

BDCM Fund Adviser, L.L.C. v Zenni
2011 NY Slip Op 33695(U)
June 20, 2011
Sup Ct, NY County
Docket Number: 602116/08
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Hon. Eileen Bransten, Justice **PART 3**

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BDCM FUND ADVISER, L.L.C., f/k/a BLACK
DIAMOND CAPITAL MANAGEMENT, L.L.C.,
BLACK DIAMOND CAPITAL HOLDINGS, L.L.C.
and STEPHEN H. DECKOFF,

Plaintiffs,
-against-

I Index No.: 602116/08
Motion Date: 4/26/11
Mot. Seq. No.: 011

JAMES J. ZENNI, JR., ZENNI HOLDINGS, L.L.C.,
Z CAPITAL PARTNERS L.L.C., Z CAPITAL
SPECIAL SITUATIONS FUND L.P. and Z CAPITAL
SPECIAL SITUATIONS FUND-A, L.P.,

Defendants.

-and-

JAMES J. ZENNI, JR., ZENNI HOLDINGS, L.L.C.,
Z CAPITAL PARTNERS L.L.C., Z CAPITAL
SPECIAL SITUATIONS FUND L.P. and Z CAPITAL
SPECIAL SITUATIONS FUND-A L.P.,

Counterclaim Plaintiffs,

-against-

BDCM FUND ADVISER, L.L.C., f/k/a BLACK
DIAMOND CAPITAL MANAGEMENT, L.L.C.,
BLACK DIAMOND CAPITAL HOLDINGS, L.L.C.,
STEPHEN H. DECKOFF, SD INVESTMENTS, L.L.C.,
and BDCM OPPORTUNITY FUND, G.P., L.L.C.

Counterclaim Defendants.

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The following papers, numbered 1 to 3, were read on this motion for leave to amend/dismiss.

Papers Numbered

Notice of Motion/Order to Show Cause - Affidavits - Exhibits	<u>1</u>
Answering Affidavits - Exhibits	<u>2</u>
Replying Affidavits	<u>3</u>

Cross-Motion: X Yes No

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

-----X
BDCM FUND ADVISER, L.L.C., f/k/a BLACK
DIAMOND CAPITAL MANAGEMENT, L.L.C.,
BLACK DIAMOND CAPITAL HOLDINGS, L.L.C.
and STEPHEN H. DECKOFF,

Plaintiffs,
-against-

Index No.: 602116/08
Motion Date: 4/26/11
Mot. Seq. No.: 011, 012

JAMES J. ZENNI, JR., ZENNI HOLDINGS, L.L.C.,
Z CAPITAL PARTNERS L.L.C., Z CAPITAL
SPECIAL SITUATIONS FUND L.P. and Z CAPITAL
SPECIAL SITUATIONS FUND-A, L.P.,

Defendants.

-and-

JAMES J. ZENNI, JR., ZENNI HOLDINGS, L.L.C.,
Z CAPITAL PARTNERS L.L.C., Z CAPITAL
SPECIAL SITUATIONS FUND L.P. and Z CAPITAL
SPECIAL SITUATIONS FUND-A L.P.,

Counterclaim Plaintiffs,

-against-

BDCM FUND ADVISER, L.L.C., f/k/a BLACK
DIAMOND CAPITAL MANAGEMENT, L.L.C.,
BLACK DIAMOND CAPITAL HOLDINGS, L.L.C.,
STEPHEN H. DECKOFF, SD INVESTMENTS, L.L.C.,
and BDCM OPPORTUNITY FUND, G.P., L.L.C.

Counterclaim Defendants.

-----X
EILEEN BRANSTEN, J.:

Motion sequence numbers 11 and 12 are consolidated for disposition.

In this breach of contract action, plaintiffs/counterclaim-defendants BDCM Fund Advisor, L.L.C., f/k/a Black Diamond Capital Management, L.L.C., Black Diamond Capital Holdings, L.L.C., and Stephen H. Deckoff (collectively, "plaintiffs" or "BDCM") move, pursuant to CPLR 3025 (b), for leave to amend the complaint.

Defendants/counterclaim plaintiffs James J. Zenni ("Zenni"), Zenni Capital Partners, L.L.C., Z Capital Partners, L.L.C., Z Capital Special Situations Fund, L.P., and Z Capital Special Situations Fund-A L.P. (collectively, "Z Funds" or "defendants"), cross-move, pursuant to CPLR 3211 (a) (7), to dismiss BDCM's second through sixth causes of action in the complaint in their entirety, and to dismiss the first cause of action as against all of the defendants other than Zenni. Motion sequence 11.

BDCM moves, pursuant to CPLR 3104 (d), to review and vacate the Judicial Hearing Officer's February 8, 2011 order of preclusion. Motion sequence 12.

BACKGROUND

In 1995, Zenni and plaintiff/counterclaim defendant Stephen H. Deckoff ("Deckoff") co-founded Black Diamond Capital Management, L.L.C., an alternative asset management firm. In 2006 Zenni and Deckoff decided to part ways. Because the parties anticipated that Zenni would establish a competing asset management fund, and that they would vie for the same clients, the parties entered in a Membership Interest Redemption Agreement ("MIRA") which set forth, with particularity, the parameters under which Zenni, and the entities through

which he would do business, could compete with BDCM; trade on BDCM's reputation and use BDCM's track record and confidential information following Zenni's severance.

The MIRA

Several sections of the MIRA concern defendants' use of BDCM's information, the confidentiality of certain information and how and when other information could be used and or disseminated. In addition, the MIRA contains a "non-disparagement" provision.

Section 12 (b) of the MIRA discusses the confidentiality of reports that plaintiffs would provide regarding the BDCM Opportunity Fund. The section states that the reports of unrealized investments, including the estimated value of each unrealized investment, which Zenni received in the first quarter after the closing, "shall not be confidential information, and [Zenni] may use such report and schedule of unrealized investments in any manner it chooses" All reports and schedules of unrealized investments delivered to Zenni after the first quarter were to be considered confidential. *Amini Aff.*, Ex. D, at 25-26.

In section 25 (a) of the MIRA, the plaintiffs agreed to provide Zenni with BDCM's accumulated credit file information. Plaintiffs agreed that they would not prosecute any claims against Zenni based on his use of this information. *Amini Aff.*, Ex. D at 43-44.

Section 25 (b) of the MIRA permits defendants to use BDCM's performance track record of all funds and investment vehicles, provided that defendants deliver to the plaintiffs a copy of the specific portion of any material containing or referencing the performance track record prior to defendants' use of the material. The section states that "[Zenni] and any of its

Affiliates may utilize the BDCM Performance Track Record in whatever form it chooses, but it may not modify any of the information contained within the BDCM Performance Track Record.” Amini Aff., Ex. D at 44-45.

In Section 25 (d) of the MIRA, plaintiffs agreed to provide defendants with certain specified information to back-up the Performance Track Record data. The section states that “the Back-up Documentation is not confidential information and . . . Zenni may disclose the Back-up Documentation to third parties.” Amini Aff., Ex. D at 46-47.

Section 33 of the MIRA is the anti-disparagement provision of the agreement. That section prohibits defendants from making or communicating “to any person or entity that is not a party to this Agreement a false statement in regard to a person that would cause or be likely to cause material injury to the business reputation or personal reputation of such person.” Amini Aff., Ex. D at 58.

Sections 31 (a) and (b) prohibit defendants’ use of confidential information or trade secrets to the detriment of plaintiffs or for the benefit of any other person. However, the section states that “this prohibition shall not apply to any information that, that through no violation of the obligations of the [defendants], is publicly available or generally known in the industry or information that is permitted to be used by the [defendants] hereunder or in the License Agreement.” Amini Aff., Ex. D at 52-52.

Finally, Section 31 (c) provides:

Notwithstanding the foregoing, nothing herein shall limit or preclude the ability of the [defendants] to solicit [plaintiffs'] current, prior or prospective investors, lenders or service providers from and after the Closing Date. Notwithstanding anything herein to the contrary, nothing herein shall prevent [defendants] from using their accumulated body of knowledge and expertise, including, without limitation, the Accumulated Credit File Information, for the benefit of any new company formed or managed by . . . Zenni or otherwise serve as a restriction on the [defendants'] ability to use their accumulate body of knowledge and expertise, including, without limitation, the accumulated Credit File Information, to compete with the [plaintiffs].

Amini Aff., Ex. D at 52.

The Complaint

Plaintiffs commenced this lawsuit in 2008, alleging six causes of action. The first cause of action demands injunctive relief premised on alleged breaches of Section 25 (b) of the MIRA. Plaintiffs contend that Zenni modified the performance track record by including information on the performance of the BDCM Opportunity Fund after the MIRA closed, claimed the performance as his own accomplishment, and failed to provide plaintiffs with copies of the performance track record materials prior to his publication or distribution thereof. The second cause of action seeks injunctive relief based on alleged Section 31 of the MIRA. Plaintiffs contend that defendants' marketing materials contained a substantial amount of plaintiffs' confidential material, including unconsummated transactions, position sizes and valuations of certain investments as well as information regarding investment

strategies, analyses and processes that plaintiffs follow in managing their investments. The third cause of action seeks unspecified damages for unspecified breaches of the MIRA. The fourth cause of action alleges that defendants have engaged in unfair competition and the fifth cause of action alleges a claim under the Delaware (or Illinois) Deceptive Trade Practices Act. The sixth cause of action seeks recovery for the alleged breach of the anti-disparagement provisions of the MIRA and common-law disparagement. Plaintiffs base this cause of action on alleged material misrepresentations concerning Zenni's involvement in plaintiffs' business. Plaintiffs assert that the misrepresentations were contained in the marketing materials that defendants distributed to potential investors in defendants' funds and actual and potential investors in plaintiffs' funds. Amini Aff., Ex. B.

Plaintiffs' proposed amended complaint contains additional allegations regarding defendants' alleged disparagement from 2008 to date. Examples include defendants' allegedly false statement that the defendants were wholly responsible for the performance track record of plaintiffs' private equity funds prior to leaving BDCM and the allegation that plaintiffs were being investigated by government regulators. Plaintiffs' proposed amended complaint also adds a seventh cause of action for tortious interference with prospective business relations based on the disparagement allegations. Goldman Aff., Ex. B.

Because of the contentious nature of this matter, discovery was supervised by Judicial Hearing Officer Beverly S. Cohen. On February 8, 2011, JHO Cohen issued an order precluding plaintiffs from introducing any evidence of individuals or entities whom plaintiffs

claim failed to invest or reduced their investment because of defendants' alleged disparagement or any evidence of damages resulting from disparagement (the "preclusion order"). Amini Aff., Ex. A. Defendants sought, and received, the preclusion order based on plaintiffs' failures to respond to defendants' discovery demands and court orders to produce information as to the identity of persons to whom the alleged disparagements were made; specific statements claimed to have been made; and the dates when those statements were made.

The court will first address defendants' motion to dismiss the complaint.

Defendants' Motion to Dismiss the Complaint

Contentions on Support of Defendants'

Motion to Dismiss pursuant to CPLR 3211 (a) (7)¹

Defendants argue that plaintiffs' first, second, third and sixth causes of action must be dismissed against all of the defendants, except Zenni. Plaintiffs contend that these causes of action are based on the MIRA and Zenni is the only defendant who is a party to the MIRA. Moreover, defendants contend that plaintiffs' second and third causes of action must be dismissed against all of the defendants, including Zenni, because, pursuant to the express terms of the MIRA, Zenni had the right to use some of plaintiffs' information and the complaint fails to identify upon what "confidential information" plaintiffs base their claim.

¹ The MIRA provides that causes of action arising from the alleged breach of the MIRA are governed by Delaware law.

Defendants assert that plaintiffs' third cause of action for damages for breach of the MIRA must be dismissed because it fails to allege a compensable injury. Defendants argue that plaintiffs' fourth cause of action for unfair competition cannot be sustained because plaintiffs have failed to plead an instance where they had a reasonable expectation of a business relationship, defendants' interference and consequent defeat of those expectations. Defendants' contend that plaintiffs' fifth cause of action is dismissable because it does not allege the specific statute or statutory provision that plaintiffs assert defendants violated. Finally, defendants argue that plaintiffs' sixth cause of action for common-law disparagement claim must be dismissed because it fails to specify the particular words complained of, nor does the claim specify the dates, times and places of the alleged disparagement. Defendants also argue that the alleged disparagement based on the MIRA must be dismissed because the claim fails to allege facts constituting the breach or to plead a compensable injury.

Plaintiffs argue in opposition that, under the express terms of the MIRA, all of the named defendants are liable because they are "affiliates" of Zenni as the MIRA defines that term. Plaintiffs also contend that they have pleaded all the necessary elements to establish breach of the MIRA's confidentiality provisions and all of the elements of the unfair competition claim. Plaintiffs assert that they have pleaded that defendants used plaintiffs' confidential and proprietary information to compete against plaintiffs in the same industry and for the same group of investors and that this caused plaintiffs damages. Moreover, although the complaint does not provide a citation to the Delaware Deceptive Practices Act, does not

identify the section of the act that is relevant to this dispute,² and does not recite the elements required to establish a claim for breach thereof, plaintiffs nevertheless assert that they have stated a claim under the act. Finally, plaintiffs' claim that they have pled a cause of action for disparagement by asserting the exact false words allegedly used by defendants. Plaintiffs assert that they have further identified that the alleged disparaging material was contained in defendants' marketing material and distributed to potential investors in defendants' fund, as well as actual and potential investors in plaintiffs funds. Plaintiffs also contend that the alleged disparaging statements amount to slander per se because the statements that malign plaintiffs in their profession.

DISCUSSION

On a motion addressed to the sufficiency of the pleadings, the court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977); see CPLR 3211 (a)(7). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). A motion to dismiss must be denied, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (internal quotations and citations omitted).

² The citation provided is to the Illinois Deceptive Practices Act. The erroneous citation is further repeated in the proposed amended complaint.

On the other hand, while factual allegations contained in a complaint should be accorded a favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration. *Sud v. Sud*, 211 A.D.2d 423, 424 (1st Dep't 1995).

A. Dismissal of Contract Causes of Action Against All Parties Except Zenni

The MIRA clauses at issue in plaintiffs' first, second, third and sixth causes of action, notably Sections 25, 31 and 33, refer to confidentiality obligations of Seller and its affiliates and the use of performance track record information by Seller and its affiliates. The MIRA names Zenni Holdings, LLC as the "Seller" and defines affiliate as: "[a]ffiliate means, with respect to any person or entity, another person or entity controlling, controlled or under common control with such person or entity" Amini Aff., Ex. D, Section (1)(d).

The complaint alleges that defendants Zenni Holdings, L.L.C., Z Capital Partners, L.L.C., Z Capital Special Situations Fund L.P. and Z Capital Situation Fund-A, L.P. are all controlled by Zenni and, thus, those entities meet the definition of affiliate under the contract. Accordingly, because the terms of the contract expressly provide that all of the named defendants are subject to confidentiality obligations under sections 25, 31 and 33, dismissal of the first, second, third and sixth contract causes of action on the ground that only Zenni is obligated thereunder the MIRA is denied.

B. Breach of Contract

To state a breach of contract claim under Delaware law, plaintiff must allege: 1) the existence of a contract; 2) the breach of an obligation imposed by that contract and 3) damage to plaintiff. *VLIW Technology, LLC v. Hewlett Packard Co.*, 840 A.2d 606, 612 (Del. 2003). In *VLIW Tech* the court explained, “[I]n alleging a breach of contract, a plaintiff need not plead specific facts to state an actionable claim. Rather, a complaint for breach of contract is sufficient if it contains ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’” *Id.* at 611, quoting Court of Chancery Rule 8(a)(1).

A complaint that gives fair notice shifts to the defendant the burden to determine the details of the cause of action by way of discovery for the purpose of raising legal defenses. Accordingly, under Delaware’s judicial system of notice pleading, a plaintiff need not plead evidence. Rather, the plaintiff need only allege facts that, if true, state a claim upon which relief can be granted

Id. at 611 (quotation marks and citations omitted).

In this case, plaintiffs allege the existence of the MIRA, breach of the confidentiality provisions and breach of the MIRA’s provisions restricting Zenni’s ability to trade based on plaintiff’s reputation, track record and confidential information following his severance and the general allegation that plaintiffs have been damaged. In *VLIW*, the court found that similar allegations were sufficient to put the defendants on notice of plaintiffs’ claims against them and thus the breach of contract cause of action survived the motion to dismiss. Defendants’ citation to *Kronenberg v. Katz*, 872 A.2d 568 (Del. Ch. 2004) for the proposition

that plaintiffs must show a compensable injury is unavailing. In that case, the matter before the court was one of a motion for summary judgment, not a motion to dismiss based on the pleadings.

Plaintiffs have pleaded a breach of contract. Accordingly, that branch of the motion seeking to dismiss plaintiffs' first, second and third breach of contract causes of action is denied.

C. Unfair Competition

In order to state a claim for unfair competition under Delaware law, a plaintiff must allege reasonable expectancy of entering into a valid business relationship, with which the defendant wrongfully interfered, thereby defeating plaintiff's legitimate expectancy of that relationship and resulting in harm to the plaintiff. *Agilent Technologies, Inc. v. Kirkland, C.A.* No. 3512-VCS, 2009 WL 119865, *5 (Del. Ch. 2009); *Rypac Packaging Mach., Inc. v. Coakley*, No. CIV. A. 16069, 2000 WL 567895, *8 (Del. Ch. 2000).

In order to plead a reasonable probability of a business opportunity, a plaintiff must identify a specific party who was prepared to enter into a business relationship with the plaintiff but was dissuaded from doing so by the defendant. While the specific party need not be named, it must be identified by details that would permit the court to infer that specific parties were involved. Moreover, in an unfair competition claim, a plaintiff cannot rely on generalized allegations of harm. *Agilent Technologies, Inc. v. Kirkland*, 2009 WL 119865 at *7.

In this case, plaintiffs have failed to identify, by name or details sufficient to allow this court to infer a third party, a party who was prepared to enter into a business relationship with the plaintiffs but was dissuaded from doing so by the defendants. Plaintiffs merely state, upon information and belief, that defendants sent marketing materials to investors and potential investors in plaintiffs' fund (Complaint, ¶ 37); that the marketing materials confused and misled potential investors (Complaint, ¶ 40) and that the parties compete for the same investors (Complaint, ¶ 60). These allegations are insufficient to satisfy the first element of the unfair competition claim. Plaintiffs' fourth cause of action must therefore be dismissed.

D. Deceptive Trade Practices Act

Plaintiffs' fifth cause of action for breach of Delaware Deceptive Trade Practices act is dismissed. Plaintiffs have failed to properly identify the statute under which this claim was made. Although the complaint states that the cause of action is based on the Delaware Deceptive Practices Act, paragraph 64 of the complaint cites to 815 ILCS 510/2, which is apparently an Illinois Statute. If the plaintiffs are relying on a Delaware statute, then the statute and subsections relied upon must be identified to properly put defendants on notice of what remedies, if any, plaintiffs seek under this cause of action. *See Mollins v. Nissan Motor Co., Ltd.*, 14 Misc. 3d 1226(A), 2007 NY Slip Op 50183(U), *7 (Sup. Ct., Nassau County 2007) ("Where liability is premised on a statutory violation, the plaintiff must allege the specific statutory provisions claimed to have been violated").

E. Disparagement or Defamation

Plaintiffs' sixth cause of action for disparagement is also dismissed.

Delaware courts have established five elements that a plaintiff must plead to form a claim for defamation. "Those elements are: (1) the defamatory character of the communication; (2) publication; (3) that the communication refers to the plaintiff; (4) the third party's understanding of the communications defamatory character; and (5) injury." *Better v. Mitchell*, C.A. No. 04-05-0053, 2004 WL 3312524, *2 (Del. Ct. Comm. Pl., 2004) (internal quotation marks omitted); citing *Read v. Carpenter*, No. 95C-03-171, 1995 WL 945544 (Del. Sup. Ct. 1995) *aff'd* 670 A.2d 1340 (1995).

In determining whether each of those elements is sufficiently pleaded, New York procedural law is controlling. *See, e.g., Ground to Air Catering, Inc. v. Dobbs Intl Servs., Inc.*, 285 A.D.2d 931, 932 (3d Dep't 2001) (even if the agreement provides that laws of another state govern, "the procedural laws of this State control"). In New York, CPLR 3016 (a) requires that, [i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally." Moreover, New York courts require dismissal of a defamation claim where the persons to whom the defamatory remarks were made and where the dates, times and places of the defamation are left unspecified. *Bell v. Alden Owners, Inc.*, 299 A.D.2d 207, 208-209 (1st Dep't 2002), *lv. denied* 100 N.Y.2d 506 (2003); *Hawley v. Merchant Ivory Productions (USA)*

Inc., 2008 NY Slip Op 31694 (U), 2008 WL 2556260 (Sup. Ct., N.Y. County 2008), *see also Gill v. Pathmark Stores, Inc.*, 237 A.D.2d 563, 564-265 (2d Dep't 1997).

In this case, the particular words of disparagement complained of are not identified and specifics regarding the dates, time and persons to whom the statements were made are not included in the complaint.³ Plaintiffs' allegations that materials were sent to current and prospective investors is not sufficient. A complaint for defamation that simply names various "employees" as the recipients fails to comply with the requirements of CPLR 3016 (a). *See Fuel Digital, Inc. v. Corinella*, 15 Misc. 3d 112(A), 2006 N.Y. Slip Op. 52590(U) (Sup. Ct., N.Y. County 2006).

As to defendants' alleged defamatory activities based on the MIRA, it is well settled that to state a commercial disparagement/injurious falsehood claim, plaintiffs are required to allege special damages.⁴ *BCRE 230 Riverside LLC v. Fuchs*, 59 A.D.3d 282, 283 (1st Dep't 2009) (special damages must be pleaded with particularity); *Wasserman v. Maimonides Med. Ctr.*, 268 A.D.2d 425, 426 (2d Dep't 2000).

³ Plaintiffs improperly submit, in a reply affidavit related to the motion to amend the complaint, an affidavit from the managing director of Portfolio Advisors in which he claims that in July 2010, Zenni contacted him and made a purportedly disparaging statement about Deckoff and Black Diamond Capital Management. Material submitted for the first time in reply may not be considered by the court. *See Root v. Brotman*, 41 A.D.3d 247 (1st Dep't 2007).

⁴ The MIRA defines disparagement as "a false statement in regard to a person that would cause or be likely to cause material injury to the business reputation or the personal reputation of such person." MIRA, Section 33.

Plaintiffs fail to plead specific damages as a result of defendants' alleged disparagement. The complaint merely alleges that defendants' "statements are likely to cause material injury to the business reputations of Plaintiffs and other individuals at BDCM" (Complaint, ¶ 46) and that plaintiffs have been and will continue to be injured by such statements. Complaint, ¶ 68. Plaintiffs' allegations do not satisfy the requirement that special damages must be pled with particularity.

Accordingly the sixth cause of action alleging defamation is dismissed.

**MOTION TO REVIEW AND VACATE THE FEBRUARY 8, 2011
ORDER OF THE JUDICIAL HEARING OFFICER**

In the fall of 2010, this matter was referred to Judicial Hearing Officer Cohen for supervision of discovery. As a result of the plaintiffs' failure to provide substantive responses to defendants' interrogatories, JHO Cohen entered a series of orders requiring plaintiffs to provide detailed and verified answers to interrogatories regarding the damages plaintiffs allegedly suffered as a consequence of defendants alleged disparaging statements to potential investors.⁵

Thereafter, in January the JHO held a hearing regarding plaintiffs' alleged lack of compliance with the discovery orders. Following briefing of the issue, she issued a February 8, 2011 order of preclusion which states, in pertinent part, "I direct that plaintiffs are

⁵ Orders dated November 1, 2010; November 29, 2010; December 20, 2010 and December 22, 2010.

precluded from introducing at trial any evidence of individuals or entities who plaintiffs claim failed to invest with them or reduced their investment because of defendants' disparagement of them or any evidence of damages resulting therefrom." Amini Aff., Ex. A.

Because the JHO's order related solely to the disparagement claim, and because this court has granted the branch of defendants' motion which sought to dismiss the disparagement claim, the motion to vacate the order of the JHO is moot.

MOTION TO AMEND THE COMPLAINT

Plaintiffs move to amend the complaint to conform the pleadings to the proof. In particular they seek to include allegations regarding defendants' alleged dissemination of false and inflammatory statements regarding plaintiffs' business reputation and ethical judgment to plaintiffs' current and prospective clients. They also seek to add a cause of action for tortious interference with prospective business relations.

A. Conform the Pleadings to the Proof

That branch of the motion that seeks to add allegations to buttress the disparagement claim is denied, because the disparagement claim has been dismissed for failure to state a cause of action

B. Tortious Interference

To state a claim for tortious interference with prospective business relations under Delaware law, plaintiff must plead: (1) that there was a reasonable probability of a business

opportunity; (2) interference by defendant with that opportunity; (3) proximate causation and (4) damages. *DeBonaventura v. Nationwide Mut. Ins. Co.*, 428 A.2d 1151, 1153 (Del. 1981).

Plaintiff contends that paragraphs 43, 46-49 and 80 of the proposed amended complaint support the allegation that there was a reasonable probability of a business opportunity. Reply Memo of Law, at 8. Those paragraphs state that defendants disseminated false information to current and prospective investors regarding plaintiffs' firm (Amended Complaint, ¶ 43), that "upon information and belief" they communicated these statements to plaintiffs' current and prospective investors (Amended Complaint, ¶ 46); that plaintiffs believe that some people may not have invested because of these alleged falsehoods (Amended Complaint, ¶ 47); on information and belief, plaintiffs knew the statements were false and they knew plaintiffs were engaging in fundraising efforts and that these statements would be damaging (Amended Complaint, ¶ 48); that they hired a private investigator to inhibit plaintiffs fundraising efforts and enhance their own (Amended Complaint, ¶ 49) and that defendants specifically chose to communicate false information to plaintiffs' current and prospective investors. Goldman Aff., Ex. B. These allegations do not establish that plaintiffs had a reasonable probability of a business opportunity. At best they are vague, conclusory statements made on information and belief. Failure to identify any specific relationship that plaintiffs had a reasonable opportunity of entering into is fatal to this claim. *See, e.g., Great American Opportunities, Inc. v. Cherrydale Fundraising*, Civ. Act. No. 3718-VCP, 2010 WL 338219, n 120 (Del. Ch. 2010).

Accordingly, it is

ORDERED that plaintiff BDCM fund Adviser, L.L.C. f/k/a Black Diamond Capital Management, L.L.C., Black Diamond Capital Holdings, L.L.C. and Stephen H. Deckoff's motion to amend the complaint is denied in its entirety; and it is further

ORDERED that defendant James J. Zenni, Jr., Zenni Holdings, LLC, Z Capital Partners, L.L.C., Z Capital Special Situations Fund, L.P., and Z Capital Special Situations Fund-A, L.P.'s cross motion to dismiss the complaint is granted to the extent that the fourth, fifth and sixth causes of action in the complaint are dismissed, and the motion is otherwise denied; and it is further

ORDERED that plaintiffs' are provided leave to replead the fifth cause of action for breach of Delaware Deceptive Trade Practices only; and it is further

ORDERED that plaintiffs' motion to vacate the February 8, 2011 order of the Judicial Hearing Officer is denied as moot.

Dated: New York, New York
June 20 2010

ENTER


Hon. Eileen Bransten, J.S.C.