

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

KEITH DOYLE,

Plaintiff,

-against-

ICON, LLC d/b/a "R BAR," DAVID FINNEGAN,
and SEAN CUNNINGHAM,

Defendants.

Index No. 602832/09

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS THE VERIFIED COMPLAINT**

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Attorneys for Defendants

Of Counsel:

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Defendants Icon, LLC ("Icon"), Sean Cunningham and David Finnegan respectfully submit this memorandum of law in support of their motion, pursuant to CPLR § 3211(a)(7), to dismiss the verified Complaint.

SUMMARY OF ALLEGATIONS

At the outset, the defendants note that nearly all of the allegations in the Complaint are false or presented out of context. The defendants acknowledge, however, that "in considering a motion to dismiss . . . the court must presume the facts pleaded to be true and must accord them every favorable inference." Leder v. Spiegel, 31 A.D.3d 266, 267 (1st Dep't 2006) (internal citations omitted). The same deference, however, is not afforded to "bare legal conclusions." See id. As relevant to this motion, the Complaint lacks adequate factual allegations and is, instead, replete with bare legal conclusions.

* * *

Doyle alleges he is a member of Icon and owns a one-third interest thereof. See Complaint at ¶ 4. Doyle alleges there is no operating agreement for Icon. See Complaint at ¶ 11. Doyle further alleges he has been excluded from the business since January 2007. See Complaint at ¶ 13.

STANDARD ON A MOTION TO DISMISS

"[I]n considering a motion to dismiss brought pursuant to CPLR 3211(a)(7), the court must presume the facts pleaded to be true and must accord them every favorable inference. It is, however, also axiomatic that factual allegations which fail to state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or unequivocally contradicted by documentary evidence, are not entitled to such consideration." Leder, 31 A.D.3d at 267 (internal citations omitted).

ARGUMENT

POINT I

THE COMPLAINT FAILS TO ADEQUATELY ALLEGE THAT JUDICIAL DISSOLUTION IS WARRANTED

In his first cause of action, Doyle seeks judicial dissolution of Icon. Doyle, however, fails to allege any fact from which an inference can be drawn that such a "drastic remedy" is warranted. See Horning v. Horning Const., LLC, 12 Misc.3d 402, n.2 (Sup. Ct. N.Y. County 2006). Specifically, nothing in the Complaint suggests that it is "not reasonably practicable" for Icon "to carry on the business in conformity with the articles of organization or operating agreement." See Ltd. Liab. Co. Law § 702. See also Horning, 12 Misc.3d at 407-08 (shareholder of one-third interest could not involuntarily dissolve company where evidence otherwise did not demonstrate that it was not reasonably practicable to carry on the business). To the contrary, the Complaint establishes that the business has carried on for almost three years since Doyle alleges he was excluded (i.e. since January 2007). See Complaint at ¶ 13.

Moreover, New York law expressly prohibits dissolution under the circumstances alleged in the verified Complaint: "[T]he occurrence of any other event that terminates the continued membership of any member shall not cause the limited liability company to be dissolved or its affairs to be wound up, and upon the occurrence of any such event, the limited liability company shall be continued without dissolution." Ltd. Liab. Co. Law § 702(b)(emphasis supplied).

The verified Complaint thus fails to allege that judicial dissolution is appropriate at this time. "Indeed, the [limited liability company law] was designed to protect members from such disruptions and expressly avoids such a result." Horning, 12 Misc.3d at 408, 816 N.Y.S.2d at 881. Accordingly, the Court should dismiss plaintiff's first cause of action for judicial dissolution.

POINT II

PLAINTIFF FAILS TO ALLEGE HE CONTRIBUTED VALUE TO THE COMPANY

Doyle's second cause of action (appointment of a receiver) and third cause of action (demand for accounting) seek equitable relief to account for profits and losses and to apportion distributions to the members. Because Doyle does not, and cannot, allege that he contributed value to the company, any distribution to Doyle is worthless. Doyle's claim for relief in his second and third causes of action are thus academic at best and certainly do not warrant a resort to the Court's equitable powers.

In the absence of an operating agreement that provides otherwise, a member is entitled to receive "the fair market value of his or her membership interest in the limited liability company as of the date of the withdrawal based upon his or her right to share in distributions from the limited liability company." Ltd. Liab. Co. Law. § 509 (emphasis added). A member's right to share in distributions is based on the "value . . . of the contributions of each member, but not including defaulted obligations to make contributions, to the extent they have been received by or promised to the limited liability company and have not been returned to any such member." Ltd. Liab. Co. Law. § 504 (emphasis added). Thus, a member's request for distribution requires, at a minimum, an allegation that the member has contributed value that has been received by the company. Doyle's verified Complaint does not contain any allegation from which an inference can be drawn that Doyle contributed anything of value to the company. Instead, Doyle relies on the "bare legal conclusion" that he is entitled to one-third of the business. Such unsupported legal conclusions are insufficient to support Doyle's claim for relief.

The same applies to a member's entitlement to profits and losses. See Ltd. Liab. Co. Law. § 503 ("If the operating agreement does not so provide, profits and losses shall be allocated

on the basis of value . . . of the contributions of each member, but not including defaulted obligations to make contributions, to the extent they have been received or promised to the limited liability company and have not been returned to any such member.").

In the absence of an allegation that Doyle has contributed value such that he has a valuable entitlement to a distribution or share of the profits and losses, the Court should dismiss plaintiff's request for an accounting and appointment of a receiver.

POINT III

PLAINTIFF HAS FAILED TO STATE A CLAIM FOR CONVERSION

To state a claim for conversion, plaintiff must show (1) his possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights. Colavito v. New York Organ Donor Network, Inc., 8 N.Y.3d 43, 50 (2006). As explained above, plaintiff has failed to allege that he contributed any value to the company such that he would have an entitlement to any distribution or right to a share of the profits and losses. In the absence of such an allegation, plaintiff cannot demonstrate a possessory right or interest in property necessary to maintain a claim for conversion.

POINT IV

PLAINTIFF HAS FAILED TO STATE A CLAIM FOR UNJUST ENRICHMENT

As explained above, plaintiff does not, and cannot, show that any alleged entitlement to a distribution or right to share in the profits and losses has value. Because plaintiff's interest is worth nothing, plaintiff "cannot show that [defendants have] been unjustly enriched at [his] expense." See Conlon v. Teischer, 8 A.D.3d 606, 607 (2d Dep't 2004). Accordingly, plaintiff's fifth cause of action should be dismissed.

POINT V

PLAINTIFF HAS FAILED TO STATE A CLAIM FOR BREACH OF CONTRACT

"[I]n order to plead a breach of contract cause of action, a complaint must allege the provisions of the contract upon which the claim is based . . . The pleadings must be sufficiently particular to give the court and [the] parties notice of the transaction or occurrences intended to be proved at trial." Maldonado v. Olympia Mechanical Piping & Heating Corp., 8 A.D.3d 348, 350 (2d Dep't 2004) (dismissing claim for breach of contract where plaintiff failed to identify the contracts that allegedly were breached). Nonetheless, plaintiff has failed to allege a valid contract, or any contract for that matter, to support a cause of action for breach of contract. Accordingly, plaintiff's sixth cause of action for breach of contract should be dismissed.

CONCLUSION

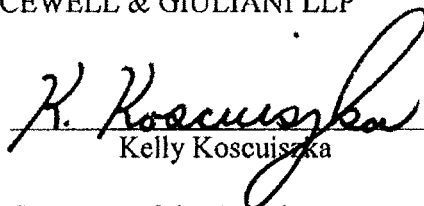
For the foregoing reasons, defendants respectfully request that their motion to dismiss the verified Complaint be granted.

Dated: New York, New York
October 30, 2009

Respectfully submitted,

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