

Guindi v Safrin

2017 NY Slip Op 31291(U)

June 15, 2017

Supreme Court, Kings County

Docket Number: 516735/16

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

Defendant's illicit hijacking of the Company" as well as other purported breaches of "contractual and fiduciary obligations to Plaintiffs."

The complaint alleged that the company was formed in November 2011 and that an Operating Agreement was executed in March 2013 giving Guindi a 60% interest. Despite initial success, the relationship between Guindi and defendant "sour[ed]", and when buyout negotiations failed, defendant "highjacked" the company, locking Guindi out of the financial accounts and illicitly issuing to herself distributions. Guindi alleges that defendant breached the Operating Agreement, breached an alleged fiduciary duty to him and the Company, and was unjustly enriched by defendant's "improper ejection of Guindi." Plaintiffs seek to remove defendant as a member of the company, impose a constructive trust over money defendant allegedly "illicitly garnered" and an accounting.

In this motion, defendant moves to dismiss the complaint, arguing that Guindi not only does not allege he was a member of the company when this action was filed, he alleges he was ousted thus conceding he is no longer a member of the Company. Nor does he plead any demand of defendant prior to filing the action. Moreover, he commingles his purported personal claims with those on behalf of the company. Still further, it is alleged, he does not produce a copy of the agreement and fails to specify a single provision purportedly breached.

Notably, the complaint was brought shortly after defendant obtained an order of protection from Family Court on September 15, 2016, directing Guindi to stay away from defendant and to refrain from communicating with her and from assaulting or intimidating her.

In opposition, plaintiffs argue that the complaint asserts no derivative claims but only direct claims on behalf of Guindi and the corporation. The complaint, it is asserted, alleges not only that Guindi is a member of the company, but a majority member, and therefore making a demand would have been to no avail. None of the causes of action are duplicative, it is urged, since they purportedly allege actions under the purported Operating Agreement and outside of it.

In reply, defendant reiterates that plaintiffs have commingled Guindi's personal claims with that of the company, the complaint does not allege that a demand was made or that it was otherwise futile, and their additional causes of action are duplicative of, and barred by, the claim of breach of contract.

“[A]llegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually * * * A complaint the allegations of which confuse a shareholder's derivative and individual rights will, therefore, be dismissed”

(*Abrams v Donati*, 66 NY2d 951 [1985]; see *Wallace v Perret*, 28 Misc 3d 1023 [Kings Co. Supreme Court 2010]).

Here, Guindi asserts claims for alleged wrongs to him individually and to the corporation, thus impermissibly mixing personal and derivative claims. In addition, the protestations of the plaintiffs notwithstanding, the causes of action asserted all arise out of, or are based on, alleged breaches of an Operating Agreement that is not annexed, and are thus redundant of one another.

Accordingly, the motion to dismiss is granted, and the complaint is dismissed.

The foregoing constitutes the decision and order of this court.

ENTER,

J. S. C.

Justice Lawrence Kripfel