IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

H. GENE SILVERBERG, individually and derivatively,	)	
Plaintiff,	)	12CH42722
v.	)	No. ~~10 L 003514~~
RICHARD KINCAID, RICK GASAWAY, SAGE BOTANIC MEDIA, LLC, a Delaware Limited Liability Company, and SAGE VERTICAL GARDEN SYSTEMS, LLC,	)	Calendar 16
	)	Judge David B. Atkins
Defendants.	)	

MEMORANDUM OPINION AND ORDER

THIS CAUSE COMING ON TO BE HEARD on defendants Richard Kincaid's, Rick Gasaway's, and Sage Vertical Garden Systems, LLC's Combined Motion to Dismiss pursuant to 735 ILCS 5/2-619.1, and the court having considered the briefs submitted and the arguments of counsel, and the court being fully advised in the premises,

IT IS HEREBY ORDERED that defendants' motion to dismiss is granted in part and denied in part.

Background

This case arises over a business dispute pertaining to defendant Sage Botanic Media, LLC ("Sage").[1] (Ver. Compl. ¶ 4) Sage is a marketing company that sells live vertical garden walls containing advertising messages. (*Id.*) Plaintiff H. Gene Silverberg invented the original Sage "garden tower" in 2009. (*Id.* at ¶ 5) Shortly thereafter, plaintiff approached defendant Richard Kincaid to solicit investment capital for Sage. (*Id.* at ¶ 6) Kincaid contributed $500,000 as an initial investment towards Sage; plaintiff assigned his intellectual property to the company as his initial contribution. (*Id.* at ¶¶ 6-7) The company continued to expand and by January 2012 it was valued at $10 million.[2] (*Id.* at ¶ 11)

In May 2011, plaintiff was replaced as CEO by defendant Rick Gasaway, an associate of Kincaid's. (*Id.* at ¶¶ 13-15) Although plaintiff opposed Gasaway's hiring, he allegedly "went along" because Kincaid threatened to cease providing additional funding for Sage if he did not. (*Id.* at ¶¶ 14-15) In November 2011, a former Sage senior product manager filed a sexual

[1] The corporate name may have been changed to Sage Vertical Garden Systems, LLC. (Ver. Compl. ¶ 4)
[2] At other points in the Verified Complaint, plaintiff alleged that Sage was valued at $10 million in January 2011. (*Id.* at ¶ 26)

harassment lawsuit against plaintiff. (Mot. Ex. E) On November 28, 2011, plaintiff executed an Indemnification Agreement wherein he agreed to indemnify Sage and its personnel for any liability incurred in connection with the lawsuit. (Mot. Ex. C)

On March 22, 2012, Kincaid asked plaintiff to leave the company. (Ver. Compl. ¶ 16) It would appear that plaintiff left the company at some point,[3] but the exact date is unclear from the complaint. Plaintiff alleges that prior to his departure he was "methodically marginalized, ignored, embarrassed, isolated and separated" from Sage personnel. (*Id.* at ¶ 18) Plaintiff further alleges that Kincaid and Gasaway devalued and mismanaged the company and its intellectual property through a series of poor management decisions. (*Id.* at ¶¶ 20-17)

On November 29, 2012, plaintiff filed his four-count Verified Complaint ("complaint") alleging breach of the covenant of good faith and fair dealing (Count I), defamation *per se* and *per quod* (Count II), invalid restrictive covenant not to compete (Count III), and a derivative action for waste, mismanagement, and breach of fiduciary duty (Count IV). On July 23, 2013, defendants filed the present combined motion to dismiss. The court heard oral argument on November 6, 2013.

Legal Standard

The Illinois Code of Civil Procedure ("Code") permits a litigant to combine a motion to dismiss pursuant to 735 ILCS 5/2-615 and 735 ILCS 5/2-619 in a single motion. 735 ILCS 5/2-619.1; *Jenkins v. Concorde Acceptance Corp.*, 345 Ill. App. 3d 669, 674 (1st Dist. 2003). However, a combined motion must be in parts. 735 ILCS 5/2-619.1. Each part shall be limited to either section 2-615 or section 2-619 and each part must clearly show the grounds for relief under the section upon which it is based. *Id.*; *Storm & Assocs., Ltd. v. Cuculich*, 298 Ill. App. 3d 1040, 1046 (1st Dist. 1998) ("Meticulous practice dictates that the movants clearly state the section of the Code under which a motion to dismiss is brought."). Defendants' motion meets these requirements.

The court will address defendants' section 2-615 arguments first because a section 2-619 motion admits the sufficiency of the plaintiff's complaint. *See Wabash Co. v. Ill. Mun. Ret. Fund*, 408 Ill. App. 3d 924, 929 (2d Dist. 2011).

Discussion

Plaintiff contends that he is entitled to discovery and an evidentiary hearing when defending against a motion to dismiss pursuant to 735 ILCS 5/2-619. As *In re Buck* explains, such a hearing is only required where a court is charged with deciding a contested issue of fact. *See* 318 Ill. App. 3d 489, 498 (1st Dist. 2000). In this case, plaintiff's complaint is being stricken with leave to replead. Whether factual issues exist in the amended complaint and whether defendants challenge them in a subsequent motion to dismiss remains to be seen. Thus, plainitff's right to discovery and an evidentiary hearing cannot be determined at this time. The court will defer its ruling on this matter to a later date, if necessary.

[3] The Verified Complaint makes mention of a severance agreement. (Ver. Compl. ¶ 29)

The response also states that "[p]laintiff will replead Count III." (Resp. at 15) At oral argument plaintiff clarified that Count III, in its current form, is withdrawn. It is unclear precisely what cause of action is alleged in Count III, but it appears the claim is based on a purportedly invalid covenant not to compete. As defendants point out in their motion, the terms of the covenant not to compete have expired. Accordingly, to the extent that plaintiff intends to replead Count III by seeking an injunction or a declaratory judgment pertaining to the covenant not to compete, the court notes that such actions would be moot.

735 ILCS 5/2-615

Illinois is a fact-pleading jurisdiction. *Weiss v. Waterhouse Sec., Inc.*, 208 Ill. 2d 439, 451 (2004). A motion to strike or dismiss pursuant to 735 ILCS 5/2-615 challenges only the legal sufficiency of a pleading. *Jarvis v. South Oak Dodge, Inc.*, 201 Ill. 2d 81, 85 (2002). The central inquiry is whether the allegations, when considered in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Id.* at 86. In reviewing the sufficiency of a claim, a court must accept as true all well-pled facts and all reasonable inferences that may be drawn from those facts. *Tedrick v. Cmty. Res. Ctr., Inc.*, 235 Ill. 2d 155, 161 (2009). The court may only consider the allegations of the pleading and the attached exhibits. *Haddick v. Valor Ins.*, 198 Ill. 2d 409, 413-14 (2001). A pleading should not be dismissed unless it appears there is no set of provable facts that would entitle the plaintiff to recovery. *Id.*

Count I, a claim for breach of good faith and fair dealing, is rooted in the agreements governing the creation of Sage and plaintiff's employment with the company. These agreements are the Amended and Restated Limited Liability Company Agreement of Sage Botanic Media, LLC ("the LLC Agreement") and the Service Agreement.[4] (*See* Mot. Exs. A-B)[5] The LLC Agreement is governed by Delaware law whereas the Service Agreement is governed by Illinois law. The LLC Agreement will be discussed in this section and the Service Agreement will be discussed in the section addressing defendants' section 2-619 arguments.

Under Delaware law, the implied covenant of good faith and fair dealing attaches to every contract by operation of law. *Gloucester Holding Corp. v. U.S. Tape & Sticky Prods., LLC*, 832 A.2d 116, 128 (Del. Ch. 2003). This covenant refers to a duty of each contracting party to act towards the other in good faith and to deal fairly. To state a claim for breach of the covenant of good faith and fair dealing, a plaintiff must allege (1) a specific implied contractual obligation, (2) a breach of that obligation, and (3) resulting damage to the plaintiff. *Kuroda v. SPS Holdings, L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009).

Although plaintiff makes various allegations of mistreatment and isolation at the hands of defendants, he fails to connect these allegations to a particular contractual provision, or even to a particular agreement. Indeed, the duty of good faith and fair dealing pertains to the execution of

[4] A First Amendment to the Service Agreement was executed on June 29, 2011. (*See Ver. Compl.* ¶ 29(o)) This amendment is not attached to the complaint but it is part of defendants' motion to dismiss.

[5] The original LLC Agreement is attached to the complaint but the amended LLC Agreement is not. Further, the exhibits to the complaint are not labeled. Accordingly, the court will refer to the exhibits attached to defendants' motion.

a party's contractual obligations. For instance, as defendants note in their motion, plaintiff complains about Gasaway being hired even though the LLC Agreement allowed Kincaid to hire additional managers with plaintiff's approval, which plaintiff gave in writing[6] as to Gasaway. (*See* Ver. Compl. ¶ 29, Ex. A) At a minimum, plaintiff must specify which contractual provisions were breached by Gasaway's hiring, and how they were breached, in order to state a claim. Because he has failed to do so, Count I is stricken.

Count IV is a derivative action against Sage based on Kincaid's and Gasaway's alleged waste, mismanagement, and breach of fiduciary duty. Both sides agree that Count IV is governed by Delaware law. The Delaware Limited Liability Act allows a member of a limited liability company to bring a derivative suit against the company if the complaint sets forth "with particularity the effort, if any, of the plaintiff to secure initiation of the action by a manager or member or the reasons for not making the effort." Del. Code. Ann. Tit. 6 § 18-1001, 1003. Likewise, Delaware corporation law prohibits a stockholder from pursuing a derivative action unless the stockholder has either made a demand that the directors pursue the claim on behalf of the company and the directors have wrongfully refused or has established that pre-suit demand is futile because the directors are incapable of making an impartial decision. *See Wood v. Baum*, 953 A.2d 136, 140 (Del. 2008). Further, a plaintiff is required to allege particularized facts establishing reasonable doubt that the directors could have acted independently and disinterestedly when responding to the demand. *Id.*

Derivative actions are also subject to additional pleading requirements created by the business judgment rule. The rule is "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). The party challenging the decision has the burden of alleging facts to rebut the presumption. *Id.* at 812.

It is possible that plaintiff has alleged sufficient facts to sustain a derivative action. However, Count IV incorporates all prior paragraphs of the complaint[7] so it is difficult to know with particularity which allegations plaintiff relied on for this claim. Depending on which allegations Count IV is based upon, plaintiff may have sufficiently pled demand or the futility of demand. However, this is certainly not made clear in the complaint and defendants are not reasonably informed of the claim they are called upon to answer. *See* 735 ILCS 5/2-612. Accordingly, Count IV is stricken.

Finally, Count II is a claim for defamation based on statements presumably[8] made by Kincaid. (*See* Mot. Ex. D) A statement is defamatory if it "tends to cause such harm to the reputation of another that it lowers that person in the eyes of the community or deters third persons from associating with [him/her]." *Emery v. Northeast Ill. Reg'l Commuter R.R. Corp.*,

[6] At oral argument, plaintiff argued that he gave his signed consent to Gasaway's hiring under duress but this allegation is not in the complaint.

[7] This practice is in violation of 735 ILCS 5/2-613 which requires each count to be pled separately. Further, certain paragraphs are impermissibly pled in a narrative fashion. (*See e.g.* Ver. Compl. ¶¶ 20-26, 29) Although these points were not raised by defendants, the court merely points them out in light of the fact that plaintiff will be granted leave to file an amended complaint.

[8] The complaint alleges that "defendant" made the defamatory statements without delineating which defendant.

377 Ill. App. 3d 1013 (1st Dist. 2007) (*quoting Bryson v. News Am. Publ'ns, Inc.*, 174 Ill. 2d 77, 87 (1996)). Statements are considered defamatory *per quod* if the defamatory character of the statement is not apparent on its face, and extrinsic facts are required to explain its defamatory meaning. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill.2d 1, 10 (1992). In such cases, a plaintiff must plead and prove actual damages as a result of the alleged defamation. *Bryson*, 174 Ill. 2d at 87. By contrast, a statement is defamatory *per se* when it is so "obviously and naturally harmful to the person to whom it refers that a showing of special damages is necessary." *Anderson v. Vanden Dorpel,* 172 Ill. 2d 399, 411-12 (1996).

"To state a defamation claim, a plaintiff must present facts [establishing (1)] that the defendant made a false statement about the plaintiff, [2] the defendant made an unprivileged publication of that statement to a third party, and [3] that this publication caused damages." *See Solaia Tech., LLC v. Specialty Publ'g Co.*, 221 Ill. 2d 558, 579 (2006). Publication is "an essential element" of a cause of action for defamation. *Popko v. Cont'l Cas. Co.*, 355 Ill. App. 3d 257, 261 (1st Dist. 2005).

Defendants argue that the allegedly defamatory statements delineated in the complaint are drawn exclusively from a May 8, 2102 termination letter sent only to plaintiff. As such, they contend the complaint does not allege these statements were ever published to a third party. To be clear, the list of defamatory statements that appears in paragraph 34 of the complaint does not appear to be drawn exclusively from the termination letter. (*Compare* Ver. Compl. ¶ 34 *with* Mot. Ex. D) Nevertheless, publication is still an essential element of a defamation claim.

At oral argument, plaintiff's counsel argued that he need not plead publication with specificity and that the allegations in paragraph 36 of the complaint were sufficient. Paragraph 36 states that "[d]efendant, with actual malice, published, or caused the publication of, said false and defamatory statements, and therefore and thereby distributed, or caused the distribution of, copies of said defamatory statements so that colleagues and other business associates of plaintiff would read and hear such statements about plaintiff." (Ver. Compl. ¶ 36) This bald allegation of publication is not enough to meet Illinois' fact pleading requirements.

Even if these allegations were sufficient, the allegedly defamatory statements are not pled with specificity. The complaint dos not indicate to whom they were made, when they were made, or even who made them. Thus, the complaint fails to sufficiently allege defamation and Count II is stricken.

735 ILCS 5/2-619

A motion to dismiss pursuant to 735 ILCS 5/2-619(a) admits the legal sufficiency of the plaintiff's claim but asserts an "affirmative matter" outside of the pleading that defeats the claim. *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). "Affirmative matter" is something in the nature of a defense that negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint. *Fancher v. Central Ill. Pub. Serv. Co.*, 279 Ill. App. 3d 530, 534 (5th Dist. 1996). Affirmative matter must be something more than evidence offered to refute a well-pled fact in the complaint. *Id.* A dismissal pursuant to section 2-619 is proper when a movant's showing of undisputed facts

would entitle the movant to judgment as a matter of law. *Webb v. Damisch*, 362 Ill. App. 3d 1032, 1037 (1st Dist. 2005).

Defendants' motion argues that, to the extent Count I and Count II seek to impose individual liability on Kincaid, those counts should be dismissed with prejudice because Kincaid was acting in his capacity as a manager of Sage. Indeed, it would seem that the individual claims against Kincaid, as pled, are barred under both Illinois and Delaware law. For instance, the Illinois Limited Liability Company Act states, in relevant part:

> [T]he debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.

805 ILCS 180/10-10(a).

Likewise, the Delaware Limited Liability Company Act states, in pertinent part:

> Except as otherwise provided by this chapter, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company, and no member or manager of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.

Del. Code. Ann. tit. 6, § 18-303(a).

Finally, the LLC Agreement itself provides that:

> No Member or Manager shall, by virtue of his status as a Member or his ownership of an Interest, be liable for the debts, obligations or liabilities of the Company, including but not limited to a judgment decree or order of a court.

(Mot. Ex. A)

Defendant does not address this contention in his response. Moreover, the allegations of the complaint indicate that any action taken by Kincaid was taken in his capacity as a manager of Sage, not in an individual capacity. Count I stems from agreements Kincaid signed solely on behalf of Sage. Likewise, the statements in Count II pertain exclusively to business matters. While it may be possible that plaintiff could state a cause of action against Kincaid for some cognizable claim, the current complaint, as alleged,[9] does not give rise to any such claim. Accordingly, the allegations pertaining to Kincaid's individual liability are stricken.

[9] For instance, at oral argument plaintiff levied allegations of fraud against Kincaid but there is no fraud claim in the complaint.

Finally, defendants correctly point out that, in Illinois, the covenant of good faith and fair dealing is generally[10] a rule of construction, not an independent cause of action. *See Voyles v. Sandia Mortgage Corp.*, 196 Ill. 2d 288, 297 (2001) (*citing Cramer v. Ins. Exch. Agency*, 174 Ill. 2d 513, 535 (1996)). Thus, while plaintiff may use the covenant of good faith and fair dealing as part of a breach of contract claim, it cannot sustain an independent cause of action. Therefore, to the extent that Count I is based on the Services Agreement, that portion of Count I is dismissed with prejudice.

WHEREFORE, defendants Richard Kincaid's, Rick Gasaway's, and Sage Vertical Garden Systems, LLC's Combined Motion to Dismiss is granted in part and denied in part. Counts I, II, and IV are stricken pursuant to 735 ILCS 5/2-615. Plaintiff H. Gene Silverberg has indicated that Count III, in its current form, is withdrawn. Furthermore, any portion of Count I based on the Service Agreement is dismissed with prejudice pursuant to 735 ILCS 5/2-619. Finally, any allegations of individual liability on the part of Richard Kincaid are stricken pursuant to 735 ILCS 5/2-619. Plaintiff H. Gene Silverberg has until December 6, 2013 to file an amended complaint.

JUDGE DAVID B. ATKINS
ENTERED:
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Judge David B. Atkins

The Court.

[10] The exception to this rule is that "a separate action in tort would remain available when an insurer breaches its duty to settle an action brought against the insured by a third party." *Cramer v. Ins. Exch. Agency*, 174 Ill. 2d 513, 525 (1996). This exception is not applicable here.