

Forefront Partners LLC v Omanoff
2020 NY Slip Op 30490(U)
February 21, 2020
Supreme Court, New York County
Docket Number: 650973/2017
Judge: Jennifer G. Schechter
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
FOREFRONT PARTNERS LLC,

Index No.: 650973/2017

Plaintiff,

DECISION & ORDER

-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.

-----X
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.

-----X
RODNEY OMANOFF and OMANOFF AMERICA
TELECOM, LLC,

Second Third-Party Plaintiffs,

-against-

FOREFRONT PARTNERS LLC, MICHAEL FLATLEY,
DAVID WASITOWSKI, MARGARET LESZCZYNSKA,
STEVE FICKES, CHRISTOPER E. ENGEL,
FOREFRONT CAPITAL MARKETS, LLC,
FOREFRONT CAPITAL ADVISORS, LLC,
FOREFRONT CAPITAL SERVICES, LLC,
FOREFRONT INCOME TRUST, FOREFRONT
CAPITAL HOLDINGS, LLC, and ROES 1 TO 50,

Counterclaim Defendant and
Second Third-Party Defendants.

-----X
JENNIFER G. SCHECTER, J.:

Familiarity with this action and the prior decisions is assumed.¹

After the court's March 5, 2019 decision concerning Forefront's spoliation, discovery was to proceed in earnest (*see* Dkt. 418). That did not occur. Instead, due to bankruptcy and SEC proceedings, the parties stipulated that the action would be severed and proceed at this time only against Omanoff, OAT, CCI, and OAL (collectively, the Remaining Defendants) (*see* Dkt. 497).

¹ Capitalized terms have the same meaning as in the prior decisions.

On October 3, 2019, the Remaining Defendants filed an answer to Forefront's second amended complaint in which Omanoff and OAT (collectively, the Omanoff Defendants) assert four counterclaims against Forefront and third-party claims against newly impleaded parties (Dkt. 494 [the Answer]). The counterclaims against Forefront are: (1) fraud, (2) breach of fiduciary duty, (3) breach of the Operating Agreement and (4) breach of the implied covenant of good faith and fair dealing. On November 15, 2019, Forefront moved (1) to strike the Answer due to its prolixity and inclusion of allegedly irrelevant, inflammatory information; and (2) to dismiss the counterclaims. None of the newly impleaded parties moved to dismiss.² For the reasons that follow, Forefront's motion is granted in part.

The inflammatory allegations concerning Reifler are not irrelevant to this case. Reifler has been accused of serious wrongdoing in his capacity as a Manager of the Company both here and in other litigation. These allegations are pertinent to the Remaining Defendants' defenses and counterclaims so there is no basis to strike them (*see Forty Cent. Park S., Inc. v Anza*, 130 AD3d 491, 492 [1st Dept 2015]).

Although the new claims were filed beyond the deadline set forth in the preliminary conference order, because discovery is at an early stage, permitting related claims that are central to the defense of this action will not unduly prejudice Forefront.

² The court will therefore not consider the motion to the extent it seeks dismissal of the claims against the newly impleaded parties, who only recently filed their own motion, which will be addressed after it is fully submitted.

Insisting the claims be maintained in a separate action, which would likely be marked related and coordinated with this case, makes no sense.

Turning now to the merits, Forefront seeks dismissal of the breach of fiduciary duty claim on the ground that it did not owe fiduciary duties to the other members merely by virtue of its membership in the Company (*see Talking Capital LLC v Omanoff*, 169 AD3d 423, 424 [1st Dept 2019]).³ The Omanoff Defendants do not dispute that Forefront itself lacks fiduciary duties, but instead claim that Forefront was Reifler's alter ego such that Forefront's corporate veil should be pierced to hold it liable for Reifler's breaches.⁴ The Answer pleads facts supporting a veil piercing claim (*see* Dkt. 494 at 39-40 ¶ 18), and Forefront does not challenge the sufficiency of these veil piercing allegations. Instead, Forefront argues, without citation to authority, that an individual owner cannot be held liable under a veil piercing claim for the torts of his company (*see* Dkt. 541 at 10-11). Forefront is wrong (*see, e.g., In re 91st St. Crane Collapse Litig.*, 154 AD3d 139, 151 [1st Dept 2017]; *see also Pensmore Invs., LLC v Gruppo, Levey & Co.*,

³ Though not raised by Forefront, the court reminds the parties that breaches of duties owed to the Company (whether contractual or fiduciary) cannot be asserted directly (*see* Dkt. 129 at 23). The word "derivative" does not appear in the Answer, nor does the Answer plead demand futility. Instead, the alleged breaches were of "duties owed to Omanoff" (Dkt. 494 at 66 ¶ 94) and recovery is sought on behalf of Omanoff and OAT, not the Company (*see id.* at 71-72). The parties shall meet and confer and be prepared to address at the next conference whether this important issue was overlooked.

⁴ Reifler had fiduciary duties since he was a Manager of the Company and its subsidiaries (*see Talking Capital*, 169 AD3d at 424). The Omanoff Defendants did not assert claims against Reifler because he filed for bankruptcy. Forefront does not contend that the veil piercing claim implicates the automatic stay.

143 AD3d 588 [1st Dept 2016]). The claim survives dismissal at this stage, and the court will not further opine on its merits given the limited challenge proffered on this motion.⁵

Next, Forefront argues that the Omanoff Defendants have not stated a claim for breach of sections 5.4 and 5.5 of the Operating Agreement because these provisions only apply to Managers and Forefront was not a Manager (*see* Dkt. 502 at 12, 15). The Omanoff Defendants do not respond to this argument, which is clearly correct. That said, the Omanoff Defendants have alleged a breach of sections 7.1, 7.2, and 7.3, which prohibit transferring and encumbering membership interests without the requisite consent (*see id.* at 19). That the remedy may be a declaration of invalidity and not damages is not a basis to dismiss the claim. However, to the extent the breach of contract claim is based on the alleged fraud and fiduciary breaches (*see* Dkt. 494 at 68 ¶ 106), that portion of the claim is dismissed as duplicative.

The claim for breach of the implied covenant of good faith and fair dealing is dismissed because the Omanoff Defendants do not claim the Operating Agreement has a gap that must be filled (*see Nemeč v Shrader*, 991 A2d 1120, 1125 [Del 2010]).

Finally, the fraud claim is sufficiently pleaded. The Answer lists numerous specific misrepresentations and omissions made by Reifler on behalf of Forefront (*see* Dkt. 494 at 61-62 ¶ 84). The omission claims are not dismissible at this time,

⁵ The parties are reminded that Delaware law governs the veil piercing claim since Forefront is a Delaware LLC; the parties should cite Delaware law in the future (*see MMA Meadows at Green Tree, LLC v Millrun Apts., LLC*, 130 AD3d 529, 530 [1st Dept 2015]). The court declines to address the claim under Delaware law as the sufficiency of the veil piercing allegations is not challenged.

notwithstanding Reifler's lack of a fiduciary relationship prior to becoming a Manager of the Company, since the facts were plausibly within Reifler's sole knowledge and could not have been discovered by the Omanoff Defendants and were allegedly essential to the inducement of Omanoff's decision to permit Forefront to become a member of the Company (*see P.T. Bank Cent. Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 378 [1st Dept 2003] ["a duty to disclose arises where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair"]).⁶ The Answer, moreover, specifies to whom the misrepresentations were made (*see* Dkt. 494 at 42 ¶ 29; *see also id.* at 43 ¶ 32). Though exact dates are not provided for some of the statements, enough detail is supplied about the timeframe and the details are sufficiently fleshed out such that Forefront has been clearly informed "of the complained-of incidents" (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). The court will not further assess the fraud claim since Forefront seeks dismissal only based on CPLR 3016(b) and not, for instance, based on whether all of the statements are actionable (*see* Dkt. 500 at 20-21).

The court has considered Forefront's other arguments, including that the defense set forth in paragraph 240 of the Answer is not viable,⁷ and finds them unavailing.

⁶ Forefront does not seek dismissal based on insufficient due diligence (*see MP Cool Investments Ltd. v Forkosh*, 142 AD3d 286, 291 [1st Dept 2016]).

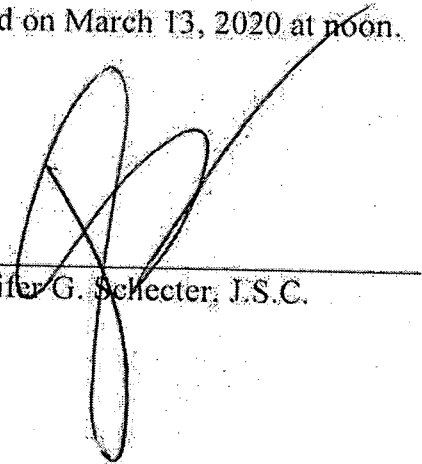
⁷ Unclean hands is a defense to equitable derivative claims (*see In re Shawe & Elting LLC*, 2015 WL 4874733, at *36 [Del Ch Aug. 13, 2015], *aff'd* 157 A3d 152 [Del 2017]).

Accordingly, it is ORDERED that Forefront's motion to strike the Answer and to dismiss the claims asserted therein is granted only to the extent that (1) the breach of contract claim is limited to the claim for breach of sections 7.1, 7.2, and 7.3 of the Operating Agreement and is otherwise dismissed; and (2) the implied covenant claim is dismissed; the motion is otherwise denied; and it is further

ORDERED that a status conference will be held on March 13, 2020 at noon.

Dated: February 21, 2020

ENTER:



Jennifer G. Schecter, J.S.C.