

O'Connor v Society Pass Inc.

2023 NY Slip Op 34535(U)

December 23, 2023

Supreme Court, New York County

Docket Number: Index No. 656938/2019

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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THOMAS O'CONNOR, CVO ADVISORS PTE. LTD.	INDEX NO. <u>656938/2019</u>
Plaintiffs,	MOTION DATE <u>09/21/2023</u>
- v -	MOTION SEQ. NO. <u>010</u>
SOCIETY PASS INCORPORATED,	
Defendant.	DECISION + ORDER ON MOTION
-----X	

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 010) 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 315, 316, 317, 318, 325 were read on this motion to AMEND and RENEW.

Defendant Society Pass, Inc.'s ("Society Pass" or "Defendant") motion pursuant to CPLR §3025(b) for leave to amend its answer to include a fraudulent inducement defense, and pursuant to CPLR §2221(e) for leave to renew Plaintiff Thomas O'Connor's ("Plaintiff" or "O'Connor") motion for partial summary judgment (Mot. Seq. 005), is **denied**.

BACKGROUND

On May 17, 2023, the Court granted in part O'Connor's motion for partial summary judgment on his first cause of action for breach of contract (NYSCEF 199 [Order]; NYSCEF 233 [Transcript]). Specifically, the Court determined that O'Connor validly exercised his right to purchase 1,148 shares of Society Pass under the terms of a Common Stock Purchase Warrant ("Warrant"). Mr. O'Connor was subsequently deposed on July 6, 2023 (NYSCEF 303 [Transcript]).

Society Pass now argues that, because Mr. O'Connor testified at deposition that he believed a Call Agreement (NYSCEF 312) he entered into with Defendant's Chief Executive Office, Dennis Nguyen ("Nguyen"), was not enforceable, that he fraudulently induced Defendant to enter several related contracts, including the Warrant. The Call Agreement provides a right for Mr. Nguyen to purchase O'Connor's shares in Plaintiff CVO Advisers PTE Ltd. ("CVO").

According to Mr. Nguyen, CVO was the entity designated to receive Series A Shares of Society Pass, as opposed to O'Connor individually, in order to provide protection to both Society Pass and Mr. Nguyen (NYSCEF 307 [Nguyen Aff. ¶¶19-25]). Mr. Nguyen asserts that he would not have caused Society Pass to enter into any agreements with O'Connor, including the Warrant, absent O'Connor's entry into the Call Agreement (Nguyen Aff. ¶¶29-35). Mr. Nguyen does not claim to ever have exercised any right under the Call Agreement (Nguyen Aff. ¶34).

DISCUSSION

A. Leave to Amend is Denied Because Society Pass Has Not Stated a *Prima Facie* Fraudulent Inducement Defense

CPLR 3025(b) provides that "[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court." "Motions for leave to amend should be freely granted, absent prejudice or surprise ... unless the proposed amendment is palpably insufficient or patently devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499 [1st Dept 2010] [citations omitted]).

The movant "need not establish the merit of its proposed new allegations" (*Id. citing Lucido v Mancuso*, 49 AD3d 220, 227 [2d Dept 2008]), as long as the proposed claims pass the threshold of basic legal sufficiency assuming the truth of the factual allegations (*Olam Corp. v*

Thayer, 2021 N.Y. Slip Op. 30345[U] [N.Y. Sup Ct, New York County 2021]). Simply put, an amendment that would not survive a motion to dismiss is not permitted (*Id.*).

The elements of fraudulent inducement are: 1) a false representation of material fact, 2) known by the party charged to be untrue, 3) made with the intention of inducing reliance and forbearance from further inquiry, 4) that is justifiably relied upon, and 5) results in damages (*United States Life Ins. Co. in City of New York v Horowitz*, 192 AD3d 613, 614 [1st Dept 2021] citing *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]). The failure to sufficiently allege each element warrants the denial of a motion to amend (*Anos Diner, Inc. v Pitios Gourmet, Ltd.*, 100 AD2d 948, 949 [2d Dept 1984]).

Accepting Society Pass' allegations as true, Society Pass has not stated a *prima facie* defense of fraudulent inducement. Fraudulent inducement must be stated with particularity pursuant to CPLR 3016 (*SL 4000 Connecticut LLC v CBRE, Inc.*, 219 AD3d 417, 418 [1st Dept 2023]). "In a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract . . . and not merely a misrepresented intent to perform" (*Bryan v Slothower*, 2018 N.Y. Slip Op. 32396[U], 3 [N.Y. Sup Ct, New York County 2018] citing *Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323-24 [1st Dept 2004]). "General allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support the claim" (*New York Univ. v Cont. Ins. Co.*, 87 NY2d 308, 318 [1995] citing *Leon v Martinez*, 84 NY2d 83, 88 [1994]).

In this case, Mr. O'Connor's subjective belief or opinion that the Call Agreement is not enforceable was not a representation of fact and is therefore insufficient to serve as the basis of a fraudulent inducement defense (*Raytheon Co. v AES Red Oak, LLC*, 37 AD3d 364, 364 [1st Dept

2007] [absence of a “false statement” precludes a fraudulent inducement counterclaim]). At most, Society Pass alleges an omission on the part of Mr. O’Connor to volunteer his opinion that the Call Agreement was not enforceable. Defendant’s unsupported argument that Mr. O’Connor intended not to comply with the Call Agreement, even if true, is insufficient as a matter of law to serve as the basis for a viable fraudulent inducement defense (*New York Univ. v Cont. Ins. Co.*, *supra*). Accordingly, leave to amend is denied.

B. Leave to Renew is Denied

CPLR 2221(e) provides, in relevant part, that a motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination. . .” and “shall contain reasonable justification for the failure to present such facts on the prior motion.” “Renewal is granted sparingly and is not a second chance freely given to parties who have failed to exercise due diligence in making their first factual presentation” (*Wade v Giacobbe*, 176 AD3d 641, 641 [1st Dept 2019]). It is incumbent on the movant to establish why it did not raise the allegedly new facts on the prior motion (*Alekna v 207-217 W. 110 Portfolio Owner LLC*, 212 AD3d 480 [1st Dept 2023]).

Renewal is not warranted because, as set forth above, there is no new “fact” to which Defendant’s request is tethered. The Call Agreement, Warrant and checks used by Plaintiff O’Connor to exercise his rights under the Warrants are all facts that were known to Defendant at the time O’Connor moved for partially summary judgment and are therefore insufficient to warrant renewal (*Rosado v Cepeda*, 219 AD3d 1236, 1236 [1st Dept 2023]). Even if the alleged facts were newly discovered, Defendant fails to proffer any excuse for its failure to raise them in opposition to O’Connor’s partial summary judgment motion (*Hausmann v Wolf*, 187 AD2d 371, 373 [1st Dept 1992]). Finally, the facts alleged are insufficient to state a *prima facie* fraudulent

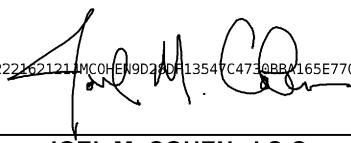
inducement defense and are therefore insufficient to warrant denial of the motion for partial summary judgment even if leave to renew were granted (*New York Univ. v Cont. Ins. Co.*, *supra*). Leave to renew is therefore denied.

* * * *

Accordingly, it is

ORDERED that Defendant’s motion for leave to amend and for leave to renew is **DENIED.**¹

This constitutes the decision and order of the Court.

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JOEL M. COHEN, J.S.C.

12/23/2023

DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	

¹ While the Court has considered the parties’ arguments on the merits, the Court notes that Defendant’s motion was supported by a combined affirmation and memorandum of law, which is not permitted. All motions must be supported by a separate memorandum of law (*see* Part 3 – Practices and Procedures Sec. VI[C]).