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

PRESENT: Hon Joan A. Madden PART 11

Index Number : 602832/2009
DOYLE, KEITH
VS.
ICON LLC D/B/A R BAR
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

his motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: April 4, 2011

_____ J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

----------X

KEITH DOYLE,

INDEX NO. 602832/09

Plaintiff,

-against-

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

Defendants.

----------X

JOAN A. MADDEN, J.:

Defendants Icon, LLC, David Finnegan ("Finnegan"), and Sean Cunningham ("Cunningham") move pursuant to CPLR 3211(a)(7) to dismiss the complaint against them for failure to state a cause of action. Plaintiff Keith Doyle opposes the motion, which is granted in part and denied in part.

BACKGROUND

The following facts are based on the allegations in the complaint, which must be accepted as true for the purposes of this motion.

Icon, LLC ("Icon" or "the LLC"), formerly known as "Pioneer Bar" and currently doing business as "R Bar," is a limited liability company organized and existing under the laws of the State of New York (Compl. ¶ 2). Plaintiff, Finnegan and Cunningham each own a one-third interest in Icon (Id. ¶ 4-7). Since Icon was formed on February 6, 2001, plaintiff has served as Icon's Secretary while defendant Finnegan has served as its President (Id. ¶ 9-10). The parties did not enter into an operating agreement at any point (Id. ¶ 11).

Beginning on or around January 2007, Finnegan and Cunningham began to exclude plaintiff from Icon's business operations and affairs. In particular, despite plaintiff's ownership

of one-third interest in Icon, defendants did not include plaintiff in decisions relating to Icon's management and disposition of its property, and failed to hold either regular or annual meetings (Id. ¶ 16-17). Although plaintiff has demanded an accounting of Icon's finances, defendants have refused to account to plaintiff in regards to Icon's assets or its profits and losses (Id. ¶ 14-15). In addition, defendants have disposed of Icon's assets without plaintiff's knowledge and consent, refused to award plaintiff a share of Icon's distributions that is commensurate with plaintiff's ownership interest (Id. ¶ 18-19), and have instead taken his shares of Icon's distributions for their own use and benefit (Id. ¶ 20).

The complaint, which was filed on or about September 14, 2009, contains causes of action for judicial dissolution, appointment of a receiver, an accounting, conversion, unjust enrichment, and breach of contract. Instead of answering the complaint, defendants have made this motion to dismiss it for failure to state a cause of action.

DISCUSSION

On a motion by defendant pursuant to CPLR 3211(a)(7), the complaint must be liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Goldman v. Metro. Life Ins. Co., 5 N.Y.3d 561, 570-71 (2005). When a complaint "states a cause of action, and . . . from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law," defendant's motion to dismiss will be denied. Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977). However, a complaint that consists merely of "bare legal conclusions" or "factual allegations which fail to state a viable cause of action" will not withstand a motion to dismiss. See Leder v. Spiegel, 31 A.D.3d 266, 267 (1st Dep't 2006), aff'd, 9 N.Y.3d 836 (2007), cert. denied, sub nom Spiegel v. Rowland, 552 U.S. 1257 (2008)).

The first cause of action, or the judicial dissolution of Icon, alleges that Icon lacks a written operating agreement and therefore the default provisions of New York's Limited Liability Law apply under which "'a member of a company may not withdraw ... prior to dissolution and winding up of the limited liability company," and that "under the facts and circumstances set forth herein, [Icon] must be dissolved prior to the expulsion of Plaintiff from the Company" (Complaint ¶'s 24, 25).

Defendants argue that the complaint fails to state a claim for judicial dissolution because it does not allege sufficient facts to establish, as required under the applicable provision of the Limited Liability Law, that it is "not reasonably practicable" for Icon to continue its business operations. In response, plaintiff argues that the complaint's allegations that defendants excluded plaintiff from Icon's business operations and refused to account to plaintiff for Icon's profits and losses or to award him distributions are sufficient to state a claim for judicial dissolution.

Under Limited Liability Company Law § 702, "[o]n 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." (emphasis supplied). Accordingly, to successfully state a cause of action for judicial dissolution under this section a plaintiff must allege sufficient facts to establish that it would not be "reasonably practicable" for the LLC to continue its business. Matter of 1545 Ocean Ave., LLC v. Crown Royal Ventures, LLC, 72 A.D.3d 121 (2d Dep't 2010). "[T]here is no definition of 'not reasonably practicable' in the context of [judicial] dissolution of a limited liability company." Id. at 127.

However, the not reasonably practicable standard has been interpreted by the courts to mean that judicial dissolution of a limited liability company will only be directed when the complaining member has shown that the business sought to be dissolved is unable to function or else that it is failing financially, or that there is an internal "deadlock" impeding its smooth operations. See Schindler v. Niche Media Holdings, LLC, 1 Misc.3d 713, 716 (Sup. Ct. N.Y. Co. 2003); see also Matter of 1545 Ocean Ave., LLC v. Crown Royal Ventures, LLC, 893 N.Y.S.2d at 598 (dissolution of an LLC pursuant to § 702 is appropriate when petitioner establishes that (1) the management of the LLC is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or (2) continuing the LLC is financially unfeasible). But see Klein v. 599 Eleventh Ave. Co. LLC, 14 Misc.3d 1211(A), at *4 (Sup. Ct. N.Y. Co. 2006) (granting defendant's motion to dismiss plaintiff's cause of action for dissolution when plaintiff failed to offer any facts "establishing why it is not reasonably practicable for [the] LLC to continue to carry on its business"). It has also been noted that "the test is whether it is 'reasonably practicable' to carry on the business of the [LLC] and not whether it is impossible." Matter of 1545 Ocean Ave., LLC v. Crown Royal Ventures, LLC, 72 A.D.3d at 132 (internal quotations and citations omitted).

Here, based on the above standard, the complaint states a cause of action for judicial dissolution based on allegations that defendants have systematically excluded plaintiff, a one-third owner, from participating in decisions relating to Icon's management and the disposition of its property, and have failed to award him distributions commensurate with his ownership interest. As the gravamen of these allegations is that plaintiff was excluded from Icon's managerial decisions and deprived of the rights ensuing from his one-third interest, such allegations are sufficient to state a claim for judicial dissolution pursuant to § 702. See Schindler

v. Niche Media Holdings, LLC, 1 Misc.3d at 716 (evidence that member is being frozen out may provide basis for judicial dissolution of limited liability company); Spires v. Casterline, 4 Misc.3d 428 (Sup. Ct. Monroe Co. 2004) (granting petition to dissolve LLC where operating agreement did not address the matter of member departure and where defendants locked plaintiff out of LLC's computer servers, databases, equipment and bank accounts and denied him access to the premises by changing the keys); Horning v. Horning Constr., LLC, 12 Misc.3d 402, 408 n.1 (Sup. Ct. Monroe Co. 2006) (agreeing that the "not reasonably practicable" standard of § 702 was satisfied by the facts in Spires).

Defendants move to dismiss the second cause of action for the appointment of a receiver, and the third cause of action for accounting, on the grounds that plaintiff has not specifically alleged that he has contributed value to Icon, and that such allegations are necessary to obtain the relief sought by these claims, including an accounting of losses and profits and a distribution to Icon's members. Defendants base their argument on Limited Liability Company Laws §§ 503 and 504, which provide that profits, losses, and distributions should be "allocated on the basis of the value, as stated in the records of the limited liability company, if so stated, of the contributions of each member." See also Ltd. Liab. Co. Law § 509 ("[U]pon withdrawal as a member of the limited liability company, any withdrawing member is entitled to receive . . . the fair value of his or her membership interest in the limited liability company as of the date of withdrawal based upon his or her right to share in distributions from the limited liability company."). Specifically, since these sections of the Limited Liability Company Law provide that profits, losses, and distributions from the LLC should be allocated in proportion to the "value" contributed by each member, defendants reason that plaintiff's right to payments from

Icon exists only to the extent plaintiff has contributed value to the LLC and in the absence of proof of such contributions, no relief can be sought.

Defendants' position is unavailing. First, as argued by the plaintiffs, it can be inferred from allegations in the complaint that plaintiff owns a one-third interest in the LLC, that he contributed value to Icon in order to obtain such interest. In any event, allegations that a plaintiff contributed value to the LLC are not necessary to state a claim for the appointment of a receiver since pursuant to Limited Liability Company Law § 703(a), "a member" of the limited liability company my seek the appointment of a receiver and there is no requirement that such member make a contribution of value to the company.[1] Moreover, a decision concerning whether to appoint a receiver is within the discretion of the court, and may follow naturally from an order for dissolution. See Spires v. Casterline, 778 N.Y.S.2d at 268 (reserving the court's authority to appoint a receiver after granting a petition for dissolution). Here, as indicated above, the complaint states a claim for judicial dissolution.

As for the request for an accounting, although not specifically addressed by the Limited Liability Company Laws, a member can demand an accounting based on membership in an LLC. See East Quogue Jet, LLC v. East Quogue Members, LLC, 50 A.D.3d 1089, 1091 (2d Dep't 2008) (affirming summary judgment in favor of plaintiff on cause of action for accounting where plaintiff was a member of the LLC from which accounting was sought); 363-367 Neptune Ave., LLC v. Neary, No. 9282/10, 2010 WL 5538410, at *10 (Sup. Ct. Kings Co. 2010) (denying plaintiff LLC's motion to dismiss defendant's counterclaim for an accounting by reason of defendant's status as a member of the LLC); Annexstein v. Lewinter, No. 016049/2007, *2009*

[1] Specifically, Limited Liability Company Law § 703(a), provides, "[u]pon cause shown, the supreme court in the judicial district in which the office of the limited liability company is located may wind up the limited liability company's affairs upon application of *any member* . . . and in connection therewith may appoint a receiver or liquidating trustee" (emphasis supplied).

N.Y. Misc. LEXIS 4858, at *3-4 (Sup. Ct. Nassau Co. 2009) (finding that plaintiff was entitled to bring a cause of action for accounting as a member of an LLC but denying plaintiff's motion for summary judgment due to statute of limitations concerns).

In this case, plaintiff alleges that he is a member and one-third owner of Icon. Despite plaintiff's ownership interest and his repeated requests for information from defendants concerning Icon's business and affairs, defendants allegedly have refused to permit plaintiff to access the LLC's books and records. These allegations are sufficient to state a cause of action for the appointment of a receiver and demand for an accounting. See Spires v. Casterline, 4 Misc.3d at 438-39 (holding that court had discretion to appoint third party to wind up an LLC's affairs and ordering a full accounting of the LLC's business after granting plaintiff's petition for dissolution).

Plaintiff's fourth cause of action is for conversion. This cause of action alleges that "plaintiff has not received a distribution from [Icon] since December 2006 [and that] upon information and belief that defendants Finnegan and Cunningham have converted plaintiff's share of [Icon's] distributions for their own use and benefit" (Complaint, ¶'s 39, 40).

Conversion takes place when there is an "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights." State v. Seventh Regiment Fund, 98 N.Y.2d 249, 259 (2002). Thus, the two key elements of conversion are (1) plaintiff's 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). Tangible personal property or specific money must be involved. Fiorenti v. Cent. Emergency Physicians, PLLC, 305 A.D.2d 453, 455 (2d Dep't 2003).

Defendants argue that the complaint fails to state a claim for conversion as the complaint does not specifically allege that plaintiff has contributed value to the LLC and, thus, plaintiff cannot claim entitlement to any distributions. This argument is without merit. As indicated above, at the pleading stage, the complaint sufficiently alleges that plaintiff contributed value to the company based on his one-third ownership interest. In addition, allegations that defendants have retained possession over specific moneys in the form of plaintiff's share of distributions for their own use and benefit are sufficient to state a claim for conversion. See Bankers Trust Co. v. Cerrato, Sweeney, Cohn, Stahl & Vaccaro, 187 A.D.2d 384 (1st Dep't 1992); 770 Owners Corp. v. Spitzer, 25 Misc. 3d 1204A, at *7 (Sup. Ct. Kings Co. 2009) (allegations that defendants retained identifiable sums which were rightfully the funds of plaintiff and diverted by defendants stated a claim for conversion).

The next cause of action, for unjust enrichment, alleges that "plaintiff is entitled to distributions from [Icon] on par with those received by Finnegan and Cunningham [and that] by retaining the distributions, Finnegan, Cunningham and [Icon] have been unjustly enriched." (Complaint, ¶'s 45, 46). In general, "[t]he theory of unjust enrichment lies as a quasi-contract claim." IDT Corp. v. Morgan Stanley Dean Witter & Co., 12 N.Y.3d 132, 142 (2009) (quoting Goldman v. Metro. Life Ins. Co., 5 N.Y.3d at 572). The quasi-contract claim "rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another." Id. (internal quotations and citations omitted). The "essential inquiry" is "whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." Sperry v. Crompton Corp., 8 N.Y.3d 204, 215 (2007) (internal quotations and citations omitted).

To state a claim for unjust enrichment a plaintiff must allege that (1) defendant was enriched, (2) the enrichment was at plaintiff's expense, and (3) the circumstances were such that equity and good conscience require defendant to make restitution. Whitman Realty Group, Inc. v. Galano, 41 A.D.3d 590, 592-93 (2d Dep't 2007); see also CDR Creances S.A.S. v. First Hotels & Resorts Inv., Inc., No. 650084/09, *2009 N.Y. Misc. LEXIS 4227*, at *8-9 (Sup. Ct. N.Y. Co. Aug. 11, 2009) (finding that plaintiff corporation stated a cause of action for unjust enrichment where funds owed to plaintiff were fraudulently transferred by defendants to their corporations to purposefully deprive plaintiff of amounts owed to plaintiff).

Under this standard, allegations that defendants have been enriched by refusing to pay plaintiff his share of distributions and have instead used Icon for defendants' exclusive benefit at plaintiff's expense are sufficient to state a claim for unjust enrichment.

Plaintiff's sixth cause of action, for breach of contract, alleges that "pursuant to the agreement with Finnegan and Cunningham, plaintiff is entitled to a pro rata amount of Company distributions [and that] [d]espite due demand Finnegan and Cunningham have failed and refused to give Plaintiff his pro rata share of distributions" (Complaint, ¶'s 48, 49).

To successfully state this claim, plaintiff must furnish enough facts to satisfy four elements: (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) failure by defendant to perform, and (4) resulting damage. Furia v. Furia, 116 A.D.2d 694, 695 (2d Dep't 1986). As a threshold matter, "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 transactions, occurrences, or series of transactions or occurrences, intended to be proved as well as the material elements of each cause of action or defense." Maldonado v. Olympia Mechanical Piping & Heating Corp., 8 A.D.3d

348, 350 (2d Dep't 2004) (quoting Atkinson v. Mobil Oil Corp., 205 A.D.2d 719, 720 (2d Dep't 1994)); see also CPLR 3013. While specific contractual provisions do not need to be alleged with particularity, failure to set forth any contractual provision whatsoever in a breach of contract claim will result in the claim's dismissal. See Shilkoff, Inc. v. 885 Third Ave. Corp., 299 A.D.2d 253, 254 (1st Dep't 2002); Sud v. Sud, 211 A.D.2d 423, 424 (1st Dep't 1995) (holding lower court properly dismissed plaintiff's breach of contract claim pursuant to CPLR 3211(a)(7) due to "plaintiff's failure to allege, in nonconclusory language . . . the essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated").

As defendants argue, under this standard, the breach of contract claim is insufficient to state a cause of action since the complaint is devoid of any facts from which even a basic understanding of this "agreement" can be gleaned, and plaintiff fails to set forth the specific terms or provisions that were violated by the defendants. Instead, the complaint relies on the conclusory allegation that "the agreement" existed and was breached by the defendants. As such, plaintiff's allegations fail to meet the threshold requirement of a cause of action for breach of contract. See Sud v. Sud, 211 A.D.2d at 424; Eva Marine Corp. v. Destiny Yachts, LLC, No. 0119-07, 2008 WL 356546 (Sup. Ct. Nassau Co. 2008) (dismissing breach of contract claim against defendant LLC where plaintiff "ma[de] no mention of any of the provisions of the Contract or how these provisions were breached by [the defendant]"). Accordingly, the breach of contract claim must be dismissed.

CONCLUSION

In view of the above, it is

ORDERED that motion to dismiss is granted only to the extent of dismissing the sixth cause of action, the action shall continue with respect to the first, second, third, fourth, and fifth causes of action; and it is further

ORDERED that defendants shall answer the complaint within 30 days of the date of this decision and order, a copy of which is being sent to the parties by my chambers; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 11, room 351, 60 Centre Street, New York, NY on May 5, 2011 at 9:30 A.M.

DATED: April 4, 2011 ~~March _, 2011~~

J.S.C.