

Katzoff v BSP Agency, LLC
2021 NY Slip Op 32836(U)
December 22, 2021
Supreme Court, New York County
Docket Number: Index No. 655823/2020
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49M

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GERALD KATZOFF and GFB RESTAURANT CORP.,
Plaintiffs,

- v -

BSP AGENCY, LLC, PROVIDENCE DEBT FUND III L.P.,
BENEFIT STREET PARTNERS SMA LM L.P., BENEFIT
STREET PARTNERS SMA-C L.P., PROVIDENCE DEBT
FUND III MASTER (NON-US) FUND L.P., BENEFIT
STREET PARTNERS SMA-C SPV L.P.

Defendants.

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INDEX NO. 655823/2020

MOTION DATE _____

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 39, 41

were read on this motion to/for DISMISS.

In this action alleging defendants’ wrongful conduct, including the fraudulent inducement of loans and guarantees to improperly seize ownership and control of plaintiffs’ restaurants, defendants, BSP Agency, LLC (“BSP”), Providence Debt Fund III, L.P., Benefit Street Partners SMA LM L.P., Benefit Street Partners SMA-C L.P., Providence Debt Fund III Master (Non-US) Fund L.P., and Benefit Street Partners SMAC SPV L.P., move, pursuant to CPLR 3211(a)(1), (3), (4), and (7), to dismiss the complaint. Plaintiffs oppose the motion.

BACKGROUND

Plaintiff Gerald Katzoff is the Chairman and Manager of the Il Mulino restaurant group (Il Mulino) which is co-owned and co-operated by non-party Brian Galligan, an experienced restaurateur (NYSCEF #1-Complaint, ¶ 2). The business relationship between Katzoff and Galligan began in 2002, when Katzoff provided the capital for the acquisition of the original Il Mulino restaurant (the Original Restaurant) (*id.*, ¶¶ 44-47). On September 12, 2002, Millennium IM Consulting LLC, which is owned by Galligan, and plaintiff GFB Restaurant Corp. (“GFB”), which owns the Original Restaurant, entered into a consulting agreement regarding the operation of Il Mulino (*id.*, ¶ 48). The consulting agreement requires Galligan to, inter alia, consult with Katzoff, as representative of GFB, with respect to the management and supervision of the Original Restaurant and expressly prohibits

Galligan from competing with the Original Restaurant by “having a direct interest or rendering services for a first-class in a high-end Italian restaurant with a similar price point, within five miles of the [Original] Restaurant (*id.*, ¶ 49).

In 2004, Katzoff and Galligan formed nonparty K.G.I.M., LLC (KGIM) to serve as manager of nonparty Il Mulino USA, LLC (Il Mulino USA), which would serve as the holding company for additional Il Mulino entities (*id.*, ¶ 51). Under the Operating Agreement of KGIM, Katzoff and Galligan are members and co-managers who each owe contractual and fiduciary duties to Il Mulino and to each other (*id.*). Under Katzoff and Galligan’s partnership (acting through KGIM as manager), Il Mulino eventually expanded from a single location into a fine dining restaurant group with 16 locations (*id.*, ¶ 52). As part of this expansion, Katzoff founded joint venture partners to open new Il Mulino restaurants in Tribeca, Gramercy, and Boca (JV Restaurants) (*id.*, ¶ 89). In addition, in connection with the operation and management of the JV Restaurants, Katzoff and Galligan entered into the JBIM Operating Agreement for the restaurants in Tribeca and Gramercy, and the JBIM II Operating Agreement for the restaurant in Boca (*id.* ¶¶ 91-92). Under the Operating Agreements, Katzoff and Galligan owe contractual and fiduciary obligations to each other to co-manage the limited liability companies formed under the agreements and the restaurants (*id.*).

On June 15, 2015, BSP induced Il Mulino USA, KGIM and IM LLC-III LLC (Borrowers) to enter into a Credit Agreement with BSP (the Credit Agreement) to finance the expansion of the restaurants (*see* NYSCEF #1, ¶ 61; NYSCEF # 8-Credit Agreement; NYSCEF # 12-Security Agreement; NYSCEF # 13-Guarantee Agreement). Katzoff personally guaranteed the loans (NYSCEF # 10, 11, 14, 15). Plaintiffs allege that BSP “falsely committed to loan Il Mulino \$30 million that would first pay off Il Mulino’s existing debt of approximately \$21 million, and ... loan Il Mulino an additional \$9 million for expansion”; this commitment was included in its letter of intent (*id.*, ¶¶ 57, 58). Although BSP “expressly committed itself to loan \$30 million (which includes the \$9 million specifically for expansion), BSP misleadingly papered the Credit Agreement as an ‘an Initial Term Loan’ of \$21 million and ‘Additional Term Loans’ of up to \$9,000,000” (*id.*, ¶ 62).

The Borrowers eventually defaulted on the loans and on July 28 and July 31, 2020. Katzoff filed bankruptcy petitions on behalf of fifteen Il Mulino entities (NYSCEF # 1, ¶181). On July 29, 2020, BSP filed a related action, *BSP Agency, LLC. v Katzoff* (Sup Ct, NY County, Chan, J., Index No. 653472/2020), against Katzoff to enforce the personal guarantees (*id.*, ¶ 181) (the Guaranty Action). At oral argument of this motion, the court was informed that BSP had acquired the assets of Il Mulino for \$20 million in a Bankruptcy sale (NYSCEF # 67-Tr. 7-12-21 Oral Argument, at 35).

Plaintiffs commenced this action, essentially alleging that defendants engaged in so-called “loan-to-own scheme” by using allegedly fraudulently induced loans and personal guarantees to improperly seize ownership and control of the Il Mulino restaurant group (NYSCEF #1, ¶ 1). Plaintiffs allege that BSP expressly committed to lending the Il Mulino restaurant group \$30 million to enable the restaurant group to expand the business and repay the loan, but, instead, used the COVID-19 pandemic as “a business opportunity to takeover a severely distressed asset at below market valuation,” to usurp Katzoff’s authority as Chairman and Manager of the restaurant group, and to exercise managerial and board rights over the restaurant group (*id.*, ¶4). In particular, plaintiffs allege that BSP coerced Katzoff to appoint an outside Chief Financial Officer that it handpicked; attempted to coerce Katzoff to pledge the most valuable assets of the restaurant group; attempted to transition Katzoff out of Il Mulino; retained a restructuring advisor, which immediately attempted to take control of the restaurant group and its finances; and directed the banks holding accounts for the restaurant group to remove Katzoff as a signatory to those accounts (*id.*).

Plaintiffs also assert that BSP tortiously interfered with Galligan’s contractual and fiduciary obligations to Katzoff and GFB by, among other things, prohibiting the Galligan from working for Il Mulino entities that were not borrowers or guarantors under the BSP loans (*id.*, ¶¶ 5; 50). The complaint alleges causes of action for lender liability on behalf of Katzoff individually (first cause of action), tortious interference with contracts on behalf of Katzoff and GFB (second cause of action), tortious interference with prospective business relations on behalf of Katzoff (third cause of action), and fraudulent inducement on behalf of Katzoff (fourth cause of action) (*id.*, ¶¶ 191-210).

Defendants now move to dismiss the complaint, asserting that Katzoff lacks standing, that the complaint fails to state a cause of action, and that the fraudulent inducement claim must be dismissed as duplicative of the defenses asserted in the Guaranty Action. Plaintiffs oppose the motion.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211 (a)(7), the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference,” and “determine only whether the facts as alleged fit into any cognizable legal theory” (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). At the same time, “[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference” (*Morgenthau & Latham v Bank of New York Company, Inc.*, 305 AD2d 74, 78 [1st Dept 2003] [internal citation and quotation omitted]). Under CPLR 3211(a)(3), dismissal is warranted if the party asserting the cause of action lacks “legal capacity to sue.”

The threshold issue regarding the claims for lender liability and fraudulent inducement is whether Katzoff has standing to sue. Standing involves a determination of whether the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast the dispute in a form traditionally capable of judicial resolution (*see Matter of Graziano v County of Albany*, 3 NY3d 475, 479 [2004]). “Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation” (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991]). In order to have standing to challenge a contract, a nonparty must either suffer direct harm flowing from the contract or be a third-party beneficiary thereof (*see Decolator, Cohen & DiPrisco v Lysagh, Lysaght & Kramer*, 304 AD2d 86, 90 [1st Dept 2003]).

Here, defendants argue that Katzoff lacks standing to bring the claims since he is not a party to the Credit Agreement and cannot seek redress for alleged harm to the Borrowers arising from that agreement. Katzoff maintains that he suffered direct harm, in the amount of at least \$25 million, as a result of misconduct by BSP relating to the loans. In particular, Katzoff claims that BSP usurped his authority as Chairman and Manager of the Il Mulino restaurants; coerced him to appoint an outside Chief Financial Officer; purported to transition him out of Il Mulino; attempted to freeze him out of Il Mulino by directing banks to remove him as signatory on business accounts; chipped away his control as manager; engaged in a multi-pronged attack directed against him personally through deceit, fraud, and intimidation; falsely depicted him as financially incompetent in order to harm his reputation; increased his risk of personal liability; used its control over him to obtain federal bailout money; falsely claimed that he no longer had the authority to manage Il Mulino; and threatened to enforce the personal guarantees if he did not hand over Il Mulino assets.

Even affording these allegations the benefit of every favorable inference, the claims for lender liability and fraudulent inducement asserted by Katzoff must be dismissed because he lacks standing to assert those claims. In the lender liability claim, Katzoff alleges that BSP, as lender, used its control and domination over Il Mulino to usurp his authority to manage the restaurant. In the fraudulent inducement claim, Katzoff asserts that BSP falsely represented that it would lend Il Mulino \$30 million to finance the expansion of the restaurant when, in fact, it loaned only \$21 million. However, in both instances, the injured party was not Katzoff, but the borrowers. Moreover, Katzoff has not shown that he is a third-party beneficiary of the Credit Agreement and related loan documents (*see Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786 [2006] [internal citation and quotation omitted] [parties asserting third-party beneficiary rights must show that “the benefit to them is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate them if the benefit is lost”]).

Under these circumstances, Katzoff, as a guarantor of the loans, cannot avail himself of causes of action that may exist in favor of the Borrowers (*see European Am. Bank v Lofrese*, 182 AD2d 67, 73 [2d Dept 1992] [holding that a guarantor does not have standing to assert an independent cause of action on behalf of his principal]; *see also Broome v ML Media Partners L.P.*, 273 AD2d 63, 64 [1st Dept 2000] [plaintiffs, a group of limited partners, lacked standing to assert claims for breach of contract and breach of fiduciary duty as they did not suffer any injury distinct from that suffered by the general partnership]; *compare GM Motors Acceptance Corp. v Kalkstein*, 101 AD2d 102, 105-106 [1st Dept], *appeal dismissed* 63 NY2d 676 [1984] [finding that amended third-party complaint states a cause of action that guarantors were fraudulently induced by creditor to enter into guaranty but fails to state a claim for breach of the loan agreement with corporation]).

As Katzoff does not have standing to assert the claims for lender liability and fraudulent inducement, these claims must be dismissed, and the court need not reach the other issues raised by the parties, including whether New York recognizes an independent cause of action for lender liability, and if the fraudulent inducement claim must be dismissed based on the defenses raised in the Guaranty Action.

The remaining claims are for tortious interference with contract and tortious interference with prospective business relations. Regarding the claim for tortious interference with contract, the complaint alleges that BSP tortiously and intentionally interfered with Galligan's ability to comply with his contractual and fiduciary obligations under three operating agreements with Katzoff, (i.e., the KGIM Operating Agreement, JBIM Operating Agreement, JBIM II Operating Agreement), and the consulting agreement with GFB thus causing damage to Katzoff and GSB (NYSCEF # 1, ¶¶ 166-200).

Specifically, it is alleged that BSP, which "had knowledge of these contracts" (*id.*, ¶ 198): (i) "tortiously and intentionally prevented Galligan from complying with his contractual and fiduciary duties under those contracts by, among other things, directing Galligan that he could not perform any work or services for the non-debtor Il Mulino entities" (*id.*, ¶ 198); (ii) "misrepresent[ed] to Galligan that, among other things, BSP – as the purported manager of Il Mulino – could dictate to Galligan which Il Mulino entities he could operate," and "BSP also threatened Galligan's livelihood and warned him that if he did not comply with BSP's direction, he would lose all operational control over the Il Mulino restaurants, [and that][t]hese lies and threats to Galligan had the intended effect of interfering with Galligan's contractual obligations to Katzoff and GFB" (*id.*, ¶¶ 166-168); and (iii) "interfered with Galligan's contractual obligations to Katzoff and GFB for the purpose of harming Katzoff in retaliation for Katzoff's refusal to hand over Il Mulino's most valuable assets to BSP – particularly the intellectual property and the Original Restaurant" (*id.*, ¶ 170).

As for damages, it is alleged that “BSP’s various tortious and fraudulent conduct is having devastating effects on Katzoff and the Original Restaurant [and that] ...[t]his harm is particularly acute for the Original Restaurant ... which Galligan has been operating for nearly 20 years ... BSP’s tortious conduct is depriving the Original Restaurant of its leader at a time when restaurants in New York are barely hanging onto survival [and that] [a]s a direct and proximate result of BSP’s interference with these contracts, Katzoff and GFB have been damaged” (*id.*, ¶¶ 189, 190, 200).

A plaintiff seeking to recover for tortious interference with contract must allege the existence of its valid contract with a third party, the defendant’s knowledge of the contract, the defendant’s intentional and improper procuring of a breach, and damages (*see White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]). Here, affording plaintiff the benefit of every favorable inference, the court finds that the allegations are sufficient to state a cause of action for tortious interference with contract. The complaint adequately alleges the existence of three valid contracts between Galligan and Katzoff in the case of the operating agreements and GSB, in the case of the consulting agreement, and that BSP knew about the contracts and that BSP intentional interfered with, and procured the breach of, the contracts.

Moreover, contrary to defendants’ argument, the complaint adequately alleges that this interference damaged plaintiffs. In this connection, although to state a cause of action for tortious interference with the contract it must be inferred that “but for” the interference the contract at issue would not have been breached (*see Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept], *lv denied* 7 NY3d 704 [2006]), the allegations here, including that the interference with Galligan’s obligations and duties under the subject contracts harmed the Original Restaurant by depriving it of its long-time leader and manager, are sufficient to “provide fair notice of ‘but for’ causation” (*Madison Third Bldg. Cos. LLC v. Berkey*, 30 AD3d 1146, 1146 [1st Dept 2006][internal citation and quotation omitted]; *see also Wells Fargo Bank v ADF Operating Corp.*, 50 AD3d 280, 281 [1st Dept 2008] [finding that successor of lender under promissory notes and security agreements adequately alleged that borrower’s principals tortiously interfered with security agreements by transferring their ownership interest in restaurant to third party without lender’s consent and sold them to profit themselves to borrower’s detriment]). Accordingly, the motion to dismiss the claim for tortious interference with contract is denied.

As for the claim of tortious interference with prospective business relations, to state a viable cause of action, a plaintiff must allege that it had business relationships with a third party; that the defendant interfered with those business relations; that the defendant acted for the sole purpose of harming the plaintiff or by using wrongful or unlawful means, and that there was resulting injury to the

business relationship (*see Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 108 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]). Here, the complaint alleges that Katzoff had independent and personal business relations with TD Bank, Signature Bank, and numerous potential investors in Il Mulino (NYSCEF #1, ¶¶ 171, 202), and that BSP, by improper means, interfered with those relations by directing the banks to remove Katzoff as a signatory on Il Mulino's bank accounts (*id.*, ¶¶ 4,16, 171-174), by making false and derogatory statements about Katzoff in False BSP Filings (*id.*, ¶¶ 25-26, 43, 56, 73, 84, 94, 102, 106, 129, 150, 183-187), for the sole purpose of harming Katzoff (*id.*, ¶¶ 25-26, 30, 129, 174, 183-187), and BSP's interference caused harm to Katzoff's relationships with the banks and potential investors (*id.*, ¶¶ 17, 172).

The court finds that the complaint sufficiently alleges Katzoff's relationships with subject banks and investors, and interference with those relationships through the making of false and derogatory statements, which were made for the sole purpose of harming plaintiff. As for wrongful means, it has been held that a cause of action for tortious interference with business relations is adequately pleaded based on allegations that false and disparaging remarks when they prevent a plaintiff from making a contract based on such remarks (*Amranth LLC v JP Morgan Chase & Co.*, 71 AD3d 40, 48-49 [1st Dept 2009], *lv dismissed* 14 NY3d 736 [2010]). In this case, however, the complaint contains insufficient allegations that as a result of defendants' false and disparaging statements, any potential business opportunities were lost, as opposed to causing reputational harm with the bank or investors (*Vigoda v DCA Prods Plus Inc.*, 293 AD2d 265, 267 [1st Dept 2002] ["tortious interference with prospective economic relations requires an allegation that plaintiff would have entered into an economic relationship but for the defendant's wrongful conduct"]; *CBS Corp v Dumsday*, 268 AD2d 350, 353 [1st Dept 2000][same]). In fact, there are no allegations that as a result of defendants' remarks, Katzoff was removed as a signatory to the subject bank accounts. Accordingly, the motion to dismiss the claim for interference with perspective business relationships must be granted.

CONCLUSION

In view of the foregoing, it is

ORDERED that defendants' motion to dismiss is granted to the extent of dismissing the causes of action for lender liability (first), tortious interference with prospective business relations (third), and for fraudulent inducement (fourth); these causes of action are dismissed and severed; it is further

ORDERED that the second cause of action for tortious interference with contract shall continue; it is further

ORDERED that defendants are directed to answer the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that a preliminary conference shall be held via telephone on February 28, 2022, at 10:30 am with the call-in number to be provided by the court, and before the conference the parties shall meet and confer and complete a preliminary conference form posted on the commercial division website under Justice Chan's name.

12/22/2021
DATE


MARGARET A. CHAN, J.S.C.
MARGARET CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART

OTHER