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

PRESENT: ~~HON. EILEEN BRANSTEN~~ Justice

PART 3

Index Number : 600871/2008

BARNELI & CIE SA

VS.

DUTCH BOOK FUND SPC, LTD.

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 600871/08

MOTION DATE 11/6/08

MOTION SEQ. NO. #007

MOTION CAL. NO. _____

__ 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

IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM

FILED
APR 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
APR 22 2009
COUNTY CLERK'S OFFICE
NEW YORK COUNTY

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

Dated: 4-14-09

HON. EILEEN BRANSTEN 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: PART THREE

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BARNELLI & CIE SA,

Plaintiff,

-*against*-

DUTCH BOOK FUNDS SPC, LTD, DUTCH BOOK PARTNERS, LLC and STANLEY R. JONAS,

Defendants.

Index No.: 600871/08
Motion Date: 11/6/08
Motion Sequence No.: 001

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PRESENT: EILEEN BRANSTEN, J:

Defendants Dutch Books Funds SPC, Ltd (the "Fund"), Dutch Book Partners, LLC ("Partners") and Stanley R. Jonas move, pursuant to CPLR 3211(a) (1), (a) (7) and 3016 (b), for an order dismissing the Complaint. Plaintiff Barnelli & Cie SA ("B&C") opposes the motion.

BACKGROUND

B&C is a Panamanian corporation with an office located in the Republic of Panama (Jonas Aff, Ex 1, ¶ 1 [the "Complaint"]). The Fund is a Cayman Islands corporation with an office located in New York, New York (*id.* at ¶ 2). Partners is a Delaware Limited Liability

Company with an office located in New York, New York (*id.* at ¶ 3). Jonas is a director of the Fund, as well as the Chief Executive Officer and Chief Financial Officer of Partners (*id.* at ¶ 4).

As a segregated portfolio company, the Fund offered shares in various segregated investment portfolios, each constituting a separate pool of assets in which the holders of shares in a particular portfolio would have an interest in the net assets of that portfolio only (*id.* at ¶ 5). The Fund offered shares in the Dutch Book Segregated Portfolio I (the "Portfolio"), pursuant to an Information Memorandum dated July 1, 2006 (the "Memorandum") (*id.* at ¶ 6).

In its complaint, B&C alleges that, in 2006, Jonas made a presentation about the Fund to potential investors in Paris (*id.* at ¶ 9). There, he explained that the Fund would be dedicated to trades based on the Federal Funds rate and that the Fund would take both put and call options over the decision of the Federal Reserve Open Market Committee's decision to raise, lower or keep interest rates unchanged (*id.*). Jonas also represented that as a result of this trading strategy, B&C would incur no capital risk; the only risk would be the loss of interest on the amount invested and the cost of acquiring the put and call options (*id.*).

Jonas, on behalf of himself, Partners and the Fund, then provided B&C with a copy of the Memorandum (*id.* at ¶ 10). The Memorandum stated that the Fund, through Partners, would create in the Portfolio a "Dutch Book on the movement of market expectations as

expressed in the pricing of, for example, Federal Funds futures and options, from uncertainty regarding future central bank action to certainty when the Federal Reserve Open Market Committee has its regularly scheduled meeting" (*id.*). The Memorandum defined a "Dutch Book" as "a set of positions 'betting' on a particular action that, in sum, earns a positive return for the owner of the 'Dutch Book' regardless of the outcome" (*id.*).

Pursuant to a written Subscription Agreement dated July 21, 2006 (the "Subscription Agreement"), B&C purchased 50,000 shares for an aggregate purchase price of $50,000,000 (*id.* at ¶ 7). The Fund retained Partners as an investment advisor for the Portfolio, pursuant to an Investment Adviser Agreement dated July 1, 2006 (*id.* at ¶ 8).

B&C alleges that defendants knew, but failed to disclose that the success of the Portfolio depended on defendants' ability to correctly anticipate how and when the Federal Reserve will act and to predict fluctuations in market prices and significant price trends, such as sustained movements, up or down, in future prices (*id.* at ¶ 14). As a result, B&C contends, there was no factual or other basis for defendants' representation that the Portfolio would earn a return as represented (*id.*).

B&C alleges that rather than creating a "Dutch Book" after it invested in the Portfolio, defendants engaged in an excessive number of transactions in speculative investments that were incompatible with the investment strategy set forth in the Memorandum (*id.* at ¶ 16). The Portfolio lost approximately $4,000,000 in the period ending October 31,2006 (*id.*). As

a result, B&C withdrew $30,000,000 from the Portfolio (*id.*). Thereafter, the Portfolio continued to incur losses and, in a period of less than one year, the Portfolio lost in excess of $8,000,000 despite generating fees and commissions in excess of $2,000,000 (*id.*).

B&C commenced this action asserting five causes of action for (i) breach of contract; (ii) breach of fiduciary duty; (iii) negligence; (iv) fraud; and (v) personal liability against Jonas based upon an alter ego theory. Defendants now move for an order dismissing the Complaint.

ANALYSIS

In the context of a CPLR 3211 motion to dismiss, the court takes the facts alleged in the complaint as true and accords the benefit of every possible favorable inference to the non-movant (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]). "[T]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1997]).

Breach of Contract

B&C alleges that "the Memorandum created contractual obligations between B&C, on the one hand, and Partners and the Fund, on the other hand, to invest in the Portfolio in

the manner set forth in the Memorandum" (Complaint ¶ 19). The breach, B&C avers, occurred when "Partners and the Fund failed and refused to invest . . . in the Portfolio. . . in accordance with the investment strategy set forth in the Memorandum, so as to create a 'Dutch Book', as defined in the Memorandum" (*id.* at ¶ 20).

Defendants argue that the cause of action should be dismissed because no privity exists between B&C and Partners. To state a cause of action for breach of contract, a plaintiff must allege the existence of a contract, performance by plaintiff, breach by defendants, and damages sustained by plaintiff as a result of the breach (*Kraus v Visa Int'l Serv. Ass'n*, 304 AD2d 408, 408 [1st Dept 2003]). B&C baldly asserts that the Subscription Agreement, which is only between it and the Fund, also "obligates" Partners, but does not allege any contractual relationship as a basis for liability. B&C may not assert a breach-of-contract cause of action against Partners because it was not in privity with the entity and there is no other basis for contractual liability alleged (*Outrigger Constr. Co. v Bank Leumi Trust Co.*, 240 AD2d 382, 383 [2d Dept 1997], *lv denied* 91 NY2d 807 [1998]; *Maldonado v Olympia Mechanical Piping & Heating Corp.*, 8 AD3d 348, 350 [2d Dept 2004]).

Additionally, as between B&C and the Fund, the Memorandum incorporated into the Subscription Agreement does not obligate the Fund to create a "Dutch Book." Rather, it contains non-actionable, aspirational language that *Partners* "will seek to create" or "believes it can create and manage a 'Dutch Book'" (Jonas Aff, Ex 3, at iii, iv, v). Thus B&C's

allegation that the Fund obligated itself to create a Dutch Book are plainly contradicted by the Memorandum and the breach of contract cause of action must be dismissed (CPLR 3211 [a] [1]; *Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003] [dismissal appropriate when allegations that defendant escrow agent breached his obligations by failing to secure payments to plaintiff were contradicted by the agreement, which "neither state(ed) nor in any way suggest(ed) that (defendant) had any obligation to insure payment . . . or to hold any money in escrow for the benefit of plaintiff"]).

Negligence

B&C alleges that defendants "failed to manage the Portfolio in a skillful, prudent, reasonable and professionally expert manner in that [they] imprudently, negligently and recklessly failed to invest the monies invested in the Portfolio by B&C in accordance with the investment strategy set forth in the Memorandum" (Complaint ¶ 30).

Defendants contend that this cause of action should be dismissed because the negligence claim improperly asserts a breach of contract claim couched as a tort claim.

"It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 388-89 [1987]). "This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract" (*id.*).

B&C alleges that Defendants owed it a duty and that they breached that duty when they failed to act "in accordance with the investment strategy set forth in the Memorandum" (Complaint ¶ 30). Thus, in its own words, B&C's negligence allegations are identical to those underpinning its breach of contract claim. B&C attempts to assert a cause of action for negligent breach of contract, which New York law does not recognize (*Megaris Furs, Inc. v Gimbel Bros., Inc.*, 172 AD2d 209, 211 [1st Dept 1991]). The negligence cause of action is therefore dismissed.

Fraud

B&C alleges that defendants falsely "represented that the monies invested in the Portfolio by B&C would be invested using a set of proprietary algorithms so as to create a 'Dutch Book' which would earn a positive return 'in all states of the world,'" made these misrepresentations with the intent to deceive and defraud B&C, who relied on these misrepresentations and was harmed, and concealed from B&C that they had no set of proprietary algorithms (Complaint ¶¶ 34-36). Further, B&C alleges that "the transactions engaged in by the Fund could not and would not create a 'Dutch Book'" (*id.*).

Defendants contend that the fraud cause of action must be dismissed because (1) B&C fails to plead that the oral representations made in Paris, on which the claim is based, were ever made to B&C; and (2) even if B&C pleaded misrepresentations were made to it, such

statements would have been disclaimed under the Subscription Agreement. Plaintiff rejoins that the asserted disclaimers in the Memorandum are insufficient to bar the fraud claim.

The complaint contains two categories of alleged misrepresentations: one relating to the investment strategy of creating a Dutch Book and the other to using a proprietary set of algorithms (*see* Complaint ¶¶ 9-13, 33-34). The first set of vague allegations, as discussed above, constitute non-actionable statements since they are simply forward-looking and aspirational (*Naturopathic Labs. Intl, Inc. v SSL Ams., Inc.*, 18 AD3d 404, 404 [1st Dept 2005] [expressions that defendants "would *envision* funding the proposed acquisition with cash on hand and borrowings . . . amount to no more than statements of prediction or expectation, and as such are not actionable"]; *Zaref*, 192 AD2d at 349 [defendants' alleged representations that the investments in question would be profitable were examples of "speculation and expressions of hope for the future[, which] do not constitute actionable representations of fact"]). The expressions in the Memorandum that B&C cite in connection with creating a "Dutch Book" are clearly statements of prediction or expectation; for example, the Fund "believes it can create and manage a 'Dutch Book,'" the Fund "believes that the opportunity to successfully construct a 'Dutch Book' is always there." The Memorandum, moreover, sets forth that "THERE CAN BE NO ASSURANCE THAT THE INVESTMENT OBJECTIVE OF THE DUTCH BOOK SEGREGATED PORTFOLIO I OR

ANY OTHER PORTFOLIO OF THE FUND WILL BE ACHIEVED" (Jonas Aff, Ex 3, at iii, iv, v).

Allegations relating to use of proprietary algorithms are likewise non-actionable for fraud as they repeat the breach of contract cause of action (*ESBE Holdings, Inc. v Vanquish Acquisition Partners, LLC*, 50 AD3d 397, 398-99 [1st Dept 2008] [fraud claims properly dismissed "since they arose directly from the written provisions of the various subscription and other agreements"]). Indeed, it even argues that "B&C alleges that fraudulent misrepresentations were contained 'in the written materials [it] was given'" (Plaintiff's Mem in Opp, at 8). Accordingly, B&C's cause of action for fraud is dismissed.

Breach of Fiduciary Duty

B&C alleges that because the defendants were entrusted with the monies invested in the Portfolio, they each stood as fiduciaries to B&C and breached their respective duties by wasting and mismanaging the assets of the Portfolio by failing and refusing to create a "Dutch Book" and by engaging in an excessive amount of speculative transactions that were incompatible with creating a "Dutch Book" (Complaint ¶¶ 24, 26, 27).

Under *North Shore Bottling Co. v C. Schmidt & Sons, Inc.*, "a contracting party may be charged with a separate tort liability arising from a breach of a duty distinct from, or in addition to, the breach of contract" (22 NY2d 171, 179 [1968]). However, the alleged basis for the fiduciary duty is the investment of funds in the Portfolio, made pursuant to the

Subscription Agreement (*see* Complaint ¶¶ 7, 24). Since B&C does not allege tort liability or a breach of a duty distinct from, or in addition to, the breach of contract claim, the breach of fiduciary duty cause of action is dismissed.

Alter Ego

B&C alleges that Jonas is personally liable as the alter ego of Partners, but alleges nothing more than that Jonas "exercised complete domination and control," used his control to "further his personal interests and comingled [sic] the assets and economic activity of Partners with his own," "disregarded the required corporate formalities," and left the corporation undercapitalized (Complaint ¶¶ 40-43). Although, generally, on a motion to dismiss, a plaintiff's allegations are presumed to be true and accorded every favorable inference, B&C's allegations consisting of bare legal conclusions are not entitled to such consideration (*see Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233, 233-34 [1st Dept 1994]). It fails to plead any facts to substantiate such conclusory claims, and does not sufficiently allege that the corporate form was used to commit a fraud against it (*see Feigen v Advance Capital Mgt. Corp.*, 150 AD2d 281, 282 [1989], *lv dismissed and denied* 74 NY2d 874 [1989]). In any event, since the corporation as a matter of law cannot be liable and all of those claims are dismissed, nothing remains for which Jonas can be personally liable. The cause of action for personal liability against Jonas is therefore dismissed.

Accordingly, it is

ORDERED that Defendants' motion to dismiss the complaint is GRANTED.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
April 14, 2008

ENTER

Hon. Eileen Bransten