Defazio v Wallis
2009 NY Slip Op 31195(U)
May 19, 2009
Supreme Court, Nassau County
Docket Number: 8715-08
Judge: Timothy S. Driscoll
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

[* 1]

Scan

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present: HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

VICTOR J. DEFAZIO, JACK FINKELSTEIN, JAMES COLLINS AND HENRY GEBHARD, Individually and derivatively, on behalf of MERIDIAN GROUP HOLDINGS, LLC; MERIDIAN AMBULANCE GROUP, LLC; MERIDIAN BEHAVIORAL SCIENCES, LLP; MEDTRANSIT; MERIDIAN BEHAVIORAL HEALTH SCIENCES, LLP; MERIDIAN MSO, INC.; MERIDIAN MSO, LLC; UNIVERSITY CARE NETWORK, LLC,	TRIAL/IAS PART: 25 NASSAU COUNTY Index No. 8715-08 Motion Seq. No. 1 Submission Date: 5/8/09
Plaintiffs,	
-against-	
KEVIN WALLIS; RYAN P. GREENBERG; THOMAS RYAN; ROBERT J. AQUINO; CAPITAL HEALTH MANAGEMENT, INC.; MERIDIAN GROUP HOLDINGS, LLC; MERIDIAN AMBULANCE GROUP, LLC; MERIDIAN AMBULANCE HOLDINGS, LLC; MERIDIAN BEHAVIORAL SCIENCES, LLP; MEDTRANSIT LLC; MERIDIAN BEHAVIORAL HEALTH SCIENCES, LLP; MERIDIAN MSO, INC.; MERIDIAN MSO, LLC; UNIVERSITY CARE NETWORK, LLC,	
Defendants.	

The following papers having been read on this motion:

Notice of Motion, Affirmation in Support and Exhibits.....x
Affirmation in Opposition.....x
Reply Affirmation..... x

This matter is before the Court for decision on the Motion filed by Defendants Kevin Wallis ("Wallis") and Ryan P. Greenberg ("Greenberg") on June 18, 2008 and submitted on May 8, 2009. [1] In light of the issues raised by the motion papers, the Court directs counsel to appear for oral argument before the Court on May 29, 2009 at 9:30 a.m.

BACKGROUND

A. Relief Sought

Defendants Wallis and Greenberg seek an Order: 1) dismissing Plaintiffs' first, third and fourth causes of action, pursuant to CPLR § 3211(a)(5), as time-barred under the applicable statute of limitations; 2) dismissing Plaintiffs' second and fifth causes of action, pursuant to CPLR § 3211(a)(7), for failure to state a cause of action; and 3) scheduling this matter for an evidentiary hearing, pursuant to CPLR § 3211(c), regarding the applicability of the statute of limitations defense.

B. The Parties' History

DeFazio, Finkelstein, Collins and Gebhard allege that they were fraudulently induced to invest in the business entities promoted by Defendants in that they relied upon Defendants' representations which Plaintiffs claim Defendants knew and or had reason to believe were false. They also assert that Defendants wasted Plaintiffs' money and assets and converted such money

and

[1] This Court assumed responsibility for this case, and this motion, on May 8, 2009.

and assets to their own use, breached their fiduciary duty to the Plaintiffs and were unjustly enriched.

These claims were the subject of a related federal lawsuit filed in the United States District Court for the Eastern District of New York on December 8, 2005, assigned Case Number CV-05-5712 ("Federal Complaint"). As it relates to Wallis and Greenberg, the Federal Complaint names Wallis and Greenberg as defendants, and contains eight (8) counts alleging that they 1) were employed by or associated with an enterprise(s) that engaged in racketeering activity in violation of 18 U.S.C.A. §§ 1962(a), (b) and (c) that caused injury to Plaintiffs; 2) breached their fiduciary obligation towards Plaintiffs; 3) committed a common law tort by making knowingly false representations regarding Plaintiffs in connection with an application for a line of credit; and 4) are liable for conversion and unjust enrichment by virtue of their improper retention of equipment and supplies on behalf of an entity in which Plaintiffs invested. Plaintiffs subsequently filed an amended complaint ("Amended Federal Complaint") dated December 14, 2006.

By Order dated July 14, 2007 ("2007 Order"), the Court (Spatt, J.) ruled on Defendants' motions to dismiss and for judgment on the pleadings. In the 2007 Order, the Court outlined the claims in the Federal Complaint and Amended Federal Complaint which included Plaintiff's allegations that: 1) Plaintiffs were induced to invest in Meridian Group Holdings ("MGH") and the affiliates through a series of misrepresentations by the individual defendants, during the period between April/May 2001 through December 2002, regarding a) Defendants' credentials, b) what Plaintiffs would receive in return for their investments, c) MGH's assets and d) other issues related to MGH's financial condition; and 2) Defendants forged Plaintiffs' signatures on an application for a line of credit with a particular bank, and misrepresented Plaintiffs' status in MGH, and ultimately defaulted on that loan, causing financial injury to Plaintiffs.

As it relates to Wallis and Greenberg, the 2007 Order: 1) granted Wallis and Greenberg's motion, pursuant to Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 12(c) for judgment on the pleadings, in part and denied it in part; and 2) dismissed the federal Racketeer Influenced and Corrupt Organization ("RICO") claims. The Court declined to dismiss the state law claims against Wallis and Greenberg (and other defendants) in light of the Court's retention of

jurisdiction over the RICO causes of action against the non-moving defendants.

By Stipulation of Dismissal dated November 30, 2007, signed by counsel for Plaintiffs and Defendant Greenberg and so-ordered on December 19, 2007 (Spatt, J.), the Plaintiffs' Complaint was dismissed, without prejudice, as against Greenberg, except as to Counts I, II and III, which were dismissed with prejudice. Counts I, II and III allege violations of 18 U.S.C.A. §§ 1962(a), (b) and (c) (RICO counts). By Stipulation of Dismissal dated November 30, 2007, signed by counsel for Plaintiffs and Defendant Wallis and so-ordered on January 16, 2008 (Spatt, J.), the Plaintiffs' Complaint was dismissed, without prejudice, as against Wallis, except as to Counts I, II and III, which were dismissed with prejudice.

On May 12, 2008, Plaintiffs filed a Summons and Verified Complaint in Nassau County Supreme Court ("Complaint"), assigned Index Number 008715-08, that names numerous defendants, some of whom were named in the Federal Complaint, including Wallis and Greenberg. The Complaint contains five (5) causes of action alleging: a) Waste by all Defendants, b) Breach of Fiduciary Obligations by the four individual Defendants, including Wallis and Greenberg, c) Common Law Tort against Wallis and Greenberg for allegedly false statements made about Plaintiffs in an application for a line of credit, d) Conversion/Theft/ Embezzlement by the four individual Defendants, and e) Unjust Enrichment by the four individual Defendants.

Plaintiffs DeFazio, Finkelstein, Collins and Gebhard, individually and on behalf of the named corporate Defendants, allege that they were fraudulently induced to invest in the business entities promoted by Defendants. They claim that they relied upon Defendants' representations which Plaintiffs claim Defendants knew and or had reason to believe were false. They also assert that Defendants wasted Plaintiffs' money and assets and converted such money and assets to their own use, breached their fiduciary duty to the Plaintiffs and were unjustly enriched.

With respect to Wallis, Plaintiffs allege that during the period of April or May 2001 through "at least" December 2002, Wallis, as either an owner or officer of MGH along with Aquino, Ryan and Greenberg and MGH and its affiliates, made certain misrepresentations to Plaintiffs, including the following:

(1) that shares of stock would be issued to Defazio (July 10, 2001 and August 14, 2001), to Collins (July 10, 2001 and August 11, 2001) and to Finkelstein (July 16, 2001 and September 26, 2001) but were never issued;

(2) that Collins was promised 2% ownership of Capital, 3-5% ownership of Empress, a percentage of Approved Ambulance, a salary in excess of $100,000 per year, $1,500 a month in expenses and a company car;

(3) Plaintiff Finkelstein was promised 10-25% ownership in Meridian and affiliates, 15% of the ongoing ambulance operation, company car, expense account, profits, a salary and payment for work performed and expansion of the business;

(4) DeFazio was promised 10-15% return on his investement, a percentage of the ambulance company;

(5) in November/December 2001, Gebhard was falsely promised that in return for his loan, he would receive a job, medical benefits and return of his loan and, further, that Gebhard was induced to invest in a company that did not exist; and

(6) between July 2001 and April 2002, Wallis made numerous misrepresentations to certain Plaintiffs concerning the assets owned by the corporate Defendants as well as the status of contractual arrangements between the corporate Defendants and potential clients that bore on the financial stability of the corporate Defendants.

With respect to Greenberg, Plaintiffs allege that during the period of April or May 2001 through "at least" December 2002, Greenberg, as either an owner or officer of MGH along with Aquino, Ryan and Greenberg and MGH and its affiliates, made certain misrepresentations to Plaintiffs, including the following:

(1) between July 2001 and April 2002, Greenberg made numerous misrepresentations to certain Plaintiffs concerning the assets owned by the corporate Defendants as well as the status of contractual arrangements between the corporate Defendants and potential clients that bore on the financial stability of the corporate Defendants;

(2) on July 8, 2001, Greenberg witnessed certain Plaintiffs providing a check to Wallis and participated in the false representation that the company in which Plaintiffs were investing in fact existed;

(3) on September 14, 2001, Greenberg, knowing or having reason to know that the statement was false, confirmed Wallis' allegedly false statement to Plaintiffs that the funds they were investing were being held in a particular escrow account;

(4) between April/May 2001 and December 2002, Greenberg wasted corporate funds by using those funds for excessive and non-existent personal expenses, including a) writing a check on November 18, 2001 for over $7,000 to American Express, and b) on December 31, 2001, writing a check on one corporate defendant's account, to another corporate defendant's account, in the sum of $92,000 for unexplained expenses; and

(5) between April/May 2001 and December 2002, Greenberg failed to advise Plaintiffs of the financial status of the corporate defendant companies in which Plaintiffs invested, which included misrepresentations regarding the number of investors in those companies.

C. The Parties' Positions

Wallis and Greenberg submit that the allegations in Plaintiffs' first cause of action in the Complaint are time-barred as beyond the six (6) year statute of limitations applicable to breach of contract pursuant to CPLR § 213. Wallis and Greenberg assert that none of the claims contained in the first cause of action were pled in the federal action and, therefore, Plaintiffs may not take advantage of the tolling provisions applicable to a dismissed federal court action. Plaintiffs oppose Wallis and Greenberg's application regarding the first cause of action, submitting that CPLR § 205 authorized the filing of the Complaint, within six (6) months of the termination of the federal action, because the Complaint is based upon the same transaction or occurrence, or series of transactions or occurrences, as the federal action.

Wallis and Greenberg also move to dismiss the second cause of action, alleging a breach of fiduciary duty, on the grounds that 1) no fiduciary duty existed between the Plaintiffs and Defendants, based on the facts alleged in the Complaint; and 2) the claim is time-barred pursuant

to the applicable statute of limitations provision of CPLR § 214(4). Plaintiffs oppose Wallis and Greenberg's application regarding the second cause of action, arguing that Defendants, as managers of limited liability companies, are required to perform their duties in good faith and with a standard of care that places them in a fiduciary relationship with Plaintiffs.

Wallis and Greenberg move to dismiss the third and fourth causes of action on the ground that they are time-barred by the applicable three year statute of limitations set forth in CPLR § 214. Plaintiffs oppose this application, submitting that the applicable statute of limitations is the six year statute provided in CPLR § 213 which applies to causes of action arising from breach of a fiduciary duty resulting in fraud, as alleged in the matter *sub judice*.

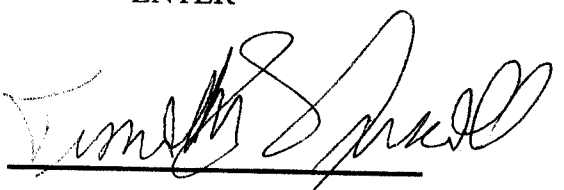
Finally, Wallis and Greenberg move to dismiss the fifth cause of action, submitting that none of the elements of unjust enrichment are pled. In addition, they argue that where a contract exists, as alleged by Plaintiffs, no cause of action for unjust enrichment lies. Finally, Wallis and Greenberg argue that the derivative claims are time-barred. Plaintiffs oppose the application, submitting that the fifth cause of action sufficiently pleads unjust enrichment and, further, that the derivative claims are not time-barred, in light of the provisions of CPLR § 205.

RULING OF THE COURT

In light of the issues raised by the motion papers, the Court directs counsel to appear for oral argument before the Court on May 29, 2009 at 9:30 a.m.

ENTER

DATED: Mineola, NY
May 19, 2009



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

MAY 21 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE