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| Storper v Invesco Ltd. |
| 2016 NY Slip Op 31286(U) |
| July 7, 2016 |
| Supreme Court, New York County |
| Docket Number: 652550/2015 |
| Judge: Jeffrey K. Oing |
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DAVID H. STORPER,

Plaintiff,

-against-

INVESCO LTD., WL ROSS & CO. LLC,
INVESCO PRIVATE CAPITAL INC., ROSS CG
ASSOCIATES L.P., ROSS CG GP LLC,
MICHAEL J. GIBBONS AND WILBUR L. ROSS

Defendants.

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Index No.: 652550/2015

Mtn Seq. No. 002

DECISION AND ORDER

Relief Sought

Defendants move, pursuant to CPLR 3211(a)(1) and (a)(7), for an order dismissing the amended complaint's first cause of action in part, and its second through sixth causes of action in their entirety.

Factual Background

Defendant Invesco Ltd. ("Invesco") is the parent company of defendants WL Ross & Co. LLC ("WL Ross") and Invesco Private Capital ("Invesco PC") (Am. Compl., ¶ 22). Defendant Wilbur L. Ross ("Ross") serves as CEO for both WL Ross and Invesco PC (Am. Compl., ¶¶ 22, 24, 28).

WL Ross is a global investment and private equity firm (Am. Compl., ¶ 23). Ross CG Associates is one of a number of WL Ross affiliates that manages WL Ross's investments (Am. Compl., ¶ 3). David Storper ("Storper") worked for WL Ross as a Senior Managing Director from April 2000 to late 2012 (Am. Compl., ¶ 29). As a

result of his position with WL Ross, Storper became a limited partner in Ross CG Associates and, as such, was entitled to a share of that entity's profits as well as carried interest (Am. Compl., ¶ 32). Ross is a limited partner in Ross CG Associates and also a member of its general partner, Ross CG GP LLC ("Ross CG GP") (Am. Compl., ¶¶ 25, 28, 37).

Under Ross CG Associates' Amended and Restated Agreement of Limited Partnership (the "Amended LPA"), a partner may voluntarily withdraw from the partnership by written notice or may be required to withdraw upon twenty-four hours written notice (Amended LPA, § 11[a]-[b], Meade Affirm., Ex. A). Upon the partner's withdrawal, he or she receives 90% of his or her capital account within thirty days, with the remainder paid thirty days after the end of the fiscal year (Id. at § 11[c][ii]). The Amended LPA also provided that it was to be governed by Delaware law (Id. at § 18[h]).

Storper left his employment with WL Ross in October 2012 (Am. Compl., ¶ 3). After leaving WL Ross, Storper received a Schedule K-1 tax form for 2012 which listed his capital account with Ross CG Associates as \$799,319 (Am. Compl., ¶ 7). On or about April 3, 2014, Storper received a notice from WL Ross's Chief Financial Officer, Michael Gibbons ("Gibbons"), informing him that Ross CG Associates was making a liquidating distribution of his capital balance in Ross CG Associates in the amount of

\$706,899, or \$92,420 less than the amount stated in Storper's 2012 K-1 (Am. Compl., ¶ 7, 5758). This liquidating distribution also failed to include profits and carried interest after September 30, 2012 (Am. Compl., ¶ 59).

Storper maintains that because he did not provide or receive written notice of withdrawal pursuant to Ross CG Associates' LPA he remains a member of Ross CG Associates and is therefore entitled to profits and carried interest in Ross CG Associates from September 30, 2012 to April 3, 2014 (Am. Compl., ¶¶ 53-54, 59-60).

On or about May 2, 2014, Storper's counsel contacted Benjamin Gruder ("Gruder"), Assistant General Counsel at Invesco Ltd. and in-house counsel to various WL Ross affiliated funds and entities, requesting documents relating to Ross CG Associates' liquidating distribution to Storper (Am. Compl, ¶ 67). Gruder transmitted documents on June 30, 2014, including a one-page summary that showed charges of "direct expenses" to Storper's account of \$547,712 in 2007, \$80,735 in 2009, and \$63,058 in 2011 (Am. Compl, ¶¶ 67-68). This information, however, did not explain the discrepancies between the liquidating distribution and K-1 (Am. Compl., ¶ 68).

On or about July 8, 2014, Ross CG Associates issued a Schedule K-1 tax form to Storper for 2013 (Am. Compl, ¶ 70). This K-1 form showed an unexplained reduction in Storper's capital

accounts of \$66,404 and a reduction in \$26,016 from his regular and IRA accounts (Am. Compl., ¶ 71).

On July 15, 2014, Storper's counsel requested that WL Ross provide, inter alia, quarterly account statements and year-end capital statements for 2012, and an explanation of the discrepancy between Storper's capital account as stated in his Form K-1 and his final distribution notice (Am. Compl., ¶ 74). Gruder responded with documents, but those documents did not explain these discrepancies (Am. Compl., ¶¶ 75-76).

On March 6, 2015, Storper commenced an action in the Court of Chancery of the State of Delaware for inspection of the books and records of Ross CG Associates, captioned Storper v WLR Recovery Associates II LLC, et al. (the "Books and Records Action") (Meade Affirm., Ex. D). After the Books and Records Action was stayed, WL Ross made an additional production of documents to plaintiff on May 5, 2015 (Am. Compl., ¶ 81). This production suggested to Storper that Ross CG Associates had concealed or misrepresented the partnership's earnings in 2012 and 2013 (Am. Compl., ¶¶ 82-85).

Storper commenced this action on July 21, 2015 asserting claims for: (1) breach of contract against all defendants; (2) breach of the covenant of good faith and fair dealing against Ross CG GP LLC and Ross; (3) breach of fiduciary duty against Ross CG GP LLC and Ross; (4) unjust enrichment against all

defendants; (5) tortious interference with contract against the WL Ross Defendants; and (6) accounting against Ross CG Associates, Ross CG GP LLC, and Ross.

Discussion

As a preliminary matter, all of plaintiff's claims against Ross, Gibbons, Invesco, Invesco PC, and WL Ross, except his tortious interference claim, fail as a matter of law because plaintiff has not sufficiently alleged that piercing the corporate veil is warranted so as to be able to assert these claims against these individuals and entities.

Delaware law controls resolution of this issue (Klein v CAVI Acquisition, Inc., 57 AD3d 376, 377 [1st Dept 2008]). To state a veil-piercing claim, Storper must "plead facts supporting an inference that the [defendants], through [their] alter-ego[s], [have] created a sham entity designed [solely] to defraud investors and creditors" (Crosse v BCBSD, Inc., 836 A2d 492, 497 [Del 2003]; Wallace ex rel. Cencom Cable Income Partners II, Inc. v Wood, 752 A.2d 1175, 1184 [Del. Ch. 1999]; Mason v Network of Wilmington, Inc., 2005 WL 1653954, at *3 [Del Ch July 1, 2005]).

Here, Storper merely alleges Ross, by and through WL Ross, engages with Ross CG Associates without reference to any legal boundaries, and asserts "discovery will likely yield [that the] corporate formalities [between Ross CG Associates, Ross CG GP, and WL Ross] were ignored" (Storper Am. Compl., ¶ 93 [emphasis

added)). These obviously conclusory allegations are insufficient grounds to pierce the corporate veil (MicroStrategy Inc. v Acacia Research Corp., 2010 WL 5550455, at *11-12 [Del Ch Dec. 30, 2010]).

Storper also alleges that "each quarter, Mr. Ross and Mr. Gibbons would mark the funds' positions without assistance from Mr. Storper" (Am. Compl., ¶ 95). While Storper claims this was "irregular," he does not allege that this conduct was illegal or inappropriate.

Finally, Storper alleges that "Ross CG Associates had no risk management guidelines, no trading procedures and no policy statements -- all standard policies and procedures for entities of Ross CG Associates' character" (Am. Compl., ¶ 9). These allegations suggest a failure of managerial diligence, rather than a disregard of corporate formalities (Mason v Network of Wilmington, Inc., 2005 WL 1653954, at *4 [Del Ch July 1, 2005]). Moreover, even if this were not the case, "the failure to observe corporate formalities does not, by itself, warrant piercing the corporate veil" (Midland Interiors, Inc. v Burleigh, CIV.A. 18544, 2006 WL 3783476, at *4 [Del Ch Dec. 19, 2006]). As Storper's allegations are insufficient to justify piercing the corporate veil, his claims for breach of contract and unjust enrichment are dismissed as to Ross, Gibbons, WL Ross, Invesco, and Invesco PC.

1. Breach of Contract

Storper alleges that the defendants breached the Amended LPA by: (1) failing to allocate and distribute to Storper the profits and carried interest to which he is entitled; (2) charging Storper inappropriate "expenses;" and (3) improperly reducing his capital account balance (Am. Compl., ¶¶ 114-115). This claim is governed by Delaware law under the Amended LPA's choice-of-law provision (Deloitte (Cayman) Corp. Recovery Services, Ltd. v Sandalwood Debt Fund A, LP, 31 Misc 3d 1225(A) [Sup Ct, NY County 2011]).

Defendants argue that the aspect of this claim involving expenses charged to plaintiff is barred by the Separation Agreement's release of WL Ross from "any and all claims" for "breach of contract (express or implied), breach of any covenant of good faith (express or implied)" (Settlement Agreement at §§ 3, 7, Meade Affirm., Ex. B). This release is qualified by section 4 of the Separation Agreement, however, which provides that "notwithstanding the foregoing ... this Release shall not release any claims Storper has ... to any rights he maintains as a member or retired or former member of any entity responsible for the management of investments for the Company" (Id. at § 4[b]). Accordingly, the Separation Agreement does not bar this claim.

Defendants next argue that this claim is time-barred. As New York's procedural rules apply here (Portfolio Recovery Assoc., LLC v King, 14 NY3d 410, 416 [2010]), the six-year statute of limitations for breach of contract actions bars that part of plaintiff's claim involving expenses charged prior to July 9, 2009 (CPLR § 213[2]).

Plaintiff responds, however, that equitable estoppel serves to toll the statute of limitations. This reliance is misplaced. Equitable estoppel applies where the party enforcing the statute of limitations misleads the other party and induces it to delay the commencement of the action, or otherwise prevents the other party from doing so (Shared Communications Services of ESR, Inc. v Goldman, Sachs & Co., 38 AD3d 325, 325-26 [1st Dept 2007]) and "requires proof that the defendant made an actual misrepresentation or, if a fiduciary, concealed facts which he was required to disclose, that the plaintiff relied on the misrepresentation and that the reliance caused plaintiff to delay bringing timely action" (Kaufman v Cohen, 307 AD2d 113, 122 [1st Dept 2003] [internal citations omitted] [emphasis added]).

Plaintiff does not argue that any misrepresentation was made by defendants, but, instead merely argues that, as a general partner in Ross CG Associates, Ross CG GP had a fiduciary duty to disclose to Storper the expenses that had been charged to his

account, but failed to do so, and this failure tolled the statute of limitations (Am. Compl., ¶¶ 7, 67-68, 88).

Under Delaware law, however, to the extent a partner in a limited partnership has fiduciary duties, these duties may be expanded, restricted or eliminated by provisions in the partnership agreement (6 Del.C. § 17-1101[d]). Any fiduciary duty to disclose is limited by the Amended LPA, which only requires Ross CG GP to "transmit to each Partner such financial information with respect to the Partnership as may reasonably be requested to enable such Partner to complete his tax returns or to fulfill any other reporting requirements, provided that the Partnership is able to obtain such information without unreasonable effort or expense" (Amended LPA, § 16[c], Meade Affirm., Ex. A [emphasis added]). Accordingly, defendants had no duty to disclose the information at issue here until a request was made. Once plaintiff made such a request defendants provided the requested information concerning the expenses at issue here. Storper does not allege that this production delayed him in bringing this action. Therefore, equitable estoppel is inappropriate, and that aspect of plaintiff's breach of contract claim based upon acts occurring before July 21, 2009 are time-barred.

2. Breach of Covenant of Good Faith and Fair Dealing

A claim for breach of the implied covenant of good faith and fair dealing is a contract claim and, thus, governed by Delaware law (Deloitte (Cayman) Corp. Recovery Services, Ltd. v Sandalwood Debt Fund A, LP, 31 Misc 3d 1225(A), supra). An implied covenant claim requires "a specific implied contractual obligation, a breach of that obligation by the defendant, and resulting damage to the plaintiff" (NAMA Holdings, LLC v Related WMC LLC, CV 7934-VCL, 2014 WL 6436647, at *16 [Del Ch Nov. 17, 2014]). This doctrine "operates only in that narrow band of cases where the contract as a whole speaks sufficiently to suggest an obligation and point to a result, but does not speak directly enough to provide an explicit answer" (Airborne Health, Inc. v Squid Soap, LP, 984 A2d 126, 146 [Del Ch 2009]).

Storper alleges that he made repeated requests to defendants for information and documents relating to Ross CG Associates' liquidating distribution, but defendants delayed in providing this information and ultimately withheld substantial portions of the information causing Storper to expend time and money to negotiate and litigate with defendants in order to obtain documents he was entitled to receive (Am. Compl., ¶¶ 108, 122, 124). Storper claims that this conduct violated the promise inherent in the Amended LPA that the parties would work together should a dispute arise regarding a Partner's interest in the

Partnership by intentionally concealing material information from the counterparty (Am. Compl., ¶ 121).

Defendants' obligations on this score, however, are explicitly set forth in the Amended LPA, which provides that "[a]t all times the General Partner shall cause to be kept proper and complete books of account ... at the principal office of the Partnership and shall be open to inspection by the Partners or their duly authorized representatives and that Ross CG GP must transmit such financial information as may reasonably be obtained by Ross CG GP to each partner to enable that partner to complete his tax returns or to fulfill any other reporting requirements" (Amended LPA, § 16[b]-[c], Meade Affirm., Ex. A). In short, if these allegations state a claim it is for breach of contract claim, rather than breach of the implied covenant of good faith and fair dealing (Cambridge Capital Real Estate Investments, LLC v Archstone Enterprise LP [1st Dept 2016]; Metro. Suburban Bus Auth. v County of Nassau, 40 Misc 3d 1233(A) [Sup Ct, NY County 2013]).

Accordingly, defendants' motion to dismiss this claim is granted, and it is dismissed.

3. Breach of Fiduciary Duty

Storper alleges that Ross CG GP breached its fiduciary duty to him by: (1) decreasing his carried interest percentage to zero; (2) failing to inform him of, and charging him,

inappropriate and excessive "expenses" and improperly reducing his capital account balance; and (3) failing to obtain audited financial statements, as required by the Amended LPA and failing to disclose this material information to Storper (Am. Compl., ¶ 130).

The first two allegations are duplicative of the breach of contract claim, and are therefore dismissed (Pollak v Moore, 85 AD3d 578, 579 [1st Dept 2011]). Plaintiff's third allegation, that Ross CG GP LLC breached its fiduciary duty to Storper by failing to obtain audited financial statements and disclose this material information to Storper as required by the Amended LPA states a breach of contract claim rather than a fiduciary duty claim and, as such, must be dismissed (Celle v Barclays Bank P.L.C., 48 AD3d 301, 302 [1st Dept 2008]).

Accordingly, defendants' motion to dismiss this claim is granted, and it is dismissed.

4. Unjust Enrichment

As Ross CG Associates' Amended LPA's choice-of-law provision applies to an unjust enrichment claim (Deloitte (Cayman) Corp. Recovery Services, Ltd. v Sandalwood Debt Fund A, LP, 31 Misc 3d 1225(A) [Sup Ct 2011]), Delaware law applies. "A claim for unjust enrichment is not available if there is a contract that governs the relationship between parties that gives rise to the unjust enrichment claim" (Kuroda v SPJS Holdings, L.L.C., 971 A2d

872, 891 [Del Ch 2009]). As there is no dispute that the Amended LPA is valid and applicable (Opp. Br. at pg. 17; Reply Br. at pg. 9), defendants' motion to dismiss this claim is granted, and it is dismissed.

5. Tortious Interference with Contract

As tort claims are "outside the scope of contractual choice-of-law provisions" New York law applies to this claim (Coco Investments, LLC v Zamir Mgr. Riv. Terrace, LLC, 26 Misc 3d 1231(A) at fn 1 [Sup Ct, NY County 2010]). To state a claim for tortious interference, Storper must allege: (1) the existence of a contract between plaintiff and a third party; (2) defendants' knowledge of the contract; (3) defendants' intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff (Kronos, Inc. v AVX Corp., 81 NY2d 90, 94 [1993]).

Storper alleges that Invesco, WL Ross, Invesco PC, Gibbons, and Ross induced Ross CG GP to breach its contractual obligations to Storper by "prepar[ing] and disseminat[ing], or causing to be prepared and disseminated, confusing, misleading and incorrect financial and tax documents relating to Ross CG Associates" (Am. Compl., ¶¶ 139-140). The complaint fails, however, to allege how these actions induced the purported breaches of the Amended LPA (i.e., failing to distribute profits and carried interest to

Storper and charging him unjustified expenses) (Am. Compl., ¶¶ 114-115).

Accordingly, that branch of defendants' motion to dismiss this claim is granted, and it is dismissed (57th St. Arts, LLC v Calvary Baptist Church, 52 AD3d 425, 426 [1st Dept 2008]).

6. Accounting

Storper seeks an accounting to determine the profits and carried charges that he is owed, as well as whether any of the expenses charged were inappropriate (Am. Compl., ¶ 149). In order to demonstrate the necessity of an accounting, Storper must allege: (1) a fiduciary relationship with the defendants involving the entrustment of money or property; (2) that no other remedy exists; and (3) that Storper demanded and was refused an accounting (Arbeeney v Kennedy Exec. Search, Inc., 31 Misc 3d 494, 503 [Sup Ct, NY County 2011]). The "mere necessity of an accounting in order for plaintiffs to ascertain the amount due on a contract with the defendant is insufficient to justify an equitable action for an accounting" where, as here, "plaintiff has an adequate remedy at law, including an unhindered opportunity during pretrial discovery and at trial to prove actual losses" (Kaminsky v FSP Inc., 2003 WL 25780814 [Sup Ct 2003]). If discovery proves to be inadequate, then "upon a proper factual showing of the insufficiency, further discovery

can be ordered" (Salovaara v Eckert, 6 Misc 3d 1005(A) [Sup Ct 2005] affd as mod., 32 AD3d 708 [1st Dept 2006]).

Accordingly, defendants' motion to dismiss this cause of action is granted, and it is dismissed.

Accordingly, it is

ORDERED that defendants' motion to dismiss that part of the first cause of action based upon events prior to July 21, 2009 is granted, and the first cause of action is dismissed in part; and it is further

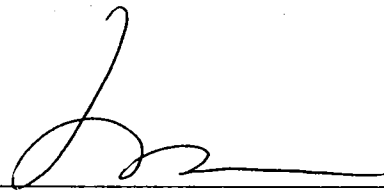
ORDERED that defendants' motion to dismiss the second through sixth causes of action is granted, and they are dismissed;

ORDERED that defendants are directed to serve an answer to the complaint within ten (10) days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear in Part 48 (Room 242) for a preliminary conference on July 27, 2016 at 11 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 7/7/16


HON. JEFFREY K. OING, J.S.C.