SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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SOUPMAN LENDING, LLC,

Plaintiff,

- v -

JAMIESON KARSON, DANIEL RUBANO, RONALD CRANE, ROCCO FIORENTINO, RANDY BELLER, JAMES SHIPP, TIM GANNON, LLOYD SUGARMAN, DAN NOOR, PASQUALE GUADAGNO, ARNOLD CASALE, and ROBERT BERTRAND,

Defendants.

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INDEX NO. 655412/2018

MOTION DATE 02/19/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for DISMISS.

This motion is decided in accordance with the attached memorandum decision and order.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

5/21/2020
DATE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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SOUPMAN LENDING, LLC,

Plaintiff,

DECISION AND ORDER

Index No. 655412/2018

- v -

JAMIESON KARSON, DANIEL RUBANO, RONALD CRANE, ROCCO FIORENTINO, RANDY BELLER, JAMES SHIPP, TIM GANNON, LLOYD SUGARMAN, DAN NOOR, PASQUALE GUADAGNO, ARNOLD CASALE, and ROBERT BERTRAND,

MOT SEQ 001

Defendants.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action seeking damages for breach of fiduciary duty and negligence, defendants Jamieson Karson, Daniel Rubano, Ronald Crane, Rocco Fiorentino, Randy Beller, James Shipp, Tim Gannon, Lloyd Sugarman, and Arnold Casale (collectively the moving defendants) move, pre-answer, pursuant to CPLR 3211(a)(1), (5), and (7) to dismiss the complaint as against them. The plaintiff opposes the motion. The motion is denied.

II. BACKGROUND

The moving defendants are alleged to be former directors and/or officers of the now bankrupt corporations Soupman, Inc., a former publicly-traded corporation, and its wholly owned

subsidiary The Original Soupman, Inc. (TOSI), as well as Kiosk Concepts, Inc., of which TOSI owned an 80% controlling share (collectively, the Soupman and its subsidiaries). By indictment dated April 7, 2017, a federal grand jury charged the President, Chief Financial Officer and Treasurer of the Soupman and its subsidiaries, defendant Robert Bertrand, a named defendant not currently moving to dismiss this action, with 20 counts of tax fraud. The indictment charged Bertrand with defrauding the government by failing to cause the Soupman and its subsidiaries, between 2010 and 2017, to, among other things, (i) report to the Internal Revenue Service approximately $1,853,312.59 in cash payments TOSI made to Soupman and its subsidiaries employees; (ii) report to TOSI's payroll processor or the Internal Revenue Service the shares Bertrand issued to certain employees of Soupman and its subsidiaries as compensation, which were valued at almost $1,000,000 and (iii) withhold and remit income, Medicare or social security taxes to the government on these unreported amounts. In December of 2017, defendant Bertrand pleaded guilty in federal court to tax fraud.

On June 15, 2017, Soupman and its subsidiaries filed a voluntary petition for bankruptcy in the United States Bankruptcy Court for the District of Delaware, jointly administered under Case No. 17-11313 (LSS). By order dated February 22, 2018, the bankruptcy court approved the sale of

certain assets of Soupman and its subsidiaries to a separate entity called Soupman LLC. The sale included "[a]ny and all claims and defenses that the Debtors' Estates may have against the Debtors' current or former directors, officers, members, or managers." David W. Carickhoff, the trustee of the bankruptcy estate, assigned the claims against, *inter alia*, these former directors and officers of Soupman Inc. and its subsidiaries to the plaintiff.

This complaint, filed October 31, 2018, alleges that the actions of Bertrand led to the inability of Soupman, Inc. to remain in business. According to the complaint, all of the moving defendants were directors during the period that Bertrand was defrauding the government by failing to pay taxes. However, the complaint alleges that defendant Gannon and Sugarman ceased being members of Soupman, Inc.'s board of directors in January 2015 and Casale ceased being members of Soupman, Inc.'s board of directors in January 2015.

The complaint alleges that Soupman, Inc. and its subsidiaries did not have a separate audit committee of the board, which could disqualify it from being listed on a national exchange as a public company. The complaint further alleges that Soupman Inc.'s 10-K annual report states that the board of directors determined that Sugarman qualified as an audit

committee financial expert. The complaint also states that in its 2015 and 2016 audit reports, Soupman, Inc. disclosed that the board of directors had determined that Karson and Shipp also qualified as audit committee financial experts.

Although the complaint alleges that Bertrand was in "control over [Soupman, Inc. and its subsidiaries] payroll and tax operations" and that "throughout the period of Bertrand's wrongful acts, and at all times thereafter, the remaining defendants had a duty to establish, maintain and carry out adequate policies and procedures to ensure that [Soupman, Inc. and its subsidiaries] collected and paid all required taxes to the United States government and to "establish, maintain, and carry out adequate policies and procedures to review and carry out adequate policies and procedures to review and monitor [Soupman, Inc. and its subsidiaries'] accounting procedures and practices to uncover any wrongful acts, such as the failure to pay taxes, and remedy any past failures to collect and pay taxes." The complaint concludes that the moving defendants breached their duties to debtors by failing to implement and maintain such policies and procedures.

The complaint contains three causes of action. The first cause of action is for breach of fiduciary duty against Bertrand and as such is not the subject of this motion as Bertrand is not

a moving defendant. The second cause of action is for breach of fiduciary duty against all defendants. The third cause of action is for negligence and gross negligence, sounding in breach of fiduciary duty. The moving defendants seek to dismiss the complaint in its entirety as against them pursuant to CPLR 3211(a)(1) and (7). Gannon, Sugarman, and Casale also move to dismiss the claims against them as barred by the three-year statute of limitations for breach of fiduciary duty under 10 Del Code § 8106.

III. DISCUSSION

A. Motion to Dismiss Pursuant to CPLR 3211(a)(7)

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v

Martinez, 84 NY2d 83 (1994); Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267 (1st Dept. 2004); CPLR 3026. "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra, at 152 (internal quotation marks omitted); see Leon v Martinez, supra; Guggenheimer v Ginzburg, 43 NY2d 268 (1977).

It is undisputed that the breach of fiduciary duty claims in this action are governed by Delaware law. The elements of a cause of action for breach of fiduciary duty in Delaware are (i) the existence of a fiduciary relationship; (ii) breach of that duty by a defendant and (iii) resulting damages. See Beard v Kates, 8 A3d 573 (Del Ch. 2010); Burry v Madison Park Owner LLC, 84 AD3d 699 (1st Dept. 2011). Under Delaware law, a corporate officer or director breaches his fiduciary duties only by engaging in "bad faith or self-interested conduct." See McMillan v Intercargo Corp., 768 A2d 492, 495 (Del. Ch. 2000).

As this action was filed in New York, the pleading standards in this action are also governed by CPLR 3016(b), which states that "where a cause of action is based upon…breach of trust… the circumstances pleading the wrong must be stated in detail. CPLR 3016. See also Giuliano v Gawrylewski, 122 AD3d

477 (1st Dept. 2014) (applying CPLR 3016 to claims governed by Delaware substantive law). Both causes of action against the moving defendants are for breach of trust, including the third cause of action for negligence and gross negligence, which alleges only that the "defendants' actions, as set forth above constitute negligence or gross negligence in carrying out their duties to" Soupman Inc. and its subsidiaries. Thus, the heightened pleading requirements of 3016(b) apply. See Foothill Capital v Grant Thornton LLP, 276 AD2d 437 (1st Dept. 2000).

Delaware law, however, substantively requires that a claim for a breach of fiduciary duty resulting from a board of directors' failure to monitor and take action in circumstances in which due attention would arguably have prevented the loss can only survive dismissal under limited circumstances. In re Caremark International, Inc. Derivative Litigation, 698 A2d 959 (Del Ch. 1996). In those cases, "only based on a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists." Id. at 971. Only then will the plaintiff have established the "lack of good faith necessary to impose liability for breach of fiduciary duty." Id. To do so, the plaintiff must offer specific facts demonstrating: "(a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a

system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." Stone v Ritter, 911 A2d 362, 370 (Del. 2006).

However, despite how exacting this standard can be, recent case law from the Delaware Supreme Court has relaxed the standard and held that at the pleading stage, a plaintiff merely needs to plead "facts supporting a reasonable inference that the board did not undertake good faith efforts to put a board-level system and monitoring in place." Marchand v Barnhill, 212 A3d 805, 820 (Sup. Ct. Del. 2019). The plaintiff's complaint survives dismissal under Marchand because it sufficiently pleads facts from which the court can infer that Soupman Inc.'s board of directors systematically failed to undertake good faith efforts to put a board-level system of monitoring and reporting in place. Id. at 821.

As in Marchand, the plaintiff alleges that, as a whole, based on the company's annual reports dating back to 2010, the board of Soupman, Inc. was aware that the company had no audit committee and systematically neglected to establish one or to establish a schedule to consider on a "regular basis, such as quarterly or biannually," any tax compliance oversight for the company such that the company may have trouble becoming public.

The complaint further alleges that Bertrand, an officer of the company was advised by Soupman Inc.'s auditors that his tax reporting scheme was illegal and the board never addressed, monitor or stop it because it had no means of becoming aware of it by virtue of this sustained and systematic failure to establish a monitoring system. Had they, they could have rectified before the tax scheme led to the collapse of the company. Furthermore, the complaint alleges facts from which the court may infer that in it led the public to believe in numerous public disclosures to the public, such as in its 10-k reports filed with the Securities and Exchange Commission that its board of directors had auditing and financial experts that would have monitored compliance with tax obligations. Given that once the IRS discovered the tax scheme it drove the company into bankruptcy, the inference is that tax compliance was intrinsically critical to the company's business operations.

These allegations mirror those in Marchand where the Supreme Court of Delaware has held that a complaint cannot be dismissed if it supports the "inference that no board-level compliance existed." Id. Thus, where, as here, a plaintiff has "plead[ed] an inference that a board has undertaken no efforts to make sure it is informed of a compliance issue intrinsically critical to the company's business operations, then that supports an inference that the board has not made the good faith

effort that Caremark requires," and the complaint cannot be dismissed. Id. In the words of the Delaware Supreme Court, "if Caremark is to mean anything, it is that a corporate board must make a good faith effort to exercise its duty of care. A failure to make that effort constitutes a breach of the duty of loyalty." Id. In as much as each and every member of the board is alleged to be culpable for this breach over a years-long period, the complaint pleads cognizable claims for breach of fiduciary duty and negligence and is sufficiently particular under CPLR 3016(b).

B. Motion to Dismiss Pursuant to CPLR 3211(a)(1)

Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431 (1st Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010).

The branch of the motion seeking dismissal under CPLR 3211(a)(1) is grounded in a provision contained in the Certificate of Incorporation of Soupman, Inc. which the movants claim relieves them of liability. The provision states that "no director of the corporation shall be personally liable to the

corporation or any of its stockholders for monetary damages for breach of fiduciary duty as a director except for liability: (i) for any director's duty of loyalty to the corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law or…for any transaction from which the director derived an improper benefit."

However, the complaint adequately alleges that the moving defendants failed to make a good faith effort to exercise its duty of care to the plaintiff, and thereby violated a duty of loyalty. Id. Such allegations belie the assertion that the purportedly exculpatory provision in Soupman Inc.'s Certificate of Incorporation resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim. See Fortis Financial Services, LLC v Fimat Futures USA, supra. This mandates the denial of the motion to dismiss under CPLR 3211(a)(1).

C. Gannon, Sugarman, and Casale's Motion to Dismiss Pursuant to CPLR 3211(a)(5)

Defendants Gannon, Sugarman, and Casale argue that the breach of fiduciary duty and negligence claims are time-barred as to them. Pursuant to CPLR 3211(a)(5), this court may dismiss claims as barred by the applicable statute of limitations if a

defendant meets its *prima facie* burden of establishing that the time in which to sue has expired. See Kennedy v Fischer, 78 AD3d 1016 (1st Dept. 2010). The burden then shifts to the plaintiff to raise a question of fact as to whether the limitations period is tolled, is otherwise inapplicable, or whether the plaintiff commenced the action within the limitations period. See New York City Sch. Const. Auth. v Ennead Architects, LLP, 148 AD3d 618 (1st Dept. 2017); Educ. Res. Inst., Inc. v Hawkins, 88 AD3d 484 (1st Dept. 2011).

Defendants Gannon, Sugarman, and Casale argue that the statute of limitations for breach of fiduciary duty and negligence are governed by the three-year statute codified under Delaware law under 10 Del. C. §3106 because Soupman, Inc. was incorporated in Delaware. See Potter v Arrington, 810 NYS2d 312 (applying Delaware's three-year statute of limitations to plaintiff's claims for breach of fiduciary duty against defendant directors of Delaware corporation). The plaintiff argues in opposition that because Soupman, Inc.'s principal place of business was in New York, the six-year statute of limitations under CPLR 213(7) applies inasmuch as this is a claim brought "by or on behalf of a corporation against a present or former director or officer…to enforce a liability." In reply, the defendants argue that even if its causes of action are governed by New York law, the "borrowing statute" in CPLR

202 would still require application of the three-year statute of limitation because Soupman is a Delaware corporation that is not a resident of New York, and thus, CPLR 205 requires the application of the shorter Delaware statute of limitations that is applicable to such claim where the Soupman, Inc. resides.

The moving defendants' contention that the borrowing statute must apply here is misplaced. CPLR 205 applies only if the cause of action accrued outside of New York and the plaintiff is a non-resident. See Norex Petroleum Ltd. v Blavatnik, 23 NY3d 665 (2014). However, in ascertaining where a cause of action accrued for purposes of applying CPLR 205, the Court of Appeals looks to the place-of-injury approach, under which the cause of action accrues where the injury occurred. See Deutsche Bank Nat'l Tr. Co. v Barclays Bank PLC, 34 NY3d 327 (2019).

Here, the injury alleged is economic in nature, and thus, the cause of action accrues where the economic impact of the defendant's alleged conduct is felt. See id. Barring "unusual circumstances," which do not exist in this case, the economic impact is said to be felt in the state of plaintiff's residence. Id. Soupman's financial disclosures state that it is "headquartered in New York," which was its principal place of business when the injuries are alleged to have occurred. As

such, the plaintiff has sufficiently raised an issue of fact for the purposes of defeating the motion under CPLR 3211(a)(5) that New York is where Soupman Inc. felt the economic impact of the defendants' alleged misconduct at the time the injuries occurred. See Loreley Financing (Jersey) No. 28 Ltd. v Merrill Lynch, Pierce Fenner & Smith, Inc., 117 AD3d 463 (1st Dept. 2014); Oxbow Clacining USA, Inc. v American Indus. Partners, 96 AD3d 646 (1st Dept. 2012). All three of these moving defendants are alleged to have been directors of Soupman, Inc. within six years of October 31, 2018, the date the action was commenced. As the six-year statute of limitations under CPLR 213(7) may apply, the motion to dismiss under CPLR 3211(a)(5) is denied.

IV. CONCLUSION

For the reasons set forth herein, the motion is denied in its entirety.

Accordingly, it is hereby,

ORDERED that the motion of defendants Jamieson Karson, Daniel Rubano, Ronald Crane, Rocco Fiorentino, Randy Beller, James Shipp, Tim Gannon, Lloyd Sugarman, and Arnold Casale to dismiss the complaint pursuant to CPLR 3211(a)(1), (5), and (7) is denied in its entirety, and it is further,

ORDERED that the parties are to contact chambers prior to June 30, 2020 to schedule a preliminary/settlement conference.

This constitutes the Decision and Order of this Court.

Dated: May 21, 2020

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON