

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

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GREGORY BEAUCHAMP, in his individual capacity,
and as a member of Port and Passage, LLC, a company
organized under the laws of the State of New York,

INDEX NO.: 653372/2012

FILED: September 26, 2012

Plaintiff,

AFFIRMATION IN SUPPORT
OF MOTION TO DISMISS

-against-

JEREMY JOHNSTONE, in his individual capacity,
and as a member of Port and Passage, LLC, a company
organized under the laws of the State of New York,

Defendant.

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JOHN VAN AMBURG, ESQ., an attorney duly licensed to practice in the courts of the State
of New York affirms the following to be true under penalties of perjury.

1. I am the attorney for the Plaintiff and as such, I am fully familiar with the facts set forth hereafter.
2. This affirmation is made in support of Plaintiff's motion to dismiss Defendant Jeremy Johnstone's first and second counterclaims. This is the first time Plaintiff has sought such relief.

PROCEDURAL HISTORY

3. This action was commenced by the filing of the Summons and Verified Complaint on

September 26, 2012.

4. Defendant filed an Answer With Affirmative Defenses and Counterclaims on March 14, 2013.

STANDARD OF REVIEW

5. A court must grant a motion to dismiss for failure to state a cause of action where the facts as alleged fail to fit into any cognizable legal theory. *Leon v. Martinez*, 84 N.Y.2d 83, 88, 638 N.E.2d 511, 513 (1994). Where the party purporting to state a cause of action relies upon “bare legal conclusions” and factual allegations that are “flatly contradicted by documentary evidence,” the court need not grant such party every favorable inference upon a motion to dismiss. *Biondi v. Beekman Hill House Apartment Corp.*, 692 N.Y.S.2d 304, 308, 257 A.D.2d 76 (N.Y. App. Div. 1st Dep’t 1999). Dismissal is warranted where “documentary evidence . . . conclusively establishes a defense to the asserted claims as a matter of law.” *Palmetto Partners, L.P. v AJW Qaulified Partners, LLC*, 83 A.D.3d 804, 806, 921 N.Y.S.2d 260 (N.Y. App. Div. 2d Dep’t 2011).

FACTUAL ALLEGATIONS

6. This matter concerns the Plaintiff and Defendant’s operation of Port and Passage, LLC (the “Company”).

7. Plaintiff repeats and re-alleges all of the statements of fact and law contained in the Plaintiff’s Complaint (attached as Exhibit A) as if fully set forth herein.

LEGAL ARGUMENT

1. This Honorable Court Should Dismiss Defendant's First Counterclaim for Breach of Fiduciary Duty

a. Defendant Fails to State a Claim for Breach of Fiduciary Because Defendant's Admitted Agreement to Withdraw from the Company In Consideration of a Sum Certain, Which Sum Defendant Admits to Receiving, Precludes Defendant from Asserting the Existence of Damages Caused by Plaintiff

8. In order to successfully state a claim for breach of breach of fiduciary duty, a claimant must allege (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct. *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 807, 921 N.Y.S.2d 260, 264 (Sup. Ct. App Div. 2d Dep't 2011).

9. Although Defendant alleges in his Answer (attached as Exhibit B) that he remains "an equal member in the company" (Def's Answer 2, ¶ 14), this allegation is belied by Defendant's own admissions and flatly contradicted by documentary evidence.

10. Furthermore, although Defendant claims damages caused by Plaintiff in an amount "not less than \$400,000" (Def's Answer 10, ¶ 19), Defendant's admissions establish that Defendant contracted with Plaintiff to receive \$11,750 as consideration for his interest in the Company, and that Defendant withdrew more than twice that amount from the Company's bank account prior to withdrawing from the Company.

11. In his answer, Defendant admits, as he must, that on May 9, 2012, Defendant and Plaintiff came to a mutual agreement whereby Defendant would withdraw from the Company. Def's Answer 2, ¶ 14. Defendant further admits that in consideration of Defendant's withdrawal, Defendant

was to receive \$11,750, paid out partly as salary and partly as severance pay, as well as possession of certain Company equipment. Def's Answer 2, 3, ¶¶ 15, 16. Additionally, Defendant admits that the remaining interest in the Company was to transfer to the Plaintiff. Def's Answer 3, ¶ 17.

12. Defendant also admits that certain terms of the withdrawal agreement between Plaintiff and Defendant were memorialized in a written agreement (the "May 9 Agreement") signed by both Plaintiff and Defendant, and that Exhibit 1 to Plaintiff's Complaint is an authentic copy of that Agreement. Def's Answer 2, ¶ 15.

13. The May 9 Agreement establishes that in exchange for completing certain Company projects, the Defendant was to receive \$6750 as "Salary for May" and \$5000 as "Severance." *See* Exhibit 1 to Plaintiff's Complaint, attached hereto as Exhibit A.

14. Defendant admits that subsequent to executing the May 9 Agreement, Defendant withdrew \$27,500 from the Company's bank account. Def's Answer 3, ¶ 18. Such amount is far in excess of the sum that Defendant was owed pursuant to the May 9 Agreement.

15. Given the Defendant's admissions, the following facts are not in dispute: (i) that on May 9, 2012, Plaintiff and Defendant came to a mutual agreement whereby Defendant would withdraw from the Company in exchange for \$11,750 paid out partly as salary and partly as severance, and (ii) that Defendant collected more than twice the amount owed to him under the May 9 Agreement when he withdrew \$27,500 from the Company's bank account.

16. Thus Defendant has collected all of the consideration due to him in exchange for his agreement to withdraw from the Company, and is no longer a member of the Company. Accordingly, this court should dismiss Defendant's counterclaim for breach of fiduciary duty because Defendant,

having already collected far more money than he was entitled to upon his withdrawal from the Company, cannot allege the existence of any damages caused by Plaintiff.

b. This Court Should Dismiss Defendant's Claim for Breach of Fiduciary Duty Because Defendant Fails to Plead His Cause of Action with Particularity, as Required by the CPLR 3016(b)

17. Defendant fails to state a claim for breach of fiduciary duty because Defendant fails to plead his claim with particularity, as required by CPLR 3016(b). Breach of fiduciary duty, like fraud, requires a heightened pleading standard. *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 A.D.3d 804, 806, 921 N.Y.S.2d 260 (N.Y. App. Div. 2d Dep't 2011). Accordingly, in order to satisfy CPLR 3016(b), the claimant must state the allegations that support his or her claim "in detail, including specific dates and items." *Scott v. Fields*, 92 A.D.3d 666, 668, 938 N.Y.S.2d 575, 577 (N.Y. App. Div. 2d Dep't 2012).

18. Here, the Defendant makes bare allegations to the effect that Plaintiff "diverted" clients and projects of the Company "for [Plaintiff's] personal and sole benefit." Def's Answer 9, ¶ 12). However, in violation of CPLR 3016(b), Defendant fails to provide any dates for the alleged diversions.

19. The failure of Defendant to provide dates for Plaintiff's alleged misconduct is particularly crippling to Defendant's claim because Defendant's admissions establish that Defendant agreed to withdraw as a member of the Company in May 2012. Section 1(a), *supra*, Def's Answer 2,3 ¶¶ 14 - 18. Defendant's allegations are entirely unclear as to whether the alleged "diversions" occurred before or after Defendant's withdrawal from the Company.

20. Thus, because Defendant fails to plead his cause of action for breach of fiduciary duty

with sufficient particularity as required by CPLR 3016(b), Defendant's first counterclaim should be dismissed.

2. This Court Should Dismiss Defendant's Second Counterclaim for Violation of the New York Limited Liability Company Law

a. Defendant Fails to State a Claim for Violation of the New York Limited Liability Company Law Because Defendant Cannot Allege that Defendant is a Member of the Company or the Existence of Damages

21. Defendant fails to state claim for violation of the New York Limited Liability Company Law because Defendant agreed to withdraw from the Company in May of 2012. *See* Section 1(a), *supra*, Def's Answer 2,3 ¶¶ 14 - 18. Thus, Defendant has no standing to bring a claim against Plaintiff for violation of New York's Limited Liability Company Law.

22. Furthermore, Defendant admits that he agreed to accept \$11,750 in consideration of his withdrawal from the Company and to withdrawing more than twice that amount from the company's bank account prior to his withdrawal. Def's Answer 2,3 ¶¶ 14 - 18. Thus, Defendant cannot now allege damages against Plaintiff stemming from the parties' prior relationship in the Company.

b. This Court Should Dismiss Defendant's Second Counterclaim for Violation of the New York Limited Liability Company Law Because it is Duplicative of Defendant's First Counterclaim

23. Defendant's second counterclaim for violation of New York's Limited Liability Company Law merely restates Defendant's counterclaim for breach of fiduciary duty. Specifically, Defendant re-alleges in his second counterclaim that "Plaintiff violated the law by unilaterally usurping

corporate opportunities for the Company and diverting them to himself and/or a company wholly owned by Plaintiff for Plaintiff (sic) sole and personal benefit.” Def’s Answer 10, ¶ 22.)

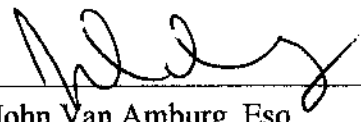
24. In order to sustain both a tort claim and a breach of contract claim, the Defendant must allege an independent legal duty for each claim. *Clark-Fitzpatrick Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 389, 516 N.E.2d 190, 193-94 (1987).

25. Here, Defendant’s second counterclaim merely rests upon the same alleged duty - that of one member an a limited liability company to another - that forms the basis of Defendant’s first counterclaim for breach of fiduciary duty. Defendant’s second counterclaim should thus be dismissed as duplicative of Defendant’s first counterclaim. In the alternative, Defendant’s first counterclaim for breach of fiduciary duty should be dismissed as duplicative of defendant’s second counterclaim.

WHEREFORE, Plaintiff, Gregory Beauchamp, respectfully requests that this Honorable Court issue an order pursuant to CPLR 3211:

1. DISMISSING Defendant’s Counterclaims;
2. For such other, further, and/or different relief as this Court may deem just or proper.

Dated: New York, New York
April 1, 2013



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