Bourbiaux v Probst
2026 NY Slip Op 51160(U)
July 27, 2026
Supreme Court, New York County
Robert R. Reed, J.
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> **Digest-Index Classification:** Labor—Hours and Wages—Claim for Unpaid Wages—Failure to Allege Employer-Employee Relationship. Labor—Whistleblower Law—Failure to Allege Employer-Employee Relationship

David Bourbiaux, THOMAS NIOCHAU, Plaintiff,

v

Theliau Probst, THIBAUT CASTET, BORDELLE LLC, BORDELLE II LLC, MAISON CLOSE NYC LLC, Defendant.

Supreme Court, New York County
Decided on July 27, 2026
Index No. 651161/2025

Robert R. Reed, J.

[*1]

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68, 69, 70, 71, 72, 74 were read on this motion to DISMISS.

Defendants Theliau Probst and Thibaut Castet (Defendants) move, pursuant to CPLR 3211(a) (1) and (7), for an order dismissing the First Cause of Action (New York Labor Law §§ 190 et seq.), Third Cause of Action (Breach of Duty of Good Faith and Fair Dealing), Fourth Cause of Action (Derivative Breach of Contract - Bordelle OA), Sixth Cause of Action (Breach of Fiduciary Duty), Eighth Cause of

Action (Unjust Enrichment), Ninth Cause of Action (Conversion - Bordelle), Tenth Cause of Action (Conversion - Bordelle II), Eleventh Cause of Action (Declaratory Judgment), Twelfth Cause of Action (Disgorgement of Attorneys' Fees Paid by Bordelle and/or Bordelle II), and Thirteenth Cause of Action (Double Derivative Claim - Maison LLC) asserted in Plaintiffs' David Bourbiaux and Thomas Niochau (Plaintiffs) Second Amended Complaint (SAC). Defendants also move, pursuant to CPLR 3024(b), for an order striking paragraphs 57, 132, 147, and 148 of the SAC.

Upon the foregoing papers, the notice of motion, affirmation of Defendants' memorandum of law and the reply memorandum, plaintiffs' opposition memorandum, affidavits of David Bourbiaux and Thomas Niochau, and the exhibits annexed thereto, and after oral argument on January 22, 2026, defendants' motion to dismiss is granted in part and denied in part as follows.

BACKGROUND

Plaintiffs are minority members of Bordelle LLC ("Bordelle") and Bordelle II LLC ("Bordelle II"). Defendants Theliau Probst (Probst) and Thibaut Castet (Castet) are alleged to be the managing members of Bordelle and Bordelle II. Bordelle is a New York limited liability company with a principal place of business in New York County. Bordelle II LLC ("Bordelle II") is a New Jersey limited liability company with a principal place of business in New York, New York. Maison Close NYC LLC ("Maison LLC") is a New York limited liability company **[*2]**that operates Maison Close, a restaurant located in New York County (SAC ¶¶ 1-6, 10).

The parties' relationship is governed principally by operating agreements executed in connection with Bordelle, Maison LLC, and Bordelle II. On or about February 28, 2022, the Bordelle members entered into the Bordelle operating agreement (Bordelle OA) (SAC ¶ 38; NYSCEF Doc No. 53). On or about May 13, 2022, Bordelle and Brandit Group NYC LLC entered into the Maison LLC operating agreement (Maison OA) (SAC ¶¶ 40-42). On November 8, 2023, the last of the Bordelle members signed an operating agreement relating to Bordelle II (Bordelle II OA) (SAC ¶ 86).

Under the Bordelle OA, Probst and Castet are the managers vested with the power both to control and to manage Bordelle's business and affairs (SAC ¶ 39[c]). The Bordelle members' ownership interest percentages are alleged to be the following: Probst 32.5%, Castet 31.5%, Niochau 23.5%, and Bourbiaux 12.5% (SAC ¶ 39[b]). Plaintiffs allege that their interests carry rights relating to profits, distributions, and company information, including financial reports and allocations of profits and net cash flow (SAC ¶¶ 39[d], [f], [g]).

Plaintiffs allege that Defendants improperly diverted business opportunities, failed to provide access to financial information, withheld distributions, operated competing ventures, and diluted Bourbiaux's ownership interest through an amendment to the Bordelle operating agreement (SAC ¶¶ 45-53, 104-121), which reduced Bourbiaux's ownership interest from 12.5% to 6%. Plaintiffs further allege that they were improperly terminated from employment associated with the restaurant operations (SAC ¶¶ 122-123). Defendants deny those allegations.

Defendants now move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss various causes of action asserted in the SAC, and, pursuant to CPLR 3024(b), to strike certain allegations.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court accepts the facts alleged in the complaint as true, accords plaintiffs the benefit of every favorable inference, and determines only whether the alleged facts fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Dismissal pursuant to CPLR 3211(a)(1) is warranted only where the documentary evidence utterly refutes the plaintiff's factual allegations and conclusively establishes a defense as a matter of law (*see Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]).

A. Violation of New York Labor Law §§ 190 et seq. and 215 (First Cause of Action)

The First Cause of Action is dismissed.

Plaintiffs seek recovery under Article 6 of the New York Labor Law for unpaid wages and under Labor Law§ 215, which prohibits employers from retaliating against employees who complain of Labor Law violations or otherwise exercise rights protected by the statute. Plaintiffs therefore must adequately allege that they were employed for hire by an employer that exercised sufficient control over the manner, terms, and conditions of their work.

New York's Labor Law § 190 (2) defines "employer" as "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service." Labor Law § 190 (3) defines "employee" as "any person employed for hire by an employer in any occupation, industry, trade, business or service." Article 6 of the Labor Law, which focuses on the payment of wages, therefore applies only where the plaintiff adequately alleges an employer-employee relationship within the meaning of the statute.

Courts applying the Fair Labor Standards Act (FLSA), the federal statute governing minimum wages, overtime compensation, and other employment standards, and the New York **[*3]**Labor Law use the "economic reality" test to determine whether an employer-employee relationship exists. The test is not controlled by labels, titles, or ownership status alone. Rather, it looks to the totality of the relationship, including whether the alleged employer had the power to hire and fire the worker, supervised and controlled work schedules or conditions of employment, determined the rate and method of payment, and maintained employment records (*Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999]; *see also Irizarry v Catsimatidis*, 722 F3d 99, 104 [2d Cir 2013]). The ultimate concern is whether, as a matter of economic reality, the worker depended on another's business for the opportunity to render service, or instead participated in the business as an owner, member, or co-venturer.

Plaintiffs argue that an individual may simultaneously hold an ownership interest in a business and qualify as an employee. The Court agrees that ownership status does not categorically preclude employee status (*see MacKenzie v Waypointe Partners Mgmt. LLC*, 2025 US Dist LEXIS 19946, at *17-*22 [SD NY 2025]). However, the inquiry remains one of economic reality. Here, the operating agreements, which constitute documentary evidence for purposes of CPLR 3211 (a) (1), establish that plaintiffs were members of Bordelle with defined ownership interests, rights to profit allocations and distributions, and access to company information. The agreements further vest management authority in Probst and Castet while recognizing Plaintiffs as equity participants in the enterprise. The documentary evidence therefore substantially defines Plaintiffs' relationship to the business and is properly considered on this motion.

Unlike the plaintiff in *MacKenzie*, who alleged that he lacked authority over company decisions, distributions, and business operations, Plaintiffs here allege disputes concerning ownership interests, distributions, governance rights, access to company information, dilution of equity, and the operation of jointly owned ventures. The pleadings, viewed as a whole, describe a dispute among business co-venturers concerning the management and economics of their shared enterprise rather than the type of wage-dependent employment relationship regulated by Article 6 of the Labor Law.

The pleadings therefore describe plaintiffs primarily as equity participants in a jointly owned hospitality venture, not as wage-dependent employees whose Labor Law claim arises from an employer-controlled employment relationship. Article 6 is not a vehicle to recast disputes among LLC members over distributions, management authority, and business opportunities as wage claims. Accordingly, Plaintiffs fail to allege an employer-employee relationship within the meaning of Labor Law §190 and therefore fail to state a claim for unpaid wages under Article 6 of New York Labor Law.

Plaintiffs also assert a retaliation claim. To state a retaliation claim under Labor Law § 215, a plaintiff must allege protected activity known to the employer, an adverse employment action, and a causal connection between the two (*see Wigdor v SoulCycle, LLC*, 139 AD3d 613, 613 [1st Dept 2016]). Even assuming plaintiffs adequately allege adverse action, the SAC principally alleges disputes concerning ownership interests, distributions, management authority, and governance of jointly owned entities rather than protected employee activity under Article 6. Because plaintiffs fail to allege adequately that they were employees within the meaning of Labor Law § 190, the retaliation claim under Labor Law § 215 likewise fails. Accordingly, the part of the motion seeking to dismiss the First Cause of Action is granted.

B. Breach of Implied Covenant of Good Faith and Fair Dealing (Third Cause of Action)

The Third Cause of Action is dismissed.

Implicit in every contract is a covenant of good faith and fair dealing, which embraces a pledge that "neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995] [citations omitted]). To demonstrate such a claim, a movant must allege facts showing that the opposition exercised contractual discretion or acted in a manner that deprived the movant of the benefits of the agreement (*id.*). A claim for breach of the implied covenant is duplicative where it arises from the same facts and seeks the same damages as a breach of contract claim, without alleging an independent duty or distinct injury (*Deer Park Enters., LLC v Ail Sys., Inc.*, 57 AD3d 711, 712 [2d Dept 2008]).

The allegations underlying the Third Cause of Action mirror those underlying the Second and Fifth Causes of Action for breach of contract. For example, while the Third Cause of Action alleges that defendants frustrated Plaintiffs' ability to receive distributions and access financial information (SAC ¶¶ 210-215), the same core conduct is alleged in support of the contract claims based on the operating agreements. Plaintiffs expressly plead the implied covenant claim only "[t]o the extent" the same conduct does not constitute a direct contractual breach (SAC ¶ 212). No independent duty or distinct injury is alleged. Therefore, because the implied covenant claim arises from the same facts, seeks the same relief, and alleges no duty independent of the operating agreements, it is duplicative of the breach of contract claims and cannot be maintained as a separate cause of action.

Accordingly, the motion to dismiss the Third Cause of Action is granted.

C. Derivative Breach of Contract, Bordelle OA (Fourth Cause of Action)

The Fourth Cause of Action is dismissed without prejudice.

Before commencing a derivative claim on behalf of an LLC, a movant ordinarily must either make a demand upon the managers to bring the action or plead with particularity that such a demand would have been futile (*see Marx v Akers*, 88 NY2d 189, 200-201 [1996]; *Matter of Comverse Tech., Inc. Derivative Litig.*, 56 AD3d 49, 55 [1st Dept 2008]). Demand futility means that a pre-suit demand upon the LLC's managers to commence litigation would have been futile because those charged with deciding whether the company should sue were incapable of exercising independent and disinterested business judgment. Conclusory allegations that demand would be futile because the managers participated in or approved the challenged conduct are insufficient. Demand futility must be pleaded with particularized facts demonstrating that a majority of the decisionmakers are incapable of exercising independent judgment regarding the proposed litigation (*id.*).

The SAC alleges only that demand would be futile because defendants allegedly "expressed a desire to continue to violate the non-compete" (SAC ¶ 274). That allegation is conclusory. It does not plead with particularity what demand was made, why a demand on Bordelle would have been futile, or facts showing that the managers were incapable of considering such a demand in the interest of the company.

Accordingly, the motion to dismiss the Fourth Cause of Action is granted without prejudice. The dismissal is based upon Plaintiffs' failure to allege demand or demand futility with the requisite particularity and does not reach the ultimate merits of the underlying derivative claim. Therefore, Plaintiffs are granted leave to replead this cause of action within thirty (30) days of service of notice of entry of this order.

D. Breach of Fiduciary Duty (Sixth Cause of Action)

The Sixth Cause of Action is dismissed.

A breach of fiduciary duty claim is duplicative of a breach of contract claim where it is premised on the same underlying conduct and seeks identical relief (*Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421, 422-423 [1st Dept 2014]). Plaintiffs plead the fiduciary duty claim only to the extent the conduct at issue does not constitute a breach of a specific contractual provision (SAC ¶ 238).

The operating agreements themselves impose fiduciary obligations upon the managers (Bordelle OA § 5.4[c]). To the extent Plaintiffs attempt to recast contractual and governance disputes as tort claims, such claims are duplicative. "It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). The duties allegedly breached here arise from the operating agreements and the parties' contractual business relationship, not from an independent legal duty extraneous to those agreements. Therefore, because the fiduciary duty claim arises from the same alleged conduct as the breach of contract claims and identifies no legal duty independent of the operating agreements, it is duplicative and cannot be maintained as a separate cause of action.

Accordingly, the motion to dismiss the Sixth Cause of Action is granted.

E. Unjust Enrichment (Eighth Cause of Action)

The Eighth Cause of Action is dismissed.

A claim for unjust enrichment requires a plaintiff to demonstrate that the defendant was enriched, at plaintiff's expense, and that equity and good conscience militate against permitting the defendant to retain what plaintiff seeks to recover (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]; *MacKenzie v Waypointe Partners Mgt. LLC*, 2025 US Dist LEXIS 19946, *17 [SD NY Feb. 4, 2025]). Unjust enrichment is unavailable, however, where a valid and enforceable contract governs the subject matter of the dispute (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

Plaintiffs' allegations concern the allocation of economic benefits arising from the parties' business relationship, including profits, distributions, management fees, and ownership interests. Those matters are governed by valid and enforceable operating agreements. Accordingly, quasi-contractual relief is unavailable because those agreements govern the subject matter of the dispute.

Accordingly, the motion to dismiss the Eighth Cause of Action is granted.

F. Conversion, Bordelle; Bordelle II (Ninth and Tenth Causes of Action)

The Ninth and Tenth Causes of Action are dismissed.

Conversion is the unauthorized assumption and exercise of the right of ownership over goods or specifically identifiable property belonging to another, to the exclusion of the owner's rights (*Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44 [1995] [citation and internal quotations omitted]). A conversion claim based on money requires legal ownership or an immediate superior right of possession to a specifically identifiable fund, not merely a contractual right to payment (*Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883, 883 [1st Dept 1982]; *See also Interstate Adjusters, Inc. v First Fid. Bank, N.A.*, 251 AD2d 232, 234 [1st Dept 1998]).

The SAC alleges conversion of "Bordelle profits" and "Bordelle II profits" (SAC ¶¶ 251-256). An undifferentiated right to a share of undistributed LLC profits describes a contractual right to distributions under the operating agreements, not an immediate right to possess a specific, segregated fund (*Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883, 883 [1st **[*4]**Dept 1982]; *See also Interstate Adjusters, Inc. v First Fid. Bank, N.A.*, 251 AD2d 232, 234 [1st Dept 1998]). Plaintiffs therefore fail to plead the specific property interest required for conversion.

The conversion claims are also duplicative of the contract claims because they arise from the same alleged failure to distribute profits and do not allege a duty independent of the operating agreements (*see Rossetti v Ambulatory Surgery Ctr. of Brooklyn, LLC*, 125 AD3d 548, 549 [1st Dept 2015]).

Accordingly, the motion to dismiss the Ninth and Tenth Causes of Action is granted.

G. Declaratory Judgment (Eleventh Cause of Action)

The Eleventh Cause of Action is dismissed.

Plaintiffs seek a declaratory judgment declaring that the Bordelle Amendment 1 is null and void for lack of consideration and that the non-compete provisions in the operating agreements are unenforceable as applied to employment in Miami, Florida (SAC ¶¶ 257-260).

Plaintiffs contend that the declaratory judgment claim is not duplicative because it seeks declaratory relief rather than damages. The Court disagrees. That distinction does not require a separate declaratory judgment cause of action where the same legal issue is already embedded in the breach of contract claims. The request to invalidate Bordelle Amendment 1 overlaps with plaintiffs' contract theory that the amendment was ineffective and that distributions and ownership interests should be governed by the original agreement. A separate declaration would serve no useful purpose beyond the contract claims (*see Apple Records v Capitol Records*, 137 AD2d 50, 54 [1st Dept 1988]).

Plaintiffs' request for a declaratory judgment concerning employment in Miami, Florida is not ripe. Plaintiffs seek a declaration that the non-compete provisions are unenforceable as applied to employment in Miami, but no enforcement action has been taken against Plaintiffs concerning employment in Miami nor have any facts been articulated to justify a conclusion that such enforcement action is imminent. The controversy is therefore not presently justiciable (*see Touro Coll. v Novus Univ. Corp.*, 146 AD3d 679, 679-680 [1st Dept 2017]).

Accordingly, the motion to dismiss the Eleventh Cause of Action is granted.

H. Disgorgement (Twelfth Cause of Action)

The Twelfth Cause of Action is dismissed.

The Twelfth Cause of Action is styled as a claim for "Disgorgement of Attorneys' Fees Paid by Bordelle and/or Bordelle II" (SAC ¶¶ 261-265). Plaintiffs allege that Probst and Castet caused Bordelle and/or Bordelle II to pay attorneys' fees incurred in defense of this action and that such indemnification would be improper if their liability stems from intentional misconduct, gross negligence, knowing violation of law, bad faith, active and deliberate dishonesty, or personal financial gain to which they were not legally entitled (SAC ¶¶ 261-265).

Disgorgement is an equitable remedy requiring a wrongdoer to surrender money or benefits obtained through wrongful conduct. It is not, standing alone, an independent cause of action (*see NWM Capital, LLC v Scharfman*, 144 AD3d 414, 415 [1st Dept 2016]; *Marcum LLP v L'Abbate, Balkan, Colavita & Contini, L.L.P.*, 222 AD3d 486, 488 [1st Dept 2023]). Rather, disgorgement is derived from an underlying substantive claim.

This dismissal does not decide whether Plaintiffs may ultimately seek repayment or disgorgement of fees as a remedy if they prevail on a surviving claim and establish facts supporting that relief. It only dismisses disgorgement as an independent cause of action.

Accordingly, the motion to dismiss the Twelfth Cause of Action is granted.

[*5]I. Double Derivative Claim — Maison LLC (Thirteenth Cause of Action)

The motion to dismiss the Thirteenth Cause of Action is denied.

Plaintiffs assert the Thirteenth Cause of Action as a double derivative claim on behalf of Maison LLC through Bordelle, which allegedly owns a fifty-percent membership interest in Maison LLC and serves as its managing member (SAC ¶¶ 266-275). A double derivative claim permits an owner of a parent entity to seek relief for injury to a subsidiary where the parent itself has failed to act (*see Matter of Comverse Tech., Inc. Derivative Litig.*, 56 AD3d 49, 52 [1st Dept 2008]).

Plaintiffs allege that Probst and Castet violated the Maison OA's non-compete provision by owning and operating Petite Disco, Ayah, and Monsieur Bistro, and by diverting business opportunities, staff, customers, resources, and goodwill away from Maison LLC (SAC ¶¶ 269-271). Plaintiffs further allege that Maison LLC failed to enforce its rights under the Maison OA despite knowledge of the alleged breaches, and that Bordelle, although vested with authority to manage Maison LLC, likewise failed or refused to act (SAC ¶¶ 272-273).

Unlike the Fourth Cause of Action, the Thirteenth Cause of Action is supported by additional factual allegations bearing on demand futility. The SAC alleges that Probst and Castet control Bordelle, that they are the persons alleged to be operating the competing ventures, and that Castet admitted defendants had concealed Monsieur Bistro because they were "at war" with plaintiffs (SAC ¶¶ 39[c], 153, 267-270). Accepting those allegations as true and according plaintiffs every favorable inference, the SAC sufficiently alleges that demand on Bordelle to cause Maison LLC to enforce its rights would have been futile.

Defendants have not submitted documentary evidence that utterly refutes these allegations or conclusively establishes a defense as a matter of law. Accordingly, the motion to dismiss the Thirteenth Cause of Action is denied.

CONCLUSION AND ORDER

Accordingly, it is hereby

ORDERED that Defendants Theliau Probst and Thibaut Castet's motion to dismiss is granted as to the First Cause of Action (New York Labor Law §§ 190 et seq.), Third Cause of Action (Breach of Duty of Good Faith and Fair Dealing), Sixth Cause of Action (Breach of Fiduciary Duty), Eighth Cause of Action (Unjust Enrichment), Ninth Cause of Action (Conversion - Bordelle), Tenth Cause of Action (Conversion - Bordelle II), Eleventh Cause of Action (Declaratory Judgment), and Twelfth Cause of Action (Disgorgement of Attorneys' Fees Paid by Bordelle and/or Bordelle II), and those causes of action are dismissed; and it is further

ORDERED that defendants' motion to dismiss is granted as to the Fourth Cause of Action (Derivative Breach of Contract — Bordelle OA), without prejudice, with leave to plaintiffs to serve and file an amended pleading within thirty (30) days of entry of this order setting forth particularized allegations of demand or demand futility; and it is further

ORDERED that defendants' motion to strike is granted as to paragraphs 132 and 147 of the Second Amended Complaint, and those paragraphs are stricken; and it is further

ORDERED that defendants' motion to strike is denied as to paragraphs 57 and 148; and it is further

ORDERED that defendants' motion to dismiss is denied as to the Second Cause of Action (Breach of Contract — Bordelle OA), Fifth Cause of Action (Breach of Contract — Bordelle II OA), Seventh Cause of Action (Accounting), and Thirteenth Cause of Action (Double Derivative **[*6]**Claim — Maison LLC).

DATE July 27, 2026

ROBERT R. REED, J.S.C.