Rutter v Bergman
2005 NY Slip Op 30244(U)
December 21, 2005
Supreme Court, New York County
Docket Number:
Judge: Helen E. Freedman
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SCANNED ON 12/27/2005
[* 1]

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

0600250/2005

PART 37

RUTTER, MITCHELL B.
VS
BREGMAN, DAVID

SEQ 1

DISMISS ACTION

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______
MOTION CAL. NO. ______

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance w accompany memo of law

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

FILED
DEC 27 2005
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/21/05

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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MITCHELL B. RUTTER, individually and as trustee of the 2001 RUTTER FAMILY TRUST and derivatively on behalf of PEGASUS CAPITAL, LLC,

Plaintiffs,

-against-

Index No. 600250/05

DAVID BREGMAN, TODD WENNER, PEGASUS CAPTAL LLC, THE PARTNERS PROPERTY GROUP LLC, PPG MOB FUND I, LLC , PPG MOB FUND IA, LLC PPG MOB FUND 1B LLC and XYZ CORPORATIONS 1-3,

Defendants.

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HELEN E. FREEDMAN, J:

Motions Seq. 01 and 02 are consolidated for disposition.

In this action, plaintiffs seeks $310,00 as reimbursement for what they claim was a loan or advance to one or more defendants. Plaintiffs also seek additional funds claiming profits from an MOB transaction. Defendants seek dismissal of all claims based on failure to state a cause of action and documentary evidence. Defendants contend, *inter alia,* that at least $160,000 of moneys was not loan, rather that it was an investment in joint venture. Defendants also claim that there is no jurisdiction over some of the defendants and seek disqualification of the law firm of Warshaw Burstein Cohen Schlesinger and Kuh, LLP on the ground that a partner of or counsel to the law firm,, Michael Zukerman, represented Pegasus and Bregman and Wenner during the time that Zukerman was at the law firm of Bryan Cave,LLP.

The motion to disqualify is denied at this time in that it appears that Zukerman did not work on anything that would be materially adverse to defendants, although he may have been instrumental in setting up Pegasus. The motion to dismiss is denied in part and granted in part as is discussed below.

Disqualification Motion

In their motion to disqualify plaintiffs' counsel, defendants allege that Michael Zukerman did work on behalf of defendants Bregman and Wenner when the former was associated with the law firm of Bryan Cave, LLP. Mr. Zukerman is currently "of counsel" to the law firm of Warshaw Burstein Cohen Schlesinger & Kuh, LLP, the firm representing plaintiffs here. Zukerman contends that although he brought Wenner and Bregman as clients into Bryan Cave, the lawyer with whom they worked on Pegasus matters at Bryan Cave was Brant Maller, and that Bregman and Wenner remained with Bryan Cave after Zukerman left.

Defendants are claiming that Zukerman was instrumental in putting together a "prototype" of the type of deal or REIT (Real Estate Investment Trust) that eventually became Pegasus. Apparently another such REIT joint venture program was put together in whole or part by Zukerman. Defendants claim that while representing Bregman and Wenner in that deal or elsewise, Zukerman became privy to confidences that might affect either the Pegasus deal or this litigation. The only thing that Zukerman is aware of in relation to Pegasus is that he may have been involved with another REIT, but even that involvement was marginal.

Mere allegations of a conflict are insufficient. In order for there to be a genuine conflict there must be (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) the matters involved in both representations must be substantially related, and (3)the interests of the present client and former client must be materially adverse.

Tekni-plex, Inc. v. Meyner & Landis, 89 N.Y.2d 123 (1996). In addition, there must be some confidential information obtained which would make representation of an adversary inappropriate. *Kassis v. Teacher's Ins. & Annuity Ass'n,* 93 N.Y.wd 611 (1999). In the present case, defendants have satisfied neither the requirement that the matters involved be substantially related nor made a showing that plaintiff's counsel obtained confidential information concerning Bregman, Wenner, or Pegasus that would make representation here inappropriate

Moreover, the lawyers in plaintiffs' law firm that are involved in the litigation are not related to Mr. Zukerman, who works in the real estate department and is "of counsel" to the firm. For the foregoing reasons, the motion to disqualify is denied.

Motion to Dismiss

Defendants move to dismiss on numerous grounds and plaintiffs request that this court convert the motion to dismiss to one for summary judgment. The motion to convert is denied as the papers are far too confusing at this juncture to make such a motion viable. The motion to dismiss is based on failure to state a cause of action, defenses founded upon documentary evidence and lack of jurisdiction over corporate defendant entities.

With respect to the motion to dismiss, some claims are clearly unsupportable while others are questionable but not subject to dismissal at this stage. The thrust of the claims set forth in the Complaint is that first, plaintiffs loaned $160,000 to Pegasus and that plaintiff(s) was (were) fraudulently induced by Wenner and/or Bregman to make a further loan in the sum of $150,000 to PPG and MOB Funds in connection with Medical Office Building ("MOB") transactions.. Plaintiff contends that he was fraudulently induced to invest in MOB's in order to secure his investment or loan to Pegasus and that the MOB transactions really should have been Pegasus

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deals. Plaintiffs claim that defendants breached a written and oral contracts, fraudulently induced them to make investments or loans, breached fiduciary duties by misappropriating business opportunities on behalf of Pegausus and on behalf of plaintiffs, were unjustly enriched, and as plaintiffs, they were entitled to adjudication of ownership interests and an accounting as well as compensation for the alleged loans.

Defendants' motion to dismiss relies in part upon the documentary evidence demonstrating that plaintiffs were joint venturers in the Pegasus Operating agreement. Defendants aver that David Bregman was the sole creator of the Pegasus Capital, LLC. It was created to market the DB (David Bregman) Structured REIT which was to publicly trade real estate investment trusts. Pegasus was to operate as a special purpose off-balance sheet entity, thus being permitted to highly leverage the existing properties as well as those acquired from the REIT. After the collapse of Enron, this type of off-balance sheet financing characterizing the Joint Venture Programs was no longer permitted.. Thus Pegasus died. The operating agreement for Pegasus specified that any member of the Limited Liability Company, including Bregman, Rutter and the Rutter Trust, would not be restricted from purchasing, developing, investing in or otherwise dealing with real estate generally, as opposed to the specific manner in which the LLC intended to conduct its business, i.e., through a Joint Venture REIT or Structured debt program. It appears that Wenner had no interest in the Joint Venture, but some claim against him remains. The MOB program came into existence after the formation of Pegasus and did not involve a REIT but involved Wenner and Bregman in a real estate investment. Rutter agreed to advance $150,000 as equity in that program as well as agreeing to obtain other investment funds. Apparently that venture failed as well. According to defendants there is no

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such thing as MOB Fund I, LLC and MOB Fund 1A and 1B LLC involve other investors.

On a motion to dismiss the court must view facts pleaded in the Complaint in a light most favorable to the plaintiff. *Guggenheimer v. Ginzburg,* 43 N.Y. 2d 268 (1977). However, allegations that are on their face incredible or are belied by documentary evidence may be dismissed. *Bernardino v. Ochlan.* 2 A.D.3d 556, 770 N.Y.S.2d 75 (2d Dept 2003). Thus, since the Operating Agreement for Pegasus provides that no modifications may be made unless in writing, the claims of an oral contract must be dismissed. As to the Medical Office Building Entities, (Partners Property Group, LLC, PPG MOB Fund I,LLC, PPG MOB Fund 1A, LLC and Fund 1B, LLC , plaintiff fails to set forth any claims against them for breach of any contracts, oral or written.

As to claims of fraudulent inducement, such claims must be stated with requisite particularity (CPLR 3016(b)), and must be separate from the claims for breach of contract. *Hawthorne Group, LLC v. RRE Ventures,* 7 A.D.3d 320, 776 N.Y.S.2d 273 (1st Dept. 2004). False representation also requires reliance upon such representation. *Lanzi v. Brooks,* 54 A.D.2d 1057 (3d Dept. 1976) aff'd 43 N.Y.2d 778 (1977). A breach of contract claim may not be recast as a fraudulent inducement claim when the only basis for the claim is breach of a contract. *Constar v. J.A. Jones Construction Co.,* 212 A.D.2d 452 (1st Dept 1995); *Tesoro Petroleum Corp.* v, Holborn Oil Co., 108 A.D.2d 607 (1st Dept. 1985). The allegation that the $150,000 loan was made based on a promise to pay $160,000 on the first agreement does not make sense. Similarly, the breach of fiduciary obligation claims appear to be redundant of the breach of contract claims. *Constar v. J.A. Jones Construction Co.,* 212 A.D.2d 452 (1st Dept 1995); it is unclear what particular obligations other than the alleged contractual obligations were breached.

Similarly, the claims for unjust enrichment are also duplicative of the breach of contract claims, and, under the circumstances here, must be dismissed. The events alleged arise out of the same transactions for which breach of contract is alleged. See *Clarke-Fitzpatrick, Inc. v. L.I.R.R.*, 70 N.Y.2d 382 (1987). Any claims against the MOB entities for unjust enrichment fail inasmuch as there is no evidence that they received funds. Moreover, it appears that plaintiffs have no basis for obtaining jurisdiction over the MOB entities. According to the Complaint, PPG MOB Fund I LLC is a Delaware limited liability company whose address is in New Jersey, MOB Fund IA, LLC lis a Delaware Company located in Colorado. MOB Fund !B, LLC is allegedly in New Jersey. While the request for loans may have been made in New York, that is insufficient to constitute transaction of business in New York under the long-arm statute.

At this juncture, there is no need to order an accounting inasmuch as the Pegasus books have been made available. The declaratory request seeks a remedy and is not a separate cause of action.

Although it is alleged that Todd Wenner was not involved in the Pegasus transaction, Bregman himself avers that Bruce Fein represented Wenner and Bregman in the Pegasus deal. Therefore, the breach of contract action as it affects Wenner will not be dismissed at this time even though he was not a signatory to the deal.

Based on the foregoing, it is

ORDERED that the motion to disqualify the law firm of Warshaw Burstein Cohen Schlesinger & Kuh is denied; and it is further

ORDERED that the Second, Fourth, Fifth, Sixth, Seventh and Eighth causes of action are dismissed; and it is further

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ORDERED that all claims against entities other than Wenner, Bregman or Pegasus are dismissed; and it is further

ORDERED that the parties shall appear at 9:30 a.m.on January 10, 2006 for a preliminary conference concerning the remaining claims

It is also

ORDERED that the clerk shall dismiss the claims as set forth above.

Dated: December 21, 2005.

Enter:

Helen E. Freedman, J.S.C.

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DEC 27 2005
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