

PF2 Sec. Evaluations, Inc. v Fillebeen

2022 NY Slip Op 31226(U)

April 12, 2022

Supreme Court, New York County

Docket Number: Index No. 151776/2014

Judge: Laurence Love

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. LAURENCE LOVE</u></p> <p align="center"><i>Justice</i></p> <p>-----X</p> <p>PF2 SECURITIES EVALUATIONS, INC.,</p> <p align="center">Plaintiff,</p> <p align="center">- v -</p> <p>GUILLAUME FILLEBEEN, LEVEL 3 CONSULTANTS, LLC,</p> <p align="center">Defendants.</p> <p>-----X</p>	<p>PART 63M</p> <p>INDEX NO. <u>151776/2014</u></p> <p>MOTION DATE <u>12/16/2020, 09/02/2021</u></p> <p>MOTION SEQ. NO. <u>013 014</u></p> <p align="center">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 013) 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 323, 324, 325, 326, 327 were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The following e-filed documents, listed by NYSCEF document number (Motion 014) 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

The following read on Plaintiff/Counter – Defendant PF2 SECURITIES EVALUATIONS, INC. (“PF2”), Counter – Defendant GENE PHILLIPS and Counter – Defendant ROBIN PHILLIPS,’ motion, per CPLR 5015, to vacate this Court’s Order, entered on June 25, 2020, that required Movants to appear for depositions, and to issue an Order denying Defendant’s oral motion to compel depositions; and

Plaintiff/Counter – Defendant PF2 SECURITIES EVALUATIONS, INC.’S motion to grant partial summary judgment, per CPLR 3212, to grant summary judgment as to liability on

the second cause of action for breach of duty; to grant summary judgment as to liability on the fifth cause of action for breach of the covenant of good faith and fair dealing; to dismiss defendant's second counterclaim for an accounting; to dismiss defendants' third counterclaim for unjust enrichment; to dismiss defendants' eighth counterclaim for fraudulent inducement; to deny, preclude, and bar defendants' remedy of reformation, as sought in their counterclaim; and to deny, preclude, and bar defendants' remedy of rescission, as sought in their counterclaim.

The complaint states that "defendant Guillaume Fillebeen joined PF2 as a partner director. PF2 provides consulting services to its clients, with a particular focus on assessing CDO (Collateralized Debt Obligations) securities. Defendant Fillebeen had access to PF2's confidential and proprietary information. In November of 2012, PF2 negotiated a buyout contract with Guillaume Fillebeen. Defendant Fillebeen began doing business as L3C – a company competing with PF2. Defendant Fillebeen's conduct ... was in breach of defendant Fillebeen's Shareholder agreement ... and in breach of defendant Fillebeen's Buyout and Employment Contract with PF2 (see NYSCEF Doc. No. 1 Pars. 17, 28, 37, 40, 45, 70).

An answer with counterclaims states, "Fillebeen created and generated his own proprietary CDO Models prior to his the (sic) formation of PF2. At no time did any of the parties enter into any oral and/or written agreement by which Fillebeen transferred ownership of his proprietary CDO Models to PF2 and/or the PF2CDs. (see NYSCEF Doc. No. 7 Pars. 35, 36).

A June 25, 2020 Decision states, "the Court directs plaintiffs to produce witnesses in response to defendants' notices of deposition" (see NYSCEF Doc. No. 285). Defendant submits an Appellate Division, First Department Order denying leave. Defendants appealed the June 25, 2020 Decision, which was denied (see NYSCEF Doc. No. 315).

A plaintiff should be prevented from repeatedly bringing his claim into court, thereby harassing the other parties involved and clogging the court's calendar (see *Headley v. Noto*, 22 N.Y.2d 1, 4 [1968]).

Plaintiff/Counter – Defendant PF2 SECURITIES EVALUATIONS, INC.'S now moves to grant partial summary judgment, per CPLR 3212, as to liability on the second cause of action for breach of duty; as to liability on the fifth cause of action for breach of the covenant of good faith and fair dealing; to dismiss defendant's second counterclaim for an accounting; to dismiss defendants' third counterclaim for unjust enrichment; to dismiss defendants' eighth counterclaim for fraudulent inducement; to deny, preclude, and bar defendants' remedy of reformation, as sought in their counterclaim; and to deny, preclude, and bar defendants' remedy of rescission, as sought in their counterclaim.

CPLR § 3212 (b) states that, "the [summary] motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

"The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact." *Alvarez v. Prospect Hospital*, 68 NY2d 320 (1986).

Named counter – defendant Gene Phillips submits an affidavit, "Fillebeen also concealed his involvement in L3C by omitting his name, phone number and address from L3C's website. Immediately after forming L3C, Fillebeen began soliciting PF2's customers to get business for himself through L3C, even though he was employed by PF2" (see NYSCEF Doc. No. 332 Pars. 74, 75).

“Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact.” *Zuckerman v City of New York*, 49 NY2d 557 (1980).

An affidavit from named defendant – Guillaume Fillebeen affirms, “GP [Gene Phillips] ... told me I was no longer welcome at PF2, and falsely stated to me that PF2’s finances were in a dire state, and, therefore, PF2 was only able to pay me a fraction of the value of my PF2 shares. My belief as to the truth of their statements as to the company’s troubles and lack of financial wherewithal was dependent on them concealing the true nature of PF2’s finances and the opportunities that were arising” (see NYSCEF Doc. No. 450 Pars. 20, 28).

“To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented.” *Glick & Dolleck Inc v Tri-Pac Export Corp*, 22 NY2d 439, 441 (1968).

“Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable.” *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 (2004). On summary judgment, “facts must be viewed in the light most favorable to the non-moving party.” *Vega v Restani Constr Corp*, 18 NY3d 499, 503 (2012).

As both sides have submitted affidavits there remains questions of fact that preclude the granting of partial summary judgment. Further disclosure is required and as depositions have not been taken, an order for summary judgment would be premature.


It is now

ORDERED that Plaintiff/Counter – Defendant PF2 SECURITIES EVALUATIONS, INC. (“PF2”), Counter – Defendant GENE PHILLIPS and Counter – Defendant ROBIN PHILLIPS,’ motion, per CPLR 5015, to vacate this Court’s Order, entered on June 25, 2020, that

required Movants to appear for depositions, and to issue an Order denying Defendant’s oral motion to compel depositions is DENIED; and it is further

ORDERED that Plaintiff/Counter – Defendant PF2 SECURITIES EVALUATIONS, INC.’S motion to grant partial summary judgment, per CPLR 3212, as to liability on the second cause of action for breach of duty; as to liability on the fifth cause of action for breach of the covenant of good faith and fair dealing; to dismiss defendant’s second counterclaim for an accounting; to dismiss defendants’ third counterclaim for unjust enrichment; to dismiss defendants’ eighth counterclaim for fraudulent inducement; to deny, preclude, and bar defendants’ remedy of reformation, as sought in their counterclaim; and to deny, preclude, and bar defendants’ remedy of rescission, as sought in their counterclaim is DENIED in its entirety. and it is further

ORDERED that counsel are directed to appear for a status conference via Virtual Microsoft Teams, on May 11, 2022, at 10:30 AM.

<p><u>4/12/2022</u> DATE</p>			 <hr/> LAURENCE LOVE, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE