

**Rossi Mktg. Group, Inc. v McGuigan**

2025 NY Slip Op 30814(U)

March 10, 2025

Supreme Court, New York County

Docket Number: Index No. 653022/2024

Judge: Arthur F. Engoron

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART 37

Justice

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ROSSI MARKETING GROUP, INC., ROBERT M ROSSI,

Plaintiffs,

- v -

CIARAN MCGUIGAN, THE MALIN GROUP, INC., THE MALIN SOHO LLC, THE MALIN WILLIAMSBURG LLC, THE MALIN WEST VILLAGE LLC, THE MALIN PARK AVE SOUTH LLC, THE MALIN NASHVILLE LLC, THE MALIN SOUTH GULCH LLC, THE MALIN EAST AUSTIN LLC, THE MALIN SAVANNAH LLC, THE NICHE COLLECTIVE INC., DOES 1-50

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46,

were read on this motion to

DISMISS

Upon the foregoing documents, and after oral argument held on February 6, 2025, defendants' motion to dismiss, pursuant to CPLR 3211(a)(7), is granted in part and denied in part as follows.

Background

On July 18, 2018, defendant Ciaran McGuigan ("McGuigan"), non-party Richard Langthorne, and plaintiff Robert M Rossi ("Rossi"), incorporated the nominal defendant The Niche Collective Inc. ("The Niche") in the state of Delaware. NYSCEF Doc. No. 29. All three men served as officers and directors of The Niche, with McGuigan as the President and Rossi as the Treasurer. Both McGuigan and Rossi Marketing held 44% of The Niche's shares.

On October 4, 2019, The Niche was dissolved by Delaware's Secretary of State via a certificate of dissolution, signed by McGuigan. NYSCEF Doc. No. 31. The prior consent from The Niche's Board to dissolve The Niche included the signatures of Rossi, McGuigan, and Langthorne (NYSCEF Doc. No. 30), however; plaintiffs allege that Rossi's signature was forged.

On October 29, 2019, McGuigan and others incorporated defendant The Malin Group, Inc, in Delaware, without Rossi. Rossi alleges that The Malin Group was "secretly created" by McGuigan and "mirrors the Niche's business by providing elevated dedication co-working spaces in locations within metropolitan areas." NYSCEF Doc. No. 27.

Rossi alleges that he was still working with McGuigan on operations for launching The Niche co-working spaces until March of 2020, after which the start of the pandemic led to a

postponement of the launch and “McGuigan’s communication regarding the operations of the Niche became progressively silent.” Id.

On November 1, 2021, The Malin opened its first brick and mortar location in Soho, New York. Rossi alleges he “was completely unaware of the existence of The Malin until he stumbled upon it” on June 23, 2022. Id.

On June 14, 2024, plaintiffs, Rossi Marketing Group, Inc. (“Marketing”) and Rossi, commenced this action against defendants, McGuigan, The Malin Group, The Malin Soho LLC, The Malin Williamsburg LLC, the Malkin West Village LLC, The Malin Park Ave South LLC, The Malin Nashville LLC, The Malin South Gulch LLC, The Malin East Austin LLC, and The Malin Savannah LLC (collectively, “The Malin Defendants”) as well as nominal defendant The Niche, asserting twelve causes of action: (1) breach of fiduciary duty, by Marketing against McGuigan; (2) aiding and abetting breach of fiduciary duty, by Marketing against The Malin Defendants; (3) usurpation of corporate opportunity, by Marketing against McGuigan; (4) unfair competition, by Marketing against McGuigan and The Malin Defendants; (5) tortious interference with prospective business relations, by plaintiffs against McGuigan and defendant The Malin Williamsburg LLC; (6) unjust enrichment, by Marketing against McGuigan and The Malin Defendants; (7) breach of implied covenant of good faith and fair dealing, by Marketing against McGuigan; (8) breach of contract, by Marketing against McGuigan; (9) fraud, by plaintiffs against McGuigan; (10) misappropriation of idea, by plaintiffs against McGuigan; (11) misappropriation of skills and expenditures, by plaintiffs against McGuigan; and (12) promissory estoppel, by plaintiffs against McGuigan. Id.

The complaint notes that where applicable, a demand of The Niche is excused as “McGuigan is a director of The Niche and his interests are so intertwined with the allegations contained in this complaint as to render any such demand futile.” Id. at ¶34. Thus, this is a direct suit in which plaintiffs seek redress for the alleged harm done to Rossi and Marketing, rather than to The Niche. Plaintiffs seek compensatory and punitive damages on each cause of action.

Defendants now move, pursuant to CPLR 3211’s subsections, to dismiss the complaint. NYSCEF Doc. No. 24. Defendants argue, inter alia, that: The Malin Defendants could not have stolen The Niche’s ideas as it was dissolved; as The Niche was a Delaware company, Delaware substantive law applies, defeating the claims; the Delaware statute of limitations applies, barring the claims; and that plaintiffs fail to state any cause of action. Defendants argue that accordingly, plaintiffs’ complaint should be dismissed pursuant to CPLR 3211(a)(1), that the documentary evidence establishes a defense as a matter of law; CPLR 3211(a)(3), as plaintiffs do not have the legal capacity to sue for claims based on Rossi’s roles as a shareholder, director or officer of The Niche; and CPLR 3211(a)(7), as the complaint fails to state a claim upon which relief can be granted. NYSCEF Doc. No. 25.

In opposition, plaintiffs argue, inter alia, that Rossi’s signatures on The Niche dissolution papers are forged, and that therefore the dissolution is void; that New York statute of limitations applies; and that plaintiffs’ claims should be tolled based on theories of equitable tolling, fraudulent concealment, and inherently unknowable injuries. NYSCEF Doc. No. 33.

In reply, defendants argue, inter alia, that documentary evidence in the form of text messages proves that Rossi signed the dissolution agreements; that the three-year wind-up period for The Niche in Delaware has already ended and its directors and officers cannot be retroactively reinstated. NYSCEF Doc. No. 43.

#### Discussion

“Generally, under New York choice-of-law principles, courts apply the law of the forum to procedural questions and, to substantive issues, the law of the jurisdiction with the most significant relationship to the dispute.” Eccles v Shamrock Capital Advisors, LLC, 42 NY3d 321, 335 (2024) (internal citations omitted). Dismissal pursuant to CPLR 3211(a)(1) is warranted where “documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” Leon v Martinez, 84 NY2d 83, 87-88 (1994). For evidence to qualify as documentary pursuant to CPLR 3211(a)(1), it must be “unambiguous,” of “undisputed authenticity,” and “essentially undeniable.” VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC, 171 AD3d 189, 193 (1st Dept 2019). Dismissal pursuant to CPLR 3211(a)(7) is warranted when, “afford[ing] the pleadings a liberal construction, tak[ing] the allegations of the complaint as true and provid[ing] plaintiff the benefit of every possible inference,” the complaint fails to assert facts that would make out a cause of action. EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005). Here, Delaware law governs the substantive issues, as Delaware has “the most significant relationship to the dispute”, which is about the internal affairs of a Delaware corporation. New York procedural rules apply, which include New York’s statute of limitations.

Addressing The Malin defendants only, causes of action two, three, four, five, and six are dismissed, as The Malin did not owe a duty to plaintiffs. Accordingly, pursuant to CPLR 3211(a)(7), plaintiffs fail to state a cause of action against The Malin. Further, the seventh cause of action, for breach of the implied covenant of good faith and fair dealing against Marketing by McGuigan, is dismissed, as such a claim is not an independent cause of action. “[A] separate cause of action for breach of the covenant of good faith and fair dealing cannot be maintained where, as here, it is premised on the same conduct that underlies the breach of contract cause of action and is intrinsically tied to the damages allegedly resulting from a breach of the contract[.]” Parlux Fragrances, LLC v S. Carter Enters., LLC, 204 AD3d 72, 92 (1st Dept 2022).

In support of their CPLR 3211(a) defense, Defendants point to text messages between McGuigan and Rossi as documentary evidence of Rossi’s consent to the dissolution. However, said text messages fail to qualify as documentary evidence because they are ambiguous. McGuigan’s September 22, 2019, text mentions “to get that document signed” and does not make clear that the conversation is about dissolving The Niche. NYSCEF Doc. No. 46.

The statute of limitations is generally three years for a breach of fiduciary duty claim seeking monetary relief, although, “[w]here an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213(8).” DiRaimondo v Calhoun, 131 AD3d 1194, 1196 (2d Dept 2015). Here, the ninth cause of action, for fraud, is essential to, and not merely incidental to, the first cause of action, for breach of fiduciary duty. Thus, as the alleged fraud took place around October of 2019, and the complaint was filed in June of 2024, the first and ninth causes of action are timely. That Rossi, upon reasonable inquiry, would have discovered the dissolution of The Niche sooner than the June 23,

2022, date alleged by plaintiffs does not alter the fact that these claims comport with New York’s six-year statute of limitations.

“Where concrete facts are peculiarly within the knowledge of the party charged with the fraud it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings.” Pludeman v N. Leasing Sys., Inc., 10 NY3d 486, 491-92 (2008). “Critical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action.” Id. Here, the plaintiffs have alleged basic facts as to the fraud by alleging that “McGuigan made material misrepresentations and omissions of fact to induce Rossi to use his well-established network, develop business strategies and corporate opportunities that McGuigan could later usurp[,]” while at the same time planning to put these resources towards The Malin, in breach of the “duty of loyalty and disclosure” that McGuigan owed. NYSCEF Doc. No. 27 ¶ 77-79. Accordingly, defendants’ motion to dismiss causes of action one and nine must be denied, as taking the allegations of the complaint as true, the complaint asserts facts that are sufficient to state a cause of action for both claims.

Pursuant to CPLR 213(2), the statute of limitations for a standard breach of contract claim in New York is six years. “As [Delaware’s] Supreme Court has made clear, the bylaws of a Delaware corporation constitute a part of a binding broader contract among the directors, officers, and stockholders formed within the statutory framework of the DGCL.” Boilermakers Local 154 Retirement Fund v. Chevron Corp., 73 A.3d 934, 939 (Del. Ch. 2013). While The Niche was dissolved in October 2019 and the corporation has since been wound up, plaintiffs’ June 2024 filing of the eighth cause of action, breach of contract by McGuigan against Marketing, is timely.

The remaining causes of action, three, four, five, six, ten, eleven, and twelve, are dismissed as to the remaining defendants, as they are incidental to the breaches of contract, fiduciary duty, and fraud.

Conclusion

Thus, defendants’ motion to dismiss is hereby granted as to causes of action two through seven and ten through twelve, and denied as to causes of action one, eight, and nine; and the Clerk is hereby directed to enter judgment accordingly.

This case appears ripe for settlement, and the Court would be willing to preside over an in-person conference with all decision-makers present. An email to Part-37@nycourts.gov can get the ball rolling.

HON. ARTHUR F. ENGORON

3/10/2025  
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  SUBMIT ORDER  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  FIDUCIARY APPOINTMENT  REFERENCE

INCLUDES TRANSFER/REASSIGN