

Clear Haven Inv. Fund, LP v Zags SPV 1 LLC
2026 NY Slip Op 31133(U)
March 23, 2026
Supreme Court, New York County
Docket Number: Index No. 654268/2024
Judge: Andrew Borrok
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK PART 53

Justice

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CLEAR HAVEN INVESTMENT FUND, LP - CLEAR HAVEN
CREDIT OPPORTUNITIES FUND II SERIES,

Plaintiff,

- v -

ZAGS SPV 1 LLC, TORPAGO, INC., BRENT JACKSON,
JOHN DOE

Defendant.

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INDEX NO. 654268/2024

MOTION DATE _____

MOTION SEQ. NO. 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 101, 102, 103, 104, 105, 106, 107, 110, 115, 116

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, Clear Haven Investment Fund, LP – Clear Haven Credit Opportunities Fund II Series (**Clear Haven**)’s motion to dismiss the Counterclaims [hereinafter defined] is GRANTED as unopposed.

A. The Motion to Dismiss the Counterclaims is Granted

This case involves claims asserted by a lender (Clear Haven) against a borrower (Zags SPV 1 LL [Zags]), the borrower’s parent company (Torpago, Inc. [Torpago]), an individual (Brent Jackson), and certain John Does.

Reference is made to a Secured Promissory Term Note (the **Note**; NYSCEF Doc. No. 46), by and between Zags and Clear Haven, dated July 29, 2022. Pursuant to the Note, once Zags repaid Clear Haven “the original principal amount” (*id.* § 1.1), Zags may “request one or more additional term loan advances under this Note at any time during the Borrowing Period” (*id.* §

1.2). Significantly, per the terms of the Note, “[t]he decision to make any such additional term loan advances under this Note shall be made by Holder [(Clear Haven)] in its sole and absolute discretion” (*id.*). The Note made it clear that Zags may not borrow more than a certain percentage of its cash and certain receivables (**Eligible Receivables**) (*id.* § 3.4[d][i][2]). The criterion for an Eligible Receivable is outlined in Exhibit B to the Note (*id.* at Exhibit B).

Additionally, as relevant, the Note contains a Right of First Refusal provision:

(ix) Right of First Refusal. If the Borrower, Parent and/or any of Parent’s subsidiaries shall have obtained a bona fide third-party offer for a working capital financing, the financing or refinancing of a revolving line of credit, a warehouse or hypothecation loan secured by credit card receivables or any other asset of the Borrower or the purchase of any credit card receivables or other assets of the Borrower and/or Parent (in each case prior to the date that is 90 days following the date hereof) that the Borrower, Parent or such subsidiary intends on accepting and/or consummating (each being a “Third-Party Financing Offer”), the Borrower shall, in writing, promptly inform Holder of such Third-Party Financing Offer and the material economic terms and conditions of such Third-Party Financing Offer (and attach a copy of such Third-Party Financing Offer). Holder shall have a right of first refusal to match the Third-Party Financing Offer’s material terms with respect to any financing or refinancing, (in each case, the “Material Terms”). After the receipt of such Third-Party Financing Offer, Holder shall have twenty-one (21) days to agree to match the Material Terms of such refinancing outlined in the Third-Party Financing Offer on terms which shall be the same or better than the Material Terms of such Third-Party Financing Offer (the “Acceptance”). Upon receipt of the Acceptance by the Borrower or such subsidiary, Holder and/or its Affiliate, on the one hand, and the Borrower or its subsidiary, on the other hand, shall, in good faith enter into negotiations, on an exclusive basis, with Holder and/or its Affiliate on an agreement for such transaction on the terms set forth in such Acceptance.

(the **ROFR** provision; *id.* § 5.2[a][ix]).

On June 12, 2025, the Defendants filed an Answer to the Clear Haven’s Amended Complaint (NYSCEF Doc. No. 88) whereby Zags and Torpago (the **Counterclaim-Plaintiffs**) asserted two

counterclaims: (i) breach of contract and (ii) tortious interference with prospective business relationships (the **Counterclaims**). With regards to the breach of contract counterclaim, the Counter-Claim Plaintiffs allege that the Plaintiff breached the Note by (i) asserting the ROFR after the 21-day period and by asserting it to a non-party and (ii) “modifying” the criterion for Eligible Receivables as a means to avoid funding advances against such receivables as “required” by the Note (*id.* ¶¶ 52-53, 3). In addition, the tortious interference counterclaim is based on Clear Haven’s alleged “misleading statements” and/or “disparaging remarks” to 400 Capital Management LLC (**400 Capital**), Marqeta, Inc. (**Marqeta**), Sutton Bank, and Basatne International LLC (**Basatne**) (*id.* ¶¶ 60).

The Plaintiff now moves to dismiss the Counterclaims. The Counterclaim-Plaintiffs have not filed opposition.

A party may move to dismiss one or more causes of action pursuant to CPLR § 3211(a)(1) and (7). CPLR § 3211(a)(1) requires dismissal where documentary evidence “conclusively establishes a defense to the claims as a matter of law” (*Gawrych v Astoria Fed. Sav. and Loan*, 148 AD3d 681, 682 [2d Dept 2017]). Pursuant to CPLR § 3211(a)(7), a claim must be dismissed when the facts alleged do not fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court must afford the pleadings a liberal construction and accept the facts alleged in the complaint as true, according the plaintiff the benefit of every favorable inference (*id.*). Bare legal conclusions are not accorded favorable inferences, however, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]).

The Plaintiff argues that the Counterclaims must be dismissed because the Counterclaim-Plaintiffs have failed to allege the requisite elements for these claims. The Plaintiff is correct.

To prevail upon a cause of action for breach of contract, a plaintiff must prove that: (i) a contract exists; (ii) plaintiff performed in accordance with the contract; (iii) the defendant breached its contractual obligations; and (iv) the defendant's breach resulted in damages (*34-06 73, LLC v Seneca Ins. Co.*, 39 NY3d 44, 52 [2022]).


The Counterclaim-Plaintiffs have failed to plead that they performed in accordance with the contract, and thus they have failed to allege all of the requisite elements of a breach of contract claim (*see 34-06 73, LLC*, 39 NY3d at 52). Although the Counterclaim-Plaintiffs allege that the Plaintiff was “required” to fund advances against Eligible Receivables, such an assertion is inconsistent with the Note’s express provisions. As discussed above, the Note vested Clear Haven with “sole and absolute discretion” to fund additional term loan advances. The failure to exercise such discretion can not be said to constitute a breach (NYSCEF Doc. No. 46 § 1.2). Lastly, Clear Haven did not exercise the ROFR as the Counterclaim-Plaintiffs allege because Clear Haven’s purported acceptance was not communicated to the correct party nor was it communicated within the 21-day acceptance period. Consequently, Clear Haven did not assume any obligations with respect to the ROFR provision and thus could not have breached its terms. Accordingly, the breach of contract counterclaim is dismissed (*see Leon*, 84 NY2d at 87-88).

Tortious interference with business relationships requires “either that the offending party acted solely out of malice...., that is, for the sole purpose of inflicting intentional harm on the complaining party..., or used improper or illegal means...that constituted a crime or independent tort or other egregious wrongdoing” (*Lynch Development Associates, Inc. v Johnson*, 219 AD3d 1328, 1329 [2d Dept 2023] [internal citations and quotations omitted]). Actions motivated by “normal economic interest” are insufficient to allege malice (*Advanced Global Tech., LLC v Sirius Satellite Radio, Inc.*, 44 AD3d 317, 318 [1st Dept 2007]). “[P]ersuasion alone although it is knowingly directed at interference with a contract” is not enough to constitute interference (*NBT Bancorp Inc. v Fleet/Norstar Fin. Grp., Inc.*, 87 NY2d 614, 624 [1996]). Notably, “[w]here tortious interference is based on a defamatory statement, pleading in accordance with CPLR 3016 is required ... [I]t is necessary to allege the time, place and manner of the false statement and to whom it was made” (*Wicked Entertainment, Inc. v Burbacki*, 2019 WL 587430, * 2 [Sup Ct, New York County 2019]). Pursuant to CLPR § 3016(b), when a cause of action such as tortious interference is based upon fraud or misrepresentation, “the circumstances constituting the wrong shall be stated in detail” (*see* CPLR § 3016[b]; *see also Masten v C.D.I. Travel, Inc.*, 178 AD2d 248, 249 [1st Dept 1991]).

The Counterclaim-Plaintiffs have failed to state a cause of action for tortious interference because they have failed to (i) allege that Clear Haven acted solely out of malice, and not normal economic interest, or that Clear Haven used improper means, and not mere persuasion, or that Clear Haven used illegal means and (ii) plead the allegations with the requisite particularity (*see Lynch Development Associates, Inc.*, 219 AD3d at 1329 [internal citations and quotes omitted]; *Advanced Global Tech., LLC*, 44 AD3d at 318; *NBT Bancorp Inc.*, 87 NY2d at

624; *Wicked Entertainment, Inc.*, 2019 WL at * 2; CPLR § 3016[b]; *Masten*, 178 AD2d at 249). As such, the counterclaim sounding in tortious interference with prospective business relationships is dismissed (*see Leon*, 84 NY2d at 87-88).

Accordingly, it is hereby ORDERED that the motion (Mtn. Seq. No. 005) to dismiss the Counterclaims is GRANTED as unopposed.


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3/23/2026
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE