

T2Tech Ridge, Inc. v APM Partners LLC
2018 NY Slip Op 32492(U)
September 28, 2018
Supreme Court, New York County
Docket Number: 655761/2017
Judge: Andrea Masley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

-----X

T2TECH RIDGE, INC., as successor in interest to T2 CORPORATION,	INDEX NO.	655761/2017
Plaintiff,	MOTION DATE	12/08/2017
- V -	MOTION SEQ. NO.	001
APM PARTNERS LLC D/B/A/ APM PIZZA PARTNERS LLC, as successor in interest to PIZZAMETRY, LLC and K & G ENTERPRISES, LLC, PUZANT KHATCHADOURIAN, JOHN KAVAZANJIAN, CLYDE KEATON, ZAVEN DADEKIAN,	DECISION AND ORDER	
Defendants.		

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 13, 15, 16, 19

were read on this motion to/for DISMISS

MASLEY, J.:

Defendants move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss plaintiff's complaint in its entirety. This action arises out of various transactions surrounding a business involved with automated vending machines that produce pizza products (Machine) in retail locations, and the eventual liquidation of that business.

Plaintiff T2Tech Ridge Inc. (plaintiff), the successor in interest to T2 Corporation (T2), alleges in its September 8, 2017 complaint that defendant APM Partners LLC (APM) is the successor in interest to Pizzametry, LLC (Pizzametry), the assets of which were allegedly transferred to APM when Pizzametry was liquidated in December 2016. Pizzametry, itself, had previously acquired the assets and interests of K & G Enterprises, LLC (K&G) in August 2011. Pizzametry was founded by individual defendant Puzant Khatchadourian, who, at relevant times, was Pizzametry's co-CEO and majority shareholder. Individual defendants John Kavazanjian, Clyde Keaton, and

Zaven Dadekian were minority shareholders in Pizzametry (together with Khatchadourian, Individual Defendants). Plaintiff asserts that the Individual Defendants are all current members of APM.

In June 2010, T2 entered a Basic Order Agreement (Order Agreement) with K&G by which T2 invested \$1.5 million in K&G and acquired a 13% membership interest in K&G and the exclusive right to manufacture the first 5,000 Machines sold and/or placed in North America (see Order Agreement, ¶ 1). The Order Agreement was amended in writing three times: on August 26, 2010 (First Amendment), on October 4, 2010 (Second Amendment), and—following Pizzametry's acquisition of K&G—on December 31, 2013 (Third Amendment) (collectively, Agreements).

The Third Amendment was entered by plaintiff, as successor to T2, and Pizzametry, as successor to K&G. The Third Amendment modified plaintiff's exclusive right to manufacture the Machines from the first 5,000 to the first 3,000 units and provided for certain payments that Pizzametry would make to plaintiff: \$244,240.65 for five Machines already built, and \$30,000 as partial payment for parts plaintiff purchased in advance. Additionally, the Third Amendment provided that Pizzametry could terminate the Agreements before it purchased 3,000 Machines, but it would then compensate plaintiff \$1,000 for each Machine not purchased up to 3,000 units. A balance of \$160,330 for excess inventory remained after the \$30,000 partial payment was satisfied, and payment of that balance was conditioned upon Pizzametry reaching \$1 million in funding.

Plaintiff alleges that it received no further orders from Pizzametry and manufactured no additional Machines following the Third Amendment. In December

2016, Pizzametry “was liquidated without proper notice to [plaintiff],” plaintiff was “squeezed out” of its membership interest in Pizzametry, and the Agreements were effectively terminated (complaint [compl.] ¶¶ 26-27).

Liquidation of Pizzametry

Plaintiff alleges that it was notified, by correspondence from Kavazanijan received on December 1, 2016, that the Individual Defendants formed APM to “proceed in a new direction,” sell Machines and supplies to customers, and expand manufacturing and engineering of the Machines with new strategic partnerships. The following day, plaintiff was advised that Pizzametry had been liquidated, its \$2.1 million debts transferred to secured creditors, and its equity value—including plaintiff’s 13% interest—was “zero” (*id.* ¶ 29-31). Plaintiff asserts it was not provided advance notice of, or an opportunity to vote on, liquidation or an opportunity to become a secured creditor. Upon information and belief, plaintiff asserts that all, or much of, the secured debts of Pizzametry were owed to the Individual Defendants. Plaintiff received formal notice of the liquidation on December 5, 2016.

Plaintiff alleges that Pizzametry’s assets were transferred to APM, which partnered with a new entity to manufacture the Machines and raised significant funds to begin mass production of Machines. Plaintiff asserts that the Individual Defendants benefitted themselves by liquidating Pizzametry and transferring its assets and intellectual property to APM, and those acts “squeeze[d plaintiff] out,” devalued its interest and investment, and interfered with its rights under the Agreements (*id.* ¶ 44).

Plaintiff’s complaint raises the following claims:

(1) breach of contract against Pizzametry and APM for failure to pay for 2,995 Machines under the termination provision (*id.* ¶¶ 46-53 [seeking award of unspecified damages]);

(2) tortious interference with contractual relations against the Individual Defendants for interfering with the Agreements (*id.* ¶¶ 54-58 [seeking award of unspecified damages]);

(3) breach of implied covenant of good faith and fair dealing against Pizzametry and APM for rendering Pizzametry unable to perform its obligations under the Agreements (*id.* ¶¶ 59-63 [seeking award of unspecified damages]);

(4) promissory estoppel against all defendants for inducing plaintiff to invest and expend resources (*id.* ¶¶ 64-67 [seeking award of unspecified damages and/or restitution]);

(5) breach of fiduciary duty against the Individual Defendants for securitization of Pizzametry's debts, self-dealing, and fraudulently transferring Pizzametry's assets to APM at plaintiff's expense (*id.* ¶¶ 68-75 [seeking award of damages for lost value of investment and membership interest]);

(6) aiding and abetting breach of fiduciary duty against APM (*id.* ¶¶ 76-81 [seeking award of unspecified damages]);

(7) fraudulent transfer under New York Debtor and Creditor Law § 276 against the Individual Defendants for the liquidation of Pizzametry and transfer of its assets to APM (*id.* ¶¶ 82-85 [seeking award of unspecified damages]);

(8) unjust enrichment against all defendants for plaintiff's lost contractual benefits and devaluation of its membership interest and investment (*id.* ¶¶ 86-93 [seeking award of unspecified damages]);

(9) civil conspiracy against all defendants for conspiring to avoid Pizzametry's obligations to plaintiff, deprive plaintiff of its membership interest in Pizzametry, and committing various unlawful acts in furtherance of those plans (*id.* ¶¶ 94-98 [seeking award of unspecified damages]; *see id.* at 18-19).

Additionally, plaintiff asks the court for an order: rescinding the "transaction by which Pizzametry's assets and operations were transferred to APM and [plaintiff] lost the value of its investment in Pizzametry and the Agreement[s]"; imposing a constructive trust on "all rights and gains of all Defendants related to the value in and associated with Pizzametry and/or APM"; and accountings related to the value of Pizzametry, APM, and the Individual Defendants' "interests and rights" in those entities (*id.* at 18-19).

Defendants now move, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the complaint in its entirety.

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] plaintiff[] 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

intendment" (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]). Dismissal under subsection (a) (1) is warranted where the documentary evidence "conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

1. Plaintiff's contract claims (first and third causes of action) and tortious interference with contract claim (second cause of action)

Defendants contend that the contract claims must be dismissed because the Third Amendment supersedes all earlier agreements, and documentary evidence demonstrates that there was no breach. Specifically, they argue that: (a) the termination provision that obligated Pizzametry to compensate plaintiff for certain unpurchased Machines was obviated by the Third Amendment; and (b) plaintiff is not entitled to the excess inventory payment of \$160,330 because the condition precedent—Pizzametry obtaining \$1 million of funding—was not satisfied. Relatedly, defendants contend that the tortious interference claim against the Individual Defendants must be dismissed as inadequately plead because there was no breach of the Agreements on which that claim is based.

Plaintiff responds that defendants "artificially and improperly" liquidated and transferred Pizzametry's assets to APM to circumvent and frustrate the funding-threshold condition; therefore, the condition is effectively excused and plaintiff is entitled to payment of \$160,330. Plaintiff further responds that the Third Amendment did not vacate Pizzametry's obligation to pay for unpurchased Machines upon termination; rather, the Third Amendment increased the number of units for which, upon termination, plaintiff would be entitled to payment.

In reply, defendants argue that the breach of implied covenant of good faith and fair dealing claim is insufficiently plead inasmuch as plaintiff does not allege that the funding threshold was not satisfied, or that it was not reached due to any act or omission attributable to Pizzametry or APM.

Preliminarily, the Third Agreement, read as a whole with the Order Agreement and First and Second Amendments, does not eliminate Pizzametry's obligation to pay for up to 3,000 unpurchased Machines upon termination. The Third Amendment amends the past agreements by increasing the number of units for which compensation would become due upon termination; it does not eliminate the termination duty. While section 9 (a) of the Third Amendment states that it is "the entire understanding of the parties with respect to the subject matter [in the Third Amendment]," and "supersedes all prior . . . written agreements," the Third Amendment plainly and unambiguously incorporates and modifies specific portions of the earlier agreements, including those concerning Pizzametry's obligations upon termination. Section 5 of the Third Amendment clearly refers to "[c]hang[ing]" section 3 of the Order Agreement and "add[ing]" to section 5 (A) of the First Amendment; section 5 of the Third Amendment plainly increases Pizzametry's obligation to pay for unpurchased Machines upon termination from up to 2,000 to 3,000 units.

The court does not address whether the "prevention doctrine" applies to plaintiff's breach of implied covenant and good faith claim (see e.g. *Thor Properties, LLC v Chetrit Group LLC*, 91 AD3d 476, 477 [1st Dept 2012] [discussing the "prevention" or "hindrance" doctrine, which precludes a party that caused or consented to non-performance of a condition precedent from relying on the non-occurrence of the

condition to prevent recovery in some circumstances)). Plaintiff does not sufficiently allege either that the funding condition was satisfied, obligating the payment, or that Pizzametry and/or APM caused or consented to the non-occurrence of that condition. Plaintiff conclusorily alleges that "Pizzametry was a business with value," and that value was transferred to APM to "squeeze [plaintiff] out and to attempt to extinguish the obligations Pizzametry owed to [plaintiff]," including payment of "\$160,330 [for] excess inventory" (compl. ¶ 43). Plaintiff also states, upon information and belief, that a "short time" after liquidation, APM partnered with a new manufacturer and obtained "significant [financing] funds" (*id.* ¶ 41). There are no allegations pertaining to funding efforts during the nearly three years between execution of the Third Amendment and liquidation of Pizzametry, or that any defendant had, but failed to perform, an obligation connected to satisfying the condition. For those reasons, the claim for breach of the implied covenant of good faith and fair dealing based on the non-payment of the conditional \$160,330 payment is dismissed.

The prong of defendants' motion that seeks dismissal of plaintiff's tortious interference with contractual relations claim is denied insofar as plaintiff's first cause of action for breach of contract survives this motion.

2. Plaintiff's breach of fiduciary duty claims (fifth and sixth causes of action) and fraudulent transfer claim (seventh cause of action)

Defendants contend that the breach of fiduciary duty claim, aiding and abetting breach of fiduciary duty claim, and fraudulent transfer claim are barred as they are not asserted in a shareholder's derivative action. Specifically, they argue that the conduct plaintiff alleges—mismanagement or diversion of Pizzametry's assets by fraudulent liquidation of the company by its officers and directors, causing the value of plaintiff's

equity investment and membership interest to be lost or diluted—state harms to Pizzametry, not plaintiff directly.

Plaintiff responds that the conduct alleged—fraudulent transfer of assets to APM committed by the Individual Defendants—states an individual claim in that plaintiff is the only shareholder that was harmed by the improper acts while the other shareholders, the Individual Defendants, all benefitted from the alleged conduct.

Defendants reply that these claims must be dismissed as derivative because there is no allegation that any defendant breached a duty owed to plaintiff independent of the duties owed to Pizzametry, and plaintiff does not allege an injury it sustained separate from any injuries allegedly sustained by Pizzametry.

"[A] stockholder has no individual cause of action against a person or entity that has injured the corporation," even if the alleged wrongful acts diminished the value of the shares of the corporation or where a shareholder incurred personal liability (*Serino v Lipper*, 123 AD3d 34, 39 [1st Dept 2014]). A shareholder "may not obtain a recovery that otherwise duplicates or belongs to the corporation" (*id.* at 40, citing *Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d 214, 225 [1st Dept 1996]), except under the narrow exception applicable "where the wrongdoer has breached a duty owed directly to the shareholder which is independent of any duty owing to the corporation" (*Serino*, 123 AD3d at 39, citing *Abrams v Donati*, 66 NY2d 951 [1985]).

As explained by the First Department in *Yudell v Gilbert* (99 AD3d 108, 114 [1st Dept 2012]), "a court should consider (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)" (*id.* [internal

quotation marks and citation omitted)). Direct claims fail as a matter of law where the harm alleged is anything other than harm to the individual shareholder alone; if the allegations confuse the complaining shareholder's derivative and individual rights, even if some of the claims are direct in nature, the claims cannot stand (*id.* at 115).

Plaintiff's breach of fiduciary duty and fraudulent transfer claims against the Individual Defendants and aiding and abetting breach of fiduciary duty claim against APM are derivative, not direct, causes of action and must be dismissed.

Plaintiff alleges that it was notified, by correspondence from Kavazanjian in December 2016, that Pizzametry's "[d]ebts were well in excess of equity and the assets of the company have been transferred to the secured creditors (\$2.1M in secured debt) in lieu of foreclosure . . . All equity in Pizzametry has a value of zero, including [plaintiff's] equity, and no contractual obligations were assumed by the creditors, including the [Agreements]. APM . . . is a new LLC and it starts with a clean slate" (compl. ¶ 31; *see id.* ¶ 29). Plaintiff was not advised "of the plan to liquidate" Pizzametry or presented with an opportunity to vote on that plan or whether Pizzametry "should be taking on secured debt" (*id.* ¶¶ 32-34). Plaintiff adds that it "has no idea when the so-called secured debt was accrued" and had no opportunity to become a secured creditor (*id.* ¶¶ 35-36). Upon information and belief, plaintiff asserts that "all" or a "significant portion" of Pizzametry's secured debts were owed to the Individual Defendants (*id.* ¶ 37).

Specifically, plaintiff alleges that the Individual Defendants breached their fiduciary duties to plaintiff by: securitizing their investments in Pizzametry "to the exclusion of," and without notice to, plaintiff; self-dealing and fraudulently transferring

Pizzametry's assets to APM without advising plaintiff; and "allowing Pizzametry to favor [the Individual Defendants] to the exclusion of," and without notice to, plaintiff (*id.* ¶¶ 70-74). APM "knowingly participated" in those alleged breaches by accepting and holding the assets transferred by the Individual Defendants' "self-dealing transaction" (*id.* ¶ 79).

As a result, plaintiff alleges it sustained the following injuries: its investment in Pizzametry was rendered worthless; its minority interest in in Pizzametry was diluted and rendered valueless; Pizzametry's "only real asset"—intellectual property rights for the Machines—was transferred to APM; it was deprived of its rights under the Agreements; and it "was deprived of the opportunity to meaningfully protect its interests prior to liquidation," causing complete loss of value of its investment and membership interest (*id.* ¶¶ 42-44, 68-75; *see also id.* ¶¶ 76-81).

Plaintiff's allegations that the Individual Defendants engaged in self-dealing transactions for their own benefit, to the exclusion of plaintiff, which resulted in the dilution or total loss of plaintiff's membership interest and investment in Pizzametry states a derivative claim that harmed only the company. That it alleges Pizzametry's intellectual property assets were fraudulently transferred to APM also states a derivative claim: the injury is to the company, not any individual shareholder, and the company would receive the benefit of recovery if the claim prevails.

Plaintiff's reliance on *Scott v Pro Mgt. Servs. Group, LLC* (124 AD3d 454 [1st Dept 2015]) is misplaced. In *Scott*, the First Department affirmed the ruling of the trial court finding that an unjust enrichment claim, at the dismissal stage, sufficiently pleaded an individual cause of action on the basis that the plaintiff, a minority shareholder of the defendant holding companies and those companies' trademarks, alleged that all other

owners of those companies received revenues, fees, royalties, and other consideration for using the trademarks, to plaintiff's exclusion (*id.* at 454). *Scott* does not contemplate claims of breach of fiduciary duty or fraudulent transfer and does not persuade this court that these claims are individual, rather than direct. Breach of fiduciary duty claims raised by minority shareholders may be direct in nature when, for example, a claimant alleges that she was deprived of her share of profits individually as, in that situation, the plaintiff would receive the benefit of the recovery, not the company (*see e.g. Gjura v Uplift El. Corp.*, 110 AD3d 540, 540 [1st Dept 2013]).

3. Plaintiff's promissory estoppel claim (fourth cause of action) and unjust enrichment claim (eighth cause of action)

Defendants contend that the promissory estoppel and unjust enrichment claims must be dismissed as they arise out of the same subject matter as the Agreements, and, thus, recovery for those claims is precluded.

Plaintiff responds that its claims for promissory estoppel and unjust enrichment are against all defendants, not only Pizzametry and APM; therefore, they are not barred by the Agreements as to the Individual Defendants. Plaintiff also responds that the Agreements do not preclude the quasi-contract claims against Pizzametry and APM because the Agreements were improperly terminated by Pizzametry and/or APM.

Plaintiff's promissory estoppel claim is dismissed as it is premised on the same factual allegations and subject matter as those composing the contract claims, which are governed by the Agreements (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Additionally, the promissory estoppel claim is duplicative of the breach of contract claim, as are the portions of plaintiff's unjust enrichment claim that

reiterate the alleged breach of the Agreements by Pizzametry and/or APM (*see Celle v Barclays Bank P.L.C.*, 48 AD3d 301, 303 [1st Dept 2008]).

However, the remaining portions of plaintiff's unjust enrichment claim are supported by factual allegations concerning matters wholly separate from those governed or contemplated by the Agreements. For example, plaintiff alleges that the Individual Defendants and/or APM improperly: froze plaintiff out of Pizzametry by becoming securitized creditors; liquidated Pizzametry to control and transfer its assets to APM; and enlarged their proprietary interests at the expense and to the exclusion of plaintiff (*see* compl. ¶¶ 86-93). Accordingly, plaintiff's unjust enrichment claim is adequately plead as to the allegedly wrongful conduct by which the Individual Defendants and APM were unjustly enriched, resulting in injuries to plaintiff separate from those related to the Agreements (*see id.* ¶¶ 87, 89-92; *see also e.g. id.* ¶¶ 68-85).

4. Plaintiff's civil conspiracy claim (ninth cause of action)

Defendants contend that the ninth cause of action must be dismissed as an independent tort for civil conspiracy is not recognized in New York State.

Plaintiff responds that its civil conspiracy claim is not independent and may be sustained because plaintiff adequately pleads an underlying tort, such as tortious interference with contract, and, coupled with allegations that defendants entered an agreement to commit the tort and took overt actions in furtherance of that agreement, states a viable claim for civil conspiracy.

Defendants reply that the claim is defective, even if coupled with the underlying tort claim, in that plaintiff does not plead any facts establishing that an agreement was reached between any of the defendants to tortiously interfere with the Agreements.

Plaintiff's civil conspiracy claim is dismissed as inadequately pleaded. Plaintiff asserts only conclusory allegations that the Individual Defendants and APM "conspired" to avoid Pizzametry's obligations to plaintiff under the Agreements (e.g. *id.* ¶¶ 94-98); those allegations do not demonstrate that an agreement to tortiously interfere with the Agreements was, in fact, reached, when such an agreement was made, or which defendants were conspirators. Thus, the civil conspiracy claim is dismissed without prejudice to be renewed if additional facts are later discovered.

Accordingly, it is

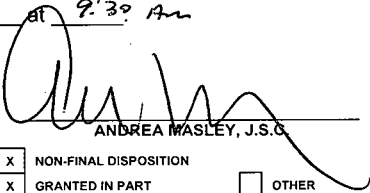
ORDERED that the motion of defendants APM Partners LLC D/B/A/ APM Pizza Partners LLC, as successor in interest to Pizzametry, LLC and K & G Enterprises, LLC, Puzant Khatchadourian, John Kavazanjian, Clyde Keaton, and Zaven Dadekian is granted in part; and it is further

ORDERED that plaintiff's third, fourth, fifth, sixth, seventh, and ninth causes of action are dismissed; and it is further

ORDERED that defendants shall serve an answer to the complaint within 20 days of this decision; and it is further

ORDERED that the parties are to appear in Part 48, 60 Centre Street, Room 242 for a preliminary conference on 10/25/18 at 9:30 Am

9/28/2018
DATE


ANDREA MASLEY, J.S.C.

CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE
	☐ DENIED		