

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

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ROBERT HOPKINS, FUNDING AMERICA LLC, FUNDING
AMERICA MANAGEMENT LLC,

Plaintiff,

- v -

KENNETH ACKERMAN, SUNRISE CONSULTING
LLC, SUNSET CONSULTING LLC, ACKERMAN FINE
ARTS LLC,

Defendant.

INDEX NO.

655010/2018

MOTION DATE

N/A, N/A

MOTION SEQ. NO.

003 004

**DECISION + ORDER ON
MOTION**

HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 92-1, 93-1, 95-1, 96-1, 98-1, 105-1, 116, 119, 120, 121, 122, 123, 124, 125, 150, 151

were read on this motion to/for

AMEND CAPTION/PLEADINGS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 152, 153, 154, 155, 156, 157

were read on this motion to/for

JUDGMENT - DEFAULT

Upon the foregoing documents, it is

In this action, *inter alia*, to recover damages for breach of contract, plaintiff

Robert Hopkins (“Hopkins”) moves for leave to amend the complaint (motion sequence 003). Defendants Kenneth Ackerman (“Ackerman”) and Sunrise Consulting Services, LLC (“Sunrise”) move for a default judgment against Hopkins on the counterclaims asserted in their first amended answer (motion sequence 004).¹

¹ For a full recitation of the facts of this case, see my decision and order dated 11/4/19.
655010/2018 HOPKINS, ROBERT vs. ACKERMAN, KENNETH
Motion No. 003 004

In my November 4, 2019 decision and order, I dismissed the complaint insofar as asserted against defendants Sunset Consulting LLC and Ackerman Fine Arts, I denied Hopkin's motion to dismiss the sixth counterclaim, and I dismissed all derivative and direct claims asserted against Ackerman and Sunrise except for a direct claim for breach of contract based on their alleged breach of Hopkins' rights to inspect the books and records of the Funding America LLC and Funding America Management LLC (collectively referred to as "Fund").

Hopkins now moves for leave to amend the complaint. He first argues that his breach of contract claim should be amended to clarify that defendants directly breached the operating agreements not only by refusing to allow Hopkins access to the corporate books and records, but also by refusing to pay distributions to Hopkins which he was allegedly entitled to as a member of Fund.

He also seeks to amend the complaint to assert an alternative theory of breach of contract based on improper dissolution. Specifically, he seeks to allege that Ackerman breached the operating agreement by "(1) violating the "Events of Dissolution" provisions of the Fund Operating Agreement, which permitted dissolution only upon the termination of the last remaining member or upon a decree of dissolution, and (2) failing to set aside a reserve for the satisfaction of creditors, "including Members who are creditors," provided in section 6.2-6.3 of the Fund Operating agreement and Section 9.2 of the Management Operating Agreement."

Hopkins next requests leave to replead his claim for breach of fiduciary duty, (1) to allege that Ackerman “froze out” Hopkins from the daily operations of the Fund, from decision making, from inclusion in K-1s, and from his membership rights, and (2) to allege that he illegally dissolved the entities to steal money that should have been paid out to Hopkins in distributions. He claims that Ackerman exercised exclusive control over the bank accounts and specifically dissolved the entities to invoke a “clawback” provision, which would avoid liabilities and provide him with extra distributions. Hopkins further explains that this claim is different from the breach of contract claim because it relates to behavior beyond the four corners of the operating agreement. In the alternative, he alleges that defendants breached a fiduciary duty by “maliciously exercising a contractual provision in an unfair or inequitable manner, so as to deprive [Hopkins] of the fruits of the contract.”

Hopkins also seeks leave to amend to allege a claim for fraudulent conveyance, providing that Ackerman transferred Fund assets to himself at the time of the dissolutions to avoid the Fund’s obligations to Hopkins. He allegedly deliberately dissolved the Fund entities and transferred assets to himself with actual intent to prevent Hopkins, a creditor, from obtaining his money.²

Finally, he seeks to add Al Reda (“Reda”) and Reda Remano & Co., LLC (“Remano”) as defendants to assert a claim against them for aiding and abetting breach of fiduciary duty. Based on information obtained in discovery, he claims that he learned

² Hopkins also sought leave to amend to include a claim under Delaware LLC Law Section 18-804, but in his reply papers, stated that he would not pursue that claim.

that Reda and Remano knew what Ackerman was planning and offered to assist him by preparing falsified tax statements to remove Hopkins' interests. Specifically, even though they knew that Hopkins was a member in Fund, they agreed to Ackerman's request to create false tax returns that excluded Hopkins as a member. Hopkins maintains that Reda can be named individually because a partner may be held liable for wrongful conduct committed by him. Reda personally managed the Fund account and he generated the false tax returns.

In opposition, Sunrise and Ackerman argue that all proposed claims by Hopkins are derivative in nature because they involve allegations of injury to the entities and seek relief that would also be claimed by the entities. Any distributions allegedly not made to Hopkins would have also allegedly been withheld from the entities.

They further argue that the claim for breach of fiduciary duty is duplicative of the claim for breach of contract. To the extent the breach of fiduciary duty claim goes beyond the failure to access the books and records, it fails to identify any duty, independent of a contractual duty, that is being breached here. Further, the proposed amendment fails to explain how any alleged "freeze-out" breached any fiduciary duty owed to Hopkins.

Finally, they argue that the claim for fraudulent conveyance is defective in that Hopkins has not been found to be a "creditor" under Delaware law, and in any event, the claim fails to allege with sufficient particularity any "actual intent to hinder, delay or defraud present or future creditors by the defendants." It is also vague as to the transfer of monies and the amounts alleged conveyed.

Also in opposition, Reda and Remano argue that Hopkins fails to allege any breach of fiduciary duty, rather, all allegations relate to purported breaches of the underlying agreement. In any event, any allegations that they aided and abetted any breach of fiduciary duty are conclusory. Hopkins merely alleges that Remano created tax returns for Ackerman but there are no specific allegations of aiding and abetting a breach of fiduciary duty. Further, Reda should not be named as a defendant because there are no allegations of any specific misconduct by Reda individually.

Defendants also move for a default judgment against Hopkins for his failure to respond to the counterclaims. The answer with counterclaims was served and filed on February 8, 2019. Defendants served and filed an amended answer with counterclaims on March 18, 2019. Hopkins moved to dismiss one of the counterclaims, and in my November 4, 2019 decision and order, I denied that motion. While Hopkins did respond to the initial counterclaims, he has thus far failed to respond to the amended counterclaims.

In opposition, Hopkins argues that defendants' counsel rushed to make this motion without first meeting and conferring with Hopkins' counsel. Hopkins did not respond to the counterclaim because the motion to amend was still pending and thought it would be most efficient to wait until that motion was resolved. Even so, Hopkins offered to serve an amended answer within ten days, but defendants never responded to that offer. Hopkins argues that this motion is frivolous and a waste of the court's resources.

Discussion

Leave to amend pleadings should be freely given but must be denied if there is prejudice or surprise resulting from the delay or if the proposed amendment is “palpably improper or insufficient as a matter of law.” *McGhee v. Odell*, 96 A.D.3d 449, 450 (1st Dept. 2012).

In my decision and order dated November 4, 2019, I dismissed all derivative claims, including claims for breach of contract based on the misappropriation and misdirection of investment proceeds and distributions. Again, in his proposed amended complaint, Hopkins asserts a breach of contract claim based on defendants’ failure to pay distributions. That is a derivative claim and cannot be pled directly by Hopkins. With regard to his new proposed claim for breach of contract based on improper dissolution, that is also a derivative cause of action and cannot be pled directly by Hopkins. As already discussed exhaustively, to the extent that Hopkins seeks to argue that the cancellation of the Fund was improper, he has to raise that claim in Delaware, where the companies were incorporated.

The motion to amend the complaint insofar as it seeks to assert a claim for fraudulent conveyance is also denied. Hopkins maintains that he sufficiently pleads “badges of fraud” to support the claim. However, he merely pleads that defendants transferred certain assets to themselves during the dissolution, even though they had “actual or constructive” knowledge that monies were owed to Hopkins. These bare-boned allegations are insufficient to state a claim for fraudulent conveyance. Hopkins

fails to plead any specific facts to support his conclusory allegations that a fraudulent conveyance occurred. *See generally RTN Networks, LLC v Telco Group, Inc.*, 126 A.D.3d 477 (1st Dept. 2015).

In my November 4, 2019 decision and order, I dismissed the breach of fiduciary duty claim in which Hopkins alleged that Ackerman and Sunrise controlled the Fund and breached their fiduciary duties by (1) improperly distributing assets; (2) neglecting valuable receivables; (3) withholding the books and records and preventing Hopkins from establishing a new receivable collection account; and (4) diverting the Fund's website and phone numbers to Ackerman Fine Arts.

Now, Hopkins seeks to allege that defendants breached their fiduciary duty by (1) freezing out Hopkins from the daily operations of the Fund, from decision making, from inclusion in K-1s, and from his membership rights, and (2) illegally dissolving the entities to steal money that should have been paid out to Hopkins in distributions. The second basis for the proposed breach of fiduciary duty claim is derivative in nature and cannot be pled by Hopkins directly.

However, the first basis for the proposed breach of fiduciary duty claim may be pled by Hopkins directly and he is granted leave to amend the complaint to include that direct claim. A claim is direct if the plaintiff has “suffered harm independent of any injury to the corporation that would entitle him to an individualized recovery.” *Feldman v. Cutaia*, 951 A.2d 727, 732 (Del. 2008). Hopkins’ first basis for alleging breach of fiduciary duty states harm unique to him and injury independent of injury to the Fund.

Finally, I find that the allegations in the proposed amended complaint do not state a claim against Reda and Remano. Hopkins broadly refer to acts taken by the accountants on behalf of the entities but do not set forth any non-conclusory allegations of providing substantial assistance to any purported breach of fiduciary duty on the part of defendants. As such, leave to amend to add Reda and Remano as defendants is denied.³

Defendants' motion for a default judgment on their counterclaims is denied, because Hopkins has been actively and vigorously litigating this action and there is absolutely no indication that he does not intend to defend the counterclaims. Hopkins is directed to serve his amended complaint within twenty days of the date of this order. Defendants will then answer the amended complaint and assert counterclaims if they so choose. Hopkins is required to timely respond to any counterclaims asserted in that answer.

In accordance with the foregoing, it is hereby
ORDERED that plaintiff Robert Hopkins' motion for leave to amend the
complaint is granted only to the extent that he is granted leave to amend his complaint
consistent with this decision and order (motion sequence 003); and it is further

³ Counsel should not interpret this decision and order as an invitation to move to amend again by simply recasting the existing factual allegations into new claims. Counsel has an obligation to produce pleadings that are accurate and thorough, and should seek to amend only if new evidence or information is uncovered to genuinely warrant an amendment.

ORDERED that the amended complaint shall be served within twenty days of the date of this order; and it is further

ORDERED that defendants Kenneth Ackerman and Sunrise Consulting Services, LLC's motion for a default judgment against Hopkins on the counterclaims asserted in their first amended answer is denied.

This constitutes the decision and order of the court.

5/4/2020
DATE

CHECK ONE:

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CASE DISPOSED

DENIED

APPLICATION:

GRANTED

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

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NON-FINAL DISPOSITION

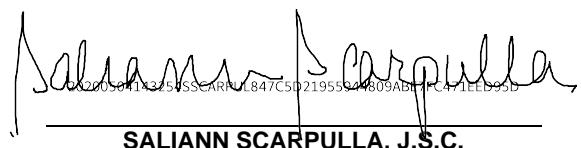
OTHER

GRANTED IN PART

SUBMIT ORDER

REFERENCE

FIDUCIARY APPOINTMENT



X202005041345SSCARPULLA847C5D21955344809ABF471EED95D

SALIANN SCARPULLA, J.S.C.