

**Parrott v Logos Capital Mgt., LLC**

2009 NY Slip Op 33001(U)

December 15, 2009

Supreme Court, New York County

Docket Number: 602400/08

Judge: Eileen Bransten

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

PRESENT: HON. EILEEN BRANSTEN

PART 3

*Motion*

Index Number : 602400/2008  
**PARROTT, TIMOTHY**  
vs.  
**LOGOS CAPITAL MANAGEMENT, LLC,**  
SEQUENCE NUMBER : 003  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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 ACCOMPANYING MEMORANDUM DECISION**

ε

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

RECEIVED  
DEC 16 2009  
MOTION SUPPORT OFFICE  
NYS SUPREME COURT - CIVIL  
NEW YORK COUNTY CLERK'S OFFICE  
DEC 22 2009  
FILED

*Handwritten signature*

Dated: 12-15-09

*Handwritten signature of Eileen Bransten*  
**HON. EILEEN BRANSTEN**  
J.S.C.

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 3

-----X

TIMOTHY PARROTT and BRADLEY REIFLER,

Plaintiffs,

*-against-*

Index No.: 602400/08  
Motion Date: 10/08/09  
Motion Seq. Nos.: 003, 004

LOGOS CAPITAL MANAGEMENT, LLC, PETER SASAKI, individually and in his capacity as Managing Member of Logos Capital Management and QUIX PARTNERS, LLC,

Defendants.

-----X

PRESENT: HON. EILEEN BRANSTEN, J.:

**FILED**  
DEC 22 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

Motion sequence numbers 003 and 004 are consolidated for disposition.

In motion sequence number 003, plaintiffs Timothy Parrott and Bradley Reifler move, pursuant to CPLR 3211 (a) (1), (3) and (7), and 3211 (b) to dismiss, or in the alternative to strike, certain of the counterclaims and defenses asserted by defendants Logos Capital Management, LLC ("Logos"), Peter Sasaki ("Sasaki") and Quix Partners, LLC ("Quix") in their answer; and pursuant to CPLR 3024 (b), to strike paragraphs 52, 54, 56, 57, 61, 62 and 64-67 of their answer.

After motion sequence number 003 was submitted, plaintiffs filed an amended complaint and defendants filed an amended answer and counterclaims in response thereto. In motion sequence number 004, plaintiffs again move to dismiss or strike certain counterclaims and defenses asserted by defendants, and to strike paragraphs 67, 70, 71, 75,

76and 78-86 of the amended answer. The amended pleadings filed by the parties are substantially similar to the original pleadings and, thus, motion sequence number 003 is superceded and rendered moot by motion sequence number 004.

### **BACKGROUND**

This is an action for money damages and an accounting in connection with an agreement by the plaintiffs to raise money for the defendant companies in exchange for an interest in the companies. Plaintiffs alleged that, on August 1, 2004, they entered into a written agreement (the "Original Agreement") with Sasaki in which they agreed to raise money to be managed by Logos, a hedge fund management company, in exchange for a 1% interest in the company for each \$1 million raised, up to a 20% interest in the company. On April 12, 2005, the Original Agreement was renewed with revised terms (the "Renewal Agreement," collectively the "Agreements"), under which plaintiffs would obtain a 20% interest in Logos and Quix as follows:

"The interest shall be structured as a perpetual 20% Revenue Share contract with an option to purchase 20% of equity in each Logos Capital Management, LLC & Quix Partners, LLC should Peter Sasaki choose sell the companies in whole or in part such that Brad & Tim would participate as equity holders (*sic*). Should Brad & Tim decide to market/sell their interest, Peter has the right of first refusal." Complaint, Ex A at 2.

The Renewal Agreement also states: “it is assumed, as described in the original agreement of August 1, 2004 (attached), that Brad & Tim or their agents will raise \$20mm for Logos Global Fund, Ltd. and/or Logos Global Fund, L.P.” *Id.*

It is undisputed that plaintiffs raised \$19.5 million for Logos and that they have been paid distributions aggregating approximately \$1.1 million. Plaintiffs allege that, in April 2007, they explored the possibility of selling their interests in Logos and Quix and that Société Général Asset Management Alternative Investments Starway (“SGAM”) expressed an interest in purchasing their interests in the two companies. Plaintiffs further allege that after they met with SGAM, they contacted Sasaki concerning his right of first refusal and that he made it clear that he would hold up any transaction with SGAM. According to plaintiffs, as a result, SGAM ceased pursuing the purchase of plaintiffs’ interests in the two companies. Plaintiffs allege that Sasaki’s conduct was malicious and intended to harm them.

In their amended complaint, plaintiffs assert causes of action for breach of contract and tortious interference with prospective economic advantage against Sasaki, conversion, unjust enrichment and breach of implied duty of good faith and fair dealing against all defendants, and for a constructive trust against all defendants.

The amended answer alleges that, after plaintiffs raised \$19.5 million, they ceased in their efforts to raise the remainder of the funds, interfered with Sasaki’s efforts to obtain potential investment in the companies by SGAM and made false statements to SGAM

representatives regarding Sasaki. The amended answer also alleges that plaintiffs are officers and/or employees of a non-party company, Pali Holdings and its subsidiary Pali Capital, Inc. (“Pali”) and that when plaintiffs signed the Agreements, they did so on behalf of Pali, and that to the extent that they purport to have signed in their own capacity, they engaged in improper self-dealing and breached their fiduciary duties to Pali.

Defendants assert several counterclaims and affirmative defenses. As a first counterclaim and affirmative defense, defendants assert a claim for breach of contract, alleging that plaintiffs ceased making efforts to raise funds for investment in Logos after they raised \$19.5 million, thereby failing to use their best efforts to carry out the Agreements. In their second counterclaim and affirmative defense, defendants allege that plaintiffs’ failure to make any efforts to raise more funds, and their causing at least one potential investor not to invest, constituted a breach of the implied covenant of good faith and fair dealing. As a third counterclaim and affirmative defense, defendants allege that plaintiffs knew of and interfered with a potential investment in Logos by SGAM and that plaintiffs’ actions constituted tortious interference with prospective economic advantage. Defendants also allege several additional affirmative defenses, including the doctrine of *in pari delicto*, unclean hands and lack of standing to enforce the written agreements.

### ANALYSIS

Plaintiffs first argue that their motion to dismiss and/or strike defenses should be granted as unopposed, because defendants were five days late in serving an affirmation stating that, given that the contentions in motion sequence number 003 and number 004, were substantively similar they were relying on their memorandum submitted in opposition to plaintiffs' motion in motion sequence number 003. Although defendants have given no justification for their tardiness, it is hard to see how the plaintiffs are prejudiced by the five-day delay, therefore, the court will consider defendants' memorandum filed in opposition to motion sequence number 003 and will consider plaintiffs' reply memorandum filed in support of that motion, as requested by plaintiffs.

Plaintiffs move to dismiss and/or strike defendants' defenses related to Pali for lack of standing. Plaintiffs further contend that the paragraphs in the amended answer that pertain to Pali should be stricken because they contain scandalous and prejudicial matter.

Citing *Sierra Club v Morton* (405 US 727 [1972]) and *Society of Plastics Indus., Inc. v County of Suffolk* (77 NY2d 761 [1991]), plaintiffs argue that defendants have no ownership interest in or relationship to Pali, and that, therefore, they have no standing to assert defenses or counterclaims based on plaintiffs' alleged relationship and obligations to Pali.

Relying on *Matter of Matthews v Marcus Garvey Brownstone Houses, Inc.* (188 Misc 2d 503 [Civ Ct, Kings County 2001], *affd* 192 Misc 2d 439 [App Term, 2d Dept 2002]),

defendants contend that standing relates to a party's right to make a legal claim, not an affirmative defense. In *Matthews*, however, the court permitted an affirmative defense without examining the question of petitioners' standing because the affirmative defense raised an issue that went to the court's jurisdiction over the proceeding.

Here, in contrast, the affirmative defenses relating to plaintiffs' relationship to Pali do not raise a question of the court's jurisdiction. Affirmative defenses have been dismissed for lack of standing to raise them. *527-9 Lenox Ave. Realty Corp. v Ninth St. Assoc.*, 200 AD2d 531, 532 (1st Dept 1994). Defendants have no standing to raise affirmative defenses based upon plaintiffs' relationship to Pali and any alleged self-dealing or breach of fiduciary duty to Pali; thus, to the extent that the affirmative defenses are so based, they are dismissed.

Plaintiffs also move, pursuant to CPLR 3024 (b), to strike allegations in the amended answer relating to their relationship with Pali. "In reviewing a motion pursuant to CPLR 3024 (b) the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action." *Soumayah v Minnelli*, 41 AD3d 390, 392 (1st Dept 2007). A similar inquiry is appropriate with respect to affirmative defenses. Plaintiffs' motion to dismiss any affirmative defenses that are based upon plaintiffs' relationship with Pali is granted, and it is hard to see how allegations with respect to that alleged relationship have any relevance to the remaining affirmative defenses; thus, the motion to strike allegations numbered 67, 70, 71 and 75 is granted. However, some of the numbered allegations contained in plaintiffs' motion to

strike do not, in fact, relate to their relationship with Pali, and with respect to those allegations, the motion to strike is denied.

Plaintiffs seek dismissal of the counterclaims of breach of contract and breach of the implied covenant of good faith and fair dealing on the basis that the Agreements do not contain a “best efforts” clause. Citing *Liu v Beth Israel Med. Ctr.* (2003 WL 21488081, 2003 US Dist LEXIS 10852 [SD NY 2003]), plaintiffs contend that a best efforts requirement will not be read into a contract unless it is specifically negotiated.

A motion to dismiss based upon documentary evidence will not be granted unless the documents conclusively refute the allegations. *Goshen v Mutual Life Ins. Co. of N. Y.*, 98 NY2d 314, 326 (2002). *Liu*, however, only supports the qualified rule that a best efforts clause will not be implied *if* the agreement expressly provides a party discretion in the performance of its obligations. 2003 US Dist LEXIS 10852, \*6 (“Where the contract grants a party discretion, the law will not read a ‘best efforts’ requirement into the contract unless the parties have explicitly bargained for a best efforts clause”).

Moreover, *Liu* involved a motion for summary judgment (*id.* at \*5) and its limited applicability here does not warrant dismissal of a claim on the pleadings. Accordingly, plaintiffs’ motion to dismiss the first counterclaim is denied.

With respect to the second counterclaim for breach of the implied covenant of good faith and fair dealing, in their reply papers submitted in motion sequence number 003, plaintiffs argue that such a claim is redundant to the breach of contract counterclaim and therefore must be dismissed. Although normally raising a new argument of law will not be permitted in reply papers (*Dannasch v Bifulco*, 184 AD2d 415 [1st Dept 1992]), given the similarity of motion sequence numbers 003 and 004, and the fact that defendants chose not to rely on their opposition papers in 003, the court will consider the argument.

To the extent that the counterclaim is based on the same allegations that support defendants' counterclaim for breach of contract, a counterclaim for breach of an implied covenant is redundant and is dismissed. *Rather v CBS Corp.*, \_\_\_ AD3d \_\_\_, 886 NYS2d 121 (1st Dept 2009). Defendants' second counterclaim, however, also alleges that plaintiffs' actions interfering with a possible investment in Logos by SGAM constituted a breach of the implied covenant of good faith and fair dealing. To that extent, the second counterclaim is not redundant and is not dismissed.

Plaintiffs' motion to dismiss the second counterclaim is granted to the extent set forth above, and is otherwise denied.

Finally, plaintiffs move to dismiss defendants' third counterclaim for prospective economic advantage.

“To prevail on a claim for tortious interference with business relations in New York, a party must prove 1) that it had a business relationship with a third party; 2) that the defendant knew of that relationship and intentionally interfered with it; 3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and 4) that the defendant’s interference caused injury to the relationship with the third party.”

*Amaranth LLC v J.P. Morgan Chase & Co.*, \_\_\_ AD3d \_\_\_, 2009 WL 3644518, \*5, 2009 NY App Div LEXIS 7787, \*\* 12-13 (1st Dept 2009).

Plaintiffs argue that defendants’ allegations of malice are conclusory and, therefore, insufficient to support a claim for tortious interference with economic advantage. *Gertler v Goodgold*, 107 AD2d 481 (1st Dept), *affd* 66 NY2d 946 (1985).

Citing *Purgess v Sharrock* (33 F3d 134, 141, 142 [2d Cir 1994]), defendants contend that they have satisfactorily alleged two different types of malice—that the opposing party acted solely to harm the claimant or harmed the claimant through improper means, and that the opposing party was motivated by spite or revenge. According to defendants, plaintiffs interfered with SGAM’s investment in Logos as an act of retribution following Sasaki’s refusal to buy them out. However, defendants also cite the allegation in their answer that plaintiffs interfered with defendants’ business relationship by causing SGAM not to invest in Logos unless SGAM made direct personal payments to them. Amended Answer at ¶ 104. Rather than establishing that plaintiffs’ sole purpose was to cause harm to defendants, that allegation suggests that plaintiffs were acting for their own financial gain. *Shared*

*Communications Servs. of ESR, Inc. v Goldman Sachs & Co.*, 23 AD3d 162, 163 (1st Dept 2005) (claim “failed to include the necessary allegation that defendant’s conduct was motivated solely by malice or to inflict injury by unlawful means, beyond mere self-interest or other economic considerations”).

Defendants also argue that plaintiffs used improper means to interfere with the proposed SGAM investment when they told representatives of SGAM “that Reifler had taught Sasaki everything he knew about investing, that they had put Logos into business, and that they were equity holders in Logos.” Amended Answer at ¶ 80. Whether or not those alleged statements were true, defendants fail to allege that plaintiffs’ conduct rises to the level of being a crime or independent tort. See *Amaranth LLC v J.P. Morgan Chase & Co.*, 2009 WL 3644518 at \*5, 2009 NY App Div LEXIS 7787 at \*\*12-13. Plaintiffs’ motion to dismiss defendants’ third counterclaim is, therefore, granted.

Accordingly, it is hereby

ORDERED with respect to Motion Sequence Number 003, that plaintiffs’ motion to dismiss and strike is denied as moot; and it is further

ORDERED with respect to Motion Sequence Number 004, that plaintiffs’ motion to dismiss and strike is resolved as follows:

1. the motion to dismiss any affirmative defenses, to the extent that they are based upon plaintiffs' relationship with Pali, and to strike allegations numbered 67, 70, 71 and 75 is granted;

2. the motion to dismiss as to defendants' first counterclaim is denied;

3. the motion to dismiss the second counterclaim is granted to the extent that the counterclaim is based upon the same allegations supporting the first counterclaim for breach of contract and is otherwise denied;

3. the motion to dismiss as to defendants' third affirmative defense is granted.

This constitutes the Decision and Order of the Court.

Dated: New York, New York

December 15, 2009

**FILED**  
DEC 22 2009  
NEW YORK  
COUNTY CLERK'S OFFICE  
ENTER



Hon. Eileen Bransten