

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable DENIS J. BUTLER IAS PART 12
Justice

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HOWARD PURSNANI, individually and as
shareholder of STYLISH MOVE
SPORTSWEAR, INC.,

Plaintiff,

-against-

STYLISH MOVE SPORTSWEAR, INC.,
KANAYA D. MANGLANI, VISHU BHAMBHANI,
MANU MANGLANI, MAYA MANGLANI, HIRO
MANGLANI and BHARTI MANGLANI,

Defendants.
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Index No.: 23746/09

Motion Date:
November 9, 2010

Cal. No.:36
Seq. No.:2

The following papers numbered 1 to 13 read on this motion by defendants, Kanaya D. Manglani, Vishu Bhambhani, Manu Manglani, Maya Manglani, Hiro Manglani and Bharti Manglani, to reargue the Court's prior decision, pursuant to CPLR §2221, and, upon reargument, to dismiss plaintiff's amended complaint on the ground that, inter alia, plaintiff has failed to state a cause of action, or, in the alternative, to compel plaintiff to correct his pleadings, pursuant to CPLR §3024(a), and on the cross-motion by plaintiff to file a second amended complaint.

	<u>Papers Numbered</u>
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Upon the foregoing papers, it is ordered that this motion and cross-motion are determined as follows:

Plaintiff commenced this action as "a shareholder and director of Stylish Move Sportswear, Inc." ("SMS") (Ex. A, ¶1)

against other "shareholders and directors of Stylish Move" and against defendant, Vishu Bhambhani, an individual alleged by plaintiff to be in "possession of res" (Ex. A, ¶6). Plaintiff's Amended Complaint contains twelve causes of action arising from the alleged breaches of fiduciary duty of the defendants with regard to the assets of SMS. Defendants contend that plaintiff's Amended Complaint should be dismissed on the ground that, *inter alia*, plaintiff fails to state a proper cause of action against defendants.

On June 18, 2010, this Court denied defendants' motion and plaintiff's cross-motion "without prejudice, and with leave to renew upon proper papers" (Ex. A), finding that the status of the parties with respect to SMS could not properly be determined without the inclusion of the corporate papers and agreements of SMS. Defendants filed the instant motion seeking to reargue their previous motion, contending that a review of the "corporate papers" or "agreements" regarding SMS are unnecessary for a determination of such motion. At oral argument, on November 9, 2010, counsel for both plaintiff and defendants stipulated that all parties, except defendant, Vishu Bhambhani, were shareholders and directors of SMS, and, as such, all parties stipulated that the Court determine the motion and cross-motion based upon the papers originally submitted.

As such, leave to reargue is granted. All parties have attempted to show that "the court overlooked or misapprehended the facts ... or for some reason mistakenly arrived at its earlier decision." (Schneider v. Solwey, 141 A.D.2d 813, 813 [2 Dept. 1988]; see, CPLR §2221[d]; Cruz v. Masada Auto Sales, Ltd., 41 A.D.3d 417 [2 Dept. 2007]).

Upon reargument, the Court determines that the branch of defendants' motion seeking dismissal on the ground that plaintiff cannot maintain this action in a derivative capacity, as plaintiff was not a holder of shares in SMS at the time of the transactions alleged in the Complaint, is denied. All parties agree that SMS was dissolved in 1996 and that such dissolution has not been annulled. Defendants contend that plaintiff could not have been a shareholder in SMS in 2003 (the period plaintiff alleges the actionable transactions took place) as the corporation ceased to exist in 1996. However, pursuant to Business Corporation Law, §1006(b), the rights and remedies of shareholders existing prior to dissolution are viewed as if the dissolution never occurred. Dissolution, in and of itself, cannot preclude a qualified plaintiff from being deemed a shareholder "at the time of bringing the action", as required by Business Corporation Law, §626(b). The nature of a derivative suit is a

claim by shareholders that the corporation has not acted in the shareholders' interests. The proper parties in interest, the shareholders, have not been dissolved (see, 172 E. 122 Street Tenants Ass'n v. Schwarz, 73 N.Y.2d 340 [1989]; Luna Lighting, Inc. v. Just Industries, Inc., 45 A.D.3d 814 [2 Dept. 2007]).

The branch of defendants' motion seeking to dismiss the action against defendant, Vishu Bhambhani ("Bhambhani") is denied. Plaintiff alleges, and has offered evidence, in the form of an alleged bank statement (Cross-Motion, Ex. D), to support the claim that SMS assets were transferred to defendant, Bhambhani, fraudulently and to plaintiff's detriment. As such, defendant, Bhambhani, a nonresident, has sufficient minimum contacts with New York State that the exercise of jurisdiction over said defendant will not violate defendant, Bhambhani's right to due process. Defendant, Bhambhani's alleged conduct and connection to SMS are such that he should reasonably anticipate being summoned into court in New York State (see, CPLR§ 302[a]; LaMarca v. Pak-Mor Mfg. Co., 95 N.Y.2d 210 [2000]; Opticare Acquisition Corp. v. Castillo, 25 A.D.3d 238 [2 Dept. 2005]).

Regarding the branch of defendants' motion seeking dismissal of the First, Second, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh causes of action of the Amended Complaint, pursuant to CPLR §3211(a)(7), the nature of the alleged fiduciary breaches and fraudulent conduct were adequately pleaded, given the allegations in the Amended Complaint, together with plaintiff's Affidavit in Opposition and Exhibit B in Opposition (see, Yatter v. William Morris Agency, Inc., 256 A.D.2d 260 [1 Dept. 1998]). Further, relevant facts relating to plaintiff's claims for breach of fiduciary duty and fraud are particularly within the knowledge of defendants and, as such, those causes of action are not subject to dismissal as insufficiently pleaded (see, Yatter, supra.).

Defendants seek dismissal of plaintiff's Fourth, Fifth, Seventh, Eighth and Ninth causes of action, pursuant to CPLR §3211(a)(5), on the grounds that such causes of action were barred by the applicable statute of limitations. Defendants contend that a three-year statute of limitations applies to those causes of action, which limitations period expired prior to commencement of this suit.

This action is grounded upon a claim of breach of fiduciary duty by defendants. In such an action, the choice of applicable limitations period depends on the substantive remedy sought by plaintiff (see, Loengard v. Santa Fe Indus., 70 N.Y.2d 262 [1987]). Where the remedy sought is purely monetary in nature,

the suit is determined to allege "injury to property" pursuant to CPLR §214(4) and has a three-year statute of limitations, but where the relief sought is equitable in nature, the six-year limitations period of CPLR §213(1) applies (see, Monaghan v. Ford Motor Company, 71 A.D.3d 848 [2 Dept. 2010]). Further, where plaintiff alleges fraud as an essential element of the breach of fiduciary duty claim, as plaintiff has done here, courts have applied a six-year limitations period, pursuant to CPLR §213(8) (see, IDT Corp. v. Morgan Stanley Dean Witter & Co., 12 N.Y.3d 132 [2009]; Monaghan, supra.). As such, plaintiff's Fourth, Eighth and Ninth causes of action are not time-barred. However, plaintiff's Fifth cause of action, for corporate waste, as a claim solely for monetary damages, is governed by a three-year limitations period and is dismissed as time-barred. Further, plaintiff's Seventh cause of action, relating to defendants' intentional interference with existing contracts of SMS, has a three-year statute of limitations, under CPLR §214(4), commencing when plaintiff first suffered damages, which, according to the amended Complaint, would be in 2003 (see, IDT Corp., supra). Therefore, the Seventh cause of action is dismissed as time-barred.

The branch of defendants' motion seeking dismissal of the Amended Complaint against defendants, Manu Manglani, Maya Manglani and Hiro Manglani, on the grounds that plaintiff has not identified any "cash transfers" made to such defendants herein, is denied. The Amended Complaint states that all defendants participated in the breaches of fiduciary duty alleged in the twelve causes of action, which were carried out, primarily, by defendant, Kanaya D. Manglani. As such, all defendants are alleged to be responsible for all such fiduciary breaches, regardless of whether any particular defendant received monetary benefits.

Plaintiff's contentions may be interpreted as alleging causes of action, against these three defendants, for "aiding and abetting" the breach of fiduciary duty, which require only a showing of a fiduciary duty owed to plaintiff, a breach of that duty, defendants' substantial assistance in effecting the breach, and resulting damages, in order for plaintiff to recover (see, Roni, LLC v. Arfa, 72 A.D.3d 413 [1 Dept. 2010]) As such, the Amended Complaint adequately states a cause of action against defendants, Manu Manglani, Maya Manglani and Hiro Manglani.

The branch of defendants' motion seeking "a more definite statement", pursuant to CPLR §3024(a), is denied. The allegations in the Amended Complaint are not "so indefinite or uncertain that the precise meaning or application thereof is not

apparent." (Royle v. McLaughlin, 195 A.D. 413, 415 [1 Dept. 1921]). If defendants desire amplification of the allegations of the Amended Complaint, they may engage in the appropriate discovery procedures.

Plaintiff cross-moves for permission to serve a Second Amended Complaint (Cross-Motion, Ex. C), which is directed to the same parties and causes of action as the Amended Complaint, but contains additional information within the numbered allegations. Plaintiff's cross-motion to amend the complaint is granted. It is well-established that leave to amend pleadings shall be freely granted absent a showing of prejudice or surprise to the opposing party (see, CPLR §3205[b] and §305[c]; Cherebin v. Empress Ambulance Service, Inc., 43 A.D.3d 364 [1 Dept. 2007]). Plaintiff's motion is timely made and meritorious (see, CPLR §1009; Rodriguez v. Paramount Development Associates, LLC., 67 A.D.3d 767 [2 Dept. 2009]). Defendants have failed to evince any prejudice or surprise herein. As such, the Second Amended Complaint, verified on February 17, 2010 (Cross-Motion, Ex. C), is deemed served upon defendants. Defendants shall have thirty (30) days from service upon defendants' counsel of a copy of this Decision and Order with Notice of Entry to serve an amended Answer to such Second Amended Complaint.

Accordingly, defendants' motion to reargue is granted and, upon reargument, defendants' motion to dismiss the Amended Complaint is granted only to the extent that the Fifth and Seventh causes of action contained therein are hereby dismissed, and, otherwise, defendants' motion is hereby denied. Plaintiff's cross-motion to amend the Amended Complaint is hereby granted.

This Constitutes the Decision and Order of the Court.

Dated: February , 2011

Denis J. Butler, J.S.C.