Polk v Jordan
2008 NY Slip Op 30212(U)
January 22, 2008
Supreme Court, New York County
Docket Number: 0602274/2006
Judge: Richard B. Lowe
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SCANNED ON 1/25/2008

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

PRESENT: HON. RICHARD B. LOWE, III, Justice

PART 56

Arthur E Palk

INDEX NO. 602274-06 602274/06

MOTION DATE 11/13/06

MOTION SEQ. NO. 003

MOTION CAL. NO.

- v -

Charles Jurdem et al

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
JAN 25 2008
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 1/22/08

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
--X
ARTHUR E. POLK,

Plaintiff,

Index No. 602274/06

-against-

CHARLES JORDAN, MARK GRAHAM and BLUE ALTERNATIVE ASSET MANAGEMENT COMPANY,
--X

FILED
JAN 25 2008
NEW YORK
COUNTY CLERK'S OFFICE

Hon. Richard B. Lowe, III:

Defendants Charles Jordan (Jordan), Mark Graham (Graham), and Blue Alternative Asset Management Company (Blue) move to dismiss the complaint pursuant to CPLR3211(a)(7) for failure to state a cause of action against either defendant for fraud, breach of fiduciary duty, or breach of contract.

Complaint

As alleged in the complaint, this action arises out of discussions entered into in June 2003 by Jordan and Polk, both African-Americans, to collaborate and launch a minority-owned and controlled hedge fund (*Complaint* ¶ 13). They sought the involvement of Graham, the senior manager and a principal of Blue, who would provide initial funding to establish the "Jordan Polk Elite Fund" ("Jordan Polk") (*Id* ¶¶ 14-15). Graham was involved because of his apparent business expertise and access to many fund managers (*Id* ¶ 18). Along with Peter Getz, a partner of Graham, they considered making Jordan Polk a minority-controlled firm with Jordan and Polk controlling 51% of the fund (*Id* ¶ 18).

Drawing on the alleged previous experience of the Blue fund, Jordan and Graham informed Polk that the new fund was to operate as a "fund of funds" (*Id* ¶ *21-24)*. Originally,

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Polk and Jordan agreed to utilize the services of Keith Wofford, to help the new hedge fund comply with the law (*Id* ¶ 16,20). However, without consulting Polk, Jordan and Graham replaced Wofford with Wilkie Farr & Gallagher LLP as attorney for the fund (*Id* ¶ 25).

Allegedly the defendants delayed and obstructed finalization of the legal documentation related to the fund despite requests from Polk for access to and confirmation of the documentation. Polk allegedly pressed the issue, specifically related to minority control and ownership because he was cognizant of the alleged difficulty that a minority-owned and controlled fund would have representing itself to potential investors and governmental regulatory bodies without completed documentation (*Id* 27, 37-40, 49-51). Polk pleads that he was stunned when Jordan claimed the legal documentation had been left for Polk to handle (*Id* ¶ 58).

The complaint alleges the fund never operated as a minority owned or controlled fund, and the defendants never intended it to operate as such. Instead Jordan Polk was replaced by the Niagara Elite Fund, LP ("Niagara") (*Id* ¶ 30-36) which contained super-majority provisions relating to ownership and control. This was despite the fact that it was representing itself to the investing public as a minority owned and controlled fund (*Id* ¶ 52-55). Polk demanded the fund operate as intended and promised –as a minority owned and controlled fund (*Id* ¶ 50).

Graham allegedly mismanaged the fund. For example, despite Graham's assurances, several fund managers claimed that their names were referred to without authorization in Niagara marketing material (*Id* ¶ 45-57). Furthermore, the assets of Blue more than doubled because it was receiving the value of investments earmarked for Niagara (*Id* ¶¶ 61-62).

This action ensued after Polk suggested the dissolution of Niagara or a buyout of the value of his interest. The defendants stated there was no value to negotiate and instead allegedly

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attempted to force Polk out (*Id* 63-66).

The defendants now move to dismiss Polk's causes of action for breach of fiduciary duty, breach of contract, and fraud for failure to state a cause of action.

Discussion

Pursuant to CPLR 3211(a)(7), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . .the pleading fails to state a cause of action." The court must accept the material allegations as true and give plaintiff the benefit of every reasonable inference when analyzing the complaint to determine whether it sets forth sufficient facts to state a cognizable claim (*Sims v First Consumers Nat. Bank*, 303 AD2d 288, 290 [1st Dept 2003])(*Kralic v Helmsley*, 294 AD2d 234, 235 [1st Dept 2002]("accepting the material allegations as true and giving plaintiff the benefit of every reasonable inference" in analysis of motion to dismiss)).

Breach of Fiduciary Duty

Absent a writing, facts may support the finding of an agreement to enter into a joint venture based on "the parties' agree[ment] to the joint venture itself, with the essential understanding of what each party's contribution and potential exposure would be" (*Richbell Information Services v Jupiter Partners, L.P.*, 309 AD2d 288 [1st Dept 2003]). "The intention to commit an agreement to writing will not prevent contract formation prior to execution" (*Id* at 297).

The plaintiff relies on *Richbell* whereby the court found that despite the absence of a writing, the complaint sufficiently plead a joint venture based upon an implied agreement (*Richbell Information Systems*, 309 AD2d at 298). The factors the court considered were acts

taken by the parties which manifested a joint undertaking, a combination of the parties resources, and a provision for the sharing of profits and losses (*Id).* When doing so, the court gave the plaintiff the benefit of every favorable inference, as it was required to do on the motion to dismiss pursuant to CPLR 3211 (*Id).*

Polk has sufficiently plead factors which may establish an intent to engage in a joint venture despite the absence of a written agreement. An intent to engage in a joint venture may be found where: Polk's name is included in the original business title of the venture, Jordan Polk; Polk's securities broker licences were registered with Jordan's company, Charles Jordan & Co (*Complaint* ¶ 12); there was an agreement to have Jordan and Polk exert principal control over the firm, thus allowing it to be classified as "minority-controlled" (*Id* ¶¶18, 19, 49); there was an agreement regarding the equitable and controlling ownership of the firm, whereby Polk and Jordan have a combined 51% equity ownership (*Id* ¶ 18); and marketing material related to the firm was circulated (*Id* ¶¶ 16, 24, 31). These pleadings are among others which include conversations between the parties regarding splitting fees arising from various business transactions, representations by Jordan to third parties that the firm is "minority-controlled", and defendants' alleged tactics to terminate Polk from the firm. In total, this is enough to plead an intent by the parties to enter into a joint venture despite the fact they did not enter into a written agreement.

The defendants argue that plaintiff has made an admission that he did not intend to enter into the venture absent a written agreement. They point to a paragraph of the complaint whereby it is plead that Polk "insist[ed] that JordanPolk/Niagara could not operate without an operating agreement that authorized members to take actions they were undertaking" (*Id* ¶ 37). This

statement may be interpreted to mean that the entity could not continue to operate without an agreement, but up until that point the parties had agreed to remain in a joint venture absent a writing. Therefore, there is an issue of fact as to whether the parties intended to be bound until the agreement was reduced to a writing (*Chatterjee Fund Mgmt, LP v Kimensional Media Assocs*, 260 Ad2d 159, 159 [1st Dept 1999]).

Because the court has found the parties were operating as a joint venture, the parties had fidcuiary duties to one another. Fiduciary duties run between partners (*Birnbaum v Birnbaum*, 73 NY2d 461 [1989]); (*Alizio v Perpignano*, 176 AD2d 279, 281 [2nd Dept 1991])("All partners are fiduciaries of one another and, as such, they owe a duty of undivided loyalty to the partnership's interests. This is a sensitive and inflexible rule which bars self-dealing and mandates the avoidance of situations where the partner's personal interest may conflict with the partnership's interest"). Under New York law, "the legal consequences of a joint venture are equivalent to those of a partnership"(*Grammercy Equities Corp v Dumont*, 72 NY2d 560, 561 [1988]).

"Actions by partners which expose the partnership to an unjustified risk of financial harm constitute a breach of such partners' fiduciary duties to their copartners"(*Wilf v Halpern*, 194 AD2d 508 [1st Dept 1993]). Withdrawing funds from a partnership and using them to form a new partnership with other partners is a breach of fiduciary duty to the other partners who are thereby deprived of a partnership opportunity (*Sandler v Fishman*, 157 AD2d 70 [2nd Dept 1992]).

The plaintiff has plead that defendants were channeling money and opportunities that should have gone to the Jordan Polk fund to Blue (*Complaint* ¶ 61-62). He also pleads that defendants were attempting to squeeze Polk out of the venture through underhanded tactics (*Id* ¶

63-66). These among other allegations are sufficient to allege a breach of fiduciary duty by the individual defendants. Therefore, at this stage, a liberal reading of the complaint allows this court to find a cognizable cause of action which precludes dismissal at this time (*See 511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-52 [2002]).

<u>*Breach of Contract*</u>

To assert a claim for breach of contract, a plaintiff must allege the "existence, terms and validity" of a contract, and the breach thereof (*Eden Temp. Servs. v House of Excellence, Inc.*, 270 AD2d 66, 67 [1st Dept 2000])

This court has already found there was a contract between the parties which was manifested through the parties conduct and intent to be bound (*See Richbell Information Services*, 309 AD2d at 297). Polk has sufficiently plead there were breaches of the contract whereby the defendants included a super majority provision requiring votes of three or more partners rather than operating the joint venture as a minority controlled firm (*Complaint* ¶ 50). Furthermore, Polk was ultimately denied any equity in the Jordan Polk fund (*Id* at 63-66). Polk also pleads the defendants did not operate the fund as a minority owned fund, did not complete the proper legal formation of the Niagara fund, and did not assist in establishing the funds client base (*Id* 80-84). This is enough to adequately plead a breach of contract claim.

The defendants argue, however, that the cuase of action is barred by the statute of frauds as is codified in New York law under General Obligations Law § 5-701(a)(1). Courts in this state, however, have held that a joint venture agreement is not subject to the statute of frauds (*Ackerman v Landes*, 112 AD2d 1081, 1082 [2nd Dept 1985]);(*Eidelberg v Zellermayer*, 5 AD2d 658, 663 [1st Dept 1958]).

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Fraud Claim

CPLR 3016(b) requires that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful deceit, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." Thus, where, as here, a plaintiff alleges fraud, the complaint must "plead a prima facie case of fraud" and "must allege each of the elements of fraud with particularity and must support each element with an allegation of fact" (*See Fink v Citizens Mortgage Banking Ltd*, 148 AD2d 578, 578 [2nd Dept 1989]). A plaintiff alleging fraud must plead with sufficient particularity the elements of a misrepresentation of material fact, scienter, reliance and damages (*See Bank of Leumi Trust Co. v D'Evori Int'l, Inc.*, 163 Ad2d 26, 31-32 [1st Dept 1990]). A fraud claim has a more stringent standard of pleading that the notice of transaction rule of CPLR 3013 and complaints based on fraud which fail to meet this standard are consistently dismissed (*Megaris Furs, Inc. v Gimbel Bros., Inc.*, 172 AD2d 209, 210 [1st Dept 1991]).

Polk pleads that Jordan fraudulently misrepresented his business experience, background and credentials (*Complaint* ¶¶ 10-13, 17, 68-69); that fraudulent misrepresentations were made concerning the ties and access of the defendants to senior managers at top-performing hedge funds (*Id* ¶¶ 17, 22-23, 49-51, 68-69); that fraudulent misrepresentations concerning defendants' intention of involving and including Polk in the legal documentation involving the joint venture were made (*Id* ¶¶ 25-27, 37-40, 68-69); and that misrepresentations were made by defendants regarding their intentions for the strategy of the joint venture (*Id* ¶¶ *21-24, 68-69).*

Polk's allegations regarding defendants statements of their ability to generate business and ability to operate the business profitably are not actionable unless plaintiff can show that at

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the time they were made, the defendant had no intention to carry them out (*Giblin v Murphy*, 97 AD2d 668, 670 [3rd Dept 1983]). These mere predictions of success are not actionable in fraud as a misrepresentation of material fact. The same is true of the allegations that Graham stated he and Getz had business connections which would help assure success of the Jordan Polk Fund.

Furthermore, Polk does not allege how he relied on the statements of the defendants. Where the complaint alleges that Polk himself is a sophisticated business man, he fails to allege how he was unable to make use of means of verification which caused him to justifiably rely on the mistatements (*Valassis Commc'ns., Inc. v Weimer*, 304 AD2d 448, 449 [1st Dept 2003]).

Polk has failed to allege with sufficient particularity a cause of action for fraud against the defendants and therefore the cause of action is dismissed.

Motion to dismiss by Blue

Defendant Blue moves to dismiss for failure to adequately plead the claims of breach of contract, breach of fiduciary duty, and fraud against it. Indeed, the complaint pleads very little as to Blue. The complaint pleads Blue is "Graham's hedge fund" which was used by him to receive financial benefits to which Jordan Polk was entitled (*Complaint* ¶ *3*). Blue "is a private equity hedge fund" that "is a successful fund that has over $400 million under management", having expanded in assets from $180 million to $400 million between 2003 and 2005 (*Id* ¶¶ 7, 61). The complaint also alleges that Blue Management received a great bulk of investment monies that should have been placed with the Niagara Fund (*Id* ¶ 62, 70).

The court agrees that these allegations do not support causes of action for breach of contract, fiduciary duty, and fraud. Based on these allegations, Blue is a hedge fund whose relation to the matter is that Graham is its principal. This is not enough to plead these causes of

action.

Polk, however, argues the complaint does contain allegations which would warrant "reverse piercing" to hold Blue accountable for Graham's actions. Courts do recognize the principal of reverse piercing "whereby a corporation may be held accountable for the actions of an individual or another corporation" (*Miramax Film Corp. v Abraham* 2003 WL 22832384, *6 [SDNY 2003](applying New York law))(*State v Easton*, 169 Misc2d 282 [Sup.Ct, Albany Cty 1995])(recognizing the applicability of reverse piercing in New York)). "In reverse piercing cases, courts should be guided by the rules governing traditional veil piercing matters" (*Miramax Film Corp.*, 2003 WL at *6). In "piercing the corporate veil", it must be established that the company "was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences"(*Retropolis, Inc. v 14th Street Development LLC*, 17 AD3d 209, 210 [1st Dept 2005]).

Polk makes no allegation in his complaint as to Graham exercising "complete domination" of Blue. Nor does he make any of the necessary underlying allegations to establish such "dominance". Polk does not allege that Graham somehow disregarded corporate formalities, used corporate funds to pay his personal bills, or stripped the assets of the LLC and transferred them to himself (*See, e.g., Manshion Joho Ctr. Co., Ltd v Manshion Joho Ctr., Inc.*, 24 AD3d 189, 190 [1 st Dept 2005]). Furthermore, there are no allegations of complete domination of Blue which was used to commit a wrong against Polk which caused him injury.

Therefore, based on the foregoing, the complaint as to Blue must be dismissed.

Conclusion

Therefore, based on the foregoing, it is hereby

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ORDERED that the action is dismissed in its entirety as to defendant Blue Alternative Asset Management, LLC and the action is severed and shall continue as to remaining defendants and it is further

ORDERED that the cause of action for fraud is dismissed as to defendants Graham and Jordan and it is further

ORDERED that the motion is denied in all other respects.

The Clerk of Court is directed to enter judgment accordingly.

Dated: January 22, 2008

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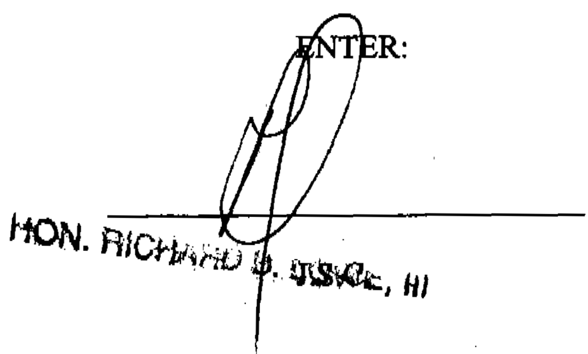

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