

Big Apple Consulting USA, Inc. v Belmont Partners, LLC
2009 NY Slip Op 31602(U)
July 9, 2009
Supreme Court, Nassau County
Docket Number: 023105-07
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**BIG APPLE CONSULTING USA, INC. and
MJMM INVESTMENTS, LLC,**

**TRIAL/IAS PART: 25
NASSAU COUNTY**

Plaintiffs,

Index No: 023105-07

Motion Seq. No: 2

-against-

Submission Date: 5/8/09

**BELMONT PARTNERS, LLC, JOSEPH MEUSE,
WILLIAM LUCKMAN, PACWEST TRANSFER, LLC,
LAUREL POFFENROTH, TRI-STATE TITLE AND
ESCROW, LLC and JOHNNIE ZARECOR,**

Defendants,

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The following papers having been read on this motion:

- Notice of Motion, Affirmation in Support, Affidavit in Support
and Exhibits.....X**
- Plaintiffs' Memorandum of Law.....X**
- Affirmation in Opposition and Exhibit (Affidavit of J. Meuse).....X**
- Memorandum of Law in Opposition.....X**
- Reply Memorandum of Law.....X**

This matter is before the Court for decision on the motion to renew and reargue filed by Plaintiffs on November 3, 2008, which was submitted on May 8, 2009.¹ The Court grants the motion to the extent that the Court permits reargument and, upon that reargument, denies the motion in its entirety.

¹ This Court assumed responsibility for this motion on May 8, 2009.

In the motion, Plaintiffs seek an order granting reargument of the Order of the Court (Austin, J.) dated September 15, 2008 (“Prior Order”). The Prior Order addressed the Defendants’ motion to dismiss the verified complaint (“Complaint”) on the grounds that 1) Plaintiffs did not have standing to maintain the causes of action in the Complaint; 2) the Complaint lacked the requisite specificity in its pleading; and 3) the Complaint failed to state a cause of action against the Defendants. In the Prior Order, the Court granted Defendants’ motion to dismiss the Complaint.

BACKGROUND

A. Relief Sought

Plaintiff seeks an Order, pursuant to CPLR §§ 2221(d) and (e), 1) granting reargument and renewal of Defendants’ motion to dismiss the Complaint; and 2) upon reargument and renewal, reinstating a) the First and Second Causes of Action of the Complaint against Defendants Belmont Partners, LLC (“Belmont”), and Joseph Meuse (“Meuse”), and b) the Third Cause of Action against Defendant Meuse. Defendants oppose Plaintiff’s motion.

B. Prior Decision

In the Prior Order, the Court outlined the background of this case as follows. Plaintiff, Big Apple Consulting USA, Inc. (“Big Apple”) and MJMM Investments, LLC (“MJMM”) advance monies to unidentified clients for the purchase of publicly traded “shell” corporations from Defendant, Belmont Partners, LLC (“Belmont”). Meuse is the president, director, and majority owner of Belmont. Defendant William Luckman (“Luckman”) is the Director of Business Development at Belmont. Defendant PacWest Transfer LLC (“PacWest”) is a transfer agency regulated by the Securities and Exchange Commission (“SEC”) and the National Association of Securities Dealers. Defendant Laurel Poffenroth (“Poffenroth”) is the president, director and majority owner of PacWest. Defendant, Tri-State Title and Escrow, LLC (“Tri-State”) served as the escrow agent on some of the stock purchase transactions. Defendant Johnnie Zarecor (“Zarecor”) is the president, director and majority owner of Tri-State. Plaintiffs allege that Belmont, PacWest and Tri-State were controlled by Meuse and that he was the alter ego of each of these entities.

The Complaint contains six causes of action: 1) breach of contract, 2) fraud, 3) breach of

fiduciary duty by Meuse, 4) breach of fiduciary duty by PacWest, 5) breach of fiduciary duty by Tri-State, and 6) aiding and abetting breach of fiduciary duty by all Defendants. Plaintiffs allege that they entered into an agreement in February 2006 whereby Belmont would supply publicly traded shell corporations to Plaintiffs' clients. Plaintiffs would, in turn, lend its clients money to purchase the companies from Belmont for the purpose of completing a reverse merger. Plaintiffs allege that the publicly traded shell corporations that Defendants sold were defective, and that Defendants misrepresented their condition to Plaintiffs and their clients. Plaintiffs allege that those misrepresentations included Meuse's claim that, after the closing, Plaintiffs' clients would control a certain percentage of the issues and outstanding shares of the shell companies. Plaintiffs alleged fraud with respect to five transactions.

In the Prior Order, the Court granted Defendants' motion to dismiss the Complaint. The Court held that 1) given the absence of the requisite contractual relationship between Plaintiffs and Defendants, Plaintiffs lacked standing to challenge or enforce the contract at issue; 2) Plaintiffs failed to allege that their reliance on the misrepresentations and omissions of Defendant was justifiable and, even if Plaintiffs had made those allegations, Plaintiffs' status as sophisticated investors precluded them from establishing the element of justifiable reliance with respect to their fraud claim; 3) Plaintiffs failed to demonstrate a factual or legal basis for establishing a fiduciary duty on the part of the parties against whom Plaintiffs alleged breach of a fiduciary duty; and 4) Plaintiffs' cause of action for aiding and abetting the breach of a fiduciary duty necessary fails in light of the Court's conclusion that Plaintiffs failed to establish a fiduciary duty.

C. The Parties' Positions

In support of their motion, Plaintiffs argue, first, that the Court incorrectly determined a question of fact, the (non) existence of an agreement, when it concluded that Plaintiffs lacked standing. Plaintiffs submit that they asserted that an agreement existed between Plaintiffs and Belmont, and Meuse as Belmont's alter-ego, and that this agreement is the underlying basis for the breach of contract claims they asserted in the First Cause of Action. Plaintiffs argue, further, that the five transactions in question were consummated based on the terms of the underlying agreement that Plaintiffs alleged, and that Plaintiffs are suing in their own right based on a breach of that alleged agreement, not under the stock purchase agreements, as the Court

concluded in the Prior Order. Thus, Plaintiffs argue, the Court improperly concluded that Plaintiffs lacked standing.

Next, Plaintiffs submit that there is new evidence, not presented in their initial opposition papers to Defendants' motion, that establishes that Plaintiffs have standing to assert claims for breach of some of the transactions at issue. Plaintiffs provides an Affidavit of Marc Jablon dated November 3, 2008 ("Jablon Affidavit"), as well as documentary evidence in support of their application. The Jablon Affidavit, as well as a document dated June 13, 2008, reflect that Marc Jablon was appointed Chairman of the Board of AFA Music Group, Ltd. Plaintiffs submit that this evidence supports their assertion that, as the successor in interest in the SuperPro transaction, Plaintiff has standing to contest that transaction. Plaintiffs also provide documentation dated February 12, 2008 reflecting Mark Kaley's recent position as the new Chairman of the Board, President and CEO of ImagiTrend, Inc., and argue that this evidence establishes that, as the successor in interest in the Gecko transaction referred to in the Complaint, Plaintiffs have standing to contest that transaction.

Plaintiffs also argue that the Court improperly dismissed the Second Cause of Action for Fraud because 1) Plaintiffs adequately pleaded reliance; 2) the determination by the Court regarding the level of Plaintiffs' sophistication as investors was an inappropriate factual determination in the context of Defendants' motion to dismiss; and 3) even if the Court properly concluded that Plaintiffs were sophisticated investors, Plaintiffs were unable to learn about Defendants' misrepresentations because Meuse controlled all the parties allegedly disseminating the misleading information

Finally, Plaintiffs submit that the Court improperly concluded that Meuse did not owe a fiduciary duty to Plaintiffs. Plaintiffs argue that Belmont and Meuser, as brokers, owed a fiduciary duty to Plaintiffs under the applicable rules of the Financial Industry Regulatory Authority ("FINRA") and the Securities and Exchange Commission ("SEC").

Defendants oppose Plaintiffs' motion, submitting that the Court's determinations in the Prior Order were correct.

RULING OF THE COURT

It is well settled that a motion for reargument is addressed to the sound discretion of the Court, and may be granted upon a showing that the Court overlooked or misapprehended the

relevant facts or misapplied any controlling principle of law. *McGill v. Goldman*, 261 A.D.2d 593, 594 (2d Dept. 1999). It is not designed, however, to provide an unsuccessful party with successive opportunities to reargue issues previously decided or to present arguments different from those originally presented. *Id.*; *Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dept. 1992).

Preliminarily, the Court notes that the appointments of CEOs Jablon and Kaley, on which Plaintiffs partially rely in the instant motion, occurred prior to the submission date on the motion that is the subject of the Prior Order, which court records reflect was June 20, 2008. Thus, this information was available to Plaintiffs prior to the submission date of Defendants' motion to dismiss, and Plaintiffs had the opportunity to present this information to the Court at that time. However, even considering this evidence, as well as the other documentary evidence that Plaintiffs have submitted, the Court concludes that Plaintiffs have not demonstrated that the Prior Order was incorrect. Accordingly, this Court concludes that Plaintiffs have failed to establish that the Court misapprehended or overlooked relevant facts or misapplied any controlling principle of law with respect to their respective claims, and denies Plaintiffs' motion in its entirety.

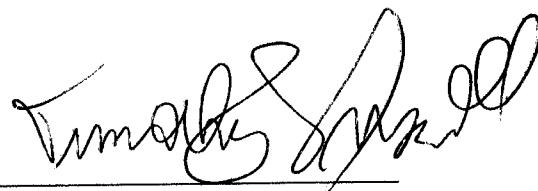
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY

July 9, 2009



HON. TIMOTHY S. DRISCOLL

J.S.C. ~~XXX~~

ENTERED

JUL 15 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**