Black Pearl Global Opportunity Fund v Summit Equities LLC
2020 NY Slip Op 30019(U)
January 2, 2020
Supreme Court, New York County
Docket Number: 655992/2016
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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BLACK PEARL GLOBAL OPPORTUNITY FUND, Index No.: 655992/2016

Plaintiff, **DECISION & ORDER**

-against-

SUMMIT EQUTITES LLC, EVAN SEIDEN, and APOGEE INVESTMENTS, INC.,

Defendants.

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JENNIFER G. SCHECTER, J.:

Motion sequence numbers 007 and 008 are consolidated for disposition.

Defendant Summit Equities, LLC (Summit) moves to vacate the default judgment entered against it. Plaintiff Black Pearl Global Opportunity Fund (BPGOF) opposes the motion and separately moves to dismiss Summit's counterclaims. Summit's motion is denied and plaintiff's motion is granted.

Motion to Vacate the Default Judgment

By order dated March 25, 2019, the court granted plaintiff's motion for a default judgment against Summit (Dkt. 125 [the Decision]).[1] The Decision explains Summit's deliberate determination not to answer the amended complaint or provide discovery and that Summit's proposed defenses were devoid of merit (*id.* at 1-9). Nothing raised by Summit now justifies deviating from these conclusions. There is no doubt that Summit, represented by able counsel, deliberately defaulted. It chose not to answer despite being informed by opposing counsel that it was in default. The argument that prior counsel was

[1] Judgment was entered on June 5, 2019 (Dkt. 134).

ineffective is uncompelling based on the court's experience overseeing this case. Indeed, among the many attorneys that have represented defendants, prior counsel was the most effective at litigating the case. They were responsible for the bulk of discovery occurring notwithstanding their clients' prior obstructionism. Their strategic decisions, including permitting Summit to default, are eminently understandable, especially given the clear lack of merit in the claims that Summit now seeks to assert. It is not ineffective to forego clearly baseless arguments. For the reasons set forth in the Decision and those that follow, Summit has no meritorious claim or defense. Thus, there is no basis to vacate the default judgment (*ICBC Broad. Holdings-NY, Inc. v Prime Time Advert., Inc.*, 26 AD3d 239, 240 [1st Dept 2006]; *see Time Warner City Cable v Tri State Auto, Inc.*, 5 AD3d 153 [1st Dept 2004]).[2]

Motion to Dismiss the Counterclaims

After entry of the default judgment, all that remained to be litigated were the fraudulent conveyance claims asserted against defendant Evan Seiden. After plaintiff was finally provided with all of its requested discovery, on consent (*see* Dkt. 147), plaintiff filed a second amended complaint on June 28, 2019 that conforms the pleadings to the proof and adds a fraud claim (Dkt. 148). On August 10, 2019, Seiden filed an

[2] Newly discovered evidence is not a basis to vacate the judgment. Such evidence would not have resulted in a different outcome because Summit's claims fail on the merits (*see Olwine, Connelly Chase, O'Donnell & Weyher v Valsan*, 226 AD2d 102, 103 [1st Dept 1996] [judgment should only be vacated if newly discovered evidence "would probably change the result previously reached"]). Nor is plaintiff's second amended complaint, which was filed after the default judgment, a basis to vacate the judgment. Summit does not cite any authority for the proposition that a default must be vacated if the complaint against the non-defaulting defendant is amended. That would afford an undeserving defaulting party with a windfall and makes no sense.

answer that asserts nine counterclaims: (1-4) fraud; (5-6) tortious interference with contract; (7) breach of contract; (8) promissory estoppel; and (9) prima facie tort (Dkt. 150). Seiden admits that the second, fourth, sixth, and seventh counterclaims are asserted on behalf of Summit (*see* Dkt. 166 at 7-8). Plaintiff now moves to dismiss the counterclaims.

The claims asserted on behalf of Summit must be dismissed. Summit is no longer a party to this action and thus cannot assert counterclaims (CPLR 3019[a]; *see Bramex Assocs., Inc. v CBI Agencies, Ltd.*, 149 AD2d 383 [1st Dept 1989]). Seiden lacks standing to assert these claims on Summit's behalf (*see Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772 [1991]). This is not a situation, such as circumstances of demand futility, where a minority member must resort to a derivative claim to vindicate the LLC's rights (*see Tzolis v Wolff*, 10 NY3d 100, 109 [2008]).[3] Rather, Seiden is simply seeking to evade the consequences of Summit's default. Seiden does not cite any authority establishing that an individual who has the legal right to commence litigation on behalf of an LLC can instead do so derivatively. Summit had every opportunity to assert counterclaims but chose not to. It opted to default and it cannot be permitted to change its mind later on. That would reward gamesmanship.

Likewise, the first, third, and eighth causes of action for fraudulent inducement of and promissory estoppel related to the Revolving Loan Agreement (the RLA) (*see* Decision at 7) are not viable because Seiden is not a party to and has no personal rights in

[3] The same is true under Delaware law, which governs Summit's internal affairs (*see Obeid v Hogan*, 2016 WL 3356851, at *16 [Del Ch June 10, 2016]).

the RLA (*see Flag Wharf, Inc. v Merrill Lynch Capital Corp.*, 40 AD3d 506, 507 [1st Dept 2007]). Nor does the RLA contain language indicating the parties' intention to make Seiden a third-party beneficiary (*see U.S. Bank N.A. v GreenPoint Mortg. Funding, Inc.*, 105 AD3d 639, 640 [1st Dept 2013]). Seiden does not cite any authority for the proposition that a member of an LLC that is not personally a party to a contract can assert fraud or quasi-contract claims based on that contract to which only his LLC is a party. Seiden is distinct from his LLC (*see Morris v New York State Dep't of Taxation & Fin.*, 82 NY2d 135, 140 [1993]). No matter his approach, Seiden cannot personally assert claims that belong exclusively to Summit.

The fifth cause of action is for tortious interference with Seiden's agreement with Apogee Investments, Inc. (Apogee), a defendant against which a default judgment was issued without opposition (*see* Decision at 9-10). Seiden alleges that he

> entered into a contract dated February 16, 2011 with Apogee regarding Apogee's investment in Summit. The agreement provided that the parties and their directors, officers, employees, affiliates and advisors **would protect the confidentiality of Summit's proprietary information** and not reveal the same to third parties. BPGOF was aware of the February 16, 2011 contract between Seiden and Apogee. BPGOF intentionally interfered with the contract **by secretly obtaining proprietary Summit information from Apogee in breach of the contract and utilizing that stolen information to advance its own financial interests** to the detriment of Seiden. The misappropriated Summit information obtained by BPGOF in breach of the contract **was utilized to create a secret unfair bargaining advantage in favor of BPGOF when dealing with Summit**. BPGOF knew it was tortiously interfering with the contract and wrongfully interfering with Seiden's rights under the contract. BPGOF knew its intentional interference with the contract would cause financial harm to Seiden. As a direct result of BPGOF's intentional interference, Summit's business operations were compromised, and Summit was left without funds to close on its pending real estate transactions, **thereby causing Seiden to**

> **lose his investment in Summit, his loans due from Summit and his anticipated profits from Summit**. BPGOF is responsible to Seiden for the damages it caused by intentionally and tortiously interfering with his contract rights (Dkt. 150 at 42-43 [emphasis added]).

These allegations do not state a claim for tortious interference with contract (*see Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996] ["Tortious interference with contract requires 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 contract, and damages resulting therefrom"]). The claim is simply a repackaged version of the previously rejected claim that plaintiff is really at fault for Summit's breach of the RLA (*see* Decision at 6-8) and seeks damages for the consequences of that breach. Seiden essentially wants plaintiff to disgorge its recovery from Summit. Regardless, the claim fails due lack of specificity about the information that was misappropriated, the dates of such misappropriation, and the involved individuals (*see 57th St. Arts, LLC v Calvary Baptist Church*, 52 AD3d 425, 426 [1st Dept 2008] ["Conclusory assertions ... are inadequate to spell out a claim here for tortious interference with contract"]). In opposition, Seiden does not provide any further detail about the supposedly proprietary information, and instead merely parrots the elements of the cause of action without providing factual support (*see* Dkt. 166 at 8, 21). The court has no idea what information plaintiffs allegedly improperly misappropriated (*see Carlyle, LLC v Quik Park 1633 Garage LLC*, 160 AD3d 476, 477 [1st Dept 2018] ["allegations were vague and

conclusory and supported by 'mere speculation'"], citing *Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006]). As plaintiff notes, it had the broad rights under the RLA to access Summit's books and records – a right that Summit violated for an extended period of time during this very litigation (*see* Dkt. 162 at 24).

Finally, the ninth cause of action is for prima facie tort. The claim is dismissed because Sedien alleges that plaintiff's actions were motivated by monetary gain (*e.g.*, Dkt. 136, ¶ 283; *see Princes Point, LLC v AKRF Eng'g, P.C.*, 94 AD3d 588, 589 [1st Dept 2012]). Thus, he has not pleaded "that disinterested malevolence was [plaintiff's] sole motive" (*Brook v Peconic Bay Med. Ctr.*, 152 AD3d 436, 439 [1st Dept 2017], citing *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983]).

Seiden's other arguments are rejected as they lack merit.

Accordingly, it is ORDERED that Summit's motion to vacate the default judgment is denied; and it is further

ORDERED that plaintiff's motion to dismiss Seiden's counterclaims is granted, the Clerk is directed to enter judgment dismissing said counterclaims, and plaintiffs' remaining claims in this action are hereby severed and shall continue.

Dated: January 2, 2020

ENTER:

Jennifer G. Schecter, J.S.C.