Meshechok v Kaplan
2019 NY Slip Op 32144(U)
July 5, 2019
Supreme Court, New York County
Docket Number: 656337/2018
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART

----------X

ALEXANDER MESHECHOK,

Plaintiff,

- v -

LAWRENCE KAPLAN,

Defendant.

CORPORATE SOLUTIONS GROUP I, LLC, CSG RE PARTNERS, LLC, CSG RE II PARTNERS, LLC, CSG RE III PARTNERS, LLC,

Nominal Defendants.

----------X

INDEX NO. 656337/2018

MOTION DATE 04/05/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 14, 16, 17, 18, 26, 27, 28, 29, 30, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52 were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Upon the foregoing documents, it is

Plaintiff Alexander Meshechok moves by order to show cause pursuant to CPLR 6301 for a preliminary injunction. (NYSCEF Doc. No. [NYSCEF] 2, Notice of Motion). Defendant Lawrence Kaplan cross-moves pursuant to CPLR 3211(a)(7), 3013 and 3016(b) to dismiss the complaint. (NYSCEF 26, Notice of Cross Motion).

Background

The following facts are alleged in the complaint, unless otherwise noted, and for purposes of this motion, accepted as true. Plaintiff initiated this action on December 18, 2018 derivatively on behalf of nominal defendants Corporate Solutions Group I, LLC ("CSG"), CSG RE Partners, LLC ("CSG RE"), CSG RE II Partners, LLC ("CSG RE II") and CSG RE III Partners, LLC ("CSG RE III") (collectively the Companies). (NYSCEF 1,

Complaint). Meshechok alleges that he is a member of the Companies and that he had been a manager of the Companies until he was "terminated from his positions" in August 2017. (*Id.*, ¶¶2-6).

CSG is an investment bank with a specialty in structuring ESOP (Employee Stock Ownership Plans) transactions for owners of middle-market companies. (*Id.*, ¶9). Meshechok alleges that CSG offers, as part of its ESOP services, access to a trade secret allegedly developed by Meshechok and allegedly owned and licensed by CSG RE, which allows its clients to reinvest a portion of the sales proceeds into real estate thereby creating a long term deferral or even a complete elimination of the capital gains relating to the sale (the "Trade Secret"). (*Id.*, ¶9). Meshechok states that after the closing of a client's ESOP transaction, CSG RE utilizes the Trade Secret to implement the reinvestment process for CSG's properties by sourcing properties, arranging the debt financing and structuring the overall deal to be in compliance with the US Tax Code. (*Id.*, ¶9). Meshechok alleges that the Trade Secret provides CSG with a "significant competitive advantage" in winning ESOP business, in that it allows CSG to charge above market investment banking fees and to sign up a higher percentage of clients in competitive bidding situations than it would otherwise be able to do. (*Id.*, ¶9). According to the complaint, CSG RE II and CSG RE III are derivative entities of CSG RE and are permitted to implement the reinvestment process "under the auspices of and subject to the ongoing consent of CSG RE." (*Id.*, ¶10). Meshechok alleges, however, that Kaplan "utilized CSG's RE's Trade Secret without authority or license and without paying a royalty to the Companies." (*Id.*, ¶14).

Meshechok alleges that prior to his termination as a manager in August 2017, all "income" generated by the Companies was distributed pro rata on an annualized basis

to him and Kaplan as owners. (*Id.*, ¶11). Meshechok claims that these pro rata payments were made in accordance with Section 4.1 of CSG's operating agreement (Operating Agreement). (NYSCEF 4, Operating Agreement). The Operating Agreement required CSG to pay any annual profits to its members in accordance with their respective ownership percentages. (*Id.*). It authorizes the payment of operating expenses and the hiring of employees. (*Id.*, §6.5). Meshechok contends that after his discharge as a manager in August of 2017, Kaplan "suspended distributions to him and began stealing assets and money from the Companies they jointly own." (NYSCEF 1, ¶11). Significantly, Meshechok explains:

> "In 2015,I received a total of $896,784 in distributions from CSG while Larry received $1,435,339. In 2016, I received $504,124 to Larry's $585,969. 6. In August 2017, Larry purported to terminate me as a manager. In the 18 months since I have received less than $100,000 in total distributions from CSG while the tax documents I received in October 2018 show that Larry paid himself more than $1.4 million."

(NYSCEF 3, Meshechok Affidavit, December 19, 2018, ¶¶5, 6).

Meshechok alleges that Kaplan "began systematically misappropriating funds and misusing CSG RE's Trade Secret for personal profit" and "wrongfully diverted business opportunities and used corporate assets to advance his personal interests over those of the Companies." (NYSCEF 1, ¶13). Meshechok alleges that Kaplan has improperly "increased his compensation"; "usurped CSG RE deals and diverted them to other entities"; "utilized CSG RE's Trade Secret without authority or license and without paying a royalty to the Companies"; and "diluted Alex's [his] interest in CSG by purporting to admit a new member and award him ownership interest without 2/3 approval of the board as required by the Operating Agreement." (*Id.* ¶14). Meshechok alleges that Kaplan has refused to distribute the Companies' income pro rata so that all

members, including Meshechok, receive their rightful share. *(Id.,* ¶17). Meshechok claims that Kaplan's "draws, distributions or compensation in excess of his pro rata 60% share of the Companies' Profits with equal distributions to Alex must be recaptured by the Companies and distributed pro rata to its members." (*Id.,* ¶22).

Meshechok alleges: (1) breach of contract; (2) breach of fiduciary duty; (3) unjust enrichment/constructive trust; (4) conversion; (5) negligence; (6) money had and received; (7) accounting; and (8) usurpation of corporate opportunities. (NYSCEF 1).

The Companies' February 8, 2019 answer consists of one affirmative defense: failure to make a demand on the managers. (NYSCEF 31, Answer).

Analysis

A party seeking a preliminary injunction must demonstrate the following three elements: "(1) a likelihood of ultimate success on the merits, (2) the prospect of irreparable injury if the provisional relief is withheld, and (3) a balance of the equities in its favor." (*Invesco Inst. (N.A.), Inc. v Deutsche Inv. Mgt. Ams., Inc.*, 74 AD3d 696, 697 [1st Dept. 2010] [citation omitted].)

Meshechok seeks to enjoin defendants from the following: (1) converting, spending or otherwise disposing of property or funds owned, possessed or controlled by the Companies outside the regular course of business that is in line with the policies and practices of the Companies as they existed on August 1, 2017 and in compliance with CSG's Operating Agreement, including but not limited to the payment or continued payment of any commissions, salary, compensation or other distributions that exceeds Larry's *pro rata* share of the profits from the Companies without an equivalent *pro rata* distribution to Plaintiff; (2) directing Kaplan to repay to the Companies any funds he received that exceed his *pro rata* share of the profits from the Companies on or after

August 1, 2017; (3) restraining and enjoining the Companies from the payment of any legal fees or expenses for Kaplan; (4) restraining and enjoining Kaplan and the Companies from the use or licensure of, or permitting others to use or license, any intellectual property or trade secrets belonging to the Companies, including but not limited to the trade secret which enables real estate to qualify as "qualified replacement property" within the contemplation of Tax Code 1042, other than in the regular course of business that is in line with the policies and practices of the Companies as they existed on August 1, 2017 and in compliance with CSG's Operating Agreement; and (5) permitting plaintiff full, unfettered and ongoing access to the complete books and records, accountant work papers, bank statements and financial and backup documents of any kind of the Companies and all related or affiliated entities controlled by the Companies, and directing their outside professionals to make all records available to plaintiff.[1]

Meshechok's motion for a preliminary injunction is denied as the gravamen of his requested relief arise from his termination in August 2017 for which he alleges breaches of contract and other claims all of which are compensable with monetary damages. While Meshechok's claim for misappropriation of a trade secret would support a preliminary injunction, here his claim is not for misappropriation or failure to protect the Trade Secret, but failure to pay for it. Specifically, Meshechok complains about where customer payments are deposited for services involving the Trade Secret, not misappropriation or failure to protect it. While the parties agreed in paragraph 10.6 of

[1] At argument, defendants' counsel agreed that it would be complying with its disclosure obligations by uploading to a data room. (March 5, 2019 argument Transcript [Tr.] 34:17-36:20).

the Operating Agreement that "the parties acknowledge that they will be irreparably harmed in the event [the Operating Agreement] is not specifically enforced," this acknowledgement would apply to Meshechok's breach of contract claim only. As to all other claims, Meshechok fails to establish irreparable harm since money damages are available. (*SportsChannel Am. Assoc. v Natl. Hockey League*, 186 AD2d 417 [1st Dept 1992]). Moreover, Meshechok fails to explain why he is seeking a preliminary injunction now when the alleged abuses began in August 2017. Clearly, there is no urgency of harm here.

Delaware substantive law is controlling in this action involving the management of Delaware limited liability companies pursuant to Section 801(a) of New York's Limited Liability Company Law and Section 10.5 of CSG's Operating Agreement. "[W]hen parties include a choice-of-law provision in a contract, they intend application of only that state's substantive law ... Unlike substantive law, matters of procedure are governed by the law of the forum state." (*Royal Park Invs. SA/NV v Stanley*, 165 AD3d 460, 461 [1st Dept 2018] [internal quotation marks and citations omitted].) Accordingly, the court applies CPLR 3211, New York's "procedural rules" for a motion to dismiss (*Davis v Scottish Re Group Ltd.*, 30 NY3d 247, 257 [2017] *revd on other grounds* 30 NY3d 247), but decides the substantive legal issues pursuant to Delaware law. (*Project Cricket Acquisition, Inc. v FCP Invs. VI, L.P.*, 159 AD3D 600, 600 [1st Dept 2018].)

However, applying the law, procedural or substantive, to this complaint is impossible. It is unclear which claims are being asserted directly, derivatively or perhaps both because Meshechok has not delineated any of the causes of action or specified which alleged facts apply to each cause of action. Indeed, a complaint will be

dismissed when the allegations confuse a shareholder's derivative and individual rights, though leave to replead may be granted. (*Abrams v Donati*, 66 NY2d 951, 953 [1985] [citations omitted].) This is true even when the substantive law of another state or country applies in a derivative action (*Davis v Scottish Re Group, Ltd.*, 138 AD3d at 234-236 [applying the substantive law of the Cayman Islands and the procedural law of New York].)

Here, the causes of action are a "confusing hodge-podge of ... personal claims [and] claims derivative in nature." (*Barbour v Knecht*, 296 AD2d 218, 228 [1st Dept 2002].) Meshechok's argument, in opposition to this motion, that Delaware law allows for dual natured claims is not a shield behind which he may circumvent his obligations to submit a well pleaded complaint with delineated claims. In this action, the court cannot even discern the nature of the claims under *Tooley v Donaldson, Lufkin, & Jenrette, Inc.*, (845 A.2d 1031, 1036 [Del 2004]) because the complaint fails to specify nonconclusory damages and the harm allegedly suffered. Indeed, each of the causes of action here end the same vague way that,

> "By reason of the foregoing, the Companies have been damaged in an amount to be determined at trial, but no less than $10,000,000 and are entitled to judgment in that amount together with injunctive relief forever barring Larry from further breaching his duties to the Companies and looting their assets, and granting specific performance restoring Alex's full and fair ownership in the Companies, together with interest, reasonable attorneys' fees, disbursements and cost of the action."

(NYSCEF Doc. No. 1 at ¶34, 38, 41, 44, 50, 56.) While Meshechok certainly states claims, his failure to articulate which are individual and which are derivative is fatal. The court urges him to clearly plead, delineating each claim as either derivative or direct, and address the deficiencies outlined in this decision.

Accordingly, it is

ORDERED that motion 01 for a preliminary injunction is denied; and it is further

ORDERED, that the cross motion is granted and the complaint is dismissed with leave to replead within 60 days of entry of this order on NYSCEF.

7/5/2019
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE