Gueta v Gueta
2025 NY Slip Op 35501(U)
February 27, 2025
Supreme Court, Nassau County
Docket Number: Index No. 608695-24
Judge: Jerome C. Murphy
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SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

TRIAL/IAS PART 5

RONEN GUETA,

Plaintiff,

Index No. 608695-24
Motion Date: 1-7-25
Sequence No.: 001

- against -

DECISION AND ORDER

JESSICA GUETA and GUETTA BUILDING COMPANY LLC,

Defendants.

The following papers have been read on this motion:

Motion Seq. 001	NYSCEF DOC.
Notice of Motion, Verified Complaint, Memorandum of Law in Support	6-9
Affirmation in Opposition	10
Reply Memorandum of Law in Further Support	14

PRELIMINARY STATEMENT

In Motion Sequence 001, Defendants move for an Order; I. Pursuant to CPLR 3211(a)(7) dismissing the Verified Complaint filed by plaintiff Ronen Gueta ("Plaintiff"); and (ii) Granting such other and further relief as the Court deems just and equitable. Opposition and Reply have been submitted.

BACKGROUND & DISCUSSION

Upon the foregoing papers, Defendants JESSICA GUETA and GUETTA BUILDING COMPANY LLC'S motion for an order pursuant to Civil Practice Law and Rules ("CPLR") 3211(a)(7), dismissing the complaint is determined as set forth hereinafter.

Factual and procedural background

On May 17, 2024, Plaintiff RONEN GUETA ("Ronen") commenced this action against Defendants JESSICA GUETA ("Jessica") and GUETTA BUILDING COMPANY LLC ("GBC") by filing a summons and complaint.

According to the complaint, on April 7, 2016, Ronen and Jessica, a married couple, formed GBC to engage in the business of real estate acquisition and development. Although Ronen and Jessica did not enter into a written operating agreement, they agreed that all profits would be distributed equally; that all company expenses would be borne equally; that all business decisions would be made with unanimous consent; that Ronen would solicit investors and customers and oversee on-site construction; and, that Jessica would manage bookkeeping, accounting, payroll, and human resources. In 2020 the parties commenced an action for divorce. During the pendency of their divorce, Ronen discovered that Jessica had allegedly misappropriated millions of dollars from GBC for her own personal use. It is further alleged, among other things, that Jessica made misrepresentations to third parties to allow her to gain control over GBC; that she has disparaged and defamed Ronen; and, that she has interfered with Ronen's business relationships.

The complaint asserts 14 causes of action sounding in breach of contract (first cause of action); fraud in the inducement (second cause of action); fraud in the execution (third cause of action); prima facie tort (fourth cause of action); defamation per se (fifth cause of action); defamation (sixth cause of action); tortious interference with contract (seventh cause of action); tortious interference with business relations (eighth cause of action); breach of fiduciary duty (ninth cause of action); unjust enrichment (tenth cause of action); prejudgment attachment of assets (eleventh cause of action); dissolution with surcharge (twelfth cause of action); dissolution (thirteenth cause of action); and, accounting (fourteenth cause of action).

Jessica and GBC ("Defendants") move to dismiss the complaint for failure to state a cause of action, which motion has been fully briefed with opposition and reply.

For the reasons set forth hereinafter, Defendants' motion is granted in part and denied in part.

Analysis

In determining a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, it is well settled that the court must "afford the pleading a liberal construction, accept all facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Davydov v Youssefi*, 205 AD3d 881 [2d Dept 2022]).

i. Breach of contract (first cause of action)

The complaint's first cause of action for breach of contract alleges that Jessica breached her contract with Ronen by making decisions affecting GBC without Ronen's consent and by misappropriating GBC's assets and Ronen's personal funds.

Defendants argue that the first cause of action for breach of contract should be dismissed because Ronen lacks standing to bring a derivative claim belonging to GBC as an individual claim;

and, because Ronen fails to allege the existence of a contract governing the use of his personal funds. In opposition, Ronen argues that the complaint sufficiently pleads the requisite elements of breach of contract and that he has suffered a direct harm as the result of Jessica's misappropriation of his personal funds.

"[T]o plead a cause of action for breach of contract, a plaintiff usually must allege that: (1) a contract exists . . . (2) plaintiff performed in accordance with the contract . . . (3) defendant breached its contractual obligations . . . and (4) defendant's breach resulted in damages" (*34-06 73, LLC v Seneca Ins. Co.*, 39 NY3d 44 [2022] [internal citations omitted]).

"Generally, corporations have an existence separate and distinct from that of their shareholders . . . and an individual shareholder cannot secure a personal recovery for an alleged wrong done to a corporation" (*New Castle Siding Co. v Wolfson*, 97 AD2d 501 [2d Dept 1983], *affd*, 63 NY2d 782 [1984] [internal citations omitted]). "The fact that an individual closely affiliated with a corporation (for example, a principal shareholder, or even a sole shareholder), is incidentally injured by an injury to the corporation does not confer on the injured individual standing to sue on the basis of either that indirect injury or the direct injury to the corporation" (*Id.* at 502). "Where, however . . . it appears that the injury to a shareholder resulted from the violation of a duty owing to the shareholder from the wrongdoer, having its origin in circumstances independent of and extrinsic to the corporate entity, an individual cause of action may exist for a shareholder of an allegedly wronged corporation" (*Id.*). Nevertheless, "[a]llegations of mismanagement or diversion of assets by officers or directors for their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually" (*Elenson v Wax*, 215 AD2d 429 [2d Dept 1995]).

Even accepting the factual allegations as true and according Ronen the benefit of every favorable inference, the complaint fails to state a cause of action for breach of contract. Inasmuch as the first cause of action alleges misappropriation of corporate assets, such claim is derivative in nature and belongs to GBC. Moreover, inasmuch as the first cause of action alleges misappropriation of Ronen's personal funds, it fails to allege the existence of a contract governing the use of his personal funds (*see, e.g., Theaprin Pharms., Inc. v Conway*, 137 AD3d 1254 [2d Dept 2016]). Therefore, that branch of Defendants' motion seeking dismissal of the first cause of action for breach of contract is granted.

ii. <u>Fraud in the inducement (second cause of action)</u>

The complaint's second cause of action for fraud in the inducement alleges that Jessica falsely represented that she would be an equal partner and that she would serve as a fiduciary to GBC and to Ronen.

Defendants argue that the second cause of action for fraud in the inducement should be dismissed because the alleged statement misrepresents an intention to perform under the contract, which is insufficient to allege fraud. Defendants also argue that the complaint's allegations lack the requisite particularity to plead fraud. In opposition, Ronen argues that the complaint's allegations demonstrate that at the time Jessica represented that she would be an equal partner and a fiduciary, Jessica harbored an intent not to honor those representations.

"To recover damages for fraudulent inducement, a plaintiff must prove '(1) a misrepresentation or an omission of material fact which was false and known to be false by the defendant, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) justifiable reliance of the plaintiff on the misrepresentation or material omission, and (4) injury' " (*CANBE Prop., LLC v Curatola*, 227 AD3d 654 [2d Dept 2024], quoting *Oxford Health Plans (NY), Inc. v Biomed Pharms., Inc.*, 181 AD3d 808 [2d Dept 2020]). "[W]here a cause of action is based in fraud, 'the circumstances constituting the wrong shall be stated in detail' " (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173 [2011]).

"A cause of action alleging fraud does not lie where the only fraud claim relates to a breach of contract" (*WIT Holding Corp. v Klein*, 282 AD2d 527 [2d Dept 2001]). "A present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud" (*Id.*).

Even accepting the factual allegations as true and according Ronen the benefit of every favorable inference, the complaint fails to state a cause of action for fraud in the inducement because the complaint's allegations amount to a misrepresentation of Jessica's intention to perform pursuant to the parties' agreement. Contrary to Ronen's contention, allegations regarding Jessica's subsequent misconduct are not indicative of her intention at the time she made the representation. Therefore, that branch of Defendants' motion seeking dismissal of the second cause of action for fraud in the inducement is granted.

iii. Fraud in the execution (third cause of action)

The complaint's third cause of action for fraud in the execution alleges that Jessica forged Ronen's signature on documents, which allowed her to gain control of GBC and to misappropriate GBC's assets and Ronen's personal funds.

Defendants argue that the third cause of action for fraud in the execution should be dismissed because the complaint's allegations lack the requisite particularity to plead fraud. Notably, Defendants argue that the complaint's allegations fail to identify the allegedly forged documents, to whom those documents were presented, and/or how those documents were relied upon. In opposition, Ronen argues that, although he did not sign any of the documents, Jessica used those documents with his forged signature to mislead third parties and to induce them to act.

In addition to the requisite elements of fraud, "[f]raud in the execution . . . arises where a party did not know the nature or the contents of the document being signed, or the consequences of signing it, and was nonetheless misled into doing so" (*Whitehead v Town House Equities, Ltd.*, 8 AD3d 367 [2d Dept 2004]; *see also Paredes v Vorhand*, 204 AD3d 1468 [4th Dept 2022]).

Even accepting the factual allegations as true and according Ronen the benefit of every favorable inference, the complaint fails to state a cause of action for fraud in the execution because it does not allege that Ronen, or anyone, was misled into signing a document without knowledge of its contents or the consequences of their signature. Therefore, that branch of Defendants' motion seeking dismissal of the third cause of action for fraud in the execution is granted.

iv. Prima facie tort (fourth cause of action)

The complaint's fourth cause of action for prima facie tort alleges that Jessica's misconduct was inflicted on Ronen with malicious intent.

Defendants argue that the fourth cause of action for prima facie tort should be dismissed because the complaint fails to allege that Jessica's sole motive was malicious intent or disinterested malevolence. Defendants also argue that the complaint's allegations lack the requisite particularity to plead special damages. In opposition, Ronen argues that the complaint sufficiently alleges that

Jessica was motivated by malice and that he suffered damages in an estimated amount of $10,000,000.

"The requisite elements for a cause of action sounding in prima facie tort include (1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal" (*Diorio v Ossining Union Free Sch. Dist.*, 96 AD3d 710 [2d Dept 2012]). "To adequately plead prima facie tort, the complaint must plead the defendant's malicious intent or disinterested malevolence as the sole motive for the challenged conduct" (*Ahmed Elkoulily, M.D., P.C. v New York State Catholic Healthplan, Inc.*, 153 AD3d 768 [2d Dept 2017]). "Special damages 'must be alleged with sufficient particularity to identify actual losses and be related causally to the alleged tortious acts' " (*Shahid v Slochowsky & Slochowsky, LLP*, 208 AD3d 1381 [2d Dept 2022], quoting *Luciano v Handcock*, 78 AD2d 943 [3d Dept 1980]). Ultimately, "prima facie tort was designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy, and not to provide a 'catch-all' alternative for every cause of action which cannot stand on its legs" (*Lancaster v Town of E. Hampton*, 54 AD3d 906 [2d Dept 2008], quoting *Bassim v Hassett*, 184 AD2d 908 [3d Dept 1992] [internal quotations omitted]).

Even accepting the factual allegations as true and according Ronen the benefit of every favorable inference, the complaint fails to state a cause of action for prima facie tort. The complaint's allegations regarding Jessica's self-dealing and self-promotion contradict the allegation that malice was the sole motive for her alleged misconduct. Moreover, the conclusory allegation of an estimated amount of damages is insufficient to plead special damages (*see, e.g.*, *Franklin D. Nastasi Trust v*

Bloomberg, L.P., 224 AD3d 804 [2d Dept 2024]). Therefore, that branch of Defendants' motion seeking dismissal of the fourth cause of action for prima facie tort is granted.

v. Defamation per se and defamation (fifth and sixth causes of action)

The complaint's fifth and sixth causes of action for defamation per se and defamation allege that Jessica published false statements about Ronen to third parties orally and in writing, which statements were intended to damage his professional and personal reputation.

Defendants argue that the fifth cause of action for defamation per se and the sixth cause of action for defamation should be dismissed because the complaint's allegations lack requisite particularity to plead defamation. Notably, Defendants argue that the complaint's allegations fail to identify the particular words, as well as when, where, to whom and the manner in which those particular words were published. In opposition, Ronen argues that the complaint's allegations sufficiently allege that Jessica made statements accusing him of being "an abuser, thief, drug addict, and criminal." Ronen acknowledges that the complaint does not allege the names of the specific individuals to whom these statements were made but argues that they were identified as "business associates." Ronen further argues that he did not need to allege the specific times that these statements were made because the defamation is ongoing.

To plead a cause of action for defamation, the plaintiff must allege the following elements: "(a) a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion, or disgrace, (b) published without privilege or authorization to a third party, © amounting to fault as judged by, at a minimum, a negligence standard, and (d) either causing special harm or constituting defamation per se" (*Greenberg v Spitzer*, 155 AD3d 27 [2d Dept 2017). "A false statement constitutes defamation per se when it charges another with a serious crime or tends to injure another in his or her trade, business, or profession" (*Geraci v Probst*, 61 AD3d 717 [2d Dept 2009], *affd as modified and remanded*, 15 NY3d 336 [2010]).

"CPLR 3016(a) provides that in an action to recover damages for libel or slander, the particular words complained of shall be set forth in the complaint. A cause of action sounding in defamation which fails to comply with these special pleading requirements must be dismissed" (*Fusco v Fusco*, 36 AD3d 589 [2d Dept 2007]). "Failure to state the particular person or persons to whom the allegedly defamatory statements were made also warrants dismissal" (*Id.*).

Even accepting the factual allegations as true and according Ronen the benefit of every favorable inference, the complaint fails to state a cause of action for defamation per se and defamation. Contrary to Ronen's contention, the complaint merely summarizes the statements allegedly made and otherwise fails to specify when, where, to whom, and the manner in which these statements were made. Therefore, those branches of Defendants' motion seeking dismissal of the complaint's fifth cause of action for defamation per se and its sixth cause of action for defamation are granted.

vi.

<u>Tortious interference with contract (seventh cause of action)</u>

The complaint's seventh cause of action for tortious interference with contract alleges that an investor had extended Ronen a line of credit in the amount of $100,000,000 to be used at his discretion for business pursuits; that Jessica was aware of this line of credit; that Jessica intentionally interfered with the contract by making defamatory statements regarding Ronen; and, that, as a result of these defamatory statements, the investor rescinded Ronen's line of credit.

Defendants argue that the seventh cause of action for tortious interference with contract should be dismissed because it is vague and conclusory. Defendants also argue that the allegations are insufficient to plead that Jessica intentionally procured the investor's breach of contract. In opposition, Ronen argues that due to her position in the company, Jessica's knowledge of the line of credit may be reasonably inferred; and, that she intentionally made defamatory statements to cause the investor to rescind the line of credit.

"The elements of a cause of action alleging tortious interference with contract are: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of a third-party's breach of that contract without justification, and (4) damages" (*Nagan Const., Inc. v Monsignor McClancy Mem. High Sch.*, 117 AD3d 1005 [2d Dept 2014]). "A necessary element of such cause of action is the intentional and improper procurement of a breach and damages" (*Law Offs. of Ira H. Leibowitz v Landmark Ventures, Inc.*, 131 AD3d 583 [2d Dept 2015]).

Accepting the factual allegations as true and according Ronen the benefit of every favorable inference, the complaint sufficiently pleads a cause of action for tortious interference with contract by alleging the existence of a line of credit; Jessica's knowledge of that line of credit; Jessica's intentional interference with the line of credit; and, damages resulting from the investor rescinding the line of credit. Therefore, that branch of Defendants' motion seeking dismissal of the seventh cause of action for tortious interference with contract is denied.

vii. Tortious interference with business relations (eighth cause of action)

The eighth cause of action for tortious interference with business relations alleges that Ronen had been engaged by Nasser Ahmad ("Ahmad") to build homes at 329 Mecox Road, Watermill, New York ("329 Mecox Road"), as well as at two locations in Bridgehampton, New York. The complaint alleges that Jessica took affirmative steps to prevent construction at 329 Mecox Road. Specifically, the complaint alleges that Jessica fraudulently filed a mechanic's lien against the property; that Jessica posed as Ronen to communicate with Ahmad in such a manner as to destroy their relationship; that Jessica threatened to sue Ahmad; and, that Jessica went to the property and caused the tradesmen to leave. The complaint also alleges that, as a result of Jessica's conduct, Ahmad terminated his relationship with Ronen.

Defendants argue that the eighth cause of action for tortious interference with business relations should be dismissed because the complaint fails to identify the individuals with whom Ronen had a business relationship. Defendants also argue that the complaint fails to allege that Jessica used wrongful means or acted solely to harm Ronen. Specifically, Defendants argue that by building homes for Ahmad, Ronen was in direct competition with GBC and that Jessica was acting in the company's interest. In opposition, Ronen argues that the complaint expressly identifies Ahmad and that it sufficiently alleged that Jessica interfered with their business relationship using wrongful means, such as filing a fraudulent mechanic's lien and threatening to sue Ahmad.

"To prevail on a claim for tortious interference with business relations in New York, a party must prove (1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party" (*Joseph v Fensterman*, 204 AD3d 766 [2d Dept 2022] [internal quotations omitted], quoting *Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40 [1st Dept 2009]).

"A claim for tortious interference with prospective business relations does not require a breach of an existing contract, but the party asserting the claim must meet a 'more culpable conduct' standard" (*L. Offs. of Ira H. Leibowitz v*, 131 AD3d at 585). "This standard is met where the interference with prospective business relations was accomplished by wrongful means or where the offending party acted for the sole purpose of harming the other party" (*Id.*). "As a general rule, the offending party's conduct must amount to a crime or an independent tort, as conduct that is neither criminal nor tortious will generally be 'lawful' and thus insufficiently 'culpable' to create liability for interference with prospective business relations" (*Id.* at 586). "[W]here the offending party's actions are motivated by economic self-interest, they cannot be characterized as solely malicious" (*Id.*).

Accepting the factual allegations as true and according Ronen the benefit of every favorable inference, the complaint sufficiently pleads a cause of action for tortious interference with business relations. The complaint's allegations are sufficient to allege that Jessica used improper means to interfere with Ronen and Ahmad's business relationship, specifically by fraudulently filing a mechanic's lien against the 329 Mecox Road and fraudulently impersonating Ronen. Therefore, that branch of Defendants' motion seeking dismissal of the eighth cause of action for tortious interference with business relations is denied.

viii. Breach of fiduciary duty (ninth cause of action)

The complaint's ninth cause of action for breach of fiduciary duty alleges that as a co-member/manager of GBC, Jessica owed various fiduciary duties to Ronen and that she breached those duties by engaging in self-dealing and by negligently managing GBC's affairs.

Defendants argue that the ninth cause of action for breach of fiduciary duty should be dismissed because the claim is derivative in nature and, in any event, because it lacks requisite particularity. In opposition, Ronen argues that in a closely-held corporation, such as GBC, the lines between derivative and direct claims can be blurred because she owed Ronen duties independent from the corporation.

"The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (*Rut v Young Adult Inst., Inc.*, 74 AD3d 776 [2d Dept 2010]). "A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR 3016(b)" (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804 [2d Dept 2011]).

Even accepting the factual allegations as true and according Ronen the benefit of every favorable inference, the complaint fails to state a cause of action for breach of fiduciary duty. As previously addressed, "[a]llegations of mismanagement or diversion of assets by officers or directors for their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually" (*Elenson*, 215 AD2d at 429). Therefore, that branch of Defendants' motion seeking dismissal of the ninth cause of action for breach of fiduciary duty is granted.

ix. Unjust enrichment (tenth cause of action)

The tenth cause of action for unjust enrichment alleges that by misappropriating Ronen's personal funds and GBC's assets, Jessica benefitted financially at the expense of GBC and Ronen.

Defendants argue that allegations regarding misappropriation of GBC's assets are derivative in nature. Defendants also argue that the complaint fails to allege that, as Ronen's wife, Jessica was not authorized to use his personal funds. In opposition, Ronen argues that Jessica misappropriated GBC's assets and Ronen's funds at their expense.

"The elements of a cause of action to recover for unjust enrichment are '(1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered' " (*GFRE, Inc. v U.S. Bank, N.A.*, 130 AD3d 569 [2d Dept 2015], quoting *Mobarak v Mowad*, 117 AD3d 998 [2d Dept 2014]).

Even accepting the factual allegations as true and according Ronen the benefit of every favorable inference, the complaint fails to state a cause of action for unjust enrichment. As previously addressed, any allegation involving misappropriation of corporate assets belongs to GBC, not Ronen. Moreover, with respect to Ronen's personal funds, the complaint fails to allege that Jessica, as Ronen's wife, not authorized to use his personal funds. Therefore, that branch of Defendants' motion seeking dismissal of the tenth cause of action for unjust enrichment is granted.

x. Prejudgment attachment (eleventh cause of action)

The complaint's eleventh cause of action for prejudgment attachment alleges that because of Jessica's alleged fraud and misappropriation, as well as the risk of dissipation, an order of attachment is warranted.

Defendants argue that the eleventh cause of action for prejudgment attachment should be dismissed because there is no separate cause of action for prejudgment attachment; and, in any event, that the complaint's allegations are insufficient to warrant such a drastic remedy. In opposition, Ronen argues that, although not typically pled as a separate cause of action, prejudgment attachment is sufficiently pled given the severity of Jessica's alleged misconduct.

Pursuant to CPLR § 6201(3), an order of attachment may be granted when "the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts." CPLR 6212 further provides that "[o]n a motion for an order of attachment . . . the plaintiff shall show, by affidavit and such other written evidence as may be submitted, that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff."

Even accepting the factual allegations as true and according Ronen the benefit of every favorable inference, the complaint fails to state a cause of action for prejudgment attachment, which is not a separate cause of action but requires the filing of a motion (CPLR 6212; *see, e.g.*, *Bochenek v Ashton*, 2023 NY Misc LEXIS 5316 [Sup Ct New York County, 2023]). In any event, the conclusory allegations set forth in the complaint are insufficient to plead the requisite elements of an order of attachment, particularly that there is a likelihood of success on the merits; and, that the amount demanded exceeds all counterclaims (especially because at this stage of the proceedings counterclaims, if any, have not yet been asserted). Therefore, that branch of Defendants' motion seeking dismissal of the eleventh cause of action for prejudgment attachment is granted.

xi. Dissolution with surcharge and dissolution (twelfth and thirteenth causes of action)

The complaint's twelfth cause of action for dissolution with surcharge and the thirteenth cause of action for dissolution allege that dissolution of GBC is warranted on the grounds that Jessica has engaged in fraudulent conduct, malfeasance, and misfeasance. The complaint also alleges that Jessica wrongfully exerted control over GBC by making unauthorized financial transactions, misappropriating assets, and misrepresenting her authority within the company. The complaint further alleges that Jessica's actions have made it impractical and detrimental for the company to continue operating as intended. Finally, the twelfth cause of action alleges that, in addition to dissolution, a surcharge is warranted because Ronen has suffered financial harm as a direct and proximate cause of her alleged misconduct.

Defendants argue that the twelfth cause of action for dissolution with surcharge and the thirteenth cause of action for dissolution should be dismissed because the complaint's allegations are insufficient to assert that GBC's management is unwilling to permit or promote the stated purpose of the entity; or, that continuing the entity is financially infeasible. In opposition, Ronen argues that the complaint's allegations regarding Jessica's unauthorized financial decisions, misappropriation, and fraudulent misrepresentations are sufficient to allege that it would be impractical to carry on the business in conformity with the parties' agreement.

Pursuant to Limited Liability Company Law § 702

> "On application by or for a member, the supreme court in the judicial district in which the office of the limited liability company is located may decree dissolution of a limited liability company whenever it is

> not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement."

Ultimately, "the petitioning member must establish, in the context of the terms of the operating agreement or articles of incorporation, that (1) the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or (2) continuing the entity is financially unfeasible" (*In re 1545 Ocean Ave., LLC*, 72 AD3d 121 [2d Dept 2010]).

Accepting the factual allegations as true and according Ronen the benefit of every favorable inference, the complaint sufficiently pleads causes of action for dissolution with surcharge and dissolution. According to the complaint, it was agreed that all business decisions would be made with unanimous consent; however, the allegations assert that Jessica has engaged in a course of conduct whereby she is making unilateral decisions affecting GBC. At this stage of the proceedings, the complaint's allegations are sufficient to assert that Jessica is unable or unwilling to reasonably permit or promote unanimous consent in accordance with the parties' agreement. Therefore, those branches of Defendants' motion seeking dismissal of the twelfth cause of action for dissolution with surcharge and the thirteenth cause of action for dissolution are denied.

xii. <u>Accounting</u>

The complaint's fourteenth cause of action for an accounting alleges that because of Jessica's alleged misappropriation there is a need to trace and account all transactions and assets regarding GBC to gain a full understanding of the company's finances.

Defendants argue that the fourteenth cause of action for an accounting should be dismissed because the complaint fails to allege that Ronen requested an accounting and that his request was refused. In opposition, Ronen argues that he did not request an accounting because Jessica's alleged misconduct rendered such request futile.

"An accounting is an equitable remedy . . . that a party may seek only where he or she can establish 'the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest' " (*Rozenberg v Perlstein*, 200 AD3d 915 [2d Dept 2021] [internal citations omitted], quoting *Gorunkati v Baker Sanders, LLC*, 179 AD3d 904 [2d Dept 2020]). "To state a viable cause of action for an accounting, the plaintiff must also allege that he or she demanded an accounting that the defendant refused to provide" (*Rozenberg*, 200 AD3d at 921).

Even accepting the factual allegations as true and according Ronen the benefit of every favorable inference, the complaint fails to state a cause of action for an accounting. Specifically, the complaint fails to allege that Ronen has requested an accounting and that such request has been refused. Therefore, that branch of Defendants' motion seeking dismissal of the fourteenth cause of action for an accounting is granted.

To the extent not explicitly addressed herein, this court has reviewed the parties' remaining arguments and finds them to be unavailing.

Accordingly, it is

ORDERED, that Defendants' motion to dismiss is hereby **GRANTED** to the extent that complaint's causes of action for breach of contract (first cause of action); fraud in the inducement (second cause of action); fraud in the execution (third cause of action); prima facie tort (fourth cause of action); defamation per se (fifth cause of action); defamation (sixth cause of action); breach of fiduciary duty (ninth cause of action); unjust enrichment (tenth cause of action); prejudgment attachment (eleventh cause of action); and, an accounting (fourteenth cause of action) are hereby **DISMISSED**; and, it is

ORDERED, that all requests for relief not addressed herein are **DENIED.**

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
February 27, 2025

E N T E R:

Jerome C Murphy

JEROME C. MURPHY, J.S.C.

ENTERED
Mar 03 2025
NASSAU COUNTY
COUNTY CLERK'S OFFICE