

Disp _____ Dec ___x___ Seq. Nos. 2-3___ Type ___misc.____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON
-----X

WILLIAM JACOBS, individually and
derivatively on behalf of WESTCHESTER
INDUSTRIAL COMPLEX, LLC,

Plaintiff,

-against-

Index No. 70359/2014

DECISION AND ORDER

WESTCHESTER INDUSTRIAL COMPLEX, LLC,
CHARLES CARTALEMI, JOAN CARTALEMI, and
DAN-NIC-CAR, LLC

Defendants.
-----X

The following papers numbered 1 to 7¹ were read on these
motions:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Affirmation and Exhibits ²	1
Memorandum of Law	2
Notice of Cross-Motion, Affidavits and Exhibits	3
Memorandum of Law	4
Response to 19-a Statement	5

¹Defendants failed to submit a Working Copy of their Rule 19-a Statement to the Court. Plaintiff failed to submit a Working Copy of its Sur-Reply to the Court. As the Sur-Reply largely addressed issues related to defendants' motion, rather than serving as a reply on plaintiff's cross-motion, the Sur-Reply was improper and was disregarded.

²Exhibits must be tabbed. Counsel is directed to review the Part Rules.

Reply Affirmation and Exhibits

6

Reply Memorandum of Law

7

There are two motions before the Court in this case, one of several, arising out of the breakup of the parties' business relationship. The first motion, filed by defendants, seeks to (1) dismiss the complaint in its entirety, on the basis that plaintiff lacks standing; or, in the alternative, (2) dismiss the first cause of action; (3) dismiss the fourth and fifth causes of action; and (4) dismiss the third cause of action. Plaintiff's motion seeks to compel discovery or, in the alternative, to strike defendants' answer.

This Court previously issued a Decision and Order dated April 21, 2016 (the "Withdrawal Decision") which held that plaintiff had withdrawn as a member of Westchester Industrial Complex, LLC ("WIC"). The basis for defendants' motion to dismiss the action turns on this withdrawal. Defendants argue that the entirety of plaintiff's complaint is derivative, and that since plaintiff has withdrawn from WIC, none of the claims may survive. There is no dispute that in order to bring a derivative suit, the movant must be a member of the limited liability corporation. See *Zentz v. Int'l Foreign Exch. Concepts, L.P.*, 106 A.D.3d 904, 965 N.Y.S.2d 180, 180 (2d Dept. 2013); *Herman v. Herman*, 122 A.D.3d 506, 507, 998 N.Y.S.2d 319, 320 (1st Dept. 2014) ("As Maurice purchased the trusts' interests

in 1998, neither the trusts nor Rosemarie were members of the LLCs in 2011 when the lawsuit commenced, and they thus lacked standing to bring the derivative claims.”).

Plaintiff does not dispute this principle, but argues, essentially, that (1) although he has withdrawn from WIC, he has not yet been paid for his interest in WIC, and so he maintains standing; and (2) that even if he could not bring any derivative claims, that does not matter because all of his claims are personal and not derivative. Turning to the first assertion, the Court finds that there is no dispute that plaintiff has withdrawn from WIC. While it is true that he has not yet been paid for that interest, he is no longer a member of WIC in any sense of the word. Plaintiff has cited no caselaw that finds that a party who voluntarily withdraws from a corporation still has standing as a member simply because the payment provisions of the parties' agreement have yet to be satisfied. Nor has research revealed any such precedent.

Plaintiff contends that it does not actually matter if he is no longer a member, because subsection (b) of the relevant statute, Business Corporation Law § 626, gives him standing. This section provides that “In any such action, it shall be made to appear that the plaintiff is such a holder at the time of bringing the action and that he was such a holder at the time of the transaction of which he complains. . . .” Plaintiff asserts

that since he was a holder both "at the time of bringing the action," as well as at the time of the transactions in question, he has standing. Plaintiff's reading might be accurate, if subsection (b) were the only applicable statute. However, there is another provision that is relevant. Business Corporation Law § 626(a) addresses the "in any such action" clause in subsection (b). It provides that **"An action may³ be brought in the right of a domestic or foreign corporation . . . by a holder of shares. . . ."** (Emphasis added). Since plaintiff is no longer a "holder of shares," he cannot bring an action "in the right" of WIC. *Indep. Inv'r Protective League v. Time, Inc.*, 50 N.Y.2d 259, 263-64 (1980) ("Where the plaintiff voluntarily disposes of the stock, his rights as a shareholder cease, and his interest in the litigation is terminated."). All of the derivative claims must, therefore, be dismissed.

That does not end the inquiry, however, because not all of plaintiff's claims are derivative, as defendants contend. Rather, only some of plaintiff's claims are derivative. There is no dispute that the first cause of action, which seeks relief based on the allegedly improper assignment by WIC of the Sun Life Mortgage, is entirely derivative, as it expressly seeks relief

³In this context, "may" means "shall;" a shareholder cannot commence an action for harm to the corporation on his or her own behalf, but only on behalf of the corporate entity. See *Bansbach v. Zinn*, 1 N.Y.3d 1. 8 (2003).

only on behalf of WIC. *Rodolico v. Rubin & Licatesi, P.C.*, 112 A.D.3d 608, 609, 977 N.Y.S.2d 264, 266 (2d Dept. 2013) ("for a wrong against a corporation a shareholder has no individual cause of action, though he loses the value of his investment."). The first cause of action is thus dismissed.

The second and third causes of action are also derivative, and must be dismissed. See *Elenson v. Wax*, 215 A.D.2d 429, 429, 626 N.Y.S.2d 531, 532 (2d Dept. 1995) ("Allegations of mismanagement or diversion of assets by officers or directors for their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually."). The second cause of action seeks damages for Cartalemi's breach of his fiduciary duty to WIC, and conversion. These damages are on behalf of WIC. Similarly, the third cause of action, which seeks damages for Cartalemi's allegedly inappropriate hiring of defendant Joan Cartalemi, also claims that WIC was damaged by having to pay unnecessary wages and a higher interest rate than WIC should have had to pay. This is also derivative.

The Court now addresses the remaining claims. The fourth cause of action seeks an accounting. While it is not derivative, it is nearly identical to a claim that plaintiff has raised in the first action between the parties, Index No. 65701/2012. The fourth cause of action is thus dismissed as duplicative, pursuant

to CPLR § 3211(a)(4). See *Scottsdale Ins. Co. v. Indem. Ins. Corp.* RRG, 110 A.D.3d 783, 784, 974 N.Y.S.2d 476, 477 (2d Dept. 2013). Defendants argue that the fifth cause of action is also duplicative of a claim in the first action. The Court agrees. The fifth cause of action, which seeks a receiver, is duplicative of the third cause of action in Index No. 65701/2012. It is also dismissed. The sixth cause of action alleges that defendant Dan-Nic-Car, LLC aided and abetted Cartalemi in his breaches of fiduciary duty to plaintiff. This appears not to be a derivative claim and, as such, remains viable.⁴

The Court declines at this time to grant plaintiff the relief it seeks on its discovery motion. Given the reduction in scope of the action as a result of this Decision and Order, the parties shall re-serve their narrowed discovery demands within one week of receipt of this Decision and Order. All responses, objections and any motions for protective orders must comply strictly with the timing and other requirements of Article 31 of the CPLR. The Court will not entertain any discovery-related motions without strict compliance with the CPLR and this Court's Part Rules.


⁴If it turns out that this claim inures solely to the benefit of WIC, then defendants may later make a motion for summary judgment.

All other requests for relief are denied.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
~~June~~, 2016

July 6


HON. LINDA S. JAMIESON
Justice of the Supreme Court

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