SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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DONALD SCHUPAK, SCHUPAK GROUP INC. and SGI MB, LLC F/K/A SGI CAMBIUM LLC,

Plaintiffs,

- v -

JOSE AROZAMENA, CAMBIUM USA, INC., and CAMBIUM MANAGEMENT, INC.,

Defendants.

INDEX NO. 655763/2020

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49

were read on this motion to/for DISMISSAL.

In motion sequence number 001, defendants José Arozamena, Cambium USA, Inc. (Cambium USA) and Cambium Management, Inc. move, pursuant to CPLR 3211(a)(1) and (7), to dismiss plaintiffs Donald Schupak (Donald[1]), Schupak Group Inc. (Schupak Group), and SGI MB, LLC f/k/a SGI Cambium, LLC's (SGI MB) complaint with prejudice on the grounds that plaintiffs' fraud claim is barred by the Settlement Agreement, plaintiffs are precluded from suing on released claims, plaintiffs have no cognizable damages, and plaintiffs fail to plead fraud with the required specificity.

BACKGROUND

The following facts are taken from the complaint and are accepted as true for the purposes of the motion to dismiss. (*Davis v Boeheim*, 24 NY3d 262, 268 [2014].) In

[1] The court respectfully refers to Donald Schupak as Donald and Andrew Schupak as Andrew to avoid confusion between parties sharing the same surname.

2010, Donald, Andrew Schupak (Andrew), and Arozamena, through their respective entities, Schupak Group, nonparty Rondout Capital Management LLC (Rondout), and Cambium USA, formed SGI MB "to participate in merchant and investment banking transactions and financial and merger-and-acquisition transactions, and to provide related advisory and consulting services." (NYSCEF Doc. No. [NYSCEF] 2, Complaint ¶ 17). Schupak Group, Rondout, and Cambium USA (collectively, Members) each owned one-third of SGI MB's membership interests and had the power/authority to appoint one of SGI MB's three managers. (*Id.* ¶ 18.) The Members appointed Andrew, Donald, and Arozamena (collectively, Managers) as the managers. (*Id.*) SGI MB's Operating Agreement provides that "each Member and each Manager was required to perform all Financial Services for the benefit of [SGI MB] ('Company Opportunities') and to present all Company Opportunities to [SGI MB]." (*Id.* ¶ 19.)

Between 2012 and 2015, disputes arose between the Members concerning two company transactions. (*Id.* ¶¶ 21, 25.) In the first transaction, SGI MB provided financial services to nonparty Oakley Capital, a British equity investment platform, in nonparty Oakley NS (Bermuda) LP's (Oakley NS) acquisition of North Sails, an international sailmaker (North Sails Transaction). (*Id.* ¶¶ 21-22.) In return for its services, Oakley Capital paid SGI MB a cash fee and agreed to award SGI MB an economic interest in Oakley NS. (*Id.* ¶ 22.) However, while the transaction was being documented, Arozamena informed the Schupaks that Oakley Capital would only award the economic interest in Oakley NS to Arozamena. (*Id.* ¶ 23.) Plaintiffs allege that this refusal to award the economic interest to SGI MB was procured by Arozamena in

breach of his contractual duties and his duty of loyalty. (*Id.*) "Arozamena also surreptitiously received fees relating to the North Sails Transaction." (*Id.*)

The second transaction involved similar alleged self-dealing. (*Id.* ¶¶ 25-26.) SGI MB provided financial services to nonparty Apollo Global Management LLC (Apollo) in connection with Apollo's acquisition of Verallia SA, an international glass manufacturer (Verallia Transaction). (*Id.* ¶ 25.) Arozamena structured the deal so that his offshore entity would receive an economic interest in the newly formed holding entity, Horizon Intermediate Holdings S.C.A. (Horizon), instead of SGI MB. (*Id.* ¶ 26.) The Verallia Transaction generated a fee of €1,750,000—roughly a third of which was required to be co-invested in the deal (Apollo Transaction Fee). (*Id.* ¶ 27.)

In August 2015, Cambium USA withdrew as a member of SGI MB (NYSCEF 38, Settlement Agreement at 1 ["WHEREAS, in August 2015, Cambium USA withdrew as a member of the Company pursuant to Section 4.4 of the LLC Agreement"].) Seeking to terminate the relationship between Cambium USA and SGI MB's other Members, and resolve any disputes with respect to Cambium USA's withdrawal, the Members and Managers[2] entered into a settlement agreement on November 3, 2015 (Settlement Agreement). (*Id.*)

While the Settlement Agreement was being negotiated, Arozamena and Andrew, through their respective companies, Cambium Management Inc. and Esopus Capital Management LLC (Esopus), were also negotiating the terms of two Economic Interest Agreements (EIAs), which would grant Andrew a percentage of the beneficial interest in

[2] Cambium Limited, Cambium Management, the Riceman Trust, and SGI Cambium, LLC are also parties to the Settlement Agreement. (NYSCEF 38, Settlement Agreement.)

Oakley NS and Horizon. (NYSCEF 2, Complaint ¶¶ 29-30; NYSCEF 29, Oakley NS EIA at 1; NYSCEF 30, Horizon EIA at 1.) Arozamena insisted that the EIAs and the Settlement Agreement be housed in separate and discrete documents. (NYSCEF 2, Complaint ¶ 31.)

During the Settlement Agreement negotiations, Donald made it clear to Arozamena that the finalization of the EIAs was a condition precedent to the Settlement Agreement, and the Settlement Agreement would not take effect until the EIAs were finalized. (*Id.* ¶ 32.)[3] On October 29, 2015, Donald's attorney sent Arozamena the Settlement Agreement executed by Donald and Andrew; the email states that the executed Settlement Agreement was provided on two conditions: (1) it must be executed by Arozamena that day and (2) "[t]he execution pages will be held in escrow by counsel, to be released and the agreement effective when Andrew and Jose enter into their own final agreement." (NYSCEF 31, October 29, 2015 Email; NYSCEF 2, Complaint ¶ 32.)

As of November 1, 2015, Andrew and Arozamena had not reached final agreement on the EIAs. (NYSCEF 2, Complaint ¶ 37.) Donald informed Arozamena that there would be no Settlement Agreement unless Arozamena and Andrew finalized the EIAs. (*Id.*) On November 2, 2015, Arozamena, both individually and in his capacity as principal of Cambium USA and Cambium Management Inc., emailed Andrew with the "final agreed version of [the Economic Interest Agreements]." (*Id.* ¶ 39.) Arozamena requested that Andrew execute and return the EIAs and informed Andrew

[3] The Settlement Agreement does not contain any language reflecting this alleged condition.

that that Arozamena sent letters to Cambium Management's administrators "to execute and return." (*Id.*) Andrew promptly executed and returned the EIAs. (*Id.* ¶ 44.)

That same day, Arozamena's attorney represented to Donald's attorney that Arozamena and Andrew "reached agreement on the material terms of their deal, that the cash component of the Andrew Schupak-Arozamena deal would be incorporated into the Settlement Agreement; and that Andrew Schupak's equity interests would be addressed in documents separate from the Settlement Agreement." (*Id.* ¶ 45.) Andrew informed Donald that Andrew "signed the EIAs, that Arozamena had represented to Andrew that the EIAs would be countersigned, and that Andrew was comfortable relying on Arozamena's representations." (*Id.* ¶ 46.) On November 3, 2015, Arozamena shared a revised version of the EIAs with minor edits and requested that Andrew "re-send the signed letters for countersignature by Cambium Management." (*Id.* ¶ 47.) Andrew re-executed the revised EIAs and returned them to Arozamena. (*Id.*) Plaintiffs allege that "at no point in November 2015 or thereafter did Arozamena state or suggest that the EIAs were not binding contracts, were drafts, were abandoned, or superseded by any other document." (*Id.* ¶ 49.) Further, plaintiffs allege that Arozamena's representations to Andrew regarding the EIAs were made with the knowledge that such would be communicated to Donald and with the intent that Andrew and Donald would rely on these representations. (*Id.* ¶ 50.)

On November 3, 2015, Arozamena executed the Settlement Agreement. (*Id.* ¶ 51.) Pursuant to the Settlement Agreement, Cambium USA agreed to transfer $800,259.50 from the Apollo Transaction Fee to Donald and $254,478.00 directly to SGI MB. (*Id.* ¶ 52.) The Settlement Agreement also contains two release provisions.

(NYSCEF 10, Settlement Agreement ¶¶ 8, 9.) Specifically, paragraph 8 of the Settlement Agreement provides that:

> "[u]pon Payment, [SGI MB], Schupak [Group], and Donald Schupak, and their present and former representatives, agents, employees, officers, directors, attorneys, associates, servants, successors, predecessors, heirs and assigns (collectively, the 'Schupak Releasors') hereby release, discharge and acquit Cambium USA, Cambium Limited, Cambium Management, the Riceman Trust, Jose de Diego-Arozamena, and any and all of their parent companies, subsidiaries and affiliates, and their current and former representatives, agents, employees, officers, directors, attorneys, associates, servants, successors, predecessors, heirs and assigns (collectively, the 'Cambium USA Releasees'), from all manners of action, causes of action, judgments, executions, debts, liability, demands, rights, obligations, damages, costs, expenses, and claims of every kind, nature, and character whatsoever, whether in law or in equity, whether based on contract (including, without limitation, quasi-contract or estoppel), statute, regulation, tort or otherwise, accrued or unaccrued, known or unknown, matured, unmatured, certain or contingent, including but not limited to any claims or liability arising directly or indirectly from the LLC Agreement, that the Schupak Releasors ever had or claimed to have, or now has or claims to have presently or at any future date, against the Cambium USA Releasees."

(NYSCEF 10, Settlement Agreement ¶ 8.) The Settlement Agreement also contains a merger/integration clause which states that the Settlement Agreement "constitutes the entire agreement and understanding between the Parties concerning the subject matter of this Agreement and shall supersede any and all understandings, agreements or communications, oral or written, between or among the Parties on or before the date of this Agreement relating to the subject matter or terms of this Agreement." (*Id.* ¶ 11.) Pertinently, the Settlement Agreement also contains a "no additional representations" clause which provides that "[n]o party has made or relied upon any representations or

promises in connection with the subject matter of this Agreement which are not specifically set forth herein. All representations and promises made by any Party to another, whether orally or in writing, are understood to be merged in this Agreement." (*Id.* ¶ 13.)

After the finalization of the EIAs, Andrew and Arozamena regularly communicated regarding their mutually owned assets (i.e., shareholdings in Oakley NS and Horizon), particularly about proposed dividend distributions and potential public offerings. (NYSCEF 2, Complaint ¶¶ 57-59.) In 2019, however, after an initial public offering of the Verallia business, Arozamena reneged on his obligations under the EIAs, claiming that the EIAs were "never countersigned by the Defendants; never became final, binding agreements; and were superseded by the Settlement Agreement."[4] [5] (*Id.* ¶ 59.)

Plaintiffs now bring this action for fraud, alleging that defendants fraudulently induced plaintiffs to enter into the Settlement Agreement, and in turn, release their claims for breach of contract and breach of fiduciary duty arising from Arozamena's alleged usurping of company opportunities and acquiring ownership interest in entities to the detriment of SGI MB.

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[4] At oral argument on March 30, 2022, counsel for plaintiffs noted that, through discovery in the related action (*see* n. 7), plaintiffs received EIAs signed by Cambium Management, Inc. (NYSCEF 49, tr at 13:25-14:1.)

[5] As a result of the alleged breach of the EIAs, Andrew initiated a related case against Arozamena to enforce the contracts. (*Andrew Schupak, et al. v Jose Arozamena, et al.*, Index No. 651787/2020). The parties' summary judgment motions are scheduled for argument on September 26, 2023.

Discussion

Legal Standard

On a motion to dismiss pursuant to CPLR 3211 (a)(7), 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] [citation omitted].) To prevail on a CPLR 3211 (a)(1) motion to dismiss, the movant has the "burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [internal quotation marks and citation omitted].) "A cause of action may be dismissed under CPLR 3211 (a)(1) only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law." (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [internal quotation marks and citation omitted].)

Plaintiffs allege that Arozamena fraudulently induced Donald to enter into the Settlement Agreement by representing that he and Andrew reached an agreement on the material terms of their deal, ultimately memorialized in the EIAs. They further allege that Arozamena represented to Andrew that the EIAs would be countersigned by Arozamena with the intent that Donald and Andrew would rely on those representations. Defendants assert the Settlement Agreement's release, merger, and "no additional representation" provisions bar this claim.

Generally, "a valid release constitutes a complete bar to an action on a claim which is the subject of the release." (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011] [internal quotation marks and citations omitted].) However, a release may be voided for any "traditional bases for setting aside written agreements" including fraud. (*Id.* [citation omitted].) "A release may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is 'fairly and knowingly made.'" (*Id.* [citations omitted].) Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release "shifts the burden of going forward . . . to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release." (*Fleming v Ponziani*, 24 NY2d 105, 111, [1969].) "[A] party that releases a fraud claim may later challenge that release as fraudulently induced only if it can identify a separate fraud from the subject of the release." (*Id.* [citation omitted].)

Even assuming that plaintiffs sufficiently allege a separate fraud, plaintiffs cannot establish the element of justifiable reliance. "In order to set aside a release on such grounds, a plaintiff must establish the basic elements of fraud, namely a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury." (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98 [1st Dept 2006] [citations omitted].) Here, the Settlement Agreement contains not only a merger clause, but also a "no additional representations" clause, which provides that "[n]o party has made or relied upon any representations or promises in connection with the subject matter of this Agreement which are not specifically set forth herein. All representations

and promises made by any Party to another, whether orally or in writing, are understood to be merged in this Agreement." (NYSCEF 10, Settlement Agreement ¶ 13.) Given the language of this clause, which was negotiated by these sophisticated parties represented by counsel, plaintiffs could not have reasonably relied on any oral representation that the deal between Arozamena and Andrew was finalized prior to entering into the Settlement Agreement. (*DuBow v Century Realty, Inc.,* 172 AD3d 622, 622 [1st Dept 2019].)

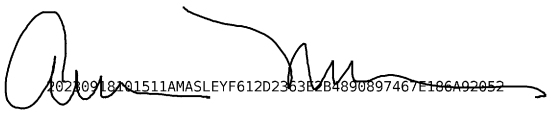
Plaintiffs' assertion that these clauses do not bar their claim is without merit. The court disagrees with plaintiffs' suggestion that these provisions are too broad, and therefore, parol evidence is not precluded.

> "Parol evidence—evidence outside the four corners of the document—is admissible only if a court finds an ambiguity in the contract. As a general rule, extrinsic evidence is inadmissible to alter or add a provision to a written agreement … Furthermore, where a contract contains a merger clause, a court is obliged to require full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing."

(*Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013] [internal quotation marks and citations omitted].) The Settlement Agreement is unambiguous and parol evidence is precluded. Even if the court found the merger clause vague, as plaintiffs suggest, the Settlement Agreement's "no additional representations" clause is clear, unambiguous, and sufficiently specific and bars plaintiffs' claim. Plaintiffs also assert that the release was not fair and knowingly made. However, the court need not address this issue as this decision does not rest on the release provision. All remaining arguments have been considered and do not alter the court's determination.

Accordingly, it is,

ORDERED that the motion of the defendants to dismiss the complaint is granted, and the complaint is dismissed in its entirety against the defendants, with costs and disbursements to the defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the defendants.



9/18/2023
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE