SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. BERNARD J. FRIED E-FILE PART 60

Index Number : 651101/2010
ELDAN-TECH, INC.,
vs.
OCELOT CAPITAL MANAGEMENT,
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

Dated: 10/29/2010

HON. BERNARD J. FRIED J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

ELDAN-TECH, INC., in the right and name of OCELOT PORTFOLIO HOLDINGS, LLC,

Plaintiff,

-against-

Index No. 651101/10

OCELOT CAPITAL MANAGEMENT, LLC,

Defendant,

-and-

OCELOT PORTFOLIO HOLDINGS, LLC,

Nominal Defendant.

Appearances:

For Plaintiff:

Krol & O'Connor
320 West 81st Street
New York, NY 10024
Igor Krol, Esq.

For Defendant:

Schlam Stone & Dolan LLP
26 Broadway, 19th Floor
New York, NY 10004
David J. Katz, Esq.

FRIED, J.:

This action arises from a promissory note executed by Isaac Hershkovitz in favor of the nominal defendant Ocelot Portfolio Holdings, LLC ("OPH") and thereafter assigned to the defendant Ocelot Capital Management LLC ("OCM"). The plaintiff Eldan-Tech, Inc. ("Eldan"), holder of a majority interest in OPH, brings this action derivatively on behalf of OPH. Before me is OCM's motion to dismiss Eldan's verified complaint (the "complaint"), pursuant to CPLR 3211(a)(1), (a)(3) and (a)(7). For the reasons that follow, I grant the motion.

The promissory note at the center of this and two related actions[1] was involved in the sale of an LLC ownership interest held by OPH. Specifically, on February 10, 2009, Hershkovitz purchased OPH's ownership interest in a company known as OCG VI LLC ("OCG VI") in consideration for, *inter alia*, the $350,000 promissory note (the "Note"). On February 11, 2009, OPH and OCM executed an assignment of the Note, wherein OPH assigned the Note to OCM (the "OCM Assignment").

At the time of the OCM Assignment, OPH was managed by OCM, and the membership interest of OPH was divided between Eldan, holder of an 80 percent interest, and OCM, holder of the remaining 20 percent. Also at that time, Rachel Arfa was the managing member of OCM and the sole officer and director of Eldan. In May 2009, Arfa was removed as an officer and director of Eldan, and OCM was removed as the manager of OPH.

The OCM Assignment is the subject of the Eldan Action, wherein Eldan and its parent company Eldan-Tech, Ltd ("Eldan Ltd") allege fraud on the part of Arfa. At issue in the OCM Action was Hershkovitz' alleged default on the Note. On July 8, 2010, in the OCM Action, I granted OCM's motion for summary judgment on its complaint (the "Judgment") and denied Eldan and Eldan Ltd's motion for leave to intervene.

This case, along with the two related Actions, involves several entities related by ownership. As such, for the purpose of background information, a brief discussion of the ownership structure of these entities follows. As discussed above, the ownership of OPH is divided between Eldan (80

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[1] *Eldan-Tech, Ltd, and Eldan-Tech, Inc. v Isaac Hershkovitz and Rachel Arfa*, Index No. 602838/09 (the "Eldan Action") (pending before this court) and *Ocelot Capital Management LLC v Isaac Hershkovitz*, Index No. 603092/09 (the "OCM Action") (disposed).

percent) and OCM (20 percent). OCM, the former manager of OPH, is wholly owned by Arfa and her husband, Alexander Shpigel. Arfa formed OPH to hold a group of related companies, OCG I through OCG VII (the "OCG's"). The OCG's were formed to hold certain Bronx real estate. As mentioned above, OCG VI was the entity sold by OPH to Hershkovitz in exchange for the Note.

In the complaint, Eldan on behalf of OPH alleges that Arfa wrongfully caused the sale of OCG VI from OPH to Hershkovitz and "pocketed the proceeds" by assigning the Note to OCM and recovering a judgment on the Note in OCM's favor, all to the detriment of OPH. (Compl, ¶¶ 5-6). The complaint further asserts two causes of action against OCM: constructive trust and conversion.

By its motion, OCM argues that Eldan's complaint should be dismissed for several reasons. First, it contends that Eldan lacks standing to bring this action because it has failed to comply with the demand requirements of a derivative claim by first making a demand on OPH's board or alleging that such demand would be futile. In addition, OCM contends that Eldan is in complete control of OPH and sees no reason why Eldan should be prevented from causing OPH to bring this action in its own name. Second, it contends that the cause of action for constructive trust should be dismissed because it fails to allege two of the required elements. Third, it contends that the cause of action for conversion should also be dismissed because it is contradicted by documentary evidence.

In opposition to OCM's motion, Eldan argues that it has standing to bring this claim on behalf of OPH because, as a holder of a majority ownership interest in OPH, it is excepted from the demand requirements of a derivative action. It further argues that it has sufficiently plead the causes of action for constructive trust and conversion.

As an initial matter, I will address Eldan's standing to bring this suit.

To bring a derivative action on behalf of OPH, Eldan is required to allege that it first made

a demand on the OPH board to proceed with the action or, in the alternative, to allege that it would have been futile to do so. (*See* Haig, Com. Litig. in New York State Courts §§ 74:9, 74:14 [2d ed.]; BCL § 626[c]). It has done neither. Indeed, the complaint is devoid of such allegations. Eldan correctly argues that it may bring a derivative action on behalf of OPH based upon *Tzolis v Wolff*, 10 NY3d 100 (2008), where the Court of Appeals held that an LLC member may bring a derivative suit on behalf of the LLC. Inasmuch as that right has been analogized to the statutory right contained in the BCL, the courts acknowledge that the right is not unbridled, and the demand requirement still must be met. (*See Evans v Perl*, 19 Misc3d 1119(A), *8 [Sup Ct, NY County 2008], citing *Tzolis*, 10 NY3d 100; *Billings v Bridgepoint Partners, LLC*, 21 Misc3d 535, 540-42 [Sup Ct, Erie County 2008]).

Eldan further argues that it was unable to make a demand upon OPH's board because it has no board. Specifically, it contends that Eytan Shafir was appointed to replace OCM when it was removed as OPH's manager, but he resigned from the position several months later, in November 2009. OCM contends that Eldan's argument is without merit. First, it asserts that Shafir's letter of resignation does not mention his resignation from OPH but indicates only that he resigned as "president and [] director of Eldan-Tech, Inc." (Krol Aff, Exh F).[2] Second, it asserts that simply because OPH has no manager, Eldan, as its majority member and the member in the position to appoint a new manager, should not be permitted to act on OPH's behalf. Indeed, according to OPH's operating agreement (the "LLC Agreement"), it is a manager-managed as opposed to a member-

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In this regard, OCM states in its reply brief that if, on the basis of Eldan's opposition papers, it represents that Shafir is no longer the manager of OPH and that OPH no longer has a manager, it will accept this representation as a "binding judicial admission" in the absence of documentary evidence. (Reply Br, at n. 1).

managed LLC, and such conduct by Eldan would be contrary to that Agreement. (LLC Agmt, § 6.01).

Therefore, I find that Eldan lacks standing to bring a derivative claim on behalf of OPH.

Having made this determination, I need not address the remainder of the issues in this action because they are derivative in nature and must be dismissed.

Accordingly, it is

ORDERED that the motion is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 29, 2010

ENTER:

J.S.C.

HON. BERNARD J. FRIED