Mazel Capital, LLC v Laifer
2015 NY Slip Op 30295(U)
March 3, 2015
Supreme Court, New York County
Docket Number: 600592/2010
Judge: Shirley Werner Kornreich
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SHIRLEY WERNER KORNREICH
J.S.C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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MAZEL CAPITAL, LLC, on its own behalf, and derivatively on behalf on HEARTWATCH, LLC,

Index No.: 600592/2010

DECISION & ORDER

Plaintiff,

-against-

FRANKLYN LAIFER,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Defendant Franklyn Laifer moves, pursuant to CPLR 3212, for summary judgment against plaintiff Mazel Capital, LLC (Mazel). For the reasons that follow, Laifer's motion is granted in part and denied in part.

I. Factual Background & Procedural History

Unless otherwise indicated, the following facts are undisputed.

Laifer is a cardiologist who stopped practicing medicine in 2002. He then attempted to develop a business of "marketing a heart monitoring device in tandem with a live 24-hour call center staffed by cardiologists and other medical professionals." *See* Dkt. 109 at 1 (Joint Statement of Material Undisputed Facts). Mazel invested in Laifer's first, failed attempt at this business, called E.K. Guard, Inc. (EKG). Laifer was EKG's "medical director". During the time period in question, Mazel's principals were Richard Jedwab, Brian Jedwab (Richard's son), and Hirsch Wolf. Wolf is now deceased.

In May 2006, Laifer made another foray into the heart monitoring, call center business with a company called Heartwatch, LLC (Heartwatch). Mazel invested $250,000 in Heartwatch and received a 9% equity stake. Laifer owned the other 91%. On May 24, 2006, Mazel and

Laifer entered into an Operating Agreement for Heartwatch. *See* Dkt. 100. The Operating Agreement is governed by New York law and contains a merger clause and a no-oral modifications clause. *See id.* at 2, 11. The Operating Agreement requires Heartwatch to keep books and records in accordance with New York's LLC laws and provides that all members, such as Mazel, are entitled to access them. *See id.* at 4. The Operating Agreement provides that Heartwatch shall be exclusively managed by Laifer. *Id.* at 3. Laifer, however, was "not entitled to any compensation for serving as Manager to [Heartwatch]." *Id.* at 4. In other words, Mazel funded the company, and Laifer provided the sweat equity.

Additionally, and in conjunction with the execution of the Operating Agreement, the parties executed a Letter Agreement, also dated May 24, 2006. *See id.* at 14. The Operating Agreement states that "[i]n the event of any conflict between [the] Operating Agreement and the Letter Agreement, the terms of the Letter Agreement shall control." *Id.* at 11. Paragraph 5 of the Letter Agreement provides:

> Mazel acknowledges and agrees that [Mazel's investment in Heartwatch will be used] for any and all legal working capital purposes, including, without limitation, for general start-up costs such as rent, salaries, utilities, and other day-to-day expenses; provided, however, that Heartwatch hereby undertakes that, unless it receives the prior written consent of Mazel, it will not use in excess of $50,000 per month for each of the first two months, and $37,500 per month for each of the following four months.

Dkt. 100 at 15.

In 2007, Mazel invested another $300,000 in Heartwatch. Additionally, other non-parties invested in Heartwatch, including Laifer's son (Alan), who invested $100,000. By 2008, when

Heartwatch's business failed and ceased operations, the equity was distributed as follows: Laifer owned 80%, Mazel owned 12%, and the other investors owned the remaining 8%.[1]

Mazel commenced this action in 2010, originally seeking Heartwatch's books and records. Mazel's operative pleading, the amended complaint dated January 16, 2012 (the AC), asserts a derivative claim for breach of contract and a direct claim for fraudulent inducement. *See* Dkt. 27. The breach of contract claim is based on the allegation that Laifer violated the Operating Agreement's prohibition on compensating himself for serving as Heartwatch's manager.[2] The fraud claim is based on the allegation that Laifer lied about how he was spending Heartwatch's money. Such lies allegedly induced Mazel to invest an additional $300,000 in Heartwatch in 2007.

Laifer's only defense to the breach of contract claim is that, while he admits he caused Heartwatch to directly pay him a salary totaling $199,127,[3] he claims this was compensation for serving as "medical director" of Remote Medical Care PLLC (Remote). Remote was the

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[1] A company named South Ferry Building Corp. owned 6.5%, Alan owned 1%, and an individual named Seymour Kramer owned .5%.

[2] Mazel's briefing and oral argument suggest that, while not expressly pleaded, it is asserting a claim for corporate waste. The evidence, however, does not support such a claim. Though, as discussed below, Laifer may have breached the Operating Agreement by paying himself a salary, Mazel does not submit any evidence that any of Laifer's other expenditures (such as his payments to consultants) were legally wasteful. Mazel's challenge to the wisdom of those expenditures is legally irrelevant under the business judgment rule. *See Barbour v Knecht*, 296 AD2d 218, 224 (1st Dept 2002). And while Laifer's spending may have slightly exceeded the monthly budget set forth in paragraph 5 of the Letter Agreement during certain months, the total amount spent during the specified time frame did not exceed the allowable amount.

[3] Laifer avers that he loaned Heartwach $62,610, and therefore, his net salary payments should be deemed to be approximately $136,000. *See* Dkt. 136 at 3 n.6. Laifer does not assert a claim for repayment of this loan. He does, however, assert a counterclaim against Heartwatch for reimbursement of $19,125 of company expenses that he paid for. *See* Dkt. 28 at 4.

company Laifer formed to provide medical services to customers of Heartwatch. Laifer claims he caused Heartwatch, instead of Remote, to pay his salary, which he contends was in keeping with his indifference to corporate formalities and tax laws.[4] *See* Dkt. 98 at 8.

II. Discussion

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

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[4] Stunningly, for instance, he states that Heartwatch's employees were designated and paid as independent contractors for tax purposes, even though they were really employees.

Laifer is not entitled to summary judgment on the issue of whether his receipt of a salary from Remote violates the Operating Agreement's prohibition on him receiving a salary for running Heartwatch. Laifer argues that he was permitted to subcontract with Remote and that he could make himself an employee of Remote, thereby causing Heartwatch to incur an obligation to pay him a salary. Doing so, however, seem at odds with the intent of the Operating Agreement, which granted Laifer most of Heartwatch's equity in consideration for his *uncompensated* work. Though subcontracting with Remote was perfectly acceptable, Laifer effectively paying himself a salary for running Remote seems tantamount to paying himself a salary for running Heartwatch. This, perhaps, might be a breach of the duty of good faith and fair dealing, even if the Operating Agreement does not expressly prohibit it because the parties' intent to compensate Laifer with sweat equity may have been defeated by Laifer becoming a salaried employee of Remote.[5]

Mazel does not affirmatively move for summary judgment. The court, upon reviewing the record, believes that a question of fact exists as to whether Laifer's salary was improper. Intent, after all, is a question of fact.

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[5] *See DMF Gramercy Enterprises, Inc. v Lillian Troy 1999 Trust*, 123 AD3d 210, 215 (1st Dept 2014), quoting *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 (2002):

> In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance. This covenant embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. While the duties of good faith and fair dealing do not imply obligations inconsistent with other terms of the contractual relationship, they do encompass any promises which a reasonable person in the position of the promisee would be justified in understanding were included.

98 NY2d at 153 (internal citations and quotation marks omitted).

That being said, of the amount at issue (less than $200,000), only 12% is effectively recoverable by plaintiff because the breach of contract cause of action is asserted derivatively. *See Sakow v Waldman*, 124 AD3d 860 (2d Dept 2015) ("A shareholder of a corporation, even of a closely held corporation, may not recover in his or her individual capacity for wrongs committed against the corporation, and any recovery obtained pursuant to a derivative cause of action asserted by a shareholder is obtained for the benefit of the injured corporation") (emphasis added), citing *Glenn v Hoteltron Sys., Inc.*, 74 NY2d 386, 392-93 (1989) and *Wolf v Rand*, 258 AD2d 401, 403 (1st Dept 1999); *see generally Serino v Lipper*, 123 AD3d 34, 39-41 (1st Dept 2014). Though Laifer could be compelled to pay all $199,127 back to Heartwatch, only approximately $20,000 would be distributable to the investors, and, at most, no more than $12,000[6] would be due to Mazel ($1,000 would actually go to Laifer's son).

The $300,000 sought on Mazel's only direct claim (fraudulent inducement of its subsequent investment in 2007) is not recoverable because this fraud claim fails as a matter of law. Mazel's claim that it invested based on Laifer's promise to abide by the Operating Agreement and the Letter Agreement is dismissed because this is a claim based on promises of future performance of a contract. *See MP Innovations, Inc. v Atlantic Horizon Int'l, Inc.*, 72 AD3d 571, 573 (1st Dept 2010) ("a fraud claim does not lie where it simply 'alleges that a defendant did not intend to perform a contract with a plaintiff when he made it.'"), quoting *Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 (1st Dept 1988); *see NY Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 (1995). Moreover, to the extent Mazel's claims can be

[6] Perhaps this is why the parties have been in no rush to litigate this 2010 case. *See* Dkt. 83 (setting forth the inordinate number of adjournments in this case).

construed to be predicated on lies about how Heartwacth's money had been spent at the time of its subsequent investment, Mazel cannot assert reasonable reliance because it had the right under the Operating Agreement to inspect Heartwatch's books and records. The parties stipulated that Mazel did not avail itself of its right to make a written demand to inspect Heartwatch's books and records before it made its subsequent investment. *See* Dkt. 109 at 2. Had it done so, it and its principals, sophisticated businessmen, would have discovered how Heartwatch was spending its money. *See UST Private Equity Invs. Fund v Salomon Smith Barney*, 288 AD2d 87, 88 (1st Dept 2001) ("a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it"); *Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96, 98-99 (1st Dept 1997) ("Where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on defendant's misrepresentations").

Further, Laifer's representations that he would abide by the Operating Agreement going forward is an inactionable expression of future intent that cannot sustain a claim for fraudulent inducement. Mazel's fraud claim, therefore, is dismissed.

Finally, Mazel's demands for punitive damages and attorneys' fees are stricken. Commercial breach of contract claims only impacting the parties do not ordinarily warrant punitive damages. Punitive damages are rare even in fraud cases, and then only in extreme cases where a defendant "evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations." *See Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457, 458 (1st Dept 2011), quoting *Ross v Louise Wise*

Servs., Inc., 8 NY3d 478, 489 (2007). That is not the case here. Moreover, a claim to recover attorneys' fees is not viable where, as here, no "unmistakably clear" agreement for such fees was entered into by the parties. *See Gotham Partners, L.P. v High River Ltd. Partnership*, 76 AD3d 203, 204 (1st Dept 2010), accord *Hooper Assoc. v AGS Computers, Inc.*, 74 NY2d 487, 491-92 (1989). Mazel's argument in support of its attorneys' fees claim is solely predicated on the alleged egregious nature of Laifer's conduct, which, for the reasons set forth above, do not warrant an award of punitive damages or attorneys' fees. Accordingly, it is

ORDERED that the motion by defendant Franklyn Laifer for summary judgment against plaintiff Mazel Capital, LLC is decided as follows: (1) the direct fraud claim is dismissed with prejudice; (2) the demand for punitive damages and attorneys' fees is stricken; and (3) summary judgment is denied on the derivative breach of contract claim; and it is further

ORDERED that the parties shall appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a pre-trial conference on April 14, 2015 at 11:30 in the forenoon.

Dated: March 3, 2015

ENTER:

J.S.C.