Forefront Partners LLC v Omanoff
2019 NY Slip Op 30306(U)
February 10, 2019
Supreme Court, New York County
Docket Number: 650973/2017
Judge: Jennifer G. Schecter
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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FOREFRONT PARTNERS LLC,

Plaintiff,

-against-

RODNEY OMANOFF, OMANOFF AMERICA TELECOM, LLC, BRENDAN ROSS, MARK PROTO, MUDMONTH, LLC, JOSEPH RAHMAN a/k/a YOUSSEF RAHMAN, CHRISTOPHER LARA, INTOUCH TELECOM, INC., DLI TC, LLC, VOIP GUARDIAN PARTNERS I LLC, VOIP GUARDIAN LLC, DIRECT LENDING INVESTMENTS LLC, and DIRECT LENDING INCOME FUND, L.P.,

Defendants,

-and-

TALKING CAPITAL LLC, TALKING CAPITAL PARTNERS II, LLC, and TALKING CAPITAL PARTNERS III, LLC,

Nominal Defendants.

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DLI TC, LLC,

Counterclaim/Third-Party Plaintiff,

-against-

FOREFRONT PARTNERS LLC, TALKING CAPITAL LLC, TALKING CAPITAL PARTNERS II, LLC, TALKING CAPITAL PARTNERS III, LLC,

Counterclaim Defendants,

-and-

TALKING CAPITAL PARTNERS I, LLC, and TALKING CAPITAL PARTNERS IV, LLC,

Third-Party Defendants.

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Index No.: 650973/2017

DECISION & ORDER

JENNIFER G. SCHECTER, J.:

Plaintiff Forefront Partners LLC (Forefront) moves by order to show cause for leave to file a proposed second amended complaint (the PSAC, *see* Dkt. 223 [redline]). Defendants Rodney Omanoff (Omanoff), Omanoff America Telecom, LLC (OAT), Mark Proto, Mudmonth, LLC (Mudmonth), Joseph Rahman, VoIP Guardian LLC, and VoIP Guardian Partners I LLC (collectively, the Omanoff Defendants) oppose the motion. Defendants DLI TC, LLC, Direct Lending Investments, LLC, Direct Lending Income Fund, L.P. and Brendan Ross (collectively, the DLI Defendants) separately oppose the motion and cross-move to stay discovery and for costs. Forefront opposes the cross-motion. Forefront's motion and the DLI Defendants' cross-motion are granted in part.

Familiarity with this action is assumed, the details of which are extensively set forth in the court's February 23, 2018 decision on defendants' motions to dismiss and are not repeated here (Dkt. 129 [the MTD Decision]).[1] In short, Forefront sues its fellow members and business partners in Talking Capital, LLC (the Company), a Delaware LLC, for violating their contractual and fiduciary obligations not to compete with the Company. Allegedly, the Omanoff Defendants formed the VoIP Companies as a competing telecommunications factoring business and the DLI Defendants breached their contractual exclusivity obligations to the Company by funding the VoIP Companies.

Defendants filed answers and counterclaims on March 30, 2018 (Dkts. 136, 139). A preliminary conference was held in April 2018. Since that time, discovery has stalled for a variety of reasons, including a change in Forefront's counsel and allegations that the

[1] Capitalized terms not defined herein have the same meaning as in the MTD Decision.

individual who controls Forefront, non-party Bradley Reifler, destroyed documents. The alleged spoliation and other issues affecting the viability of this action are the subject of two motions that have not yet been fully briefed and will be addressed at a later date (*see* Dkts. 308, 356). In the interests of efficiency, ESI discovery was put on hold pending a decision on this motion (*see* Dkt. 239 [11/13/18 Tr.]).

On December 13, 2018, Forefront moved for leave to amend to assert the following proposed derivative causes of action: (1) aiding and abetting breach of fiduciary duty against the VoIP Companies, OAT, Mudmonth, Contacts and Contracts Inc. (CCI) and Omanoff America, LLC (OAL), based on the VoIP Companies' competition with the Company; (2) breach of the fiduciary duty of loyalty against Omanoff based on his alleged failure to offer DLI TC the opportunity to participate in the Bolotel Transactions in contravention of DLI TC's right of first refusal under section 2 of the PSA; (3) tortious interference with contract (the PSA)[2] against Omanoff, Proto, Rahman, OAT, Mudmonth, CCI, OAL, and the VoIP Companies based on DLI TC funding the VoIP Companies in contravention of the restrictive covenant in section 18 of the PSA; and (4) breach of the fiduciary duty of care based on gross negligence (so as to

[2] Unlike the Operating Agreement and the claims concerning the internal affairs of the Company and the Subsidiaries, the PSA and all claims related to it are governed by New York law (*see* MTD Decision at 6). Thus, the tortious interference with contract claim is governed by New York law.

not be precluded by the Operating Agreement's exculpatory clause) against Omanoff, Proto and Rahman based on their due diligence of the Bolotel Transactions.[3]

On February 7, 2019, the Appellate Division affirmed this court's determinations that (1) the Operating Agreement does not preclude Forefront from maintaining this derivative action; (2) Forefront stated a claim for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and loss of corporate opportunities; and (3) the conflicting allegations in the first two iterations of the complaints are not grounds for dismissal (*Talking Capital LLC, v Omanoff*, 2019 WL 469893 [1st Dept Feb. 7, 2019]).[4] The Appellate Division also, however, held that (1) OAT and Mudmonth could not be sued for breach of fiduciary duty merely based on their status as members; and (2) the VoIP Companies were improperly named as defendants because Forefront only sought injunctive relief against them without having asserted any predicate cause of action (*see id.* at *1-2). The Appellate Division's decision does not impact Forefront's motion for leave to amend, as none of the proposed new claims contravene the Appellate Division's holdings. On the contrary, those holdings conclusively refute certain arguments raised by defendants in opposition. None of the new claims are predicated on OAT and Mudmonth having themselves committed breaches of fiduciary duty (as opposed to aiding and

[3] Plaintiff is permitted "to add additional particularity regarding the formation and ownership of the VoIP Companies" in support of its claim for misappropriation of corporate opportunity, which this court already determined was sufficiently pleaded (Dkt. 237 at 19; MTD Decision at 27-30; *see Kimso Apts. LLC v Gandhi*, 24 NY3d 403, 411 [2014] [parties may amend to conform pleadings to the proof]).

[4] Not all of the holdings in the MTD Decision were appealed (such as the court's determinations related to personal jurisdiction and the original iteration of the Bolotel claim).

abetting the other breaches the Appellate Division found to be well pleaded). Moreover, while the VoIP Companies are again named as defendants, this time, Forefront has remedied its prior pleading deficiency by actually asserting substantive causes of action against them (aiding and abetting breach of fiduciary duty and tortious interference with contract).

Turning now to the standard for determining whether to grant leave to amend, it is well settled that amendments should be permitted unless they are clearly devoid of merit or would cause undue prejudice (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]). As discussed below, all but the proposed Bolotel claim have potential merit. Additionally, because the case is in its infancy, there is no prejudice.

The proposed aiding and abetting claim is based on the allegation that "the competing VoIP Defendants were actually owned and/or controlled by the Manager Defendants [Omanoff, Proto and Rahman], and as such the companies were aware of the relationship between the Manager Defendants and [the Company] and the Subsidiaries" (Dkt. 237 at 17). CCI and OAL, two entitles of which Omanoff is a director, are named as new defendants on this claim because they are allegedly members of VoIP Guardian LLC.[5]

[5] "The Omanoff Defendants' document production also includes the Operating Agreement[s] of [the VoIP Companies]. These documents make clear that not only did Omanoff, Proto and Rahman own the competing [VoIP] Defendants indirectly through their various companies, but that Omanoff and Proto signed documents in their capacities as directors of OAT, [CCI], [OAL], and Mudmonth" (Dkt. 237 at 15-16). To be sure, if CCI and OAL were mere passive investors in the VoIP Companies and were not controlled by the very individual who allegedly committed the underlying breach of fiduciary duty (Omanoff), the court would agree that these entities

Defendants argue that Forefront fails to plead "knowing participation" in the breach of fiduciary duty (*Malpiede v Townson*, 780 A2d 1075, 1096 [Del 2001], *see RBC Capital Markets, LLC v Jervis*, 129 A3d 816, 866 n 192 [Del 2015] [collecting cases explaining that scienter must be proven]).[6] That contention is baseless. Forefront clearly pleads,[7] and quite plausibly so, that Omanoff, Proto and Rahman knew about their fiduciary duties to the Company and that by forming and operating a competing company,[8] they caused a breach of such duties (*see Mesirov v Enbridge Energy Co.*, 2018 WL 4182204, at *13 [Del Ch Aug. 29, 2018] ["complaint must plead facts that allow a reasonable inference that the aider and abettor acted knowingly, intentionally or with reckless indifference"]). Their knowledge is imputed to the companies they manage (*Kirschner v KPMG LLP*, 15 NY3d 446, 465 [2010] ["acts of agents, and the knowledge

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could not have provided substantial assistance (*see* Dkt. 240 at 18). But they are controlled by Omanoff; thus, a reasonable inference may be drawn that they were necessary for Omanoff's breaches.

[6] *Jervis* makes clear that it is not enough to prove a failure "to prevent directors from breaching their duty of care," but that active misconduct is required (*see id.* at 865).

[7] The Omanoff Defendants' contention that this claim lacks the requisite specificity is baseless. Indeed, in support of this argument, they misleadingly block-quote from a portion of the MTD Decision where the court dismissed a different aiding and abetting claim regarding different subject matter (e.g., "calls routed by Bolotel") against different defendants (*see* Dkt. 240 at 17). By contrast, as discussed, Forefront's new aiding and abetting claim explains exactly how each of the defendants helped cause the wrongful competition that forms the basis of the underlying breach of fiduciary duty claim.

[8] Notwithstanding their arguments in opposition to this motion, in their motion seeking to disqualify Forefront from serving as a derivative plaintiff, the Omanoff Defendants appear to concede that they knew and intended to leave to work for a competing company (*see* Dkt. 308 at 7 [stating this case "concerns disputes about an investment whose losses allegedly damaged the (Company) seriously and ***a decision by Defendants to allegedly leave that unsuccessful company and start a new venture without Reifler and his firm" Forefront"***] [emphasis added]).

they acquire while acting within the scope of their authority are presumptively imputed to their principals"]; *see In re PLX Tech. Inc. Stockholders Litig.*, 2018 WL 5018535, at *2 [Del Ch Oct. 16, 2018] [co-managing member's knowledge and actions imputed to entity he managed "for purposes of the knowing participation element of a claim for aiding and abetting"]).[9] Those companies allegedly provided substantial assistance to the breaches committed by Omanoff, Proto and Rahman by forming and managing the VoIP Companies (*see Talking Capital*, 2019 WL 469893, at *2 ["Given the DLI defendants' intimate relationship with the Company, the complaint sufficiently alleges that these defendants had reason to believe that they were aiding and abetting the manager defendants' breach of fiduciary duty in funding the new competing business"]). Even more clearly, the VoIP Companies themselves allegedly provided substantial assistance by actually competing with the Company.[10]

Next, the proposed claim against Omanoff for breaching his duty of care by failing to offer DLI TC the opportunity to participate in the Bolotel Transactions is not clearly devoid of merit. Omanoff is plausibly alleged to have been aware of DLI TC's right of first refusal but nonetheless made the intentional decision to cause TCP II to breach its obligations under section 2 of the PSA by deliberately choosing not to tell DLI TC about

[9] "Knowing" modifies "'participation,' not breach" . . . [and thus the] underlying wrong does not have to be knowing or intentional" (*In re PLX Tech. Inc. Stockholders Litig.*, 2018 WL 5018535, at *47).

[10] As noted, the Appellate Division *did not* hold that the VoIP Companies could not face liability based on Forefront's allegations, but only that they were improperly sued based on a requested remedy rather than an actual cause of action. The current amendment cures this defect.

the deal. This constitutes intentional misconduct and is not exculpated under the Operating Agreement.[11] Thus, if DLI TC prevails on its defense to its own breach of contract due to TCP II's prior breach, Omanoff might be held liable for the consequences of TCP II's breach.

As for Forefront's proposed tortious interference with contract claim, it was expressly contemplated in the MTD Decision:

> [B]y working with Ross on behalf of the VoIP Companies, the Manager Defendants are helping DLT TC violate the PSA's restrictive covenants. Even if the Company had no claim for breach of fiduciary duty for the alleged wrongful competition, TCP II could still sue the Omanoff Defendants for causing the wrongful competition prohibited by section 18 of the PSA. But as noted earlier, ***Forefront does not plead a cause of action for tortious interference with contract*** (*id.* at 29 [emphasis added]).

Forefront now seeks to do so. To state a claim for tortious interference with contract, a plaintiff must plead "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the

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[11] To the extent defendants again argue that Forefront's allegations concerning the actions and knowledge of Omanoff and the DLI Defendants are inconsistent with allegations in the original complaint, the court has already explained why such allegedly conflicting allegations cannot defeat the claim as a matter of law (*see* MTD Decision at 8-9 n 12) and the Appellate Division expressly affirmed this holding (*see Talking Capital*, 2019 WL 469893, at *2 [the "purported contradiction between the original complaint and the amended complaint is not a basis for dismissal. Rather, the original allegations are simply informal judicial admissions, entitled to evidentiary weight but not dispositive"]). That the allegations conflict with other allegations in the PSAC does not render them legally devoid of merit (CPLR 3014; *see WL Ross & Co. v Storper*, 156 AD3d 514, 516 [1st Dept 2017] [plaintiff "can properly plead alternative arguments, as well as take hypothetical or inconsistent positions in asserting its claims"]). Only discovery will show if, when and how Omanoff presented the Bolotel Transactions to DLI TC (*see* MTD Decision at 9 n 13) and Forefront is permitted to plead in the alternative (*see PK Rest., LLC v Lifshutz*, 138 AD3d 434, 438 [1st Dept 2016]).

contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996]). The causation of damages element requires allegations "that the contract would not have been breached 'but for' the defendant's conduct" (*Carlyle, LLC v Quik Park 1633 Garage LLC*, 160 AD3d 476, 477 [1st Dept 2018]). The Omanoff Defendants contend that Forefront did not plead that their conduct was the "but for" cause of the alleged breach of the PSA (*see BGC Partners, Inc. v Avison Young [Canada] Inc.*, 160 AD3d 407 [1st Dept 2018], citing *Cantor Fitzgerald Assocs., L.P. v Tradition N. Am., Inc.*, 299 AD2d 204 [1st Dept 2002]). They are wrong. Forefront alleges that the very reason the DLI Defendants breached section 18 of the PSA was because the Omanoff Defendants asked them to fund the VoIP Companies' factoring deals just as they had previously funded the Company's deals. Based on these allegations in the PSAC, but for the Omanoff Defendants' solicitation of the DLI Defendants' breach, it would not have occurred.

Forefront, however, still has not pleaded a non-exculpated claim in connection with the Bolotel Transactions. In the MTD Decision, the court set forth problems with how this claim was pleaded and concluded that: [12]

> The AC does not clearly explain what exactly the Omanoff Defendants did wrong. The AC's pattern of group pleading inhibits the court from understanding who exactly did what. Nor is it clear whether Forefront is alleging a *Caremark* claim or some sort of conspiracy claim involving Ross. The former is likely extremely difficult to plead given the Operating Agreement's exculpatory clause, while the latter seems nonsensical for the

[12] *See also* MTD Decision at 8 ("The circumstances of the Bolotel Transactions are not explained with much detail in the AC other than with general allegations implying impropriety on the part of Manager Defendants, who supposedly failed to consider the bankruptcy").

> reasons discussed earlier. Nevertheless, the court will permit Forefront to move for leave to amend if it can plead these possibly non-exculpated claims with the requisite specificity (*id.* at 26-27).

The PSAC does not sufficiently remedy these defects. It supposedly "include[s] information regarding the normal business operation for [the Bolotel Transactions] and specific allegations regarding the incomplete finance application and insufficient supporting information submitted for the Bolotel Transactions" (Dkt. 237 at 19). But at bottom, all the PSAC alleges is that Bolotel's credit application lacked sufficient information about its telecommunications contractual counterparty, AVP, whose receivables were impaired by the bankruptcy of AVP's parent company, Logica (PSAC ¶¶ 57-64; *see* MTD Decision at 8). While perhaps it was negligent for the Company's managers to fail to vet this information before lending money to Bolotel, the PSAC does not allege any facts permitting a reasonable inference of gross negligence (*Colnaghi, U.S.A., Ltd. v Jewelers Protection Servs., Ltd.*, 81 NY2d 821, 823-24 [1993] [gross negligence "differs in kind, not only degree" from ordinary negligence and involves "reckless disregard for the rights of others or 'smacks' of intentional wrongdoing"]; *see Brown v United Water Delaware, Inc.*, 3 A3d 272, 276 [Del 2010], citing *Browne v Robb*, 583 A2d 949, 953 [Del 1990] [gross negligence rises to the level of "'an extreme departure from the ordinary standard of care'"]).[13] Pleading gross negligence

[13] "New York law is essentially the same as Delaware law for the tort claims of gross negligence and willful misconduct" (*Coco Investments, LLC v Zamir Manager River Terrace, LLC*, 26 Misc 3d 1231[A], at *6 [Sup Ct, NY County Mar. 3, 2010] [collecting cases]). Forefront's moving brief mentions "gross negligence" five times; yet, it fails to cite any case law demonstrating that the standard has been met here.

successfully requires "articulation of facts that suggest ***a wide disparity*** between the process the directors used ... and that which would have been rational" (*Guttman v Huang*, 823 A2d 492, 507 n 39 [Del Ch 2003] [emphasis added]). It involves "a devil-may-care attitude or indifference to duty amounting to recklessness" and a plaintiff must plead facts demonstrating that "the defendant was recklessly uninformed or acted outside the bounds of reason" (*Metro. Life Ins. Co. v Tremont Group Holdings, Inc.*, 2012 WL 6632681, at *7 [Del Ch Dec. 20, 2012] [citations omitted]). Here, at most, Forefront has pleaded facts suggesting that the Manager Defendants did an inadequate job vetting the Bolotel Transactions. It does not allege any specific conduct that permits a reasonable inference of intentional misconduct or conduct outside the bounds of reason.

Finally, because the motions to disqualify Forefront and for spoliation sanctions could result in the dismissal of this action, a brief stay pending their determination makes sense.[14]

Accordingly, it is

ORDERED that Forefront's motion for leave to amend is granted in part to the extent that, within one week, it may file a second amended complaint containing all proposed claims in the PSAC other than the proposed breach of fiduciary duty claim concerning the Bolotel Transactions; and it is further

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[14] This is no reflection on the merits of the motions, which have not been reviewed.

ORDERED that the DLI Defendants' cross-motion is granted only to the extent that discovery is stayed pending the March 5, 2019 oral argument on defendants' motions, and the cross-motion is otherwise denied.[15]

Dated: February 10, 2019

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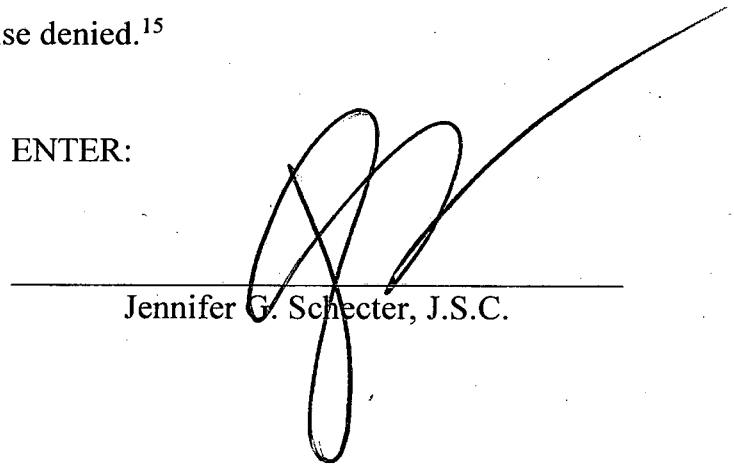

Jennifer G. Schecter, J.S.C.

[15] Defendants' requests for costs is denied as, for the most part, plaintiff's motion is granted.