Kirschenbaum v De Baets
2023 NY Slip Op 33880(U)
October 30, 2023
Supreme Court, New York County
Docket Number: Index No. 653287/2019
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

----------X

JASON KIRSCHENBAUM,

Plaintiff,

- v -

STEPHANE DE BAETS, THOSAPONG JURUTHAVEE, ELEVATED RETURNS, LLC,315 EAST DEAN ASSOCIATES, INC.,ASPEN DIGITAL, INC.,ER MERRY WAY LP, ER GLOBAL, LLC,JOHN DOES 1-10,

Defendant.

INDEX NO. 653287/2019

MOTION DATE 03/08/2023, 07/21/2023, 09/21/2023

MOTION SEQ. NO. 006 007 008

DECISION + ORDER ON MOTION

----------X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 154, 155, 156, 157, 158, 160, 183, 184, 185, 186, 187, 188, 189, 190, 193

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 191, 192, 194, 195, 196, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 217, 218, 219, 220, 221, 222, 223, 224

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

The following e-filed documents, listed by NYSCEF document number (Motion 008) 214, 215, 216, 225, 226

were read on this motion to/for SEAL.

Upon the foregoing documents, (i) the plaintiff's motion to amend (Mot. Seq. No. 006) is denied because the proposed Third Amended Complaint (**TAC**; NYSCEF Doc. No. 157) is palpably insufficient as a matter of law (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]), and (ii) the defendants' motion for summary judgment (Mot. Seq. No. 007) is granted because there are no material issues of act which warrant a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

I. Plaintiff's motion to amend

Reference is made to a Decision and Order dated October 16, 2020 (the **Prior Decision**; NYSCEF Doc. No. 69) in which the Court dismissed the plaintiff's claims for (i) fraud and (ii) in the alternative, conversion without prejudice. In the TAC, the plaintiff wishes to renew these claims based on facts it alleges it uncovered during discovery.

A claim for fraud requires a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). In the Prior Decision, this Court dismissed the claim sounding in fraud because the plaintiff failed to (i) plead with particularly facts that permit a reasonable inference of fraudulent misconduct and (ii) allege any facts to show that he reasonably relied on any of the alleged misrepresentations (NYSCEF Doc. No. 69, at 8). The TAC suffers from the same infirmities. The additional representation provided as a predicate for this claim is that the plaintiff was told to pay for his investment in Securitize using his digital currency (NYSCEF Doc. No. 157 ¶ 67). The TAC does not allege that this representation was false or that the plaintiff relied on this representation *in making his investment in Securitize* or how this caused damage. Thus, the claim sounding in fraud fails.

A claim for conversion requires (i) the plaintiff's possessory right or interest in the property and (ii) the defendant's dominion over the property or interference with it, in derogation of the plaintiff's rights (*Colavito v NY Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). In the Prior Decision, the Court dismissed this claim because the plaintiff failed to "explain how his invested funds were subject to any obligation to be returned and whether such obligation was

conferred by contract or another manner" (NYSCEF Doc. No. 69 at 10). The TAC also does not allege any obligation on behalf of the defendants to return the funds that were invested in Securitize, i.e., a possessory interest in the alleged converted property. Thus, this claim also fails.

Inasmuch as the TAC proposes claims that fail as a matter of law, it is palpably insufficient and the motion for leave to amend is denied (*McGhee*, 96 AD3d at 450).

II. Defendants' motion for summary judgment

On a motion for summary judgment, the movant must make a *prima facie* showing of entitlement to judgment, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez,* 68 NY2d 320 at 324). Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposition papers (*id.*). Once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish the existence of material issues of fact requiring trial (*id.*).

Reference is made to a Decision and Order dated October 16, 2020 (the **Prior Dismissal**; NYSCEF Doc. No. 69) pursuant to which this Court dismissed all claims except for the claim sounding in unjust enrichment. Familiarity is presumed.

The elements of unjust enrichment are "(1) the other party was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the other party to retain

what is sought to be recovered" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). The existence of a valid and enforceable written contract governing the particular subject matter precludes recovery under a theory of unjust enrichment (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]).

In the Prior Dismissal, the Court held that the plaintiff had sufficiently alleged that the defendants were unjustly enriched through his monetary contributions to Aspen REIT, Aspen Coin, and Securitize:

> In sum and substance, Mr. Kirschenbaum alleges that he contributed significantly to a number of projects: the Sunset Tower deal, creation of the Aspen REIT and Aspen Coin, the acquisition of a certain interest in Securitize, development of ER/ER Global, and a capital raise for the acquisition of Seamico Securities (NYSCEF Doc. No. 30, ¶ 25). More specifically, Mr. Kirschenbaum asserts that he contributed $1 million to the Aspen REIT, $1.36 million to Aspen Coin, and invested $1 million in Securitize, and that the defendants have denied him any ability to liquidate or redeem his interests in the same (id., ¶¶ 43, 54-55, 66). According every favorable inference to Mr. Kirschenbaum, as the court must on a motion to dismiss, Mr. Kirschenbaum has sufficiently alleged that the defendants were unjustly enriched through his monetary contributions to the Aspen REIT, Aspen Coin, and Securitize and, thus, states a claim for unjust enrichment.
>
> Although the Moving Defendants assert that the unjust enrichment claim is duplicative of the Mr. Kirchenbaum's breach of contract claim, the parties' Agreement does not apply to any projects other than the Sunset Tower REIT and the unjust enrichment claim may be sustained insofar as Mr. Kirschenbaum seeks damages for projects other than the Sunset Tower REIT. Accordingly, the fifth cause of action for unjust enrichment is sustained and to the extent that the Second Amended Complaint pleads a cause of action for unjust enrichment, the claim as alleged therein survives

(NYSCEF Doc. No. 69, at 13-14).

Following the completion of discovery and on the fully developed record, each of these alleged investments is governed by an existing and enforceable contract such that Mr. Kirschenbaum cannot maintain a claim sounding in unjust enrichment.

As to the investment in Aspen REIT, the parties agreed that Mr. Kirschenbaum's investment in the Sunset Tower REIT was governed by the March 22, 2016 Letter Agreement (the **Agreement**; NYSCEF Doc. No. 164). Pursuant to the Agreement, the parties agreed that following the sale of the Sunset Tower REIT, the Agreement would remain in place and cover future investments. In his moving papers, Mr. Kirschenbaum acknowledged and confirmed that, following the sale of the Sunset Tower Hotel, the Agreement remained in place and covered his investment in the Aspen REIT:

> 36. We simply replaced the Sunset Tower Hotel with the St. Regis Aspen Hotel and pursued the Aspen REIT. Defendant DeBaets sent an e-mail confirming same. See e-mail from Defendant DeBaets confirming same dated 5/24/2017 at hereto as Exhibit 59. Defendant DeBaets testified, "I sold the hotel and in order to bring the experiment to a tangible outcome we decided to replace the underlying asset from the Sunset Tower to the St. Regis Aspen." EBT of Defendant DeBaets, Exhibit @, at 113:10-14.
>
> 37. Moreover, there was no question that my role and equity was unaltered as I continued with the new asset Aspen REIT. Defendant DeBaets testified:
>
> > Q When the Sunset Tower deal did not go through did you notify Mr. Kirschenbaum that your agreement with him was terminated?
> > A No.
> > Q Was it terminated?
> > A No. Id., 133:12-18

(NYSCEF Doc. No. 198 ¶¶ 36-37). Thus, an unjust enrichment claim predicated on his Aspen investment fails as it is governed by the Sunset agreement.

As to Aspen Coin, that investment was covered by a Purchase Agreement dated October 2, 2018 (NYSCEF Doc. No. 167) pursuant to which Mr. Kirschenbaum agreed to purchase $1,360,000 worth of Aspen Digital Inc.

As to Securitize, that investment was covered by a Series A Preferred Stock Purchase Agreement dated November 2, 2018 (NYSCEF Doc. No. 216) pursuant to which purchased $999,998.29 of Series A Preferred Stock of Securitize, Inc.

Because Mr. Kirschenbaum's investments in each of the Aspen REIT, Aspen Coin, and Securitize are governed by valid and enforceable contract, they are precluded from being the predicate of a cause of action for unjust enrichment (*Goldman*, 5 NY3d at 572). Thus, the motion for summary judgment is granted.

III. Defendants' motion to seal

The defendants' motion (Mot. Seq. No. 008) to seal NYSCEF Doc. Nos. 216 is granted to the extent that Exhibit A contains sensitive non-party financial information and the public's interest in such information is far outweighed by the need for sealing (*Danco Lab., Ltd. V Chemical Works of Gedeon Richter, Ltd.*, 274 AD2d 1, 8 [1st Dept 2000]; 22 NYCRR § 216.1[a]). The parties are hereby ordered to upload a copy of the sealed document with only the signatures pages of non-parties and Exhibit A of the document redacted to the NYSCEF system.

It is hereby ORDERED that plaintiff's motion to amend the complaint is denied; and it is further

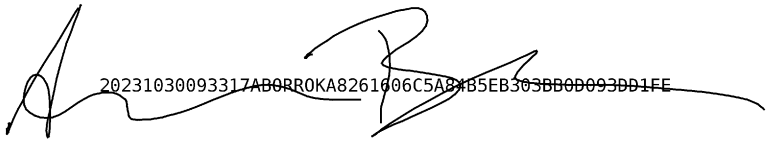
ORDERED that the defendants' motion for summary judgment is granted; and it is further

ORDERED that the Clerk of the Court is directed, upon service on him of a copy of this order with notice of entry, to seal NYSCEF Doc. Nos. 216 and to separate this document and to keep them separate from the balance of the file in this action; and it is further

ORDERED that thereafter, or until further order of the court, the Clerk of the Court shall deny access to the said sealed documents to anyone (other than the staff of the Clerk or the court) except for counsel of record for any party to this case and any party; and it is further

ORDERED that service upon the Clerk of the Court 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); and it is further

ORDERED that the parties shall upload the sealed document with only the signature pages of non-parties and Exhibit A of the document redacted to the NYSCEF system within three business days of this decision and order.



10/30/2023
DATE

ANDREW BORROK, J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
[ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER

653287/2019 KIRSCHENBAUM, JASON vs. DE BAETS, STEPHANE
Motion No. 006 007 008