Venturetek, L.P. v Rand Publishing Co., Inc.
2006 NY Slip Op 30386(U)
March 8, 2006
Supreme Court, New York County
Docket Number: 0605046/1998
Judge: Herman Cahn
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[* 1] SCANNED ON 3/10/2006

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

PRESENT: Herman Cahn, Justice — PART 49

0605046/1998

VENTURETEK, L.P.
VS
RAND PUBLISHING

SEQ 23

SUMMARY JUDGMENT

INDEX NO.
MOTION DATE 3/17/05
MOTION SEQ. NO. 023
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

FILED
MAR 10 2006
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE ......

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

Dated: 3/8/06

H Cahn, 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: IAS PART 49

VENTURETEK, L.P., RICHARD ELKIN, ANTOINE BERNHEIM, STACY BERNHEIM, and GENSTAR, LTD., individually and as shareholders of Rand Publishing Co., Inc.,

Plaintiffs,

-against-

RAND PUBLISHING CO., INC., MASON P. SLAINE, MICHAEL E. DANZIGER, WARBURG PINCUS VENTURES, L.P. and E.M. WARBURG, PINCUS & CO., L.L.C.,

Defendants.

Index No. 605046/98

Herman Cahn, J.

Motion sequence numbers 21, 23, 24, and 25 are consolidated for disposition.

Defendants Mason P. Slaine and Michael E. Danziger separately move for summary judgment dismissing the claims asserted against them in the second amended complaint (seq. nos. 25 and 24, respectively).

Plaintiffs move for partial summary judgment as to parts of their causes of action, set forth in 25 numbered statements contained in their notice of motion (seq. No. 23), CPLR 3212 (e).

Defendant Slaine additionally moves for an order excluding any testimony from non-party J. Morton Davis (seq. no. 21).

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BACKGROUND

The facts of this case have been detailed in several prior decisions and orders of this court, familiarity with which is presumed.

Rand Publishing Co., Inc. is a small Delaware corporation that was formed, and was wholly owned, by defendants Slaine and Danziger, in February, 1993. At the time, Slaine and Danziger each invested $450,000.00 in Rand in order to launch a new start-up magazine, Financial Technology Review ("FTR"), which focused on the uses of computers and information technology in the financial services industry.

Following FTR's launch, Slaine and Danziger sought to raise additional monies for FTR's future capital needs, as well as to enable them to expand Rand's business by developing another start-up company, a database for the hospitality industry. To these ends, in November 1993, Slaine prepared a "Business Summary," which Rand distributed to certain potential investors (Jaroslawicz Affirm. Ex. A). The Business Summary described Rand as:

> a newly organized business engaged in information publishing. It recently launched its first product, *Financial Technology Review* (FTR), a monthly controlled circulation magazine that covers the uses of computers and information technology in the financial services industry. Rand Publishing Company also intends to develop directories, buyers guides, conferences and expositions in the financial technology field. Additionally, the company is pursuing development of a relational database covering the hospitality industry.

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> To the extent they are available, Rand Publishing Company will also pursue niche acquisitions

(Id.)

The Business Summary indicated that Rand was hoping to raise $5,000,000.00 through the sale of 50% of its shares. The Business Summary indicated that Rand had invested $800,000.00 in FTR up to that date; that it expected to invest a total of $1.5-2.0 million in FTR, and expected to invest a total of $2.0-2.5 million in developing the hospitality database.

Plaintiffs are investors in Rand. Pursuant to an Agreement for Issuance and Sale of Stock dated December 30, 1993, plaintiffs, together, invested a total of $3.6 million in Rand, acquiring 50% of the company (Jaroslawicz Affirm. Ex. H).[1] Slaine and Danziger each retained a 25% share of Rand. Although the Agreement identified FTR as the sole "current business" of Rand (id. ¶ 5), plaintiffs allege that the primary purpose of Rand was to invest in or acquire additional niche publications.

The Agreement provided for a three person board (¶ 4 [k]). Slaine and Danziger served as corporate officers and directors, with plaintiff Venturetek, the largest single shareholder, having the right to name the third member. The Agreement additionally provided that, for so long as plaintiffs

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[1] Specifically, plaintiff Venturetek, L.P. invested $2,950,000.00, plaintiff Genstar Ltd. invested $500,000.00, plaintiffs Antoine and Stacy Bernheim together invested $100,000.00, and plaintiff Richard Elkin invested $50,000.00.

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collectively owned 20% or more of Rand, "Danziger and Slaine shall remain actively involved in the affairs of the Corporation, to the extent that they deem appropriate to develop the business" (¶ 4 [j]).

Neither Slaine nor Danziger were to receive any compensation for their efforts on behalf of Rand. Indeed, when the Agreement was executed, both Slaine and Danziger were employed full time in executive positions at Thomson Financial Services, Inc., a large provider of financial information and software products. Between 1994 and 1996, Slaine served as President and Chief Executive Officer of Thomson Financial, where he was actively engaged in seeking niche business acquisitions in the information and publishing field, the same business in which Rand allegedly was engaged. Their employment at Thomson Financial was known to all Rand investors.

In April 1994, after receiving the infusion of new capital, Rand launched Hospitality Data Services, Inc. ("HDS"), a start-up business offering a database for the hospitality industry. In early 1995, Rand invested $1,250,000.00 of its remaining cash to acquire, along with a group of other investors, Progressive Grocer Associates ("PGA"), the publisher of two magazines focusing on the supermarket industry.

Ultimately, neither FTR nor HDS, Rand's two start-up companies, proved successful. Rand terminated its investment in

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FTR in July 1994, and its investment in HDS in April 1996. By the end of 1996, Rand had only $1.2-1.3 million in cash remaining on hand, plus its investment in PGA, which was illiquid.

In quarterly letters sent to plaintiff shareholders between July 1996 and the end of 1997, Slaine represented that he and Danziger continued to be actively engaged in seeking out opportunities to invest Rand's remaining funds. To that end, plaintiffs were informed, at various times, that Slaine and Danziger had looked at a large Florida based publishing company; had reviewed three investments in the newsletter, book, and electronic information areas; had made an offer on an electronic publisher of tax and accounting information on CD Rom; and had pursued an educational publisher called Technology in Higher Education (Jaroslawicz Affirm. Ex. B). Some of the letters also indicated that it was difficult to find appropriate investments, given Rand's limited cash position and the competition for investments in the information publishing industry.

Meanwhile, in December 1996, Slaine left his position at Thomson Financial upon the expiration of his employment contract. That same month, he formed a new information publishing business, Information Ventures, L.L.C., with Warburg Pincus Ventures, L.P. and E.M. Warburg, Pincus & Co. ("Warburg"). During 1997, the same period in which Slaine was writing letters to Rand shareholders about how difficult it was to find

investment opportunities for Rand, Slaine acquired four niche publication businesses for Information Ventures: (1) CRC Press, a publisher of scientific, technical and medical, and professional titles, which was acquired for $13 million cash; (2) St. Lucie Press, a publisher of professional titles, which was acquired for $2.6 million cash; (3) Auerbach, a provider of technology-oriented print and electronic subscription based products, which was acquired for $8 million cash; and (4) MicroPatent, a provider of intellectual property information products and services, which was acquired for $7.4 million cash.

On April 17, 1998, Slaine made a final investment on behalf of Rand, by investing $500,000.00 of Rand's remaining funds in Fame Information Services, Inc., a Warburg-controlled company that provided financial software to investment and banking firms. At the time, Slaine was serving on Fame's board of directors, a fact that was disclosed to Rand shareholders prior to the purchase.

Unlike Rand, Information Ventures proved quite successful. It was decided to take it public, in 1998, as Information Holdings, Inc. ("IHI"). A prospectus and registration statement were filed with the SEC in June 1998. In anticipation of the initial public offering, Danziger was invited to, and eventually did, join IHI's Board. At about this time, Danziger allegedly suggested to Slaine that Rand be offered the

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opportunity to invest its remaining funds in shares of IHI as part of the IPO. After Slaine obtained approval from IHI's underwriter, Danziger contacted the Rand investors and offered them the opportunity to invest Rand's available funds in IHI under favorable terms. Plaintiffs declined the offer and, shortly thereafter, threatened to sue Slaine for breach of fiduciary duty. Danziger, who was offered the same opportunity and terms as Rand, did purchase shares during the IPO.

The IPO went forward in August 1998, and IHI proved highly successful.

In October 1998, plaintiffs commenced the instant action against defendants Slaine and Danziger, alleging usurpation of corporate opportunities and breach of fiduciary duty. The complaint also sought the imposition of a constructive trust over any benefits or proceeds obtained by defendants as a result of their alleged wrongdoing.[2]

In their second amended complaint, plaintiffs allege that Slaine breached his fiduciary duty to Rand by forming Information Ventures, a company engaged in acquiring information publishing businesses in niche markets, the same line of business that Slaine and Danziger had been pursuing on behalf of Rand. Plaintiffs contend that Slaine further breached his fiduciary

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[2] The complaint also asserted a claim against Warburg for tortious interference with contract. That claim has since been settled.

duty to Rand by secretly acquiring the four niche publication businesses for Information Ventures, opportunities which, they allege, should have been offered to Rand. Although Danziger was not involved in the formation of Information Ventures, or its acquisition of the four niche publications, plaintiffs allege that he breached his fiduciary duty to Rand by failing to investigate and stop Slaine from breaching his fiduciary duty and usurping those corporate opportunities rightfully belonging to Rand.

Additionally, during discovery, plaintiffs learned that, in December 1996, Slaine had entered into an employment agreement with Warburg for his work with Information Ventures. That agreement contained an exclusivity provision pursuant to which Slaine had agreed not to "engage in any other business activity" (Jaroslawicz Affirm. Ex. I § 4). Plaintiffs argue that by entering into such an agreement, Slaine further breached his fiduciary obligation to Rand to "remain actively involved in the affairs of the Corporation, to the extent that [he] deem[ed] appropriate to develop the business" (id., Ex. H ¶ 4 [j]).

Slaine argues that summary judgment dismissing all of the claims against him is warranted, as the evidence shows that Rand was never an operating company or Slaine's employer, but was merely an investment vehicle with limited funds. He contends that since Information Ventures was never in competition with

Rand, there was no conflict of interest in his overlapping involvement with each. Slaine further contends that the four acquisitions at issue were never Rand's corporate opportunities, because it was in no financial position to exploit them. Further, it is argued that the opportunities were not in Rand's line of business, and it had no interest or expectancy in them.

Danziger argues that summary judgment dismissing the claims against him is warranted, because he was not involved in the formation of Information Ventures, and did not know about the four acquisitions until after each had been made.

Plaintiffs argue that summary judgment on those parts of their causes of action, set forth in 25 numbered statements containing various statements of fact or law, should be granted, as doing so would serve to shorten the trial.

Finally, Slaine seeks to exclude testimony that might be offered by non-party J. Morton Davis, regarding: (a) any alleged representations made by Slaine to induce Davis to invest in Rand; and (b) Davis' claim that he would have been willing to invest more money in Rand for the acquisition of investment opportunities. Slaine argues that any testimony as to representations made to Davis by Slaine would be irrelevant, as Davis did not invest in, or become a shareholder of, Rand. Slaine additionally argues that Davis' testimony regarding his willingness to invest funds in Rand is unverifiable and self-

serving, and thus inadmissable.

DISCUSSION

A motion for summary judgment will be granted where a movant has made "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Once the movant has made such a showing, the party opposing the motion has the burden of producing evidentiary facts sufficient to raise triable issues of fact (see Zuckerman v City of New York, 49 NY2d 557 [1980]).

As an initial matter, the court notes that Delaware law applies to plaintiffs' usurpation of corporate opportunity and fiduciary duty claims, as issues of corporate governance are determined by the law of the state of incorporation (Kikis v McRoberts Corp., 225 AD2d 455 [1st Dept 1996]; Hart v General Motors Corp., 129 AD2d 179 [1st Dept], lv denied 70 NY2d 608 [1987]). Rand was incorporated in Delaware.

The corporate opportunity doctrine, as delineated in Delaware law, holds that:

> a corporate officer or director may not take a business opportunity for his own if: (1) the corporation is financially able to exploit the opportunity; (2) the opportunity is within the corporation's line of business; (3) the corporation has an interest or expectancy in the opportunity; and (4) by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimicable to his duties to the corporation.

(Broz v Cellular Info. Sys., Inc., 673 A2d 148, 155 [Del 1996].)

A corollary to the doctrine states that:

> a director or officer *may* take a corporate opportunity if: (1) the opportunity is presented to the director or officer in his individual and not his corporate capacity; (2) the opportunity is not essential to the corporation; (3) the corporation holds no interest or expectancy in the opportunity; and (4) the director or officer has not wrongfully employed the resources of the corporation in pursuing or exploiting the opportunity.

(Id. [emphasis in original], referencing Guth v Loft, Inc., 5 A2d 503, 509 [Del 1939].)

These tests:

> provide guidelines to be considered by a reviewing court in balancing the equities of an individual case. No one factor is dispositive and all factors must be taken into account insofar as they are applicable

(Broz, supra, 673 A2d at 155.)

Slaine argues that summary judgment in defendants' favor is warranted, because the evidence establishes that no part of the four-part test for finding a usurped corporate opportunity has been met. Specifically, Slaine argues that Rand, with only $1.3 million in remaining cash and $1.25 million in an illiquid investment in PGA, clearly lacked the funds to make any of the acquisitions at issue. He further argues that all four of the acquisitions at issue were in a different line of business from that of Rand, as they all were focused in the scientific, technical and medical segments of the publishing market, and that there is no evidence that Rand had either an interest or

expectancy in any of these acquisitions. Slaine contends that there was no conflict between his duties to Rand and his work at Information Ventures, as Rand had no exclusive right to his services, and Information Ventures was not in competition with Rand. Slaine additionally argues that his employment agreement with Warburg did not prevent him from fulfilling any of his obligations to Rand, because the exclusivity provision in that agreement explicitly carved out an exception for "personal investing activities" (Jaroslawicz Affirm. Ex. I § 4).

Slaine has produced evidence to show that the four acquisitions entailed financial needs or risks that exceeded Rand's resources and capacity. Simply comparing the price of each of the four investments with the amount of cash Rand had, shows that they were beyond Rand's ability to purchase. Further, nothing in the Agreement requires, or even permits, further investment by existing shareholders, or provides a mechanism for the issuance of additional shares of Rand. Therefore, Slaine would have had no obligation to renegotiate the terms of the Agreement or restructure Rand in order to raise additional capital.

Specifically, the acquisitions of four companies - CRC Press, St. Lucie Press, Auerbach, and MicroPatent - were all equity transactions. Each required more than the capital

available to Rand at the time the opportunity arose.[3] As for CRC Press, the seller additionally required IHI to assume $18,000,000.00 in liabilities (Slaine Aff. ¶ 83, Ex. 25).

Moreover, the acquisitions were undertaken at a time when Rand had no offices, employees, or full-time management staff available to operate the companies (Slaine Aff. [11/25/98] ¶¶ 17, 29, 36).

In response, plaintiffs submit the affidavit of Martin A. Bell, a director of Rand. Bell does not deny that Rand did not have sufficient liquid assets to purchase the companies outright, at the time the opportunity arose. Rather, he speculates that had plaintiffs known of the opportunity, "Venturetek and some of Rand's other investors" would have "had, or had access to, millions of dollars of cash to fund these acquisitions themselves" (Bell Aff. ¶ 10).

The circumstances are not to be judged by possible future capabilities of Rand investors. Under Delaware law, the right to appropriate an opportunity depends "'on the circumstances existing at the time it presented itself ... without regard to subsequent events'" (Broz, 673 A2d at 158, quoting Guth, 5 A2d at 513]). A corporation, lacking the

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[3] Rand had approximately $1,000,000.00 in liquid assets. The cash purchase requirements for the referenced companies were $15,400,000.00 for CRC Press; $4,600,000.00 for St. Lucie Press; $9,500,000.00 for Auerbach; and $8,000,000.00 for MicroPatent (Slaine Aff. [11/25/98] ¶ 27).

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wherewithal at the time the opportunity arose, cannot claim usurpation based on speculation about the possibility of future investment (Broz, supra, 673 A2d at 158; see also, Fliegler v Lawrence, 361 A2d 218, 224 [Del 1976] [corporation could not show that it had "ready sources capital" for the opportunity at the time it arose]).

Bell's speculative statements about possible future investment are rendered even more tenuous by the following: (1) the Rand Stockholders' Agreement makes no provision for additional investment by stockholders (Bell Depo. at 463; Wertheim Depo. at 289; Elkin Depo. at 285, 456-57, 461; Selengut Depo. at 43, 185-86, 202-04); (2) David Selengut, a member of Venturetek's general partner, never told anyone at Rand that he would invest additional money in the company (Selengut Depo. At 460-61); (3) plaintiff Richard Elkin, a Rand stockholder, testified that he never offered to invest additional money in the company, nor was he prepared to do so (Elkin Depo. at 645); and (4) plaintiff Antoine Bernheim, a Rand stockholder, testified that neither he, his wife, co-plaintiff/stockholder Stacy Bernheim, or his company, plaintiff Genstar Ltd., were prepared to invest additional money in the company (Antoine Bernheim Depo. at 448).

Plaintiffs fail to establish the key prerequisite of having a "reasonable expectancy" in the opportunity (Guth, supra,

5 A2d at 511). Paragraph 4 (j) of the Rand Stockholders' Agreement provided that Danziger and Slaine "shall remain actively involved in the affairs" of Rand only "to the extent that they deem appropriate to develop the business" (see, Bell Depo. at 246). Moreover, each one of the four companies was directed to Slaine through his involvement with Information Ventures and Warburg Pincus; they were not directed to him as a director of Rand (Slaine Aff. ¶¶ 81-93). Thus, Rand cannot make out a claim against Slaine in these circumstances, because a director is not liable when he is presented the opportunity in a capacity other than as a director or officer of the plaintiff corporation (Broz, supra, 673 A2d at 155; Guth, supra, 5 A2d at 509).[4]

Consequently, plaintiffs cannot show actionable conduct on defendants' part, in support of their claims of usurpation of corporate opportunities. Therefore, defendants motions for summary judgment dismissing the complaint is granted.

In view of the foregoing, plaintiffs' motion for

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[4] The analysis concerning Rand's inability to take advantage of the opportunity altogether, applies equally to the benefit of all defendants. Additionally, as for defendant Danziger in particular, there is no evidence that he played any role in the formation of Information Ventures, or that he possessed prior knowledge of the four acquisitions.

partial summary judgment is denied.[5]

Defendant Slaine's motion to preclude the trial testimony of J. Morton Davis is denied, as moot.

Accordingly, it is

ORDERED that defendant Mason P. Slaine's motion for summary judgment to dismiss the claims asserted against him in the second amended verified complaint (seq. no. 25) is granted; and it is further

ORDERED that defendant Michael E. Danziger's motion for summary judgment to dismiss the claims asserted against him in the second amended verified complaint (seq. no. 24) is granted; and it is further

ORDERED that the plaintiffs' motion for partial summary judgment (seq. no. 23) is denied; and it is further

ORDERED that defendant Mason P. Slaine's motion for an order to exclude any testimony from non-party J. Morton Davis in this action (seq. no. 21) is denied, as moot; and it is further

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[5] Plaintiffs failed to submit a statement "of the material facts as to which the moving party contends there is no genuine issue to be tried," as required by Rule 19-a of the Rules governing the Commercial Division. Their failure to have submitted such a statement constitutes another ground for denial of this motion, as indicated by the language of that Rule.

ORDERED that the clerk shall enter judgment in accordance herewith.

Dated: March 8, 2006

ENTER:

J.S.C.

FILED
MAR 10 2006
COUNTY CLERK'S OFFICE
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