Avgoustidis v Almiroudis
2023 NY Slip Op 35231(U)
August 18, 2023
Supreme Court, Queens County
Docket Number: Index No. 702239/2022
Judge: Joseph Risi
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOSEPH RISI
A. J. S. C.

IA Part 3

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DIMITRIOS AVGOUSTIDIS individually and derivatively on behalf of MESTA REALTYLLC,

Plaintiffs,

-against-

GEORGE ALMIROUDIS and MESTA REALTY LLC,

Defendants.

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Index Number: 702239/2022

Motion Seq.: #1

DECISION/ORDER

The following electronically filed documents on this motion by defendants for an Order pursuant to CPLR §3211(a)(1), (5) and (7) dismissing plaintiff DIMITRIOS AVGOUSTIDIS' complaint in its entirety.

	Papers Numbered
Notice of Motion-Affidavit-Exhibits-Memorandum of Law-Service……………..................................	EF 7 – 17
Affirmation in Opposition-Service..	EF 23
Memorandum of Law in Reply- Service…………………………	EF 24

Upon the foregoing papers, it is ordered that the motion is determined as follows:

This is an action whereby plaintiff DIMITRIOS AVGOUSTIDIS ('AVGOUSTIDIS'), suing individually and derivatively on behalf of MESTA REALTY LLC ('MESTA'), asserts causes of action seeking damages and an injunction based on breaches of fiduciary duty, declaratory relief, and an inspection of MESTA's books and records. Defendants seek to dismiss the complaint pursuant to CPLR §3211(a)(1), (5) and (7).

Plaintiff AVGOUSTIDIS and defendant ALMIROUDIS formed MESTA in 2008 for the purpose of owning and managing real property for rental income purposes. The parties entered into an operating agreement on March 5, 2008, and MESTA purchased five different properties. Plaintiff alleges that defendant began to freeze out and exclude plaintiff from the business starting in 2015, took distributions from MESTA without remitting such distributions to plaintiff, and has consistently rented spaces to occupants/tenants while allowing them to pay MESTA rent in an amount below market rate. Defendants argue that plaintiff's complaint (1) fails to state a cause of action; (2) asserts claims that are barred by the statute of limitations; and (3) seeks to enforce purported rights that are contrary to the parties' written operating agreement governing the affairs of MESTA.

Defendants' counsel submits a memorandum of law in support of this motion, arguing that plaintiff's first and second causes of action, which assert direct and derivative claims for breach of fiduciary duty, fail to meet the particularity requirements of CPLR §3016(b). Counsel argues that plaintiff fails to provide any detail as to how he was purportedly frozen out from MESTA, what decision-making he was excluded from, and what books and records were not supplied to him. Additionally, counsel argues that plaintiff's claims are made solely "upon information and belief" without disclosing the source, which also constitutes a failure to comply with the particularity requirements of CPLR §3016 and case law. As such, counsel argues that the first and second claims should be dismissed pursuant to CPLR §§3211(a)(7) and 3016(b).

Defendant's counsel also argues that plaintiff's requests for an injunction and accounting contained in the first cause of action should independently be dismissed. Plaintiff seeks an injunction that "Almiroudis be directed to permit Avgoustidis to manage Mesta equally." Counsel argues that the request fails because plaintiff cannot allege that he does not have an adequate remedy at law in connection with his first and second claims, which expressly seek monetary damages. Additionally, counsel argues that plaintiff has been purportedly frozen out of MESTA for seven years, but has never sought injunctive relief until now. As a result, plaintiff cannot demonstrate that he will suffer irreparable harm absent the injunction. Additionally, counsel argues that plaintiff's third claim seeking a declaratory judgment should be dismissed pursuant to CPLR §3211(a)(1) based upon documentary evidence. Counsel argues that the plaintiff's alleged agreements regarding the division of profits and losses, as well as the purported agreements as to membership interest and voting rights, are governed by the terms of the operating agreement. As the operating agreement states that the foregoing will be allocated in accordance with the parties' respective capital accounts/contributions, counsel argues that the documentary evidence conclusively disproves plaintiff's allegations.

Defendant's counsel further argues that plaintiff's first and second claims are barred by the statute of limitations and should be dismissed pursuant to CPLR §3211(a)(5). Counsel argues that the only alleged misconduct referenced in the complaint occurred in or about June of 2015, and the three-year statute of limitations on said claims has run. Counsel also points to the six-year statute of limitations when the relief sought is equitable in nature. He argues that plaintiff's requests for equitable relief are merely incidental to his request for monetary damages and were undoubtedly inserted for the sole purpose of avoiding the statute of limitations. Additionally, counsel argues that plaintiff is attempting to circumvent the statute of limitations by inserting the phrase "each and every day since" in reference to misconduct beginning in 2015, without providing any facts.

Plaintiffs' counsel submits an affirmation in opposition, arguing that defendant has installed and continued to install/renew leases in the MESTA buildings, day after day and year after year, since 2015. As such, counsel argues that the continuing wrong doctrine permits what might otherwise be perceived as an untimely claim for purposes of the statute of limitations. Additionally, counsel argues that plaintiff has stated its claims with sufficient particularity, as plaintiff has averred that MESTA properties are consistently leased to tenants, yet plaintiff has inexplicably not received any distributions from the business. With respect to the operating agreement, counsel states that there is merely an issue of fact as to the parties' respective capital accounts, which will be sorted out through discovery.

To establish a prima facie case for breach of fiduciary duty, a plaintiff must allege: (1) the existence of a fiduciary relationship; (2) misconduct by the defendant; and (3) damages directly caused by the defendant's misconduct (*see Village of Kiryas Joel v County of Orange*, 144 A.D.3d 895 [2d Dept. 2016]). On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 [2002]; *Leon v Martinez*, 84 NY2d 83 [1994]; *Greer v National Grid*, 89 AD3d 1059 [2d Dept. 2011]; *Prestige Caterers, Inc. v Siegel*, 88 AD3d 679 [2d Dept. 2011]). Accepting all of the allegations of the complaint as true, with a liberal construction and without opinion as to plaintiff's ability to ultimately establish their truth before the trier of fact (*see generally Cooper v 620 Props. Assocs.*, 242 AD2d 359 [2d Dept. 1997]), this Court concludes that the complaint sufficiently alleges a cause of action for breach of fiduciary duty. As such, defendants request for a dismissal of plaintiff's first and second causes of action for failure to state a case of action is denied.

"To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Harounian v Harounian*, 198 AD3d 734 [2d Dept 2021], quoting *Teitler v Pollack & Sons*, 288 AD2d 302, 302 [2d Dept 2001]; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, [2002]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Xia-Ping Wang v Diamond Hill Realty, LLC*, 116 AD3d 767, 767-68 [2d Dept 2014]). Here, the operating agreement states that the profits and losses, as well as the members' membership interest and voting rights, are to be allocated in accordance with each members' capital contributions. However, neither party has offered any evidence as to their respective capital contributions. As such, factual issues remain, and the dismissal of plaintiff's third cause of action is not warranted at this juncture.

On a motion pursuant to CPLR §3211(a)(5) to dismiss a complaint as barred by the applicable statute of limitations, the moving defendant must establish, prima facie, that the time in which to commence the action has expired (*Kitty Jie Yuan v 2368 W. 12th St., LLC*, 119 AD3d 674 [2d Dept. 2014]). Here, plaintiff alleges that defendant has continued to lease and re-lease spaces to tenants over time. While information obtained during discovery may lead to dismissal under CPLR §3211(a)(5), such relief is denied at this time.

Accordingly, it is hereby

ORDERED, that the motion is denied; and it is further

ORDERED, that 1) this matter is referred to the Alternative Dispute Resolution Program of the Queens County Commercial Division for mediation of all issues; 2) the mediation shall be conducted in accordance with, and subject to, the Program Rules; and 3) all proceedings in this action in this court, including discovery and motion practice, shall continue during the mediation process.

This is the decision and order of the Court

Date: August 18, 2023

HON. JOSEPH RISI, A.J.S.C.