Raycom Program Ventures, Inc. v Reliable Fast Cash, LLC
2018 NY Slip Op 31946(U)
July 30, 2018
Supreme Court, Kings County
Docket Number: 501246/18
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

RAYCOM PROGRAM VENTURES, INC.,
Plaintiff,

Decision and order
Index No. 501246/18

ms #1

- against -

RELIABLE FAST CASH, LLC, MARY C. MCDONNELL, and BELLUM ENTERTAINMENT, LLC, d/b/a BELLUM ENTERTAINMENT,
Defendants,

BR HOLDING COMPANY LLC, FIX IT AND FINISH LLC, and FLIP MY FOOD LLC,

July 30, 2018

PRESENT: HON. LEON RUCHELSMAN

According to the complaint the defendant Mary McDonnell entered into merchant agreements with the defendant Reliable Fast Cash LLC [hereinafter 'RFC'] during the summer of 2017. On August 16, 2017 Ms. McDonnell executed a confession of judgement which stated the debts were obligations due from various entities including the defendant Bellum Entertainment. McDonnell executed a second confession of judgement which stated the debts were obligations due from various entities including Bellum Entertainment and the nominal defendants Fix It and Finish, LLC and Flip My Food LLC. On September 13, 2017 the defendant Reliable Fast Cash LLC [hereinafter 'RFC'] entered a judgement in Kings County against sixteen individuals and entities including defendants Mary McDonnell and Bellum Entertainment LLC based upon the confessions of judgement executed by Mary McDonnell.

On January 19, 2018 the plaintiff filed the instant lawsuit seeking to vacate the judgement on the grounds such judgement was fraudulently obtained. The plaintiff is a fifty percent owner of BR Holding Company LLC, and defendant Bellum Entertainment is the other fifty percent owner. BR Holding Company LLC was formed to develop and produce programs called Fix It and Finish It and Flip My Food. Indeed, nominal defendants Fix It and Finish, LLC and Flip My Food LLC are both distinct California entities owned by BR Holding Company LLC. All three entities, namely BR Holding Company LLC, Fix It and Finish LLC and Flip My Food LLC are managed in part by Mary McDonnell. In addition, McDonnell is the CEO of Bellum Entertainment, the half owner of BR Holding Company LLC. In this case McDonnell executed confessions of judgement, it is alleged, binding entities improperly. Specifically the complaint alleges Ms. McDonnell executed the confessions of judgement without authority from the other entities including the nominal defendants herein. The complaint thus alleges five causes of action. The first seeks a declaration the second confession of judgement purporting to bind the nominal defendants should be declared void since McDonnell had no authority to bind them. The second cause of action pleads fraud alleging McDonnell signed a fraudulent confession of

judgement. The third cause of action seeks to declare the second confession of judgement void on the grounds it violated CPLR §3218. The fourth cause of action seeks to void the second confession of judgement on the grounds the loan which formed the basis of such judgement was usurious. The last cause of action seeks a vacatur of the judgement against the nominal defendants.

The defendant RFC has moved seeking to dismiss the complaint on various grounds and the plaintiff has opposed the motion.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR 3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807 NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]. Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the

determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

The parties agree that California law governs the issue of futility of notice. Thus, California Corporations Code §800 (b)(2) states that no derivative lawsuit may be commenced unless "the plaintiff alleges in the complaint with particularity plaintiff's efforts to secure from the board such action as plaintiff desires, or the reasons for not making such effort, and alleges further that plaintiff has either informed the corporation or the board in writing of the ultimate facts of each cause of action against each defendant or delivered to the corporation or the board a true copy of the complaint which plaintiff proposes to file" (id). As the Supreme Court noted, for a stockholder to sue derivatively "he must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court" (see, Hawes v. City of Oakland, 104 US 450, 14 Otto 450 [1881]).

The defendant assets the plaintiff failed to comply with that provision and that consequently the plaintiff has no standing to pursue the lawsuit. The plaintiff counters that specific evidence such notice would have been futile has been

presented.

To succeed upon an assertion that notice would have been futile and hence not required specific facts must be presented that the individual at issue (McDonnell in this case) cold not be expected to fairly evaluate the claims of the shareholder plaintiff (see, Bader v. Anderson, 179 Cal.App.4th 775, 101 Cal.Rptr3d 821 [Court of Appeals, 6th District, 2009]). Thus, the plaintiff must establish that if a demand would have been filed with the Board of Directors they could not have exercised independent and disinterested business judgement (id). Thus, McDonnell will be considered incapable of being disinterested if facts support a personal benefit to her regarding the transaction being challenged (id). In that instance the business judgement rule is inapplicable and demand futility is established.

In this case, the complaint alleges that McDonnell, through her control of Bellum Entertainment owns half of BR Holding Company LLC and that her very conduct led to the confession of judgement on behalf of BR Holding Company LLC which is the subject of this lawsuit. The conduct of executing that confession of judgement was not a board business decision (Rales v. Blasband, 634 A2d 927 [Supreme Court of Delaware, 1993] where the court explained that such

allegations require a different standard to evaluate demand futility). Therefore, demand would obviously have been futile.

The defendant presents essentially two arguments the standard for demand futility has not been met. First, defendant argues the futility has not been presented with sufficient particularity. However, particularity governs the totality of the futility and as long as such futility can be discerned by the court then the particularity will naturally suffice. Thus, RunflatAmerica, LLC v. Malkasian, 2015 WL 1524588 [Court of Appeal, 2d District, Division 4 2015], does not demand a contrary result. That case merely explains the truism that particularity is required, without which such demand futility cannot be achieved and that general and unspecific allegations are surely insufficient to assert demand futility.

Secondly, the defendant argues that even if true demand futility exists concerning McDonnell there has been no evidence presented that such demand futility exists with respect to BR Holding Company LLC. Thus, defendant argues the plaintiff should have issued a demand to BR Holding Company LLC to pursue claims against defendant RFC. First, such argument is circular, since a demand upon BR Holding LLC is in

actuality a demand upon McDonnell since she is the owner, through her ownership of Bellum Entertainment of half of BR Holding LLC. More importantly, there is no basis such demand would not have been futile. Defendant points to an email written by McDonnell to the CEO of RFC on March 31, 2018 complaining about restraining notices RFC filed with Netflix. In the email she noted that BR Holdings [sic] will accelerate their litigation against you with this filing" (see, Email dated March 21, 2018, included within the Notice of Motion to Dismiss, Exhibit M) supporting the existence of potential claims by BR Holding Company LLC against RFC. However, such threatening email, whatever its actual meaning, does not support a conclusion that in totality such demand would not have been futile. Therefore, the first basis seeking dismissal of the lawsuit is denied.

Generally, pursuant to CPLR §3218 a judgement debtor may seek relief from a confession of judgement by instituting a plenary action. Thus, this action is proper and there are no grounds for dismissal based upon CPLR §3218 (Mail Commercial Corp., v. Chrisa, 85 Misc2d 613, 381 NYS2d 391 [Appellate Term, 1st Dept., 1976]).

There is further no merit to the argument McDonnell waived the rights of the remaining parties. It is alleged

McDonnell had no authority to enter judgements on behalf of those entities. Likewise, any such waiver, allegedly without authority, may equally be challenged.

Concerning the specific causes of action, the first cause of action seeks a declaratory judgement the defendant has no right to enforce the second confession of judgement. Such cause of action is proper. First, there is no merit to the argument a declaratory judgement only concerns future action and not past conduct. The case cited to support that proposition, Schildhaus v. Gilroy, 22 Misc2d 524, 195 NYS2d 124 [Supreme Court, New York County 1959] does not state that all declaratory judgements concern future conduct, not could the court issue such a statement. Rather, that case specifically concerned the use of a declaratory judgement when an individual had already been subject to criminal proceedings. Further, the failure to assert McDonnell did not have apparent authority to execute the confessions of judgement does not warrant a motion to dismiss the cause of action. Therefore, the motion seeking to dismiss the first cause of action is denied.

The second cause of action alleges fraud on the part of both McDonnell and RFC. It is well settled that to succeed upon a claim of fraud it must be demonstrated there was a

material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & Mclaughlin, Esqs, 149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014]). Moreover, it is well settled that to successfully plead fraud, the fraud must be pled with specificity from which intent or reasonable reliance might be inferred (see, CPLR §3016(b), Goldstein v. CIBC World Markets Corp., 6 AD3d 295, 776 NYS2d 12 [1st Dept., 2004]). The plaintiff's complaint describes in elaborate detail the scheme, which if proven true, includes not only McDonnell but RFC as well. The complaint provides far greater than mere conclusory assertions of fraud. Thus, the motion seeking to dismiss the fraud cause of action is denied as to all defendants.

The third cause of action seeks to declare the second confession of judgement void pursuant to CPLR §3218. The court has already determined that section does not bar the cause of action. Additionally, there are no other grounds in which to dismiss this cause of action at this time. The

motion seeking to dismiss it, is denied.

The fourth cause of action alleges the confession of judgement is void because the merchant agreement was criminally usurious. However, the merchant agreement was not a loan. The plaintiff argues that such a determination is premature and the parties should have the opportunity to engage in discovery to examine the precise nature of the merchant agreement. However, the merchant agreement by its very terms concerns the sale of future receipts and is not characterized as a loan thereby. Consequently, the motion to dismiss the fourth cause of action is granted.

The fifth cause of action which seeks to vacate the second confession of judgement appears duplicative of earlier causes of action. However, the court has permitted those causes of action to proceed and therefore, this cause of action may likewise proceed, surely at this early stage of the litigation.

Therefore, based on the foregoing, the motions of the defendant seeking to dismiss the complaint is denied, except for the fourth count which is hereby dismissed.

So ordered.

ENTER:

DATED: July 30, 2018
Brooklyn NY

Hon. Leon Ruchelsman
JSC