

Mari v Quatela

2020 NY Slip Op 34274(U)

December 9, 2020

Supreme Court, Suffolk County

Docket Number: 617344-17

Judge: Elizabeth H. Emerson

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SHORT FORM ORDER

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NO.: 617344-17

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 9-4-20
SUBMITTED: 9-17-20
MOTION NO.: 004-MOT D.

THERESA A. MARI, AND QUATELA, HARGRAVES, &
MARI, PLLC,

Plaintiffs,

-against-

LAW OFFICES OF DAVID P. FALLON, PLLC
Attorneys for Defendant Dawn Hargraves
53 Main Street, Suite 1
Sayville, New York 11782

JOSEPH QUATELA, DAWN HARGRAVES, QUATELA,
HARGRAVES, & CHIMERI, PLLC, CHRISTOPHER
CHIMERI, AND QUATELA CHIMERI, PLLC,

Defendants,

FARRELL FRITZ, P.C.
Attorneys for Defendants Joseph Quatela,
Christopher Chimeri, Quatela, Hargraves &
Chimeri, PLLC, Quatela Chimeri, PLLC, and
Nominal Defendant Quatela, Hargraves,
& Mari, PLLC
400 RXR Plaza
Uniondale, New York 11556

-and-

QUATELA, HARGRAVES, & MARI, PLLC,

Nominal Defendant.

X

Upon the following papers read on this motion to dismiss ; Notice of Motion and supporting papers 146-167 ; Notice of Cross Motion and supporting papers 171-176 ; Answering Affidavits and supporting papers 180 ; it is,

ORDERED that the motion by the defendants Joseph Quatela; Christopher Chimeri; Quatela, Hargraves & Chimeri, PLLC; Quatela Chimeri, PLLC; and nominal defendant Quatela, Hargraves & Mari, PLLC, for partial dismissal of the defendant Dawn Hargraves' cross claims against them is granted to the extent of dismissing the first, second, third, fourth, sixth, seventh, ninth, and tenth cross claims in their entirety and the fifth cross claim insofar as it alleges breach of contract; and it is further

ORDERED that the motion is otherwise denied; and it is further

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ORDERED that the cross-claimant parties are directed to complete a preliminary conference order and send a copy thereof to chambers.

The main action has been discontinued. The only remaining claims are the defendant Dawn Hargraves' cross claims against the individual defendants and Quatela Chimeri, PLLC. Hargraves alleges that, in 2011, she formed a professional limited liability company (PLLC) with James Hagney, Joseph Quatela, and Theresa Mari for the practice of law. The members of the firm changed over the years, but their obligations to each other remained the same. Hargrave alleges that the individual defendants and Quatela Chimeri, PLLC, breached their contractual and fiduciary obligations, inter alia, by failing to distribute profits equally, by diverting firm monies and assets to themselves, and by paying personal expenses with firm monies. Hargraves asserts 11 cross claims in her amended answer. The individual defendants; Quatela Chimeri, PLLC; Quatela Hargraves & Chimeri, PLLC; and Quatela, Hargraves & Mari, PLLC, move to dismiss 10 of the 11 cross claims.

Preliminarily, the court notes that Hargraves has not asserted any cross claims against Quatela Hargraves & Chimeri, PLLC, and Quatela, Hargraves & Mari, PLLC. Accordingly, the motion is denied as academic insofar as it seeks dismissal of cross claims against them.

Hargraves does not oppose dismissal of the first four cross claims, which sound in contribution and indemnification. Accordingly, they are dismissed.

The fifth cross claim combines direct claims, which seek redress for injury to Hargraves individually, with derivative claims, which seek to recover for injury to the PLLC (*see, Yudell v Gilbert*, 99 AD3d 108, 113). It alleges that the individual defendants breached their contractual and fiduciary duties by failing to distribute profits equally, by failing to pay Hargraves fees for cases on which she worked, by diverting firm monies and assets to themselves, and by paying personal expenses with firm monies. When, as here, individual harm is claimed, but it is confused with or embedded in harm to the business entity, it cannot separately stand (*Serino v Lipper*, 123 AD3d 34, 40 [and cases cited therein]). In order to distinguish a derivative claim from a direct one, the court should look to who suffered the alleged harm (the entity or the individual) and who would receive the benefit of any recovery or remedy (*Id.*). If there is any harm to the individual, as opposed to the entity, the individual may proceed with a direct action (*Id.*).

The court finds that Hargraves' allegations that the individual defendants failed to distribute profits equally and failed to pay her fees for cases on which she worked state a claim for breach of the operating agreement. This claim alleges an injury to Hargraves individually, and she would be the one to receive the benefit of any recovery. It is, therefore, a direct claim. Accordingly, the fifth cross claim is dismissed, without prejudice, insofar as it alleges breach of the operating agreement, and Hargraves may proceed with a direct action if she be so advised.

The remaining allegations, that the individual defendants diverted firm monies and assets to themselves and paid personal expenses with firm monies, state a claim for breach of fiduciary duty. Allegations of mismanagement or diversion of firm assets plead a wrong to the

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business entity (*Yudell, supra* at 114, *citing Abrams v Donati*, 66 NY2d 951, 952). The fifth cross claim is, therefore, derivative insofar as it alleges breach of fiduciary duty. The moving defendants seek dismissal thereof on the ground that Hargraves does not have standing to maintain a derivative action because she withdrew from the firm in February 2017.

In order to maintain a derivative cause of action, a plaintiff must be a shareholder of the corporation (**Business Corporation Law** § 626 [c]) or a member of the LLC (*see, Jacobs v Cartalemi*, 156 AD3d 605, 607). The moving defendants are correct that, once a plaintiff withdraws from an LLC, she loses standing to maintain any derivative causes of action on its behalf (*Id.*). The requirement that ownership continue until commencement of the derivative action is rooted in practical considerations (**Independent Investor Protective League v Time, Inc.**, 50 NY2d 259, 263). Although a derivative action is theoretically brought for the benefit of the corporation (or LLC), in a very real sense, the standing of the shareholder (or member) is based on the fact that she is defending her own interests as well as those of the corporation (or LLC) (*Id.*). When a plaintiff voluntarily disposes of stock, her rights as a shareholder cease, and her interest in the litigation is terminated (*Id.* at 263-264). Being a stranger to the corporation, the former stockowner lacks standing to institute or continue the derivative suit (*Id.* at 264).

When a corporation has dissolved, however, the shareholder's interest does not abruptly end (*Id.*). At a minimum, the stockholder possesses a substantial interest in the distribution of corporate assets (*Id.*). Even if dissolution and distribution of assets are accomplished contemporaneously, the shareholder's stake in any cause of action existing in favor of the corporation remains quite real (*Id.*). From a purely analytical standpoint, then, a shareholder of a dissolved corporation has sufficient interest in a derivative action to satisfy the spirit of the rule requiring ownership at the commencement of the action (*Id.*). Thus, corporate dissolution, in itself, will not preclude a qualified plaintiff from being deemed a "shareholder" at the time of bringing the derivative action (*Id.*).

The record reflects that, contrary to the moving defendants' contentions, Quatela Hargraves & Chimeri, PLLC, was dissolved as of March 1, 2017. Thus, contrary to the moving defendants' contentions, Hargraves has standing to maintain a derivative action.

The moving defendants also contend that Hargraves has failed to plead with particularity the efforts made to secure the initiation of an action by the board or the reasons for not making such an effort, as required by Business Corporation Law § 326 (c). The demand requirement of Business Corporation Law § 326 (c) applies to members of New York limited liability companies (*Barone v Sow*, 128 AD3d 484). The demand is excused due to futility when the complaint alleges, *inter alia*, that a majority of the board of directors is interested in the challenged transaction (*Id.*). Director interest may be self-interest in the transaction at issue, *i.e.*, a receipt of "personal benefits" (*Marx v Akers*, 88 NY2d 189, 200, *citing Barr v Wackman*, 36 NY2d 371, 376). Hargraves alleges that two of the three members of the PLLC personally benefitted from the alleged transactions by diverting to themselves money and other assets that belonged to the PLLC. Accordingly, the court finds that the demand requirement was satisfied.

In view of the foregoing, the court declines to dismiss the fifth cross claim insofar as

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it alleges breach of fiduciary duty.

The sixth, seventh, ninth, and tenth cross claims for conversion, unjust enrichment, and breach of contract are based on the same allegations as the fifth cross claim. They are, therefore, dismissed as duplicative.

Hargraves may seek an accounting in connection with her derivative claims (*see, Berardi v Berardi*, 108 AD3d 406, 407 [and cases cited therein]). Accordingly, the court declines to dismiss the eighth cross claim for an accounting.

DATED: December 9, 2020


J. S.C.