

W Mgt. Servs. Ltd. v Fanning
2022 NY Slip Op 32637(U)
August 4, 2022
Supreme Court, New York County
Docket Number: Index No. 650727/2021
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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W MANAGEMENT SERVICES LTD

Plaintiff,

- v -

OISIN FANNING,

Defendant.

INDEX NO. 650727/2021

MOTION DATE _____

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 77, 78, 79, 80, 81, 82, 83, 84, 85

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Upon the foregoing documents, W Management Services Ltd.’s (**W Management**) motion for partial summary judgment must be granted and Oisin Fanning’s cross-motion for summary judgment must be denied because W Management has made its prima facie showing of entitlement to summary judgment as to liability on its cause of action for breach of contract and Mr. Fanning has failed to raise any triable issue of material fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Reference is made to a Decision and Order, dated November 30, 2021 (the **Prior Decision**; NYSCEF Doc. No. 20). Capitalized terms used but not otherwise defined shall have the meaning ascribed thereto in the Prior Decision.

It is undisputed that Mr. Fanning failed to deliver capital shares of SLE, in breach of the Loan Documents. Mr. Fanning’s argument that W Management cannot establish damages and that not

only is W Management not entitled to summary judgment but also he is entitled to dismissal fails (cf. *Quik Park West LLC v Bridgewater Operating Corp.*, 189 AD3d 488, 489 [1st Dept 2020]).

As discussed in the report of Robert MacLavery, W Management's damages expert, (NYSCEF Doc. No. 79) W Management is entitled to actual damages, including, among other things, the Upfront Commitment Fee (see NYSCEF Doc. No. 3, at 3-4).

Mr. Fanning's affirmative defenses fail and do not preclude summary judgment here. Mr. Fanning argues that, although the Loan Documents required the delivery of the capital shares in one free-of-payment delivery (NYSCEF Doc. No. 3, at 1). Mr. Fanning alleges that Ms. Akbar told him that W Management would pay at the time of delivery, and therefore he was fraudulently induced to sign the Loan Documents. The problem with this theory is that Mr. Fanning could not have reasonably relied on Ms. Akbar's statement because it is directly contradicted by the express terms of the Loan Documents (*Bank of Am., N.A. v Lang Indus., Inc.*, 127 AD3d 1457, 1458-1459 [3d Dept 2015]). Mr. Fanning also cannot assert fraudulent inducement based on Ms. Akbar's statement because the Loan Documents contain both a merger clause (NYSCEF Doc. No. 2, ¶ 11[m]) and an express disclaimer of any reliance on any representation not set forth in the Loan Documents, including specifically with respect to the capital shares (*id.*, ¶ 11[o]) (*Rodas v Manitaras*, 159 AD2d 341, 342 [1st Dept 1990]; see *WT Holdings Inc. v Argonaut Group, Inc.*, 127 AD3d 544, 544 [1st Dept 2015]).

Mr. Fanning's aiding and abetting breach of fiduciary duty affirmative defense also fails because Mr. Fanning has failed to allege the underlying breach of fiduciary duty and that this was

anything more than an arm's length transaction (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 25 [1st Dept 2015]). Mr. Fanning admitted in his deposition that he did not have a contract with Ms. Akbar and had not discussed their relationship (Tr at 98-99, [NYSCEF Doc. No. 78]). He has not otherwise demonstrated that she owed him any fiduciary duties. In addition, Mr. Fanning has not brought claims against her for the alleged breach of fiduciary duty. Mr. Fanning's affirmative defense for tortious interference also fails because Mr. Fanning has not alleged that W Management acted either for the sole purpose of harming Mr. Fanning or with malice (*Stuart's, LLC v Edelman*, 196 AD3d 711 [2d Dept 2021]). Mr. Fanning also fails to demonstrate an adequate basis to support the affirmative defense for breach of the implied covenant of good faith and fair dealing. Thus, the motion for summary judgment as to liability must therefore be granted and the cross-motion denied. The issue of damages shall be referred to a JHO or Special Referee to hear and determine the actual damages W Management suffered.

It is hereby ORDERED that W Management's motion for summary judgment as to liability on its cause of action for breach of contract is granted; and it is further

ORDERED that Mr. Fanning's cross-motion for summary judgment is denied; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and determine the issue of damages, which is hereby submitted to the JHO/Special Referee for such purpose; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the “References” link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

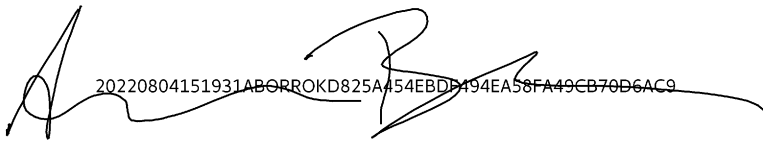
ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the “References” link on the court’s website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the plaintiff(s)/petitioner(s) shall serve a pre-hearing memorandum within 24 days from the date of this order and the defendant shall serve a pre-hearing memorandum within 20 days from service of plaintiff’s papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules).



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8/4/2022
DATE

ANDREW BORROK, JSC

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