

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Ramos

PART 53

Index Number : 603151/2009

EITAN VENTURES, LLC,

vs

PEELED INC.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with accompanying Memorandum Decision.

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

Dated: 1/3/2011


CHARLES E. RAMOS^{S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
-----X

EITAN VENTURES, LLC;

Plaintiff,

-against-

Index No.
603151/09

PEELED INC., and NOHA WAIBSNAIDER,

Defendants.
-----X

Charles Edward Ramos, J.S.C.:

Defendants Peeled Inc. (Peeled) and Noha Waibsnaider (together, defendants) move for summary judgment dismissing the amended complaint (Complaint), and seek attorney's fees.

Background

The facts set forth below are taken from the parties' Rule 19-A Statements, affidavits and pleadings unless otherwise noted.

Plaintiff Eitan Ventures, LLC (Eitan) is a venture capitalist firm that invests in start-up companies. Peeled sells and markets dried fruit and nut snacks. Defendant Waibsnaider is Peeled's Chief Executive Officer.

In the spring of 2007, Peeled solicited an investment from Eitan. At the time, Peeled prepared an investor memo containing projections that it presented to Eitan. Waibsnaider allegedly made additional representations to Eitan about Peeled's revenue, cash flow and future prospects. On this basis, Eitan agreed to invest \$150,000 in Peeled.

Eitan's investment was evidenced by a promissory note (Note), that was to mature on December 31, 2009, and which was convertible to Peeled common stock pursuant to a convertible debt

agreement (Agreement) (Exhibit B, annexed to the Herschenfeld Aff.).

Pursuant to the Agreement, Peeled was permitted to prepay the Note in whole or in part at any time "as long as both parties mutually agree to the prepayment" (Agreement, § 1.2). The Agreement also provides that principal and interest under the Note is convertible "at the option of" Eitan, and would be converted "upon the earliest of (a) December 31, 2009, or (b) the closing of the Next Financing," as defined therein, at the conversion rate of \$60 per share (Agreement, §§ 3.1-3.2).

According to Eitan's principal, Ethan Herschenfeld, in August 2007, Waibsnaider approached him in order to solicit additional funds. At this time, Eitan requested updated financials, including monthly revenues. According to Herschenfeld, he discovered that Peeled's revenue was five times less than Peeled had previously represented. Eitan became very concerned about Peeled's ability to stay solvent, as financial statements that Peeled had provided showed revenues in dramatic decline. Eitan raised these concerns with Waibsnaider, who acknowledged that Peeled was having cash flow problems. Shortly thereafter, Peeled ceased providing financial information.

On December 14, 2009, Eitan sought to convert \$55,118 of the principal and interest due on the Note into common stock of Peeled. However, Peeled refused to recognize the conversion on the ground that the Agreement did not permit *partial* conversions of principal and interest. Six days later, on December 31, 2009,

Peeled attempted to repay in full the entire amount of outstanding principal and accrued interest, that amounted to \$205,118, which Eitan accepted under protest.

According to Eitan, Peeled frustrated its right to take an ownership interest in Peeled by partial conversion of principal and interest due on the Note. In March 2010, Eitan commenced this action alleging causes of action for fraudulent misrepresentation, breach of contract, and breach of fiduciary duty, against Waibsnaider.

Discussion

Peeled moves for summary judgment dismissing the complaint pursuant to CPLR 3212. According to Peeled, Eitan cannot prove an essential element of its fraud claim, namely, that it suffered damages because Peeled repaid Eitan the entire balance of the loan at its maturity, plus accrued interest at the contractual rate of fourteen percent. In addition, Peeled argues that the breach of contract claim arising out of its refusal to recognize a partial conversion of principal and interest is undermined by the language of the Agreement, which does not permit partial conversions. Finally, Peeled moves to dismiss the claim for breach of fiduciary duty under the well-established principal that an ordinary debtor and noteholder do not share a fiduciary relationship.

In opposition and in support of its fraud claim, Eitan insists that a plaintiff is permitted to recover in fraud based upon the loss of a business opportunity in reliance on a

defendant's fraud, and despite the fact that it "received a nominal return on the overall transaction" (Eitan's Memo in Opp, 13). Further, Eitan contends that there is no language in the Agreement limiting its right to convert, and that, at a minimum, the Court a triable issue of fact remains as to the parties' reasonable intent in this regard. As to the breach of fiduciary duty claim, Eitan argues that a fiduciary relationship was created with Waibsnider to the extent that Peeled and Eitan acted as joint venturers.

I. Fraud

Under New York's long-standing out-of-pocket rule, the true measure of damages for fraud is indemnity for the actual pecuniary loss sustained as the direct result of the wrong (*Starr Foundation v American Intl. Group, Inc.*, 76 AD3d 25 [1st Dept 2010]; *Rather v CBS Corp.*, 68 AD3d 49, 57-8 [1st Dept 2009], *lv appeal denied* 13 NY3d 715 [2010]). Under this rule, damages are to be calculated to compensate plaintiffs for what they lost as a result of the fraud, not to compensate them for what they might have gained (*Id.*).

Eitan's fraud claim, premised on allegations that it based its calculation of the Note's conversion price on Peeled's misrepresentation concerning its revenue, in other words what it would have obtained if it had received accurate data from Peeled, is precisely the kind of fraud claim that is barred by the out-of-pocket rule. The "loss of an alternative contractual bargain cannot serve as a basis for fraud or misrepresentation damages

because the loss of the bargain was 'undeterminable and speculative'" (*Starr Foundation v American Intl. Group, Inc.*, 76 AD3d 25).

Here, it is undisputed that Peeled repaid Eitan the entire balance of the Note plus accrued interest. Thus, Eitan cannot demonstrate that it sustained "actual pecuniary loss" as a result of any misrepresentation. Therefore, the motion for summary judgment is granted as to the fraud claim.

II. Breach of Contract

The court's role in interpreting an agreement is to ascertain the intent of the parties at the time that the agreement was entered into (*Evans v Famous Music Corp.*, 1 NY3d 452, 458-59 [2004]). If that intent is discernible from the plain meaning of the language of the contract, there is no need to look further, even if the contract is silent on the disputed issue (*Id.*).

Nonetheless, an agreement is ambiguous if it contains internal inconsistencies or on its face is reasonably susceptible to more than one interpretation, and extrinsic evidence is admissible to determine the parties' intent, in this regard (*Foot Locker, Inc. v Omni Funding Corp. of America*, 78 AD3d 513 [1st Dept 2010]; *Gessin Elec. Contractors, Inc. v 95 Wall Assocs., LLC*, 74 AD3d 516, 518-19 [1st Dept 2010]). A contractual provision is ambiguous where a natural and reasonable reading of its language allows for two or more possible meanings (*Innophos, Inc. v Rhodia, S.A.*, 38 AD3d 368, 375 [1st Dept 2007], *affirmed* 10

NY3d 25 [2008]).

This Court determines that, because the Agreement does not contain an ambiguity, interpretation of the contract as a matter of law is appropriate.

The Agreement permits Peeled to make a partial prepayment of the Note at any time, but only if both parties agree to the prepayment. There is no authority for any unilateral partial prepayment, or, as is sought here, partial conversion.

In light of this, there is no reasonable basis for this Court to conclude that the Agreement permits partial conversions.

III. Breach of Fiduciary Duty

Eitan alleges that its relationship with Peeled's CEO and controlling shareholder, Waibsnaider, was more akin to joint venturers. As a result, Eitan allegedly placed higher trust in her to provide it with complete and accurate information about Peeled's financial state and to refrain from interfering with its conversion of stock.

An indispensable element of a joint venture arrangement is the sharing of profits and losses, and the mutual control of management (*Magnum Real Estate Services, Inc. v 133-134-135 Assocs., LLC*, 59 AD3d 362, 363 [1st Dept 2009]). Here, the Agreement is a loan agreement, and Eitan fails to allege sufficient facts showing that Eitan and Waibsnaider were joint venturers.

Moreover, it is well-settled that the relationship between an ordinary debtor and a note-holding creditor generally does not

give rise to the existence of a fiduciary duty (*SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 354 [1st Dept 2004]). The fact that Peeled's principal purportedly knew that Eitan is a venture capital firm and provided it with sensitive financial information in the course of Peeled's solicitation of funding is insufficient to transform the contractual relationship into a fiduciary one.

Therefore, the motion for summary judgment is granted.

Finally, the Court denies Peeled's request for attorney's fees under 22 NYCRR § 130-1.1. In its discretion, the Court determines that the action is not so frivolous as to warrant this relief.

Accordingly, it is

ORDERED Defendants' motion for summary judgment is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of said defendant.

Dated: January 3, 2011

ENTER:



J.S.C.
CHARLES E. RAMOS