

<b>Goldman v Neros Broadway LLC</b>
2020 NY Slip Op 33507(U)
October 16, 2020
Supreme Court, New York County
Docket Number: 655351/2018
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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INDEX NO. 655351/2018  
MOTION DATE 07/10/2019  
MOTION SEQ. NO. 001 002  
MARC GOLDMAN, JUDITH NATH, JEROME EISENBERG,  
LAWRENCE BENENSON, ARTHUR MARK, SUZANNE  
BERGER, LAURIE W. KRUPPA LIVING TRUST, 8  
SKIPPER JOE'S LLC, GANESA LLC, GREENLEAF  
PRODUCTIONS LLC, LIEBHABER FAMILY LIMITED  
PARTNERSHIP and WHITTIER MANAGEMENT LLC

Plaintiffs,

- v -

DECISION + ORDER ON  
MOTION

NERDS BROADWAY LIMITED LIABILITY COMPANY,  
ELEVEN ENTERTAINMENT LLC, CARL LEVIN, VK  
HALMOS PRODUCTIONS LLC and VICKI HALMOS,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 62, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 104, 106

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 63, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 105, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120

were read on this motion to/for DISMISSAL

ORDER

Upon the foregoing documents,

ORDERED that the defendants' motions to dismiss (Motion  
Seq. Nos. 1 & 2) are hereby GRANTED; and it is further

ORDERED and ADJUDGED that the complaint is hereby DISMISSED  
in its entirety, with costs and disbursements, to the defendants  
as taxed by the Clerk of the Court, and the Clerk is directed to  
enter judgment accordingly in favor of the defendants.

DECISION

As stated in the complaint, this action is brought by investors in a failed Broadway musical production provisionally entitled "Nerds" that was to be based upon "the rivalry between the late Steve Jobs of Apple and Bill Gates of Microsoft." Unfortunately, unlike the companies of its main characters, the musical was cancelled before production or previews began. Plaintiffs allege that they lost their investment as a result and that such losses were caused by the mismanagement and intentional misrepresentations by the defendants.

The complaint alleges that on or about December 2015, only about \$200,000 had been raised towards the costs of staging the production even though at that time production costs were thought to be approximately \$7.5 million. The complaint further alleges that in early January 2016 defendants decided to enter into a contract with a theatrical organization for over \$600,000 despite not having raised sufficient capital to stage the production. Plaintiffs, as set forth in the complaint, invested over \$600,000 into the production from late January through early March 2016. On March 8, 2016, defendants announced they were not moving forward with the production causing plaintiffs losses on their investment.

The complaint asserts that "the failure of the venture was the foreseeable and inevitable result of the reckless financial

commitments Defendants caused the [Nerds] LLC to make without adequate capitalization, contrary to Defendants' representations of financial health."

The complaint alleges four causes of action.

The first cause of action is for breach of contract against defendants Eleven LLC and Halmos LLC alleging that they "breached the Operating Agreement by failing to render services customary and usually rendered by theatrical producers, devote as much time to the affairs of the LLC as necessary, or perform their duties in good faith and instead performed their duties in a grossly negligent manner and/or through willful misconduct."

The second cause of action against all defendants is for breach of fiduciary duty and the third cause of action is for the same relief purportedly brought on a derivative basis.

The fourth cause of action sounds in fraud and misrepresentation and the fifth cause of action seeks rescission of the operating agreement.

Defendants Nerds Broadway LLC, Eleven Entertainment LLC, and Carl Levin (Motion Seq. No. 1), and defendants VK Halmos Productions LLC and Vicki Halmos (Motion Seq. No. 2) now move seeking dismissal of the complaint which is opposed by the plaintiffs.

With respect to the first cause of action, the court agrees with the defendants that plaintiffs fail to state an actionable

claim against the LLCs. To the extent that the complaint can be read to assert that defendants breached the operating or subscription agreements, the facts alleged there, assumed to be true for purposes of this motion, fail to make out a prima facie case of such breach because those agreements specifically directed and permitted the conduct about which plaintiffs complain. Section 3.1.1 of the operating agreement "authorize[s] the Managers to expend all of said Capital Contribution, prior to Full Capitalization, on an immediate use basis, for any proper purpose of the Company." Thus, the allegation that the defendants unjustly expended money by entering into contracts that would require all of the capital contributed by the plaintiffs to be expended fails to state a cause of action where the contract itself authorizes such expenditures. See Zuckerbrod v 355 Co., LLC, 113 AD3d 675, 676 (2d Dept 2014).

Furthermore, Article VI of the operating agreement gave the defendants broad managerial authority of the production. Plaintiffs' conclusory allegations in the complaint are insufficient to overcome the business judgment presumption that any action or inaction on the part of the defendants was taken in good faith in what they thought was the best interests of the venture at that time. See Wilson v Tully, 243 AD2d 229, 238 (1st Dept 1998). "The hard core of the business judgment

doctrine is that the business outcome of an investment project that is unaffected by [] self-interest or bad faith cannot itself be an occasion for [] liability." Id. In the absence of any allegation of self-dealing or wrongful acts, plaintiffs' allegations fail not only to state a cause of action for breach of contract but also fail to set forth a breach of fiduciary duty where the actions taken were within the express grant of authority in the parties' agreement. See Kassover v Prism Venture Partners, LLC, 53 AD3d 444, 450 (1<sup>st</sup> Dept 2008); In re Kenneth Cole Productions, Inc., Shareholder Litig., 122 AD3d 500, 501 (1<sup>st</sup> Dept 2014), affd sub nom. Matter of In re Kenneth Cole Productions, Inc., 27 NY3d 268 (2016) ("pre-discovery dismissal based on the business judgment rule was appropriate since there are no allegations sufficient to demonstrate that the members . . . did not act in good faith or were otherwise interested").

Plaintiffs' allegations of fraud and misrepresentation also fail at the pleading stage because Article 11 of the Operating Agreement expressly provides that "[e]ach Member represents, warrants, and covenants that such Member is an Accredited Investor and has not been induced to enter into this Agreement by any warranties, guarantees, promises, statements or representations, whether express or implied, except those that are expressly and specifically set forth herein, and that the

Managers shall not be bound or liable in any manner by any express or implied warranties, guarantees, promises, statements or representations pertaining hereto except as are expressly and specifically set forth herein." This "merger clause extinguished any claims arising from defendants' alleged misrepresentation." Pitt St., LLC v 85-87 Pitt St. Realty Corp., 83 AD3d 446 (1<sup>st</sup> Dept 2011). Further, having not adequately plead grounds for a cause of action sounding in fraud and misrepresentation, plaintiffs fail to state a claim for the relief of rescission. See Hill v McKinley, 254 AD 283, 285 (1<sup>st</sup> Dept 1938).

Thus, the court agrees with defendants that plaintiffs allegations that the cancellation of the production was the result of mismanagement and fraud fail at the pleading stage to state claims upon which relief may be granted, even assuming the allegations made in the complaint are true. Dismissal of the complaint must be granted.

10/16/2020  
DATE

Debra A. James  
DEBRA A. JAMES, 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: