SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 15
NASSAU COUNTY

KENNETH SCHLOSSBERG, individually and derivatively on behalf and in the right of STEUBEN FOODS, INC.,

Plaintiff,

-against-

HENRY SCHWARTZ, STEUBEN SALES, INC., ELMHURST DAIRY, INC., DORA'S NATURALS, INC., WORCHESTER CREAMERIES CORP. and EMPACT AMERICA, INC.,

Defendants,

STEUBEN FOODS, INC.,

Nominal Defendant.

Decision and Order

MOTION SUBMITTED: January 29, 2013
MOTION SEQUENCE:03
INDEX NO.:014491-11

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Affidavit in Opposition	2
Memorandum of Law in Opposition	3
Reply Affirmation	4

Pursuant to a shareholders agreement dated July 30, 1982, Plaintiff Kenneth Schlossberg acquired a 10% stock ownership in Steuben Food, Inc. (the "Company")[1] represented by 100 shares of its common stock. Schlossberg is also a director of the Company and served as President of the Company from 1982 through 2011.

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[1] The Company is a contract manufacturer of aseptic beverages and food products.

On May 4, 2011, at the age of 62, Schlossberg was terminated by the Company.[2] At that time, Schlossberg's business development responsibilities were assumed by Jeffrey Sokol (who was approximately 20 years younger than Schlossberg) and Schlossberg's executive responsibilities were assumed by Thomas Krol (who was approximately 25 years younger than Schlossberg). Henry Schwartz replaced Schlossberg as President of the Company (Affidavit in Support).

On June 9, 2011, Schlossberg commenced an action against Henry Schwartz, Steuben Sales, Inc., Elmhurst Dairy, Inc., Dora's Naturals, Inc., Worchester Creameries Corp., and Empact America, Inc., naming them as Defendants, and against the Company, as a nominal Defendant. An amended complaint filed on December 28, 2011 was followed by a motion to dismiss and a cross motion for leave to file and serve a second amended complaint. By order dated July 26, 2012, this court granted Schlossberg's motion for leave to serve and file a second amended complaint and denied the motion to dismiss as academic.[3] Defendants thereafter served the instant motion to dismiss the second amended complaint.

For the reasons that follow, the Defendants' motion is granted in part and denied in part.

The Court's Determination

Pursuant to CPLR 3211(a)(1), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." Initially, the court rejects Defendants' contention that the facts asserted in Schlossberg's second amended complaint should not be deemed true for purposes of determining the instant motion to dismiss given that they are "inherently incredible or flatly contradicted by documentary evidence". Specifically, the Defendants contend that Schlossberg "added legal conclusions and statements of fact which are inherently incredible (given the existence of three prior complaints he verified that did not contain these statements that were added in response to Defendants' original motion to dismiss) and/or are flatly contradicted by documentary evidence in an attempt to fix the defects in his original amended complaint" (Affirmation in Support at ¶¶ 7-8). However, an amended pleading supersedes the original pleading. The original pleading thereafter has no effect, forms no part of the record, and the action proceeds as if the original pleading had never been served (*see Stella v Stella*, 92 AD2d 589 [2d Dept 1983]; 84 NY Jur2d

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[2] Although Schlossberg's employment as President was terminated, Schlossberg remains a 10% shareholder and director of the Company.

[3] The second amended complaint asserted both direct and derivative claims for a total of 17 causes of action.

Pleadings § 224). Accordingly, any claim that the second amended complaint should be dismissed pursuant to CPLR 3211(a)(1) based upon the different factual assertions contained in the prior complaints is unpersuasive.

Defendants also seeks dismissal on the ground that none of the seventeen causes of action state a claim for which relief can be granted. "When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (*Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]). "In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Id.* at 1181).

Breach of Fiduciary Duty (First Cause of Action)

The elements of a breach of fiduciary duty claim are: the existence of a fiduciary relationship between plaintiff and defendant; misconduct by the defendant; and damages caused by defendant's misconduct (*Palmetto Partners, L.P. v AJW Qualified Partners*, LLC, 83 AD3d 804 [2d Dept 2011]). Directors or officers of a corporation stand in a fiduciary relationship to the corporation, must act in good faith and "owe the corporation their undivided loyalty and 'may not assume and engage in the promotion of personal interests which are incompatible with the superior interests of their corporation'" (*Yu Han Young v Chiu*, 49 AD3d 535, 536 [2d Dept 2008] [internal quotations omitted]; *Schachter v Kulik*, 96 AD2d 1038, 1039 [2d Dept 1983]).

In the first cause of action, a derivative claim, Schlossberg asserts that Schwartz breached his "fiduciary duties to [the Company] and has taken actions which have adversely affected the corporation and has used his position to misappropriate and divert opportunities to himself and other companies wholly-owned by him and/or his family". The first cause of action also claims that Schwartz breached his "fiduciary duties to Schlossberg by seeking to deprive him, as a minority shareholder and officer of the corporation, of the full and fair opportunity to participate in the management and operations of the Company, as well as share in the corporate earnings on a pro-rata basis through salaries, bonuses and other compensation" (Second Amended Complaint at ¶¶ 91-95).

Notwithstanding Schlossberg's additional assertion that Schwartz breached a fiduciary duty to him individually, in determining a claim as derivative or individual, the "pertinent inquiry is whether the thrust of the plaintiff's action is to vindicate his personal rights as an individual and not as a stockholder on behalf of the corporation" (*Albany-Plattsburgh United Corp. V Bell*, 307 AD2d 416, 419 [3d Dept 2003]). Here, Schlossberg seeks damages on behalf of the corporation and, as such, the court views the first cause of action as being derivative in nature

only.[4] In this regard, the court notes that the complaint must be liberally construed and the plaintiff must be given the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83 [1994]; *Peters v Accurate Building Inspectors Division of Ubell Enterprises, Inc.*, 29 AD3d 972 [2d Dept 2006]). Accordingly, the first cause of action sets forth sufficient allegations which state a claim for breach of fiduciary duty (*see Yu Han Young v Chiu*, 49 AD3d at 535, *supra*; *Moser v Devine Real Estate* [3d Dept 2007]).[5]

Breach of Duty of Loyalty (Second Cause of Action)

In the second cause of action, also a derivative claim, Schlossberg claims that Schwartz has breached his duty of loyalty, as an officer, director and controlling shareholder of the Company, insofar as Schwartz has diverted business opportunities and assets from the Company to other Schwartz-owned affiliated companies and that Schwartz has commingled funds and assets from the Company to other Schwartz-owned affiliated companies (Second Amended Complain at ¶¶ 96-101).[6] Given the factual assertions underlying Schlossberg's claim for breach of the duty of loyalty, this cause of action is subsumed in the breach of fiduciary duty claim alleged in the first cause of action and may only be appropriate as an additional factual allegation in support of that claim for relief (*see Tudor v Riposanu*, 93 AD2d 718 [1st Dept 1983]).[7] As such, the second cause of action must be dismissed.

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[4] Paragraph 95 of the second amended complaint states that by "reason of Schwartz's breach of fiduciary duty, [the Company] is entitled to compensatory and exemplary damages . . . . " (Second Amended Complaint at ¶ 95). Similarly, in the prayer for relief, Schlossberg "demands judgment . . . on the first cause of action, for derivative breach of fiduciary duty owed to [the Company]" (Second Amended Complaint at p 31).

[5] However, in light of the applicable six-year statute of limitations, the cause of action, only to the extent that it is untimely, would be dismissed. It is necessary to note that although the notice of motion does not indicate that it seeks relief pursuant to CPLR 3211(a)(5), the body of the motion does contain a request for relief in this regard. In addition, the opposition papers do address the issue.

[6] An employee owes a duty of loyalty to his employer at all times and is prohibited from acting in any manner inconsistent with his agency or trust, and is at all times bound to exercise the utmost good fath and loyalty in the performance of his duties (*see Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 430 [2001]).

[7] Schlossberg's assertion that Schwartz has commingled funds and assets from the Company and other Schlossberg companies owned and controlled by Schlossberg and his family is the only factual allegation contained in the second cause of action which is not contained in the first cause of action for breach of fiduciary duty.

Breach of Contract (Third through Sixth Causes of Action)[8]

In the third cause of action, Schlossberg asserts that: Schwartz agreed that each calendar year the Company would pay, in addition to salary and bonus, additional compensation to him, in lieu of a distribution, based upon his 10% shareholder interest; he was not paid any portion of this additional compensation for the years 2010 and 2011; and, during the prior years, he was not paid the amount of additional compensation actually due him because Schwartz caused the Company to improperly reduce the amount of such additional compensation by failing to include in the calculation funds that had been misappropriated and diverted by Schwartz away from the Company for Schwartz's personal benefit and/or other companies owned by Schwartz and/or his family (Second Amended Complaint at ¶¶ 102-110).

Considering the allegations in the light most favorable to Schlossberg, the court finds that the third cause of action asserts actions and omissions by Schwartz and the Company that support a viable claim for breach of contract.[9]

In the fourth cause of action, also for breach of contract, Schlossberg alleges that in 2000, there was an agreement that if the Company continued to be profitable while he was President, Schlossberg would receive an annual "earned bonus" based upon his job performance and the continued profitability of the Company but that the Company has not paid him his earned bonus of $180,000 for the year 2010 (Second Amended Complaint at ¶¶ 111-119).

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[8] Defendants claim that the breach of fiduciary duty claim is duplicative of the breach of contract claims asserted in the third through sixth causes of action. Contrary to the Defendants' contention, the breach of fiduciary duty claim is not duplicative of the breach of contract claim because: 1) the breach of fiduciary duty claim is a derivative claim while the breach of contract claims are direct claims; and 2) the breach of fiduciary duty claim asserts violations independent of the wrongs alleged in the breach of contract claims.

[9] The Defendants also argue that Schlossberg changed the allegations in his three prior complaints from alleging that Schwartz "had decided to 'distribute annual **profits** of [the Company] as additional compensation in lieu of a **dividend**' to him to now suddenly claiming being owed not distribution of profits but only 'additional compensation . . . in lieu of a distribution'" and that all "mention of profits was deleted" by Schlossberg from his re-constituted claim in his second amended complaint" (Affirmation in Support at ¶¶ 21-22) (emphasis in original). According to Defendants, given this drastic alteration of allegations, the new allegation is "inherently incredible" and, as such, the court is "not bound to accept" Schlossberg's new allegation as true for purposes of determining the instant motion to dismiss and, Schlossberg's third cause of action for breach of contract should be dismissed pursuant to 3211(a)(1)" (Affirmation in Support at ¶¶ 22-23). However, as noted earleir (see p 2, *supra*), an amended pleading supersedes the original pleading, the original pleading thereafter has no effect, forms no part of the record, and the action proceeds as if the original pleading had never been served (*see Stella v Stella*, 92 AD2d 589 [2d Dept 1983]; 84 NY Jur2d Pleadings § 224).

The Defendants argue that Schlossberg's claim based upon an agreement to pay an annual bonus based upon annual profits cannot be determined after the conclusion of a year and, thus, is barred by the statute of frauds (Affirmation Support at ¶¶ 30).[10] However, in *Cron v Hargro Fabrics* (91 NY2d 362, 367-68 [1998]), the Court of Appeals rejected this argument - that an agreement falls within the statute of frauds because the calculation of a plaintiff's bonus would necessarily occur after the passage of a year. Contrary to the Defendants' contention, the mere fact that the alleged agreement envisioned that Schlossberg's compensation with respect to an annual bonus would be calculated over a period exceeding one year does not bring the agreement within the statute of frauds as "'[s]uch future satisfaction of a pre-existing liability involved the matter of computation only and is merely mechanical in nature'" (*Stillman v Kalikow*, 22 AD3d 660 [2d Dept 2005] quoting *Gold v Benefit Plan Administrators*, 233 AD2d 421 [1996] [agreement regarding the payment of commissions not violative of statute of frauds even though commissions could not be determined until after the one year period]).

The breach of contract claim asserted in the fifth cause of action is articulated as follows: Between 2002 and 2004, Schwartz "improperly moved the Private Label Business" of the Company into Steuben Sales, a company wholly owned by Schwartz and/or his family; that following the transfer, Schwartz "agreed to pay Schlossberg additional compensation in lieu of a distribution based on 10% of the profits of the Private Label Business each year"; that Schwartz has "manipulated the profits actually reported by Steuben Sales to deprive Schlossberg of his right to receive his full 10% share of the profits due him under such agreement"; and that the Company, at Schwartz' direction, "has failed to give Schlossberg all amounts due to Schlossberg from the profits of the Private Label Business for each year under the agreement" (Second Amended Complaint at ¶¶ 120-129).

Except to the extent Schlossberg's claims are barred by the six-year statute of limitations, the court finds that the fifth cause of action for breach of contract action is not barred under the statute of frauds because the calculation of Schlossberg's additional compensation in lieu of a distribution is based on a pre-existing liability based on 10% of the yearly profits of the Private Label Business.

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[10] Specifically, according to the Defendants, "[s]ince plaintiff's claim to an 'annual earned bonus' cannot be computed within one year because any profits of [the Company] cannot be determined on an annual basis until after the one year period expires . . . any alleged agreement to pay an 'annual' bonus is barred by the plain terms of GOL 5-701. Stated differently, since it is impossible to pay a bonus within one year that is allegedly based on the annual profits of [the Company] for any given year that cannot be determined until after the conclusion of that one year period, Plaintiff's claim to an annual bonus is barred by the Statute of Frauds" (Affirmation Support at ¶¶ 35-36) (emphasis in original).

The last breach of contract cause of action asserts that the Company has failed to pay Schlossberg for his vacation earned in the years 2010 and 2011 (Second Amended Complaint at ¶¶ 130-138). While the notice of motion seeks dismissal of "plaintiff's causes of action", the affirmation does not raise any arguments in support of dismissal of the sixth cause of action.

Accounting (Seventh Cause of Action)

In the seventh cause of action, Schlossberg asserts that he is "entitled to a full and unfettered accounting of the books and records of [the Company]; that "[d]espite demands for an accounting by Schlossberg, such demands have been refused and Schlossberg has not received an accounting" (Second Amended Complaint at ¶¶ 140-143). This demand for an accounting does not satisfy the requisite particularity under Business Corporation Law ("BCL") § 626© and, therefore, must be dismissed. BCL 626© provides that in any shareholders' derivative action, the "complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort" (*cf Conroy v Cadillac Fairview Shopping Center Properties*, 143 AD2d 726 [2d Dept 1988] [complaint sufficiently pleaded a prior demand for and refusal of an accounting by alleging a demand for and refusal of "'true and full information' about the financial affairs of the partnership"]).

Mismanagement, corporate Waste, Self-Dealing, Misappropriation of Assets and Diversion of Corporate Opportunity (Eighth Cause of Action)

The eighth cause of action, denominated as a derivative claim, asserts that: the Company had a vested right and/or expectation in revenues derived from its business operations; that Schlossberg had a vested right and/or expectation in 10% of the profits of the Company, which right and/or expectation was diverted and misappropriated by Schwartz; Schwartz misappropriated corporate opportunities belonging to the Company and formed Steuben Sales to conduct the same business in order to deprive the Company of its revenues, goodwill and other benefits; that Schwartz has taken actions which adversely affect the Company and has used his position as leverage to misappropriate opportunities to himself and other companies owned by Schwartz and/or his family (Second Amended Complaint at ¶¶ 147-149).

Contrary to the Defendants' contention, the eighth cause of action is a derivative claim and does not confuse Schlossberg's individual claim with those of the Company. Notably, the damages sought, which are claimed on behalf of the Company only, are the amount of revenues, goodwill and other benefits the Company would have enjoyed "but for Schwartz's diversion and misappropriation of corporate opportunities, funds and assets" (Second Amended Complaint at ¶ 149). To the extent the claims are not barred by the six-year statute of limitations applicable to a derivative action, dismissal of the eighth cause of action is not warranted (*see* CPLR 213[7]; *North Fork Preserve, Inc. v Kaplan*, 31 AD3d 403 [2d Dept 2006]).

Statutory and Common Law Injunctive Relief (Ninth and Tenth Causes of Action)

In the ninth cause of action, Schlossberg asserts that all of the proceeds received by Schwartz and his companies arising from the purported wrongful conduct should be set aside. Schlossberg also seeks to enjoin the Defendants, pursuant to BCL 720, from further dissipating or transferring any of the assets of the Company, and alleges that as a result of Schwartz and his companies' misconduct, the Company has suffered, and will continue to suffer, irreparable injury (Second Amended Complaint at ¶¶ 152-55).

The necessary proof to obtain an injunction under the BCL 720 is less exacting than the requisite showing of likelihood of success on the merits, irreparable injury, and a balance of equities favoring the party seeking the preliminary injunction under common law (*People ex rel Arcara v Cloud Books, Inc.*, 96 AD2d 751 [4th Dept 1983]; *Gambar Enterprises, Inc., Kelly Services, Inc.*, 69 AD2d 297 [4th Dept 1979]). Pursuant to BCL 720(a)(3), an action may be brought against Schwartz to "enjoin a proposed unlawful conveyance, assignment or transfer of corporate assets, where there is sufficient evidence that it will be made". The second amended complaint asserts a viable claim for injunctive relief under BCL 720 given the allegations that Schwartz has, and continues to, transfer assets of the Company to other companies owned by Schwartz and/or his family.

Moreover, Schlossberg has pleaded a cause of action for common law injunctive relief.[11]

Unjust Enrichment (Eleventh and Twelfth Causes of Action)

In order to state a viable claim for unjust enrichment, a plaintiff must assert that "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Marini v Lombardo*, 79 AD3d 932 [2d Dept 2010] *quoting Citibank, N.A. v Walker*, 12 AD3d 480, 481 [2d Dept 2004] [internal quotation marks omitted], *abrogated on other grounds by Butler v Catinella*, 58 AD3d 145 [2d Dept 2008]. Unjust enrichment occurs when in equity and good

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[11] According to the tenth cause of action, "Schlossberg individually, and derivatively on behalf of [the Company], is entitled to injunctive relief including, but not limited to, restraining and enjoining Defendants from, *inter alia*: (a) engaging in or taking any further steps or acts to divert business, profits, and corporate opportunities from Steuben Foods to themselves or others; (b) taking any actions to remove Schlossberg as a director; (c) taking any actions which would impair, defeat interfere with, or adversely affect Schlossberg's rights as a director and shareholder of Steuben Foods; (d) using funds from Steuben Foods to pay for any personal expenses; (e) using funds from Stueben Foods to pay for their defense; and (f) otherwise acting outside the ordinary course of business" (Second Amended Complaint at ¶ 157).

conscience a party obtains or possesses value that rightfully belongs to another party (*Parsa v State of New York*, 64 NY2d 143 [1984]).

In the eleventh cause of action, Schlossberg asserts that, at Schwartz's direction, the Company has failed to pay Schlossberg additional compensation in lieu of a distribution for the years 2010 and 2011, an earned bonus for the year 2010, and all amounts due from profits of the Private Label Business; and that the Company has been unjustly enriched at Schlossberg's expense (Second Amended Complaint at ¶¶ 159-160). The eleventh cause of action to recover damages for unjust enrichment is indistinguishable from the breach of contract causes of action and, therefore, is subject to six-year statute of limitations period set forth in CPLR 213(2) (*Chi Kee Pang v Synlyco, Ltd*, 89 AD3d 976 [2d Dept 2011]; *37 Park Drive South, Inc. v Duffy*, 63 AD3d 1040 [2d Dept 2009] [six-year statute of limitations applied to implied contract or unjust enrichment claim]; *compare Ingrami v Rovner*, 45 AD3d 806 [2d Dept 2007] [three-year limitations applied to claims for fraud, conversion and unjust enrichment]). Here, Schlossberg has asserted a viable claim for unjust enrichment except for those claims relating to profits due from the Private Label Business more than six years prior to the commencement of the instant action.

Schlossberg's twelfth cause of action, a derivative unjust enrichment claim on behalf of the Company, is based upon the misappropriation of assets and diversion of corporate opportunity from the Company to other Schwartz and/or family-owned companies. Specifically, Schlossberg alleges in the complaint that: Schwartz has "improperly diverted and misappropriated assets and/or funds of [the Company] to other companies owned by him and/or his family . . . without fair or adequate consideration"; "Schwartz and such companies owned and/or controlled by him and/or his family have been unjustly enriched at [the Company's] expense", and; it is "against equity and good conscience to permit Schwartz and such companies owned and/or controlled by him and/or his family to retain [the Company's] assets and funds wrongfully diverted to them by Schwartz" (Second Amended Complaint at ¶¶ 163-165). Except to the extent any of the claims contained in the twelfth cause of action are barred by the three-year statute of limitations, the twelfth cause of action, as pleaded, sets forth a viable claim for derivatively asserted unjust enrichment (CPLR 214(3); *Lambert v Sklar*, 30 AD3d 564 [2d Dept 2006] [action to recover damages for, *inter alia*, unjust enrichment was subject to three-year statute of limitations]).

Constructive Trust (Thirteenth Cause of Action)

In order to assert a viable claim for a constructive trust, a plaintiff must allege a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, and unjust enrichment (*Marini v Lombardo* 79 AD3d 932 [2d Dept 2010], *O'Brien v Dalessandro,* 43 AD3d 1123 [2d Dept 2007]). A constructive trust is an equitable remedy and its purpose is to

prevent unjust enrichment. While the elements serve only as guideline and a constructive trust still may be imposed even if all of the elements are not established, the court nevertheless must dismiss the thirteenth cause of action because Schlossberg failed to assert that he made a transfer in reliance on a promise made by Schwartz. To the contrary, Schlossberg argues that "Schwartz improperly directed [the Company] to transfer the Private Label Business to Steuben Sales and to transfer approximately $1,000,000 to Empact under circumstances where justice and equity demand that Steuben Sales and Empact should not retain such property" (Memorandum of Law in Opposition at p 19).

Compel Right of Inspection (Fourteenth Cause of Action)

In the fourteenth cause of action, Schlossberg asserts the right of inspection of the Company's books and records pursuant to BCL 624 and alleges that he made prior demands to inspect and review the financial books and records but that such demands have been refused (Second Amended Complaint ¶¶ 176-180). The Defendants do not object to Schlossberg's inspection and, thus, dismissal of the fourteenth cause of action is not warranted.

Common Law Dissolution (Fifteenth Cause of Action)

Upon the petition of a minority shareholder, a court may direct common law dissolution of a corporation if those in control of the corporation are: looting the corporate assets to enrich themselves at the expense of the minority shareholders; continuing the corporation solely to benefit those in control; or that the actions of those in control have been calculated to depress the capital of the corporation in order to coerce the minority shareholders to sell their stock at a depressed price (*Liebert v Clapp*, 13 NY2d 313 [1963]; *Shapiro v Rockville Country Club, Inc.*, 22 AD3d 657 [2d Dept 2005]; *Kruger v Gerth*, 22 AD2d 916 [2d Dept 1964]). Under such circumstances, the court may invoke its equitable powers when it appears that the "directors and majority shareholders have so palpably breached the fiduciary duty they owe to minority shareholders that they are disqualified from exercising the exclusive discretion and the dissolution power given to them by statute"(*Matter of Kemp & Bentley, Inc.*, 64 NY2d 63, 69-70 [1984] quoting *Liebert v Clapp*, 13 NY2d 313 [1963]).

According to the complaint, "acts of oppression against Schlossberg as well as the corporate waste, looting, mismanagement, misappropriation of assets, and self-dealing by Schwartz" have resulted in "internal dissension among the shareholders and the shareholders are

so divided that dissolution would be beneficial" (Second Amended Complaint at ¶ 183).[12] Deeming the allegations in the second amended complaint as true, Schwartz has pleaded a cause of action for common law dissolution.

Age Discrimination Under the New York State and New York City Human Rights Law (Sixteenth and Seventeenth Causes of Action)

Schlossberg claims age discrimination under the New York State and City Human Rights Laws, based on his being terminated from the Company at the age of 62. The State Law, Executive Law § 296(1)(a), provides that "[i]t shall be an unlawful discriminatory practice" for an "employer" to discriminate against an "individual" based on age and other prohibited classifications. The City Law, Administrative Code § 8-107(1)(a), provides that "[i]t shall be an unlawful discriminatory practice" for an "employer" to discriminate against any "person" based on age or other prohibited classifications.

In order to plead viable causes of action for age discrimination, a plaintiff must assert: 1) that he is a member of the class protected by the statute; 2) that he was qualified to hold the position from which he was terminated; 3) that he was actively or constructively discharged; and 4) that the discharge occurred under circumstances giving rise to an inference of age discrimination (*Dzikowski v J.J. Burns & Co., LLC*, 98 AD3d 468 [2d Dept 2012]; *Bailey v New York Westchester Square Medical Center*, 38 AD3d 119 [1st Dept 2007]; *Ferrante v American Lung Association*, 90 NY2d 623, 629 [1997]). The complaint must also allege that someone younger replaced the terminated employee, or include direct evidence of discriminatory intent or statistical evidence of discriminatory conduct (*Ashker v International Business Machines Corp.*, 168 AD2d 724 [3d Dept 1990]).

In support of the their motion, the Defendants argue that Schwartz's affidavit "conclusively" establishes that Schwartz, who is 15 years older than Schlossberg, has replaced Schlossberg as President of the Company, and, as such, Schlossberg's age discrimination claims should be dismissed as a matter of law (Affirmation in Support at ¶¶ 95, 97). However, the affidavit of Schwartz may well support a motion for summary judgment dismissing the complaint

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[12] According to the second amended complaint: Schwartz has caused the Company to give his family members a salary for "no-show" jobs; Schwartz misappropriated Company profits for his own personal use; Schwartz founded Empact, a not-for-profit corporation formed to address the potential threat of electromagnetic pulses by terrorists and has misappropriated more than $1 million from the Company to contribute to this "cause"; and the $27 million debt owed to the Company by affiliated companies owned by Schwartz and/or his family has increased because, at Schwartz's direction, such companies did not pay for those goods and services the Company had provided to them.

pursuant to CPLR 3212, but in the context of a motion to dismiss the complaint pursuant to CPLR 3211(a)(7), the court may not consider a defendant's affidavit, which simply disputes the allegations against the defendant (*Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008] [affidavits submitted by a defendant "will almost never warrant dismissal under CPLR 3211 *unless* they establish conclusively" that plaintiff does not have a cause of action"] [emphasis in original]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]). Accordingly, contrary to the Defendants' contention, the complaint states valid causes of action to recover damages for violations of the New York State Human Rights Law and the New York City Human Rights Law.

Conclusion

Based on the foregoing, it is hereby ordered that the Defendants' motion is granted to the extent that the second, seventh, and thirteenth causes of action are dismissed, and the first, fifth, eighth, eleventh and twelfth causes of action, to the extent that they are time-barred, are dismissed, and the motion is, in all other respects, denied.

This constitutes the decision and order of the court.

Dated: April 5, 2013

Hon. Vito M. DeStefano, J.S.C.