

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM

Justice

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INDEX NO. 650120/2017

600-602 10TH AVENUE REALTY CORPORATION,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 005 006

- v -

ESTATE OF HY NUSIMOW, LARISSA NUSIMOW, AVI NUSIMOW,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 107, 108, 109, 112, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 006) 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 110, 126

were read on this motion to/for DISMISS DEFENSE

In motion sequence number 005, counterclaim-defendant Ester Pinchevsky moves, pursuant to CPLR 3211(a) (3) and (7), to dismiss counterclaims of the defendants Avi Nusimow (Avi), the Estate of Hy Nusimow (Estate), Larissa Okun Nusimow (Larissa) (collectively, Defendants) in its entirety. In motion sequence number 006, plaintiff 600-602 10th Avenue Realty Corporation (ARC) moves pursuant to CPLR 3211 (b) to dismiss the affirmative defenses of the defendants. Defendants cross-move (1) pursuant to CPLR 3212 for summary judgment on their first and second counterclaims; (2) pursuant to 3215 for a default judgment on their counterclaims; (3) pursuant to 3124 for an order declaring that Pinchevsky has waived any objection to Defendants' First Demand for Documents; (4) pursuant to Business Corporation Law Section 1104 (a) (2) or (3) for dissolution of ARC, or

in the alternative, for an order directing Pinchevsky to purchase Larissa's 50% interest in ARC at market value; and (5) pursuant to 6301 for injunctive relief.

For the 3211 motions, the court accepts the facts alleged by the claimant as true.

ARC is a domestic business corporation formed in May 1979; its sole asset is a mixed-use building located at 602 Tenth Avenue, New York, New York (Building) (NYSCEF Doc. No. [NYSCEF] 55, Amended Answer with Counterclaims, ¶¶ 27-28). Defendant-counterclaimant Larissa became fifty percent shareholder in the company by operation-of-law when her husband, Hy Nusimow, passed away in 2016 (*id.*, ¶ 29). The other fifty percent is owned by Pinchevsky, who is also ARC's president (*id.*, ¶ 30).

Pinchevsky allegedly used corporate funds to defray her personal expenses, failed to maintain the building in a commercially suitable manner, failed to conduct required corporate formalities in the day-to-day operation of ARC, such as organizing board meetings and recordkeeping, refused to provide documents to the other shareholder for inspection despite Larissa's demands, and failed to obey court orders regarding her operation of ARC and occupancy of the Building (*id.*, 31).

On January 5, 2018, Larissa, the Estate, and Avi filed their joint amended answer with counterclaims alleging causes of action for (1) breach of fiduciary duty to Larissa; (2) breach of fiduciary duty to ARC; (3) dissolution of ARC pursuant to New York Business Corporation Law Sec. 1104(a)(1); (4) appointment of a temporary receiver; and (5) breach of contract.

Pinchevsky now moves to dismiss the counterclaims against her. Defendants cross-move for summary judgment, as well as other relief. ARC also moves to dismiss the

affirmative defenses of Defendants.

DISCUSSION

Pinchevsky's Motion to Dismiss Counterclaims

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, factual allegations "that consist of bare legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence" cannot survive a motion to dismiss (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted]; see also CPLR 3211 [a] [1]).

Pinchevsky asserts that the first counterclaim must be dismissed because Larissa lacks standing as she is not a shareholder and the allegations of Pinchevsky's mismanagement or diversion of assets of ARC for her own enrichment can only be brought as derivative claims. Pinchevsky asserts that Larissa does not have any standing because the Estate has not distributed the stocks to her. Pinchevsky further asserts that this court's order dated January 10, 2017 precludes the transfer of the stocks to Larissa. Furthermore, she purports that Larissa will not have any standing until a final disposition is rendered on the corporation's causes of action against the Estate.

Even if Larissa is a valid shareholder, her direct claim for breach of fiduciary duty must be dismissed as the harm alleged is that of the corporation and not a direct harm her (*Yudell v Gilbert*, 99 AD3d 108 [1st Dept 2012]).

"A plaintiff asserting a derivative claim seeks to recover for injury to the business entity. A plaintiff asserting a direct claim seeks redress for injury to him or herself

individually. Sometimes whether the nature of the claim is direct or derivative is not readily apparent. New York does not have a clearly articulated test, but approaches the issue on a case by case basis depending on the nature of the allegations. For instance, where shareholders suffer solely through depreciation in the value of their stock, the claim is derivative, even if the diminution in value derives from a breach of fiduciary duty. Allegations of mismanagement or diversion of corporate assets also plead a wrong to the corporation corporate opportunity.”

(*Yudell v Gilbert*, 99.AD3d 108, 113-114 [1st Dept 2012] [citations omitted]). Using corporate funds to defray her personal expenses, failing to maintain the building in a commercially suitable manner, failing to conduct required corporate formalities such as organizing board meetings and recordkeeping are all alleged wrongs to ARC. The injuries inflicted by these activities may only give rise to a derivative action. Thus, the first counterclaim is dismissed.

The second counterclaim is a derivative claim by Larissa on behalf of ARC for breach of fiduciary duty. It is undisputed that “the defendants procured an order in the Surrogates Court in Florida transferring the Shares to [Larissa]” (NYSCEF 14, Amended Complaint, ¶ 37; NYSCEF 55, Amended Answer with Counterclaims, ¶ 17). Thus, there is enough evidence at this time for the court to find that Larissa has standing to bring claims on behalf of ARC.

Nevertheless, the second counterclaim is dismissed with leave to replead as it fails to state a breach of fiduciary claim with particularity (CPLR 3016 [b]). The circumstances constituting the alleged wrong must be stated in detail. The second counterclaim contains nothing more than conclusory allegations of wrongdoing and fails to plead Pinchevsky’s misconduct in sufficient detail. Further, in their cross motion for summary judgment, Defendants fail to submit sufficient evidence of the wrongdoings alleged in their amended answer supporting their claim for breach of fiduciary duty.

Further, as ARC is the real party in interest in this derivative action, it must be named as a nominal counterclaim-defendant (CPLR 1001; see *Bader & Bader v Ford*, 66 AD2d 642, 645 [1st Dept 1979] ["In a [stockholder's] derivative action, however, the real party in interest is the corporation. The plaintiff in such action appears as nominal representative of the corporate defendant."]). Finally, there are also no allegations that demand was made or that a demand would have been futile (BCL § 626 [c]; see also *Brewster v Lacy*, 24 AD3d 136 [1st Dept 2005]).

Thus, the second counterclaim is dismissed with leave to replead.

The third counterclaim is for dissolution of ARC claiming Pinchevsky failed to hold board meetings and she engaged in corporate waste, based on the same allegations of the breach of fiduciary claims. It also alleges that an impasse exists between Pinchevsky and Larissa, the two 50% shareholders. In so far as this remedy hinges on Pinchevsky's wrongdoings and corporate waste, it must be dismissed for the reasons state above. In regard to the "intractable impasse" alleged, Defendants fail to allege "a single instance of internal dissension which resulted in a deadlock over a management decision and/or a stalemate in the election of a director or directors and/or a performance of duty" (*In re Dubonnet Scarfs, Inc.*, 105 AD2d 339, 342 [1st Dept 1985]). While the court dismisses this counterclaim, it does so with leave to replead.

Defendants' fourth counterclaim for appointment of a receiver is a remedy and not a cause of action (*Lemle v Lemle*, 92 AD3d 494, 498 [1st Dept 2012] ["The appointment of a receiver is not a form of ultimate relief that can be awarded in a plenary action, but rather, is limited as a provisional remedy."])).

Defendants' fifth counterclaim alleges a breach of a 1980 settlement stipulation "so ordered" by this court (Cahn, J.), in which the parties to that agreement Pinchevsky and Hy Nusimow allegedly agreed to enter into a replacement shareholder agreement. This counterclaim is also dismissed as it is barred by the six-year statute of limitations to prosecute breach of contract actions (CPLR 213).

As Defendants' counterclaims are dismissed, their cross motion for summary judgment is denied as moot.

ARC's Motion to Dismiss Defenses

The Amended Answer asserts eight affirmative defenses: documentary evidence, standing, failure to state a claim, res judicata and collateral estoppel, necessary party, capacity, unclean hands, and statute of frauds.

Defendants' first affirmative defense is based on the existence of a 1984 Notice of Special Meeting of Shareholders of ARC, which informs the minority shareholders of the majority shareholder's intent to sell the Building. The Notice makes no mention of terminating the Shareholder Agreement as Defendants allege. While this maybe documentary evidence presented at a trial, it does not provide a complete defense, conclusively disposing of plaintiff's claims as a matter of law. Thus, this defense is dismissed. However, this does not prevent the parties from presenting the Notice as evidence at trial.

Defendants' affirmative defenses for standing, res judicata and collateral estoppel, necessary party, capacity, unclean hands and statute of fraud are all dismissed on the ground that they are bare legal conclusions without supporting facts (CPLR 3013; *Commissioners of the State Ins. Fund v Ramos*, 63 AD3d 453 [1st Dept 2009]). However,

this court grants Defendants leave to amend the answer to replead its defenses, asserting facts in support.

The court declines to dismiss Defendants' third affirmative defense for failure to state a claim. "The motion court was free not to dismiss the "affirmative defense" of failure to state a claim, because failure to state may be asserted at any time even if not pleaded and is therefore 'mere surplusage' as an affirmative defense" (*San-Dar Assoc. v Fried*, 151 AD3d 545, 545-546 [1st Dept 2017] [citations omitted]).

Defendants' Document Demand

Pinchevsky has 15 days from the date of this order's entry on NYSCEF by the court to produce any documents responsive to Defendants' First Demand. If documents are not produced Pinchevsky waives her objections. If the documents cannot be produced because they are not in Pinchevsky control and/or possession, a detailed *Jackson* affidavit must be filed within 15 days from this date of this order's entry on NYSCEF by the court.

Accordingly, it is

ORDERED that counterclaim-defendant Ester Pinchevsky motion to dismiss counterclaims of the defendants Avi Nusimow, the Estate of Hy Nusimow, Larissa Okun Nusimow is granted and the counterclaims are dismissed in their entirety; and it is further

ORDERED that plaintiff's motion to dismiss Defendants' affirmative defenses is granted in so far as the first, second, fourth, fifth, sixth, seventh, and eighth affirmative defenses are dismissed; and it is further

ORDERED that Defendants are granted leave to serve an amended answer so as to replead their second and third counterclaims and their second, fourth, fifth, sixth, seventh, and eighth affirmative defenses by August 2, 2019; and it is further

ORDERED that Defendants' cross motion for summary judgment and other relief is denied except their request for relief under CPLR 3124; and it is further

ORDERED that Pinchevsky has 15 days from the date of this order's entry on NYSCEF by the court to produce any documents responsive to Defendants' First Demand. If documents are not produced Pinchevsky waives her objections. If the documents cannot be produce because they are not in Pinchevsky control and/or possession, a detailed Jackson affidavit must be filed within 15 days from this date of this order's entry on NYSCEF by the court.

Motion Seq. No. 005

7/5/19
DATE

HON. ANDREA MASLEY
ANDREA MASLEY, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

- NON-FINAL DISPOSITION
- GRANTED IN PART OTHER
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

Motion Seq. No. 006

7/5/19
DATE

HON. ANDREA MASLEY
ANDREA MASLEY, J.S.C.

CHECK ONE:

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- GRANTED DENIED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

- NON-FINAL DISPOSITION
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APPLICATION:

CHECK IF APPROPRIATE: