ThreeAm SPC, LTC (In Voluntary Liquidation) v Ribotsky
2012 NY Slip Op 31639(U)
June 11, 2012
Sup Ct, Nassau County
Docket Number: 013675/11
Judge: Stephen A. Bucaria

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

THREEAM SPC, LTC. (In Voluntary Liquidation),

Plaintiff,

INDEX No. 013675/11

MOTION DATE: April 18, 2012
Motion Sequence # 001

-against-

COREY RIBOTSKY, THE NIR GROUP, LLC, & FIRST STREET MANAGER II, LLC,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Affidavit in Support..... XX
Memorandum of Law..... XX
Amended Memorandum of Law..... X
Reply Memorandum of Law..... X

Defendants' motion to dismiss the complaint pursuant to CPLR §§ 3211(a)(1), 3211(a)(7) and 3106(b) is **denied** in its entirety, with leave to renew, at the conclusion of sufficient discovery having been conducted by the parties.

Factual Background

Plaintiff, ThreeAm is an exempted Grand Cayman Islands portfolio company with its business address at 42 North Church Street, Grand Cayman, Cayman Islands. Plaintiff

invested in the shares of AJW Fund and AJW Fund II through ThreeAm's representative, Field Nominees. Defendant First Street II is a New York limited liability company and its principal place of business is at 1044 Northern Boulevard, Roslyn, New York. First Street II is the Investment Manager of the AJW Fund and the AJW Fund II. The sole owner and manager of First Street II is the NTR Group.

Defendant NIR Group is a New York limited liability company and its principal place of business is at 1044 Northern Boulevard, Roslyn, New York. Defendant Ribotsky is an individual New York resident and he is the Manager and Principal Owner of the NIR Group which is the sole owner and manager of First Street II. Ribotsky is also one of two Directors in the AJW Fund and in AJW Fund II.

The AJW Fund is a Cayman Islands investment fund and an exempted company with limited liability with a registry office of Admiral Administration Ltd., P.O. Box 3201, Admiral Financial Centre, Fort Street, Grand Cayman KY1-1208, Cayman Islands. The investment manager of AJW Fund is First Street II, which is located in New York. Likewise, AJF Fund II is also a Cayman Islands investment fund and an exempted company with limited liability. Its registered office is at the same address as the AJW Fund in the Grand Cayman Islands. First Street which is located in New York is also the manager of AJW Fund II.

In September 2006, Plaintiff, through its agent, First Nominees Limited, invested approximately $11,875,000 in two accounts for the subscription of shares in AJW Fund. On October 16, 2008, AJW Fund informed Plaintiff that it intended to restructure Plaintiff's investment in AJW Offshore Ltd. by offering Plaintiff shares in a newly-organized entity, AJW Offshore, II Ltd. Defendants' stated purpose for said restructuring was so the fund's redemption terms "better reflect the market and liquidity of the underlying investments, and management and incentive fees payable by the New Company to the Investment Manager will be reduced." Plaintiff was required to elect one of three options with respect to their investment.

The material difference between Options One and Two was that those selecting Option One would be subject to a three-year lock-up period of their investment. However, those selecting Option Two would not be subject to any lock-up period. In exchange for not having their shares locked-up, Option Two investors would be subject to slightly higher management and incentive fees than those electing Option One. Hence, Option Two offered investors/shareholders greater liquidity by providing them with an opportunity to redeem

their investments in well-defined, staged increments.

In defendants' Notice, Plaintiff was told that Option Two Investors could redeem all of their shares but that each redemption request was limited to 12.5% of that investor's share value at any one time. In addition, Option Two also provided that any redemption request in excess of 12.5% of the net asset value of an investor's shares would be subsequently paid at the next redemption date but subject to the same 12.5% limitation for each of the redemption dates. Hence, Plaintiff believed that by choosing Option Two it could "expect" to be substantially redeemed over the next two years (eight quarters). However, Plaintiff knew that this was its expectation and not Defendants' "guaranteed" rate of redemption. That is, said Defendants' Notice indicated that the payment of redemptions by the AJW Fund II would be subject to a "payment cap" of 12.5% of AJW Fund II's available cash as of the redemption date.

In this regard, Defendants' subscription booklet for AJW Fund I investors, which Plaintiff executed in August 2006, emphasized the "risk factors" of such an investment to include Plaintiff's waiting an indefinite amount of time for the redemption of its investment. And in the Private Placement Memorandum for both AJW Fund I and AJW Fund II which Plaintiff represented it read, Defendants indicate that they trade in thinly capitalized over-the-counter stocks (penny stocks) which are subject to significant losses in value, should the Fund be forced to liquidate, and that many of the investments made by the Master Fund will lack liquidity or be thinly traded. These caveats by Defendants are interstitial with their "Payment Cap."

On about November 10, 2008, Plaintiff elected Option Two as to all of its investments/shares in the AJW Fund which shares would now be transferred to AJW Fund II. However, in four of the six redemptions requested by Plaintiff, Defendants paid Plaintiff less than 1% of Plaintiff's investment value. Defendants claimed that the "payment cap" allowed them to disregard the promised liquidity. Nonetheless, Plaintiff claims that Defendants led it to believe that it could redeem in full, its investment after eight quarters. At this point in time, more than three years later, plaintiff has received only a small fraction of its investment.

Discussion

Defendants' reliance on the sufficiency of its documentary evidence (CPLR § 3211[a][7]) is substantially misplaced. Likewise, Defendants claim that the complaint fails

to state a cause of action (CPLR § 3211[a][7]) and that Plaintiff has failed to properly plead the elements of fraud etc. (CPLR § 3016[b]). That is, there are several critical and traversable questions of fact that are left unanswered by the unverified pleadings and the only relevant affidavit as to the facts by the director of Plaintiff, Jon Malmsater. (Ex. C, Notice of Motion to Dismiss Complaint). Said traversable questions of fact are as follows:

(1) Defendants argue that Plaintiff lacks standing to sue herein under Cayman Law, but Defendants assume that Cayman Law is applicable. As Defendants are all New York residents, New York Law may be applicable, depending upon where the contract option was negotiated and in tort, where the alleged fraud/ misrepresentation was actually perpetrated. Was it effected in the Grand Cayman Islands or in New York? No verified pleading, no affidavit or affirmation by any person with knowledge (not the attorneys), answers this question(s). Discovery as to this issue is required.

(2) Does the "Payment Cap" exculpate Defendants from Plaintiff's failure to achieve full redemption of its investment in AJW Offshore II, Ltd. hedge fund within two years of Plaintiff's placing a redemption request? Was this merely an expectation and not a guarantee in Plaintiff's own opinion? Was it unreasonable for Defendants to be unable to redeem Plaintiff's investment in two years, as opposed to a protected period of redemption, given the volatile and fragile nature of "penny stocks," in which this fund was substantially invested, thereby depriving Plaintiff of the necessary cash to effect the requested redemption? See in this regard, ***Talansky v Schulman***, 2 AD3d 355, at 360-1 (1st Dept). All of the foregoing questions require substantial discovery and perhaps a trial, rather than resolution merely on documents. See in this regard, ***Lucia v Goldman***, 68 AD3d 1064 at 1065 (2nd Dept).

(3) Were the Defendants negligent at all, grossly negligent or deliberate frauds when they allegedly perpetrated this transaction upon Plaintiff? Did Defendants clearly have "scienter" of the misrepresentations they allegedly made to Plaintiff? The nature of scienter, the state of mind of Defendants is subjective, not readily lending itself to documentary resolution, solely. And the state of mind of Defendants, (their intention), is exclusively within their knowledge. Likewise, the "reliance" of the Plaintiff is equally subjective. Hence all of the above fact questions, mandate discovery in detail. They are not readily resolvable merely upon documentary evidence, and in all likelihood a trial may be ultimately warranted. See in this regard, ***Houbigant, Inc. v Deloitte & Touche, LLP***, 303 AD2d 93 at pp. 98-99; ***P.S. Auctions, Inc. v Exchange Mut. Ins. Co.***, 105 AD2d 473.

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Applicable Law

As to the necessity of further discovery, Rule 3211 CPLR(d) states "Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had* and may make such other order as may be just."

Concerning the sufficiency of the claims of the complaint and that of fraud/misrepresentation in particular, the Court of Appeals held in ***Nonnon v City of New York***, 9 NY3d 825 at p. 827, that a Plaintiff is granted every favorable factual inference. The complaint is to be liberally construed and the alleged facts therein are to be assumed as true. The same essential position has been taken by the Second Department in ***Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP***, 38 AD3d at p. 38, granting every possible inference favorable to the Plaintiff and requiring only that,

> ". . . the complaint states in some recognizable form any cause of action known to our law. . . ."

As to the choice of law in a conflicts of law circumstance, it is stated in Vol. 19A NY Jur.2d at p. 545, "§ 37 'Grouping of contacts,' 'center of gravity,' or 'significant relationship' approach. . . . In place of the traditional conflict of law rules, such as the place of contracting or place of performance, New York courts apply in more recent contract cases the 'grouping of contacts' approach, which is also sometimes referred to as the 'significant relationship' approach, the 'center-of-gravity' approach, 'interest analysis' or 'paramount interest' test. . . ." See in this regard ***Matter of Allstate Ins. Co. (Stolarz)***, 81 NY2d 219; ***Zurich Ins. Co. V Shearson Lehman Hutton, Inc.***, 84 NY2d 309;. ***Lazard-Freres & Co. v Protective Life Ins Co.***, 108 F3d 1531 (2d Cir. 1997); ***Hutner v Green***, 734 F2d 896 (2d Cir. 1984); ***Royal Industries Ltd. v Kraft Foods, Inc.***, 926 F.Supp. 407 (S.D.N.Y. 1996). The treatise continues at page 548, § 38 to state, ". . . 'Grouping of contacts,' 'center of gravity,' or 'significant relationship' approach – Factual contacts considered . . . Under the 'grouping of contacts' or 'significant relationship' approach, the court may consider a spectrum of significant contacts, including the place of contracting, the place of negotiation and performance,* the location of the subject matter of the contract and the domicile of the contracting parties. In making a choice-of-law determination, the traditional factors, the place of contracting and the place of performance are given the heaviest weight. . . .*

Brink's Ltd. v South African Airways, 93 F3d 1022 (2d Cir. 1996)."

The commentator then continues at pages 579-80, § 60 Defenses to tort actions of the treatise to explain more specifically choice of law in tort actions. Section 60 states, ". . . when the conduct occurs in the state of a defendant's domicile, and the defendant would not be liable under that state's laws, the defendant should not be held liable under the tort law of the plaintiff's domicile; conversely, where injury in the plaintiff's own domicile and the law of that state would permit the plaintiff to recover, the defendant should not be allowed to interpose the defendant's own state's law as a defense. ***Hamilton v Accu-Tek***, 47 F.Supp.2d 330 (E.D.N.Y. 1999)." The court concludes that significant discovery is also required as to the choice of law question.

A status conference is scheduled for August 6, 2012 at 9:30 a.m. in Chambers of the undersigned.

This decision constitutes the order of the Court.

Dated JUN 11 2012

J.S.C.

ENTERED
JUN 13 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE