SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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ALEXANDER MESHECHOK,

Plaintiff,

- v -

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

Defendants.

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**INDEX NO.** 656337/2018

**MOTION DATE** _____

**MOTION SEQ. NO.** 006

**DECISION + ORDER ON MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 190, 193, 194, 195, 196, 197, 198, 199, 200, 201, 203, 204, 210, 211

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, it is

Plaintiff Alexander Meshechok moves, pursuant to CPLR 2221, for leave to reargue, renew, and/or modify the court's decision and order dated October 1, 2020 (NYSCEF Doc. No. 172 [NYSCEF] Decision and Order [motion seq. nos. 003, 004, 005]), dismissing the amended complaint in its entirety against defendants George Thacker and Lawrence Kaplan, severing and continuing the action against the remaining 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), and dismissing the eighth cause of action, the individual breach of contract claim against CSG RE III. (NYSCEF 173, Transcript [tr] at 51:3-58:2 [motion seq. nos. 003, 004, 005]; NYSCEF 172, Decision and Order [motion seq. nos. 003, 004, 005].) The court issued its decision on the record. (*Id.*)

Familiarity with the underlying decision is presumed. CSG, CSG RE, CSG RE II, and CSG RE III (collectively, the Companies) are Delaware Limited Liability Companies authorized to do business in New York. (NYSCEF 184, First Amended Complaint [FAC] ¶¶ 2-6.) Kaplan is a member, manager, and owner of the Companies with plaintiff. (*Id.* ¶¶ 7-8.) Specifically, plaintiff owns 40% of CSG (Kaplan owns 60%) and 36% of both CSG RE and CSG RE III. (*Id.* ¶¶ 3, 5.) Plaintiff was a manager of the Companies until August 2017 when he was terminated by Kaplan. (*Id.* ¶ 6.) Thacker is a member, manager, and owner of defendant CSG RE II. (*Id.* ¶ 8.) "Plaintiff owns 18% of CSG RE II and Thacker owns 50%." (*Id.* ¶ 4.)

CSG is an investment bank that specializes in structuring Employee Stock Ownership Plan (ESOP) transactions. (*Id.* ¶ 10.) As part of its ESOP services, CSG offers its clients access to a trade secret developed by plaintiff. (*Id.*) This trade secret, owned and licensed by CSG RE to CSG, allows CSG's clients, who sold their companies to ESOPs, to reinvest a portion of their proceeds into real estate. (*Id.*) When the trade secret is licensed to a client to use as part of the reinvestment process, that client pays an upfront fee and grants a future profit-sharing interest in the real estate, generating future payments upon certain events. (*Id.* ¶ 11.) This revenue was directed to an entity in which Kaplan and plaintiff have proportional joint ownership, such as CSG RE, so they could benefit proportionally. (*Id.*)

"CSG RE II and CSG RE III are derivative entities of CSG RE." (*Id.* ¶ 12.) These two entities are permitted to implement the reinvestment process through the use of the trade secret subject to CSG RE's consent. (*Id.*) "CSG RE II shares the profits generated through its use of the Trade Secret with 50% owner Thacker related to his

origination of clients for CSG that complete the reinvestment process." (*Id.*)

Plaintiff alleges that he and Kaplan never took a salary and that all income and profits from the Companies were distributed to plaintiff, Kaplan, and Thacker, pro rata, based on ownership percentages. (*Id.* ¶ 14.) After his termination, plaintiff failed to receive any further distributions from the Companies. (*Id.*) Instead, Kaplan allegedly retroactively increased his own compensation and started to pay himself commissions for the deals Kaplan worked on. (*Id.* ¶ 18.) Plaintiff alleges that this violated CSG's written operating agreement which requires all "net cash flow" or other property to be distributed pro rata to plaintiff and Kaplan. (*Id.* ¶ 37.) The CSG operating agreement prohibits plaintiff or Kaplan from taking any distributions or compensation beyond the pro rata split. (*Id.*) Plaintiff alleges that oral or implied agreements relating to the other Companies were also breached by failing to make pro rata distributions. (*Id.* ¶ 38.)

Kaplan also diluted plaintiff's interest in CSG by admitting a new member without the 2/3 member approval as required by CSG's operating agreement. (*Id.*) Plaintiff further alleges that Kaplan used the trade secret without authority, diverted CSG RE's business opportunities, and made undocumented pension fund contributions solely for his benefit. (*Id.* ¶¶ 17-18.) Plaintiff claims that any derivative demand to recoup the wrongful distributions will be futile because Kaplan and/or Thacker are not disinterested or independent managers and personally benefited in the alleged deals. (*Id.* ¶¶ 29-30.)

Plaintiff brought this action derivatively on behalf of the Companies against Kaplan and Thacker, as well as individually against the Companies, Kaplan, and Thacker. (*Id.* ¶ 1.) In the underlying decision, the court granted Thacker's motion to dismiss in its entirety on the basis that the court lacked jurisdiction over him. (NYSCEF

143, tr. at 53:21-54:1.) The court found that plaintiff did not sufficiently allege that Thacker's activities were purposeful nor that a substantial relationship existed between the transactions and claims asserted. (*Id*. at 52:15-53:12.) Additionally, the court found that plaintiff did not sufficiently allege Thacker's involvement in the alleged improper distributions made by CSG RE II. (*Id*. at 53:13-20.) The court then dismissed plaintiff's derivative causes of action for failure to establish that the benefit of the recovery would inure to the Companies, rather than plaintiff directly. (*Id*. at 54:2-12.) Further, the court dismissed plaintiff's individual breach of fiduciary duty causes of action as duplicative of the sustained individual breach of contract causes of action. (*Id*. at 57:5-8.)

Plaintiff now brings a renew/reargue/modify motion to restore the breach of fiduciary duty causes of action against Kaplan, both individually and derivatively, and the derivative usurpation claim against Kaplan (tenth, eleventh, fifteenth, sixteenth, and twenty-sixth causes of action). (NYSCEF 211, tr at 7:11-17 [motion seq. no. 006].)[1]

[1] In his moving brief, plaintiff seeks restoration of the second (derivative breach of contract claim against Kaplan), tenth (derivative breach of fiduciary claim against Kaplan), eleventh (derivative breach of fiduciary claim against Kaplan), fifteenth (individual breach of fiduciary claim against Kaplan), sixteenth (individual breach of fiduciary claim against Kaplan), nineteenth (derivative unjust enrichment claim against Kaplan), twentieth (individual unjust enrichment claim against Kaplan), and twenty-sixth causes of action (derivative usurpation of corporate opportunity against Kaplan). However, plaintiff waived consideration of the restoration of the second, nineteenth, and twentieth causes of action at argument, requesting that the court consider restoring only the breach of fiduciary duty claims and usurpation claim. (NYSCEF 211, tr. at 7:11-17 [motion seq. no. 006] ["So, Your Honor, by this motion, we are seeking restoration specifically the breach of fiduciary duty, the individual breach of fiduciary duty claim against Mr. Kaplan, the derivative breach of fiduciary duty claim against Mr. Kaplan and the usurpation claim which is also a derivative claim against Mr. Kaplan. We believe that those are the correct claims that cover these allegations."].)

**Discussion**

Motion to Reargue

At oral argument, plaintiff's counsel stated this motion is "probably best characterized as a motion to reargue". (*Id*. at 3:21-23.) "A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision. Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted." (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [internal quotation marks and citations omitted]; *see also* CPLR 2221[d][2].) The portion of plaintiff's motion seeking to reargue is granted, and the court will review the merits of plaintiff's reargument.

Plaintiff asserts that the court overlooked defendants' burden to prove the entire fairness of the diversion of proceeds generated by the trade secret. Specifically, plaintiff implores the court to "grant reargument and/or modify its Decision to the extent there is any ambiguity as to whether damages attributable to the diversion of Trade Secret profits under Delaware's Entire Fairness Doctrine are fully recoverable under the sustained causes of action. … If so, the dismissed causes of action should be restored as not superfluous and necessary for Plaintiff to obtain complete relief." (NYSCEF 170, Plaintiff's Moving Brief at 4 of 19.)

Plaintiff contends that Kaplan licensed the trade secret from the Companies to other entities controlled solely by Kaplan (Kaplan Owned Entities). Plaintiff asserts that

the Kaplan Owned Entities collected revenue from the trade secret bypassing the Companies to avoid royalty payments to them. Plaintiff argues that the court overlooked these allegations and that Kaplan's conduct violates Delaware's Entire Fairness Doctrine. Plaintiff asks the court to "reinforce that Plaintiff's individual contract claim enables the assessment of diverted Trade Secret proceeds under the Entire Fairness standard and further permits these proceeds to be recovered by Plaintiff or deemed a part of the Companies profits for purposes of calculating Plaintiff's distributive share." (NYSCEF 170, Plaintiff's Moving Brief at 10 of 19.)

The fundamental principle of Delaware law is "that the business and affairs of a corporation are managed by or under the direction of its board of directors. In exercising these powers, directors are charged with an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders." (*Cede & Co. v Technicolor*, 634 A2d 345, 360 [Del 1993] [citation omitted].) When a transaction is challenged on the grounds that a director is self-interested, and the transaction is beneficial to that director, there are "three safe harbors to prevent nullification of potentially beneficial transactions simply because of director self-interest." (*Valeant Pharms. Intl. v Jerney*, 921 A2d 732, 745 [Del Ch 2007], citing 8 Del C § 144.) These "safe harbors" include the invocation of the Business Judgment Rule and the Entire Fairness standard. (*Id.*) The business judgment rule

> "posits a powerful presumption in favor of actions taken by the directors in that a decision made by a loyal and informed board will not be overturned by the courts unless it cannot be attributed to any rational business purpose. Thus, a shareholder plaintiff challenging a board decision has the burden at the outset to rebut the rule's presumption. To rebut the rule, a shareholder plaintiff assumes the burden of providing evidence that directors, in reaching their challenged decision, breached any one of the triads of their fiduciary duty--good faith, loyalty or due care. If a

> shareholder plaintiff fails to meet this evidentiary burden, the business judgment rule attaches to protect corporate officers and directors and the decisions they make, and our courts will not second-guess these business judgments. If the rule is rebutted, the burden shifts to the defendant directors, the proponents of the challenged transaction, to prove to the trier of fact the entire fairness of the transaction to the shareholder plaintiff. Under the entire fairness standard of judicial review, the defendant directors must establish to the court's satisfaction that the transaction was the product of both fair dealing and fair price."

(*Cede & Co. v Technicolor*, 634 A2d 345, 361 [Del 1993] [internal quotation marks and citations omitted], *rearg granted in part* 636 A2d 956 [Del 1994] [modifying the previous decision by concluding that defendant's charter requirement of director unanimity must be taken into consideration in determining whether the director's undisclosed self-interest would have been material to a reasonable shareholder].)

Here, plaintiff is seeking to extend the Entire Fairness standard to the evaluation of his breach of contract claims. Plaintiff fails to cite any law to support this position. The Entire Fairness standard applies to breach of fiduciary duty claims, and there is no indication that the Delaware courts have extended its application beyond fiduciary duty claims. This court declines to do so.

In the alternatively, plaintiff seeks reinstatement of certain derivative and individual breach of fiduciary duty claims arising out of the alleged diversion of royalties and proceeds, as well his derivative claim for usurpation of corporate opportunities, royalties, proceeds, and profit-sharing interest.

*Derivative Breach of Fiduciary Duty and Usurpation Claims*

When the court is presented with direct and derivative claims, two questions are posed: (1) who suffered the harm alleged in the complaint (the corporation or the suing stockholder), and (2) who would receive the benefit of the recovery or other remedy.

(*Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1035 [Del 2004].) In the context of a claim for breach of fiduciary duty, the inquiry requires "[l]ooking at the body of the complaint and considering the nature of the wrong alleged and the relief requested," and deciding whether "the plaintiff demonstrated that he or she can prevail without showing an injury to the corporation." (*Id.* at 1036 [internal quotation marks and citation omitted].)

In the underlying decision, the court ruled that plaintiff failed to sufficiently allege that the Companies would receive the benefit of the recovery. (NYSCEF 173, tr at 54:2-5 [motion seq. nos. 003, 004, 005].) The court found that plaintiff did not sufficiently plead that the corporation suffered the foremost harm and would be the recipient of the recovery. Rather, plaintiff, as an individual, would be on the receiving end of any recovery, and thus, the court sustained certain direct claims alleged by plaintiff. Plaintiff now argues that the court overlooked that royalties, upfront payments, and profit-sharing interests have been diverted from the Companies to the Kaplan Owned Entities.

The tenth cause of action is a derivative claim against Kaplan for breach of fiduciary duty arising from Kaplan's alleged misappropriation of the Companies' funds. Plaintiff alleges that Kaplan distributed Company funds to himself greater than his pro rata share, reducing plaintiff's share. The eleventh cause of action is a derivative claim against Kaplan for breach of fiduciary duty arising from Kaplan's alleged diversion of the Companies' royalties, upfront payments, and profit-sharing interests to the Kaplan Owned Entities. The court erred in dismissing these claims.

Under the first prong of *Tooley*, "[c]laims are treated as derivative when they naturally assert that the corporation's funds have been wrongfully depleted, which, though harming the corporation directly, harms the stockholders only derivatively… ." (*Dietrichson v Knott*, 2017 Del. Ch. LEXIS 64, at *10 [Del Ch Apr. 19, 2017, No. 11965-VCMR] [internal quotation marks and citation omitted].) "Under the second prong of Tooley, [w]here all of a corporation's stockholders are harmed and would recover pro rata in proportion with their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative in nature." (*Id*. at *11 [internal quotation marks and citation omitted].)

In the tenth and eleventh causes of action, plaintiff alleges dissipation of Company funds and diversion of monies that are allegedly owed to the Companies. The initial recipient of any damages for these breaches of fiduciary duty would be the Companies and not plaintiff individually, though plaintiff repeatedly concentrates on his share of proceeds.

Plaintiff's twenty-sixth cause of action is a derivative claim for usurpation of corporate assets. Plaintiff alleges that Kaplan has wrongfully taken corporate opportunities and assets belonging to the Companies by licensing the Trade Secret without consent, directing payment of royalties and upfront payments, and diverting the resulting profit-sharing interests to his own entities. While the court agrees that plaintiff has properly plead this as a derivative claim, it is duplicative of the derivative breach of fiduciary duty claim seeking damages for this exact conduct. Thus, this claim will not be reinstated as they are identical claims.

Defendants assert that plaintiff cannot bring derivative claims on behalf of the Companies and also individual claims against Companies as it presents a conflict. "One of the primary concerns where both direct and derivative claims are alleged is the possibility of an inherent conflict of interest for the Plaintiffs' counsel." (*In re Ebix, Inc. Stockholder Litig.*, 2014 WL 3696655, at *18 [Del Ch July 24, 2014].) The conflict must be strong to bifurcate the litigation or dismiss either the direct or derivative claims. (*Id.*) Where the claims are not internally inconsistent and the same factual issue underlies all the claims, both sets of claims with a same party on both sides, may go forth. (*Id.*) Here, defendants do not establish a conflict so strong as to order bifurcation or dismissal. The claims here are based on the same factual issues.

*Individual Breach of Fiduciary Duty Claims*

Plaintiff next argues that his individual breach of fiduciary duty claims are not duplicative of his individual breach of contract claims because the trade secret issues stem from facts beyond the breach of contract claims. In the fifteenth cause of action, plaintiff alleges that Kaplan breached his fiduciary duty to plaintiff by causing the Companies to make distributions to other shareholders but not plaintiff. In the sixteenth cause of action, plaintiff alleges that Kaplan licensed or permitted the trade secret to be used while excluding plaintiff from all proceeds from the trade secrets, including royalties, upfront payments, and profit-sharing interests.

"'[W]here a dispute arises from obligations that are expressly addressed by contract, that dispute will be treated as a breach of contract claim. In that specific context, any fiduciary claims arising out of the same facts that underlie the contract obligations would be foreclosed as superfluous.'" (*Panattoni Dev. Co., Inc. v Scout Fund*

*1-A, LP*, 154 AD3d 555, 557 [1st Dept 2017], quoting *Nemec v Shrader*, 991 A2d 1120, 1129 [Del 2010] [citations omitted].) In the underlying decision, the court presumed the allegations in plaintiff's complaint to be true. (NYSCEF 173, tr at 51:10-13 [motion seq. nos. 003, 004, 005].)

In the FAC, plaintiff alleges the existence of contractual agreements, written, oral and implied, between himself and the Companies. (NYSCEF 184, FAC, ¶¶ 36-38, 61-81.) Specifically, plaintiff alleges in his sixth cause of action for individual breach of contract against the Companies that "[p]ursuant to the CSG Operating Agreement, and oral and implied operating agreements governing and between Meshechok and the Companies, Meshechok is entitled to pro rata distributions from all of the Companies equal to his ownership share where other members and owners receive distributions ... the Companies have made distributions to other members and owners without making corresponding distributions to Meshechok." (*Id.* ¶ 63.) This is identical to his fifteenth cause of action detailed above. He seeks the same damages of $6 million. (*See Id.* ¶¶ 65, 114.)

As to the trade secret, in the seventh cause of action for individual breach of contract against the Companies, plaintif claims that "[p]ursuant to CSG's written Operating Agreement and the oral and implied operating agreements governing and between Meshechok and the Companies, Meshechok is entitled to benefit *pro rata* from any licensure or use of the Trade Secret." (*Id*. ¶ 68.) The language is nearly identical to the sixteenth cause of action, the individual breach of fiduciary duty claim against Kaplan. (*Id*. ¶ 116.) Additionally, both causes of action seek the same damages of $8 million. (*Id*. at ¶¶ 70, 118.)

The individual breach of fiduciary duty claims against Kaplan stem from duties prescribed by the alleged contracts. Thus, the court adheres to its original determination that the individual breach of fiduciary duty claims are duplicative of plaintiff's individual breach of contract claims.

Motion to Renew

Despite plaintiff's concession that this is a motion to reargue, the court will briefly address the standard for a motion to renew and address plaintiff's purported new fact.

A motion to renew is based upon new facts not offered on the prior motion or a change in the law that would impact the prior determination. (CPLR 2221[e][2].) If there are new facts offered, the motion must contain a reasonable justification for failure to present those facts. (CPLR 2221 [e][3].) Plaintiff must raise new facts and provide a reasonable reason for failing to previously present those facts. (*Wade v Giacobbe*, 176 AD3d 641 [1st Dept 2019], *lv to appeal dismissed,* 35 NY3d 937 [2020].)

Plaintiff argues that his individual breach of fiduciary duty claims are not duplicative of the previously sustained individual breach of contract claims because defendants deny having any written or other operating agreements. Plaintiff's concern is that defendants contest the existence of operating agreements for CSG RE, CSG RE II, and CSG RE III and contest that CSG's operating agreement provides a recourse for the diverted proceeds; thus, the only way for plaintiff to recover is to reinstate its individual claims for breach of fiduciary duty.

Plaintiff cites to the complaint in *CSG RE Partners, LLC, et al. v Meshechok, et al.*, as evidence that defendants claim to not have any written or operating agreements. (NYSCEF 177, CSG RE Partners, LLC's Verified Complaint, ¶ 25.) In paragraph 25,

CSG RE Partners, LLC and CSG RE Partners II, LLC allege that they alone "do not have written or other operating agreements, and as such, are governed by the Delaware Limited Liability Company Act, under which there is no contractual or other requirement that a limited liability company make distributions to its members, including Meshechok." (*Id.*) First, this allegation only asserts that there is no operating agreement between plaintiff and CSG RE and CSG RE II. Second, the court accepts the allegations in the FAC, i.e., that plaintiff had operating agreements, written, oral, or implied, with these two defendants as true. Thus, the individual breach of fiduciary duty claims are still duplicative of the individual breach of contract claims in this action. The fact that these two defendants allege there are no agreements in another action does not make it so in this action. The court will dismiss the individual breach of fiduciary claims without prejudice.

The court has considered the parties' remaining arguments and finds them unavailing without merit or otherwise not requiring an alternate result.

Accordingly, it is

ORDERED that plaintiff Alexander Meshechok's motion to reargue is granted; and it is further

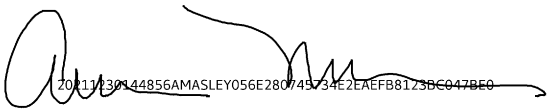
ORDERED that, upon reargument, the Court vacates its prior order, dated October 1, 2020, in part, and reinstates plaintiff's tenth and eleventh causes of action, but also adheres to its decision dismissing the fifteen, sixteenth, and twenty-sixth causes of action; and it is further

ORDERED that the plaintiff's motion for leave to renew is granted but the court adheres to the portion of its Decision and Order, dated October 1, 2020, dismissing the fifteenth and sixteenth causes of action; and it is further

ORDERED that that all papers, pleadings, and proceedings in the above-entitled action be amended by restoring Lawrence Kaplan as defendant, without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].




12/30/2021
DATE

ANDREA MASLEY, J.S.C.

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