

Arnett v Charles Morgan Sec., Inc.

2014 NY Slip Op 32379(U)

September 2, 2014

Supreme Court, New York County

Docket Number: 653445/2013

Judge: Melvin L. Schweitzer

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This opinion is uncorrected and not selected for official publication.

The Revised Note provided a priority interest in any new equity issued by EGI in excess of \$250,000, and that any new funds borrowed would be subordinate to the Revised Note until it was fully repaid (*id.*, ¶¶ 28-30).

On July 1, 2006, EGI failed to pay the amounts due under the Revised Note, and was in default as of that date. To date, EGI has failed to pay any sums due pursuant to the Revised Note (*id.*, ¶¶ 27, 31).

On October 31, 2006, EGI retained defendant Charles Morgan Securities, Inc. (CMS) as its placement agent in connection with an offering of EGI's securities in an amount of up to \$1.5 million of 12% convertible notes, convertible into EGI's common stock (*id.*, ¶ 36). CMS was to receive a commission in the form of cash and warrants to purchase EGI stock (*id.*, ¶¶ 37-8). At the same time, EGI and CMS entered into an Investment Advisory Agreement and an Investment Banking Agreement, whereby CMS agreed to provide advisory and investment banking services to EGI regarding the private placement and sale of the convertible notes of EGI (*id.*, ¶¶ 39-40). Individual defendant Paul Taboada is (i) the president, CEO and chairman of CMS; (ii) the president and owner of defendant CMS Global Securities, Inc. (CMS Global), which is the majority shareholder of CMS; (iii) the president and owner of defendant PCM Industries, Inc., which is a significant shareholder of CMS; and (iv) the president and owner of defendant Mandalay Industries, Inc., which allegedly is a holding company for Taboada's personal assets (*id.*, ¶¶ 10-15).

From November 2006 to January 2007, CMS placed an aggregate of \$1.5 million of 12% convertible notes for EGI, and received fees therefor (*id.*, ¶¶ 44-45). The convertible note holders converted their debt into equity, receiving EGI stock, and because EGI failed to timely

register the stock underlying those notes, EGI was required to issue additional shares of its common stock to the convertible note holders (*id.*, ¶ 47).

From March 15, 2007 to November 21, 2007, CMS also acted as EGI's placement agent in connection with the sale of 6.3 million shares of EGI's common stock, and eight promissory notes with a face value of \$1,975,000 (*id.*, ¶¶ 48, 50). As of September 2008, EGI allegedly repaid \$1.4 million in principal and \$143,215 in interest due on those notes (*id.*, ¶ 49).

In February 2008, CMS acted as EGI's placement agent for an offering of up to \$3 million of EGI's Series B convertible stock, and between March 2008 and June 30, 2008, CMS sold 110,000 shares of this stock for almost \$2.2 million (*id.*, ¶¶ 61, 64).

From July 31, 2008 to December 31, 2009, CMS acted as EGI's placement agent for a number of private placements of EGI's stock and notes, to help it raise working capital and pay debt (*id.*, ¶¶ 51-56, 70-73).

Plaintiff contends that these issuances of stock and other issuances of EGI's securities constituted the issuance of "new equity" and should have resulted in the full repayment of the Revised Note representing plaintiff's loan to EGI, but it did not (*id.*, ¶ 64).

On February 1, 2010, EGI renewed its Investment Banking Agreement with CMS to extend from that date to July 31, 2010 (*id.*, ¶ 77). As payment for its services, CMS received 6 million shares of unregistered EGI common stock (*id.*).

EGI failed to repay the amounts due to plaintiff pursuant to the Revised Note (*id.*, ¶ 22). Plaintiff alleges that EGI's failure to repay him was the result of tortious acts of defendants (*id.*, ¶ 91). He alleges that CMS acted in furtherance of a plan to interfere with EGI's obligation to repay the Revised Note out of any new equity raised by EGI, allegedly by placing improper

demands and requirements upon EGI in the offerings for which CMS acted as placement agent (*id.*, ¶¶ 97-98).

Plaintiff commenced this action on October 4, 2013, alleging two causes of action against all defendants – the first for tortious interference with plaintiff’s contract with EGI, and the second for breach of defendants’ fiduciary duty to plaintiff (*id.*, ¶¶ 109-112).

Discussion

The defendants’ motion to dismiss is granted, and the complaint is dismissed in its entirety on the ground that both claims are untimely.

On a claim for tortious interference with contract, which alleges harm to the plaintiff’s economic interests, the limitations period is three years under CPLR 214 (4) (*see AQ Asset Mgt., LLC v Levine*, 119 AD3d 457 [1st Dept 2014]; *see also Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 108 [1st Dept 2009]). The statute begins to run when the defendant performs an act that constitutes the interference, and causes the plaintiff to suffer injury (*see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]).

In the instant action, even if this court were to find, as plaintiff asserts in opposition, that each of the equity financings continued to trigger an obligation to repay plaintiff’s loan, which actually was already in default on July 1, 2006 (*see* complaint, ¶¶ 26-27), and that defendants caused the breach by EGI, the last equity financing in which CMS played a role was on June 25, 2010 (*see id.*, ¶¶ 77, 82), and its engagement was over by July 31, 2010. Thus, June 25, 2010 was the last date that plaintiff could allege any wrongful conduct inducing a breach. Therefore, the limitations period expired on June 25, 2013, several months before this action was commenced on October 4, 2013. The claim is untimely.

The breach of fiduciary duty claim also is untimely. On a claim for breach of fiduciary duty, New York does not provide a single statute of limitations, rather, the choice of the limitations period depends on the substantive remedy the plaintiff seeks (*Access Point Med., LLC v Mandell*, 106 AD3d 40, 43 [1st Dept 2013], citing *IDT Corp. v Morgan Stanley Dean Witter & Co*, 12 NY3d 132, 139 [2009]). Where the plaintiff's claim is essentially for money damages, and fraud is not alleged or is only incidental to the claim asserted, the applicable limitations period is three years under CPLR 214 (4) for injury to property (*id.* at 44; see *Elmakies v Sunshine*, 113 AD3d 814 [2d Dept 2014]; *Carbon Capital Mgt., LLC v American Express Co.*, 88 AD3d 933, 939 [2d Dept 2011]). Where the plaintiff primarily is seeking equitable relief, and allegations of fraud are essential to the fiduciary duty claim, the statute of limitations is six years under CPLR 213 (8) (see *IDT Corp. v Morgan Stanley Dean Witter & Co*, 12 NY3d at 140; *Monaghan v Ford Motor Co.*, 71 AD3d 848, 849-850 [2d Dept 2010]). The statute begins to run when damages are sustained by the plaintiff (*Kronos, Inc. v AVX Corp.*, 81 NY2d at 94).

Here, the complaint clearly states that “[t]his is an action seeking monetary damages,” and that it seeks damages on the second claim “in the amount of \$441,188 ”(complaint, ¶¶ 17, 112). There are no requests for equitable relief, and the elements of fraud are not alleged. Therefore, the three year period applies (CPLR 214 [4]). Plaintiff's claim rests on his allegations that defendants breached their fiduciary duty to plaintiff by their actions in controlling EGI by virtue of their ownership of EGI stock (complaint, ¶ 111), and preventing it from repaying plaintiff's loan out of any new equity raised by defendants (*id.*, ¶ 97). Even if defendants owed plaintiff a fiduciary duty, June 25, 2010, the date of the last transaction that took place during CMS's term as EGI's investment banker (complaint, ¶¶ 77, 82), was the last possible date that

plaintiff could have alleged any purported wrongful conduct. Plaintiff would have suffered damages on that date, after the EGI stock was issued and EGI failed to pay plaintiff on his loan. Therefore, plaintiff was required to interpose this claim within three years from then, on June 25, 2013. Since this action was not commenced until October 4, 2013, this claim, like the tortious interference claim, is untimely.

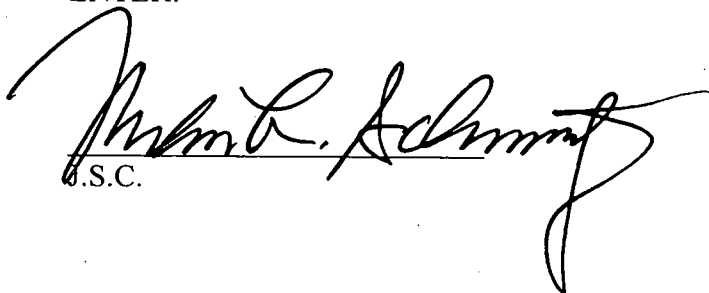
The court has considered the plaintiff's remaining contentions and finds them to be without merit.

Accordingly, it is

ORDERED that the defendants' motion to dismiss is granted, the complaint is dismissed in its entirety, with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

Dated: September 2, 2014

ENTER:


W.R. Schmitt
S.C.