

Khan v Garg

2024 NY Slip Op 31654(U)

May 9, 2024

Supreme Court, New York County

Docket Number: Index No. 652334/2013

Judge: Andrea Masley

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

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RAZA KHAN, <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> VISHAL GARG, EDUCATION INVESTMENT FINANCE CORPORATION, 1/0 CAPITAL LLC, and EMBARK HOLDCO I, LLC, <p style="text-align: center;">Defendants.</p>	INDEX NO. <u>652334/2013</u> MOTION DATE _____
	MOTION SEQ. NO. <u>030</u> <p style="text-align: center;">DECISION + ORDER ON MOTION SECOND AMENDMENT</p>

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 030) 1382, 1383, 1384, 1396, 1397, 1457, 1461, 1484, 1485, 1486, 1487, 1488, 1489, 1490, 1491, 1492, 1493, 1494, 1495, 1496, 1497, 1498, 1530, 1531, 1532, 1543, 1598, 1649, 1797, 1800, 1801, 1804, 1805, 1806, 1807 were read on this motion to/for PRECLUDE.

Upon the foregoing documents, it is

At trial on May 8, 2024, defendants objected to plaintiff’s evidence concerning “EIFC’s enterprise value” which plaintiff mentioned during his opening statement. Plaintiff’s expert did not opine on EIFC’s enterprise value. (See NYSCEF 1489, O’Bryan Report.) Accordingly, plaintiff’s reference to “enterprise value” in its memo of law opposing defendant’s motion to preclude certain evidence was inaccurate. (NYSCEF 1532, Plaintiff’s Memo of Law in Opposition at 16 [mot. seq. no. 030].) This court compounded the problem when it quoted plaintiff’s memo of law as to what plaintiff intended to prove at trial. Accordingly, page 12 of the court’s April 18, 2024 decision is modified as follows:

“Plaintiff intends to present evidence at trial that ‘these particular breaches of Garg’s fiduciary duties, individually and collectively, led to the attrition of EIFC’s employees and customers base, and ultimately the complete destruction of EIFC.’ (NYSCEF 1532, MOL at 16; NYSCEF 1489, O’Bryan Report ¶ 39.)”

[* 1]

This is a derivative action by Khan, on behalf of EIFC, against Garg where damages are calculated based on Garg's alleged harm to EIFC, not the value of Khan's ownership interest in EIFC.

Defendants' objection above prompted the court to revisit its April 18, 2024 amended decision. (NYSCEF 1801, Amended Decision and Order [mot. seq. no. 030] [April 18, 2024].)¹ The court did not explicitly state a reason for its decision on defendants' motion sequence 030 as to items **1, 6, 7, 8** and **12**,² because they were addressed in the court's discussion of plaintiff's motion sequence 039 to renew. (*Id.* at 3-10.) Again, in motion 030, defendants sought to preclude evidence concerning:

1. The facts and issues that were alleged and settled in *Activist Special Advisory Services, LLC v. Phoenix Real Estate Solutions* (the "PRESL Arbitration"), Case No. 011400002627, American Arbitration Proceeding.
6. Any evidence relating to employment agreements executed by Mingsung Tang and Ziggy Jonsson.
7. Any argument that Garg hired Tang and Jonsson to work for Defendant 1/0 Capital and steal or destroy intellectual property belonging to EIFC.
8. Any argument that Garg and 1/0 Capital intentionally induced PRES to terminate its contract with ASAS and to divert the contract to 1/0 Capital.
12. Any argument that Garg (i) misappropriated EIFC proprietary information, clients, relationships or business opportunities or (ii) set up competing businesses by stealing EIFC's core business and misappropriating its proprietary information, business opportunities or clients.

To clarify, since the court denied plaintiff's motion sequence 039 to renew, the court also rejected plaintiff's identical estoppel argument opposing defendant's motion to preclude. Accordingly, defendants' motion to preclude evidence on the following topics is granted unless plaintiff raises a viable alternate argument in its opposition to

¹ This amended decision addressed motion sequence numbers – 030, 035, and 039 – and is uploaded three times under each sequence number at NYSCEF 1801, 1802, and 1803.

² Defendants sought to preclude a total of 15 items (defendants' 1-15). (See NYSCEF 1801, Amended Decision and Order at 10-11 [mot. seq. no. 030] [April 18, 2024].)

defendants' motion 030. Plaintiff asserted its estoppel argument with regard to defendants' **1, 4, 5, 6, 7, 8, 12, 14** and five damage theories, arguing that

"Plaintiff respectfully submits that Defendants should be estopped from seeking preclusion of the following evidence and arguments at trial, inter alia:

- [Defendants' **1**] The facts and issues that were alleged and settled in Activist Special Advisory Services, LLC v. Phoenix Real Estate Solutions (the "PRESL Arbitration"), Case No. 011400002627, American Arbitration Proceeding.
- [Defendants' **4**] Any arguments that the settlements reached in the above actions were contrary to the interests of EIFC and Khan.
- [Defendants' **5**] Any argument that Garg subverted the PRESL Arbitration by failing to produce documents.
- [Defendants' **6**] Any evidence relating to employment agreements executed by Mingsung Tang and Ziggy Jonsson.
- [Defendants' **7**] Any argument that Garg hired Tang and Jonsson to work for Defendant 1/0 Capital and steal or destroy intellectual property belonging to EIFC.
- [Defendants' **8**] Any argument that Garg and 1/0 Capital intentionally induced PRES to terminate its contract with ASAS and to divert the contract to 1/0 Capital.
- [Defendants' **12**] Any argument that Garg (i) misappropriated EIFC proprietary information, clients, relationships or business opportunities or (ii) set up competing businesses by stealing EIFC's core business and misappropriating its proprietary information, business opportunities or clients.
- [Defendants' **14**] Any testimony at trial from Peter Vinella
- [Defendants' **1**] Damages Theory: Receivable Amounts Owed Activist - \$1.4 million
- Damages Theory: CDO Analytics – Triaxx/Activist Losses - \$11.3 million³
- Damages Theory: CDO Analytics – Lost Prospective Customers - \$27.9 million⁴
- [Defendants' **10**] Damages Theory: Better Mortgage Equity - \$132.2 million
- [Defendants' **9, 12**] Damages Theory: Climb Credit Equity – \$10.6 million."⁵ (NYSCEF 1532, Plaintiff's Memo of Law in Opposition at 13 [mot. seq. no. 030].)

Defendants' motion to preclude evidence concerning defendants' **1, 5, 6, and 8** is granted⁶ for the additional reason that the court granted defendants' motion for partial

³ This damages theory will be addressed by the court after hearing from plaintiff.

⁴ This damages theory will be addressed by the court after hearing from plaintiff.

⁵ This damages theory will be addressed by the court after hearing from plaintiff.

⁶ As to defendants' **1**, plaintiff is precluded from offering facts and issues alleged and settled in the PRESL Arbitration in support of his case, but as explained below, plaintiff is not precluded from presenting facts and issues alleged and settled in the PRESL Arbitration as a defense to defendants' counterclaims. Thus, this portion of the motion as to defendants' **1** is effectively denied.

summary judgment dismissing Count II (v),⁷ (vii),⁸ (x)⁹, (xiv)¹⁰ and (xv)¹¹ of the First Amended Complaint (NYSCEF 335) on the ground that the factual predicates for the PRES claims and the employment claims were alleged in the arbitration and settled. “The fiduciary duty claim is dismissed to the extent that it is based on those factual predicates.” (NYSCEF 1358, Amended Decision and Order at 8 [mot. seq. no. 026] [May 8, 2023].) Accordingly, the court did not address damages in the May 8, 2023 decision. (*Id.* at 12.) However, the May 8, 2023 decision necessarily precludes plaintiff’s “Damages Theory: Receivable Amounts Owed Activist - \$1.4. million.”

While the court’s summary judgment decision necessarily precluding defendants’ **1**, plaintiff may defend himself against defendants’ counterclaims for corporate waste arising from litigations that plaintiff initiated. Therefore, defendants’ motion to preclude is denied as to defendants’ **1** as plaintiff is permitted to introduce facts and issues that were alleged and settled in the PRESL Arbitration to defend himself.

Just as defendants’ motion to preclude was granted as to defendants’ **9** and **14** in the April 18, 2024 decision, defendants’ motion to preclude evidence concerning

⁷ “(v) diverting Phoenix’s service contract with EIFC subsidiary ASAS to Defendant 1/0 CAPITAL LLC for his own personal benefit and, to that end, inducing Mingsung Tang and Ziggy Jonsson to violate their non-competition agreements with EIFC and to become employed by Defendant 1/0 CAPITAL (or some other legal entity associated with 1/0 CAPITAL);” (NYSCEF 335, FAC at 24.)

⁸ “(vii) causing Phoenix not to pay \$1,040,000.00 owed to ASAS/EIFC;” (NYSCEF 335, FAC at 24.)

⁹ “(x) unilaterally settling EIFC’s claims against Phoenix and Embark for the benefit of Phoenix and Embark and detriment to EIFC;” (NYSCEF 335, FAC at 25.)

¹⁰ “(xiv) failing to enforce EIFC’s legal and contractual rights vis-à-vis Tang and Jonsson;” (NYSCEF 335, FAC at 25.)

¹¹ “(xv) conspiring with Tang and Jonsson and others to misappropriate EIFC’s intellectual and other property and assets.” (NYSCEF 335, FAC at 25.)

defendants' **6, 7, and 12**, is granted because they concern EIFC's intellectual property, data, and proprietary information. (NYSCEF 1801, Amended Decision and Order at 11-12 [mot. seq. no. 030] [April 18, 2024].)

Likewise, the court now corrects its error regarding defendants' 10 in the April 18, 2024 amended decision. Defendants' motion to preclude evidence concerning Better Mortgage, defendants' **10**, is granted because the court denied plaintiff's motion to amend which sought to add Better Mortgage Corporation and Better Holdco, Inc. (B&B) as new parties. (NYSCEF 1346, Decision and Order [mot. seq. no. 027] [January 16, 2023].) The amendments were prejudicial. (*Id.* at 6.) The court explained:

"Plaintiff's motion to amend the eighth^[12] and ninth^[13] Counts against B&B is denied for the additional reason that plaintiff has known about them since 2017. In the FAC, plaintiff alleges that 'on information and belief' Garg 'utilized [EIFC's] intellectual property and data at his new company, Better Mortgage.' (NYSCEF 335, FAC ¶¶85.) However, there was no cause of action in the FAC for this purported theft and B&B was not added as a defendant when plaintiff amended in 2017." (*Id.* at 8.)

Accordingly, the January 16, 2023 decision necessarily precludes plaintiff's "**Damages Theory: Better Mortgage Equity - \$132.2 million.**"

The following paragraph in the April 18, 2024 decision is modified by striking defendants' **4**:

"Defendants' motion is granted as to numbers **11 and 13** above which are not addressed by plaintiff in his opposition." (NYSCEF 1803, April 18, 2024 Decision at 11.)

¹² Plaintiff alleged misappropriation of trade secrets against Better Mortgage and B&B derivatively on behalf of EIFC. (NYSCEF 1180, Proposed Second Amended Complaint ¶¶ 214-223.)

¹³ Plaintiff alleged unfair competition resulting from Count 8 against B&B derivatively on behalf of EIFC. (NYSCEF 1180, Proposed Second Amended Complaint ¶¶ 224-231.)

Plaintiff addressed defendants' **4** on motion 039 which the court denied. Defendants' **4** seeks to preclude "[a]ny arguments that the settlements reached in the above actions were contrary to the interests of EIFC and Khan." Accordingly, defendants' motion would be granted as to defendants' **4** for the same reasons that the court denied plaintiff's motion sequence 039. However, as with defendants' **1**, plaintiff must be able to defend himself against defendants' counterclaims concerning corporate waste arising from excessive litigation. Thus, while plaintiff is precluded from arguing that the settlements were contrary to EIFC's and Khan's interest on his case, he is not precluded from making these arguments as a defense to defendants' counterclaims. Thus, this portion of the motion as to defendants' **4** is effectively denied.

Accordingly, the court's summary statement on page 14 of the April 18, 2024 decision should read as follows: defendants' motion is denied as to **1, 2, 3, 4, 15** and granted as to **5, 6, 7, 8, 9, 10, 11, 12, 13, and 14**.

To be clear, plaintiff may present evidence on his remaining claims which are:

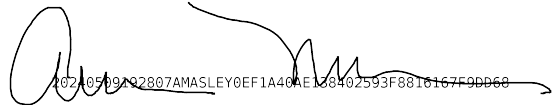
"(I) corporate deadlock as to EIFC requesting that "one party ... be ordered to buy out the other" (NYSCEF 335, FAC ¶¶ 151-154); (II) breach of fiduciary duty of loyalty and good faith against Garg for (i) converting EIFC's funds; (ii) falsifying EIFC's financial records; (iii) failing to file EIFC's tax returns since 2009; (vi) "failing to assign the asset purchases of the Senior Secured Term Note to EIFC"; (viii) "using EIFC's funds to benefit MRU Lending"; (ix) "improperly seizing EIFC equipment on June 24, 2013"; and (xii) "amending EIFC's tax returns with false financial information" (*id.* ¶¶ 155-159); (III) conversion against Garg and Embark for "wrongfully transferr[ing] funds [or using funds] belong to EIFC and EIFC-related entities" (*id.* ¶¶ 160-168); (VII) conversion against Garg for transferring EIFC funds to another entity, MRU Lending (*id.* ¶¶ 187-190); (VIII) unjust enrichment against Garg for transferring funds belonging to EIFC (*id.* ¶¶ 191-195); and (IX) an accounting of EIFC's books and records. (*Id.* ¶¶ 196-201; see *also* NYSCEF 360, May 30, 2018 Decision and Order at 10-11 [decision on mot. seq. no. 012 to dismiss Amended Complaint dismissing Count IV against all defendants and Counts I, II, IV, V, VI, VII, VIII and IX against Embark]; NYSCEF 1349, April 13, 2023 Decision and Order at 13 [decision on mot. seq. no. 026 for summary judgment dismissing Count II (iv), (v), (vii), (x), (xi), (xiv), and (xv),

Count V and Count VI.) Plaintiff seeks damages for Counts II, III, VII, and VIII. (NYSCEF 335, FAC at 31-33.) (NYSCEF 1801, Amended Decision and Order at 2-3 [mot. seq. no. 030] [April 18, 2024].)

Likewise, plaintiff may defend against Garg’s counterclaims which are “breach of fiduciary duty, corporate waste and mismanagement, and conversion” including for initiating alleged frivolous litigation. (*Id.*, citing NYSCEF 334, June 9, 2017 First Amended Answer and Counterclaims ¶¶ 67-79.)

Accordingly, it is

ORDERED that defendants’ motion is denied as to **1, 2, 3, 4, 15** and granted as to **5, 6, 7, 8, 9, 10, 11, 12, 13, and 14.**



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5/9/2024
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE