

Votta v Garcy

2010 NY Slip Op 30486(U)

March 9, 2010

Supreme Court, Richmond County

Docket Number: 100548/09

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index. 100548/09
Motion No.: 001
002

SAMUEL J. VOTTA, VINCENT J. VOTTA,
JONATHAN S. VOTTA, and SUSAN VOTTA,
B&M FITNESS CORP d/b/a FITNESS 2000,
DAVID GRUNBERGER, DUV FELDMAN,
SAMUEL SPUTZ, EVER-NU METAL PRODUCTS, INC.,
ROCCO GAGLIARDI, JOHN D. GAGLIARDI,
JOHN A. GAGLIARDI, FRANK GAGLIARDI,
EUGENE GAGLIARDI, PETER S. FOLINO,
CRAIG MURRAY, EDCA REALTY and
EASTERN SECURITY CORP., each individually and
derivatively as shareholders of E-Z Media, Inc. and Atlas
Carriers, Inc. suing in the right of E-Z Media, Inc./Atlas
Carriers, Inc.,

Plaintiffs

against

GEORGE GARCY, Individually and as Officer and Director
of E-Z Media Inc./Atlas Carriers, Inc.; ANGELO CUOMO,
Individually and as Officer and Director of
E-Z Media Inc./Atlas Carriers, Inc.; JUDITH GUIDO,
Individually and as Officer and Director of
E-Z Media Inc./Atlas Carriers, Inc.; E-Z MEDIA, INC.;
ATLAS CARRIERS, INC.; MAJESTIC CARRIERS, INC.;
and WILLIAM GUIDO, Individually,

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of the following motion (1) for preliminary injunction, and (2) to dismiss:

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Notice of Motion and Affidavits	4
Answering Affidavits	5
Replying Affidavits	6
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Plaintiffs move by Order to Show Cause for a preliminary injunction enjoining Defendants George Garcy (“Garcy”), Angelo Cuomo (“Cuomo”), Judith Guido, William Guido, E-Z Media, Inc., Atlas Carriers, Inc., and Majestic Carriers, Inc. from selling, transferring or encumbering the patents or any of the business assets owned by E-Z Media, Inc. or Atlas Carriers Inc. Plaintiffs’ motion is dismissed since the relief requested has already been provided.

Defendants move for an Order dismissing Plaintiffs’ complaint pursuant to CPLR 3211, which is granted in part and denied in part.

PROCEDURAL HISTORY

This case was commenced on March 3, 2009 with Plaintiffs’ filing of an Order to Show Cause requesting that a preliminary injunction be granted to enjoin Defendants from taking any action with respect to patents held by E-Z Media or issuing any further shares in the Company. Plaintiffs filed a verified complaint on March 6, 2009. An Amended Complaint was filed on April 22, 2009 which raised the forty-six causes of action that are the subject of the current motion to dismiss. On June 12, 2009 this Court recognized Plaintiffs’ election of a new board of directors by written shareholder consent pursuant to Nevada statutes NRS 78.320(3) and NRS 78.335(1). As a result of the June 12, 2009 hearing, Plaintiffs having received the relief requested in their causes of action numbered 3, 6, 7, 11 and 12.

FACTS

E-Z Media, Inc. (the “Company” or “E-Z Media”) is a Nevada corporation duly authorized to do business in New York as a foreign business corporation. For a time, E-Z Media was no longer licensed to do business in Nevada due to its failure to pay applicable franchise taxes. However, E-Z Media has since paid all applicable taxes and, on April 9, 2009, was reinstated in good standing in

Nevada. E-Z Media's main offices are located at 50 Beaver Street, New York, New York. Garcy incorporated E-Z Media as a way to market and sell food and drink carriers whose patents had been created and assigned to the Company by Cuomo. Garcy ran the Company as President until July of 2009. During that time, Defendants developed a business plan that described how the Company intended to utilize the patents to make a profit. The business plan was presented to prospective investors as a way to solicit funds. Each Plaintiff invested significant sums of money in the Company. Several investors never received physical delivery of any stock certificates representing ownership in the Company. In place of certificates, some Plaintiffs present subscription agreements signed by Garcy in his capacity as President of the Company as evidence of their ownership of stock in the Company. In addition to the purchase of stock, some investors loaned money to the Company, as evidenced by several promissory notes. The Company defaulted on all repayment obligations under these loans and, in lieu of repayment, additional percentages of ownership were purportedly given to the creditor-Plaintiffs.

The Company has never generated any revenue in the several years it has been in operation. The patents are the only assets that the Company possesses. The Company has never held any formal meetings of the board of directors or annual meeting of the shareholders, and no minutes of any meetings exist. The Articles of Incorporation limit the amount of stock that the Company can issue to 75,000 shares. This limit has never been amended. Over the years, Garcy has sold more shares than the Company is permitted to issue under its Articles of Incorporation. Garcy has also failed to keep an accurate list of shareholders and the percentages of ownership in the Company attributable to each. As much as \$1 million in Company funds was transferred to Defendant Judith Guido over several years. Judith Guido is Garcy's sister. Even though listed as the Company's Secretary, at no time did Judith Guido perform any work on behalf of the Company.

DISCUSSION

Plaintiffs seek a preliminary injunction enjoining Defendants from encumbering the Company's assets or selling more stock. Defendants seek to dismiss Plaintiffs' claims based on

documentary evidence, lack of standing, failure to state a cause of action, and the statute of limitations. Both motions are addressed below.

Jurisdiction - E-Z Media

E-Z Media failed to pay applicable Nevada state franchise taxes, which resulted in the suspension of the Company's license to do business in Nevada. Pursuant to New York Business Corporation Law § 1305, E-Z Media was rendered unauthorized to do business in New York due to its failure to remain in good standing in the state of its incorporation. Section 1305 states:

“Upon filing by the department of state of the application for authority the foreign corporation shall be authorized to do in this state any business set forth in the application. Such authority shall continue so long as it retains its authority to do such business in the jurisdiction of its incorporation and its authority to do business in this state has not been surrendered, suspended or annulled in accordance with law.”

Even though E-Z Media was unauthorized to do business in New York at the time this action was commenced on March 3, 2009, this court maintained jurisdiction over E-Z Media at all times. Failure of a foreign corporation doing business in New York to pay applicable state taxes and fees affects that corporation's legal capacity to maintain an action, but does not affect jurisdiction.¹ New York Business Corporation Law § 1312(b) is particularly relevant in establishing this court's jurisdiction over E-Z Media as a defendant, regardless of its authority to do business in either state. Section 1312(b) states:

“The failure of a foreign corporation to obtain authority to do business in this state shall not impair the validity of any contract or act of the foreign corporation or the right of any other party to the contract to maintain any action or special proceeding thereon, and *shall not prevent the foreign corporation from defending any action or special proceeding in this state.*”(emphasis added)

¹ *Hot Roll Mfg. Co. v Cerone Equipment Co.*, 38 AD2d 339, 329 NYS2d 466 [3d Dept 1972]

Since the failure to remain authorized to do business in New York is not a jurisdictional defect, subsequent repayment of all back-taxes and fees warrants nunc pro tunc application, which averts dismissal of the action.² E-Z Media's failure to pay applicable franchise taxes was a violation that could be cured nunc pro tunc. Therefore, once E-Z Media repaid all back-taxes and regained its good standing in Nevada, E-Z Media would have standing to both maintain an action as plaintiff as well as defend an action in this court.

E-Z Media was reinstated as a corporation in good standing in Nevada after repaying all applicable back-taxes and fees on April 9, 2009. Once E-Z Media regained its good standing in Nevada, E-Z Media was again authorized to transact business in New York. Therefore, E-Z Media regained its ability to both maintain and defend an action on April 9, 2009 with its repayment of back-taxes nunc pro tunc, even though E-Z Media was not in good standing at the time this action was commenced on March 3, 2009.

Plaintiffs' Motion for Preliminary Injunction

On a motion for a preliminary injunction, the applicant must prove three things, namely: (1) the likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that the equities are balanced in his favor.³ Here, Plaintiffs have already been granted the relief sought in the preliminary injunction. Pursuant to an agreement between the parties and the Court's June 12, 2009 hearing on the record that recognized Plaintiffs' election of a new board of directors by written shareholder consent, Plaintiffs are now in control of the Company because they occupy four out of the five seats on the Company's Board of Directors. This places them in direct control over the patents held by the Company as well as the issuance of shares. Since these are the remedies sought by Plaintiffs' motion for preliminary injunction, and such

² *Willoughby Rehab. & Health Care Ctr., LLC v. Webster*, 2006 NY Slip Op 52067U, 3 (New York County 2006)

³ *McLaughlin, Piven, Vogel, Inc. v. W. J. Nolan & Co.*, 114 A.D.2d 165 [2d Dept 1986]

relief has already been granted, Plaintiffs' motion for a preliminary injunction is dismissed since the relief requested has already been provided.

Defendants' Motion to Dismiss

In considering a motion to dismiss pursuant to CPLR 3211, this Court must accept the facts as alleged in the complaint as true and determine only whether the facts as alleged fit within any cognizable legal theory.⁴ Under CPLR 3211(a)(1), a dismissal is warranted if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. In assessing a motion under CPLR 3211, however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint.⁵ A complaint which is sufficient on its face may be dismissed if the factual claims are "flatly contradicted by documentary evidence"⁶

At the hearing dated June 12, 2009, Plaintiffs were given control of the Company's Board of Directors and Defendants were ordered to produce any Company records in existence. Similarly, such control over the Board also gives Plaintiffs the authority to issue shares and use the patents as they deem necessary in the course of business.

Standing

Defendants move to dismiss Plaintiffs' derivative causes of action for misappropriation and conversion, breach of fiduciary duty, imposition of constructive trust, and looting and waste of corporate assets for lack of standing pursuant to CPLR 3211(a)(3). Business Corporation Law § 626(c) provides that in any shareholders' derivative action, the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the

⁴ *Morone v. Morone*, 50 N.Y.2d 481 [1980]

⁵ *Leon v. Martinez*, 84 N.Y.2d 83 [1994]

⁶ *Smuckler v. Mercy College*, 244 A.D.2d 329, 330 [2d Dept 1997]

reasons for not making such effort.⁷ Defendants assert that Plaintiffs failed to follow the actions required by Section 626(c) in order to obtain standing to sue derivatively on behalf of the Company. This Court disagrees.

The requirement in Section 626(c) that shareholders make an initial demand on the Board to make efforts to remedy the complained of behavior is excused if the shareholders can show that such a demand would have been “futile.”⁸ A demand by a shareholder that the corporation initiate an action would be futile if a complaint alleges with particularity that (1) a majority of the directors are interested in the transaction, or (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgment in approving the transaction.⁹

Plaintiffs admit that no demand was made upon the Company’s Board. However, Plaintiffs allege that, due to the self-dealing nature of the transactions at issue, Defendant directors were interested parties and, thus, demand would have been futile. Defendants allegedly engaged in the systematic looting of the Company by continuously soliciting new investors while using the invested funds for personal use. Plaintiffs specify Garcy’s alleged use of shell corporations to transfer Company funds to these corporations without any benefit flowing in return. Plaintiffs also point to the transfer of as much as \$1 million in Company funds to Guido for what appears to be little to no work for the Company.¹⁰

Where a complaint attacks the directors’ acts in causing the corporation to enter into a transaction for their own financial benefit, demand is excused because of the self-dealing of those

⁷ Business Corporation Law §626(c)

⁸ *Tsutsui v Barasch*, 2009 NY Slip Op 8607 (2d Dept 2009)

⁹ *Marx v. Akers*, 88 N.Y.2d 189 [1996]; *Tsutsui*, *supra*

¹⁰ Testimony of Judith Guido, June 12, 2009, lines 6 through 18

directors in the challenged transaction.¹¹ Here, Plaintiffs have set forth sufficiently detailed allegations of fraudulent behavior on the part of the Company's directors to establish that demand would have been futile. Such details include Garcy's alleged use of shell corporations to gain personal access to Company funds and the transfer of as much as \$1 million in Company funds to his sister, Guido, in return for no work. Furthermore, there is testimony by Joshua Cantor, a business consultant, that Defendants Garcy and Cuomo attempted to solicit his opinion as to the best way to "backdate" stock certificates.¹² This fraudulent behavior indicates that Defendants may have been involved in self-dealing, and thus were "interested" in the complained of transactions. Since Plaintiffs have showed that a majority of directors were interested in the transactions, thereby satisfying the first test of showing demand futility, this Court finds that Plaintiffs have demonstrated their standing to sue derivatively on behalf of the Company. As such, Defendants' motion to dismiss Plaintiffs' causes of action numbered 1, 2, 4, and 5 is denied.

Standing - B&M Fitness Corp.

Defendants specifically mention B&M Fitness Corp.'s ("B&M") claims for Breach of Contract and Fraud (29th and 46th causes of action) as being particularly ripe for dismissal pursuant to CPLR 3211(a)(3) due to the B&M's alleged lack of standing to sue. Defendant asserts that B&M, as an unlicensed corporation operating in New York, does not have the requisite capacity to sue under New York General Business Law § 130.¹³

However, Plaintiff B&M has presented documentary evidence that contradicts Defendants' allegations that it is not licensed to operate in the state of New York by attaching the results of a search on the New York Department of State website.¹⁴ Therefore, Defendants' motion to dismiss

¹¹ *Barr v. Wackman*, 36 N.Y.2d 371 [1975]

¹² Testimony of Joshua Cantor, June 12, 2009, p.49

¹³ Gen. Bus. Law § 130

¹⁴ Exhibit F, Plaintiffs' Affirmation in Opposition to Defendants' Motion to Dismiss

Plaintiff B&M's claims of breach of contract and fraud due to lack of standing is denied.

Eighth Cause of Action - Breach of Contract

Defendants move to dismiss Plaintiffs' eighth cause of action for breach of contract based on documentary evidence and for failure to state a claim pursuant to CPLR 3211(a)(1) and (7).

In order for Plaintiffs to recover in their causes of action for breach of contract, the complaint must adequately allege the existence of a contract, Plaintiffs' performance under the contract, Defendant's breach of the contract, and resulting damages.¹⁵ Where a contract is clear and unambiguous, the parties' intent must be found within the four corners of the document and the question of intent is one of law.¹⁶

The existence of a valid contract between Plaintiffs and Defendants is undisputed. In addition, Defendants have not alleged that Plaintiffs have failed to perform under the contract. Rather, Defendants argue that they themselves are not in breach of any provision contained within the agreements.

Plaintiffs' complaint and affidavits allege sufficient facts to refute Defendants' contentions, which the contracts do not dispute. The agreements in question contemplated the transfer of money in exchange for a percentage of ownership in the Company.¹⁷ The specific percentage of ownership was laid out in the "General Terms" section of every agreement. These terms and percentages of

¹⁵ *JP Morgan Chase v. J.H. Elec. of N.Y., Inc.*, 2010 NY Slip Op 477, 2 [2d Dept 2010]; *Furia v Furia*, 116 AD2d 694, 498 N.Y.S.2d 12 [2d Dept 1986]

¹⁶ *Gora v. D.I.D. Acquisition Co.*, 226 A.D.2d 425, 426 [2d Dept 1996]

¹⁷ Exhibit A, Plaintiff's Amended Verified Complaint

ownership are clear and unambiguous. The facts as presented, and viewed in the light most favorable to the Plaintiffs, indicate that Defendants allegedly breached the contract by having failed to transfer the requisite percentage of ownership that each Plaintiff was entitled to. Indeed, it appears that Defendants somewhat randomly assigned percentages of ownership as they saw fit, with no regard to any prior subscription agreements entered into or previously assigned percentages of ownership.

Since the terms of the contract are clear and unambiguous, the documentary evidence fails to “flatly contradict” Plaintiffs’ factual claims, and the facts sufficiently support a claim for breach of contract, Defendants motion to dismiss Plaintiffs’ breach of contract claims must be denied.

Ninth Cause of Action - Fraud

Defendants move to dismiss Plaintiffs’ ninth cause of action for fraud for failure to state a cause of action pursuant to CPLR 3211(a)(7). Defendants alleged that Plaintiffs have failed to plead fraud with the requisite particularity under CPLR 3016(b). In addition, Defendants allege that Plaintiffs cannot maintain simultaneous fraud and breach of contract claims since the allegedly fraudulent behavior stems from a breach of a contractual provision.

CPLR 3016(b) establishes the heightened pleading requirement when attempting to establish fraud:

“Where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust, or undue influence, the circumstances constituting the wrong shall be stated in detail.”

In an action to recover damages for fraud, the plaintiff must prove: (1) a misrepresentation or a material omission of fact, (2) which was false and known to be false by defendant, (3) made for the purpose of inducing the other party to rely upon it, (4) justifiable reliance of the other party on

the misrepresentation or material omission, and (5) injury.¹⁸ The question of a fraudulent intent is generally one of fact.¹⁹ Bare allegations of fraud in a complaint without any allegation of the details constituting the wrong are not sufficient to sustain a cause of action.²⁰ Although, as a rule, scienter is a necessary element of fraud, the term includes a pretense of exact knowledge, the assertion of a false material fact susceptible of accurate knowledge but stated to be true to the personal knowledge of the representor, and a reckless indifference to error.²¹ A conclusive test for whether misrepresentations were the inducement to a contract is whether the representee would have refused his or her consent to it if the representations had not been made or if he or she had known the truth concerning them.²²

Plaintiffs plead fraud with the requisite particularity to survive a motion to dismiss. Several representations are alleged to have been fraudulently made. Defendants represented the percentage of ownership that each investor would receive in exchange for funds. As discussed above, Defendants allegedly knew that the percentages of ownership being assigned to each investor were not accurate. Defendants were purporting to issue stock to investors even though such stock was in an amount above and beyond that which was permitted to be issued by the Articles of Incorporation of the Company. Such knowledge indicates that the misrepresentations were made with scienter.

In addition to the statements regarding Plaintiffs' respective percentages of ownership in the Company, Plaintiffs also identify several other fraudulent statements that Defendants allegedly knew were false at the time they were made. For example, Defendants asserted that the patents were free

¹⁸ *Channel Master Corp. v. Aluminium Ltd. Sales, Inc.*, 4 N.Y.2d 403 [1958]

¹⁹ *Gray v. Richmond Bicycle Co.*, 167 N.Y. 348 [1901]

²⁰ *Kline v. Taukpoint Realty Corp.*, 302 A.D.2d 433 [2d Dept 2003]

²¹ *Skrine v. Staiman*, 30 A.D.2d 707 [2d Dept 1968], order aff'd without opinion, 23 N.Y.2d 946 [1969]

²² *Jones v. Title Guarantee & Trust Co.*, 277 N.Y. 415 [1938]

from any liens or encumbrances. However, Defendants had allegedly previously pledged the patents as collateral to several investors. Defendants also misrepresented how the funds would be used, asserting that the funds would be used solely for business purposes. Plaintiffs have set forth sufficient facts that show Defendants never intended to use the funds to further the interests of the Company. Instead, the Defendants allegedly converted the funds for personal use, such as the purchase of real property in the name of Defendant Guido.

Plaintiffs have adequately alleged that each of these statements were misrepresentations known to have been false at the time they were made. Therefore, Plaintiffs have adequately pleaded scienter.

Each of these statements were allegedly made to induce Plaintiffs to invest in the Company. Indeed, there is no other reason to misrepresent facts when trying to attract investors to invest in a company.

Plaintiffs also allege that they justifiably relied on these misrepresentations in making their decision to invest in the Company. Had Plaintiffs known that the Company's sole assets were potentially in jeopardy or that their investments would be used for the personal expenses of the Company's directors, it is doubtful that any Plaintiff would have invested in the Company. Clearly, an investor would decline to invest in a Company that misrepresents the true percentage of ownership that is being exchanged for an investment or does not have the authority to issue the shares under the agreements.

As a result of Defendants' numerous alleged misrepresentations and knowledge of their falsity, Plaintiffs relied on these misrepresentation in their decision to invest in the Company and subsequently lost most of their investment in the process. Therefore, Plaintiffs have pleaded fraud with sufficient particularity to survive a motion to dismiss

When a fraud claim is predicated on contractual obligations such as in this case, additional

requirements must be met. To survive an attack that a tort claim is but a breach of contract in other clothing, there must be a legal duty independent of the contract that has been violated. To maintain a claim of fraud in such a situation, a plaintiff must either: (i) demonstrate a legal duty separate from the duty to perform under the contract; or (ii) demonstrate a fraudulent misrepresentation collateral or extraneous to the contract; or (iii) seek special damages that are caused by the misrepresentation and unrecoverable as contract damages.²³ 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.²⁴ It is fundamental that fiduciary "liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation"²⁵

Despite Defendants' contentions that Plaintiffs cannot maintain simultaneous fraud and breach of contract claims, this Court disagrees. In this case, as directors of the Company, Defendants had fiduciary duties separate and distinct from their duty to perform under the contract. Such an independent legal duty, even though connected to and dependent upon the contract, is nevertheless extraneous to the contract and is not dependent solely upon the contractual relation between Plaintiffs and Defendants. This separate and distinct legal duty owed by Defendants allows Plaintiffs to proceed under causes of action for both breach of contract as well as fraud.

Therefore, since Plaintiffs have alleged sufficient facts to plead fraud with particularity along with a legal duty independent from the duty to perform under the contract, Defendants' motion to dismiss Plaintiffs' ninth cause of action for fraud must be denied.

²³ *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382 [1987]; *Banc of Am. Commer. Fin. Corp. v. Issacharoff*, 188 Misc. 2d 790, 796 [Sup. Ct. 2000]

²⁴ *Meyers v. Waverly Fabrics, Div. of F. Schumacher & Co.*, 65 N.Y.2d 75 [1985]; *Rich v. New York C. & H. R. R. Co.*, 87 N.Y. 382, 398 [1882]

²⁵ *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 [2005]; Restatement [Second] of Torts § 874, Comment b

Tenth Cause of Action - Violation of Securities Act of 1933 Section 5

Defendants move to dismiss Plaintiffs' tenth cause of action for a failure to register the securities issued in violation of Securities Act of 1933 (the "Securities Act") § 5²⁶ based upon documentary evidence and the expiration of the applicable statute of limitations pursuant to CPLR 3211(a)(1) and (5).

Actions alleging violations of Section 5 are subject to limitation periods set forth in Securities Act § 13.²⁷ Under Section 13, Plaintiffs' cause of action is subject to a one-year statute of limitations.²⁸ However, under the federal tolling doctrine, the statute of limitations does not begin to run "until plaintiffs discovered, or by reasonable diligence could have discovered, the basis of the lawsuit."²⁹ Section 13 further states that in no event may the action be commenced more than three years after the date of sale of the shares.

Defendants contend that they are entitled to dismissal of Plaintiffs' claims that Defendants failed to register the securities in violation of Section 5. Defendants point to the fact that Plaintiffs explicitly acknowledged that Defendants' sale of securities were being conducted pursuant to Securities Act § 4(2) and Rule 504 of Regulation D promulgated thereunder,³⁰ which is not subject to the registration requirement of Section 5.³¹ Plaintiffs held themselves out as accredited investors and acknowledged that the securities being issued were not subject to any registration requirements.

²⁶ 15 U.S.C. 77e

²⁷ *Houlihan v. Anderson-Stokes, Inc.*, 434 F. Supp. 1319 [D.D.C. 1977]

²⁸ 15 U.S.C. 77m

²⁹ *Fitzgerald v. Seamans*, 180 U.S. App. D.C. 75, 553 F.2d 220, 228 (1977)

³⁰ 15 U.S.C 77d(2)

³¹ Plaintiffs' Verified Complaint, Exhibit H

Plaintiffs allege that Defendants were engaged in the use of interstate means of communication and the mails in order to offer their securities to investors. Such an allegation would render the safe-harbor of Section 4(2) and the provisions of Rule 504 of Regulation D promulgated thereunder inapplicable since Section 4(2) does not permit public solicitation of investors.³² Plaintiffs further assert that Defendants actively concealed such public solicitation and assured Plaintiffs of the applicability of the Rule 504 safe-harbor, as evidenced by the applicable provisions of the stock purchase agreements entered into by Plaintiffs and highlighted by Defendants in their arguments in favor of dismissal. Therefore, although Plaintiffs acknowledged in the stock purchase agreements that the stock was not subject to registration, such disclosure does not bear on the current issue since Plaintiffs assert that the stock was, indeed, subject to registration due to the public solicitation by Defendants.

This court holds that the federal tolling doctrine should be applied in the instant case due to Defendants' concealment of its obligation to register the securities. The authority most directly in support of the Court's conclusion is *Dyer v. Eastern Trust & Banking Co.*³³ In *Dyer*, the plaintiff sued alleging defendants made false assurances to plaintiff that the sale of securities in question did not require registration under the Securities Act. The instant case is just such a controversy: Plaintiffs allege not only that Defendants' representations regarding exemption from registration were false, but that the representations were grounded in the fraudulent concealment of Defendants' true obligations to register the securities due to their public solicitation.³⁴

Applying the federal tolling doctrine to the present case, the only actions that are timely are those based upon contracts for the purchase of stock within one year after Plaintiffs discovered, or with reasonable diligence could have discovered, Defendants' public solicitation of investors. Additionally, Plaintiffs' cause of action is limited by the absolute three-year statute of limitations

³² *SEC v. Ishopnomarkup.com, Inc.*, 2007 U.S. Dist. LEXIS 70684 (E.D.N.Y. 2007)

³³ *Dyer v. Eastern Trust & Banking Co.*, 336 F. Supp. 890 [D. Me. 1971].

³⁴ *Houlihan*, supra

under Section 13. Since Plaintiffs commenced this action on March 3, 2009, in no event shall any cause of action under Section 5 concerning a purchase of stock prior to March 3, 2006 be considered timely. All alleged violations of Section 5 that are grounded in stock purchases or issuances prior to March 3, 2006 must be dismissed as untimely.

Causes of Action 13 through 46 - Breach of Contract and Fraud

Defendants move to dismiss the remaining causes of action numbered 13 through 46 based upon documentary evidence and failure to state a claim pursuant to CPLR 3211(a)(1) and (7).

The 13th through 29th causes of action as alleged by Plaintiffs virtually mirror the generic breach of contract cause of action previously dealt with above, except the present causes of action apply to each individual Plaintiff and their respective contracts. As this Court has previously held that Plaintiffs have alleged sufficient facts to survive Defendants' motion to dismiss Plaintiffs' generic claim for breach of contract, and each Plaintiff has sued for the same breach in contracts that are virtually identical in all material respects to the generic contract in the eighth cause of action, Defendants' motion to dismiss Plaintiffs' individual breach of contract claims must be denied. Each individual claim for breach of contract and fraud are virtually identical in composition to the generic eighth and ninth causes of action, Defendants' motion to dismiss Plaintiffs' claims of breach of contract and fraud must be denied.

Similarly, the 30th through 46th causes of action as alleged by Plaintiffs virtually mirror the generic fraud cause of action previously dealt with in the ninth cause of action above, except the present causes of action apply to the misrepresentations Defendants made to each individual Plaintiff, respectively. As this Court has previously held that Plaintiffs have alleged sufficient facts to survive Defendants' motion to dismiss Plaintiffs' generic claim for fraud, and each Plaintiff has sued for virtually the same alleged misrepresentations as those contained in the generic ninth cause of action for fraud, Defendants' motion to dismiss Plaintiffs' individual fraud claims must be denied.

Accordingly, it is hereby:

ORDERED, that Plaintiffs' motion for preliminary injunction to enjoin Defendants from encumbering the Company's assets or issuing additional stock in the Company is dismissed since the requested relief has already been provided; and it is further

ORDERED, that Defendants' motion to dismiss Plaintiffs' third, sixth, seventh, eleventh and twelfth causes of action is dismissed as moot; and it is further

ORDERED, that Defendants' motion to dismiss Plaintiffs' tenth cause of action is granted to the extent of any stock purchased prior to March 3, 2006, and it is further

ORDERED, that Defendants' motion to dismiss Plaintiffs' remaining causes of action are denied; and it is further

ORDERED, that the parties return to DCM3 for a compliance conference on April 29, 2010 at 9:30a.m.

ENTER,

DATED: March 9, 2010

Joseph J. Maltese
Justice of the Supreme Court

