

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: COMMERCIAL DIVISION**

PRESENT: HON. JENNIFER G. SCHECTER PART 54

Justice

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JANET HAN, SWEETCATCH KKA LLC,

INDEX NO. 654281/2018

Plaintiffs,

- v -

ORDER

ROBERT KWAK, JOSEPH KO, ANTHONY PANTANO, NC
KKA LLC

Defendants.

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"Plaintiff has elected the remedy of rescission on her claim for fraud" and she "understands that this election means that the case will proceed to a bench trial as opposed to a jury trial" (Dkt. 87). Plaintiff, however, does "not see any procedural impediment to . . . proceeding to trial on her direct and derivative claims at the same time" (*id.*). The court disagrees.

There is no impediment to trying both direct and derivative claims when, for instance, a member is seeking to redress individual harm (e.g., unpaid distributions or violation of disclosure rights) while also seeking recovery on behalf of the company for corporate waste (*see, e.g., Beatrice Invs., LLC v 511 9th LLC*, 177 AD3d 551, 552 [1st Dept 2019]). In that situation there is no conflict between the direct and derivative claims.

That is not the case here. Plaintiff's direct claim for rescission would deprive her of standing to maintain derivative claims (*see Rubinstein v Catacosinos*, 91 AD2d 445, 446 [1st Dept 1983], *affd* 60 NY2d 890 [1983], *accord People v Grasso*, 54 AD3d 180, 192 [1st Dept 2008]). While plaintiff may plead conflicting theories in the alternative, an election of remedies must be made at trial (*Unisys Corp. v Hercules Inc.*, 224 AD2d 365, 367 [1st Dept 1996]). While the court has discretion about when such an election must be made (*Wilmoth v Sandor*, 259 AD2d 252, 254 [1st Dept 1999]), this is not a situation where the legal position of the defendant warrants permitting a trial on a claim asserted in the alternative (*see Chowaiki & Co. Fine Art v Lacher*, 115 AD3d 600, 601 [1st Dept 2014]). Rather, the plaintiff herself elected to seek rescission of the equity that she needs to have standing on her derivative claims.

Moreover, plaintiff would not be an adequate derivative representative since she will necessarily be conflicted (*see Gilbert v Kalikow*, 272 AD2d 63 [1st Dept 2000]). Even if she prevails on her derivative claims the company may recover nothing as she must give them up to obtain her preferred relief of rescission. A plaintiff who would forego the

ORDER

company's recovery in favor of her own should not be permitted to take derivative claims to trial. Plaintiff cannot adequately represent the company's interest in this situation.

For the avoidance of doubt, the court is not suggesting that a plaintiff may never plead a claim for rescission along with derivative claims. Rather, the court finds that, where, as here, plaintiff has expressed a clear preference for rescission, plaintiff cannot proceed to trial on her direct and derivative claims at the same time and must make an election prior to trial.

Accordingly, it is ORDERED that the second through sixth causes of action in the amended complaint are dismissed with prejudice as to plaintiff Janet Han and without prejudice as to Sweetcatch KKA, LLC or any of its other members, the Clerk is directed to enter judgment accordingly, and the first cause of action against defendant Robert Kwak is hereby severed and shall continue.

And it is further ORDERED that a bench trial on Teams will commence on February 14, 2023 at 10:00 a.m., and will conclude no later than February 16, 2023. The parties shall join the Teams meeting by 9:45 a.m. The parties will be permitted to make 5-minute openings statements, to be followed immediately by cross-examination of the first witness. At the conclusion of trial the court will set a schedule for post-trial briefs in lieu of closing statements.

And it is further ORDERED that direct-testimony affidavits shall be e-filed by January 31, 2023. The affidavits shall be e-filed in the order the witnesses will be testifying.

It is further ORDERED that by February 2, 2023, the parties shall email the part clerk a list of the email addresses of the testifying witnesses and any other trial participant or observer that has not already received the Teams invite for the trial.

The parties are cautioned that the court will strictly enforce the deadlines set in this order and that further failure to comply with deadlines will not be tolerated.


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DATE: 10/4/2022

JENNIFER G. SCHECTER, JSC