FF Venture Capital LLC v Plotkin
2024 NY Slip Op 33264(U)
September 15, 2024
Supreme Court, New York County
Docket Number: Index No. 651314/2023
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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FF VENTURE CAPITAL LLC, Plaintiff,	INDEX NO.	651314/2023
- v -	MOTION DATE	05/30/2024
ADAM J. PLOTKIN, RDWC, LLC Defendant.	MOTION SEQ. NO.	003

DECISION + ORDER ON MOTION

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

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

Upon the foregoing documents, and for the reasons set forth below, Adam Plotkin and RDWC, LLCs motion (Mtn. Seq. No. 003) for leave to file an amended counterclaim and add a third-party complaint which (i) includes certain additional details as to its promissory estoppel claim, (ii) incorporates a claim for breach of fiduciary duty against ff Venture Capital, LLC (**ffVC**), and (iii) adds a third-party action for breach of fiduciary duty and wage theft under the New York Labor Law (**NYLL**) against John Frankel is granted to the extent set forth below.

The Relevant Facts and Circumstances

The plaintiffs in the case allege that this case is about Mr. Plotkin and RDWC, LLC alleged submission of certain unauthorized expense reports totaling over $100,000, Mr. Plotkin's resignation and attempt to retract it, and the parties' disagreement over Mr. Plotkin's agreed upon compensation. According to Mr. Plotkin, the case is about ffVC and Mr. Frankel's breach of their obligations to him and his company over certain promised and earned compensation.

More specifically and as previously discussed, ffVC engaged Mr. Plotkin to provide consulting services in 2013 (FAC, ¶18). In 2015, Mr. Plotkin became an employee of ffVC as an investing partner, responsible for identifying investments, serving as a board-level strategic advisor for portfolio companies, and participating in raising capital from investors (*id.*, ¶20). Mr. Frankel was the owner and controller of ffVC.

On or about February 21, 2017, ffVC and Mr. Plotkin entered into a formal employment agreement (**Employment Agreement;** NYSCEF Doc. No. 2), where the parties agreed that Mr. Plotkin's compensation included a minimum of 7.5% carried interest in certain funds launched after his employment began but not any funds launched after his employment was terminated:

> For each other fund sponsored and advised by ffVC or an affiliate (each a "Fund") launched during your term of employment, a Carried Interest Percentage in the General Partner or carried interest percentage of such Fund (as the case may be) that is no less than 7.5%. For the avoidance of doubt, you shall not be entitled to a Carried Interest Percentage in the General Partner or carried interest percentage of such Fund (as the case may be) in any Fund launched after the date that your employment shall be deemed to be terminated pursuant to the section below entitled "Termination without Cause Pursuant to Amendment of Affiliate Agreement.

(NYSCEF Doc. No. 2).

During Mr. Plotkin's employment, ffVC raised two additional funds: ff Violet (VI) Venture Capital Fund GP, LLC (**ff Violet**), and ff Burgundy Capital Fund (ff Burgundy; ff Burgundy and ff Violet, hereinafter, collectively the **Funds**) (FAC, ¶¶77, 84).

According to Mr. Plotkin, in July 2019, ffVC promised him that his company RDWC would receive a 29.04% carried interest in each of the additional Funds (FAC, ¶¶ 78 and 85).

Additionally, Mr. Plotkin alleges that on January 27, 2022, Mr. Frankel promised him that he would cause his company, ffVC, to make RDWC a general partner of ff Burgundy (*id.*). Finally, as discussed below, Mr. Plotkin alleges that Mr. Frankel as his employer violated the labor law.

In this motion, Mr. Plotkin seeks to file an amended counterclaim to (i) include additional details of the cause of action sounding in promissory estoppel claim to amplify his allegations as to detrimental reliance and damages, (ii) incorporate a claim for breach of fiduciary duty against ffVC, and (iii) add a third-party action for breach of fiduciary duty and wage theft under the New York Labor Law (**NYLL**) against Mr. Frankel personally. As discussed below, his motion is granted.

Discussion

It is well settled that pursuant to CPLR 3025(b), leave to amend a pleading shall be freely given and that absent surprise or prejudice, leave should be denied only where "the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law" (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]).

I. The Promissory Estoppel Claim is not utterly devoid of merit or palpably insufficient

In their opposition papers, ffVC argues that the motion should be denied because Mr. Plotkin does not adequately allege detrimental reliance or cognizable injury (NYSECEF Doc No. 47). The argument fails.

To state a promissory estoppel cause of action, one =must allege (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance on that promise, and (3) injury to the relying party as a result of the reliance (*Condor Funding, LLC v 176 Broadway Owners Corp.*, 147 AD3d 409, 411 [1st Dept 2017]). Where there is a dispute between the parties as to the existence of a contract, a party may plead in the alternative and a claim for promissory estoppel is not duplicative (*Mayer v Marron*, 2015 N.Y. Misc. LEXIS 5331, at *20-21 (Sup. Ct. N.Y. Cty. Nov. 12, 2015)).

In the proposed amended pleading (NYSCEF Doc. No. 44), Mr. Plotkin alleges that ffVC made a clear and unequivocal promise for compensation:

> 77. In 2019 and 2020 ffVC commenced a pre-raise for a limited capacity Fund, ff Violet (VI) Venture Capital Fund GP, LLC ("ff Violet").
>
> 78. The 2017 Employment Agreement, which provided, in pertinent part, "for each other fund sponsored and advised by ffVC or an affiliate (each a "Fund") launched during your term of employment, a Carried Interest Percentage in the General Partner or carried interest percentage of such Fund (as the case may be) that is no less than 7.5% [emphasis added]." Consistent with the terms of the 2017 Employment Agreement in connection with Plotkin's employment in July 2019 ffVC, through Frankel, promised him that RDWC would receive carried interest in ff Violet of twenty-nine and four hundredths percent.
>
> 79. This statement was a clear and unambiguous promise, and it was reasonable for Mr. Plotkin to rely on it, because for the period January 31, 2020, through December 31, 2020, RDWC's limited partnership and twenty-nine and four hundredths interest in ff Violet were both documented in IRS Schedule K-1 forms for 2020 issued in 2021

(*id.,* ¶¶ 77-79).

Mr. Plotkin argues that his reliance was reasonable under the circumstances and that certain IRS Schedule K-1s for the calendar years 2020 and 2021 corroborate at a bare minimum the promise

that he would receive a 29.04% interest in ff Violet and not a mere 7.5% or 0% (NYSCEF Doc. No. 51). He argues that he has sufficiently alleged detrimental reliance and damages in that he alleges that he worked tirelessly to earn this "additional" (i.e., over the 7.5% floor) approximately 22% compensation based on the promises that he would receive this higher level of compensation and that he was damaged in that he did not receive it.[1]

Taking this allegation as true as the Court must at this stage of the pleading (*Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994) detrimental reliance and damages are properly alleged. For the avoidance of doubt, the difference between 29.04% and 7.5%, or 0%, quantifies the extent of his alleged actionable damages and Mr. Plotkin does not merely allege reputational harm.

Finally, ffVC is also not correct that Mr. Plotkin's claim fails because he fails to allege unconscionable injury. Whether circumstances rise to the level of unconscionable injury should not be determined on the pleadings (*Castellotti v Free*, 138 AD3d 198, 205 [1st Dept 2016]). Given the fact that he alleges that he was promised more than double the compensation set forth in the Employment Agreement, this is sufficient at this stage of the proceeding.

II. The NYLL Wage-Theft Claim against Mr. Frankel is not utterly devoid of merit or palpably improper

Under the NYLL, Mr. Frankel may be held personally liable as an employer because the NYLL defines "employer" to include any person, corporation, limited liability company, or association

[1] He also alleges reputation harm in participating in the unknowingly participating in the affirmative misrepresentation to existing and potential investors as to his interest.

employing any individual in any occupation, industry, trade, business, or service (NYLL § 190(3)). As set forth in the proposed amended pleading, Mr. Plotkin alleges Mr. Frankel's responsibility for the theft of Mr. Plotkin's wages. Although not previously asserted against Mr. Frankel personally, this claim was made clear previously such that it can not now be said to be a surprise or to result in prejudice (*Thompson*, 24 AD3d 203 [1st Dept 2005]). The Court notes that Mr. Frankel has not yet been served but the opposition papers do not adequately dispute that Mr. Frankel is properly added or that the claim is palpably insufficient or utterly devoid of merit.

III. The breach of fiduciary duty claim is also not utterly devoid of merit or palpably improper

In their opposition papers this claim, ffVC argues that that the breach of fiduciary duty claim must be brought as a shareholders' derivative claim and that as such, the proposed amended pleading as to this claim is improper.

Under New York law, to have standing to bring a derivative claim, one must be a shareholder (i) at the time the alleged wrong was committed and (ii) when the lawsuit is brought derivatively (*Pessin v Chris-Craft Indus., Inc.*, 181 AD2d 66 [1st Dept 1992]; *Honzawa Holding Co. v Hiro Enter. USA, Inc.,* 291 AD2d 318 [1st Dept 2002]).

It is not entirely clear whether Mr. Plotkin's carried interest in the general partner funds had vested at the time of the alleged wrong. If his interest had actually vested, as discussed below, to bring a direct claim he would need under the *Tooley* test to allege what amounts to be disproportionate harm. This would require Mr. Plotkin to articulate how the recovery, if any, does not belong to all of the interest holders in the general partner funds (to the extent that there

are in fact other holders of interests in the funds). If on the other hand, the interest had not vested at time of the alleged wrong or when the lawsuit is brought, he would not have standing to bring a derivative claim. As discussed above, this needs clarification in the amended pleading that Mr. Plotkin seeks to assert.

That said, to state a claim for breach of fiduciary duty, a plaintiff must allege (1) that the defendant owed a fiduciary duty, (2) that the defendant committed misconduct, and (3) that the plaintiff suffered damages caused by that misconduct (*RNK Capital LLC v Natsource LLC*, 76 AD3d 840, 841-842, 907 [1st Dept 2010]; *Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 [2d Dept 2010]).

Mr. Plotkin alleges that he holds a carried interest in the general partner venture capital funds ff Silver, ff Rose, ff Saphire, and ff Graphite, which are managed by ffVC. Mr. Frankel, who owned and controlled ffVC, had a fiduciary duty as the manager of the general partners to act in the best interests of the carried-interest holders in the general partner venture capital funds which he is alleged to have breached by appropriating expenses to these funds in which Mr. Plotkin held a carried interest.

More specifically, when a partner of ffVC accused ffVC and Mr. Frankel of breach of contract, unjust enrichment, and promissory estoppel due to Mr. Frankel's self-serving and misleading representations to investors and potential investors in the Funds, Mr. Frankel is alleged to have concealed that he charged $150,000 of his personal legal expenses to certain of the general

partner funds instead of paying those fees himself or having his company ffVC pay for them. As such, he is alleged to have breached his fiduciary duties to Mr. Plotkin (NYSCEF Doc. No. 48).

Although this certainly states a claim for breach of fiduciary duty, as discussed above, it is not clear on Mr. Plotkin's papers whether the claim he seeks to assert is derivative or direct or whether he has standing to bring the claim in either event.

The test as to whether a claim is direct or derivative was developed in *Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031 [Del 2004]. New York adopted the Tooley test in in *Yudell v Gilbert,* 99 AD3d 108 (1st Dept 2012).

As the *Yudell* court explained:

> [a] court should look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation. (*Tooley v. Donaldson, Lufkin & Jenrette, Inc.,* 845 A2d 1031, 1039 [Del 2004]

(*Yudell*, 99 AD3d 108, 114 [1st Dept 2012]).

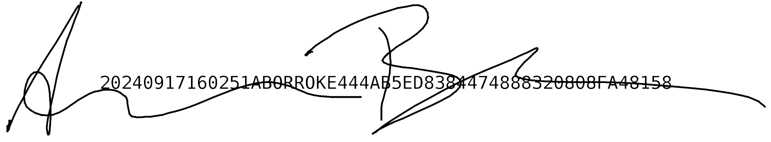
It will be incumbent on Mr. Plotkin in his revised amended counterclaim pleading to make clear what his status was at the time of the alleged wrongdoing and when the lawsuit was brought, whether there were other interest holders in these funds, if his interest had vested how he was disproportionately affected and if it had not vested how the harm to him was not speculative.

The Court has considered the counterclaim defendants remaining arguments and finds them unavailing.

Mr. Plotkin shall file an amended counterclaim in accordance with this decision and order within 45 days.

Accordingly it is hereby,

ORDERED that the motion for leave to amend is granted and the proposed amended counterclaim shall be deemed served.



9/15/2024			ANDREW BORROK, J.S.C.		
DATE					
CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION		
	[X] GRANTED	[ ] DENIED	[ ] GRANTED IN PART	[ ] OTHER	
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER		
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