SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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MATTHEW R. MAYERS, Index No.: 650410/2013

Plaintiff, **DECISION & ORDER**

-against-

STONE CASTLE PARTNERS, LLC, GEORGE SHILOWITZ, JOSHUA S. SIEGEL, CHARLESBANK EQUITY FUND VI, LIMITED PARTNERSHIP, CHARLESBANK EQUITY COINVESTMENT FUND VI, LIMITED PARTNERSHIP, CHARLESBANK COINVESTMENT PARTNERS, LIMITED PARTNERSHIP, CB-SC ACQUISITION, INC., CB-SC II, INC., and CIBC CAPITAL CORPORATION,

Defendants.

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STONE CASTLE PARTNERS, LLC, Index No.: 654075/2013

Plaintiff,

-against-

MATTHEW R. MAYERS and RRWT, LLC,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 004 and 006 are consolidated for disposition.

Matthew R. Mayers and RRWT, LLC (RRWT) move, pursuant to CPLR 3211, to dismiss the complaint of Stone Castle Partners, LLC (the Company). Seq. 004.[1] Mayers moves, pursuant to CPLR 2221, for reargument of the court's order dated February 19, 2014 (the Prior Dismissal Decision) (Dkt. 86), which dismissed certain of the claims in Mayers' complaint. Seq. 006. The motions are granted in part and denied in part for the reasons that follow.

[1] The actions were joined for discovery and trial.

I. Reargument of the the Prior Dismissal Decision

"A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dept 1992) (quotation marks omitted). "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." *Id.*

The court assumes familiarly with the Prior Dismissal Decision,[2] which sets forth the Company's allegations regarding Mayers' involvement with Tropic. Reargument of the holdings in the Prior Dismissal Decision [*see* Dkt. 86 at 14] is denied. However, in light of the parties' differing interpretations of the court's dicta in the Prior Dismissal Decision, to clarify, *the court holds here that no findings of fact were made in that decision*, which was a dismissal, not a summary judgment, decision. Despite the dicta, the court was quite clear that "regardless of how the court might view Mayers' actions, it is the LLC Agreement itself and, to the extent its terms are unclear, the parties' own intentions that will determine if Mayers forfeits half his equity." *See* Dkt. 86 at 11. In other words, the core issue of whether Mayers' involvement with Tropic is amenable to "remedial action" under section 6.01(b) of the LLC Agreement is a question of fact. It was not decided in the Prior Dismissal Decision, nor should the parties cite the court's dicta at the summary judgment stage to make an argument purportedly based on "law of the case."[3] The

[2] All capitalized terms have the same meaning as in the Prior Dismissal Decision.

[3] To the extent the Prior Dismissal Decision misstated certain details immaterial to the court's holdings [*see, e.g.*, Dkt. 136 at 9-10 n.4], the parties obviously should not rely on such facts at the summary judgment stage.

Prior Dismissal Decision should only be used to determine which of the causes of action in Mayers' complaint survived dismissal.

II. The Company's Motion to Dismiss

A. Allegations & Procedural History

The Company's complaint was filed on November 25, 2013. However, the court cites to and applies the instant motion to the Company's amended complaint, filed on April 15, 2014 (the AC). *See* Dkt. 153. The AC is identical to the Company's original complaint, aside from the deletion of certain language in paragraph 33, which was at issue in the disqualification motion.[4] Compare Dkt. 61 at 11, with Dkt. 153 at 10-11.

The AC, in essence, is a countersuit against Mayers and RRWT, the latter being a company used by Mayers to acquire Tropic CDO Preferred Shares. *See* AC ¶ 27. With the AC, the Company seeks to prevail on the for-Cause dispute at issue in Mayers' lawsuit by virtue of Mayers' involvement with Tropic, as well as two other endeavors discussed below. The AC asserts eight causes of action: (1) a declaratory judgment that Mayers was validly terminated for Cause; (2) a declaratory judgment that the Company has rights with respect to the Contingent Compensation Agreement (discussed below); (3) breach of the LLC Agreement, asserted against Mayers; (4) tortious interference with the LLC Agreement, asserted against RRWT; (5) breach of fiduciary duty, asserted against Mayers; (6) aiding and abetting breach of fiduciary duty, asserted against RRWT; (7) tortious interference with prospective business relations, asserted against Mayers; and (8) disgorgement of compensation under the "faithless servant" doctrine, asserted against Mayers.

[4] *See Mayers v Stone Castle Partners, LLC*, 126 AD3d 1 (1st Dept 2015).

In the AC, the Company complains of Mayers' conduct with respect to three ventures: (1) Tropic; (2) an opportunity to obtain a fee in connection with Argentine debt litigation; and (3) contemplated *qui tam* litigation. The court will only discuss the Company's allegations related to the latter two ventures, as the facts underlying the AC's Tropic allegations involve the same conduct discussed in the Prior Dismissal Decision.[5] Additionally, the court will not discuss the applicable terms of the LLC Agreement, which also are set forth in detail in the Prior Dismissal Decision.

In 2005, while allegedly acting on behalf of the Company, Mayers identified an "Asset" (not named in the AC) that could be used by creditors seeking to enforce a judgment in a long running dispute over the Republic of Argentina's default on its sovereign debt. AC ¶ 59; *see generally NML Capital, Ltd. v Republic of Argentina*, 699 F3d 246 (2d Cir 2012).[6] Working under the oversight and with the approval of Siegel, a Company board member, Mayers negotiated an agreement with two of Argentina's creditors, whereby the Company would disclose information about the Asset in exchange for a fee. ¶¶ 61-62. The terms were set forth in a letter agreement dated October 24, 2006.[7] ¶ 62. Mayers, however, did not enter into the

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[5] The only point worth noting is that Mayers' argument that his involvement with Tropic was permissible since Tropic was not on the Company's "Restricted List" is unavailing at this juncture. The Company explains that such list merely restricts transacting in certain securities that could give rise to insider trading liability. The legal significance of the list is a question of fact (which may require expert testimony) that cannot be resolved on a motion to dismiss.

[6] The holdout creditors have gone to great (and quite creative) lengths to identify and seize assets not subject to sovereign immunity. *See* Emily Schmall, *Seizure of Ship From Argentina Forces Shake-Up*, N.Y. TIMES (Oct. 18, 2012), available at http://www.nytimes.com/2012/10/19/world/americas/seizure-of-argentine-ship-forces-shake-up.html?_r=0.

[7] The letter agreement was submitted as exhibit 4 to the affidavit of Marshall T. Potashner dated January 23, 2014. *See* Dkt. 60. The letter agreement, along with certain other exhibits, were filed under seal.

letter agreement on behalf of the Company, but executed the agreement on behalf of non-party Royal Capital Partners, LLC (RCP), which allegedly is an affiliate of the Company. *Id.*

After Mayers provided the judgment creditors with information concerning the Asset, Mayers, again acting with Siegel's approval, entered into a "Contingent Compensation Agreement" with the judgment creditors (the CCA). ¶ 63. Siegel's understanding was that the CCA would be entered into by an affiliate of the Company. ¶ 64. Instead, on February 8, 2007, Mayers executed the CCA on behalf of RRWT, the entity, as noted earlier, that Mayers used to purchase Tropic shares. ¶¶ 64-65. According to the Company, the judgment creditors eventually secured the Asset on July 19, 2012, but, as far as the Company knows, the Asset has not yet been liquidated. ¶ 65. Nonetheless, at various points between 2006 and November 2012, when Siegel asked Mayers about the status of the judgment creditor deal, Mayers told Siegel "that there had been little to no progress and that any expected revenues from the transaction were not quantifiable." ¶ 66. The Company claims this alleged deceit is a basis to terminate Mayers for Cause.

Additionally, during 2011, Mayers, allegedly acting as director of an entity called the Center for Equal Application of Fair Housing Laws, LLC, contemplated commencing *qui tam* litigation against municipalities under the federal False Claims Act. ¶ 69. Mayers allegedly contemplated suing the cities of New York, Buffalo, and Newark, New Jersey, as well as Westchester County. ¶ 71. According to the AC, Mayers performed substantial work in contemplation of this litigation, including conducting due diligence and drafting complaints. ¶¶ 72, 74. The Company claims that the contemplated *qui tam* litigation was problematic for two reasons. First, Mayers did not receive permission from the Company to involve himself in this

sort of litigation. ¶ 74. Had he done so, the Company would have strenuously objected since Mayers' connection to that litigation would pose a significant customer relations problem for the Company since a substantial percentage of its clients are the very sort of municipalities Mayers intended to sue. ¶ 73. Second, the amount of work entailed in Mayers' *qui tam* litigation allegedly violated section 6.01 of the LLC Agreement, which prohibits non-Company related work that that requires "material time." ¶ 74.

B. Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames, id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed only if "the documentary evidence utterly refutes plaintiff's factual

allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

C. Discussion

To begin, Mayers argues that the Company lacks standing to assert any claims related to the CCA because that was a deal involving RCP, not the Company. The argument misconstrues the Company's allegations. The Company is not asserting a claim for breach of the CCA or the prior letter agreement. Obviously, only the contracting parties, which did not include the Company, could assert such a claim. The Company is alleging that Mayers violated his duties to the Company by entering into the CCA on his own behalf (via RRWT), rather than on behalf of the Company or one of its affiliates. The Company asserts this claim both as a basis to justify for-Cause termination and also as a claim for breach of fiduciary duty. The claim, as asserted, belongs to the Company, not RCP, since it was the Company that was harmed when the opportunity to benefit from the CCA was allegedly taken from it by Mayers.

Next, Mayers argues that the Company has not alleged an independent claim for breach of fiduciary duty that is not duplicative of the Company's claim for breach of the LLC Agreement. As discussed in the Prior Dismissal Decision, these claims are governed by Delaware law.

The parties dispute whether the fiduciary duty claims challenging Mayers' involvement with the CCA and the *qui tam* litigation are duplicative of the Company's claims for breach of the LLC Agreement. In support of his argument that the claims are duplicative, Mayers primarily relies on the court's dismissal of his own breach of fiduciary duty claim against the

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Company. The court dismissed Mayers' fiduciary duty claim because it solely related to the Company's conduct with respect to Mayers' termination. *See* Dkt. 86 at 10. The court held that the claim was duplicative because the LLC Agreement governs whether his termination can be deemed as for-Cause.

The Company's fiduciary duty claims, in contrast, are not duplicative of its claims for breach of the LLC Agreement because they concern matters not expressly addressed by the LLC Agreement. As noted by the Company, the Supreme Court of Delaware has held that to distinguish between breach of contract and breach of fiduciary duty claims, it is useful to ascertain whether the fiduciary duty claim "could be brought had the parties not signed a contract." *See Parfi Holding AB v Mirror Image Internet, Inc.*, 817 A2d 149, 157 (Del 2002). As Vice Chancellor Noble has explained:

> [W]here a dispute arises from obligations that are expressly addressed by contract, that dispute will be treated as a breach of contract claim and thus any fiduciary claims arising out of the same facts that underlie the contract obligations would be foreclosed as superfluous. Delaware does recognize a narrow exception to this general rule where the breach of fiduciary duty claim may be maintained independently of the breach of contract claim. Thus, **fiduciary duty claims can survive, despite sharing a common nucleus of operative facts with the underlying contractual claims, if the fiduciary duty claims depend on additional facts as well, are broader in scope, and involve different considerations in terms of a potential remedy. [T]o maintain both claims, a plaintiff must properly plead distinct harms caused by the defendants that fell outside the scope of their contractual relationship.**

AM General Holdings LLC v Renco Group, Inc., 2013 WL 5863010, at *10 (Del Ch 2013) (citations and quotation marks omitted; emphasis added).

Mayers' for-Cause claim, obviously, could not exist but for the LLC Agreement, as the entire for-Cause framework is established by the LLC Agreement.[8] *See Nemec v Shrader*, 991

[8] As discussed herein, that is not the case with Mayers' own alleged conduct, which is problematic simply by virtue of his status as an employee.

A2d 1120, 1129 (Del 2010) (for-Cause framework is "solely a creature of contract", "[a]ny separate fiduciary duty claims that might arise out of the Company's exercise of its contract right, therefore, [are] foreclosed."). Mayers' duty of loyalty to the Company, however, exists independent of the LLC Agreement. *See Dweck v Nasser*, 2012 WL 161590, at *12 (Del Ch 2012) (duty of loyalty prevents corporate officer from misappropriating corporate opportunity[9]), citing *Broz v Cellular Info. Sys., Inc.*, 673 A2d 148, 154 (Del 1996). Secretly taking a corporate opportunity, as alleged, or commencing litigation against municipalities that allegedly compose a significant portion of the Company's client base, are actions that employees should expect to have consequences, regardless if they have a written employment agreement. That being said, the prospective *qui tam* litigation cannot give rise to a breach of fiduciary duty claim because no litigation was actually commenced and, therefore, the Company was not harmed.[10] While the Company may still proceed with its claim that the amount of time Mayers spent on the *qui tam* litigation violated the LLC Agreement, no independent fiduciary wrong was committed because

[9] Mayers' argument that the CCA was not a corporate opportunity since it did not fall within the traditional securities services provided by the Company is not a basis for dismissal. This is a question of fact. It should be noted, however, that the AC pleads that Mayers was allegedly pursuing the CCA with Siegel within the scope of his employment. The use of RCP to pursue the deal is not dispositive since the Company, as alleged in both Mayers' and the Company's pleadings, normally operates through subsidiaries, such as StoneCastle Advisors, LLC. It is also of no moment that section 14.02(a) of the LLC Agreement states that "[e]xcept as otherwise provided in [the LLC Agreement], the doctrine of corporate opportunity ... shall not apply to the Members", since section 14.02(b) provides that Members *do* have a duty of loyalty to the Company and are liable for bad faith and intentional misconduct. These sections, read together, simply would absolve Mayers of liability for failing to bring a corporate opportunity to the Company that he was pursuing on his own (subject, of course, to the prohibition on not spending material time on non-work matters). Then too, the LLC Agreement expressly provides that Members are subject to Delaware's fiduciary duty laws.

[10] Mayers' *qui tam* involvement also might not amount to a fiduciary violation under section 14.02, discussed above, but the court need not reach this issue in the absence of any actual damages arising from this *prospective* litigation.

Mayers never filed the contemplated lawsuits. To the extent the Company claims Mayers' preparation for those prospective lawsuits was itself a fiduciary breach, that claim is duplicative since the amount of time Mayers was permitted to spend on non-work matters is governed by the LLC Agreement. The Company's breach of fiduciary duty claim with respect to the CCA, however, survives dismissal.[11]

Turning to the Company's disgorgement claim under the faithless servant doctrine, the parties first dispute whether New York or Delaware law applies. Under New York law, an employee who "acts in any manner inconsistent with his agency or trust" and fails "to exercise the utmost good faith and loyalty in the performance of his duties" is deemed a "faithless servant" and must "account to his principal for secret profits [and forfeit] his right to compensation." *Lamdin v Broadway Surface Advertising Corp.*, 272 NY 133, 138 (1936); *see Visual Arts Found., Inc. v Egnasko*, 91 AD3d 578, 579 (1st Dept 2012). While "Delaware law does not recognize a faithless fiduciary doctrine … at least one Delaware court has held that corporate officers may be required to forfeit their compensation if their breach of fiduciary duty was of 'some detriment to the corporation or conflict of interest on the part of the officer.'" *Hollinger Int'l, Inc. v Hollinger Inc.*, 2005 WL 589000, at *29 n.25 (ND Ill 2005), quoting *Citron v Merritt-Chapman & Scott Corp.*, 409 A2d 607, 611 (Del Ch 1977).

The court will not reach the issue of what law applies since the parties' briefing on the subject is inadequate. The Company merely argues that New York law applies because the

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[11] While the parties do not address the issue, New York law may apply to the claim that RRWT aided and abetted Mayers' breach of fiduciary duty since such a tort allegedly occurred in New York. However, regardless of whether New York or Delaware law applies, the claim survives because RRWT allegedly satisfied the "knowing participation" prong since RRWT was the company Mayers used to enter into the CCA. *See Kaufman v Cohen*, 307 AD2d 113, 126 (1st Dept 2003); *Allied Capital Corp. v GC-Sun Holdings, L.P.*, 910 A2d 1020, 1038-39 (Del Ch 2006).

employment actually occurred in New York, despite the LLC Agreement (i.e., Mayers' employment contract) being governed by Delaware law. Mayers, however, appears to argue that the law governing the Employment contract *necessarily* determines the applicable faithless servant law. Neither party, however, cites any law in support of their position.

However, to hold that the faithless servant doctrine applies to these claims would be tantamount to rewriting the employment contract. The LLC Agreement defines the scope of Mayers' fiduciary duties – which, as noted earlier, are significantly curtailed. *See GRT, Inc. v Marathon GTF Tech., Ltd.*, 2012 WL 2356489, at *6 (Del Ch 2012) ("Under Delaware law, courts will not rewrite contracts to read in terms that a sophisticated party could have, but did not, obtain at the bargaining table"), citing *Nemac*, 991 A2d at 1126. The LLC Agreement has clear limits on the scope of and remedy for Mayers' breaches. Forfeiture of other compensation is not consistent with the LLC Agreement. Moreover, to the extent the Company has rights in the CCA, its breach of fiduciary duty claim affords it the proper remedy – namely, that the proceeds of the CCA be remitted to the Company. By submitting to Delaware law and defining the scope of its remedy should Mayers breach his fiduciary duty, the Company has contracted away its faithless servant claim. The faithless servant claim, therefore, is dismissed.

Finally, Mayers is not entitled to dismissal of the Company's declaratory judgment claim concerning whether his termination was validly deemed for-Cause, and, particularly, whether his alleged breaches are amenable to remedial action. As the Prior Dismissal Decision held, questions of fact preclude dismissal. To be clear, the court did not hold that Mayers committed a "breach of trust," or even that such a breach of trust is sufficient to justify for-Cause termination. While courts have held this to be the case [*see, e.g., Grocery Haulers, Inc. v C & S Wholesale*

Grocers, Inc., 2012 WL 4049955, at *15 (SDNY 2012) ("When a breach involves deceptive conduct that goes to the essence of the contract and fundamentally destroys the parties' relationship, it may not be subject to cure")], a question of fact remains as to whether the parties intended the alleged breaches of trust to be incurable under the LLC Agreement.

It should be noted, however, that the issue of whether, in this case, for-Cause justifications discovered post termination may be relied on also is not amenable to resolution on a motion to dismiss. While the Company quotes from *Fitzpatrick v Am. Int'l Group, Inc.*, 2013 WL 709048, at *26 (SDNY 2013), for the proposition that under New York law, "an employer may seek to justify its termination of an employee for cause based on information obtained after the termination," the Company's reliance on *Fitzpatrick* is misplaced. First, Delaware law, not New York law, governs the LLC Agreement. Second, the court in *Fitzpatrick* actually noted that "case law authority regarding New York law on this point is not vast." The parties do not cite any cases interpreting a contract under Delaware law that contains language comparable to the LLC Agreement, which provides that "no act or failure to act by [Mayers] shall be considered Cause unless the Company has given a reasonably detailed written notice thereof to the Management Investor and, where remedial action is reasonably feasible." On this record, whether this language can be interpreted to include malfeasance discovered post-termination is an issue the court will not now reach. Accordingly, it is

ORDERED that the motion by Matthew R. Mayers for reargument of the court's February 19, 2014 order is denied, although such order is clarified to the extent set forth in this decision; and it is further

ORDERED that the motion by Matthew R. Mayers and RRWT, LLC to dismiss Stone Castle Partners, LLC's complaint, which the court *sua sponte* applies to the amended complaint, is granted in part as follows: (1) the eighth cause of action (the "faithless servant" claim) is dismissed; (2) the fifth and sixth causes of action (breach of fiduciary duty and aiding and abetting breach of fiduciary duty) are limited to the CCA claim; and (3) the motion is otherwise denied; and it is further

ORDERED that (1) pursuant to the parties' March 19, 2015 stipulation (Dkt. 181), Mayers must amend his complaint in accordance with the Prior Dismissal Decision within 14 days of the entry of this order on the NYSCEF system; and (2) within 14 days thereafter, all parties must file an answer to each other's pleadings; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on June 11, 2015 at 11:00 in the forenoon; and it further

ORDERED that before the preliminary conference, the parties must read and comply with the court's rules, and the joint status letter discussed therein must be e-filed and faxed to Chambers (212-952-2777) no later than June 4, 2015 at 4:00 pm.

Dated: April 28, 2015

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C