

<b>Black v Phoenix Cayman Ltd.</b>
2022 NY Slip Op 32576(U)
July 28, 2022
Supreme Court, New York County
Docket Number: Index No. 652460/2020
Judge: Barry R. Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

ANDREW BLACK, HANS ERIK MOLBERG, CELESTINO AMORE, and DR. HENRY BALBOA individually and on behalf of PHOENIX HOLDCO LP,

Plaintiffs,

- v -

PHOENIX CAYMAN LTD., VISHAL GARG, RAJA VISWESWARAN, NICHOLAS CALAMARI, TRIAXX HOLDCO, LLC, 1/0 CAPITAL LLC, and 1/0 HOLDCO LLC,

Defendants.

Table with 2 columns: INDEX NO., MOTION DATE, MOTION SEQ. NO. and their corresponding values.

DECISION + ORDER ON MOTIONS

HON. BARRY R. OSTRAGER

The Court heard oral argument on July 28, 2022 via Microsoft Teams on the motion by defendant Raja Visweswaran for an Order dismissing the Amended Complaint pursuant to CPLR 3211(a)(5), (7), and (8) (seq. 006) and the motion by the remaining defendants for an Order pursuant to CPLR 3211(a)(1), (3), (5), and (7) dismissing with prejudice: (1) Counts 1, 4, 6, 7, 8, 9, and 11 of the Amended Complaint in their entirety with respect to Defendants Phoenix Cayman Ltd., Vishal Garg, Nicholas Calamari, Triaxx Holdco LLC, 1/0 Capital LLC, and 1/0 Holdco LLC ("the Remaining Defendants"), (2) Count 5 of the Amended Complaint in its entirety with respect to Defendants Nicholas Calamari, Triaxx Holdco LLC, 1/0 Capital LLC, and 1/0 Holdco LLC, and in part with respect to Defendants Phoenix Cayman Ltd. and Vishal Garg, and (4) Counts 2, 10, and 12 of the Amended Complaint in their entirety with respect to Defendant Vishal Garg (seq. 007). In addition, the Court heard oral argument on the recently filed motion by non-party Raza Khan for costs and fees related to the production of

Electronically Stored Information (“ESI”) (seq. 008). In accordance with the July 28, 2022 transcript of proceedings, the motions are determined as follows.

The Court grants the motion by defendant Raja Visweswaran to dismiss all claims against him for lack of personal jurisdiction pursuant to CPLR 3211(a)(8). The Court denied an earlier motion to dismiss on March 29, 2021 without prejudice to renewal following jurisdictional discovery. Since that time, plaintiffs have deposed defendant Visweswaran and obtained a significant number of documents. Therefore, plaintiffs at this point in the litigation must do more than make a *prima facie* showing of jurisdiction over defendant, who is a resident of the United Kingdom over whom there is not general jurisdiction. To establish specific jurisdiction, plaintiffs must make the requisite showing of “continuous and systematic” activities by defendant in New York which show that defendant was availing himself of the privilege of conducting business in New York and the protections of New York law. Plaintiffs must also show a nexus between any New York activities and plaintiffs’ claims.

Plaintiffs have failed to satisfy either prong of the jurisdictional test. The principal place of business of the corporations for which defendant serves as a director are not attributable to defendant without purposeful activities in New York. The various telephone calls and emails initiated by persons who may have been in New York when defendant was not are an insufficient basis to invoke jurisdiction in New York. Further, most of the activity pre-dated the formation of the Partnership at issue and therefore has no nexus to the claims for conversion of fees or waste after the Partnership was formed. Accepting as true plaintiffs’ claim that defendant Visweswaran attended a meeting in New York to negotiate the transaction with ICP, the single meeting does not constitute a showing of “continuous and systematic” activities in New York to support jurisdiction over the United Kingdom resident. Nor can the forum selection clause in the LP

Agreement provide a basis for jurisdiction, as defendant was not a signatory nor otherwise personally bound by the Agreement nor a holder of any direct controlling interest in the Partnership.

If plaintiffs had established jurisdiction, the majority of their claims would nevertheless fail on the merits as follows. The fraud claim in the First Cause of Action fails to state a claim against defendant. The allegations of concealment in the pre-launch phase of the investment primarily are attributable to defendant Garg. Even though plaintiffs conducted discovery, the amended complaint lacks specific fraud allegations attributable to the moving defendant within the Statute of Limitations period. The claim under the Cayman Islands Partnership Law (the Second Cause of Action) would be dismissed as the statute does not apply to defendant Visweswaran individually, and no basis exists to pierce the corporate veil.

The conversion claim (the Fifth Cause of Action) fails and would be dismissed as no funds have been identified that are tied to the moving defendant in the three-year period before the action was commenced. Nor has a basis for equitable estoppel been established.

The motion to dismiss by the Remaining Defendants (seq. 007) is determined as follows. Defendants do not challenge the claims asserted against Phoenix Cayman in the Second, Third, Tenth, and Twelfth Causes of Action, nor those asserted against Phoenix Cayman and Vishal Garg in the Fifth Cause of Action as to purported conduct occurring after June 12, 2017. To the extent defendants seek to dismiss all other claims against all other parties, those branches of the motion are decided as follows.

The Court dismisses the Second Cause of Action against defendant Garg for violation of the Cayman Islands Partnership Law. The statute does not apply to Garg as a limited partner. The allegations are not sufficient to pierce the corporate veil. The Court also dismisses the Tenth

Cause of Action against Garg for breach of the LP Agreement and the Twelfth Cause of Action for attorney's fees pursuant to the LP Agreement. Garg is not a party to the LP Agreement, and no basis has been stated for individual liability.

The Court dismisses the Fourth Cause of Action against Phoenix Cayman Ltd. for production of books and records as moot. The records have been provided. To the extent plaintiffs assert a right to attorney's fees in connection with their efforts to compel production, that claim can be asserted under the Twelfth Cause of Action or as otherwise appropriate. No need exists to maintain the Fourth Cause of Action separately.

The Court denies dismissal of the First Cause of Action alleging fraud against Garg. Defendants argue the claim is time-barred both under the six-year Statute of Limitations for fraud and the two-year discovery rule. However, the Amended Complaint alleges a broad range of misrepresentations and omissions by Garg, and the Court cannot find as a matter of law that plaintiffs failed to exercise reasonable diligence to discover the fraud.

The Fifth Cause of Action asserts a conversion claim against all defendants derivatively regarding Administrative Fees, Management Fees, and Incentive Fees. Defendants primarily rely on the three-year Statute of Limitations for conversion and seek to dismiss all claims before June 12, 2017, which is three years before the action is commenced. Regarding the 1/0 defendants, the movants claim none of the allegations pre-date June 12, 2017. Defendants do not challenge any conversion claims against Garg after June 12, 2017. Plaintiffs claim in response that the conversion began in 2014 and was ongoing and concealed, that Garg owned the 1/0 entities, and that the wrongfully converted funds have been specifically identified as to all the defendants. The Court therefore denies dismissal without prejudice based on a liberal construction of the

pleadings and defendants' failure to establish the Statute of Limitations defense at this stage of the litigation as a matter of law.

The Sixth Cause of Action asserts a conversion claim derivatively against Garg, Calamari and Triaxx only regarding the Partnership Interest in the Collateral Manager, PSCIL.

Defendants' main argument relates to standing; i.e., that only PSCIL, a subsidiary of Phoenix, had the option to purchase ICPAM, and that plaintiffs have no standing to assert the claim.

Defendants also argue that an option to purchase is not a "possessory interest" sufficient to support a conversion claim. Although the Court rejects plaintiffs' argument that this Court's prior decision constitutes law of the case, the Court denies dismissal of the Sixth Cause of Action without prejudice. The Option Agreement conferred option rights to PSCIL that could not be assigned absent a written agreement between the parties, which never occurred. Construing the pleadings liberally, the Court finds the claim has been adequately pled and that defendants have not established either their standing defense or their statute of limitations defense as a matter of law.

For similar reasons, the Court denies dismissal of the Seventh Cause of Action, which is the same as the Sixth Cause of Action but sounds in unjust enrichment. The Court denies dismissal of the Eighth Cause of Action asserting a derivative claim against Garg, Calamari, and Triaxx for tortious interference with the Option Agreement based on an analysis similar to that applied to the Sixth and Seventh Causes of Action.

The Court denies dismissal of the Ninth Cause of Action alleging a derivative claim against Calamari for breach of fiduciary duty. Defendants assert that the claims address Calamari in his role as counsel, but he was counsel to a Phoenix subsidiary but not Phoenix Holdco or its limited partners. Issues of fact exist that bar dismissal at the pleading stage regarding the precise

role played by Calamari at all relevant times. Those issues would also bar any dismissal based on standing or the statute of limitations defense at this time.

The Court denies dismissal of the Eleventh Cause of Action asserting a derivative claim of corporate waste and mismanagement against Garg. Defendants have failed to establish a defense based on the business judgment rule as a matter of law. Issues exist as to whether Garg believed that his actions were in the best interests of the company and whether any exceptions to the business judgment rule apply based on fraud, self-dealing, or a conflict of interest.

The motion by non-party Raza Khan for costs and fees related to the production of Electronically Stored Information (“ESI”) (seq. 008) is granted to the extent of awarding the movant \$13,000.00.

The Remaining Defendants shall file an Answer to the remaining claims within twenty days, and discovery shall continue expeditiously. A status conference is scheduled for September 14, 2022 at 10:00 a.m. The other rulings made by the Court regarding discovery are set forth in a separate Status Conference Order being issued simultaneously with this decision. Counsel are urged to continue efforts to resolve the dispute consensually.

Dated: July 28, 2022

*Barry R. Ostrager*  
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BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE