

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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MICHAEL H. STEINHARDT,

Plaintiff,

- v -

STEVEN ODZER, RUBEN AZRAK, and BT SUPPLIES
WEST, INC.,

Defendants.

INDEX NO. 651192/2024

MOTION DATE _____

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 29, 30, 31, 33, 35

were read on this motion to/for DISMISSAL.

In this action, plaintiff and minority shareholder of BT Supplies West, Inc. (BTSW, or the Company), Michael H. Steinhardt, sues defendants and shareholders Steven Odzer and Ruben Azrak, individually and derivatively, “for stealing and wasting Company assets, diverting Company opportunities, grossly negligently mismanaging the Company’s business, and breaching their duties as fiduciaries.” (NYSCEF Doc. No. [NYSCEF] 1, Complaint ¶ 1.)

In motion sequence 001, defendants move pursuant to CPLR 3211(a)(1), (3), (5), and (7) to dismiss the complaint. (NYSCEF 29, Amended Notice of Motion.)

Background

BTSW is a company engaged “in the janitorial supply and Covid-19-related Personal Protective Equipment (‘PPE’) business.” (NYSCEF 1, Complaint ¶ 13.)

The parties in this action are shareholders of BTSW. Plaintiff Steinhardt owns 100 shares of Class A common stock and 50 shares of Class B common stock. (*Id.* ¶

9.) Defendant Odzer is a “majority shareholder” of BTSW, as well as the chief executive officer (CEO) and Vice President. (*Id.* ¶ 10.) Defendant Azrak is “the majority beneficial owner of BTSW” as well as “an officer and director of the Company.” (*Id.* ¶ 11.)

In 2018, Odzer was introduced to Rabbi Evan (Eitan) Rubin, the principal member of RSH BTSW, LLC (RSH) and Realstar Holdings, LLC (Realstar), and “fraudulently induced” him to invest \$7 million in BTSW. (*Id.* ¶¶ 34-36.) BTSW intended to use the money to acquire L&M Food Services, Inc. (L&M), and grant RSH and Realstar a beneficial interest through BTSW. (*Id.* ¶ 36.) Instead, \$2.3 million went into Odzer’s personal bank account, and L&M was acquired by AZO Supplies LLC (AZ), an entity owned by Azrak and Odzer. (*Id.* ¶¶ 37-38.) 885 Airpark, LLC (885 Airpark), another entity formed by Azrak and Odzer purchased the land on which L&M was located, also using funds invested through Rubin’s entities. (*Id.* ¶ 38.)

Between March 23, 2020, and April 30, 2020, Realstar led a group of investors who collectively invested \$13,232,000 in BTSW for the purchase of PPE (the PPE Loans). (*Id.* ¶ 51.) BTSW agreed to repay the principal amount of the PPE Loans and also agreed that Realstar would receive a third of the profits of sales of PPE. (*Id.* ¶ 52.) Moreover, BTSW would use the remaining profits to service its debts to RSH. (*Id.* ¶ 53.) When BTSW failed to honor these promises, RSH and Realstar sued BTSW for more than \$41 million. (*Id.* ¶ 55.) Other investors also brought lawsuits against BTSW. (*Id.* ¶¶ 61-63, 68, 74, 76, 78, 81, 83-84, 87.)

On March 5, 2024, Steinhardt brought this action to recover its investments in BTSW and for damages to the Company caused by Azrak and Odzer’s diversion of

corporate opportunities, mismanagement, breach of contracts, and defrauding of investors. Defendants move herein to dismiss the complaint.

Legal Standard

On a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, “accept the facts alleged in the complaint as true, afford plaintiffs the benefit of every possible favorable inference, and determine only whether the facts alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].)

CPLR 3211(a)(1) allows a party to seek dismissal of a cause of action asserted against him because “a defense is founded upon documentary evidence.” (CPLR 3211 [a] [1].) A cause of action may be dismissed pursuant to CPLR 3211(a)(1) “only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Leon v Martinez*, 84 NY2d at 88.)

CPLR 3211(a)(3) allows a party to seek dismissal of a cause of action asserted against him because “the party asserting the cause of action has not legal capacity to sue.” (CPLR 3211 [a] [3].) “Where a CPLR 3211(a)(3) motion is based upon an alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff’s lack of standing as a matter of law.” (*Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79, 89-90 [2d Dept 2021] [citations omitted].)

CPLR 3211(a)(5) allows a party to seek dismissal of a cause of action asserted against him because “the cause of action may not be maintained because of statute of limitations.” (CPLR 3211 [a] [5].) “On a motion to dismiss a cause of action . . . as barred by the applicable statute of limitations, a defendant must establish, prima facie,

that the time within which to sue has expired. Once that showing has been made, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations has been tolled, an exception to the limitations period is applicable, or the plaintiff actually commenced the action within the applicable limitations period.” (*Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman, LLP*, 188 AD3d 530, 531 [1st Dept 2020] [citation omitted].)

CPLR 3211(a)(7) allows a party to seek dismissal of a cause of action asserted against him because “the pleading fails to state a cause of action.” (CPLR 3211 [a] [7].) When considering a motion pursuant to CPLR 3211(a)(7) “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977].) “[B]are legal conclusions as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence” cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted].) However, “a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint.” (*Leon v Martinez*, 84 NY2d 83, 88 [1994] [citing *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 (1976)].)

Discussion

In the complaint, plaintiff alleges twelve causes of action. (NYSCEF 1, Complaint.) Six of the claims are asserted derivatively for (1) breach of fiduciary duty against Odzer, (2) aiding and abetting breach of fiduciary duty against Azrak, (3) breach of fiduciary duty against Azrak, (4) aiding and abetting breach of fiduciary duty against Odzer, (7) unjust enrichment against Odzer and Azrak, and (8) an accounting against

Odzer and Azrak. The remaining six claims are asserted directly for (5) breach of contract against BTSW, (6) breach of contract against Odzer and Azrak, (9) breach of fiduciary duty against Azrak, (10) aiding and abetting breach of fiduciary duty against Odzer, (11) breach of fiduciary duty against Odzer, and (12) aiding and abetting breach of fiduciary duty against Azrak.

Defendants move to dismiss the complaint on the grounds that (i) there is an “impermissible conflict” between Steinhardt’s direct and derivative claims, (ii) the direct claims are derivative in nature, and (iii) the claims are barred by the statute of limitations.

Derivative Claims

Defendants argue that an impermissible conflict exists between Steinhardt’s direct and derivative claims, and that such conflict warrants dismissal of Steinhardt’s derivative claims. Specifically, defendants contend that where, as here, there are other shareholders not party to the action and plaintiff asserts a direct claim against the Company¹, the entity whose interest it is trying to protect by suing derivatively, the premise that plaintiff will fairly and adequately represent the interest of the corporation cannot be satisfied, thus warranting dismissal of all derivative claims.

Where an actual conflict of interest exists between plaintiff’s direct and derivative claims, dismissal of the derivative claims is warranted because

“[a]n adequate representative must have the capacity to prosecute a derivative suit vigorously and need be free from interests that are antagonistic to the interests of the class. While there is always a theoretical conflict of interest in situations where a plaintiff in a single lawsuit seeks redress on behalf of the corporation and from the corporation, it is indisputable that the existence of an actual conflict

¹ Plaintiff’s fifth cause of action is a direct claim against BTSW for breach of contract. (See NYSCEF 1, Complaint ¶¶ 127-131.)

disqualifies a plaintiff from acting as representative in these dual capacities. An actual conflict may exist where substantial recovery on the [direct] claim may reduce the potential recovery on behalf of the corporation on the derivative claim.” (*Cypress Holdings, III, L.P. v Sport-BLX, Inc.*, 2024 US Dist LEXIS 171442, *14 [SD NY, Sept. 23, 2024, No. 22 Civ 1243 (LGS) [internal quotation marks and citations omitted].)

However, even where an actual conflict exists between the direct and derivative claims

“both types of claims can [] survive in one action if specific circumstances exist. Direct and derivative claims may be brought in the same action, for example, when the company at issue in the litigation has been dissolved, or is otherwise no longer in existence, or where the plaintiffs and defendants are the only shareholders of the company, such that recovery on either the direct or derivative claim would inure to the benefit of the same individuals.” (*Id.* at *14 -15 [internal quotation marks and citations omitted].)

In the fifth cause of action, Steinhardt alleges breach of contract on the part of BTSW. (See NYSCEF 1, Complaint ¶¶ 127-131.) This claim creates an actual conflict with Steinhardt’s derivative claims because if Steinhardt were to succeed on its contract claim, Steinhardt’s damages would reduce the potential recovery on behalf of the corporation on the derivative claims. (See *Prophet Mortgage Opportunities, LP v Trust*, 2024 WL 708774, *5-6 [SD NY, Feb. 21, 2024, No. 22 Civ 9771 (JPC)] [court dismissed derivative claims after finding that plaintiff’s recovery on its direct claims “may well reduce the [nominal defendant’s] recovery on its derivate claims”]; see also *Pokoik v Norsel Realities*, 2017 NY Slip Op 50459[U], *6 [Sup Ct, NY County 2017] [“if a plaintiff cannot demonstrate . . . that [he] is free of adverse personal interest . . . the derivative causes of action will be dismissed” (citations omitted)].)

Steinhardt argues that even if an actual conflict exists, his direct and derivative claims may be brought in the same action because “there are no other non-defendant shareholders.” (NYSCEF 10, Defendants’ MOL at 10.) “Direct and derivative claims have [] been allowed to move forward simultaneously where the plaintiffs and the

defendants were the only shareholders of the company, such that recovery on either the direct or the derivative claim would inure to the benefit of the same individuals.”

(*Tatintsian v Vorotyntsev*, 2018 WL 23244998, *3 [SD NY, May 22, 2018, No. 1:16-cv-7203-GHW].) Defendants argue that documentary evidence – the 2015 Common Stock Purchase Agreement (NYSCEF 7) – conclusively establishes that there are *other* shareholders than those party to this action – Sig Rogich and Sam Rottenstein – and therefore, the direct and derivative claims cannot proceed simultaneously. Steinhardt submits in opposition (i) a June 28, 2023 letter to Odzer and Azrak in which Rogich “irrevocably surrender[s] and relinquish[es] [his] shares as well as all ownership in [BTSW]” (NYSCEF 12) and (ii) Rottenstein’s January 29, 2024 deposition transcript (NYSCEF 13), in which he testifies that he is no longer a shareholder of BTSW (*id.* at 57: 17-25). Defendants argue that Steinhardt’s submissions do not defeat their defense because BTSW’s July 31, 2019 balance sheet (NYSCEF 16) and 2019-2020 Find Report (NYSCEF 17) evidence the existence of Jacob Goldman and Boaz Spitz as shareholders.² The court finds that the documentary evidence fails to conclusively establish whether BTSW has other shareholders whose existence would preclude plaintiffs from bringing both direct and derivative claims in this action.

² Plaintiff filed a proposed order to show cause, seeking leave to file a sur-reply to answer defendants’ allegations about the existence of other BTSW’s shareholders. (NYSCEF 18, Proposed Order to Show Cause; NYSCEF 28, MOL in Support.) The court declined to sign the proposed OSC, noting that the “parties and court shall discuss need for sur reply at argument.” (NYSCEF 32.) During oral argument, plaintiff’s counsel argued that Odzer’s deposition testimony in the related action captioned at *RSH BTSW, LLC v BT Supplies West, Inc.*, Index No. 613625/2021, evidence that there are no other shareholders other than Odzer, Azrak, and Steinhardt. (NYSCEF 35, Tr at 11: 5-14.) Defendants’ counsel argued that Odzer’s deposition testimony, in fact, evidence that there are other shareholders, including Ganz, Goldman, and Rubin. (*Id.* at 8: 2-8.)

“Courts can allow both sets of claims to move forward if the existence of a conflict is unclear, and then use their power to fashion a proper remedy if a conflict arises.” (*Tatintian*, 2018 WL 23244998 at *3 [SD NY, May 22, 2018] [internal quotation marks and citation omitted]; see also *Cypress Holdings, III, L.P.*, 2024 US Dist LEXIS 171442 at *13 [SD NY 2024] [“derivative claims . . . survive the motion as the existence of a conflict is unclear” (internal quotation marks and citation omitted).] Therefore, the court declines to dismiss the derivative claims at this stage of the litigation.

Accordingly, defendants’ motion to dismiss the first, second, third, fourth, seventh, and eight causes of action is denied.

Direct Claims

Defendants argue that Steinhardt’s ninth, tenth, eleventh, and twelfth causes of action³ should be dismissed because they are improperly labeled direct claims when they are, in fact, derivative in nature and identical to Steinhardt’s first, second, third, and fourth causes of action.

“A plaintiff asserting a derivative claim seeks to recover for injury to the business entity. A plaintiff asserting a direct claim seeks redress for injury to him or herself individually. Sometimes whether the nature of the claim is direct or derivative is not readily apparent. New York does not have a clearly articulated test, but approaches the issue on a case by case basis depending on the nature of the allegations.” (*Yudell v Gilbert*, 99 AD3d 108, 113 [1s Dept 2012].)

Steinhardt argues that the ninth, tenth, eleventh, and twelfth causes of action are direct claims because Odzer and Azrak, as majority shareholders, owed Steinhardt, as a minority shareholder, fiduciary duties, and that Odzer and Azrak’s breach of such

³ In the complaint, Steinhardt alleges direct claims for breach of fiduciary duty against Azrak, aiding and abetting breach of fiduciary duty against Odzer, breach of fiduciary duty against Odzer, and aiding and abetting breach of fiduciary duty against Azrak. (NYSCEF 1, Complaint.)

duties injured Steinhardt “separate and distinct from the damages suffered by the corporation.” (NYSCEF 10, Plaintiff’s MOL at 20.) In the complaint, Steinhardt alleges that Azrak and Odzer breached their fiduciary duties to Steinhardt by (i) “taking money from investments made by investors and using it for his own personal purposes” (NYSCEF 1, Complaint ¶¶ 150, 170), (ii) “diverting corporate opportunities away from [BTSW]” (*id.* ¶¶ 151, 171), (iii) “allowing [BTSW] to default on actions brought against it and failing to pay [BTSW’s] attorneys in those actions” (*id.* ¶¶ 152, 172), (iv) “defrauding investors into investing in [BTSW]” (*id.* ¶¶ 153, 173), (v) “breaching numerous contracts, personal guarantees, agreements and purchase orders” (*id.* ¶¶ 154, 174), and (vi) “managing [BTSW’s] affairs in such a grossly negligent and reckless way that it is essentially no longer an operating and going concern” (*id.* ¶¶ 155, 175).

Though courts allow shareholders to bring direct claims, such claims are appropriate only “when the wrongdoer has breached a duty owed to the shareholder independent of any duty owing to the corporation wronged.” (*Abrams v Donati*, 66 NY2d 951, 953 [1985] [citations omitted].) “[A]llegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually.” (*Abrams v Donati*, 66 NY2d 951, 953 [1985] [citations omitted].) Similarly, courts have held that “[t]he fruits of a diverted corporate opportunity are properly a corporate asset” and that even though “the innocent shareholder[] was injured [] to the extent that he was entitled to share in those profits . . . [the injury] [i]s derivative, not direct.” (*Glenn v Hoteltron Systems, Inc.*, 74 NY2d 386, 392-93 [1989].) Steinhardt’s allegation of breach of fiduciary duty is derivative. “[A]ny pecuniary loss plaintiffs

suffered derives from a breach of duty and harm to the business entity.” (*Yudell*, 99 AD3d at 114 [1st Dept 2012].) Since Steinhardt’s causes of action for breach of fiduciary duty cannot be maintained as direct claims, his causes of action for aiding and abetting breach of fiduciary duty must also be dismissed. (*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003].)

Accordingly, defendants’ motion to dismiss the ninth, tenth, eleventh, and twelfth causes of action is granted.

Statute of Limitations

Defendants argue that Steinhardt’s fifth cause of action for breach of contract against BTSW is barred by the six-year statute of limitations for contract claims pursuant to CPLR 213(2). Steinhardt argues that equitable tolling precludes dismissal of his claim.

“The doctrine of equitable estoppel applies where it would be unjust to allow a defendant to assert a statute of limitations defense.” (*Zumpano v Quinn*, 6 NY3d 666, 673 [2006].) Specifically, “equitable estoppel will apply where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action.” (*Id.* [internal quotation marks and citation omitted].) Here, Steinhardt alleges that the doctrine applies because BTSW, through Odzer, fraudulently misrepresented that Steinhardt would be repaid the \$4,695,648 he loaned to the Company. Specifically, Steinhardt alleges in the complaint that “on February 7, 2017, [Odzer] told Mr. Steinhardt that a series of checks would leave him with money ‘toward the old debt’” and that “[i]n 2020, Odzer continually stated to Mr. Steinhardt’s CFO that a series of payments would be made to bring down the amounts owed.” (NYSCEF 1, Complaint ¶¶

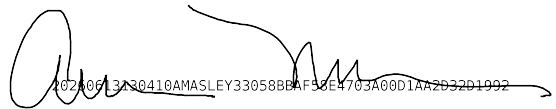
95, 98.) Moreover, Steinhardt alleges his reliance on Odzer’s promises by stating that Odzer “play[ed] on Mr. Steinhardt’s emotions and . . . [their] alleged ‘friendship’.” (*Id.* ¶ 96.) Defendants do not address Steinhardt’s invocation of the equitable estoppel doctrine on reply. (See NYSCEF 15, Reply Affirmation.) Thus, the court finds that Steinhardt’s allegations are sufficient, at this stage of the litigation, to apply the doctrine of equitable estoppel. Therefore, defendants’ motion to dismiss the fifth cause of action is denied.

Accordingly, it is

ORDERED that motion sequence 001 is granted in part, to the extent that the ninth, tenth, eleventh, and twelfth causes of action are dismissed; and it is further

ORDERED that defendants are directed to answer the complaint by June 30, 2026; and it is further

ORDERED that the parties shall comply with Part 48 Procedure 16 (initial disclosure) by June 30, 2026. The parties shall also meet and confer and submit a proposed Part 48 preliminary conference order, via NYSCEF and email, by June 18, 2026. If the parties cannot agree, each may submit competing proposals.



6/13/2026

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE