

Fortress Value Recovery Fund I LLC v Rhodes

2012 NY Slip Op 31906(U)

July 16, 2012

Sup Ct, NY County

Docket Number: 601118/07

Judge: Barbara R. Kapnick

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

PRESENT: **BARBARA R. KAPNICK**

PART 39

Justice

Fortress Value Recovery Fund
I LLC

INDEX NO. 601118/07

MOTION DATE _____

- v -
Greg L. Rhodes, Ashish Paul & Cincom
Systems Inc.

MOTION SEQ. NO. 13

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

JUL 19 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/16/12



BARBARA R. KAPNICK

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

-----X
FORTRESS VALUE RECOVERY FUND I LLC,

Plaintiff,

-against-

GREG L. RHODES, ASHISH PAUL, and
CINCOM SYSTEMS, INC.,

Defendants.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No. 601118/07

Motion Seq. No. 013

FILED
JUL 11 2011
CLERK OF COURT
JUL 11 2011
BARBARA R. KAPNICK, J.

Plaintiff Fortress Value Recovery Fund I LLC (f/k/a D.B. Zwirn Special Opportunities Fund, L.P.) ("Fortress"),¹ which is an investment fund, filed its Amended Second Supplemental Complaint on or about April 16, 2011 (the "Complaint").

According to the Complaint, defendant Greg L. Rhodes ("Rhodes") resides in Columbus, Indiana and was an executive director of non-party Cincom IOutsource Inc. ("Cincom IOutsource"), whose business it was to secure call center business in the United States to be processed through a contact center network in India.

Pro se defendant Ashish Paul ("Paul"), who is currently incarcerated in the Northeast Ohio Correctional Center, was,

¹ This Court previously granted plaintiff's motion to amend the caption to change the name of plaintiff to Fortress Value Recovery Fund I LLC.

according to the Complaint, the president of Cincom IOutsource.

Defendant Cincom Systems, Inc. ("Cincom"), an Ohio Corporation, is the parent company of Cincom IOutsource.

Background

Plaintiff generally alleges that in September 2005, its managing director, Mark McGreenery ("McGreenery") was contacted by non-party Nick Mittal a/k/a Dinesh Dalmia ("Mittal") with respect to an opportunity to provide financing for the leasing of telecommunications equipment by non-party Vanguard Info Solutions, Corp. ("Vanguard"). In October 2005, non-party First Financial Corporate Services, Inc. ("First Financial") allegedly forwarded to plaintiff a list of the approximately \$10 million worth of equipment to be financed.

According to plaintiff, Mittal told McGreenery that the equipment it was to finance would be purchased from Cincom IOutsource. Vanguard then provided Fortress with an unsigned Purchase Agreement between it and Cincom IOutsource, including a schedule of equipment, pursuant to which Vanguard allegedly agreed to purchase telecommunications equipment and related materials from Cincom IOutsource for over \$10 million. The Purchase Agreement was allegedly to be signed by Rhodes.

According to Fortress, before funding the transaction, it sought confirmation from Cincom IOutsource about the equipment sold to Vanguard, including the invoices, purchase price and Vanguard's down payment. In November 2005, Paul told Rhodes that Mittal had acquired Vanguard, which needed equipment in the course of expanding its debt collection business, and that Quantum E-Services ("Quantum") would supply equipment through Cincom IOutsource, all information that Paul allegedly knew was false.

Plaintiff also alleges that Rhodes prepared invoices for the equipment on Cincom IOutsource letterhead under Paul's instruction, while Paul himself prepared the Quantum invoice that was provided to Cincom's accounting department. Plaintiff contends that all of the documents Rhodes prepared and signed were done so with the knowledge of Paul, Cincom IOutsource and Cincom. Further, plaintiff alleges that Rhodes, Paul and Cincom IOutsource collaborated and prepared the false documents knowing that the equipment did not exist as represented, had not and would not be delivered in the form and condition as represented, did not cost the amount represented and that funds paid by plaintiff would not be used to purchase the equipment.

On November 1, 2005, in alleged reliance on documents sent and Rhodes' representations, plaintiff wire transferred approximately

\$7.5 million to Cincom IOutsource to pay for the equipment allegedly purchased by Vanguard from Cincom IOutsource.

It is also alleged that Paul had Rhodes set up a company called Global Process & Services, Inc. ("GPS"), whose bank account was controlled by Paul. Cincom IOutsource, as authorized by Cincom, allegedly wire transferred \$900,000 to GPS for a "call list" which Paul and Rhodes knew did not actually exist. Plaintiff alleges that Paul directed various other improper transfers from GPS's bank account.

According to plaintiff, Cincom IOutsource never sold or delivered the intended equipment to Vanguard and its invoices were fraudulent. On December 1, 2005, McGreenery visited Vanguard's facility to inspect the equipment and found that the facility was not operational, and two weeks later Vanguard defaulted on its lease payments. McGreenery also discovered on January 24, 2006, that the serial numbers on the equipment at the facility did not match those furnished by Cincom IOutsource. Plaintiff subsequently repossessed the balance of the equipment, and found that none of it was new or of the value represented by Rhodes, although it was allegedly made to appear new.

Discussion

The only cause of action pled against Paul is the third cause of action for common law fraud, which is also pled against Cincom. Plaintiff alleges that Paul authorized Rhodes to prepare fraudulent invoices, including fictitious call lists, and to make fraudulent misrepresentations to plaintiff to induce it to finance the equipment purchase. Plaintiff also claims that Paul intended for plaintiff to rely upon these representations in determining to finance the equipment purchase and that plaintiff did so rely. Plaintiff contends that its reliance was to its detriment because there was no equipment or call lists purchased, and that as a result of its reliance it has been damaged in the amount of approximately \$7.5 million.

In the instant motion, defendant Paul moves to be dismissed from this action on the grounds that (1) emails between Paul's prior counsel and plaintiff's counsel show that there was a "preliminary agreement" or "deal" that removed him from these proceedings; (2) plaintiff, a sophisticated entity, could not have reasonably relied on any alleged misrepresentations because it failed to conduct due diligence, and in any event, it could not have relied on Paul's statements because he had no contact whatsoever with plaintiff regarding the investment; and (3) his constitutional rights are being infringed upon because key

witnesses have not been deposed and he is unable to present a defense or otherwise participate in a future trial of this action.

Plaintiff opposes the motion and argues that the email string relied upon by Paul shows that the parties were in negotiation about a settlement, but that a settlement was never in fact reached. Plaintiff also argues that Paul's liability for fraud is supported by the evidence gathered by plaintiff thus far and that Paul's constitutional rights are not being infringed upon.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.

Leon v. Martinez, 84 NY2d 83, 87-88 (1994) (internal citations omitted).

With respect to the "preliminary agreement" or "deal" to remove Paul from these proceedings, there is no evidence that an agreement was ever finalized or executed between the parties. The email chain referred to by Paul and attached to his Affirmation in Support, merely reflects the negotiation of a settlement and is not evidence that a settlement was in fact reached. Accordingly, the Court cannot dismiss the fraud claim asserted against Paul on this

basis.

Next, with respect to Paul's argument that the fraud claim should fail because plaintiff did not conduct adequate due diligence and could not have reasonably relied on any of the alleged misrepresentations, the Court finds that these arguments raise issues of fact that cannot be decided on a motion to dismiss. See *DDJ Management, LLC v. Rhone Group LLC*, 15 NY3d 147, 155 (2010).

Insofar as Paul has raised concerns regarding his constitutional rights, these are not grounds for Paul to be dismissed from this action. Moreover, to the extent Paul is concerned that he is unable to participate in the trial of this case, the Court notes that a trial date has not been set and in fact this case has been removed from the Court's trial calendar by the Decision/Order of this Court dated April 30, 2012. Consistent with prior instructions to the parties and as expressed in a letter dated February 16, 2011 from the Court to Mr. Paul, the Court has ensured and will continue to ensure that the other parties in this action copy Paul on all papers served and that Paul is included in any mailings that may be sent to the parties by the Court.

In accordance with the foregoing, the instant motion is

denied.

This constitutes the decision and order of this Court.

Dated: *July 16*, 2012

FILED

JUL 17 2012



BARBARA R. KAPNICK
J.S.C.

CLERK
COURT OF APPEALS

BARBARA R. KAPNICK
J.S.C.