

Eicher v Macquarie Infrastructure Mgt. (USA) Inc.

2014 NY Slip Op 31716(U)

July 1, 2014

Supreme Court, New York County

Docket Number: 153749/2012

Judge: Eileen A. Rakower

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER PART 15

Justice

ROBERT EICHER,

Plaintiff,

INDEX NO. 153749/2012

MOTION DATE _____

- v -

MOTION SEQ. NO. 003

MACQUARIE INFRASTRUCTURE MANAGEMENT
(USA) INC., TAURUS AEROSPACE GROUP, INC.,
JIM PRADETTO,

MOTION CAL. NO. _____

Defendants.

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

PAPERS NUMBERED

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

1-2

Answer — Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

This action arises out of a Securities Purchase Agreement pursuant to which Taurus Aerospace Group, Inc. (“Taurus”), an aerospace industry supplier, and Macquarie Infrastructure Management (USA) Inc. (“Macquarie”), “as the sponsor and/or manager of Taurus,” purchased Plaintiff, Robert Eicher’s (“Plaintiff”) interests in Aircraft on the Ground., Inc., AOG Tank Tigers Inc., and AOG Europe, Ltd. (collectively, “AOG”).

Defendants Macquarie and Taurus (collectively, “Defendants”), previously moved to dismiss the Complaint (Mot. Seq. #1) pursuant to CPLR 3211(a)(1) and (7). Defendants also moved to bar any untimely opposition to their motion (Mot. Seq. #2).

By Order dated March 17, 2014, Defendants’ motions (Mot. Seq. #1 and #2) were “denied as moot as per Defendants’ filing of Notice of Removal of this action to the United States District Court for the Southern District of New York, on July 20, 2012, pursuant to 28 U.S.C. §§1441 and 1446.”

Defendants now move, for an Order, pursuant to CPLR 2221, for leave to

renew their motions, asserting that although the case was marked as having been removed to federal court in 2012, it was subsequently remanded to this Court on August 8, 2013 although not reflected in the Court's records.

The Court notes that counsel for Plaintiff moved by Order to Show Cause (Mot. Seq. #4) to be relieved as counsel for Plaintiff. Defendants opposed that motion. By Order dated April 29, 2014, the Court denied the motion to withdraw. No opposition to the motion to dismiss was ever filed in this matter.

Defendants' motion for leave to renew their previous motion to dismiss is granted and the Court shall now review that motion.

CPLR § 3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence;

(7) the pleading fails to state a cause of action.

On a motion to dismiss pursuant to CPLR §3211(a)(1), "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]).

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

The Complaint alleges the following claims against Macquarie and Taurus: breach of the Securities Purchase Agreement (first cause of action); fraud (second cause of action); breach of implied covenant of good faith and fair dealing (third cause of action); unjust enrichment (fourth cause of action); promissory estoppel (fifth cause of action); negligent misrepresentation (sixth cause of action); and mismanagement of funds (seventh cause of action).

Defendants move to dismiss all claims against Macquarie on the grounds that Plaintiff fails to allege any wrongdoing by Macquarie, privity between himself and Macquarie, or that Macquarie may be held liable for the conduct of its affiliate, Taurus, under a piercing the corporate veil theory of liability.

Defendants move to dismiss the claims asserted against Taurus on the basis that the breach of contract claims are untimely and barred by the parties' agreement, which provides that a dispute concerning calculation must be raised within 15 days of the alleged miscalculation and must be resolved through an accounting referee, not through litigation.

Defendants further move to dismiss the breach of contract claims on the grounds that they allege no direct harm to Plaintiff and thus are derivative claims, not direct breach of contract claims.

Defendants further move to dismiss Plaintiff's claim for breach of the implied covenant as against Taurus because it repeats his breach of contract claim without alleging bad faith on Taurus' part. Defendant further contends that Plaintiff's tort and quasi contract claims are duplicative.

Defendants further move to dismiss Plaintiff's fraud claims on the basis they are not plead with the requisite specificity, and fail to state a claim.

Defendants further move to dismiss the negligent representation claim for failure to state a claim, the mismanagement claim based on lack of standing, and the punitive damages claim based on failure to claim.

Wherefore, it is hereby,

ORDERED that Defendants' motion to dismiss the Complaint is granted without opposition, and the Complaint is dismissed as against defendants,

Macquarie Infrastructure (USA) Inc. and Taurus Aerospace Group, Inc., and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action as against defendant, Jim Pradetto, is severed and shall proceed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: JULY 1, 2014


HON. EILEEN A. RAKOWSKI

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE