

Sansum v Fioratti

2014 NY Slip Op 30122(U)

January 16, 2014

Supreme Court, New York County

Docket Number: 604989/01

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE
Justice

PART 12

Sansum
Floratti, et al., -v-

INDEX NO. 604989/01
MOTION DATE _____
MOTION SEQ. NO. 008

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 94-115
Answering Affidavits — Exhibits _____ | No(s). 130-149
Replying Affidavits _____ | No(s). 158, 105-106

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 1/16/14

[Signature], J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----X
JAMES MONTROSE SANSUM,

Plaintiff,

- against -

Index No. 604989/01

Mot. seq. nos. 008, 009

DECISION AND ORDER

HELEN CONSTANTINO FIORATTI, ARIANNA
FIORATTI LORETO, and L'ANTIQUAIRE & THE
CONNOISSEUR,

Defendants.

-----X
BARBARA JAFFE, J.:

For plaintiff:

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For defendants:

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By notice of motion, plaintiff moves pursuant to CPLR 3212 for an order granting summary judgment on his six causes of action and dismissing defendants' counterclaims.

Defendants oppose.

By notice of motion, defendants move pursuant to CPLR 3212 for an order granting them summary judgment dismissing plaintiff's claims and defenses and granting partial summary judgment on the issue of plaintiff's liability on their fifth counterclaim. Plaintiff opposes.

By decision and order dated May 15, 2013, I denied defendants' motion to strike the complaint based on plaintiff's failure to respond to discovery, for the reasons set forth on the record at oral argument. (NYSCEF 161).

I. ANALYSIS

A. Plaintiff's motion

1. Direct versus derivative claims

In the first cause of action (breach of fiduciary duty), plaintiff alleges that defendants diverted corporate profits and assets from defendant L'Antiquaire and the Connoisseur, Inc. (LAC) and intentionally diminished LAC's value, to his and LAC's detriment. In the second cause of action (accounting), plaintiff alleges that defendants' diversion of LAC's assets renders it impossible to determine LAC's overall value and the value of his shares and thus an accounting is needed. In his third cause of action (breach of duty of good faith and fair dealing), plaintiff reiterates the aforementioned allegations. In his fourth cause of action (declaratory judgment), plaintiff seeks a judgment declaring that he is the rightful owner of certain property. In the fifth cause of action (declaratory judgment), plaintiff seeks a judgment declaring that certain items which were paid for and owned by LAC and which comprised LAC's corporate assets, and over which defendants allegedly exercised dominion and control to his and LAC's detriment, should be deemed the property and assets of LAC for the purposes of valuation and an accounting and to determine the value of his interest in LAC. (NYSCEF 3).

In his amended complaint, plaintiff asserts as to his first, second, third, and fifth causes of action that defendants' actions primarily damaged LAC and thereby injured the value of his interest in LAC. These claims are derivative. (*See Yudell v Gilbert*, 99 AD3d 108 [1st Dept 2012] [plaintiff-stockholder's claim for breach of fiduciary duty against other stockholders was derivative and not direct as pecuniary loss suffered by plaintiff derived from breach of duty and harm to business entity]). In *Yudell*, the court observed that the following claims were derivative

and not direct: (1) a claim that a shareholder suffered a depreciation in the value of her stock, even if the diminution resulted from a breach of fiduciary duty; (2) claims that corporate assets were mismanaged or diverted for the other shareholders' own enrichment; and (3) a claim that a corporate opportunity was diverted. (99 AD3d at 114; *see also Gordon v Credno*, 102 AD3d 584 [1st Dept 2013] [plaintiff, shareholder in closely-held corporation, had to bring claim involving diversion of corporate assets as derivative claim]; *Berardi v Berardi*, 108 AD3d 406 [1st Dept 2013] [shareholder's action against corporation for accounting must be brought as derivative action]).

Plaintiff cites no authority for the proposition that he is entitled to sue directly by virtue of the fact that LAC is a closely-held corporation of only three shareholders. (*Compare Glenn v Hoteltron Sys., Inc.*, 74 NY2d 386 [1989] [certain claims derivative even though corporation consisted of only two shareholders; diversion of corporate assets by one shareholder for own profit resulted in corporate injury as it deprived corporation of those profits, and innocent shareholder injured to extent he was entitled to share in profits]; *Wolf v Rand*, 248 AD2d 401 [1st Dept 1999] [even if corporation closely held and defendants might share in award, claims belong to corporation and damages are awarded to it rather than directly to derivative plaintiff]). Given this result, I need not address defendants' contentions regarding the applicable statute of limitations.

Although plaintiff's fourth cause of action is personal to him and need not be brought derivatively, he has failed to establish, *prima facie*, his entitlement to judgment on it.

2. Corporate dissolution

There exists a common-law right to dissolution of a corporation where management has

breached its fiduciary duty to shareholders, caused injury to the company thereby damaging minority shareholders, and the conduct is egregious. (15A NY Jur 2d, Business Relationships § 1378 [2013]; *Ferolito v Vultaggio*, 99 AD3d 19 [1st Dept 2012] [allegations of fiduciary breaches, looting, and oppressive acts state claim for common-law dissolution]). However, a hearing is required where there exist contested issues relevant to the application. (15A NY Jur 2d, Business Relationships § 1395 [2013]; *Matter of MacDougall*, 150 AD2d 160 [1st Dept 1989]).

3. Unclean hands defense

Plaintiff raises factual issues as to whether his conduct suffices to establish unclean hands. (55 NY Jur 2d, Equity § 103 [2013] [unclean hands doctrine should not be applied until all relevant facts have been considered on merits at plenary trial]; *see Dillon v Dean*, 158 AD2d 579 [2d Dept 1990] [denying summary judgment to defendant on defense that plaintiff had unclean hands as factual questions remained as to whether plaintiff acted with unclean hands]).

Moreover, even if plaintiff had unclean hands, he levels the same allegation against defendants, who dispute it. (55 NY Jur 2d, Equity § 101 [2013] [“equity will aid a party who is less guilty than the other party and who has been deliberately wronged by that other party”]; *see Dillon*, 158 AD2d at 580 [defendant may not invoke unclean hands doctrine in order to bar judicial scrutiny of own malfeasance]).

4. Defendants’ affirmative defenses and counterclaims

As defendants do not oppose the portion of plaintiff’s motion seeking dismissal of their affirmative defenses and counterclaims, except as to the fifth counterclaim, they are dismissed.

B. Defendants' motion

1. Faithless servant

As there remain numerous triable issues as to whether plaintiff was a faithless servant, defendants' request for a judgment on their fifth counterclaim is denied. (*See eg G.K. Alan Assoc., Inc. v Lazzari*, 44 AD3d 95 [2d Dept 2007], *aff'd* 10 NY3d 941 [2008] [denying summary judgment given factual issues]; *McDougal v Apple Bank for Sav.*, 200 AD2d 418 [1st Dept 1994] [same]).

2. Invocation of right against self-incrimination

As triable issues remain, I need not consider defendants' application to strike plaintiff's deposition testimony and to draw an adverse inference against him based on his invocation of his right against self-incrimination. (*See eg El-Dehdan v El-Dehdan*, _ NYS2d _, 2013 WL 6641279 [2d Dept 2013] [party's invocation of privilege against self-incrimination in civil case may be considered by fact-finder in assessing strength of evidence offered by opposing party on issue which party was in position to controvert]; *Rodriguez v Galin*, 13 AD3d 188 [1st Dept 2004] [given triable issues of fact, summary judgment motions brought by third-party defendants properly denied, notwithstanding fact that third-party plaintiff frequently invoked right against self-incrimination during deposition]).

II. CONCLUSION

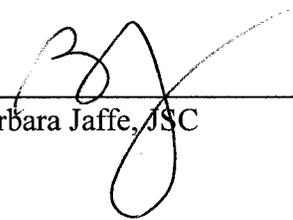
Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment is granted to the extent of dismissing defendants' affirmative defenses and first, second, third, and fourth counterclaims, and is otherwise denied; it is further

ORDERED, that defendants' motion to dismiss is granted to the extent of dismissing plaintiff's first, second, third, and fifth causes of action, and is otherwise denied; and it is further

ORDERED, that defendants' motion for partial summary judgment on their fifth counterclaim is denied.

ENTER:



Barbara Jaffe, JSC

DATED: January 16, 2014
New York, New York