SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. Justice

PART 12

Index Number : 603297/2008
LEVINSON, BRUCE
vs.
STEINER DIGITAL STUDIOS
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. 603297/08

MOTION DATE

MOTION SEQ. NO. 002

The following papers, numbered 1 to ____, were read on this motion to/for Dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: JUN 07 2013

BARBARA JAFFE, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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BRUCE LEVINSON,

Plaintiff,

-against-

STEINER DIGITAL STUDIOS, L.L.C., NEW YORK STUDIOS, INC., EPONYMOUS ASSOCIATES LLC, LOU MADIGAN, JOSEPH WILSON, ERROL HOLT, LOUIS KEYES, KENNETH FALK, CARY HART, MARK COEHLO, PETER RENZULLI, FRANCIS REFOL, JOSEPH SICURANZA, LOUIS HERNANDEZ, MICHAEL HERNANDEZ, RICHARD LEECHOW and JOHN DOES 1-10,

Defendants.

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Index No. 603297/08

Subm.: 2/6/13
Motion Seq. No. 002

DECISION & ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Gregory Brown, Esq.
Law Offices of Bruce Levinson
747 Third Avenue, 4th Fl.
New York, NY 10017-2803
212-750-9898

For Madigan:
Charles von Simson, Esq.
Damon Morey LLP
The Avant Building
200 Delaware Avenue
Buffalo, NY 14202
716-856-5500

For SDS/Eponymous:
Delia M. Guazzo, Esq.
Guazzo & Guazzo
711 Third Avenue, 20th Fl.
New York, NY 10017
646-658-0500

For New York Studios:
Kenneth B. Falk, Esq.
Falk & Flotteron, LLC
843 Rahway Avenue
Woodbridge, NJ 07095
732-877-1500

By notice of motion dated July 20, 2011, defendant Lou Madigan moves pursuant to CPLR 3211(a)(7) for an order dismissing plaintiff's claims against him. Plaintiff opposes.

By notice of cross-motion dated July 31, 2012, plaintiff moves pursuant to CPLR 3124 for an order compelling defendants to provide true and complete responses to his discovery demands, declaring defendants Kenneth Falk, New York Studios, Inc. (New York Studios),

Eponymous Associates, LLC (Eponymous), and Steiner Digital Studios, LLC (SDS) to have abused the confidentiality order entered in this action, and awarding him costs, disbursements, and attorney fees. Madigan, SDS, Eponymous, and New York Studios oppose.

I. BACKGROUND

On February 14, 1997, plaintiff and New York Studios, then known as Liberty Entertainment Group (Liberty), entered into a retainer agreement whereby plaintiff agreed to provide his legal services in developing "multi-media production facilities at the Brooklyn Navy Yard" in exchange for the following hourly compensation: (1) $210, $110 of which was deferred until Liberty raised $10,000,000 in financing, and (2) $210 worth of "founder's shares" in Liberty. (Affirmation of Charles von Simson, Esq. [von Simson Aff.], Exh. C). The agreement provides that "if Liberty is unable to pay its obligations to [plaintiff] as they become due, Liberty's shareholders, including but not limited to Delphi Studios, Inc. and Progressive Internet Alternatives, Inc. [PIA] shall jointly and severally satisfy those obligations." (*Id.*). Madigan, Chief Operating Officer, director, and shareholder of PIA, signed the agreement on PIA's behalf, and he initialed a handwritten edit on the first page. (*Id.*).

On or about April 30,1999, New York Studios and SDS entered into a joint venture to develop film and television studios at the Brooklyn Navy Yard, creating Eponymous as their operating entity. (*Id.*, Exh. A; Affidavit of Bruce Levinson, Esq., dated July 31, 2012 [Levinson Affid.], Exh. O). Pursuant to the Eponymous operating agreement, SDS agreed to contribute funds to Eponymous to enable it to pay plaintiff no less than $195,000 for his legal services. The agreement also provides that Eponymous and SDS are liable for plaintiff's fees. (von Simson Aff., Exh. A).

On or about May 3, 2002, New York Studios assigned to plaintiff its right, title, and interest in its claim against SDS for his fees. (*Id.*).

By letter dated November 23, 2004, New York Studios assured plaintiff of its obligation to pay him $195,000 in legal fees and expenses." (Levinson Affid., Exh. N).

Sometime before October 18, 2007, Madigan left New York Studios and joined SDS. (*Id.*, Exh. O). That day, New York Studio's Board of Directors reported to its shareholders, *inter alia*, that "upon [Madigan's] resignation, . . . the[y] . . . uncovered outstanding financial liabilities, including tax, labor, and accounting liens for unpaid bills," that they are "settling these debts," that "these and other expenses are contractual obligations of Eponymous," and that they have "submitted them to [SDS] for reimbursement . . . ." (*Id.*).

On November 13, 2008, plaintiff commenced the instant action with the filing of a summons and verified complaint, alleging that, pursuant to the retainer agreement, defendants owe him $222,660.14 in unpaid legal fees and $987,930 worth of New York Studios stock. (Simson Aff., Exh. A). In his first cause of action, he alleges, in pertinent part, that defendants breached the agreement in failing to pay him for his legal services. (*Id.*). In his second cause of action, he claims, in pertinent part, that New York Studios retained his statements reflecting an indebtedness of $220,660.14 without objection, and that "[u]pon information and belief, the statements of account were reviewed and approved by defendants, none of whom raised any objection." (*Id.*). Plaintiff alleges in the third cause of action, as relevant here, that Madigan "owed [him] a fiduciary duty by virtue of plaintiff being a shareholder of New York Studios and [Madigan] being [a] member[] of New York Studios's [B]oard of Directors," and that he breached this duty by:

> failing to enforce the rights of New York Studios against [SDS], failing to take any action against [SDS] related to the professional fees due plaintiff, failing to obtain an accounting from [SDS] related to Eponymous, and permitting the waste of New York Studios' assets[; and] . . . . by . . . permitting judgments and tax liens to be entered against New York Studios and creating a conflict of interest by accepting employment with [SDS], which conflict led Madigan to act in ways that were antithetical to the interests of New York Studios.

(*Id.*). And in his fourth cause of action, plaintiff contends, in relevant part, that Madigan is liable to him for $987,930 worth of New York Studios stock for breaching the retainer agreement. (*Id.*).

Between October 27 and 31, 2011, plaintiff served defendants with interrogatories. (Affidavit of Gregory Brown, Esq., dated July 31, 2012 [Brown Affid.]). By letter dated December 22, 2011, SDS and Eponymous refused to provided any responses absent a confidentiality order. (Levinson Affid., Exh. B).

On February 9, 2012, the justice previously assigned to this part so-ordered a confidentiality agreement, providing, in pertinent part, that "[a]ny party may designate [d]ocuments produced . . . in connection with this action as 'confidential,'" or as 'Attorneys' Eyes Only.'" (Levinson Affid., Exh. E). "Confidential information" is defined therein as:

> all [d]ocuments . . . , and all information contained therein, and other information designated as confidential, if such [d]ocuments . . . contain trade secrets, proprietary business information, competitively sensitive information, or other information the disclosure of which would, in the good faith judgment of the party designating the material as confidential, be detrimental to the party's business or the business or any of that party's customers or clients.

(*Id.*). The agreement also reflects that confidential materials may be filed with the court under seal or may be submitted at oral argument, to be returned "after disposition of the motion or other proceeding for which they were submitted. (*Id.*).

On March 16, 2012, SDS and Eponymous served plaintiff with verified responses to his

interrogatories, subject to supplementation in accordance with the confidentiality order. (Affirmation of Delia M. Guazzo, Esq., dated Aug. 24, 2012). On May 8, 2012, SDS and Eponymous served plaintiff with unverified supplemental responses to his interrogatories, designating as confidential most of their written responses and all documents provided. (Brown Affid.). On May 10, 2012, Falk and New York Studios served plaintiff with their responses, also unverified, specifying that, "[p]ursuant to the confidentiality . . . order . . . , all documents (1) supplied or purported to have been supplied to New York Studios [ ] by [SDS or Eponymous], and (2) all documents reflecting communications between New York Studios [ ] and its counsel are hereby designated confidential . . . ." (Levinson Affid., Exh. G).

By letter dated May 31, 2012, plaintiff objected to SDS's and Eponymous's responses, specifically addressing SDS's responses to interrogatories 1, 8, 10, and 13-18, and Eponymous's responses to interrogatories 4, 14, 17, and 19-23, demanding that they supplement them further, and claiming that they abused the confidentiality order in designating every document provided as confidential. (*Id.*). By letter of the same date, plaintiff objected to Falk's and New York Studios's responses, requesting that they supplement them further and specify the documents they believe are confidential. (*Id.*, Exh. H). On June 5, 2012, plaintiff served SDS and Eponymous with notices for discovery and inspection, requesting their 2007 to 2011 tax returns and certified financial statements reflecting their assets and liabilities from 2007 to date. (*Id.*, Exh. K).

On June 6, 2012, Falk and New York Studios supplemented their responses to plaintiff's interrogatories but maintained that all documents are confidential. (*Id.*, Exh. H). On June 29, 2012, SDS and Eponymous objected to plaintiff's discovery requests on the ground that the

documents they seek are neither material nor necessary (*id.*, Exh. K), and by letter dated July 12, 2012, responded to plaintiff's May 31 letter, explaining their supplemental responses to his interrogatories and declining to supplement them further. (*Id.*, Exh. F).

By affidavit dated July 31, 2012, plaintiff states that Madigan was one of two people at New York Studios who reviewed his invoices and that he sent an additional notice of his claim to Madigan after he had left New York Studios for SDS but received no response. The same day, plaintiff served his cross-motion. By stipulation dated August 7, 2012, the parties agreed that any opposition to the cross-motion must be served on or before August 24, 2012.

By affidavit dated August 24, 2012, Douglas Steiner, manager and member of SDS and Eponymous, states that, pursuant to Eponymous's operating agreement, SDS's obligation to transfer funds to Eponymous so that it may pay plaintiff his fees is conditioned on Eponymous obtaining "financing completion," which is set forth therein as: "(i) a binding commitment for permanent funding . . . in the approximate amount of $82 million . . . ; (ii) the closing of a loan made by the New York City Economic Development Corporation . . . ; and (iii) the first funding of a construction loan . . . ." According to Steiner, none of financing "events" occurred. (*Id.*).

Steiner explains SDS's and Eponymous's designation of interrogatory responses and documents as confidential as follows:

> SDS and Eponymous are private entities involved in the highly competitive and very public industry of film and TV production. The terms of the [o]perating [a]greement, the terms of SDS's interest in Eponymous, the details of loans or other financing, and the details of SDS or Eponymous'[s] business expenses, profits, losses, and other financial transactions, including of course their tax returns, are all highly private matters that do not belong in the public realm.
>
> All of the documents which were designated as "Confidential" contain proprietary business information, competitively sensitive information, or other similar information

the disclosure of which I believe would be detrimental to the conduct of our business. (*Id.*).

On August 25, 2012, Falk served plaintiff with an unsworn and unaffirmed statement in opposition to the cross-motion. (Falk Opp. Aff.).

On January 23, 2013, I heard oral argument on the instant motion and cross-motion. Plaintiff then submitted the documents SDS, Eponymous, and New York Studios designated as confidential.

II. MOTION TO DISMISS

Pursuant to CPLR 3211(a)(7), a party may move for an order dismissing a cause of action against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, "accept the alleged facts as true, accord [the non-moving party] the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable theory." (*Leon v Martinez*, 84 NY2d 83, 87 [1994]).

A. Timeliness of motion

1. Contentions

In opposition to the motion, plaintiff claims that Madigan's motion is untimely, having been served following service of the answer. In reply, Madigan observes that CPLR 3211(e) expressly provides that a motion pursuant to CPLR 3211(a)(7) may be served at any time.

2. Analysis

Pursuant to CPLR 3211(e), a party may move pursuant to CPLR 3211(a)(7) to dismiss a pleading at any time. Therefore, Madigan's motion is timely.

B. First and fourth causes of action

1. Contentions

Madigan denies that he may be held personally liable for New York Studios's debt to plaintiff, regardless of the form of the damages sought, having signed the retainer agreement solely in his capacity as a shareholder of PIA, and absent any provision in the agreement permitting shareholders to be held personally liable for plaintiff's fees. (Madigan Mem. of Law in Support of Motion to Dismiss). In any event, he claims that any ambiguity in the agreement as to whether shareholders may be held personally liable for plaintiff's fees must be construed against plaintiff. (*Id.*).

In opposition, plaintiff asserts that Madigan had personal knowledge of the debt and stood to benefit from the agreement. (Pl. Mem. of Law in Support of Cross Motion and in Opp. to Motion to Dismiss).

In reply, Madigan observes that there is no evidence in either the retainer agreement or subsequent correspondence that reflects an intent to be personally liable for plaintiff's fees. (Madigan Reply Mem. of Law).

2. Analysis

An agent who signs a contract on behalf of a corporation may not be held personally liable on the contract absent "clear and explicit evidence of [his] intention to substitute or superadd his personal liability for or to that of [the corporation]." (*Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4 [1964]; *Salzman Sign Co. v Beck,* 10 NY2d 63, 67 [1961]; *Mencher v Weiss*, 306 NY 1, 4 [1953]; *Ho Sports, Inc. v Meridian Sports, Inc.*, 92 AD3d 915, 917 [2d Dept 2012]; *News Am. Mktg. v Lepage Bakeries, Inc.*, 16 AD3d 146, 147 [1st Dept 2005];

Paribas Props., Inc. v Benson, 146 AD2d 522, 525 [1st Dept 1989]). As "a promise to answer for a debt to another is void unless subscribed by the party to be charged," a contractual provision purporting to bind individually an agent for a corporation's debts does not, by itself, constitute clear and explicit evidence of his intention to be so bound. (*Savoy*, 15 NY2d 1; *Salzman*, 10 NY2d 63; *Herman v Ness Apparel Co.*, 305 AD2d 217 [1st Dept 2003]; *Rene Boas & Assocs. v Vernier*, 22 AD2d 561 [1st Dept 1965]). Accordingly, the general practice for agents intending to be held personally liable is to sign an agreement twice, once as the corporation's agent, and again as an individual. (*Salzman*, 10 NY2d 63; *Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406 [1st Dept 2011]).

Here, the retainer agreement itself contains no indication that Madigan assumes personal liability for plaintiff's fees. That Liberty's shareholders assume liability does not establish that its shareholders do as well. Even if it did, however, Madigan did not sign the agreement in his individual capacity, and the provision alone does not constitute clear and explicit evidence of an intention to be personally bound. (*See Salzman*, 10 NY2d 63 [clause providing that "the officer . . . signing on behalf of [ ] corporation, hereby personally guarantee[s] the payments hereinabove provided for" insufficient to personally bind officer who signed on corporation's behalf]; *Ho Sports, Inc. v Meridian Sports, Inc.*, 92 AD3d 915 [2d Dept 2012] [clause providing that "[a]ny [ ] person who signs [it] hereby expressly agrees that recourse may be had against that person's [ ] property for all of that person's obligations under this guarantee" insufficient to individually bind officer who signed only on behalf of corporation]; *cf. Mencher,* 306 NY 1 [contractual provision reflecting that it binds "individual members" of corporation constituted evidence of its president's intention to be personally bound notwithstanding that he included abbreviation for

president after his signature, as he signed his name next to preprinted word "member," and his name was included in list of those comprising corporation]; *Paribas Props.*, 146 AD2d 522 [although officer signed agreement in official capacity only, as he was identified by name as being liable for corporation's debt, and as evidence reflected that provision was heavily negotiated, officer personally bound]). Nor do Madigan's initials on the first page, or on the subequent correspondence. (*See H&H Custom Homes, Inc. v Kossoff*, 96 AD3d 445 [1st Dept 2012] [where agent signed promissory note only in his capacity as agent, his initials on letter printed on corporation's letterhead modifying note do not constitute clear and explicit evidence of his intent to be personally bound]). That Madigan knew of the debt to plaintiff and may have personally benefitted from it is immaterial.

C. Second cause of action

1. Contentions

Madigan argues that plaintiff may not seek to collect a debt under a disputed contract as an account stated, and that in any event, he failed to plead that any account was presented to and approved by him in his individual capacity, or any facts from which his agreement to be held personally liable for the account may be implied. (Madigan Mem. of Law in Support of Motion to Dismiss).

In opposition, plaintiff claims that as Madigan accepted invoices and reaffirmed in writing that New York Studios owes him fees, an account stated is established as to Madigan, who may be held personally liable for his fees as a PIA shareholder pursuant to the retainer agreement. (Pl. Mem. of Law in Support of Cross-Motion and in Opp. to Motion to Dismiss).

In reply, Madigan observes that there exists no evidence that plaintiff submitted account

statements to him in his personal capacity and that, were plaintiff's argument true, every business owner who reviews an invoice issued to the business could be held personally liable for the business' debts. (Madigan Reply Mem. of Law).

2. Analysis

"An account stated is an agreement between [ ] parties to an account . . . with respect to the correctness of the account items and balance. . . . An agreement may be implied where a defendant retains bills without objecting to them within a reasonable period of time, or makes partial payment on the account." (*Am. Express Centurion Bank v Cutler*, 81 AD3d 761, 762 [2d Dept 2011]). An account stated claim "cannot be used to create liability where none otherwise exists." (*DL Marble & Granite Inc. v Madison Park Owner, LLC*, __ AD3d __, 2013 NY Slip Op 2357 [1st Dept Apr. 9, 2013], *citing Gurney, Becker & Bourne, Inc. v Benderson Dev. Co., Inc.*, 47 NY2d 995 [1979]; *accord JMD Holding Corp. v Cong Fin. Corp.*, 5 AD3d 334 [1st Dept 2004]).

Here, the November 23, 2004 letter references an agreement between New York Studios and plaintiff as to the amount of his outstanding fees. The agreement, however, is not between plaintiff and Madigan, and not as to Madigan in his personal capacity. It thus provides no basis for plaintiff's account stated claim against him. Nor does Madigan's failure to respond to the notice plaintiff sent after Madigan left New York Studios give rise to an account stated, as Madigan may not otherwise be held liable for New York Studios's failure to pay plaintiff. (*See Russo v Heller*, 80 AD3d 531 [1st Dept 2011] [account stated claim against corporation's principal dismissed as "plaintiff has not identified any basis for bypassing [corporation] and asserting these claims directly against [him]").

D. Third cause of action

1. Contentions

Madigan denies that plaintiff has stated a claim for breach of fiduciary duty based on his failure to cause New York Studios to collect from SDS plaintiff's fees, absent any fiduciary relationship with plaintiff in his capacity as counsel for New York Studios. He maintains that the only injury plaintiff alleges, New York Studios's failure to pay him, was sustained in his capacity as counsel, not as a shareholder, and also denies that plaintiff has stated a claim for breach of fiduciary duty based on his alleged mismanagement of New York Studios in permitting liens and warrants to be issued against it, as that claim should have been brought derivatively. (Madigan Mem. of Law in Support of Motion to Dismiss).

In opposition, plaintiff asserts that New York Studios's failure to cross-claim against Madigan reflects that it would have been futile for him to demand that they commence an action for a breach of fiduciary duty against him, and Madigan's mismanagement of New York Studios harmed him personally. (Pl. Mem. of Law in Support of Cross-Motion and in Opp. to Motion to Dismiss).

In reply, Madigan observes that as plaintiff seeks attorney fees, he is claiming injury in his capacity as counsel for New York Studios, and that the liens and warrants were issued against New York Studios, not plaintiff. (Madigan Reply Mem. of Law).

2. Analysis

a. Madigan's failure to cause New York Studios to collect plaintiff's fees from SDS

"A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.

It exists only when a person reposes a high level of confidence and reliance in another, who thereby exercises control and dominance over him." (*People v Coventry First LLC*, 13 NY3d 108, 115 [2009]). "One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation." (Restatement [Second] of Torts § 874).

Here, although there existed a fiduciary relationship between Madigan and plaintiff in his capacity as a shareholder (*Lindner Fund v Waldbaum, Inc.*, 82 NY2d 219 [1993]), the injury allegedly sustained by plaintiff did not arise from that relationship but from plaintiff's status as counsel, and plaintiff pleads no facts reflecting that Madigan acted for, advised, or controlled him in this capacity. Accordingly, plaintiff fails to state a claim against Madigan for breach of fiduciary duty based on his failure to cause New York Studios to collect plaintiff's fees from SDS. (*See Otto v Melman*, 80 AD3d 738 [2d Dept 2011], *lv denied* 17 NY3d 703 [breach of fiduciary duty claim asserted by patient against physician dismissed on 3211(a)(7) motion where alleged misconduct, bad advice as to soundness of investment, was beyond scope of patient-physician fiduciary relationship]).

b. Madigan's mismanagement of New York Studios

Generally, a shareholder has no individual cause of action for a wrong committed against a corporation, and "allegations 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]). However, a shareholder may assert a personal cause of action where, as pertinent here, "the defendant's alleged misconduct 'effects a separate and distinct wrong' to the plaintiff which

is independent of any wrong to the corporation" (*Burnett v Pourgol*, 83 AD3d 756, 757 [2d Dept 2011]), or where it would have been futile for the shareholder to demand that the corporation commence a derivative suit (*Bansbach v Zinn*, 1 NY3d 1, 9 [2003]).

i. Separate and distinct wrong

In determining whether a plaintiff has alleged injury separate and distinct from any wrong to the corporation, "the pertinent inquiry is whether the thrust of the plaintiff's action 'is to vindicate his personal rights as an individual and not as a stockholder on behalf of the corporation.'" (*Albany-Plattsburgh United Corp. v Bell*, 307 AD2d 416, 419 [3d Dept 2003], *quoting Rossi v Kelly*, 96 AD2d 451, 452 [1st Dept 1983]).

Here, plaintiff's claim that Madigan mismanaged the corporation may be construed as seeking the vindication of a personal right insofar as he asserts that, but for the judgments and liens entered against New York Studios, it would have paid him his fees as they came due. Nonetheless, as he sustained this harm solely in his capacity as counsel for New York Studios and not as its shareholder, Madigan's mismanagement of the corporation provides no basis for plaintiff's breach of fiduciary claim against him. (*See supra*, II.D.2.a.).

ii. Futility

To claim futility, a plaintiff must plead with particularity that "(1) a majority of the directors are interested in the transaction, or (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgment in approving the transaction." (*Marx v Akers*, 88 NY2d 189, 198 [1996]; *accord Yudell v Gilbert*, 99 AD3d 108, 115 [1st Dept 2012]).

Having failed to allege that New York Studios's other directors were interested in, failed

to inform themselves of, or failed to exercise their business judgment in approving or permitting the transactions that resulted in judgments and liens being entered against the corporation, plaintiff fails to plead futility. Accordingly, to the extent plaintiff seeks to assert a derivative cause of action, he fails to state a claim upon which relief may be granted.

III. MOTION TO COMPEL AND FOR DECLARATION OF ABUSE OF CONFIDENTIALITY ORDER

A. Contentions

Plaintiff claims that defendants' responses to his interrogatories are unverified and obfuscatory, and that defendants failed to act in good faith in designating every document they provided as confidential, thereby violating the confidentiality order. (Pl. Mem. of Law in Support of Cross-Motion and in Opp. to Motion to Dismiss). He also asserts that the communications between Falk and New York Studios are privileged, not confidential, and that they waived this privilege in disclosing them. (*Id.*).

In opposition, SDS and Eponymous assert that the motion is improperly denominated as a cross-motion as plaintiff seeks relief against non-moving parties. (SDS and Eponymous's Mem. Of Law in Opp. to Cross-Motion). In any event, they claim that they sufficiently responded to plaintiff's interrogatories, that he waived his objection to their failure to verify the supplemental responses by not raising it earlier, and that supplemental responses need not be verified if the original responses were. (*Id.*). They deny that their tax returns and financial statements are subject to disclosure as Steiner alleges that Eponymous never obtained the financing on which payment to plaintiff was conditioned, and given plaintiff's failure to establish that they are otherwise necessary to his case. (*Id.*). They also deny abusing the confidentiality order, as all of

the documents and responses designated as confidential constitute or pertain to sensitive information that would be detrimental to their business if released. (*Id.*).

Falk adopts SDS's and Eponymous's arguments and denies that he waived the attorney-client privilege in designating his communications with New York Studios as confidential rather than privileged. (Falk Opp. Aff.). He claims that he and New York Studios designated documents received from SDS as confidential pursuant to Eponymous's operating agreement. (*Id.*).

In reply, plaintiff argues that Falk's affirmation should not be considered as absent an affirmation that it is true under penalties of perjury, and it was untimely served. (Pl. Reply Mem. of Law). In any event, he contends that as Falk and New York Studios fail to identify which documents they received from SDS, it is impossible to determine which are confidential. (*Id.*). Plaintiff notes that he set forth specific objections to SDS's and Eponymous's responses in his May 31 letter and that he may not now elaborate on those objections given the designation of the responses as confidential. (*Id.*). He observes that, as the purpose of discovery in this matter is to determine whether he is entitled to payment of his fees, he should be permitted to obtain SDS's and Eponymous's tax returns and financial statements rather than having to rely on Steiner's self-serving affidavit. (*Id.*).

At oral argument, Falk claimed to have submitted his affirmation in opposition on behalf of himself and New York Studios. Plaintiff countered that the affirmation appears to have been submitted on Falk's behalf only.

The portion of this motion pertaining to Madigan is not addressed as plaintiff's claims against him have been dismissed.

B. Analysis

1. Consideration of cross-motion

Although a cross-motion "is an improper vehicle for obtaining relief from a non-moving party" (*Sheehan v Marshall*, 9 AD3d 403 [2d Dept 2011], *quoting Mango v Long Is. Jewish-Hillside Med. Ctr.*, 123 AD2d 843, 844 [1st Dept 1986]), as non-moving defendants respond on the merits and allege no prejudice resulting from plaintiff's improper denomination of the instant motion as a cross-motion, it is determined on its merits (*see Daramboukas v Samlidis*, 84 AD3d 719 [2d Dept 2011] [cross-motion seeking relief against non-moving party considered as non-moving party has opportunity to be heard on merits and demonstrated no prejudice]; *Sheehan*, 9 AD3d 403 [same]; *Kleeberg v City of New York*, 305 AD2d 549 [2d Dept 2003] [same]; *see also Keller v Merchant Capital Portfolios, LLC*, 103 AD3d 532 [1st Dept 2013] [defendant's untimely cross-motion properly considered as plaintiffs had sufficient opportunity to respond and demonstrated no prejudice resulting from delay]).

2. Consideration of Falk's affirmation in opposition

To the extent Falk submitted his affirmation on his own behalf, he is required, like any other party, to submit his statements in affidavit form. Nor may it be considered to the extent he submitted it on behalf of New York Studios, as an attorney's statement must be "affirmed by him to be true under the penalties of perjury" in order to have force and effect. (CPLR 2106).

In light of this result, plaintiff's contentions as to the timeliness of plaintiff's opposition need not be considered.

3. Verification

Pursuant to CPLR 3133(b), "interrogatories shall be answered in writing under oath by

the party served, if an individual, or, if the party served is a corporation . . . , by an officer, director, member, agent or employee having the information."

Having failed to verify their supplemental responses to plaintiff's interrogatories, and absent any authority for the proposition that the objection is waived if a party fails to object in a timely manner to noncompliance with CPLR 3133(b), or that supplemental responses need not be verified if the original responses were, defendants must serve plaintiff with verified responses. (*See Corriel v Volkswagen of Am., Inc.*, 127 AD2d 729 [2d Dept 1987] [where plaintiff's answers to interrogatories were unverified, trial court should have granted defendant's motion to compel plaintiff to properly respond to interrogatories]).

4. Responses to interrogatories

A party may move to compel disclosure from another party that has not responded or complied with a discovery request. (CPLR 3124). Pursuant to CPLR 3101(a), a party is entitled to "full disclosure of all matter material and necessary in the prosecution or defense of an action," which should be "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and proxility." (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]). Moreover, "[p]retrial disclosure extends not only to admissible proof but also to testimony or documents which may lead to the disclosure of admissible proof . . . ." (*Polygram Holding, Inc. v Cafaro*, 42 AD3d 339, 341 [1st Dept 2007]).

I find as follows and indicate only those interrogatories requiring responses.

a. SDS

i. Interrogatory 1

SDS is ordered to provide a more responsive answer to this interrogatory, detailing any financing it has received, even if such financing does not constitute financing completion.

iii. Interrogatory 10

SDS is ordered to provide a more responsive answer to this interrogatory, expressly addressing whether it entered into any agreements with Eponymous and/or New York Studios other than Eponymous's operating agreement, and if so, providing copies of or setting forth the terms of same.

iv. Interrogatory 13

This interrogatory does not constitute a request for a legal conclusion and pertains to relevant information. SDS is thus ordered to answer it.

b. Eponymous

i. Interrogatory 4

Eponymous is ordered to provide a more responsive answer to this interrogatory, addressing whether SDS made contributions to Eponymous pursuant to any agreement, and if so, identifying the relevant provisions of such agreement(s). Eponymous is also ordered to provide copies of any documents related to the distributions.

iii. Interrogatory 17

Eponymous is ordered to answer this interrogatory to the extent of disclosing whether any payments were made to any of the creditors listed in Schedule 2 of its operating agreement, and if so, detailing those payments and providing copies of any communications related to them.

5. Falk's designation of communications with New York Studios as confidential

The attorney-client privilege does not apply to all confidential communications between an attorney and his client but rather "only to those of a legal character relating to the engagement." (*Madden v Creative Servs.*, 84 NY2d 738, 745 [1995]).

Generally, a party waives a privilege in disclosing a privileged document

> unless it is shown that the client intended to maintain the confidentiality of the document, that reasonable steps were taken to prevent disclosure, that the party asserting the privilege acted promptly after discovering the disclosure to remedy the situation, and that the parties who received the documents will not suffer undue prejudice if a protective order against use of the document is issued.

(*N.Y. Times Newspaper Div. v Lehrer McGovern Bovis, Inc.*, 300 AD2d 169, 172 [1st Dept 2002]).

Here, absent any reference to the attorney-client privilege in Falk's and New York Studios's May 10, 2012 response to plaintiff's interrogatories, or any evidence as to the content of the disclosed communications, whether the communications are privileged, whether Falk and New York Studios sought to preserve the privilege in designating them as confidential, and whether their disclosure constituted a waiver of the privilege may not be determined.

6. SDS's and Eponymous's tax returns and financial statements

"Because of their confidential and private nature, disclosure of tax returns is disfavored. The party seeking disclosure must make a strong showing of necessity and demonstrate that the information contained in the returns is unavailable from other sources." (*Williams v New York City Hous. Auth.*, 22 AD3d 315, 316 [1st Dept 2005]; *accord Briton v Knott Hotels Corp.*, 111 AD2d 62, 62 [1st Dept 1985]).

As SDS and Eponymous are ordered to supplement their responses to plaintiff's

interrogatories to address whether, and to what extent, they obtained funding (*see supra*, III.B.4.a.i., III.4.b.i., iii.), and as plaintiff requests that they produce their tax returns and financial statements to obtain that information, their disclosure is unnecessary.

7. Confidentiality order

Steiner's explanation for SDS's and Eponymous's designation of nearly all of their responses to plaintiff's interrogatories and all of the documents they produced as confidential is conclusory and thus insufficient to satisfy the confidentiality order's good faith requirement. So too is Falk's and New York Studios's failure to specify the documents obtained from SDS, as it is impossible for plaintiff to identify them, and thus, to determine which documents are designated as confidential.

Accordingly, SDS, Eponymous, New York Studios, and Falk are ordered to provide, within 30 days of the date of this decision and order, an affidavit from a principal: (1) identifying, in each written response or document, or types of responses or documents designated as confidential, the trade secrets, proprietary information, or competitively sensitive information that they believe would be detrimental to their business if disclosed; and (2) explaining why they believe the disclosure of this information would be detrimental to their business.

7. Attorney fees and costs

I decline to award plaintiff attorney fees and costs.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Lou Madigan's motion for an order dismissing plaintiff's

claims against him is granted, and the complaint is hereby severed and dismissed as against Lou Madigan; it is further

ORDERED, that plaintiff's cross-motion for an order compelling defendants to provide true and complete responses to his discovery demands is granted to the extent that defendants Steiner Digital Studios, LLC, Eponymous Associates, LLC, Kenneth Falk, and New York Studios, Inc. are ordered to serve plaintiff with verified responses to his interrogatories within 30 days of the date of this decision and order, Steiner Digital Studios, LLC and Eponymous Associates, LLC supplementing their previously supplemented responses in accordance with this decision and order; it is further

ORDERED, that plaintiff's cross-motion for an order compelling defendants to provide true and complete responses to his discovery demands is otherwise denied; it is further

ORDERED, that plaintiff's cross-motion for an order declaring defendants Steiner Digital Studios, LLC, Eponymous Associates, LLC, Kenneth Falk, and New York Studios, Inc. to have abused the confidentiality order entered in this action is granted to the extent that Steiner Digital Studios, LLC, Eponymous Associates, LLC, Kenneth Falk, and New York Studios, Inc. are ordered to provide, within 30 days of the date of this decision and order, an affidavit from a principal: (1) identifying, in each written response or document, or types of responses or documents, that they have designated as confidential, the trade secrets, proprietary information, competitively sensitive information that they believe would be detrimental to their business if disclosed; and (2) explaining why they believe the disclosure of this information would be detrimental to their business; and it is further

ORDERED, that plaintiff's cross-motion for an order awarding him costs, disbursements,

and attorney fees is denied.

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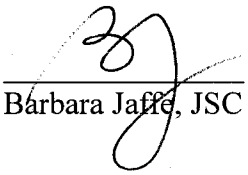

Barbara Jaffe, JSC

DATED: June 7, 2013
New York, New York