

Sotomayor v Medifast, Inc.

2007 NY Slip Op 32743(U)

August 21, 2007

Supreme Court, New York County

Docket Number: 0604076/2003

Judge: Richard B. Lowe

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

PRESENT: HON. RICHARD B. LOWE, III
Justice

PART 56

Leonard Sotomayer

INDEX NO. 604076/03

MOTION DATE 6/11/07

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

- v -

Medefest

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

FILED
SEP 04 2007
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

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Dated: 8/21/07

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE MDAT

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
LEONARD ZACHARY SOTOMAYOR, individually, as
assignee of the rights of H-T Capital, Inc. and
derivatively on behalf of T-1 Holdings, LLC,

Plaintiff,

Index No.
604076/03

-against-

MEDIFAST, INC., formerly Healthrite, Inc., DAVID
SCHEFFLER and T-1 HOLDINGS, LLC,

Defendants.

FILED
SEP 04 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----X
RICHARD B. LOWE III, J. :

Defendant David Scheffler moves pursuant to CPLR 3211(a)(1) and (7) for an order dismissing the complaint. Plaintiff cross-moves to reinstate the third, fourth, fifth and sixth causes of action in the complaint.

Background

On December 30, 2003, plaintiff initiated this action in this court. Plaintiff brings this action individually, in his alleged capacity as assignee of the rights of H-T Capital, Inc.(H-T) and derivatively on behalf of T-1 Holdings, LLC (T-1).

The complaint alleges the following: in 1999, H-T and defendant Medifast, Inc., formerly Healthrite, Inc. (Medifast) entered into a contract whereby H-T was to act as selling agent for Medifast in connection with a proposed offering of Medifast securities. Medifast breached the contract by failing to pay a cash fee to H-T in the sum of \$35,000 and by failing to issue warrants to H-T for the purchase of 50,000 shares of common stock of Medifast. Thereafter, the rights of H-T to the benefits of the contract were assigned to plaintiff. Subsequently, plaintiff claims to be the beneficiary of a claim for damages in the amount of \$35,000, plus the present value of 50,000

shares of Medifast common stock.

In 1997, Medifast and T-1 entered into a contract wherein T-1 agreed to serve as financial advisor for Medifast with respect to personal financing to be used for acquisitions, working capital and corporate purposes. The members and managers of T-1 has always been Sotoayor and Scheffler, who is on the board. Medifast breached the contract by failing and refusing to issue warrants to T-1 within 30 days of the contract, as required by the terms and, instead, issuing them to Scheffler, individually.

The first cause of action maintains a breach of contract claim against Medifast, and the second cause of action appears to contain a claim for either breach of contract or conversion against Scheffler. These causes of action are brought by plaintiff in his alleged capacity as assignee of the rights of H-T. The remaining causes of action are brought derivatively on behalf of T-1 by plaintiff. The third cause of action is for breach of contract against Medifast. The fourth cause of action is for breach of fiduciary duty against Scheffler. The fifth cause of action is for aiding and abetting a breach of fiduciary duty against Medifast. The sixth cause of action is for civil conspiracy against Medifast and Scheffler.

In March 2004, Medifast and Scheffler moved in separate motions to dismiss the complaint. By an Order dated September 30, 2004, this court dismissed the complaint based upon plaintiff's lack of standing. Specifically, the first and second causes of action were dismissed because the court found that the alleged assignment of H-T's rights to plaintiff was not valid and that plaintiff had no rights pursuant to the 1999 contract. The remaining causes of action were dismissed without prejudice, because T-1, a Delaware LLC, did not file a document to do business in this state and, accordingly, plaintiff could not bring a derivative suit. Having

dismissed on these grounds, the court did not address the remaining arguments in support of dismissal.

Following this ruling, plaintiff filed an appeal with the Appellate Division, First Department, on November 10, 2004. By an Order dated April 13, 2006, the Appellate Division reinstated the first two causes of action, based on a disputed issue of fact as to the authenticity of the assignment provision of the 1999 contract. The Appellate Division affirmed the dismissal of the remaining causes of action. (*See Sotomayor v Medifast, Inc.*, 28 AD3d 309 (1st Dept 2006).

On January 30, 2007, the parties attended a preliminary conference and this court issued an Order granting defendants the opportunity to file renewed motions to dismiss on or before March 1, 2007. On that date, Scheffler filed a motion to dismiss the first and second causes of action. Plaintiff opposed the motion to dismiss and cross-moved to reinstate the third, fourth, fifth and sixth causes of action.

Arguments

Scheffler argues that plaintiff is seeking to enforce a breach of contract claim against him, despite the fact that Scheffler is a non-signatory to the underlying agreement. Scheffler maintains that because he is not a party to the contract, the claim against him must be dismissed for failure to state a cause of action. Moreover, Scheffler contends that plaintiff cannot recast the claim as one for conversion, because plaintiff has no entitlement to the funds received by Scheffler.

Scheffler contends that he initially filed a motion to dismiss on several grounds, including plaintiff's failure to state a claim. This court dismissed the complaint on other grounds, namely because plaintiff had no assignment rights under the contract. The Appellate Division reversed

that dismissal, stating only that it was disputed whether or not plaintiff had assignment rights under the contract. According to Scheffler, because neither court addressed the issue of his non-signatory status with respect to the contract, he can resubmit his motion to dismiss based upon that ground.

Plaintiff opposes the motion, claiming that Scheffler is not entitled to resubmit a motion to dismiss. Plaintiff contends that Scheffler has brought this motion despite the fact that the arguments raised on this motion are identical to the arguments argued before the Appellate Division. According to plaintiff, Scheffler is asking this court to overrule the Appellate Division, which is beyond the power of this court.

Plaintiff cross-moves to for an order allowing him to reinstate the third through sixth causes of action, submitting certification that T-1, the LLC for which plaintiff is bringing this derivative action, is now in good standing in the State of Delaware and is authorized to do business in the State of New York. Since the causes of action were dismissed without prejudice, plaintiff argues that he has offered sufficient proof that said causes should be reinstated.

Medifast opposes the cross motion with respect to the third, fifth and sixth causes of action. Medifast argues that the third cause of action is time-barred. That claim is based upon the alleged failure by Medifast to issue and register 60,000 Medifast warrants in the name of T-1 pursuant to a May 15, 1997 contract. The issuance and registration was to occur "not later than 30 days from the date of the agreement." Medifast states that in order to be timely, any claim for breach of the subject agreement would have to have been filed on or before June 14, 2003. Medifast argues that as the complaint was filed on December 30, 2003, the claim is barred by the six-year statute of limitations.

Medifast argues that the fifth cause of action is also time-barred. The complaint alleges that Medifast aided and abetted Scheffler's breach of fiduciary duty. Medifast argue that a claim of a breach of fiduciary duty in which money damages are sought carries a three-year statute of limitations. According to Medifast, since any claim that Scheffler breached a fiduciary duty in September 1998 is time-barred, any claim that Medifast assisted in such a breach of fiduciary duty is also time-barred.

The sixth cause of action alleges that Medifast and Scheffler conspired to cause the damages asserted in the first through fifth causes of action. Medifast contends that it is well established in New York law that conspiracy on its own cannot lie as a cause of action.

Medifast argues that the cross motion should be denied because T-1 was not in existence when the derivative claims were initiated. Medifast states that under Delaware law, T-1 must have been in existence throughout the duration of the derivative suit.

In reply, plaintiff argues that the third cause of action is timely, because Medifast breached the 1997 contract by registering 60,000 warrants in the name of "Scheffler or his designee" in September 1998. Plaintiff contends that the action was commenced less than six years from the date of that breach and should not be dismissed as untimely.

Plaintiff argues that defendants should be estopped from pleading the statute of limitations with respect to the fifth cause of action. Plaintiffs claims that he was deceived into believing that there was no cause of action for aiding a breach of fiduciary duty and no need to institute an action in connection with the T-1 warrants. He states that he discovered that he had been deceived by defendants in June 2002, during the discovery proceedings.

As for the sixth cause of action, which alleges conspiracy, plaintiff argues that there are

underlying tort claims in the complaint which are incorporated by reference into the conspiracy claim. According to plaintiff, these include breach of fiduciary duty and aiding and abetting a breach of fiduciary duty. Plaintiff contends that the conspiracy claim is sufficient enough to withstand dismissal.

Discussion

The court will examine Scheffler's motion first. Under CPLR 3211 (e), a party may challenge a specific pleading through a single motion. Scheffler cites Montgomery v Minarcin, (263 AD2d 665 [3rd Dept 1999]) to support his position that he should be allowed to bring the present motion. In that case, defendants submitted a motion to dismiss based upon personal jurisdiction and statute of limitations. The lower court initially granted the motion to dismiss based solely on statute of limitations grounds. The appellate court reversed the dismissal based on the statute of limitations. Defendants resubmitted to the lower court their motion to dismiss based on lack of personal jurisdiction. The lower court dismissed the motion but the appellate court reversed again, holding that the resubmitted motion was not in violation of the single motion rule. That motion had been part of the original motion and defendants did not raise new grounds.

This court sees similarities between this case and Montgomery. Scheffler is moving on a ground raised but not considered by either this court or the Appellate Division. His motion is not in violation of the single motion rule.

Scheffler is correct in stating that a non-signatory to a contract is not a party to that contract and cannot be sued for breach of that contract. See National Survival Game of N.Y., Inc. v NSG of LI Corp., 169 AD2d 760 (2d Dept 1991). Plaintiff's position is that he alleged a valid

case for conversion. Conversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights. Peters Griffin Woodward, Inc. v WCSC, Inc., 88 AD2d 883 (1st Dept 1982).

The complaint alleges that at the direction of Scheffler, Medifast paid him the consideration owing to H-T pursuant to the 1999 agreement, in the form of monies, stock, warranties and convertible preferred stock. Plaintiff, the assignee of H-T, duly demanded payment, but Scheffler refused to make such payment. The court finds that plaintiff has alleged an adequate cause of action in conversion. It is not duplicative of a breach of contract claim because Scheffler lacks a contractual relationship with plaintiff. The second cause of action withstands dismissal.

Scheffler does not comment on the first cause of action, which is brought against Medifast. The court will not dismiss this claim, since there are no objections raised against it.

Plaintiff seeks to renew his derivative action on behalf of T-1. He has submitted proof that T-1 is registered as an LLC in Delaware, and is licensed to do business in this state. Plaintiff is in compliance with the relevant statutory law. The issue raised by Medifast concerns the effect of the statute of limitations on the third and fifth causes of action. The third cause of action alleges breach of contract. In contract cases, the cause of action accrues and the statute of limitations begins to run from the time of the breach. John J. Kassner & Co. v City of New York, 46 NY2d 544 (1979). As set forth in the complaint, Medifast issued the warrants to Scheffler in September 1998 and included them in its subsequent registration statements. This is when the breach allegedly occurred. The court concludes that this action was commenced within the six year period and the cause of action is timely.

The fifth cause of action alleges assisting a breach of fiduciary duty. While plaintiff apparently concedes that the three-year statute applies, he contends that he was prevented from bringing this claim by defendants' deception and that defendants are estopped from raising their defense. Equitable estoppel is applicable where plaintiff knew of the existence of the cause of action but defendants' misconduct caused plaintiff to delay in bringing suit. See Green v Albert, 199 AD2d 465 (2d Dept 1993). Defendants are not estopped from asserting the statute of limitations defense as long as plaintiff possesses timely knowledge sufficient to place him or her under a duty to make inquiry and ascertain all relevant facts prior to the expiration of the applicable statute of limitations. See Gleason v Spota, 194 AD2d 764 (2d Dept 1993).

In his affidavit against the prior motion, plaintiff stated that he was misled into inaction by Scheffler, who advised him in late 1998 that Scheffler had received the warrants owed to T-1 and would exercise them at a more appropriate time. It was not until June 2002 that plaintiff instructed Scheffler to exercise the warrants. Scheffler denied having the warrants. Plaintiff claimed that he was misled by Scheffler.

The court finds that the allegation of wrongful conduct and deception asserted by plaintiff is insufficient to allow the imposition of estoppel. Plaintiff does not allege a duty on Scheffler's part to disclose information to plaintiff. Plaintiff does not state how he changed his position while relying on Scheffler's words or conduct. The fifth cause of action is hereby dismissed as untimely.

The sixth cause of action is alleged to be insufficiently pleaded. There is no tort of conspiracy in and of itself. There must first be pleaded specific wrongful acts which might constitute an independent tort. Satin v Satin, 69 AD2d 761 (1st Dept 1979). Conspiracy may be

alleged only to connect defendants to an otherwise actionable tort. Monsanto v Electronic Data Systems Corp., 141 AD2d 514 (2d Dept 1988). Here, plaintiff avers that the complaint connects defendants' conspiracy claim to the breach of fiduciary duty claim. However, only Scheffler is liable for breach of fiduciary duty, not Medifast. The conspiracy claim has not connected both defendants to the actionable tort and must be dismissed.

Conclusion

Accordingly, it is

ORDERED that the motion to dismiss the complaint is denied; and it is further


ORDERED that the cross motion to reinstate the third through sixth causes of action is denied with respect to the fifth and sixth causes of action and is otherwise granted; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 10 days after service of this order with notice of entry.

DATED: August 21, 2007

FILED
SEP 04 2007
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:


HON. THOMAS B. LOVE, III
IN SENATE