

**OOO Grazhdan Proyek Stroi v Prometheus Capital
Trust, S.A.**

2024 NY Slip Op 30752(U)

March 5, 2024

Supreme Court, New York County

Docket Number: Index No. 653363/2019

Judge: Louis L. Nock

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

-----X

OOO GRAZHDAN PROYEK STROI,

Plaintiff,

INDEX NO. 653363/2019

MOTION DATE 02/08/2023

MOTION SEQ. NO. 003

- v -

PROMETHEUS CAPITAL TRUST, S.A., PROMETHEUS
CAPITAL GROUP, PROMETHEUS CAPITAL BANK, JOHN
BLOCH, ROBERT ANDREAS, ROBERT L. REESE,
WILLIAM M. PINZLER, ALBERTO ARCE, and CARL
BRUNNER,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 30, 31, 32, 33, 51, 71, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 91, 92, 93, 94, 95, 96, and 97

were read on this motion to DISMISS.

LOUIS L. NOCK, J.S.C.

Upon the foregoing documents, the motion by defendant William M. Pinzler to dismiss the complaint pursuant to CPLR 3211(a)(7) and (a)(10) for failure to state a cause of action and failure to join a necessary party is granted, and the cross-motion by plaintiff for an extension of time to serve and to amend the complaint pursuant to CPLR 306-b and 3025 is denied, for the reasons set forth in the as set forth in the following memorandum.

Background

As alleged in the complaint, this action arises out of agreements between plaintiff and defendants Prometheus Capital Trust, S.A., Prometheus Capital Group, and Prometheus Capital Bank (collectively, "Prometheus"), pursuant to which plaintiff "was to be assigned by lease a portfolio of securities for use by plaintiff as collateral for a bank loan to be arranged by Prometheus" (complaint, NYSCEF Doc. No. 1, ¶ 1). Defendant Pinzler functioned as

Prometheus' outside counsel, and is the only defendant to have been served. The remaining defendants are alleged to be officers and representatives of Prometheus (*id.*, ¶¶ 13-15, 17).

Plaintiff alleges that it forwarded “hundreds of thousands of dollars” to Prometheus to cover a contract deposit and insurance premiums, but Prometheus never assigned the portfolio of securities to plaintiff and failed to procure the bank loan for Prometheus (*id.*, ¶ 2). None of the funds sent to Prometheus, which plaintiff asserts were sent through defendant Pinzler, were ever returned, totaling not less than \$1,000,000 (*id.*, ¶¶ 3-4). Plaintiff asserts that the entire transaction was fraudulent, including, that the individual defendants may have used “aliases and false identities to perpetrate their fraud” (*id.*, ¶ 6).

Plaintiff commenced this action on June 7, 2019. Pinzler filed an answer to the complaint on September 27, 2019. Since that time, no other defendant has been served, nor has plaintiff sought an extension of time to do so until the present motion practice. Plaintiff asserts that it has attempted, through discovery and through private investigators, to locate the defendants for service (*Chigintsev aff.*, NYSCEF Doc. No. 77, ¶¶ 51-56), but has not provided any proof of the details of those searches, whether by documentary evidence or affidavits of the investigators.

Standard of Review

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). “[The court] accept[s] the facts as alleged in the [pleading] as true, accord[ing the nonmovant] the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory” (*id.* at 87-88). Ambiguous allegations must be resolved in the nonmovant’s favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). “The motion

must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). “[W]here . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration” (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Discussion

Failure to Join a Necessary Party (CPLR 3211[a][10])

Pinzler first moves to dismiss the complaint because plaintiff has failed to serve the Prometheus entities, who are the only parties to the contract with plaintiff. A party may move to dismiss a complaint on the ground that “the court should not proceed in the absence of a person who should be a party” (CPLR 3211[a][10]). “Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants” (CPLR 1001[a]). “By nature and definition, the issue arises under CPLR 3211(a)(10) only where a potentially affected party is not named in the caption of the action” (Hon. Mark C. Dillon, Practice Commentaries, McKinney’s Cons Laws of NY, CPLR C3211:32 [2020]). Here, the Prometheus entities have been joined as parties and named in the action, and, therefore, this branch of Pinzler’s motion must be denied.

Pinzler’s cited cases¹ are not to the contrary (*Germain v Town of Chester Planning Bd.*, 178 AD3d 926, 927 [2d Dept 2019] [“We agree with the Supreme Court's determination to grant dismissal of the petition for failure to timely join the landowner, Chill Factor”]; *Cabrera v City*

¹ Pinzler Mem. (NYSCEF Doc. No. 33) at 6, 7, 17.

of *N.Y. Civ. Serv. Comm'n*, 2019 WL 112721 at * 2 [Sup Ct, NY County, 2019] [“Having failed to timely join the DOC and New York City as necessary parties, the court is compelled to dismiss the petition”], *affd* 181 AD3d 540 [1st Dept 2020]; *Taurus Petroleum Ltd. v Global Emerging Markets North America, Inc.*, 2018 NY Slip Op 31264[U] at *21 [Sup Ct, NY County, 2018] [dismissing complaint for failure to name borrower and entity that received money from borrower, who were not named]).²

Failure to State a Cause of Action (CPLR 3211[a][7])

Plaintiff alleges three causes of action directly against Pinzler: fraud, unjust enrichment, and conversion. “Generally, in a claim for fraudulent misrepresentation, a plaintiff must allege 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” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). Allegations of fraud must include who spoke, what they said, and the date on which they said it (*EI Entertainment U.S. LP v Real Talk Entertainment, Inc.*, 85 AD3d 561, 562 [1st Dept 2011]). Here, plaintiff fails to plead fraud with requisite particularity (CPLR 3016[b]). First, plaintiff engages in impermissible group pleading (*Principia Partners LLC v Swap Fin. Group, LLC*, 194 AD3d 584, 584 [1st Dept 2021] [“The complaint failed to distinguish between the entities and was an improper group pleading”]).

² The court takes note of Pinzler’s citation to one decision rendered by a court of concurrent jurisdiction herewith – *Rocket Shippers, LLC v SB Glob. Ventures PTE Ltd.* (2022 NY Slip Op 33721[U] at *3 [Sup Ct, NY County, 2022] [Saunders, J.] – granting dismissal on grounds of a plaintiff’s failure to serve a named defendant; however, the undersigned elects, instead, to follow the plain dictate of CPLR 3211(a)(10) and the official Practice Commentary thereon (*see*, Hon. Mark C. Dillon, Practice Commentaries, McKinney’s Cons Laws of NY, CPLR C3211:32 [2020] [“By nature and definition, the issue arises under CPLR 3211(a)(10) **only where** a potentially affected party is not named in the caption of the action”] [emphasis added]).

Second, the complaint fails to allege what misrepresentations Pinzler allegedly made, who he made them to, or when he made them (*EI Entertainment U.S. LP, supra*).

Moreover, where a fraud claim arises out of the same facts and seeks the same damages as a claim for breach of contract, it must be dismissed as duplicative (*see Fairway Prime Estate Mgt., LLC v First American Intl. Bank*, 99 AD3d 554, 557 [1st Dept 2012] [“if the promise concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract”]; *HSH Nordbank AG v UBS AG*, 95 AD3d 185, 206 [1st Dept 2012] [dismissing fraud claim based in part on alleged insincere promise regarding the manner of performance]). While pled against separate defendants, the breach of contract and fraud claims arise out of the same facts, namely, Prometheus’ failure to perform under the agreement with plaintiff.

Turning to the unjust enrichment and conversion causes of action, they, too, arise out of the same facts as the breach of contract claim and must be dismissed as duplicative *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987] [unjust enrichment]; *Richbell Information Services, Inc. v Jupiter Partners, LP*, 309 AD2d 288, 306 [1st Dept 2003] [conversion]). Plaintiff does not, in actuality, allege a duty collateral to the contract that could give rise to tort liability (*Brown v Brown*, 12 AD3d 176 [1st Dept 2004]).

Finally, plaintiff alleges claims against Pinzler for “concerted action liability” and “aiding and abetting liability” (complaint, NYSCEF Doc. No. 1, ¶¶ 79-87). To the extent that plaintiff alleges civil conspiracy, such a separate tort does not exist under New York law (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016]). Moreover, as set forth above, the tort claims underlying such claims are all insufficiently pled. In order to allege aiding and abetting liability, it is necessary to plead the underlying tort sufficiently, and plaintiff has not done so (*Oster v*

Kirschner, 77 AD3d 51, 55 [1st Dept 2010] [“A plaintiff alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud”]).

Accordingly, so much of Pinzler’s motion to dismiss the complaint for failure to state a cause of action is granted.

Cross-Motion for Leave to Amend the Complaint (CPLR 3025)

Leave to amend a pleading should be freely given, but a court must first examine the merits of the proposed amendment (*Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 365-66 [1st Dept 2007]). An amendment to a complaint may not “be based on facts that would contradict the original theory” (*Brunetti v Musallam*, 59 AD3d 220, 223 [1st Dept 2009] [internal quotation marks and citations omitted]). Here, plaintiff originally alleged that Prometheus breached the agreement with plaintiff with the aid of its counsel, Pinzler, and other officers and agents of Prometheus. While plaintiff alleged that some of the individual defendants were operating under aliases or false identities, plaintiff did not claim that any defendant was a fictitious person or entity. In the amended complaint, plaintiff now alleges a wholly different factual underpinning for its claims. Specifically, plaintiff now attempts to pin the entire scheme on Pinzler, alleging that the other entities named in the complaint are entirely fictitious creations of Pinzler in furtherance of his alleged scheme to defraud plaintiff. This is markedly different from the allegations originally made against Pinzler as one among several individual defendants. It does not go unnoticed that Pinzler is thus far the only defendant who has been served. Moreover, as set forth by Pinzler, Prometheus Capital Trust, S.A., appears to be an operating entity domiciled in Costa Rica (Prometheus corporate filings, NYSCEF Doc. No. 95). As plaintiff’s two theories of liability are factually inconsistent, the cross-motion for leave to amend is denied.

Cross-Motion for an Extension of Time to Serve (CPLR 306-b)

Pursuant to CPLR 306-b, service of the summons and complaint shall be made within 120 days after the commencement of the action. Upon motion, a court may, within its discretion, grant an extension of time within which to effect service for good cause shown or in the interest of justice (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 101 [2001]). While the “good cause” standard requires a showing of reasonable diligence; under the broader “interest of justice” standard, “the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff’s request for the extension of time, and prejudice to defendant” (*id.* at 105).

Here, the court notes both the age of the case, and the length of time that plaintiff waited until making this request. The court is also cognizant that plaintiff has been attempting through discovery, subpoena practice (decision and order, NYSCEF Doc. No. 98), and otherwise to determine the locations of the other defendants, though the affidavit of its principal is scant in this regard (*Chigintsev aff.*, NYSCEF Doc. No. 77, ¶¶ 51-56). Given the age of the case and the timing of the allegations of the original complaint, it is likely that, in the absence of an extension, at least some of plaintiff’s claims may be time-barred, due in no small part to the difficulty in locating defendants, as well as the myriad delays and impediments imposed by the COVID-19 pandemic from 2020 onward. In addition, the complaint adequately alleges, at minimum, a cause of action for breach of contract against Prometheus. The court, therefore, grants the motion in the interests of justice, and extends plaintiff’s time to serve the remaining defendants with the summons and complaint (NYSCEF Doc. No. 1) for sixty days following the filing by

the court of this decision and order. Given the information provided by Pinzler in opposition to the cross-motion, that should be sufficient time to, at least, serve Prometheus.

Accordingly, it is hereby

ORDERED that the motion to dismiss the complaint as to defendant William M. Pinzler for failure to state a cause of action is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendant William M. Pinzler and against plaintiff dismissing the complaint against Pinzler, with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the action is severed and continued as against the remaining defendants; and it is further

ORDERED that so much of the cross-motion for leave to serve an amended complaint is denied; and it is further

ORDERED that so much of the cross-motion for an extension of time to serve the original complaint (NYSCEF Doc. No. 1) is granted to the extent that plaintiff's time to serve the remaining defendants with said original complaint is extended to sixty days following the date of the filing by this court of this decision and order; and it is further

ORDERED that this order is in no way determinative of the tolling of the statute of limitations or other issues of repose, should such issues arise.

This constitutes the decision and order of the court.

ENTER:

Louis L. Nock

<u>3/5/2024</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> GRANTED IN PART
		<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE