SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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JOSEPH LENTINI,

Plaintiff,

- v -

WILLIAM CAPITAL ASSOCIATES, INC., WILLIAM LENTINI

Defendants.

INDEX NO. 451202/2018

MOTION DATE 11/16/2018

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to DISMISS.

Plaintiff Joseph Lentini ("Joseph") brings this suit against his brother Defendant William Lentini ("William") and Defendant William Capital Associates ("WCA") in his individual capacity, and derivatively on behalf of WCA, for breach of contract, fraud, and breach of fiduciary duty, among other claims. Defendants move to dismiss Plaintiff's Amended Complaint.

Background

WCA is a closely held New York corporation engaged in the financing, purchase, sale, and leasing of real estate. Verified Second Amended Complaint ("SAC"), ¶19 (NYSCEF Doc. No. 8).[1] Joseph alleges that in 1973 he and William entered into a partnership with equal interests in WCA. *Id.*, ¶¶21-22. In consideration for his ownership interest in WCA Joseph

[1] The following statement of facts is based on the factual allegations in the SAC, which are taken to be true solely for purposes of this motion to dismiss. *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 582 (2017).

worked at a reduced salary. *Id.* Joseph further alleges that it was the brothers' mutual understanding that each was to receive fifty percent of all WCA net revenue in the form of regular and periodic salary and bonus payments, that each was responsible for one half of the expenses and liabilities of the company, and that each was entitled to be reimbursed for legitimate expenses. *Id.*, ¶¶26-27. The brothers were also supposed to have pension plans of equal value through WCA. *Id.*, ¶22.

As evidence of this business arrangement, Joseph states that at times he deferred receipt of his salary, bonus, and reimbursement of expenses under the belief that WCA needed the cash to meet its financial obligations, and under the belief that he would be reimbursed when WCA had the cash available. *Id.*, ¶30. These expenses included attorneys' fees on behalf of WCA. *Id.*, ¶32. Joseph has also alleged specific instances in which he personally generated revenue for WCA. *Id.*, ¶42. The SAC also points to testimony and affidavits from other litigation in which William admits to a 50-50 partnership in WCA with Joseph, as well as a supposed finding by the Court (Diamond, J.) that WCA is jointly owned by William and Joseph. *Id.*, ¶¶23-24.

The brothers also undertook several other business ventures, which are the subject of related litigations. In one of these litigations, after the Court (Diamond, J.) granted a judgment of $569,025.66 to WCA in 2004, the brothers agreed to undertake an accounting of their respective debits and credits with respect to their various joint ventures to properly disburse the judgment payment. *Id.*, ¶¶54-55. The brothers' accountant Nicholas Jacangelo and the accounting firm of McGrath, Doyle & Phair (together "the Accountants") were to hold the proceeds of the judgment in escrow and only release them after the accounting. *Id.*, ¶57. No accounting has taken place. *Id.*, ¶59. In addition, there were unexplained wire transfers between WCA and Jacangelo in 2011, totaling approximately $160,000. *Id.*, ¶¶61-64. Joseph has since

been denied access to the books and records of WCA. *Id.*, ¶¶65-66. WCA has also been dissolved, and, according to Joseph, William has misappropriated all of WCA's corporate assets for his exclusive use and benefit, or unlawfully transferred them to third parties. *Id.*, ¶¶67-68.

In this case, Joseph alleges a total of 15 causes of action. Six of these claims are brought personally against WCA: (1) declaratory judgment, (2) an Accounting, (3) fraudulent inducement, (4) unjust enrichment, (5) breach of contract, and (6) promissory estoppel. In addition, Joseph's claims personally against William are for: (7) declaratory judgment, (8) breach of contract, and (9) breach of the covenant of good faith and fair dealings. Lastly, Joseph brings claims derivatively, on behalf of WCA, against William for: (10) breach of fiduciary duty, (11) fraud, (12) fraudulent concealment, (13) unjust enrichment, (14) conversion, (15) and an action against a director under BCL § 720.

Analysis

Failure to State a Claim Under CPLR §3211(a)(7)

In assessing a motion to dismiss under CPLR § 3211(a)(7), the Court must give the complaint a liberal construction, accept its factual allegations as true, and provide the plaintiff with the benefit of every favorable inference. *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 582 (2017); *Myers v. Schneiderman*, 30 N.Y.3d 1, 11 (2017). However, "allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration." *Kliebert v. McKoan*, 228 A.D.2d 232, 232 (1st Dep't 1996).

Although the Amended Complaint is far from a model of clarity, the Court finds that Joseph has pleaded just enough to state the claims he has asserted. "A test of the sufficiency of the pleading is whether it gives notice of the transactions relied on and the material elements of a

cause of action." *Duross Co. v. Evans*, 22 A.D.2d 573, 573 (1st Dep't 1965) (citing CPLR 3013 ("Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.")). Without expressing any view on the merits, the Court finds that Joseph has set forth his factual allegations with sufficient specificity to put Defendants on notice of the claims against them.

Other Grounds for Dismissal

Defendants have not conclusively established their defenses as a matter of law. *First*, although the statute of frauds bars oral agreements concerning the purchase or sale of a business interest, "including a majority of the voting stock interest in a corporation and including the creating of a partnership interest," N.Y. Gen. Oblig. Law § 5-701(a)(10), "the statute of frauds is generally inapplicable to an agreement to create a joint venture," *Foster v. Kovner*, 44 A.D.3d 23, 27 (1st Dep't 2007). Here, Joseph sufficiently alleges the existence of an arrangement "closely akin to that of a joint venture," *Dura v Walker, Hart & Co.*, 27 N.Y.2d 346, 350 (1971), in which, "at all relevant times, the Brothers understood, knew and agreed that they would advance their business interests together as equal partners with equal rights to, among other things, management and profits." SAC, ¶6; *see id.*, ¶22 ("At all relevant times . . . William Lentini and Plaintiff each have held an equal, fifty percent (50%) legal and beneficial interest in WCA."); *id.*, ¶¶13, 18 (referring to "the Brothers' joint business ventures"). Giving Joseph "the benefit of every favorable inference," the indicia of a joint venture "may be implied from the totality of the conduct alleged here." *See Richbell Info. Servs., Inc. v. Jupiter Partners, L.P.*, 309 A.D.2d 288, 298 (1st Dep't 2003) (enumerating "[t]he indicia of the existence of a joint venture" including "acts manifesting the intent of the parties to be associated as joint venturers").

Therefore, Joseph's claims cannot be dismissed at this early stage on the basis of the statute of frauds.

Second, Defendants' arguments about the timeliness of Joseph's claims do not justify dismissal of the Amended Complaint at this stage. As the First Department recently explained:

> In moving to dismiss an action as barred by the statute of limitations (CPLR 3211[a][5]), the defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the cause of action has expired. The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period, and the plaintiff must aver evidentiary facts establishing that the action was timely or [ ] raise an issue of fact as to whether the action was timely.

MTGLQ Inv'rs, LP v. Wozencraft, 172 A.D.3d 644, 644–45 (1st Dep't May 30, 2019) (internal citations and quotation marks omitted).

Defendants argue that almost all of Joseph's claims are time-barred, *see* Defs.' Mem. of Law at 5-6, 8, 10, 13-14, 16, 18, claiming that the statute of limitations governing most of these causes of action expired in 1979. That assumes the causes of action accrued in 1973, when Joseph says he and William agreed to jointly own WCA. SAC, ¶¶21-22. But Joseph does not allege that the agreement was breached that year. Fact questions still exist on that issue – and on, *inter alia*, whether an enforceable agreement was ever reached, and when Joseph first knew or should have known about alleged fraud. Separately, claims arising from the relevant fiduciary relationships may not have accrued until October 2016, when William formally dissolved WCA without Joseph's knowledge or permission, thus repudiating Joseph's alleged fiduciary relationship with William and WCA. At a minimum, the incomplete factual record warrants discovery, not dismissal, to clarify the chronology of the relevant agreements and alleged breaches. As such, the Amended Complaint will not be dismissed on statute of limitations grounds. *See Endervelt v. Slade*, 194 A.D.2d 305, 305 (1st Dep't 1993) (denying motion to

dismiss because "triable issues of fact exist with respect to the time plaintiffs discovered or should, with due diligence, reasonably have discovered the alleged fraud"); *Morgan Guar. Tr. Co. of New York v. Westreich*, 213 A.D.2d 238, 239 (1st Dep't 1995) (denying motion to dismiss on statute of limitations grounds where "issue of fact was raised" about whether the applicable period was extended); *Texeria v. BAB Nuclear Radiology, P.C.*, 43 A.D.3d 403, 405 (2d Dep't 2007) (affirming denial of motion to dismiss on statute of limitations grounds because "the plaintiff raised a triable issue of fact as to whether the statute of limitations . . . was tolled").

Third, assuming the truth of Joseph's allegations, as the Court must do at this stage, he has standing to pursue derivative claims on WCA's behalf. *See, e.g.*, SAC, ¶21 ("At all relevant times . . . William Lentini and Plaintiff have jointly owned WCA."); *id.*, ¶70 ("Plaintiff has been an equal shareholder and owner of WCA along with William Lentini."). Indeed, this Court (Bransten, J.) already ruled in a precursor to this case, *Lentini v. 219 W. 20th St. Corp.*, Index No. 160470/2016, that "Joseph Lentini has sufficiently alleged his shareholder status in support of his derivative claims." Sept. 5, 2018 Decision and Order, at 17. Lentini Aff., Ex. 12 (NYSCEF Doc. No. 32). *Fourth*, and finally, Joseph's quasi-contract claims are not duplicative of his breach of contract claim, and may be pleaded in the alternative, because Defendants dispute the existence of a valid, binding contract. *Beach v. Touradji Capital Mgmt. L.P.*, 85 A.D.3d 674, 675 (1st Dep't 2011).

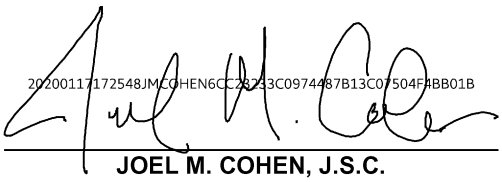
* * * *

Accordingly, it is

ORDERED that Defendants' motion to dismiss the Second Amended Complaint is Denied; and it is further

ORDERED that the parties are to appear for a Preliminary Conference on February 4, 2020 at 10:00 a.m. The parties should be prepared to address how, if at all, litigation and discovery in this case impacts (or is impacted by) litigation and discovery in other pending cases between the parties.

This constitutes the decision and order of the Court.



1/17/2020
DATE

JOEL M. COHEN, J.S.C.

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