Rothman v RNK Capital, LLC
2015 NY Slip Op 31640(U)
August 26, 2015
Supreme Court, New York County
Docket Number: 150120/15
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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ZOR ROTHMAN and REVERSING ENTROPY, LLC,

Plaintiffs,

-against-

RNK CAPITAL, LLC, GREY20 FUND LP, ORGANICA WATER, SUNRAY POWER MANAGEMENT, LLC, ROBERT KOLTUN, and JOHN DOES NOS. 1-2,

Defendants.

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Index No. 150120/15

Motion seq. no. 001

DECISION AND ORDER

BARBARA JAFFE, J.:

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By notice of motion, defendants RNK Capital, LLC, Grey2O Fund LP, Sunray Power Management, LLC, Robert Koltun, and John Does Nos. 1-2 move pursuant to CPLR 3211(a)(1), (5), and (7) for an order dismissing plaintiffs' first, third, fourth, fifth, and sixth causes of action against them, all claims against Koltun individually, and plaintiffs' request for punitive damages. Plaintiffs oppose.

I. UNDISPUTED BACKGROUND

A. Parties

Plaintiff Rothman is the sole member of plaintiff Reversing Entropy (RE). Defendant RNK Capital is an investment firm. Defendant Koltun is RNK's managing member. He holds a 47.5 percent interest in the company. Rothman is a passive investor in RNK and holds a five percent interest in it. (NYSCEF 11).

Defendant Grey2O was a Delaware limited partnership that was liquidated on December 31, 2014, after distributing all of its assets to its partners. Its only active investment prior to liquidation was its ownership of shares in Cleanwater Partners I Ltd. Rothman was a limited partner in Grey2O. (*Id*).

Defendant Sunray Management provides management services to various companies for a fee. Koltun, Rothman, and David Khasidy are Sunray's managing members. Koltun holds 60 percent of Sunray's Class A Membership Units, and Rothman and Khasidy each own 20 percent. (*Id.*).

B. Facts

On February 26, 2013, RNK issued a check to RE for $167,172.10 as a "closeout of [RE's] capital account through 1/1/13." On February 27, 2013, Rothman signed an acknowledgment, as member of and on behalf of RE, as follows:

> I hereby acknowledge receipt of a check in the amount of $167,172.10, (the "Distribution") which represents the sum of the Capital Account balances of Reversing Entropy, LLC (the "Investor") for its investments in RNK Capital LC, Grey K GP, LLL, Grey K GP II, LLC, and Grey K GP III, LLC (together, the "Company"). I acknowledge and agree that upon payment of the Distribution, the Investor's Capital Accounts in the Company will be zero as of January 11, 2013. (Emphasis in original).

(NYSCEF 13).

On or about June 1, 2014, Sunray advised its members that another company, Sol-Wind Renewable Power, LP, had made an offer to purchase assets and equity of entities affiliated with Sunray, including those in which Rothman has interests. Subsequently, Sunray signed purchase agreements with Sol-Wind, which were contingent on Sol-Wind's successful participation in an initial public offering (IPO). However, as Sol-Wind did not proceed with the IPO, the

agreements were terminated. (NYSCEF 12).

On or about September 18, 2014, Koltun gave written notice to the investors in Grey2O, including Rothman, that the liquidation and dissolution of Grey2O had been authorized, and as part of the liquidation, Grey2O's assets were to be distributed to its partners. Koltun also advised that a final financial audit would be conducted, and that once the audit and a possible third-party valuation were completed, the investors would receive their distribution. (*Id.*).

By letter dated February 20, 2015, Koltun advised Rothman that effective December 31, 2014, his holding in Cleanwater Partners I Ltd. was transferred to him in-kind from Grey2O as follows: (1) Preferred A-1 stock: 26,413 shares at the issue price of $1.32; and (2) Common stock: 532 shares at the issue price of $0.07. (*Id.*). On March 10, 2015, Rothman received $34,902.86 from the Grey2O liquidation. (*Id.*).

C. Procedural background

On or about March 2, 2015, plaintiffs served and filed an amended complaint against defendants, asserting as follows:

(1) In the first cause of action, plaintiffs allege that when RE received a distribution from RNK's capital account in February 2013, RNK, without plaintiffs' consent and contrary to their agreement, deducted over $17,000 from the distribution and has refused to pay it to RE despite due demand;

(2) In the second cause of action, they allege that RE was entitled to review RNK's books and records, that RE gave RNK reasonable notice of its intent to have its accountant examine the books and records, and that RNK has refused to make them available for inspection;

(3) In the third cause of action, it is alleged that Rothman was entitled to receive five percent of the Cleanwater shares distributed to Grey2O, but did not receive them;

(4) In the fourth cause of action, plaintiffs assert that at the June 2014 meeting regarding Sunray's deal with Sol-Wind, Rothman and others were not given any

documentation about the deal, that they were given inaccurate and incomplete information, that it was fraudulently concealed that other sellers related to Sunray and other assets being sold to Sol-Wind were owned by Sunray, and that the fraud was made to enable the parties to the deal to receive all the proceeds from the deal to the exclusion of Rothman;

(5) In the fifth cause of action, it is alleged that while the deal with Sol-Wind did not occur, Sunray is attempting or will attempt to arrange a similar transaction with a different buyer, and in that transaction, Sunray continues to exclude Rothman from receiving his due proceeds; and

(6) In the sixth cause of action, plaintiffs assert that on or about September 1, 2004, Rothman loaned Koltun $50,000 with the understanding that it would be repaid with interest, and that instead of repaying it, on or about December 1, 2005, it was agreed that Koltun would convert the $50,000 loan into an investment with Grey K Environmental Fund (GreyK). Beginning in September 2014, Rothman requested that Koltun confirm the investment in writing, but Koltun refused to do so and has also refused to give the benefits of the investment to Rothman.

(NYSCEF 1).

Plaintiffs seek as damages: (1) on the first claim, a judgment for RE against RNK in the sum of $17,986.12 plus interest from February 28, 2013; (2) on the second claim, a judgment ordering RNK and its officers to make immediately available to RE all of RNK's books and records; (3) on the third claim, a judgment directing RNK, Koltun, and Grey2O to deliver to plaintiffs their shares of Cleanwater; (4) on the fourth claim: (a) a judgment directing Koltun, Sunray, and John Does 1 and 2 to deliver to Rothman all documents related to any contemplated sale of Sunray's assets; (b) a declaration that Rothman shall receive 20 percent of all net proceeds from the purchaser of Sunray's assets; and (c) punitive damages against Koltun, Sunray, and John Does 1 and 2 for $1 million; (5) on the fifth claim, a declaration that upon the sale of Sunray's assets, Rothman will receive 20 percent of the net proceeds; and (6) on the sixth claim, an order directing Koltun to acknowledge in writing Rothman's investment in GreyK and to pay

Rothman his share of all cash distributions that have been made since December 1, 2005. (*Id.*).

II. MOTION TO DISMISS

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Id.*; *Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]). The standard is whether the pleading states a cause of action, not whether the proponent has a cause of action. (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180, 1180–1181 [2d Dept 2010]).

A party may also move for an order dismissing a pleading on the ground that it has a defense based on documentary evidence. (CPLR 3211[a][1]). The motion may be granted where factual allegations in the complaint are flatly contradicted by documentary evidence. (*Kaisman v Hernandez*, 61 AD3d 565 [1st Dept 2009]; *Kliebert v McKoan*, 228 AD2d 232 [1st Dept 1996], *lv denied* 89 NY2d 802 [1996]). And pursuant to CPLR 3211(a)(5), a claim may be dismissed if it may not be maintained because of, *inter alia,* release.

A. First cause of action

Defendants maintain that Rothman's claim that he is entitled to an additional $17,000 from RNK's capital account is contradicted by his written agreement that he had received a distribution in 2013 and that after such distribution, RE's capital accounts in RNK had a zero

balance. They argue that the agreement constitutes a release. (NYSCEF 11).

Plaintiffs deny that they believed that the amount paid them was the full amount owed, and assert that for that reason, they did not sign a release. Rather, they maintain that the acknowledgment is a receipt, not a release. (NYSCEF 17).

In reply, defendants contend that absent any allegation that RE has or had a positive balance in its capital account with RNK since 2013, plaintiffs have not shown an entitlement to a further distribution. (NYSCEF 19).

Here, the acknowledgment signed by Rothman provides only that he had received a sum from the RNK capital account and that RE's capital account balance was thereby reduced to zero. Nothing therein provides that Rothman agreed that he was due no further distributions or that the sum he received was the total amount to which he believed he was entitled. That RE's capital account balances for its investments in RNK and the Grey entities were zero is not evidence that he is not entitled to the $17,000. Thus, the acknowledgment does not constitute a release. (*See* 19A NY Jur 2d, Compromise, Accord, and Release § 84 [2015] [to constitute valid release, there need be language indicating present intent to renounce or discharge claim or obligation]).

Laquila Group, Inc. v Hunt Constr. Group, Inc., cited by defendants, is inapposite, as there, the court found a question of fact as to whether the acknowledgments of payment constituted releases or receipts of payment. (44 Misc 3d 1203[A], 2014 NY Slip Op 51007[U] [Sup Ct, Kings County 2014]). Here, by contrast, disposition of the motion requires that the complaint be construed in plaintiffs' favor.

B. Third cause of action

Defendants assert that Rothman received the value of the investment of his Cleanwater

shares and is entitled to nothing more, and they deny that RE is entitled to anything related to Cleanwater as it was not a partner in Grey2O. (NYSCEF 11).

Plaintiffs contend that defendants never explained how they determined the number of shares to which Rothman was entitled and have thus failed to establish that he received all of the shares that he should receive. (NYSCEF 17).

According to defendants, plaintiffs have never alleged that Rothman received less shares than he was entitled to receive, and they deny having an obligation to explain how they calculated his shares. (NYSCEF 19).

Again, plaintiffs sufficiently allege that Rothman did not receive all of his Clearwater shares, and defendants offered no documentary proof establishing otherwise.

C. Fourth and fifth causes of action

Defendants maintain that plaintiffs fail to state a claim in their fourth and fifth causes of action, observing that there is no cognizable claim for civil conspiracy in New York State, and that plaintiffs fail to allege the elements of a fraudulent misrepresentation or that they were damaged in any way by the failed Sunray transaction. Moreover, as the Sunray transaction did not occur, plaintiffs' claim for a declaration related to any potential and hypothetical future transaction does not lie absent a justiciable controversy. (NYSCEF 11).

Plaintiffs deny that their demand is hypothetical or contingent. (NYSCEF 17). In reply, defendants reiterate that no justiciable controversy exists. (NYSCEF 19).

Pursuant to CPLR 3001, the court "may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy." A justiciable controversy requires a real dispute between adverse parties with a

stake in the outcome of the dispute. (*Long Is. Lighting Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253, 253 [1st Dept 2006]).

As the Sunray transaction never closed, plaintiffs' request for a declaration of their rights related thereto is moot and non-justiciable. (*See Estate of Brown v Pullman Group*, 60 AD3d 481 [1st Dept 2009], *lv denied* 13 NY3d 789 [party's claim for declaration that proposed transaction, if consummated, would have breached parties' contract, was moot and did not present justiciable controversy as transaction did not proceed and was abandoned]).

Their request for a declaration related to any potential future transaction involving Sunray is hypothetical and thus not justiciable. (*See Furlong v New York State Workers' Compensation Bd.*, 97 AD2d 357 [1st Dept 1983] [as dispute between parties was dependent upon possible happening of future event, which may not occur, no justiciable controversy existed]).

D. Sixth cause of action

Defendants argue that plaintiff's claim for breach of contract fails as they have not alleged that they demanded payment from Koltun or that he refused to pay, or that Koltun agreed to acknowledge the equity in writing, or that they were damaged by defendants' conduct. (NYSCEF 11).

Plaintiffs assert that they have alleged the existence of two agreements or contracts between Rothman and Koltun, that Koltun breached both agreements by failing to acknowledge Rothman's interest in GreyK and to repay the loan, and that they have been damaged in the unpaid amount of the loan or the lost interest or investment in GreyK. (NYSCEF 17).

Defendants observe that plaintiffs have not alleged that Koltun failed to supply Rothman with an interest in GreyK, but only that he failed to acknowledge it in writing, and that such an

allegation cannot constitute a breach of contract. (NYSCEF 19).

While plaintiffs assert that Koltun failed to repay the loan, they also allege that they instead agreed that Koltun would give Rothman an interest in GreyK. Thus, any claim for breach of the failure to repay the loan is waived. However, to the extent that plaintiffs' claim may be construed as an allegation that Koltun failed to provide Rothman with the interest in GreyK, plaintiffs have sufficiently stated a cause of action for breach of contract.

E. Claims against Koltun

Defendants rely on the RNK Capital Operating Agreement and Sunray Management LLC Agreement as precluding any claims against Koltun in his personal capacity, and observe that under Delaware law, provisions excluding personal liability for members of companies are enforceable. (NYSCEF 11).

Plaintiffs contend that Koltun may be held personally liable for tortiously interfering with their agreement with RNK or breaching his fiduciary obligation to RE, or by fraudulently concealing the full extent of the Sunray transaction and converting money and property owed to plaintiffs, and observe that in the sixth cause of action, the loan was made by Koltun personally as was his promise to give Rothman an investment in GreyK. (NYSCEF 17).

As the complaint contains no causes of action against Koltun for tortious interference or for breach of a fiduciary obligation, defendants argue that Koltun cannot be held personally liable under either theory, and that in any event, the claims have no merit as only a stranger to a contract can tortiously interfere with it and the cause of action for a breach of fiduciary duty is duplicative of the cause of action for breach of contract. (NYSCEF 19).

Having failed to allege a claim for tortious interference, breach of fiduciary duty, or

conversion against Koltun, and as it is undisputed that the relevant agreements bar holding Koltun personally liable for the actions of the defendant companies, plaintiffs have failed to state a claim against Koltun personally for all their causes of action except the sixth cause of action relating to the GreyK transaction.

F. Punitive damages

Defendants contend that plaintiffs have not alleged that defendants engaged in conduct sufficient to warrant an award of punitive damages. (NYSCEF 11).

Plaintiffs argue that their allegation that defendants engaged in fraud related to the Sunray transaction and that they had a fraudulent or evil motive is sufficient. (NYSCEF 17).

In reply, defendants maintain that punitive damages are not recoverable for a breach of contract, and that they are appropriate in a fraud case only where the fraud is gross, involves moral culpability, and is aimed at the general public. (NYSCEF 19).

In order to survive a motion to dismiss under CPLR 3211(a)(7), a claim for punitive damages must contain facts which, if true, would warrant such damages. (*See eg Varveris v Hermitage Ins. Co.*, 24 AD3d 537 [2d Dept 2005]). Thus, a plaintiff's claims for punitive damages should not be dismissed if the facts alleged could be considered by a reasonable jury to warrant punitive damages. (*Id.*). However, if the plaintiff fails to set forth any facts or allegations to support its contention that the defendant's conduct warrants punitive damages, the claim should be dismissed. (*Id.*).

Generally, an award of punitive damages is appropriate where "the conduct of the party being held liable evidences a high degree of moral culpability, or where the conduct is so flagrant as to transcend mere carelessness, or where the conduct constitutes willful or wanton negligence

or recklessness." (*Pellegrini v Richmond County Ambulance Serv., Inc.*, 48 AD3d 436, 437 [2d Dept 2008] [quotations omitted]). However, "[p]unitive damages are only available in limited circumstances where it is necessary to deter conduct which may be characterized as a fraud evincing a high degree of moral turpitude or such wanton dishonesty as to imply a criminal indifference to civil obligations directed at the public generally." (*Varveris*, 24 AD3d at 538).

Here, plaintiffs' allegations against defendants, even if true, reflect a private business dispute between business partners, and thus do not support a demand for punitive damages. (*See Segal v Cooper*, 49 AD3d 467 [1st Dept 2008] [request for punitive damages stricken as primary claims were contract-based, and there were no allegations that defendants' conduct was directed at public generally or involved high degree of moral turpitude]; *Fischer v Yaakov*, 176 AD2d 655 [1st Dept 1991] [punitive damages not available in breach of contract action based on private wrong, but only where fraud is aimed at general public, is gross, and involves high moral culpability, and is "not merely an isolated transaction incident to the conduct of a legitimate business"]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants RNK Capital, LLC, Grey2O Fund LP, Sunray Power Management, LLC, Robert Koltun, and John Does Nos. 1-2's motion to dimiss is granted to the extent of dismissing plaintiffs': (1) fourth and fifth causes of action; (2) all claims against Koltun individually except for the sixth cause of action; and (3) request for punitive damages; and it is further

ORDERED, that defendants are directed to serve an answer to the complaint within 20

days after service of a copy of this order with notice of entry.

ENTER:

Barbara Jaffe, JSC

DATED: August 26, 2015
New York, New York