

**Coast to Coast Energy Inc. v Gasarch**

2020 NY Slip Op 32679(U)

August 17, 2020

Supreme Court, New York County

Docket Number: 651670/2010

Judge: Joel M. Cohen

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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: COMMERCIAL DIVISION PART IAS MOTION 3EFM

-----X

COAST TO COAST ENERGY INC., INVESTOR, COAST TO COAST DRILLING PARTNERS I, II, III, IV, V, VI, VII, INVESTOR, CHARLES BARNES, INVESTOR, WILLIAM SPENCE, INVESTOR, MARGARET SPENCE, INVESTOR, HARRY WILMOT, INVESTOR, DONNA WILMOT, INVESTOR, CLIFTON MILLER, INVESTOR, CRISTINA GARCES-BARNES, INVESTOR, WESLEY SHREVE, INVESTOR, IRA RUSSACK, INVESTOR, LAWRENCE DOHERTY, INVESTOR, MARK GONSALVES, INVESTOR, JOSEPH GIORDANO, INVESTOR, JOHN AND JANE DOES, INVESTORS

Plaintiffs,

- v -

MARK GASARCH, PROMOTER, JOHN WAMPLER, PROMOTER, WALTER CUKAVAC, PETROLEUM SPECIALIST, PETRO-SUISSE LIMITED, DRILLER,

Defendants.

-----X

INDEX NO.	651670/2010
MOTION DATE	N/A, N/A
MOTION SEQ. NO.	028 029
<b>DECISION + ORDER ON MOTION</b>	

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 028) 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 677, 689, 690, 691

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 029) 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 692, 693, 694

were read on this motion for SUMMARY JUDGMENT.

This case involves ill-fated investments made by Plaintiffs<sup>1</sup> in a series of oil exploration and drilling expeditions in Trinidad. In Motion Sequence 028, Plaintiffs Spence and Doherty<sup>2</sup> seek partial summary judgment on liability (based on Spence's analysis of Trinidadian public records) against Defendant Petro Suisse, Ltd., a New York corporation ("PSNY"). In Motion Sequence 029, PSNY seeks summary judgment against all Plaintiffs and for dismissal of Plaintiffs' Third Amended Complaint. In response, Plaintiffs cross-move for partial summary judgment liability (based on PSNY's bankruptcy proceeding records). These motions are consolidated for purposes of this decision and order.

For the reasons set forth below, the foregoing motions and cross-motion are denied.

### **BACKGROUND**

After extensive motion practice, this case has been whittled down to one claim (fraud) by the current Plaintiffs against one defendant (PSNY) (*see* NYSCEF 669 ["PSNY's Statement of Material Facts"] at ¶ 11; *see also* NYSCEF 688 ["Plaintiff's Counterstatement of Material Facts"] at ¶ 7).

Plaintiffs contend that PSNY fraudulently induced them to invest in one or more limited partnerships for the purpose of developing and drilling oil wells in Trinidad (*id.*). PSNY, operating primarily through its director Mark Gasarch ("Gasarch") was the general partner of the

---

<sup>1</sup> Plaintiffs are Charles Barnes ("Barnes"), Lawrence Doherty ("Doherty"), Ronald Domescek ("Domescek"), Cristina Garces-Barnes ("Garces-Barnes"), Joseph Giordano ("Giordano"), Gordon Lynch ("Lynch"), John O'Neill ("O'Neill"), Ira Russack ("Russack"), Wesley Shreve ("Shreve"), William Spence ("Spence"), Robert Stonerock ("Stonerock"), and Morris Talansky ("Talansky").

<sup>2</sup> Although Plaintiffs Coast to Coast Partners I through VII are listed as moving parties for Motion Sequence 028, the Court (Bransten, J.) previously dismissed all claims brought by those entities (*see* NYSCEF Doc 542 ["Dec. 18, 2018 Order"] at n. 3). This decision and order therefore does not apply to those entities.

limited partnerships into which capital for the oil related investments were made (PSNY's Statement of Material Facts at ¶¶ 1 - 2). Plaintiffs claim that Gasarch, on behalf of PSNY, made material misrepresentations to potential investors orally and in private placement memoranda ("PPM") regarding the number of wells drilled and the wells' profitability (*see id.* at ¶¶ 1, 5; *see also* NYSCEF 665 ["Plaintiffs' Statement of Material Facts"]).

### DISCUSSION

On a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party, as "[s]ummary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact'" (*Vega v. Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [quoting *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]]). If the moving party makes a prima facie showing of entitlement to judgment, the burden shifts to the non-moving party to "produce evidentiary proof in admissible form" sufficient to establish the existence of material issues of fact which require a trial in the action (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). "[O]nly the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgement" (*Rotuba Extruders v. Ceppos*, 46 NY2d 223, 231 [1978]).

In order to establish fraud, a plaintiff must prove: "a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). A successful claim for fraud must be set forth in the record in detail (*see Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 178 [2011]).

#### **A. Disputed Issues of Fact Preclude Summary Judgment for Plaintiffs**

*Motion Sequence 028*

In Motion Sequence 028, Plaintiffs Spence and Doherty move for summary judgment on the ground that evidence in the public records of Trinidad and Tobago, as interpreted by Spence, demonstrates conclusively that PSNY misrepresented the number of wells it had in operation. Based on the Court's review of the evidence presented, Spence and Doherty have not proffered sufficient evidence to demonstrate that they are entitled to summary judgment.

Typically, the issues of material misrepresentation and reasonable reliance, essential elements of a fraud claim, raise issues of fact that are not subject to summary disposition (*see Brunetti v. Musallam*, 11 AD3d 280, 281 [2004] [citing *Texaco Inc. V. Synergy Group Inc.*, 171 AD2d 788 [1991]]). This is such a case. Spence and Doherty fail to provide evidence that would permit the Court to find, as a matter of law, that PSNY misrepresented material facts to induce their investment.

Spence and Doherty have submitted affidavits asserting that PSNY misrepresented the number of PSNY's wells in Trinidad and Tobago. The assessment is based on Spence's assessment of public records<sup>3</sup> (*see* NYSCEF 618 ["Spence Affidavit"] at ¶¶ 15, 22, 37; NYSCEF 622 ["Spence's Analysis"]; NYSCEF 623 – 628 ["Records from Petrotrin"]). Spence does not explain the methods he used to conduct such an analysis (Spence Affidavit at ¶¶ 15, 34, 37), and the documents themselves do not on their face to establish the factual assertions contained in Spence's affidavit.

Further, neither Spence nor Doherty provide evidence that demonstrates conclusively that they relied upon PSNY's purported misrepresentations in making their investments. Spence has

---

<sup>3</sup> This Court (Bransten, J.) previously observed that Spence is not an expert with respect to the assessment of those public records. (*see* Dec. 18, 2018 Order at 5).

given conflicting testimony as to whether he relied upon the alleged misrepresentations in the PPM when he made his investment. In his deposition, Spence testified that he did not read his PPM prior to investing, whereas now he avers that he read the portions of the PPM that he deemed relevant (*see* NYSCEF 689 [“Defendant’s Memo of Law in Reply”] at p. 5 [citing NYSCEF 490 [“Spence Deposition”] at 29:16-18]; Spence Affidavit at ¶¶ 12 – 14). Doherty, meanwhile, submitted no evidence of any specific communications made *to him* containing material misrepresentations to induce his investment (*see* NYSCEF 637 [“Doherty’s Affidavit”]).

In sum, Spence and Doherty have not submitted sufficient evidence to permit judgment in their favor as a matter of law. Accordingly, the motion for summary judgment is denied.

*Motion Sequence 029 (Cross-Motion)*

In Motion Sequence 029, all Plaintiffs (including Spence and Doherty) cross-move for summary judgment on the ground that documentary evidence (specifically, an escrow account purportedly maintained by PSNY) establishes, as a matter of law, PSNY’s liability to Plaintiffs. There are, however, factual disputes that preclude summary judgment on that ground.

In 2017, PSNY filed for Bankruptcy pursuant to § 362 of the Bankruptcy Code (NYSCEF 694 [“Gasarch Deposition”] at 4:11-14). Plaintiffs claim that following PSNY’s Bankruptcy filing, Gasarch submitted a schedule to the Bankruptcy Trustee of funds owed to many of the moving Plaintiffs (NYSCEF 681 [Boyle’s Affirmation in Support of Plaintiffs’ Cross Motion] at ¶ 3). According to Plaintiffs, Gasarch represented to the Bankruptcy Trustee that the schedule displayed escrow funds that had been set aside but never paid to the Plaintiffs, and that PSNY acknowledged an indebtedness to the Plaintiffs (*id.*).

Gasarch has testified, however, that the escrow account at Plains Capital Bank in Texas was not created by PSNY but instead was created by Petro Suisse Limited Barbados (the “PSB Ledger”) (Gasarch Deposition at 19:23 – 20:23). According to Gasarch, the list of individuals on the PSB Ledger was related to disputed or contingent creditors who would first have to prove their respective claims against PSNY before being entitled to any escrow funds (*id.* at 34:22 – 35:15). There is, at a minimum, a question of fact as to whether the PSB Ledger acknowledges PSNY’s indebtedness to Plaintiffs, and whether and to what extent the escrow account (and any associated representations) supports Plaintiffs’ claims in this case.

Accordingly, Plaintiffs’ cross-motion for summary judgment is denied.

#### **B. PSNY Fails to Submit Evidence Demonstrating Entitlement to Summary Judgment**

PSNY’s motion for summary judgment, Motion Sequence 029, consists almost entirely of assertions that Plaintiffs have failed to prove their case. Under CPLR 3212, a defendant moving for summary judgment must submit an affidavit setting forth facts that “show that ... the cause of action ... has no merit.” Accordingly, “[i]t is a defendant’s burden, when it is the party moving for summary judgment, to demonstrate affirmatively the merits of a defense, which cannot be sustained by pointing out gaps in the plaintiff’s proof” (*Quantum Corp. Funding, Ltd. v. Ellis*, 126 AD3d 866, 871 [2d Dept 2015]). Although it will be Plaintiffs’ burden *at trial* to establish the elements of their fraud claim, at this stage it was incumbent on PSNY to submit evidence that entitles it to judgment in its favor. It did not do so.

PSNY submitted an affidavit from Gasarch (*see* NYSCEF 688 [“Gasarch Affirmation”]). He does not affirm, directly or through evidence, that the allegedly false statements upon which Plaintiffs rely were, in fact, accurate. If he had provided such evidence as to the truthfulness of PSNY’s oral and written communications, the burden would have shifted back to Plaintiffs to

show that there is a dispute of fact on that point. But he never did so. Therefore, Plaintiffs had no burden to provide evidence in response (*see Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [“Failure to make such showing [of a prima facie case for summary judgment] requires denial of the motion, regardless of the sufficiency of the opposing papers”]).

Nevertheless, Spence did provide some evidence that PSNY’s representations were knowingly false, including a purported disparity between PSNY’s reported number of successful wells and the actual reported figures in Trinidad’s public records (*id.* at ¶¶ 30, 37). Although that evidence was not sufficient to warrant a grant of summary judgment in Spence’s favor in Motion Sequence 028, *see supra*, it is sufficient to show a triable issue of fact to preclude summary judgment in PSNY’s favor. It will, of course, be Plaintiffs’ burden to provide sufficient evidence *at trial* to establish their claims.

With respect to the question of reliance, Gasarch avers that certain Plaintiffs did not submit evidence to show that they relied on written or oral PSNY misrepresentations to their detriment (*id.* at ¶¶ 13 – 17). PSNY offers portions of testimony from various Plaintiffs suggesting that they never personally met or spoke to Gasarch (*see* NYSCEF 667 [“PSNY’s Memo of Law in Support of Motion for Summary Judgment”] at pp. 11 – 13). While those statements may undermine arguments Plaintiffs may make at trial, they do not establish a lack of reliance. Although individual Plaintiffs like Barnes, O’Neill, and Giordano testify that they did not speak with Gasarch prior to making their investments, PSNY did not establish that these individuals could not or did not rely on PSNY’s oral or written representations, such as letters and subscription agreements, when making their decision to invest. Spence, for his part, submitted evidence that when making his investment, he relied upon representations about PSNY’s previous success with developed and profitable wells (Spence Affidavit at ¶¶ 7, 11, 14).

There remain issues of fact to be resolved at trial, where (again) Plaintiffs will have the burden of proof.

**CONCLUSION**

In accordance with the foregoing, it is

**ORDERED** that Plaintiff Spence and Doherty’s motion for partial summary judgment (Motion Sequence No. 028) is **denied**; it is further

**ORDERED** that PSNY’s motion for summary judgment is **denied**; it is further

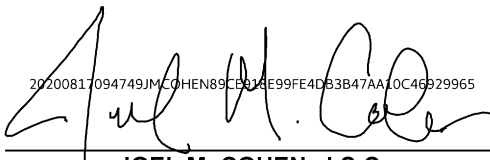
**ORDERED** that Plaintiffs’ cross-motion for partial summary judgment is **denied**; and it is further

**ORDERED** that the parties are to appear for a pre-trial teleconference on Tuesday, September 29, 2020 at 10:00 am.

This constitutes the Decision and Order of the Court.

8/17/2020

DATE

  
20200817094749JMC0HEN89CE814E99FE4D83B47AA10C46B29965  
JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: