Johnson v Asberry
2019 NY Slip Op 31690(U)
June 12, 2019
Supreme Court, New York County
Docket Number: 653236/2018
Judge: Tanya R. Kennedy

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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MELISSA JOHNSON,

Plaintiff,

-against-

Index No. 653236/2018
Motion Sequence 002

TIFFANY ASBERRY and ASBERRY HOLDING COMPANY, LLC,

Defendants.

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HON. TANYA R. KENNEDY, J.S.C.:

Defendant Tiffany Asberry (Asberry) moves by Order to Show Cause (OSC), pursuant to CPLR 3211 (a)(1), (7), and (10), to dismiss the complaint based upon documentary evidence, failure to state a claim, and for failure to join a necessary party.

BACKGROUND

This is an action between a minority shareholder, plaintiff Melissa Johnson (Johnson), and Asberry, the majority shareholder of a limited liability company, Johnson & Asberry Communications, LLC (J&A) (complaint, ¶¶ 5-7). Johnson alleges that Asberry mismanaged and wasted company assets and executed a freeze-out merger with defendant, Asberry Holding Company, LLC (AHC), a limited liability company Asberry solely owned, to eliminate Johnson's minority interest (*id.*, ¶ 22).

In 2011, Johnson and Asberry formed J&A to provide public relations services for government-related projects as a subcontractor to prime contractors working for city agencies (*id.*, ¶25). Johnson and Asberry initially made equal capital contributions to J&A and intended

to jointly and co-equally manage and own such entity (*id.*, ¶¶11, 26). However, Johnson and Asberry subsequently decided to split their membership shares, 51% to Asberry and 49% to Johnson, for the sole purpose of obtaining certification from New York City as a "Minority-Owned Business Enterprise" (*id.*, ¶¶5-6; 11; Exhibit D).

On March 20, 2011, Johnson and Asberry entered into J&A's operating agreement and were elected under said agreement to operate "as co-equal Managers" (Original Operating Agreement) (complaint, ¶¶12, 18; Exhibit A to complaint, pp. 22-31). The Original Operating Agreement provided, *inter alia*, that "[a]ny manager rendering services to the Company shall be entitled to compensation commensurate with the value of such services" (complaint, ¶21; Exhibit A to complaint, p. 26).

Johnson and Asberry agreed to maintain time sheets to reflect their client and administrative work for J&A (complaint, ¶37). Monies which J&A received for client work would be paid to Johnson or Asberry as "guaranteed payments" according to the billable hours reflected in their time sheets (*id.*). Monies which J&A received as "overhead" would be paid as "guaranteed payments" for the time spent on administrative, non-billable work set forth on their time sheets (*id.*). Any remaining funds (e.g. profits) would be paid as distributions pursuant to the parties' membership interests (*id.*). Johnson alleges that she performed most of the client and administrative work for J&A and that Asberry failed to maintain timesheets and to devote any substantial time to J&A (*id.*, ¶¶ 29-33,39).

The Original Operating Agreement provided that if either member proposed to sell or dispose of their interest in J&A, that member was required to "**first make a written offer to sell such interest to the other Members at a price determined by mutual agreement**" (*id.*, ¶15; Original Operating Agreement, article VII, section 1, p. 27) and included a provision regarding

the procedures for such buy-out rights (Original Operating Agreement, article VII, section 1, p. 31).

In or around July 2017, Johnson sought to buy out Asberry's interest in J&A due to, *inter alia,* Asberry's alleged use of J&A funds for personal expenses, the alleged failure to perform services, and the alleged failure to maintain timesheets (complaint, ¶40). Asberry rejected this offer in or around August 2017 (*id.*, ¶ 41).

Johnson alleges that on or about December 23, 2017, Asberry unilaterally withdrew $11,521.70, representing 51% of J&A's operating account balance of $27,591.57 and instructed Johnson to withdraw 49% of the balance ($11,069.86) to leave $5,000 in the account as capital, in violation of the Original Operating Agreement and the parties' past practice (*id.*, ¶¶ 45-46).

On May 31, 2018, Asberry emailed to Johnson a May 29, 2018 "written consent in lieu of meeting," which Asberry signed in her sole capacity appointing herself as sole manager of J&A and substituting a New Operating Agreement, bearing the same date, which Asberry signed in her sole capacity as "Co-Founder" and "Majority in Interest Member" (New Operating Agreement) (*id.*, ¶ 48-49). The New Operating Agreement did not reference the original agreement.

Johnson also alleges that she did not consent to amending the Original Operating Agreement and that the New Operating Agreement altered the method of calculating J&A's income and distributions in a manner which adversely affected her, in violation of section 417(b) of the Limited Liability Company Law (*id.*, ¶50). Section 417(b) of the Limited Liability Company Law prohibits the amendment of an operating agreement that changes the manner of computing distributions of any member without the written consent of each member adversely affected. Additionally, Johnson alleges that on May 31, 2018, Asberry improperly withdrew

$38,465.75 from J&A's bank account without authorization and opened a new J&A account naming herself as the sole signatory (*id.*, ¶ 54-55).

Johnson further alleges that on June 11, 2018, Asberry forwarded her: (1) an exchange agreement between AHC and Asberry in which Asberry transferred her interest in J&A for a 100% membership interest in AHC (without prior notice to Johnson and without offering Johnson the right to purchase such interest in violation of the Original Operating Agreement); (2) a June 7, 2018 agreement and plan of merger between defendant AHC and J&A; (3) a June 7, 2018 "notice of action in lieu of meeting," a "notice of merger," and a "notice of dissenters' rights;" (4) a "written consent of the majority in interest" of J&A, authorizing the merger of AHC and J&A; and (5) a June 7, 2018 "agreement and plan of merger" between AHC and J&A (*id.*, ¶ 58).

Lastly, Johnson alleges, *inter alia*, that J&A owes her at least $75,000 in accounts receivable for client work performed, and that defendants offered to pay her $2,450 for her 49% membership interest in J&A, which is well below fair value (*id.*, ¶¶ 59, 63).

On June 27, 2018, Johnson commenced this action, asserting causes of action for (1): injunctive relief for breach of the Original Operating Agreement and the Limited Liability Company Law; (2) declaratory judgment that the Original Operating Agreement remain in full force and effect, and the purported merger is of no effect; (3) specific performance of the Original Operating Agreement; (4) imposition of a constructive trust upon the membership interests of J&A; (5) an accounting; (6) breach of fiduciary duty, waste, mismanagement, and self-dealing; (7) fraud; and (8) conversion (*id.*, ¶¶ 68-127).

ARGUMENTS

Asberry moves to dismiss the complaint based upon documentary evidence, failure to state a claim, and for failure to join a necessary party. With respect to dismissal pursuant to CPLR 3211(a)(1), Asberry argues that the New Operating Agreement governs J&A's operation and authorized the distributions she made, as well as to elect herself sole manager and to adopt such agreement.

Specifically, Asberry notes that section 4.7 of the Original Operating Agreement exculpates her from any liability because her actions "were done in good faith to promote the best interests of J & A" (defendant's opposition brief at 10). Section 4.7 of the Original Operating Agreement states that:

> "[a]ny act or omission of the Managers, the effect of which may cause or result in loss or damage to the Company or the Members if done in good faith to promote the best interests of the Company, shall not subject the Managers to any liability to the Members"

(Exhibit A to complaint, Original Operating Agreement § 4.7 at 25).

Asberry also relies upon section 3.2 of the Original Operating Agreement regarding distributions, which provides, in relevant part, that available funds for distribution "shall mean the net cash of [J & A] available after appropriate provision for expenses and liabilities, as determined by the Managers" (*id.* § 3.2 at 23).

With respect to dismissal pursuant to CPLR 3211(a)(7), Asberry argues that the fraud cause of action must fail because it is merely one for breach of contract and that there is no allegation regarding a breach of any duty that is collateral or extraneous to the parties' agreement. Asberry also claims that the fraud cause of action is not pled with the requisite specificity. Asberry further argues that she has been improperly named in the action in her individual capacity. Lastly, Asberry maintains that Business Corporation Law (BCL) § 623(h),

which provides the right to an appraisal proceeding for the enforcement by a shareholder of his/her dissenting rights, is Johnson's exclusive remedy.

As for dismissal pursuant to CPLR 3211(a)(10), Asberry argues that J&A is a necessary party which was not joined. Particularly, Asberry argues that J&A would be inequitably affected by a judgment in this action since Johnson, *inter alia*, seeks to enjoin the merger between J&A and AHC (which no longer exists), and there is the possibility that J&A would be prohibited from conducting business under the New Operating Agreement.

In opposition, Johnson argues that the Order to Show Cause (OSC) is untimely and should be dismissed. Johnson also argues that the issue of whether Asberry acted in good faith is a factual issue which cannot be established by documentary evidence. Johnson also argues, *inter alia*, that the fraud claim is stated with sufficient particularity and that BCL §623 does not preclude her from commencing this action seeking equitable relief to remedy Johnson's unlawful or fraudulent conduct. Johnson further argues, *inter alia*, that Asberry may be sued in her individual capacity for breach of fiduciary duty and that dismissal under CPLR 3211(a)(10) is not warranted since J&A is subject to the court's jurisdiction, which may summon J&A to appear. Johnson notes that J&A was formed under the laws of this state and lists a New York City business address (Asberry Affidavit, Exhibit C).

DISCUSSION

Initially, the Court notes that Johnson correctly asserts that this OSC is untimely. Defendants' time to answer was extended to August 6, 2018, and this OSC was filed more than two weeks after the deadline on August 21, 2018, without any excuse or explanation. However, Johnson failed to move for a default judgment, and there is no showing of prejudice. Due to the strong public policy in favor of resolving cases on their merits (*see Cantave v 170 W. 85 St.*

Hous. Dev. Fund Corp., 164 AD3d 1157, 1157 [1st Dept 2018]), and since there is no showing of defendants' intent to abandon this case, the Court will consider and determine the merits of this OSC (*see Artcorp Inc. v Citirich Realty Corp.*, 140 AD3d 417, 418 [1st Dept 2016]).

CPLR 3211(a)(1)

On a motion to dismiss pursuant to CPLR 3211(a)(1), the movant is required to establish that the documentary evidence conclusively refutes the party's claim (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-591 [2005]). The movant must demonstrate that "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

On the merits, Asberry has failed to demonstrate that there is documentary evidence which conclusively establishes a defense to all of Johnson's claims (CPLR 3211 [a][1]). Asberry cites to various provisions of the Original Operating Agreement to support her argument that such agreement governed her conduct and that she discharged her fiduciary duty to further J&A's best interests.

However, whether Asberry appropriately discharged her fiduciary duty is an issue of fact which cannot be determined by documentary evidence (*see Stowe v 19 E. 88th St.*, 257 AD2d 355, 356 [1st Dept 1999] [whether board discharged fiduciary duty or acted unreasonably with regard to the plaintiff is a fact issue not determinable on a motion to dismiss]; *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476, 478 [1st Dept 1987] [issue of whether party which owed fiduciary duty appropriately discharged duty and acted reasonably "is by its very nature one of fact," and cannot be established by documentary evidence]). Further, Asberry's affidavit is not appropriate proof submitted in support of this motion (CPLR 3211[a][1]) and raises factual

issues which warrant denial of the relief she seeks (*see Williamson, Picket, Gross, Inc. v Hirschfeld*, 92 AD2d 289, 290 [1st Dept 1983]).

CPLR 3211(a)(7)

When evaluating a defendant's motion to dismiss pursuant to CPLR 3211(a)(7), the court "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference" (*Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016], citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

To recover damages for fraud, a plaintiff must establish "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing [plaintiff] to rely upon it, justifiable reliance [of the plaintiff] on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney*, 88 NY 2d 413, 421 [1996]). Further, CPLR 3016 (b) provides that "the circumstances constituting the wrong shall be stated in detail."

While the complaint herein does not contain any affirmative misrepresentations by Asberry, it pleads that over the course of several months, Asberry did not inform Johnson that she intended to appoint herself the sole manager of J&A; that she intended to and purportedly adopted a new operating agreement for J&A in violation of the law; that she transferred her entire interest in J&A to AHC; and that she executed a merger between J&A and AHC, which effectively froze Johnson out of J & A (complaint, ¶¶ 40-63).

These allegations constitute material omissions by Asberry, who worked independently of Johnson and sought to conceal her activities. This sufficiently states a fraud cause of action through allegations which give rise to permissible inferences that Asberry had certain knowledge

or information regarding the management of J&A and her activities thereunder, as co-manager, which Johnson was unable to ascertain (*see Williams v Sidley Austin Brown & Wood, L.L.P.*, 38 AD3d 219, 220 [1st Dept 2007]; *Selechnik v Law Off. of Howard R. Birnbach*, 82 AD3d 1077, 1078–1079 [2d Dept 2011]).

Moreover, as discussed below, Asberry had a fiduciary duty to Johnson, which is the basis of her duty to disclose her actions regarding her change of J&A's management structure, the attempted amendment of the operating agreement, and the merger. Contrary to Asberry's contentions, the fraud alleged is not that Asberry failed to perform under the Original Operating Agreement. Rather, it is based on Asberry's material omissions as to her intent and actions to amend the operating agreement to cause a merger of J&A with her own company, and then freeze Johnson out of the business.

Personal Liability

To the extent that Asberry contends that she cannot be held personally liable on Johnson's fiduciary duty claim, that contention is rejected. As the majority shareholder of a limited liability company, Asberry owed a fiduciary duty to Johnson as the minority shareholder (*see Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). Johnson alleges that Asberry breached that fiduciary duty by, *inter alia*, distributing profits before paying expenses owed (e.g., for time Johnson spent on administrative work) (complaint, ¶ 46); amending the operating agreement without Johnson's consent in violation of Limited Liability Company Law § 417 (b); amending that agreement so that Johnson was no longer a manager; withdrawing over $38,000.00 in funds from the J&A bank account and opening a new account in the name of the new merged company; creating the new merged company, naming herself sole manager and

freezing out Johnson; and naming herself sole signatory of the new merged company's bank account (*id.*, ¶¶ 48-55).

Contrary to Asberry's arguments, Johnson is not seeking to pierce the corporate veil to assert personal liability against Asberry. Rather, the claims against Asberry are based upon her alleged breach of a fiduciary duty (*see Jones v Voskresenskaya*, 125 AD3d 532, 533 [1st Dept 2015] ["members of LLC may stand in fiduciary relationship to each other"]; *Pokoik v Pokoik*, *supra* at 429 [breach of fiduciary duty claim asserted by non-managing member of limited liability company against managing member]; *see also Stang LLC v Hudson Sq. Hotel, LLC*, 158 AD3d 446, 447 [1st Dept 2018] [fiduciary duty claim may be alleged by member against managing member of limited liability company]).

Remedy under the LLC Law

Asberry also argues that Johnson elected her exclusive remedy when she served a notice of dissent from the proposed merger, pursuant to section 1002 of the Limited Liability Company Law, demanding fair value for her shares if the proposed merger was effectuated (exhibit 1 to opposition affirmation of James O'Brien). Asberry relies upon BCL § 623(h), which provides that if the dissenting shareholder disagrees with the price offered, the exclusive remedy is to commence an appraisal proceeding to fix the fair value of the shares.

First, it should be noted that section 1005 of the Limited Liability Company Law is applicable herein, and that subsection b of that section provides that the procedure in BCL §623 applies to mergers of limited liability companies. Second, while the pursuit of an appraisal proceeding generally is a dissenting stockholder's exclusive remedy, there is an exception under BCL § 623(k), which permits dissenting members to forego an appraisal, and commence an

appropriate action for equitable relief for fraudulent or unlawful corporate action [BCL § 623(k); *see e.g. Walter J. Schloss Assoc. v Arkwin Indus.*, 61 NY2d 700 [1984], *reversing based on dissenting opin below* 90 AD2d 149, 155-161 [Mangano, J., dissent]; *see Breed v Barton*, 54 NY2d 82, 86-87 [1981]; *Matter of Willcox v Stern*, 18 NY2d 195, 204 [1966]; *Matter of Lazar v Robinson Knife Mfg. Co.*, 262 AD2d 968, 969 [4th Dept 1999]).

Here, in dissenting to the merger, Johnson's exclusive remedy would be an appraisal proceeding. However, she challenges the merger because Asberry allegedly committed fraud and breached her fiduciary duty by merging J&A with her own company and amending the Original Operating Agreement without Johnson's prior knowledge or written consent.

Since Johnson challenges the merger as being fraudulent as to her and a breach of fiduciary duty; challenges Asberry's actions as unlawful under the Original Operating Agreement and the Limited Liability Company Law, and is seeking equitable relief in the form of an injunction; a declaratory judgment; specific performance; constructive trust; and an accounting, she is permitted to assert her claims (*see Breed v Barton*, *supra* at 86-87 [dissenting shareholder must have primary request for equitable relief]; *Matter of Lazar v Robinson Knife Mfg. Co.*, *supra* at 969 [dissenting shareholder's claims for breach of fiduciary duty, fraud and overreaching by the directors in their adoption of and participation in a stock option plan seeking rescission, constructive trust, and accounting permitted under BCL § 623(k) exception]; *SBE 44 Wall, LLC v New 44 Wall St., LLC*, 2013 NY Slip Op 32104 [U] at * 3 [Sup Ct, NY County, 2013]); *cf. Theodore Trust U/A Dated Dec. 30, 1971 v Smadbeck*, 277 AD2d 67, 68 [1st Dept 2000] [dissenting shareholders' claims were dismissed because they did not primarily seek equitable relief]; *Kingston v Breslin*, 56 AD3d 430, 432 [2d Dept 2008] [shareholder's claim was

asserted derivatively and not in his individual capacity and, thus, subject to exclusivity provision of the BCL]).

CPLR 3211(a)(10):

Under CPLR 1001(a), an individual or entity that "might be inequitably affected by a judgment" in an action shall be named as a necessary party (*Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Standards & Appeals*, 5 NY 3d 452, 457 [2005]; *L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 10 [1st Dept 2007]). Where a party is subject to the jurisdiction of the court and is not named in the action, the court need not dismiss, but shall summon such party to the matter (*see* CPLR 3211[b]; *Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Standards & Appeals*, *supra* at 457).

Here, J&A is a necessary party who is subject to this Court's jurisdiction since it was formed under the laws of this state and maintains its place of business in New York City. J&A would certainly be inequitably affected by any judgment in this matter since Johnson seeks, among other things, a declaratory judgment that the Original Operating Agreement remain in full force and effect, and the purported merger is of no effect. Therefore, this branch of the motion is also denied, and J&A is ordered summoned in this action.

Accordingly, it is

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that defendant Asberry is directed to serve an answer to the complaint within twenty (20) days after service of a copy of this order with notice of entry; and it is further

ORDERED that Johnson and Asberry Communications is summoned and is directed to intervene in this action by interposing an answer within twenty (20) days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel for all parties are directed to appear for a preliminary conference in Room 321, 60 Centre Street, on July 10, 2019 at 2:15 P.M.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
June 12, 2019

ENTER:

Hon. Tanya R. Kennedy
J.S.C.

HON. TANYA R. KENNEDY