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

----------X

RAYMOND G. SALEEBY, Index No.: 650371/2016

Plaintiff, **Motion Sequence: 1**

-against- **Assigned to: Justice Anil C. Singh**

REMCO MAINTENANCE, LLC, PATRIARCH PARTNERS, LLC, and LYNN TILTON,

Defendants.

----------X

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT REMCO MAINTENANCE LLC'S MOTION TO DISMISS

Abe M. Rychik, Esq.
Richard J. Halmo, Esq.
Of Counsel

TABLE OF CONTENTS

PRELIMINARY STATEMENT

The within Memorandum of Law is respectfully submitted in support of Remco Maintenance LLC's ("Remco") motion for an Order pursuant to CPLR Rule 3211(a) dismissing Plaintiff's Complaint and for such other and further relief as this Court deems just and proper.

It is respectfully submitted that Plaintiff's Complaint should be dismissed because the events described in the Complaint do not set out a cognizable cause of action against this Defendant and are flawed on procedural grounds.

STATEMENT OF FACTS

Patriarch RMC Acquisition, LLC is a Delaware Limited Liability Company, organized under Delaware law, whose name was changed to Remco Maintenance, LLC on December 13, 2004. **Exh. "B"**, Section 2.01(b)[1]. On April 1, 2005, Remco entered into an Employment Agreement with plaintiff, Raymond G. Saleeby ("Plaintiff" or "Saleeby"), to become its President and Chief Executive Officer of Remco. **Exh. "C"**. As part of his compensation, Plaintiff was provided Class B Membership shares in the company **Exh. "C"**, Section 4(c). The Limited Liability Company Agreement of Patriarch RMC Acquisition, LLC (t/b/k/a Remco Maintenance, LLC), dated November 29, 2004 and amended April 1, 2005 (the "LLC Agreement") provided, *inter alia*, that, upon termination of his employment with Remco, Remco reserved the right to "elect to repurchase any or all of such Class B Member's Membership Interests, for a price per Membership Interest equal to...an amount equal to the Fair Market Value of the Class B Interests as of the date of such termination." **Exh. "B"**, Section 6.05(a)(ii). "Fair Market Value" was defined in the LLC Agreement, in part, as "the value determined by the Board in good faith, based on all factors which the Board, in its sole discretion, determines to be relevant and appropriate." **Exh. "B"**, Section 1.01.

[1] A more detailed description of the exhibits is provided in Defendant's Affirmation in Support

Plaintiff's Complaint illustrates that Plaintiff's termination of employment was in serious dispute through 2014. Demands by counsel were made, correspondence exchanged (*See* **Exh "A"**, at ¶31-32 and **Exh. "D"**), and ultimately Saleeby refused to sign Remco's proposed Separation Agreement. Per the Complaint, Saleeby and Remco engaged in disputed negotiations regarding Saleeby's termination of employment, severance, vacation pay and rights to unemployment insurance from the date of his termination in February 2012 through 2014. In 2014, Plaintiff's accountant expected to receive a K-1, and only then was notified that Plaintiff's shares had been redeemed. **Exh. "A"**, at ¶31. Plaintiff himself wrote an email to Lynn Tilton describing the employment termination conflict on September 18, 2014. **Exh. "A"**, at ¶32.

Per the Complaint, Plaintiff was terminated from his position in or about February of 2012. **Exh. "A"**, at ¶22. Plaintiff's counsel admitted, however, that an outstanding dispute as to Plaintiff's employment status lasted for months thereafter, and in fact Plaintiff's unemployment compensation application was denied after his alleged termination. **Exh. "D"**. That same letter also admits that Remco redeemed the shares in compliance with the LLC Agreement. **Exh. "D"**. The Complaint also alleges that the defendants, through counsel, informed Plaintiff that his Class B Membership Interest in the Company had been valued at zero, and therefore Remco was entitled to repurchase Plaintiff's Class B Membership Interest for zero dollars. **Exh. "A"**, ¶24.

Plaintiff has filed a three-count Complaint related to this valuation of his Class B Membership, in which he alleges conversion and breach of contract, seeking $2.5 million in damages, and alternatively seeks dissolution of Remco by sale. **Exh. "A"**. However, as set forth below, Plaintiff's Complaint should be dismissed in light of the duplicative causes of action, the lack of a breach of contract, and also due to the inability of this Honorable Court to dissolve a foreign Limited Liability Company, as a matter of law.

LEGAL ARGUMENT

I. PLAINTIFF'S CLAIMS DO NOT CONSTITUTE VALID CAUSES OF ACTION

In this action Plaintiff has failed to meet its burden to state a valid cause of action. In analyzing the merits of a Motion to Dismiss under CPLR 3211(a)(7), the Court must analyze whether the plaintiff has "stated a claim cognizable at law." Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc., 115 A.D.3d 128, 134, N.Y.S.2d 21 (1st Dept. 2014). Motions to Dismiss are also appropriate when the plaintiff has "identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action." Id. In this latter instance, a defendant is permitted to submit evidence in support of their motion, and the Court's review changes from an analysis of "whether the plaintiff has stated a cause of action to whether it has one." Id.

In the present matter, under both New York and Delaware law, Plaintiff's Complaint utterly fails to state any cognizable claim, as a matter of law. Plaintiff's conversion claim is subsumed under the claim of breach of contract, and cannot exist, therefore, as a matter of law. Meanwhile, Plaintiff cannot claim a breach of contract in this matter because Remco, in its sole discretion and pursuant to the terms of the LLC Agreement, properly redeemed Mr. Saleeby's Class B shares for Fair Market Value; an act that was consistent with the terms of the LLC Agreement. Additionally, Plaintiff's dissolution claim is negated by recent case law holding that this Honorable Court lacks the authority to dissolve foreign companies. For these reasons, Plaintiff's Complaint must be dismissed, as a matter of law.

II. PLAINTIFF'S CONVERSION CLAIM SHOULD BE DISMISSED, AS A MATTER OF LAW, BECAUSE IT IS DUPLICATIVE OF PLAINTIFF'S BREACH OF CONTRACT CLAIM

The First Cause of Action of Plaintiff's Complaint, alleging conversion, must fail as a matter of law because it is simply a restatement of Plaintiff's breach of contract claim, and no independent facts are alleged which would give rise to a separate cause of action. The First Department has made clear that "an action for conversion cannot be predicated on a mere breach of contract." Yeterian v. Heather Mills N.V. Inc., 183 A.D.2d 493, 494, 583 N.Y.S.2d 439 (1st Dept. 1992); Kopel v. Bandwidth Technology Corp., 56 A.D.3d 320, 868 N.Y.S.2d 16 (1st Dept. 2008); Fesseha v. TD Waterhouse Investor Services, Inc., 305 A.D.2d 268, 269, 761 N.Y.S.2d 22 (1st Dept. 2003); Peters Griffin Woodward, Inc. v. WCSC, Inc., 88 A.D.2d 883, 884, 452 N.Y.S.2d 599 (1st Dep't 1982). For a claim of conversion to survive in light of a simultaneous claim of breach of contract, the claim of conversion must allege "independent facts sufficient to give rise to tort liability." Yeterian, 183 A.D.2d at 494.

In the present matter, it is clear that Plaintiff's conversion claim is predicated on the same material facts as its breach of contract claim. Specifically, the First Cause of Action for conversion and the Second Cause of Action for breach of contract both allege that "Saleeby earned, owned and was entitled to possess the Class B Membership Interest." **Exh. "A"**, ¶36, ¶42. Both causes of action further allege that the defendants "deprived Saleeby" of his Class B Membership Interest without compensation. **Exh. "A"**, ¶37, ¶43. The identical language found in the first two causes of action in the Complaint clearly indicate that the claim of conversion is predicated on the same factual allegations as those which form the basis of the breach of contract claim. As a result, Plaintiff's First Cause of Action for conversion must be dismissed, as a matter of law.

III. PLAINTIFF'S CAUSE OF ACTION FOR BREACH OF CONTRACT MUST BE DISMISSED BECAUSE HE FAILS TO IDENTIFY THE BREACH OF ANY AGREEMENT

Plaintiff's breach of contract claim must fail, as a matter of law, because Plaintiff fails to cite any specific contractual provision that was breached by Remco. It is well settled that, to establish a cause of action for breach of contract, a plaintiff is required to prove "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." Harris v. Seward Park Housing Corp., 79 A.D.3d 425, 426, 913 N.Y.S.2d 161 (1st Dept. 2010), citing Morris v. 702 E. Fifth St. HDFC, 46 A.D.3d 478, 850 N.Y.S.2d 6 (1st Dept. 2007). Because Plaintiff has failed to state with particularity the provisions of the contract that were breached, dismissal is proper as a matter of law.

A. Plaintiff Has Failed To Cite The Contractual Provisions In His Second Cause Of Action

In all breach of contract cases, a plaintiff is required to cite to specific provisions of the contract which a defendant allegedly breached. Courts in New York freely dismiss breach of contract claims when a plaintiff fails "to allege, in nonconclusory language, as required, the essential terms of the parties' purported personal services contract, including those specific provisions of the contract upon which liability is predicated." Caniglia v. Chicago Tribune-N.Y. News Syndicate, 204 A.D.2d 233, 234, 612 N.Y.S.2d 146 (1st Dept. 1994); *see also* Clifden Futures, LLC v. Man Financial, Inc., 20 Misc.3d 638, 641, 858 N.Y.S.2d 580 (Sup. Ct. New York County 2008).

In the present matter, it is clear that Plaintiff has failed to cite to particularized provisions of the contract and, more importantly, has failed to properly explain how any of the provisions of the agreement were breached. In his Second Cause of Action, Plaintiff does not cite a single provision in either the LLC Agreement or the Employment Agreement in support of his claim.

Instead, it is clear that Plaintiff's Complaint asks this Court to make an inference, from the Factual Allegations section of the Complaint, that one of the contractual provisions mentioned must have been breached because the Defendant has, according to Plaintiff, "deprived Saleeby of the Class B Membership Interest without compensating him for the Fair Market Value of that Interest." **Exh. "A"**, ¶43. Such conclusory language does not constitute a proper pleading in New York breach of contract cases.

Upon closer examination, Plaintiff utterly fails to cite which, if any, contractual provision was allegedly breached by the Defendant, nor does he describe in what way said provision was breached. The Plaintiff fails not only to cite to a specific provision, but even fails to cite to a specific document, choosing instead to refer collectively to "the Agreements" in his Second Cause of Action. **Exh. "A"**, pp. 11-12. The Defendants cannot be left guessing which provision (or which document) serves as the basis for Plaintiff's claim. As a result, it is clear that the breach of contract claim must be dismissed for failure to properly plead a cause of action.

B. Remco Properly Exercised Its Right To Redeem The Class B Shares, As Provided By The Contract

Assuming, *arguendo*, that the Honorable Court manages to infer an allegation from the pleadings, it remains clear that no breach of contract took place. Plaintiff appears to allege a breach of contract based upon Remco's redemption of the Class B shares for Fair Market Value, but that act itself was sanctioned by the LLC Agreement. *See* **Exh. "B"**, Section 6.05(a)(ii). It is axiomatic that an act specifically authorized by a contract cannot serve as the basis for a breach of contract claim. Shilkoff, Inc. v. 885 Third Ave. Corp., 299 A.D.2d 253, 750 N.Y.S.2d 53 (1st Dept. 2002). *See also* Gravel, Inc. v. Squicciarini, 272 A.D.2d 375, 709 N.Y.S.2d 91 (2nd Dept. 2000) (holding that a corporation's exercise of its contractual right to pay defendant the balance

of the purchase price of a deceased shareholder's shares without penalty did not constitute a breach of contract).

Defendant's redemption of Plaintiff's shares is appropriate regardless of whether New York law or Delaware law applies. We note that while Saleeby's Employment Agreement is governed by New York law, the LLC Agreement is governed by Delaware law. *See* **Exh. "B"**, Section 10.05. Whether Plaintiff asks this Honorable Court to apply New York or Delaware law to his poorly pled Complaint is immaterial, however, as the Courts in Delaware are in agreement with the Courts in New York concerning the authority of a company to redeem shares from its employees. In Delaware, a company's exercise of "its absolute contractual right to redeem" cannot serve as a basis of a breach of contract claim. *See* Nemec v. Shrader, 991 A.2d 1120, 1127-28 (Del. 2010). In Nemec, similar to the present matter, the Supreme Court of Delaware found that a company's election of an employee's shares in a Stock Plan, as authorized by contract, was appropriate as the employees "received exactly what they bargained for." Id. at 1126. The Court specifically held that there was no breach of contract "particularly where the contract authorizes the Company to act exactly as it did here." Id.

Here, it is clear that the unilateral redemption of Plaintiff's shares for Fair Market Value, in compliance with the LLC Agreement, was properly executed by the Defendant. Section 6.05 of the LLC Agreement gave Remco the right "to elect to repurchase any or all of such Class B Member's Membership Interests, for a price per Membership Interest equal to...an amount equal to the Fair Market Value of the Class B Interests as the date of such termination." **Exh. "B"**, Section 6.05(a)(ii). Plaintiff's allusion to the 60-day timeframe after termination is irrelevant to this matter, because Mr. Saleeby's employment status, by Plaintiff's own admissions, remained

in dispute in 2013, when his Class B shares were redeemed. **Exh. "D"**. Indeed it continued long thereafter.

As provided in the LLC Agreement, the definition of Fair Market Value clearly indicates that the defendants are not liable to Plaintiff for breach of contract. The LLC Agreement defines "Fair Market Value" as "the value *determined by the Board* in good faith, based on all factors which the Board, *in its sole discretion*, determines to be relevant and appropriate." **Exh. "B"**, Section 1.01 (emphasis added). It is clear that this definition allowed Remco to independently value the Class B shares, without any input from the Plaintiff, and it did so. The fact that Plaintiff is displeased with the value of the shares is wholly irrelevant, pursuant to the terms of the contract. The contract provided only that the Board determine the value for the shares in its sole discretion, and because Remco did just that, the claim of breach of contract must fail, as a matter of law.

The present matter is quite similar to Shilkoff, Inc., *supra*. In that case, the defendant corporation bought out a limited partnership's interests pursuant to a buy/sell provision. Shilkoff, Inc., *supra*, 299 A.D.2d at 253. The Supreme Court, New York County dismissed the breach of contract claim, and the Appellate Division, First Department, affirmed, after finding that the defendant unambiguously had the "right to set the value of the partnership interests to be purchased and that that value did not depend on the price that a third party would have paid." Id.

Similarly, the LLC Agreement clearly and unambiguously grants Remco the authority to determine, in its sole discretion, what factors should be considered in its valuation of the Class B shares. Plaintiff's conclusory statement that the valuation of the Class B shares "defies common sense" does not, and cannot, suffice as a legal basis for a breach of contract claim. **Exh. "A"**, ¶25. Further, given the above, the fact that the "Defendants failed to provide Saleeby with any

analysis supporting this zero valuation" is wholly irrelevant, as the contract did not require any such disclosure to Saleeby. Id. The simple fact of the matter is that Remco was entitled to repurchase the Class B shares at a Fair Market Value; a figure that it, in its sole and unilateral discretion, was permitted to determine.

Relatedly, Plaintiff utterly fails to illustrate in his Complaint how he is entitled to $2.25 million as the result of any alleged breach. Plaintiff offers absolutely no basis for his statement that, in early 2012, Remco was valued at approximately $30 million, nor is there any showing that this figure bears any relevance on the determination of the value of Plaintiff's Class B shares. Plaintiff's conclusory statement regarding the alleged value of Remco is a failed attempt to create an inference that, somehow, Remco breached the agreement. Such flagrant innuendo cannot stand in the place of a well-pleaded cause of action, and as such it must be dismissed by this Honorable Court, as a matter of law.

Plaintiff's Complaint, essentially, asks this Honorable Court to make a better contractual agreement than the one Plaintiff himself entered into. The Court, however, is not endowed with such power. "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent...a written agreement that is clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Riverside South Planning Corp. v. CRP/Extell Riverside, L.P., 60 A.D.3d 61, 66, 869 N.Y.S.2d 511 (1st Dept. 2008). Additionally, "[a] court may not, in the guise of interpreting a contract, add or excise terms or distort the meaning of those used to make a new contract for the parties." Id. Here, by arguing that the valuation of the Class B shares was improper, and by arguing that Remco did not have the right to repurchase the Class B shares, Plaintiff is clearly attempting to rewrite the contractual obligations to which he previously agreed, as well as the Membership Agreement to which he

was subject. The contractual language is clear and unambiguous and gives Defendant the right to redeem the shares for Fair Market Value. As such, Plaintiff's breach of contract claim must be dismissed, as a matter of law.

C. No Modification Or Amendment Took Place

Plaintiff's Complaint also tangentially refers to an alleged modification or amendment to the LLC Agreement eliminating all of the Class B shares. Not only did such modification or amendment not take place prior to the redemption of Saleeby's membership shares, but such amendment is irrelevant to a breach of contract claim because the repurchasing of the shares negated any other claim to the shares by Plaintiff.

Plaintiff's allegation in this regard appears to stem from Section 10.03 of the LLC Agreement, which states, in part, that "any modification or amendment of this Agreement which materially and adversely affects the Class B Members in a manner which is materially worse than the effect on any other Member shall not be effective without the consent of such Class B Members." **Exh. "B"**, Section 10.03. Reference to this Section is immaterial. Any "elimination" of Class B shares was due to the redemption of the shares by Remco, as provided in the contract, not any amendment. Remco's exercising of its contractual right does not constitute a modification or amendment of the Agreement; indeed, the repurchase was completed in compliance with the Agreement. As such, there is no cause of action stemming from any alleged breach of Section 10.03, as a matter of law.

D. No Cause Of Action Can Be Pled From The Employment Agreement

Finally, Plaintiff cannot sustain a cause of action for breach of contract stemming from any part of the Employment Agreement. Plaintiff refers to Section 4(c) and Section 7 of the Employment Agreement. Section 4(c) refers to the allocation of the 7.5% membership interest in

Remco, while Section 7 explains the conditions under which Plaintiff would forfeit his right to such membership. Plaintiff makes no allegation whatsoever in the Complaint that illustrate that either of these provisions were violated in any way. Indeed, the redemption of Plaintiff's Class B shares does not relate in any way to Section 4(c) or Section 7 of the Employment Agreement, as said redemption was performed under the auspices of the LLC Agreement. As such, no cause of action can arise from a breach of the Employment Agreement.

IV. THIS COURT LACKS SUBJECT MATTER JURISDICTION TO GRANT DISSOLUTION OF A FOREIGN LIMITED LIABILITY COMPANY

Plaintiff's Third Cause of Action, seeking dissolution of Remco, must be dismissed, as a matter of law, because this Honorable Court lacks the authority to grant such an order. The First Department, following a detailed consideration of other Judicial Departments' analysis of this issue, recently held that "New York courts lack subject matter jurisdiction to dissolve a business entity created under another state's laws." Matter of Raharney Capital, LLC v. Capital Stack LLC, 2016 N.Y. Slip. Op. 01425, at *4, 25 N.Y.S.3d 217 (1st Dept. February 25, 2016); *see also* Rimawi v. Atkins, 42 A.D.3d 799 (3rd Dept. 2007) (Court lacked subject matter jurisdiction over dissolution of Delaware limited liability company); Matter of MHS Venture Mgt. Corp. v. Utilisave, LLC, 63 A.D.3d 840, 881 N.Y.S.2d 452 (2nd Dept. 2009) ("A claim for dissolution of a foreign limited liability company is one over which the New York courts lack subject matter jurisdiction.").

Simply put, New York Courts have made clear that they lack the authority to dissolve a foreign limited liability company, such as defendant Remco. By Plaintiff's own admission, Remco is a "limited liability company organized under the laws of the State of Delaware." **Exh. "A"**, ¶8. As such, the Third Cause of Action of Plaintiff's Complaint must be dismissed, as a

matter of law, in light of the Court's lack of subject matter jurisdiction to dissolve Remco, a foreign limited liability company.

CONCLUSION

Plaintiff's Complaint must be dismissed, as a matter of law, for both procedural and substantive reasons. Plaintiff's allegation of conversion must be dismissed procedurally because that claim is automatically subsumed under the breach of contract claim. The breach of contract claim itself also materially fails because no specific provision in either of the Agreements is pled as grounds for any alleged breach. Instead, Plaintiff's Complaint sets forth various provisions in the hope that the Court will infer a breach. This Honorable Court, as well as the Defendants, should not be required, as a matter of law, to scour the Complaint and guess not only which provisions of the Agreements were breached, but also in what way those provisions were breached. As a matter of law, the allegations of breach of contract are not sufficiently pled, and must fail.

Not only does the breach of contract claim fail on procedural grounds, but more importantly, it also fails substantively because there was simply no breach of the Agreements. As far as can be discerned from the conclusory Complaint, Plaintiff is alleging that the Defendant executed an act – namely, redeeming the Class B shares – which it was unilaterally entitled to do, based on its own valuation, per the LLC Agreement. Because the performance of an authorized act cannot constitute a breach of contract, under New York or Delaware law, it is clear that the cause of action must fail, as a matter of law.

Finally, Plaintiff's application for dissolution of Remco, a Delaware Company, is improper as a matter of law. New York law is clear that the Courts lack subject matter

jurisdiction to dissolve a foreign company. As such, Plaintiff's third cause of action should also fail, as a matter of law.

For the reasons set forth herein as well as the accompanying Affirmation in Support, an Order pursuant to CPLR Rule 3211(a) should be entered dismissing Plaintiff's Complaint as a matter of law, and such other and further relief as this Court deems just and proper.

Dated: New York, New York
April 1, 2016

KATZ & RYCHIK P.C.

By: _____

Abe Rychik, Esq.
Richard J. Halmo, Esq.
Attorneys for Defendant
Remco Maintenance, LLC
30 Broad Street, 8th Floor
New York, New York 10004
Tel: (212) 766-4700
Fax: (212) 766-4705

To: Michael M. Fay, Esq.
Jenny H. Kim, Esq.
Jason M. Herbst, Esq.
BERG & ANDROPHY
Attorneys for Plaintiff
Raymond G. Saleeby
120 West 45th Street, 38th Floor
New York, New York 10036
(646) 766-0073

Charles A. Michael, Esq.
STEPTOE & JOHNSON LLP
Attorneys for Defendants
Patriarch Partners, LLC and Lynn Tilton
1114 Avenue of the Americas
New York, New York 10036
(212) 378-7604