

STATE OF NEW YORK
SUPREME COURT
COMMERCIAL DIVISION

COUNTY OF ALBANY

ROBERT SCOTT THOMSON,

Plaintiff,

-against-

DECISION & ORDER

WALSH and HACKER, WALSH HACKER
and ASSOCIATES, LLP, GLENN D. CHASE,
PETER J. WALSH, JEFFREY M. FOX,
SEAN F. NICOLETTE, and KELLY B. DEAN,

Defendants.

Index No.: 908597-21

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

LUIBRAND LAW FIRM, PLLC
Attorneys for Plaintiff
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WHITEMAN OSTERMAN & HANNA LLP
Attorneys for Defendants
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Hon. Richard M. Platkin, A.J.S.C.

This is “an action in equity and law” by which plaintiff Robert Scott Thompson seeks (1) an accounting with respect to the assets and liabilities of defendant Walsh and Hacker, a law partnership that dissolved on April 15, 2021, and (2) recovery of all assets of the dissolved law firm that defendants are alleged to have wrongfully transferred to themselves or others (NYSCEF Doc No. 5 [“Complaint”], ¶ 9).

In lieu of answering, defendants move pursuant to CPLR 3211 (a) (7) for an order: dismissing all claims, other than plaintiff’s claim for an equitable accounting; limiting the accounting claim to the date of dissolution of Walsh and Hacker; and dismissing all claims against defendant Walsh and Hacker & Associates LLP, incorrectly sued herein as “Walsh Hacker and Associates, LLP.”

Plaintiff opposes the motion and cross-moves pursuant to CPLR 2001 and 3025 (b) for leave to amend his complaint to correct the foregoing misnomer.

BACKGROUND

The law firm of Walsh and Hacker (“Law Firm” or “Firm”) existed from 1979 to April 15, 2021 as a general partnership, and it operated without a written partnership agreement (*see* Complaint, ¶¶ 2, 10, 13).

Plaintiff joined the Firm in 1984 and became a partner in 1989 (*see id.*, ¶ 13). Over time, defendants Glenn D. Chase, Peter J. Walsh, Jeffrey M. Fox, Sean F. Nicolette and Kelly B. Dean (collectively, “Partner Defendants”) were admitted as partners (*see id.*, ¶ 16), and defendant Walsh became the Firm’s managing partner on June 22, 2018 (*see id.*, ¶ 19). On the date of dissolution, plaintiff allegedly owned 17.99% of the partnership and had a balance of about \$62,807 in his capital account (*see id.*, ¶¶ 29-32).

Based on plaintiff's protracted illness and absence from "active work" in 2020 (*id.*, ¶ 23), as well as the Partner Defendants' desire to replace plaintiff with someone younger (*see id.*, ¶ 24), defendant "Walsh, on behalf of some or all of the [Partner] Defendants," asked plaintiff to retire from the Firm and transfer his partnership interest to current and/or new partners (*id.*). Plaintiff refused, and the Partner Defendants allegedly met – outside his presence and without notifying him – to execute "a purported Notice of Dissolution" for the law partnership, effective April 15, 2021 (*id.*, ¶¶ 25-26).

Also on April 15, 2021, the Partner Defendants and others formed a new law firm: defendant Walsh and Hacker & Associates LLP ("WHA"), sued herein as Walsh Hacker and Associates, LLP (*see id.*, ¶ 27). The Partner Defendants allegedly assumed control over the assets of the dissolved Law Firm, including its office space, computers, equipment, technology networks, business relationships, Internet website, accounts receivable and cash accounts, and diverted these valuable assets to themselves and the new WHA law firm (*see id.*, ¶¶ 33-38).

On July 21, 2021, plaintiff requested that an accounting of the Law Firm be conducted by August 12, 2021 (*see id.*, ¶ 43). On August 17, 2021, plaintiff requested the return of his capital account and renewed his request for a prompt accounting (*see id.*, ¶¶ 44-45).

On September 21, 2021, plaintiff received partial payment of his capital account (*see id.*, ¶ 46), but "there has been no accounting provided" by the Partner Defendants, who remain "in the exclusive control of the accounts of [the Law Firm]" (*id.*, ¶¶ 47-49).

Plaintiff commenced this action on October 4, 2021 through the electronic filing of a summons and Complaint. In addition to suing for an accounting, plaintiff alleges claims for conversion, constructive trust, unjust enrichment and breach of fiduciary duty (*see id.*, ¶¶ 50-79).

Defendants move, pre-answer, for an order: (1) dismissing all of plaintiff's damages claims, arguing that an equitable accounting is the sole remedy available to plaintiff at this juncture; (2) limiting the accounting claim to an accounting of the Law Firm's assets and liabilities as of the April 15, 2021 dissolution date; and (3) dismissing all claims against WHA. Plaintiff opposes the motion and cross-moves for leave to amend the Complaint to correctly name WHA as a defendant.

ANALYSIS

On a motion to dismiss under CPLR 3211 (a) (7), the courts' "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" (*Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001] [internal quotation marks and citation omitted]). The complaint "is to be given a liberal construction, the allegations contained within it are assumed to be true and the plaintiff is to be afforded every favorable inference" (*State of New York v Jeda Capital-Lenox, LLC*, 176 AD3d 1443, 1445 [3d Dept 2019] [internal quotation marks and citations omitted]). "Dismissal . . . is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017] [citations omitted]).

"Upon notice of dissolution and the demand for an accounting, any partner has a right to an immediate accounting as of the date of dissolution, which, at th[at] juncture, would be such partner's sole remedy" (*220-52 Assoc. v Edelman*, 241 AD2d 365, 367 [1st Dept 1997] [citations omitted]; *see generally* Partnership Law § 74). The "sole remedy" language reflects the principle that "a partner may not maintain an action at law for any claim arising out of the partnership until

there has been a full accounting and a balance struck, or an express agreement to pay”

(*Wiesenthal v Wiesenthal*, 40 AD3d 1078, 1080 [2d Dept 2007] [collecting authorities]; *see Gold v Ingber*, 307 AD2d 609, 609 [3d Dept 2003]).

As plaintiff correctly observes, “exceptions to this general rule have been recognized where the wrong alleged involves a partnership transaction which can be determined without an examination of the partnership accounts, or where no complex accounting is required or only one transaction is involved which is fully closed but unadjusted” (*Wiesenthal*, 40 AD3d at 1079-1080 [internal quotation marks and citations omitted]; *see Le Bel v Donovan*, 96 AD3d 415, 416 [1st Dept 2012]). However, it is apparent from the Complaint that these exceptions are inapplicable here, and determination of plaintiff’s claims for conversion, constructive trust, unjust enrichment and breach of fiduciary duty “necessarily require[s] inspection of the books, records and accounts of the partnership” (*Kriegsman v Kraus, Ostreicher & Co.*, 126 AD2d 489, 490 [1st Dept 1987]; *see 1056 Sherman Ave. Assoc. v Guyco Const. Corp.*, 261 AD2d 519, 520 [2d Dept 1999]; *Wynne v Gruber*, 237 AD2d 284, 284 [2d Dept 1997]).¹

Accordingly, plaintiff’s claims for conversion, constructive trust, unjust enrichment and breach of fiduciary duty are premature and should be dismissed without prejudice on that basis (*see Gold*, 307 AD2d at 609; *Wynne*, 237 AD2d at 284-285; *Kitty Walk Sys., Inc. v Midnight Pass Inc.*, 431 F Supp 2d 306, 311-312 [ED NY 2006]; *cf. Wiesenthal*, 40 AD3d at 1080).

The Court further concludes that plaintiff’s demand for an accounting is overbroad insofar as it extends beyond the Law Firm’s dissolution on April 15, 2021 (*see Complaint*, ¶ 56;

¹ Insofar as plaintiff argues that the Law Firm was not dissolved (*see e.g. Complaint*, ¶ 9 [referring to “alleged dissolution”]), the Law Firm was a partnership at will (*see id.*, ¶ 10; NYSCEF Doc No. 13, p. 6) that “could dissolve at any time by [any partner] expressing an intent that the partnership was not to continue” (*Briscoe v White*, 34 AD3d 712, 713 [2d Dept 2006]; *see Morris v Crawford*, 304 AD2d 1018, 1019 [3d Dept 2003]; *Shandell v Katz*, 95 AD2d 742, 743 [1st Dept 1983]; *see also Partnership Law* §§ 60; 62 [1] [b]).

see also NYSCEF Doc No. 13 [“Opp Mem”], pp. 10-11). In the absence of a contrary agreement, “[u]pon notice of dissolution and the demand for an accounting, any partner has a right to an immediate accounting *as of the date of dissolution*” (220-52 *Assoc.*, 241 AD2d at 367; accord *Scholastic, Inc. v Harris*, 259 F3d 73, 90 [2d Cir 2001]; *see Dawson v White & Case*, 88 NY2d 666, 670 [1996]; *Bitetto v F. Chau & Assoc., LLP*, 10 Misc 3d 595, 601 [Sup Ct, Nassau County 2005] [Austin, J.]).

Finally, plaintiff’s claim for an accounting purports to extend to WHA, which improperly is sued as “Walsh Hacker and Associates, LLP.” Even if WHA had been correctly named in the Complaint,² plaintiff has not stated a claim for an accounting against WHA, a partnership formed *after* the Law Firm’s dissolution in which plaintiff never was a partner.

In seeking to avoid dismissal, “[p]laintiff attempts to read into the [Court of Appeals’ decision in] *Dawson [v White & Case]* that Partnership Law § 74 confers a right to an accounting as against the ‘partnership continuing the business’” (*Bitetto*, 10 Misc 3d at 602; *see* Opp Mem, p. 10). However, *Dawson* “merely applied the rule that an accounting is performed . . . *as of the date of dissolution . . . in accordance with Partnership Law § 74*” (*Bitetto*, 10 Misc 3d at 602 [emphasis added]). Even if WHA were a continuation of the Law Firm, an allegation that does not appear in the Complaint, “[t]he continuation of the business of the partnership after its dissolution does not revive the dissolved entity”; rather, it “creates a new partnership at will” (*id.* at 601 [citations omitted]).

² Plaintiff cross-moves for leave to amend the Complaint to correct the misnomer but the cross motion is untimely, having been filed four days prior to the return date of defendants’ motion (*see* NYSCEF Doc Nos. 3, 10; CPLR 2214 [b]; 2215). In any event, a motion to amend a pleading should be denied where, as here, the proposed amendment “is palpably insufficient” to overcome the legal deficiencies in the claim (*Belair Care Ctr., Inc. v Cool Insuring Agency, Inc.*, 161 AD3d 1263, 1265 [3d Dept 2018] [internal quotation marks and citation omitted]).

CONCLUSION

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted in accordance with the foregoing, and plaintiff's cross motion for leave to amend the complaint is denied; and it is further

ORDERED that plaintiff's causes of action for conversion, constructive trust, unjust enrichment and breach of fiduciary duty are dismissed as premature as against all defendants; and it is further

ORDERED that plaintiff's claim for an accounting against Walsh and Hacker & Associates LLP, incorrectly sued herein as "Walsh Hacker and Associates, LLP," is dismissed with prejudice; and it is further

ORDERED that plaintiff's cause of action for an accounting of Walsh and Hacker shall be limited to an accounting as of the April 15, 2021 date of dissolution; and it is further

ORDERED that defendants shall answer plaintiff's complaint within **twenty (20) days** from the date of this Decision & Order; and finally it is

ORDERED that a remote preliminary conference shall be scheduled, and the parties shall confer prior to such conference regarding the matters set forth in Commercial Division Rule 8, including the use of alternative dispute resolution, such as mediation, to bring about an early resolution of this action.

This constitutes the Decision & Order of the Court, the original of which is being uploaded to NYSCEF for entry by the Albany County Clerk. Upon such entry, counsel for defendants shall promptly serve notice of entry on all parties entitled to such notice.

Dated: Albany, New York
March 2, 2022


RICHARD M. PLATKIN
A.J.S.C.

Papers Considered:

NYSCEF Doc Nos. 3-6, 10-15.



03/03/2022