

W SBIC Ventures II, L.P. v VW Parent Corp.
2011 NY Slip Op 34126(U)
May 18, 2011
Supreme Court, New York County
Docket Number: 651695/2010
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
J.S.C. Justice

PART 45
INTERIM ORDER

Index Number : 651695/2010
W SBIC VENTURES II, L.P.
vs
VW PARENT CORP.
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

by defendant Joan Hammer to dismiss the complaint as against her is GRANTED and the action is severed as to her and continues against the remaining defendants.

Dated: May 18, 2011

Melvin L. Schweitzer
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 45

-----X	
W SBIC VENTURES II, L.P.; WV II EMPLOYEE	:
PARTNERS, LLC; CEDAR STREET VENTURE FUND I,	:
L.P.; and BRADLEY BROWNSTEIN,	:
	:
Plaintiffs,	:
	:
-against-	:
	:
VW PARENT CORP.; VW ACQUISITION CORP;	:
VEGASWORM, INC.; TRIOS TRAVEL LLC; MARC	:
BERCOON; WILLIAM GOLDSTEIN; GLEN HAMMER;	:
and JOAN HAMMER,	:
	:
Defendants.	:
-----X	

Index No. 651695/2010

DECISION AND ORDER

Motion Sequence No. 001

MELVIN L. SCHWEITZER, J.:

Plaintiffs W SBIC Venture II, L.P., WV II Employee Partners, LLC, Cedar Street Venture Fund I, L.P., and Bradley Brownstein (Mr. Brownstein) (collectively, plaintiffs) bring this action to recover damages for breach of contract, fraudulent inducement to enter into a contract and fraudulent transfer following a failed business venture. Defendant Joan Hammer (Mrs. Hammer) moves to dismiss the claims against her pursuant to CPLR 3211(a)(1), (7) and (8).

Background

Plaintiffs W SBIC Ventures II, L.P. and WV II Employee Partners, LLC (together, W SBIC Ventures) are investment funds, organized under the laws of Delaware, with a principal place of business in New York (Compl. ¶ 4). Plaintiff Cedar Street Ventures Fund I, L.P. is also an investment fund, organized under the laws of Delaware, with a principal place of business in New York (*Id.* ¶ 5). Plaintiff Mr. Brownstein is a resident of California with a principal place of business in California (*Id.* ¶ 6).

On October 4, 2007, plaintiffs and several of the defendants entered into a complex restructured stock purchase agreement relating to indirect investments in an online provider of casino and leisure travel (the company) (*Id.* ¶ 24). Defendants Marc Bercon, William Goldstein and Glen Hammer (Mr. Hammer) executed a guaranty with respect to the terms of a put arrangement, pursuant to which plaintiffs could put their equity investment in the parent of the company to such parent (Compl. ¶¶ 39, 40). On June 1, 2009, plaintiffs exercised the put, requiring the repurchase of plaintiffs' interest in the parent (Compl. ¶ 1). Defendants have not honored their guaranty obligation (Compl. ¶ 1).

Plaintiffs allege that they would not have entered into the transaction or accepted Mr. Hammer as a guarantor with respect to the put arrangement but for Mr. Hammer's granting of a negative pledge on a sizeable equity investment in Gramercy Insurance Company (GIC), and his representation that he owned the \$37,500,000 investment asset (Compl. ¶¶ 2, 49, 52). In addition, plaintiffs allege that on July 26, 2007, Mr. Hammer with his wife, defendant Mrs. Hammer, provided W SBIC Ventures with a joint statement of financial condition, dated as of September 30, 2006, and represented that they owned the investment in GIC (Compl. ¶ 51). However, Mr. Hammer's personal statement of financial condition, dated as of March 31, 2008, did not list the GIC as an investment asset (Compl. ¶ 53). When W SBIC Ventures sought clarification, Mr. Hammer allegedly responded that the GIC investment was held in his wife's name (Compl. ¶¶ 54-55). Plaintiffs allege that Mr. Hammer has not clarified whether the investment asset was held in his wife's name on September 30, 2006, or whether he transferred it, or, at least, a joint ownership interest in it, to her after signing the put agreement (Compl. ¶¶ 2, 56).

Defendant Mrs. Hammer is a resident of Georgia (Compl. ¶ 14; Affidavit of Joan Hammer ¶ 3). Nowhere in the complaint is it alleged that she was a party to any of the agreements with plaintiffs. Plaintiffs are bringing this action against her on the theory that she either participated in Mr. Hammer's misrepresentations regarding his ownership of the GIC stock or that she conspired in transferring ownership of the stock to prevent plaintiffs from having access to it pursuant to the guaranty arrangement referred to above. (Compl. ¶ 2). In their third count, plaintiffs allege that Mrs. Hammer "conspired to induce Plaintiffs to enter into the Put Guaranty because, upon information and belief, Mrs. Hammer knew and consented to the fact that Mr. Hammer sent W SBIC Ventures their joint Statement of Financial Condition and provided a negative pledge on the [GIC] stock" (Compl. ¶ 83). Plaintiffs' fourth, fifth, sixth and seventh counts for fraudulent transfer, constructive fraudulent transfer, civil conspiracy and unjust enrichment, respectively, are based on similar allegations (Compl. ¶¶ 88-112).

Parties' Contentions

Mrs. Hammer moves to dismiss the complaint. Initially, she contends that as a non-domiciliary who has had no contacts with plaintiffs or New York State, the court lacks personal jurisdiction over her. Furthermore, she contends that plaintiffs have failed to set forth any facts upon which jurisdiction in New York could be based. Additionally, she contends that plaintiffs have failed to state a claim for fraud against her, because documentary evidence establishes that their reliance upon Mr. Hammer's alleged misrepresentation was not justified.

In support of her motion, Mrs. Hammer submits the affidavit of Todd Campbell, President of GIC. Attached, as Exhibits A-D, to the affidavit are excerpts from GIC's Annual Statements for the years 2006 -2009. Attached to Ex. A is a copy of the internet filing

confirmation page and screenshot of the 2006 Annual Statement of GIC with the National Association of Insurance Commissioners (NAIC). According to Mr. Campbell, the Annual Statements are on file with the Texas Department of Insurance and are made available to the public shortly after filing (Campbell Aff. ¶ 12). The statements show that for the period of 2006 to 2009, Mrs. Hammer owned 100% of Benchmark Holdings, Inc., which owned the investment in GIC. Mrs. Hammer contends that, in light of this publically available information, plaintiffs' reliance on Mr. Hammer's allegedly contradictory statements was not justified as a matter of law.

Finally, Mrs. Hammer contends that the Annual Statements serve as documentary evidence that the alleged GIC stock transfers from husband to wife never occurred, and so cannot be grounds for plaintiffs' fraudulent transfer or unjust enrichment claims.

Plaintiffs respond that the complaint specifically alleges facts which satisfy both the New York long-arm statute, that is, CPLR 302 (a) (3) (ii), and constitutional due process requirements. They point to the allegations that Mrs. Hammer conspired with Mr. Hammer to fraudulently induce plaintiffs to enter into the guaranty arrangement, because she knew and consented to Mr. Hammer's false representation that he owned, and could negatively pledge, the GIC shares. Plaintiffs also allege that, as the secretary and indirect owner of a controlling investment in GIC, which does business in thirty-five states, Mrs. Hammer derives substantial revenue from interstate commerce.¹

In addition, plaintiffs contend that documents submitted by Mrs. Hammer are not "documentary evidence" because they are essentially unverifiable. In particular, plaintiffs take issue with the printouts obtained from NAIC, an insurance industry, non-governmental entity.

¹Notably, this is the first time that plaintiffs raise this allegation and they do not submit an affidavit or any other evidence in support of it, but merely allege it in their memorandum of law in opposition to Mrs. Hammer's motion (Memorandum of Law in Opposition, p. 10).

These printouts, they contend, are “unverifiable, non-governmental documents stored on a website requiring membership log-in to retrieve data.” (Memorandum of Law in Opposition, p. 7). Moreover, they contend that, even if the court were to consider the records and affidavits submitted by Mrs. Hammer, they fail to resolve all factual issues, and so do not dispose of plaintiffs’ claims. According to plaintiffs, the records summarily state that Mrs. Hammer owns the GIC shares, but they do not state that Mr. Hammer does not jointly hold the GIC shares with his wife.

Plaintiffs argue that whether their reliance on statements made by Mr. Hammer was justified presents a question of fact, an inquiry that is not appropriate at this stage of the proceedings. Finally, plaintiffs contend that it would be improper to dismiss their claims against Mrs. Hammer before they have had the opportunity to conduct discovery regarding the investment in GIC.

Discussion

CPLR 302 (a)(3)(ii) confers jurisdiction over a non-domiciliary defendant when: (1) the defendant committed a tortious act outside the State; (2) the act gives rise to a cause of action; (3) the act caused injury to person or property within the State; (4) the defendant expected or should reasonably have expected the act to have consequences in the State; and (5) the non-domiciliary derived substantial revenue from interstate or international commerce. *See* CPLR § 302 (a)(3)(ii); *LaMarca v Pak-mor Mfg. Co.*, 95 NY2d 210, 215 (2000). If the long-arm statute requirements are met, then federal due process considerations must also be examined. *LaMarca*, 95 NY2d at 216.

Here, plaintiffs fail to establish the elements of CPLR 302 (a)(3)(ii). “First, the mere conclusory claim that an activity is a conspiracy does not make it so, especially when the complaint fails to assert that the alleged conspirators knew their act would have an affect [sic] in New York.” *Pramer S.C.A. v Abaplus Intern. Corp.*, 76 AD3d 89, 97 (1st Dept 2010). Here, even allowing plaintiffs every favorable inference, the complaint does not contain facts from which the court can infer that Mrs. Hammer participated in her husband’s alleged fraud. Every allegation against her is based on information and belief, notably without revealing the source of that information. *See DDJ Management, LLC v Rhone Group LLC*, 78 AD3d 442, 443 (1st Dept 2010) (“[W]here allegations of fraud are based on information and belief, the source of such information must be revealed.”). Moreover, rather than allege specific acts by Mrs. Hammer, the complaint only alleges that Mr. Hammer committed fraudulent acts with her knowledge and consent, without detailing how Mrs. Hammer had obtained knowledge with respect to the matter. Such conclusory allegations are legally insufficient. *See CPLR 3016(b)*; *see e.g. Northern Valley Partners, LLC v Jenkins*, 23 Misc 3d 112(A), 910 NYS2d 406 (NY Co Sup Ct 2009).

Assuming that plaintiffs had sufficiently alleged that Mrs. Hammer committed a tortious act giving rise to a cause of action, they have failed to demonstrate that she should reasonably have expected the fraud to have consequences in New York. To establish jurisdiction “a more direct injury within the State and a closer expectation of consequences within the State [is called for] than the indirect financial loss resulting from the fact that the injured person resides or is domiciled there.” *Fantis Foods, Inc. v Standard Importing Co.*, 49 NY2d 317, 326 (1980). Other than the conclusory “Defendants have committed tortious acts causing injury to plaintiffs within the state,” the complaint does not allege injury suffered in New York (Compl. ¶ 16).

In their opposition to Mrs. Hammer's motion, plaintiffs attempt to remedy this deficiency by arguing that New York is the chosen jurisdiction of the operative agreements, and so Mrs. Hammer should have expected her tortious acts to have consequences here. However, it is not alleged that Mrs. Hammer was a party to, or had any knowledge of, such agreements.

Because plaintiffs have failed to establish a jurisdictional predicate under New York's long-arm statute, there is no need to enter into an analysis of federal due process considerations.

Finally, plaintiffs fail in their attempt to convince the court to allow discovery regarding ownership of the GIC shares.² In order to obtain discovery pursuant to CPLR 3211(d), plaintiffs have the burden of demonstrating the possible existence of essential jurisdictional facts that are not yet known. *Copp v Ramirez*, 62 AD3d 23 (1st Dept 2009). Here, plaintiffs have not submitted any affidavits or alleged any facts in the complaint that suggest the existence of any such facts. In their memorandum of law, plaintiffs merely argue that “[m]aking the negative pledge specifically referencing the [GIC] Shares and generating a joint financial statement both likely required Joan Hammer's participation. . . . These facts require additional discovery.” (Memorandum of Law in Opposition, p. 4). This does not qualify as a “sufficient start” showing that their position is not frivolous and that discovery would be more than a “fishing expedition.” See *Spencer Laminating Corp. v Denly*, 5 Misc 3d 200 (NY Civ Ct 2004) (discussing *Peterson v Spartan Indus.*, 33 NY2d 463 (1974)).

In light of the fact that the court has no jurisdiction over defendant Mrs. Hammer, there is no need to reach the parties' other contentions.

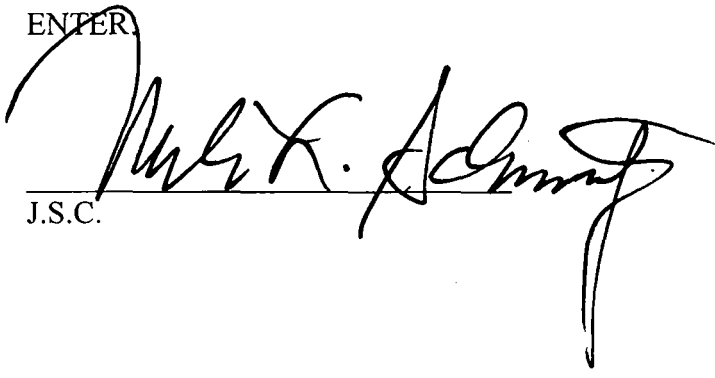
² Although plaintiffs do not specify which CPLR provision they are relying on, the court assumes it is CPLR 3211(d), because of the early stage in litigation.

Accordingly, it is hereby

ORDERED that defendant Joan Hammer's motion to dismiss the complaint against her is granted.; and it is further

ORDERED that the action is severed as to defendant Joan Hammer, and is continued as to the remaining defendants.

Dated: May 18, 2011

ENTER

J.S.C.