ORDERED in the Southern District of Florida on April 20, 2015.

Erik P. Kimball, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

In re: — **Case No. 14-11440-EPK**

JOHN THOMPSON STILLEY, — **Chapter 7**

Debtor.
_______________________________________/

JOANNE LABARBERA, individually,
And the ESTATE OF SANTO LABARBERA,
With JOANNE LABARBERA as its
EXECUTRIX,

Plaintiffs,

vs. — **Adv. No. 14-01459**

JOHN THOMPSON STILLEY,
SEAFOOD HOUSE, INC., SEAFOOD
HOUSE, LLC, SUSAN CHILDS,
And GEORGE MICHAEL AS TRUSTEE
OF THE REGINA S. MICHAEL
FAMILY TRUST,

Defendants.
_______________________________________/

ORDER GRANTING MOTION TO DISMISS

THIS MATTER came before the Court upon the *Motion to Dismiss Amended Complaint* [ECF No. 45] (the "Motion") filed by John Thompson Stilley, a defendant in this adversary proceeding and the debtor in the above-captioned bankruptcy case. Mr. Stilley seeks to dismiss in its entirety the *First Amended Complaint to Liquidate Claims Objecting to Dischargeability Under 11 U.S.C. § 523* [ECF No. 39] (the "Amended Complaint") filed by Joanne LaBarbera and the Estate of Santo LaBarbera.

The Amended Complaint requests relief in seven counts. In five of the counts, the plaintiffs request that the Court hold the defendants, including Mr. Stilley, liable on a variety of civil charges based in contract and tort law. The final two counts request a finding of nondischargeability under 11 U.S.C. § 523 for any claims established against Mr. Stilley under the first five counts.

Mr. Stilley argues in his Motion that the Amended Complaint fails to state a claim against any defendant and thus requests dismissal with prejudice. The Court has considered the briefs and is otherwise fully advised in the premises.

STATEMENT OF FACTS

Analysis of the legal claims at issue requires a recounting of the decades-long relationship among the parties in this case. The following is a recitation of the facts alleged by the plaintiffs consistent with that presented in the Amended Complaint.

Formation and Operation of Seafood House, Inc.

On November 23, 1993, Santo LaBarbera incorporated Seafood House, Inc. under Florida law by filing articles of incorporation with the Department of State. As the sole director of Seafood House, Inc., Mr. LaBarbera then adopted by-laws for the new corporation. The provisions of the articles and by-laws of Seafood House, Inc., and alleged violations of those articles and by-laws, are a primary subject of the Amended Complaint.

Seafood House, Inc. operated as Snapper's, a seafood restaurant in Boynton Beach, Florida. Soon after founding the business, Mr. LaBarbera sought a partner to undertake day-to-day responsibilities at Snapper's. Accordingly, in 1994 Mr. LaBarbera, in his role as president, caused Seafood House, Inc. to enter into a formal agreement (the "Written Agreement") with Mr. Stilley under which Mr. Stilley took responsibility for daily operation of the restaurant. Under the Written Agreement, Seafood House, Inc. issued to Mr. Stilley 49 of its 100 authorized shares, control over the corporate records, and a salary equal to 50% of the restaurant's profits. In exchange, Mr. Stilley agreed to work at least 50 hours per week at the restaurant.

According to the plaintiffs, the Written Agreement was implemented in parallel with an oral agreement (the "Oral Agreement") that created a partnership between Mr. LaBarbera and Mr. Stilley. The Oral Agreement allegedly was entered into in late 1993 or early 1994 and included terms similar to those contained in the Written Agreement. However, the Oral Agreement was formed not between Mr. Stilley and the corporation, but between Mr. Stilley and Mr. LaBarbera personally. According to the plaintiffs, Mr. LaBarbera and Mr. Stilley agreed that shares of the corporation would be divided 51% to Mr. LaBarbera and 49% to Mr. Stilley and that profits would be split 50/50.

The restaurant was a financial success. The parties profited from the venture without notable conflict until January 1, 1997, when Mr. LaBarbera died. Upon his death, Mr. LaBarbera's estate (the "LaBarbera Estate") obtained ownership of his 51 shares of Seafood House, Inc. pursuant to a will executed in Florida in 1974. In his will, Mr. LaBarbera bequeathed his 51 shares in equal measure to his children Nicholas LaBarbera, Susan Childs, and Joanne LaBarbera.

Execution of the LaBarbera Estate

Upon Mr. LaBarbera's death in January 1997, Mr. LaBarbera's three children obtained control of the LaBarbera Estate as co-executors. Florida Statutes § 733.615 requires unanimous consent by all co-executors of a decedent's estate for "all acts connected with the administration and distribution of the estate." In other words, absent court intervention, to effectuate distribution of the shares of stock in Seafood House, Inc. formerly owned by Mr. LaBarbera required unanimous consent of Mr. LaBarbera's three children.

Consensus proved elusive. Between 1997 and 2005, the LaBarbera Estate retained possession of the 51 shares of Seafood House, Inc. Mr. LaBarbera's share of profits from the corporation was paid to the LaBarbera Estate. According to the Amended Complaint, during this period Mr. Stilley grew resentful of Mr. LaBarbera's children, whom he saw as undeserving of the large dividends paid them via the LaBarbera Estate.

Transfers of Shares

On May 18, 2006, Susan Childs, as president of Seafood House, Inc., together with Mr. Stilley as its secretary, signed stock certificates Nos. 6, 7, and 8. These stock certificates purported to distribute 17 shares of the corporation, then held in the LaBarbera Estate, to each of Mr. LaBarbera's three children, consistent with his will. In the Amended Complaint, the plaintiffs allege that this was done without unanimous consent of the co-executors of the LaBarbera Estate, nor were the corporate documents of Seafood House, Inc. amended to permit issuance of additional shares. The plaintiffs allege that the new or replacement shares were issued in violation of the bylaws of the corporation and Florida law.

On July 14, 2006, Nicholas LaBarbera sold the 17 shares in Seafood House, Inc. he purported to own to Mr. Stilley for consideration. As a result, Mr. Stilley declared himself the owner of 66 shares of Seafood House, Inc., and thus its controlling shareholder. Mr.

Stilley then caused the corporation to cease paying to the LaBarbera Estate a portion of the profits from operation of the restaurant representing the 17 shares allegedly purchased.

Aftermath

Joanne LaBarbera was aware of the stock issuance and transfer, and made her objections known to her siblings and Mr. Stilley, but took no formal action. During the two years following the distribution of stock on May 18, 2006, the restaurant continued to operate substantially as it had before.

On May 8, 2008, Mr. Stilley, acting in the capacity as majority shareholder of the corporation, executed two "Written Consents." By these documents, Mr. Stilley appointed himself and his wife as executive officers of Seafood House, Inc. He then caused the corporation to rescind the Written Agreement and awarded himself a salary of $250,000 per annum. The plaintiffs allege that Mr. Stilley acted out of anger and resentment toward Mr. LaBarbera's children, including the plaintiff Joanne LaBarbera. After the execution of the Written Consents, Seafood House, Inc. discontinued payment of dividends to shareholders.

In 2010, Nicholas Labarbera and Susan Childs resigned as co-executors of the LaBarbera Estate, leaving Joanne LaBarbera as the sole executor. Their resignation freed Ms. LaBarbera to initiate litigation in Palm Beach County Circuit Court on March 22, 2011 on behalf of the LaBarbera Estate. Ms. LaBarbera and the LaBarbera Estate filed a number of complaints in that case, four of which were dismissed and the last of which was stayed by the present bankruptcy case.

On December 27, 2012, Mr. Stilley caused Seafood House, Inc. to be converted to a Limited Liability Company. The formation documents named Mr. Stilley and his spouse as managing members.

On January 22, 2014, Mr. Stilley filed the instant bankruptcy case under chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq*. On May 28, 2014, the plaintiffs commenced this adversary proceeding with the filing of the *Complaint* [ECF No. 1], which the Court dismissed without prejudice for failure to state a claim upon which relief could be granted. ECF No. 34. The Plaintiffs thereupon filed the Amended Complaint [ECF No. 39] at issue here.

ANALYSIS

Count I

In Count I, the plaintiffs request declaratory relief pursuant to 28 U.S.C. § 2201 and Fed. R. Bankr. Proc. 7001. The plaintiffs ask the Court to find that the May 2006 issuance of shares of stock in Seafood House, Inc. to Mr. LaBarbera's three children consistent with Mr. LaBarbera's will (the "2006 Stock Distribution") was not valid under the articles and by-laws of Seafood House, Inc. and was not authorized under Florida law regarding co-execution of decedent's estates. The plaintiffs ask the Court to find that the sale of stock from Nicholas LaBarbera to Mr. Stilley was thus also not valid. Finally, the plaintiffs ask the court to find that, as a result of the invalidity of the 2006 Stock Distribution, Mr. Stilley was never the majority shareholder of Seafood House, Inc. and thus lacked authority to execute the Written Consents, convert the corporation to an LLC, or cause the corporation to fail to make distributions to the plaintiffs. All of the relief requested in Count I stems from the plaintiffs' belief that the 2006 Stock Distribution was not valid.

To the extent Count I states a claim for breach of Florida law and the corporation's governing documents, the plaintiffs do not have standing to assert such claims as direct claims against Mr. Stilley or any other named defendant. Such claims are held by the corporation, Seafood House, Inc., and not by any present or former shareholder.

To the extent the plaintiffs may have suffered individual damage, as alleged in Count I, such damage is at most the indirect result of initial harm to the corporation. Direct harm to the plaintiffs individually is not plead with sufficiency under Florida law.

Last year, in *Dinuro Investments v. Camacho*, 141 So.3d 731 (Fla. 3rd Dist. Ct. App. 2014), a Florida appellate court clarified decades of Florida case law on the pleading of direct and derivative claims. The court stated as follows:

> In short, the current Florida doctrine explaining which actions should be maintained directly and which must be brought derivatively is incredibly opaque, the application often varying from case to case depending on the facts. In our view, the only way to reconcile nearly fifty years of apparently divergent case law on this point is by holding that an action may be brought directly only if (1) there is a direct harm to the shareholder or member such that the alleged injury does not flow subsequently from an initial harm to the company **and** (2) there is a special injury to the shareholder or member that is separate and distinct from those sustained by the other shareholders or members . . .

141 So.3d at 739-40 (emphasis in original). In other words, to sustain a personal claim a shareholder plaintiff must plead *both* direct initial harm *and* a special injury to the plaintiff that is distinct from that experienced by other owners. In this case, Mr. Stilley allegedly caused the initial harm to the company, by acts in violation of certain corporate protocols, but no direct harm is alleged with regard to the plaintiffs themselves. The Amended Complaint lacks allegations sufficient to support the first element under *Dinuro*.

Count I must fail because the claims stated are held by the corporation and not by any individual plaintiff, and because the plaintiffs fail to plead sufficient facts to support personal claims.[1] These shortcomings affect all defendants equally, and so the Court will dismiss Count I in its entirety.

[1] To the extent the allegations in Count I may be taken to present a claim arising under Florida Statutes § 733.615, regarding administration of decedents' estates, Mr. Stilley was not a co-executor of the LaBarbera Estate nor is it alleged that he obtained any duty under Florida law in this regard.

Count II

Count II presents claims for breach of the Written Agreement by Mr. Stilley. Neither of the plaintiffs is a party to the Written Agreement. The plaintiffs have standing to present such claims only if they are third-party beneficiaries of the Written Agreement.

The plaintiffs argue that Mr. LaBarbera was, and so the LaBarbera Estate is, a third-party beneficiary of the Written Agreement on two grounds: first, that Mr. LaBarbera's status as sole shareholder of Seafood House, Inc. prior to the execution of the Written Agreement necessitates such a finding; and, second, that the acts of the parties after forming the Written Agreement indicate that the Written Agreement was intended to benefit Mr. LaBarbera, personally, and thus the LaBarbera Estate. There is nothing in the Amended Complaint to support the contention that Joanne LaBarbera, personally, could be a third-party beneficiary of the Written Agreement.

Under Florida law, to support a claim as a third-party beneficiary of a contract, the plaintiff must show "'clear' or 'manifest' intent that the contract primarily and directly benefit the third party." *Jenne v. Church & Tower, Inc.*, 814 So.2d 522, 524 (Fla. 4th Dist. Ct. App. 2002). In determining the intent of the parties, "[t]he language used in a contract is the best evidence." *Boat Town U.S.A., Inc. v. Mercury Marine Div. of Brunswick Corp.,* 364 So.2d 15, 17 (Fla. 4th DCA 1978); *see Hollywood Lakes Country Club v. Cmty. Ass'n Servs., Inc.,* 770 So.2d 716, 719 (Fla. 4th Dist. Ct. App. 2000); *Horizon Images, Inc. v. Delta Color Graphics, Inc.,* 639 So.2d 186, 187 (Fla. 4th Dist. Ct. App. 1994) ("[T]here *must* . . . be a clear intention *in the contract* between [the contracting parties] to directly and substantially benefit [the third-party], in order for [the third-party] to sue on the third-party beneficiary theory") (emphasis added).

In *Jenne*, the leading case on this issue, a sheriff was unable to obtain third-party beneficiary status on a contract between the county government and a construction company for the construction of a new detention center. 814 So.2d at 523. The construction company's delayed performance on the contract cost the sheriff millions of dollars related to overcrowding of extant detention facilities. *Id.* at 523-24. The sheriff claimed third-party beneficiary status arguing that the intent of the contract was to prevent such costs. *Id.* at 524-25. The court held that the sheriff lacked standing because the contract was "intended to directly and primarily benefit the citizens" of the county that entered into the contract and not the sheriff. *Id.* at 525. The fact that the parties to the contract contemplated the sheriff's needs, and even required the sheriff's approval of certain contractual conditions, did not afford the sheriff status to sue over variation of the contract terms. *Id.*; *cf.* *Restatement (Second) of Contracts §* 311(1) (1981).

This case presents facts substantially identical to *Jenne* in the corporate context. As with the contract in *Jenne*, the Written Agreement contains no language indicating Mr. LaBarbera as an intended third-party beneficiary. Mr. LaBarbera's name appears only on the contract's signature page as a corporate representative of Seafood House, Inc. As in *Jenne*, there is little doubt that Mr. Stilley and Mr. LaBarbera contemplated Mr. LaBarbera's desires when negotiating the Written Agreement. Mr. LaBarbera caused Seafood House, Inc. to enter into the Written Agreement. However, Mr. LaBarbera was, and the LaBarbera Estate remains, distinct from Seafood House, Inc. In fact, unlike the sheriff in *Jenne*, Mr. LaBarbera had the opportunity to enter into a contract with Mr. Stilley personally. He chose not to take that opportunity.

The plaintiffs lack standing to pursue the claims presented in Count II. The Court will dismiss Count II in its entirety.

Count III

In Count III, the plaintiffs request relief on grounds of conversion. Although difficult to parse, it appears that in Court III the plaintiffs argue that they had a right to distributions from Seafood House, Inc. and that by obtaining control of Seafood House, Inc., terminating the Written Agreement, and assigning himself a salary, Mr. Stilley thus converted the plaintiffs' right to such distributions.

Conversion is an unauthorized act that permanently or indefinitely deprives another of his or her property. *Brand v. Old Republic Nat'l. Title Ins. Co.*, 797 So.2d 643, 646 (Fla. 3d. Dist. Ct. App. 2001); *cf. Wilson Cypress Co. v. Logan,* 120 Fla. 124, 127-28 (Fla. 1935). In other words, the tort claim of conversion requires a showing that the plaintiff had a right to certain property, and that the defendant acted to deprive the plaintiff thereof.

In Count III of the Amended Complaint, the plaintiffs fail to allege that they had any cognizable property right in the "profits" allegedly converted by Mr. Stilley, nor could they so allege.

The plaintiffs state that "Stilley has deprived [the LaBarbera Estate] . . . of profits resulting from its 51% ownership interest and the [Written] Agreement, whereby Stilley was required to pay 50% of the net profits of Snappers to the Estate each month." Complaint, ¶116. The Written Agreement contains no provision regarding payment to Mr. LaBarbera or any person other than Mr. Stilley. The Written Agreement provides that Mr. Stilley's "salary shall be based on fifty (50%) percent of the net profits each month." Complaint, Exh. C. The Written Agreement does not address what happens to the remaining profits, which apparently were to stay with the corporation to be used for other corporate purposes.

Although not directly addressed in Count III, the only agreement that might support the plaintiffs' claim of a property right is the alleged Oral Agreement. The plaintiffs argue that Mr. LaBarbera and Mr. Stilley agreed orally that they would split profits 50/50. As discussed more fully below, such an agreement violates the statute of frauds and is not enforceable. Even if a right to a payment under a contract is a sufficient property right to support a conversion claim, which appears doubtful, the plaintiffs can have no property interest in payments under an unenforceable contract.

Even so, the plaintiffs do not argue that Mr. Stilley took their right to payment under the Oral Agreement. They argue that Mr. Stilley caused the corporation to abrogate that agreement for his own benefit. This does not give rise to a conversion claim. Even if the Oral Agreement was enforceable, at most the plaintiffs might have a breach of contract claim against the corporation.

In the Motion, Mr. Stilley focuses on the statute of limitations, arguing that any conversion claim stated in Count III is time barred as it was brought (initially in state court) more than four years after the 2006 Stock Distribution. *See* Florida Statutes § 95.11(3)(o). Yet the "conversion" the plaintiffs point to in Count III is not a conversion of the shares of stock. In Count III, the plaintiffs repeatedly claim that Mr. Stilley converted the "profits" of the corporation allegedly due to the plaintiffs. If such a conversion claim could exist, the date of each such conversion would be the date Mr. Stilley took "profits" supposedly due to the plaintiffs. It is impossible to tell from the Amended Complaint when each taking may have occurred, and so it is not proper for the Court to dismiss Count III on statute of limitation grounds. This has no bearing on the Court's ruling here, as Count III will be dismissed for other reasons.

Count III fails to state a cognizable claim for conversion under Florida law and will be dismissed.

Count IV

In Count IV, the plaintiffs allege that Mr. Stilley breached his duty as a partner to Mr. LaBarbera, and thus the LaBarbera Estate, by failing to distribute 50% of the profits of the restaurant to the LaBarbera Estate. This claim is based on the alleged Oral Agreement between Mr. LaBarbera and Mr. Stilley to act as partners in the operation of Seafood House, Inc. and to split profits 50/50. Because Mr. LaBarbera was a party to this alleged agreement, the LaBarbera Estate has standing to bring this claim.

Mr. Stilley argues that this claim is void because the Oral Agreement is not enforceable as a partnership agreement under Florida law as it violates the statute of frauds, and so no breach of fiduciary duty claim can exist.

Florida Statutes § 725.01, provides in pertinent part:

> No action shall be brought ... upon any agreement that is not to be performed within the space of 1 year from the making thereof ... unless the agreement ... upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith...

Whether an agreement is "to be performed within the space of 1 year," under Florida law, is a factual determination of the intent of the parties to the agreement. While this typically requires the Court to consider evidence not appropriately before the Court at the motion to dismiss stage, Florida courts uniformly hold that the intent to establish an ongoing business is within the statute of frauds, rendering oral agreements unenforceable. *Bross v. Wallace*, 600 So.2d 1198, 1199 (Fla. 4th Dist. Ct. App. 1992); *see Yates v. Ball*, 132 Fla. 132, 181 So. 341 (Fla.1937)*; De Ribeaux v. Del Valle*, 531 So.2d 992 (Fla. 3d DCA 1988)*; Byam v. Klopcich*, 454 So.2d 720 (Fla. 4th DCA 1984). According to the Amended Complaint, Mr. LaBarbera and Mr. Stilley allegedly formed the Oral Agreement with the intent to sustain an ongoing business, the operation of the restaurant owned by Seafood House, Inc.. Under prevailing Florida law, such an agreement must be in writing. There was no written agreement between Mr. LaBarbera and Mr. Stilley. Thus, there was no partnership under Florida law and Mr. Stilley cannot be subject to a claim for breach of fiduciary duty to a partner. Count IV will be dismissed.

Count V

Under Count V, the plaintiffs claim that Mr. Stilley breached his fiduciary duty as managing member of Seafood House, Inc. by paying himself a salary that prevented distribution of profits to the members, including the plaintiffs.

To challenge the compensation of a corporate executive, "a shareholder must file a *derivative action* for breach of fiduciary duty, claiming that the payment of excessive compensation constitutes corporate waste." *Orlinsky v. Patraka*, 971 So.2d 796, 801-02 (Fla. 3rd Dist. Ct. App. 2007) (emphasis added); *see Rogers v. Hill*, 289 U.S. 582, 591-92 (1933); *Int'l Ins. Co. v. Johns*, 874 F.2d 1447, 1461 (11th Cir. 1989). In this case, as in all cases in which executive compensation is challenged as a breach of fiduciary duty, the officer of the entity allegedly inflicted a harm on the corporation. The plaintiffs suffered a harm that was at best indirect. *See Dinuro Investments v. Camacho* 141 So.3d at 739-40 (clarifying pleading standard for derivative and direct claims and rendering the standard applicable to LLCs); *Orlinsky*, 971 So.2d at 801-02. The plaintiffs have no standing to pursue the breach of fiduciary duty claim. The Court will dismiss Count V.

Counts VI and VII

The plaintiffs plead Count VI and Count VII under subsections of 11 U.S.C. § 523. Section 523 provides that "[a] discharge under section 727 . . . of this title does not discharge an individual debtor from any debt" that meets the specifications of various subsections. In other words, as the Court stated on the record at the hearing on September 10, 2014, "[t]here has to be a debt in order to have it excepted from discharge." ECF No. 36 at 23.

In this case, a debt could only exist if the plaintiffs successfully proved any of Counts I-V with regard to Mr. Stilley. The Court has determined to dismiss Counts I-V. Thus, the Court must dismiss Counts VI and VII as well.

Dismissal with Prejudice

The Court previously dismissed the plaintiffs' first complaint in this action, with leave to amend. The Court here considers the plaintiffs' second attempt to state valid claims. The Court is not required to permit further amendment, and declines to do so now. Dismissal will be with prejudice.

CONCLUSION

Therefore, being fully advised in the premises, it is ORDERED AND ADJUDGED that:

1. The Motion [ECF No. 45] is GRANTED in its entirety.
2. The Amended Complaint [ECF No. 39] is DISMISSED WITH PREJUDICE.

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Copies furnished to:

Cory S. Carano, Esq.

Cory S. Carano, Esq. is directed to serve a conformed copy of this order on all appropriate parties and file a certificate of service with the Court.