

**Nelson v Patterson**

2009 NY Slip Op 32595(U)

October 29, 2009

Supreme Court, New York County

Docket Number: 100948/09

Judge: Joan A. Madden

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

HON. JOAN A. MADDEN

PRESENT:

PART 1

J.S.C.  
Justice

Index Number : 100948/2009  
 NELSON, GEOFFREY W., JR.  
 VS.  
 PATTERSON, BARRY  
 SEQUENCE NUMBER : # 001  
 DISMISS COMPLAINT

INDEX NO. 100948-09

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

ere 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 determined in accordance with the Amended decision and order.*

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

**FILED**  
 NOV 06 2009  
 NEW YORK  
 COUNTY CLERK'S OFFICE

Dated: October 29, 2009

J  
HON. JOAN A. MADDEN <sup>J.S.C.</sup>

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 11

-----X  
GEOFFREY W. NELSON, JR. and GARFIELD  
CAPITAL MANAGEMENT, LLC,

Plaintiffs,

-against-

BARRY PATTERSON, ROBERT FARRINGTON,  
INGLOBALVEST, INC., GLOBALVEST  
PARTNERS LLC, MCLAUGHLIN & STERN, LLP  
and MARC C. ROSENBERG,

Defendants.  
-----X

JOAN A. MADDEN, J.:

INDEX NO. 100948/09

**FILED**  
NOV 06 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

Defendants Barry Patterson, Robert Farrington, Inglobalvest, Inc., and Globalvest Partners LLC (collectively, the “Inglobalvest defendants”) move for an order pursuant to CPLR 3211(a)(3) and (a)(7), dismissing the First, Second, Third and Sixth causes of action in the complaint. Plaintiffs oppose the motion and co-defendants McLaughlin & Stern, LLP and Marc C. Rosenberg have not responded to the motion.

The complaint alleges that beginning in 2005, plaintiff Garfield Capital Management, LLC (“Garfield Capital”) made a series of short-term private bridge loans to defendant Inglobalvest or “related entities.” Plaintiff Nelson is the principal and managing member of Garfield Capital, a Delaware corporation with “principle offices” in Manhattan. The complaint alleges that defendant Globalvest is a “subsidiary or affiliate” of co-defendant Inglobalvest, defendant Patterson is the “principal and managing member of Inglobalvest,” and defendant Farrington is an “employee and/or officer of Inglobalvest and Globalvest.”

The complaint states that in 2006, defendants Patterson and Farrington intentionally made misrepresentations to plaintiffs to induce Garfield Capital to make two loans to Inglobalvest totaling \$125,000 to finance a public stock offering by SpatiaLight. The alleged misrepresentations included advising Nelson that Inglobalvest was fully solvent, the loan proceeds would be used exclusively to fund expenses incurred by SpatiaLight in completing a public offering, and Inglobalvest and its related entities would be fully secured, in accordance with a purchase agreement between Globalvest and SpatiaLight, which Patterson and Farrington provided to Nelson.

The complaint alleges that the loans were memorialized in two promissory notes<sup>1</sup> executed by Inglobalvest, one for \$75,000 dated July 19, 2006 and another for \$50,000 dated August 24, 2006. The promissory notes provided for repayment of both loans with 8% interest after 90 days. Although Inglobalvest failed to repay the loans within the 90-day period, it ultimately repaid Garfield Capital a total of \$102,000, leaving a unpaid balance of \$27,500, with accrued interest.

The complaint states that plaintiffs raised the money for the loans to Inglobalvest from nonparty Leon Frankel, "an investor with whom they had an existing relationship," and based on information from Patterson and Farrington, Nelson advised Frankel that the money would be loaned to SpatiaLight and the loan "would be more than fully secured by marketable SpatiaLight common stock." The complaint alleges that in February 2008, SpatiaLight filed a Chapter 7 bankruptcy petition.

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<sup>1</sup>Neither plaintiffs nor defendants submit copies of the promissory notes, or the purchase agreement between Globalvest and SpatiaLight.

The complaint further alleges that Patterson and Farrington contacted Frankel directly and “intentionally and falsely claimed that Inglobalvest had paid not \$102,000, but \$115,392.45 on the loans to Garfield.” The complaint states that “[i]n reality, the additional \$13,392.45 had been paid by Globalvest or its affiliates to Mr. Nelson under a consulting agreement between Mr. Nelson and Globalvest,” in which Nelson agreed to “locate potential investors and transactions for Globalvest and receive \$120,000 for one year of services beginning in June 2006.” The complaint alleges that Nelson stopped performing consulting services for Globalvest in early 2007, “when it became clear Globalvest was not going to pay him any additional monies under the consulting contract.” The complaint additionally alleges that as a “direct and proximate result” of Patterson’s and Farrington’s false representations to Frankel as to the amount repaid on the loans, Nelson “lost” Frankel as a client, and Frankel “refused to enter into additional transactions with Mr. Nelson, including a U.S. Coal bridge loan and senior debt offering that would have produced profits for Mr. Nelson of \$200,000 and \$500,000, respectively.”

Based on the foregoing allegations, plaintiffs assert four causes of action against some or all of the Inglobalvest defendants: 1) a first cause of action by Garfield Capital against Inglobalvest for breach of contract, seeking as damages the \$27,500 owed on the promissory notes, plus interest; 2) a second cause of action by Nelson and Garfield Capital for fraud against the four Inglobalvest defendants, seeking damages of not less than \$700,000, and punitive damages exceeding \$1 million; 3) a third cause of action by Nelson and Garfield Capital for negligent misrepresentation against the four Inglobalvest defendants, seeking damages of not less than \$700,000, and punitive damages exceeding \$1 million; and 4) a sixth cause of action by Nelson and Garfield Capital for tortious interference against the four Inglobalvest defendants,

seeking damages of not less than \$700,000.<sup>2</sup>

The Inglobalvest defendants are now moving pursuant to CPLR 3211(a)(3) for dismissal of the first, second, third and sixth causes of action, on the ground that Garfield Capital lacks the capacity to sue. Any question as to whether Garfield Capital, as a foreign corporation, is authorized to transact business in New York, has been resolved. It is undisputed that on March 26, 2009, Garfield filed a certificate of authority, pursuant to New York Limited Liability Company Law § 805. See Uribe v. Merchants Bank of N.Y., 266 AD2d 21, 22 (1<sup>st</sup> Dept 1999); Business Corporation Law § 1312(a).

The Inglobalvest defendants are also moving pursuant to CPLR 3211(a)(6) for dismissal of the second, third and sixth causes, on the grounds of failure to state a cause of action. Defendants argue that: 1) the complaint contains no substantive allegations against defendant Globalvest; 2) the claims asserted by Nelson belong to the entity which made the loan, Garfield Capital, rather than to its principal Nelson; 3) Garfield Capital's fraud claim is duplicative of its breach of contract claim; 4) the complaint fails to allege the special relationship necessary to support a claim for negligent misrepresentation; and 5) the tortious interference claim fails to plead several necessary elements.

On a CPLR 3211(a)(7) motion to dismiss addressed to the sufficiency of the pleading, the complaint must be liberally construed, and the allegations must be accepted as true and accorded the benefit of every favorable inference to determine whether they come within the ambit of any

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<sup>2</sup>The complaint also includes two causes of action by Nelson for breach of fiduciary duty (fourth cause of action) and legal malpractice (fifth cause of action) against defendants McLaughlin & Stern, LLP and Marc C. Rosenberg, seeking damages of not less than \$700,000 and attorney's fees.

\* 6]

cognizable legal theory. See Cron v. Hargro Fabrics, Inc., 91 NY2d 362, 366 (1998); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wise Metals Group, LLC, 19 AD3d 273 (1<sup>st</sup> Dept 2005); DeMicco Bros., Inc. v. Consolidated Edison Co., 8 AD3d 99 (1<sup>st</sup> Dept 2004). In determining a motion to dismiss for failure to state a cause of action, the test is simply whether plaintiff has a cause of action, not whether plaintiff has stated one. See Leon v. Martinez, 84 NY2d 83, 88 (1994); Blonder & Co., Inc. v. Citibank, N.A., 28 AD3d 180 (1<sup>st</sup> Dept 2006). In addition, a plaintiff's affidavit may be considered for the limited purpose of remedying any pleading defects in the complaint, and such additional affidavit must be similarly given its "most favorable attendant." Cron v. Hargro Fabrics, Inc., *supra* at 366 (quoting Arrington v. New York Times Co., 55 NY2d 433 [1982]); see Rovello v. Orofinio Realty Co., Inc., 40 NY2d 633, 635 (1976); Amaro v. Gani Realty Corp., 60 AD3d 491, 492 (1<sup>st</sup> Dept 2009).

Contrary to defendants' assertions the second, third and sixth causes of action adequately assert substantive allegations regarding Globalvest's involvement in the underlying transactions. The complaint alleges that Patterson is "the principal and managing member" of both Globalvest and Inglobalvest, Patterson and Farrington acted on their own behalf and on behalf of Globalvest and Inglobalvest together, and Globalvest was the party to the SpatialLight purchase agreement. Moreover, in opposition to the motion, plaintiffs submit an affidavit from Nelson intended to remedy any pleading defects in the complaint. Nelson states that although the promissory note was with Inglobalvest, Patterson instructed him to wire the loan proceeds directly to Globalvest, Globalvest was the actual "bridge lender to SpatialLight and the recipient of any collateral," and Patterson's alleged misrepresentations "were clearly made to benefit Globalvest and not Inglobalvest." Nelson also alleges that Interglobalvest "is little more than a 'paper' or 'shell'

Inglobalvest.” Nelson also alleges that Interglobalvest “is little more than a ‘paper’ or ‘shell’ entity.” Notably, in both their moving and reply papers, defendants do not controvert plaintiffs’ allegations as to Globalvest’s role in the underlying transactions. Based on foregoing, the complaint as supplemented by Nelson’s affidavit, contains sufficient substantive allegations as to Globalvest’s direct involvement in and benefit from the underlying transactions.<sup>3</sup>

Turning to the second cause of action for fraud, defendants argue that: 1) Nelson cannot maintain a claim for fraud because any alleged misrepresentations were made to him in his capacity as the principal and managing member of Garfield Capital, a limited liability company; and 2) Garfield Capital’s fraud claim should be dismissed as duplicative of its breach of contract claim.

The court agrees that Nelson is improperly attempting to recast a claim belonging to Garfield Capital, as claim held by him individually. Pursuant to New York Limited Liability Law §610, “[a] member of a limited liability company is not a proper party to proceedings by or against a limited liability company, except where the object is to enforce a member’s right against or liability to the limited liability company.” See Katz v. Katz, 55 AD2d 680 (2<sup>nd</sup> Dept 2008). Plaintiffs assert that during the transactions at issue in this action, Nelson was acting in capacity as the principal and managing member of Garfield Capital, a limited liability company. For example, the complaint alleges that the Inglobalvest defendants made misrepresentations to

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<sup>3</sup>Plaintiffs also rely on the doctrine of piercing the corporate veil, arguing that defendants “cannot hide behind corporate formalities.” The complaint does not assert a claim for piercing the corporate veil, and at this juncture, it is unclear whether the doctrine is applicable in this action. However, in light of the determination above, that the complaint as supplemented by Nelson’s affidavit contains sufficient substantive allegations against Globalvest, the court need reach any issue as to whether piercing the corporate veil is necessary or appropriate in this action.

Capital limited liability company, Nelson is not a proper party to the fraud claim, and the second cause of action is dismissed as to Nelson.

As to Garfield Capital, the second cause of action for fraud shall stand, since it is not duplicative of the breach of contract claim asserted on behalf of Garfield. “[A] cause of action for fraud may be maintained where a plaintiff pleads a breach of a duty separate from, or in addition to, a breach of the contract. For example, if a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also give rise to the plaintiff’s breach of contract claim” (citations omitted). First Bank of Americas v. Motor Car Funding, Inc., 257 AD2d 287, 291 (1<sup>st</sup> Dept 1999); see Manas v. VMS Assocs, LLC, 53 AD3d 451 (1<sup>st</sup> Dept 2008); Freedman v. Pearlman, 271 AD2d 301 (1<sup>st</sup> Dept 2000).

Here, Garfield Capital’s breach of contract claim (first cause of action) is based on Inglobalvest’s default on the promissory notes, and seeks as damages the balance due on the notes, \$27,500. In contrast, the fraud claim seeks damages of at least \$700,000 and asserts that Garfield Capital was induced to make the two loans to Inglobalvest based on misrepresentations of material facts as to Inglobalvest’s solvency, the purchase agreement between Globalvest and SpatiaLight, and the security for the loans. Under these circumstances, since the fraud claim is based on misrepresentations of present facts, it involves the breach of a duty separate from the duty to perform the contract, and is not duplicative of the breach of contract claim. See First Bank of Americas v. Motor Car Funding, Inc., *supra*. Thus, the motion to dismiss is denied as to the second cause of action as asserted by Garfield Capital.

The third cause of action for negligent misrepresentation is dismissed in its entirety. As determined above, any alleged misrepresentations were made to Nelson in his capacity as the principal and managing member of the limited liability company, Garfield Capital, and as such he cannot properly maintain a claim for negligent misrepresentation, in his individual capacity. The third cause of action fails as to both Nelson and Garfield Capital, as the complaint does not plead the necessary element of a special relationship of trust or confidence between plaintiffs and the Inglobalvest defendants. See Dobroshi v. Bank of America, N.A., 65 AD3d 882 (1<sup>st</sup> Dept 2009). As emphasized by the Appellate Division First Department, “[t]his court has repeatedly held that an arm’s length borrower-lender relationship is not of a confidential or fiduciary nature and therefore does not support a cause of action for negligent misrepresentation.” Id.

The motion to dismiss is denied as to the sixth cause of action for tortious interference with prospective economic advantage. Defendants argue that plaintiffs fail to plead that: 1) Inglobalvest or Globalvest did or said anything to tortiously interfere with any prospective business relationship of plaintiffs; 2) Garfield Capital had any prospective business opportunities; 3) Patterson or Farrington used wrongful means or acted with the sole purpose of harming Garfield Capital; 4) plaintiffs would have entered into certain agreements but for the purported interference; and 5) the existence of a business relationship with a third party. Defendants’ arguments are without merit.

“To state a cause of action for tortious interference with prospective business advantage, it must be alleged that the conduct by defendant that allegedly interfered with plaintiff’s prospects either was undertaken for the sole purpose of harming plaintiff, or that such conduct was wrongful or improper independent of the interference allegedly caused thereby.” Jacobs v.

Continuum Health Partners, Inc., 7 AD3d 312, 313 (1<sup>st</sup> Dept 2004). To establish the element that defendants acted solely out of malice or employed “wrongful means,” plaintiffs must also allege that they would have received some prospective economic advantage “but for” defendants’ misconduct. See Risley v. Rubin, 272 AD3d 198, 199 (1<sup>st</sup> Dept 2000), lv app den 96 NY2d 701 (2001); American Preferred Prescription, Inc. v. Health Management, Inc., 252 AD2d 414, 418 (1<sup>st</sup> Dept 1998).

Plaintiffs sufficiently allege that Inglobalvest and Globalvest are responsible for making fraudulent representations. Plaintiffs essentially assert that Patterson and Farrington were acting on behalf of those two entities and themselves when they contacted plaintiffs’ client, Leon Frankel, and falsely advised that Inglobalvest had complied with the terms of the loans and plaintiffs were defrauding him. The complaint alleges that Patterson is the principal and managing member of both Inglobalvest and Globalvest, Patterson controlled both entities, and Farrington is an officer or employee of both. In his affidavit, Nelson further states that “I believe Mr. Patterson and Farrington were not acting solely for themselves but also on behalf of Globalvest and Inglobalvest when they made [the] representations to Mr. Frenkel.”<sup>4</sup>

The complaint as supplemented Nelson’s affidavit alleges an interference on behalf of Garfield Capital. Nelson is the principal and managing member of Garfield Capital and states that he “personally and Garfield jointly suffered damages as a result of” Patterson and Farrington acts, “though I do not claim I am entitled to ‘double recovery’ both directly and through Garfield for this reason.”

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<sup>4</sup>The complaint spells the name of plaintiffs’ client/investor as “Frankel,” but Nelson’s affidavit spells the name as “Frenkel.”

The complaint as supplemented by Nelson's affidavit also alleges that Patterson and Farrington acted with wrongful means or for the sole purpose of harming plaintiffs, as opposed to normal economic self-interest. Plaintiffs allege that in retaliation for aggressively attempting to collect on the loans, Patterson and Farrington falsely advised Frankel that Inglobalvest had fully repaid the loans, and that Garfield Capital had fraudulently withheld funds to which Frankel was entitled. According to Nelson, "[r]uining my reputation with Mr. Frenkel resulted in no economic benefit" to defendants and "[t]his was simply malicious retaliation for my insistence on pressing Garfield's claim." Accepting these allegations as true, plaintiffs allege enough specific facts to support a reasonable and arguable inference that defendants were motivated solely by a desire to harm plaintiffs.

Plaintiffs further identify two specific financial transactions that were allegedly not completed as a result of defendants' wrongful conduct. Nelson states in his affidavit that "as a direct result of the [Inglobalvest] Defendants' interference with my relationship with Mr. Frenkel, Mr. Frenkel refused to participate in two major debt financing transactions involving U.S. Coal, Inc." Nelson further states that in one of the transactions, "my entity or I would have earned a 5 percent placement fee on a \$4,000,000 one-year loan," and in the other the fee would have been 1% "on a \$50,000,000 senior secured debt financing in which U.S. Coal was seeking to replace a pre-existing investor suffering a liquidity crisis. These were one-time opportunities that were permanently lost as a direct result of the damage inflicted by the [Interglobalvest] Defendants on my reputation with Mr. Frenkel." Based on the foregoing, the complaint as supplemented by Nelson's affidavit pleads sufficient facts to support a claim for tortious interference with prospective business advantage.

As a final matter, plaintiffs request leave to amend the complaint “to cure any deficiency from failing to explicitly name Globalvest in its ‘breach of contract’ count [first cause of action] to reflect Mr. Nelson’s contractual claim against Globalvest arising from breaches by Globalvest of the consulting agreement between these parties.” Leave to amend should be freely granted absent surprise or prejudice to defendants, unless the proposed amendment is devoid of merit or palpably insufficient, as a matter of law. See CPLR 3025(b); Thompson v. Cooper, 24 AD3d 203 (1<sup>st</sup> Dept 2005); Zaid Theatre Corp. v. Sona Realty Co., 18 AD3d 352 (1<sup>st</sup> Dept 2005).

The complaint already contains the allegations necessary to support a breach of contract claim by Nelson against Globalvest. Paragraphs 28, 29 and 30 of the complaint allege that Nelson and Globalvest had a “consulting agreement . . . under which Nelson was to locate potential investors and transactions for Globalvest and receive \$120,000 for one year of services beginning in June 2006,” together with health insurance; Nelson was paid \$13,392.45 under that agreement, but when “it became clear” that Globalvest was not going to make any further payments, Nelson “stopped working to locate potential transactions for Globalvest in early 2007.” In his affidavit, Nelson further states that defendant Patterson “agreed to hire me as a consultant for a one-year term through his company Globalvest and provide me with health insurance benefits, [but] Peterson and Globalvest only paid me a small portion of the \$120,000 payment due to me under this agreement and never provided me with health insurance.” Under these circumstances, plaintiff will be permitted to serve and file an amended complaint adding a separate cause of action for breach of contract by Nelson against Globalvest, based on breach of the consulting agreement.

Accordingly, it is hereby

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted in part and denied in part; and it is further

ORDERED that the second cause of action for fraud is severed and dismissed to the extent such claim is asserted by plaintiff Geoffrey W. Nelson, Jr., and the third cause of action for negligent misrepresentation is severed and dismissed in its entirety; and it is further

ORDERED that the balance of the motion to dismiss is denied; and it is further

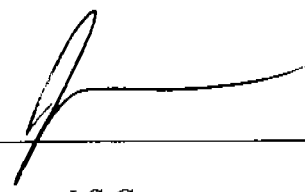
ORDERED that plaintiffs shall serve and file an amended complaint in accordance with the foregoing decision, within 20 days of the date of this decision and order; and it is further

ORDERED that defendants shall serve and file answers to the amended complaint within 20 days of receipt of the amended complaint.

The court is notifying the parties by mailing copies of this decision and order.

DATED: October 29, 2009

ENTER:



J.S.C.  
**FILED**  
NOV 06 2009  
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