Bondgof Enterprises, Inc. v Alchemy Noho, LLC

2006 NY Slip Op 30070(U)

April 25, 2006

Supreme Court, New York County

Docket Number: 0108197/2005

Judge: Charles E. Ramos

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SCANNED ON 5/1/2006
[* 1]

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

PRESENT: Charles Edward Ramos PART 53

Index Number : 108197/2005

BONDGOF ENTERPRISES

vs

ALCHEMY NOHO, LLC

Sequence Number : 001

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 ______

FILED MAY 01 2006 COUNTY CLERK'S OFFICE NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion decided per attached dec.

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

Dated: 4/25/06

CHARLES E. RAMOS J.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
BONDGOF ENTERPRISES, INC

Index No. 108197/05

Plaintiff,

-against-

ALCHEMY NOHO, LLC, ALCHEMY PROPERTIES, INC., ALCHEMY MORTGAGE FINANCE INC PENSION PLAN, ORCHARD REALTY CAPITAL LLC, MARLENE GILBERT, JOEL BREITKOPF, GERALD DAVIS AND KENNETH HORN

Defendant.
--X

Charles Edward Ramos, J.S.C.:

In motion 001, defendants Alchemy Noho LLC, Alchemy Properties, Inc, Alchemy Mortgage Finance Inc. Pension Plan, Orchard Realty Capital LLC, Marlene Gilbert, Joel Breitkopf, Gerald Davis and Kenneth Horn, Esq., (together "Alchemy") move pursuant to CPLR 3211(a)(7) to dismiss the complaint which alleges fraud in the inducement and conversion. Plaintiff, Bondgof Enterprises ("Bondgof"), seeks reformation of the May 29, 2001, Amended and Restated Operating Agreement between Alchemy Noho, Horn's own entity, and Bondgof.

Background

The background discussion is taken from the allegations of the Bondgof complaint unless otherwise indicated.

Bondgof is a corporation which, until August 17, 2001, owned the property located at 57 Bond Street, New York, NY (the "Premises"), where it operated a gas station.

In 2000, Gary Rudakov, Bondgof's president, was approached

by Ben Chasin, regarding the possible sale of the Premises to a developer for the purposes of constructing condominium units. Chasin introduced Rudakov to Kenneth Horn, Esq., the president and sole shareholder of Alchemy Properties Inc. ("API"). After numerous discussions, Horn and Rudakov agreed to a joint venture whereby Bondgof would convey the Premises to a new entity of which Bondgof and an entity formed by Horn would become members. Subsequently, Alchemy Noho, Horn's own new entity, and Bondgof formed Bowery/Noho, LLC (the "Company") to develop the Premises.[1]

Before the Company was formed, an initial Operating Agreement (the "Original Agreement") was executed on November 16, 2000. Pursuant to the Original Agreement, Alchemy agreed to contribute $4,550,000 for its 60% interest, along with the assumption of all development responsibility of the Company.

Before the Company acquired title to the Premises, the parties met in person to go over the figures and essential terms of the agreement which were recorded in a memorandum dated May 18, 2001. Pursuant to Alchemy's request, the parties pursued negotiations with the help of counsel culminating in the Amended and Restated Operating Agreement (the "Amended Agreement") dated May 29, 2001, to replace the Original Agreement.

In relevant part, Paragraph 6(b) was changed to reflect a

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[1]While the complaint states that Joel Breitkopf and Gerald Davis are members of Alchemy Noho, defendants allege that Horn, Alchemy Mortgage Finance Inc. Pension Plan, Orchard Realty Capital LLC and Marlene Gilbert constitute Alchemy Noho are members, but not Breitkopf and Davis.

reduction of Alchemy's capital contribution from $4,550,000 to $4,500,000 and to define Alchemy's cash contribution as consisting of "'cash' and the amount of personal guarantee of the Company's obligations by Kenneth S. Horn." Additionally, paragraph 20(f) of the Agreement is an integration clause stating that it is the "entire agreement of the parties" and the "sole source of agreement of the parties."

On August 17, 2001, at the closing, the Company acquired the Premises from Bondgof. Alchemy contributed $500,000 cash at the closing and later, on May 2002, contributed an additional $270,000. Horn guaranteed $4 million of the Company's borrowings from its lender. As consideration for both aspects of the capital contribution, Alchemy Noho received a "Guaranteed Payment" of $450,000 as provided by paragraph 6(k) of the Agreement until both (a) Alchemy Noho had its full cash contribution returned; and (b) its personal guarantee was cancelled.

The gravamen of Bondgof's complaint is that defendants fraudulently induced the execution of the Amended and Restated Operating Agreement allowing Alchemy-Noho, LLC, the managing member of the Company, to make its capital contribution to the Company in part by having its principal, Horn, guarantee $4 million of the Company's debt, rather than contributing the totality in cash.

Alchemy argues that Bondgof, by amending the original Agreement to include paragraph 6(b) has expressly authorized

Alchemy-Noho's contribution to "consist of 'cash' and the amount of the personal guarantee of the Company's obligations by Horn." Thus, according to defendants, the parties expressly amended the Agreement to permit this form of capital contribution.

Alchemy first argues that since the Agreement contains an integration clause, the parol evidence rule bars the first four causes of action forbidding Bondgof to contradict allegedly clear and unambiguous provisions of the Agreement to establish either a breach of contract or fraud. Alchemy further argues that the first four causes of action must be dismissed because Bondgof cannot establish reasonable reliance upon statements in the Amended Agreement. Next, Alchemy contends that Bondgof has not sufficiently pled causes of action five through seven, incorrectly asserting them as direct claims whereby these causes of action allege injury to the Company, and not Bondgof. Lastly, Alchemy argues that Bondgof asserts its claims not only against the Company but its members, some shielded by virtue of being members of a limited liability company under New York law.

Bondgof, on the other hand, claims that it has been deliberately misled into executing the Amended and Restated Agreement upon the defendant's express representation that it was investing $4.5 Million cash into the deal. According to Bondgof, Horn as an attorney at law and managing member, owed a fiduciary duty to disclose all material facts affecting the transaction; however, allegedly purposefully avoided such disclosure in order to induce plaintiff to turn over the Premises for less than

market value.

Discussion

Fraud Based Claims (First through Fourth Causes of action)

Paragraph 6(b) expressly permits Alchemy-Noho's contribution to "consist of 'cash' and the amount of the personal guarantee of the Company's obligations by Kenneth S. Horn." This clause is written in clear, unambiguous terms and thus by operation of the parol evidence rule, this Court cannot consider evidence contradicting the substance of Bondgof and Alchemy's Agreement. *W.W.W. Assocs v Giancontieri*, 77 NY2d 157, 162 (1990).

The New York Court of Appeals set forth a clear standard for application of the parol evidence doctrine:

> when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but instead or misstated is generally inadmissible to add to or vary the writing. *Id.*

In order to determine whether the parol evidence rule operates to exclude evidence of prior agreements between the parties with regards to Horn's cash contribution, or in the alternative, Horn's guarantee of Bowery/Noho's debt, this Court must address the finality and exclusivity of the Agreement.

An integration or merger clause such as paragraph 20(f) is strong evidence that Bondgof and Alchemy Noho intended that the contract be final, complete, and an exclusive statement of the agreement whereby extrinsic proof will not be considered by the

court since it contradicts the plain terms of the Agreement.[2]

Bondgof asserts that the Amended Agreement is not susceptible to this exclusion as parol evidence can be introduced to establish a claim of fraudulent inducement despite a general integration clause which alone is insufficient to preclude such evidence. *Danann Realty Corp. v Harris*, 5 NY2d 317, 320 (1959). This exception does not apply to Bowery/Noho's Amended Agreement. To successfully overcome the bar against parol evidence, Bondgof must show "[t]he essential elements of a cause of action for fraud [which] are representation of a material existing fact, falsity, scienter, deception." *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 (1995). To that end, "[t]he plaintiff must allege and prove that it reasonably relied on a material misrepresentation by the defendant." *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dep't 2003). As a matter of law, one party's reliance upon another party's misrepresentations, which is contradicted by express terms in an agreement, renders such alleged reliance unreasonable. *Bango v Naughton*, 184 Ad2d 961, 963 (3rd Dep't 1992)(An "express provision in the written contract contradicts the claimed oral representations in a meaningful fashion [...], the conflict between the provisions of the written contract and the oral representations negates the claim of reliance upon the latter."). The express terms of the

[2] Paragraph 20(f) "require[s] full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the integrated writing."

Amended Agreement contradict Bondgof's reliance.

Further, where a complaint is devoid of factual evidence demonstrating reasonable reliance, the complaint should be dismissed for failure to adequately plead reasonable reliance. *Natl Union Fire Ins. Co. of Pittsburgh, Pa. v Xerox Corp.*, 2004 NY Slip Op 24470, *8 (Ramos NY County 2004), aff'd, 2006 NY Slip Op 4 (1st Dep't 2006)(the plaintiff's reliance on the defendant's false statements was unreasonable because express terms in the insurance policy contradicted the plaintiff's reliance). Bondgof fails to plead reasonable reliance.

In any case, Bondgof's purported evidence is insufficient. Bondgof submits four documents, written projections on payments and equity on the Bond Street Unit, allegedly representing that Alchemy would contribute cash entirely . *See* Verified Complaint, Exhibits D, E, F, G. Having accepted the Amended Agreement in an arm's length transaction providing specifically for Alchemy's capital contribution to consist of cash and Horn's personal guarantee, Bondgof cannot now claim in conclusion based on these documents that it was induced by fraud as to Horn's alleged representations that Alchemy's capital contribution would consist entirely of cash.

Despite Alchemy's fiduciary duty owed to Bondgof, under narrow circumstances, Bondgof cannot claim reliance upon Alchemy's representations, or lack thereof, if such reliance is unreasonable. While New York law has not addressed the issue of fiduciary duty coupled with unreasonable reliance directly, the

First Department stated that a party's reliance on its fiduciary's representations is unreasonable where the party can easily verify its veracity. *Blue Chip Emerald LLC v Allied Partners Inc.*, 299 AD2d 278, 280-281 (1st Dep't 2002). In *Blue Chip Emerald*, the First Department emphasized that the Supreme Court, in granting defendants' motion to dismiss the complaint, overlooked that defendants were fiduciaries and owed to plaintiffs a fiduciary duty of full disclosure. *Id* at 280. The Court held that "a fiduciary cannot by contract relieve itself of the fiduciary obligation of full disclosure by withholding the very information the beneficiary needs in order to make a reasoned judgment whether to agree to the proposed contract." *Id.* However, in declining to give effect to plaintiff's own representations that it received full disclosure, the Court reasoned that plaintiffs did not have "ready and efficient means" to discover the veracity of defendant's representations. *Id.* "[R]eady and efficient means", in the *Blue Chip* case, may have been demonstrated where plaintiffs could have learned the substance of the representations from public sources or "easily located private sources," like defendant's financial records. *Id.* at 281. Thus, the corollary to the Court's holding in *Blue Chip Emerald* is that when a fiduciary relieves itself of its obligation of full disclosure, a party's reliance on the available information may be unreasonable where the information the party needs may be obtained by "ready and efficient means." See *Id.* at 280-81.

Bondgof clearly had "ready and efficient means" to learn the veracity of Alchemy's alleged representations that its capital contribution would consist entirely of cash since not only were these terms explicit in the Agreement but the Agreement was the product of "extended negotiations . . [b]etween sophisticated business people." *Nynex Corp. v Shared Resources Exchange, Inc.*, 1990 NY Misc LEXIS 759, *10 (Sup Ct Westchester Co, Sept 10, 1990). Therefore, the first through fourth causes of action are dismissed.

Insufficiency of the Pleadings (Fifth through Seventh Causes of Action)

This Court is guided by the lower pleading requirement of the notice standard of CPLR 3013. *Higgins v New York Stock Exchange*, 2005 NY Slip Op 25365, *18 (Ramos NY County 2005) ("The First Department has subordinated the pleading requirement of CPLR 3016(b) with the notice standard of CPLR 3013 . . . and . . . complaints will be sustained where supporting affidavits are sufficiently detailed to apprise defendants of the conduct upon which the claim is predicated.") (*citations omitted*). Notwithstanding the liberal notice pleading requirement, a plaintiff is still required to set forth factual allegations of each material element necessary to sustain recovery under some cognizable legal theory. *See id.* To that end, this court cannot sustain Bondgof's fifth through seventh causes of action as the pleadings are legally insufficient failing to comply to CPLR 3013's requirements.

Bondgof's remaining claims are causes of action for

conversion. "Conversion is the unauthorized exercise of dominion or control over specifically identified property which interferes with the owner's rights." *Hoffman v Unterberg*, 9 AD3d 386, 386 (2nd Dep't 2004). When funds are provided for a particular purpose, the use of those funds for an unauthorized purpose constitutes conversion. *Id.*

The fifth through seventh causes of action are vague and fail to allege the necessary elements required to fulfill causes of action for conversion. In the fifth cause of action, plaintiff alleges that "Alchemy abused [its] duty be [sic] awarding excessive commissions . . . in contravention of paragraph 10(b)(vii) of the [Amended] Agreement." Bondgof seeks "judgment against API directing return of any excessive commission it received . . . for distribution in according [sic] to the Agreement as same is reformed by this Court". Bondgof fails to set forth the reasons why the commissions are excessive and, more importantly, how they conflict with the Agreement or how this constitutes conversion.

The sixth cause of action states that "Horn diverted certain Company funds from the company project to other projects run by Alchemy." Again, this allegation fails to identify legal ownership to the company funds, the actual funds for which plaintiff claims superior ownership, and how Horn's use of the money constituted unauthorized dominion over the money. *Meese v Miller*, 79 A.D.2d 237, 242 (4th Dep't 1981) ("To establish conversion the plaintiff must demonstrate legal ownership or an

immediate superior right of possession to a specific identifiable thing and that the defendant exercised an unauthorized dominion over that property, which can be specific money, to the exclusion of the plaintiff's rights.")

Finally, in the seventh cause of action, plaintiff alleges that "defendant Alchemy and Horn knowingly permitted, Members and Contractors used by the Company to spend Company funds in an amount yet to be discovered to the private use of said contractors." Similarly to the sixth cause of action, this allegation does not provide this court or Bondgof's adversary with sufficient detail to constitute a conversion claim or to discern any interference by defendant with plaintiff's property.

Lack of Standing (eighth cause of action)

Bondgof has no standing to assert the eighth causes of action for alleged injuries suffered by the Company. "[A]n individual shareholder, has no right to bring an action in his own name for a wrong committed against the corporation." *Schleidt v Stamler*, 106 AD2d 264, 265 (1st Dep't 1984). Although Limited Liability Law "provides no right to bring a derivative action," *Schindler v Niche Media Holdings, LLC*, 1 Misc 3d 713, 716 (Sup Ct NY County 2003), section 610 of New York Limited Liability Law reads: "[a] member of a limited liability company is not a proper party to proceedings by or against a limited liability company, except where the object is to enforce a member's right against or liability to the limited liability company." LLC § 610. Therefore, Bondgof can only assert its

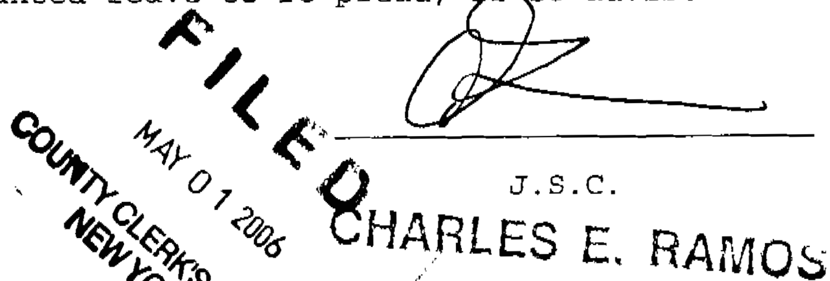
claims against Alchemy for wrongs that it suffered.

Plaintiff argues that the damaged party was the plaintiff since the Company allegedly received the same gross income during the subject transactions. However, the second, fifth, sixth, seventh, and eighth causes of action all allege payments, diversion and misuse out of the "Company's funds." Further, plaintiff does not specify at any point how Bondgof, rather than the Company, suffered the alleged harm. Although Bondgof asserts that it was personally damaged, its harm was incidental in nature to the losses incurred out of Company funds.[3] Accordingly, Bondgof's second and fifth through eighth causes of action are dismissed.

Accordingly, it is

ORDERED that defendants' motion to dismiss the first through eighth causes of action pursuant to 3211 is granted. The plaintiff is hereby granted leave to re-plead, if so advised.

Dated: April 25, 2006



J.S.C.

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[3] Though Bondgof relies on *Higgins* in arguing that it has standing, its reliance is unavailing on multiple grounds. First, as Bondgof acknowledges, *Higgins*, though informative, does not control here because *Higgins* was governed by the BCL while this case is governed by limited liability law. 2005 NY Slip Op at *5. Second, even if *Higgins* did control, the test Bondgof relies on was improperly applied. Bondgof, in attempting to draw an analogy to corporation law, alleges a diminution in the value of its equity. As this Court explained in *Higgins*, "this harm is said to derive from the harm suffered principally by the corporation and only collaterally to shareholders, and thus is derivative in nature." *Higgins*, 2005 NY Slip Op at *6.

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.