Raycom Program Ventures, Inc. v Reliable Fast Cash, LLC
2018 NY Slip Op 32945(U)
November 20, 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

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RAYCOM PROGRAM VENTURES, INC.,

Plaintiff,

Decision and order
Index No. 501246/18

MS #2

- 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,

November 20, 2018

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PRESENT: HON. LEON RUCHELSMAN

The defendant has moved pursuant to CPLR 3211 seeking to reargue a decision and order dated July 30, 2018. The plaintiff has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The facts were adequately presented in the prior order and need not be recited again.

Conclusions of Law

A motion to reargue which is not based upon new proof or evidence may be granted upon the showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision

(Delcrete Corp. v. Kling, 67 AD2d 1099, 415 NYS2d 148 [4th Dept., 1979]). Thus, the party must demonstrate that the judge must have overlooked some point of law or fact and consequently made a decision in error. Its purpose is designed to afford an opportunity to establish that the court overlooked or misapprehended relevant facts or misapplied a controlling principle of law. The motion cannot be made after the time for appealing the prior order has expired (Millson v. Arnot Reality Corp., 266 AD2d 918, 697 NYS2d 435 [4th Dept., 1999]). Thus, where a party fails to demonstrate that the Court misapprehended any of the relevant facts or misapplied any controlling principle of law, a motion to reargue must be denied Matter of Mattie M. v. Administration for Children's Services, 48 AD3d 392, 851 NYS2d 236 [2d Dept., 2008], McNamara v. Rockland County Patrolmen's Benevolent Association, Inc., 302 AD2d 435, 754 NYS2d 900 [2d Dept., 2003]).

The defendant argues the court overlooked the second half of California Corporations Code §800(b)(2) which governs futility of notice and which requires that the 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). Raycom asserts that there is no evidence such notice was provided and that consequently the statute has not been fulfilled and demand futility has not been presented.

While the statute appears to require an additional notice to the board or a copy of the complaint, California courts interpreting this statute have not imposed this additional notification. Thus, in Apple Inc., v. Superior Court, 18 Cal.App 5th 222, 227 Cal.Rptr.3d 8 [Court of Appeal 6th District, California 2017] the court noted that "a derivative plaintiff under California law already must make a demand on the company's board to take legal action or show that it would have been futile to do so at the time the case is initiated (§ 800(b)(2)). If the suit is properly initiated and the derivative claims are validly in issue, the presuit demand requirement has been met" failing to mention any such additional notification requirement. The case of Klein v. Cook, 2015 WL 2454056 [N.D.C. San Jose Division 2015] is instructive. In that case the court noted, citing earlier State authority, that "in California, the demand requirement under Corporations Code § 800(b)(2) 'is similar to the federal rule and requires that the plaintiff in a shareholder derivative suit allege 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 allege 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). Indeed, Federal Rule 23.1(b)(3)(A)(B) states that regarding derivative actions the complaint must "state with particularity any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and the reasons for not obtaining the action or not making the effort" (id). Again, the Federal Rule, upon which the California rule is patterned, has no such additional notice requirement. Therefore, the absence of such a notification cannot be deemed a failure to comply with the statute. Consequently, the motion to reargue that portion of the prior decision is denied.

Next, defendant seeks to reargue the portion of the decision that held there was no merit to the assertion McDonnell waived the rights of the remaining parties. On October 11, 2017 McDonnell did sign a declaration which stated that "I, on behalf of all defendants waive the right to attach

the validity of the New York Judgement" (see, Declaration of Mary Carole McDonnell, ¶7). Thus, defendant argues that McDonnell's waiver as manager and agent of BR Holding Company and the nominal defendants this action is now barred since it has been waived. However, the complaint alleged that "managers of BR Holding cannot confess judgement on behalf of the company without the consent of *all* members of BR Holding...plaintiff, which is a 50% member of BR Holding, never consented to Defendant McDonnell signing the Second Confession of Judgement on behalf of BR Holding" (see, Verified Complaint, ¶36). Upon reargument the defendant argues the court "seemed to conflate the issue of authority to execute the confession of judgement before judgement was entered and the authority to waive a challenge to a judgement some time after the judgement had been entered" (Memorandum of Law in Support of Motion to Reargue, page 6).

However, the complaint surely presents facts, which must be accepted as true, that McDonnell had no authority to enter into confessions of judgement without consent of all members. Thus, it naturally flows that likewise, McDonnell had no authority to waive challenges to confessions of judgement she had no authority to execute in the first place. It would be absurd to argue that although McDonnell had no authority to

execute the judgements (or at least there are questions about such authority) once they were executed and she then unilaterally waived any challenges, then such challenges are indeed waived. The defendant does raise the curious fact that between the execution of the confession of judgement and the execution of the waiver, approximately a month later, no action was taken to remove McDonnell as a manager. However, such inaction does not conclusively establish the waiver was accepted by BR Holding and the nominal defendants. Rather, that is a matter that can be explored during discovery and might prove useful at a later stage of the litigation. However, at this juncture, there is no basis to reargue the determination the first cause of action states a valid claim. Consequently, the motion seeking reargument in this regard is denied.

The defendant further argues the court overlooked the legal truism that the plaintiff is required to demonstrate the defendant had actual knowledge that McDonnell lacked the authority to bind the nominal defendants (see, Corporations Code §313, Corporations Code §17703.01(b)(2), Snukal v. Flightways Manufacturing Inc., 3 P3d 286, 23 Cal.4th 754 [Supreme Court of California 2000]). For example, Corporations Code §17703.01(b)(2) states that "every manager

is an agent of the limited liability company for the purpose of its business or affairs, and the act of any manager, including, but not limited to, the execution in the name of the limited liability company of any instrument for apparently carrying on in the usual way the business or affairs of the limited liability company of which the person is a manager, binds the limited liability company, unless the manager so acting has, in fact, no authority to act for the limited liability company in the particular matter and the person with whom the manager is dealing has actual knowledge of the fact that the manager has no such authority" (id).

However, there is no authority presented the plaintiff must, at the pleading stage, establish these legal conclusions. The defendant asserts that "Plaintiff's first cause of action fails and must be dismissed because it does not, and cannot, allege that RFC had actual knowledge that McDonnell lacked authority to bind the nominal Defendants and Plaintiff" (supra, page 8). That is a conclusion that has not been tested through discovery. The issue of apparent authority and knowledge of such authority or lack thereof should survive the pleading stage. Consequently, the motion seeking reargument on this issue is denied without prejudice. Upon the conclusion of all discovery any part may make any

motion.

The motion seeking to dismiss the fraud claim is denied. As noted in the prior order such allegation was pled with particularity and the defendant has failed to present any argument requiring reconsideration. Likewise, the motions seeking to reargue dismissing the cause of action pursuant to CPLR §3218 and the fifth cause of action are denied. The defendant has not presented any arguments, not already presented, why the court should alter its prior determination.

Therefore, based on the foregoing, all the motions seeking reargument are denied.

So ordered.

ENTER:

DATED: November 20, 2018
Brooklyn NY

Hon. Leon Ruchelsman
JSC