

**Lemle v Lemle**

2017 NY Slip Op 30811(U)

April 20, 2017

Supreme Court, New York County

Docket Number: 601281/2007

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 3

-----X  
MICHAEL LEMLE, Individually and as a  
Shareholder of 132 WEST 31<sup>ST</sup> STREET  
REALTY CORP., Suing in the Name of  
132 WEST 31<sup>ST</sup> STREET REALTY CORP.,

**DECISION/ORDER**

Index No. 601281/2007  
Motion Seq. No. 015 & 016

Plaintiff,

-against-

FLORENCE LEMLE, DOUGLAS LEMLE, DEANNE  
LEMLE BOSNAK, LEARKA BOSNAK, JAKE  
LEMLE and 132 WEST 31<sup>ST</sup> STREET  
REALTY CORP.,

Defendants.

-----X  
HON. SALIANN SCARPULLA, J.:

Motions bearing sequence numbers 015 and 016 are consolidated for disposition.

This is a shareholder dispute arising in connection with a family-owned New York corporation whose primary asset is the building located at 132 West 31<sup>st</sup> Street in Manhattan. In motion sequence 015, defendant 132 West 31<sup>st</sup> Street Realty Corp. (“132 West”), moves, pursuant to CPLR § 3212, for an order granting partial summary judgment and dismissing the first, third and tenth causes of action in the fourth amended complaint (“complaint”). Plaintiff Michael Lemle cross-moves for summary judgment on the second through sixth causes of action in the complaint.

In motion sequence 016, defendants Florence Lemle, Douglas Lemle, Deanne Lemle Bosnak, Larkka Bosnak and Jake Lemle (collectively, the “Individual Defendants”) move, pursuant to CPLR § 3212, for an order granting summary judgment and dismissing the complaint in its entirety as to Larkka Bosnak and Jake Lemle, and dismissing the first through seventh, ninth, and tenth causes of action as to Florence Lemle, Douglas Lemle and Deanne Lemle Bosnak.

### **Background**

The facts of this case have been set forth in detail in previous decisions in this action, including the decision of the Appellate Division, First Department, titled *Lemle v Lemle*, 92 A.D.3d 494 (1<sup>st</sup> Dep’t 2012).

Relevant here, 132 West is a closely held corporation owned and managed by plaintiff and his siblings, Florence Lemle, Douglas Lemle and Deanne Lemle Bosnak. Each is a shareholder, director and officer of the Corporation, and each owns approximately 4.6% of 132 West’s outstanding shares. Larkka Bosnak is the daughter of Deanne Lemle Bosnak. Jake Lemle is the son of Douglas Lemle. Nonparty Edna Lemle, the mother of plaintiff and his siblings, was a director, as well as the majority shareholder, owning 80% of 132 West’s stock. Edna Lemle died in 2011.

132 West’s principal asset is an underlease for an office building located at 132 West 31<sup>st</sup> Street in Manhattan. Plaintiff states that the building is managed by an independent company and that 132 West is now a holding company, receiving passive

income from the underlease. Plaintiff also states that 132 West has additional assets, including securities, gold, and real property. Plaintiff states that the income derived from these assets is also passive.

According to the complaint, 132 West's income is distributed pro rata in accordance with the ownership interests. The complaint states that, over the years, 132 West employed two additional mechanisms to move funds into the hands of the plaintiff and his siblings.

One mechanism was by payment, to the various parties, of compensation in lieu of dividends, purportedly for their services as directors and officers of 132 West. Plaintiff states that he and his siblings each receives, or received, an annual director's fee of \$50,000 and an annual officer's salary of \$50,000. Florence Lemle allegedly receives an additional salary of \$125,000 as 132 West's chief financial officer and as acting chief executive officer.

Plaintiff alleges that, in 2012, he was removed from his position as vice president of 132 West and, in 2013, was removed from his position as a director, resulting in a loss of income with respect to both positions.

The second means for moving funds into the parties' hands was through loans from 132 West. However, over the years, disputes arose between plaintiff and his siblings with respect to loan balances, interest rates, due dates and other terms of the loans.

In June 2004, in an attempt to resolve such loan disputes, each of the parties with outstanding loans entered into a loan modification agreement with 132 West (collectively, "Loan Modification Agreements"). The Loan Modification Agreements provided that each of the loan balances, "as they will ultimately be determined," would be payable "on the later of" the death of Edna Lemle and distribution of her estate or December 30, 2012. As set forth above, Edna Lemle passed away in 2011.

Plaintiff commenced this action in 2007, individually and derivatively, alleging that his siblings had converted millions of dollars from 132 West in breach of their fiduciary duties by, among other things, falsifying corporate records to eliminate millions of dollars of principal and interest owed by them to 132 West and paying themselves excessive compensation.

According to the complaint, on March 22, 2012, Florence Lemle, Douglas Lemle, Deanne Bosnak and Learka Bosnak reelected themselves as officers of 132 West, but did not reelect plaintiff as vice president of 132 West. In January 2013, those same defendants allegedly reelected themselves as directors and did not reelect plaintiff as a director of the Corporation. At the same time, Jake Lemle was made a director.

The complaint alleges that, on or about December 31, 2012, 132 West made a distribution ("2012 Distribution") to the shareholders consisting of: 1) repayment of each of the individual shareholder loans from 132 West, and 2) a note, bearing interest payable annually beginning on December 31, 2014, with the principal being due December 31,

2018. The complaint alleges that the 2012 Distribution was made in spite of the provisions of the Loan Modification Agreements and notwithstanding that the balances of the various shareholder's loans had yet to be definitively determined.

The complaint in this action has been amended several times. The current complaint alleges ten causes of action for: (1) breach of contract based on the Loan Modification Agreements; (2) corporate waste based on salaries paid to Individual Defendants; (3) corporate waste based on advanced legal fees; (4) corporate waste based on improperly eliminated loan obligations that plaintiff's siblings owed to 132 West; (5) breach of fiduciary duty; (6) corporate waste and conversion; (7) fraud; (8) accounting; (9) accounting of corporate waste and looting; and (10) and dissolution.

### Discussion

A party moving for summary judgment is required to make a prima facie showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985); *Grob v Kings Realty Assoc.*, 4 A.D.3d 394, 395 (2d Dep't 2004). The party opposing must then demonstrate the existence of a factual issue requiring a trial of the action. *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980).

As a threshold matter, the complaint is dismissed as to defendants Learka Bosnak and Jake Lemle. The complaint fails to set forth specific allegations as to these two

defendants, and plaintiff has not demonstrated that any issues of fact exist with respect to any causes of action asserted against them.

Moreover, to the extent that plaintiff asserts direct claims as an individual in the second through ninth causes of action, those claims are also dismissed. Each of those claims are derivative in nature, and are not properly asserted by plaintiff in his individual capacity, as plaintiff has not asserted a breach by defendants of any duty owed independently to him. *See Albany Plattsburgh United Corp. v Bell*, 307 A.D.2d 416, 420 (3d Dep't 2003) (stating that a shareholder's individual claims were properly dismissed absent an independent duty owed to the shareholder and when the claims were essentially corporate in nature).

Plaintiff contends that the Appellate Division, First Department has already found that he is entitled to assert claims in his individual capacity. This is unpersuasive.

In a decision dated February 14, 2012, the First Department, in considering the sufficiency of the first amended complaint, noted that plaintiff had brought claims both derivatively and in his individual capacity. *See Lemle v Lemle*, 92 A.D.3d at 496. Specifically, the court stated that "[i]n 2007, plaintiff brought this action, individually and derivatively as a shareholder...." *Id.* The court further stated, with respect to the first amended complaint that "[i]n his individual capacity, plaintiff asserted claims against the corporation for common-law dissolution and the appointment of a temporary receiver...." *Id.* Contrary to plaintiff's assertion, the First Department decision did not address, much

less determine, whether plaintiff could assert additional individual claims as advanced in this complaint.

Plaintiff also contends that he is entitled to assert an individual claim based on defendants' alleged inflation of his loan balance. However, the issue of determining the correct loan balances is already properly asserted as part of the eighth cause of action for an accounting, and plaintiff has not demonstrated that any additional cause of action is warranted. Accordingly, I dismiss plaintiff's individual claims in the second through ninth causes of action.

## **I. Defendants' Partial Summary Judgment Motions**

### **A. Breach of Contract**

The first cause of action is for breach of the various Loan Modification Agreements executed by the plaintiff and his siblings with 132 West.<sup>1</sup> Specifically, plaintiff alleges that the 2012 Distribution violated the Loan Modification Agreements because such agreements contemplated that there would be a definitive determination of the respective loan balances prior to their repayment, which has not occurred. The first cause of action seeks, as a remedy, an order directing that the loan balances of each shareholder be determined in accordance with the requirements of each given Loan Modification Agreement.

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<sup>1</sup> Plaintiff does not oppose the Individual Defendants' motion to dismiss this cause of action against them in their individual capacities.

This cause of action is dismissed. The Loan Modification Agreements state that the loan balances, "as they will ultimately be determined," would be payable "on the later of" the death of Edna Lemle and distribution of her estate or December 30, 2012.

As set forth above, Edna Lemle passed away in 2011 and as of the date of the complaint, there had been no final distribution of the Estate. However, while the Loan Modification Agreements set forth a final date for repayment, they contain no language suggesting that the loan balances could not be repaid prior to either December 30, 2012 or the distribution of the Estate. Thus, plaintiff fails to demonstrate that the 2012 Distribution constituted an improper repayment of the loan balances in violation of the terms of the Loan Modification Agreements.

Plaintiff contends that the loan balances were incorrect at the time of the 2012 Distribution which repaid such balances and seeks a determination as to the correct balances. However, plaintiff has already set forth a claim for an accounting of such balances in the eighth cause of action in the complaint, which none of the parties seeks to dismiss. Therefore, such a request is duplicative.

### **B. Corporate Waste**

The Individual Defendants move for summary judgment dismissing the second and fourth causes of action in the complaint, which are for corporate waste.

The second cause of action alleges that the Individual Defendants authorized payment of excessive salaries, bonuses and reimbursements to themselves, as well as to

family members and friends. The complaint asserts that many of such payments were to parties who performed little or no work for 132 West. It also asserts that one or more of the defendants used corporate funds to improperly pay for personal expenses such as vacations and shopping.

Plaintiff also asserts that, for several years, defendants have made such payments to his exclusion, since he was not reelected to his position as an officer in 2012, and was not reelected to his position as a director in 2013.

Individual Defendants' motion to dismiss the second cause of action is denied. At this point, numerous factual questions exist as to whether the payments complained of were excessive and constituted corporate waste. Questions also exist as to whether any of the defendants improperly used corporate funds for personal expenses. Fact questions further exist as to whether such payments were in lieu of dividends and, in turn, whether plaintiff was improperly ousted from his positions as an officer and director of 132 West.

Defendants' argue that plaintiff is estopped from challenging any of the payments at issue here because, according to defendants, he participated in and approved of such payments during the period of time in which he allegedly benefitted from such practices. Defendants largely rely on portions of deposition testimony by plaintiff which, they argue, demonstrates his approval of the conduct at issue here. However, none of the testimony relied on by defendants conclusively demonstrates that plaintiff is now estopped from asserting this cause of action. To the contrary, the testimony raises "issues

of fact as to whether [plaintiff] committed misconduct and, if so, whether [Individual Defendants'] misconduct far exceed that of [plaintiff]" *Savitt v Greenberg Traurig, LLP*, 126 A.D.3d 506, 507 (1st Dep't 2015).

The fourth cause of action alleges that the Individual Defendants committed corporate waste by causing various shareholder loans amounts, i.e. principal and interest, to be eliminated from the 132 West's books and records, thus reducing the amount owed by various parties to 132 West.

Defendants' motion to dismiss this claim is also denied. First, defendants themselves concede that a forensic accounting is required, as set forth in the eighth cause of action, to determine the correct amount of the various loan balances.

Moreover, numerous factual questions exist as to whether the Individual Defendants wrongfully eliminated any amounts of principal and interest from 132 West's books in order to reduce any of the outstanding loan balances.

### **C. Legal Fees**

132 West moves to dismiss the third cause of action, which is for waste arising from the alleged advancement of several million dollars in legal fees by 132 West to the Individual Defendants to defend against the instant action by plaintiff. 132 West argues that advancement of such fees is permitted by the 132 West's bylaws.

Plaintiff does not dispute that 132 West's bylaws permit the advancement of legal fees such as those in the instant action. However, he contends that the amounts expended so far on behalf of 132 West and the Individual Defendants is unreasonable.

The motion to dismiss the third cause of action is denied. While the parties agree that 132 West is permitted to advance legal fees in this action, defendant has not demonstrated that the amount of fees expended thus far is reasonable and questions of fact exist on this issue.

#### **D. Breach of Fiduciary Duty & Conversion**

Plaintiff's fifth and sixth causes of action are for breach of fiduciary duty and conversion, respectively. Both causes of action arise from plaintiff's allegations of waste and misappropriation of assets by the Individual Defendants.

The Individual Defendants move for summary judgment dismissing both causes of action as duplicative of plaintiff's claims for waste set forth in the second, third and fourth causes of action.

Individual Defendants' motion is denied. First, in a decision dated February 14, 2012, the Appellate Division, First Department, found that plaintiff adequately pled causes of action for both breach of fiduciary duty and conversion in the first amended complaint. *See Lemle v Lemle*, 92 A.D.3d at 497. Both causes of action arose from plaintiff's allegations, as also asserted in the current complaint, that defendants had falsified their corporate loan accounts and had wrongfully transferred corporate assets to

themselves through, among other things, excessive compensation and benefits, reimbursement for inappropriate personal expenses, and compensation to individuals who performed no work for 132 West. *Id.* at 497.

Individual Defendants contend that, because such allegations are now asserted under causes of action for corporate waste, the claims for breach of fiduciary duty and conversion are impermissibly duplicative. However, Individual Defendants put forth no cases to demonstrate that plaintiff may not continue, at this stage, to pursue each of these causes of action alternatively.

Moreover, given the existence of disputes as to the underlying factual allegations, it would be inappropriate to dismiss these causes of action at this point.

#### **E. Fraud**

Plaintiff's seventh cause of action is for fraud, arising from the Individual Defendants' alleged misrepresentation to 132 West of the correct amounts of the various loan balances. "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009).

In its 2012 decision in this action, the First Department found that "[t]he allegations that the individual defendants falsified their corporate loan accounts are sufficient to establish a knowing misrepresentation made to the corporation." *Lemle v*

*Lemle*, 92 A.D.3d at 499. The court further found that, at that point, plaintiff had failed to set forth specific facts alleging that the 132 West acted, or failed to act, in reliance on such misrepresentations. *Id.* However, the court declined to dismiss the claim, permitting plaintiff to conduct further discovery. *Id.*

Individual Defendants have not demonstrated that this cause of action should be dismissed. As set forth above, questions of fact exist as to the correct amount of the various loan balances. Moreover, factual questions exist as to whether, as now alleged by plaintiff, 132 West relied on Individual Defendants' misstatement of such balances in taking certain actions, including filing and issuing incorrect tax and financial documents for which 132 West is financially responsible and expending fees to correct such wrongly issued documents. Therefore, the motion to dismiss the seventh cause of action is denied.

#### **F. Accounting for Waste & Looting**

Plaintiff's ninth cause of action states that each of the Individual Defendants "must be compelled to account to the Corporation for his/her official misconduct and wrongful diversion, waste and looting of the funds and property of the Corporation." Verified Fourth Amended Complaint, ¶ 204.

To the extent that this cause of action seeks an accounting, it is duplicative of plaintiff's eighth cause of action, which seeks an accounting, and which is not the subject of these motions. To the extent that this cause of action is for waste, breach of fiduciary

duty or conversion, it is similarly duplicative of plaintiff's cause of action for such claims, as set forth above. Therefore, the ninth cause of action is dismissed.

### G. Dissolution

132 West and Individual Defendants both move for summary judgment dismissing plaintiff's tenth cause of action, which seeks dissolution of 132 West.

Dissolution is a common-law remedy, which is available to minority shareholders who allege that the majority shareholders or the corporate officers or directors have looted the corporation and violated their respective fiduciary duties. *Matter of Candlewood Holdings, Inc.*, 124 A.D.3d 775, 776 (2d Dep't 2015).

Defendants seek summary judgment dismissing this claim on the grounds that plaintiff has failed to demonstrate that the Individual Defendants wasted corporate assets or breached their fiduciary duties to 132 West. However, as set forth above, numerous questions of fact exist with respect to such allegations, which preclude a grant of summary judgment.

Defendants also argue that, in any event, if any of the Individual Defendants are liable for misappropriation of corporate assets, then Plaintiff would be liable for such misappropriation as well, because he too received the salaries and directors' fees which are at issue here. As such, they argue that he has unclean hands and is precluded from seeking dissolution of 132 West.

This argument is unpersuasive. At best, questions of fact exist as to whether plaintiff himself misappropriated any corporate assets, such as would constitute unclean hands on his part. Therefore, the motions to dismiss the tenth cause of action are denied.

#### H. Statute of Limitations

This action was commenced on April 18, 2007. The Individual Defendants now request that the court dismiss “all parts of each cause of action that accrued prior to April 18, 2001 as barred by the statute of limitations.” Defs.’ Mem. of Law at 4. Although defendants seek a blanket dismissal, they only address the causes of action for waste and breach of fiduciary duty, which they assert are subject to a six-year statute of limitations, and the conversion cause of action, which they assert is subject to a three-year limitations period. Defendants argue that plaintiff cannot recover damages for those claims arising from an event which occurred before each claim’s respective limitation period.

Generally, the limitation period for a breach of fiduciary duty claim is either six years or three years, depending on whether the relief sought is primarily equitable in nature or only for money damages. *See Kaufman v Cohen* 307 A.D.2d 113, 118 (1st Dep’t 2003). In some actions, as plaintiff argues, the statute of limitation is tolled until the relationship terminates or the fiduciary openly repudiates his or her obligations. *Stern v Morgan Stanley Smith Barney*, 129 A.D.3d 619 (1<sup>st</sup> Dep’t 2015); *Otto v Otto*, 110 A.D.3d 620, 621 (1<sup>st</sup> Dep’t 2013).

Here, defendants have not demonstrated that the fiduciary relationship has been terminated or openly repudiated. It is possible that plaintiff may have a cause of action for breach of fiduciary duty, seeking an accounting or other equitable relief, arising from events that occurred before April 18, 2001. Defendants do not address, much less rebut, plaintiff's argument that some of those events may support a cause of action for breach of fiduciary duty and that such claims are tolled until the fiduciary relationship is terminated, which has not happened yet.

Arguably, the open repudiation doctrine toll does not apply to claims for money damages as specifically sought in plaintiff's fifth cause of action for breach of fiduciary duty. However, courts apply this limitation when a plaintiff's claims are solely at law, *see Stern v Morgan Stanley Smith Barney*, 129 A.D.3d 619 (1<sup>st</sup> Dep't 2015), unlike here, where plaintiff alleges breach of fiduciary duty and seeks a mix of both damages and an accounting, *see Transp. Workers Union of Am. Local 100 AFL-CIO v Schwartz*, 17 A.D.3d 218 (1<sup>st</sup> Dep't 2005) (applying this special tolling rule to equitable claims, as well as to claims for monetary damages); *People ex rel. Spitzer ex rel. Ultimate Charitable Beneficiaries v Ben*, 55 A.D.3d 1306 (4<sup>th</sup> Dep't 2008) (same).

Although a number of the claims, including the fifth cause of action for breach of the fiduciary duty, do seek monetary damages, those remedies are ancillary to the primary relief sought, which is equitable, *i.e.*, an accounting. Because plaintiff primarily seeks an accounting, and pursues damages as an incident to the outcome of that claim, I

apply the open repudiation doctrine to plaintiff's breach of fiduciary duty claim.

Accordingly, the alleged misconduct antedating April 18, 2001 falls within the permissible temporal scope.

Plaintiff also contends that some of the allegations set forth in the complaint, such as the falsifying of corporate books and records, are part of a series of continuous wrongful acts, and, as such, may be timely because some of those acts occurred within the limitations period.

"The continuous wrong doctrine is an exception to the general rule that the statute of limitations runs from the time of the breach though no damage occurs until later." *Henry v Bank of America*, 147 A.D.3d 599, 601 (1<sup>st</sup> Dep't 2017) (internal quotation marks and citation omitted). "The doctrine is usually employed where there is a series of continuing wrongs and serves to toll the running of a period of limitations to the date of the commission of the last wrongful act." *Id.* (internal quotation marks and citation omitted). "Where applicable, the doctrine will save all claims for recovery of damages but only to the extent of wrongs committed within the applicable statute of limitations." *Id.* (internal quotation marks and citation omitted).

Here, factual questions exist as to whether any of the events alleged to have originated before April 18, 2001, including the falsifying of corporate books and records, are part of a series of continuous wrongs which continued after such date and therefore may be considered in conjunction with a timely cause of action. I note that, although

plaintiff may not recover for conduct that occurred prior to the limitations period, evidence of such conduct may be admissible to shed light on the ultimate damages recoverable within the limitations period. This is because the damages here, if any, are a by-product of the possible continuing wrongs occurring before 2001. Defendants have not demonstrated that I should dismiss any part, let alone all parts, of each cause of action that accrued prior to April 18, 2001.<sup>2</sup>

## II. Plaintiff's Cross-Motion

Plaintiff cross-moves for summary judgment on the second through sixth causes of action in the complaint. In light of the foregoing decision, the cross motion is denied.

In accordance with the foregoing, it is

ORDERED that the motion by defendant 132 West 31<sup>st</sup> Street Realty Corp. for partial summary judgment dismissing the first, third and tenth causes of action in the fourth amended complaint is granted to the extent that the first cause of action is dismissed and the motion is otherwise denied; and it is further

ORDERED that the motion by defendants Florence Lemle, Douglas Lemle, Deanne Lemle Bosnak for partial summary judgment is granted to the extent that the first and ninth causes of action are dismissed and the second through eighth causes of action

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<sup>2</sup> In plaintiff's cross-motion for summary judgment, plaintiff "seeks the return to [132 West] of monies improperly paid as disguised dividends from 2001 to the present." Pl.'s Cross-Mot. at 7. Therefore, to the extent defendants argue in their motion that plaintiff's damages claim for waste based on salaries paid to Individual Defendants is time-barred on matters occurring prior to April 18, 2001, the parties agree on that point.

remain only as derivative causes of action, and the motion is otherwise denied; and it is further

ORDERED that the motion by Learka Bosnak and Jake Lemle for summary judgment is granted and the complaint is severed and dismissed against them with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the cross-motion by plaintiff Michael Lemle for summary judgment on the second through sixth causes of action in the fourth amended complaint is denied.

This constitutes the decision and order of the Court.

DATE: 4/20/17

  
SALIANN SCARPULLA, JSC