SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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DPB FAMILY LLC, BMCPS LLC, DEA ASTON LLC, ARISTOTLE DEFTEREOS, SPIROS DEFTEREOS, STAVROS KALOGEROPOULOS, and EDWIN PINTO, individually and derivatively on behalf of FIDI DISTRICT LLC, COLUMBUS VILLAGE LLC, and NGM MANAGEMENT GROUP LLC,

Plaintiffs,

-against-

EUTYCHIA GROUP LLC, EL TORO GROUP LLC, FIDI DISTRICT LLC, COLUMBUS VILLAGE LLC, and NGM MANAGEMENT GROUP LLC,

Defendants.

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Index No.: 652555/2018

DECISION & ORDER

JENNIFER G. SCHECTER, J.:

Defendants Eutychia Group LLC (Eutychia) and El Toro Group LLC (El Toro) and nominal defendants FiDi District LLC (FiDi), Columbus Village LLC (Columbus), and NGM Management Group (NGM) move, pursuant to CPLR 3211, to dismiss the complaint.[1] Plaintiffs DPB Family LLC, BMPS LLC, DEA Aston LLC, Aristotle Deftereos, Spiros Deftereos, Stavros Kalogeropoulos, and Edwin Pinto oppose the motion. The motion is granted in part.

[1] Plaintiffs do not assert any claims against NGM, Columbus, and FiDi, which are merely necessary parties (nominal defendants) on the derivative claims that plaintiffs assert on their behalves.

Factual Background & Procedural History

The following facts are drawn from the Complaint (Dkt. 1)[2] and are assumed true unless refuted by documentary evidence.

This action concerns the governance and management of three Bareburger restaurants, located at 153 Eighth Avenue, 795 Columbus Avenue, and 111 Fulton Street in Manhattan (the Restaurants). The Restaurants are respectively owned and managed by three New York LLCs – NGM, Columbus, and FiDi (collectively, the LLCs or the Companies). The Companies are governed by operating agreements that, as relevant here, are materially identical (*see* Dkts. 26-28 [the Operating Agreements]). Eutychia, which is managed by El Toro, is the sole "Class A" member of the Companies and has the exclusive right to manage them (*see* Dkt. 26 at 5, 32). Plaintiffs are "Class B" members of the Companies who, except with respect to "Major Decisions" as defined by the Operating Agreements (*id.* at 3), have no right to manage the Companies (*id.* at 5, 33). Major Decisions include transactions with Eutychia's members or affiliates (*id.* at 3). Section 2.4 of the Operating Agreements prohibit Eutychia from making Major Decisions without the consent of the majority of the members (*id.* at 5). Plaintiffs, however, allege that Eutychia did so on two occasions:

> First, Michael Pitsinos, who is a member of [Eutychia] and a managing member of [El Toro], purported to extend a loan in the amount of $200,000 to support the operations of the LLCs (the "Pitsinos Loan"). Defendants

[2] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

> never sought a vote on whether the LLCs should accept the Pitsinos Loan and failed to disclose the terms of the Pitsinos Loan to the Minority Members prior to the loan's purported consummation. Second, the LLCs received the benefit of a loan purportedly in the amount of $486,000 from an entity owned by Billy Messados (the "Messados Loan") (the Pitsinos Loan and Messados Loan, collectively, the "Unauthorized Loans"). The entity that loaned $486,000 for the benefit of the LLCs is either Queens Medallion Funding LLC or Medallion Capital Partners, LLC, both of which are, upon information and belief, wholly owned by Messados. Messados is a member of Medallion Capital Partners, LLC, which is the managing member of [El Toro], which is in turn the managing member of Eutychia Group. As with the Pitsinos Loan, Defendants never sought a vote on whether the LLCs should accept the Messados Loan and failed to disclose the terms of the Messados Loan to the Minority Members prior to the loan's purported consummation. Upon information and belief, the Unauthorized Loans were either never made, or if they were made, were at terms grossly unfair to the LLCs and were a windfall for the two individuals behind the Unauthorized Loans.

Complaint ¶¶ 43-49 (paragraph breaks and numbering omitted).

Additionally, plaintiffs allege that Eutychia's members, non-parties Billy Messados, George Hadjipanayi, and Michael Pitsinos, used the Companies' funds to pay expenses of other Bareburger restaurants that they manage (e.g., to pay for construction and rent). Plaintiffs claim that in 2016, they were offered the opportunity invest in those other restaurants but declined.

Plaintiffs further allege that Eutychia mismanaged the Restaurants and committed corporate waste. For instance, it paid the salaries of Messados, Hadjipanayi, and Pitsinos prior to paying the Companies' other employees and the Companies' taxes, thereby causing plaintiffs to be personally liable on the latter. There is currently an action pending before anther Justice of this court in which it is alleged that the Companies owe

nearly $2 million in taxes (*see El Toro Group LLC v Bareburger Group, LLC*, Index No. 651018/2018 [Sup Ct, NY County] [Ostrager, J.]).[3] Plaintiffs allege many other acts of corporate waste, such as overpaying for furniture and food. In November 2016, allegedly due to these issues, Bareburger's franchisor removed Eutychia as manager of all five locations it operated, including the three subject Restaurants.

Finally, plaintiffs claim that they have been denied access to the Companies' books and records and seek access to them pursuant to section 3.4 of the Operating Agreements.

Plaintiffs commenced this action on May 22, 2018 by filing a complaint containing nine causes of action seeking the following relief: (1) damages for breach of the fiduciary duties of loyalty and care, asserted directly and derivatively[4] against Eutychia and El Toro; (2) a declaratory judgment, asserted directly and derivatively, that Eutychia and El Toro failed to seek majority consent of the members prior to entering into the Unauthorized Loans; (3) a declaratory judgment, asserted directly, that Eutychia breached section 3.4 of the Operating Agreements by failing to keep correct books and records of the Companies; (4) damages for breach of sections 2.4 and 3.4 of the Operating Agreements, asserted directly and derivatively against Eutychia; (5) damages (including disgorgement by Eutychia of all compensation paid to it by the Companies),

[3] The parties disputed whether the two cases are related (*see* Dkt. 20). By order dated August 6, 2018, the court denied plaintiffs' request to transfer this case to Justice Ostrager (*see* Dkt. 21).

[4] While it would have been better to plead the direct and derivative claims separately, that plaintiffs did not do so is of no moment since it is easy to distinguish between them here.

removal of Eutychia as managing member and appointment of a Receiver based on direct and derivative claims premised on the faithless servant doctrine; (6) damages for aiding and abetting breach of fiduciary duty, asserted directly and derivatively against El Toro; (7) an equitable accounting of the Company, asserted directly against Eutychia; (8) damages for breach of the implied covenant of good faith and fair dealing, asserted directly against Eutychia; and (9) damages for tortious interference with contract, asserted directly against El Toro.[5]

Defendants move to dismiss the complaint.

Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint and all reasonable inferences that may be gleaned from those facts (*Amaro v Gani Realty Corp.*, 60 AD3d 491 [1st Dept 2009]). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). If the defendant seeks dismissal of the complaint based upon documentary evidence, the motion will succeed only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of

[5] While the complaint also asserts this claim derivatively, in their opposition brief, plaintiffs clarify that they only intend to assert the claim directly (*see* Dkt. 22 at 13).

law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Defendants proffer six arguments in support of dismissal: (1) plaintiffs have improperly commingled direct and derivative claims; (2) plaintiffs have not stated a claim against El Toro; (3) plaintiffs have not stated a claim for breach of the implied covenant; (4) the declaratory judgment claims are duplicative; (5) plaintiffs have not stated a claim for an accounting; and (6) prior litigation over the Companies' books and records bars plaintiffs' current accounting and books and records claims. The court addresses these arguments in turn.

First, while a complaint with impossible-to-untangle direct and derivative claims is subject to dismissal (*see Barbour v Knecht*, 296 AD2d 218, 228 [1st Dept 2002]), it is quite clear from the complaint which of the claims are direct and which are derivative. All of the claims concerning harm to the Companies are derivative (*see Yudell v Gilbert*, 99 AD3d 108, 114 [1st Dept 2012]).[6] In that category are all claims for monetary damages based on the unfair terms of the Unauthorized Loans, the payment of the other restaurants' expenses, and disgorgement based on the faithless servant doctrine. These claims do not uniquely implicate plaintiffs' individual rights as members (*see Serino v Lipper*, 123 AD3d 34, 41 [1st Dept 2014]). By contrast, all of the claims based upon

[6] Demand futility (Complaint ¶¶ 82-89) is not addressed because defendants do not challenge the sufficiency of those allegations (*see generally Matter of Comverse Tech., Inc. Derivative Litig.*, 56 AD3d 49, 53 [1st Dept 2008]).

plaintiffs' rights as Class B members – violation of their consent rights concerning Major Decisions, breach of their rights to books and records and accountings, removal of Eutychia, and the appointment of a receiver – are direct as they stem from plaintiffs' individual rights under the Operating Agreements. Moreover, the mismanagement claims that allegedly resulted in plaintiffs incurring personal tax liability is direct, as such damages uniquely affect plaintiffs. Since there is no confusion over which claims are direct or derivative, dismissal for improper commingling is unwarranted.

Next, El Toro argues that it cannot be held liable without piercing Eutychia's corporate veil, which the complaint does not seek to do. El Toro does not cite any authority for the proposition that the manager (El Toro) of an LLC (Eutychia) that manages other LLCs (the Companies) cannot be held liable for aiding and abetting breach of the manager's fiduciary duties or for tortiously interfering with the LLCs' operating agreements absent veil piercing. "A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach" (*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]). "Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996]). El Toro does not argue that

the complaint fails to properly allege the elements of these causes of action;[7] it only argues that it cannot face liability without veil piercing. This court is unaware of any authority holding that aiding and abetting and tortious interference claims require veil piercing as predicates to liability, and rejects the notion as unpersuasive. The first cause of action for breach of fiduciary duty against El Toro, however, is dismissed as plaintiffs did not establish that El Toro owed them any fiduciary duty (*see* Dkt. 22 at 13-14 [contending that "certain" (i.e., not all) claims against El Toro are validly pleaded]).

Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing is dismissed as duplicative (*see Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]). All of the alleged wrongdoing is either expressly violative of the Operating Agreements or constitutes a breach of the fiduciary duties of care or loyalty. Plaintiffs do not allege any gap in the Operating Agreements for the implied covenant to fill or that the legal and equitable relief sought is unavailable on their other causes of action (*see Art Capital Grp., LLC v Carlyle Inv. Mgmt. LLC*, 151 AD3d 604, 605 [1st Dept 2017]).

Likewise, the declaratory judgment claims are duplicative of the breach of contract claims. Breach of contract claims require proof that the contract was breached (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]); thus, a separate claim seeking a declaratory judgment regarding the breach is unnecessary (*Cherry Hill Market Corp. v Cozen O'Connor P.C.*, 118 AD3d 514, 515 [1st Dept 2014]).

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[7] It only does so in a conclusory fashion improperly for the first time on reply (*see* Dkt. 23 at 9).

Plaintiffs have stated a claim for an accounting. Managing members of an LLC owe fiduciary duties to the minority members (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]) and thus can be compelled to account (*Mohinani v Charney*, 156 AD3d 443, 444 [1st Dept 2017]). As defendants themselves recognize, the right to an accounting is distinct from the right to books and records access (*see* Dkt. 16 at 18). Thus, the court rejects defendants' argument that prior litigation in Queens County Supreme Court (*see* Dkt. 16 at 18-20) over some (but not all) of plaintiffs' books and records rights has any preclusive effect on plaintiffs' current claim for an accounting. It is unclear, however, in this case if an accounting is necessary (*see Barry v Clermont York Assocs., LLC*, 144 AD3d 607, 608 [1st Dept 2016]) or if the monetary recovery sought by plaintiffs is sufficient to remedy the alleged wrongdoing (*Unitel Telecard Distribution Corp. v Nunez*, 90 AD3d 568, 569 [1st Dept 2011]). At the pleading stage, the court need not make this determination and simply concludes that plaintiffs have stated a claim for an accounting.

Finally, the aforementioned Queens County litigation does not preclude plaintiffs ***continued*** right to books and records access under section 3.4 of the Operating Agreement. The scope of such access will be addressed in discovery.

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is granted only to the extent that the second (declaratory judgment), third (declaratory judgment), and eighth (implied covenant) causes of action are dismissed, the portion of the first cause of action

(breach of fiduciary duty) asserted against El Toro is dismissed, the remaining claims shall be construed as either direct or derivative to the extent set forth herein and the motion is otherwise denied.

Dated: October 16, 2018

ENTER:

Jennifer G. Schecter, J.S.C.