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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45

USHA SOHA TERRACE, LLC, individually and derivatively, on behalf of both SOHA TERRACE, LLC and 2280 FDB, LLC,	
Plaintiffs,	Index No. 653377/2013
- against -	DECISION AND ORDER
ROBINSON BROG LEINWAND GREENE GENOVESE & GLUCK, P.C., LEONARD NATHANSON, MICHAEL E. GREENE, SOHA TERRACE, LLC and 2280 FDB, LLC,	Motion Sequence No. 001
Defendants.	

MELVIN L. SCHWEITZER, J.:

Defendants move for an order dismissing the complaint, pursuant to CPLR 3211 (a) (1) based on documentary evidence, (a) (3) for lack of capacity to sue, and (a) (7) for failure to state a claim.

This is a legal malpractice action in which plaintiffs assert both direct and derivative claims against legal counsel for the owner and the developer with regard to a construction project in which plaintiff USHA SOHA Terrace, LLC was a minority investor in the developer. Defendants urge that plaintiffs cannot pursue their claims as either direct or derivative, and even if they could, the claims are insufficiently plead. The motion is granted and the amended complaint is dismissed.

Background

The facts are as stated in the Amended Complaint.

Derivative plaintiff SOHA Terrace, LLC, a New York limited liability company (the Developer), was organized for the purpose of constructing, developing, and managing a mixed

use residential and commercial development located at 2280 Frederick Douglas Boulevard, New York, New York (the Project or the Property). Plaintiff USHA SOHA Terrace, LLC is a minority member of the Developer (plaintiff Minority Member) (amended complaint, ¶ 3). Derivative plaintiff 2280 FDB, LLC (2280 FDB) is the fee owner of the Property (*id.*, ¶¶ 1-). RGS Holdings, LLC (RGS Holdings) was the majority member of the Developer, and was controlled by Hans Futterman. Ameritrans Capital Corp. was also a member of the Developer (*id.*, ¶ 10). Defendant Robinson Brog Leinwand Greene Genovese & Gluck, P.C. is a law firm (Robinson), and defendants Leonard Nathanson and Michael Greene, are partners in the firm (collectively, Legal Counsel) (*id.*, ¶¶ 4-6).

Legal Counsel was retained by 2280 FDB and the Developer to provide legal services regarding the Project (*id.*, ¶ 12). It also represented RGS Holdings and Futterman in various matters (*id.*, ¶ 16). Legal Counsel represented 2280 FDB, and certain affiliates of RGS Holdings and Futterman, in binding arbitration proceedings against Racanelli Developers Group, LLC (Racanelli), which related to Racanelli's alleged breach of contract regarding its services as general contractor on both the Project and on another unrelated project controlled by RGS Holdings and Futterman (*id.*, ¶¶ 18-19). The arbitration sought recovery of funds held in a cash collateral account (Cash Collateral Funds) which secured Racanelli's performance in favor of 2280 FDB (*id.*, ¶ 20). In the arbitration, Legal Counsel learned of an over $2 million judgment against Racanelli in favor of the Empire Developers Corp. (Empire), and represented Futterman in his purchase of that judgment from Empire (*id.*, ¶¶ 21-22). Legal Counsel then helped Futterman use the judgment to execute on the Cash Collateral Funds to the detriment of, and

allegedly in breach of its fiduciary duty to, 2280 FDB, the Developer and their members (*id.*, ¶¶ 23-26).

2280 FDB obtained an arbitration award against Racanelli in excess of $2.2 million, but did not recover any portion of that award from Racanelli (*id.*, ¶¶ 32-3). Plaintiffs allege that Legal Counsel collected an excessive legal fee from 2280 FDB in connection with the arbitration, and promoted the interests of RGS Holdings and Futterman to the exclusion of, and in detriment to, plaintiffs (*id.*, ¶¶ 34-37).

Plaintiffs commenced this action, purportedly as both a direct and a derivative action, asserting three causes of action.[1] The first is for breach of fiduciary duty, alleging that Legal Counsel owed a fiduciary duty to 2280 FDB, the Developer and its members, which was breached, and plaintiffs were damaged in an amount of no less than $5 million (*id.*, ¶¶ 46-50). The second claim alleges legal malpractice against Legal Counsel, seeking damages in the amount of no less than $5 million, as well as punitive damages (*id.*, ¶¶ 51-55). The third claim, under Judiciary Law § 487, alleges that Legal Counsel colluded with RGS Holdings and Futterman to convert monies from 2280 FDB and the Developer to the exclusion of plaintiff Minority Member, again seeking no less than $5 million in damages as well as treble damages (*id.*, ¶¶ 56-59).

In moving to dismiss, defendants urge that as a minority, indirect investor in the Project, plaintiff Minority Member cannot claim any direct injury from actions taken by Legal Counsel.

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[1] Originally, plaintiffs' complaint contained two claims, one for breach of fiduciary duty and the other for legal malpractice (exhibit C to affirmation of Matthew S. Hackee). On March 3, 2014, after defendants' motion to dismiss was brought, plaintiffs served and filed an amended complaint as of right (exhibit A to affirmation of Brendan C. Kombol). Contrary to plaintiffs' contention, the service of the amended pleading does not nullify the motion. Defendants addressed the amended complaint in their reply papers. The court, therefore, will consider the dismissal motion as addressed to the amended complaint.

They also urge that plaintiffs lack standing to bring a derivative claim on behalf of 2280 FDB, because they are not shareholders of, nor entities which control, 2280 FDB. Further, defendants argue that the claims are insufficient, because the legal malpractice claim fails to allege proximate cause, the fiduciary duty claim is duplicative of the malpractice claim, and the Judiciary Law § 487 claim fails to allege the requisite pattern of wrongdoing or deceit.

Discussion

The motion to dismiss is granted. First, plaintiff Minority Member, as a member of a limited liability corporation, lacks standing to sue in its individual capacity for losses derived solely from injury to the limited liability company. *See Yudell v Gilbert*, 99 AD3d 108, 113-114 (1st Dept 2012]; *Breslin Realty Dev. Corp. v Shaw*, 72 AD3d 258, 266 (2d Dept 2010); *Baker v Andover Assoc. Mgt. Corp.*, 30 Misc 3d 1218 [A], 2009 NY Slip Op 52788[U], * 16-17 (Sup Ct Westchester County 2009). To determine if a claim is direct or derivative, the court must look at the source of the claim of right. If the harm is from the defendants to the corporation, the harm to the shareholders or investors flows through the corporation, and is derivative. On the other hand, if the right flows from a breach of a duty owed directly to the shareholder, then the suit is direct. *See Weber v King*, 110 F Supp 2d 124, 132 (ED NY 2000); *Baker v Andover Assoc. Mgt. Corp.*, 30 Misc 3d 1218 [A], 2009 NY Slip Op 52788 [U], * 16-17. A claim for diminution in value of the shares is harm to the corporation, the shareholder's injury flows through the corporation, and the claim is derivative even if the decrease in value derives from a breach of fiduciary duty. *See Yudell v Gilbert*, 99 AD3d at 113-144; *O'Neill v Warburg Pincus & Co.*, 39 AD3d 281, 281-282 (1st Dept 2007). Here, in the amended complaint, plaintiff asserts losses as any "monies owed to [2280 FDB] and [Developer], which were in turn paid to [RGS Holdings

and Futterman] resulted in actual monetary losses to [plaintiff Minority Member], in that [plaintiff Minority Member] retains a fourteen percent (14%) interest in assets of Developer" (amended complaint, ¶ 43). This claim for diminution in the value of plaintiff's shares involves harm to the corporation, and may only be pursued derivatively. In addition, the only other injury alleged is the failure of 2280 FDB to recover any portion of its award against Racanelli, which is a direct injury only to 2280 FDB.

To the extent that plaintiff Minority Member alleges the claims as derivative ones, alleging that a demand on the board to commence this action would have been futile "in that all such entities are wholly dominated and controlled by both the Legal Counsel and Futterman" (*id.*, ¶ 45), the allegations are insufficient for failure to plead with the requisite particularity. A pre-suit demand, pursuant to Business Corporation Law (BCL) § 626, is required in an action involving a limited liability corporation. *See Najjar Group, LLC v West 56th Hotel LLC*, 110 AD3d 638, 639 (1st Dept 2013); *Segal v Cooper*, 49 AD3d 467, 468 (1st Dept 2008). The plaintiff must present sufficient facts and nonconclusory allegations as to the futility of a demand to satisfy the statute's requirements. *See* BCL § 626 (c); *Brewster v Lacy*, 24 AD3d 136, 136-137 (1st Dept 2005). The amended complaint fails to allege any factual support regarding Legal Counsel's purported control of 2280 FDB or any other entity, and the allegations regarding Futterman are conclusory.

Plaintiff also cannot maintain this as a double derivative action in the name of 2280 FDB. A double derivative action is one brought by a shareholder "not only for wrongs inflicted directly on the corporation in which he holds stock, but for wrongs done to that corporation's subsidiaries which make indirect, but nonetheless real, impact upon the parent corporation and its

stockholders." *See Kaufman v Wolfson*, 1 AD2d 555, 556-557 (1st Dept 1956). In order for a plaintiff to pursue a double derivative claim, it must allege that the company in which it owned shares "controlled the subsidiary corporation that owned the claim." *See Ascot Fund Ltd. v UBS PaineWebber, Inc.*, 28 AD3d 313, 314-315 (1st Dept 2006). It cannot be maintained by the shareholder of a corporation which merely owns stock in the wronged corporation, or which is merely a creditor of the second corporation by virtue of preferred stock ownership. *See Pessin v Chris-Craft Indus.*, 181 AD2d 66, 72 (1st Dept 1992); *Breswick & Co. v Harrison-Rye Realty Corp.*, 280 App Div 820, 821 (2d Dept 1952). The key consideration is control at the time of the supposed harm (*Pessin v Chris-Craft Indus.*, 181 AD2d at 72).

The documentary evidence, here, 2280 FDB's limited liability company agreement, demonstrates that there was independence between the Developer and 2280 FDB at the time of the alleged wrong. For example, the Developer did not have the "right, power or authority to, take, carry out or implement any action constituting a Major Decision on behalf of the Company [2280 FDB]," and, thus, it could not retain accountants or lawyers; enter into material agreements in excess of $100,000 or otherwise outside of the ordinary course of business or not in accord with the business plan; "commenc[e], defend[], or settl[e] litigation;" or even hire employees; or approve any architect and general contractor for the Project, without the consent of its minority member (exhibit A to Haskell aff, limited liability company agreement § 3.1 at 23-24). This agreement shows that 2280 FDB's minority member, nonparty GS 2280 FDB Member LLC, a special purpose entity controlled by Goldman Sachs Group, Inc., had some control over 2280 FDB with regard to Major Decisions such that there was independence between the Developer and 2280 FDB. Contrary to plaintiff Minority Member's argument, the amended complaint does

not allege that the Developer was the sole owner of 2280 FDB at the time of the alleged wrong, and, instead, plaintiff admits that during that time "a now retired member of [2280 FDB] had certain rights under the [2280 FDB Limited Liability Company Agreement]," which included rights regarding Major Decisions, such as hiring counsel, and, thus, the Developer did not control 2280 FDB's attorney-client relationship with Legal Counsel at the time of the alleged harm. Therefore, plaintiff fails to plead a sufficient basis for double derivative standing.

Moreover, the plaintiff's claims also fail to state a cause of action. To state a claim for legal malpractice, a plaintiff must allege the attorney's negligence, that the negligence was a proximate cause of the plaintiff's injury, and that plaintiff suffered actual damages (*Pellegrino v File*, 291 AD2d 60, 63 [1st Dept 2002]). It must allege that "but for counsel's alleged malpractice, the plaintiff would not have sustained some actual ascertainable damages" (*id.* [citations omitted]). A failure to establish such proximate cause warrants dismissal regardless of any established negligence (*id.*). If the plaintiff cannot demonstrate "its own likelihood of success absent such advice," the advice is not the proximate cause of the plaintiff's harm (*id.* [citations omitted]). In addition, conclusory allegations of damages are insufficient (*id.*).

In the amended complaint, the injury alleged to be suffered by 2280 FDB is its failure to execute on the $2.2 million arbitration award it obtained against Racanelli (amended complaint, ¶¶ 32-33). Plaintiff alleged that 2280 FDB failed to enforce the arbitration award against the Cash Collateral Funds because Futterman, also represented by Legal Counsel, was able to execute on those funds first in connection with the judgment he purchased from the Empire Developers Corp. (*id.*, ¶¶ 21-23). Plaintiff, however, fails to allege that but for Legal Counsel's alleged negligence or negligent advice, 2280 FDB would have successfully executed on its

$2.2 million arbitration award against the Cash Collateral Funds, or that Racanelli had no additional assets against which 2280 FDB could have executed on the arbitration award. In fact, it does not even allege that Legal Counsel played any causal role in Futterman's decision to execute the Empire Developer Corp.'s judgment against the Cash Collateral Funds. Thus, the amended complaint fails to allege proximate cause, and the legal malpractice claim is insufficient.

Plaintiff's breach of fiduciary duty claim is dismissed as duplicative of the insufficient legal malpractice claim, since it arises from the same facts as that claim, and alleges identical damages. *Bernard v Proskauer Rose, LLP*, 87 AD3d 412, 416 (1st Dept 2011); *Mecca v Shang*, 258 AD2d 569, 570 (2d Dept 1999).

Finally, the third claim in the amended complaint fails to sufficiently plead a claim under Judiciary Law § 487. Under that statute, the plaintiff needs to allege an extreme and chronic pattern of legal delinquency in order to recover. *Solow Mgt. Corp. v Seltzer*, 18 AD3d 399, 400 (1st Dept 2005]; *Pellegrino v File*, 291 AD2d at 63). The amended complaint here fails to allege the requisite pattern of wrongdoing or deceit necessary to sustain that claim, and fails to allege that any loss suffered by 2280 FDB was the proximate result of Legal Counsel's alleged collusion or deceit.

Accordingly, it is

ORDERED that the motion to dismiss is granted and the amended complaint is dismissed in its entirety, with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

Dated: July 9, 2014

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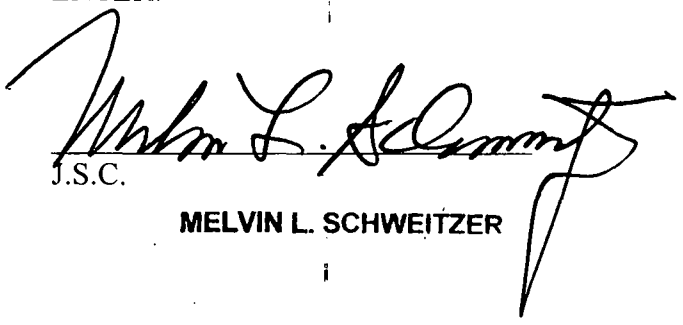

J.S.C.

MELVIN L. SCHWEITZER