

**Bravura Private Wealth Pty Ltd. v Cadmus Asset
Mgt., Ltd.**

2018 NY Slip Op 30117(U)

January 19, 2018

Supreme Court, New York County

Docket Number: 653737/2016

Judge: Arthur F. Engoron

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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BRAVURA PRIVATE WEALTH PTY LIMITED and
BRAVURA INVESTMENT LIMITED,

Plaintiffs,

Index No. 653737/2016

- against -

DECISION AND ORDER

CADMUS ASSET MANAGEMENT, LTD;
CEDAR CAPITAL MANAGEMENT GROUP, INC;
and WAEL CHEHAB,

Defendants.
-----X

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 3, were used on Defendants' motion, pursuant to CPLR 3211(a)(7), to dismiss the Plaintiffs' complaint.

Papers Numbered

Moving Papers	1
Opposing Papers	2
Replying Papers	3

Upon the foregoing papers, the instant motion is denied.

Background

There are two plaintiffs in this case: Bravura Private Wealth Pty Limited ("Bravura Private") and Bravura Investment Pty Limited ("Bravura Investment") (collectively "the Bravura Companies"). The Bravura Companies are corporations organized and existing under the laws of Australia, having their principal places of business in Australia.

There are three defendants in this case: Cadmus Asset Management, Ltd. ("Cadmus"), Cedar Capital Management Group, Inc. ("Cedar Capital") and Wael Chehab ("Chehab"). Cadmus is a corporation organized and existing under the laws of Bermuda, with its principal place of business in New York City and State. Cedar Capital is a corporation organized and existing under the laws of Delaware, with its principal place of business in New York City and State. Chehab is an individual citizen residing in the State of New York. Chehab is a director of Cadmus and serves as a director and Chief Executive Officer of Cedar Capital.

The complaint states as follow: In late 2014, Chehab represented to plaintiffs that defendants were working with licensed, high yield traders in the United States and had met the traders and their licensed trade principals several times. Chehab also represented to plaintiffs that defendant had completed due diligence on the traders and determined that they were licensed, regulated and in good financial standing. Chehab also represented to plaintiffs that he would proceed to place personal and family funds at the disposal of the aforementioned traders in order to begin the trading process and therefore not lose the traders, who would otherwise seek out different potential clients. Chehab asked plaintiffs if plaintiffs had any clients who would be interested in investing with the traders, to which plaintiffs responded they would approach clients if assured that Chehab had completed the aforementioned due diligence on the traders with whom they would be working.

In early 2015, Chehab represented to plaintiffs that he had been successfully trading and that returns had been as high as 40-65% per month. Chehab again asked plaintiffs if any of their clients would be interested in investing with the traders,

and if they were, defendants would offer said clients around 15-20% net per month, leaving a 20-30% net participation fee (profit) that would be split 50/50 between defendants and plaintiffs (hereinafter "fee splitting agreements").

In response, plaintiff again asked if the traders were licensed and regulated. Chehab represented to plaintiff that not only were the traders licensed and regulated, but that Chehab was personally licensed and regulated. Further, Chehab gave assurances that Chehab was in fact the sole principal of defendants Cadmus and Cedar Capital and that Chehab would have control over the investment funds at all times, which at no point would be at risk.

In reliance on the above representations, plaintiffs introduced several clients to Chehab. Several trade and investment agreements were enacted between clients of the plaintiffs and Chehab, and, concurrently, several fee splitting agreements were entered into between defendants and plaintiffs pursuant to said client agreements.

By mid-December 2015, defendants had failed to remit payments to plaintiffs as per the fee splitting agreements. Chehab told plaintiffs that this failure was a result of banking auditing hold-ups and administrative problems. Chehab assured plaintiffs that payments would be forthcoming. In reliance on Chehab's assurances that the default in payment was purely the result of administrative problems, plaintiffs advanced their own funds to pay clients in anticipation of receipt of the funds from Chehab. In response to the continued failure to remit payments as per the contractual agreements between defendants and plaintiffs, plaintiffs requested a formal letter from Chehab, which was duly sent or about February 9, 2016.

In this letter Chehab (1) promised to remit all outstanding payments in full within 72 hours; (2) said that should the outstanding payments fail to be paid in full, he would be assessed a penalty of 10% per month on any outstanding funds; (3) stated that any late payment after the end of the month on any future payments would again be accorded a 10% penalty per month based against returns until paid; and (4) Chehab would, under penalty of perjury, attest to the above and that such a letter could be tendered in court to recover funds and agreed damages.

In or about February or March 2016, plaintiffs learned that the principal trading partners of Chehab were neither licensed nor regulated traders, as defendants had represented to plaintiffs.

At present, plaintiffs have not been paid according to the fee splitting agreements. Likewise, fees are owed to plaintiffs' clients as a result of their investment with defendants.

The Instant Motion

By notice of motion dated December 20, 2016, defendants now move, pursuant to CPLR 3211(a)(7), to (1) dismiss plaintiffs' fourth cause of action, against defendant Chehab, for failure to state a cause of action; (2) dismiss plaintiffs' fifth cause of action, against all defendants, for failure to state a cause of action; and (3) dismiss plaintiffs' sixth cause of action, against all defendants, for failure to state a cause of action.

Discussion

Pursuant to 3211(a)(7), Chehab moves to dismiss plaintiffs' fourth cause of action, to pierce the corporate veil of defendant Cadmus and defendant Cedar, on the ground that plaintiffs have failed to allege facts constituting the elements of said cause of action. Pursuant to 3211(a)(7), all Defendants move to dismiss Plaintiffs' fifth cause of action, for fraud, on the ground that plaintiffs have failed to allege facts constituting the elements of said cause of action. Pursuant to 3211(a)(7), all Defendants move to dismiss Plaintiffs' sixth cause of action, for negligent misrepresentation, on the ground that plaintiffs have failed to allege facts constituting the elements of said cause of action.

On a motion to dismiss pursuant to CPLR 3211(7), the "court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide Plaintiff the benefit of every possible inference." *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 175 (2005); *see also Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 974 (1994). The sole determination to be made herein is whether the facts, as alleged, fit within any cognizable legal theory. *See Leon*, 84 N.Y.2d at 87, 614 N.Y.S.2d at 974.

A plaintiff may rest upon the matter asserted within the four corners of the complaint and need not make an evidentiary showing by submitting affidavits in support of the complaint. A plaintiff is at liberty to stand on the pleading alone and, if

the allegations are sufficient to state all of the necessary elements of a cognizable cause of action, will not be penalized for not making an evidentiary showing in support of the complaint. *Kempf v. Magida*, 37 AD3d 763, 832 N.Y.S.2d 47 [2d Dept 2007]; see also *Rovello v. Orofino Realty Co.*, 40 NY2d 633, 635-636, 357 N.E.2d 970, 389 N.Y.S.2d 314 (1976).

Given this liberal interpretation afforded the plaintiffs' pleading, and as set forth below, plaintiffs' complaint sufficiently pleads claims for 1) piercing the corporate veil; 2) fraud; and 3) negligent misrepresentation. Accordingly, defendants' motion to dismiss is denied.

- I. Chehab's request, pursuant to CPLR 3211(a)(7), to dismiss plaintiffs' fourth cause of action, to pierce the corporate veil of defendant Cadmus and defendant Cedar, is denied.

Plaintiffs allege the elements necessary to pierce a corporate veil. These are: (1) the owner exercised complete domination of the corporation in respect to the transactions questioned; and (2) that such domination was used to commit a fraud or wrong against the plaintiff, which resulted in plaintiffs' injury. *Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 141-142 (1993).

Plaintiffs clearly allege the first element of piercing the corporate veil in paragraph 11 of the complaint. Plaintiffs allege that Mr. Chehab represented that at all times he, as owner and sole principal of Cadmus and Cedar Capital, would have control over the investment funds. Whereas defendant claims neither to have domination nor even to be a shareholder in the aforementioned companies, plaintiff clearly alleges facts that point to the contrary. Therefore, plaintiffs allege sufficiently particularized facts that satisfy the first element of a cause of action for piercing the corporate veil.

Further, in paragraphs 60 and 61 of the complaint, plaintiffs allege facts that satisfy the second element required for a cause of action to pierce the corporate veil. Plaintiffs allege facts that indicate that Chehab used his supposed domination to fraudulently harm plaintiffs, who as a result of such a fraud suffered a pecuniary loss. Therefore, plaintiffs have alleged sufficiently particularized facts that satisfy the second element of a cause of action for piercing the corporate veil.

Thus, Chehab's request, pursuant to CPLR 3211(a)(7), to dismiss Plaintiffs' fourth cause of action to pierce the corporate veil of defendant Cadmus and defendant Cedar is denied.

- II. Defendants' request, pursuant to CPLR 3211(a)(7), to dismiss Plaintiffs' fifth cause of action, for fraud, is denied.

Defendants' motion to dismiss plaintiffs' fifth cause of action, for fraud, is denied because the complaint sufficiently pleads a cause of action for fraud. In order to plead a case for fraud, a plaintiff must allege that: (1) the defendant represented a material fact; (2) such representation was false; (3) defendant intended to deceive plaintiff; (4) plaintiff believed and justifiably relied upon the statement; and (5) as a result of such reliance plaintiff sustained pecuniary loss. *Ross v. Louise Wise Services, Inc.*, 8 N.Y.3d 478, 488 (2007).

Plaintiffs' complaint alleges all of the above. Plaintiffs allege the first two elements in the fifth cause of action of the complaint. Specifically, plaintiffs allege the following: (1) Chehab represented that he completed due diligence and that the traders were in fact regulated and licensed; (2) Chehab represented that he had successfully traded with the trade group; and (3) Chehab represented that as owner and sole principal of defendants Cadmus and Cedar, Chehab would have control of the investment funds, which at no time would be at risk. Plaintiffs allege that the above representations were false when made, and defendants knew they were false.

The next three elements are alleged in paragraphs 62 and 63 of plaintiffs' complaint. Plaintiffs allege that Defendant Chehab made the above statements with the intent that plaintiffs would rely on said statements. The false statements were material, as plaintiffs justifiably relied on them and introduced their clients to defendants. Finally, plaintiffs allege that the false representations caused plaintiffs pecuniary damages.

Additionally, defendants argue that this fraud claim must fail as to all defendants, even if the allegations are indeed true, because plaintiffs are sophisticated investors who cannot have justifiably relied upon defendants' alleged

misrepresentations. Such a determination, however, is factual and cannot be decided as a matter of law. Defendants' claim of plaintiffs' sophistication cannot be decided on a summary judgment motion because a motion to dismiss should not attempt to make factual determinations. See *T. Lemme School Dist. v. Schalmont Cet. School Dist.*, 52 A.D.3d 1006, 860 N.Y.S.2d 241 (3 Dept. 2008).

For the aforementioned reasons, defendants' request to dismiss Plaintiffs' fifth cause of action, for fraud, is denied.

III. Defendants' request, pursuant to CPLR 3211(a)(7), to dismiss plaintiffs' sixth cause of action, for negligent misrepresentation, is denied.

Defendants' request to dismiss plaintiffs' sixth cause of action, for negligent misrepresentation, is denied because the complaint sufficiently pleads a cause of action for negligent misrepresentation. Defendants argue that this claim must fail because a sophisticated party cannot establish that it entered into an arm's length transaction based on justifiable reliance when a party failed to make use of available means of verification. In this instance, however, there was no outside verification provided by which plaintiff should have known that reliance was a mistake. Plaintiffs' verification was provided by the word of defendant alone, and not by any corroborating document. Thus, the plaintiffs can and have made a valid claim of negligent misrepresentation.

Moreover, it is not for the court to make a determination of whether or not the plaintiffs are sophisticated investors who cannot have justifiably relied upon defendants' alleged misrepresentations. Such a determination, is factual and cannot be decided as a matter of law at this stage. Defendants' claim of plaintiffs' sophistication cannot be decided on a summary judgment motion because a court cannot determine facts on a motion to dismiss for failure to state a cause of action. See *T. Lemme School Dist. v. Schalmont Cet. School Dist.*, 52 A.D.3d 1006, 860 N.Y.S.2d 241 (3 Dept. 2008).

Conclusion

Motion to dismiss denied.

Dated: 1/19/18



Arthur F. Engoron, J.S.C.