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

PRESENT: **PART** 45

Index Number : 109920/2009
JAIN, NIKET K.
vs
RASTEH, A. JAMES
Sequence Number : 002
DISMISS ACTION

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

The following papers, numbered 1 to _____ were read on 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 to dismiss the complaint is granted; cross motion for sanctions and appointment of receiver is Denied; motion for costs is Denied, all as per attached Decision and Order.

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

Dated: February 1, 2010

MELVIN L. SCHWEITZER J.S.C.

Check one: ☑ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

NIKET K. JAIN, Plaintiff, -against- A. JAMES RASTEH and WHITE EAGLE PARTNERS, LLC, Defendants.	Index No. 109920/09 DECISION AND ORDER Motion Sequence: 002

Melvin L. Schweitzer, J.:

Defendants A. James Rasteh (Mr. Rasteh) and White Eagle Partners LLC (White Eagle) move for dismissal of the amended complaint, for failure to state a claim and based on documentary evidence. Plaintiff Niket K. Jain (Mr. Jain or plaintiff) opposes the motion and cross-moves for sanctions and the appointment of a temporary receiver.

Background

Messrs. Jain and Rasteh formed the White Eagle partnership in or about May 2008. Am Compl ¶ 5; Mot Br at 2. White Eagle provides investment management and advisory services in connection with a hedge fund. Am Compl ¶ 4; Mot Br at 5. Messrs. Jain and Rasteh were the Managing Members of White Eagle. According to the Operating Agreement, Mr. Jain was to receive 17% and Mr. Rasteh was to receive 83% of White Eagle's net profits, or net losses. Rasteh Aff, Exh 1 (Op Agmt), § 9. The dispute here stems from Mr. Rasteh causing Mr. Jain's mandatory withdrawal as a Managing Member of White Eagle.

The original complaint was dismissed by decision and order dated August 13, 2009 (the 8/13/09 Decision). Plaintiff agreed not to oppose defendants' motion to dismiss the complaint,

with the understanding that he could amend it.[1] 8/13/09 Decision at 4. The court granted plaintiff 30 days to file an amended complaint. 8/13/09 Decision, at 4. Plaintiff then filed the Amended Complaint, dated August 13, 2009. Katz Aff, Exh 36 (the Am Compl).

Defendants argue that the Amended Complaint contains essentially the same factual allegations that were in the original complaint and that plaintiff made no attempt to address or acknowledge the evidence defendants submitted in support of their original motion to dismiss. They argue that plaintiff merely added a few "new causes of action that are patently legally insufficient and border on frivolous, and clarifies a breach of contract cause of action that is just as lacking in merit as the one obliquely pled in the original Complaint." Mot Br at 3.

Discussion

Documentary Evidence

Defendants move to dismiss the first cause of action for breach of contract, based on documentary evidence.

CPLR 3211(a)(1) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . a defense is founded upon documentary evidence." The standard that must be met by the movant is high and "such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002). On such a motion,

> the allegations are not deemed true .... The motion should be granted where the essential facts have been negated beyond substantial

[1] Defendants' motion to dismiss the complaint was filed as a cross-motion, in conjuncture to their opposition to plaintiff's motion seeking a preliminary injunction. *See* 8/13/09 Decision.

> question by the affidavits and evidentiary matter submitted. Allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and accorded every favorable inference.

Biondi v Beekman Hill House Apt. Corp., 257 AD2d 76, 81 [1st Dept 1999], *aff'd*, 94 NY2d 659 [2000] [internal quotations and citations omitted].

In his breach of contract claim, Mr. Jain alleges he "has not committed any act whatsoever that would allow Mr. Rasteh to discharge [him] 'for cause.'" Am Compl, ¶ 6. He asserts, *inter alia*, that an email was sent to him, indicating he will be escorted out of the White Eagle offices if he comes in, and that defendants refused his demands for a share of the capital and profits or to be allowed to return to the office and have access to the company records and accounts. He claims these were violations of the Operating Agreement provisions setting forth the permitted bases for any termination. *Id.* ¶¶ 7-8.

Defendants counter that the documentary evidence conclusively establishes that the contract breaches alleged by Mr. Jain did not occur. At bottom, they contend the terms of the Operating Agreement itself establish that they did not breach it, and that other documents before the court contradict Mr. Jain's allegations.

The terms of the Operating Agreement permit Mr. Rasteh to require Mr. Jain "to withdraw for Cause (and only Cause) at any time." Op Agmt, § 12(a)(ii). 'For Cause' is defined in the agreement as: (a) a finding of a felony or a violation of the securities laws, by a court, governmental body or plea agreement; (b) a material breach of the Operating Agreement; or (c) fraudulent behavior. *Id.*

Defendants submit a letter dated June 30, 2009 from one of their attorneys notifying Mr. Jain's attorneys that Mr. Jain is "hereby terminated for cause . . . pursuant to Section 12 (a) (ii) of the Operating Agreement. Katz Aff, Exh 35. The letter details that Mr. Jain repeatedly refused to provide information regarding his personal trading when requested by White Eagle, purportedly as part of its regulatory compliance efforts; and that he also communicated with White Eagle's largest customer to enlist their assistance in resolving certain outstanding disputes between himself and Mr. Rasteh, even though Mr. Rasteh did not want Mr. Jain to so communicate. In both these instances of disagreement between Messrs. Jain and Rasteh, the Operating Agreement specifies that, in "the event that the Managing Members disagree with respect to a particular issue, the decision of [Mr.] Rasteh [as a Managing Member] shall govern," except in very specific exceptions that are inapplicable here. Op Agmt § 5.

Defendants argue that Mr. Jain breached the Operating Agreement by refusing to comply with requests regarding his personal trading activities and communications with clients. Rather than counter this, Mr. Jain argues that all pleadings must be liberally construed and, where a complaint states a cause of action within its four corners, a motion to dismiss should fail. Opp Br at 4-5. Mr. Jain argues that dismissal should not be granted when evidentiary material is considered unless there remains no significant dispute. Opp Br at 5. He argues that any documentary evidence produced by defendants "has been more than matched" by the documentary evidence he produced. He argues that, since there is contradictory evidence, a trial is indicated.

It is clear from the record currently before the court, however, that Mr. Jain's personal trading account information was requested for an annual compliance audit, and that Mr. Jain

failed to provide it in a timely fashion. Katz Aff, Exhs 32-35. Although Mr. Jain correctly notes that dismissal of an action is not appropriate unless no significant dispute between the parties remains, he has failed to provide credible evidence to contradict defendants' documentary evidence. As such, the first claim for breach of contract is dismissed pursuant to CPLR 3211(a)(1).

Failure to State a Claim

Defendants also move to dismiss all of the claims, alleging that they fail to state a claim for which relief may be granted.

The court now examines the remaining causes of action in the context of CPLR 3211(a)(7).

Second Cause of Action

Plaintiff's second cause of action is "for misrepresentation, fraud, wilful default, breach of trust and undue influence pursuant to CPLR Rule 3016(b)." Am Compl at 3 (in all caps).

Defendants argue that,

> Mr. Jain has failed to plead any of the elements of the claims set forth in CPLR 3016(b). For example, he has not alleged the material misrepresentation of fact, detrimental reliance, scienter, or fraud required to plead a fraud claim. Nor has he alleged the existence of a fiduciary duty or breach of fiduciary duty required to plead a breach of fiduciary duty claim. Indeed, all he alleges is that various provisions of the Operating Agreement were breached by Defendants. But [the controlling] Delaware law is clear that a breach of fiduciary duty claim cannot lie were all that is alleged is a breach of contract. . . . Moreover, Mr. Jain failed to plead with the particularity required by CPLR 3016(b) any of the claims listed therein.

Mot Br at 13-14.

In this, defendants are correct. Plaintiff argues, generally, that all pleadings must be liberally construed and where a complaint states a cause of action within its four corners, a motion to dismiss should fail. Opp Br at 4-5. Plaintiff fails, however, even to directly address, much less rebut, defendants' arguments regarding dismissal of the second (and fourth) causes of action. They urge that this failure should result in dismissal of those claims by default. Reply Br at 7.

Plaintiff has had ample opportunity to remedy or clarify his pleadings. The complaint now before the court already has been amended. Counsel already was given the opportunity to flush out plaintiff's claims following dismissal of the first complaint. Yet on this current motion to dismiss, plaintiff has failed to oppose it with anything other than an argument that the court should look to the four corners of the complaint. Certainly, the court has done so. The second cause of action still fails to state a cause of action in that it does not allege facts that satisfy the elements of a fraud claim or one for deception under NY Gen Bus Law § 349.

Third Cause of Action

Plaintiff's third cause of action is for "for unconscionable contract or clause pursuant to New York Uniform Commercial Code, Section 2-302." Am Compl at 4. Section 2-302 provides:

> Unconscionable Contract or Clause
>
> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

NY CLS UCC § 2-302.

Defendants argue, first, that Section 2-302 does not provide for damages, but rather gives courts the power to refuse to enforce an unconscionable contract or clause. *Pearson v Nat'l Budgeting Sys., Inc.*, 31 AD2d 792, 792-93 (1st Dept 1969). Defendants also argue that the Operating Agreement contains a choice of law provision specifying Delaware law, and that the Delaware UCC § 2-302 provision applies only to transactions in goods.[2]

Plaintiff counters that as New York is the jurisdiction of this action, as both individual parties reside here, and as the corporate entity's offices are in New York, the law of this State should govern here. Plaintiff points to a New York opinion applying UCC Section 2-302 in the context of a commercial leasing dispute. *See Rowe v Great Atlantic and Pacific Tea Co., Inc.*, 46 NY2d 62 (1978).

The Operating Agreement here unquestionably requires that it be construed under the law of the State of Delaware. Op Agmt § 20. Plaintiff fails to provide an argument for why the choice of law provision in the agreement specifying that Delaware law governs, should not

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[2] Delaware's UCC clearly provides:

> Scope; certain security and other transactions excluded from this article
> Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

6 Del. C. § 2-102.

control. Inasmuch as the third cause of action seeks a remedy under inapplicable law, it fails to state a cause of action for which relief may be granted.

Fourth Cause of Action

Plaintiff's fourth cause of action is "for deceptive acts and practices in violation of New York General Business Law Section 349." Am Compl at 5. The section provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." NY CLS Gen Bus § 349(a).

Defendants argue the section is inapplicable because it is directed at protecting the consuming public, and private contract disputes are outside its ambit. *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 24-25 (1995).

As with the second cause of action, plaintiff fails to directly address, much less rebut, defendants' arguments for the dismissal of this fourth cause of action. And, as above, his failure to do so has left the court to conclude that, even looking to the four corners of the amended complaint, he has failed to allege a cause of action which can survive the motion to dismiss and for which relief could be granted.

For the reasons specified above, the second, third, and fourth causes of action are dismissed, pursuant to CPLR 3211(a)(7).[3]

[3] Defendants also sought dismissal of the first cause of action under CPLR 3211(a)(7). Inasmuch as the breach of contract claim has been dismissed pursuant to CPLR 3211(a)(1), the court need not address its viability under a 3211(a)(7) challenge, and declines to do so.

Cross-Motion

Sanctions

Mr. Jain alleges that defendants should be sanctioned for the electronic filing of false and defamatory statements. Opp Br at 1. He argues that Uniform Rules 205.5b(b)(2)(i) and (ii) require all parties to consent prior to any electronic filing. He alleges that defendants filed false and defamatory material about him, in Mr. Rasteh's affidavit, dated July 27, 2009. He argues that the statements therein were deliberately filed on the internet without Mr. Jain's or his counsel's consent. He seeks a hearing, pursuant to 22 NYCRR Section 130-1.1(d), to determine the appropriate sanction.

New York law provides that

> conduct is frivolous if:
>
> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.
> Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party.

22 NYCRR § 130-1.1(c)

Mr. Jain contends that there can be no question but that the statements at issue "were designed to harass and maliciously injure" him. Opp Br at 2.

Defendants oppose the cross-motion. They argue that counsel appearing before the Commercial Division are required to electronically file the pleadings. Reply Br at 2-3. They further argue, *inter alia,* that, if Mr. Jain believes the statements at issue to be defamatory, he should have moved to strike them, pursuant to CPLR 3024(b), which provides for doing so for "any scandalous or prejudicial matter unnecessarily inserted in a pleading." Defendants also argue that Mr. Jain should have raised any of his objections to their pleadings at the motion conference held or in a pre-motion letter, pursuant to Commercial Division Rule 24, rather than cross moving for sanctions.[4]

It is true that cases before this court are presumptively to be filed electronically.[5] The court declines to weigh in on what Mr. Jain should have done in these circumstances. What currently is before the court is Mr. Jain's cross-motion claim for sanctions. That motion does not set forth a credible basis for sanctions. As Mr. Jain has not adequately alleged action by defendants which, if true, could rise to the level of sanctionable conduct, no hearing is warranted, and Mr. Jain's cross-motion seeking sanctions is denied.

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[4] Defendants argue that Mr. Jain's cross-motion for sanctions is frivolous and, thus, is itself sanctionable. Reply Br at 3.

[5] The precise language is available on the courts' website, and provides:

> Electronic Filing in the Commercial Division
> As set forth in the Statement and Notice below, effective June 15, 2008, all Commercial Division cases in New York County Supreme Court shall presumptively be filed electronically through the New York State Courts Electronic Filing System.

See http://www.nycourts.gov/courts/comdiv/newyork_efiling_as_of_061508.shtml

Temporary Receiver

Mr. Jain further moves for a temporary receiver, pursuant to CPLR 6401. This Section provides for the

> Appointment of temporary receiver. . . .
> Upon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed, before or after service of summons and at any time prior to judgment, or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, materially injured or destroyed.

CPlR 6401(a).

Mr. Jain argues that Mr. Rasteh is a Canadian citizen who has indicated a desire to take both his own and White Eagle's assets and go to Europe. Opp Br at 3. Accordingly, he argues, a temporary receiver is certainly indicated.

Defendants oppose the appointment of a temporary receiver. They argue that Mr. Jain has not presented evidence, beyond his own speculation, that there is a danger of their assets being removed from the state, lost, materially injured or destroyed. Reply Br at 2. Mr. Rasteh asserts that he has no intention of removing his own or White Eagle's assets to Europe, or anywhere else. Rasteh Reply Aff, ¶ 2.

The appointment of a receiver is only appropriate when absolutely necessary.

> The drastic remedy of the appointment of a receiver is to be invoked only where necessary for the protection of the parties . . . . There must be danger of irreparable loss, and courts of equity will exercise extreme caution in the appointment of receivers, which should never be made until a proper case has been clearly established.

In re Armenti, 309 AD2d 659, 661 (1st Dept 2003) (internal citations omitted). At this time, there is no evidence before the court that would warrant the appointment of a receiver. Mr. Jain's cross-motion that seeks appointment of a temporary receiver is denied.

Costs

Finally, defendants now seek costs, pursuant to CPLR 8106, 8201, and 8202. CPLR 8106 provides for "Costs upon motion. Costs upon a motion may be awarded to any party, in the discretion of the court, and absolutely or to abide the event of the action." CPLR 8201 provides for "Amount of costs in an action. Costs awarded in an action shall be in the amount of: 1. two hundred dollars for all proceedings before a note of issue is filed." CPLR 8202 provides for the "Amount of costs on motion. Costs awarded on a motion shall be in an amount fixed by the court, not exceeding one hundred dollars."

It is within the court's authority to award and or shift costs. Counsel, however, has failed to provide the court with sufficient arguments in their favor for doing so. The court, in its exercise of its discretion, declines to do so.

Accordingly, it is

ORDERED that defendants' motion, to dismiss the Amended Complaint, is granted; and it is further

ORDERED that plaintiff's cross-motion for sanctions and the appointment of a temporary receiver, is denied; and it is further

ORDERED that no costs are awarded or shifted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: February 1, 2010

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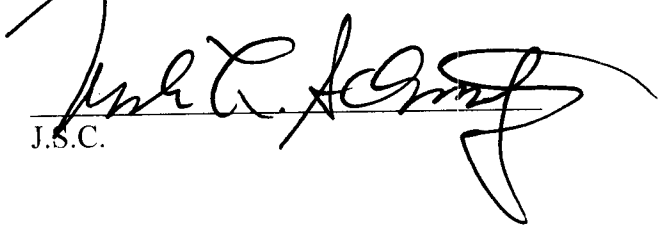

J.S.C.