

**Digital Broadcasting Corp. v Ladenbuhg, Thalman,
& Co., Inc.**

2007 NY Slip Op 34560(U)

March 20, 2007

Supreme Court, New York County

Docket Number: 117041/05

Judge: Richard B. Lowe III

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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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 28 2007
NEW YORK
COUNTY CLERK'S OFFICE

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RICHARD B. LOWE III, J:

Before this Court is the motion for Defendant Silverman Collura & Chermis, PC ("SCC") and the cross motion for Plaintiff Digital Broadcasting Corp ("DBC") pursuant to CPLR 2221 for leave to reargue the November 6, 2006 decision, which denied SCC's motion to dismiss the claims against it and granted the collective Defendants' motion to dismiss the Breach of Fiduciary Duty claim against them. In addition, DBC seeks leave to amend its complaint pursuant to CPLR 3025(b).

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 Martin Licht ("Licht"), an attorney and partner with the SCC law firm. Licht introduced DBC to Ladenburg, Thalman, & Co, ("Ladenburg") an investment banking firm. Jonathan Intrator ("Intrator") was the Ladenburg representative/investment banker assigned to work with DBC.

Between early 2000 and March 2001, DBC alleges that the Defendants made fraudulent representations to it in connection with the private placement. Accordingly, in December 2005, it commenced the instant action against the Defendants.

The Defendants filed motions to dismiss the claims against them. On October 26, 2006, this Court heard oral arguments on the motions. In a written decision dated November 6, 2006, SCC's motion to dismiss the claims against it was denied, and DBC's Breach of Fiduciary Duty claims against all Defendants were dismissed pursuant to CPLR 3211(a)(7) as time-barred.

In the instant motion, SCC seeks to reargue this Court's previous decision that DBC plead a cognizable claim against them. In the cross motion, DBC requests a re-argument on the determination that its Breach of Fiduciary duty claim was time-barred. It avers that this Court

did not take into account case law that holds that when a claim is rooted in a fraud, a six-year statute of limitations period is applicable. It also seeks leave to amend its complaint.

DISCUSSION

A motion for re-argument addressed to the discretion of the court is designed to afford a party an opportunity to establish that the court overlooked or misapprehended relevant facts or misapplied any controlling principle of law; its purpose is not to serve as a vehicle to permit the unsuccessful party to argue, once again, the questions previously decided (*See. William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992], *lv to app dismissed in part, den. in part*, 80 NY2d 1005 [1992])

I. SCC's Motion to Re-argue

After oral arguments heard on March 9, 2007, SCC's motion to re-argue was denied. This Court's reasoning for the denial can be found in the record.

II. DBC's Cross Motion

a. Cross Motion to Reargue

At the oral arguments' conclusion, this Court rendered a decision denying DBC's motion to re-argue. However, after reviewing DBC's memorandum of law and its complaint, this Court determined that DBC has in fact adequately plead that a principle of law was previously overlooked. Accordingly, DBC's motion will hereto be addressed.

In the written decision dated November 6, 2006, this Court held to the traditional rule that a cause of action for Breach of a Fiduciary Duty has either a three or six year statute of limitations depending on the relief sought. (*See, Carlington Center Point Assoc v MR Realty Assoc*, 4 AD 3d 179 [1st Dept 2004].) Since DBC only seeks money damages, the three-year

statute of limitations period was held to be controlling. Because DBC commenced its action in 2005, four years after the alleged duty-breach occurred, this claim was dismissed.

DBC argues that under New York case law, 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 the former claim should be re-instated because it was brought within the proper limitations period.

Defendants Ladenburg and Intrater oppose the motion. They correctly argue that DBC specifies in his Second Cause of Action for Breach of Fiduciary Duty against them that it is based on the failure “to disclose to the plaintiff material conflicts of interest which compromised their obligations to the plaintiff.” (*Complaint at page 14*, ¶ 67) Indeed, this specific allegation relates not to the fraud accusations, but to the aversion that Ladenburg and Intrater also had in their client roster DBC’s competitors in the broadcast industry. This aversion pertains to DBC’s breach of the covenant of good faith and fair dealing claim, which was dismissed.

However, within DBC’s claim for Breach of Fiduciary Duty under both the Second and Sixth Causes of Action,¹ it re-alleges ¶ 1-58 of the complaint. Embedded in these assertions are DBC’s allegations that each of the Defendants 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* ¶

¹ The Second Cause of Action alleges a Breach of Fiduciary Duty claim against Ladenburg and Intrater. The Sixth Cause of Action alleges it against Licht and SCC.

58) All of these assertions were incorporated by reference under the breach of fiduciary duty claims.

Ladenburg and Intrater argue that if DBC presents a cognizable claim for breach of fiduciary duty grounded in fraud, there must first exist a fiduciary relationship between DBC and SCC/Licht and Ladenburg/Intrater. To be sure, if no such relationship existed, the breach of fiduciary duty claims would mandate dismissal.

“Attorneys have a fiduciary duty of loyalty and confidentiality to their clients.” (*Solow v W.R. Grace & Co*, 83 NY 2d 303 [1994].) Here, SCC as the firm representing DBC and Licht as the individual attorney handling the legal aspect of the private placement, owed such a duty to it. DBC alleges that Licht, and SCC through him, committed a fraud by asserting statements known to be false at the time they were made. Accordingly, within the complaint is a breach of said fiduciary duty.

“A fiduciary relationship exists when one person is under a duty to act or give advice for the benefit of another upon matters within the scope of the relationship, and a cause of action for breach of fiduciary duty may survive, for pleading purposes, when the complaining party sets forth allegations that, apart from the terms of the contract, the underwriter and issuer created a relationship of higher trust that would arise from the underwriting agreement alone. (*EBC I, Inc v Goldman Sachs & Co*, 5 NY 3d 11 [2005].)

Here, DBC and Ladenburg entered into a contract on June 22, 2000 where the latter would underwrite and sell the former's securities. DBC's complaint alleges that several fraudulent statements were made regarding the status of this placement. To be sure, this purported fraud relates back to the terms of the contractual relationship. But DBC also pleads

that in September 2000, two months after the contract's formation, ". . . Intrater explained that expansion of the company's [DBC] subscriber base would help facilitate the private placement, and set the stage for a possible initial public offering at a later date." (*Complaint at page 7 ¶ 36*) Furthermore, DBC alleges that "in reliance on the statements. . . plaintiff increased its spending on infrastructure and expended substantial amount of money. . ." (*Id at ¶ 37*)²

This latter aversion goes beyond the terms of the contract. It provides that Ladenburg would "raise money for the private placement." (*Ladenburg/Intrater Memo in Opp'n at page 5*) Here, however, DBC pleads that it relied on Intrater's advice to expand its infrastructure and that such an expenditure would assist in a public offering in the future. To be sure, this advice does not pertain to the four corners of the private placement agreement. Rather, the pleading articulates that additional advice was given beyond the contract's terms, and DBC relied on it to its detriment. This sufficiently alleges a "higher trust" that overcomes a motion to dismiss.

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. The Second and Sixth Causes of Action are hereby re-instated, as they were commenced within the proper six-year statute of limitations period.

² In support of its contention that a fiduciary relationship existed with Ladenburg and Intrater, DBC discusses at great length the supposed conflict of interest because some of Ladenburg's clients were its competitors. (*DBC Memo of Law at pages 9-10*) As discussed *supra*, this argument relates to the now-dismissed breach of the covenant of good faith and fair dealing claim. Accordingly, it will not be addressed here.

b. DBC's Cross Motion for Leave to Amend its Complaint

After oral arguments heard on March 9, 2007, DBC's motion for leave to amend its complaint was granted. This Court's reasoning can be found in the record.

CONCLUSION

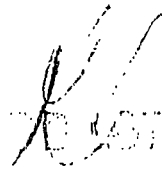
For the foregoing reasons, it is hereby

ORDERED that DBC's second and sixth causes of action are re-instated.

This shall constitute this Court's decision and order.

Dated: March 20, 2007

ENTER:


RICHARD B. LOWE, III

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

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