SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ANIL C. SINGH Justice PART 45

Index Number : 654208/2015
BRAUN, GABRIEL
vs.
GREEN, AVRAHAM
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: August 31, 2016

ANIL C. SINGH, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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GABRIEL BRAUN,

Plaintiff,

-against-

AVRAHAM GREEN, and SPRING CENTER, INC.,

Defendants.

DECISION AND ORDER

Index No. 654208/2015

Mot. Seq. 001

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SINGH, J.:

In this action for, *inter alia*, fraud; breach of fiduciary duty and duty of loyalty; declaratory judgment; breach of contract/breach of Shareholders' Agreement; breach of implied duty of good faith and fair dealing; accounting or inspection of corporate records; unjust enrichment; conversion; and common-law dissolution, Gabriel Braun (the "plaintiff") seeks a declaration of his status as an 8% shareholder and entitlement to distributions and proceeds from the third condemnation proceeding, as well as damages, injunctive relief, and attachment. Compl., ¶ 81. Plaintiff further seeks the dissolution of Spring Center, or alternatively, an order directing Green to buy out Braun's 8% share in Spring Center at its "appraised value," as opposed to the formula set forth in the Shareholders' Agreement. Id.

Defendants move, pursuant to CPLR 3016(b), 3211(a)(7) and/or 3211(a)(1), to dismiss all of the claims asserted in the complaint filed by plaintiff, except for certain distributions for rental income that are concededly due him under the Shareholders' Agreement, but which defendants contend should be setoff against the counterclaims pleaded in the answer (mot. seq. 001). Plaintiff opposes.

Facts

Defendant Spring Center, Inc. ("Spring Center") is a Florida corporation formed in 1994 to purchase a commercial real estate parcel (the "Property") located in Houston, Texas. Defendant Avraham Green ("Green") is the president of Spring Center, and owns 92% of the outstanding shares. Plaintiff Gabriel Braun is an 8% shareholder who managed Spring Center, through his development and management business Braun Enterprises, from the time it acquired the Property, until he resigned and turned over the management to Green in March of 2014.

The rights and responsibilities of the parties are set forth in two agreements that became effective upon acquisition of the Property: (1) a "Management Agreement," under which Braun Enterprises was to provide Braun's services to act as the manager of the Property; and (2) the Shareholders' Agreement. See compl., exh. 2.

The Management Agreement makes clear that Braun was to be personally responsible for the management of the Property. Although the initial term of the

Management Agreement was five years, it was renewable at the option of Spring Center. Although Spring Center never formally exercised its renewal option, Braun continued to manage the Property for almost 20 years, from December of 1994 until February 28, 2014, when Braun turned over the management of the company to Green.

The Shareholders' Agreement provided that Braun would receive eight percent of the outstanding capital stock subject to a variety of restrictions and conditions. Pursuant to the Shareholders' Agreement, in order to maintain that eight percent interest, Braun was required to contribute his share of any additional capital that was needed by the corporation, either by paying additional capital, or by deferring distributions of the cash that would otherwise be available for that purpose. See Shareholders' Agreement §§ 3(a), 4(a)(ii). In the event that Braun failed to make the requisite additional capital contributions, any further distributions to which he would otherwise be entitled would be used to (1) repay Green for any additional monies he advanced to make up for the shortfall, with interest at 8% per annum, and (2) pay for the new shares that he was obligated to purchase, also with interest at 8% per year. See id., § 3(b).

Alternatively, instead of issuing new shares, paragraph 4(a) of the Shareholders' Agreement gives the company the option of using cash that would otherwise be available for distributions to pay for capital improvements. The

Shareholders' Agreement expressly states that "the Corporation, may to the extent necessary to pay for capital improvements, defer such payments to fund such capital improvements." Shareholders Agmnt. §4(a). Finally, the Shareholders' Agreement prohibits plaintiff from selling his shares to third parties while Green owns a majority interest and contains provisions designed to insure that Braun will ultimately receive 8% of the company's value based upon its actual earnings. See id., § 5(a)(ii); 5(a)(iii).

Since 1994, portions of the Property were the subject of three condemnation proceedings by the State of Texas. Plaintiff claims that he was given a distribution of 8% of the proceeds of the first two proceedings. Compl., ¶ 31, 34. The third condemnation, which gives rise to Braun's primary claim in this lawsuit, was not concluded until December 2015, when Green allegedly settled with the state on the eve of trial for the gross amount of $13 million. Id., ¶ 35.

In October 2013, Braun announced that he would no longer continue to manage the Property and, after a few months of transition, turned over all responsibility for its management to Green effective March 1, 2014. Id., ¶ 38. Plaintiff alleges that, prior to his resignation as property manager, it was Spring Center's practice to make distributions to him as an individual shareholder in proportion to his 8% interest in the Spring Center property, but that after his resignation, defendants changed course and have refused to distribute either

plaintiff's 8% share from rentals, or the proceeds of the third condemnation proceeding. Id., ¶¶ 36-37. On November 6, 2015, after the third condemnation proceeding agreement was reached but before the funds were received, Braun was advised that Spring Center intended to use the proceeds to fund capital improvements at the property. Plaintiff brought this suit seeking a declaration of his status as an 8% shareholder and entitlement to distributions and proceeds from the third condemnation proceeding, as well as damages, injunctive relief, and attachment.

Analysis

Legal Standard

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in the light most favorable to plaintiffs, and plaintiffs must be given the benefit of all reasonable inferences. Allianz Underwriters Ins. Co. v. Landmark Ins. Co., 13 A.D.3d 172, 174 (1st Dept 2004). The court determines only whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). The court must deny a motion to dismiss, "if, from the pleading's four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law." 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002).

"[N]evertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence, are not entitled to such consideration." Quatrochi v. Citibank, N.A., 210 A.D.2d 53, 53 (1st Dept 1994) (internal citation omitted).

To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence relied upon by the defendant must "conclusively establish a defense to the asserted claims as a matter of law." David v Hack, 97 A.D.3d 437, 438 (1st Dept 2012), quoting Leon, 84 N.Y.2d at 88.

As an initial matter, plaintiff contends that the motion under CPLR 3211(a)(1) is untimely because it should have been made before the answer was filed. Under CPLR 3211(e), only motions "specified in paragraphs two, seven or ten...may be made at any subsequent time or in a later pleading." Defendants filed their answer on February 11, 2016 and filed their motion to dismiss subject to CPLR 3211(a)(1) on March 11, 2016. As this motion was made after the filing of the answer, defendant's motion to dismiss under CPLR 3211(a)(1) is denied.

Defendant has also mischaracterized the issue presented by plaintiff. The issue is not whether the same documentary evidence that creates a defense under 3211(a)(1) can also be asserted in support of a motion to dismiss under 3211(a)(7). See Simkin v Blank, 19 N.Y.3d 46, 52 (2012) ("allegations . . . flatly contradicted by documentary evidence" are not entitled to consideration in opposition to a 3211

(a) (7) motion); Basis Yield Alpha Fund (Master) v Goldman Sachs Group., Inc., 115 A.D.3d 128, 133 (1st Dept 2014) (holding that defendant could rely on documentary evidence in support of a motion under CPLR 3211(a)(7) even if (unlike the present case) the document is not included in the pleadings). Rather, the issue is whether a motion to dismiss based upon CPLR 3211(a)(1) survives when the moving party fails to timely file the motion. Pursuant to CPLR 3211(e), the motion does not survive and is therefore denied.[1]

Declaratory Judgment and Breach of Contract (Third and Fourth Causes of Action)

Defendant's motion to dismiss plaintiff's third cause of action seeking a declaratory judgment, and plaintiff's fourth cause of action alleging that defendant's breached the Shareholder's Agreement, is denied.

Defendants seek to dismiss the third and fourth causes of action to the extent that plaintiff seeks to prevent the company from using any of the proceeds from the third condemnation for capital improvements, based upon the express terms of the Shareholders' Agreement. Although defendants do not seek dismissal with respect to plaintiff's claim for distributions of rental income, they contend that Spring Center has appropriately withheld these distributions as a setoff against the damages detailed in the counterclaims.

[1] Although defendant's motion to dismiss under CPLR 3211(a)(1) is denied, defendant's motions to dismiss under CPLR 3211(a)(7) survive. See CPLR 3211(e) ("a motion based upon a ground specified in paragraphs two, seven or ten of subdivision (a) may be made at any subsequent time or in a later pleading"). Therefore, the court considered defendant's motion to dismiss only as it pertained to CPLR 3211(a)(7), the standard which is enumerated, *supra*.

"It is well settled that a written agreement which is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Sullivan v Harnisch, 96 A.D.3d 667, 667 (1st Dept 2012) (citation omitted); see also Greenfield v Philles Records, 98 N.Y.2d 562, 569 (2002) ("a written agreement . . . must be enforced according to the plain meaning of its terms"). "Construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms." Beal Sav. Bank v Sommer, 8 N.Y.3d 318, 324 (2007).

"Whether a contractual term is ambiguous must be determined by looking within the four corners of the document and not to extrinsic sources." Slattery Skanska Inc. v American Home Assur. Co., 67 A.D.3d 1, 14 (1st Dept 2009); see also Goldman Sachs Group., Inc. v Almah LLC, 85 A.D.3d 424, 427 (1st Dept 2011) (citation omitted) ("The 'intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and the parties' reasonable expectations"). "Ambiguity in a contract arises when the contract, read as a whole, fails to disclose its purpose and the parties' intent," or where its terms are subject to more than one reasonable interpretation. Ellington v EMI Music, Inc., 24 N.Y.3d 239, 244 (2014); see also Dean v Tower Ins. Co. of N.Y., 19 N.Y.3d 704, 708 (2012). However, parties cannot create ambiguity from

whole cloth where none exists, because "provisions in a contract are not ambiguous merely because the parties interpret them differently." Mount Vernon Fire Ins. Co. v Creative Hous., 88 N.Y.2d 347, 352 (1996).

The term "capital improvements" is not expressly defined in the agreement, it is inherently ambiguous and cannot be relied upon to dismiss plaintiff's claims. The Shareholders Agreement states,

> Cash Available for Distribution generated in each monthly shall be distributed to the shareholders in proportion to the stock held by them as of the last day of the month, as promptly as practicable after that day, provided, however, that the Corporation may, to the extent necessary to pay for *capital improvements*, defer such payments to fund such *capital improvements*. Any such deferred payments...shall be repaid...prior to any subsequent distributions to the Shareholders of the Corporation.

Shareholders Agmnt. §4(a)(ii) (emphasis added). The term at issue, 'capital improvements' is not defined in the Shareholders Agreement. Plaintiff contends that 'capital improvements' is specific to existing capital or buildings on the property and does not include new developments or alleged plans for imagined future construction. Plaintiff's memo., p. 8. Defendant argues that 'capital improvements' allow them to withhold distributions for any purpose relating to the property's development. As the contract provision is susceptible to more than one reasonable meaning, defendant's motion to dismiss plaintiff's third and fourth causes of action are dismissed. See Chimart Assoc. v. Paul, 66 N.Y.2d 570, 573 (1986); China

Privatization Fund (Del), L.P. v. Galaxy Entertainment Group Ltd., 95 A.D.3d 769, 770 (1st Dept 2012) (the construction of an ambiguous contract is a matter for the fact finder and a motion to dismiss is inappropriate).

Defendant's argument that the term 'capital improvements' is a commonly employed term in real estate matters and is therefore unambiguous is misguided. Defendant alleges that the plain and ordinary meaning of the term "capital improvements," as reflected in a variety of published definitions, is not limited to improvements to existing physical structures. See Black's Law Dictionary (10th ed 2014) ("capital improvement" is "an outlay of funds to acquire or improve a fixed assets," and "improvement" is "an addition to property, usually real estate, whether permanent or not; especially one that increases its value or utility or that enhances it appearance); see also http://definitions.uslegal.com/c/capital-improvement/ ("capital improvement" "is defined as a non-recurring expenditure or any expenditure for physical improvements, including costs for: acquisition of existing buildings, land, or interests in land; construction of new buildings or other structures, including additions and major alterations . . . . It may mean any change, alteration, rearrangement or addition to existing facilities. It is also new construction, acquisition or improvements to sites, buildings or service systems").

However, whether there is ambiguity "is determined by looking within the four corners of the document, not to outside sources." Kass v Kass, 91 N.Y.2d 554,

566 (1998). As the Shareholders Agreement is silent as to the definition of 'capital improvements,' and there are two reasonable interpretations as to the intent of the meaning of 'capital improvements,' defendant's motion is denied.

Accordingly, the defendant's motion to dismiss plaintiff's third and fourth causes of action for declaratory judgment and breach of contract is denied.

Fraud (First Cause of Action)

Defendant's motion to dismiss plaintiff's first cause of action for fraud is granted. A fraud claim that is "based on the same facts as underl[ying] the contract claim" and is neither collateral to the contract nor alleges damages "that would not be recoverable under a contract measure of damages" is barred as duplicative of the breach of contract claim. See J.E. Morgan Knitting Mills v Reeves Bros., 243 A.D.2d 422, 423 (1st Dept 1997) (affirming dismissal of cause of action for fraud alleging that defendants knew at the time of contract execution that undisclosed liabilities warranty was false as duplicative of breach of contract cause of action); Pollak v Moore, 85 A.D.3d 578, 579 (1st Dept 2011) (alternative claims sounding in fraud and fraud in the inducement "were duplicative of [plaintiff's] breach of contract claims and, as such, properly dismissed).

Here, plaintiff's fraud claim is nothing more than a rehash of the breach of contract claim that defendants are obligated to make distributions to plaintiff under the terms of the Shareholders' Agreement. The gravamen of plaintiff's fraud claim

is that, by signing the Shareholders' Agreement, Green made representations to plaintiff that he would receive distributions from cash available for distributions and capital proceeds. Compl. ¶ 48. Plaintiff alleges that these representations were false, as Green has wrongfully withheld distributions of any kind from Green. Id. These allegations, however, are exactly the same as the breach of contract allegations, and plaintiff has alleged no fraudulent misrepresentations that are collateral or extraneous to the terms of the Shareholders' Agreement, or any damages that are different than those that they seek with respect to the breach of contract claim.

Accordingly, defendant's motion is granted.

Breach of Fiduciary Duty (Second Cause of Action)

Defendant's motion to dismiss plaintiff's second cause of action for breach of fiduciary duty is granted. "To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct." Burry v Madison Park Owner LLC, 84 A.D.3d 699, 699-700 (1st Dept 2011). As to the key second element, plaintiff's entire allegation is that Green breached a fiduciary duty by "making distributions to himself but not [Braun], and by breaching the terms of the Shareholders' Agreement." Compl. ¶ 53. However, such an allegation is entirely duplicative of the breach of contract claim, and the second cause of action must be dismissed for that reason. See Mosaic Caribe, Ltd. v AllSettled Group, Inc., 117

A.D.3d 421, 423 (1st Dept 2014) (affirming dismissal of breach of fiduciary duty cause of action as "duplicative of the breach of contract claim as it alleges the very same facts as the breach of contract claim"); Chowaiki & Co. Fine Art Ltd. v Lacher, 115 A.D.3d 600, 600 (1st Dept 2014) (dismissing breach of fiduciary duty claim because it is "duplicative of the breach of contract claim, since the claims are premised upon the same facts and seek identical damages"); Pollak, 85 A.D.3d at 579 (affirming dismissal of breach of fiduciary claim as duplicative of breach of contract claims).

Plaintiff asserts that a breach of fiduciary duty is not duplicative if it alleges an independent duty. Plaintiff's memo. at 11. Here, no such independent duty is alleged. Rather, the only duty alleged is the duty to make distributions to plaintiff, a subject covered by the Shareholders' Agreement and the breach of contract claim. Therefore, defendant's motion to dismiss is granted.

Implied Duty of Good Faith and Fair Dealing (Fifth Cause of Action)

Plaintiff's claim premised on the implied duty of good faith and fair dealing also fails as duplicative of the breach of contract claim. It is well-settled that, when an implied covenant claim arises from the same facts and seeks the same damages as an express breach of contract claim, the implied covenant claim fails. See Havell Capital Enhanced Mun. Income Fund, L.P. v Citibank, N.A., 84 A.D.3d 588, 588 (1st Dept 2011) (affirming dismissal of breach of the implied covenant of good faith

and fair dealing claim that "arose from the same facts and sought identical damages, [and] was duplicative of the contract claim"); 2470 Cadillas Resources, Inc. v DHL Express (USA), Inc., 84 A.D.3d 697, 698 (1st Dept 2011) ("The third cause of action, for breach of the implied covenant of good faith and fair dealing, is duplicative of the breach of contract cause of action since it is based on the same facts as are alleged in support of that cause of action"); see also TeeVee Toons, Inc. v Prudential Sec. Credit Corp., L.L.C., 8 A.D.3d 134, 134 (1st Dept 2004) (affirming dismissal of claim for breach of the implied covenant of good faith because it was "redundant" of breach of contract claim).

Here, plaintiff alleges that Green breached the implied covenant of good faith and fair dealing based on Spring Center's alleged failure to make distributions to him. These are the same allegations that support Braun's breach of contract claim. See compl., ¶ 61. Accordingly, plaintiff fails to state an independent implied covenant claim, and the fifth cause of action must be dismissed.

Accounting and Inspection (Sixth Cause of Action)

On March 25, 2016, plaintiff stipulated to the dismissal of the accounting and inspection claims, as well as his request for an attachment, with prejudice. See Docket No. 33.

Unjust Enrichment (Seventh Cause of Action)

Similarly, plaintiff cannot maintain a cause of action for unjust enrichment. "[A] party may not recover in . . . unjust enrichment where the parties have entered into a contract that governs the subject matter." Pappas v Tzolis, 20 N.Y.3d 228, 234 (2012) (citation omitted); see also Scavenger, Inc. v GT Interactive Software Corp., 289 A.D.2d 58, 59 (1st Dept 2001) ("since the matters here in dispute are governed by an express contract, defendant's counterclaim for unjust enrichment was properly found untenable"). Because the Shareholders' Agreement governs the matter of plaintiff's action – Spring Center's distributions to shareholders – plaintiff's seventh cause of action is barred, and must be dismissed.

Plaintiff argues that an unjust enrichment cause of action may survive as an alternative ground where "the existence or efficacy of a contract is not conclusively established." Shirley Elfie Life Trust v Pinkesz, 44 Misc. 3d 1226[A] at *11 (Sup. Ct. Kings Cnty. 2014], revd sub nom Pinkesz Holdings, LLC v Pinkesz, 139 A.D.3d 1032 (2d Dept 2016); see plaintiff's memo. at 15. Here, however, there is no question concerning the existence of the Shareholders' Agreement or its efficacy. Therefore, defendant's motion to dismiss is granted.

Conversion (Eighth Cause of Action)

Plaintiff's cause of action for conversion is barred because it simply repackages his allegations of breach of contract. See compl., ¶ 74 ("By the conduct alleged herein, Defendant Green has converted and continues to convert [Braun's]

property to his own use and benefit without authority to do so"). A claim for conversion cannot be based upon a mere alleged breach of a contractual obligation. "For a cause of action in conversion to lie, the duty breached must spring from circumstances extraneous to the contract; wrongfully withholding money pursuant to a contractual relationship constitutes a breach of the contractual relationship, not conversion." Kante v. All Taxi, 28 Misc. 3d 133[A] at *2 (2d Dept 2010); see e.g. CDR Creances S.A. v Euro-American Lodging Corp., 40 A.D.3d 421, 422 (1st Dept 2007) (dismissing conversion claim as duplicative of breach of contract claim).

Accordingly, because the factual allegations underpinning plaintiff's conversion claim – that he is entitled to distributions under the Shareholders' Agreement – are no different than those for his breach of contract claim, plaintiff's conversion claim fails, and the eighth cause of action must be dismissed.

Common-Law Dissolution (Ninth Cause of Action)

Under New York law, a non-statutory claim for dissolution of a corporation may be maintained in cases where "the directors and majority shareholders 'have so palpably breached the fiduciary duty they owe to the minority shareholders that they are disqualified from exercising the exclusive discretion and the dissolution power given to them by statute.'" Leibert v Clapp, 13 N.Y.2d 313, 317 (1963) (citation omitted); see e.g. Matter of Nelkin v H.J.R. Realty Corp., 25 N.Y.2d 543, 548 (1969)

(affirming dismissal of common-law dissolution claim when the majority "ha[d] not been guilty of looting or exploiting the corporation").

However, since the creation of the statutory dissolution proceeding under section 1104-a of the New York Business Corporation Law (BCL), such claims have been sustained only in the most egregious circumstances, in which the majority was accused of systematic looting of corporate assets in flagrant disregard of the rights of the minority shareholders. Fedele v Sebert, 250 A.D.2d 519, 521 (1st Dept 1998) (minority standing for dissolution prior to enactment of BCL § 1104-a existed "only where the controlling shareholders engaged in certain egregious conduct"); Lemle v Lemle, 92 A.D.3d 494, 500 (1st Dept 2012) ("egregious conduct necessary to sustain" common-law dissolution); Matter of Sternberg, 181 A.D.2d 897, 897-898 (2d Dept 1992) (common-law dissolution available "*only* to minority shareholders who accuse the majority shareholders and/or the corporate officers or directors of looting the corporation"); see e.g. Ferolito v Vultaggio, 99 A.D.3d 19, 28 (1st Dept 2012) (allegations of fiduciary breaches by corporate officer sufficient to sustain a claim for common-law dissolution).

Plaintiff alleges that, during the 20-year period that he was managing the company, Green occasionally made demands or criticized some of Braun's decisions using strong language. See compl. ¶¶ 25-27. Braun makes no allegations, however, that Green was looting the corporation, or that the corporation suffered any damage.

Braun's claim that Spring Center is wrongfully withholding money that it needs to finance capital improvements clearly does not rise to the level of "egregious conduct" that gives rise to a claim for dissolution. Braun's claim is not based on any "egregious conduct" by Green, but rather, on his belief that he would personally be better off if the company were dissolved and its assets distributed to the shareholders, rather than being invested in capital improvements. See compl., ¶ 27 (invoking appeal to Braun's "net worth" as being "almost entirely invested in Spring Center and other partnerships with Green"). However, "neither sympathy nor a shareholder's need for cash qualify as either a statutory or common-law ground for judicial dissolution." Matter of Dubbonet Scarfs, 105 A.D.2d 339, 343 (1st Dept 1985). Rather, the treatment of the majority shareholder toward the minority shareholder must be "egregious," i.e., a degree of wrongdoing that "go[es] far beyond charges of waste, misappropriation and illegal accumulations of surplus, which might be cured by a derivative action for injunctive relief and an accounting." Leibert, 13 N.Y.2d at 316; see also Matter of Kemp & Beatley (Gardstein), 64 N.Y.2d 63, 73 (1984) (noting majority conduct toward a minority shareholder does not warrant dissolution "simply because the petitioner's subjective hopes and desires in joining the venture are not fulfilled" and "[d]isappointment alone should not necessarily be equated with oppression.").

In opposition, plaintiff asserts that the complaint does, indeed, allege "looting" by defendants, and points to several paragraphs of the complaint in support of this assertion. See plaintiff's memo. at 19-20. However, none of these paragraphs alleges looting of corporate assets. see compl., ¶¶ 24, 29-34, 35, 37, 48-49 (alleging background of condemnation proceedings and that defendants have withheld distributions from third condemnation proceeding).

It is clear that, in the rare cases in which courts have recognized a claim for common-law dissolution, the persons responsible for managing the corporate affairs have misused their position to divert to themselves a significant portion of the company's assets. No such conduct is alleged here. Rather, the dispute is whether Spring Center can retain and use the proceeds of the condemnation proceeding to develop its property, or if it is contractually obligated to distribute them to its shareholders.

Accordingly, the ninth cause of action for common-law dissolution must be dismissed as well.

To the extent that Braun also seeks to recover his share of distributions of funds that are not being withheld to fund capital improvements, defendants are not seeking dismissal of those claims on this motion. Spring Center contends that it will apply those funds as set-offs against the various claims it asserts against Braun in its

counterclaims in this proceeding, and that Braun's right, if any, to those funds will be determined based on the outcome of those claims.

Accordingly, it is

ORDERED that the motion to dismiss the complaint is granted, as to the first, second, fifth, sixth, seventh, eighth and ninth causes of action; and it is further

ORDERED that the motion to dismiss the complaint is denied, as to the third and fourth causes of action.

Date: August 31, 2016
New York, New York

Anil C. Singh