d at 275).

Defendants contend that plaintiffs' causes of action for conversion, misrepresentation, tortious interference, and for an accounting must be dismissed as they are not cognizable, are deficient, or inadequately pled or stated. Here, considering the allegations in the amended complaint and the affidavit of Amjad submitted in opposition to the instant motion, the verified complaint sufficiently alleges causes of action sounding in conversion, misrepresentation, tortious interference, and an accounting (*see Recine v Recine*, 201 AD3d 827, 830 [2d Dept 2022]). Moreover, the evidence proffered by defendants in support of their motion did not utterly refute the plaintiffs' allegations or conclusively establish a defense as a matter of law to said claims (*see id.*; *Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326-327 [2002]).

Disqualification of Counsel

Defendants move to disqualify plaintiffs' counsel from representing Super Ace Corp. as they claim that an attorney cannot represent a shareholder as well as the corporation in an internal dispute among shareholders. In opposition, plaintiffs' counsel notes that the identity of the shareholders is in dispute in this matter. Plaintiffs highlight that their position is that Donia is not a shareholder of the corporation or a trustee of the Farhoud Trust, and thus plaintiffs' claims are not against any shareholder. Plaintiffs seek a declaratory judgment to ascertain who is/are the rightful shareholders of Supe Ace Corp.

"The disqualification of an attorney is a matter which rests within the sound discretion of the court" (*Legacy Builders/Developers Corp. v Hollis Care Group, Inc.*, 162 AD3d 649, 649 [2d Dept 2018]; *see Olmoz v Town of Fishkill*, 258 AD2d 447, 447 [2d

Dept 1999]). “A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted” (*Deerin v Ocean Rich Foods, LLC*, 158 AD3d 603, 607 [2d Dept 2018]). “The party seeking to disqualify a law firm or an attorney bears the burden to show sufficient proof to warrant such a determination” (*id.*). Here, the court must accept the facts as alleged in the amended complaint as true and accord plaintiffs the benefit of every possible favorable inference. The court declines to disqualify plaintiffs’ counsel, at this time, as the law firm does not represent a corporation and shareholder in an internal dispute among shareholders since the amended complaint specifically alleges that Donia is not a shareholder.

CPLR 1003 and CPLR 1024

Defendants argue that the fictitious and nominal parties should be dropped pursuant to CPLR 1003 and CPLR 1024. They contend that plaintiffs failed to exercise due diligence to ascertain the identities of John and Jane Does 1-20 and XYZ Corporations/LLCs 1-20. Additionally, defendants allege that no claims are asserted by or against the nominal defendants, and thus they are not proper parties to this action. In opposition, plaintiffs state that it is too early in the litigation to find the identities of individuals who may be culpable in this matter as plaintiffs do not yet know who else, if anyone, committed unlawful acts and may be added to this litigation.

CPLR 1024 allows for the commencement of an action against an unknown party (*see Taveras v City of New York*, 108 AD3d 614, 617 [2d Dept 2013]). “The purpose of

this section is to permit a cause of action known to exist to be brought against a person whose name only is unknown” (*Orchard Park Central School Dist. v Orchard Park Teachers Assn*, 50 AD2d 462, 467 [2d Dept 1976]). The portion of defendants’ motion to remove the unknown parties from the caption is denied, without prejudice and with leave to renew upon the completion of discovery or expiration of the applicable statute of limitations (*see generally Wilmington Trust, N.A. v Shasho*, 197 AD3d 534, 536 [2d Dept 2021]). The portion of defendants’ motion to remove the nominal defendants from the caption pursuant to CPLR 1003 is likewise denied as Amjad and Dina will likely be affected by the declaratory judgment rendered in this action and their rights potentially impacted (*see State v Park*, 204 AD2d 531, 532 [2d Dept 1994]).

CPLR 3024

Defendants request that plaintiffs provide a more definite statement pursuant to CPLR 3024 (a), which “protects parties from pleadings that are vague or ambiguous, providing a mechanism for the court to order more definite statement when warranted to enable the responding party to properly frame a response to the pleading” (*Pisula v Roman Catholic Archdiocese of New York*, 201 AD3d 88, 96 [2d Dept 2021]). The court finds that plaintiffs’ pleading is neither vague nor ambiguous requiring the need for a more definite statement. To the extent defendants seek additional information as to the claims made in plaintiffs’ amended complaint, defendants can depose the plaintiffs and ascertain the details they seek through relevant discovery.


CONCLUSION

All arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by the court, regardless of whether they are specifically discussed herein. Accordingly, it is

ORDERED that defendants' mot. seq. no. four to dismiss and related relief is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.