

<b>Iacovacci v Brevet Holdings, LLC</b>
2019 NY Slip Op 33651(U)
December 16, 2019
Supreme Court, New York County
Docket Number: 158735/2016
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH

PART IAS MOTION 18EFM

Justice

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INDEX NO. 158735/2016

PAUL IACOVACCI,

MOTION DATE 11/12/2019

Plaintiff,

MOTION SEQ. NO. 023

- v -

BREVET HOLDINGS, LLC, BREVET SHORT DURATION PARTNERS, LLC, BREVET SHORT DURATION HOLDINGS, LLC

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 023) 814, 815, 816, 817, 818, 819, 820, 821, 858, 859, 860, 861, 862, 863, 864, 865, 877, 878, 879, 880, 881, 882, 883

were read on this motion to/for AMEND CAPTION/PLEADINGS

Upon the foregoing documents, plaintiff moves for leave to amend his complaint to assert claims against Douglas Monticciolo, Mark Callahan, and John Tripp, individually and in their capacity as members of the defendant companies; as well as Johnny Lan and "John" and "Jane" "Does."

"Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit" (Y.A. v Conair Corp., 154 AD3d 611, 612 [1st Dept 2017]). "[A] motion for leave to amend is committed to the broad discretion of the court" (Yong Soon Oh v Hua Jin, 124 AD3d 639, 640 [2d Dept 2015]; see Verizon New York, Inc. v Consol. Edison, Inc., 38 AD3d 391 [1st Dept 2007]).

The Court agrees with defendants that plaintiff does not state a valid basis for asserting claims against Monticciolo, Callahan, and Tripp in the causes of action where they served as nothing more than as agents for the companies or were otherwise acting within the scope of their

employment. This applies to the plaintiff's proposed third, fourth, sixth, seventh, eighth, ninth,<sup>1</sup> twelfth, thirteenth, and fourteenth causes of action. Most of these proposed claims fail for the additional reason that they do not contain any new allegations against the newly proposed defendants, including those asserted against Lan and the Does. This is especially true for the fraud and conspiracy to commit fraud claims (count eight and nine), which require particular allegations under a heightened pleading standard. There are no new allegations of the "circumstances constituting the wrong[s]" committed by any of the proposed defendants individually as required by CPLR 3016.<sup>2</sup> The Court finds that the general "scheme" alleged by plaintiff is insufficient to add these defendants when compared to the already existing allegations against the companies.

The Court similarly agrees with defendants that the proposed amendment should not be granted with respect to the fifth count for tortious interference against Lan and the Does. Glaringly deficient from plaintiff's proposed pleading are allegations that Lan's actions caused the breach of the agreements, which is an element of the claim.

However, the plaintiff's proposed amendments to add counts ten and eleven are not devoid of merit to the extent that they are asserted against other members of the companies: Monticciolo, Callahan and Tripp. Those portions of the two claims asserted against Lan and the Does is denied as they are not members and did not owe plaintiff any duty based on the cited portions of the agreements. The case law that plaintiff cites to hold Lan liable on this claim is

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<sup>1</sup> If the fraud claim cannot be maintained against the newly proposed defendants, then there cannot be any conspiracy to defraud involving them (see Alexander & Alexander of New York, Inc. v Fritzen, 68 NY2d 968, 969 [1986] ["Allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort"]).

<sup>2</sup> The only new allegations constituted a further elaboration of plaintiff's damages (see ¶ 136), which were not discussed by either side.

inapposite and only states that an officer or director owes fiduciary duties to the corporation and other corporate shareholders — it does not state that an officer owes such duties to others individually (see Glob. Minerals and Metals Corp. v Holme, 35 AD3d 93, 98 [1st Dept 2006]).

Accordingly, it is ORDERED that the plaintiff's motion for leave to amend the complaint is granted, in part, as follows: leave is granted as to the proposed tenth and eleventh counts, along with certain allegations that have nothing to do with the newly proposed defendants, and, to this extent, the proposed amended complaint in the form annexed to the moving papers shall be deemed served upon the existing defendants upon service of a copy of this order with notice of entry; and it is further

ORDERED that leave to amend the complaint is otherwise denied and those causes of action asserted against any newly proposed defendants are stricken; and it is further

ORDERED that a supplemental summons and amended complaint shall be served, in accordance with the Civil Practice Law and Rules, upon the additional parties in this action within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the action shall bear the following caption:

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PAUL IACOVACCI,	Plaintiff,	INDEX NO.:
-against-		158735/2016
BREVET HOLDINGS, LLC, a Delaware Limited Liability Company, BREVET SHORT DURATION PARTNERS, LLC, f/k/a Brevet Capital Partners III, LLC, a Delaware Limited Liability Company, BREVET SHORT DURATION HOLDINGS, LLC, f/k/a Brevet Capital Holdings III, LLC, a Delaware Limited Liability Company, BREVET CAPITAL PARTNERS, LLC, a Delaware Limited Liability Company BREVET CAPTIAL HOLDINGS, LLC, a Delaware Limited Liability Company, DOUGLAS MONTICCIOLO, MARK CALLAHAN, and JOHN TRIPP,		
	Defendants.	

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And it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being added pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (ww.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.

12/16/2019

DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE