

SHORT FORM ORDER

E-FILE

INDEX NO. 16/609510

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY

PRESENT:

HON. JERRY GARGUILO
SUPREME COURT JUSTICE

ORIG. RETURN DATE: 10/5/15
FINAL SUBMISSION DATE: 11/9/16
MOTION SEQ#001, 002, 003
MOTION: 001-MD;002-MotD; 003-MD

JONATHAN TROFFA,

Plaintiff,

JOS. M. TROFFA LANDSCAPE AND MASON
SUPPLY, INC.,

Plaintiff,

-against-

JOSEPH M. TROFFA,

Defendant,

LAURA J. TROFFA, JOS. M. TROAFFA
MATERIALS CORPORATION, NIMT
ENTERPRISES, LLC, J.J.T. DEVELOPMENT
ENTERPRISES, INC., and JOS. M. TROFFA
LANDSCAPE AND MASON SUPPLY, INC.,

Defendants.

PLAINTIFFS' ATTORNEY
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ISLANDIA, NY 11749

DEFENDANTS' ATTORNEY
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622 THIRD AVENUE, SUITE 37200
NEW YORK, NEW YORK 10017

Upon the following efiled papers numbered 30 to 78 read on these motions to strike the complaint, dismiss the complaint, and cross motion to withdraw dissolution proceeding; Notice of Motion/Order to Show Cause and supporting papers 30 - 34, 35 - 51; Notice of Cross Motion and supporting papers 50 - 66; Answering Affidavits and supporting papers 52 - 59; Replying Affidavits and supporting papers 69 - 76, 78; Other; and upon due deliberation; it is,

In this action, plaintiff/petitioner alleges that defendants/respondents usurped corporate opportunities and seeks to dissolve defendant/respondent Joseph M. Troffa Landscape and Mason Supply, Inc. ("the corporation"). The corporation, a landscape and mason supply business, was formed by defendant Joseph Troffa in 1975, and conducts business on six adjacent parcels of land

in an industrial park in East Setauket, New York. Defendant Joseph Troffa was the sole shareholder until December 28, 1995, when Joseph gifted plaintiff 40 shares of stock, or 50% ownership of the corporation. The record reveals that in 1997, plaintiff was named as vice president of the corporation. The record also reveals that NIMT Enterprises LLC was formed on October 17, 1996. Plaintiff/petitioner owns 1% interest in defendant NIMT Enterprises, LLC.

This action was commenced by efileing a petition/complaint on June 17, 2016. Although a proposed order to show cause seeking a dissolution of the corporation was also efiled and presented to the court, it was not signed by this court or served. By letter dated August 15, 2016, plaintiff/petitioner informed defendants/respondents that he would be withdrawing his petition for dissolution and order to show cause but would maintain the complaint. The letter further stated that plaintiff/petitioner intended to file an amended complaint as of right. Defendants/respondents efiled an answer and consent to dissolve on August 15, 2016. On August 16, 2016, plaintiff efiled an amended complaint which omitted the first cause of action seeking dissolution.

The amended complaint contains four causes of action: breach of fiduciary duty and duty of loyalty, and accounting; constructive trust; action to quiet title; and derivative action. The gravamen of the complaint/petition and amended complaint is that defendants breached their fiduciary duties to plaintiff when they allegedly used corporate funds to purchase Parcel 1 in 1980, Parcel 2 in 1992, Parcels 3 and 4 in 1997, Parcel 5 in 2004, however, did not give ownership of the parcels to the corporation. Three of the five properties are titled in the name of defendant NIMT Enterprises, LLC and two of the parcels are titled in the name of defendant LJT Development Enterprises, Inc. The complaint also alleges that a sixth parcel called the compost yard, was purchased by Joseph alone on March 12, 2013, partially with corporate funds.

Defendants/Respondents now move (001) to strike the amended complaint pursuant to New York Business Corporation Law ("BCL") § 1116, grant a dissolution of Jos. M. Troffa Landscape and Mason Supply, Inc. on consent, and conditionally appoint a receiver to liquidate and wind up the corporation's affairs. Defendants/Respondents move separately (002) to dismiss all non-dissolution causes of action in the verified petition/complaint and in the amended complaint, if the court deems it properly filed. Plaintiff/Petitioner cross-moves (003) to withdraw his claim for dissolution of the corporation pursuant to BCL § 1116, for a hearing pursuant to BCL 1109, to stay dissolution, and to order a plan distributing assets to the shareholders in lieu of dissolution.

That branch of defendants' motion seeking to strike the amended complaint pursuant to New York Business Corporation Law ("BCL") § 1116 and plaintiff's cross motion to withdraw his petition for dissolution are denied. BCL § 1116 authorizes discontinuance of a "special proceeding for the dissolution of a corporation . . . when it is established that the cause for dissolution did not exist or no longer exists." Upon such a showing, the Court may exercise its discretion to authorize discontinuance of the proceeding "upon terms and conditions, as the court deems proper" (CPLR 3217 [b]; see *In re Astoria Sports Complex, Inc.*, 5 AD3d 681, 681, 774 NYS2d 762 [2d Dept 2004]). However, plaintiff's counsel affirms that the proposed order to show cause was presented to the Court on July 7, 2016, and had not been signed by the Court at the time of this motion's

submission. In light of plaintiff's letter dated August 15, 2016, withdrawing the Petition and Order to Show Cause, the court notes that no dissolution proceeding was duly commenced. Therefore, BCL § 1116 was not triggered. As a result, plaintiff's cross motion to withdraw the dissolution is denied as academic.

Turning to defendants' application to grant the dissolution on consent, such consent does not comply with the statutory requirement to commence a judicial dissolution by order to show cause (BCL 1106) and is denied. If defendants seek to dissolve the corporation, they may, if so advised, counterclaim for dissolution and must submit a new order to show cause. As for defendants' contention that the amended complaint was untimely, CPLR 3025 provides that a pleading may be amended as of right * * * within twenty days after service of a pleading responding to it. Here, inasmuch the amended complaint was efiled and served the day after the answer to the original complaint/petition was efiled, the amended complaint is timely and proper. The court declines to appoint a receiver at this time. Therefore, defendants' motion to strike the complaint is denied in its entirety, and plaintiff's cross motion seeking leave to withdraw pursuant to BCL § 1116 is denied as academic.

Turning next to defendants' second motion to dismiss all non-dissolution claims in the complaint and amended complaint pursuant to CPLR 3211 (a) (1), (3), (5), and (7). Initially, since the amended complaint supercedes the original petition/complaint, the court will only determine that branch of the motion seeking to dismiss the amended complaint.

Where a defendant moves to dismiss an action asserting the existence of a defense founded upon documentary evidence pursuant to CPLR 3211 (a) (1), the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Trade Source, Inc. v Westchester Wood Works, Inc.*, 290 AD2d 437, 736 NYS2d 605 [2002]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 756 NYS2d 94 [2003]). Pursuant to CPLR 3211 (a) (3), the party asserting the cause of action has not legal capacity to sue.

Upon a 3211(a) (5) motion to dismiss a complaint as time barred under the applicable statute of limitations, the initial burden is on the movant to make a prima facie showing that the time in which to bring the claim has run. In applying the statute of limitations, the court must look to the essence of the claim and not to the form in which it is pleaded (*Green Bus Lines, Inc. v General Motors Corp.*, 169 AD2d 758, 759, 565 NYS2d 124 [2d Dept 1991]). "The burden then shifts to the plaintiff to aver evidentiary facts establishing that his or her cause of action falls within an exception to the statute of limitations, or raising an issue of fact as to whether such an exception applies" (*Romanelli v Disilvio*, 76 AD3d 553, 554, 907 NYS2d 258 [2d Dept 2010]).

"In considering a motion to dismiss a pleading for failure to state a cause of action, the court must accept the allegations of the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (CPLR 3211 [a][7]; *Munger v Board of Educ. of the Garrison Union Free School Dist.*, 85 AD3d 747, 748, 924 NYS2d 578, 580 (2d Dept 2011); accord *Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 (1994).

With regard to the first cause of action, breach of fiduciary duty, duty of loyalty and accounting, the applicable statute of limitations for breach of fiduciary claims depends upon the substantive remedy sought (*Kaufman v Cohen*, 307 AD2d 113, 760 NYS2d 157 [1st Dept 2003], citing *Loengard v Santa Fe Industries, Inc.*, 70 NY2d 262, 267, 519 NYS2d 801 [1987]). Where the relief sought is equitable in nature, the six-year limitations period of CPLR 213 (1) applies (*Kaufman v Cohen*, *supra*, citing *Loengard*, *supra*). "On the other hand, where suits alleging a breach of fiduciary duty seek only money damages, courts have viewed such actions as alleging 'injury to property,' to which a three-year statute of limitations applies" (*id.* citing CPLR 214 [4]).

Here, the court finds that the statute of limitations for breach of fiduciary duty and duty of loyalty is three years since plaintiff seeks monetary damages (*Kaufman v Cohen*, *supra*). Thus, the equitable relief plaintiff seeks, including an accounting, is incidental to that relief (*IDT Corp. V Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 879 NYS2d 355 [2009]). However, a shareholder who seeks a corporate accounting, as here, must do so in the context of a derivative action (see NY BCL § 720 [b]; *Romanoff v Superior Career Institute Inc.*, 69 AD2d 856, 415 NYS2d 457 [1979]). Inasmuch as this action was commenced on June 27, 2016, the allegations of defendants' breach of fiduciary duty and loyalty prior to June 27, 2013 are time barred, which include the first five real estate purchases, as demonstrated by defendants' submission of the respective deeds to the parcels. The court notes that plaintiff has failed to identify an exception to the statute of limitations. Therefore, that branch of the motion seeking to dismiss the first cause of action is granted to the extent that all claims of breach of fiduciary duty and loyalty which occurred prior to June 27, 2013 are dismissed, as is the accounting claim in its entirety.

That branch of defendants' motion to dismiss the second cause of action which seeks a constructive trust is granted. The elements of a constructive trust are as follows: a confidential or fiduciary relationship, a promise, a transfer in reliance on the promise and unjust enrichment (*Maiorino v Galindo*, 65 AD3d 525, 883 NYS2d 589 [2d Dept 2009]). The court agrees that all the elements of a constructive trust have not been met by plaintiff, in that plaintiff made no transfers in reliance on a promise.

That branch of defendants' motion to dismiss the third cause of action which seeks quiet title is granted. An action seeking quiet title pursuant to Real Property and Proceedings Law § 1500 et seq. is intended to clear title to real property (*Key Bank v Del Norte, Inc.*, 251 AD2d 740, 673 NYS2d 788 [3rd Dept 1998]), where, *inter alia*, property lines, easements, property tax liens and mortgages are at issue, none of which exist here. Therefore, in viewing the allegations in the light most favorable to plaintiff, the court finds that plaintiff has failed to state a third cause of action.

That branch of defendants' motion to dismiss the fourth cause of action which alleges a derivative cause of action is denied, inasmuch as shareholders are entitled to sue only derivatively, not individually. Contrary to defendants' contention, plaintiff is excused from making a demand on the Board of Directors. Subdivision (c) of section 626 of the Business Corporation Law provides that, in any shareholder's derivative action brought in the right of the corporation to procure judgment in its favor, "the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort."

However, a demand is excused “where the board itself is accused of patent breach of its fiduciary duties and its members are named as parties defendant” (*Barr v Wackman*, 36 NY2d 371, 368 NYS2d 497 [1975]). Here, the record reveals that the plaintiff is a fifty percent shareholder and a member of the Board of Directors, and defendant Joseph is the remaining fifty percent shareholder and member of the Board of Directors. Liberally construed, the complaint alleges acts for which the remaining shareholder/director may be liable and plaintiff reasonably concluded that the board would not be responsive to a demand. Under the present circumstances, the court finds that the plaintiff substantially complied with subdivision (c) of section 626 of the Business Corporation Law and is excused from making a demand upon the Board of Directors (*Bansback v Zinn*, 1 NY3d 1, 769 NYS2d 175 [2003]; *Marx v Akers*, 88 NY2d 189, 644 NYS2d 121 [1996]).

Accordingly, it is

ORDERED that the motions (001, 002) and cross motion (003) are consolidated for the purpose of this determination; and it is further

ORDERED that defendants’ motion (001) for an order striking the complaint is denied; and it is further

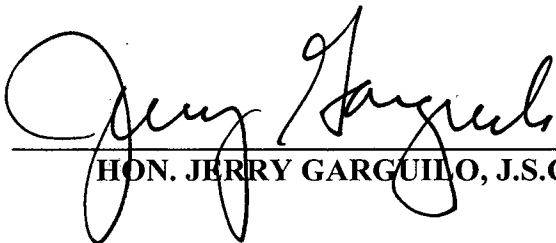
ORDERED that defendants’ motion (002) to dismiss the amended complaint is granted to the extent that allegations of breach of fiduciary duty and loyalty which occurred before June 27, 2013 and an accounting in the first cause of action, and the second and third causes of action are dismissed; and it is further

ORDERED that plaintiff’s cross motion (003) seeking to withdraw the petition and order to show cause is denied as academic; and it is further

ORDERED that defendants are directed to serve and efile their answers to the amended complaint pursuant to CPLR 3211 (f); and it is further

ORDERED that the counsel and clients are directed to appear for a preliminary conference in Part 48 on March 28, 2017 at 10:00 a.m. in the courtroom of the undersigned..

DATED: January 11, 2017



HON. JERRY GARGUILO, J.S.C.