

Digital Broadcasting Corp. v Ladenburg, Thalman, & Co., Inc.
2007 NY Slip Op 30383(U)
March 21, 2007
Supreme Court, New York County
Docket Number: 0117041
Judge: Richard B. Lowe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Lord
Justice

PART Ston

Digital Broadcast Corp

INDEX NO. 117041/CS

MOTION DATE 11/22/06

MOTION SEQ. NO. 006

MOTION CAL. NO. _____

- v -

Leidenberg, Thalmann & Co

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 _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
MAR 28 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/21/07

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 56

-----X
DIGITAL BROADCASTING CORP.,

Index No:117041/05

Plaintiff

- against -

DECISION AND ORDER

LADENBURG, THALMAN, & CO., INC.,
SILVERMAN COLLURA & CHERNIS, P.C.,
JONATHAN INTRATER and
MARTIN LICHT,

Defendants

FILED
MAR 21 2017
NEW YORK
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RICHARD B. LOWE III, J:

Plaintiff Digital Broadcasting Corp. (“DBC”) brings this action against Ladenburg, Thalman & Co., Inc (“Ladenburg”); Silverman Collura & Chernis, PC (“SCC”); Jonathan Intrater (“Intrater”); and Martin Licht (“Licht”) for fraud, breach of fiduciary duty, breach of contract, breach of implied covenant of good faith, and aiding and abetting fraud.¹ In the instant motion , Defendant Licht seeks dismissal of the fraud, aiding and abetting fraud, and breach of fiduciary duty claims against him.

¹ DBC originally brought a cause of action against Licht under Judiciary Law 487. DBC withdrew the claim. (*Mem in Opp'n at 15*)

BACKGROUND

The general facts of this matter were previously discussed in this Court's prior decision dated November 6, 2006 and shall not be repeated here, except to the extent necessary to decide this motion.

DBC is in the business of transmitting digital wireless broadband services. It decided that it needed to raise capital in order to execute a new business strategy. The chosen capital-raising vehicle was a private placement of its securities. In order to assist it with its endeavor, it consulted with Licht, an attorney and partner with the SCC law firm. Licht introduced DBC to Ladenburg, an investment banking firm. Intrater is the Ladenburg representative/investment banker assigned to work with DBC.

Between early 2000 and March 2001, DBC alleges that the Defendants made certain fraudulent representations to it in connection with the private placement. Accordingly, in December 2005, it commenced the instant action against the Defendants. In the underlying actions' relevant claims, DBC alleges Licht committed fraud by making representations he knew to be false; that he aided and abetted Ladenburg in perpetuating the fraud; and that he breached his fiduciary duties to it.

The Defendants filed motions to dismiss the claims against them. On October 26, 2006, this Court heard oral arguments on the motions. Defendant Licht did not attend, and his motion was denied on default. On November 13, 2006, Licht's counsel moved this Court by Order to Show Cause to vacate the default decision, and entertain his motion to dismiss the claims against him.

DISCUSSION

I. Order to Show Cause to Vacate the November 6, 2006 Order and Decision

Licht demonstrated to this Court that he did not receive notice of the scheduled oral argument. Accordingly, the November 6, 2006 Order and Decision denying his motion to dismiss is vacated, and this Court will hereto address Licht's argument.

II. Defendant Licht's Motion to Dismiss

"A party may move for judgment dismissing one or more causes of action asserted against him on the grounds that the pleading fails to state a cause of action. . ." (*CPLR 3211(a)(7)*) In a motion to dismiss, the court takes the facts as alleged in the complaint as true and accords the benefit of every possible favorable inference to the non-movant (*see AG Capital Funding Partners, LP v State Street Bank and Trust Co*, 5 NY 3d 582 [2005]). "The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail." (*Ackerman v 204 East 40th Owners Corp.*, 189 AD 2d 665 [1st Dept 1993].)

a. First Cause of Action: Fraud

Licht seeks dismissal of the fraud claim against him contending that DBC failed to state a cause of action. He avers that the alleged statements are not actionable as a matter of law because they consist of puffery, opinion, and hopeful expectations of future events. DBC contends that the alleged statements were representations of fact, which were known to be false at the time they were made.

In order to sustain a claim for fraud, “there must be a knowing misrepresentation of material fact, which is intended to deceive another party and to induce them to act upon it, causing injury.” (*Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD 2d 64 [1st Dept 2003].) Furthermore, “each of these essential elements must be supported by factual allegations sufficient to satisfy the requirement of CPLR 3016(b) that the circumstances surrounding the fraud be pleaded in detail.” (*Bramex Associates, Inc v CBI Agencies, Ltd*, 149 AD 2d 383 [1st Dept 1989].) A claim for fraud, however, cannot be sustained if the alleged misrepresentations “. . .consisted of mere puffery, opinions of value, or future expectations.” (*Sidamonidze v Kay*, 304 AD 2d 415 [1st Dept 2003].)

Here, DBC alleges that

In or about early June 2000, Licht represented that Intrater told him that Ladenburg had investors “lined up” to do the private placement, that the offering was “sold out” and that it was a “done deal” if DBC agreed to retain Ladenburg. Licht further represented that Intrater had told him that DBC and Nerlinger needed to stop all independent efforts to raise capital. . .and that Licht [said] that he was told by Intrater that the private placement would be oversubscribed. . .

(*Complaint at page 4, paragraph 21 and 24*)

Here, Licht allegedly relayed to DBC statements that Ladenburg and Intrater made during the initial “sales-pitch” meeting, and shortly after the Ladenburg-DBC contract’s formation. To be sure, the above-cited allegations plead that Licht *repeated* assertions that were made to him. These are not Licht’s representations, but rather Intrater’s through Ladenburg the Investment Banking Firm. If these statements concerning the private placement are fraudulent, it is Intrater and Ladenburg who committed the fraud, not Licht.

However, DBC's allegations for fraud against Licht do not conclude here. Elsewhere in the complaint, DBC pleads that

Licht. . .confirmed that Ladenburg. . .had already "lined up"investors, that it would be a "done deal" and further represented that the private placement would be a stepping stone to a subsequent IPO.

(Id at page 5, paragraph 22)

Licht repeated. . .that any independent efforts by DBC to raise capital would interfere with the private placement offered by Ladenburg.

(Id at paragraph 26)

Nerlinger was told by Licht. . .that Ladenburg was working on the private placement memorandum and everything was moving forward smoothly.

(Id at page 7, paragraph 35)

Nerlinger was told by Licht and Intrater that they wanted to see faster growth in DBC's subscriber base and that DBC should expand its infrastructure . . .[and that]. . .that expansion of the company's subscriber base would help facilitate the private placement. . .[and that] Licht and Intrater further told Nerlinger that the money from the private placement would be paid to DBC within the first two weeks of October 2006.

(Id at paragraph 36)

Licht told all who were present that everything was on course and that the money from the private placement would be in the hands of DBC within a few weeks. . .

(Id at page 8, paragraph 38)

Unlike the earlier pleadings, which simply recounted Licht's recitation of assertions made to him by the other Defendants, these alleged statements trace their genesis to Licht directly. Indeed, it is Licht who asserted these representations, which DBC alleges are false.

Furthermore, Licht's contention that "at best, [his] alleged statements were expressions of future expectations and hopeful opinions" is without merit. (*Licht Memo at page 2, paragraph 6*) Assertions that the private placement "is oversubscribed" and "investors are lined up" along with those that contain definitive dates for the placement's closing convey certainty to the recipient. This cannot be construed to be a salesperson's puffery in order to entice a prospective client to purchase a product or service; rather, these alleged comments taken together with the assertion that the private placement money was never delivered, provide DBC with a cognizable claim for fraud. Therefore, the motion to dismiss the fraud claim is denied.

b. Fifth Cause of Action: Aiding and Abetting Fraud

Licht seeks dismissal of the aiding and abetting fraud claim against him on the grounds that DBC's complaint fails to state a cognizable cause of action. In order to establish a claim for aiding and abetting fraud, a plaintiff must allege the existence of a fraud, the defendant's knowledge of the fraud, and that the defendant provided substantial assistance to advance the fraud. (*See, Houbigant, Inc v Deloitte & Touche LLP*, 303 AD 2d 92 [1st Dept 2003].)

Here, this Court found in its November 6, 2006 decision that DBC plead a cognizable fraud claim against Ladenburg and Intrater. Furthermore, it is abundant with allegations that Licht directly misrepresented, in conjunction with Intrater, that Ladenburg received subscriptions of \$20 million; that the private placement was fully subscribed; and that the closing date was set. Moreover, it alleges that Licht knew these statements were untrue and that the assertions were in fact false. To be sure, the private placement was never closed, a memorandum was never produced, and the purported subscribers never materialized. DBC

thereby satisfactory pleads that Licht knew a fraud existed. Finally, with the allegations that Licht directly continued to assert the same misrepresentations that Intrater/Ladenburg made earlier, DBC sufficiently pleads that Licht assisted them in advancing said fraud.

At this stage in the litigation, a court only looks to see if the complaint states a cognizable cause of action, regardless of how inarticulate it might be. (*See Mandelblatt v Devon Stores*, 132 AD 2d 162 [1st Dept 1987].) From the complaint's four corners, DBC sufficiently pleads that Licht aided and abetted Ladenburg/Intrater's alleged fraud. Licht's motion to dismiss this claim is therefore denied.

c. Sixth Cause of Action: Breach of Fiduciary Duty

DBC alleges that Licht breached his fiduciary duty to it by making the alleged fraudulent statements. Licht avers that this claim is barred by the statute of limitations.

"A breach of a fiduciary duty claim is governed by either a three year or six year statute of limitations." (*Carlington Center Point Assoc v MR Realty Assoc*, 4 AD 3d 179 [1st Dept 2004].) A "breach of fiduciary duty cause of action, which seeks monetary relief, is governed by the three-year statute of limitations." (*Transport Workers Union of America v Alan G. Schwartz*, 821 NYS 2d 53 [1st Dept 2006].) Here, DBC seeks monetary damages, so the three-year statute would ordinarily apply.

However, when "a cause of action for breach of fiduciary duty [is] based on allegations of actual fraud, [it is] subject to a six-year statute of limitations period." (*Kaufman v Cohen*, 307 AD 2d 113 [1st Dept 2003].) DBC avers that its breach of fiduciary duty claim is grounded in its fraud claim, and therefore it is entitled to a six-year statute of limitations period.

Within DBC's claim for Breach of Fiduciary Duty, it re-alleges ¶ 1-58. Embedded in these assertions are DBC's allegations that Licht committed a fraud upon it. The accusations for fraud relate to the statements that "investors were lined up", the private placement was "over subscribed" , and dates-certain given for the private placement's closing. DBC further alleges that these statements were false and were known to be false at the time they were made. (*Id at* ¶ 58) All of these assertions were incorporated by reference under the breach of fiduciary duty claims.

In order to plead a cognizable claim for breach of fiduciary duty grounded in fraud, there must first exist a fiduciary relationship between DBC and Licht. "Attorneys have a fiduciary duty of loyalty and confidentiality to their clients." (*Solow v W.R. Grace & Co*, 83 NY 2d 303 [1994].) Here, Licht as the attorney representing DBC, owed such a duty to it. DBC alleges that Licht committed a fraud by asserting statements known to be false at the time they were made. According, within the complaint is a breach of said fiduciary duty.

In reviewing a defendant's motion to dismiss pursuant to CPLR 3211(a)(7) , a court need not look to see if the plaintiff proves the claim in the pleadings; rather it will look only at this stage to see if he states a cognizable cause of action despite how poorly drafted it may be. (*See Mandelblatt v Devon Stores*, 132 AD 2d 162 [1st Dept 1987].) From the four corners of its complaint, DBC pleads that its Breach of Fiduciary Duty claims are connected to its fraud claims.

DBC's last contact with Licht was in March 2001; the complaint against him was filed in December 2005. The time period between the cause of action's accrual and the complaint's

filing is within six years. Accordingly, DBC 's breach of fiduciary duty claim against Licht is cognizable and not time-barred; therefore it is not dismissed.


CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the motion to dismiss the First, Fifth and Sixth Causes of Action against Licht is denied.

This shall constitute the decision and order of this Court.

Dated: March 21, 2007

FILED
MAR. 28 2007
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ENTER:


RICHARD B. LOWE, III, J.S.C.