

Sprecher v Miller

2024 NY Slip Op 31505(U)

April 26, 2024

Supreme Court, New York County

Docket Number: Index No. 655888/2020

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

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BENNETT SPRECHER, PROMENADE THEATRE CORPORATION

Plaintiff,

INDEX NO. 655888/2020

MOTION DATE 01/26/2024

MOTION SEQ. NO. 010

- v -

WILLIAM P. MILLER, CADOGAN CORPORATION,

Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 010) 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185

were read on this motion to/for DISMISS.

This action arises out of allegations that defendants, William P. Miller, a majority shareholder of the plaintiff corporation, the majority shareholder’s son and a corporation solely owned and operated by Miller, have actively caused the plaintiff corporation to lose over \$2 million in profits.

Plaintiff Sprecher alleges that from 1983 through the present, Sprecher has been solely responsible for the creation, design, construction, and management of the operations of Promenade Theatre Corporation’s (“PTC”) primary asset, a leasehold interest in real property located at 2162 Broadway in New York County. Sprecher alleges that the 1983 agreement entitled him to 50% of the management fees and that this agreement was affirmed orally and the complaint alleges in 2006, Miller began to diminish the percentage paid to Sprecher. Sprecher alleges that there was no consideration given for the change in the percentage of management fees. Sprecher conveyed a portion of his ownership interest to his spouse, Amy Sprecher and together the parties maintain a one third interest in PTC.

In 2006, the parties entered into a joint venture agreement, with a non-party. Sprecher contends that the 2006 agreement did not alter the terms of the 1983 agreement and contends that he was still entitled to a 50% management fee as indicated in the 1983 agreement. Miller, as the majority shareholder, increased the PTC's spending on management fees while simultaneously decreasing Sprecher's percentage of those fees.

Plaintiffs allege that defendants mismanaged the corporate funds of plaintiff, PTC, and engaged in self-dealing to the detriment of Sprecher as a minority shareholder and PTC and failed to distribute the profits of PTC to the minority shareholders. Additionally, plaintiffs contend that engaging in and settlement of an arbitration was not in the best interest of PTC and did not occur with the consent of Sprecher.

Defendants now seek to dismiss the amended complaint¹ CPLR §§ 3211(a)(4) and (a)(7). Plaintiffs oppose the instant motion. For the reasons set forth below, the motion to dismiss is granted in part.

When considering a motion to dismiss based upon CPLR § 3211(a)(7), the court must accept the alleged facts as true, accord the plaintiff the benefit of every possible favorable inference, and determine whether the facts alleged fit into any cognizable legal theory. *Leon v. Martinez*, 84 NY2d 83 [1994]. On a motion to dismiss the court “merely examines the adequacy of the pleadings”, the court “accept as true each and every allegation made by plaintiff and limit our inquiry to the legal sufficiency of plaintiff's claim.” *Davis v Boenheim*, 24 NY3d 262, 268

Plaintiffs amended complaint contains five causes of action against the defendants, derivative claims alleging breach of fiduciary duty, conversion and waste of corporate assets, unjust enrichment, and direct claims of breach of contract and equitable accounting.

¹ The amended complaint is NYSCEF Doc. 88, the movant failed to annex the pleading as required by the CPLR and Uniform Court Rules, a defect the court overlooked for the sake of judicial economy.

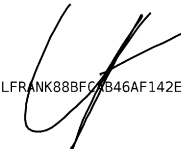
Preliminarily, the Court finds that the amended complaint sufficiently alleges derivative causes of action as against the defendants. The amended complaint alleges that defendants used corporate funds for personal use and engaged in arbitration that was not in the best interest of the corporation. Defendants have failed to establish that the complaint fails to adequately state a cause of action nor do defendants submit documentary evidence to establish a defense as a matter of law.

Defendants' submissions of emails are not in admissible form, nor do they provide an absolute defense to the amended complaint. Accordingly, the Court declines to dismiss the first, second and fifth causes of action.

The Court finds that the only cause of action that defendants have established requires dismissal is the third cause of action, breach of contract. Defendants have established, and plaintiffs' have failed to adequately rebut that this cause of action is time-barred. Assuming, as the Court is required to, that the latest possible date for defendant's alleged breach of the contract occurred in 2008, as pled in the amended complaint, the statute of limitations would have expired on December 31, 2014, at the latest. The applicable statute of limitations pertaining to breach of contract claims is six years. *See Frey v Rose* 51 AD3d 859, 861; CPLR § 213(2). Consequently, plaintiff Sprecher's breach of contract cause of action filed in November 2020 is time barred. The Court is not persuaded by the argument that the "continuing wrong doctrine" tolls the statute of limitations for this cause of action and plaintiff has not provided any legal authority to support that position.

The Court has reviewed the remaining contentions of the defendants and finds them unavailing. Accordingly, it is hereby

ORDERED that the motion to dismiss the complaint is granted in part in that the third cause of action is dismissed in its entirety.


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4/26/2024
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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<input type="checkbox"/>	SUBMIT ORDER
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
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<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
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