

RVW Prods. Corp. v Levin
2021 NY Slip Op 31231(U)
April 7, 2021
Supreme Court, New York County
Docket Number: 655390/2018
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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RVW PRODUCTIONS CORPORATION, and RVW FILMS
 LLC,

Plaintiffs,

- v -

JOHN LEVIN, ROBERT DISCOLO, RIVER PARTNERS
 CAPITAL MANAGEMENT LP, LEVIN CAPITAL
 STRATEGIES LP, JOHN LEVIN & COMPANY, ZACHARY
 TARICA, FOREST ROAD COMPANY LLC, JOHN AND
 JANE DOES 1-10, and ABC ENTITIES 1-10,

Defendants.

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INDEX NO. 655390/2018

MOTION DATE 05/07/2020,
05/07/2020

MOTION SEQ. NO. 004 005

**DECISION + ORDER ON
 MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 70, 71, 72, 73, 74, 75, 76, 84

were read on this motion to/for

DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 005) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 77, 78, 79, 80, 81, 82, 83, 85

were read on this motion to/for

DISMISS

Upon the foregoing documents, it is

In motion sequence number 004, defendants Zachary Tarica and Forest Road Company LLC (Forest) (collectively, Forest Defendants) move, pursuant to CPLR 3211 (a)(1) and (7), to dismiss the amended complaint. In motion sequence number 005, defendants John Levin, Robert Discolo, River Partners Capital Management LP (River Partners), Levin Capital Strategies LP (Levin Capital), and John Levin & Company (Levin Co) (the entities collectively, Levin Companies) move, pursuant to CPLR 3211 (a)(1) and (7), to dismiss the amended complaint. Plaintiffs cross-move in both motions for sanctions.

Background

Unless indicated otherwise, the following facts are taken from the amended complaint, and for the purposes of this motion to dismiss, are accepted as true.

Plaintiff RVW Productions Corporation (RVW) is a Louisiana corporation that produces films. (NYSCEF Doc. No. [NYSCEF] 58, Amended Complaint ¶ 1.) Plaintiff RVW Films, LLC writes scripts for the films. (*Id.* ¶ 2.) Defendant Forest is a New York limited liability company that lends money; defendant Tarica is one of its principles. (*Id.* ¶¶ 8-9.) The entities collectively called the Levin Companies include River Partners, a New York corporation that manages private funds, Levin Strategies, a New York limited partnership that manages investments, and Levin Co., a New York corporation that manages investments. (*Id.* ¶¶ 5-7.) Defendant Levin is a principle of the Levin Companies, and defendant Discolo is another principle of one or more of the Levin Companies. (*Id.* ¶ 3-4.)

RVW decided to make a film in Louisiana (Movie). (*Id.* ¶ 14.) “Per RVW Production’s finance plan, RVW Production had to seek a loan against the Louisiana tax credit offered. This is customary and standard for all movies in production in Louisiana.” (*Id.* ¶ 21.) On April 7, 2018, RVW contacted Levin about becoming an equity investor in the Movie; Levin declined because “his wife would kill him” due to the Movie’s subject matter. (*Id.* ¶ 18.)

In May 2018, RVW sought tax credit funding from Forest to produce the Movie. (*Id.* ¶ 23.) Over the course of the next weeks, Cathy Beckerman, the principle of RVW, negotiated the terms of the loan with Tarica. (*Id.* ¶¶ 16, 24.) RVW Production and

Forest agreed on the terms of the loan (Contract), and the closing was scheduled. (*Id.* ¶ 25.)

On May 22, 2018, during a meeting with the Producer, Tarica learned that the Producer knew Levin and Discolo. (*Id.* ¶ 27.) Tarica informed plaintiffs that Levin, Discolo, and the Levin Companies were majority investors in Forest. (*Id.*) At this meeting, the Producer was informed that Forest would have to notify Levin, as a majority shareholder. (*Id.* ¶ 28.)

“From May 22, 2018 through June 29, 2018, Tarica repeatedly re-affirmed Forest Road's commitment to performing under the Contract.” (*Id.* ¶ 26.) As the closing approached, Tarica asked for more information unorthodox for this type of loan, yet RVW provided what was requested; nevertheless, Forest continued to ask for more information. (*Id.* ¶ 32.) Although Tarica assured plaintiffs that the loan would close, plaintiffs looked around for other funding. (*Id.* ¶ 33.) More information was still requested, and when plaintiffs asked Tarica why, he told them that Levin and Discolo insisted that it be provided. (*Id.* ¶ 34.)

During a phone call on June 28, 2018, the day of the closing, with Beckerman, the Producer, Levin, and Discolo where Levin suggested that the Levin Companies fund the loan on better terms than Forest.¹ (*Id.* ¶¶ 36, 38.) Levin “also suggested that one of the Producer's trusts fund the loan, but the Producer specifically declined to do so. Despite this, Mr. Levin called the wife of a trustee of the Producer's personal trust, telling her the Producer needed money.” (*Id.* ¶ 38.)

¹ During this phone call, Levin informed plaintiffs that he never heard of Forest. (*Id.*, ¶ 37.)

Plaintiffs provided due diligence documentation to Levin, Discolo, and the Levin Companies immediately, and within hours, Discolo contacted plaintiffs to inform them that Levin was going to personally fund the Loan at 9%, a 1% discount from Forest. (*Id.* ¶¶ 39, 40.) Discolo stated that he would wire the first \$500,000 that day and requested wiring instructions. (*Id.* ¶ 40.) After the instructions were sent, Levin called the Producer and said that Forest was not going to lend the money because Tarica had an unpleasant experience with the Producer despite Levin's attempts to convince Tarica otherwise. (*Id.* ¶ 41.) The Producer told Levin that Discolo had told RVW that Levin would fund the loan personally, but Levin said he could not do so. (*Id.* ¶ 42.)

Beckerman called Tarica and told him what Levin had said, but Tarica disputed Levin's account and re-affirmed his commitment to the loan, assuring RVW that the loan would close the next day, June 29, 2018. (*Id.* ¶¶ 43, 44.) Tarica told Beckerman and the Producer not to speak to Levin or Discolo. (*Id.* ¶ 44.) On June 29, 2018, Forest informed RVW that it "was backing out" of the Contract, refusing to disclose to RVW the reasons. (*Id.* ¶ 45.) RVW ultimately received the equity they needed from other sources. (*Id.* ¶ 20.)

RVW claims that the defendants' actions were intended to "string plaintiffs along" until the worst possible moment so that they could not get another loan before being severely damaged. (*Id.* ¶ 47.) RVW alleges that the delay and inability to obtain a tax credit loan caused RVW to lose at least \$1.5 million in equity investment and hundreds of thousands of dollars in post-production financing. (*Id.* ¶ 56.) In addition, the delay in funding caused the inability to pay employees and independent contractors, leading to them leaving to pursue other opportunities, loss of three prominent actors, loss of

locations, including the Statute of Liberty and the Plaza, harm to the reputation of the movie, and bad publicity, which will hurt the Movie's chances of getting distributed. (*Id.* ¶¶ 52, 53, 54, 57.)

After this court dismissed the complaint, plaintiffs filed an amended complaint alleging claims of (1) breach of contract (against Forest Defendants); (2) breach of the covenant of good faith and fair dealing (against Forest Defendants); (3) tortious interference with Contract (against Levin Defendants); (4) tortious interference with business relations and/or prospective business relations (against all defendants). Defendants move to dismiss all claims pursuant to CPLR 3211.

Discussion

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [The court] accept[s] the facts as alleged in the complaint as true, [and] accord[s] plaintiff [] the benefit of every possible favorable inference.” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted].) However, bare legal conclusions and “factual claims which are either inherently incredible or flatly contradicted by documentary evidence” are not “accorded their most favorable intendment.” (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995].)

“A cause of action may be dismissed under CPLR 3211 (a) (1) ‘only where the documentary evidence utterly refutes [the] plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.’” (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [citation omitted].) “The documents submitted must be explicit and unambiguous.” (*Dixon v 105 West 75th St. LLC*, 148 AD3d 623, 626 [1st Dept 2017] [citation omitted].) “Factual affidavits do not constitute

documentary evidence”. (*Art & Fashion Group Corp.*, 120 AD3d at 438. [citation omitted].)

Breach of Contract

“To state a claim for breach of contract, a plaintiff must allege: (1) the parties entered into a valid agreement, (2) plaintiff performed, (3) defendant failed to perform, and (4) damages.” (*VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 58 [1st Dept 2013] [citation omitted].) When it is alleged that a purported oral agreement was breached, “plaintiff should specifically state that [it] is relying upon an ‘oral agreement’ and he should set forth all the relevant terms of that oral agreement.” (*Bomser v Moyle*, 89 AD2d 202, 205 [1st Dept 1982].) An oral agreement may be enforceable as long as the terms are clear and definite, and the conduct of the parties evinces mutual assent “sufficiently definite to assure that the parties are truly in agreement with respect to all material terms.” (*Kramer v Greene*, 142 AD3d 438, 439 [1st Dept 2016] [citations omitted].)

Plaintiffs allege that “RVW Productions and Forest Road orally came to an agreement on the terms of the Contract, the terms of which were further disclosed in a text message, and a closing was scheduled.” (NYSCEF 45, Amended Complaint ¶ 62.) Under the terms of the oral agreement, “Forest Road would provide RVW Productions with a loan on the tax credit from the State of Louisiana related to the Movie for \$1,544,169.00” and “RVW Productions would pay 10% interest yearly subject to quarterly adjustments by Forest Road and 2% of the backend.” (*Id.* ¶ 61.)

However, the text message referred to contradicts plaintiffs’ allegations of the existence of a valid oral agreement. Specifically, the text message states, “discuss 1.

Status update 2. What you are doing with Post 3. CAMA execution – new terms are fine, just need sr lender name to be changed to junior senior lender 4. Mezz execution (need that lender to sign something acknowledging that we are senior to him) 5. Terms: a. 10% yr 1,2,4,6,8 quarterly agreed to change year 3 to 10 (per comments) b. backend agreed 2% c. loan amount \$1,544,169 6. Execution of PG from Nick Loeb”. (NYSCEF 49, Text Message.) This text message contradicts any claim of mutual assent “sufficiently definite to assure that the parties are truly in agreement with respect to all material terms.” (*Kramer v Greene*, 142 AD3d at 439.)

Furthermore, the amended complaint contradicts itself, as RVW attempted to find other funding after the alleged oral agreement was formed. (NYSCEF 58, Amended Complaint, ¶ 33.) Plaintiffs also allege that they were negotiating with the Levin Defendants the day before the closing of the Forest Defendants loan. (*Id.* ¶¶ 36-41.) In fact, plaintiffs send the Levin Defendants wiring instructions for the funds. (*Id.* ¶ 41.)

If RVW and Forest formed a binding oral agreement, as the plaintiffs allege, there would be no need to procure funding from other sources, including the Levin Defendants. Therefore, as a matter of law, plaintiffs cannot state a breach of contract claims as there was no oral contract formed between the parties. This claim is dismissed with prejudice.

Breach of the Implied Covenant of Good Faith and Fair Dealing

“There can be no claim of breach of the implied covenant of good faith and fair dealing without a contract.” (*Randall’s Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 463 [1st Dept 2012] [citation omitted].) Here, plaintiffs have failed to

sufficiently allege the existence of a contract, and thus, this claim is dismissed with prejudice.

Tortious Interference

Claim of Tortious Interference with Contract

"A claim of tortious interference with contract requires: (1) the existence of a valid contract between the plaintiff and a third party, (2) defendant's knowledge of the contract, (3) defendant's intentional procurement of a breach of the contract without justification, (4) actual breach of the contract, and (5) resulting damages." (*American Preferred Prescription v Health Mgt.*, 252 AD2d 414, 417 [1st Dept 1998] [citation omitted].) Again, plaintiffs have failed to sufficiently allege a contract's existence, and thus, this claim is dismissed with prejudice.

Claim of Tortious Interference with Prospective or Existing Business Relations

To state a claim for tortious interference with prospective business relations, a plaintiff must allege: "(1) the existence of a business relationship between the plaintiff and a third party; (2) the defendants' interference with that business relationship; (3) that the defendants acted with the sole purpose of harming the plaintiff or used dishonest, unfair, improper, or illegal means that amounted to a crime or independent tort; and (4) that such acts resulted in injury to the plaintiff's relationship with the third party." (*Schorr v Guardian Life Ins. Co. of Am.*, 44 AD3d 319, 323 [1st Dept 2007] [citations omitted].)

Plaintiffs allege that the Forest Defendants "interfered with Plaintiffs' prospective business advantages by making misrepresentations regarding Plaintiffs to other potential lenders, including, but not limited to, Producer Capital Fund." (NYSCEF 45,

Amended Complaint ¶ 96.) However, plaintiffs do not sufficiently allege the interference was with the sole purpose of harming the plaintiff, or by means that were unlawful or improper. Additionally, plaintiffs fail to allege the existence of a business relationship between plaintiffs and a third party. Plaintiffs' allegations are conclusory at best. Thus, this claim is dismissed.

"To state claim for tortious interference with business relationships, a plaintiff must allege "(1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party." (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009] [citations omitted].)

Plaintiffs allege that the Levin Defendants, due to personal animus against the Producer and disagreement with the Movie's perceived political ideology, actively sought to use the Levin Companies' influence to sabotage the business relations between plaintiffs and Forest. (NYSCEF 45, Amended Complaint ¶ 48.)

This court previously held that plaintiffs sufficiently alleged that the Levin Defendants interfered with plaintiffs' business relationship with the Forest Defendants. (NYSCEF 38, Decision and Order [motion seq nos. 002, 003].) However, the Levin Defendants now assert that the documentary evidence shows that plaintiffs cannot prove damages. Specifically, the Levin Defendants submit plaintiffs' loan agreement with another party that was entered into three weeks after Forest declined to fund the

loan. This agreement does not conclusively show that plaintiffs did not suffer damages as a result of the delay.

The Levin Defendants also assert that plaintiffs admittedly reached out to Forest for “stop gap” financing after Forest did not fund the loan, and thus, they cannot allege injury to their relationship. However, it is sufficient to allege an injury to the relationship at the time of the interference, even if the relationship was mended after the fact. Thus, this claim goes forward as previously determined.

This court declines to award sanctions to plaintiffs as defendants’ conduct in filing these motions is not sanctionable conduct.

All remaining arguments have been considered and do not yield an alternative result.

Accordingly, it is

ORDERED that defendants Zachary Tarica and Forest Road Company LLC's motion to dismiss the amended complaint is granted and the amended complaint is dismissed in its entirety against defendants with costs and disbursements as taxed by the Clerk and the Clerk is directed to enter judgment; and it is further

ORDERED that defendants John Levin, Robert Discolo, River Partners Capital Management LP, Levin Capital Strategies LP, and John Levin & Company’s motion to dismiss the amended complaint is granted, in part, to the extent that plaintiffs’ claim for tortious interference with contract is dismissed; and it is further

ORDERED that plaintiffs’ cross motions for sanctions is denied; and it is further

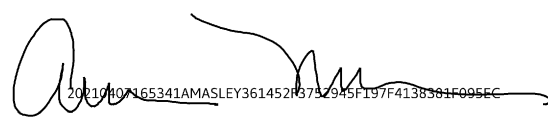
ORDERED that this action severed and continued as to defendants John Levin, Robert Discolo, River Partners Capital Management LP, Levin Capital Strategies LP, and John Levin & Company; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the Forest Defendants shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-filing" page on the court's website – www.nycourts.gov/supctmanh), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that the Levin Defendants are directed to answer the amended complaint within 20 days of this order's entry on NYSCEF; and it is further

ORDERED that the remaining parties are to submit a preliminary conference order to the court (SFC-Part48@nycourts.gov) within 30 days of this order's entry on NYSCEF. If the parties cannot agree on a proposed PC order, they may each submit a proposed PC order for the court's review.



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4/7/2021
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
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<input type="checkbox"/>	SETTLE ORDER		
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<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
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<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: