

<b>Weinstein v W.W.W. Assoc., LLC</b>
2019 NY Slip Op 32868(U)
September 27, 2019
Supreme Court, New York County
Docket Number: 652365/2014
Judge: Jennifer G. Schechter
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

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JEFFREY WEINSTEIN, individually and derivatively  
on behalf of WWW Associates, LLC,

Index No.: 652365/2014

**DECISION & ORDER**

Plaintiff,

-against-

W.W.W. ASSOCIATES, LLC, BARBARA  
WEINSTEIN as Preliminary Executor of the Estate  
of Leon Weinstein, KENNETH WEINSTEIN, BALE  
CORP., LBKC ASSOCIATES, LLC, BARBARA  
WEINSTEIN, individually, CANDEE WEINSTEIN,  
JOHN-JANE DOE, and JOHN-JANE DOE CORP.,

Defendants.

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JENNIFER G. SCHECTER, J.:

Familiarity with the litigation before this court concerning nominal defendant W.W.W. Associates, LLC (the Company) is assumed.<sup>1</sup> At this juncture, where discovery is almost complete, plaintiff has asserted new claims concerning an additional breach of fiduciary duty based on the revelation in discovery that after the Company had contracted to purchase property located at 975 Stewart Avenue in Garden City, New York (the Property) and made a \$200,000 down payment, Kenneth Weinstein<sup>2</sup> executed an assignment on behalf of the Company giving the right to purchase the Property to an entity controlled by the individual defendants (but not plaintiff), LBKC Associates, LLC (LBKC). This revelation impelled plaintiff to file a new action in Supreme Court, Nassau

<sup>1</sup> The relevant background is set forth in the court's July 26, 2018 decision (Dkt. 192). There is a related action before this court under Index No. 161961/2014.

<sup>2</sup> Given the involvement of so many Weinstein family members, the court refers to them by their first names.

County – the county in which the Property is located – so that a notice of pendency could be filed (*see* Dkt. 293 [the LBKC Complaint]).<sup>3</sup> After the notice of pendency was vacated (*see* Dkt. 271), plaintiff moved to consolidate the Nassau County action with this case for obvious logistical reasons – the entire universe of claims concerning the Company’s real estate business is currently before this court. By order dated June 4, 2019, the court granted plaintiff’s consolidation motion (Dkt. 284). The court then ordered the parties to continue briefing the then-pending motion to dismiss the LBKC Complaint under a new motion sequence number in this action (Dkt. 291).<sup>4</sup> That motion is granted in part.

To begin, Barbara and Candee Weinstein seek dismissal of all claims asserted against them because plaintiff does not seek to pierce LBKC’s corporate veil and because they are non-managing members of LBKC. It is well settled that where tort claims are asserted, individual members of an LLC may be held personally liable if the requisite elements of the claims are sufficiency pleaded (*Vandashield Ltd. v Isaacson*, 146 AD3d 552, 554 [1st Dept 2017]). However, Barbara and Candee cannot be held liable for the

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<sup>3</sup> The LBKC Complaint asserts 14 causes of action: (1-4) declaratory judgment; (5-6) breach of fiduciary duty; (7-8) unjust enrichment; (9-10) aiding and abetting breach of fiduciary duty; (11) unjust enrichment; (12) equitable accounting; (13) appointment of a receiver; and (14) attorneys’ fees. Plaintiff did not label his causes of action, many of which appear to assert both direct and derivative claims. All of the direct claims are being dismissed. Likewise, as noted at the outset, the Company is merely a nominal defendant on the derivative claims notwithstanding not being separately listed as such in the caption. For the avoidance of doubt, as set forth in the decretal paragraph, the first 13 causes of action against all defendants except for Barbara and Candee Weinstein survive. As the claims against Leon’s estate are not being dismissed, Barbara, the Preliminary Executor, remains a defendant but only in that capacity and does not face any personal liability.

<sup>4</sup> The captions in the parties’ opposition and reply briefs do not conform to the one set in the June 18, 2019 order (*see* Dkt. 291 at 2).

actions of LBKC and its managing members merely by virtue of their status as non-managing members unless they are specifically alleged to have provided substantial assistance to the managers' breach (*see Stanfield Offshore Leveraged Assets, Ltd. v Metro. Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009]). Merely alleging that minority members of an LLC benefitted from their LLC's wrongful actions is not a basis for imposing personal liability (*see Lau v Lazar*, 130 AD3d 413, 414 [1st Dept 2015], citing LLC Law § 609[a]). Nor are such minority members proper parties to such a lawsuit (*see* LLC Law § 610). Plaintiff's suggestion that the Company can obtain Barbara's and Candee's membership interests in LBKC as a remedy is rejected. There is no logical justification, nor any authority cited by plaintiff, suggesting that imposing such a remedy absent wrongdoing by them is permissible. While it is premature to determine whether monetary damages or an equitable remedy is appropriate if liability against Kenneth is established, the latter would most likely entail the Property itself – and not membership interests in LBKC – being transferred to the Company (*see Herman v Herman*, 162 AD3d 459, 460 [1st Dept 2018]). The claims against Barbara and Candee are therefore dismissed.

Defendants also seek dismissal of the direct claims in the LBKC Complaint, arguing that all the alleged harm was caused to the Company, which lost the corporate opportunity to purchase the Property.<sup>5</sup> Defendants are correct (*see Yudell v Gilbert*, 99

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<sup>5</sup> Plaintiff's direct claims and his causes of action against Candee and Barbara in her individual capacity also are dismissed for failure to state a cause of action.

AD3d 108, 113 [1st Dept 2012]). Plaintiff's claims are classically derivative and thus he may only seek to recover on behalf on the Company.<sup>6</sup>

Defendants next seek to strike paragraphs 25-27, 29, 31-37, 41-43, 62-64, and 71-78 of the LBKC Complaint as irrelevant, repetitive, or prejudicial (*see* CPLR 3024[b]). There is no basis to do so. "The paragraphs of the complaint that defendants seek to strike are not scandalous or prejudicial and are relevant to the causes of action pleaded" (*Forty Cent. Park S., Inc. v Anza*, 130 AD3d 491, 492 [1st Dept 2015]). Detailed allegations concerning the purchase of the Property and related cash transfers along with their context were properly included given the specificity requirements applicable to breach of fiduciary duty claims (*see Parker Waichman LLP v Squier, Knapp & Dunn Communications, Inc.*, 138 AD3d 570, 571 [1st Dept 2016]).

Defendants further contend that a claim for attorneys' fees cannot be maintained as an independent cause of action. Defendants are correct (*see 59 Studios L.P. v Chelsea Piers L.P.*, 27 AD3d 217 [1st Dept 2006]). But that is academic. It is well settled that if plaintiff procures a substantial corporate benefit by recovering from defendants on behalf of the Company, he will be entitled to seek reimbursement of his reasonable attorneys' fees (*see Ital Assocs. v Axon*, 167 AD3d 537, 538 [1st Dept 2018], citing *Seinfeld v*

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<sup>6</sup> Plaintiff's argument that the alternative "direct" remedy contemplated by *Stavroulakis v Pelakanos* (58 Misc 3d 1221[A], at \*13-14 [Sup Ct, NY County 2018]) is appropriate because monetary damages or the transfer of the property to the Company is the most straightforward means of recovery is rejected. There are no peculiar reasons here to deviate from the usual rule that recovery in derivative actions belongs to the company (*see O'Neill v Warburg, Pincus & Co.*, 39 AD3d 281 [1st Dept 2007]).

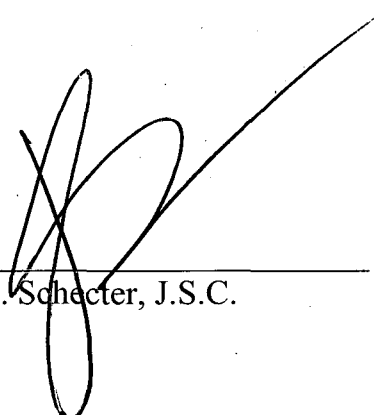
*Robinson*, 246 AD2d 291, 292 [1st Dept 1998]). It is obviously premature to determine if an award of attorneys' fee award will be warranted.

Finally, defendants' arguments raised for the first time on reply cannot serve as the basis for dismissal (*see Sylla v Brickyard Inc.*, 104 AD3d 605, 606 [1st Dept 2013]). The court expresses no views at this time on whether some of these arguments may be raised later (*see Stavroulakis*, 58 Misc 3d 1221[A], at \*13 n 27).<sup>7</sup>

Accordingly, it is ORDERED that defendants' motion to dismiss the LBKC Complaint is granted only to the extent that (1) the claims against Barbara Weinstein (in her individual capacity) and Candee Weinstein are dismissed; (2) plaintiff's individual claims are dismissed, including the fourteenth cause of action for attorneys' fees (subject to plaintiff's right to seek them upon prevailing on the derivative claims); and (3) the motion is otherwise denied.

Dated: September 27, 2019

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Jennifer G. Schechter, J.S.C.

<sup>7</sup> For example, defendants assert on reply that the LBKC Complaint lacks the requisite demand futility allegations (*see* Dkt. 299 at 15) and that the appointment of a receiver is an unwarranted remedy (*see id.* at 16). In any event, facts supporting a claim of demand futility could certainly be pleaded here (since Kenneth faces a substantial threat of the imposition liability) and the appropriate remedy for the alleged breach, if proven, is best determined after trial and not at the pleading stage. The court also declines to opine on whether a valid "requisite majority vote" occurred (*see* Dkt. 299 at 16)--a contention made without citation to any documentary evidence--given defendants' failure to address whether any such vote included members of LBKC, who were interested in the challenged transaction and thus would not have been able to vote on a deal that is subject to entire fairness review absent ratification from a majority of the unconflicted members (*see Stavroulakis*, 58 Misc 3d 1221[A], at \*10-11).