

High Tides, LLC v DeMichele
2012 NY Slip Op 31751(U)
June 21, 2012
Sup Ct, Nassau County
Docket Number: 024029/09
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

HIGH TIDES, LLC, a New York Limited
Liability Company,

Plaintiff,

INDEX No. 024029/09

MOTION DATE: May 14, 2012
Motion Sequence # 013

-against-

DON DEMICHELE, CHRISTOPHER CORTESE,
STEVEN A. GALLOWAY, BART D. THORNE,
JEFFREY SERKES, KENNETH KELLAWAY
and DUNKIN' BRANDS, INC.,

Defendants.

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Support..... X
- Reply Affirmation..... X
- Memorandum of Law..... X

Motion by defendant Bart Thorne to dismiss the complaint is **granted** in part and **denied** in part.

This is an action for fraud. Plaintiff High Tides, LLC is a New York limited liability company owned in part by former professional hockey player Patrick LaFontaine. Defendants Don DeMichele, Kenneth Kellaway, and Steven Galloway were directors of Kainos Partners Holding Company LLC, which operated Dunkin Donuts shops in New York,

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Nevada, and South Carolina. Defendant Christopher Cortese was the chief financial officer of Kainos. Defendant Bart Thorne was president and chief operating officer of Kainos and a founding member of the company. Defendant Jeffrey Serkes is the chief operating officer of Palisade Capital Management, which had a substantial investment in Kainos. Defendant Dunkin Brands, Inc services Dunkin Donuts franchises.

In July 2007, High Tides made an initial investment of \$500,000 in Kainos and LaFontaine participated in a public relations event for the company. On November 6, 2007, High Tides received Kainos' "Confidential Investor Summary Memorandum" from Cortese as well as its "2008 Annual Operating Plan." The confidential investor memorandum projects a "pro forma" accrued return of 8% for the initial years and an "average cash on cash return" of 43.4-53.8 % for years 10-15. However the memorandum states that the company does not assume responsibility for or make any representation with respect to the accuracy of the information contained therein. The Confidential Investor Memorandum contains a one page professional biography of DeMichele and states that he will serve as Chairman of the Board of the Company. The Memorandum contains similar professional biographies of Galloway, Thorne, and Cortese and states that Galloway will serve as chief development officer, Thorne will serve as chief operations officer, and Cortese as chief financial officer. The first page of the Memorandum lists Cortese under "contact information" and includes his phone number.

In December 2007, allegedly in reliance upon the Confidential Investor Summary Memorandum and the 2008 Annual Operating Plan, High Tides invested an additional \$1,000,000 in Kainos. On August 25, 2008, High Tides invested another \$252,000 in the company. Kainos filed a Chapter 11 bankruptcy petition, and plaintiff lost most or all of its investment in the company.

The present action was commenced on November 23, 2009. The complaint asserts claims for fraud, fraudulent inducement, fraudulent concealment, negligent omission, negligent misrepresentation, conspiracy to defraud, and aiding and abetting fraud. By order dated May 11, 2010, the court dismissed the fraud, fraudulent inducement, fraudulent concealment, negligent misrepresentation, and negligent omission claims against defendants Serkes, Kellaway, and DeMichele. The court dismissed the conspiracy to defraud claims against defendants Dunkin Brands, Serkes, Kellaway, and DeMichele.

However, the court denied the motion to dismiss the seventh cause of action, aiding and abetting fraud, against defendants Dunkin Brands, Serkes, Kellaway, and DeMichele. The court concluded that plaintiff had sufficiently alleged that these defendants provided

substantial assistance to defendants Cortese, Galloway, and Thorne, with knowledge of the fraud committed by those defendants. At the time of the court's May 11, 2010 order, no motion to dismiss on behalf of defendants Cortese, Galloway, or Thorne had been filed.

By order dated October 25, 2011, the Appellate Division reversed the order of this court and dismissed the seventh cause of action for aiding and abetting fraud, asserted against defendants Serkes, Kellaway, and Dunkin Brands, for failure to state a cause of action. The court stated that, "The complaint is devoid of any allegations of specific misrepresentations or omissions made by defendants Serkes, Kellaway, and DeMichele, and the conclusory allegations of fraud insofar as attributed to these defendants are insufficient to satisfy the pleading requirement of CPLR 3016(b)." The court concluded that the complaint failed to adequately allege an underlying fraud, defendants Serkes, Kellaway, and Dunkin Brands' knowledge of the fraud, and substantial assistance on the part of those defendants.

In its order, the Appellate Division affirmed the judgment of this court to the extent that it dismissed the first through sixth causes of action as against defendant DeMichele. Defendant DeMichele did not appeal from the denial of his motion to dismiss the seventh cause of action.

By order dated May 3, 2012, this court granted defendant DeMichele's motion for summary judgment dismissing the seventh cause of action as asserted against him based upon the Appellate Division order and the stare decisis doctrine (*Kash v Jewish Home*, 61 AD3d 146, 150 [4th Dept 2009]).

Defendant Thorne moves to dismiss the complaint for lack of particularity pursuant to CPLR 3016(b), collateral estoppel pursuant to CPLR 3211(a)(5), and failure to state a cause of action pursuant to CPLR 3211(a)(7).

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. The court must accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference (*AG Capital Funding Partners v. State Street Bank and Trust Co.*, 5 NY3d 582, 591 [2005]).

To establish a prima facie case for fraud, plaintiff must prove that 1) defendant made a representation as to a material fact, 2) such representation was false, 3) defendant intended to deceive plaintiff, 4) plaintiff believed and justifiably relied upon the statement and was

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induced by it to engage in a certain course of conduct, and 5) as a result of such reliance plaintiff sustained pecuniary loss (*Ross v. Louise Wise Services, Inc.*, 8 NY3d 478, 488 [2007]).

Giving plaintiff the benefit of every possible favorable inference, the complaint alleges that Kainos made a false representation, in the Confidential Investor memorandum, as to the “average cash on cash return” which an investor would receive in subsequent years and High Tides relied upon this representation by investing \$ 1 million in the company. The court must give plaintiff the benefit of the favorable inference that Cortese, as the chief financial officer and “contact person,” was the author of this representation. Similarly, Galloway, the chief development, and Thorne, the chief operations officer, whose biographies figured prominently in the offering memorandum, may have been responsible for the misrepresentation, or at the very least provided substantial assistance to Cortese.

The issue of justifiable reliance is generally a question of fact that is not amenable to summary resolution (*Ventur Group v Finnerty*, 68 AD3d 638 [1st Dept 2009]). Thus, the court must give plaintiff the benefit of the favorable inference that High Tides relied on the false representation as to “cash on cash return,” despite Kainos’ disclaimer as to the accuracy of the information in the offering memorandum.

The court concludes that plaintiff has stated the circumstances constituting the wrong in sufficient detail as required by CPLR 3016(b) and has alleged, as against defendant Thorne, legally sufficient fraud and aiding and abetting fraud causes of action.

The doctrine of collateral estoppel, or issue preclusion, is rooted in principles of fairness. The doctrine may be invoked in a subsequent action or proceeding to prevent a party from relitigating an “identical issue” decided against that party in a prior adjudication (*ABN AMRO Bank v MBIA Inc.*, 17 NY3d 208, 226 [2011]). The specific issue decided against plaintiff on the prior appeal from the denial of defendant Serkes and Kellaway’s motion to dismiss was whether “innocent directors,” not involved in the confidential investor memorandum, could be held liable for aiding and abetting fraud by Cortese and Galloway. The critical issue on the present motion is whether key officers, who were featured in the offering memorandum, may be held liable for misrepresentations contained therein. Since the identical issue presented on the present motion was not decided against plaintiff on the prior appeal, plaintiff is not collaterally estopped from proceeding against defendant Thorne on a fraud theory.

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Defendant Thorne's motion to dismiss is **granted** as to the first, second, fourth, fifth, and sixth causes of action but **denied** as to the third (fraud) and seventh (aiding and abetting fraud) causes of action.

So ordered.

Dated JUN 21 2012

Stephen A. Bucaria
J.S.C.

ENTERED

JUN 25 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE