

Bricolage Capital Holdings, LLC v Scalamandre

2007 NY Slip Op 32237(U)

July 13, 2007

Supreme Court, New York County

Docket Number: 0603456/2006

Judge: Shirley W. Kornreich

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

JUDGE SHIRLEY WERNER KORNREICH

PRESENT:

Index Number : 603456/2006

BRICOLAGE CAPITAL HOLDINGS,

vs

SCALKAMANADRE, ERNEST A.

Sequence Number : 001

SUMMARY JUDGMENT

PART 54

INDEX NO. 603456/06

MOTION DATE 5/17/07

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion to/for S.J.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

3, 4

5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED

JUL 23 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: [Signature]

HON. SHIRLEY WERNER KORNREICH
[Signature] J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
BRICOLAGE CAPITAL HOLDINGS, LLC,

Plaintiff,

-against-

INDEX NO.
603456/2006
DECISION &

ORDER
ERNEST A. SCALAMANDRE,

Defendant.

-----X
ERNEST A. SCALAMANDRE,

Defendant / Third-Party Plaintiff,

-against-

ANDREW D. BEER,

Third-Party Defendant.

-----X
KORNREICH, SHIRLEY WERNER, J.:

FILED
JUL 23 2007
NEW YORK
COUNTY CLERK'S OFFICE

Defendant / third-party plaintiff Ernest A. Scalamandre is a former employee of a business entity affiliated with Bricolage Capital Holdings, LLC ("BCH"). BCH brought this action to enforce two promissory notes executed by Mr. Scalamandre in favor of BCH. Mr. Scalamandre claims that he signed the notes pursuant to an oral agreement that they would never be enforced. BCH now moves for summary judgment on the promissory notes.

I. Statement of Facts

A. Affidavit of Mr. Beer

In December, 2001, Bricolage Capital, LLC ("BC"), an investment advisor affiliated with BCH, hired Mr. Scalamandre to help build a "fund of funds." At that time, Mr. Scalamandre owned Pinnacle Associates GP, LLC ("PA"), which was the general partner of a "fund of funds" called the P. Fund, L.P. d/b/a Pinnacle Fund (the "Pinnacle Fund"). As a condition of Mr. Scalamandre's employment with BC, he reduced his ownership in PA to 20%, with BCH owning the remaining 80%.

Mr. Beer states that at Mr. Scalamandre's request, BCH loaned to Mr. Scalamandre \$200,000, which he invested in the Pinnacle Fund. In exchange for this loan, Mr. Scalamandre signed a promissory note, dated February 6, 2002 (the "First Note"). The First Note states that payment was due on or before February 28, 2005, with an interest rate of 6% per annum, increasing to 8% per annum for amounts past due. The First Note also states that Mr. Scalamandre would pay reasonable fees and expenses of BCH's attorney, if necessary. Mr. Beer claims there were no side letters or agreements, written or oral, regarding the First Note. Mr. Beer also states that Mr. Scalamandre subsequently requested a \$51,400 loan from BCH to join a country club in Southhampton, NY. In exchange for this loan, Mr. Scalamandre signed a promissory note, dated August 5, 2002 (the "Second Note"). The terms of the Second Note are nearly identical to the First Note, except the Second Note's maturity date was August 31, 2005. Mr. Beer again claims that there were no side letters or agreements, written or oral, to the Second Note. The promissory notes attached to Mr. Beer's affidavit do not mention the purpose of the loans, nor do they give any indication that the loans were not meant to be repaid. The notes also do not contain merger clauses.

In April 2003, BC sold its management contracts for the Pinnacle Fund to a newly-formed company called Pinnacle Asset Management, L.P. ("PAM LP"). PA continued to serve as the general partner of the Pinnacle Fund. The parties agree that upon the formation of PAM LP, Mr. Scalamandre was given a controlling 66% interest in the newly formed entity, and the titles of Chief Investment Officer and Senior Managing Director, as well a controlling ownership interest in of 66% in PA.

Mr. Beer claims that because Mr. Scalamandre was unable to make PAM LP profitable, it was reorganized several times and Mr. Scalamandre's interest in it was reduced. In late 2003, PAM LP hired Don Segalas to spearhead the marketing of PAM LP funds. In mid-2004, Apex Capital Management, LLC ("Apex"), co-founded by Mr. Beer, agreed to invest in PAM LP. The conditions of this investment were: (1) Mr. Scalamandre's ownership interest in PAM LP was to be reduced to 22.5%; (2) Mr. Segalas was to assume day-to-day control of PAM LP and would receive 22.5% ownership; (3) Apex would own 30%; (4) BCH would own 20%; and (5) Marcel Massimb, the chief risk manager of PAM LP, would own 5%. As part of this recapitalization, the partnerships and operating agreements of the various companies were amended in September, 2004.

Mr. Beer states that Mr. Scalamandre was unhappy with changes at PAM LP, and that the company had concerns he would leave. Fearing investors' reaction to the departure of the Chief Investment Officer, PAM LP asked BCH to offer Mr. Scalamandre an incentive to stay on. BCH reached two letter agreements, both dated September 10, 2004, extending the repayment of the First and Second Notes until December 31, 2005

("Extension Letters"). The Extension Letters provide the First and Second Notes would be marked "paid and satisfied" if Mr. Scalamandre remained continuously employed by PAM LP through December 31, 2005.

Mr. Beer contends that Mr. Scalamandre's performance took a downturn following the agreements. He claims Mr. Scalamandre failed to perform several of his duties as the CIO and took 14 weeks of vacation within the first ten months of 2005. According to Mr. Beer, there was pressure to terminate Mr. Scalamandre, but Mr. Segalas resisted and, instead, Mr. Beer met with Mr. Scalamandre on or about August 15, 2005 to discuss the problems. Mr. Beer claims Mr. Scalamandre informed him that he was unhappy with his level of equity in PAM LP, and was not interested in improving his performance if it wouldn't benefit him.

In early September, 2005, PAM LP's management was reorganized. Willis Williams, the Compliance Officer for PAM LP and Chief Operating Officer for Apex, sent a letter to Mr. Scalamandre, informing him of the changes and issuing an ultimatum. The letter stated that Mr. Scalamandre's performance would be reviewed on December 15, 2005, to determine whether "the relationship was succeeding." If he passed the performance review, the letter offered to extend payment of the notes to December 31, 2006. Mr. Scalamandre refused to sign this agreement.

Mr. Beer states that Mr. Scalamandre's performance and attendance at work failed to improve following Mr. Williams' letter. Consequently, Mr. Scalamandre was fired from PAM LP on December 12, 2005, and Mr. Beer wrote Mr. Scalamandre on December 14, 2005, informing him that, pursuant to the September 10, 2004 letters,

repayment was due on the First and Second Notes. Mr. Beer asked that repayment be made by December 29, 2005, but Mr. Scalamandre made no payments.

B. Affidavit of Mr. Scalamandre

Mr. Scalamandre states that the \$200,000 paid to him by BCH was compensation for personal services. He states that the First Note was not issued until at least one month after he received the \$200,000 from BCH. He claims that when Mr. Beer presented the note, he told Mr. Scalamandre not to worry and that it would be torn up at some point in the future. Mr. Beer informed him that the First Note would allow the monies to be tax-deferred until a later date. Mr. Scalamandre was informed that the specific repayment terms were only "window dressing," and that the loan would be absolutely, and without condition, forgiven. Mr. Scalamandre claims that Mr. Beers also presented the Second Note as a tax deferral plan subject to an oral agreement that it would be forgiven.

According to Mr. Scalamandre, PA was separated from BC because of problems with BC's tax shelter work. Mr. Scalamandre cites several lawsuits against BC and Mr. Beer relating their tax shelter business. Mr. Scalamandre contends that he requested indemnification from Mr. Beer and BC for any tax shelter work done while PA had been owned by BC and that this created animosity between himself and Mr. Beer.

Mr. Scalamandre denies that he signed the September 10, 2004 Amended and Restated Limited Liability Company Agreement for PA, which allegedly reduced his interest in PA from 66% to 22.5%, claiming that one of his purported signature is a forgery. The copy of that agreement submitted by Mr. Scalamandre differs from the one submitted by BCH in that it has Scalamandre's signature on page 22, but not above his

printed name on page 23. Mr. Scalamandre states that he “was specifically informed by Mr. Segalas that there were no changes from any of the prior agreements: to wit, I was still the majority owner and the Manager Member in charge of investment decisions.” In addition, Mr. Scalamandre asserts that he was not given the attached schedule reflecting his reduced percentage in PAM LP as of 2004. He further states that when he signed the Extension Agreements he was told by Mr. Beer that the loans would not have to be repaid and that there would be no tax consequences, statements upon which he allegedly relied because of Mr. Beer’s tax shelter expertise. Mr. Scalamandre claims that PAM LP was reshuffled without his consent and that he refused to sign the 2005 Agreement, believing that he was being “railroaded” out of the company. As a result, Mr. Scalamandre contends that his termination on December 12, 2005 was contrary to the existing corporate agreements, under which he allegedly owned a majority interest in PA and PAM LP. Mr. Scalamandre disputes that his performance deteriorated, citing an award won by one of his funds in 2005.¹

C. Affidavit of Mr. Williams

In its reply papers, BCH submits the affidavit of Mr. Williams, which disputes

¹Mr. Scalamandre asserts 14 affirmative defenses and 3 counterclaims in his answer: (1) failure to state a cause of action; (2) notes induced by fraud; (3) notes procured under false pretenses; (4) improper acts; (5) improper termination; (6) doctrine of unclean hands; (7) doctrine of accord and satisfaction; (8) lack of consideration; (9) fraud and misrepresentation; (10) bad faith; (11) plaintiff and third-party defendant caused the operative event; (12) equity precludes recovery; (13) damages caused by plaintiff and third-party defendant; (14) damages caused by third-party not under control of defendant; (15) counterclaim of fraud and misrepresentation; (16) counterclaim of tortious interference with a contract and a prospective economic advantage; and (17) counterclaim of indemnification.

that Mr. Scalamandre's termination violated the corporate agreements. Mr. Williams claims that PAM LP is controlled by its general partner, Pinnacle Asset Management, LLC ("PAM LLC"), which had the right to terminate Mr. Scalamandre's employment. Mr. Williams states that Mr. Scalamandre was an at will employee of PAM LP, as well as limited partner, but states that his 22.5% ownership was actually in PAM LLC, as stated in an attachment to the September 10, 2004 Amended and Restated Operating Agreement of PAM LLC, the document that Mr. Scalamandre claims that he received without the attached schedule showing the reduction of his interest. Mr. Williams states that since PAM LLC is the general partner of PAM LP, it had the authority to terminate Mr. Scalamandre, an at-will employee of PAM LP.

C. Documentary Evidence

1. PA

Pursuant to the July 22, 2003 and September 10, 2004 Amended and Restated Limited Liability Company Agreement, PA is a limited liability company under Delaware law. Mr. Scalamandre is the managing member, and Mr. Beer is a member of PA, which oversees investments in the Pinnacle Fund and other funds. Under the July 22, 2003 agreement, a vote of 80% was required to restructure the equity ownership of PA, whereas 70% was required in the September 10, 2004 agreement.

2. PAM LP

Pursuant to the September 10, 2004 Amended and Restated Limited Partnership Agreement, to which Mr. Scalamandre says he did not agree, PAM LP is a limited partnership under Delaware law. PAM LLC is the partnership's general partner, which

has the authority to engage personnel as it may deem necessary or advisable, and to determine when a forfeiting event as occurred which would necessitate the removal of a partner.

3. *PAM LLC*

Pursuant to the September 10, 2004 Amended and Restated Operating Agreement, PAM LLC is a limited liability company under Delaware law. One of PAM LLC's purposes is to invest in and serve as the general partner of PAM LP. The managing members are Mr. Scalamandre and Mr. Segalas, with Mr. Scalamandre holding the title of Senior Managing Member. The power to make most managerial decisions rests with the managing members, including the acts on behalf of PAM LLC in its capacity as general partner of PAM LP. Any major decision, including reorganizing of PAM LP or PAM LLC, determination of a forfeiting event and restructuring management percentages requires the consent of 70% of the members. The attached schedule lists Mr. Scalamandre's capital percentage as 22.5%. However, although the record contains copies of two amended and restated agreements of PAM LLC, dated September 10, 2004 and September 15, 2005, the original PAM LLC operating agreement is noticeably absent from the record.

The September 15, 2005 Amended and Restated Operating Agreement for PAM LLC is not signed by Mr. Scalamandre. The 2005 Agreement removed the authority to act on behalf of PAM LLC as the general partner of PAM LP from the managing members, and placed it in the hands of a Board of Directors. The board consisted of Mr. Scalamandre, Mr. Segalas, and a representative of Apex, with decisions decided by a

majority vote. Any board member can be removed by an affirmative vote of 65%-in-interest of the members. Mr. Scalamandre is listed as the CIO of PAM LLC and was now only a member, with a 22.5% profit percentage.

II. Arguments of the Parties

BCH argues that it is entitled to summary judgment because the notes are an unambiguous agreement to pay and parol evidence of an oral agreement is not available to contradict the express language of the notes. In addition, BCH argues that public policy prohibits enforcement of an agreement to defer taxes owed to the Internal Revenue Service. Finally, BC argues that it was entitled to fire Mr. Scalamandre before the notes were forgiven under the Extension Agreements because he was an at-will employee of PAM, LLC, subject to termination at any time.

Mr. Scalamandre argues that the loans are not enforceable because (1) BCH and Mr. Beer acted inequitably and with unclean hands; (2) there are factual questions as to the validity of the termination itself; (3) there was no consideration for the notes; and (4) the notes were procured by fraud. Finally, Mr. Scalamandre argues that evidence of fraud may refute a contract, notwithstanding the parole evidence rule, and that the acts of Mr. Beer, not Mr. Scalamandre, may have created a tax fraud. Mr. Scalamandre also argues that he was not properly terminated under the corporate agreements.

III. Conclusions of Law

In order to prevail on a motion for summary judgment, the movant “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Alvarez v. Prospect*

Hospital, 68 N.Y.2d 320, 324 (1986). Upon this showing, “the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Id.*

BCH is correct that Scalamandre’s parol evidence of a scheme to defraud the Internal Revenue Service is inadmissible because it violates public policy. *Cooper v. Cooper & Clement, Inc.*, 198 A.D.2d 812 (4th Dept. 1993). This case is distinguishable from *Greenleaf v. Lachman*, 216 A.D.2d 65 (1st Dept 1995), because the defendant in that case had signed the note solely for the benefit of the plaintiff, who was seeking to avoid paying a gift tax. The court held that the plaintiff could not enforce the note and, thereby take advantage of his own wrong at the expense of the plaintiff. Here, defendant Scalamandre allegedly signed the note to defer his own income taxes, making him a beneficiary of the fraud. In searching the record, the court dismisses Mr. Scalamandre’s 2nd, 3rd and 9th affirmative defenses and first counterclaim alleging that the notes were the product of fraud, misrepresentation and “false pretenses.”

However, there is a question of fact as to whether Mr. Scalamandre owned a sufficient percentage of PAM, LP and PA on the day that he was fired to require his consent to the termination. The Extension Agreements provide that the loans would be forgiven if Mr. Scalamandre was continuously employed by PAM LP through December 31, 2005. The parties agree that prior to September 10, 2004, Mr. Scalamandre owned 66% of PA and PAM LP. Under the PAM LP agreements in the record, a restructuring of the equity interests in that entity required approval of 70% of the equity ownership, which

could not have been accomplished without Mr. Scalamandre's approval if he still owned 66%. Neither party has presented the original PAM LLC agreement, and Mr. Scalamandre denies receiving the schedule that reduced his percentage in PAM LP to 22.5%. Mr. Williams' reply affidavit making the argument for the first time that PAM LLC was the general partner of PAM LP with the authority to fire Mr. Scalamandre cannot be considered. *Branham v. Loews Orpheum Cinemas, Inc.*, 31 A.D.3d 319 (1st Dept. 2006), *affirmed*, 8 N.Y.3d 931 (2007)(evidence presented for first time in reply not considered). Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendant Scalamandre's 2nd, 3rd and 9th affirmative defenses and first counterclaim are dismissed with prejudice; and it is further

ORDERED that the parties are to appear before the court at 9:30 in the forenoon on August 9, 2007 for a pretrial conference.

Dated: July 13, 2007

ENTER:

FILED
JUL 23 2007
NEW YORK
COUNTY CLERK'S OFFICE
J.S.C.