

**Strategic Review Comm. LLC v Prodigy Network,
LLC**

2022 NY Slip Op 31729(U)

May 25, 2022

Supreme Court, New York County

Docket Number: Index No. 656453/2020

Judge: Joel M. Cohen

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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 03M

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STRATEGIC REVIEW COMMITTEE LLC,	INDEX NO.	<u>656453/2020</u>
Plaintiff,	MOTION DATE	<u>11/08/2021</u>
- v -	MOTION SEQ. NO.	<u>002</u>
PRODIGY NETWORK, LLC, PRODIGY SHOREWOOD INVESTMENT MANAGEMENT, LLC	DECISION + ORDER ON MOTION	
Defendants.		

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46
 were read on this motion for LEAVE TO FILE AMENDED COMPLAINT.

Following dismissal of its original complaint, Plaintiff Strategic Review Committee LLC (“SRC”) now moves, under CPLR 3025 [b], for leave to file an amended complaint (NYSCEF 32 [the proposed amended complaint [“PAC”]]). For the reasons set forth below, the motion is **denied**.

DISCUSSION

Under CPLR 3025 [b], leave to amend “shall be freely given” provided that the movant satisfies its burden of showing that “the proffered amendment is not palpably insufficient or clearly devoid of merit” (*Fairpoint Cos., LLC v Vella*, 134 AD3d 645, 645 [1st Dept 2015] [internal citation omitted]). “[I]n determining whether to grant leave to amend the court must examine the underlying merits of the causes of action asserted therein, since to do otherwise would constitute a waste of judicial resources” (*Glenn Partition, Inc. v Trs. of Columbia Univ. in N.Y.*, 169 AD2d 488, 489 [1st Dept 1991]). Accordingly, “[a] proposed amendment that cannot

survive a motion to dismiss should not be permitted” (*Scott v Bell Atl. Corp.*, 282 AD2d 180, 185 [1st Dept 2001]; *see Olam Corp. v Thayer*, 2021 NY Slip Op. 30345[U] [Sup Ct, New York County 2021]).

On this motion, Defendant Prodigy Shorewood Investment Management, LLC (“PSIM”)¹ contends that the proposed amendments are deficient in two respects: (A) that SRC still fails to allege standing, and (B) that SRC fails to state a cause of action.

A. The PAC Alleges Standing

In its Decision and Order dated August 4, 2021, this Court granted PSIM’s motion to dismiss the original complaint “on the ground that Plaintiff has failed to adequately plead standing to assert a claim for breach of a contract to which it was not a signatory” (NYSCEF 44; *see* NYSCEF 43 at 36-39 [oral arg. tr.]). A litigant “may not pursue claims under [a contract]” where “it is neither a party to the contract . . . nor a third party beneficiary thereof” (*Flag Wharf, Inc. v Merrill Lynch Capital Corp.*, 40 AD3d 506, 507 [1st Dept 2007]). The Restructuring Support Agreement, dated as of August 12, 2019 (the “RSA”), was “entered into by and among” Prodigy, PSIM, and “the members of the Strategic Review Committee” (RSA [NYSCEF 3]). Plaintiff SRC, a corporate entity, was not a signatory.

SRC has argued that the members of the Strategic Review Committee assigned their rights under the RSA to SRC, through an Assignment and Assumption Agreement (the “Assignment”) (NYSCEF 24 at 4-6). But as a basis for standing, the purported assignment raised several concerns. For starters, it was not pleaded in the initial complaint. The document,

¹ Defendant Prodigy Network LLC failed to answer or otherwise respond to the initial complaint in this action, and filed for Chapter 7 bankruptcy on March 25, 2021 (NYSCEF 30 at 2 n.2). SRC is not seeking relief against Prodigy at this time (*id.*).

moreover, lists the “Assigning Party” as two members of the Committee, while five members of the Committee executed the RSA. These peculiarities could not be cured by a conclusory affidavit from SRC’s counsel, unaccompanied by an affidavit of facts from someone with personal knowledge of the agreement (NYSCEF 43 at 37-38). Ultimately, the Court found “[t]here is no basis . . . to understand or believe that this assignment reflects and incorporates an assignment from all of the parties to the Support Agreement; it doesn't say that on its face, and there’s no affidavit, there’s no allegation [in the complaint]” (*id.* at 38).

The PAC addresses those concerns about the Assignment in three steps. *First*, the PAC specifically alleges that through the Assignment, “the Committee assigned all rights and obligations under the Agreement to the SRC” (PAC ¶ 16). *Second*, the PAC alleges that the Assignment “was executed by the two remaining members of the Committee” – Partners Capital S.A. (“Partners”) and Beca Investment Advisors S.A. (“Beca”) (*id.* n.3). And *third*, according to the PAC, two other original members of the Committee, SAI and Jenny Benhos Ambe, “resigned from the Committee in or about 2019 and no longer possesses and [sic] rights in the Committee or under the Agreement” (*id.*). The other original Committee member, Nobilis, allegedly “authorized Partners and Beca to execute the Assignment on its behalf” (*id.*). Importantly, the PAC attaches affidavits from SAI, Benhos Ambe, and Nobilis in support of these allegations (*id.*; *see* NYSCEF 37 [SAI aff.]; NYSCEF 38 [Benhos Ambe aff.]; NYSCEF 39 [Nobilis aff.]). These new factual allegations and evidence support SRC’s argument that the Committee members intended the SRC to carry forward their collective rights under the RSA.

Therefore, the amended pleadings sufficiently allege SRC’s standing to pursue claims under the RSA.

B. The PAC Fails to State a Cause of Action

However, SRC's motion is denied because the PAC fails to state a cause of action. SRC asserts two claims for breach of contract. In the first cause of action, SRC alleges that "PSIM breached the Agreement by failing to provide the required documents to the SRC" (PAC ¶ 53). And in the second cause of action, SRC alleges that "PSIM breached the Agreement by failing to request an amendment to required [sic] prior Majority Consent of the Investors before they could make any Major Decisions," as defined in the RSA, and that this failure "deprived Plaintiff of the ability to object to the transactions which resulted in the complete loss of their investments" (*id.* ¶¶ 57-58).

Both claims are "palpably insufficient" and "clearly devoid of merit." To state a viable claim for breach of contract, the alleged damages "must be proximate and certain . . . and not remote, speculative or contingent" (*Fruition, Inc. v Rhoda Lee, Inc.*, 1 AD3d 124, 125 [1st Dept 2003]). The first cause of action epitomizes the kind of speculative, contingent claim prohibited by New York law. It theorizes that if PSIM had provided information to SRC about offers from potential buyers, SRC "would have been able to protect its investments in the Projects by seeking court intervention to stop the turnover of the Transferred Projects which would have prevented their investments from being entirely wiped out" (PAC ¶ 48). But SRC still does not identify "any language in the [RSA] that suggests a right to participate or consult or change any decisions that the defendants might make" (NYSCEF 43 at 40). And without a contractual basis "to stop the turnover," the first cause of action remains "one speculation piled on top of another" (*id.* at 41). As a result, PSIM's alleged failure to provide documents to SRC cannot form the basis of a viable claim for breach of contract (*Assured Guar. Corp. v EMC Mortg., LLC*, 39 Misc.3d

1207(A) [Sup Ct, New York County 2013] [damages for breach of contract “must be reasonably certain and directly traceable to a breach of contract”]).

The second cause of action is similarly speculative. Under section 2 [a] [viii] of the RSA, PSIM is required to “request an amendment, as soon as reasonably practicable, for approval by the requisite Investors (and, if applicable creditors) in a Project to require prior Majority Consent of the Investors, before Prodigy and/or PSIM (as the case may be) may make any Major Decision . . . with respect to the related Project” (PAC ¶ 18). SRC alleges that PSIM “failed to request an amendment as required by section 2 [a] [viii],” and that by failing to do so, PSIM “effectively prevented the investors, including Plaintiff, from stopping the transfers which resulted in the complete loss of their investments” (*id.* ¶ 31). But this allegation is missing at least two links in the chain of causation. The PAC does not allege that PSIM itself could have caused those amendments to go into effect, nor does it allege that, if PSIM had made the request, “the requisite Investors” for the Project would have approved it.

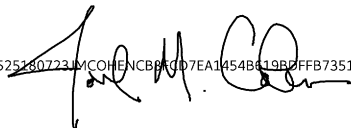
That is not to say that SRC’s contractual rights under the RSA were meaningless or illusory. Such rights might have provided the basis to seek contemporaneous *injunctive* relief with respect to access to information or requesting amendment, for example, precisely *because* the alleged breaches “may not be compensable by non-speculative damages” later on (*Hemmings v Ivy League Apt. Corp.*, 42 Misc 3d 1215(A), *5 [Sup Ct, New York County 2013], quoting *Wisdom Import Sales Co. v Labatt Brewing Co., Ltd.*, 339 F3d 101 [2d Cir 2003]). But here, SRC seeks to connect PSIM’s failure to take certain actions under the RSA to money damages representing the loss of SRC’s investment. And that claim requires factual allegations from which proximate damages reasonably can be inferred. The PAC fails to do that.

* * * *

Accordingly, it is

ORDERED that SRC's motion for leave to amend the complaint is **DENIED**, and the Clerk is directed to enter judgment in favor of PSIM.

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

5/25/2022

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE