

Thomas v G2 FMV, LLC
2018 NY Slip Op 31596(U)
July 10, 2018
Supreme Court, New York County
Docket Number: 154593/2017
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: **HON. KATHRYN E. FREED**

IAS Part 2

-----X
PATRICK J. THOMAS,

Plaintiff,

Index No. 154593/2017

-against-

G2 FMV, LLC, G2 INVESTMENT GROUP, LLC,
JONATHAN TODD MORLEY, DORI VICKEN
KARJIAN and BREVET DIRECT LENDING –
SHORT DURATION FUND, L.P. AKA BREVET
CAPITAL SPECIAL OPPORTUNITIES FUND III,
L.P.,

Motion Seq. Nos. 001 and 002

Defendants.

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 37, 38, 39, 40, 641, 42, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76 were read on this motion to/for DEFAULT/DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 77 were read on this motion to/for DISMISSAL

Upon the foregoing documents, it is ordered that the motions and cross motions are decided as follows.

This decision and order consolidates for resolution the motions and cross motions filed under motion sequence numbers 001 and 002.

This action arises out of a settlement agreement reached in a prior action between two of the parties to this action -- plaintiff Patrick J. Thomas and defendant G2 FMV, LLC (G2). Asserting that the agreement was procured by fraud, Thomas commenced this action against G2 and other parties that allegedly conspired to thwart his ability to collect the monies due him pursuant to the settlement. Thomas now moves for a default judgment pursuant to CPLR 3215(a)

and (b) against Brevet Direct Lending – Short Duration Fund, L.P. aka Brevet Capital Special Opportunities Fund III (Brevet). Brevet opposes and cross moves to dismiss pursuant to CPLR 3211(a)(1) and (7), alternatively seeking leave to extend its time to appear. Defendants G2, G2 Investment Group, LLC (G2IG), Jonathan Todd Morley and Dori Vicken Karjian (collectively, the G2 Defendants) also move to dismiss pursuant to CPLR 3211(a)(1)-(3), (5), and (7).

FACTUAL AND PROCEDURAL BACKGROUND

The facts set forth herein are taken from the Verified Complaint and from the papers submitted in this and related actions. The background regarding the relationships between the parties and the nature of their disputes has been discussed at length in various decisions at both the trial and appellate level, familiarity with which is presumed.¹ As is relevant here, G2 and G2IG are Delaware limited liability corporations. Plaintiff was the Chief Operating Officer of G2IG from 2009 until March 3, 2014. At the time of his departure, he was also a member of G2 holding 20,200 membership “Units” or shares in that entity. Pursuant to G2’s Operating Agreement, if plaintiff resigned with “good cause” he was entitled to be paid the fair market value of his units. Doc. 1, at pars. 18-20.²

Morley was the Chairman of both G2 and of G2IG, a member of the Management Committee of G2 and of the Executive Committee of G2IG. Karjian was General Counsel of both G2 and G2IG and the Secretary of both the Management Committee of G2 and the Executive

¹ See *G2 FMV, LLC v Thomas*, 2015 WL 128259 (Sup Ct NY County 2015), *aff'd* 135 AD3d 421 (1st Dept 2016); *G2 FMV, LLC v Thomas*, 2015 WL 400184 (Sup Ct NY County 2015); *G2 FMV, LLC v Thomas*, 2015 WL 6087608 (Sup Ct NY County 2015); *Thomas v G2 FMV, LLC*, 2016 WL 320622 (Sup Ct NY County 2015), *aff'd* 147 AD3d 700 (1st Dept 2017); *Thomas v G2 FMV, LLC*, 2018 WL 1778318 (Sup Ct NY County 2015).

² Unless otherwise indicated, all references are to the documents filed with NYSCEF in connection with the captioned action.

Committee of G2IG. *Id.*, pars. 21-22. Plaintiff alleges that beginning around October 2013, Morley and Karjian determined to wrongfully remove him from his employment with G2IG and deprive him of the value of his membership interests. He claims that they embarked upon a campaign of harassment, defamation and disparagement to induce him to resign for cause, forfeit his units, and execute a one-sided separation agreement. Plaintiff asserts that defendants intended to silence him as a whistleblower, and that it was Morley, Karjian and others who engaged in misconduct, including self-dealing. *Id.*, pars. 1, 6, 30.

On January 25, 2014, G2IG placed plaintiff on administrative leave, stripping him of access to the company's office, network and email. On January 29, plaintiff notified G2IG that there was "good reason" for his resignation under the Operating Agreement. Because G2IG did not exercise its contractual right to cure within 30 days of that notice, plaintiff resigned on March 3, 2014 and demanded payment of the fair market value of his units. *Id.*, pars. 34-37.

On March 10, 2014 G2 brought an action against plaintiff (*G2 FMV, LLC v Thomas*, NY County Index Number 650753/2014) ("the Underlying Action") accusing plaintiff of various forms of corporate malfeasance and incompetence including the improper deferring of payment of IRS trust fund taxes, and seeking a declaration that plaintiff's resignation was not with good reason. Plaintiff filed an answer in the Underlying Action on March 31, 2014, interposing various counterclaims. *Id.*, pars. 38-39. As in the instant action, plaintiff's counterclaims alleged that defendants were punishing him to cover up their own wrongdoing, and he included a claim for indemnification for attorneys' fees and costs. See Underlying Action, Doc. 14. On July 8, 2014, in response to plaintiff's motion for summary judgment, G2 withdrew its claims and conceded that plaintiff resigned with good reason. Doc. 1, par. 40.

On September 11, 2014, G2 offered plaintiff \$633,343 for his units. *Id.*, par. 41. On September 16, plaintiff provided G2 with a “Disagreement Notification” asserting that the value of his units was \$8.26 million. Underlying Action, Doc. 189. In February 2015, plaintiff filed an amended answer containing a counterclaim for breach of contract based on his contention that, in violation of the Operating Agreement, G2 failed to conduct a good faith appraisal of the value of his units. *Id.*, Doc. 155. In March 2015, plaintiff commenced a separate action against G2, G21G, Morley, Karjian and two other corporate officers (*Thomas v G2 FMV*, NY County Index No 152318/2015) (“the Tort Action”) alleging defamation and malicious prosecution based upon the filing of, and allegations made in, the Underlying Action.

Ultimately, plaintiff obtained an independent appraisal and, on May 6, 2016, Mercer Capital Management determined that the fair market value of his units was \$2,060,400. Doc. 1, par. 43. On June 9, 2016, plaintiff entered into a Unit Purchase and Settlement Agreement (“the Settlement Agreement”) with G2 to facilitate the repurchase of his shares. Doc. 70. In it, G2 agreed to pay plaintiff a total of \$2,400,000, representing the fair market value as determined by Mercer plus additional consideration of \$339,600. (Settlement Agreement, § 1). The sum was made payable over a thirty-month period from August 2016 to October 2019, with a payment upon execution of \$100,000, payments of \$100,000 in each of August and November 2016, followed by payments of \$175,000 every three months thereafter. (*Id.*, § 1[a]). G2 also agreed to make prompt payment of certain legal fees and other costs for which he was indemnified under the Operating Agreement, and to pay plaintiff approximately \$10,000 to satisfy a consultant’s invoice. (*Id.*, § 1(a)). G2 represented that “[t]he Company has, and will have, sufficient assets to pay the Repurchase Price.” (*Id.*, § 4).

The parties further agreed that, upon G2's default in payment and failure to cure within ten days, plaintiff would be entitled to file a confession of judgment for the balance due. (Id., § 4). Finally, the agreement required the filing of stipulation of discontinuance with prejudice within three days of execution, providing that “[f]or the avoidance of doubt, the Parties understand and agree that the filing of the stipulation . . . in no way abrogates or terminates any of the rights or obligations that each of the Parties has as against one another pursuant to this Settlement Agreement”

The Settlement Agreement was executed by Karjian on behalf of G2, but neither he nor any other individual or entity was made a party to the agreement. Nor did plaintiff receive any third-party guarantees of G2's performance thereunder. Furthermore, the parties stipulated that “[n]othing in this Agreement, expressed or implied, is intended to confer on any person or entity other than the Parties or their respective successors and assigns, any rights, remedies, obligations or liabilities under or by reason of this Agreement.” (Id. at § 8).

G2 made the first three payments under the Settlement Agreement, totaling \$300,000, to plaintiff. However, G2 defaulted on the \$175,000 installment due on January 17, 2017. Doc. 1, par. 63. Plaintiff claims that he refrained from taking immediate action after Karjian asserted that a “funding event” was imminent. Id., par. 56. However, on March 7, 2017, plaintiff docketed a judgment by confession in the amount of \$2,240,551.03. (See *Thomas v G2 FMV, LLC*, NY County Index No. 152136-2017, Doc. 11) (“the Judgment Action”).

Plaintiff has been unable to collect on the judgment. The complaint alleges that both before and after the execution of the Settlement Agreement, defendants engaged in a number of transactions designed to place the funds out of plaintiff's reach. Specifically, plaintiff claims that, on December 31, 2015, G2 loaned G21G an unspecified (but apparently multi-million dollar)

amount in exchange for a promissory note with a maximum six-year term but callable at any time upon demand. He asserts that G2 received less than adequate reasonable value for the loan, and that the company was at the time in a distressed financial condition due to its actual and contingent debts to plaintiff. On December 31, 2016 G2, amended the amount of the loan to G2IG to approximately half its value from one year earlier but left the term unchanged. Plaintiff also alleges that on October 14, 2016, G2 encumbered its assets with a lien by entering into a Guaranty and Collateral Agreement in favor of Brevet to secure another loan to G2IG. Doc. 1, pars. 58-62.

The instant action was commenced on May 17, 2017. The complaint sets forth six causes of action, for fraudulent inducement against G2, Morley and Karjian; for fraudulent transfer against G2IG and Brevet; for appointment of a receiver against G2; for alter ego liability against G2IG; for piercing the corporate veil of G2IG; and for contractual indemnification from G2. Doc. 1, pars. 117-195. Plaintiff's process server attempted to serve Brevet at its New York City office on May 24 and 25, 2017 but the company refused to accept the papers. Doc. 19. On May 24, Brevet was also personally served in Delaware through its registered agent. Doc. 21. On June 1, 2017, plaintiff additionally served Brevet by Certified Mail and First Class Mail at its New York City office. Doc. 22.

DISCUSSION

For the following reasons, the G2 Defendants' motion to dismiss is granted in its entirety as to defendants G2IG, Morley and Karjian, without prejudice to plaintiff's right to pursue whatever relief may be available against them under the veil piercing, alter ego and fraudulent conveyance theories in ongoing supplementary special proceedings in the Judgment Action. The motion to dismiss is granted as to G2 except as to the claim for indemnification. Plaintiff's motion

for a default judgment against Brevet is denied, and Brevet's motion to dismiss is granted without prejudice to plaintiff's right to establish in the Judgment Action that the lien should be avoided.

The G2 Defendants' Motion to Dismiss

Fraudulent Inducement

In the first cause of action for fraudulent inducement, plaintiff alleges that he executed the Settlement Agreement in reliance upon the representation in section 6(g) that G2 "has, and will have, sufficient assets to pay the Repurchase Price." He asserts that the statement was included at the direction of Morley and Karjian, and that they knew that it was false or were indifferent to its truth. He claims he had good reason to believe G2 would honor its commitment because in the past, G21G had made numerous indemnification payments on G2's behalf to plaintiff's attorneys. Upon information and belief, plaintiff pleads that defendants' conduct was part of a scheme to make minimal payments while buying time for G21G to dissipate and encumber G2's assets.

Under Delaware law³, "[i]n order to prove fraudulent inducement, a party must establish the existence of (1) a false representation, (2) knowledge of falsity, (3) intentional inducement, (4) reasonable reliance, and (5) damages. *AgroFresh Inc. v MirTech, Inc.*, 257 F Supp 3d 643, 662 (D Del 2017), citing *E.I. DuPont de Nemours & Co. v Florida Evergreen Foliage*, 744 A2d 457, 461-62 (Del 1999). However, "a plaintiff cannot state a claim for fraud simply by adding the term 'fraudulently induced' to a complaint or alleging that the defendant never intended to comply with the agreement at issue when the parties entered into it." *Narrowstep, Inc. v Onstream Media Corp.*, 2010 WL 5422405, at *15 (Del Ch 2006). Furthermore, mere "statements of expectation or opinion about the future of the company and the hoped for results of business strategies" cannot

³Section 12.1 of the parties' Operating Agreement provides that "the rights of the parties hereunder will be governed by, interpreted, and enforced in accordance with the laws of the State of Delaware."

form the basis of a fraud claim. *Trenwick Am. Litig. Tr. v Ernst & Young, L.L.P.*, 906 A2d 168, 209 (Del Ch 2006), *aff'd sub nom Trenwick Am. Litig. Tr. v Billett*, 931 A2d 438 (Del 2007). This is so because the fact “[t]hat a statement of opinion did not prove to be an accurate forecast of the future does not mean that the predicting party misstated any actual fact that could serve as the basis for reasonable reliance.” *Metro Comm. Corp. BVI v Advanced Mobilecomm Techs. Inc.*, 854 A2d 121, 148 (Del Ch 2004). The plaintiff must allege with specificity facts establishing that the defendants’ financial representations were false and known to be so. *See Trentwick*, 906 A2d 168, 208 (“Notably absent from the complaint are particularized allegations identifying what aspects of [defendants’] financial statements were tainted by improper accounting practices, when those financial statements were made public, and the circumstances that suggest that any inaccuracies were intentional, rather than good faith mistakes in estimation”).

The Settlement Agreement’s warranty that G2 “has, and will have, sufficient assets” to satisfy its obligations is too generic to provide the necessary inference of fraud. That kind of representation is implicit in virtually every contractual promise to make installment payments, and a mere default, without more, cannot support the conclusion that defendants were misrepresenting the company’s finances or its intent to perform. *See Black Horse Capital, LP v Xstelos Holdings, Inc.*, 2014 WL 5025926, at *25 (Del Ch 2014). Significantly, plaintiff does not dispute that G2’s “assets” (as opposed to cash on hand) were or are sufficient to cover its debt to him, or that G2 made \$300,000 in payments for his units plus nearly \$1 million in indemnified legal fees.

Furthermore, even if the warranty were actionable as a misrepresentation, the absence of reasonable reliance is fatal to plaintiff’s claim. At the time of the execution of the Settlement Agreement, the parties had been in a hostile, adversarial and distrustful relationship for years. As noted, plaintiff has commenced litigation against defendants accusing them of defamation,

malfeasance and various forms of dishonesty. Moreover, in his opposing affidavit, plaintiff asserts that he believed that G2's financials and record-keeping were "fraudulent" and "not to be trusted." Doc. 44, 17-18. Incongruently, plaintiff argues that this distrust somehow entitled him to rely on the warranty, in that it was "necessarily approved by G2's largest unitholder and Chairman, Defendant Morley."

Plaintiff's position is also inconsistent in view of the remedies that he negotiated for inclusion in the Settlement Agreement. Expressly anticipating the possibility of a default, he obtained a confession of judgment. However, despite the opportunity to do so, he did not demand personal guarantees from Karjian or Morley. He may not circumvent the consequences of this neglect by interposing a fraud claim. *See Universal Enter. Group, L.P. v Duncan Petroleum Corp.*, 2013 WL 3353743, at *14 (Del Ch 2013) (a party who "structures a contract to address the risk of loss associated with the false representation, and proceeds to closing cannot claim justifiable reliance").

Finally, this Court agrees with defendants that plaintiff has not adequately alleged damages flowing from the fraud. Plaintiff's assertion that, had he not entered into the agreement, he might have obtained a judgment and been able to collect on it nine months sooner, is entirely speculative. Further, no such damages could be collected from G2, insofar as plaintiff has docketed a judgment against the company for the full amount it owed.

Fraudulent Transfer/Alter Ego/Veil Piercing (As Against G2IG)

The sole purpose of this plenary action is to collect on an existing money judgment. Where a creditor seeks to enforce such a judgment against third parties under veil-piercing, fraudulent conveyance and related theories, "[t]he relief sought . . . is more appropriately obtained in a

supplementary special proceeding pursuant to CPLR article 52.” *O'Brien-Kreitzberg & Assocs v K.P., Inc.*, 218 AD2d 519, 520 (1st Dept 1995). Plaintiff is already pursuing such relief in the Judgment Action. *See* NY County Index No. 1521362017, Docs. 13-34. Accordingly, the relief sought herein against G21G is duplicative and the remaining claims against it are dismissed without prejudice to the ongoing special proceedings.

Receivership

The cause of action seeking appointment of a receiver for G2 pursuant to section 18-805 of the Delaware Limited Liability Company Act is dismissed. That section provides:

When the certificate of formation of any limited liability company formed under this chapter shall be canceled by the filing of a certificate of cancellation pursuant to § 18-203 of this title, the Court of Chancery, on application of any creditor, member or manager of the limited liability company, or any other person who shows good cause therefor, at any time, may either appoint 1 or more of the managers of the limited liability company to be trustees, or appoint 1 or more persons to be receivers, of and for the limited liability company

(Emphasis supplied). The claim fails for at least two reasons. First, the statute vests jurisdiction to appoint a receiver in Delaware’s Court of Chancery. Plaintiff thus lacks standing to pursue that remedy in this Court. *See, e.g., Raharney Capital, LLC v Capital Stack LLC*, 138 AD3d 83, 86-88 (1st Dept 2016) (“We agree with the near-universal view that the courts of one state do not have the power to dissolve a business entity formed under another state’s laws”). Plaintiff’s appeal to section 12.1 of the Operating Agreement, which permits the parties to bring an action “in any court of competent jurisdiction in the City of New York,” must fail, as no New York court is competent to appoint a receiver under the Delaware statute.

Second, as the statute expressly states, the appointment of a receiver is only permissible when a certificate of formation for the LLC has been cancelled. *See Ross Holding & Mgmt. Co. v*

Advance Realty Group, LLC, 2010 WL 3448227, at *5 (Del Ch 2010) (“[t]he LLC Act includes only a single provision addressing when a receiver may be appointed: 6 Del. C. § 18-805, which allows for the appointment of a receiver only when a limited liability company's certificate of formation has been cancelled”; see *Otto v Otto*, 110 AD3d 620, 620 (1st Dept 2013) (“plaintiff failed to file a petition in the Delaware Chancery Court in order to have the certificates of cancellation of the Delaware entities annulled”). Plaintiff has not alleged that a certificate of cancellation has been filed by or on behalf of G2.

Indemnification

G2 seeks dismissal of the claim for indemnification on the ground that the action does not arise out of his status as a “member” of the company as required by section 4.7 of the Operating Agreement, but rather from his status as a creditor. This Court rejects this argument. In the Tort Action, this Court (Kornreich, J.) ruled that plaintiff was entitled to indemnification on his breach of contract claim under section 4.7, notwithstanding that plaintiff lost his membership status upon selling his shares. In so holding, this Court noted that the Operating Agreement provided that indemnification would be available regardless of whether any party continued in the capacity as a member, and that the contract claim concerned his right, as a member, to certain financial information under the Operating Agreement. *Thomas v G2 FMV, LLC*, 2018 WL 1778318, at *2 (Sup Ct, NY County 2018). Similarly, this action concerns his right to payment for his units as provided in that agreement.

Plaintiff's Motion for a Default Judgment/Brevet's Motion to Dismiss

The motion for a default judgment against Brevet is denied. When “two modes of service have been made under which two different periods in which to answer are provided for . . . the defendant has the right of choice and no default can occur until the last day of the longer period to answer has expired.” *Olson v Jordan*, 181 Misc 942, 945 (Sup Ct, Queens County 1943; Siegel, NY Prac. § 231 (6th ed. 2018)). Plaintiff filed two separate affidavits of service indicating two methods of service, and Brevet's time to respond had not expired without respect to the later method at the time plaintiff made its motion for a default judgment.

For the reasons discussed above in connection with the fraudulent transfer and related claim against G21G, the complaint is dismissed as against Brevet without prejudice to plaintiff's right to seek relief in the Judgment Action, including the avoidance of Brevet's lien.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff Patrick J. Thomas for a default judgment (motion sequence 001) is denied; and it is further

ORDERED that the cross motion by defendant Brevet Direct Lending–Short Duration Fund, L.P. aka Brevet Capital Special Opportunities Fund III, L.P. (motion sequence 001) is granted without prejudice to plaintiff's right to seek such relief in the Judgment Action, including avoidance of Brevet's lien; and it is further

ORDERED that the motion by defendants G2 Investment Group, LLC, Jonathan Todd Morley and Dori Vicken Karjian to dismiss (motion sequence 002) is granted, without prejudice to plaintiff's right to pursue whatever relief may be available against them under the veil piercing, alter ego and fraudulent conveyance theories in ongoing supplementary special proceedings in the Judgment Action; and it is further

ORDERED that plaintiff is directed to serve this order with notice of entry within 20 days of the entry of this order; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in this matter on November 13, 2018 at 80 Centre Street, Room 280 at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

7/10/2018

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE