SUPERIOR COURT OF NEW JERSEY

HUDSON VICINAGE

CHAMBERS OF
MARY K. COSTELLO
JUDGE

WILLIAM J. BRENNAN COURTHOUSE
583 Newark Avenue
Jersey City, New Jersey 07306

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE COMMITTEE ON OPINIONS

RCS LOGISTICS, INC.,

Plaintiff,

vs.

EXPOLANKA USA LLC, CAROL M. KOLSTER, RAYMOND LUENGO, AMANDA NICOSIA, CHRISTINE ROGERS, EVAN T. ROSEN, JENNIFER ROSS, MAIRA SALABARRIA, KRISTEN M. SKROSKIS, LELLY L. STURGES, WILLIAM E. WILKENING and WALTER V. SALESKI,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : HUDSON COUNTY

DOCKET NO.: HUD-L-2668-17

Civil Action

MEMORANDUM DECISION

Decided: March 13, 2019

Robert H. Bernstein, Esq.
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MARY K. COSTELLO, J.S.C.

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FACTS AND PROCEDURAL HISTORY

This matter arises out of a business dispute between the parties. On June 19, 2017 Plaintiff RCS Logistics, Inc. (hereinafter "RCS") filed a Verified Complaint and Jury Demand seeking to protect and recover its business, trade secrets, confidential and proprietary information, which it is alleged were misappropriated by Defendant Expolanka USA LLC (hereinafter "Expolanka"). On August 4, 2017 an Answer was filed on behalf of all named defendants.

An initial case management order was entered on October 11, 2017 establishing a Discovery End Date of October 28, 2018. On November 17, 2017 an Order was entered denying Defendants' motion to dismiss under R. 4:6-2(e). On January 19, 2019, an Order was entered denying Defendants' motion for reconsideration of the November 17, 2018 Order. Following motion practice, a second case management order was entered on February 7, 2019 extending the Discovery end Date to February 19, 2019. Discovery was extended yet again to July 14, 2019 by a third case management order entered on May 14, 2019. By order dated October 12, 2018, a motion to amend the complaint was granted, in part. An Amended Complaint was filed on October 19, 2018. An Answer to the Amended Complaint with Counterclaim against Patrick J. Heaney was filed on November 30, 2018. On February

4, 2019 a motion to dismiss the Counterclaim was filed by RCS. Oral argument was heard on March 1, 2019 and this is the Court's decision on that motion.

CONTENTIONS OF THE PARTIES

RCS instituted this litigation against Defendant Evan T. Rosen (hereinafter "Rosen") and several other former RCS employees and Expolanka USA, LLC. Rosen was a longtime employee and officer of RCS, most recently serving as the company's Executive Vice President and Chief Commercial Officer where he was tasked with assisting RCS in the sales process. Rosen has never been a shareholder of RCS or been a member of its Board of Directors. However, given his longtime service "and in reliance on Rosen's assumed continued contribution to the company, Rosen alleges that Counterclaim Defendant Patrick J. Heaney (hereinafter "Heaney") had promised him that he would receive 5% of the proceeds of the sale of RCS."

Rosen filed a Counterclaim alleging Heaney mismanaged RCS and misused corporate funds for personal purposes. RCS argues that Rosen's claim for breach of fiduciary duty (Count I) should be dismissed because Rosen lacks standing. Rosen identifies "misuse of corporate funds, self-dealing, and other financial improprieties" as the basis for his breach of fiduciary duty claim. RCS insists that the alleged harm about which Rosen

complains is to RCS, not himself. Distinct injury only gives rise to a direct claim where the one pleads "an injury distinct from the injury suffered by the shareholders in general." Weil v. Express Container Corp., 360 N.J. Super. 599, 611 (App. Div. 2003) certif. denied 177 N.J. 574 (2003), "[a]ctions that have the effect of depressing stock value harm all shareholders and are therefore classed as giving rise to derivative claims." Strasenburgh v. Straubmiller, 146 N.J. 554 (1996). RCS argues that the claims are derivative, therefore they can only be asserted by the company or its shareholders. Rosen has no standing since he admits he was never a shareholder. His allegation that he stood to receive 5% of the sale of RCS based on an alleged oral promise does not provide standing to assert a derivative claim. RCS asserts that Rosen may not assert a derivative claim unless he "was a shareholder of the corporation at the time of the act or omission complained of … and remains a shareholder throughout the derivative proceeding. N.J.S.A. § 14A:3-6.2.

RCS goes on to argue that Rosen's allegations also don't give rise to a direct, individual claim even if he was a shareholder because he fails to allege any "special injury" - he does not allege that only his 5% was impacted by Heaney's alleged conduct, but rather that the total value of the company was depleted.

Furthermore, argues RCS, Heaney did not owe Rosen a fiduciary duty. "A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on a matter within the scope of their relationship." F.G. v. MacDonell, 150 N.J. 550, 563 (1997). Rosen also does not contend that Heaney was under a legal duty to act for Rosen or to give advice for Rosen's benefit. Employers do not owe fiduciary duties to their employees, nor do employees owe fiduciary duties to one another. See Snyder v. Dietz & Watson, Inc., 837 F. Supp. 2d 428, 444 (DN.J. 2011). The only relationship Rosen alleges with Heaney is that they were both officers of RCS. The Counterclaim is devoid of any allegations that support the assertion that Rosen looked to Heaney for advice. In fact, RCS and Heaney claim that they looked to Rosen for support in regards to the anticipated sale of the company. Rosen only pleads that Heaney had offered Rosen 5% of the proceeds of RCS, however, "[a]n employer-employee relationship providing for the division of profits will not give rise to a fiduciary obligation on the part of the employer absent an agreement to also share losses." Vitale v. Steinberg, 307 A.D.2d 107, 108, 764, N.Y.S.2d 236, 237 (2003).

The next assertion by RCS is that Rosen's fraud claim (Count IV) should be dismissed. To state a claim for fraud Rosen must plead: "(1) a material misrepresentation of a

presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997). "A court may dismiss a complaint alleging fraud if the allegations do not set forth with specificity, nor do they constitute as pleaded, satisfaction of the elements of legal or equitable fraud." State Dep't of Treasury, Div. of Investment ex. rel. McCormac v. Qwest Communications International, Inc., 387 N.J. Super. 469 (App. Div. 2006). The specific communications identified in the Counterclaim are not statements by Heaney to Rosen and therefore cannot be the basis of a fraud claim. Rosen describes an e-mail, but said e-mail is between Rosen and an outside consultant, it did not include Heaney. Rosen also quotes from other e-mails, but Rosen himself was not copied on them and does not allege that he received them. The only statement by Heaney identified in the Counterclaim that Rosen claims to have been aware of at the time is a statement by Heaney to a potential buyer, in which Heaney used the wrong currency to describe RCS's EBITDA. This statement is insufficient to support a claim of fraud in general, much less a claim by Rosen. Even Rosen acknowledges that this mistake was a "misstatement" rather than a misrepresentation.

RCS argues that Rosen's contention that Heaney failed to disclose some alleged mismanagement of RCS to Rosen does not allege an actionable misrepresentation or omission. Rosen fails to identify any alleged omission with the requisite particularity and fails to plead any facts that might allege that Heaney had a duty to make any disclosure to Rosen personally. Rosen admits that any duty to disclose stemmed solely from Rosen's role as an employee and officer of RCS.

Moreover, argues RCS, Rosen does not plead that he relied upon alleged misrepresentation or omission to his detriment, nor does he allege that he suffered any damages. Rosen claims only that the alleged misstatement had an "effect on the sales process," but not that Rosen himself relied upon it. Similarly, Rosen does not allege any detrimental reliance on Heaney's purported omissions regarding his alleged mismanagement of RCS. To the contrary, Rosen admits that he "observed" these issues while employed by RCS. While he contends that he was unaware of the "gravity of the situation" the allegations in the Counterclaim demonstrate that he was fully aware of RCS's finances, and establish that he did not rely on any alleged misrepresentations or omissions by Heaney.

RCS continues to state that Rosen admits that he was "involved extensively" in the sales process and that months before his resignation the owner of RCS's Asian affiliates

purportedly confirmed the company's "poor financial condition" and disclosed Heaney's alleged "spending habits" and their impact on the company. Then, contrary to his contradictory claim that he was somehow misled, Rosen admits that it was "clear that the company's future viability was in doubt" and that that knowledge caused him to leave RCS. He was fully aware of the financial condition of the company and did not rely on Heaney's alleged omissions because he claims that he resigned because of his knowledge. Rosen's non-specific allegations that Heaney failed to disclose information regarding the company's finances is baseless and requires dismissal.

Because he admits that he did not detrimentally rely on any alleged misrepresentation or omission, RCS posits that Rosen does not and cannot allege that he has been damaged in any way. Rosen was not a shareholder of RCS, and thus was not harmed by any diminution in value in the company. Also, Rosen alleges his 5% was lost because of Heaney's actions. However, he admits he chose to resign prior to the end of the sale, terminating that conditional promise. Plus, it has already been established that the sale was not impacted by the conduct Rosen alleges.

RCS's next argument is that Rosen's claims for civil conspiracy (Count III) and aiding and abetting (Counts II and V) should be dismissed. The sole allegation pled in support of each of these claims is that RCS's Controller assisted Heaney in

his alleged use of company funds for personal spending by approving Heaney's expense reports. These claims assert that Heaney and the Controller conspired to harm RCS, but no harm to Rosen individually is, or can be, alleged.

In response, Rosen argues that Heaney has admitted his commitment to give Rosen 5% of the proceeds of any sale. Rosen never formally received shares in RCS USA but Heaney held him out as a 5% owner in the RCS Deal Book in November, 2014 and in the RCS Deal Book circulated by RCS's bankers to prospective buyers in 2016 and 2017. Furthermore, the single letter of intent RCS USA received identified Rosen as a minority shareholder - it listed Rosen, along with Heaney and his son Brian as the "sellers as to shares."

To state a claim for breach of fiduciary duty, three elements must be pled: (1) the existence of a fiduciary relationship between the parties; (2) the breach of a duty imposed by that relationship; and (3) damages or harm to the plaintiff caused by said breach. McKelvey v. Pierce, 173 N.J. 26, 57 (2002). Rosen's claim is not derivative. He does not seek, as a derivative plaintiff would, to "redress corporate injuries which secondarily harm all shareholders alike." Rather, he seeks to redress an injury unique to him by virtue of Heaney's promise that Rosen (and only Rosen) would receive 5% of the proceeds of any sale. "Rosen has expressly pled an 'injury

distinct from the injury suffered by the shareholders in general' - i.e., that he could not collect on Heaney's promise because Heaney's misconduct ensured that no sale would be consummated."

Rosen argues that RCS conceded in Paragraph 3 of the First Amended Complaint that Rosen would receive 5% in the event of a sale, and Heaney reiterated the same in his sworn certification filed on November 2017. Therefore, Heaney is judicially estopped from asserting an inconsistent position here.

Rosen argues that Heaney owed him a fiduciary duty by virtue of their relationship of trust and confidence and Heaney's representations to and regarding Rosen. "The essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position." McKelvey v. Pierce, 173 N.J. 26, 57 (2002). Rosen's claim is not premised on an employer/employee relationship. Rosen is suing Heaney personally for "breach of the fiduciary duty that Heaney himself owed Rosen by virtue of their relationship of trust and confidence born of Heaney's promise[.]" "It would turn the law respecting fiduciary obligations on its head if the CEO and controlling shareholder of a closely-held corporation owed no fiduciary obligations whatsoever to the Chief Commercial Officer whom he held out to

be a minority shareholder and promised 5% of the proceeds from a sale of the corporation."

Rosen insists that he has pled with particularity a fraud claim against Heaney. Contrary to movant's allegations that Rosen has not alleged any actionable misrepresentations or omissions in connection with efforts to market and sell RCS, Rosen identifies several in his Counterclaim (all of which Rosen learned of "only through discovery in this litigation"):

- Monthly statements dated between May 2014 and December 2016 for an American Express Platinum Card account in Heaney's name, all of which were sent to RCS USA's then-corporate office in Springfield Gardens, New York and paid out of RCS USA's Operating Account, reflect hundreds of charges totaling nearly one million dollars for expenditures having no conceivable business purpose.
- On a monthly basis, Heaney received wire transfers directly out of RCS USA's Operating Account between May 2014 and June 2017.
- Heaney regularly endorsed hefty checks made out to "Cash" that were paid out of RCS USA's Operating Account

Rosen maintains that he has sufficiently pled fraudulent conduct by Heaney, although further discovery by way of depositions of critical witnesses, is likely to reveal more.

Rosen contests the notion that he was fully aware of RCS's finances. Rosen only came to learn of Heaney's conduct through third-party discovery in this litigation. Rosen was generally aware of RCS USA's worsening financial condition but that does not render it unreasonable for him to have relied on Heaney's portrayal that he was doing all he could to sell the company. Heaney had a duty to disclose his financial improprieties and self-dealing to Rosen.

Rosen claims that since Heaney gave him a false hope of the 5% payout, and held Rosen out as a minority shareholder - both no doubt for Heaney's own personal gain and to incentivize Rosen to work hard to make RCS a more attractive target - it would be a grave injustice to hold Heaney harmless for engaging in activity he had to have known would render that 5% commitment illusory.

Rosen argues that RCS has not cited any authority for the proposition that Rosen's aiding and abetting and conspiracy claims are, or even can be, derivative. They are not, for the same reasons Rosen's claim for breach of fiduciary duty against Heaney is direct. Movant alleges that Rosen's sole allegation in support of these claims is that RCS's Controller assisted Heaney in his alleged use of company funds for personal spending by approving Heaney's expense reports. However, Rosen points out that the Counterclaim alleges the several ways by which

Donna Delgais, RCS USA's Controller, had knowledge of and substantially assisted Heaney in his wrongdoing. For example:

- Delgais was responsible for reviewing and approving the nearly one million dollars' worth of non-business expenditures incurred on Heaney's American Express corporate card and paid for using corporate funds.
- Delgais approved and signed the checks made out to "Cash" paid out of RCS USA's Operating Account, which Heaney would then endorse and deposit.
- Delgais would "orchestrate wire transfers direct to Heaney of out RCS USA's Operating Account."

Rose insists that these allegations are plainly sufficient to state viable claims for aiding and abetting breach of fiduciary duty and fraud, which "focus[] on whether a defendant knowingly gave 'substantial assistance' to someone engaged in wrongful conduct" - a "fact-sensitive" inquiry. Podias v. Mairs, 394 N.J. Super. 338, 353 (App. Div. 2007)."

LEGAL ANALYSIS

A motion to dismiss for failure to state a claim upon which relief can be granted is governed by R. 4:6-2(e) of the New Jersey Court Rules. The rule "permits litigants, prior to the filing of a responsive pleading, to file a motion to dismiss an opponent's complaint, counterclaim, cross-claim, or third-party

complaint" Malik v. Ruttenberg, 398 N.J. Super. 489, 493 (App. Div. 2008).

The proper analytical approach to such motions requires the motion judge to 1) accept as true all factual assertions in the complaint, 2) accord to the nonmoving party every reasonable inference from those facts, and 3) examine the complaint "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim." Id. at 494 (quoting Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989).

The motion to dismiss should be approached with great caution and should only be granted in the rarest of instances. Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005). The allegations are to be viewed "with great liberality and without concern for the plaintiff's ability to prove the facts alleged in the complaint." Id.

"Shareholders cannot sue for injuries arising from the diminution in value of their shareholdings resulting from wrongs allegedly done to their corporations. Nor can stockholders assert individual claims for wages or other income lost because of injuries assertedly done to their corporations." Pepe v. Gen. Motors Acceptance Corp., 254 N.J. Super. 662,666 (App. Div. 1992). Under Pepe, Rosen would not have standing. However, Rosen states he is not suing as a shareholder, nor does he claim

to be a shareholder. Instead, Rosen claims Heaney owed him a fiduciary duty due to Heaney's position as CEO while Rosen was the Chief Commercial Officer, the third highest position in RCS, and due to Heaney's promise that Rosen would receive 5% of profits. Rosen offers no case law to support this position. The fact that the percentage share in the sale proceeds was offered to no one other than Rosen distinguishes him for all others who were shareholders and who stood to gain from their status as shareholders. Rosen was singled out by Heaney and offered this unique opportunity. For this reason, the Court finds that this put Heaney and Rosen in a special relationship so as to create a "special injury" under Weil v. Express Container Corp., 360 N.J. Super. 599, 611 (App. Div. 2003), certif. denied 177 N.J. 574 (2003). As stated in F.G. v. MacDonell, 150 N.J. 550,563 (1997), "[a] fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship." Heaney is alleged to have singled out Rosen for this special treatment (i.e., 5% share of the sale while not being a shareholder) and by doing so, he created a special relationship.

To state a claim for fraud Rosen must plead: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an

intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997). Rosen has plead that the American Express statements revealed close to $1,000,000 in non-business charges. The submission of these statements for payment cannot be said to have been material misrepresentations made to Rosen. The same is true of the monthly wire transfers and the checks made out to "cash" form the operating account. While these alleged misappropriations are a breach of the fiduciary duty set forth above, they do not support a claim of fraud because (a) none of the omissions, or instances described by Rosen were made **to** Rosen, and (b) as such, there was no intention on Heaney's part that Rosen would rely on the alleged misrepresentations or omissions.

CONCLUSION

The motion to dismiss the Counterclaim under R. 4:6-2(e) is granted in part and denied in part. As to Count One, breach of fiduciary duty, the motion is denied. As to Counts Two, Three and Five, civil conspiracy, aiding and abetting, the motion is denied. As to Count Four, fraud, the motion is granted.