Northern Val. Partners, LLC v Jenkins
2010 NY Slip Op 30751(U)
April 6, 2010
Supreme Court, New York County
Docket Number: 101957/08
Judge: Eileen Bransten
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SCANNED ON 4/7/2010

[* 1]

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

PRESENT: _____ PART 3

Index Number : 101957/2008

NORTHERN VALLEY PARTNERS

vs.

JENKINS, JOHN, OGDEN, ROBERT

SEQUENCE NUMBER : 004

DISMISS

C

INDEX NO. 101957/08

MOTION DATE 11/19/09

MOTION SEQ. NO. 04

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... 1

Answering Affidavits — Exhibits 2

Replying Affidavits 3

FILED

APR 07 2010

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

[redacted] IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 4-6-10

E. Ilan Branstein J.S.C.

HON. EILEEN BRANSTEIN

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: PART 3

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NORTHERN VALLEY PARTNERS, LLC,
et al.,

Plaintiffs,

-against-

JOHN JENKINS, ROBERT OGDEN, MARK HARDY, KIRK HANSON, RODGER R. KROUSE, MARC J. LEDER, CLARENCE E. TERRY, M. STEVEN LIFF, STEPHEN G. MARBLE, T. SCOTT KING, GARY F. HOLLOWAY, C. DARYL HOLLIS, and GEORGE R. REA,

Defendants.

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Index No. 101957/08
Motion Date: 11/19/09
Motion Seq. Nos.: 004-007

FILED
APR 07 2010
NEW YORK
COUNTY CLERK'S OFFICE

PRESENT: EILEEN BRANSTEN, J.

In this action, plaintiffs allege they were defrauded into investing over $4.45 million in San Holdings, Inc. ("Sanz") and that their investment was rendered worthless when Sanz filed for liquidation 18 months after they placed their investment. Plaintiffs have sued Sanz's former management, defendants John Jenkins (former CEO), Robert Ogden (former CFO), Mark Hardy and Kirk Hanson (former executives), in addition to the former members of Sanz's board of directors, defendants Rodger R. Krouse, Marc J. Leder, Clarence E. Terry, M. Steven Liff, Steven G. Marble, T. Scott King, Gary F. Holloway, C. Daryl Hollis, and George R. Rea (the "Director Defendants").

DISCUSSION

By memorandum decision and order dated April 14, 2009 ("Order"), this court dismissed the original complaint against the Director Defendants. Plaintiffs were granted

leave to serve an amended complaint, which they have done. In motion sequence no. 004, the Director Defendants (except for Gary F. Holloway, who has separate counsel) now move for dismissal of the May 22, 2009, first amended complaint, pursuant to CPLR 3211 (a) (8), for lack of personal jurisdiction, and, pursuant to CPLR 3211 (a) (7) and 3016 (b), for failure to state a fraud claim. Defendant Gary F. Holloway, defendants Mark Hardy and Kirk Hanson and defendants John Jenkins and Robert Ogden separately move, in motion sequence nos. 005, 006 and 007 respectively, for dismissal of the amended complaint's single count of fraud pursuant to CPLR 3211 (a) (7) and 3016 (b).

I. Lack of Personal Jurisdiction Over the Director Defendants

The allegations of the original complaint are summarized in the Order, and will not be repeated herein except as necessary (*see* Order at 2-6). In short, the court ruled that while a basis may exist to assert long-arm jurisdiction over the Director Defendants pursuant to CPLR 302 (a), the plaintiffs had failed to allege sufficient details regarding the transaction and its connection to New York to do so. Plaintiffs had failed to include how or where the alleged fraudulent misrepresentations were made and whether any of the Director Defendants derive substantial revenue from interstate commerce (*see* Order, at 8-10).

In opposition to the pending motion to dismiss, plaintiffs again argue that the court has personal jurisdiction over the Director Defendants pursuant to CPLR 302 (a). CPLR 302 (a) (1) and (2) provide that a court may exercise personal jurisdiction over any

non-domiciliary "who in person or through an agent" transacts any business within the state or commits a tortious act within the state.

Plaintiffs contend that the Director Defendants transacted business in New York. Plaintiffs state that the Director Defendants reached out to Monarch Capital in New York personally or through their agents, Jenkins, Ogden and Hardy, and initiated and directed the discussions regarding the possible investment (Amended Complaint, ¶ 14). Plaintiffs allege that the Director Defendants also committed a tortious act in New York by making misrepresentations and sending false and misleading information about the true financial condition of Sanz to the plaintiffs in New York. Plaintiffs further allege that the Director Defendants perpetrated a fraud upon the plaintiffs with respect to bonuses issued to Jenkins, Ogden, Hardy and Hanson.

Unlike the original complaint, the amended complaint is filled with detailed allegations regarding activities of Jenkins, Ogden and Hardy in New York pertaining to the contested transaction. The amended complaint details New York face-to-face meetings with plaintiffs' representative, Michael Potter of the New York firm Monarch Capital Group, Inc. ("Monarch Capital"), as well as formal presentations, telephone calls, and/or emails to and from this state. For example, plaintiffs now alleged that the January 23, 2006, telephone call between Potter and defendant Marc Leder, wherein they discussed the structure of the

plaintiffs' investment, occurred while Leder was at the New York offices of Sun Capital,[1] and that Potter had numerous telephone calls with Sun Capital's New York office to discuss and negotiate the investment. In addition, the amended complaint alleges that the financing deal closed in New York under agreements governed by New York law. This is a different story from the three New York contacts alleged in the original complaint (*see* Order, at 9), and far cry from the single letter mailed to New York that was deemed insufficient to form the basis of long-arm jurisdiction under CPLR 302 (a) (2) in *Bauer Industries v Shannon Luminous Materials Co.* (52 AD2d 897 [2d Dept 1976]), upon which the Director Defendants rely.

The key issue is now whether any of this activity can be ascribed to the Director Defendants to allow the court to exercise long-arm jurisdiction over those defendants. As the court previously held:

> A plaintiff attempting to invoke long-arm jurisdiction pursuant to CPLR 302 (a) (1) based on the actions of the defendant's agent, as in this case need not establish a formal agency relationship between the defendant and the agent; rather it only needs to convince the court that the agent engaged in purposeful activities in New York in relation to his transaction for the benefit of and with the knowledge and consent of the out-of-state defendants, and that they exercised some control over the agent in the matter (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]). However, "[t]o make a prima facie showing of 'control,' a plaintiff's allegations must sufficiently detail the

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[1] The amended complaint alleges that Sanz owed its largest investor, Sun Solunet, LLC, $14 million; that Sun Capital is the parent of Sun Solunet; and that Sun Capital controlled the majority of Sanz's common stock and had appointed a majority of the Sanz board (Amended Complaint ¶ 19).

> defendant's conduct so as to persuade a court that the defendant was a 'primary actor' in the specific matter in question; control cannot be shown based merely upon a defendant's title or position within the corporation, or upon conclusory allegations that the defendant controls the corporation" (*Karabu Corp. v Gitner*, 16 F Supp 2d 319, 324 [SD NY 1998]).

(Order, at 7).

The amended complaint satisfies the requirements for long-arm jurisdiction under CPLR 302 (a). The amended complaint alleges that Jenkins, Ogden and Hardy acted under the instruction of, and with the knowledge and support of their co-defendants who served on the Sanz board, and who were either employees of Sun Capital (Sanz's main investor) – defendants Krouse, Leder, Terry, Liff, Marble and King (Amended Complaint, ¶ 49) – or appointed to the Sanz board at the request of Sun Capital – defendants Hollis, Rea and Holloway (*id.*, ¶¶ 7, 49). The amended complaint alleges that, throughout the negotiations of the private placement of capital, Jenkins represented to Potter that he was in constant communication with the Director Defendants and that all financial information was approved by the Sanz board prior to its presentation to the plaintiffs (*id.*, ¶ 39); that the Sanz board was given detailed written updates on the status of negotiations with the plaintiffs (*id.*, ¶ 41 and Ex. A); how Sanz waited for and needed Sun Capital's approval of the proposed deal structure (*id.*); and that the board members who were independent of Sun Capital (defendants Hollis, Rea and Holloway) were apprised of all the terms and conditions of the private placement and approved of the transaction (*id.*). In addition, the amended complaint alleges

that the Director Defendants' motivation for defrauding the plaintiffs was to ensure that fresh capital was obtained in order to allow Sanz to repay the substantial sums it owed to Sun Capital (*id.*, ¶ 49). These allegations, if proven at trial, are sufficient for a jury to conclude that Jenkins, Ogden and Hardy, acting as agents of the Director Defendants, engaged in purposeful activities in New York in relation to the private placement transaction for the benefit of and with the knowledge and consent of the out-of-state Director Defendants, and that they exercised some control over Sanz's management team in the matter (*see Kreutter v McFadden Oil Corp.*, 71 NY2d at 467).

Since the amended complaint adequately states a basis for the exercise of long-arm jurisdiction over defendants Krouse, Leder, Terry, Liff, Marble, King, Hollis and Rea pursuant to CPLR 302 (a) (1) and (2), that portion of motion sequence no. 005 which seeks to dismiss the complaint for lack of personal jurisdiction is denied.

II. Failure to State a Claim For Fraud

Jenkins, Ogden and Hardy and Hanson each argue that the amended complaint fails to state a claim for fraud against them. Each claim that their alleged promise to make a bona fide investment in Sanz (*see* Amended Complaint, ¶ 24) was merely a non-actionable promise of future performance. However, a statement of future intention is actionable if the complaint also alleges that, at the time the promissory statements was made, the defendant never intended to honor or act upon his statement (*Deerfield Communications Corp. v*

Chesebrough-Ponds, Inc., 68 NY2d 954, 956 [1986]; *Crafton Bldg. Corp. v St. James Constr. Corp.*, 221 AD2d 407, 409 [1st Dept 1995]).

The amended complaint alleges that, at or about the same time that the Sanz management team promised Potter that they would make a bona fide investment in Sanz, Jenkins suggested awarding specific bonus amounts to the Director Defendants to enable them to participate in the placement of capital (Amended Complaint, ¶¶ 24-25). In their reply papers, defendants argue that plaintiffs have changed their story per the new opposing affidavit of Michael Potter sworn to on September 3, 2009. However, Potter does not claim that only Jenkins promised to invest in Sanz, only that this initially was the case. Potter clearly avers that Jenkins represented that *all* of the management defendants would invest in Sanz as a condition to plaintiffs' investment.

Defendants further argue that Jenkins' email dated February 23, 2006 to Holloway and Terry (*see* Amended Complaint, Ex. C), proves that Jenkins intended to invest $100,000 regardless of whether the Sanz board approved the bonuses. While this email is certainly evidence that Jenkins may use to defend himself, it does not conclusively refute plaintiffs' fraud claims, even assuming the court were to consider dismissing the complaint based on documentary evidence pursuant to CPLR 3211 (a) (1).

Jenkins and Ogden make two other equally unpersuasive arguments in support of their motion to dismiss. First, they argue that, to the extent that plaintiffs' fraud claim is based on

representations contained in the Securities Purchase Agreements, namely that no brokerage or finder's fees or commissions will be payable by the company and that all financial disclosure about the company are true and correct (*see* Amended Complaint, ¶ 45), plaintiffs are improperly couching a breach of contract claim against Sanz as a fraud claim against its management team. In *ESBE Holdings, Inc. v Vanquish Acquisition Partners* (50 AD3d 397, 398 [1st Dept 2008]), upon which Jenkins and Ogden rely, the court merely dismissed the fraud claim as duplicative of a breach of contract claim. It is well settled that "a cause of action for fraud may be maintained where a plaintiff pleads a breach of duty separate from, or in addition to, a breach of the contract" (*First Bank of Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 291-92 [1st Dept 1999], citing *Non-Linear Trading Co. v Braddis Assocs.*, 243 AD2d 107, 118 [1st Dept 1998]). The complaint here alleges that a plaintiff was induced to enter into a transaction because a defendant misrepresented material facts. The plaintiffs have therefore stated a claim for fraud despite that the same circumstances also give rise to a breach of contract (*id.*).

Jenkins and Ogden additionally argue that the company's allegedly false projections of Sanz's future performance are not actionable in fraud. Fraud under New York law is the misrepresentation of a material existing fact. Statements of prediction or expectation about future events cannot give rise to a fraud claim (*ESBE Holdings, Inc. v Vanquish Acquisition Partners*, 50 AD3d at 398). However, in *CPC International Inc. v McKesson Corp.* (70

NY2d 268 [1987]), the Court of Appeals recognized that financial projections of a company's future performance that are alleged to be false, unreasonable and not based on the company's actual financial condition can constitute the basis of a claim for fraud (*see also East 32nd Street Assocs. v Jones Lang Wooten USA*, 191 AD2d 68, 71 [1st Dept 1993]).

Here, the amended complaint alleges that in late December 2005 defendants Jenkins and Ogden provided Monarch Capital with forecasts for Sanz's EarthWhere software business. The forecasts showed projected revenues in 2006 of $4.9 million (Amended Complaint, ¶ 34). By February 2, 2006, Jenkins provided plaintiffs with an "opportunity pipeline" for Sanz's EarthWhere software business that showed projected sales for 2006 of approximately $9.9 million. Plaintiffs allege that the first quarter figures for 2006 were false and that no reasonable basis existed to double the forecast provided in December 2005 (*id.*, ¶ 36). Plaintiffs aver that Sanz suffered a net loss of $32.9 million in 2006 (*id.*, ¶ 37).

The amended complaint also alleges that defendants Jenkins and Ogden provided plaintiffs a false explanation for losses that had occurred in 2005, and assured them that the problem had been fixed. Plaintiffs contend that, based on this false premise, defendants Jenkins and Ogden provided plaintiff with a financial forecast for 2006 that indicated that Sanz would be cash-flow positive. Plaintiffs state that this financial forecast was vital to the plaintiffs as they intended their new capital to assist Sanz in developing the EarthWhere software and growing its core business (*id.*, ¶ 37).

Plaintiffs alleged that Jenkins and Ogden knew in 2006 when they were making these representations that the company it would not meet their forecast for the first quarter of 2006 (*id.*, ¶ 38). Giving the plaintiffs every possible favorable inference and accepting the pleaded facts as true, as the court must on a motion to dismiss the complaint (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *PT Bank Cent. Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 375 [1st Dept 2003]), plaintiffs' allegations are sufficient to state a cause of action for common law fraud against Jenkins and Ogden.

The motion to dismiss is granted, however, as to defendant Kirk Hanson. The amended complaint's only mention of Hanson's role in the alleged fraud is the allegation that he served as "an executive" with Sanz (Amended Complaint, ¶ 6), that Jenkins promised Potter that Hanson would make a bona fide investment in Sanz (*id.*, ¶ 24; Potter Aff., ¶ 5) and that Hanson received a $22,500 special bonus for 2005 to be invested in the private placement (Amended Complaint, ¶ 27, Ex. C). Unlike Hardy (*see id.*, ¶ 13 [C], [E]), the amended complaint does not allege Hanson to have had any dealings with the plaintiffs. Indeed, while the amended complaint specifically alleges that Jenkins, Ogden and Hardy acted at the behest of the Director Defendants, in an effort to benefit both Sanz and Sun Capital (*id.*, ¶¶ 13 [E], 22), allegations against Hanson are glaringly absent. Plaintiff's counsel's unsupported speculation regarding what Hanson may have known, based solely on Hanson's various titles (*see* Plaintiff's Memo. of Law in Opp., at pp 3, 8, 13), is insufficient to defeat Hanson's motion to dismiss.

The amended complaint also lacks allegations that defendant Mark Hardy had any role in the alleged representation to Potter about Sanz's management investing their own money in Sanz and/or the board's decision to award Hardy a 2005 bonus. However, the amended complaint does allege that Hardy traveled to New York in December 2005 and January 2006 for three days to meet with Potter and prospective investors (Amended Complaint, ¶ 13 [C]). The amended complaint also alleges that Hardy received a copy of, and therefore knew of, the allegedly false and fraudulent "opportunity pipeline" for Sanz's EarthWhere business (*id.*, ¶ 36). These allegations are sufficient to tie him to the alleged fraud regarding the false financial projections.

Turning to the Director Defendants' motions, this court previously ruled that the original complaint and first affidavit of Michael Potter were too conclusory as to "how any of the individual members of Sanz's board participated in the alleged fraud" (Order, at 13). More specifically, the court ruled:

> There are no details regarding who Jenkins was seeking instruction and/or approval from; no e-mails, letters or faxes demonstrating any one of the Director Defendants was copied on any communication between Potter and Jenkins or Ogden; and no claim that any meetings or telephone conferences were held regarding board approval of the proposed private placement or any conditions Monarch Capital was placing on the deal. Potter's description of his January 24, 2006 conversation between Leder is also very general; he merely states that the two men discussed the "terms and conditions of the private placement" (Potter Aff. ¶ 10), but fails to say whether they discussed the management investment condition or any of the allegedly false earnings models and other financial analyses provided by Jenkins and Ogden.

(*Id.*).

The amended complaint cures most of these deficiencies. Plaintiffs now allege that all communication between Jenkins and Ogden and Potter of Monarch Capital were relayed back to the Director Defendants in contemporaneous emails and memoranda; that Jenkins, Ogden and Hardy were taking their instructions from the Director Defendants, who were acting in the furtherance of the interests of Sun Capital (Amended Complaint, ¶¶ 13 [E], 14 and Ex. A); that Sanz waited for and needed Sun Capital to approve the proposed deal structure (*id.*, ¶ 41 and Ex. A); that, as members of the audit and compensation committees, defendants Terry, Rea and Hollis were responsible for reviewing and verifying Sanz's financial statements and SEC filings and that, having access to the most accurate and current information on Sanz, they "must have known that the financial information provided to the plaintiffs misrepresented the company's condition" (*id.*, ¶ 43); and that, throughout the negotiations, Jenkins reiterated that "all financial information" was approved by the Sanz board prior to being presented to the plaintiffs (*id.*, ¶ 39). Plaintiffs also argue that the Director Defendants' approval of the bonus awards to Jenkins, Ogden, Hardy and Hanson when the company was in financial distress and needed a large influx of capital to stay afloat was an integral part of the scheme to convince the plaintiffs to invest their money in Sanz.

These allegations are sufficient to state a claim for common-law fraud against the Director Defendants.

CONCLUSION and ORDER

Accordingly, it is hereby

ORDERED that the motion (seq. no. 004) of defendants Rodger R. Krouse, Marc J. Leder, Clarence E. Terry, M. Stephen Liff, Stephen G. Marble, T. Scott King, C. Daryl Hollis, and George R. Rea to dismiss the amended complaint is denied; and it is further

ORDERED that the motion (seq. no. 005) of defendant Gary F. Holloway to dismiss the amended complaint is denied; and it is further

ORDERED that the motion (seq. no. 006) of defendants Mark Hardy and Kirk Hanson to dismiss the amended complaint is granted as to defendant Kirk Hanson, and denied as to Mark Hardy, and the Clerk is directed to enter judgment dismissing the action as against defendant Kirk Hanson; and it is further

ORDERED that the motion (seq. no. 007) of defendants John Jenkins and Robert Ogden to dismiss the amended complaint is denied; and it is further

ORDERED that the defendants shall serve and file an answer to the amended complaint within twenty (20) days of service of a copy of this order with notice of entry; and it is further

ORDERED that the parties shall appear for a compliance conference on June 8, 2010 in Room 442.

Dated: April 6, 2010
New York, NY

FILED
APR 07 2010
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

Eileen Bransten, J.S.C.