

TGT, LLC v Advance Entertainment LLC
2018 NY Slip Op 31789(U)
April 3, 2018
Supreme Court, New York County
Docket Number: 650633/2017
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

TGT, LLC,

Plaintiff,

Action No. 1

-against-

Index No.: 650633/2017
Mot. Seq. Nos.: 003 & 004

ADVANCE ENTERTAINMENT LLC,
DTI MANAGEMENT, LLC, CURTIS CHENG,
individually and in his official capacity as CEO of DTI
MANAGEMENT, LLC, and JOSEPH MELI,

Defendants.

VINCENT V HODES FAMILY IRREVOCABLE TRUST,

Plaintiff,

Action No. 2

-against-

Index No.: 151712/2017
Mot. Seq. No.: 002

ADVANCE ENTERTAINMENT LLC,
DTI MANAGEMENT, LLC, CURTIS CHENG,
individually and in his official capacity as CEO of DTI
Management, LLC, and JOSEPH MELI,

Defendants.

Decision and Order

Masley, J.:

Defendants DTI Management, LLC (DTI) and Curtis Cheng, individually and in his official capacity as CEO of DTI, (collectively, DTI Defendants) move, pursuant to CPLR 2201, 2304, and 3103, for an order staying discovery, quashing non-party subpoenas, and issuing a protective order as to certain discovery demanded by plaintiff

TGT, LLC (TGT) from DTI in the matter bearing Index No. 650633/2017 (Action No. 1; Mot. Seq. No. 003). In opposition, TGT cross moves to compel discovery.

Also in Action No. 1, DTI Defendants move, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss TGT's second amended complaint (TGT Complaint) (Action No. 1; Mot. Seq. No. 004).

In the related matter bearing Index No. 151712/2017 (Action No. 2), DTI Defendants move, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the second amended complaint (Trust Complaint) of plaintiff Vincent V Hodes Family Irrevocable Trust (Trust) (Action No. 2; Mot. Seq. No. 002).

Joint oral argument for Motion Sequence Numbers 003 and 004 in Action No. 1 and Motion Sequence Number 002 in Action No. 2 was heard on November 28, 2017; the record of that proceeding is incorporated into this decision (see NYSCEF Doc. Nos. 124 [Action No. 1], 53 [Action No. 2]). Further, the court takes judicial notice that, in October 2017, defendant Joseph Meli pleaded guilty of one count of securities fraud in a federal criminal action, *United States v Meli* (17-cr-127 [SDNY 2017]; see also *SEC v Meli*, 17-cv-632 [SDNY 2017]; *SEC v Carton, et al.*, 17-cv-6764 [SDNY 2017] [pending actions against Meli and others commenced by SEC for similar alleged conduct]). Meli's criminal sentencing was scheduled for January 31, 2017, but has been delayed.

This decision addresses Motion Sequence Numbers 003 and 004 in Action No. 1, and Motion Sequence Number 002 in Action No. 2.

Background

Action No. 1 and Action No. 2 are related matters arising from the alleged fraudulent investment scheme perpetrated by Meli. Both the TGT Complaint and Trust

Complaint allege that Meli is the sole owner and managing member of defendant Advance Entertainment LLC (Advance), and was—at relevant times—co-CEO, director, and “Head of the Entertainment Division” of DTI, “a leading player in the live event ticket industry,” of which defendant Cheng was also co-CEO. Both the TGT and Trust Complaints allege that Meli, as owner of Advance and top executive of DTI, solicited investments for the purchase of blocks of tickets to a forthcoming Broadway play on behalf of those companies; the investors, in turn, were promised significant returns on their investments as the tickets were resold on the secondary market. Both TGT and Trust Complaints allege that the DTI Defendants aided and abetted Meli’s scheme by, among other things, entering into a fraudulent letter of intent (LOI) with Advance, which bolstered Meli’s and Advance’s credibility and deceived investors into believing that both DTI and Advance were successful businesses with significant assets and/or value.

Specifically, TGT and the Trust allege that they were defrauded by Meli, who falsely represented that Advance and its “affiliate,” DTI, had an agreement with a major theatre organization— nonparty Ambassador Theatre Group Ltd. (Ambassador)—to purchase large blocks of tickets to the two-part Broadway performances of *Harry Potter and the Cursed Child* (*Harry Potter*), which would be sold on DTI’s online ticket resale platform for a large profit. TGT alleges that it was divested of, \$7,860,000; the Trust alleges that it was divested of \$300,000.

Action No. 1

TGT is a Minnesota LLC formed in January 2017 to invest in the Action No. 1 defendants’ “Confidential Offering.” The governor of TGT’s board, Michael Connor, was

approached by Meli in June 2016 and provided with the LOI, executed by Meli for Advance and Cheng for DTI, by which Advance agreed to purchase DTI for \$63 million. TGT alleges, however, that those parties knew Advance did not have the assets to consummate the transaction, and that the LOI was intended to bolster the defendants' fraudulent investment scheme. While Advance had allegedly paid DTI a good faith deposit of \$250,000, DTI returned the deposit to another company owned by Meli a few months later.

According to the TGT, Meli informed Connor in July 2016 that Advance's acquisition of DTI was revised such that a subsidiary company of nonparty CVC Capital Partners (CVC)—a private equity firm with approximately \$80 billion in assets—would instead purchase/invest in DTI, with Advance receiving a significant minority equity interest in the restructured DTI. This information was joined by a written proposal, which contemplated ongoing contribution of Advance's ticket deals to DTI. Meli represented that he would be a controlling executive of DTI after the acquisition.

In September 2016, DTI filed a Form D document, listing Meli as a director, with the SEC in connection with an endeavor to raise capital. Between August 2016 and January 2017, TGT alleges that DTI made numerous payments to Meli, and entities held by Meli, as payments for Meli's services as a director and co-CEO of DTI, as well for use in fabricating DTI-related investment opportunities to third parties; TGT alleges that other DTI executives, including Cheng, were aware then that Meli was pitching sponsored investment opportunities and partnerships through Meli's entities. Thus, TGT alleges that DTI and CVC failed to do due diligence before appointing Meli as Director, co-CEO, and Head of the Entertainment Division of DTI, which mislead TGT

and other investors. In October 2016, CVC closed the transaction by purchasing a substantial ownership interest in DTI for \$75 million, though the stake in DTI owned by Advance is unknown to TGT.

Connor was approached by Meli before the end of 2016 with the *Harry Potter* investment opportunity. Meli represented that, pursuant to a deal DTI and Advance secured with Ambassador, DTI and Advance would purchase \$62.5 million in block tickets to the play. Meli estimated that investors could expect a return of three to five times their original investment, and TGT asserts that it chose to invest in the Ambassador deal because of DTI's considerable experience and online sales platform in the ticket resale industry, as well as CVC's ownership interest in DTI. Meli represented that DTI was an affiliate of Advance, and the Ambassador-Advance agreement Meli provided to Connor states that "Advance intends to re-sell the Tickets through its affiliated online platform operated by DTI" (see plaintiff's exhibit A to second amended complaint, ¶ 3).

TGT alleges that DTI was aware that Meli would use his role as co-CEO and a Director of DTI, as well as head of DTI's Entertainment Division, to solicit investors for opportunities, and that DTI and its executives knew, or should have known, that Meli was pitching the *Ambassador/Harry Potter* deal to third parties; thus, the scheme was within the scope of Meli's executive positions at DTI. TGT alleges it invested \$7,860,000 in that deal via funding agreement.

The TGT Complaint contains the following causes of action: (1) fraud against all defendants; (2) conversion against Meli, Advance, and DTI; (3) breach of contract

against Advance; (4) aiding and abetting fraud against the DTI Defendants; and (5) corporate liability for director/officer's torts against DTI.

Action No. 2

Essentially, the Trust asserts that the same information and documents provided to Connor and TGT were passed along, via Connor, to the Trust, and the Trust Complaint pleads the same allegations as the TGT Complaint; however, in Action No. 2, the Trust alleges that its establisher, Vincent Hodes, was approached by Connor in December 2016 about investing Trust funds with Meli, Advance, and DTI in connection with the Ambassador deal. The Trust alleges that, as a result of the fraudulent representations made by "defendants" to Connor, it invested \$300,000 in Advance.

The Trust Complaint contains the following causes of action: (1) fraud against all defendants; (2) conversion against Meli, Advance, and DTI; (3) breach of contract against Advance and Meli; and (4) aiding and abetting fraud against the DTI Defendants.

The Motions and Cross Motions

Action No. 1; Motion Sequence Number 003: DTI Defendants' Motion to Stay/Quash Discovery, and TGT's Cross Motion to Compel Discovery

TGT previously agreed to stay discovery and proceedings against Meli and Advance (Meli Defendants) pending resolution of the criminal action against Meli. The DTI Defendants now move, pursuant to CPLR 2201, 2304, and 3103, for an order staying discovery, quashing various non-party subpoenas, and issuing a protective order as to certain discovery demands made by TGT against the DTI Defendants until such time as Meli's federal criminal action is resolved and/or the DTI Defendants' motion to dismiss the TGT Complaint is decided (Mot. Seq. No. 004).

TGT opposes the DTI Defendants' motion to stay discovery, quash non-party subpoenas, and enjoin TGT from serving further discovery demands, and cross moves for an order compelling the DTI Defendants to respond to TGT's previously-served discovery demands.

At oral argument, the court stayed discovery as against the DTI Defendants pending Meli's sentencing in federal court and the resolution of the DTI Defendants' motions to dismiss in Action No. 1 and Action No. 2. The discovery motion and cross motion are addressed below in the section following the discussion of the DTI Defendants' motions to dismiss.

Action No. 1; Motion Sequence Number 004

The DTI Defendants move to dismiss the TGT Complaint pursuant to CPLR 3211 (a) (1) and (a) (7) on the ground that TGT inadequately pleads the elements of secondary liability on the part of the DTI Defendants.

Action No. 2; Motion Sequence Number 002

The DTI Defendants move to dismiss the Trust Complaint pursuant to CPLR 3211 (a) (1) and (a) (7) on the ground that the Trust inadequately pleads the elements of secondary liability on the part of the DTI Defendants.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [The court] accept[s] the facts as alleged in the complaint as true, [and] accord[s] plaintiffs the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994] [citation omitted]). However, bare legal conclusions and "factual claims which are either inherently incredible or flatly

contradicted by documentary evidence" are not "accorded their most favorable intentment" (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]).

1. Action No. 1 and Action No. 2: The Fraud Claims

"In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]). "[A] principal, even if innocent, is liable for acts of fraud that are within the scope of an agent's actual or apparent authority" (*Chubb & Son Inc. v Consoli*, 283 AD2d 297, 298 [1st Dept 2001] [citation omitted]).

DTI Defendants challenge the fraud claims only on the basis that neither TGT nor the Trust adequately plead actual or apparent authority, authority by estoppel, or the theory of respondeat superior. DTI Defendants also argue that the reliance on Meli's misrepresentations was not reasonable; however, they do not contest that the remaining elements of TGT's and the Trust's fraud claims are sufficiently plead; that is, that TGT and the Trust were injured by the misrepresentations, intended to induce reliance, of Meli/Advance.

The court finds that TGT and the Trust adequately allege apparent authority, and, thus, the fraud claims survive these motions to dismiss.

"[W]here[] . . . the asserted basis for the principal's liability is apparent authority, there is no requirement that the tortious act be committed in furtherance of the

principal's business. The plaintiff suing on the basis of apparent authority is required, however, to prove that the principal created an appearance of authority on which the plaintiff reasonably relied, thereby enabling the agent to successfully perpetrate the tort" (*Parlato v Equit. Life Assur. Soc. of U.S.*, 299 AD2d 108, 114 [1st Dept 2002] [citation omitted]).

"Apparent authority must be based on words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction" (*1230 Park Assoc., LLC v Northern Source, LLC*, 48 AD3d 355, 355–356 [1st Dept 2008] [citation omitted]). While "an agent cannot, though his own acts, cloak himself with apparent authority" (*id.*), "[t]here is a general presumption that [a high-ranking executive] of a corporation is clothed with the powers which, of necessity, inhere in the position" (*Odell v 704 Broadway Condominium*, 284 AD2d 52, 56 [1st Dept 2001] [citation omitted]).

Here, TGT and the Trust sufficiently allege with specificity that Meli was appointed a Director of DTI, announced publicly through DTI's Form D filing; moreover, Meli was DTI's co-CEO, as well as the Head of its Entertainment Division. The "true test" of the apparent authority of a corporation's president, or other top-ranking executive, is "whether, at the time, he [or she] is engaged in the discharge of the general duties of [the] office, and in the business of the corporation" (*id.* at 56-57). As alleged in the TGT and Trust Complaints, DTI's primary activity was the resale of tickets to live events in the secondary market, and Meli's fraudulent act was predicated on DTI's ability to resell large blocks of tickets in that same market. Thus, TGT and the Trust sufficiently plead the appearance of the agent's apparent authority.

The DTI Defendants' reliance on *Edinburg Volunteer Fire Co., Inc. v Danko Emergency Equip. Co.* (55 AD3d 1108 [3d Dept 2008]) in support of their argument that DTI did not cloak Advance or Meli with authority to solicit investments to Advance as an intermediary of DTI does not necessitate an alternate result. In that case, the plaintiff contracted with an alleged agent of the defendant truck manufacturer, an independent contractor who promoted the sale and distribution of the defendant's trucks. The Appellate Division, Third Judicial Department found that the fraud claim should have been dismissed, because—while the alleged agent was authorized to negotiate the sale proposal for the products—the principal's conduct in so authorizing the alleged agent did not extend to the specific transaction at issue, that is, the contractor's finalization and acceptance of prepayment of funds to his own personal company (*see id.* at 1109-1110). Here, TGT and the Trust allege that Meli was a publicly-announced director of DTI who brought the Ambassador opportunity—represented to TGT and the Trust as a "DTI/[Advance]" investment—to them in his capacity as a top executive of DTI. TGT and the Trust also allege that Meli's company, Advance, was a minority owner of DTI.

Although the "mere creation of an agency for some purpose does not automatically invest the agent with 'apparent authority' to bind the principal without limitation" (*Ford v Unity Hosp.*, 32 NY2d 464, 472 [1973]), TGT and the Trust allege that DTI appointed Meli as director, co-CEO, and head of its Entertainment Division, specifically authorizing Meli to solicit investment opportunities in the secondary ticket market—the very activity that he purportedly fraudulently committed. They also allege that that the Ambassador deal was within the scope of Meli's authority in his senior position at DTI, and that Meli represented that the deal was affiliated with DTI.

Contrary to the DTI Defendants' arguments, the issue of reasonable reliance on the appearance of authority here is an issue of fact, and cannot be dismissed upon these motions (see generally *DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147 [2010]). The cases cited by the DTI Defendants are distinguishable. The claim in *Heffernan v Marine Midland Bank, N.A.* (267 AD2d 83, 84 [1st Dept 1999]) was dismissed for failure to state a cause of action where the plaintiffs failed to make a reasonable inquiry as to "risk-free," guaranteed returns on bank notes, whereas, here, the opportunity was not so extraordinary given that the *Harry Potter* play had a history of success in London, and that the resale values for tickets to recent, hit plays on Broadway had been lucrative. Here, the investment opportunity was not free of all risk, and the returns were estimated, not guaranteed. Additionally, in *Crigger v Fahnestock & Co.* (443 F3d 230, 233-234 [2d Cir 2006]), the complaint was dismissed after a jury trial, and the *Edinburg* court's dismissal of the fraud claim was decided on different grounds (see 55 AD3d 1108).

As TGT and the Trust sufficiently allege apparent authority, actual authority is not necessary to determine (*Goldston v Bandwidth Tech. Corp.*, 52 AD3d 360, 363 [1st Dept 2008] [where conduct "falls within the scope of the executive's apparent authority, his actual authority is immaterial"]). Likewise, the court need not address the DTI Defendants' arguments as to the theories of authority by estoppel and respondeat superior.

The court notes, however, that much, if not most, of the information pertaining to the DTI Defendants' knowledge of the alleged actions of Meli/Advance, whether the alleged fraud was within the scope of Meli's position at DTI, and whether the acts were

done in the furtherance of DTI's business are within the exclusive possession of the DTI Defendants, and evaluation of factual contradictions in the evidence pertaining to those issues renders them unfit for resolution on these motions to dismiss.

2. Action No. 1. and Action No. 2: The Aiding and Abetting Fraud Claims

A cause of action that alleges aiding and abetting fraud must plead an underlying fraud, that the defendants had knowledge of the fraud, and that they substantially assisted the achievement of the fraud (*see Balanced Return Fund Ltd. v Royal Bank of Can.*, 138 AD3d 542, 543 [1st Dept 2016]).

DTI Defendants argue that TGT and the Trust fail to establish that DTI Defendants had knowledge of the fraud, or substantially assisted the commission of the fraud; they do not contest the existence of the alleged underlying fraud perpetrated by Meli/Advance. TGT and the Trust contend that the allegations sufficiently demonstrate DTI Defendants' knowledge of, and substantial assistance in achieving, the fraud.

In the TGT and Trust Complaints, those parties allege that the LOI was executed by Cheng on behalf of DTI, and by Meli on behalf of Advance, to assist in the execution of the fraud by leading Connor to have confidence in Advance and its supposed partnership with DTI. TGT and the Trust allege that DTI Defendants knew that Advance did not have the funds to purchase DTI, and that the LOI and deposit (which was later returned) were "orchestrat[ed]" by DTI Defendants and Meli/Advance to "increase the likelihood that" Connor—and, ultimately, TGT and the Trust—"would later invest money" into the fraudulent deals.

TGT and the Trust also allege the LOI served to bolster Meli's representations that he was in control of DTI, as Cheng and Meli intended. The majority interest in DTI

was then acquired by CVC, and Advance owned a minority interest. The Proposal for the CVC transaction contemplated reorganizing DTI with “ongoing execution” of Advance deals devised by Meli, which further “baited” Connor and other investors into placing funds into Advance’s ticket schemes. Additionally, the Form D filing of DTI in September 2016 listed Meli as a director of DTI, and supported Meli’s representations that he had control over DTI and its Entertainment Division.

Accordingly, the aiding and abetting claims survive these motions to dismiss because the TGT and Trust Complaints “accomplish[] the result of informing . . . [DTI Defendants] of the substance of . . . [plaintiffs’] claim[s] and consist[] of . . . more than mere bare allegations of the elements of fraud without any supporting detail” (*Joel v Weber*, 166 AD2d 130, 139 [1st Dept 1991] [third alteration in original]). Furthermore, a defendant’s intent, and knowledge of intent, to commit fraud is often “to be divined from surrounding circumstances” (*see AIG Fin. Products Corp. v ICP Asset Mgt., LLC*, 108 AD3d 444, 446 [1st Dept 2013]), and the necessary facts for evaluating the aiding and abetting claims are solely in the possession of the DTI Defendants, since discovery has yet to proceed.

Accordingly, the allegations in both the TGT and Trust Complaints are sufficient to infer general knowledge and substantial assistance “in a manner beyond just performing routine business services” (*id.* at 447), and some discovery is needed to address these issues.

3. Action No. 1 and Action No. 2: Conversion Claims; and Action No. 1: Negligence Claim

Neither TGT nor the Trust oppose the DTI Defendants’ arguments in support of dismissing the conversion claims and negligence claim. TGT and the Trust also did not

contest those issues at oral argument. Accordingly, those claims are deemed waived, and are dismissed as against the DTI Defendants.

4. Action No. 1; Motion Sequence Number 003: DTI Defendants' Discovery Motion and TGT's Cross Motion

The DTI Defendants' Motion Sequence Number 003 in Action No. 1 seeks an order staying discovery, quashing non-party subpoenas, and issuing a protective order until DTI Defendants' motions to dismiss are resolved and the underlying criminal action against Meli has concluded. At oral argument, the court temporarily stayed discovery as to the DTI Defendants until February 7, 2018—the date of a scheduled discovery conference—in view of the fact that Meli's federal sentencing was scheduled to occur on January 31, 2018. Meli has not yet been sentenced, and the parties have failed to advise this court when the sentencing proceeding will occur. Thus, there is no reason to maintain the stay. Further, the motion to quash the non-party subpoenas is also denied as the DTI Defendants have not shown that the requests are overly broad and burdensome on the non-parties.

As the DTI Defendants' motions to dismiss in Action No. 1 and Action No. 2 are resolved by this decision, and there is no date of which the court is aware for Meli's criminal sentencing, all stays pertaining to the discovery at issue in Action No. 1, Motion Sequence Number 003 are lifted.

Accordingly, it is

ORDERED that Defendants Curtis Cheng, individually and in his official capacity as CEO of DTI, and DTI Management, LLC's motion pursuant to CPLR 2201, 2304, and 3103, for an order staying discovery, quashing non-party subpoenas, and issuing a protective order as to certain discovery demanded by plaintiff TGT, LLC in the matter

bearing Index No. 650633/2017 (Action No. 1; Mot. Seq. No. 003) is denied and plaintiff TGT, LLC's cross motion is granted. All stays pertaining to the discovery at issue in Action No. 1, Motion Sequence Number 003 are lifted; and it is further

ORDERED that Defendants Curtis Cheng, individually and in his official capacity as CEO of DTI, and DTI Management, LLC's motion to dismiss TGT's second amended complaint (Action No. 1; Mot. Seq. No. 004) is granted and the second and fifth causes of action of the second amended complaint are dismissed; and it is further

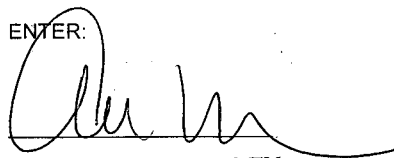
ORDERED that defendants Cheng and DTI Management, LLC are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that Defendants Curtis Cheng, individually and in his official capacity as CEO of DTI, and DTI Management, LLC's motion to dismiss the second amended complaint of plaintiff Vincent V Hodes Family Irrevocable Trust in the matter bearing Index Number 151712/2017 (Action No. 2; Mot. Seq. No. 002) is granted and the second cause of action of the second amended complaint is dismissed; and it is further

ORDERED that defendants Cheng and DTI Management, LLC are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel in Actions Nos. 1 and 2 are directed to appear for a preliminary conference in Room 242, 60 Centre Street, on April 11, 2018, at 10:00 AM.

Dated: 4/3/18

ENTER:


HON. ANDREA MASLEY