SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
- X
PETER LENGYEL-FUSHIMI,

Index No.: 512764/2021

Plaintiff,

v.

ANTHONY BELLIS, ZACHARY KINNEY, and
KINGS COUNTY BREWERS COLLECTIVE, LLC

Defendants.
- X

BRIEF MEMORANDUM OF LAW IN SUPPORT OF CROSS MOTION TO DISMISS PURSUANT TO CPLR 3211(a) *et seq.* and for SUMMARY JUDGMENT PURSUANT TO CPLR 3211(c) and CPLR 3212

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CASES

STATUTES

MEMORANDUM OF LAW

Summary of Argument

The Court is respectfully referred to the Defendants limited Memorandum of Law in Opposition to Order to Show Cause (NYSCEF Doc. 16) and the Affidavit of Zachary Kinney in Opposition (NYSCEF Doc. 17'), which were filed for the limited purpose of written opposition to the "*ex parte*" relief requested by Plaintiffs since we could not oppose this in person with the COVID-19 protocols. Those documents specifically opposed any injunctive relief or temporary restraining order ("TRO"). The Court denied such relief by its Order on June 1, 2021 (NYSCEF Doc. 18, Exhibit "1"). It appears that the TRO having been denied, presumably as such was not an emergency, there is no likelihood of success on the merits, the balance of equities favors the Defendants in opposition, et al. that the balance of the relief sought by the Order to Show Cause is moot. (NYSCEF Doc. 2).

In summary of the instant application, which seeks to dismiss the Complaint (NYSCEF Doc. 1), Defendants posit that the motion is defective and was effectively denied; the Complaint is defective and the cross-motion must be granted as a matter of law. Without reaching any substantive issues, the defects and deficiencies are fatal and the Complaint must be dismissed for any or all of the above reasons, or those stated in further detail below, or by the motion to dismiss.

Standard of Review

Although the standard for a motion to dismiss is well-settled (pursuant to CPLR § 3211(a)(7), it 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 Ginzberg, 43 NY2d 268, 274-75 [1977]) -- this changes when the movant submits evidentiary material that supports the arguments. Thus here, "the test is whether the Plaintiff has a cause of action, not whether he/she has properly stated one" (Guggenheimer at 275). The lack

of standing is sufficient for a dismissal under CPLR 3211(a)(3) or (a)(7).

Summary of Facts and History

There have been three operating agreements relevant to this action. Plaintiff acts as if the Original Operating Agreement from 2014 (the "Original OA"; annexed as Exhibit "3", NYSCEF Doc. 5) are the tablets of the Ten Commandments instead of a form document that was largely disregarded by the three founders for 7 years.

When Plaintiff resigned in December 2020 and stopped coming to work in January 2021, the Class "A" Managing Members had to review the document and revise it. The First Amended and Restated Operating Agreement ("FAROA") was entered into by the Class "A" members on April 20, 2021 in order to clean up many of the loose ends from the Original OA. This was then sent to all members. No comments were received from any member.

Plaintiff was terminated formally on April 26, 2021, the FAROA had to be in place so that the termination would be effective, management of the LLC was clear and the classes of membership were settled. This all occurred and was intended as a stop-gap measure until a formal agreement could be drafted, since the FAROA was a modification of the Original OA and not a replacement.

To date, excepting this action, there has been no rejection of the Termination nor any objection; there has been no objection to the FAROA nor any rejection of it. Having received no objections from Plaintiff (or any other members) regarding the FAROA, twenty days from the execution of the FAROA, on May 10, 2021 the Second Amended and Restated Operating Agreement ("SAROA") was executed by the Class A members and sent to all members. The Class B, C and D members were informed that the SAROA replaced the FAROA and while their signature was not required, they were welcome to sign if they wished to ratify the changes. Of the 22 total members only Gregor Rothfuss, Class B member (8%); Evangelos Pefanis Class C Member, (1%) and Jeffrey Lengyel

(1%) indicated some light objections. In emails that were upon information and belief written by counsel for the Plaintiff, Mr. Sakin, "Mr. Pefanis" expounded on near-identical legal arguments as to certain aspects of the Original OA. These were as unpersuasive in emails as they are in the NYSCEF filings.

There has been no change to the voting and authority of the Class "A" Managing Members from the Original OA in the FAROA or the SAROA. It is undisputed that only the Class "A" members may vote and that only a majority of the Class "A" votes are needed to carry any action (except for merger and acquisitions) in the Original Operating Agreement (Exhibit "3"):

> **"In the event of a dispute between Members, final determination shall be made by a vote of the majority of the Class A Members"** (OOA Section 4.1)
>
> and
>
> **"Unless otherwise stated in this Agreement or under New York law, the vote of the Class A Members holding a majority of the Class A Membership Interests shall be required to approve or carry an action"**(OOA Section 6.1)

The same requirement is expressed in the FAROA (Exhibit "4"):

> **"the powers of the Company shall be exercised by and under the authority of, and the business and affairs of the Company shall be managed under the direction of, a the Class A Managing Members (the "Managers" in the Operating Agreement and hereafter known as "Managing Members"), and the Managing Members shall have responsibility for the day-to-day management of the Company and as Managing Members of the Entity. The Managing Members shall be Anthony Bellis and Zachary Kinney…"** (FAROA Section 8 modifying Section 6.1 of the Original OA);
>
> And
>
> **"Unless otherwise stated in this Agreement or under New York law, the vote of the active Class A Members holding a majority of the Class A Membership Interests shall be required to approve or carry an action"** (Section 6.4);

This is the same language as in the SAROA (Exhibit "5")

> "**Management by Class A Managing Members. The management and control of the Company and its business shall be vested exclusively in the Class A**

> **Managing Members. No other Person shall become a Managing Member except as provided herein. (SAROA 7.1);**

And:

> **"Rights and Powers of Managing Members. Except as expressly provided herein, the Managing Members shall have the exclusive right to manage the business of the Company and are hereby authorized to take any action of any kind and to do anything and everything it deems necessary with respect thereto for the success of the Company"**

There has been effectively no change to the powers of the Class "A" Managing Members, the only change is that Mr. LENGYEL-FUSHIMI, the Plaintiff, is not a Class "A" member and now holds 25.33% of the total equity of the LLC as a Class "D" non-voting member.

While Defendants acknowledge that Plaintiff may not be happy about his change in class or his termination, it is eminently permissible under any version of the LLC operating agreement for the majority of the Class "A" – Mr. KINNEY with 25.33% and Mr. BELLIS with 25.33% totalling 50.66% to make the decision to terminate Mr. LENGYEL as an employee, remove him as a managing member and change the class of his equity. Therefore, since the actions were taken properly and were ratified by the Class "A" members, there cannot be any valid dispute as to the propriety of these actions and Mr. LENGYEL fails to state a cause of action.

LEGAL ARGUMENT

I. PLAINTIFF FAILS TO STATE A CAUSE OF ACTION: CPLR §3211(a)(1) and (7) Dismissal is Appropriate

It is well settled that a Complaint may be dismissed when it is premised upon "that a material fact alleged by the Plaintiff 'is not a fact at all' and that 'no significant dispute exists regarding it' (Pechko v Gendelman, 20 AD3d 404, 406-407 [2d Dept 2005]). As a result, the claims must be dismissed since the LLC Operating Agreements all concur that action by the majority of the Class "A" was proper.

While a Complaint is to be liberally construed in favor of Plaintiff on a CPLR §3211 motion to dismiss, the court is "not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." Robinson v. Robinson, 303 A.D.2d 234, 235, 757 N.Y.S.2d 13, I4 (1st Dept 2003) (citations omitted).

Here, the Court can dismiss "Count Two: Breach of Contract" since there can not be any dispute that any version of the operating agreement, particularly the SAROA, allows for the Plaintiff to be removed as a Managing Member, terminated as an employee, and the class of his shares modified. As there has been a vote of the majority of the Class "A" there cannot be any breach of contract claimed.

Further, as here, where the bare legal conclusions and factual allegations are contradicted by documentary evidence (or the lack thereof), they are not presumed to be true or accorded every favorable inference, and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (Guggenheimer , *supra* at 275 (1977).)

Pursuant to CPLR §3211 (a)(1), this cause of action also must be dismissed since "the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Gould v Decolator, 121 AD3d 845, 847 [2nd Dept. 2014]).

This is also true for "Count Three: Breach of the Implied Covenant of Good Faith and Fair Dealing". "For a complaint to state a cause of action alleging breach of an implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract, or to withhold its benefits from the plaintiff." (Aventine Inv. Mgmt., Inc. v Canadian Imperial Bank of Commerce, 265 AD2d 513, 514 [2d Dept 1999]). Otherwise, this is deemed to be duplicative with the breach of contract claim and cannot be cross-pleaded. "A claim for breach of the implied covenant of good faith and fair dealing is properly dismissed as duplicative of a breach of contract claim where both claims arise from the same facts. (MBIA

Ins. Corp. v Countrywide Home Loans, Inc., 87 AD3d 287, 297 [1st Dept 2011].) This claim cannot be maintained where "it is premised on the same conduct that underlies the breach of contract cause of action and is intrinsically tied to the damages allegedly resulting from a breach of the contract." (MBIA Ins. Corp. v Merrill Lynch, 81 AD3d 419, 419-420 [1st Dept 2011]. Furthermore, "no obligation can be implied that 'would be inconsistent with other terms of the contractual relationship'" (Dalton v Educational Testing Serv., 87 NY2d 384 at 389 [1995], quoting Murphy v American Home Prods. Corp., 58 NY2d 293, 304 [1st Dept. 1993]).

Clearly, it is inconsistent with the Class "A" majority voting rights if Plaintiff can seek damages and recission for decisions he is not happy with. The claim does not provide any actual facts and such is in conflict with the LLC operating agreements; it is also duplicative of the breach of contract claim.

The claim under LLCL §409 "Count Four" is similarly duplicative of "Count Five: Breach of Fiduciary Duty" since LLCL 409 is just a statutory statement of fiduciary duty (see, Nathanson v. Nathanson, 20 AD3d 403 [2nd Dept. 2005]). This is not a valid cause of action even if it were not duplicative. The individual Defendants, as the Managing Members of the LLC (although not named as such, and this action is not styled as a derivative action, which perhaps the Court will forgive and allow amendment of in the future) do not deny their obligations under LLCL 409 and the common law, but such is already expressed in the SAROA – there is not need to state such as a claim.

That leaves only Count Five, which in itself is defective as a matter of law since it is again just a list of complaints about the Defendants operating under the terms of the Original OA, FAROA or SAROA to remove Plaintiff as a managing member, terminate his employment and change his equity to Class D. There is no true allegation of any breach of care, breach of duty, improper use of funds or claim specifically noting any wrongdoing by any of the individual Defendants or in their capacity

as Managing Members – just that Plaintiff is not happy with the amendments made to the LLC operating agreements.

If the Court agrees that the Defendants, as a majority of the Class "A" had the right to make the changes under the Original OA to the FAROA and then the SAROA – then this entire Complaint is fatally flawed and cannot continue.

Since the Original OA at Section 4 and 6 allowed for a majority of the Class A to take such actions (see above) as did the FAROA at Section 8 (modifying Section 6) and the SAROA at Article 7 – then Count Five (a) through (d) all are *intra vires* acts. (See Exhibits "3", "4" and "5").

It is not until the very end of the Complaint (Exhibit "2") that the true reason for this filing is exposed – on page 24 of 25, at 99 (e) is this line: [Defendants] Refused to consent to Plaintiff's sale of 5.5 percent of his equity to Rothfuss, one of the Company's non-managing members, for $420,000 in cash". It is a true "Eureka!" moment if the Court is wondering what this entire case is about. It is about nothing more than the refusal of the Class "A" Managing Members to allow the sale of 25.33% of the equity (now Class "D") to a Class "B" member who already holds the maximum 8% allowable. To allow this sale would create a non-managing member with more equity than either Class "A" Managing Member and would create a valuation of the equity that the LLC is not comfortable with. The Class "A" has the right under any version of the Operating Agreement to deny sale of equity and did so. This is the only reason for this filing: Plaintiff wants the Court to force the Class "A" to allow this sale and has cast aspersions and shadows upon the LLC and its managing members in order to achieve these goals. This is bad faith and that is simply not what the already overburdened Courts are for.

Should the Court then determine that documentary evidence of the Operating Agreements supports the rights of the Class "A" majority members in taking such action, then "Count One: Declaratory Judgment" must also be dismissed. "The supreme court may render a declaratory

judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy" (CPLR 3001). "[T]he demand for relief in the complaint shall specify the rights and other legal relations on which a declaration is requested" (CPLR 3017[b]).

Since the Court must review the documentary evidence – all of which was previously submitted by the Plaintiff with its Order to Show Cause and none of which is in dispute – then there should be no need for any further declaratory judgment. Clearly the Class "A" Managing Members always had the right to take any action and clearly such action has been taken. The documentary evidence warrants a dismissal (CPLR §3211(a)(1)). It is not a justiciable controversy. The motion to dismiss therefore "presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration" (North Oyster Bay Baymen's Assn. v Town of Oyster Bay, 130 AD3d 885, 890 [2nd Dept. 2017]).

This Complaint must be dismissed as a matter of law.

II. There Is No Cause to Pierce the Corporate Veil

Although poorly pleaded, it appears that this action seeks to pierce the veil and go after the individual Class A members.

This is a properly formed LLC with the required corporate structures and separate bank accounts; and because there are no specific claims against the corporation in the defective Complaint, there cannot be a piercing of the veil. There has been no demand on the corporation nor any allegation that such would be futile. To the extent such are asserted, all claims against the individual Defendants must be dismissed, which results in the action being dismissed.

All must also be summarily dismissed-- literally, no cause of action in the Complaint that can survive this motion as a matter of law can stand against the individual shareholder Defendants. There is no true allegation of any breach of care, dominion or domination by one or all of the managing

members, or claim specifically noting any wrongdoing by any of the individual Defendants, nor is a formal request to pierce the corporate veil made in the Complaint, despite naming the individuals. This is a transparent harassment ploy by the Plaintiff who apparently is facing a number of personal financial issues and has decided that the Defendants is an easy target.

"The general rule . . . is that a corporation exists independently of its owners, who are not personally liable for its obligations." East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc., 66 A.D.3d 122 [2nd Dept. 2009]; Transcribing Service, LLC v. Paul, 72 A.D.3d 675, 898 N.Y.S.2d 234 [2nd Dept. 2010].

There is no valid reason to pierce the corporate veil here, and New York Courts have manifested that they are "loath to disregard the corporate form." Harris v. Stoney Clove Lake Acres, Inc. 202 A.D.2d 745, 608 N.Y.S.2d 584, 586 [3d Dept. 1994]).

With no claim of improper action or wrongdoing, there is no cause to hold the individual member liable. "[E]quity will intervene to pierce the corporate veil and permit the imposition of personal liability in order to avoid fraud or injustice." Transcribing Service, LLC v. Paul, *supra*, at 675, citing Shkolnik v. Krutoy, 65 A.D.3d 1214 ([2d Dep't 2009]). The legally established entity is legally **separate and distinct** from the individual members – a distinction not easily disregarded under New York law. (See, i.e. Port Chester Electrical Const. Corp. v. Atlas, 40 N.Y.2d 652, 656, [1976].)

There is no claim the corporation is fictitious, that there is any fraud, that there was any complete domination by a member or even that any wrong was done by any individual member that caused any injury to the Defendants, even if any of the claims survive this motion. " A Plaintiff seeking to pierce the corporate veil must demonstrate that a court in equity should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the Plaintiff." East Hampton Union Free School Dist. v. Sandpebble supra

at 98 citing Love v. Rebecca Dev., Inc., 56 A.D.3d 733, [2d Dep't 2008]. As such, the causes of action against the individual Defendants, to the extent any such claims have been made upon which relief may be granted and survive this motion, must be dismissed

III. This Court Should Grant Summary Judgment to the Cross-Movants Pursuant to CPLR §3211(c)

It is well settled that Summary Judgment motions are permitted if upon all the parties and proof submitted, the cause of action or defense shall be established sufficiently to warrant the Court to direct judgment as a matter of law. Andre v. Pomeroy, 35 N.Y.2d 361(1974).

CPLR §3211(c) allows the court to treat this motion as one for summary judgment pursuant, even pre-Answer. (*see* Mihlovan v Grozavu, 72 NY2d 506, 508 [1988]; *see generally* McNamee Constr. Corp. v City of New Rochelle, 29 AD3d 544, 545 [2006]).

Conclusion

As set forth above, and in the movant's Affirmation and Memorandum of Law, there are no facts in dispute here and therefore the motion should be granted, with prejudice.

No previous motion for such relief has been made.

Dated: June 1, 2021
New York, New York

___/s_____
Kevin O'Donoghue

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MEMORANDUM OF LAW

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CERTIFICATION PURSUANT TO 22 N.Y.C.R.R. §130-1.1a

KEVIN SEAN O'DONOGHUE hereby certifies that, pursuant to 22 N.Y.C.R.R. §130-1.1a, the foregoing Memorandum is not frivolous nor frivolously presented.

Dated: June 1, 2021
New York, New York

_____/s_____
KEVIN SEAN O'DONOGHUE, Esq.

PLEASE TAKE NOTICE

* *that the within is a true copy of a entered in the office of the clerk of the within named Court on .*

* *that a of which the within is a true copy will be presented for settlement to the Hon. one of the judges of the within named Court at , on at 9:30 a.m.*
