

Chan v Havemeyer Holdings LLC

2023 NY Slip Op 32603(U)

July 26, 2023

Supreme Court, New York County

Docket Number: Index No. 652359/2022

Judge: Melissa A. Crane

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. MELISSA A. CRANE PART 60M

Justice

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KAI CHO VINCENT CHAN, ALLEN FU, DAI YU, YUCA
CAPITAL PARTNERS LP,

Plaintiff,

- v -

HAVEMEYER HOLDINGS LLC, TC, HAVEMEYER
MANAGER LLC, TAVROS HOLDINGS LLC, NICHOLAS
SILVERS, COLIN RANKOWITZ

Defendant.

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INDEX NO. 652359/2022

MOTION DATE N/A

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 63, 64, 65, 66, 67, 69, 70, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81

were read on this motion to/for

AMEND CAPTION/PLEADINGS

In MS 01, defendants Havemeyer Holdings LLC, TC Havemeyer Manager LLC, and Tavros Holdings LLC moved, pursuant to CPLR 3211(a)(1) & (7), to dismiss the complaint as asserted against them. Defendants also moved for permission to make an application for attorneys' fees pursuant to the fee-shifting provision in the parties' agreement in the event that the Motion is granted. After defendants filed their motion to dismiss on October 31, 2022 (Docs 10-22), Plaintiffs filed an amended complaint on December 30, 2022 (Doc 27). As such, the court denied as moot defendants' motion to dismiss the original complaint (Doc 32).

In MS 02, defendants Havemeyer Holdings LLC, TC Havemeyer Manager LLC, and Tavros Holdings LLC moved, pursuant to CPLR 3211(a)(1), (2) & (7), to dismiss the first amended complaint and again sought attorneys' fees pursuant to the fee-shifting provision in the parties' agreement in the event the court granted the Motion. On May 22, 2023, the court dismissed all of plaintiffs' claims in the first amended complaint (FAC) except the individual plaintiffs' cause of

action for breach of fiduciary duty. In fifth cause of action in the FAC, the individual plaintiffs' asserted that only TC Havemeyer Manager LLC (TC Havemeyer) breached the fiduciary duties it owed to the individual plaintiffs, not to entity plaintiff Yuca Capital Partners LP (Yuca) (*see* Doc 27 at ¶¶ 168 ["Individual Plaintiffs became members of Havemeyer prior to March of 2020."], 169 ["TC Havemeyer as managing member of Havemeyer owes fiduciary duties to Individual Plaintiffs, including the duty to disclose."], 177 ["Based on this false representation and omission of material facts, which was in Defendants' particular knowledge and which Individual Plaintiffs justifiably and reasonably relied upon, Individual Plaintiffs invested in Havemeyer in March 2020."], 181 ["Individual Plaintiffs have been injured in the amounts of their March 2020 Investments in Havemeyer."]). Plaintiffs did not assert in the FAC that Yuca had any pre-existing relationship or membership with defendants, or that TC Havemeyer owed Yuca a fiduciary duty. The court severed the individual plaintiffs' breach of fiduciary duty claim against TC Havemeyer and dismissed the remaining causes of action in the FAC (*see* Doc 57 [decision and order resolving MS 02]).

In MS 03, plaintiffs now move for leave to serve a second amended complaint. The only remaining defendant, TC Havemeyer, opposes the motion.

Plaintiffs now seeks to re-add all of the former defendants that the court dismissed in MS 02, as well as two new defendants. Specifically, Plaintiffs seek to assert the fifth cause of action for breach of fiduciary duty against TC Havemeyer and the following proposed defendants: Havemeyer Holdings LLC (HH LLC), Tavros Holdings LLC (Tavros), Nicholas Silvers, Colin Rankowitz, Havemeyer Owner LLC (HO LLC), and Havemeyer MPE LLC (HMPE LLC). Plaintiffs also seek to add a claim for aiding and abetting breach of fiduciary duty against TC Havemeyer and all the proposed defendants.

Discussion

"Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Y.A. v Conair Corp.*, 154 AD3d 611, 612 [1st Dept 2017] [citations omitted]). Leave to amend a pleading will be denied where the proposed pleading fails to state a cause of action (*Davis & Davis, P.C. v Morson*, 286 AD2d 584, 585 [1st Dept 2001]).

The Appellate Division, First Department has explained:

"It is true that 'leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party.' However, 'it is equally true that the court should examine the sufficiency of the merits of the proposed amendment.' . . . [T]he court [i]s *not* required to accept their allegations as true on a motion to amend"

(*Boaz Bag Bag v Alcobi*, 129 AD3d 649, 649 [1st Dept 2015] [internal citations omitted] [emphasis in original]).

Although adding the proposed defendants to the breach of fiduciary duty claim and permitting plaintiffs to include a claim for aiding and abetting breach of fiduciary duty would not cause undue prejudice or surprise, the court must assess whether the proposed amendments have merit.

I. Breach of Fiduciary Duty

"To state a claim for breach of fiduciary duty, plaintiffs must allege that: (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct" (*Besen v Farhadian*, 195 AD3d 548, 549-50 [1st Dept 2021], citing *Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 [1st Dept 2011]). "Under CPLR 3016 (b), the claim must be pleaded with particularity, and the circumstances constituting the alleged wrong must be stated in detail" (*Behrman v Red Flower, Inc.*, 61 Misc 3d 1217(A) [Sup Ct, NY

County 2018]; *see* CPLR 3016 [b] [“Where a cause of action or defense is based upon misrepresentation, fraud, . . . (or) breach of trust . . . , the circumstances constituting the wrong shall be stated in detail.”]).

Here, plaintiffs’ proposed second amended complaint fails to allege, with particularity, the existence of a fiduciary relationship between any of the proposed additional defendants and any of the plaintiffs. Specifically, in the unverified proposed second amended complaint, plaintiffs allege that HH LLC owed them a fiduciary duty but does not state how that fiduciary obligation arises.

Thus, the proposed amended fifth cause of action fails to state a claim for breach of fiduciary duty against the proposed new defendants, and the court denies that part of the motion (*see* Doc 66 [proposed second amended complaint]; *see also* Doc 64 [Brecher aff. in support of MS 03]). Plaintiffs’ unsupported legal conclusions that the proposed new defendants each owed plaintiffs a fiduciary duty are palpably insufficient.

For instance, HH LLC is the entity that plaintiffs invested in, but plaintiffs do not identify any provision in HH LLC’s operating agreement that creates HH LLC’s fiduciary obligation to any plaintiff. Rather, the operating agreement establishes that TC Havemeyer is the managing member of HH LLC. Further, plaintiffs allege that: Tavros is a member of TC Havemeyer, not HH LLC’s managing member; Rankowitz is allegedly a member of Tavros, not TC Havemeyer or HH LLC; and HO LLC and HMPE LLC are simply subsidiaries of HH LLC. Even accepting as true plaintiffs’ allegations that Tavros and Silvers are members of TC Havemeyer, plaintiffs do not assert that either of those proposed defendants are TC Havemeyer’s managing or controlling member (*see Nostalgic Partners, LLC v New York Yankees Partnership*, 72 Misc 3d 1224(A) [Sup Ct, NY County 2021], *affd as mod*, 205 AD3d 426 [1st Dept 2022] [“Nor do the Trusts, as non-

managing members of Nostalgic, owe fiduciary duties, notwithstanding the allegations of limited control, and their duties are in any event governed by the terms of the LLC Agreement.”)].

In addition, Yuca does not state a claim for breach of fiduciary duty against TC Havemeyer in the proposed second amended complaint. The basis for the individual plaintiffs’ fiduciary duty claim in the FAC is the pre-existing relationship that those plaintiffs had with TC Havemeyer. When the purported March 2020 investments occurred, the individual plaintiffs were already minority members of HH LLC. Yuca was not a member of HH LLC, therefore TC Havemeyer, as HH LLC’s managing member, did not owe Yuca any fiduciary duty at that time. Further, plaintiffs do not establish particularized facts to support their assertion that any of the defendants owed Yuca a fiduciary duty as a prospective investor in HH LLC. Plaintiffs’ assertion that “Yuca is a pooled family investment fund that focuses on equities and has no real estate experience” is not sufficient to create a fiduciary duty here.

Accordingly, Motion Seq. No. 03 is denied with respect to the part of the motion that seeks to add the proposed defendants to the fifth cause of action.

II. Aiding and Abetting Breach of Fiduciary Duty

“A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach.

. . . . Although a plaintiff is not required to allege that the aider and abettor had an intent to harm, there must be an allegation that such defendant had actual knowledge of the breach of duty. Constructive knowledge of the breach of fiduciary duty by another is legally insufficient to impose aiding and abetting liability”

(*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003] [internal citations omitted]).

Motion Seq. No. 03 is granted to the extent that the individual plaintiffs may serve a second amended complaint that includes a claim for aiding and abetting TC Havemeyer's breach of fiduciary duty against Silvers, Rankowitz, and Tavros. Plaintiffs allege, for instance, that:

"Silvers, as a member of Havemeyer and of TC Havemeyer and of Tavros, was aware of their fiduciary duties owed to Plaintiffs. Silvers induced and participated in Havemeyer, HO LLC, HMPE, Tavros and TC Havemeyer's breach of fiduciary duty to Plaintiffs by, inter alia, misrepresenting to them that the refinancing referenced herein was 'already done' when in fact it was not, and concealing from them the true fact that no refinancing had been secured at the time Plaintiffs made their March 2020 investments"

(Doc 66, ¶ 215).

Plaintiffs also allege:

"Rankowitz as a member of Tavros was aware of TC Havemeyer and Havemeyer's fiduciary duties to Plaintiffs. Rankowitz's communications to Plaintiffs in March 2020 that misled them into believing that the refinancing was completed constituted a breach of his fiduciary duty to Plaintiffs. Rankowitz, TC Havemeyer and Tavros thus aided and abetted . . . each other to breach their fiduciary duties to Plaintiffs"

(*id.*, ¶ 217).

While plaintiffs do not plead the aiding and abetting claim with exceptional art, it is not palpably insufficient.

However, this prong of plaintiffs' motion is denied with respect to proposed defendants HH LLC, HO LLC, HMPE LLC, and TC Havemeyer because the individual plaintiffs do not assert sufficient facts to establish that those entities had actual knowledge or substantially assisted TC Havemeyer's alleged breach of fiduciary duty.

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that Mot. Seq. No. 03 is granted to the extent that the individual plaintiffs may serve a second amended complaint that interposes the proposed aiding and abetting breach of

fiduciary duty claim on the individual plaintiffs' behalf against Silvers, Rankowitz, and Tavros; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that plaintiffs' must serve a supplemental summons and the second amended complaint within 5 days of the date of this decision and order; and it is further

ORDERED that the caption be amended to reflect the amendment, and that all future papers filed with the Court shall bear the following amended caption:

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KAI CHO VINCENT CHAN, ALLEN FU, and DAI YU,

Plaintiffs,

Index No. 652359/2022

-against-

TC HAVEMEYER MANAGER LLC, TAVROS HOLDINGS LLC, NICHOLAS SILVERS, and COLIN RANKOWITZ,

Defendants.
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And it is further

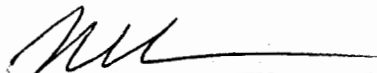
ORDERED that within 5 days of the court's entry of this order, counsel for plaintiffs shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the General Clerk's Office (Room 119), who are directed to mark the Court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the County Clerk and Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-filing" page on the court's website – www.nycourts.gov/supctmanh); and it is further

ORDERED that the parties may not stipulate to extend any defendant's time to answer or otherwise respond to the second amended complaint. Pre-motion conferences are required for all applications, including motions to dismiss the second amended complaint.

7/26/2023

DATE



MELISSA A. CRANE, J.S.C.

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