

Halpern v Kuskin

2013 NY Slip Op 32005(U)

August 22, 2013

Supreme Court, New York County

Docket Number: 652645/2012

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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EVAN HALPERN, INDIVIDUALLY AND ON
BEHALF OF KRG-BEED AND KRG-CRYSTAL, LLC.
JASON QUITNE and DAVID RATNER,

Plaintiffs,

- against -

GARY KUSKIN,

Defendant.

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HON. EILEEN A. RAKOWER, J.S.C.

Index No.
652645/2012

**DECISION
and ORDER**

Mot. Seq. 002

In this action, Plaintiffs Evan Halpern (“Halpern”), individually and on behalf of KRG-BEED, LLC (“BEED”) and KRG-Crystal, LLC (“Crystal”), Jason Quitne (“Quitne”), and David Ratner (“Ratner”) allege claims of tortious interference with contract, fraudulent concealment, aiding and abetting fraud, breach of fiduciary, violation of New York’s Debtor Creditor Law, money had and received, constructive trust, and accounting against defendant Gary Kuskin (“Defendant”) arising out of Defendant’s alleged actions in assuming control over certain entities previously run by his son Brad Kuskin.

Defendant now moves, pursuant to CPLR §3211(a)(7) and §3016(b), to dismiss the First, Second, Third, Fourth, Fifth, Sixth, Eleventh and Twelfth Causes of Action in the Amended Complaint for failure to state causes of action and to plead with the required specificity; pursuant to CPLR §3211(a)(7), dismissing the Seventh, Eighth, Ninth, Tenth, Eleventh and Twelfth Causes of Action; pursuant to CPLR §3211(a)(5), to dismiss the Sixth and Twelfth Causes of Action as to events occurring before July 31, 2009; pursuant to CPLR §3211(a)(3), dismissing the Third, Sixth, Seventh, Eighth, Ninth, and Tenth Causes of Action on the grounds that said claims are derivative; and pursuant to CPLR §3211(a)(3), dismissing the Eleventh and Twelfth Causes of Action on the grounds that the entities asserting the claims do not allege that BEED and Crystal are authorized to do business in New York.

CPLR §3211 provides in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(3) the party asserting the cause of action has no legal capacity to sue; or

(5) the cause of action may not be maintained because of . . . statute of limitations; or

(7) the pleading fails to state a cause of action

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true.. and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People v. Sturm, Ruger & Co., Inc.*, 309 A.D.2d 91, 108 [1st Dept 2003](internal citations omitted)(see CPLR §3211[a][7]).

It is alleged in the Amended Complaint, on or about March 17, 2008, Halpern, Ratner, Brad Kuskin, and another member executed the Operating Agreement of BEED. It is alleged that Halpern and Ratner each invested \$600,000 in exchange for each receiving a 8.82% interest in BEED. According to the complaint, BEED’s purpose was “to acquire, own, construct, operate, manage, and/or lease property in Crested Butte, Colorado [the real property located at Marcellina Lane, Crested Butte, Colorado]”(“Colorado Property”). It is alleged that, contrary to Brad Kuskin’s representation and in disregard of the operating agreement, on or about March 21, 2008, the Colorado Property was acquired in the name of KRG-CB II, LLC, a Delaware limited liability company. The complaint alleges that such purchase was made using the funds invested by Halpern and Ratner.

It is further alleged in the Amended Complaint, on or about June 12, 2008, Halpern, Quitne, and Brad Kusin, as well as other members, executed the Operating Agreement of Crystal. It is alleged that Halpern and Quitne invested \$500,000 for in exchange for each receiving a 9.615% interest in Crystal. According to the complaint, Crystal’s purpose was “to acquire, own, construct, operate, manage, and /or lease property in Crystal Springs, New Jersey” [the real property located at Crystal Springs Village 50 Sugar Maple Lane, Hamburg, New Jersey]” (“NJ Property”). It is alleged, the money was not invested in the manner Brad Kuskin represented it would be.

The investments of plaintiffs described above were paid as follows: “At the direction of Brad Kuskin, Halern and Ratner transferred these funds to the Bank of America account of KRG; . . . At the direction of Brad Kuskin, Halpern and Quitne transferred these funds to the Bank of America account of KRG.”

According to the complaint, “non-party Kravetz Realty Group LLC (“KRG”) is a New York limited liability company with a principal place of business at 20 Broad Street, 25th Floor, New York, 10005.” This entity is not the titled owner of either of the aforementioned properties, but it is the recipient of the invested funds.

According to the complaint, the Colorado property has now been foreclosed upon.

All of the actions of defendant Gary Kuskin are alleged to come after the purchases of the Colorado and NJ properties by stranger corporations and contrary to the terms of the operating agreements to which plaintiffs are a party. All of the actions of defendant Gary Kuskin are alleged in conjunction with corporations, none of which are BEED or Crystal.

To the extent Plaintiffs allege Defendant attempted to make Brad Kuskin judgment proof, Plaintiffs show no judgment they were in a position to enforce. To the extent Defendant owed a fiduciary duty as manager of either of Plaintiffs’ entities, Plaintiffs allege no facts or actions by defendant Gary Kuskin in connection with BEED or Crystal, which entities never procured the Colorado or NJ properties, through no misdeed of defendant Gary Kuskin.

The allegations of the Complaint explain that in 2008, Plaintiffs were fraudulently induced by Brad Kuskin to invest funds to purchase certain properties on behalf of BEED and Crystal, but that Brad Kuskin did not thereafter acquire those properties in those entities’ names. Such actions, if true, may constitute fraud or conversion on Brad Kuskin’s part. The alleged conversion would be time-barred based on the applicable three year statute of limitations. CPLR §214[3]). The allegation that defendant Gary Kuskin interfered with the operating agreements is also unfounded, since Brad Kuskin had already breached those agreements prior to Gary Kuskin’s involvement in Brad’s affairs. Brad Kuskin had already purchased the Colorado and NJ properties in the names of other entities in contravention of the operating agreements. Finally, with respect to defendant Gary Kuskin and his attempts to insulate his own family investments, those investments are separate and apart from BEED and Crystal.

The following claims are made by Plaintiffs against defendant Gary Kuskin: tortious interference with contract, fraudulent concealment, aiding and abetting fraud, breach of fiduciary, violation of New York's Debtor Creditor Law, money had and received, constructive trust, and accounting.

The first, second, and third causes of action relate to the Colorado Property. The fourth through sixth causes of action relate to the New Jersey Property.

First and Fourth Causes of Action - Tortious Interference with Contract

The first cause of action alleges that "Kuskin tortuously interfered with Halpern and Rather's contract with, inter alia, Brad Kuskin and KRG, specifically, the Operating Agreement of BEED." It further alleges that "[u]pon information and belief, KRG was in possession of funds invested by Halpern and Ratner in the CO Property that could have been used to protect Halpern and Ratner's interests in the CO Property" and that as a result of the actions taken by Kuskin, Halpern and Ratner have been damaged by the loss of their investment in the CO property. The fourth alleges that "Kuskin tortuously interfered with Halpern and Quitne's contract with, inter alia, Brad Kuskin and KR Capital, specifically, the Operating Agreement of Crystal" and that Halpern and Quitne have been damaged by the loss of their investments in the NJ Property.

A claim for tortious interference with contract requires: (1) the existence of a valid contract between the plaintiff and a third party; (2) defendant's knowledge of that contract; (3) defendant's intentional procurement of the third party's breach of the contract without justification; (4) actual breach of the contract; and (5) damages resulting therefrom. (*White Plains Coat & Apron Co., Inc. v. Clintas Corp.*, 8 N.Y.3d 422, 425 [2007]).

Even accepting the allegations of true, the Amended Complaint fails to state a claim because the alleged breach of the operating agreements stems from Brad Kuskin's alleged mishandling of the funds invested and failure to purchase the properties in the BEED and Crystal names, respectively. Further, the breach of the agreements preceded Defendant's alleged involvement in Brad Kuskin's affairs and management takeover.

Second and Fifth Causes of Action -Aiding and Abetting Fraud

The second cause of action alleges that "Kuskin aided and abetted the fraud of Brad Kuskin on Halpern and Ratner and fraudulently concealed the same" and that "[as] the result of the foregoing, Kuskin owed fiduciary duties to the Plaintiffs by

virtue of his assumption of control of KRG.” Halpern and Ratner allege to have been damaged by the loss of their investment in the CO Property. The fifth cause of action alleges that “Kuskin aided and abetted the fraud of Brad Kuskin on Halpern and Quitne and fraudulently concealed same,” that “as a result of his assumption of control over KR Capital, Kuskin owed fiduciary duties to Plaintiffs.” Halpern and Quitne allege to have been damaged by the loss of their investment in the NJ Property.

Fraud requires pleading a material misrepresentation, defendant’s knowledge of its falsity and intent to induce reliance, plaintiff’s justifiable reliance, and damages. (*Eurycleia Partners, L.P. v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 [2009]). Here, the only alleged representation by defendant Gary Kuskin to Plaintiffs is Defendant’s alleged communication that he was working with a buyer of the Colorado Property to recover Halpern and Ratner’s money; however, there is no allegation of reliance or resultant damages. To the extent that Plaintiffs allege Gary Kuskin aided and abetted Brad Kuskin’s fraudulent representations, no facts are alleged stating that Gary knew of Brad’s representations to Plaintiffs, knew of his intent to purchase the properties in contravention of the agreements, or aided in hiding such purchases of those properties. The complaint merely states “at sometime in 2008 or early 2009, Kuskin and his wife discovered that Brad Kuskin had been misusing certain funds collected by KRG for other purposes.”

Third and Sixth Causes of Action- Breach of Fiduciary Duties

The third cause of action alleges that “Kuskin breached the fiduciary duties owed to Halpern and Ratner by virtue of his assuming control of KRG, the managing member of BEED for the purpose of protecting Brad Kuskin and the Kuskin family business to the detriment of Halpern and Ratner.” Halpern and Ratner allege to have been damaged by the loss of their investment in the CO Property. The sixth cause of action alleges that “Kuskin breached the fiduciary duties owed to Halpern and Quitne by virtue of his assuming control of KR Capital, the managing member of Crystal for the purpose of protecting Brad Kuskin and the Kuskin family business to the detriment of Halpern and Quitne.” Halpern and Ratner allege to have been damaged by the loss of their investment in the NJ Property.

The elements of a claim for breach of fiduciary duty are: (1) the existence of a fiduciary relationship; (2) misconduct by the defendant; and (3) damages directly caused by the defendant’s misconduct. (*Fitzpatrick House III, LLC v. Neighborhood Youth & Family Services*, 55 A.D.3d 664, 664 [2nd Dept 2008]).

Plaintiffs' third and sixth causes of actions fail state causes of action against Defendant. Plaintiffs still retain their investment in BEED and Crystal, and based on the allegations, BEED and Crystal did not own the Colorado and New Jersey properties based on Brad Kuskin's alleged breach in 2008. At the point Gary Kuskin came into his management role as a fiduciary, the sale of those properties to other entities had already been consummated.

Seventh Cause of Action - NY Debtor Creditor Law §276

The seventh cause of action alleges that, upon information and belief, Brad Kuskin conveyed certain assets and property to defendant Gary Kuskin, that such transfers were made to hinder, delay, or defraud creditors, including Plaintiffs, and that defendant Gary Kuskin has thereby violated NY Debtor Creditor Law §276 and is liable for an amount to be determined at trial. In footnote 4 of their opposition, Plaintiffs acknowledge that their seventh cause of action is limited to recovering Brad Kuskin's assets that are in Defendant's possession unless those assets have been dissipated by Defendant.

Eighth Cause of Action- Money Had and Received

The eighth cause of action alleges "Brad Kuskin conveyed certain assets and property, including sums of money, to Kuskin", and "these transfers included the funds that were provided to Brad Kuskin by Plaintiffs for investment in the CO Property and the NJ Property." It alleges that "Kuskin still retains such sums transferred to him by Brad Kuskin", and "under the principals of equity and good conscience, the defendant should not be permitted to keep the money belonging to Plaintiffs." Plaintiffs allege that they are entitled to the return of \$1.7 million.

A claim for money had and received requires that (1) the defendant received money belonging to the plaintiff; (2) the defendant benefitted from the receipt of the money; and (3) principals of equity and good conscience will not permit the defendant to keep the money. (*Aaron Ferer & Sons Ltd v. Chase Manhattan Bank, Nat Ass'n*, 731 F.2d 112, 125 [2nd Cir 1984](citations omitted). The Amended Complaint fails to plead the first element - that Defendant received money belonging to Plaintiffs. Rather, the allegations of the Amended Complaint that Plaintiffs transferred funds to KRG at the urging of Brad Kuskin, in connection with their initial investments and that Brad Kuskin improperly misused and commingled those funds in other entities without regard to source or purpose. The complaint states that "Brad Kuskin was and is the 100% owner of KRG." The monies were not sent to Defendant. Furthermore, the Amended Complaint alleges that in exchange for those funds, Plaintiffs received certain interests in BEED and Crystal.

Ninth Cause of Action- Constructive Trust

The Amended Complaint alleges that “Brad Kuskin conveyed certain assets and property to Kuskin” and “these transfers included the funds that were provided to Brad Kuskin by Plaintiffs for investment in the CO Property and the NJ Property” and in “reliance on Brad Kuskin’s promise to invest them in a competent manner on their behalf and to manage the investment as a fiduciary.” The Amended Complaint further alleges, “Upon Kuskin’s assumption of control of the entities, interests and funds set forth herein, Kuskin stood in the shoes of Brad Kuskin and had no greater rights of fewer obligations with respect to such properties than Brad Kuskin.” As a result, Plaintiffs assert that they are “entitled to the imposition of a constructive trust over all property, tangible or intangible, which rightfully belongs to Plaintiffs that is in the possession or control of Kuskin in an amount to be ascertained at trial.”

“A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.” (*Simonds v. Simonds*, 45 N.Y.2d 233, 241 [1978]). A complaint seeking imposition of a constructive trust must allege “four elements...(1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) a transfer in reliance thereon, and (4) unjust enrichment.” *Panetta v. Kelly*, 17 A.D. 2d 163, 166 [1st Dept 2005], *lv dismissed* 5 N.Y.3d 782 [2005]. Plaintiffs fail to state a claim for constructive trust because there are no allegations of any promise, express or implied or a transfer to Defendant in reliance thereon.

Tenth Cause of Action - For an Accounting

As for the tenth cause of action, “Plaintiff seeks an order directing Kuskin to provide an accounting of: i) Crystal; ii) BEED; iii) any entities which controlled Crystal or BEED or which took possession (directly or indirectly of the funds invested by Plaintiffs; and iv) all property transferred from Brad Kuskin to Kuskin.” The Amended Complaint alleges, “By virtue of his assumption of *de facto* to control over the entities of which Plaintiffs were members and/or the managing members of those entities, Kuskin owed a fiduciary duty to Plaintiffs.”

In order to state a claim for an accounting, a plaintiff must allege “the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest” (*Weinstein v. Natalie Weinstein Design Assocs.*, 86 A.D. 3d 641, 643 [2nd Dept 2011]). Taking the allegations of the Amended Complaint as true, the tenth cause of action states a claim for an accounting.

Eleventh and Twelfth Causes of Action - Derivative Claims

The eleventh cause of action asserts “to the extent that the foregoing conduct of Kuskin resulted in injury to BEED, apart from that suffered by Halpern and Ratner, Halpern hereby asserts causes of action “1” through ‘10’ against Kuskin on behalf of BEED”. In its twelfth cause of action, Plaintiffs asserts “to the extent that the foregoing conduct of Kuskin resulted in injury to Crystal, apart from that suffered by Halpern and Quitne, Halpern hereby asserts causes of action ‘1’ through ‘10’ against Kuskin on behalf of Crystal.”

As alleged in the Amended Complaint, BEED is a limited liability corporation organized under the laws of the State of Colorado with a principal place of business in New York and Crystal is a limited liability corporation organized under the laws of the State of Delaware with a principal place of business in New York.

However, although the Amended Complaint alleges that BEED and Crystal have principal places of business in New York; Plaintiffs concede that neither party has obtained authorization to do business in New York and now argue that neither entity is actually doing business in New York although the Complaint has not been so amended. See N.Y. BCL §1323 (“a foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state...”). Plaintiffs’ derivative claims are therefore dismissed.

Wherefore, it is hereby

ORDERED that Defendant Gary Kuskin’s motion is granted to the extent that Plaintiffs’ first, second, third, fourth, fifth, sixth, eighth, ninth, eleventh and twelfth causes of are action are dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: 8/22/13



 EILEEN A. RAKOWER, J.S.C.