

Matte Projects, LLC v Zalkin

2023 NY Slip Op 30911(U)

March 22, 2023

Supreme Court, New York County

Docket Number: Index No. 651902/2022

Judge: Arthur F. Engoron

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This opinion is uncorrected and not selected for official publication.

Before he would “invest” in Matte, Davies allegedly insisted that plaintiff pay \$32,000 in “due diligence fees” to a Swiss company, non-party Inside Knowledge, so that Davies could know who he was investing in. NYSCEF Doc. No. 2.

On February 10, 2020, Matte wired Inside Knowledge \$32,000. NYSCEF Doc. No. 2 ¶ 33.

On March 5, 2020, Max Pollack (“Pollack”), a member of Matte, emailed non-party Check Fund Manager LLC to “get some diligence on an overseas investor,” Davies. NYSCEF Doc. No. 26.

On March 9, 2020, Check Fund Manager replied to Pollack that, essentially, Davies’ name was too common and his biography too vague for much diligence, but more could be discovered with Davies’ signed consent. NYSCEF Doc. No. 26. Pollack forwarded the Check Fund Manager emails to various Matte and Astor email addresses and specifically asked defendants Mickey Klein (“Klein”) and Seth Zalkin (“Zalkin”), Astor’s principals, to confirm that “this KYC [Know Your Customers] happens post diligence?” Id.

On March 11, 2020, Pollack emailed Astor to, inter alia, ask about Davies, specifically asking if “any background check [had] been run?” NYSCEF Doc. No. 13. Klein replied:

I haven’t done any formal background check on [Davies]. If you’d like to do one, and it’s not uncommon to run those on individual investors, it’s usually not done until you move towards a definitive agreement, post their diligence.

With that said.. I can ask him.

The KYC doc’s, he has filled out for my other client, but some details were being withheld until we finalize diligence there as well. I’ve spoken to one of his attorneys in NY and he told me John is a VERY private and cautious person with his personal financial details. I’m sure I can get you on a call with him as well.

Id.

In response Pollack wrote, inter alia: “Can you ask his team on the KYC stuff – let’s try to dual path.” Id.

On May 14, 2020, Pollack forwarded to various Matte and Astor email addresses a “Due Diligence Report” on Matte sent by Inside Knowledge. NYSCEF Doc. No. 16.

At some point in August 2020 plaintiff and defendants lost contact with Davies. NYSCEF Doc. No. 2 ¶ 38.

The parties now appear to agree that Davies was a con artist who controlled Inside Knowledge and had no intention of investing in Matte.

On April 18, 2022, plaintiff commenced the instant action, asserting five causes of action: (1) fraudulent inducement as against all defendants; (2) breach of contract as against Astor; (3)

breach of the implied covenant of good faith and fair dealing as against Astor; (4) unjust enrichment as against all defendants; and (5) piercing the corporate veil as against Astor. NYSCEF Doc. No. 2.

On June 30, 2022, defendants moved, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint. NYSCEF Doc. No. 5.

Discussion

Dismissal pursuant to CPLR 3211(a)(1) is warranted where “documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” Leon v Martinez, 84 NY2d 83, 87-88 (1994). Under CPLR 3211(a)(7), dismissal “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” Goshen v Mutual Life Ins. Co. of NY, 98 NY2d 314, 326 (2002). Dismissal pursuant to CPLR 3211(a)(7) is warranted when, “afford[ing] the pleadings a liberal construction, tak[ing] the allegations of the complaint as true and provid[ing] plaintiff the benefit of every possible inference,” the complaint fails to assert facts that would make out a cause of action. EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005).

As an initial matter, plaintiff claims that the emails do not satisfy the requirements of CPLR 3211(a)(1). However, they are documentary evidence here, as they were properly introduced in affidavits from Klein and Zalkin and as the content of them is “essentially undeniable,” and is supported by statements in affidavits from plaintiff’s principals and the complaint. Amsterdam Hosp. Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 433 (1st Dept 2014) (“In our electronic age, emails can qualify as documentary evidence if they meet the “essentially undeniable” test”).

Fraudulent inducement as against all defendants

The elements of a claim for fraudulent inducement are: (1) a false representation of material fact (2) known by the speaker to be untrue (3) made with the intention of inducing reliance (4) that is justifiably relied upon, and (5) results in damages. Schumaker v Mather, 133 NY 590, 596 (1892).

Defendants argue that plaintiff’s fraudulent inducement cause of action should be dismissed as it is duplicative of its breach of contract cause of action, and, in any case, *both* causes of action fail because defendants never agreed that they would do background checks on potential investors and *did*, inter alia, introduce plaintiff to investors besides Davies.

Plaintiff responds that the fraudulent inducement claim is not duplicative, even though they seek the same damages, because prior to signing the Agreement defendants misrepresented “their qualification, experience and that their services included performing due diligence on potential investors,” specifically pointing to where the Timeline says “diligence” would occur during “weeks 6-9.”

Defendants in return argue that the “diligence” described in the Timeline referred to *investors* doing due diligence on *plaintiff*; that nothing in the complaint alleges why Astor’s representations about its principals were false; that plaintiff has not shown that, even if Astor *had*

represented that it would do a background check, that Matte relied on such a representation (especially since it hired its own due diligence firm); and also note that after asking if a background check had been done on Davies and being told one hadn't been performed, plaintiff never asked Astor to do one nor did it ask to end Matte and Astor's relationship.

Here, the documentary evidence presented by defendants, including the Agreement and the Timeline, are not ambiguous, and they support a motion to dismiss a cause of action for fraudulent inducement. Nothing in the Agreement speaks to background checks or due diligence, and the "diligence / mgmt. meetings" referenced in the Timeline refer to the sort of checks Davies demanded as part of his alleged scheme. Even if those diligence terms meant what plaintiff argues, plaintiff fails to plead that defendants knowingly misled it. Further, that plaintiff hired its own background check firm and only asked if a background check had been performed *after* paying Inside Knowledge belies the fact that plaintiff had not relied on a representation that such a check would have already been done.

Thus, plaintiff's cause of action for fraud should be dismissed.

Breach of contract as against Astor

Defendants argue that they did not breach the Agreement because it is silent on background checks or due diligence of potential investors, and only promises to "provide financial advisory services ... in support of a transaction," which defendants say they did by, *inter alia*, presenting a list of potential investors (which plaintiff rejected) and helping arrange a convertible \$250,000 promissory note ("Joseph Note," NYSCEF Doc. No. 12).

Plaintiff responds that defendants did not "procure" the Joseph Note since it came from a connection made by Matte and was not a "transaction" contemplated by the Agreement.

Defendants are correct. The Agreement on its face does not require that Astor do any sort of background check on potential investors, and between helping arrange the Joseph Note, however it was procured, and providing a rejected list of potential investors, Astor at least provided some financial advisory services (on the quality of which this Court will not opine).

Therefore, plaintiff's cause of action for breach of contract should be dismissed.

Breach of the implied covenant of good faith and fair dealing as against Astor

Plaintiff's purported cause of action for breach of the covenant of good faith must also be dismissed as a separate cause of action of that type "cannot be maintained where, as here, it is premised on the same conduct that underlies the breach of contract cause of action and is intrinsically tied to the damages allegedly resulting from a breach of the contract." Parlux Fragrances, LLC v S. Carter Enters., LLC, 204 AD3d 72, 92 (1st Dept 2022) (internal quotations and citations omitted).

Unjust enrichment as against all defendants

Plaintiff's cause of action for unjust enrichment, pleaded in the alternative, should also be dismissed because the Agreement was a valid and enforceable contract, and, further, cannot be maintained against Zalkin and Klein as they were not signatories to the Agreement in their

individual capacities. See FM Cost Containment, LLC. v +42 W. 35th Prop. LLC, 203 AD3d 426, 427 (1st Dept 2022) (“recovery on a theory of quasi contract is foreclosed, as a claim for unjust enrichment does not lie where it duplicates a conventional contract claim” and “[p]laintiff cannot maintain a quasi contract claim against a third-party nonsignatory to a contract that covers the subject matter of the claim”).

Piercing the corporate veil as against Astor

Finally, plaintiff’s remaining purported cause of action, for piercing the corporate veil, should be dismissed as plaintiff’s allegations are merely conclusory and piercing the corporate veil cannot stand as a cause of action alone, which, for the reasons stated hereinabove, it otherwise would. In any event, piercing the corporate veil is not a cause of action, it is a collection device.

This Court has considered plaintiff’s other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Therefore, the motion of defendants, Seth Zalkin, Mickey Klien, and Astor Group LLC, to dismiss the complaint of plaintiff, Matte Projects, LLC, is hereby granted; the case is dismissed; and the Clerk is hereby directed to enter judgment accordingly.



3/22/2023
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

CHECK IF APPROPRIATE: