

Brevet Direct Lending v Aprio LLP

2023 NY Slip Op 34962(U)

October 5, 2023

Supreme Court, New York County

Docket Number: Index No. 656441/2018

Judge: Jennifer G. Schechter

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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: COMMERCIAL DIVISION**

PRESENT: HON. JENNIFER G. SCHECTER **PART 54**

Justice

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INDEX NO. 656441/2018

BREVET DIRECT LENDING - SHORT DURATION FUND,
L.P.,

MOTION SEQ. NO. 009

Plaintiff,

- v -

**DECISION + ORDER ON
MOTION**

APRIO LLP, F/K/A HABIF, AROGETI & WYNNE, LLP,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 009) 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308

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

Motion seq. 9 in Index No. 656441/2018 and motion seq. 7 in Index No. 650651/2019 are consolidated for disposition. Citations to Dkt. refer to the docket of Index No. 656441/2018.

The primary question in these cases is whether defendant committed gross negligence in providing services under the parties' engagement agreement, as damages would otherwise be capped at \$379,126, which is "two times the total amount of fees paid" (Dkt. 198 at 4).

As an initial matter, the parties dispute whether any of the plaintiffs other than Royal and Brevet have standing since they are the only plaintiffs that are named as Clients in the engagement agreement (*see id.* at 1). Thurman and Horwits lack standing for the reasons stated on the record (Dkt. 308 at 44-48). However, there is evidence of defendant's knowledge that BHSC would be an Acquisition Vehicle (*see* Dkt. 198 at 1). Thus, there are questions of fact about BHSC's standing (*see Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 551 [1985]).

On the merits, defendant is entitled to summary judgment on all claims for gross negligence except for the portion of the claim concerning confirmation.com. There is evidence that defendant failed to follow its own procedures by not directly confirming the amount of funds in the HSBC account (Dkt. 294 at 21-22; *see* Dkt. 286 at 15). Thus, there

is a question of fact about whether such failure amounts to gross negligence (*see S.A. De Obras y Servicios, COPASA v Bank of Nova Scotia*, 170 AD3d 468, 473 [1st Dept 2019] ["Plaintiffs have sufficiently alleged that defendants' conduct evinced a reckless disregard for plaintiff's rights insofar as it failed to comply with, or actively disregarded, its own policies"], citing *Tillage Commodities Fund, L.P. v SS&C Techs., Inc.*, 151 AD3d 607, 608 [1st Dept 2017]).

By contrast, there is no evidence that defendant's failure to employ any of the other means of further verification violated any internal company policy or accepted industry practice. Most significantly, plaintiffs lack evidence that defendant's failure to discover the truth about the MBNA, Lycamobile and BTMI accounts receivable, which were fabricated by Griffith, was due to gross negligence. Plaintiffs did not submit evidence that defendant violated company policy or industry standards by failing to take further steps to investigate whether the people with whom they emailed or spoke were using fake email addresses and phone numbers (*see* Dkt. 195 at 13-16, 20-21; *see also id.* at 23-25 [explaining Griffith's fraudulent scheme]). While perhaps defendant may have been negligent in failing to vet the legitimacy of the email addresses and phone numbers, plaintiffs have not submitted evidence that this is normally done as part of the confirmation process or that defendant was aware of any red flags suggesting that the email addresses and phone numbers were suspect (*see Rotterdam Ventures, Inc. v Ernst & Young LLP*, 300 AD2d 963, 965 [3d Dept 2002]). Thus, no reasonable finder of fact could conclude that defendant's failure to do so was grossly negligent (*see Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823-24 [1993]; *see also Gluck v JPMorgan Chase Bank*, 12 AD3d 305, 306 [1st Dept 2004], citing *Lubell v Samson Moving & Storage, Inc.*, 307 AD2d 215, 217 [1st Dept 2003]).

Finally, there are serious questions about what damages, if any, Brevet will be able to prove at trial. Brevet certainly cannot recover damages based on the lost opportunity to earn a \$3.5 million refinancing fee or \$704,050 in interest. Brevet's damages are the loan proceeds it actually provided to BHSC that were not capable of being repaid. It is undisputed that Brevet actually advanced \$13.45 million. But for the alleged gross negligence, this amount would not have been provided to BHSC. Nor would any loan have been made had the fraud been revealed. There was no lost opportunity here (*cf. Alrose Steinway, LLC v Jaspan Schlesinger, LLP*, 205 AD3d 529, 530 [1st Dept 2022]). Thus, there is no basis to hold defendant liable for interest and a refinancing fee that would never have been obtained, as defendant's alleged gross negligence was not the proximate cause of the lost opportunity to earn those amounts (*see VPC Projects, LLC v Golenbock Eiseman Assor Bell & Peskoe, LLP*, 191 AD3d 623 [1st Dept 2021]).

Brevet also may not admit any evidence at trial regarding their damages that was not produced during discovery, such as invoices for fees paid for professional services (regardless if the claimed amount is \$533,682 or \$1,731,179.68). Brevet cannot merely testify about these expenses since by failing to actually produce the underlying invoices

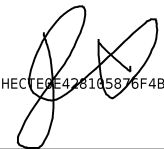
during discovery it prejudiced defendant by depriving it of a meaningful ability to vet the invoiced amounts. It is too late to fix this problem.

Moreover, as discussed during oral argument, Brevet's damages are subject to a significant set-off from the settlement proceeds it is receiving from BHSC. It will remain unclear, at least until the end of 2023, if Brevet may recover more on the settlement than it actually disbursed to BHSC (*see* Dkt. 299 at 14 [indicating that, in total, Brevet will have recovered more than \$15 million]). If the remaining settlement payments are made, then it would appear that Brevet's only remaining provable out-of-pocket loss would be the actual fees paid to defendant. Indeed, this would render the question of whether defendant was grossly negligent moot with respect to Brevet.

The parties should be prepared to address the status of the settlement payments during the next conference, which will be held in early 2024 after the final payment is scheduled to be made. In the interim, the parties are urged to try to settle given the limited issues that remain for trial.

Accordingly, it is ORDERED that defendant's motions for summary judgment are GRANTED IN PART to the extent set forth above, and a status conference to discuss a pre-trial schedule will be held on Teams on January 16, 2024 at 1:00 p.m.

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JENNIFER G. SCHECTER, J.S.C.

10/5/2023

DATE

CHECK ONE:

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