

Piroozian v Homapour
2012 NY Slip Op 31188(U)
April 19, 2012
Sup Ct, Nassau County
Docket Number: 11152-11
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
IMANUEL PIROOZIAN,

Plaintiff,

-against-

SHAHRIAR HOMAPOUR and HIGGINS AVE LLC,

Defendants.
-----x

**TRIAL/IAS PART: 16
NASSAU COUNTY**

**Index No: 11152-11
Motion Seq. No: 1
Submission Date: 3/2/12**

Papers Read on this Motion:

- Notice of Motion, Affirmation in Support,
Affidavit in Support and Exhibits.....x**
- Memorandum of Law in Support.....x**
- Affidavit in Opposition,
Affirmation and Memorandum in Opposition and Exhibits.....x**
- Reply Affirmation and Reply Affidavit.....x**

This matter is before the court on the motion by Defendants Shahriar Homapour (“Homapour”) and Higgins Ave LLC (“Company”) (“Defendants”) filed December 14, 2011 and submitted March 2, 2012. For the reasons set forth below, the Court 1) denies Defendants’ motion to dismiss the first and second causes of action in the Complaint; and 2) grants Defendants’ motion to dismiss the third cause of action in the Complaint.

BACKGROUND

A. Relief Sought

Defendants move for an Order, pursuant to CPLR § 3212(a) and Limited Liability Company Law (“LLCL”) § 409(a), granting Defendants summary judgment dismissing the complaint.

Plaintiff Imanuel Piroozian (“Piroozian” or “Plaintiff”) opposes the motion.

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. A to Roth Aff. in Supp.) alleges as follows:

Plaintiff and Homapour are members of the Company. On or about February 19, 2010, Plaintiff and Defendants entered into an agreement ("Agreement") that provided for the distribution of the Company's net income, from January 1, 2010, to the parties as follows: Plaintiff would receive 37 ½ % and Homapour would receive 62 ½ %. The Company operated a warehouse in Queens County, New York ("Building"). The Agreement did not include distributions made from events that were addressed in a separate Queens Warehouse Division agreement dated February 2, 2010 ("Warehouse Agreement").

In response to a demand by Plaintiff, Homapour issued a statement that listed the Company's income and expenses for the year 2010. Homapour represented the Company's income to be \$798,363.32 for that period, and further represented the expenses to be \$472,338.92, leaving a net income of \$326,024.40.

In the first cause of action, Plaintiff alleges that he is entitled to \$122,259.15, representing 37% of the net income, which Homapour has refused to pay him. Plaintiff alleges that this constitutes a breach of the parties' Agreement. In the second cause of action, Plaintiff seeks an accounting of the Company's finances, which Homapour has allegedly refused to provide. In the third cause of action, Plaintiff alleges that Homapour breached his duty to manage the Building and secure tenants for the units in the Building, resulting in vacancies in the Building. Plaintiff seeks damages in the amount of \$90,000.

In their Verified Answer (Ex. C to Roth Aff. in Supp.), Defendants deny many of the allegations in the Complaint. They also assert eight (8) affirmative defenses: 1) Plaintiff has failed to state a claim on which relief can be granted; 2) Plaintiff's claims are barred by the Business Judgment Rule; 3) Plaintiff lacks standing and/or capacity to maintain this action; 4) Plaintiff's claims are derivative in nature, and should have been asserted on the Company's behalf; 5) Plaintiff's allegations plead a wrong to the Company only and, therefore, Plaintiff may only sue derivatively and not individually; 6) Plaintiff's claims are barred by the Company's Operating Agreement, as amended; 7) Plaintiff's equitable claims are barred by the doctrine of unclean hands; and 8) Defendants have defenses based on documentary evidence.

In support of Defendants' motion, Homapour affirms that he and Plaintiff are brothers-in-law who also have a business relationship which has involved the formation of multiple entities to purchase real estate and make mortgage loans. As reflected by the Company's Articles of

Organization (Ex. D to Homapour Aff. in Supp.), Plaintiff and Homapour formed the Company to purchase property (“Property”) located at 133-05 32nd Avenue, Queens, New York. On or about May 26, 2004, Plaintiff and Homapour executed the Operating Agreement (*id.* at Ex. C) to memorialize their rights and obligations with respect to the Company. Initially, Plaintiff and Homapour each held a 50% interest in the Company, and were each designated as the Company’s Managing Members.

In 2006, the prior owner of the Property commenced an action in Queens County to recover title to the Property (“Queens Action”). Due to a deterioration in their relationship and their desire not to continue in business together, in February of 2010, Plaintiff and Homapour entered into the Warehouse Agreement (Ex. E to Homapour Aff. in Supp.). Plaintiff and Homapour also amended and modified the Operating Agreement by executing the First Amendment to the Operating Agreement (“First Amendment”) (*id.* at Ex. F). The First Amendment includes a provision stating that Plaintiff “hereby resigns as Managing Member of the Company.” Homapour submits that, in light of that resignation, Homapour remains the sole Managing Member of the Company and possesses the sole authority to determine the distribution of profits, leasing of the Building and other matters related to the Company’s daily operations.

Homapour affirms that, in light of the Queens Action, the Company faces significant financial liability. Homapour determined that the distribution of profits was not in the Company’s interest as it may be required to remit significant funds to the plaintiff in the Queens Action if the plaintiff prevails in that Action. With respect to Plaintiff’s allegations regarding the Company’s bank accounts, Homapour affirms that he determined that it was appropriate to close the Company’s former account, on which Plaintiff was a signatory, and open a new account on which Homapour, the sole Managing Member, is the sole signatory.

Homapour avers, further, that he opened a new Company account to prevent Plaintiff from continuing to improperly transfer the Company’s assets, as Plaintiff allegedly did in connection with the parties’ prior sale, through a corporation they owned, of property located in Brooklyn, New York (“Brooklyn Property”). Homapour alleges that, as reflected by the email provided (Ex. H to Homapour Aff. in Supp.), Plaintiff approved the sale of the Brooklyn Property but subsequently claimed, through his attorney, that the contract of sale was entered into without Plaintiff’s knowledge or consent (*id.* at Ex. I). Shortly before the closing on the Brooklyn Property, Homapour discovered that, on July 21, 2010, Plaintiff fraudulently

transferred a fifty (50%) percent interest in the Brooklyn Property from the corporation to himself, as reflected by the deed provided (*id.* at Ex. L). Homapour alleges that Plaintiff completed this transfer without Homapour's knowledge or consent, and for purported consideration of \$10,000 although the Brooklyn Property was valued at over \$500,000. As a result of Plaintiff's malfeasance, on or about October 22, 2010, Plaintiff was required to execute a deed transferring the fifty (50%) percent interest back to the corporation, as reflected by the deed provided (*id.* at Ex. N). The sale of the Brooklyn Property was subsequently completed. Homapour affirms, further, that following the closing on the Brooklyn Property, Plaintiff improperly withdrew the sum of \$12,602.00 from the corporation's bank account, using counter checks, allegedly to prevent Homapour from discovering the withdrawal.

Homapour also disputes Plaintiff's allegation that he has not been provided with access to the Company's books and records. Homapour also affirms, however, that he has been "overly protective" of the Company's books of records based on his concerns that, in light of Plaintiff's prior fraudulent conduct, "the books and records would be doctored, not returned to me, or copied and distributed to third parties without my consent in order to have [the Property] evaluated for sale and create uncertainty for existing tenants" (Homapour Aff. in Supp. at ¶ 35).

Homapour affirms, further, that Plaintiff's allegations regarding the Company's failure to lease the Property are untrue, and asserts that Plaintiff has attempted to undermine Homapour's authority as Managing Member of the Company. Homapour avers that Plaintiff requested that a real estate broker evaluate the Property for sale, despite the fact that the Company does not wish to sell the Property. Moreover, since August 2010, portions of the Property have been leased to two separate tenants, as reflected by the leases provided (Ex. P to Homapour Aff. in Supp.).

In opposition, Plaintiff affirms that from 2004 to January 2010, regular distributions were made to Homapour and Plaintiff. Plaintiff provides a statement of the Company's accountant (Ex. 1 to Piroozian Aff. in Opp.) reflecting those distributions, as well as a K-1 statement reflecting sums to which Plaintiff was entitled in 2010, but which he has not received. Plaintiff affirms that it was not until he advised Homapour in or about 2009 that he wished to end their partnership that Homapour claimed that it was necessary to set the Company's assets aside, ostensibly to protect the Company in the event that it was held liable in the Queens Action. Plaintiff describes Defendant's explanation for not distributing Plaintiff's share of the Company's profits as "pure speculation and conjecture" (*id.* at ¶ 11), and notes that distributions continued for several years following the filing of the Queens Action in 2006.

Plaintiff also contends that Defendant did, in fact, enter into the contract of sale regarding the Brooklyn Property without Plaintiff's knowledge, noting that Homapour retained a different attorney than the corporation usually retained, and affirming that Homapour ignored all of Plaintiff's requests for an accounting. Plaintiff provides correspondence from 2010 and 2011 (Ex. 2 to Piroozian Aff. in Opp.) reflecting his requests for an accounting, all of which were ignored. Plaintiff concedes that he transferred the 50% interest, as alleged by Homapour, but says that he did so because he did not trust Homapour to give him his share of the proceeds from the sale of the Brooklyn Property.

With respect to Homapour's allegation that Plaintiff improperly withdrew funds, Plaintiff affirms that he withdrew only funds to which he was entitled. Plaintiff affirms that in March of 2010, Homapour withdrew \$4,000 without Plaintiff's consent, and that the parties ultimately received equal amounts from the sale of the Brooklyn Property.

C. The Parties' Positions

Defendants submit that 1) Plaintiff lacks standing to maintain this action because the causes of action are derivative in nature, but Plaintiff has sued individually; and 2) Plaintiff's claims are barred by the business judgment rule, which clearly applies to Homapour's decisions regarding the distribution of profits, opening and closing of bank accounts and leasing of the Property.

Plaintiff opposes Defendants' motion, submitting that Plaintiff's allegations are clearly not derivative, but rather a claim by one individual against another individual, based on Plaintiff's claim that Homapour failed to distribute profits to Plaintiff. Plaintiff notes, *inter alia*, that 1) the First Amendment describes the agreement as one between the individuals; and 2) the Warehouse Agreement refers repeatedly to the two individuals. Plaintiff submits that his rights flow from the breach of the duty owed by Homapour to Plaintiff, not to the Company.

Plaintiff also argues that there are issues of fact precluding summary judgment regarding whether Homapour's business decisions were defensible under the business judgment rule. By way of example, Plaintiff contends that Homapour's claim that withholding profits was necessary to protect the Company in the event that it was found liable in the Queens Action is implausible and speculative.

In reply, Defendants submit, *inter alia*, that 1) Plaintiff has failed to provide evidence in support of his claim that, because he is seeking to redress a wrong to him personally, rather than to the Company, he may bring this action in his personal capacity; 2) in light of the fact that

Homapour has established his good faith reasons for his decision not to distribute the Company's profits, and given Defendant's failure to establish the existence of a triable issue of fact, Defendants have demonstrated their right to judgment; and 3) in light of the fact that Plaintiff's papers do not dispute Homapour's recitation of the facts regarding the third cause of action related to the leasing of the Property, these issues are deemed admitted and Defendants are entitled to judgment on the third cause of action.

RULING OF THE COURT

A. Summary Judgment Standards

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincheran*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Mere conclusions or unsubstantiated allegations will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

B. Business Judgment Rule

The business judgment rule bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. *Matter of 1st Rochdale Cooperative Group, Ltd. v. Altman*, 2008 U.S. Dist. LEXIS 4966, * 2 (S.D.N.Y. 2008), quoting *Auerbach v. Bennett*, 47 N.Y.2d 619, 629 (1979) and citing *Owen v. Hamilton*, 44 A.D.3d 452 (1st Dept. 2007). The business judgment rule, however, will not protect a decision that is the product of fraud, self-dealing or bad faith. *Id.*, quoting *Patrick v. Allen*, 355 F. Supp. 2d 704, 710 (S.D.N.Y. 2005). To earn the protection of the business judgment rule, directors must do more than merely avoid fraud, bad faith and self-dealing. *Id.*, citing *Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264, 274 (2d Cir. 1986). The business judgment rule protects directors who act with "due care" and "conscientious fairness." *Id.* at * 3, citing *Hanson Trust, supra*, quoting *Alpert v. 28 Williams St.*

Corp., 63 N.Y.2d 557, 569 (1984). In other words, a director who exercises reasonable diligence in gathering and considering material information, who makes an informed decision after a reasonable investigation, will be protected from liability, even if the decision turns out to be unwise or inexpedient. *Id.*, citing *Levandusky v. One Fifth Ave. Apt. Corp.*, 75 N.Y.2d 530, 538 (1990), quoting *Pollitz v. Wabash R.R. Co.*, 207 N.Y. 113, 124 (1912).

C. Actions against Corporations

For a wrong against a corporation a shareholder has no individual cause of action, though he loses the value of his investment or incurs personal liability in an effort to maintain the solvency of the corporation. *Abrams v. Donati*, 66 N.Y.2d 951, 953 (1985). Exceptions to that rule have been recognized when the wrongdoer has breached a duty owed to the shareholder independent of any duty owing to the corporation wronged. *Id.* Allegations of mismanagement or diversion of assets by officers or directors to their own enrichment without more, however, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually. *Id.* The pertinent inquiry is determining whether an individual has standing to assert a claim is whether the thrust of the plaintiff's action is to vindicate his personal rights as an individual and not as a stockholder on behalf of the corporation. *Craven v. Rigas*, 85 A.D.3d 1524, 1527 (3d Dept. 2011), quoting *Albany-Plattsburgh United Corp. v. Bell*, 307 A.D.2d 416, 419 (3d Dept. 2003), *lv. dism. and den.*, 1 N.Y.3d 620 (2004) (internal quotation marks and citations omitted).

D. Application of these Principles to the Instant Action

The Court denies Defendants' motion to dismiss the first and second causes of action in the Complaint, based on the Court's conclusion that 1) the first cause of action sufficiently alleges that the thrust of the Plaintiff's action is to vindicate his personal rights as an individual and not as a stockholder on behalf of the corporation in that Plaintiff alleges that Homapour breached an agreement between Homapour and Plaintiff providing for the payment of certain distributions to Plaintiff; 2) in light of the conflicting affidavits, and in consideration of Plaintiff's allegation that the distributions continued for several years following the filing of the Queens Action, there exist issues of fact regarding the applicability of the business judgment rule; and 3) in light of the conflicting affidavits, there exist issues of fact regarding whether Homapour provided Plaintiff with an adequate accounting of the Company's books and records.

The Court grants Defendants' motion to dismiss the third cause of action in light of Homapour's affirmations and supporting documentation regarding the leasing of the Property,

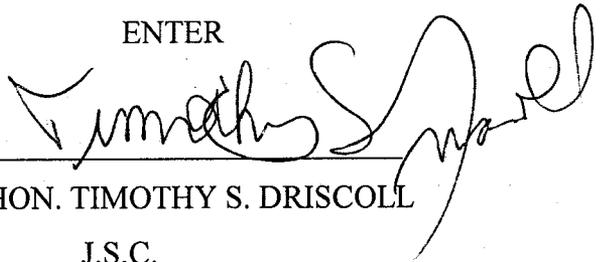
and Plaintiff's failure to refute those assertions.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds the parties of their required appearance before the Court for a Preliminary Conference on May 24, 2012 at 9:30 a.m.

DATED: Mineola, NY
April 19, 2012

ENTER

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
APR 24 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE