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| 3P-733, LLC v Davis |
| 2020 NY Slip Op 30797(U) |
| March 11, 2020 |
| Supreme Court, New York County |
| Docket Number: 650800/2018 |
| Judge: Andrea Masley |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM

Justice

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INDEX NO. 650800/2018

3P-733, LLC, COINVESTMENTS PARTNERS, PIYUSH
BHARDWAJ,

MOTION DATE _____

Plaintiffs,

MOTION SEQ. NO. 005

- v -

TAWAN DAVIS, ROSS LEINHART, ELF INVESTMENTS,
LLC., CPG INVEST, LLC,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 254, 255, 256, 257, 258, 259, 260, 316

were read on this motion to/for REARGUMENT/RECONSIDERATION

In Motion Sequence Number (Motion) 003, defendants moved; pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the second amended complaint (SAC) of plaintiffs. Motion 003 was granted in part by this court's April 2, 2019 decision and order (Prior Decision) (NYSCEF 178). The Prior Decision is incorporated into this decision and order for all purposes, and the factual and procedural history of this action will not be repeated here.

Plaintiffs now move, pursuant to CPLR 2221, to reargue Motion 003 and reinstate various claims dismissed in the Prior Decision. At oral argument, the court denied Motion 005 as to all claims but for the fraud claim (*see generally* NYSCEF 316). This decision and order addresses the motion to reargue as it relates to plaintiffs' fraud claim.

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221 [d] [2]). There is no fact or law

identified in support of Motion 005 that the court overlooked or misapprehended in the Prior Decision.

In the second amended complaint, plaintiffs' breach of contract claim, which was not at issue in the underlying motion to dismiss, states:

"102. Plaintiffs repeat and re-allege the foregoing Paragraphs of the Complaint as if they were set forth herein at length.

103. By and through his unilateral termination of the CPG/Steinbridge joint venture with Plaintiff, Defendants have caused considerable breaches of contract with Plaintiffs.

104. As a result of Defendants' breaches of contract, Plaintiffs have suffered considerable financial hardship and damage to their reputations"

(NYSCEF 71, ¶¶ 102-104).

First, plaintiffs' motion to reargue is defective in that they did not submit with this motion the second amended complaint. Nonetheless, the motion is denied as plaintiff has not identified any fact or law that was overlooked in the Prior Decision.

Affording plaintiffs every favorable inference with regard to the allegations in the SAC, the court noted, with regard to the breach of fiduciary duty claim at issue, that "the breach of fiduciary duty claim[] . . . is duplicative of and superseded by the breach of contract claim to the extent that the plaintiffs assert fiduciary misconduct under the Carbyne operating agreement" (NYSCEF 178 at 4). The court further held, however, that "the breach of fiduciary duty claim is not dismissed as to CPG" on the basis that "Plaintiffs allege that the Carbyne members agreed, essentially, to rename Carbyne 'Steinbridge' and to transpose/apply the Carbyne operating agreement terms to Steinbridge" but "no operating agreement for Steinbridge was executed" (*id.*). Additionally,

"[u]nder either plaintiffs' theory that the Carbyne terms apply to Steinbridge or that a new oral contract between 3P and CPG was entered, the breach of fiduciary duty claim is not dismissed against CPG as duplicative of the contract claim to the extent

that Steinbridge's members' fiduciary obligations and rights are not governed by the Carbyne operating agreement (see *Madison Realty Partners 7, LLC v Ag ISA, LLC*, CIV.A. 18094, 2001 WL 406268, at *6, 2001 Del. Ch. LEXIS 37, at *18-20 [Del Ch, Apr. 17, 2001] [breach of fiduciary duty claims precluded by breach of contract claims where both claims are based on the same underlying conduct and controlled by the LLC's operating agreement]). That is, absent any official operating agreement for Steinbridge, the breach of fiduciary duty claim is not dismissed as duplicative of the breach of contract claim at this time"

(*id.* at 4-5).

With regard to the fraud cause of action in the SAC, plaintiffs alleged that Davis: (1) materially misrepresented to Bhardwaj that the Carbyne operating agreement would carry over to Steinbridge word-for-word; (2) caused Bhardwaj to contribute labor to build Steinbridge's business; (3) ousted Bhardwaj from the joint venture under a false pretext; and (4) benefited from Steinbridge's transactions himself, to the exclusion of plaintiffs.

When asked by the court at oral argument to identify what facts differentiate the fraud claim from the contract claim, plaintiffs' counsel answered that "[t]he fraud was committed by Davis" (NYSCEF 168 at 72). In any event, in the Prior Decision, the court held that

"the fraud claim is duplicative of the breach of contract claim as it is premised on precisely the same facts and alleges the same injuries: CPG, through one of its members (Davis), made misrepresentations to Bhardwaj regarding the transition to and agreements to be utilized for Steinbridge, then falsely accused Bhardwaj of petty theft in a scheme to expel 3P from the business. Thus, the injury that Bhardwaj sustained was only that sustained by 3P, as plaintiffs allege that the membership interest in Carbyne/Steinbridge was held by 3P, not by Bhardwaj individually. The only glimmer of extra-contractual injury plaintiffs allege in connection with the purported fraud is injury to Bhardwaj's reputation in the real estate business, and those injuries are the subject of various other claims (i.e., for defamation and tortious interference with an unrelated contract) that are distinct from the fraudulent misrepresentation here (application of the Carbyne agreement terms to Steinbridge) and do not establish an adequate extracontractual injury"

(NYSCEF 178 at 6).

The court, therefore, dismissed the fraud claim as duplicative of plaintiffs' amorphous contract claim (see NYSCEF 71, ¶ 103 ["By and through his unilateral termination of the CPG/Steinbridge joint venture with Plaintiff, Defendants have caused considerable breaches of contract with Plaintiffs."]).

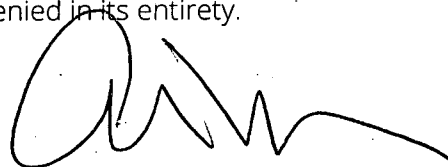
On this motion, plaintiffs make a new argument that the contract claim should be narrowly construed to include only breach of the CPG operating agreement, not the alleged oral contract between 3P and CPG to transpose the Carbyne operating agreement to Steinbridge. The existence of such an oral agreement was, contrary to plaintiffs' argument here, inferred from the allegations in plaintiffs' SAC for the purposes of the underlying motion to dismiss. Plaintiffs now effectively ask the court to ignore their claim for breach of that oral contract so that their fraud claim is not rendered duplicative and may be reinserted into one of the many subsequent amended complaints plaintiffs have filed in this action. On the record before the court on this motion to reargue and the underlying motion to dismiss, the court declines. Additionally, the availability of punitive damages for a fraud claim does not prevent that claim from being duplicative of an existing contract claim.

There is no issue of fact or law which the court overlooked or misapprehended in its Prior Decision.

Accordingly, it is

ORDERED that Motion Sequence Number 005 is denied in its entirety.

3/11/2020
DATE


Hon. Andrea Masley, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:
CHECK IF APPROPRIATE: