SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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CORNER FURNITURE DISCOUNT CENTER, INC.
And 2901 FURNITURE OUTLET, INC.,

Plaintiffs,

-against-

GARY SAPIRSTEIN,

Defendant.

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GARY SAPIRSTEIN,

Defendant/Counterclaimant,

-against-

CORNER FURNITURE DISCOUNT CENTER, INC.,

Plaintiffs/Counterclaim Defendant,

RONGAR REALTY OF N.Y., INC. and
2826 REALTY CORP.,

Additional Counterclaim Defendants.

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Index No. 30522/2018E

MEMORANDUM IN OPPOSITION OF PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S FIRST COUNTERCLAIM AND AFFIRMATIVE DEFENSES 2, 3, 4, 5, AND 9

Plaintiffs' have moved to dismiss Defendant's First Counterclaim of Judicial Dissolution of all party Plaintiffs and counterclaim defendants and the following affirmative defenses : second affirmative defense (lack of standing);third affirmative defense (failure to join necessary party);fourth affirmative defense (failure to mitigate damages);fifth affirmative defense (unclean hands);and ninth affirmative defense (statute of limitations on damages).There is no basis for any of these dismissals.

Plaintiffs' Attack on the Judicial Dissolution of All Corporate Entities Must Fail

Plaintiffs are attacking this notice pleading that sets forth a proper claim of judicial corporate dissolution which obviously has been followed and filed by a Petition under BCL Sec 1104-1106, and in particular 1104-a. The filing of this Petition and the substantial factual support found in the Declaration of Gary Sapirstein in Support of the Petition, dated January 20, 2019 ("DPP") with attached exhibits appended to the Petition obviates any need for this Court to deal with this aspect of the motion to dismiss. It is moot.

All that remains are the assertions to attempt to eliminate affirmative defenses 2,3,4,5 and 9, which must fail.

Affirmative Defenses are all Supportable as Noticed Pleadings

<u>Second Affirmative Defense</u>:

Plaintiffs' claim is barred because it lacks standing. Plaintiffs' are not the proper parties in interest as the claims are derivative in nature and must be brought by a shareholder of corporate Plaintiffs' in its derivative capacity.

The defense gives full notice of the problem associated with the complaint. That is all CPLR 3013 requires If there is any doubt additional evidence, as allowed by CPLR 3211(c) has

been provided in filed evidence, DPP at paras 3, 10, 11-14, 16, 21-23, 26-28, and 33, and the explanation of the defense in the Bill of Particulars ("BP"), filed by Defendant on January 22, 2019, Response No.'s 2, 3 and 4.

The lack of standing defense here is standard where Defendant has claimed that the corporate Plaintiffs' are not the proper parties here and nothing in the law prevents this defense from being put forward by the Answer to the Complaint, Plaintiffs can't allege they will be prejudiced by surprise.

Defendant has made it clear that this was the behavior of Ronald Stechler and his son to harm Defendant and deny him his benefits as an executive and shareholder. Plaintiffs' are not operating companies. They have no minutes of meetings, except to terminate Defendant.

This business is a classic family business where none of the typical corporate activities take place at any time for any purpose. This has been set out in detail in the DDP and the BP. See *FTBK Investor II LLC v. Genesis Holding LLC et al*.,7 NYS 3d 825,829-832(Sup. Ct. NY Cy 2014) for general pleading recognition for standing. See *Higgins v. New York Stock Exchange*,806 NYS 2d. 339,349-355 (Sup. Ct. NY Cy 2005). *Baker v. Andover Associates Management Corp. et al*., 924 NYS 2d. 307 (Sup. Ct. Westch. Cy 2009) showing in its conclusions the documents as evidence of a standard lack of standing pleading, the type of evidence that supports full understanding of the pleading. CPLR 3211(c). The DDP and BP make the claim clear.

Third Affirmative Defense:

Plaintiffs are barred from filing this Complaint because it failed to join a necessary party. Plaintiffs are not the proper parties in interest as this claim is derivative in nature, therefore this claim must be brought by a shareholder of the corporate Plaintiff [sic, Plaintiffs] in its derivative capacity who is a necessary and indispensable party to this action.

The defense sets forth with clarity of notice that the shareholders Ronald Stechler and Eric Stechler should have brought this action, not the corporations. This is basically a family operation and run like a family business. Plaintiffs are fully aware of this by the language of the defense. Nothing needs to be added but if there is disagreement further explanation exists in the DPP paras 3, 10, 11-14, 16, 21-23, 26-28, and 33, and BP Response No. 5.

Failure to join a necessary party is spelled out in the DDP, the BP and the Answer. See the standard language set forth in the Official Forms ,22 NYCRR Appendix A-2. CPLR 1001(b). The considerations required by (b) have direct applicability to determining here the necessity of these individuals. It is also self-evident from the Complaint, Answer, DDP and BP that all evidence supports positions that Ronald Stechler and Eric Stechler were/are the moving and necessary parties to prove the allegations made by Defendant. Those individuals controlled the family business without regard to the normal operations of a corporation or any of the corporations in play here. See *Tzolis v. Wolff*,10 NY 3d 100 (2008)(LLC derivative actions by shareholders allowed) .*Jose Duran et al v. Vilma H. Bautista et al.*,2015 Misc LEXIS 1092(Sup. Ct. NY Cy 2015),47 Misc. 3d 1207,15 NYS 3d 711. *Swezey v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*,19 NY 3d 543,551,973 N.E. 2d 703,950 NYS 2d 293 (2012).

Fourth Affirmative Defense:

Plaintiffs failed to mitigate any damages allegedly sustained. As such, any damages actually sustained by Plaintiffs should be reduced proportionally for the failure to mitigate losses.

This defense is self-explanatory and proper under CPLR 3013 as “sufficiently particular”. Plaintiffs are on notice that they have to look at the harm they claim has occurred and what they did or did not do to limit the harm both they and allegedly Defendant did to one another to cause damage. There is no requirement under CPLR 3013 to do a factual analysis now of every event where damage and mitigation existed and were available to stem harm. The complete activities

that are relevant are substantially presented in the DPP and the BP if further explanation is needed. See CPLR 3211(c).

Mitigation of harm and damages is a special defense alerting all parties that they should review their behavior and determine all that should have been done was done. The history of the concept of mitigation shows it has either been an affirmative defense or, without pleading it, just the presentation of proofs to support the need to analyze mitigation. See *Wehle v. Haviland et al.*,42 How. Pr. 399,1872 N.Y. Misc LEXIS 125(1872), indicating matters in mitigation of damages can stand without being listed as an affirmative defense. It is recognition that the true purpose of mitigation is to present evidence under a burden given to the party against whom it is asserted. See *Shenkman v. O' Malley*,157 NYS 2d 290,298-299 (Sup. Ct. First Dept 1956). *Whalen v. Gathoni*, 210 Conn Super. Lexis 267 at *7-8(Super. Ct of Conn Dist N.H. 2010)("Raising the issue of mitigation of damages as a special defense also clarifies the general denial by informing the plaintiff that the defendant seeks to be benefitted by a particular matter of fact, and he should, therefore, prove the matter alleged by him….Allowing the defendant to plea this special defense places the burden of proof on the defendant to produce affirmative evidence supporting a failure to mitigate defense." Id at p *9-11.

Fifth Affirmative Defense:

Plaintiffs' claims are barred, in whole or in part, by the doctrine of "unclean hands".

Unclean hands is an equitable doctrine which says Plaintiffs come to this litigation with bad acts. If more notice is required than the warning notice that both parties are aware of the actions of Plaintiffs and Ronald Stechler it is fulfilled by the evidence set forth in the DDP paras.3, 10, 11-14, 16 and 21-23, and the further allegations and explanations in the BP Response No. 8. CPLR 3211(c). This rule requires reviewing such additional evidence showing Plaintiffs have full notice of their misbehavior.

The pleading as simply as it is stated is in direct accord with CPLR 107 Official Form 19 Description: Answer containing "Defense that Plaintiff was guilty of Culpable Conduct" the Form simply stating effectively: "First Affirmative Defense… The injuries, if any, alleged to have been sustained by plaintiff were caused, in whole or partly, by the culpable conduct of the plaintiff." Culpable conduct is a variation of unclean hands. Nothing more need be said say the official drafters of the forms under CPLR 107.If needed this is further supported by the DDP and the BP.CPLR 3211(c).

Ninth Affirmative Defense:

Plaintiffs damages are limited to the period allowed by the State of New York Statute of Limitations.

The Statute of Limitations is fairly well defined under New York law and can be app[lied to the four causes of action under CPLR 213-215,as to whether to apply a 1 year,3 year ,6 year or 10 year limitation. The issue of whether the actual period of application of the statute of limitations must be set out in an affirmative defense has been answered by the New York Court of Appeals in *Sialkot Importing Corp. v. Berlin*,296 NY 482(1946) A specific date is not required. Although the Official Forms (FORM 17) refer to a period of time that is merely considered a ceiling of pleading where the floor is a statement that it is unnecessary. See the majority and concurring opinions in *Scholastic Inc. v. Pace Plumbing Corp.*, 129 A.D. 3d 75,8 NYS. 3d 143, First Dept. 2015).

The important point of these cases is whether there is prejudice to the movant without more detail. Referring to the Complaint here, a standard recognized by Scholastic, Id at p.86 and liberally as a pleading in *Immediate v. St. Johns Queens* Hospital,48 NY 2d671,673 (1979),421 NYS 2d 875,397 NE 2d 385 (there will be no strict date requirement as set forth by example only in Official Form 17), there is only clarity not prejudice.

It also would be quite cumbersome here where there are 4 causes of action and the parties are not going to debate prejudice but whether what is the proper application under the CPLR statute of limitations provisions by year (CPLR 213-215). The four cause of action are:

(1) breach of fiduciary duty under a six year statute of limitations;

(2) Fraud, typically, with specific exceptions, under a 3 year statute of limitations (although not properly plead in this case) or under CPLR 213(8) 2 years from the time discovered, or 6 years for a director for an accounting CPLR 213(7);

(3) Conversion), a 3 year statute of limitations (CPLR 214(3);and

(4) Under the Faithless Servant Doctrine (not applicable in this case) of 6 years, suggested by *City of Binghamton v. Whalen*,141 A.D. 3d 145(Third Dept 2016),as comparable in scope for statute of limitation purposes as a breach of fiduciary duty but remedies somewhat different.

All of the above makes it obvious there should be no need to create a more complicated pleading where there are multiple causes of action, multiple arguments as to which term is the correct one and where the complaint answers the parties' argument as to which term applies.

This is a direct recognition by both parties that there exists statutes of limitations that will govern any rightful award. Very straightforward notice that both parties are going to look at activities that are subject to different statutes which will cover alleged activities. Under CPLR 3013 there is no requirement to cite specific limitation statutes. The allegations appear to be commercial in nature and unsurprising statutes will apply as the facts begin to emerge. See the factual events (dates and activities) set forth in the DPP.

Defendant specifically reserves its rights to amend any of its pleadings particularly its affirmative defenses if it recognizes the need to do so or decisions by the Court would make it necessary to do so. CPLR 3211(e) and the 2005 Recommendations of the Advisory Committee on Civil Practice:

> "…Under current law, if such a motion is made [to dismiss an affirmative defense] if the opposing party desires leave to plead again in event the motion is granted he shall so state in his opposing papers and may set forth evidence that could properly be considered on a motion for summary judgment in support of a new pleading…"

CONCLUSION

For the reasons set forth above the motion to dismiss should be denied in its entirety.

Dated: New York New York
January 22, 2019

RIMON, P.C.

By: */s/Maxim H. Waldbaum*

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Gary Sapirstein

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2019, I authorized the electronic filing of the foregoing with the Clerk of the Court using the NYSCEF system which will send notification of such filing to the registered participants.

I certify under penalty of perjury under the laws of the State of New York that the foregoing is true and correct.

Dated: New York New York
January 22, 2019

RIMON, P.C.

By: */s/Maxim H. Waldbaum*

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