Markowitz v Mancusi
2015 NY Slip Op 32278(U)
December 3, 2015
Supreme Court, Richmond County
Docket Number: 101327/13
Judge: Philip G. Minardo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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STEVEN MARKOWITZ and MICHELLE MARKOWITZ,

Plaintiffs,

-*against*-

ANGELINA MANCUSI, MICHAEL MANCUSI and CHRISTINE MANCUSI,

Defendants,

STATEN ISLAND GO CARTS, INC and STATEN ISLAND HOCKEY, INC,

Nominal Defendants.

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DCM Part 6
Present:
Hon. Philip G. Minardo

DECISION AND ORDER

Index No. 101327/13
Motion No. 4382-001

The following papers numbered 1 to 3 were fully submitted on the 22nd day of October, 2015:

	Pages Numbered
Notice of Motion to Dismiss by Defendants Angelina Mancusi, Michael Mancusi and Christine Mancusi, with Supporting Affirmation and Exhibits (dated January 6, 2015)	1
Affirmation in Opposition by Plaintiffs, with Supporting Affirmation and Exhibits (dated March 20, 2015)	2
Reply Affirmation in Support by Defendants Angelina Mancusi, Michael Mancusi and Christine Mancusi (dated May 1, 2015)	3

Upon the foregoing papers, the motion to dismiss is granted, in part, and is otherwise denied.

This is an action for an accounting and to recover damages for breach of fiduciary duty and conversion. To the extent relevant, it is undisputed that the parties herein are shareholders in Staten Island Hockey, Inc., which had a licensing agreement with City of New York Department of Parks and Recreation "to operate a recreational facility... open to the public and which included a hockey rink, Go-Cart Track, Miniature Golf Course... and related facilities" effective April 23, 2000 to April

22, 2008 (*see* Verified Complaint, para 25).[1] It is also undisputed that these same parties are shareholders in Staten Island Go Carts, Inc., which appears to have a similar licensing agreement with the City effective June 23, 2008 to April 22, 2016 (id. at 85).[2]

According to the Verified Complaint, defendants are alleged to be "guilty of breach of fiduciary duty and conversion" arising out of their attempt to transfer plaintiffs' shares in Staten Island Hockey, Inc and/or Staten Island Go Carts, Inc "without the[ir] consent or knowledge" and "appropriat[ing] all of the receipts... to [her/his] own use" (id. at 29-34). It is further alleged that "between 1999 and 2008... [defendants have] collected for the account of [Staten Island Hockey, Inc and/or Staten Island Go Carts, Inc] gross receipts in an amount exceeding the sum of $1,400,000", and that defendants have failed to account for the monies received, "fifty percent of which is due and owing to [plaintiffs]" (id. at 35-64, 89-118).

In addition, plaintiffs assert a cause of action for the dissolution of Staten Island Go Carts, Inc pursuant to New York Business Corporation Law §1104-a.[3] In support, plaintiffs allege that

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[1] According to a filing receipt from the Department of State's Division of Corporations and State Records, the dissolution of Staten Island Hockey, Inc was filed on August 20, 2008 (*see* Defendants Exhibit "F").

[2] It is not clear if the parties entered into a shareholder agreement for Staten Island Hockey, Inc. and/or Staten Island Go Carts, Inc.

[3] Under section 1104-a of the Business Corporation Law, holders of 20% or more of all outstanding shares may petition for dissolution on one or both of the following two grounds: (1) the directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders; and/or (2) the property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation (*see Matter of Dubonnet Scarfs, Inc*, 105 AD2d 339, 341 [1st Dept 1985]). In addition, shareholders have a right to common-law dissolution, which is available to minority shareholders whenever the majority shareholders and/or corporate officers or directors are accused of looting the corporation and violating their fiduciary duty (*cf. Matter of Candelwood Holdings, Inc,* 124 AD3d 775 [2nd Dept 2015]; *see also Gjuraj v. Uplift El Corp*, 110 AD3d 540 [1st Dept 2013]).

"since at least June 23, 2008", defendants are "guilty of oppressive acts toward plaintiff[s]... [and] used... [the] business operations of Staten Island Go Carts, Inc to further [their] own interests ... looted corporate assets, diverted corporate assets to [their] own use, [and] wasted corporate assets" (id. at 119-145).

This action was commenced by the filing and service of a summons and complaint on or about August 7, 2013 (see Defendants' Exhibit "A").[4]

In the matter presently before the Court, defendants move to dismiss the complaint pursuant to CPLR 3211(a)(5) on the grounds that the causes of action sounding in breach of fiduciary duty, conversion, and for an accounting are barred by the statute of limitations. Defendants also move to dismiss pursuant to CPLR 3211(a)(7) on the ground that the complaint fails to state a cause of action for breach of fiduciary duty and, under CPLR 3211(a)(3), due to plaintiffs' lack of standing to sue on behalf of Staten Island Go Carts, Inc.[5]

A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR 3016(b). The elements of the cause of action are (1) the existence of a fiduciary relationship, (2) misconduct by the defendants, and (3) damages directly caused by the defendants' misconduct (*see Armentano v. Paraco Gas Corp*, 90 AD3d 683, 684 [2nd Dept 2011]). Here, affording the complaint a liberal construction, accepting the facts alleged therein as true, and according plaintiffs the benefit of every possible inference, the complaint sufficiently alleges that

[4]Although it is undisputed that issue was joined, neither party submitted a copy of defendants' Answer.

[5]The branch of defendants' motion which seeks to preclude plaintiffs with respect to outstanding discovery demands, appears to be moot.

defendants have breached a fiduciary duty owing to plaintiffs.[6] Nevertheless, plaintiffs' cause of action for breach of fiduciary duty must be dismissed.

A defendant moving to dismiss a complaint on the ground that it is barred by the statute of limitations bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired (*see Loeuis v. Grushin*, 126 AD3d 761, 763 [2nd Dept 2015]). In New York, the statute of limitations for a cause of action sounding in breach of fiduciary duty is dependent on the relief sought (id. at 764). As a result, there is no single statute of limitations for breach of a fiduciary duty. Rather, the applicable limitations period depends on the substantive remedy that the plaintiff is seeking (id.). Thus, where the remedy sought is purely monetary in nature, the action is construed as one alleging injury to property within the meaning of CPLR 214(4), to which a three-year statute of limitations applies. Where, however, the relief sought is equitable in nature, the six-year limitations period specified in CPLR 213(1) would apply. Similarly, where an allegation of fraud is essential to the breach of fiduciary duty claim, the six-year statute of limitations in CPLR 213(8) has been held to be applicable (id.; *see IDT Corp v. Morgan Stanley Dean Witter & Co*, 12 NY3d 132, 139). In all events, the statute of limitations for a cause of action alleging a breach of fiduciary duty does not begin to run until the fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated (id. at 764).

Here, the cause of action alleging breach of fiduciary duty seeks purely monetary damages, and, under circumstances where the cause of action is devoid of any allegations of fraud, a three-

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[6]Contrary to defendants' arguments in support of dismissal pursuant to CPLR 3211(a)(7), a shareholder in a closely held corporation may assert a personal cause of action alleging breach of fiduciary duty against a fellow shareholder where, as here, the defendants' alleged misconduct affects a separate and distinct wrong to the plaintiffs, which is independent of any wrong to the corporation (*see Burnett v. Pourgol*, 83 AD3d 756, 757 [2nd Dept 2011]). Moreover, a shareholder may assert a personal cause of action alleging conversion against a fellow shareholder (*see Collins v. Telcoa Intl Corp*, 283 AD2d 128, 134 [2nd Dept 2001]).

year statute of limitations applies. According to plaintiff's Verified Complaint, the alleged breach occurred "between 1999 and 2008" or "since at least June 23, 2008" As such, the cause of action to recover damages for breach of fiduciary duty is time-barred (*see* CPLR 3211[a][5]; *Scott v. Fields*, 85 AD3d 756, 759 [2nd Dept 2011]).

Similarly, the allegations of conversion also reference the time period "between 1999 and 2008" or "since at least June 23, 2008". A cause of action for conversion is subject to a three-year period limitations (*see* CPLR 214[3]; *Maya NY, LLC v. Hagler*, 106 AD3d 583, 585 [1st Dept 2013]), and is normally deemed to accrue on the date the conversion actually takes place, instead of the date of discovery or "the exercise of diligence to discover" (id. at 585). Here, the action for conversion was commenced in 2013, more than three years after the purported conversion in 2008. Accordingly, the claim for conversion is time-barred.

In proceedings for an accounting, the governing limitations period is the six-year period set forth in CPLR 213(1). In such cases, it is well settled that the statutory clock begins to run when the defendant openly repudiates his or her fiduciary obligations. Accordingly, a defendant's attempt to invoke a statute of limitations defense based on the mere lapse of time will not suffice absent proof of an open repudiation. When measured from the date of repudiation, the defendant/fiduciary bears the burden of proving that the repudiation was clear and made known to the beneficiaries. Moreover, if there is any doubt from the papers before the Court that the expiration of the statute of limitations has been conclusively established, the motion to dismiss the proceeding should be denied. In such circumstances, it is only where such facts are developed during the course of the accounting as conclusively demonstrate the merit of a statute of limitations defense that the proceeding should be dismissed as time-barred (*see Matter of Behr*, 191 AD2d 431 [2nd Dept 1993]).

In the case at bar, it is alleged, inter alia, that "since at least June 23, 2008" defendants have

been "guilty of oppressive acts toward plaintiff[s]". Since plaintiffs commenced this action by the filing and service of a summons and verified complaint on or about August 7, 2013, plaintiffs' action for an accounting is timely.

Alternatively, defendants contend that the action must be dismissed as plaintiffs, suing individually, lack standing to allege derivative claims on behalf of the corporation (*see* CPLR 3211[a][3]).

It is black letter law that a stockholder has no individual cause of action against a person or entity that has injured the corporation. This is true notwithstanding that (1) the wrongful acts may have diminished the value of the shares of the corporation, or (2) the shareholder incurs personal liability in an effort to maintain the solvency of the corporation, or (3) the wrongdoer may ultimately share in the recovery in a derivative action if the wrongdoer owns shares in the corporation. An exception exists, however, where the wrongdoer has breached a duty owed directly to the shareholder which is independent of any duty owing to the corporation (*see Serino v. Lipper*, 123 AD3d 34, 39 [1st Dept 2014]).

In its attempt to distinguish a derivative claim from a direct one, a court may consider (1) who suffered the alleged harm (the corporation or the individual stockholders); and (2) which of these would receive the benefit of any recovery or other remedy (id. at 40). If there is any harm caused to the individual, as opposed to the corporation, then the individual may proceed with a direct action. On the other hand, even where an individual harm is claimed, if it is confused with or embedded in the harm to the corporation, it cannot stand separately (id.).

Here, plaintiffs are alleged to have made capital investments totalling $135,000 in Staten Island Hockey, Inc and a total of $180,000 in Staten Island Go Carts, Inc (*see* Verified Complaint,

[* 7]

paras 24, 66-68). Moreover, plaintiffs have alleged as damages caused by defendants, the collection of gross receipts in an amount exceeding $1,400,000, "fifty percent which is due and owing to plaintiffs". In view of the foregoing, the Court opines that these claims are direct, as it is plaintiffs who suffered the alleged harm individually, and that they would receive the benefit of any recovery (*see Scott v. Pro Mgt Servs Group, LLC,* 124 AD3d 454 [1st Dept 2015]). As such, plaintiffs have standing to bring this action (id.; *see Gjuraj v. Uplift El Corp*, 110 AD3d at 540, *et. seq*.), and they are not required to satisfy the pleading requirements set forth in Business Corporation Law §626(c)[7] (*see Scott v. Pro Mgt Servs Group, LLC,* 124 AD3d at 454).

Defendants' remaining contentions have been considered and rejected.

Accordingly, it is

ORDERED that the motion to dismiss is granted solely with respect to the causes of action for conversion and breach of fiduciary duty; and it is further

ORDERED that the above claims are severed and dismissed; and it is further

ORDERED the balance of the motion is denied; and it is further

ORDERED that the Clerk enter judgment and mark his records accordingly.

ENTER,

/s/ Philip G. Minardo

J.S.C.

DATED: December 3, 2015

[7]Business Corporation Law §626(c) provides that in any such 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".