

<b>Konstantinidis v Pappas</b>
2018 NY Slip Op 32281(U)
May 25, 2018
Supreme Court, Kings County
Docket Number: 507612/15
Judge: Lawrence S. Knipel
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At an IAS Term, Part Comm-4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25<sup>th</sup> day of May, 2018.

P R E S E N T:

HON. LAWRENCE KNIPEL,  
Justice.

-----X  
KYRIAKOS KONSTANTINIDIS, INDIVIDUALLY AND  
ON BEHALF OF SDP ASSOCIATES, LLC,

Plaintiff,

- against -

Index No. 507612/15

JAMES PAPPAS, VANESSA HOUIRIS AND  
STEVEN PAPPAS,

Defendants,

SDP ASSOCIATES, LLC,

Nominal Defendant.

-----X  
The following papers numbered 1 to 16 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	<u>1-4, 5-6, 7-8</u>
Opposing Affidavits (Affirmations)_____	<u>9-12, 13, 14</u>
Reply Affidavits (Affirmations)_____	_____
_____Affidavit (Affirmation) <u>in further support</u>	<u>15, 16</u>
Other Papers_____	_____

Upon the foregoing papers, defendants James Pappas (James), Vanessa Houriris (Vanessa), Steven Pappas (Steven) and nominal defendant SDP Associates, LLC (SDP) move for an order, 1) pursuant to CPLR 3211 (a) (1), (5) and (7), dismissing the complaint

of plaintiff Kyriakos Konstantinidis in its entirety, and 2) pursuant to 22 NYCRR § 130-1, awarding attorneys' fees. Plaintiff moves for an order, pursuant to CPLR 3025 (b) and (c), granting him leave to amend the complaint. By separate motion, defendants move to vacate the note of issue in the event that the motion to dismiss the complaint is not granted and/or the court grants plaintiff's motion for leave to amend the complaint.

Plaintiff, individually and on behalf of SDP, commenced this action to recover damages based on an alleged wrongful transfer of 10% of plaintiff's ownership interest in SDP to other members of the company. SDP was formed solely by Steven in 1994. According to the complaint, Steven was seeking to infuse additional capital into SDP and induced plaintiff in or around 1998 to invest \$200,000. Around the same time, plaintiff gave a loan to SDP in the amount of \$278,500.00. In or around 2001, SDP was seeking additional financing to purchase a building at 129-137 Graham Avenue in Brooklyn. Steven approached his sister, Patricia Pappas (Patricia), and Gus Papadimitriou (Gus) who each contributed \$100,000 in capital to SDP. Plaintiff alleges that around this time, Steven decided to transfer and/or give his ownership interest in SDP to Vanessa and James, who each became 15% owners of SDP without giving any consideration for their ownership interests or making any capital contributions to the company.

On or about November 27, 2002, an Operating Agreement was executed which recognized the ownership interests of the members of SDP as follows: Plaintiff-30%; Gus-20%; Patricia-20%; James-15% and Vanessa-15%. Plaintiff alleges that in 2002, the

members of SDP received periodic distributions, paid in proportion to their ownership interest in SDP as mandated by the Operating Agreement. Plaintiff states that the periodic distribution he received for his 30% ownership interest was typically \$2,000. Plaintiff claims that in 2003, Steven requested that plaintiff transfer 10% of his interest to James and Vanessa, the result being that all members of SDP would own equal 20% shares in the company. Plaintiff alleges he informed Steven that no transfer of his interest would be made to James and/or Vanessa without consideration.

In the complaint, plaintiff maintains that Steven, with the knowledge of James and Vanessa, made numerous false oral and written representations to the SDP employees, who maintained the books and records of the company and handled all financial transactions, that plaintiff's ownership interest had been reduced from 30% to 20% and that James' and Vanessa's ownership interests had been each increased to 20%. Plaintiff asserts that without his consent or knowledge and in contravention of the Operating Agreement, all distributions after 2004 were incorrectly divided between the members of SDP as if all members owned 20%. Plaintiff alleges that although the distributions received by him continued to be \$2,000, SDP was secretly paying all members \$2,000. Plaintiff maintains that his distribution as a 30% owner should have been \$3,000, not \$2,000.

In 2014, SDP entered into a transaction to refinance the mortgage loan on the 129-137 Graham Avenue property. In conjunction with the transaction, plaintiff was presented with closing documents for the refinancing loan indicating that he owned only 20% of SDP, not

30%, and that James' and Vanessa's ownership interests were each listed as 20%, rather than 15%. Plaintiff alleges that he objected to executing the closing documents due to the misrepresentation of ownership but nonetheless signed the documents after being informed that the mortgage loan transaction would otherwise fail. Plaintiff states that the new mortgage loan transaction resulted in a \$1.8 million loan to SDP and a distribution by SDP of \$1.4 million to its members as if they each owned 20% interest. Plaintiff alleges that he continued to maintain his objections to the ownership interests stated in the closing documents and that SDP's counsel informed him that he was acting on the instructions of Steven when he set forth those ownership interests. Plaintiff further objected to SDP's payment from the refinance proceeds to non-member Steven in the amount of \$100,000.

On December 23, 2014, plaintiff, through his attorneys, sent a correspondence to the members of SDP further expressing his objection to the improper distributions of the November 21, 2014 mortgage loan transaction, as well as the improper monthly distributions that had been occurring over the years, and demanded that distributions be corrected in accordance with the Operating Agreement. Plaintiff further demanded that the \$100,000 payment to Steven be reclaimed by SDP and distributed to plaintiff according to his 30% share. Plaintiff alleges that none of the members of SDP, including James and Vanessa, responded to his demand and none of the members of SDP attempted to reclaim any of the improperly distributed SDP funds in response to plaintiff's demand. Plaintiff states that Steven refused to allow SDP to correct the distributions and refused to return the \$100,000

in refinance proceeds. Plaintiff alleges that his review of the books and records of SDP do not show any transaction between him and James and Vanessa by which James and Vanessa purchased 10% of plaintiff's interest or any capital contribution from James and Vanessa that would justify the increase in their interests from 15% to 20%. In addition, plaintiff asserts that the books and records contain many inconsistencies revealing that they were fraudulently altered to make it appear that plaintiff owned only 20%.

In the complaint, plaintiff sets forth causes of action for tortious interference with a contract against Steven (first), breach of contract against James and Vanessa (second), fraud against all defendants (third), misappropriation (conversion) against all defendants (fourth), unjust enrichment against all defendants (fifth), a derivative claim for misappropriation against all defendants (sixth) and an accounting (seventh).

Plaintiff commenced this action on June 19, 2015. Defendants interposed an answer on August 19, 2015 setting forth various affirmative defenses, including statute of limitations. On April 13, 2017, defendants moved to dismiss the complaint pursuant to CPLR 3211(a)(1), (5) and (7) and for attorneys' fees pursuant to 22 NYCRR § 130-1. By order dated July 14, 2017, the motion was denied with leave to renew following the completion of certain discovery. In the instant renewed motion to dismiss, defendants argue that all of plaintiff's claims accrued in 2003 and are therefore time barred. Defendants also maintain that the derivative claim is deficient in that there is no allegation that plaintiff made a demand upon SDP to institute an action or that a demand would be futile. Defendants'

statute of limitations argument is based, in part, upon the following testimony given by plaintiff at his deposition:

MR. SWEENEY: He is asking you about when you learned that [Steven] had done the 10% transfer.

The question is when did you find that out,

THE WITNESS: 2003.

Q. What did you do when you find [sic] out?

A. I never agreed to it. I complained to him all the time since then.

Q: How did you complain?

A: Over the phone, when I was coming here, any time. Even in Greece when we were together.

Q: Did you complain to him in writing?

A: No.

Q: Did you complain to anyone else?

A: The whole family. Here or in Greece. Everybody knows from that year.

Q. And you kept complaining –

A. All the time.

Q: From 2003 to 2014?

A: All the time. (Plaintiff's EBT Transcript, at 44-45).

In opposition, plaintiff submits his own affidavit (previously submitted in opposition to the first motion to dismiss) to clarify his deposition testimony. Plaintiff avers, in essence, that defendants' attorney, when asked to clarify his question, indicated that he was asking "what is referred to in paragraphs 19 and 20" of the complaint, that is, the time when Steven approached him about transferring a 10% interest to James and Vanessa. Plaintiff contends that he did not learn of the actual taking of his interest "until much later." Plaintiff avers that he did not recall the specific year he first saw the 2005 Schedule K-1 filed by SDP (the first to reflect a reduction of his interest) but that it "could have been as late as 2010." In an opposing memorandum of law, plaintiff argues that his breach of contract claim is based on defendants breaching the Operating Agreement between the parties by causing monthly distributions to be wrongfully, unlawfully, and fraudulently misapplied and diverted and that each and every time plaintiff received an incorrect distribution from SDP, a new cause of action for breach of contract accrued. Plaintiff maintains that regardless of when he learned of the wrongful taking of his 10% interest, at the very least any claim based on a breach of contract that occurred within six years of the June 19, 2015 commencement date of this action is timely.

In the face of defendants' motion to dismiss, plaintiff moves for leave to amend the complaint to allege that distributions were paid monthly, approximately twelve times per year, and that each and every improper distribution constituted a breach of contract. In the proposed amended complaint, plaintiff alleges that he first became aware that his ownership

interest in SDP was incorrectly represented as only 20% on a Schedule K-1 that he received from SDP in or about 2010. Plaintiff also amends the cause of action for a derivative claim to allege, inter alia, demand futility. In his amended derivative cause of action, plaintiff alleges that Steven, through James and Vanessa, misappropriated \$100,000 from the refinance proceeds and that Steven, James and Vanessa misappropriated SDP funds to pay legal fees associated with this action. Plaintiff alleges in the amended complaint that:

“A pre-suit demand on SDP to initiate a direct legal action to recover the \$100,000 would have been futile because Steven Pappas, through his children and through his company that manages SDP’s books and records, exerts complete control over SDP (as detailed fully above). As Steven Pappas (through his wife Helen Pappas) is the recipient of the \$100,000, he is obviously self interested in the transaction at hand.”

With respect to the misappropriation of funds for legal fees, plaintiff essentially repeats the above language, alleging that “as [d]efendants are the beneficiaries of the payment of these legal fees they are obviously self-interested in the transaction at hand.”

In moving for dismissal of the complaint on the ground that the action was barred by the statute of limitations, defendants must establish, prima facie, that the time in which to commence the action had expired (*see 6D Farm Corp. v Carr*, 63 AD3d 903 [2d Dept 2009]; *Island ADC, Inc. v Baldassano Architectural Group, P.C.*, 49 AD3d 815 [2d Dept 2008]). In determining whether a complaint is sufficient to withstand a motion pursuant to CPLR 3211 (a) (7), “the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of

action cognizable at law a motion for dismissal will fail” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence which forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*see Trade Source v Westchester Wood Works*, 290 AD2d 437 [2d Dept 2002]).

Moreover, “[i]n the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit” (*Markowits v Friedman*, 144 AD3d 993, 995 [2d Dept 2016]; *see* CPLR 3025[b]; *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015]; *Fox Paine & Co., LLC v. Houston Cas. Co.*, 153 AD3d 678, 679 [2d 2017]; *Smallberg v Raich Ende Malter & Co., LLP*, 140 AD3d 942, 943 [2d Dept 2016]; *Hothan v Mercy Med. Ctr.*, 105 AD3d 905, 906 [2d Dept 2013]; *Blue Diamond Fuel Oil Corp. v Lev Mgt. Corp.*, 103 AD3d 675, 676 [2d Dept 2013]).

While defendants' motion is not expressly identified as a summary judgment motion, insofar as issue has been joined by service of an answer and the parties have laid bare their proof, the motion shall be treated as one for summary judgment pursuant to CPLR 3212 based on the statutory grounds of CPLR 3211 (a) (1), (5) and (7) (*see Kavoukian v Kaletta*, 294 AD2d 646 [3d Dept 2002]). A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68

NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion to lay bare its proof and present evidentiary facts sufficient to raise a genuine triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d at 562; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” for this purpose (*Zuckerman v City of New York*, 49 NY2d at 562).

In considering defendants’ motion for summary judgment, the court will take into consideration the proposed amendments to the complaint (*see 49 W. 12 Tenants Corp. v Seidenberg*, 6 AD3d 243, 243 [1<sup>st</sup> Dept 2004]; *Livadiotakis v Tzitzikalakis*, 302 AD2d 369, 370 [2d Dept 2003]; *Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 38 [1<sup>st</sup> Dept 1998]).

A cause of action for tortious interference with contract is governed by a three-year statute of limitations (*see Chung v Wang*, 79 AD3d 693 [2d Dept 2010]) and accrues when the injury is sustained (*see American Federal Group, Ltd. v Edelman*, 282 AD2d 279 [1<sup>st</sup> Dept 2001]). Plaintiff alleges that Steven tortiously and intentionally interfered with plaintiff’s business relationship with the other members of SDP and with SDP’s Operating Agreement by causing SDP, James and Vanessa to wrongfully divert distributions in violation of the Operating Agreement as if plaintiff had sold 10% of his shares to James and Vanessa. According to the original and proposed amended complaint, distributions after

2004 were incorrectly divided between the members of SDP as if all members owned 20% and the “fraudulent transfer was first shown on the company’s Schedule K-1s for the 2005 year.” Thus, all of the facts necessary to the cause of action sounding in tortious interference with contract existed by 2005 and plaintiff could have obtained relief in court as of that date. (*Spinap Corp. v Cafagno*, 302 AD2d 588 [2d Dept 2003]). As the complaint was filed more than three years later, the tortious interference claim is untimely.<sup>1</sup> Since tortious interference with contract is not a continuing tort (*Spinap Corp. v Cafagno*, 302 AD2d at 588), plaintiff cannot argue that a new cause of action for tortious interference occurred with each underpayment of his distributions.

Accordingly, the first cause of action is dismissed pursuant to CPLR 3212 and 3211 (a) (5).

“A cause of action for breach of contract accrues and the statute of limitations begins to run from the time of breach” (*Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 108 AD2d 3, 7 [2d Dept 1985], *affd* 66 NY2d 38 [1985] [internal quotation marks omitted]; *see Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]). Plaintiff refers to provisions in the Operating Agreement that “[a] member may not assign in whole or in part his limited liability company interest” and the provision which states that the operating agreement may only be amended “upon the written consent of all” members. Plaintiff alleges

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<sup>1</sup>The cause of action for tortious interference with contract would be untimely even if it accrued in 2010, when plaintiff avers he first became aware of the transfer of 10% of his interest as reflected in the 2005 Schedule K-1.

that SDP, James and Vanessa “have intentionally breached this Operating Agreement by purporting to assign Plaintiff’s SDP interests and by attempting to amend the Operating Agreement without the written consent of all members to provide defendant James Pappas and defendant Vanessa Houris each 20% ownership interest and causing distributions to be wrongfully, unlawfully, and fraudulently misapplied and diverted.”

“The general rule applicable to contract actions is that a six year Statute of Limitations begins to run when a contract is breached or when one party omits the performance of a contractual obligation” (*Squeri v Moriches Assoc.*, 307 AD2d 260, 261 [2d Dept 2003] [internal quotation marks omitted]; *see Stalis v Sugar Cr. Stores*, 295 AD2d 939 [4<sup>th</sup> Dept 2002]; *Airco Alloys Div. v Niagara Mohawk Power Corp.*, 76 AD2d 68, 80 [4<sup>th</sup> Dept 1980]). “[W]here a contract provides for continuing performance over a period of time, each breach may begin the running of the statute anew such that accrual occurs continuously and plaintiffs may assert claims for damages occurring up to six years prior to the filing of the suit” (*Airco Alloys Div. v Niagara Mohawk Power Corp.*, 76 AD2d at 70). Here, however, the wrongful act was the purported transfer of 10% of plaintiff’s ownership interest to James and Vanessa. The breach occurred in 2005 at the latest, when the Schedule K-1s reflected that plaintiff’s ownership interest was reduced to 20% and the interests of James and Vanessa were increased to 20% each. The fact that plaintiff may have continued to suffer damages in the underpayment of distributions as a result of the alleged wrongful transfer of plaintiff’s ownership interest is not relevant to the statute of limitations (*see Ely–Cruikshank Co. v.*

*Bank of Montreal*, 81 NY2d 399, 402–403 [1993]). The subsequent receipt of distributions which did not reflect his proper ownership interest is not a continuing wrong but rather a continuing effect of the earlier allegedly wrongful act of divesting plaintiff of 10% of his ownership. Contrary to the contention of plaintiff, the case of *Welwart v Dataware Elecs. Corp.*, (277 AD2d 372, 373 [2d Dept 2000]), cited by defendants in support of their motion, is largely on point. In *Welwart*, the alleged wrong involved defendants' depriving plaintiff of shares of stock and diverting the profits of the corporation. The court determined that the limitations period was measured from the date of the initial alleged breach when the defendants allegedly deprived the plaintiff of his right to the shares and began diverting profits and that no new causes of action accrued each time profits were diverted. Here, the initial wrong was the defendant's changing of the respective ownership interests of SDP to deprive plaintiff of 10% of his ownership interest. A new cause of action did not arise every time plaintiff received only a 20% share of distributions as such was merely a continuing effect of the initial breach.

As a result, the second cause of action is dismissed under CPLR 3212 and 3211 (a) (5).

A cause of action alleging fraud must be commenced within six years after the date on which the cause of action accrued or within two years after the time the plaintiff could, with reasonable diligence, have discovered the alleged fraud, whichever is later (*see* CPLR 213 [8]; *Banker v Vitanza*, 115 AD3d 690, [2d Dept 2014]; *Espie v Murphy*, 35 AD3d 346,

347 [2d Dept 2006]). In his affidavit submitted in opposition to the motion to dismiss, plaintiff states that he could not recall first seeing a Schedule K-1 reflecting the incorrect ownership interest, but that it could have been as late as 2010. In the proposed amended complaint, plaintiff alleges that he became aware that his ownership interest in SDP was incorrectly represented as only 20% on a Schedule K-1 that he received from SDP “in or about 2010.” Because plaintiff was aware of the alleged fraud (which occurred in 2003 according to the proposed amended complaint) as late as 2010, his cause of action for fraud, brought more than two years later, is untimely.

Accordingly, the third cause of action is dismissed under CPLR 3212 and 3211 (a) (5).

Conversion is governed by a three-year statute of limitations (*see* CPLR 214[3]). A cause of action for conversion accrues “when all of the facts necessary to sustain the cause of action have occurred, so that a party could obtain relief in court” (*Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 43 [1995]). A cause of action alleging unjust enrichment is governed by the six-year statute of limitations of CPLR 213 (1), which accrues upon the occurrence of the alleged wrongful act giving rise to the duty of restitution (*see Williams–Guillaume v Bank of Am., N.A.*, 130 AD3d 1016 [2d Dept 2015]). Both the fourth cause of action for conversion and fifth cause of action for unjust enrichment accrued when distributions were made based on plaintiff’s reduced ownership interest and James’ and Vanessa’s increased interest, which occurred at the latest in 2005. The conversion and unjust enrichment claims are therefore not timely interposed in this 2015 action. At any rate, insofar

as the allegations giving rise to the conversion and unjust enrichment claims against James and Vanessa are predicated on the same facts giving rise to the breach of contract claim, they cannot be sustained as separate causes of action (*see Fortune Limousine Serv., Inc. v Nextel Communications*; 35 AD3d 350, 354 [2d Dept 2006]; *MBL Life Assur. Corp. v 555 Realty Co.*, 240 AD2d 375, 376 [2d Dept 1997] [“a claim of conversion cannot be predicated on a mere breach of contract”]).

To the extent plaintiff alleges that Steven misappropriated and converted plaintiff’s 30% share of \$100,000 in refinancing loan proceeds “for no consideration,” and is unjustly enriched by the retention of these monies, defendants have established as a matter of law that this portion of the loan proceeds constituted a fee for Steven’s efforts in procuring the loan.<sup>2</sup> Plaintiff has not submitted proof demonstrating that Steven was not entitled to this portion of the proceeds.<sup>3</sup>

Accordingly, the fourth and fifth causes of action are dismissed pursuant CPLR 3212 and CPLR 3211 (a) (5) & (7).

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<sup>2</sup>In his affidavit dated April 11, 2017, submitted on both motions to dismiss, Steven avers:

“On November 21, 2014, SDP closed on a \$1.8 million refinance of the Building that I arranged with the lender (“the Closing”). In consideration for my work in successfully obtaining and closing on the \$1.8 million loan, the majority members of SDP approved the payment of a consulting fee/commission to me in the amount of \$100,000.”

<sup>3</sup>The court notes that while plaintiff was able to procure affidavits from Gus and Patricia attesting that they never approved of or had any vote to approve of the payment of defendants’ attorneys fees, there is no statement from either of these members that the \$100,000 payment to Steven was unauthorized.

In order to adequately plead a shareholders' derivative cause of action, the complaint shareholders must "set forth with particularity [the aggrieved shareholders'] efforts . . . to secure the initiation of such action by the board or the reasons for not making such effort" (Business Corporation Law § 626 [c]; see *Walsh v Wwebnet, Inc.*, 116 AD3d 845, 846 [2d Dept 2014]; *Malkinzon v Kordonsky*, 56 AD3d 734, 735 [2d Dept 2008]; *Lewis v Akers*, 227 AD2d 595, 596 [2d Dept 1996]). Such "[d]emand is futile, and excused, when the directors are incapable of making an impartial decision as to whether to bring suit" (*Bansbach v Zinn*, 1 NY3d 1, 9 [2003]; see *Malkinzon v Kordonsky*, 56 AD3d at 735; *Danzy v NIA Abstract Corp.*, 40 AD3d 804, 805 [2d Dept 2007]). Demand is excused because of futility when a complaint alleges with particularity (1) "that a majority of the board of directors is interested in the challenged transaction," which may be based on self-interest in the transaction or a loss of independence because a director with no direct interest in the transaction is "controlled" by a self-interested director, (2) "that the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances," or (3) "that the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors" (*Marx v Akers*, 88 NY2d 189, 200-201 [1996] [internal quotation marks omitted]). However, "[t]o justify failure to make a demand, it is not sufficient to name a majority of the directors as defendants with conclusory allegations of wrongdoing or control by wrongdoers" (*Glatzer v Grossman*,

47 AD3d 676, 677 [2d Dept 2008]; see *Bansbach v Zinn*, 1 NY3d at 11; *Marx v Akers*, 88 NY2d at 199-200; *Lewis v Akers*, 227 AD2d at 596).

The amendments here are insufficient to allege demand futility and thus cannot support a derivative claim. Significantly, there is no allegation that a “majority of the board of directors,” or members in this case, is interested in the challenged transaction. The only persons alleged to be interested are Steven, who does not own any interest in SDP, and James and Vanessa, who are but only two of the five members of SDP.

As there is no sufficient allegation in either the original or amended complaint that a demand was made or a demand would be futile, plaintiff’s derivative claim must fail.

Accordingly, the sixth cause of action is dismissed pursuant to CPLR 3212 and CPLR 3211 (a) (7).

Turning to the seventh cause of action for an accounting, plaintiff seeks access to SDP’s books and records. Defendants assert that plaintiff, as a member of SDP, has a right to inspect the books and records of the company and that these records were made available before the commencement of this action and will continue to be made available to plaintiff in the future upon written demand. Inasmuch as plaintiff has failed to demonstrate that defendants are refusing access to requested records the seventh cause of action is dismissed pursuant to CPLR 3212.

To summarize, defendants’ motion to dismiss the complaint is granted in its entirety. The complaint is hereby dismissed.

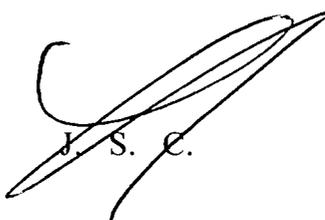
Despite this disposition, the court does not find defendants have sufficiently established that the instant action was frivolous or that an award of attorneys' fees is warranted. Accordingly, that part of defendants' motion for an award of attorneys' fees is denied.

Insofar as the amendments to the complaint were insufficient to save this action from dismissal, plaintiff's motion for leave to amend the complaint is denied.

Defendant's motion to vacate the note of issue is denied as academic.

The following constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.  
**Justice Lawrence Knipel**