

Carver Cross Securities Corp. v Radar Media LLC

2006 NY Slip Op 30256(U)

October 30, 2006

Supreme Court, New York County

Docket Number: 0601865/2005

Judge: Bernard J. Fried

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

PRESENT: BERNARD J. FRIED
Justice

FBIEM PART 60

Carver Cross Securities
PLAINTIFF

INDEX NO. #601865-2005

MOTION DATE #003

MOTION SEQ. NO. _____

-v-
Radar Media LLC

MOTION CAL. NO. _____

DEFENDANT

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 _____

NYS SUPREME COURT REVIEWED
NOV 02 2006
E-FILED DEPT.

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the attached memorandum decision.

SO ORDERED

FILED
OCT 30 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/30/06

Bernard J. Fried
J.S.C. **BERNARD J. FRIED**
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

-----X
CARVER CROSS SECURITIES CORP.,

Plaintiff,

-against-

Index No.
601865/05

RADAR MEDIA LLC, MJ LLC, MAER
ROSHAN, PAUL FISH, MORTON
ZUCKERMAN and JEFFREY EPSTEIN,

Defendants.

-----X

APPEARANCES:

For Plaintiff:

Gordon Locke
74 Shelldrake Place
New Rochelle, New York 10804

For Defendants Radar Media LLC
Maer Roshan and Paul Fish:

Norton & Associates, LLC
551 Fifth Avenue, 27th Floor
New York, New York 10176
(Michael E. Norton)

For Defendants MJ LLC, Mortimer
Zuckerman and Jeffrey Epstein:

Luisa K. Hagemeyer
450 West 33rd Street
New York, New York 10001

FRIED,J.:

Motion sequence numbers 003 and 004 are consolidated for disposition.

The defendants Radar Media LLC (Radar Media), Maer Roshan (Roshan), and Paul
Fish (Fish) move, pursuant to CPLR 3211 (a) (7), for an order dismissing the amended

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OCT 30 2006
NEW YORK
COUNTY CLERK'S OFFICE

complaint.

The defendants MJ LLC (MJ), Mortimer Zuckerman s/h/a Morton Zuckerman (Zuckerman) and Jeffrey Epstein (Epstein) also move, pursuant to CPLR 3211 (a) (1) and 3211 (a) (7), for an order dismissing the amended complaint.

The plaintiff Carver Cross Securities Corp. (Carver Cross) is a registered broker dealer, and member of the National Association of Securities Dealers, engaged in the business of introducing prospective buyers and prospective sellers of companies, and the raising of capital for companies. The defendant Radar Media, and its principals Roshan and Fish, published a magazine. The defendant MJ, and its principals Zuckerman and Epstein, acquired Radar's business.

The amended complaint makes the following allegations. Radar Media had a written finder's fee agreement for Carver Cross to act as its financial advisor, and placement agent, in an effort to raise capital via the issuance of equity and debt securities. The finder's fee agreement provided for Carver Cross to be paid financial advisory fees, and completion or success fees, for financing that closed. In the event that substantially all of Radar's equity shares were transferred, Carver Cross was to be paid a completion fee. The defendants Zuckerman and Epstein, through MJ, devised a scheme to acquire control of Radar, to avoid paying to Carver Cross the success fees to become due by virtue of the transaction.

The first cause of action in the amended complaint is against the defendant Radar Media, and pleads breach of contract. The second cause of action is against the defendants Roshan, Fish, Zuckerman and Epstein, and pleads conspiracy to defraud. The third cause of action is against the defendants Roshan and Fish and pleads a fraudulent

conveyance made in violation of Debtor and Creditor Law § 270 et seq. The fourth cause of action is against the defendant MJ and pleads successor corporation liability. The fifth cause of action is against the defendants Radar Media, Roshan and Fish and pleads a claim, pursuant to the agreement, for attorney's fees. The amended complaint also seeks punitive damages.

In support of their motion to dismiss, the defendants MJ, Zuckerman and Epstein make the following arguments. The clear and unambiguous terms of the finder's fee agreement require that the alleged financing have been closed and funded before any completion fee became due to Carver Cross. The amended complaint contains no allegation that the capital financing was ever obtained. In the absence of any such allegation, there is no factual basis supporting the breach of contract claim. The only factual allegation is that MJ and Radar entered into a commonplace asset purchase transaction, in which MJ did not assume all of Radar's liabilities. In fact the finder's fee agreement contains a separate mergers and acquisitions clause. The amended complaint does not allege that there was ever a merger or acquisition in which Carver Cross assisted so as to become entitled to completion fees under this provision. There is no allegation in the amended complaint that Carver Cross was not paid the financial advisory fee to which it was entitled. There are no allegations that the complained-of transaction was prohibited by the agreements. The amended complaint fails to allege the elements of fraud.

In support of their motion to dismiss, the defendants Radar Media, Roshan and Fish make the following additional arguments. The third cause of action against Roshan and Fish for fraudulent conveyance must be dismissed: for the failure specify which of the six possibly

applicable sections of the Debtor and Creditor Law apply to this case, because the plaintiff Carver Cross is not a debtor under the Debtor and Creditor Law, and for the failure to allege the necessary elements that the transaction was made without fair consideration and that the transfer rendered Roshan and Fish insolvent.

In opposition to the motions, the plaintiff Carver Cross makes the following arguments. The amended complaint alleges a breach of the fee agreement's provision which requires that in the event that substantially all of Radar's equity shares are transferred Carver Cross shall be paid a completion fee. A civil conspiracy is a combination of two or more persons who, by concerted action, seek to accomplish an unlawful purpose by unlawful means. The amended complaint alleges a conspiracy among Roshan, Fish, Zuckerman and Epstein to structure Radar's sale to MJ, in a manner designed to defraud Carver Cross out of its fees, by breaching Debtor and Creditor Law §§ 270 and 273, which make every conveyance made by a person who is rendered insolvent fraudulent as to creditors if the conveyance is made without fair consideration. Radar's transfer to MJ was made without fair consideration and rendered Radar insolvent. MJ is subject to successor liability because the transaction amounted to a merger of Radar and MJ.

In reply, the defendants make the following arguments. On the breach of contract claim, the plaintiff Carver Cross has omitted from its quote of the mergers and acquisitions clause that the equity shares have to be acquired "with the assistance of CCSC." The plaintiff Carver Cross has not alleged that it satisfied this essential term. The plaintiff Carver Cross is seeking to amend the third cause of action for fraudulent conveyance, without leave of court, because the only claim asserted against Zuckerman and Epstein is for common-law

fraud, and the only defendants against whom Carver Cross asserted a fraudulent conveyance claim are Roshan and Fish.

In addition, on one hand, the plaintiff Carver Cross argues that the entire complaint should be sustained if only one cause of action is found viable, and on the other hand, the defendants argue that the entire complaint should be dismissed if only one cause of action is found deficient.

On a motion to dismiss a complaint for legal insufficiency, the court accepts the facts alleged as true and determines simply whether the facts alleged fit within any cognizable legal theory (Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300 [2001]; Morone v Morone, 50 NY2d 481 [1980]). The pleading is to be liberally construed, accepting all the facts alleged therein to be true and according the allegations the benefit of every possible favorable inference (Goshen v Mutual Life Ins. Co. of New York, 98 NY2d 314 [2002]; Leon v Martinez, 84 NY2d 83 [1994]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11 [2005]). Any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence (AG Capital Funding Partners, L.P. v State Street Bank and Trust Co., 5 NY3d 582 [2005]; Rovello v Orofino Realty Co., 40 NY2d 633 [1976]). However, the credibility of the parties is not under consideration (S. J. Capelin Assoc. v Globe Mfg. Corp., 34 NY2d 338 [1974]). In addition, evidentiary material may be considered on a motion to dismiss made pursuant to CPLR 3211 (a) (7) to assess the viability of a complaint where such evidence demonstrates that a material fact alleged by the plaintiff to be true is “not a fact at all” (Guggenheimer v

Ginzburg, 43 NY2d 268, 275 [1977]). To the extent that the motion is considered to have been made pursuant to CPLR 3211 (a) (1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (Leon v Martinez, 84 NY2d 83, 87-88 [1994]).

The elements of a cause of action for breach of contract are (1) formation of a contract between the plaintiff and the defendant, (2) performance by the plaintiff, (3) the defendant's failure to perform, and (4) resulting damage (PJI 4:1 [2006 Supp]).

Here, the plaintiff Carver Cross states a cause of action for breach of contract by alleging that the parties' agreement required the payment of a completion fee upon the transfer of substantially all of Radar's equity shares. Contrary to the defendants' assertion, the relevant portion of the contract is set forth in the amended complaint. Paragraph 14 of the amended complaint provides that "in the event substantially all of [Radar's] equity shares are transferred during the term of this Letter ... CCSC shall be paid a Completion fee." Since the subject agreement is unambiguous on its face (Reiss v Financial Performance Corp., 97 NY2d 195 [2001]), it may be construed as a matter of law. Giving the amended complaint every favorable inference, I conclude that the subject agreement permits the construction urged by the plaintiff Carver Cross.

Even assuming the admissibility of the defendants' assertion made in their reply papers, that the ellipsis in the above quoted contract clause requires that the transfer of shares must come with the assistance of Carver Cross, the reply submission is insufficient to demonstrate that, in fact, Carver Cross did not render the required assistance. Whether, in fact, Carver Cross assisted in the transfer, is a matter which cannot be safely decided simply on a pleading

motion, but requires a further exploration of the facts, whether by way of summary judgment or trial.

The second cause of action alleging that the defendants Roshan, Fish, Zuckerman and Epstein conspired to commit fraud, must be dismissed since New York does not recognize an independent tort of civil conspiracy, and no specific wrongful acts constituting fraud are alleged (Alexander & Alexander of New York, Inc. v Fritzen, 68 NY2d 968 [1986]; Steier v Schreiber, 25 AD3d 519 [1st Dept 2006]). To make out a prima facie case of fraud, the complaint must contain allegations of a representation of material fact, falsity, scienter, reliance and injury (Lama Holding Co. v Smith Barney, 88 NY2d 413, 421 [1996]). Contrary to Carver Cross's contention, the complaint and supporting papers do not allege the essential elements of a fraud claim. The amended complaint merely alleges that the defendants attempted to take advantage of a perceived loophole in the contract (Barclay Arms, Inc. v Barclay Arms Assocs., 74 NY2d 644 [1989]). As a result, there is no independent fraud to provide a basis for liability under their conspiracy theory (Small v Lorillard Tobacco Co., Inc., 94 NY2d 43 [1999]). Therefore, the second cause of action for civil conspiracy must be dismissed.

Turning to the third cause of action, Debtor and Creditor Law § 270 provides:

In this article "assets" of a debtor means property not exempt from liability for his debts. To the extent that any property is liable for any debts of the debtor, such property shall be included in his assets.

"Conveyance" includes every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or incumbrance.

"Creditor" is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

"Debt" includes any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

Debtor and Creditor Law § 273 provides that:

Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

To establish a fraudulent conveyance, the plaintiff must demonstrate: (1) that there was a conveyance, (2) that the transferor would become insolvent as a result of the conveyance, and (3) that there was no fair consideration for the conveyance (Palermo Mason Constr., Inc. v Aark Holding Corp., 300 AD2d 458 [2 Dept.2002]). Both insolvency and lack of fair consideration are prerequisites to a finding of constructive fraud under section 273, and the burden of proving these elements is upon the party challenging the conveyance (Joslin v Lopez, 309 AD2d 837 [2d Dept 2003]). Actual motive or intent to defraud on the part of the transferor need not be shown (Murin v Estate of Schwalen, 31 AD3d 1031 [3d Dept 2006]). A person is deemed insolvent when "the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured" (Debtor and Creditor Law § 271 [1]; Ede v Ede, 193 AD2d 940, 941 [3d Dept 1993]), and "fair consideration requires that the exchange not only be for equivalent value, but also that the conveyance be made in good faith" (Ede v Ede, 193 AD2d at 941-942).

The amended complaint adequately alleges that Radar was insolvent after the transfer. Moreover, giving the amended complaint every possible favorable inference, the allegations support a claim that the transfer was not made in good faith. Although the defendants Roshan and Fish received substantial consideration in exchange for their interest in Radar, Carver Cross alleges sufficient facts supporting its allegation that the consideration was unfair because it was made in bad faith. Therefore, the motion to dismiss the third cause of action must be

denied.

Carver Cross's fourth cause of action alleges that MJ's takeover of Radar was a de facto merger. It is alleged that MJ adopted Radar's: employees, including Fish and Roshan; premises; website; magazine; and furniture and fixtures.

As a general rule, a corporation that purchases the assets of another corporation is not responsible for the torts of the seller corporation. However, "[a] corporation may be held liable for the torts of its predecessor if (1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations" (Schumacher v Richards Shear Co., Inc., 59 NY2d 239, 244-245 [1983]; Kretzmer v Firesafe Products Corp., 24 AD3d 158 [1st Dept 2005]).

Continuity of ownership describes a situation in which the purchaser of assets of a corporation and the seller become owners together of what formerly belonged to each, which may lead to successor liability (In re New York City Asbestos Litigation, 15 AD3d 254 [1st Dept 2005]). In the instant case, there was continuity of ownership between the purchaser of the assets of the magazine, and the seller, for purposes of determining whether the purchaser was liable for the torts of the seller; the purchaser paid for the seller's assets with stock, not with cash, and the seller's shareholders became shareholders of the purchaser. In addition, the seller Radar did not retain substantial assets, and did not continue to have substantial contractual obligations (see Broadview Intl. LLC v Commissioner.com, Inc., 17 AD3d 102 [1st Dept 2005]).

Here, the plaintiff Carver Cross alleges sufficient facts to plead, prima facie, the

applicability of the above-enumerated exceptions. Although the defendant MJ expressly disclaimed the assumption of any liability, there is a basis to infer a de facto merger, especially since plaintiff offers sufficient facts to raise an issue regarding continuity of ownership (Cargo Partner AG v Albatrans, Inc., 352 F3d 41 [2nd Cir 2003]) and there is sufficient evidence of continuity of management, personnel, physical location, assets and general business operation (see In re New York City Asbestos Litig., 15 AD3d 254, supra). The hiring of nearly all of the predecessor's employees is sufficient to raise an issue as to continuity of management (Subramani v Bruno Mach. Corp., 289 AD2d 167 [1st Dept 2001]). Moreover, Carver Cross has offered evidence raising an issue with respect to a fraudulent conveyance. Therefore, the motion to dismiss the fourth cause of action must be denied.

Finally, the movants fail to make any argument in support of their motions to dismiss the fifth cause of action to recover counsel fees.

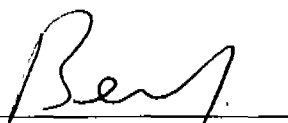
Accordingly, it is

ORDERED that the motions to dismiss are granted only to the extent that the second cause of action of the amended complaint is dismissed; and it is further

ORDERED that the defendants are directed to serve answers to the amended complaint within 10 days after service of a copy of this order with notice of entry.

Dated: 10/30/06

ENTER:



J.S.C.

BERNARD J. FRIED
J.S.C.

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OCT 30 2006
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