| **Saleeby v Remco Maintenance, LLC** |
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| 2016 NY Slip Op 31447(U) |
| July 25, 2016 |
| Supreme Court, New York County |
| Docket Number: 650371/2016 |
| Judge: Anil C. Singh |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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RAYMOND G. SALEEBY

Plaintiff,

-against-

REMCO MAINTENANCE, LLC, PATRIARCH PARTNERS, LLC, and LYNN TILTON

Defendants.

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DECISION AND ORDER

Index No. 650371/2016
Mot. Seq. 001, 002

**HON. ANIL C. SINGH, J.:**

In this action sounding in conversion, breach of contract, and common law dissolution, defendants Remco Maintenance, LLC, Patriarch Partners, LLC and Lynn Tilton (together, "defendants") move to dismiss the complaint. Plaintiff Raymond G. Saleeby opposes.[1]

On April 1, 2015, Remco Maintenance, LLC ("Remco") entered into an Employment Agreement with plaintiff Raymond G. Saleeby ("Saleeby"). The employment agreement provided that Saleeby would be President and CEO of Remco. Section 4(c) of the employment agreement further provided that Saleeby was to receive a 7.5 percent membership interest in Remco as of April 1, 2005, his employment date, half of which vested immediately and half of which vested over two years:

> Subject to the provisions of Section 7 of this Agreement, effective as of the date hereof, the Employee will receive such number of membership interests in the Company equal to 3.75% of the outstanding membership interests of the

[1] It should be noted that plaintiff has consented to dismiss the corporate dissolution claim without prejudice.

[* 2]

Company, on a fully diluted basis, as of the date hereof (the "Initial Membership Interests"). In addition, the Employee shall participate in a management equity incentive plan to be established by the Company for senior executive officers of the Company, as in effect during the Employment Term (the "Management Incentive Plan"). Subject to the provisions of Section 7 of this Agreement, pursuant to the Management Incentive Plan, the Employee will be entitled to receive such number of membership interests in the Company equal to 3.75% of the outstanding membership interests as of the date hereof (the "Additional Membership Interests"), which Additional Membership Interests shall vest in eight equal installments at the end of each calendar quarter beginning with the first quarter of 2005 and ending with the fourth quarter of 2006. In the event of termination other than a termination for "cause" (as defined below) or a termination by the Employee for any reason, all invested Membership Interest shall immediately vest.

The Limited Liability Company Agreement of Patriarch RMC Acquisition, LLC (t/b/k/a Remco Maintenance, LLC), dated November 29, 2004 and amended April 1, 2005, was signed by Lynn Tilton, who has the title of Manager and the stockholders, the Class A Members and plaintiff Saleeby. The LLC agreement was amended to reflect plaintiff Saleeby's Class B membership interest.

Moreover, Section 6.05(a) of the agreement provides:

(a) Repurchase Upon Termination. Upon termination of a Class B Member's employment with the Company for any reason, the Company shall have the right, exercisable within 60 days after the later to occur of (A) the date of such termination, and (B) the final resolution of any disputes relating to such termination, to elect to repurchase any or all of such Class B Member's Membership Interests, for a price per Membership Interest equal to:

(i) in the event of termination of employment for Cause or due to such Class B Member's voluntary termination, the amount actually paid by such Class B Member to the Company for such Membership Interest; and

(ii) in all other cases, an amount equal to the Fair Market Value of the Class B Interests as of the date of such termination.

(b) Right to Assign. In the event that the Company is unable to repurchase the Class B Interests as provided above (whether due to contractual, legal or other restrictions), the Company may assign the Company's right to purchase the Class B Interests pursuant to Section 6.05(a) above to any of its Affiliates, in which case such Affiliate will have the right to purchase the Class B Interests pursuant to Section 6.05(a) above.

"Fair Market Value" is defined in the LLC Agreement in relevant part as:

> "the value determined by the Board in good faith, based on all factors which the Board, in its sole discretion, determines to be relevant and appropriate, including, without limitation, type of asset, marketability (or absence thereof), restrictions on disposition, purchases of the same or similar securities by other investors, pending mergers or acquisitions and current and prospective financial position and operating results."

Plaintiff was terminated from his position in or about February 2012. He was asked to sign a proposed separation agreement but refused to do so. From February 2012 through 2014, plaintiff and Remco were engaged in disputed negotiations regarding plaintiff's termination of employment, severance, vacation pay and rights to unemployment insurance.

The complaint also alleges that the defendants, through counsel, informed plaintiff that his Class B membership interest in the company were redeemed at a fair market value of zero dollars. In its moving papers, defendants confirm that Saleeby's membership interests were repurchased in 2013.

**Analysis**

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must afford the pleadings a liberal construction, accepting the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference. AG Capital Funding Partners. L.P. v State St. Bank & Trust Co., 5 NY3d 582, 591 (2005). The court's sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail. Polonetsky v Better Homes Depot, 97 NY2d 46, 54 (2001). The facts pleaded are to be presumed to be true and are to be

accorded every favorable inference, although bare legal conclusions, as well as factual claims, flatly contradicted by the record are not entitled to any such consideration. See, Morone v Morone, 50 NY2d 481 (1980).

"A motion to dismiss the complaint pursuant to CPLR 3211(a)(1) may be granted only if the documentary evidence submitted by the defendant utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law." See, Granada Conominium III Association v Palomino, 78 AD3d 996, 996 (2d Dept 2010). Furthermore, the documentary evidence must resolve all factual issues as a matter of law and conclusively dispose of the cause of action. Goshen v Mut. Life Co. of N.Y., 98 NY2d 314, 326 (2002).

***Breach of contract***

The gravamen of the case is whether the value of plaintiff's Class B interest as determined by the Board was done in good faith, pursuant to the definition of Fair Market Value ("FMV") in Section 1.1 of the LLC agreement.

There is no dispute that plaintiff was terminated without cause. Therefore, pursuant to section 6.05 of the LLC agreement and subject to the timing requirement, *infra*, the Company has the right to elect to repurchase the Class B interest "for a price per Membership Interest equal to" "the Fair Market Value of the Class B Interests as of the date of the termination". Fair Market Value is defined under the agreement as "the value determined by the Board *in good faith*, based on all factors which the Board, in its *sole discretion*, determines to be relevant and appropriate." (emphasis added).

The definition of Fair Market Value pursuant to the agreement gives the Board sole discretion in determining the factors to be used but also limits their determination to

one that is done in good faith. Plaintiff contends that valuing his interest at zero dollars, the board's determination was not in good faith. Remco counters that the Board had sole discretion to determine the value of Class B shares. While the Board has "sole discretion" in determining the factors and value of the shares, the contract does provide that it be done in "good faith". New York courts have held that "good faith" is the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. Levandusky v One Fifth Ave. Apt. Corp., 75 NY2d 530, 538 (1990). See also, Fletcher v Dakota, Inc., 99 A.D. 3d 43, 48 (1st Dept 2012); Bregman v 111 Tenants Corp., 97 A.D. 3d 75, 83-84 (1st Dept 2012). Black's Law Dictionary (10th ed. 2014) defines "acting in good faith" as "(b)ehaving honestly and frankly, without any intent to defraud or to seek an unconscionable advantage." Whether the determination in this case was made in good faith is an issue that cannot be decided on a motion to dismiss.

Remco cites Shilkoff Inc. v. 885 Third Ave. Corp., 299 AD 2d 253 (1st Dept 2002) to support its motion to dismiss. In that case, the defendant corporation bought out a limited partnership's interests pursuant to a buy/sell provision. The court held that the defendant had the right "to set the value of the partnership interests to be purchased and that that value did not depend on the price that a third party would have paid." While Shilkoff provides guidance as to what constitutes a board's "sole discretion" in determining fair market value, it does not address an outcome when the provision provides that the determination be made "in good faith". Plaintiff has alleged that the determination made by the board was not done in good faith. In a CPLR 3211(a)(7) motion, the court must "accept the allegations of the complaint as true and provide

plaintiff the benefit of every possible favorable inference". AG Capital Funding Partners, L.P. v State St. Bank & Trust Co., 5 N.Y. 3d 582, 591 (2005).

Moreover, section 6.05 of the LLC agreement also clearly provides that the "Company shall have the right, exercisable within 60 days *after* the later to occur of (A) the date of such termination, and (B) the final resolution of any disputes relating to such termination, to elect to repurchase any or all of such Class B Member's Membership Interests." Here, defendants state that the Class B shares were repurchased in 2013. While plaintiff was terminated in 2012, there was dispute as to the terms of his severance with a final resolution occurring only in 2014. Accordingly, there is a question as to whether Remco's purchase of the shares was timely under section 6.05 LLC agreement.

Defendants' argument that plaintiff has failed to cite the contractual provisions with regards to the breach of contract has no merit. The factual allegations in the four corners of the complaint state a cause of action for breach of contract.

Accordingly, defendant Remco's motion to dismiss plaintiff's breach of contract claim is denied.

***Conversion***

Plaintiff's claim for conversion is duplicative of his breach of contract claim and is dismissed.

A plaintiff alleging conversion must plead "wrongful or criminal behavior, as distinguished from acts that are a mere violation of contractual rights". PKO Television, Ltd v. Time Life Films, Inc., 169 AD 2d 582, 583 (1st Dept 1991). In addition, a conversion claim cannot be sufficiently independent if the damages sought "are the same as breach of contract damages". Peters Griffin Woodward, Inc. v. WCSC, Inc., 88 AD 2d

883, 884 (1st Dept 1982). The First Department has consistently held that a claim for conversion cannot proceed unless "independent facts are alleged giving rise to tort liability." Kopel v. Bandwidth Tech Corp., 56 A.D.3d 321 (1st Dept 2008).

Here, Saleeby has not alleged wrongdoing or damages distinct from his contract claim. The allegations that he was stripped of his Class B membership interest and the repurchasing of the Class B membership interest occurring 60 days after termination are all part of the breach of contract claim. Moreover, he seeks identical relief on both claims: a judgment in excess of $2.25 million.

The cases cited by plaintiff are inapplicable to the case at hand because they involved separate conduct or separate damages. See e.g., Apple Records, Inc. v. Capitol Records, Inc., 137 AD 2d 50, 55 (1st Dept 1988) (a fraud claim did not restate the breach of contract claims because it was premised on separate conduct namely, defendants' fraudulent concealment and misrepresentation); Wildenstein v. 5H & Co, Inc., 97 A.D.3d 488 (1st Dept 2012) (in an action by a plaintiff against a contractor over allegedly defective apartment renovations, the conversion claim involved separate misconduct because the contractor allegedly retained certain items that belong to plaintiff in an attempt to extort more money from her). Here, plaintiff has not asserted separate conduct or damages.

Accordingly, defendants' motion to dismiss plaintiff's claim for conversion is granted.

***Claims as against defendants Patriarch & Lynn Tilton***

Plaintiff's claims against defendant Patriarch and Lynn Tilton are dismissed. Neither Patriarch nor Ms. Tilton are parties to the Employment Agreement or the LLC

Agreement. The Employment Agreement was signed by Lynn Tilton in her capacity as a manager of Remco. The LLC Agreement was also signed by Lynn Tilton in her capacity as a manager.

As an initial matter, under both Delaware[2] and New York law, Ms. Tilton cannot be held liable as a manager. Delaware law provides that LLC managers are not responsible for LLC liabilities "whether arising in contract, tort or otherwise". 6 Del. C. § 18-303. Moreover, New York case law has established that corporate officers and directors are not "personally liable to one who has contracted with the corporation". Murtha v. Yonkers Child Care Ass'n, Inc., 45 N.Y.2d 913, 915 (1978).

Plaintiff's allegations are insufficient to state an alter ego claim against defendants Patriarch and Ms. Tilton. Whether to hold shareholders liable for a company's obligations under an alter ego theory is governed by the state where the company is incorporated. See, Klein v. CAVI Acquisition, Inc., 57 A.D.3d 376, 377 (1st Dept 2008). Both Patriarch and Remco were incorporated in Delaware. Under Delaware law, a plaintiff raising an alter ego theory must allege (1) facts that if taken as true, demonstrate (one company's) complete domination and control of another; and (2) that the corporate structure caused fraud or similar injustice. See, Wallace v. Wood, 752 A. 2d. 1175, 1183-84 (Del. Ch. 1999). Plaintiff has not sufficiently alleged that corporate structure caused fraud. He has also not alleged fraudulent conduct involving the corporate form and independent of the underlying contract and conversion claim.

***Plaintiff's leave to replead claims as against defendants Patriarch & Lynn Tilton***

[2] Since the corporations are incorporated in Delaware, defendants argue that Delaware law applies.

Plaintiff request for leave to replead his claims as against defendants Patriarch and Lynn Tilton is denied as any attempt to do so would be futile.

Here, plaintiff cannot cure the complaint to assert claims against defendants Patriarch and Lynn Tilton as they are not parties to the contracts at issue and cannot be held under the alter ego theory. Plaintiff 's amendments to the complaint would be futile. See e.g., Cusack v Greenberg Traurig, LLP, 109 A.D. 3d 747, 749 (1st Dept 2013) (plaintiff fails to state how any defects would have been addressed if he had been given leave to amend the complaint and, in any event, any further amendment of the complaint would have been futile); Health-Loom Corp. v Soho Plaza Corp., 209 A.D. 2d 197, 198 (1st Dept 1994).

Accordingly, it is hereby

**ORDERED** that defendants' motion to dismiss plaintiff's breach of contract cause of action is denied; and it is further

**ORDERED** that the defendants' motion to dismiss plaintiff's cause of action sounding in conversion is granted; and it is further

**ORDERED** that the defendants' motion to dismiss plaintiff's claim against Patriarch and Lynn Tilton is granted without leave to amend.

Date: July 25, 2016
New York, New York

Anil C. Singh