

**Office Group, Inc. v Sinesio**

2020 NY Slip Op 32527(U)

July 31, 2020

Supreme Court, New York County

Docket Number: 655670/2019

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

OFFICE GROUP, INC., LESLEY HOROWITZ

Plaintiff,

- v -

DOMINIC SINESIO,

Defendant.

-----X

INDEX NO. 655670/2019
MOTION DATE 02/18/2020
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 27, 28, 30

were read on this motion to/for DISMISS

Upon the foregoing documents, Office Group, Inc. and Lesley Horowitz's (collectively, the Plaintiffs) motion to dismiss the counterclaims in the Amended Answer (hereinafter defined) is granted solely with respect to the third counterclaim for an accounting.

The Relevant Facts and Circumstances

Mr. Sinesio and Ms. Horowitz are each 50% shareholders and directors of Office Group, Inc. (Office Group), which was formed in 1998 to provide design and marketing services (Amend. Answer., NYSCEF Doc. No. 14, ¶¶ 108-109). Mr. Sinesio alleges that he and Ms. Horowitz agreed to share equal responsibilities in managing Office Group, including running its daily operations, obtaining and managing clients, providing marketing services, and managing its financial obligations (id., ¶ 110). Mr. Sinesio claims that Ms. Horowitz never stepped up to her responsibilities and that he ultimately ran the day-to-day operations of Office Group, managed financial and administrative obligations, and brought in clients (id., ¶¶ 113-115). In December 2015, Ms. Horowitz and Mr. Sinesio allegedly agreed to dissolve Office Group (id., ¶ 118).

As he began to wind up the business in 2016, Mr. Sinesio alleges that Ms. Horowitz used Office Group's business checking account to pay for her personal expenses (*id.*, ¶¶ 122-123). In October 2016, Ms. Horowitz allegedly spent all of Office Group's funds, leaving it unable to pay its bills (*id.*, ¶ 125). As Ms. Horowitz's unauthorized spending allegedly continued into July 2017, Mr. Sinesio claims that he was forced to bail out Office Group with his own money (*id.*, ¶¶ 126-127). Then, according to Mr. Sinesio, Ms. Horowitz allegedly refused to dissolve Office Group (*id.*, ¶¶ 128-129).

Mr. Sinesio also claims that he purchased certain artwork with Ms. Horowitz from 1996 to 2009 with an agreement that the art would be jointly owned (*id.*, ¶ 144). However, from 2010 onwards, he asserts that Ms. Horowitz exclusively retained the artwork (*id.*, ¶ 146).

The Plaintiffs commenced this action on September 27, 2019 alleging that Mr. Sinesio misused Office Group's resources to create a competing business, Sinesio & Company (the **Complaint**; NYSCEF Doc. No. 1). The Plaintiffs assert five causes of action against Mr. Sinesio for: (i) breach of fiduciary duty, (ii) fraud, (iii) constructive fraud, (iv) unjust enrichment, and (v) tortious interference with contract/prospective business relations.

On December 18, 2019, Mr. Sinesio filed an Answer with Counterclaims alleging claims for: (i) breach of fiduciary duty, and (ii) conversion of the Artwork (the **Answer**; NYSCEF Doc. No. 6). Subsequently, the Plaintiffs moved to dismiss the counterclaims. In response, Mr. Sinesio then filed an Amended Answer with Counterclaims on January 27, 2020 alleging claims for: (i)

breach of fiduciary duty, (ii) dissolution of Office Group, (iii) an accounting, and (iv) unjust enrichment (the **Amended Answer**; NYSCEF Doc. No. 14). The Plaintiffs then withdrew their previously filed motion to dismiss and filed the instant motion.

## Discussion

On a motion to dismiss, the pleadings are to be afforded a liberal construction and the facts as alleged in the complaint are accepted as true (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). Under CPLR § 3211 (a)(5), a court may dismiss an action due to expiry of the statute of limitations. Dismissal under CPLR § 3211 (a)(7) requires the court to assess whether the proponent of the pleading has a cause of action and not whether he has stated one (*id.*).

### A. First Counterclaim (Breach of Fiduciary Duty)

The Plaintiff argues that the first counterclaim for breach of fiduciary duty should be dismissed because it is not stated with particularity and, in any event, that the claim is time-barred. In his opposition papers, Mr. Sinesio argues that he provided the requisite detail for his claim, and that the claim is timely.

A claim for breach of fiduciary duty requires (1) the existence of a fiduciary relationship, (2) misconduct by the fiduciary, and (3) damages directly caused by the fiduciary's misconduct (*Baldeo v Majeed*, 150 AD3d 942, 945 [2d Dept 2017]). A claim grounded in breach of fiduciary duty must be pled with particularity pursuant to CPLR § 3016 (b) (*Berardi v Berardi*, 108 AD3d 406, 407 [1st Dept 2013]).

Here, Mr. Sinesio alleges that Ms. Horowitz breached her fiduciary duty by (i) failing to participate in the financial and administrative management of Office Group, (ii) causing Office Group to pay for unauthorized personal expenses in October 2016 without repaying the company, and (iii) reducing Mr. Sinesio's share of Office Group's profits as a result (NYSCEF Doc. No. 14, ¶¶ 156-158). In his affidavit in opposition to the instant motion, Mr. Sinesio identifies three transactions between October 2016 to July 2017, which transactions allegedly consisted of personal expenses that Ms. Horowitz had paid through Office Group's checking account (NYSCEF Doc. No. 27, ¶¶ 4-6). Mr. Sinesio also pleads damages resulting from Ms. Horowitz's alleged wrongdoing as he claims to have personally covered Office Group's expenses without reimbursement (NYSCEF Doc. No. 14, ¶ 158). According every favorable inference as this court must on a motion to dismiss, Mr. Sinesio alleges misconduct by Ms. Horowitz with sufficient particularity to state a claim for breach of fiduciary duty (*Pludeman v N. Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008] [purpose of CPLR § 3016 (b) is to inform a party of the incidents complained of and this is accomplished when the facts are sufficient to permit reasonable inference of alleged conduct]).

As Mr. Sinesio seeks monetary damages for Ms. Horowitz's alleged breach of fiduciary duty, his claim is subject to a three-year limitation period (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009] [three-year limitation period applies to breach of fiduciary duty claim where remedy sought is "purely monetary"]).

Mr. Sinesio's initial counterclaims were not filed until December 18, 2019 (NYSCEF Doc. No.

6). However, inasmuch as Mr. Sinesio's breach of fiduciary duty claim concerns Ms. Horowitz's

conduct in October of 2016, Mr. Sinesio correctly argues that the claim relates back to the date that the Complaint was filed on September 27, 2019 pursuant to CPLR § 203 (d).

CPLR § 203 (d) codifies the doctrine of equitable recoupment, which permits a defendant to assert an otherwise untimely counterclaim if it arises from or relates to the same transactions as alleged in the complaint (*California Capital Equity, LLC v IJGG, LLC*, 151 AD3d 650, 650 [1st Dept 2017]). To invoke the doctrine, a defendant must show that “an otherwise untimely defense or counterclaim . . . arises from the transactions, occurrences, or series of transactions or occurrences alleged in the complaint” (*id.* at 650, citing *Bloomfield v Bloomfield*, 97 NY2d 188, 192-193 [2001]). In other words, the counterclaim must “arise from the ‘same’ transactions or series of transactions” (*id.*).

Here, the Complaint alleges that, *inter alia*, Mr. Sinesio breached his fiduciary duties to Ms. Horowitz, deprived Ms. Horowitz of her salary and refused to compensate her fairly throughout 2016 (*e.g.*, NYSCEF Doc. No. 1, ¶ 37). At the pleading stage, this is sufficient for the court to conclude that the counterclaim arises out of the same series of events that forms the basis of the allegations in the Complaint (*compare, California Capital, supra; with, Hager v Hager*, 177 AD2d 401 [1<sup>st</sup> Dept 1991] [counterclaims time barred where original pleading did not give notice that the wrongful conduct in connection with certain transactions or occurrences referred to in the counterclaims would be called into question]). Significantly, Ms. Horowitz placed her 2016 compensation at issue in her Complaint, and Mr. Sinesio is, thus, also entitled to assert claims relating to her compensation and/or whether she wrongfully misused company funds to pay for her own personal expenses. As such, Mr. Sinesio’s breach of fiduciary duty claim is timely

under CPLR § 203 (d) inasmuch as he seeks to assert claims that would have been timely as of the date of the Complaint, i.e., September 27, 2019 (CPLR § 203[d]). The branch of the Plaintiffs' motion to dismiss the first counterclaim for breach of fiduciary duty is denied.

### **B. Second Counterclaim (Dissolution of Office Group)**

The Plaintiffs argue that the second counterclaim for dissolution of Office Group pursuant to common law and BCL § 1104 (a)(1) should be dismissed because the Plaintiffs also seek a dissolution of Office Group. Mr. Sinesio argues that his claim for dissolution should not be dismissed simply because Ms. Horowitz seeks the same relief.

Inasmuch as the Plaintiffs assert that they also seek dissolution of Office Group, the Complaint simply does not state a proper cause of action for dissolution – the Plaintiffs allege five causes of action for breach of fiduciary duty, fraud, constructive fraud, unjust enrichment and tortious interference with contract and only the prayer for relief contains a cursory mention of dissolution (*see* NYSCEF Doc. No. 1, ¶ 93 [A]). Therefore, Mr. Sinesio may assert a counterclaim for the dissolution of Office Group. Further, there appears to be the requisite deadlock to support a claim for dissolution pursuant to the Business Corporation Law § 1104 because Mr. Sinesio alleges that he and Ms. Horowitz have been unable to reach any agreement to wind down Office Group, resulting in a deadlock that precludes the operation of the corporation's affairs (NYSCEF Doc. No. 14, ¶¶ 170-176). However, inasmuch Mr. Sinesio asserts the second counterclaim for dissolution based on both common law and BCL § 1104(a)(1), the claim may only be maintained based on BCL § 1104(a)(1). A claim for common law dissolution is remedy that is available only to minority shareholders that accuse majority

shareholders of looting the corporation, and here, Mr. Sinesio is not a minority shareholder but an equal 50% shareholder of Office Group with Ms. Horowitz (*see Ferolito v Vultaggio*, 99 AD3d 19, 28 [1st Dept 2012] [common law dissolution claim properly stated where “shareholders in control have been looting the company’s assets at the expense of the minority shareholders”]; *Fadele v Seybert*, 250 AD2d 519 [1<sup>st</sup> Dept 1998]). Accordingly, the Plaintiffs’ motion to dismiss the second counterclaim for dissolution of Office Group is granted solely to the extent that this claim seeks common law, not statutory, dissolution.

### **C. Third Counterclaim (Accounting)**

Mr. Sinesio seeks an accounting from Ms. Horowitz to determine the amount of unauthorized distributions from Office Group that she allegedly applied towards her personal expenses. However, a claim for an accounting fails to state a cause of action in the absence of any allegations that a demand for an accounting has been made and refused (*see Kaufman v Cohen*, 307 AD2d 113, 123 [1st Dept 2003]). Here, Mr. Sinesio’s accounting claim must fail because there are no allegations that he demanded an accounting from Ms. Horowitz, which she has refused to provide. Accordingly, the branch of the Plaintiff’s motion to dismiss the third counterclaim for an accounting is granted without prejudice.

### **D. Fourth Counterclaim (Unjust Enrichment)**

The Plaintiffs argue that the fourth counterclaim for unjust enrichment should be dismissed because this claim allegedly accrued in 2009 and is time-barred as a result. In his opposition



papers, Mr. Sinesio claims that this claim did not accrue until mid-2017 when he discovered that Ms. Horowitz would not pay him for his interest in certain artwork that they had purchased together.

The elements of unjust enrichment are that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). A six-year statute of limitations generally applies to claims for unjust enrichment, which accrue "upon the occurrence of the alleged wrongful act giving rise to restitution" (CPLR § 213 [1]; *Yarbro v Wells Fargo Bank, N.A.*, 140 AD3d 668, 669 [1st Dept 2016], citing *Kaufman v Cohen*, 307 AD2d 113, 127 [1st Dept 2003]).

The Amended Answer alleges that both Mr. Sinesio and Ms. Horowitz purchased several pieces of artwork, but that Ms. Horowitz has been unjustly enriched by her exclusive enjoyment of the artwork since late 2010 (NYSCEF Doc. No. 1, ¶¶ 144-146). In his affidavit in opposition, Mr. Sinesio clarifies that his romantic relationship with Ms. Horowitz came to an end in 2010 and that he moved out of their former apartment, where the artwork was located, while the artwork remained there (NYSCEF Doc. No. 27, ¶ 9). The apartment adjoined the Office Group workspace where he continued to work (*id.*). Mr. Sinesio claims that he always assumed that Ms. Horowitz intended to "eventually pay [him] for the value of [his] interest in the artwork" and that they discussed the need to divide the artwork in December of 2015 (*id.*, ¶ 10). Mr. Sinesio attests that the first time Ms. Horowitz gave an indication that she intended to retain the artwork was in mid-2017, when the parties' relationship became strained (*id.*, ¶ 11). This is sufficient to

allege a timely unjust enrichment claim at the pleading stage (*Farina v Bastianich*, 116 AD3d 546, 548 [1<sup>st</sup> Dept 2014] [benefit may be conferred where person is conferred a benefit, or “otherwise saved expense or loss”). Accordingly, the branch of the Plaintiffs’ motion to dismiss the fourth counterclaim for unjust enrichment is denied.

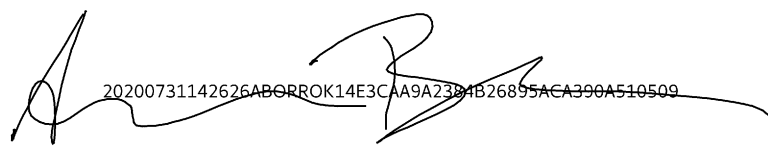
The branch of the Plaintiffs motion for sanctions pursuant to 22 NYCRR 130-1.1 (c)(3) is denied because it cannot be said that Mr. Sinesio’s counterclaims are completely without merit.

Accordingly, it is

ORDERED that the Plaintiffs motion to dismiss is granted with respect to the third counterclaim for an accounting only, the accounting counterclaim is dismissed, and the motion is otherwise denied as set forth herein; and it is further

ORDERED that the Plaintiffs file a reply to the counterclaims alleged in the Amended Answer within 20 days of this decision and order; and it is further

ORDERED that the parties appear for a preliminary conference in Part 53 on September 23 at 11:30 AM.



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7/31/2020  
DATE

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ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE

