Gregory J. Gallo, Esq.
Charles J. Casolaro, Esq.
1050 Franklin Avneue, Suite 402
Garden City, New York 11530
Tel: (516) 248-1399 Ext. 101
Facsimile: (516) 706-0086

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DAWN MECCA, INDIVIDUALLY and AS A SHAREHOLDER OF PAYBACK REPO, INC., D/B/A PRI AND PAYBACK REPO INC., and AS A SHAREHOLDER OF RISK MANAGEMENT and LOSS MITIGATION SERVICES INC, and RISK MANAGEMENT AND LOSS MITIGATION SERVICES, INC.,

Plaintiff,

-against-

SCOTT LENNON, INDIVIDUALLY and AS PRESIDENT OF PAYBACK REPO, INC., D/B/A PRI and PAYBACK REPO INC., and as PRESIDENT OF RISK MANAGEMENT and LOSS MITIGATION SERVICE, INC., and RISK MANAGEMENT AND LOSS MITIGATION SERVICES, INC.

Defendants.

¶

Index No.: 2:16-cv-01414-LDW-ARL

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

The defendants moved pursuant to FRCP §§12 (b) (5) and 12 (b) (6) to dismiss the plaintiffs' verified complaint for insufficient service and failure to state a claim, respectively. The plaintiffs file this memorandum of law in opposition to the defendants motion to dismiss.

STATEMENT OF FACTS

This case was commenced in New York State Supreme Court, Nassau County by service and filing of a summons with notice on September 2, 2015 (Index No. 605687/2015). The defendants served a demand for the complaint on September 22, 2015. The plaintiff served and filed a complaint on March 4, 2016. The defendants removed the case to this District Court on March 22, 2016. The defendants filed a Motion for Pre Motion Conference on April 6, 2016 (Docket # 4).

ARGUMENT

Fed. R. Civ. Proc. 12(B)(5)
DEFENDANTS MOTION IS UNTIMELY

Defendants claim that the Complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(5) due to "insufficiency of service of process." It is undisputed Defendants Lennon and Payback Repo d/b/a PRI were served with a Summons with Notice pursuant to New York Civil Practice Law and Rules ("CPLR") §308(2) and CPLR §311(a)(1), respectively, on September 2, 2015. On September 22, 2015, the Defendants served and e-filed a Demand for the Complaint. The Complaint was due to be filed and served on October 12, 2015, in accordance with the Civil Practice Law and Rule ("CPLR") §3012(b). Plaintiff filed and served the Complaint on March 4, 2016. Both parties assert that New York State's CPLR governs service in this instance.

Accordingly, the governing rule is CPLR §3012(b), which provides in pertinent part that "A demand or motion under this subdivision does not of itself constitute an appearance in the action." In this instance, the Defendants had thirty (30) days after receiving the complaint to either file an appearance, an answer or make a motion which had the effect of extending the time to answer. CPLR § 320(a). According to the state and federal court dockets, the Defendants did not file an appearance, nor did they interpose an answer. Finally, they did not file a motion until April 6, 2016 (Document 4 Filed 04/06/16 #: 29), which was beyond the thirty (30) days by which they had to either appear, answer or move. The Defendants failed to comply with CPLR § 320(a), and thus, their motion pursuant to CPLR § 3012(b) seeking dismissal under Rule 12(b)(5), should be denied.

DEFENDANTS WERE SERVED

Defendants claim that the Complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(5) due to "insufficiency of service of process" because the Complaint was served late. Specifically, the Complaint was served 144 days after it was due. Plaintiff anticipated filing the Complaint timely, however, for the reasons set forth in the Declaration of Charles J. Casolaro, Esq., and the Affidavit of Dawn Mecca, the Complaint was not filed and served until March 4, 2016.

The Court of Appeals addressed late service of a complaint vis a-vis this statutory scheme (CPLR 305[b] & 3012[b]) in *A & J Concrete v Arker* (54 N.Y.2d 870). In A & J Concrete, the plaintiff commenced its action by service of a summons as authorized by *CPLR 305(b)* The defendants then served a demand for the complaint pursuant to CPLR 3012 (b). When plaintiff failed to serve the complaint within the required 20 days, the defendant rejected it. Plaintiff then moved for an extension of time within which to make service and to compel defendants to accept such service. The motion was made pursuant to CPLR 2004, which authorizes a court to grant an extension of time for good cause shown. Like CPLR 306-b, CPLR 2004 is silent concerning the submissions necessary in order for relief to be accorded.

The Court of Appeals held that "[o]nce the time to serve a complaint has expired, a plaintiff must provide the court with an affidavit of merit or a verified complaint in lieu thereof" *A & J Concrete* (supra at 872). In the instance case, the plaintiff's filed and served a Verified Complaint. Moreover, the Declaration of Charles J. Casolaro, Esq. and the Affidavit of Dawn Mecca, demonstrate the merits of the action, and that the delay was excusable. Thus, this opposition should be treated by the Court as both opposition to the motion and as a motion for an extension of time pursuant to CPLR § 2004. While the merits of the action are addressed more properly in the opposition to dismissal under Rule 12(b)(6), *see below*, the submissions

from counsel and plaintiff show that the delay was excusable. Without repeating the said submissions, the difficulty for the plaintiff and her counsel was realized in attempting to marshal documents necessary to corroborate the allegations made in the verified complaint. As detailed by plaintiff, she was summarily forced by defendant, Scott Lennon, from her position with the defendant entities. The result being the plaintiff was without many documents to review by which she could accurately recall specific factual allegations. The plaintiff undertook efforts to retrieve documents from various sources so as to be able to accurately piece together the factual allegations of her verified complaint. Her counsel further describes his duty to insure that the pleadings complied with N.Y. Comp. Codes R. & Regs. tit. 22, 130-1.1-a (1997), which requires lawyers to sign all papers served or filed in civil proceedings to certify that after a reasonable inquiry, the lawyer finds neither the pleadings nor the statements of fact to be frivolous or false. Essentially, counsel sought to establish a good faith basis for the allegations contained in the complaint. In New York, it has always been the rule that relief from defaults should be liberally granted (see, Weinstein, Korn & Miller, New York Civil Practice, § 5015.02; Siegel, New York Practice, 3rd ed., § 108 at 187). Here, the defendants will have suffered no prejudice should their motion to dismiss be denied. As the Affidavit of Dawn Mecca demonstrates, the defendants kept the records upon which she will need to proffer to prove some of her claims. The 144-day delay in serving the complaint has neither led to the spoliation of evidence or the fading of memories. The motion should be denied.

Fed. R. Civ. Proc. § 12(b)(6)

PLAINTIFF STATES A CLAIM

Defendant Lennon 's motion brought pursuant to Fed. R. Civ. Proc.12(b)(6) should

also be denied. Plaintiff clearly states claims upon which relief can be granted and Defendant fails to demonstrate, as a matter of law, that he is entitled to judgment at this early stage of litigation. If anything, Defendant demonstrates that Plaintiff is entitled to judgment as a matter of law.

"In considering a motion to dismiss for failure to state a claim upon which relief can be granted, the court is to accept as true all facts alleged in the complaint. The court is to draw all reasonable inferences in favor of the plaintiff." *Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 237 (2d Cir. 2007). A complaint must make a sufficient factual showing that supports a claim for relief that is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009).

Plausibility is context driven and "depends on a host of considerations: The full factual picture presented by the complaint, the particular cause of action and its elements, and the available alternative explanations." *Arar v. Ashcroft*, 585 F.3d 559, 617 (2d Cir. 2009). "[A] claim should only be dismissed at the pleading where the allegations are so general, and the alternative explanation so compelling, that the claim no longer appears plausible." *Id.*

"[T]he *Twombly* Court concluded that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. . . . The *Twombly* plausibility standard... does not prevent a plaintiff from pleading facts alleged 'upon information and belief" where the facts are peculiarly within the possession and control of the defendant... The *Twombly* Court stated that [a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a

reasonable expectation that discovery will reveal evidence of illegal[ity].” (internal quotation marks and citations omitted) *Arista Records LLC v. Doe*, 604 F.3d 110, 120 (2d Cir. 2010).

New York’s CPLR governs the standard of the pleadings herein. Specifically, § 3013 provides:

> Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.

CPLR §§ 3013 and 3016(f) require only that pleadings be sufficiently particularized so as to provide notice of the transactions that the plaintiff intends to prove, and the material elements of each claim. CPLR § 3026 states that a pleading is deemed to allege whatever can be implied from its statements by fair and reasonable intendment. *Components Direct, Inc. v. European American Bank and Trust Co*., 175 A.D.2d 227 (2d Dept. 1991). Where there is sufficient detail to provide a defendant with notice of an alleged transaction and the elements of the claims, a motion to dismiss is properly denied. *Chaudhry v. Abdair*, 261 A.D.2d 499 (2d Dept. 1999).

In describing the plaintiff’s allegations in its verified complaint as “nothing more than conclusory assertions and a bare recitation of legal elements without sufficient information to properly put Defendants on notice of the claims against them,” the defendants are mischaracterizing the sufficiency of the allegations. The allegations, while not “threadbare” as defendants assert, lack specificity of facts but not the facts themselves. For instance, the plaintiff alleges that the Defendant Scott Lennon misappropriated from Payback Repo, the consequence of which was that Plaintiff, Dawn Mecca, was caused to lose money. The complaint alleges that Lennon and Mecca were the only shareholders of Payback Repo. Thus, the cause of action for conversion of corporate funds was a direct action by Mecca against

Lennon. To determine whether an action is direct or derivative "…[a] court should look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation." (*Tooley v. Donaldson, Lufkin & Jenrette*, Inc., 845 A.2d 1031, 1039 [Del.2004]). Thus, under Tooley, a court should consider " (1) who suffered the alleged harm (the corporation or the stockholders); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders individually)" *Yudell v. Gilbert*, 949 N.Y.S.2d 380, 99 A.D.3d 108 (1st Dept., 2012) *citing Tooley* (id. at 1035).

BREACH OF CONTRACT

The elements of a claim for breach of contract are (1) the existence of a contract, (2) due performance of the contract by plaintiff, (3) breach of the contract by defendant, and (4) damages resulting from the breach, *JP Morgan Chase v. J.H. Elec. of NY, Inc*., 69 AD3d 802, 803 [2d Dept 2010]. In the instant case, the plaintiff alleged that defendant Lennon, was president and owned 51% of Payback Repo, Inc. (¶ Sixth), and that plaintiff owned 49% of Payback Repo, Inc. (¶ First), and was its director (¶ Seventh). Lennon had excluded plaintiff from the daily operations (¶ Eleventh), refused to allow plaintiff to inspect the corporate books and withheld profits and dividends from plaintiff (¶ Twelfth). Finally, plaintiff alleged that the Lennon's actions violated the by-laws of Payback Repo, Inc. ("corporations") (¶ Fifteenth). In short, plaintiff alleged that Lennon took money to which she was entitled as a majority co-owner of Payback Repo, Inc., "the repossession and asset recovery corporation"

(¶ Eighth). The requirements for formation of a contract are (1) at least two parties with legal capacity to contract, (2) mutual assent to the terms of the contract, and (3) consideration, see generally, Restatement, Second, Contracts §§ 9, 12, 17; 1 Williston, Contracts (4th Ed.) 200-09. The legal standards to be applied in evaluating a motion to dismiss pursuant to CPLR 3211(a)(7) are well-settled. In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7), the sole criterion is whether the pleading states a cause of action *Cooper v. 620 Prop. Assoc.*, 242 A.D.2d 359 [2d Dept 1997], citing *Weiss v. Cuddy & Feder*, 200 A.D.2d 665 [2d Dept 1994]. If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail *511 West 232nd Owners Corp. v. Jennifer Realty Co*., 98 N.Y.2d 144, 152 [2002]; *Cooper*, supra, 242 A.D.2d at 360). The court's function is to "accept ... each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts' " (*511 West 232nd Owners Corp*., quoting *219 Broadway Corp. v. Alexander's, Inc*., 46 N.Y.2d 506, 509 [1979]). The pleading is to be liberally construed and the pleader afforded the benefit of every possible favorable inference (*511 West 232nd Owners Corp*., supra).

CONVERSION

The elements of a cause of action in conversion are that the plaintiff's right to possession, intent of the defendant, and the defendant's interference with plaintiff's property rights to the exclusion of plaintiff's rights. *See Meese v. Miller,* 79 A.D.2d 237, 436 N.Y.S.2d 496 (4th Dep't 1981). The plaintiff sets forth in the complaint that the defendant, Scott Lennon, diverted money that was owed to the corporation, more specifically, to the plaintiff for

himself. It is clear that the plaintiff is claiming that the money was rightfully hers. Accordingly, the complaint sets forth a valid cause of action for conversion.

CORPORATE DISSOLUTION

The plaintiff brings a valid cause of action for corporate dissolution. Business Corporation Law § 1104-A provides in pertinent part:

> § 1104-a. Petition for judicial dissolution under special circumstances.
>
> (a) The holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation… may present a petition of dissolution on one or more of the following grounds:
>
> (1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders;
>
> (2) The property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation

"The drastic remedy of the appointment of a receiver is to be invoked only where necessary for the protection of the parties. 'There must be danger of irreparable loss, and courts of equity will exercise extreme caution in the appointment of receivers, which should never be made until a proper case has been clearly established' " DiBona v. General Rayfin Ltd., 45 A.D.2d 696, 357 N.Y.S.2d 71, quoting *Laber v. Laber*, 181 App.Div. 733, 735, 168 N.Y.S. 1040). However, the posture of the instant case has not reached the hearing and/or accounting stage whereby the court must rule on the appointment of a receiver. Instead, we are at the pleading stage and thus, the defendants' motion is premature.

DISMISSAL WITHOUT PREJUDICE

The defendants allege that the plaintiff's claim should be dismissed because it confused direct and derivative claims and, in the alternative, the derivative claims lacks the

futility of demand provisions. If this Court dismisses the claims for these reasons, then the dismissal should be without prejudice. The appellate court in *Tico, Inc. v Borrok*, 57 AD3d 302 (1st Dep't 2008) modified the trial court's granting of the respondent's motion to dismiss with prejudice a derivative action by limited partners of alleging breach of fiduciary duty and related business to the extent of deleting the provision that the dismissal is with prejudice. The Court held: "Although the court properly determined that plaintiffs lacked standing on the basis that they did not make a formal demand on all of the general partners and failed to demonstrate that such a demand would have been futile, dismissal of the complaint with prejudice was improper. A dismissal premised on lack of standing is not a dismissal on the merits for res judicata purposes (*see Alco Gravure, Inc. v Knapp Found*., 64 NY2d 458, 465 [1985]." It reasoned that: "If given effect, however, the provision of the judgment that the dismissal was "with prejudice" would bar plaintiffs from thereafter filing an amended complaint even if they would have standing at that time. For this reason alone the provision should be deleted from the judgment." Here, if the Court dismisses the complaint in accordance with FRCP 12(b)(6), the dismissal should also be without prejudice for the plaintiff to replead in accordance with FRCP. Likewise, if the Court dismisses the complaint pursuant to FRCP 12(b)(5), the dismissal should be without prejudice, since, again, dismissal is not on the merits of the case.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss should be denied in its entirety.

Dated: Garden City, New York
June 6, 2016

Gregory J. Gallo, Esq.
Charles J. Casolaro, Esq.
1050 Franklin Avneue, Suite 402
Garden City, New York 11530
Tel: (516) 248-1399 Ext. 101
Facsimile: (516) 706-0086