Coast to Coast Energy, Inc. v Gasarch
2018 NY Slip Op 33350(U)
December 18, 2018
Supreme Court, New York County
Docket Number: 651670/2010
Judge: Eileen Bransten

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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COAST TO COAST ENERGY, INC., COAST TO COAST DRILLING PARTNERS I, II, III, IV, V, VI, AND VII, CHARLES R. BARNES, WILLIAM W. SPENCE, MARGARET M. SPENCE, HARRY WILMOT, DONNA WILMOT, CLIFTON C. MILLER, CRISTINA GARCES-BARNES, WESLEY SHREVE, IRA RUSSACK, LAWRENCE J. DOHERTY, MARK A. GONSALVES, JOSEPH GIORDANO and JOHN and JANE DOES 1-100,

Plaintiffs,

-against-

MARK GASARCH, WALTER CUKAVIC, PETRO SUISSE LIMITED, a New York Corporation, and JOHN AND JANE DOES 1-100,

Defendants.

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Index No.: 651670/2010
Motion Seq. 24 and 25

Bransten, J.:

This is an action arising from an allegedly fraudulent scheme conceived by defendants to solicit investors to buy into various partnerships related to oil exploration and drilling in Trinidad.

In motion sequence 024, plaintiffs Lawrence J. Doherty (Doherty) and William Spence (Spence) (collectively, the moving plaintiffs) move, pursuant to CPLR 3212, for partial summary judgment in their favor as to liability on their fraud claims against defendant Mark Gasarch (Gasarch).

In motion sequence 025, Mark Gasarch moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against himself.

Motion sequence numbers 024 and 025 are hereby consolidated for disposition.

A. BACKGROUND[1]

In 2003, Defendants Gasarch and Wampler are alleged to have fraudulently solicited investments in limited partnerships for oil exploration in Trinidad from certain investors, including plaintiffs. *See* Third Amended Comp. ("TAC") ¶¶ 1-6. Gasarch and Wampler did so by drafting and offering fifty-four private placement memoranda, offering interests in twelve limited partnerships, which purportedly had been formed to fund the building, drilling, and production of individual oil wells, with the revenues associated with each of the oil wells allegedly to be distributed back to the various investors. *Id* at ¶¶ 31-32.

The partnerships were divided into two categories: oil-exploration partnerships and oil-equipment partnerships. Plaintiffs state that each partnership had a general partner which was controlled by Gasarch and/or Wampler. Relevant here, plaintiffs allege that defendant PSNY was the general partner of approximately 50 limited partnerships formed by Gasarch and Wampler. *See* Gasarch 19-A Statement of Facts ¶2. The individual plaintiffs in this action invested in one or more of the limited partnerships. *See id* at ¶4. Plaintiff Coast to Coast Energy is the general partner of the plaintiff CTC Partnerships, which were created for the purpose of drilling wells. *See* TAC ¶ 132. Lawrence Doherty and Mark Gonsalves were principals of Coast to Coast Energy. *Id* at ¶ 136.

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[1] Much of the factual background is derived from the Third Amended Complaint as the parties' respective 19-A Statements fail to provide adequate context for this dispute. The Court notes that the Plaintiff's 19-A statements are riddled with procedural deficiencies, including the requirement that "Each statement of material fact by the movant or opponent pursuant to subdivision (a) or (b), including each statement controverting any statement of material fact, must be followed by citation to evidence submitted in support of or in opposition to the motion." *See* 22 NYCRR 202.70 Rule 19-A(d).

The gravamen of the third amended complaint is that Gasarch and Wampler never intended to follow through on the promises made to investors. *Id* at ¶ 4. Instead, they allegedly collected money from the investors and then lied about the building of wells and the production of oil from such wells. *See id.* They allegedly produced fabricated production reports to induce new investments, using some of that money to make distributions to earlier investors, before eventually ceasing any payments at all to investors. *Id.* The TAC also alleges that defendants wrongfully transferred assets out of the partnerships and sold them to third parties for defendants' own profit. *See id* at ¶ 6.

Plaintiffs Doherty and Spence contend that Gasarch fraudulently induced them (and other individuals and entities) to invest in one or more limited partnerships, which were purportedly formed for oil exploration and drilling in Trinidad.[2] Specifically, the Plaintiffs allege that the Defendant made material misrepresentations regarding the number of wells drilled and generating profits in order to induce them into investing in the oil wells. *See* TAC ¶¶ 413-423. The purpose of the limited partnerships included the building of oil wells, and the extraction and subsequent sale of petroleum. Gasarch's company, defendant Petro Suisse Limited (PSNY), a New York corporation, was the general partner of each of the limited partnerships.

To induce the investment, the Plaintiffs were presented with a private placement memorandum which, in the case of Plaintiff Spence, was not read prior to investing. *See* Plaintiffs' 19-A ¶1; Spence Response 19-A ¶1. The Plaintiffs were provided with an overview

[2] From the submissions, it is unclear whether moving plaintiffs move for summary judgment against Gasarch in his individual capacity or in his capacity as an officer of defendant Petro Suisse Limited, or both.

prepared by Defendant Gasarch for investors and potential investors. *See* Plaintiffs' 19-A ¶2; see also Defendant's Response 18-A ¶2.

Doherty and Spence contend that Gasarch never intended to build the wells, and, instead, operated a Ponzi scheme, wherein he falsified documents to induce new investors to invest in his companies, and used the new investor's funds as distributions to older investors. Ultimately, payments to all investors ceased, and the assets of the limited partnerships were transferred to other companies and sold, with the proceeds allegedly going to Gasarch.

B. DISCUSSION

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *See Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions.'" *Genger v. Genger*, 123 A.D.3d 445, 447 (1st Dept 2014), quoting *Schiraldi v. U.S. Min. Prods.*, 194 A.D.2d 482, 483 (1st Dept 1993). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *See Zuckerman v. City of New York*, 49 N.Y.2d at 562; s*ee also Ellen v. Lauer*, 210 A.D.2d 87, 90 (1st Dep't 1994) ("It is not enough that the party opposing summary judgment insinuate that there might be some question with

respect to a material fact in the case. Rather, it is imperative that the party demonstrate, by evidence in admissible form, that an issue of fact exists …"). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

I. Affidavits of the Parties

Initially, the Court notes that many of the Plaintiff's factual contentions are brought by affidavit. Many of the statements in both Plaintiffs and Defendant's affidavits are utterly without supporting documentation and are conclusory. *See e.g. Doherty Affid.* ¶¶*4, 7, 13* (conclusory stating that Gasarch "either lied to this Court . . . or lied to investors); *Spence Affid.* ¶¶*7, 9* (noting that he supervised the preparation of the chart listed as Exhibit 3, and that the number of wells developed are reflected in the Official Records of the Republic of Trinidad and Tobago, without affixing any of the official records), ¶ 17 (conclusory statement that the Defendant committed a fraud), ¶23 (conclusory statement that an analysis confirms the fraudulent practice); ¶29 (conclusory statement that non-party Eaton & Van Winkle engaged in deceptive practices), ¶31 (conclusory statement "I have been defrauded. I have lost my investment. I have incurred substantial obligations as a result of Gasarch's repeated lies to me and to others. I request a trial to prove my damages). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient. *See Zuckerman v. City of New York*, 49 N.Y.2d at 562.

"The proponent of summary judgment must eliminate material issues of fact by producing evidentiary proof in admissible form. . . . It is only the party opposing summary judgment who may, in the alternative, demonstrate acceptable excuse for his failure to meet the

strict requirement of tender in admissible form." *See Finkelstein v. Cornell Univ. Med. Coll.*, 269 A.D.2d 114, 117 (1st Dept 2000).

Here, questions as to whether statements made by the parties are admissible are apparent throughout their submissions. For example, Plaintiff Spence purportedly conducted an analysis of prior monthly operations summaries. *See Spence Affid.* ¶*23*. He has not otherwise proffered foundational evidence that he is an expert able to render an expert opinion on the issue, what methods he purportedly used to render an analysis. *See Gerber Trade Fin., Inc. v. Skwiersky, Alpert & Bressler, LLP*, 12 A.D.3d 286, 286-287 (1st Dep't 2004) (holding the expert's opinion was conclusory, speculative and beyond the scope of expert opinion where the conclusions were "unsupported by facts, they are dependent on his personal opinion rather than on accounting principles and are at odds with the uncontradicted testimony"). Similarly, Gasarch occasionally relies upon his own prior affidavits, without further evidentiary support, in support of his summary judgment motion. *See e.g.* Gasarch Affirm. Exs. F, K. The insufficiency of these submissions either warrants a finding that a material issue of fact exists, at a minimum, or a finding in favor of the Defendant as a matter of law. The Court will, therefore, analyze the remaining arguments to determine whether material issues of fact exist.

II. Plaintiffs' Claims for Fraud

In motion sequence 024, Doherty and Spence move for summary judgment in their favor on their fraud claims against Gasarch. In motion sequence 025, Gasarch moves for summary judgment dismissing the fraud claims of each remaining plaintiff, as against him.[3]

In a claim for fraud, "there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury" *GoSmile, Inc. v Levine*, 81 A.D.3d 77, 81 (1st Dept 2010). Such a fraud claim requires proof of "actual pecuniary loss". *McDonald v. McBain*, 99 A.D.3d 436, 437 (1st Dept 2012).

> "To establish a fraud claim, a plaintiff must demonstrate that a defendant's misrepresentations were the direct and proximate cause of the claimed losses. To establish causation, plaintiff must show both that defendant's misrepresentation induced plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiff complains (loss causation)." *See Vandashield Ltd. v Isaacson*, 146 A.D.3d 552, 553 (1st Dept 2017).

When a claim sounds in fraud, the measure of damages is "indemnity for the actual pecuniary loss *sustained* as the direct result of the wrong." *See Connaughton v. Chipotle Mexican Grill, Inc.*, 135 A.D.3d 535, 538 (1st Dept 2016), *aff'd* 29 N.Y.3d 137 (2017). "In other words, damages are calculated to compensate plaintiffs for what they lost because of the fraud, not for what they might have gained in the absence of fraud." *Id.*

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[3] The fraud claims brought by plaintiffs Coast To Coast Energy, Inc. and Coast To Coast Drilling Partners I, II, III, IV, V, VI and VIII were dismissed in the Prior Order.

A. Threshold Determination of Alter Ego

The threshold determination, in this instance, is whether the Plaintiff has proven the fraud claims alleged apply to Gasarch, individually, or in his capacity as an officer of PSNY, or both. To the extent that the fraud claims are alleged against Gasarch in his corporate capacity, the court must also determine whether it may pierce PSNY's corporate veil in order to hold Gasarch liable for any of PSNY's corporate obligations.

1. Claims against Gasarch, individually

At the January 31, 2018 oral argument, counsel for plaintiff explicitly acknowledged that Gasarch "is being sued not because he is Mark Gasarch. He is being sued because he was an officer of [PSNY]". *See Tr. 27:20 – 27:28:5* (January 31, 2018) (Rachel C. Simone, CSR). In view of this admission by plaintiff's counsel, Gasarch is entitled to summary judgment dismissing the fraud claims against him to the extent that they are alleged against him in his individual capacity.

2. Claims against Gasarch, as an officer of PSNY

The entirety of the fraud claims against Gasarch rest upon a finding that he is an alter ego of PSNY. In order to establish alter ego liability sufficient to pierce the corporate veil, the complaining party must "establish that the owners of the entity, through their domination of it, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against the party asserting the claim such that a court in equity will intervene." *See Tap Holdings, LLC v. Orix Finance Corp.*, 109 A.D.3d 167, 174 (1st Dep't, 2013) *citing Morris v.*

N.Y. State Dep't of Taxation & Fin., 82 N.Y.2d 135 (1993); *see also Baby Phat Holding Co., LLC v. Kellwood Co.*, 123 A.D.3d 405, 407 (1st Dep't 2014) (noting that stating a claim under a theory of alter ego requires a demonstration of complete domination with respect to the transaction attacked).

In determining whether the corporation was completely dominated by another, the Court may consider factors such as "the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the alleged dominated corporation; whether the corporations are treated as independent profit centers; and the payment or guarantee of the corporation's debts by the dominating entity ... [n]o one factor is dispositive." *Tap Holdings, LLC*, 109 A.D.3d at 174.

a. Failure to Adhere to Corporate Formalities

Gasarch argues that the record before the court is devoid of any evidence that he failed to adhere to corporate formalities with respect to PSNY. In support of this argument, Gasarch cites to his own affidavit, Gasarch Affid. Ex. K, wherein he states that he was the president, director and sole shareholder of PSNY. Based on this status, Gasarch attests that PSNY maintained its own bank account, which was separate from his personal bank account, and that PSNY filed its own tax returns. *See* Doherty Affid. Ex. 11 (submitting a 2007 tax return).

Plaintiffs make reference to several documents evidencing Gasarch's purported failure to observe corporate formalities in other actions. One such document is the complaint in an action captioned *Eaton & Van Winkle, LLP v. John Wampler, et. al.*, Index No. 102517/2011 (Sup Ct,

NY County), wherein the plaintiff, who is the former counsel for Gasarch and/or PSNY, alleges, "upon information and belief," that PSNY is an alter ego of Gasarch, and that Gasarch operated PSNY in violation of the corporate form. *See* Doherty Affid. Ex. 18.[4] "The burden upon a party opposing a motion for summary judgment [however] is not met merely by a repetition or incorporation by reference of the allegations contained in pleadings or bills of particulars, verified or unverified." *See Indig v. Finkelstein*, 23 N.Y.2d 728, 729 (1968). Therefore, the Court discounts these additional submissions as improper.

This action is based on an alleged fraudulent inducement for investments occurring from 2003-2008. *See TAC* ¶198. No evidence has been presented that Gasarch did not adhere to corporate formalities, rather, at a minimum Gasarch adhered to those formalities by filing separate tax returns. *See* Doherty Affid. Ex. 11.

b. Inadequate Capitalization

Gasarch argues that the record contains evidence that PSNY was sufficiently capitalized, having over $8 million in capital on hand at the time of the alleged fraud. In support, he relies on a 2013 decision in the matter of *Securities and Exchange Commission v Petro-Suisse Ltd. and Mark Gasarch,* 2013 WL 5348595 *1 (SDNY, Sept. 25, 2013) (Nathan, J.), which approved a consent judgment that directed that PSNY and Gasarch pay $8,370,000 in disgorgement, "or all of the proceeds that they obtained by selling partnership interests in the 21 Charged Offerings. It

[4] Notably, moving plaintiffs' counsel has referred to a "sworn statement" and/or an affidavit/affirmation from Gasarch's former attorney, Robert Churchill of Eaton & Van Winkle (Moving plaintiffs' counter statement of material facts, at 6; January 31, 2018 court tr, at 19). However, such sworn statement, affidavit and/or affirmation is not an exhibit to plaintiffs' motion.

also provides that this obligation shall be deemed satisfied because Defendants have already disbursed $9.5 million to investors in the Charged Offerings". *See id.*; *see also* Doherty Affid. Ex. 15 (copy of an SEC Settlement). This, Gasarch reasons, shows that PSNY was able to make its payments as they came due, and was, therefore, sufficiently capitalized. In addition, PSNY's 2007 tax return shows that PSNY had over $16 million in assets. *See* Doherty Affid. Ex. 11 (2007 tax return).

In opposition, moving plaintiffs have not presented any evidence that would raise a question of fact as to whether PSNY was adequately capitalized.

c. Commingling of Assets

Gasarch argues that there is no evidence that he commingled his personal assets with those of PSNY. Specifically, the record does not include evidence of any transactions between his personal bank account and PSNY's bank account at any time.

In opposition, moving plaintiffs argue that Gasarch had more than one personal bank account, and that he may have used these additional accounts to commingle his assets with PSNYs. To that effect, Doherty stated that, at Gasarch's direction, he "periodically made deposits into [Gasarch's] personal bank account at Bank of New York . . ." *See* Doherty Affid. at ¶21. That said, Doherty does not annex any documents that support his understanding that the Bank of New York account was a personal account of Gasarch, that the money he deposited belonged to PSNY, or, for that matter, that any PSNY funds were, in fact, located in said

account.[5] Doherty's unsupported statement is merely an averment of a factual conclusion, and does not raise a question of fact as to whether Gasarch commingled his personal funds with PSNY. *See Genger v. Genger*, 123 A.D.3d 445, 447 (1st Dept 2014), quoting *Schiraldi v. U.S. Min. Prods.*, 194 A.D.2d 482, 483 (1st Dept 1993). Plaintiffs have not presented any evidence that Gasarch and PSNY's assets were commingled.

d. *Use of Corporate Funds for Personal Use*

Gasarch argues that there is no evidence in the record that he used any of PSNY's corporate funds for his personal use. Specifically, he notes that none of the bank records annexed to moving plaintiffs' affidavits list a distribution of funds from PSNY's bank accounts directly to Gasarch, or that such funds were otherwise distributed for Gasarch's own personal use.

In opposition, moving plaintiffs argue that a "Special Account" through which Gasarch is alleged to have paid himself through corporate funds, is a personal account. There is, however, ample evidence that the Special Account was not Gasarch's personal account. Plaintiff Doherty, in fact, submits the evidence that the "Special Account" was Gasarch's client escrow account, wherein he held funds that belonged to John H. Wampler, President of Petro-Suisse, and his companies. *See* Doherty Affid. Ex. 8. Pursuant to the Plaintiff's submissions, the funds held in Gasarch's escrow account were only disbursed as directed by his client John Wampler. *See id.*

[5] In addition, while plaintiffs note that they have developed a "sources and uses of funds" flow chart, to demonstrate how Gasarch intermingled funds, plaintiffs have not provided it to the court.

Moving plaintiffs have not presented any evidence that the Wampler Letter or the Gasarch Letter are inaccurate. Accordingly, moving plaintiffs have failed to articulate where or when Gasarch used PSNY's funds for his own personal use.

C. CONCLUSION

Given the foregoing, Gasarch has established his prima facie entitlement to summary judgment dismissing the fraud claim against him in his capacity as an officer of PSNY, as he has sufficiently set forth that the record is devoid of any evidence that he "abused the privilege of doing business in the corporate form" with respect to PSNY. *Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d at 142.

Thus, as moving plaintiffs have failed to provide sufficient evidence that this court should pierce PSNY's corporate veil to reach Gasarch, Gasarch is entitled to summary judgment dismissing plaintiff's fraud claims against him in his capacity as an officer of PSNY. For the same reason, Doherty and Spence are not entitled to summary judgment in their favor on that part of their motion for summary judgment that seeks relief against Gasarch in his capacity as an officer of PSNY.

1. <u>The remaining non-moving plaintiffs</u>

Plaintiffs Charles R. Barnes, Margaret M. Spence, Harry Wilmot, Donna Wilmot, Clifton C. Miller, Cristina Garces-Barnes, Wesley Shreve, Ira Russack, Mark A. Gonsalves and Joseph Giordano have not opposed Gasarch's motion. Therefore, as Gasarch has established his prima facie entitlement to judgment dismissing the fraud claims against him in both his individual and

corporate capacities, Gasarch is entitled to dismissal of the fraud claims alleged against him by these non-moving plaintiffs.

DECISION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion of plaintiffs Lawrence J. Doherty (Doherty) and William Spence (Spence) (motion sequence number 024), pursuant to CPLR 3212, for partial summary judgment in their favor as to liability on the fraud claim against defendant Mark Gasarch (Gasarch), is denied; and it is further

ORDERED that Gasarch's motion (motion sequence 025), pursuant to CPLR 3212, for summary judgment dismissing the complaint as against him is granted, with costs and disbursements to him, as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly in favor of Gasarch; and it is further

ORDERED that the remainder of this action is severed and shall continue; and it is further

ORDERED that the remaining parties shall contact the Part 3 clerk to schedule a status conference.

Dated: December 18, 2018

ENTER:

Eileen Bransten

HON. EILEEN BRANSTEN
J.S.C.