Pons v Adriness Partners L.P.
2020 NY Slip Op 31115(U)
April 6, 2020
Supreme Court, New York County
Docket Number: 452196/2018
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

- X

JEAN PONS, VIRGINIE PONS, GILLES CHARPENTIER and GENESIS HOLDINGS, individually and derivatively on behalf of ADRINESS PARTNERS L.P.,

Plaintiffs,

-against-

ADRINESS PARTNERS L.P., ADRINESS ADVISORS LLC, ADRINESS CAPITAL MANAGEMENT LLC, DF ADVISORS INC., ESTATE OF DANIEL FRIEDLENDER, CELESTE FRIEDLENDER, ADRIEL FRIEDLENDER, NESSIA FRIEDLENDER, SANDRA NUNNERLEY and SANDRA NUNNERLEY INC.,

Defendants.

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DECISION AND ORDER
Index No.: 452196/2018

Motion Sequence No.: 004

O. PETER SHERWOOD, J.:

In this derivative action, plaintiffs who are passive investors in defendant Adriness Partners, L.P., ("Adriness") claim to be victims of a Ponzi scheme conducted by Daniel Friedlender, the now deceased controlling member of DF Advisors, Inc., (the general partner of Adriness) and the operator of all of the defendant companies except Sandra Nunnerley, Inc. ("Nunnerley") (*see* Complaint ¶ 12, NYSCEF Doc. No. 110) ("Compl."). The amended complaints ("FAC" or "complaint") also names Sandra Nunnerley, Inc., (another passive investor) and its principal Sandra Nunnerley as defendants (together "defendant Transferees") because eight months prior to discovery of the Ponzi scheme Nunnerley withdrew from the partnership and redeemed $2,545,382.000 in December 2017 (*id.*, ¶ 35) on investments of $2,030,000 made in December 2015 and February 2016 (*id.*, ¶ 23) with an additional $200,000 invested in October 2016 Aff. Ex. C, (Doc. No. 126)

Of the twenty-two causes of action asserted in the complaint, five are alleged against the defendant Transferees, fraudulent conveyance (directly and derivatively), unjust enrichment, breach of contract and violation of 6 Del. Code § 17-607 (derivatively for excessive distributions to Nunnerley) (Claims 15, 16, 19, 20, 21). Nunnerley, Inc. is also joined in the claim for a judicial accounting (Claim 22). On this motion, defendant Transferees seek to dismiss the amended complaint as to them.

The FAC lists Gilles Charpentier as a plaintiff but he is not otherwise mentioned in the FAC. According to plaintiff, he is a former limited partner and current nonparty (*see* Opp. Br. at 2) who assigned all of his rights, title and interest in the partnership to one of the Pons plaintiffs after the complaint was filed (*id.*, at 5). The Estate of Daniel Friedlender is named as a defendant but no personal representative or temporary administrator has been named to accept service and appear on its behalf. Plaintiffs have made multiple attempts to obtain the cooperation of Mr. Friedlender's heirs to petition for appointment of an administrator but with no success (Opp. Br. at 18-19).

DISCUSSION

In an earlier motion, Nunnerley argued that an accounting was a necessary precondition to bringing monetary claims against a fellow limited partner. It is undisputed that a pre-suit accounting is generally a precondition to maintaining an action at law among limited partners (*see e.g., Stark v Goldber*g, 297 AD2d 203, 204 [1st Dept 2002]). In a judicial accounting, all partners, including limited partners, must be joined (*see Marks v Zucker*, 118 AD2d 452, 455 [1st Dept 1986]). The motion became loot when plaintiffs filed an amended complaint (Br. at 4, Doc. No. 122). The amended complaint does not cure the defect because plaintiffs did not include Charpentier and the Estate.

Plaintiffs claim Chapentier is not necessary because he has no current interest in this action (Opp. Br. at 5). However, the time for determining that issue is when the accounting is sought. In any event, the failure to add the Estate is fatal to the accounting claim.

Individual defendant Sandra Nunnerley is not a party to the partnership agreement and the claims against her must be dismissed absent a viable alter ego claim (*see Robinson v Paramount Pictures Corp*., 112 AD2d 208 [2d Dept 1985] [dismissing complaint against individual defendant where documentary evidence established that all transactions were conducted by his corporation]). The amended complaint fails to allege that the corporate form was used to commit a fraud against plaintiffs. There are no allegations that Ms. Nunnerley's control of the corporation led to any identified inequity, fraud or malfeasance here (*see TNS Holdings v MKI Securities Corp*., 92 NY2d 335, 339 [1998]). The claims against Ms. Nunnerley shall be dismissed.

The claims against the defendant Transferees are based on just two factual allegations: (1) Sandra Nunnerley, Inc. received a distribution 8 months (Comp ¶ 146) prior to the time the Ponzi scheme became known to the limited partners and (2) "on information and belief" Nunnerley

demanded the redemption payment after it received account statements from the partnership that it knew or had reason to know were fraudulent (*see* Compl ¶¶ 146, 152). The FAC alleges that the distribution represented Ms. Nunnerley's "redemption of funds from the partnership" (*id*., ¶ 151). That distribution constituted return of an investment of over $2,200,000 made two years earlier together with a modest profit. The FAC also alleges the redemption was made after receipt of "account statements" (*id*., ¶ 152) but the FAC does not allege that the "account statements" is alleged to have received were not sent to all limited partners at the same time.

The FAC contains additional allegations, including lack of adequate consideration for the payments made, the partnership knew of its debt for stolen money and was aware it could not fulfill its obligations, the payment to Nunnerley left the partnership with unreasonably small capital, the defendants had reason to know the distributions were fraudulent and between the time plaintiffs invested and Daniel Friedlender's death, Nunnerley revived extensive transfers from the partnership (*see* Opp at 12-13). These allegations are contradicted by the FAC, irrelevant or conclusory. The allegation that the transfer was made "without fair consideration" (Compl. ¶ 150) is contradicted by the allegation that Nunnerley gave substantial consideration in the form of an investment of at least $2,030,000 (Compl. ¶ 23). What Friedlender may have thought is irrelevant to the decision of the Nunnerley to withdraw its investment and to the claims against the defendant Transferees. The allegation that Nunnerley received unidentified "red flags" is entirely conclusory.

As to the claim of breach of contract, plaintiffs do not identify which provision, if any, of the partnership agreement was breached by Nunnerley when it redeemed its interest in the partnership (*see Kraus v Visa Int'l Svs. Assin*, 304 AD2d 408 [1st Dept 2003]; *Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995] [plaintiff must allege "in nonconclusory language, . . . the essential terms of the parties' purported contract, including the specific provisions of the contract on which liability is predicated"]. Here, plaintiffs have failed to identify which provision of the partnership agreement was breached when another limited partner elected to redeem its interest in the partnership. Having failed to allege breach of any particular contractual provision, the breach of contract claim must be dismissed for failure to state or cause of action (*see Feld v Apple Bank*, 116 AD 3d 549, 550 [1st Dept 2014]).

The claim for unjust enrichment must be dismissed as there is a valid and enforceable written agreement governing the parties' relationship specifically the partnership agreement (*see IDT Corp. v Morgan Stanley Dean Witter & Co*., 12NY3d 132, 142 [2009]).

With respect to the plaintiffs claim based on 6 Del. Code § 17-607, that statute states:

> "[a] limited partnership shall not make a distribution to a partner to the extent that at the time of distribution . . . all liabilities of the limited partnership, other than liabilities to partners on account of their partnership interests . . ., exceed the fair value of the assets of the limited partnership."

id., at §17-607(a). As discussed above, the redemption payment of which plaintiffs complain was "on account of [a] partnership interest". Moreover, the provision expressly applies only to the limited partners who know at the time that the distribution exceeded the fair value of the partnership's assets, without taking into account the liabilities of the other partners (*see id.*, § 17-607[b]). These conditions have been alleged here.

Accordingly, the amended complaint as against the defendant Transferees must be dismissed as (1) the accounting claim cannot survive; (2) the claim against Sandra Nunnerley individually does not alleged facts sufficient to support a vail piercing claim; and (3) plaintiffs have failed to state causes of action against Sandra Nunnerley, Inc.for fraudulent conveyance, unjust enrichment, breach of contract or 6 Del. Code § 17-607. It is hereby

ORDERED that the motion to dismiss of defendants Sandra Nunnerley and Sandra Nunnerly, Inc., is GRANTED and the amended complaint as to said defendants is hereby DISMISSED; and it is further

ORDERED that the remaining causes of action are SEVERED and shall continue as against remaining parties; and it is further

ORDERED that counsel for the remaining parties shall appear at a preliminary conference on Tuesday, June 2, 2020 at 10:30 AM at Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

ENTER:

O. P. Sherwood

J.S.C.

O. PETER SHERWOOD

DATED: April 6, 2020