Mayers v Farman

2024 NY Slip Op 34207(U)

November 22, 2024

Supreme Court, New York County

Docket Number: Index No. 654370/2023

Judge: Melissa Crane

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** **PART** **60M**

Justice

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JONATHAN MAYERS, RESOLOVED RECORDS LLC,

Plaintiff,

- v -

RICHARD FARMAN, RICHARD GOODSTONE, JESSE WATSON, DOUG HERZOG, KERRISON BLACK, VIRGO-KREWE LLC,SUPERFLY EVENTS LLC

Defendant.

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INDEX NO. 654370/2023

MOTION DATE 04/10/2024

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 42, 43, 44, 45, 46, 54

were read on this motion to/for DISMISS.

BACKGROUND

The facts are taken from the amended complaint unless noted otherwise (Doc 22 [amended complaint]). Superfly Events LLC ("Superfly" or the "company") is a Delaware business in the live entertainment and branded experiences industries. Plaintiff Mayers was a co-founder and managing member of Superfly. Superfly organized large music festivals and other events. Mayers was also employed as CEO of Superfly's subsidiary, Superfly Experiential LLC ("SuperflyX"). SuperflyX created branded "fan experience" events based on popular television and film properties.

In 2018, defendant Virgo-Krewe ("Virgo") invested in the company "[d]ue to lack of revenue generation from ongoing projects" (Complaint, para 20). At that time, ownership of the company was as follows: Virgo, 12.9%; Mayers, 22.71%; Farman, 22.71%; Goodstone,18.26%; Black, 9.09%; an unspecified investment fund, 10%; "and the remaining approximate 5%

interest was held by various friends and acquaintances of the Co-Founders (including Resolved Records)" (*id.*, para 21).

Plaintiffs assert that the founding members [Mayers, Farman, Goodstone, and Black] "had their own niche[s] and interests," "their respective divisions [at Superfly] were operating independently," and there were "diverging opinions regarding the direction of the Company" (*id.*, para 29). In 2019-2020, the members discussed restructuring the company into separate divisions that different co-founders controlled. In January 2021, the parties executed a term sheet that contemplated a proposed restructuring (*id.*, para 33). In general, the proposed restructuring would have granted each co-founder a majority stake in their own divisions, with reduced minority stakes in the other co-founders' divisions, so that the co-founders could pursue their own projects.

During these restructuring negotiations, Mayers and Avi Kent, SuperflyX's Executive Vice President, "locat[ed]" "an experienced private equity investor" who presented a "Financing Term Sheet" for a significant investment in SuperflyX in August 2021 (*id.*, para 53-54). However, on August 12, 2021, the company terminated Mayers (without cause) from his employment as Superfly's co-president (*id.*, para 59). Then, on August 17, 2021, the company's managers formally terminated Mayers from all positions in the company (*id.*, para 60-61). In accordance with the company's LLC Agreement, nonparty Houlihan Lokey Financial Advisors Inc. ("Houlihan Lokey") appraised the company. Mayers and the company submitted competing valuations to Houlihan Lokey, and Houlihan Lokey then determined the company's fair market value. Ultimately, the defendants did not elect to buy out Mayers's membership interest in Superfly (*id.*, para 81). Mayers currently owns 22.71% membership interests in the company.

Mayers's Prior Action and His [Dismissed] Direct Claims

In a prior action, *Mayers v Superfly Events, LLC*, Index No. 651363/2022, Mayers asserted direct claims against the company, its managers, Virgo, and SuperflyX. Mayers complained that Virgo delayed finalizing the 2021 company restructuring and made misrepresentations about the restructuring to Mayers to "induce Mayers to continue developing SuperflyX and enhance its value for defendants' benefit" (Index No. 651363/2022, Doc 2 [Prior Action Compl.], para 68). Mayers asserted that he invested $1.4 million of his own funds based on Virgo's promise to contribute $5 million (*id.*, para 65, 68). Mayers alleged that defendants sought to "deprive him of the fruits of his labor" by terminating him as Superfly's co-president rather than finalizing the restructuring (*id.* para 79). Once terminated, Mayers provided notice of a "Repurchase Event" under the company's fourth amended and restated LLC agreement ("LLC Agreement") (*id.*, para 80-81). Following that notice, Mayers and the company exchanged "Fair Market Value" determinations to Houlihan Lokey. This valuation process was not completed when the prior action complaint was initially filed, but it concluded while the prior action was still pending.

Mayers asserted the following claims in the prior action: (1) breach of fiduciary duty against the Superfly managers; (2) breach of the implied covenant of good faith and fair dealing against all defendants; (3) promissory estoppel against Superfly, SuperflyX, and Virgo; (4) fraud against Virgo and Watson; (5) unjust enrichment against all defendants; and (6) breach of a promissory note against Superfly (*id.* paras 86-112).

In ruling, the court (Cohen, J.) granted the defendants' motion to dismiss the complaint. Justice Cohen opined that "[Mayers's] underlying claim is that this was an attempted buyout of his shares at a discounted price, which didn't occur" (Index No. 651363/2022, Doc 23 at pg 45

[oral arg tr]). The court found that Mayers's first four causes of action, including breach of fiduciary duty, were "based on an alleged harm to the company that has diminished [Mayers's] interest in the company" (*id.*, pg 47). Mayers's breach of fiduciary claim, "[t]herefore, . . . has to be a derivative claim, if it is anything" (*id.*; *see also id.* at pg. 48 ["those first four claims fail on the ground that the fundamental theory of the cause of action is diminution of the value of the shares of the company."]).

As to Mayers's direct breach of fiduciary duty claim, Justice Cohen also found:

> "the first cause of action for breach of fiduciary duty against the managers of Superfly Events, the plaintiff, in my view, fails to specify the conduct that forms the basis of a breach of fiduciary duty claim. Instead, the complaint asserts, generally, that the manager of defendants breached their fiduciary duties by terminating him in bad faith for an improper purpose, and contrary to the best interest of the company due to their greed and jealousy. Without more, I don't think there is enough in the complaint to allege more than just bad management, . . . the complaint is just rich with the concept that Mayers was just a better business person than the rest of the people involved in the outfit, and they should've listened to him and [they] shouldn't have gotten rid of him. And that may be true. I don't know. But the -- that is not the basis of a breach of fiduciary duty claim. There is nothing in the complaint, to me, that involves self-dealing, or anything other than just second guessing business decisions that were made by the remaining managers"

(*id.* at pgs. 48-49; *see also id.* at pgs 49-50 [stating that the prior action complaint also failed to adequately plead a non-exculpated claim that rebuts the business judgment rule]).

Discussing Mayers's promissory estoppel claim, Justice Cohen stated:

> "Plaintiff claims that Virgo made various promises and representations upon which Mayers relied and acted and proved to be false. Specifically, he claims that he continued to develop, build Superfly X, invest $1.4 million of his own money into Superfly X, and solicited and secured investments, potential investments into Superfly X from others. But when looked at as a whole, this claim simply does not hold water, even assuming the truth of his allegations.
>
> The Employment Agreement legally obligated plaintiff to undertake efforts in support of both Superfly X and Superfly as a whole, so he wasn't being induced to do anything that he wasn't all but already obligated to do.

> In terms of loaning money, that was part of the transaction that was documented, and which has been satisfied as the note transaction. And I also don't think that his claim could be based on the unconsummated reorganization of the company, as I don't think that the complaint alleges a clear and unambiguous promise to complete the reorganization"

(*id.* at pg 52).

Justice Cohen also dismissed, with prejudice, Mayers's breach of promissory note claim as moot (*id.* at pg 55 ["I think it is agreed (that the breach of promissory note claim] is moot."]). As defense counsel noted at oral argument,

> "Mr. Mayers has not lost the value of the notes he funded [$1.4 million] . . . . [I]n the letter to the Court, . . . on October 26th, in response to defense motion to stay discovery, [Mayers's] concede[d] that Mr. Mayers['s] . . . notes were repaid, and that his last claim, which is cause of action number six, is moot"

(*id.* at pg 3 [referring to plaintiff's counsel's letter, not filed in the docket]).

Thus, the court dismissed Mayers's prior action complaint with prejudice. Mayers did not appeal.

Plaintiffs' Current Complaint and Their Derivative Breach of Fiduciary Duty Claims

In this new complaint, plaintiffs largely restate Mayers's allegations from the prior action as derivative claims. Plaintiffs allege that defendants fired Mayers without cause in order to "cut Mayers out from the enormous potential of SuperflyX" (Doc 22 [amended compl.], para 65 [stating that the "ill-fated decision" to fire Mayers was driven by greed and jealousy]; *see also id.* para 70 ["Although it proved to be a disastrous maneuver, terminating Mayers was defendants' attempt to deprive Mayers of the fruits of his labor and wrest control of SuperflyX."]).

Plaintiffs allege that SuperflyX was positioned for great success before Mayers's termination (*e.g. id.*, paras 66, 82, 85). They further allege that "the wheels completely fell off SuperflyX" after Mayers was fired (*see id.* paras 82-84, 90-92 [stating that SuperflyX's "actual results fell far short of projections and expectations" in 2021 and 2022]). However, plaintiffs'

nonconclusory allegations posit that SuperflyX's value decreased after Mayers's termination due to ordinary mismanagement, not any bad faith conduct. For example, plaintiffs state:

> "SuperflyX's business, operations, and plans were dramatically and materially negatively impacted as key projects in development were no longer pursued, while other projects did not perform or advance as expected. Without Mayers, the Mangers failed to effectively manage and promote ongoing and/or developing projects, which resulted in greatly reduced revenues and significant damage to SuperflyX . . .
>
> . . . . Further, defendants damaged relationships with key partners and/or counterparties on projects under development and/or in negotiation, failed to close on and/or terminated prospective projects, and damaged relationships that Mayers had spent considerable time developing and cultivating"

(*id.* para 67-68; *see also id.* para 82 [post-termination, SuperflyX lacked financing, and its existing projects underperformed, potential deals were not consummated, its reputation suffered, and "there was a complete void in leadership which led to major staff turnover"]).

Ultimately, Mayers's $1.4 million investment in SuperflyX was repaid (*see* Docs 31 [notice of option to convert or sell promissory notes]; 32 [Bill of Sale]; *see also* Index No. 651363/2022, Doc 23 [oral arg. tr.] at 55 [dismissing Mayers's breach of promissory note claim as moot because Mayers's conceded that the notes were repaid]). That is, Mayers did not just lose his investments in SuperflyX. He was issued promissory notes for those investments, and he was repaid on those notes. Post-termination, in September 2022, Mayers elected to sell his convertible notes, rather than turn those notes into SuperflyX equity (Doc 32). At that same time, Virgo obtained a greater stake in SuperflyX from the company because Virgo *did* elect to convert its SuperflyX notes into equity (*compare* Doc 33 [purchase agreement] *with* Doc 22 [amended compl.], paras 87-88 [alleging, misleadingly, that "defendants decided to essentially sell SuperflyX to Virgo" in a "difficult-to-decipher transaction"]). Following that transaction, Virgo owned an 81% interest in SuperflyX, and the company owned the remaining 19% interest

(Doc 22, para 88). Contrary to plaintiffs' contention, this transaction is not "difficult to decipher."

In sum, plaintiffs assert that company's value hinged on Mayers's leadership and SuperflyX's projects, and Mayers's termination caused "a complete destruction of the Company's value" (*id.*, para 91). Meanwhile, plaintiffs complain that the remaining co-founders' compensation "dramatically *rose* during the precipitous decline of the Company" (*id.*, para 93).

Plaintiffs raise two derivative claims in their amended complaint. First, they assert breach of fiduciary duty against the defendants for terminating Mayers, "squander[ing] the promise and potential for SuperflyX and effectively dr[iving] its value, and the overall value of the Company, into the ground" (*id.*, para 107). They claim that defendants were "driven by . . . their self-serving goal of cutting Mayers out of the enormous potential of SuperflyX" (*id.*, para 107-108). Second, they assert corporate waste based on the co-founders' purportedly excessive compensation after Mayers's termination (*id.*, para 112).

Defendants now move to dismiss the amended complaint pursuant to CPLR 3211 (a) (1), (3), (5), and (7), and plaintiffs oppose the motion.

DISCUSSION

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [The court] accept[s] the facts as alleged in the complaint as true, [and] accord[s] plaintiff[] the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted]). However, bare legal conclusions and "factual claims which are either inherently incredible or flatly contradicted by documentary evidence" are not "accorded their most favorable intendment" (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487

[1st Dept 1995]). Dismissal under CPLR 3211 (a) (1) is warranted where the documentary evidence "conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez,* 84 NY2d 83, 88 [1994]; *see also Amsterdam Hospitality Group, LLC v Marshall–Alan Associates, Inc.*, 120 AD3d 431, 433 [1st Dept 2014]). As the company is a Delaware LLC, New York law applies to procedural matters and Delaware law applies to substantive issues.

First, res judicata does not bar plaintiffs' claims. Mayers's first four [direct] causes of action in the prior action were dismissed for lack of standing (*see* Index No. 651363/2022, Doc 23, pg 56-57 ["The only claims that are made here that I'm dismissing with prejudice are individual claims. I have not addressed or dealt with any claims by or on behalf of the company, since those were not pleaded."]). The court's dismissal of the prior action expressly recognized that Mayers *might* be able to assert derivative claims on behalf of the company.

However, as an initial matter, plaintiffs have not satisfied their pleading burden with respect to demand futility. Delaware law governs the issue as to whether pre-suit suit demand is excused because Superfly is a Delaware LLC. Delaware Chancery Court Rule 23.1 requires a plaintiff to plead demand futility with particularity (Del Ch Ct R 23.1; *see United Food & Commercial Workers Union v Zuckerberg,* 262 A3d 1034, 1058-1059 [Del 2021] [requiring a three-prong, director-by-director test for demand futility]). Plaintiffs' demand futility allegations are conclusory and lack specificity (Doc 22 [amended compl.], para 101 [vaguely stating, among other things, that "defendants received material personal benefits from the misconduct alleged herein"]).

Even if plaintiffs had established demand futility with the requisite specificity, the amended complaint fails to state a viable claim for breach of fiduciary duty. To plead a cause of action for breach of fiduciary duty, a plaintiff must allege (1) that a fiduciary duty existed, and

(2) that the defendant breached that duty (*e.g. McKenna v Singer*, 2017 WL 3500241, *15 [Del Ch Ct 2017]). The manager defendants each owed fiduciary duties of loyalty and care to the company. Virgo, on the other hand, owed the company no fiduciary duties as it was only a member of Superfly, not a manager (*see Beach to Bay Real Estate Ctr. LLC v Beach to Bay Realtors Inc.*, 2017 WL 2928033, at *5 [Del Ch July 10, 2017], *as rev* [July 11, 2017] [stating that Delaware courts "have interpreted the Delaware LLC Act to imply default fiduciary duties to *managers* of a LLC unless such duties are clearly disclaimed. . . . On the face of the Complaint, minority membership is the sole allegation that purports to create the fiduciary duty. That is insufficient as a matter of law"] [first alteration in original]; *see also e.g. Skye Min. Inv'rs, LLC v DXS Capital (U.S.) Ltd.*, 2020 WL 881544, at *25-29 [Del Ch Feb. 24, 2020]). Even if plaintiffs are correct that Virgo could be deemed to be Superfly's "de facto" manager (*see* Doc 42 at 26 [pls' mem opp]), they do not plead facts that are sufficient to establish a "de facto" manager relationship. In addition, plaintiffs do not argue that Virgo controlled the company's managing board (*see Skye Min. Inv'rs, LLC*, 2020 WL 881544, at *25-29), or that Virgo appointed managers in a manner that violated the LLC Agreement (*see* LLC Agreement, section 6.03 [Doc 29]; *see generally* plaintiffs' mem opp [Doc 42]).

Regardless, plaintiffs nonconclusory allegations "fail[] to rebut the presumptions of loyalty, prudence and good faith under the business judgment rule" (*Giuliano v Gawrylewski*, 122 AD3d 477, 478 [1st Dept 2014] [citing Delaware cases]). Further, even if plaintiffs' allegations were sufficient to rebut the business judgment rule presumption, plaintiffs still fail to adequately state a non-exculpated breach of fiduciary duty claim against the defendants. Under the Delaware Limited Liability Company Act (6 Del C § 18-101 *et seq*), parties to an LLC agreement are permitted to limit the scope of the managers liabilities.

The Superfly LLC Agreement states:

> "To the fullest extent permitted by law, no Manager shall be liable for monetary damages for any act or omission performed or omitted by any of them in good faith that relates to the Company or any Group Company . . . , other than any action or omission of such Manager that (i) has been determined by a court of competent jurisdiction or pursuant to the procedures set forth in Section 13.03 to be in violation of this Agreement or any other written agreement between such Person and the Company or any Group Company or (ii) constitutes fraud or a criminal act"

(Doc 29, § 6.02 [a] [LLC Agreement]).

Thus, the exculpation clause insulates managers from liability for good faith breaches of fiduciary duties (*see Mule v Sillerman*, 180 AD3d 600, 600 [1st Dept 2020] ["even if . . . the transactions (are subject) to entire fairness review, rather than the less exacting business judgment rule, plaintiff is nevertheless required to plead non-exculpated claims."], citing *In re Cornerstone Therapeutics Inc., Stockholder Litig.*, 115 A.3d 1173, 1180–1181 [Del. 2015]). Plaintiffs do not allege that the defendants breached the LLC Agreement itself or committed a fraud or a crime. Accordingly, plaintiffs must adequately assert a non-exculpated breach of fiduciary duty claim against the defendants, whether or not the business judgment rule applies.

Here, plaintiffs do not allege sufficient nonconclusory facts to establish that defendants intentionally acted with any purpose other than advancing the company's interests. As defendants correctly note, "the hollow invocation of 'bad faith' does not magically render a deficient complaint dismissal-proof" (*Fisk Ventures, LLC v Segal*, CIV.A. 3017-CC, 2008 WL 1961156, at *11 [Del Ch May 7, 2008]). Plaintiffs' conclusory assertions are not adequate. For instance, plaintiffs speculate that:

> "[t]he ill-fated decision by defendants to terminate Mayers was driven by greed, jealousy, and a desire to cut Mayers out from the enormous potential of SuperflyX -- the unit he nurtured and developed, raised money for, and personally invested in -- and was clearly not taken in the best interest of the Company and its members"

(Doc 22 [amended compl.], para 65; *see also id.* para 107).

In addition, plaintiffs' allegations regarding the failed restructuring negotiations and Mayers's $1.4 million investment in SuperflyX are not actionable. As discussed above, Mayers's elected to sell his $1.4 million convertible notes, rather than convert those notes into SuperflyX equity, and his $1.4 million investment was repaid. Thus, even accepting plaintiffs' nonconclusory allegations as true (e.g., that the defendants' actions devalued the company), plaintiffs' breach of fiduciary duty claim fails because they do not plead facts to establish defendants' bad faith. As Justice Cohen noted in the prior action, "[t]here is nothing in the complaint . . . that involves self-dealing, or anything other than just second[-]guessing business decisions" (Index No. 651363/2022, Doc 23 [tr] at pg 49).

Likewise, plaintiffs' corporate waste claim also fails to state a viable cause of action. In Delaware, a corporate waste claim based on excessive compensation is a type of "bad faith" conduct done "with a purpose other than that of advancing the best interests of the corporation" (*Cent. Laborers' Pension Fund ex rel. Goldman Sachs Group, Inc. v Blankfein*, 34 Misc 3d 456, 467 [Sup Ct 2011], *affd sub nom. Cent. Laborers' Pension Fund v Blankfein*, 111 AD3d 40 [1st Dept 2013] [citing Del. Cases] [internal quotation marks omitted]).

> "Thus, in order to plead a breach of the fiduciary duty of loyalty based on this bad faith conduct, Plaintiffs must allege particularized facts, and not merely conclusory statements, that would 'raise a reason to doubt whether the board's action was taken on an informed basis or whether the directors honestly and in good faith believed that the action was in the best interests of the corporation' "

(*id.*, quoting *In re Walt Disney Co. Derivative Litigation,* 825 A2d 275, 286 [Del. Ch.2003]).

Here, plaintiffs do not contend that the managers were inadequately informed in making compensation decisions, and plaintiffs' conclusory allegations of bad faith are not sufficient.

Although the company's decline is regrettable, all plaintiffs' claims in the amended complaint really amount to is that Mayers was a superlative businessperson, and the company would have performed better had he remained. Allegations of this type are too speculative to survive a motion to dismiss.

CONCLUSION

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that defendants' motion to dismiss (MS 03) is granted, and the amended complaint is dismissed in its entirety against all defendants, with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendants; and it is further

ORDERED that the Clerk is directed to mark this case disposed.

11/22/2024
DATE

HON. MELISSA CRANE, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE