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| Jobar Holding Corp. v Halio |
| 2019 NY Slip Op 32813(U) |
| September 23, 2019 |
| Supreme Court, New York County |
| Docket Number: 655689/2017 |
| Judge: Saliann Scarpulla |
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2

prepared misleading tax returns and false Schedule K-1s that appeared legitimate in order to conceal the fact that Halio was stealing money from Jobar, and in order to assist Halio in shielding her fraud from Buck. In addition, Turman had knowledge about checks issued to Halio as loans that were never intended to be repaid, and transfers to non-Jobar accounts that were made without any reasonable explanation.

In 2016, Buck commenced a proceeding under Business Corporation Law §624 and was able to see some of Jobar's records pursuant to the court's order (*Matter of the Application of Robert Buck and Robert Buck, as Executor of the Estate of Joan Buck v Jobar Holding Corp.*, Sup Ct, Nassau County, Oct. 17, 2016, Libert, J., Index No. 605680/16). Buck alleges that, although the records were incomplete, they revealed that Halio fraudulently transferred at least \$1.5 million of Jobar's funds to herself. Buck alleges that by the time her fraud was discovered in mid-2017, Halio had stolen all of Jobar's funds which had remained after the property was sold in 2006.

The causes of action asserted against Turman were for aiding and abetting fraud, aiding and abetting breach of fiduciary duty, accountant malpractice, fraud, and negligent misrepresentation. As stated in the complaint, these causes of action were asserted on behalf of Buck.

Turman now moves to dismiss the complaint insofar as asserted against it. Turman first argues that according to the allegations of the complaint, Halio's theft of funds began from the time of the sale of property in 2006. As such, because this action was commenced in 2017, the claims are all barred by the statute of limitations. In

3

opposition, plaintiffs argue that the statute of limitations does not bar their causes of action because they only discovered Halio's wrongdoing and Turman's involvement when Jobar bank records and other documents were obtained in 2017. In any event, Turman's conduct was continuing from at least 2007 through 2015, thereby causing plaintiffs' continuous harm, and the statute of limitations did not begin to run until the last unlawful act.

Turman next contends that the causes of action for aiding and abetting fraud, fraud, aiding and abetting breach of fiduciary duty, and negligent misrepresentation must be dismissed for failure to state a cause of action. It maintains that the fraud cause of action is redundant of the malpractice cause of action in that both are based on the same set of facts and seek the same relief. Further, the fraud and aiding and abetting causes of action are not pled with sufficient particularity. In addition, Turman maintains that because Buck's cause of action for negligent misrepresentation relies only on Turman's silence in not divulging Halio's alleged theft of funds, the cause of action is not viable because there was no active misrepresentation.

Plaintiffs contend that they have adequately pled Turman's fraud and aiding and abetting fraud by stating the following with sufficient particularity: "(1) Halio engaged in a fraudulent scheme whereby she misappropriated, misused, converted and/or embezzled no less than \$1,500,000.00 of Jobar funds; (2) Turman & Eimer LLP, primarily by and through Mark A. Bernstein had knowledge of the fraudulent scheme (i.e., and the resulting misappropriation of funds); and (3) Turman & Eimer LLP, primarily by and

4

through Mark A. Bernstein was responsible for keeping the accounting ledgers that detailed all of Jobar's financial transactions, including all money that flowed in and out of Jobar's bank accounts.” They maintain that Turman intentionally omitted the material fact that Halio was stealing corporate funds by making fake loans to herself that were not intended to be repaid. Turman also prepared false tax documents.

Plaintiffs also contend that they sufficiently stated a cause of action for aiding and abetting breach of fiduciary duty in that “Turman & Eimer LLP substantially assisted Halio's wrongdoing by failing to disclose the fraud and breach of fiduciary duties to the Plaintiffs despite a fiduciary obligation to do so; by keeping the accounting ledgers that detailed all of Jobar's financial transactions, including all money that flowed in and out of Jobar's bank accounts, which disclosed the ongoing flow of funds stolen by Halio; by preparing inaccurate, misleading and false tax returns for Jobar and similarly inaccurate, misleading and false Schedule K-1s; and by intentionally delaying delivery of Schedule K-1's to Buck and on multiple occasions intentionally interfering with Buck's attempts to obtain financial information for Jobar.”

With regard to the cause of action for negligent misrepresentation, plaintiffs allege that it sufficiently states a cause of action based on Turman's failure to notify Buck of Halio's fraudulent actions.

Finally, Turman argues that Buck does not plead any individual injury apart from the alleged injury to Jobar. Further, any derivative allegations in the complaint are improperly interspersed with the non-derivative allegations. They are mingled in all of

5

the causes of action, and therefore the entire complaint must be dismissed. In opposition, plaintiffs explain that the derivative claims asserted in the complaint are only asserted against Halio and that “Buck, as an individual, is not seeking to pursue any derivative claims.”

Discussion

Although the complaint is rife with allegations that a serious wrong was committed, the drafting of the pleading makes it difficult to determine the precise causes of action that are being pled. Plaintiffs state in their opposition papers that derivative claims are only being asserted against Halio, however, some of the allegations stated in the causes of action asserted against Turman support derivative causes of action as well. In addition, while the causes of action asserted against Turman are stated as being on behalf of Buck individually, some of those causes of action would be inappropriate or unsustainable as causes of action on behalf of an individual.

The theft of a corporation’s funds is a wrong against the corporation and a shareholder has no right to sue as an individual for a wrong committed against the corporation. *Serino v. Lipper*, 123 A.D.3d 34, 39 (1st Dept 2014). This is so even if the wrongful act caused the shareholder’s holdings to decrease in value. *Id.* A shareholder may not obtain a recovery that belongs to the corporation or duplicates it. *Id.* at 40. To remedy an injury to a corporation, a shareholder must bring a derivative action on behalf of the corporation. *See Abrams v. Donati*, 66 N.Y.2d 951 (1985).

6

However, if the wrongdoer breaches a duty owed directly to the shareholder and the duty is independent of any duty owed to the corporation, the shareholder may bring an individual action against the wrongdoer. *Serino*, 123 A.D.3d at 40. Where the shareholder, rather than the corporation, suffers the harm and would receive the benefit of any recovery, the shareholder may proceed with a direct action against the wrongdoer. *Yudell v. Gilbert*, 99 A.D.3d 108, 114 (1st Dept 2012).

The causes of action asserted against Halio and against Turman consist of the same factual assertions and allege the same injury, the loss of \$1.5 million. That loss was to Jobar and most of the claims asserted against Turman allege a wrong done to Jobar, not to Buck. Although the complaint explicitly sets forth a cause of action based on BCL § 626 (shareholders' derivative action) against Halio and does not do the same against Turman, it is not clear from the complaint that derivative allegations are not also being asserted against Turman. For example, the aiding and abetting breach of fiduciary duty cause of action is based on the allegation that Turman aided and abetted Halio's wrongs against Jobar, not against Buck individually.

Regarding plaintiffs' allegations that Turman caused Buck individual harm, the complaint states that Turman consistently delayed delivery of K-1s to Buck and many times intentionally interfered with Buck's attempts to obtain financial information for Jobar. The complaint alleges that Buck relied on the allegedly falsified tax forms prepared by Turman to prepare his own and his mother's estate's taxes. These are not derivative claims, as Buck, not Jobar, suffered the alleged harm and would receive the

7

benefit of any recovery. However, plaintiffs do not allege a clear injury to Buck or damages sustained by him resulting from this alleged misconduct. In sum, the causes of action asserted against Turman are an unclear mix of Buck's personal claims, derivative claims on behalf of Jobar, and other claims that are not sustainable to any of the plaintiffs.²

It is well settled that derivative and individual claims based on the same operative facts cannot be interspersed in the same action. *Abrams v. Donati*, 66 N.Y.2d 951 (1985); *Barbour v. Knecht*, 296 A.D.2d 218, 228 (1st Dept 2002). Complaints that mingle derivative and individual claims are generally dismissed with leave given to replead. *Id.* Because of the mixing of derivative and individual claims, and the unclear nature of the allegations being asserted against Turman, the complaint is dismissed insofar as asserted against Turman without prejudice to bring properly pled causes of action against this defendant.³

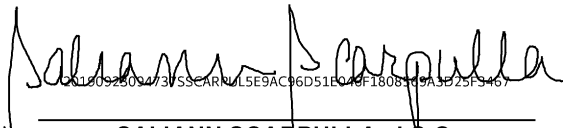
² For example, the cause of action for aiding and abetting Halio's fraud is misplaced because there is no cause of action alleged against Halio for fraud.

³ Notably, with regard to Turman's statute of limitations arguments, the complaint does not clearly state when the claims accrued. It appears that Buck did not obtain certain documents until 2016 pursuant to the BCL § 624 proceeding, while others were allegedly obtained before then. Plaintiffs seek to lengthen some of the statutes of limitations due to privity or fiduciary duty. Further information is needed to determine whether the statute of limitations bars causes of action against Turman.

In accordance with the foregoing, it is

ORDERED that the motion by defendant Turman & Eimer LLP to dismiss the complaint is granted without prejudice, and the complaint is hereby dismissed as against said defendant.

This constitutes the decision and order of the court.

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| <p><u>9/ 23 /2019</u> DATE</p> |  SALIANN SCARPULLA, J.S.C. | |
| CHECK ONE: | <input type="checkbox"/> CASE DISPOSED <input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED <input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE |
| APPLICATION: | | |
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