

Edelman v Organic Ave., LLC
2016 NY Slip Op 30262(U)
February 16, 2016
Supreme Court, New York County
Docket Number: 653091/15
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
JOHN EDELMAN,

Plaintiff,

Index No. 653091/15

-against-

DECISION/ORDER

ORGANIC AVENUE, LLC and WELD NORTH
VENTURES, LLC,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirmation in Opposition	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff John Edelman commenced the instant action against defendants Organic Avenue, LLC (“Organic Avenue”) and Weld North Ventures, LLC (“Weld North”) seeking to recover funds he is allegedly entitled to for the sale of certain shares he owns in Organic Avenue. Defendant Weld North now moves for an Order pursuant to CPLR §§ 3211(a)(1) and (7) dismissing the complaint. The motion is resolved as set forth below.

The relevant facts according to the complaint are as follows. Defendant Organic Avenue is a company that owns and operates retail stores for the sale of organic juices and products (hereinafter referred to as “Organic Avenue” or the “company”). On or about July 22, 2011, plaintiff became a member of the company and owner of 100,000 Class B shares of the company, equal to 0.55% of the company. The members of the company adopted a Third Amended and Restated Operating Agreement (the “Third Operating Agreement”) as of May 24,

2012, which plaintiff executed. According to the Third Operating Agreement, defendant Weld North was the owner of 31.27% of the company. Section 25 of the Third Operating Agreement provides that it may be modified or amended if “such modification or amendment is approved in writing by the voting Members holding at least sixty-six and two thirds percent (66 2/3%) of the then outstanding voting Units.”

Voting members of the company holding at least 66 2/3% of the then outstanding voting units adopted the company’s Fourth Amended and Restated Operating Agreement as of December 31, 2012 (the “Fourth Operating Agreement”). Plaintiff did not execute or acknowledge the Fourth Operating Agreement and he did not have notice of the Fourth Operating Agreement until it was provided to him on or about April 25, 2015. Pursuant to the Fourth Operating Agreement, as of December 31, 2012, Weld North became the owner of 67.8% of the company. The Third Operating Agreement was also modified in a number of other respects, including Section 8(a), which entitled Weld North to purchase the units of the other members, specifically providing that Weld North shall offer or cause the company to offer, prior to December 31, 2013, to purchase all or any portion of the units held by all members for a price per unit equal to \$1.335 and that the offer shall remain open and irrevocable for a period of 15 days from the date of the delivery of the offer to the members.

Defendant Weld North alleges that it complied with Section 8(a) of the Fourth Operating Agreement and offered, prior to December 31, 2013, to purchase the units of the other members of the company by e-mail transmission dated November 5, 2013. However, plaintiff asserts that such notice was insufficient pursuant to Section 20 of the Fourth Operating Agreement, which requires that notices sent by e-mail be accompanied by a mailing. Plaintiff asserts that Weld North’s offer was conveyed to plaintiff solely by electronic means and that a copy was not

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delivered pursuant to Section 20 of the Fourth Operating Agreement. Plaintiff did not accept Weld North's offer to purchase his shares.

On or about June 25, 2015, the Company entered into an agreement to sell the company's assets and all interest in the company to OA Holding Company, LLC ("OAHC"). Pursuant to Section 19 of the Fourth Operating Agreement, plaintiff was required to participate in the sale and assign his interest in the company to OAHC. In compliance with said obligations, on or about July 7, 2015, plaintiff assigned his interest in the company to OAHC and in consideration, plaintiff received 2,400 Class B membership units of OAHC.

Thereafter, plaintiff commenced the instant action asserting causes of action for breach of contract against Organic Avenue, violation of Limited Liability Company Law § 407(c) against Organic Avenue, breach of fiduciary duty against Organic Avenue and Weld North, two separate breach of contract claims against Weld North and a declaratory judgment. Weld North now moves to dismiss the complaint.

In order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211(a)(1), the documents relied upon must definitively dispose of plaintiff's claim. *See Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1st Dept 1995). Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002). On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). "Where a pleading is attacked for alleged inadequacy

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in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)).

In the instant action, Weld North's motion for an Order pursuant to CPLR § 3211(a)(1) dismissing the complaint's third cause of action for breach of fiduciary duty based on documentary evidence is granted. Weld North relies on Section 25 of the Third Operating Agreement and Section 24 of the Fourth Operating Agreement as grounds for dismissal of plaintiff's fiduciary duty claim. Specifically, Section 25 of the Third Operating Agreement and Section 24 of the Fourth Operating Agreement provide as follows:

Except as otherwise provided in the NYLLC Law, by law or expressly in this Agreement, no Member (in their capacity as a member of the Company) shall have any fiduciary or other duty to another Member with respect to the business and affairs of the Company.

Thus, as Weld North was a member of the Company, it did not owe a fiduciary duty to plaintiff, another member of the Company. Although plaintiff alleges in his complaint that Weld North was not merely a member of the Company but rather a *managing* member of the Company, such assertion is belied by documentary evidence. Section 5(a) of the Fourth Operating Agreement states that "[t]he Board shall have the sole right to manage the business and affairs of the Company...the Members shall have no power or authority to take any action or make any decision for or on behalf of the Company." Thus, as the Fourth Operating Agreement indicates, management of the Company's business and affairs was instilled in the Board alone and not in any of the individual members. As the Fourth Operating Agreement does not give Weld North management abilities and specifically states that only the Board will manage the Company, Weld North was not a managing member and thus, it did not owe plaintiff a fiduciary duty.

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Therefore, the third cause of action for breach of fiduciary duty against Weld North must be dismissed.

Moreover, even if the documentary evidence did not dispose of plaintiff's fiduciary duty claim against Weld North, which it does, plaintiff's fiduciary duty claim against Weld North would be dismissed on the ground that it is duplicative of plaintiff's breach of contract claim. A claim for breach of fiduciary duty should be dismissed as duplicative of the breach of contract claim where they are based on the same allegations and seek identical damages. *Chowaiki & Co. Fine Art Ltd. v. Lacher*, 115 A.D.3d 600 (1st Dept 2014). Here, plaintiff's fiduciary duty claim is duplicative of his breach of contract claim as they are based on the same allegations, that defendant Weld North failed to provide plaintiff with the information needed to make an informed decision about whether to sell his shares to Weld North, including failing to provide plaintiff with the Fourth Operating Agreement until April 25, 2015, over two years after the agreement became effective, and failing to give plaintiff proper notice of its offer to purchase his shares. Plaintiff is also seeking identical damages in his breach of fiduciary duty claim as he is seeking in his breach of contract claim, an amount of \$133,500.00, which is the amount he would have received had he sold his shares to Weld North. Thus, plaintiff's fiduciary duty claim against Weld North must also be dismissed as duplicative of plaintiff's breach of contract claim.

However, Weld North's motion for an Order dismissing plaintiff's breach of contract claims is denied. Although the court notes that plaintiff asserts two separate causes of action for breach of contract, the fourth and fifth causes of action, the court will analyze the dismissal of said causes of action as though they constitute one cause of action for breach of contract. To sufficiently state a cause of action for breach of contract, a complaint must allege (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's

breach of the contract; and (4) damages as a result of the breach. *See JP Morgan Chase v. J.H. Electric of NY, Inc.*, 69 A.D.3d 802 (2d Dept 2010).

In the instant action, this court finds that the complaint sufficiently states a claim for breach of contract against Weld North. The complaint alleges the existence of the Fourth Operating Agreement and that plaintiff performed under the agreement. Further, the complaint alleges that Weld North breached both Section 20(a) of the Fourth Operating Agreement by failing to comply with its contractual notice requirements and Section 8(a) of the Fourth Operating Agreement by failing to timely offer to purchase plaintiff's shares in the Company. Specifically, plaintiff alleges that he only received notice of Weld North's offer to purchase his shares by e-mail transmission, which was insufficient under Section 20(a) the agreement, which provides as follows:

All notices, requests, consents and other communications hereunder to any party shall be deemed to be sufficient if contained in a written instrument delivered in person or by facsimile (or similar electronic means with a copy by nationally-recognized overnight courier specifying overnight delivery) or sent by nationally-recognized overnight courier specifying overnight delivery or first class registered or certified mail, return receipt requested, postage prepaid, addressed to such party at the address set forth below or at such other address as may hereafter be designated in writing by such party to the other parties.

Additionally, plaintiff alleges that he did not receive Weld North's offer to purchase his shares within the time prescribed by Section 8(a) of the Fourth Operating Agreement, which provides that:

[O]n or prior to December 31, 2013 [Weld North] shall, or shall cause the Company to, offer to purchase all or any portion of the Units (other than the Incentive Units) then held by all Members (other than [Weld North]) for a price per Unit equal to \$1.335 (the "Subsequent Offer"). The Subsequent Offer shall remain open and irrevocable for a period of fifteen (15) days (the "Subsequent Offer Period") from the date of delivery of the Subsequent Offer to the

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Members (other than [Weld North]). Each Member (other than [Weld North]) may accept the Subsequent Offer by delivering to the Company a notice (the "Acceptance Notice") within the Subsequent Offer Period....

Plaintiff alleges that because the Subsequent Offer was not transmitted in accordance with Section 20 of the Fourth Operating Agreement as it was only e-mailed to plaintiff with no additional mailing, the Subsequent Offer was a nullity and therefore, no offer was received by plaintiff by December 31, 2013. Additionally, plaintiff alleges damages as a result of Weld North's breach. Specifically, plaintiff alleges that because Weld North's purchase offer was not delivered in accordance with the terms of the Fourth Operating Agreement, the offer was a nullity and thus, he was never provided with a purchase offer within the timeframe prescribed in the agreement, which caused him damages in the amount of \$133,500.00, the amount he would have obtained had he received a valid purchase offer from Weld North by December 31, 2013 and agreed to sell his shares to Weld North.

Weld North's assertion that plaintiff's breach of contract claim must be dismissed because the Fourth Operating Agreement did not require Weld North to make its purchase offer by mail is without merit. Specifically, Weld North asserts that the notice provision "does nothing more than specifically approve of certain methods of delivery – it does not state that other methods of delivery are insufficient or that using some other form of delivery renders a notice invalid." However, the notice provision expressly states that a notice to a party "shall be deemed to be sufficient *if*" said notice is sent as prescribed by said provision (emphasis added). As Weld North has not established that its offer was sent in conformity with the notice provision, plaintiff's breach of contract claim on that basis still stands.

Further, Weld North's assertion that plaintiff's breach of contract claim must be dismissed because plaintiff fails to allege damages is without merit. Specifically, Weld North

asserts that because plaintiff has not alleged that he would have accepted the offer had he received it through a method of delivery other than e-mail, he cannot assert any damages based on Weld North's breach. Although plaintiff does not specifically allege that he would have sold his shares to Weld North had he received proper notice pursuant to the Fourth Operating Agreement, plaintiff alleges that because the notice was insufficient, it was a nullity and therefore, it was as though plaintiff never received an offer to purchase his shares. As Weld North fails to brief the issue of whether plaintiff's complaint sufficiently alleges damages even if the offer was a nullity with no cause or effect, the court finds that plaintiff has sufficiently alleged damages for the purposes of a motion to dismiss.

Finally, this court turns to Weld North's motion to dismiss the sixth cause of action on the ground that it is duplicative of plaintiff's breach of contract claim. It is well-settled that "[a] cause of action for a declaratory judgment is unnecessary and inappropriate where the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract." *Apple Records, Inc. v. Capitol Records, Inc.*, 137 A.D.2d 50, 54 (1st Dept 1988). Indeed, the First Department has held that a declaratory judgment claim will be dismissed if it "parallel[s] the breach of contract claims and merely seek[s] a declaration of the same rights and obligations as will be determined under the [breach of contract] causes of action." *Id.*

Here, this court finds that the sixth cause of action must be dismissed as duplicative of plaintiff's breach of contract claim as there is no relief plaintiff can obtain in this action other than money damages because the Company has been sold. Plaintiff's sixth cause of action seeks a declaratory judgment that (1) Weld North did not convey the November 5, 2013 offer to plaintiff as required by both the Third Operating Agreement and Fourth Operating Agreement; (2) plaintiff has been prejudiced by Weld North's failure to comply with the contractual notice

Operating Agreement and Fourth Operating Agreement; (2) plaintiff has been prejudiced by Weld North's failure to comply with the contractual notice requirements of the Third Operating Agreement and Fourth Operating Agreement; (3) by reason of Weld North's failure to comply with the contractual notice requirements of the Fourth Operating Agreement, the time to respond to the November 5, 2013 offer has not commenced; (4) the time for plaintiff to accept the November 5, 2013 offer has not expired; and (5) upon assignment to Weld North of plaintiff's interest in OAH, Weld North shall pay plaintiff the sum of \$133,500.00 with interest from December 20, 2013. However, the court finds that the above declarations sought by plaintiff parallel plaintiff's breach of contract claim and are thus, duplicative. Indeed, if plaintiff prevails on his breach of contract claim, then it will have been determined that Weld North's purchase offer was not conveyed as required under either operating agreement, that plaintiff was prejudiced by Weld North's failure to abide by the operating agreement, that the time to respond to Weld North's offer has not commenced, that the time for plaintiff to accept Weld North's offer has not expired and that plaintiff is entitled to the \$133,500.00.

Accordingly, Weld North's motion to dismiss the action is granted solely to the extent that plaintiff's third cause of action for breach of fiduciary duty against Weld North and plaintiff's sixth cause of action for a declaratory judgment are dismissed. This constitutes the decision and order of the court.

Dated: 2/16/16

Enter: _____


J.S.C.

CYNTHIA S. KERN
J.S.C.