SSL Partners, LLC v Gotham City Partners, LLC

2008 NY Slip Op 30332(U)

February 1, 2008

Supreme Court, New York County

Docket Number: 0116514/2005

Judge: Walter Tolub

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SCANNED ON 2/6/2008

[* 1]

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

Index Number : 116514/2005

SSL PARTNERS, LLC

vs.

GOTHAM CITY PARTNERS

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

PART ____

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

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

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

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IS DECIDED

FILED FEB 06 2008 NEW YORK COUNTY CLERK'S OFFICE

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IS DECIDED

Dated: 2/1/08

WALTER B. TOLUB J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 15

SSL PARTNERS, LLC,

Plaintiff,

-against-

Index No. 116514/05

GOTHAM CITY PARTNERS, LLC, a Limited Liability Company a/k/a Quo, GARY MALHOTRA, an individual, and CARLO SENECA, an individual,

Defendants.

WALTER B. TOLUB, J.:

Defendants Gotham City Partners, LLC, a Limited Liability Company, a/k/a Quo (Gotham), Gary Malhotra and Carlo Seneca move, pursuant to CPLR 3212, for an order granting summary judgment to defendants on the remaining fraud claims of plaintiff SSL Partners, LLC (SSL).

Plaintiff cross-moves for leave to amend its complaint and for sanctions against defendants.

This action involves an investment by plaintiff SSL in defendant Gotham to operate a nightclub named Quo, in the Chelsea section of New York City.

On November 2, 2006, this court issued a decision granting in part and denying in part defendants' motion to dismiss the complaint. The court dismissed plaintiff's first, fourth, fifth and sixth causes of action for breach of fiduciary duty, breach of contract, conversion and for an accounting and dissolution of Gotham, but permitted plaintiff to replead any new or expanded

pleadings, within thirty days of service of a copy of the order with notice of entry. The court left standing plaintiff's second and third causes of action, which, though duplicative, stated a cause of action for fraud.

Defendants' Motion for Summary Judgment

The complaint alleges that defendants represented to plaintiff that Gotham and Quo were financially sound companies that operated in accordance with New York State laws, but that defendants conducted illegal activities on the premises of Quo and used investments made by plaintiff to fund their own personal expenses, misrepresented the profits and expenditures of Gotham and Quo, and hid their activities from plaintiff, all in order to induce plaintiff to invest in Gotham and Quo.

In order to recover damages for fraud,

> the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.

Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 421 (1996); *see also New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 (1995)("[t]he essential elements of a cause of action for fraud are 'representation of a material existing fact, falsity, *scienter*, deception and injury'" [citation omitted]).

Where the misrepresentation was relied upon in deciding to enter a contract, such as an investment, it must have occurred

prior to the date the contract was entered into. *See O'Dell v Ginsberg,* 253 AD2d 544 (2d Dept 1998).

To counter plaintiff's allegations that defendants misrepresented that Gotham and Quo were financially sound businesses, defendants submit the affidavit of Gary Malhotra, a member and manager of Gotham, who states that in March and April 2004, when plaintiff purchased its minority interest in Gotham, the doors to Quo were not yet opened; thus, there could have been no representation regarding the financial soundness of the business when the investment was made by SSL Partners. Defendants also rely on the deposition testimony of investors, Jose Soto[1] and Dean Larkey,[2] recognizing that Quo was a new business without a financial track record. *See* Deposition of Jose Soto, at p. 35 (Quo was a new club without a financial history; they were investing in people); Deposition of Dean Larkey, at p. 44 (any numbers shown to him were estimates and not a guarantee), at p. 80 (any numbers shown to him before investing were solely projections). Thus, any statements by defendants regarding the likelihood of success of Quo would have been predictions. Statements of hope, expectation, prophecy or predictions for the future do not, however, constitute actionable

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[1] Jose Soto is a member of SSL.

[2] Dean Larkey signed the Accredited Investor Representations and Warranties and, therefore, is presumably also a member of SSL.

fraud. *Channel Master Corp. v Aluminium Ltd. Sales,* 4 NY2d 403, 408 (1958).

In response to the question "what did [Malhotra] tell you, prior to investing in Gotham, that you now say is false?" Larkey answered "I am not sure anything." Larkey Deposition, at p. 89. Asked the same question about Seneca, Larkey responded that Seneca had said that the club would do so well he would guarantee their investment. *Id.* at pp. 62-63, 89; *see also* Soto Deposition, at p. 10 (Seneca said he would guarantee Soto's money). According to counsel for plaintiff, however, plaintiff is not relying on that alleged guarantee of Soto and Larkey's investments to support its causes of action for fraudulent misrepresentation. *See* Reply Affirmation of Kristian K. Larsen, dated September 26, 2007, ¶ 9 ("however, the real issue underlying Plaintiff's fraud claims is not whether Defendant guaranteed Plaintiff a profit, but whether Defendants misstated and misappropriated Gotham accounts in contravention of representations they made to Plaintiff regarding how they were going to manage the income, expenses and distributions of Gotham"). Plaintiff has, however, submitted no evidence of specific misstatements or misrepresentations made by either of the individual defendants.

The bulk of plaintiff's allegations of fraud concern defendants' alleged mismanagement of the club or illegal actions

by the individual defendants after the club was opened. According to Larkey, defendants did not misrepresent how the company would do, rather, "they misappropriated the income and possibly the expenses ... instead of doing ... what they were supposed to do with it, which is pay out distributions on the profits." Larkey Deposition, at p. 90.

Plaintiff contends that the portion of Larkey's deposition quoted above is taken out of context by defendants, and is a mischaracterization of Larkey's testimony. Plaintiff, however, fails to supply any other portion of Larkey's testimony that supports the allegations in the complaint. Nor does plaintiff specify any particular statements that were made by defendants which caused them to invest in Gotham. Rather, as Soto stated in deposition, he recognized that every investment is risky (Soto Deposition, at p. 36), but they were "investing in people ... in individuals that [were] going to be running this club." *Id.* at p. 35; *see also id.* at p. 9 (Seneca asked him to invest in the nightclub and told him "I have the best team. I have an A team, this is going to be an A rated club"). Moreover, according to Soto, the club did succeed. *See id.* at p. 36. However, this shows little more than that Soto trusted Seneca because of their past business dealings, and that Seneca predicted that the business would be successful. It is not evidence of misrepresentations or material omissions of existing facts.

Counsel for plaintiff argues that, through their general representations that Gotham and Quo were financially sound businesses, defendants implicitly promised that they would not conduct illegal activities on the premises of Quo, misrepresent actual expenses, misrepresent personal expenses, etc. *See* Reply Affirmation of Kristian K. Larsen, at pp. 2-3. As noted above, however, plaintiff fails to provide evidence of any specific representations made by defendants regarding any projected expenses of the club or the individual defendants. Furthermore, to the extent plaintiff seeks to rely on defendants' "implicit promise" not to conduct illegal activities on Quo's premises, that "implicit promise" relates not to a misrepresentation of a material existing fact, but rather to alleged misrepresentation of defendants' future intent, which is not actionable as fraud. *Nassau County v Incorporated Vil. of Rosyln,* 218 AD2d 688, 690 (2d Dept 1995), citing *Chimento Co. v Banco Popular de Puerto Rico,* 208 AD2d 385 (1st Dept 1994)(alleged misrepresentation of what would be done in the future not actionable).

Finally, the Accredited Investor Representation and Warranty signed by Dean Larkey specifically states that the investors recognized the risks involved in the investment and were not relying on any oral or written representations concerning the Gotham:

> Investor Bears Economic Risk. Investor has substantial experience in evaluating and investing in private

> placement transactions of securities in companies similar to the Company so that it is capable of evaluating the merits and risks of its investment in the Company and has the capacity to protect its own interests. Based on such knowledge, experience and skill in evaluating and investing in issues of securities derived from actual participation in financial, investment and business matters, the Investor is capable of evaluating the merits and risks of an investment in the Membership Interests and the suitability of the Membership Interests as an investment. *** The Investor is aware that no guarantees have been or can be made respecting the future value, if any, of the Membership Interests or the profitability or success of the business of the Company.
>
> ***
>
> In considering this investment, the Investor has not relied upon any representation made by, or other information (whether oral or written) furnished by or on behalf of the Company or any director, officer, employee, agent or affiliate thereof.

Accredited Investor Representations and Warranties, § 2 (a) & (e).

For these reasons, defendants' motion for summary judgment dismissing the second and third causes of action is granted.

Plaintiff's Cross Motion For Leave to Amend and for Sanctions.

In the November 2, 2006 decision dismissing four of plaintiff's causes of action, this court permitted plaintiff to replead or expand its pleadings within 30 days of service of a copy of the decision with notice of entry. The decision with notice of entry was served on counsel for plaintiff on November 7, 2006. More than nine months later, on or about August 20, 2007, plaintiff filed this cross motion for leave to amend its complaint, neglecting to include a copy of the proposed amended

complaint. Only in September 2007, did plaintiff provide a copy of the proposed second amended complaint, annexed to the reply affirmation of its attorney. The proposed pleading repeated the allegations in the amended complaint that were found inadequate to sustain the first, fourth, fifth and sixth causes of action. In addition, the proposed pleading alleges that, in or about June 2007, counsel for plaintiff was contacted by a minority member of Gotham and informed that defendants had formed a new limited liability company, 511 West LLC (511), for the purposes of operating a new nightclub in the rear portion of the space where Quo had previously operated. Plaintiff alleges that the action was taken without informing plaintiff, that defendants had intentionally reduced the size of Quo to the detriment of Quo and plaintiff, and that defendants Malhotra and Seneca had increased their salaries. On the basis of these new allegations, plaintiff reasserts causes of action for breach of fiduciary duty (first cause of action) fraudulent misrepresentation (second and third causes of action) and breach of contract (fourth cause of action).[3]

The complaint implies that plaintiff only learned about the establishment of the new nightclub and the new LLC in June 2007. In support of its cross motion for leave to file an amended

[3] Plaintiff no longer asserts a cause of action for conversion.

complaint, however, plaintiff submits an affidavit of Jose Soto, dated August 2007. Soto states that, on or about November 2006, he was notified by Seneca that electrical work was needed at the premises occupied by Quo because a portion of those premises was to be rented. Soto further states that he objected to the renovation and renting of the back space, because it was not being done pursuant to a vote of the members of Gotham, and it was being performed through a new company. Finally, Soto contends that these actions by defendants improperly diluted plaintiff's interest in Gotham.

Soto's affidavit indicates that, during the same month that this court rendered its November 2006 decision, plaintiff was aware of the actions that form the basis of the new allegations in the proposed second amended complaint. Plaintiff provides no adequate explanation for its failure to seek leave to amend its complaint within the time specified by this court. Plaintiff's cross motion to amend its complaint is, therefore, untimely.

Even if plaintiff's motion were timely, however, plaintiff's motion for leave to amend would be denied. Although motions to amend pleadings are to be freely granted (CPLR 3025 [b]), an order permitting amendment should not be granted without passing on the validity of the amended causes of action. *East Asiatic Co. v Corash,* 34 AD2d 432 (1st Dept 1970). Pursuant Section 7.03 of Gotham's Amended and Restated Operating Agreement, dated

September 30, 2003, the managers of Gotham had the power and authority to invest company funds (section 7.03 [c]), execute instruments and documents "including without limitation, checks, drafts, notes and other negotiable instruments, ... security agreements, financing statements, leases, ... *operating agreements of other limited liability companies*, and any other instruments or documents necessary in the opinion of the Manager, to the business of the Company." Section 7.03 (f) (emphasis supplied). Since Gotham's operating agreement gave the manager of Gotham the authority to invest company funds and to execute operating agreements of other limited liability companies, plaintiff's proposed amended cause of action for breach of contract fails.

Moreover, as defendants argue, it is hard to see how the creation of 511, a new LLC comprised of Gotham and Arden Diamond, LLC, dilutes plaintiff's interest in Gotham, for the structure of Gotham remains unchanged. Thus, the proposed cause of action for breach of fiduciary duty fails as well.

With respect to the two causes of action for fraudulent misrepresentation, in addition to the prior allegations, the proposed amended complaint alleges that defendants secretly formed 511 for the purpose of diluting plaintiff's interest in Gotham and Quo and diverting allocations, distributions and profits earned from Quo and Gotham to the members of 511. Since

these allegations relate to actions taken more than two years after Soto and Larkey decided to invest in Gotham, they cannot support plaintiff's claims for fraudulent misrepresentation.

Finally, that branch of plaintiff's cross motion seeking sanctions is also denied.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment dismissing the remaining causes of action in the amended complaint is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

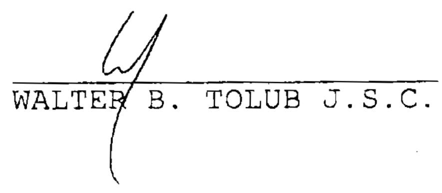
ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's cross motion for leave to amend its first amended complaint and for sanctions is denied.

Dated: 2/1/08

FILED
FEB 06 2008
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:



WALTER B. TOLUB J.S.C.