

Alpha Omega Alliance, LLC v Landsman

2023 NY Slip Op 32757(U)

July 27, 2023

Supreme Court, New York County

Docket Number: Index No. 655047/2020

Judge: Verna L. Saunders

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unilaterally terminated the contracts between it and defendants MediraRx and Eco Pharmacy without complying with the contract's notice and cure provisions, though plaintiff maintains that the contracts were terminated for cause. Movant argues that the fraudulent inducement claims herein are attempts by plaintiff to "immunize" its improper termination of the contracts. Essentially, plaintiff's position is that defendant Ira Landsman, purportedly speaking as a representative of MediraRx, made various representations about the 340B program and various services provided by MediraRx and Eco Pharmacy. Reliance on these representations allegedly convinced plaintiff to enter into the agreements at issue here.

Defendants move for dismissal on three grounds: 1) that the court lacks personal jurisdiction over defendants Eisenmann, Principe, Eco Pharmacy, and Eco Pharm as these defendants are located in and reside in Florida and have no connections to New York; 2) that plaintiff has failed to plead justifiable reliance; and 3) as to defendants Principe and Eco Pharm, that no specific factual allegations are pleaded as against them.

Plaintiff opposes the motion arguing that the court has jurisdiction over Eisenmann, Principe, Eco Pharmacy, and Eco Pharm under both the conspiracy theory of personal jurisdiction and, as against the individually-named defendants, under the alter ego theory of personal jurisdiction. Plaintiff further argues that as to the heightened standard of due diligence of fraudulent misrepresentations, same only applies to sophisticated parties, which plaintiff's former CEO was not; and finally, that the conspiracy claim is valid as the underlying fraudulent inducement claim is valid. Plaintiff also seeks leave to file a second amended complaint.

In determining a motion to dismiss pursuant to CPLR 3211, "the pleading is to be afforded a liberal construction. [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [internal citations omitted].)

Leave to amend a pleading pursuant to CPLR § 3025 "shall be freely given," in the absence of prejudice or surprise (*see e.g., Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]; *Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354 [1st Dept 2005]). CPLR 3025 requires "[a]ny motion to amend or supplement pleadings [to] be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." In order to conserve judicial resources, examination of the underlying merits of the proposed amendment is mandated (*Thompson*, 24 AD3d at 205; *Zaid*, 18 AD3d at 355). Leave will be denied where the proposed pleading fails to state a cause of action or is palpably insufficient as a matter of law (*see Aerolineas Galapagos, S.A. v Sundowner Alexandria*, 74 AD3d 652 [1st Dept 2010]; *Thompson*, 24 AD3d at 205).

Here, plaintiff avers that jurisdiction may be had over the moving defendants on two specific grounds: the conspiracy theory and the alter ego theory. Plaintiff asserts that defendants engaged in a conspiracy to commit the tortious act of fraud to induce it to enter into the subject contracts.

Plaintiff must present sufficient facts to demonstrate jurisdiction.

To assert a basis for jurisdiction under the alter ego theory, “generally, a plaintiff seeking to pierce the corporate veil must show that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff’s injury.” (*Sutton 58 Assocs. LLC v Pilevsky*, 189 AD3d 726, 729 [1st Dept 2020], quoting *Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 47 [2018]). Plaintiff must allege sufficient facts to “satisfy the ‘heavy burden’ necessary to pierce the corporate veil or to establish an alter ego relationship.” (*Etex Apparel, Inc. v Tractor Intl. Corp.*, 83 AD3d 587, 587 [1st Dept 2011]).

In the proposed second amended complaint, plaintiff alleges that the individual defendants, to wit: Eisenmann and Principe, are the alter egos of MediraRx. This assertion is not supported by specific facts but rather allegations made upon information and belief that Eisenmann and Principe use MediraRx as a shell company in that they failed to implement formalities of the corporate existence, removed funds for personal use, used common office space, telephone, etc., and engaged in transactions which were not at arm’s length, among other allegations. These allegations however do little more than regurgitate the rule set out in *Wm. Passalacqua Bldrs., Inc. v Resnick Devs. S. Inc.*, 933 Fd2d 131, 139 (2d Circ 1991) and lack supporting facts. In fact, there is no factual support in the record as developed by these motions for any of the conclusory statements made herein. This, without more, is insufficient to grant an exercise of personal jurisdiction on the basis of alter ego.

Alternatively, plaintiff seeks to establish jurisdiction over Eisenmann, Principe, Eco Pharmacy, and Eco Pharm pursuant to CPLR 302(a)(2). Plaintiff therefore must demonstrate that the above defendants were involved in a conspiracy in the commission of tortious acts within New York State. While the relationship between the parties must be evaluated to ascertain awareness and/or direction and control of the alleged in-state versus out-of-state co-conspirators, (see *Lawati v Montague Morgan Slade Ltd.*, 102 AD3d 427, 428 [1st Dept 2013]), an analysis of the alleged tortious act here must first be conducted.

“The elements of a claim for fraudulent inducement are ‘a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury’” (*United States Life Ins. Co. in NY v Horowitz*, 192 AD3d 613, 613 [1st Dept 2021], quoting *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996].)

Here, the tortious act alleged is fraud in the contract inducement and plaintiff claims that the movants engaged in a conspiracy in the commission of this act. Specifically, plaintiff claims that defendant Landsman, a purported 340B third-party administrator, offered to assist plaintiff’s former CEO, Monique D. Brown Wellons (“Wellons”), in complying with the 340B federal program requirements such that Wellons contracted on behalf of plaintiff to execute a third-party administrator contract with MediraRx and a contract with Eco Pharmacy. Wellons purportedly relied upon Landsman’s statements that Landsman was experienced in administering and managing the various procedural and bureaucratic policies and regulations associated with the 340B program and these representations persuaded her to enter into the subject contracts. Plaintiff contends that Wellons was not sophisticated and thus, relied on Landsman’s statements

to her detriment. However, these facts are insufficient to sustain a fraud in the inducement claim insofar as the bald allegation that plaintiff's former CEO Wellons lacked knowledge of complex federal regulations such that she was unsophisticated in her business dealings with defendants is belied by her undisputed fifteen-year tenure as an executive of the company. Wellons claimed dependence on information she elected not to vet, and without seeking the aid of in-house or retained legal or financial advisors cannot be said to be defendants' fault. An assessment of fact versus opinion, puffery, or other marketing techniques is indeed one of the functions of an executive who reasonably and routinely avails itself of experts in order to obtain reliable information to protect its organization in fulfillment of its fiduciary functions. When that does not occur, the burden of liability, if any, cannot be said to fall upon other parties. While plaintiff asserts that there was a scheme afoot to defraud plaintiff and other similar non-profit organizations, this bald assertion, without more, is insufficient to demonstrate an inability to act with ordinary care to consult knowledgeable disinterested persons and act with due diligence. Thus, plaintiff's allegations here that Wellons relied on the statements of Landsman as she was not a sophisticated party fails to show that such reliance was justified given the above and thus, fails to support the conspiracy claim which jurisdiction would then be based upon (see *United Natural Foods, Inc. v Goldman Sachs Group*, 190 AD3d 578, 579 [1st Dept 2021]; *UST Private Equity Investors Fund, Inc. v Salomon Smith Barney*, 288 AD2d 87, 88 [1st Dept 2001]). Furthermore, an examination of the allegations in the second amended complaint indicate that the plaintiff has failed to cure the deficiencies outlined above (see *State of N.Y. ex rel. Willcox v Credit Suisse Sec. (USA) LLC*, 210 AD3d 609, 610 [1st Dept 2022], citing *Kliebert v McKoan*, 228 AD2d 232, 233 [1st Dept 1996]). Thus, leave to amend the complaint is denied.

All other arguments have been considered and are either without merit or need not be addressed given the foregoing. Accordingly, it is hereby

ORDERED defendants' motion to dismiss the complaint is hereby granted; and it is further

ORDERED plaintiff's cross-motion to amend the complaint is denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendants shall serve a copy of this decision and order, with notice of entry, upon plaintiff.

This constitutes the decision and order of this court.

July 27, 2023



 HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

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