

Marlborough Gallery, Inc. v Levai

2021 NY Slip Op 31677(U)

May 17, 2021

Supreme Court, New York County

Docket Number: 654459/2020

Judge: Barry Ostrager

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

Table with 2 columns: Case details (Marlborough Gallery, Inc., Plaintiff, - v -, Max Levai, Pierre Levai, Pascal Spengemann, and John Helmrich, Defendants.) and Motion details (INDEX NO. 654459/2020, MOTION DATE, MOTION SEQ. NOS. 001, 002, 003, 004, 005).

DECISION + ORDER ON MOTIONS

HON. BARRY R. OSTRAGER

Before the Court are four motions (001-005) to dismiss the Complaint, one by each defendant, and motion 005 by defendant Pierre Levai for an order requiring plaintiff Marlborough Gallery, Inc. ("Marlborough") to provide indemnification, reimbursement, and advancement of attorneys' fees and costs incurred and to be incurred by defendant Pierre Levai in connection with his defense of claims brought by Marlborough in this action pursuant to New York Business Corporation Law ("BCL") § 724. Based on the papers submitted and the oral argument on the record of May 12, 2021, the motions 001, 002, 003 and 004 to dismiss are granted in part and denied in part as set forth below, and motion 005 is denied.

Motion 002 by Pierre Levai

The motion to dismiss count one for breach of fiduciary duty against Pierre Levai is denied except to the extent that one allegation is time-barred. Paragraph 128 of the Complaint alleges at least eight distinct breaches of fiduciary duty by defendant Pierre Levai ("Pierre"). The Complaint sets forth the breaches in sufficient detail for Pierre to be on notice of the alleged wrongdoing, whether applying the regular pleading standard or the heightened pleading standard under CPLR 3016(b). However, with respect to the allegation that Pierre improperly "loaned"

twenty-three valuable artworks to an individual named Marcia Levine and that those artworks have been in “Levine’s possession for as long as two decades and most for at least a decade”, this specific allegation must be stricken from the Complaint as time-barred. Plaintiff argues that the statute of limitations was tolled because Plaintiff was entitled to rely on Pierre’s representations as truthful because he was a fiduciary of the Gallery. Pierre argues that Plaintiff was at least on inquiry notice because Plaintiff could have inspected the records of the Gallery at any time and physically observed that the paintings were “on loan” for a long time. The Court finds that because the Complaint does not allege active concealment of these paintings being on loan to Ms. Levine or in fact dispute that the paintings were actually “on loan” to Ms. Levine (whether properly or improperly), the statute of limitations was not tolled, and this specific allegation is time-barred. To the extent that Plaintiff alleges that Pierre improperly transferred or loaned paintings to Ms. Levine during the operative statute of limitations period, Plaintiff may replead those allegations.

The motion to dismiss count two for aiding and abetting a breach of fiduciary duty against Pierre Levai is denied. Count two alleges that Pierre rendered substantial assistance to Max Levai in the course of effecting Max Levai’s breaches of fiduciary duty. Pierre argues that Marlborough fails to allege any specific facts supporting the contention that Pierre actually knew about any breach of duty by Max and that Marlborough does not allege in detail how Pierre substantially assisted in the alleged breaches of fiduciary duty. The Complaint alleges that Pierre, in his role as Board member, purported to authorize Max to consign artwork to Tripoli Patterson, LLC, to consign artwork at below-market prices, to gift artwork to a third party, and to use Gallery-owned artwork for his own business enterprise. Compl. ¶ 134. These allegations are sufficient to withstand a motion to dismiss.

The motion to dismiss count three for conversion against Pierre Levai is denied except to the extent that one allegation is time-barred. The Complaint alleges that Pierre interfered with the Gallery's possession and dominion over its property by, purporting to authorize Max Levai to consign the Gallery's artworks to Tripoli Patterson, LLC, without authority from the Marlborough Board; improperly gifting a valuable work owned by the Gallery to a third party, Dan Nadel; knowingly purchasing two artworks owned by the Gallery at prices below their market value; and intentionally taking several artworks owned by the Gallery for the benefit of himself or others to the derogation of the Gallery's rights and interest in its own property.

Pierre argues that Plaintiff's conversion claim fails to allege that Pierre exercised unauthorized dominion over the artwork. Pierre argues that plaintiff does not allege that Pierre lacked the authority as a Marlborough Director (and President until June 2019) to take these actions. In opposition, Plaintiff argues a corporate officer "has no power" to use corporate resources for his own personal benefit. Here, although Pierre purported to authorize the transfers, his scope of authority was limited to legitimate sales of artwork—not self-dealing in violation of his duties as a fiduciary. Thus, the Complaint alleges that the misappropriation of artwork was unauthorized. The Court agrees that Plaintiff has sufficiently pled that Pierre was unauthorized to take dominion over the artwork for his own personal benefit or for his son's benefit -or any reason other than a legitimate business purpose in the interest of the Gallery.

However, once again with respect to the allegation that Pierre "permit[ed] his companion Marcia Levine to have in her personal possession for up to 20 years at least 23 artworks owned by the Gallery to the derogation of the Gallery's rights and interest in its own property," this allegation is barred by the statute of limitations and must be stricken from the conversion claim.

Count four for trespass to chattels against Pierre Levai is dismissed. As Pierre argues, the Complaint does not allege harm to the condition, quality or material value of the chattels at issue.

While Plaintiff is correct that liability for trespass to chattels may also be imposed “if the owner is deprived of use of the chattel for a substantial time.” *Jackie’s Enters., Inc. v. Belleville*, 165 A.D.3d 1567, 1572–73 (3d Dep’t 2018) (internal citations, quotation marks, and alterations omitted), the Complaint also does not allege that Plaintiff has been deprived of its property for a “substantial time”, nor does it allege injury to the property. Plaintiff’s claims for interference with its artworks, and indeed its request for the return of specific artworks, are adequately captured by Plaintiff’s remaining claims.

Count five for unjust enrichment against Pierre Levai is dismissed as duplicative as it relates to the exact same conduct underlying the breach of fiduciary duty claim. Plaintiff argues that this count is pled in the alternative. However, because the Court is sustaining the breach of fiduciary duty claim, there is no need for this superfluous claim.

Count six for usurpation of corporate opportunity against Pierre Levai is dismissed. The sole allegation against Pierre under this cause of action is the alleged transfer of twenty-three artworks to Ms. Levine, which for the reasons stated above, is barred by the statute of limitations.

Count seven for breach of contract against Pierre Levai is dismissed. The Complaint alleges that there was an oral employment agreement between Plaintiff and Pierre. However, the Complaint fails to allege any of the essential terms of a contract.

Count eight for breach of the duty of good faith and fair dealing against Pierre Levai is also dismissed because the Complaint does not sufficiently allege the underlying oral agreement, and in any event, is duplicative of the breach of fiduciary duty claim.

Count nine for negligence of Pierre Levai is dismissed as duplicative of the breach of fiduciary duty and conversion claims. The exact same alleged intentional conduct that underlies the breach of fiduciary duty and conversion claims is alleged in support of the negligence claim.

Plaintiff argues that this count is pled in the alternative. However, because the Court is sustaining the breach of fiduciary duty claim, there is no need for this superfluous claim.

Count ten is not plead against Pierre Levai.

Count eleven for fraud against Pierre Levai is dismissed as time-barred. The sole allegation under this claim against Pierre under this cause of action is the alleged transfer of twenty-three artworks to Ms. Levine, which for the reasons stated above, is barred by the statute of limitations.

Count twelve for constructive fraud against Pierre Levai is dismissed as duplicative of breach of fiduciary duty and aiding and abetting breach of fiduciary duty claims.

Count thirteen for negligent misrepresentation against Pierre Levai is dismissed as time-barred. The sole allegation under this claim against Pierre is the alleged transfer of twenty-three artworks to Ms. Levine, which for the reasons stated above, is barred by the statute of limitations.

Count fourteen for civil conspiracy against Pierre Levine is dismissed. New York does not recognize an independent cause of action for civil conspiracy. “A conspiracy to commit a tort is never itself a cause of action.” *Bahiri v. Madison Realty Cap. Advisors, LLC*, 30 Misc. 3d 1208(A), 924 N.Y.S.2d 307 (Sup. Ct. 2010), citing *Alexander & Alexander of N.Y. v. Fritzen*, 68 N.Y.2d 968, 969 [1986]; *Litras v. Litras*, 254 A.D.2d 395 [2d Dept 1998]). “While conspiracy allegations may be pled to connect someone to an actionable tort committed by another, where the substantive tort is already pled against the parties, the conspiracy claim will be dismissed as duplicative. *Id.* (internal citations omitted).

Count fifteen for an accounting is dismissed without prejudice because the Complaint fails to allege that a demand for an accounting has been made. *See Behrman v. Red Flower, Inc.*,

61 Misc. 3d 1217(A), 110 N.Y.S.3d 899 (N.Y. Sup. Ct. 2018) (distinguishing between a demand for books and records and a demand for an accounting).

Motion 003 by Max Levai

The motion to dismiss count one for breach of fiduciary duty against Max Levai (“Max”) is denied. Paragraph 127 of the Complaint alleges at least eighteen distinct breaches of fiduciary duty by Max. Plaintiff has sufficiently alleged damages, including those that may be recovered under the faithless servant doctrine.

The motion to dismiss count two for aiding and abetting breach of fiduciary duty against Max Levai is denied. The Complaint alleges that Max rendered substantial assistance to his father Pierre in the course of effecting Pierre’s breaches of fiduciary duty by allowing, if not actually authorizing, the sale of two artworks owned by the Gallery to Pierre at prices below their market value, aiding and assisting Pierre in the improper transfer of a valuable artwork owned by the Gallery to a third party, and overseeing the drafting of letters Pierre sent to the Board that wrongly suggested that Max’s proposal for purchasing Gallery assets was fair to Marlborough. Compl. ¶ 133. These allegations are sufficient to withstand a motion to dismiss.

The motion to dismiss count three for conversion against Max Levai is denied. The Complaint alleges that Max interfered with the Marlborough Gallery’s possession and dominion over its property by intentionally taking several artworks owned by the Gallery and consigning them to Tripoli Patterson, LLC, without authority from the Marlborough Board; improperly gifting a valuable work owned by the Gallery to a third party, Dan Nadel; intentionally taking several artworks owned by the Gallery and transferring them to the Alone Gallery, without authority from the Marlborough Board; and intentionally taking several artworks owned by the Gallery and shipping them to his home or to a business in which he has a personal or proprietary interest. As explained and for the same reasons stated in response to Pierre’s motion, the

Complaint sufficiently alleges that these acts were not authorized, as Max was only authorized to act for the benefit of the business rather than himself.

Count four for trespass to chattels against Max Levai is dismissed as there is no allegation of harm to the allegedly misappropriated artwork, nor does the Complaint specify how long Plaintiff has been deprived of the property. Moreover, with respect to the allegation that Max canceled or altered invoices relating to the sale of artworks commissioned by Marlborough, this allegation cannot form the basis of a trespass to chattels claim, which only applies to the interference with tangible personal property.

The motion to dismiss count five for unjust enrichment against Max Levai is denied as the allegations underlying the unjust enrichment claim specifically against Max are distinct from the allegations underlying the breach of fiduciary duty and conversion claims. With respect to unjust enrichment, the Complaint alleges Max unjustly enriched himself at the Marlborough Gallery's expense by using the Gallery's resources to establish his own business venture, appropriating several artworks owned by Marlborough for his own use, taking payment from Marlborough of commissions and reimbursement of expenses to which he was not entitled, using his position to take a loan from Marlborough, canceling or altering invoices pertaining to commission agreements with three artists in order to benefit a venture or ventures in which he had a personal interest and receiving compensation and commissions while breaching fiduciary duties owed to Marlborough.

Count six for usurpation of corporate opportunity against Max Levai is dismissed as duplicative of the breach of fiduciary duty claim.

Count seven for breach of contract against Max Levai is dismissed. The Complaint fails to allege any of the essential terms of the alleged oral employment contract or any of the elements of contract formation.

Count eight for breach of the covenant of good faith and fair dealing against Max Levai is dismissed because the Complaint fails to allege the existence of the underlying oral contract and the alleged breaches are the same as the alleged breaches of fiduciary duty and therefore would be duplicative in any event.

Count nine for negligence against Max Levai is dismissed as duplicative of the breach of fiduciary duty and conversion claims. The exact same alleged intentional conduct that underlies the breach of fiduciary duty and conversion claims is alleged in support of the negligence claim. Plaintiff argues that this count is pled in the alternative. However, because the Court is sustaining the breach of fiduciary duty claim, there is no need for this superfluous claim.

The motion to dismiss count ten for defamation by Max Levai is denied. The Complaint alleges that Max made certain defamatory statements to a publication called ArtNet. Max argues that (1) the statements were true (2) the statements do not refer to Marlborough and (3) the statements are not susceptible to defamatory meaning. The Court rejects these arguments. First, on a motion to dismiss, the Court must take Plaintiff's allegations, here regarding the falsity of Max's statements to ArtNet, as true. Second, the statements do clearly refer to Marlborough and the Marlborough Board as the operators of the Gallery. And third, the statements are plainly susceptible to defamatory meaning.

Count eleven is not pled against Max Levai.

Count twelve for constructive fraud against Max Levai is dismissed as duplicative of Plaintiff's claim for breach of fiduciary duty.

Count thirteen for negligent misrepresentation against Max Levai is dismissed as this count does not include any factual allegations against Max.

Count fourteen for civil conspiracy against Max Levai is dismissed for the same reasons explained above in motion 003.

Count fifteen for an accounting against Max Levai is dismissed for the same reasons explained above in motion 003.

Motion 001 by John Helmrich

The motion to dismiss count one for breach of fiduciary duty against John Helmrich (“Helmrich”) is denied. Paragraph 130 of the Complaint alleges numerous breaches of fiduciary duty by Helmrich. Regarding damages, “at this stage of the pleadings, [a plaintiff] need only plead allegations from which damages attributable to [defendant employee’s] alleged breach might be reasonably inferred.” *Qosina Corp. v. C & N Packaging, Inc.*, 96 A.D.3d 1032, 1033 (Second Dept. 2012). The Complaint alleges damages in the form of a diminution of the value of the business as it winds down and the loss of business due to Helmrich’s encouraging artists to move their business to the Levai’s new, competing venture, Complt. ¶¶ 29, 54, 74-76, 101-02, 115, the value of money Helmrich improperly authorized paid to Max and to himself, Complt. ¶¶ 113-14, and the lost opportunity value of the paintings Helmrich authorized sold at below-cost prices to Pierre, Complt. ¶¶ 117-19.3 These allegations are sufficient to withstand a motion to dismiss.

The motion to dismiss count two for aiding and abetting breach of fiduciary duty against Helmrich is denied. The Complaint alleges intentional acts by Helmrich in support of Max and Pierre’s alleged breaches of fiduciary duty.

Count five for unjust enrichment against Helmrich is dismissed as duplicative of breach of the fiduciary duty claim as it based on the same allegations.

Count six for usurpation of corporate opportunity against Helmrich is dismissed as duplicative of breach of fiduciary duty claim as it based on the same allegations.

Count seven for breach of contract against Helmrich is dismissed as the Complaint fails to plead the essential elements of a Contract.

Count eight for breach of the duty of good faith and fair dealing against Helmrich is dismissed as the Complaint fails to allege the underlying contract, and this claim is also duplicative of the breach of fiduciary duty claim.

Count nine for negligence against Helmrich is dismissed as duplicative because the same intentional acts that underlie the breach of fiduciary duty claim are pled in support of the negligence claim.

Count fourteen for civil conspiracy against Helmrich is dismissed for the same reasons stated above in motion 003.

Count fifteen for an accounting against Helmrich is dismissed for the same reasons stated above in motion 003.

Motion 004 by Pascal Spengemann

The motion to dismiss count one for breach of fiduciary duty against Pascal Spengemann (“Spengemann”) is denied. Paragraph 128 of the Complaint alleges numerous breaches of fiduciary duty by Spengemann.

The motion to dismiss count two for aiding and abetting breach of fiduciary duty against Spengemann is denied.

Count five for unjust enrichment against Spengemann is dismissed as duplicative of the breach of fiduciary duty claim.

Count six for usurpation of corporate opportunity against Spengemann is dismissed as duplicative of the breach of fiduciary duty claim.

Count seven and count eight for breach of contract and breach of the covenant of good faith and fair dealing against Spengemann are dismissed because the Complaint does not allege any of the essential elements of a contract between Plaintiff and Spengemann and these claims are duplicative of the breach of fiduciary duty claims.

Count nine for negligence against Spengemann is dismissed as duplicative of the breach of fiduciary duty claim as the same alleged intentional conduct underlies the breach of fiduciary duty claim.

Counts fourteen and fifteen for civil conspiracy and an accounting are dismissed for the reasons stated above on motion 003.

Motion 005 by Pierre Levai Pursuant to BCL § 724

Defendant Pierre Levai moves for an order requiring Plaintiff to provide indemnification, reimbursement, and advancement of attorneys’ fees and costs incurred and to be incurred by Pierre in connection with his defense of claims brought by Marlborough in this action pursuant to New York Business Corporation Law (“BCL”) § 724. As set forth below, the motion is denied as premature without prejudice to renewal insofar as it seeks indemnification and denied insofar as it seeks advancement.

Under BCL § 724(c), where indemnification is sought by judicial action, the Court may “allow [an officer or director] such reasonable expenses, including attorneys’ fees, during the pendency of the litigation as are necessary in connection with his defense therein,” provided only that (i) the defendant has “raised genuine issues of fact or law” with respect to the claims against him, and (ii) awarding reimbursement and advancement would not be “inconsistent” with the company’s charter, bylaws, or other corporate action in force at the time the purported claims accrued. See BCL §§ 724(c), 725(b)(2).

An award of advancement is a matter of judicial discretion, not an entitlement. BCL § 724(c) (“Where indemnification is sought by judicial action, the court *may* allow a person such reasonable expenses, including attorneys’ fees, during the pendency of the litigation as are necessary in connection with his defense therein” (emphasis added)). The Court is not persuaded at this time that there is any need for advancement.

Accordingly, it is hereby

ORDERED that Motion 001 by John Helmrich is denied as to Counts one and two and granted as to Counts five, six, seven, eight, nine, fourteen and fifteen and those claims are severed and dismissed; and it is further

ORDERED that Motion 002 by Pierre Levai is denied as to Counts one, two, and three, and granted as to Counts four, five, six, seven, eight, nine, eleven, twelve, thirteen, fourteen and fifteen and those claims are severed and dismissed; and it is further

ORDERED that Motion 003 by Max Levai is denied as to Counts one, two, three, five and ten, and granted as to Counts four, six, seven, eight, nine, eleven, twelve, thirteen, fourteen and fifteen and those claims are severed and dismissed; and it is further

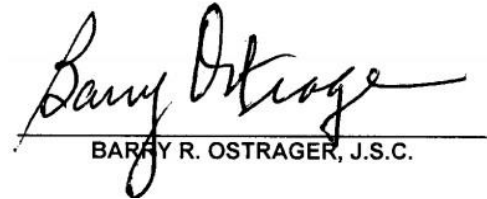
ORDERED that Motion 004 by Pascal Spengemann is denied as to Counts one and two and granted as to Courts five, six, seven, eight, nine, fourteen and fifteen and those claims are severed and dismissed; and it is further

ORDERED that Motion 005 by Pierre Levai is dismissed; and it is further

ORDERED that defendants shall answer the remaining claims within 20 days of the date of this decision and order; and it is further

ORDERED that all counsel shall appear for a preliminary conference on September 7, 2021 at 11:00 am.

Dated May 17, 2021


BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE