SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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HERVE LARREN, BIDKIND LLC, ARONIS LIFE LLC, and HERVE LARREN as a member suing on behalf Of SHEIK N' BEIK ENTERTAINMENT,

Plaintiffs,

-against-

JULIO SANTO DOMINGO, SHEIK N' BEIK ENTERTAINMENT LLC and XYZ CORP.,

Defendants.

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DECISION/ORDER

Index No. 654159/2015
Motion Seq. No. 001

HON. SALIANN SCARPULLA, J.S.C.

In this action arising out of an alleged joint venture, defendants Julio Mario Santo Domingo ("Santo Domingo") and Sheik N' Beik Entertainment LLC ("SNB") move to dismiss the complaint pursuant to CPLR §§ 3211(a)(1) and (7) and CPLR § 3016.

Background

Plaintiff Herve Larren ("Larren") alleges that he entered into a joint venture with Santo Domingo, heir to a large fortune, to help Santo Domingo become a DJ. Larren and Santo Domingo allegedly formed SNB, Aronis Life ("Aronis"), and BidKind LLC ("BidKind") (collectively, the "Companies") between January and May 2013, in furtherance of the joint venture.

SNB is a Delaware Limited Liability Company that was formed as a record label to market Santo Domingo's DJ services at music events, clubs, and festivals. BidKind is

a Delaware Limited Liability Company that was formed as an online charity to raise funds for nonprofit organizations by auctioning music and celebrity experiences. Aronis is a Delaware Limited Liability Company that was formed to coordinate events that would showcase Santo Domingo as a DJ. Larren alleges that he owns a majority interest in BidKind and Aronis without specifying Santo Domingo's interest, and he further alleges that Santo Domingo owns a controlling interest in SNB. Larren further alleges that Santo Domingo's trust fund financed the Companies.

On January 13, 2013, Larren executed an employment agreement with SNB to become its chief executive officer ("CEO") and 10% interest owner (the "Employment Agreement"). Larren alleges that he has received a bonus of $286,003.50 from SNB because of his success in marketing Santo Domingo as a DJ.

Larren claims that Santo Domingo was presented with a business opportunity to acquire Soundslinger LLC ("Soundslinger"), a live music festival promotion company, due to Larren's efforts. Larren alleges that Santo Domingo asked him to secure the acquisition, and Santo Domingo allegedly promised Larren that if he chose to invest in Soundslinger, the investment would be done through the joint venture.

Larren alleges that he completed due diligence and presented the Soundslinger investment opportunity to the trustees of Santo Domingo's trust ("Trustees"), but the Trustees did not approve the funds necessary to acquire Soundslinger. Instead, according to Larren, Santo Domingo colluded with the Trustees to acquire Soundslinger without Larren by: (1) dismantling the Companies in which Larren had an interest by blocking him from accessing the Company's email, bank accounts, and office; (2) terminating

Larren from SNB; (3) erasing equity in the Companies by defaming him to potential investors; and (4) diverting the Companies' assets to acquire Soundslinger through another entity.

Larren alleges that on August 27, 2015, Santo Domingo demanded that he turn over his equity interest in the Companies; forego the equity interest in Soundslinger; and resign as CEO of SNB. After refusing Santo Domingo's alleged demands, Larren received a letter on September 1, 2015 purporting to terminate him for cause as CEO of SNB. The termination letter specified alleged incidents of embezzlement, including payment of the $286,003.50 he received as an alleged bonus. Larren alleges that the basis for termination is a pretext to deny him severance.

Thereafter, Santo Domingo allegedly commenced a defamation campaign against Larren by publishing false statements to former colleagues and potential investors. Larren claims that BidKind lost an investment from Aurelien Chemli ("Chemli"), who had committed to investing $5,000,000.00 in BidKind, after Chemli heard the false information that Larren embezzled from SNB.

Additionally, Larren alleges that Santo Domingo interfered with and caused (i) iHeartMedia, Inc. conglomerate to terminate an imminent deal with BidKind; and (ii) Dailymail to terminate an imminent deal with Aronis Life. The complaint alleges that after ruining BidKind and Aronis, Santo Domingo used BidKind's infrastructure and assets to create a new company duplicative of BidKind.

BidKind, Aronis, and Larren, individually and on behalf of SNB, commenced this action asserting seven claims: (1) breach of contract against Santo Domingo and SNB;

(2) breach of fiduciary duty against Santo Domingo; (3) unjust enrichment against Santo Domingo and SNB; (4) tortious interference with prospective economic advantage against Santo Domingo; (5) defamation against Santo Domingo; (6) defamation *per se* against Santo Domingo; and (7) declaratory judgment for a constructive trust against Santo Domingo and XYZ Corp., the unknown corporation Santo Domingo used to acquire Soundslinger. Santo Domingo and SNB now move to dismiss.

Discussion

"On a motion to dismiss directed at the sufficiency of the complaint, the plaintiff is afforded the benefit of a liberal construction of the pleadings [and] '[t]he scope of a court's inquiry . . . [is] to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action.'" *1199 Hous. Corp. v Intl. Fid. Ins. Co.*, 14 A.D.3d 383, 384 (1st Dep't 2005). However, the complaint should be dismissed when the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Beal Sav. Bank v Sommer*, 8 N.Y.3d 318, 324 (2007).

Breach of Contract Cause of Action against Santo Domingo and SNB

In the first cause of action Larren alleges a claim for breach of the Employment Agreement. The complaint contains no allegations that Santo Domingo entered into the Employment Agreement with Larren in an individual capacity, thus there is no basis upon

which to hold Santo Domingo individually liable for breach of contract. I therefore dismiss the breach of contract cause of action against Santo Domingo.[1]

Regarding SNB, Larren alleges that SNB materially breached the contract by firing him for cause without basis to do so, which deprived him of his severance benefits pursuant to paragraph 7 of the Employment Agreement. Under the Employment Agreement, SNB could terminate Larren with or without cause. The Employment Agreement defines "Cause" to include "fraud, embezzlement, misappropriation, theft, dishonesty or willful misconduct or breach of fiduciary duty[.]" If Larren was terminated for cause he would be entitled only to accrued pay and vacation time. However, if Larren was terminated without cause, he would be entitled to a severance payment in addition to his accrued pay and vacation time.

SNB argues that the breach of employment contract claim against it should be dismissed because the Employment Agreement grants SNB the sole discretion to determine whether Larren's conduct violates company policy.[2] Contrary to SNB's argument, the Employment Agreement does not give SNB the unfettered and unreviewable right to determine whether Larren was terminated for cause, as that term is

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[1] Moreover, Larren fails to oppose dismissal of the breach of contract claim as against Santo Domingo.

[2] SNB submits Larren's termination letter, dated September 1, 2015, notifying Larren that he is "terminated for Cause (as such term is defined in the Employment Agreement)" because Larren "charged approximately $100,000 in personal expenses to the corporate American Express card without authorization" and "signed a check from [SNB's] bank account payable to [him] in the amount of $286,003.50 in January 2015."

defined in the Employment Agreement, particularly because Larren alleges that the reasons given for his termination were a pretext to avoid paying him his contractually agreed upon severance. *See generally Hoffman v. Wyckoff Heights Medical Center*, 129 A.D.3d 526, 526 (1st Dep't 2015) (stating that the motion to dismiss was premature because discovery was necessary to determine whether misconduct constituted cause for termination). Accordingly, I deny dismissal of the breach of contract cause of action against SNB.

Breach of Fiduciary Duty Against Santo Domingo

In the second cause of action, plaintiffs allege that Santo Domingo breached his fiduciary duties to the plaintiffs in several ways. Delaware law applies to the breach of fiduciary duty claim involving the Companies, as these are all Delaware entities. *See Hart v. General Motors Corp.*, 129 A.D.2d 179, 182 (1st Dep't 1987) (Issues of corporate governance are "governed by the law of the state in which the corporation is chartered"); *see also Simon v. Becherer*, 7 A.D.3d 66, 71 (1st Dep't 2004). However, to the extent that the breach of fiduciary duty claim arises from the alleged joint venture between Santo Domingo and Larren, I apply New York law.

A. Corporate Opportunity in Soundslinger

In the complaint Larren alleges that by usurping the opportunity to acquire Soundslinger and steering the opportunity to a company unaffiliated with the joint venture, Santo Domingo breached his fiduciary duty to Larren. Santo Domingo moves to dismiss this cause of action for failure to plead with particularity.

As an initial matter, the parties dispute whether Santo Domingo and Larren were co-venturers. "The indicia of the existence of a joint venture are: acts manifesting the intent of the parties to be associated as joint venturers, mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses". *Richbell Info. Services, Inc. v Jupiter Partners, L.P.*, 309 A.D.2d 288, 298 (1st Dep't 2003).

Here, Larren sufficiently alleges the existence of a joint venture through submission of a sworn affidavit, stating that: (1) Santo Domingo and Larren entered into a joint venture to promote Santo Domingo as a DJ and SNB as a record label; (2) BidKind and Aronis were formed in furtherance of the joint venture's purpose; (3) Santo Domingo would provide capital while Larren would provide knowledge and skill to the joint venture; (4) Larren had control over the enterprise based on his membership interest in each company; and (5) profits and losses in the joint venture were shared in accordance with Santo Domingo's and Larren's membership interest in each company.

Contrary to Santo Domingo's contention, Larren's inability to make a capital investment in the alleged joint venture does not, alone, refute the allegation that Santo Domingo and Larren agreed to share losses.[3] Santo Domingo cites *Mawere v Landau*, 39 Misc. 3d 1229(A) (Sup. Ct. 2013) for the proposition that the "risk of losing the value of

[3] Santo Domingo's assertion that there is no basis to find that Larren and Santo Domingo entered into a joint venture because there is no written agreement lacks merit. *See Cobblah v Katende*, 275 A.D.2d 637, 639 (1st Dep't 2000) (stating that oral agreement may be sufficient).

one's services is not sufficient to constitute sharing in the losses of a joint venture." *Id.* at 6. However, unlike *Mawere*, Larren here asserts that as co-venturers, both agreed to share the losses in accordance with their respective membership interest in the Companies, independent of Larren's contribution of services. Accordingly, viewing the complaint and papers submitted as a whole, Larren sufficiently alleges that Santo Domingo owed him a fiduciary duty as a co-venturer, and Larren may, at this pleading stage, proceed with a direct claim against Santo Domingo for breach of fiduciary duty in this context.

As between co-joint venturers, the doctrine of corporate opportunity represents one of the duties a fiduciary assumes. *See Alexander & Alexander of New York, Inc. v Fritzen*, 147 A.D.2d 241, 246 (1st Dep't 1989). "The doctrine of 'corporate opportunity' provides that corporate fiduciaries . . . cannot, without consent, divert and exploit for their own benefit any opportunity that should be deemed an asset of the corporation" *Alexander*, 147 A.D.2d at 246. New York courts have utilized various tests to determine what constitutes a corporate opportunity, including the tangible expectancy test and the same line-of-business test. *Alexander*, 147 A.D.2d at 246.; *see also Lee v Manchester Real Estate and Const., LLC*, 118 A.D.3d 627, 627–28 (1st Dep't 2014) ("[N]o one test [] is 'consistently sufficient' to address what constitutes a corporate opportunity in every case").

In the complaint Larren has sufficiently alleged that Santo Domingo usurped a corporate opportunity regarding Soundslinger because: (1) Soundslinger was within the joint venture's line of business; (2) Larren, as an alleged co-venturer, had an expectancy

in the opportunity based on Santo Domingo's alleged promise; and (3) Santo Domingo used Larren's time, knowledge, and skill in pursuing the opportunity.

Santo Domingo argues, in opposition, that he had no duty to make a capital investment to acquire Soundslinger through either the joint venture or a jointly-owned entity; and that neither Larren nor any of the jointly-owned entities had the funds to make the investment. While Santo Domingo's assertions may ultimately prove true, the complaint's allegations are sufficient to further develop the factual record and determine whether this claim has merit. *See Owen v Hamilton*, 44 A.D.3d 452, 454 (1st Dep't 2007) (stating that merely because the corporation is unable to avail itself of the opportunity does not determinatively prevent liability as a fiduciary). Accordingly, to the extent premised on the joint venture's corporate opportunity, I deny dismissal of the breach of fiduciary cause of action.[4]

B. Conduct as to BidKind and Aronis

The parties also dispute whether Santo Domingo owes a fiduciary duty as an alleged member of BidKind and Aronis. The complaint alleges that Larren specifically owns a controlling interest in BidKind and a majority interest in Aronis, and that Santo Domingo "owned a membership interest" in BidKind and Aronis without specifying more.

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[4] To the extent the complaint may be read to assert the breach of fiduciary duty claim based on SNB's corporate opportunity, I dismiss this claim. *See* Pl.'s Opposition Br. 8 (representing that the complaint alleges a "breach of fiduciary duty against [Santo] Domingo . . . [for] usurping and stealing . . . the corporate opportunity of the Soundslinger investment from his co-venturer Larren" and not derivatively).

Generally, "Delaware law imposes no default fiduciary duties on non-managing, non-controlling members of limited liability companies" *Imbert v LCM Interest Holding LLC*, 2013 WL 1934563, at 7 (Del. Ch. May 7, 2013). However, Larren submits an email in which Santo Domingo unilaterally terminated Larren's access to BidKind's and Aronis' bank accounts by representing to the bank that he "own[s] the controlling share of all companies[.]" The documents submitted are sufficient to raise an issue regarding whether BidKind and Aronis, as separate entities, could freely exercise independent judgment without Santo Domingo and, in turn, whether Santo Domingo owes a fiduciary duty. *See In re KKR Fin. Holdings LLC Shareholder Litig.*, 101 A3d 980, 995 (Del. Ch. 2014) ("[I]n deciding whether a stockholder owes a fiduciary obligation to the other stockholders of a corporation in which it owns only a minority interest, the focus of the inquiry is on whether the stockholder can exercise actual control over the corporation's board."); *see also See Feeley v NHAOCG, LLC*, 62 A.3d 649, 662–63 (Del. Ch. 2012) (passive members . . . may owe fiduciary duties depending on whether that person controls a manager of the LLC or otherwise has a fiduciary relationship to the LLC.").

Assuming that Larren can establish a fiduciary duty on this basis, the allegations are otherwise sufficient to state a claim. Larren alleges that Santo Domingo intentionally sabotaged BidKind and Aronis by commandeering and freezing the email and bank accounts of the two companies to allegedly use BidKind's and Aronis' assets to launch an identical company without Larren. *See Boyer v Wilmington Materials, Inc.*, 754 A.2d 881, 903 (Del. Ch. 1999) (finding that the plaintiff may sue individually after defendants conducted an asset sale with the principal purpose to eliminate plaintiff from the

continued participation in the ownership and management of the business at issue). Therefore, I deny Santo Domingo's motion to dismiss this cause of action as to these claims.

C. SNB Derivative Waste Claim[5]

Santo Domingo argues that I should dismiss the breach of fiduciary claim to the extent that Larren derivatively asserts it on behalf of SNB for waste because the complaint fails to plead it with particularity. Santo Domingo cites *Janklowicz v Landa*, 2014 N.Y. Slip Op. 31508(U) (Sup. Ct. Kings County 2014) for support, in which the trial court found that the allegations were conclusory where plaintiff alleged that the defendant "mismanag[ed] the business operations" and "wast[ed] the assets". Unlike *Janklowicz*, Larren specifically alleges that Santo Domingo used SNB's funds for first class travel, including a trip to Ibiza in 2013, and purchasing multimillion dollar artwork such as a Keith Haring. These allegations are more detailed than those set forth in *Janklowicz,* are sufficient to give notice of the alleged waste, and accordingly, I deny the motion to dismiss the breach of fiduciary cause of action based on these allegations as well.

[5] Larren has plead demand futility to derivatively assert a claim on behalf of SNB because Larren alleges that Santo Domingo is interested in the transaction under attack and therefore, cannot be considered independent as a controlling member. *See Sandys v Pincus*, 152 A.3d 124, 128 (Del. 2016); *Goldstein v Bass*, 138 A.D.3d 556, 556 (1st Dep't 2016).

Unjust Enrichment and Constructive Trust Against Santo Domingo and SNB

In the third cause of action Larren alleges that Santo Domingo and SNB were unjustly enriched by excluding Larren from the Soundslinger investment and by stealing BidKind's assets to open an identical competing company. Santo Domingo and SNB move to dismiss, arguing that the complaint failed to state a claim for unjust enrichment because Larren has already been compensated for his services as CEO of SNB.

I find that Santo Domingo's alleged acquisition of Soundslinger without Larren, after Larren allegedly vetted the opportunity and presented it to the Trustees in reliance on Santo Domingo's promise to share the opportunity with Larren, sufficiently states a claim for unjust enrichment. *See Georgia Malone & Co. Inc. v. Ralph Reider*, 86 A.D.3d 406, 408 (1st Dep't 2011) (requiring that: (1) the defendant was enriched; (2) at the expense of the plaintiff; and (3) that it would be inequitable to permit the defendant to retain that which is claimed by the plaintiff). Moreover, Santo Domingo and Larren have not demonstrated, as a matter of law, that Larren's effort to secure the Soundslinger opportunity was part of the work he performed as CEO of SNB rather than in another capacity. Accordingly, I deny Santo Domingo's and SNB's motion to dismiss the third cause of action.

For the same reasons, I deny dismissal of the seventh cause of action, which seeks a constructive trust and a declaratory judgment that Larren is the 10% owner of the entity Santo Domingo used to acquire Soundslinger.

Defamation and Defamation *Per Se* Against Santo Domingo

Larren asserts the fifth and sixth causes of action against Santo Domingo for defamation and defamation *per se*, and Santo Domingo argues that both causes of action fail to satisfy the heightened pleading standard to successfully allege a defamation claim.

Despite Santo Domingo's argument to the contrary, the complaint and supplemental affidavits submitted by Larren in opposition to this motion sufficiently afford Santo Domingo notice of the allegedly defamatory communications. Specifically, Larren alleges that Santo Domingo instructed Alyssa Richardson, a BidKind employee, to disseminate to business associates and potential investors the false information that Larren embezzled from Santo Domingo. Larren also alleges that Santo Domingo informed the Companies' employees that Larren embezzled from SNB. This allegation is amplified in the affidavit of Katie Tardif, who states the date and circumstances at which the allegedly defamatory statement was made to her. Larren alleges that, because of these allegedly defamatory statements, Santo Domingo ruined his business reputation, and that Santo Domingo's defamation caused BidKind and Aronis to lose investments, such as the Chemli investment.

Though some allegations in the complaint relate to statements made in another judicial proceeding, the causes of action for defamation are largely premised on statements made prior to the commencement of that action. Accordingly, I deny dismissal of the defamation and defamation *per se* causes of action, except to the extent that these causes of action are premised upon statements made in the action entitled, *Julio Mario Santo Domingo v. BidKind LLC and Herve Larren*, Index No. 653453/2015.

Tortious Interference with Prospective Economic Advantage

Santo Domingo moves to dismiss the fourth cause of action of tortious interference with prospective economic advantage, arguing that the allegations are vague and fail state a claim for tortious interference.

Review of the complaint shows that plaintiffs allege: (1) that Santo Domingo was aware of actual prospective business relationships with third parties; and (2) that Santo Domingo unlawfully and maliciously interfered with Larren's, BidKind's, and Aronis's business relationships to harm each. *See Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 108 (1st Dep't 2009). Specifically, the complaint alleges a prospective business relationship BidKind had with Chemli, who allegedly committed to invest $5,000,000.00 but later withdrew after Santo Domingo allegedly defamed Larren. Plaintiffs also allege that Santo Domingo interfered with BidKind's prospective business relationship with iHeartMedia, Inc., and with Aronis Life's prospective business relationship with Dailymail. Accordingly, the complaint sufficiently plead a cause of action for tortious interference with prospective economic advantage, and I deny dismissal of that cause of action.

In accordance with the foregoing, it is

ORDERED that motion to dismiss by defendants Julio Mario Santo Domingo, Sheik N' Beik Entertainment LLC, and XYZ Corp is granted only to the extent the first cause of action for breach of contract is dismissed as against defendant Julio Mario Santo Domingo, and the fifth and sixth causes of action for defamation and defamation per se

are dismissed to the extent they are premised upon statements made in the action entitled, *Julio Mario Santo Domingo v. BidKind LLC and Herve Larren*, Index No. 653453/2015, and the motion is otherwise denied; and it is further

ORDERED that counsel are directed to appear for a compliance conference in Room 208, 60 Centre Street, on February 28, 2018, at 2:15 p.m.

This constitutes the decision and order of the Court.

1/25/18
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED			[X]	NON-FINAL DISPOSITION	
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