Dineen v Wilkens
2016 NY Slip Op 32810(U)
December 21, 2016
Supreme Court, Westchester County
Docket Number: 62130/16
Judge: Linda S. Jamieson
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Disp __x___ Dec _____ Seq. Nos.__1-2___ Type __dismiss, consolidate_

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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PATRICIA C. DINEEN individually and
PATRICIA C. DINEEN, a shareholder
in the right of APPLESEED VENTURES, INC.,

Plaintiff,

-against-

Index No. 62130/16

DECISION AND ORDER

BARBARA J. WILKENS, P. DANIEL HOLLIS III
and SHAMBERG MARWELL HOLLIS ANDREYCAK &
LAIDLAW, P.C.,

Defendants.

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The following papers numbered 1 to 5 were read on these motions:

Paper	Number
Notice of Motion, Affidavit and Exhibits	1
Memorandum of Law	2
Notice of Cross-Motion, Affirmation and Exhibits	3
Memorandum of Law	4
Reply Memorandum of Law	5

The Court has before it two motions in this case that is the latest in a string of litigations arising out of a dispute between sisters stemming from the operation of a family business, Wilkens Farm. Plaintiff Dineen is the sister who claims to have been squeezed out of the business, Appleseed Ventures, Inc.

("Appleseed") by her sister, non-party Barbara J. Pratt. Their mother is defendant Wilkens. Defendant Hollis and Shamberg Marwell Hollis Andreycak & Laidlaw, P.C. (the "firm") are lawyers who represent Pratt in the various litigations (collectively, the "legal defendants"). According to the legal defendants, they also tangentially represented Appleseed.

Defendants' motion seeks (1) to dismiss all claims against all defendants on the ground that the complaint fails to state a cause of action; (2) to dismiss the claims against the legal defendants on the basis of documentary evidence; (3) to dismiss the claims against the legal defendants because of the statute of limitations; and (4) sanctions for frivolous conduct by commencing the action. Plaintiffs' motion seeks (1) to consolidate this action with a pending action; (2) to disqualify the legal defendants; (3) leave to file an amended complaint; and (4) discovery.

This case arises out of the same basic set of facts as the other litigations: Dineen's view that non-party Pratt and her husband conspired against her in 2011 to terminate a valuable lease that Appleseed had for a farm, owned by a family entity,[1] so that the Pratts could transfer the lease to their corporation, White Hill Orchards, Inc. ("White Hill"). This Court previously found in another litigation that the purported lease termination

[1]The farm, including the land and all of the equipment, is all owned by the family through various entities, not relevant here.

was invalid. Thereafter, Barbara Pratt terminated the lease properly, a fact which plaintiffs concede. The termination of the lease, effective on December 31, 2015, had a far-reaching effect beyond the rental payments. It also terminated an option that could only be exercised if both of the sisters' parents were dead, or if defendant Wilkens, as the surviving parent, desired to sell the premises. Since Wilkens is still alive, and has indicated no desire to sell, the option has lapsed by its terms.

Analysis

It is well-settled that "In determining a motion pursuant to CPLR 3211(a)(7), the court is limited to an examination of the pleadings to determine whether they state a cause of action, accepting facts alleged as true and interpreting them in the light most favorable to the plaintiff." *Fedele v. Qualified Pers. Residence Trust of Doris Rosen Margett*, 137 A.D.3d 965, 967, 27 N.Y.S.3d 613, 615 (2d Dept. 2016). However, "affidavits may be received for a limited purpose only, usually to remedy defects in the complaint." *Tirpack v. 125 N. 10, LLC*, 130 A.D.3d 917, 918, 14 N.Y.S.3d 110, 112 (2d Dept. 2015). As Dineen has submitted an affirmation for this purpose, the Court considers it as well. What the Court cannot consider are the allegations that are contained solely in plaintiffs' memorandum of law that are not supported by similar statements in the affirmation. *See Brown v. Smith*, 85 A.D.3d 1648, 1649, 924 N.Y.S.2d 867 (4th Dept. 2011) (statements made only in a memorandum of law have no

evidentiary value). Although Dineen makes a blanket statement in her affirmation that "to the extent [she has] personal knowledge of the facts contained" in the memorandum of law, she ratifies and affirms them, this does not change anything, as it is not clear what statements are "facts" of which she has personal knowledge, and which statements are allegations that she avers "are true upon information and belief."

It is also well-settled that "on a motion to dismiss a complaint pursuant to CPLR 3211(a)(5) on statute of limitations grounds, the moving defendant must establish, prima facie, that the time in which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable." *Yang v. Oceanside Union Free Sch. Dist.*, 90 A.D.3d 649, 649, 933 N.Y.S.2d 905 (2d Dept. 2011).

The Court begins by examining whether Dineen has any claims as an individual. There is no question that where claims seek relief only on behalf of a corporation, they are derivative. *Rodolico v. Rubin & Licatesi, P.C.*, 112 A.D.3d 608, 609, 977 N.Y.S.2d 264, 266 (2d Dept. 2013) ("for a wrong against a corporation a shareholder has no individual cause of action, though he loses the value of his investment."). *See also Elenson v. Wax*, 215 A.D.2d 429, 429, 626 N.Y.S.2d 531, 532 (2d Dept. 1995) ("Allegations of mismanagement or diversion of assets by officers or directors for their own enrichment, without more,

plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually."). A review of the claims in this action show that all of the harm alleged is to Appleseed, and not to Dineen. Dineen appears not to dispute this, as she fails to address this argument in her motion papers. Accordingly, the Court dismisses all of the claims brought by Dineen, as all of them inure solely to Appleseed.

Next, the Court examines defendants' argument that because plaintiffs failed to comply with Business Corporation Law § 626(c) (which provides that in a derivative action "the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort."), all of the derivative claims should be dismissed as well. A review of the complaint herein shows that plaintiffs entirely failed to comply with this section. A review of Dineen's affirmation - submitted in response to defendants' motion - shows that it too fails to address the demand or futility requirement. The only place where plaintiffs address this requirement is in the non-evidentiary memorandum of law. For this reason alone, all of the derivative claims in the complaint (*i.e.*, the entire complaint) must be dismissed. *See Walsh v. Wwebnet, Inc.*, 116 A.D.3d 845, 847, 984 N.Y.S.2d 100, 104 (2d Dept. 2014).

Even if the Court had found that plaintiffs had complied with § 626(c), the Court would still have to dismiss all of the

claims in the complaint. The Court begins by addressing the fifth cause of action, for aiding and abetting fraudulent conveyances; and the seventh cause of action, for civil conspiracy. Simply stated, neither of these claims is cognizable in the State of New York. *See, e.g.*, *Estate of Shefner v. De La Beraudiere*, 127 A.D.3d 442, 5 N.Y.S.3d 100, 101 (1st Dept. 2015) ("under New York law, there is no claim for aiding and abetting a fraudulent conveyance"); *Plymouth Drug Wholesalers, Inc. v. Kirschner*, 239 A.D.2d 479, 658 N.Y.S.2d 64, 64 (2d Dept. 1997) ("New York does not recognize civil conspiracy as an independent cause of action."). Accordingly, the fifth and seventh causes of action are dismissed as a matter of law.

The Court next examines all of the claims against Wilkens. There is no dispute that the complaint in this action only mentions Wilkens a handful of times.[2] In the first cause of action, for fraudulent conveyance, plaintiffs allege that Wilkens "ought to be directed to return the property to the Wilkens Trust." In the second cause of action, plaintiffs allege that Wilkens "stands to be unjustly enriched at the expense and to the detriment of Plaintiff," so that it is "against equity and good conscience to permit" Wilkens "to retain the benefits derived

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[2]Indeed, a review of the complaint seems to paint non-party Pratt as the villain in plaintiffs' mind.

from her wrongful conduct."[3] However, there is no allegation in either the complaint or in Dineen's affirmation that Wilkens was involved in the allegedly improper conveyance of the property to White Hill. Nor is there **any** explanation as to how Wilkens is being unjustly enriched. Wilkens remains the owner of the premises, and is thus entitled to retain the rental or other benefits derived therefrom. Accordingly, all claims against Wilkens are dismissed, as a matter of law. As the second cause of action seeks damages only from Wilkens, it is dismissed in its entirety.

Turning next to the first cause of action, for fraudulent conveyances, the allegations of fraudulent conveyances in the complaint concern property allegedly belonging to Appleseed that "defendants" fraudulently conveyed. However, plaintiffs plainly allege, repeatedly, that Pratt and her husband, using their company White Hill, were the ones who allegedly illicitly and improperly made these conveyances. Neither Wilkens, nor the legal defendants, made any conveyances of any property that belonged to Appleseed or Dineen. To the extent that what plaintiffs really mean is that the legal defendants aided and abetted fraudulent conveyances made by non-parties, as

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[3]The fifth cause of action, for aiding and abetting fraudulent conveyance, also mentions Wilkens. It begins by stating that Pratt owed fiduciary duties to plaintiff, but then states that Wilkens participated in a fraudulent conveyance. This may be a typo, and plaintiffs may have meant Pratt. Either way, it is irrelevant, as discussed above.

demonstrated above, this is not a valid cause of action in New York. Accordingly, the Court must dismiss the first cause of action.

As for the third cause of action, this seeks damages for "malpractice/negligence"[4] by the legal defendants. Plaintiffs allege that Appleseed retained the legal defendants to perform corporate, real estate and other legal services, yet they failed to use reasonable care in performing these duties. Assuming that there was an attorney-client relationship between Appleseed and the legal defendants, plaintiffs have failed to allege a claim for legal malpractice. "A cause of action to recover damages for legal malpractice requires proof of three elements: (1) that the defendant failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by an ordinary member of the legal community, (2) that such negligence was the proximate cause of the actual damages sustained by the plaintiff, and (3) that, but for the defendant's negligence, the plaintiff would have been successful in the underlying action." *Cummings v. Donovan*, 36 A.D.3d 648, 648, 828 N.Y.S.2d 475, 476 (2d Dept. 2007).

Here, plaintiffs have failed to allege such elements. While plaintiffs may believe that the legal defendants had some role –

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[4]If plaintiffs are alleging malpractice, they cannot also allege negligence, as they are duplicative claims. *Turner v. Irving Finkelstein & Meirowitz, LLP*, 61 A.D.3d 849, 850, 879 N.Y.S.2d 145, 147 (2d Dept. 2009).

a role which the legal defendants vehemently deny - in the alleged bad acts of non-parties Pratt and White Hill (which are not actually before the Court in this particular litigation), there are no allegations that the legal defendants committed any malpractice. Plaintiffs have simply not alleged that the legal defendants failed to perform any legal role in an improper or sub-par manner. Moreover, to the extent that plaintiffs complain about any role that the legal defendants may have had in the termination and transfer of the lease to White Hill in 2011, those claims are untimely. *Tsafatinos v. Lee David Auerbach, P.C.*, 80 A.D.3d 749, 750, 915 N.Y.S.2d 500 (2d Dept. 2011) ("The statute of limitations applicable to actions sounding in legal malpractice is three years regardless of whether the underlying theory is based in contract or tort (CPLR 214(6))."). The third cause of action is thus dismissed in its entirety.

The fourth cause of action seeks damages for breach of fiduciary duty. There is no allegation that Wilkens had any fiduciary duty to Appleseed, a company with which she had no formal (or informal) affiliation, except that her daughters owned it. Nor is there any allegation that the legal defendants had any independent fiduciary duty to Appleseed, except to the extent that the legal defendants represented Appleseed. Because this cause of action arises "from the same facts as the legal malpractice cause of action, [and does] not allege distinct damages," it is "duplicative of the legal malpractice cause of

action" and should be dismissed. *Kvetnaya v. Tylo*, 49 A.D.3d 608, 609, 854 N.Y.S.2d 425, 427 (2d Dept. 2008).

The sixth cause of action seeks damages for aiding and abetting the breach of fiduciary duty because defendants allegedly assisted non-party Pratt's breach of fiduciary duties to Appleseed. "To prevail on this claim, plaintiffs must allege: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." *Schroeder v. Pinterest Inc.*, 133 A.D.3d 12, 24-25, 17 N.Y.S.3d 678, 688-89 (1st Dept. 2015). It is imperative that "a plaintiff must plead this cause of action with particularity; conclusory allegations are insufficient." *Id.* at 25, 17 N.Y.S.3d at 689. Although the complaint is entirely deficient in this regard, plaintiffs attempt to embellish their claim in Dineen's affirmation. A review of the both the complaint and the affirmation shows that the legal defendants are mentioned only in the following general ways:[5] (1) the legal defendants "were

[5]The memorandum of law expands on these claims by discussing various acts of "disloyalty" to Appleseed that amount to dual representation and accepting payment of legal fees from Appleseed. Counsel states that "This is not a case of an attorney who knew of wrongdoing and did nothing, but a case where the attorneys knew of wrongdoing and actively assisted their clients (B. Pratt and White Hill) in stripping Appleseed of assets and income." Yet plaintiffs do not allege in any detail that the legal defendants "knew of wrongdoing" and deliberately "actively assisted" in wronging Appleseed. There is simply no such detail alleged by plaintiffs. In any event, since plaintiffs were aware of this alleged disloyalty for five years before commencing this action, it appears that they acquiesced in the dual representation.

counsel" to the Pratts in the formation of White Hill in May 2011 (which would be barred by the statute of limitations); (2) that the legal defendants allegedly assisted the Pratts in the 2011 assignments (also untimely); and (3) in representing Appleseed while also representing the Pratts and White Hill throughout the various litigations. All of these things, even if true, are "allegations of ordinary professional activity, not substantial assistance" sufficient to meet the very high standards for aiding and abetting a breach of fiduciary duty. *Gregor v. Rossi*, 120 A.D.3d 447, 449, 992 N.Y.S.2d 17, 19 (1st Dept. 2014). *See also Sanford/Kissena Owners Corp. v. Daral Properties, LLC*, 84 A.D.3d 1210, 1212, 923 N.Y.S.2d 692, 695 (2d Dept. 2011). Accordingly, the Court dismisses the sixth cause of action. The complaint is thus dismissed in its entirety. The Court denies the request for sanctions.

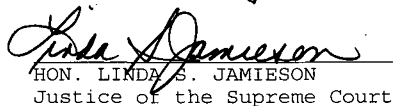
As for plaintiffs' request to amend the complaint, it is denied. First, plaintiffs failed to attach a copy of their proposed amendment to their motion. *Branch v. Abraham & Strauss Dep't Store*, 220 A.D.2d 474, 475, 632 N.Y.S.2d 168, 169 (2d Dept. 1995). Second, assuming that any proposed amendment would incorporate the allegations set forth in Dineen's affirmation, the Court finds that such allegations could not constitute a valid amended complaint. *See Lucido v. Mancuso*, 49 A.D.3d 220, 229, 851 N.Y.S.2d 238, 245 (2d Dept. 2008) ("Where the proposed

amended pleading is palpably insufficient or patently devoid of merit, . . . the motion for leave to amend should be denied.").

As to the remaining requests for relief, for consolidation and disqualification, they must be denied as moot.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
December 21, 2016



HON. LINDA S. JAMIESON
Justice of the Supreme Court

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