

SM Holding Ltd v Star Health Network, Inc.
2017 NY Slip Op 31323(U)
May 15, 2017
Supreme Court, New York County
Docket Number: 158992/2015
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 7

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SM HOLDING LTD, as assignee of ARUN MEHRA,

Plaintiff,

-against-

STAR HEALTH NETWORK, INC.,
AFZAL JAMAL NAIYER, JOHN SANIL MANAVALAN:
and ANIL JOSHI,

Defendants
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Index No: 158992/2015
DECISION/ORDER
Motion sequence 1 and 2

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of defendants' motion to dismiss plaintiff's complaint and defendants' motion to consolidate this action with a previously-filed action:

PAPERS

NUMBERED

Defendants' Brief in Support of Motion to Dismiss	1
Greathead's Affirmation in Support of Motion to Dismiss and Annexed Exhibits	2
Naiyer's Affirmation in Support of Motion to Dismiss and Annexed Exhibits	3
Smith's Affirmation in Support of Motion to Dismiss and Annexed Exhibits	4
Estrin's Affirmation in Opposition to Motion and Annexed Exhibits	5
Defendants' Reply Brief in Further Support of Motion to Dismiss	6
Defendants' Brief in Support of Motion to Consolidate	7
Smith's Affirmation in Support of Motion to Consolidate and Annexed Exhibits	8
Estrin's Affirmation in Opposition to Motion to Consolidate	9
Defendants' Reply Brief in Further of Motion to Consolidate	10

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The Law Office of Gregory L. Smith (Gregory Smith, Jared Brown), for defendants
Estrin & Benn, LLC (Melvyn Estrin, Artie Venti), for plaintiff

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Gerald Lebovits, J.:

In this action, by motion sequence number 001, Star Health Network, Inc. (Star Health), Afzal Jamal Naiyer (Naiyer), John Sanil Manavalan (Manavalan) and Anil Joshi (Joshi) (collectively, Defendants) move for an order, pursuant to CPLR 3211 (a) (1), (3), (4), (7) & (10), dismissing the complaint filed by plaintiff SM Holding Ltd. (SM Holding), as assignee of Arun Mehra (Mehra). Separately, by motion sequence number 002, Defendants move for an order, pursuant to CPLR 602, consolidating this action for all purposes with another action pending in this court styled *Star Health Network, Inc. v Arun Mehra*, Index No. 652083/2015 (Companion Action). Plaintiff opposes the relief sought in each of the foregoing motions. For the reasons set forth herein, the motions are granted to the extent stated below.

I. Background

The following facts are derived from the parties' pleadings, which are generally undisputed, except as noted herein. Star Health, a Delaware corporation with its principal office in New York City, is formed by medical doctors as a platform to provide healthcare services from the United States to patients and hospitals worldwide, particularly in India. On March 13, 2012, Star Health entered into a Subscription Agreement with Mehra, an Indian investor who is the managing director of SM Holding, a foreign corporation with its principal office in Dubai. Pursuant to the Subscription Agreement, which was executed in New York, Mehra would invest \$1 million in Star Health, to be paid in two \$500,000 installments, and in return, would be issued ten million shares of common stock that represent one-third of the company's total shares. Pursuant to the Agreement, Star Health would provide Mehra access to its books and records, and subject to his satisfactory review of same, the first \$500,000 would have to be paid within thirty days after its execution. As a condition to the effectiveness of the Subscription Agreement and the receipt of common stock, Mehra would have to execute a Stockholders Agreement in a mutually agreeable form, a draft of which was attached to the Subscription Agreement. Several drafts of the Stockholders Agreement were prepared, which reflected the parties' ongoing negotiations with respect to the corporate governance and management of Star Health.

By May 2012, the parties still had not finalized the Stockholders Agreement. At that time, as the individuals Defendants were planning to travel to India to further their emerging business, Mehra invited them to his New Delhi home to finalize the Stockholders Agreement, and to consent to the assignment of his rights to SM Holding under the Subscription Agreement. Defendants agreed, and on May 16, 2012, they met with Mehra and signed what they "assumed to be" the final draft (i.e. an execution form) of the Stockholders Agreement. Nayyer affirmation, ¶¶ 14-15. On July 12, 2012, Defendants requested Mehra's colleague, Sunil Wahal, the chief financial officer of Link Global Group, in which SM Holding is a member and for which Mehra is its chairman and chief executive officer, to wire \$250,000 of the first tranche of the \$500,000 to Star Health's bank account. The requested funds were duly transmitted to Star Health.

Defendants allege that they did not discover that the Stockholders Agreement was altered by Mehra until August 2012, at a shareholder meeting held in India, when they asked why Mehra failed to pay even the first \$500,000 installment in full, as they only received \$250,000 by then. *Id.*, ¶ 16. Defendants also allege that Mehra's son, Divji Mehra, informed them at the meeting that the Stockholders Agreement, which the parties executed on May 16, 2012, "did not include any restrictions on Mehra's management rights that were tied to [his] payment of the full \$1 million investment." *Id.*, ¶ 17. Upon reviewing the executed Stockholders Agreement to verify Divji's statement, which, among other things, eliminated the restrictions on Mehra's management rights, as well as the amount of shares of stocks that Mehra would be issued, if he failed to pay his \$1 million investment, Defendants immediately left the meeting. *Id.*

On September 19, 2012, Star Health terminated the Subscription Agreement and the Stockholders Agreement, and declared the Agreements null and void due to Mehra's alleged fraud in altering the Stockholders Agreement and failure to fully pay the \$1 million investment. On the same day, in a letter written by Scott Greathead, Star Health's former counsel, Mehra was

informed that Star Health was prepared to return the \$250,000 to him, subject to his signing a confirmation that the funds belong personally to him (in a form of the Declaration of Ownership attached to the letter), and executing a mutual release, releasing each other from any further liability (in a form of the Mutual Release attached to the letter). Defendants assert that the Declaration of Ownership by Mehra was necessary because the funds wired to Star Health were from an account in the name of Vogue Metals & Commodities House DMCC (Vogue Metals), which, similar to SM Holding, is a member of the Link Global Group of companies. *Id.*, ¶ 18.

Instead of signing the attached form of Declaration of Ownership, Mehra proposed that such form be changed to a “Mutual Declaration” by Mehra and Naiyer, in which Mehra would confirm that the wired funds belonged to him and/or his group of companies, and that Naiyer would declare with respect to, among other things, any usage of such funds. The parties agreed to sign the documents, and agreed that the same would be held in escrow by a “neutral” attorney in India pending Mehra’s receipt of the funds. Greathead affirmation, ¶ 12. Defendants, by their former counsel, allege that they were unable to locate an Indian attorney willing to serve in this capacity because “Mehra had a reputation in the Indian legal community as notoriously litigious and untrustworthy.” *Id.*, ¶ 13. Mehra counters that the statement is defamatory to his reputation. Mehra affirmation, ¶ 39. On December 12, 2012, Mehra appeared in Greathead’s office and demanded an immediate return of the funds. Greathead affirmation, ¶ 14. After escorting Mehra out of the office, Greathead filed a summons with notice, via the NYSCEF system, seeking to commence an action against Mehra on behalf of Star Health. *Id.* However, Greathead was unable to complete personal service of the summons upon Mehra. *Id.*, ¶ 15. In January 2013, Peter Lazarus, a Dubai attorney contacted Greathead by email and demanded return of the funds to Mehra, but when Greathead asked him to accept service of the summons, he refused. *Id.*, ¶ 16.

The parties did not resume communication until June 2015, when SM Holding’s counsel of record contacted Star Health’s present counsel to again demand a return of the funds and to discuss a resolution of the dispute. Smith affirmation, ¶ 2. On June 12, 2015, Defendants’ counsel sought to initiate the Companion Action on behalf of Star Health against Mehra, alleging, among other things, fraud, breach of fiduciary duty and breach of contract, by filing a summons with notice with this court. *Id.*, ¶ 4. Mehra’s counsel refused service of the summons and stated that he was “not authorized to accept service on behalf of my client.” *Id.*, ¶ 8.

Thereafter, on or about August 28, 2015, SM Holding commenced the instant action against Defendants. The complaint in this action asserts six causes of action: breach of contract, fraud, conversion, unjust enrichment, fraud in the inducement, and civil conspiracy. By these motions (sequence numbers 001 and 002), Defendants seek an order dismissing all causes of action, as well as an order consolidating the instant action with the Companion Action.

II. Motion to Dismiss (Motion Sequence Number 001)

Before addressing the merits of each cause of action, which is discussed further below, Defendants seek to dismiss the complaint, as a threshold matter and pursuant to CPLR 3211 (a) (1) and (a) (3), by arguing that the Stockholders Agreement is null and void; SM Holding is not the real party in interest (i.e., the real party is Mehra, who seeks to avoid the personal jurisdiction

of this court as to the claims against him in the Companion Action); and the funds SM Holding seeks to recover belong to a different legal entity. Defendants' moving brief at 11-15.

To prevail upon a motion to dismiss based on CPLR 3211 (a) (1), "such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002) (internal citation omitted). Notably, Mehra, in his affirmation opposing the instant motion, failed to deny Defendants' allegation that he secretly altered the Stockholders Agreement just prior to its execution. Thus, Defendants argue that the Stockholders Agreement should be deemed null and void due to fraud in the execution because there was a misrepresentation of its essential terms, and that Defendants signed it without a "reasonable opportunity" to know of its alteration. Defendants' reply brief at 3. Defendants also argue that, because the Stockholders Agreement should be deemed unenforceable, SM Holding cannot be the "legitimate assignee" of Mehra's rights under the Subscription Agreement, and, thus, does not have standing to prosecute this action. *Id.* Defendants further argue that SM Holding failed, despite repeated requests, to produce a signed copy of the Assignment and Assumption Agreement, pursuant to which Mehra purportedly assigned his rights to it. *Id.*

It has been long held that a signer of an instrument who failed to read it is bound by its terms. *Pimpinello v Swift & Co., Inc.*, 253 NY 159, 162 (1930). Also, it has been held that "[i]n the absence of fraud, duress or some other wrongful act by a party to a contract, a signer of an agreement is deemed to be conclusively bound by its terms whether or not he or she read it." *Maines Paper & Food Serv. Inc. v Adel*, 256 AD2d 760, 761 (3d Dept 1998). Here, while SM Holding and Mehra failed to read the allegation of fraud in the execution, an issue can be raised as to whether Defendants had a fair opportunity to discover the fraud or whether they exercised reasonable diligence before they initialed every page and signed the Stockholders Agreement, particularly in light of the fact that the signed Agreement contained different pagination and margins when compared with the final draft of the Agreement. *Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 266 (1st Dept 2008) (negligent failure to read the document before signing vitiated justifiable reliance, an essential element of fraud in the execution claim). Hence, the issue of whether the Stockholders Agreement should be deemed null and void cannot be determined at this juncture, particularly where no discovery has been taken by the parties in this action.

Although plaintiff has failed to produce a signed copy of the draft Assignment and Assumption Agreement, which, according to Defendants, is the basis of dismissal for lack of legal capacity to sue under CPLR 3212 (a) (3), it is undisputed that Defendants had consented to the assignment, as reflected in the second recital paragraph of the Stockholders Agreement ("the Company has consented to such assignment and assumption"), and in their moving brief at 7 ("Defendants agreed" to Mehra's insistence that they "consent to the assignment of his rights under the Subscription Agreement to Plaintiff"). Thus, the absence of a signed document does not conclusively establish that SM Holding has no standing, where it is undisputed that SM Holding is a signatory party to the Stockholders Agreement, the enforceability of which cannot be determined at this time, and Mehra, as the purported assignor, is its managing director.

Further, although Mehra failed to transmit to Defendants the investment pursuant to the terms of the Subscription Agreement, which was required to be made within 30 days from the execution thereof (i.e. by April 12, 2012), it is undisputed that Defendants belatedly asked him to fund the investment on July 12, 2012. Thus, strict compliance was waived by Defendants. In addition, while Defendants challenge SM Holding’s standing because documentary evidence showed that the wired funds were from an account in Vogue Metal’s name, they have not cited any caselaw for the proposition that such a scenario deprives plaintiff of standing to commence an action that asserts a multitude of claims, including conversion and unjust enrichment.¹ The wired funds are fungible in nature, and Vogue Metal is a member of the Link Global Group, within which SM Holding is also a member and Mehra is its chairman, and there is a certification by plaintiff’s accountant (Mehra affirmation, exhibit D) stating that the funds were reflected in its “audited financials,” and were “invested by remittance through [its] associate concern [Vogue Metals].” Also, the wired funds were accepted, and Defendants even offered to return same upon termination of the Subscription and Stockholders Agreements, but subsequent negotiations failed, which led to the filing of the Companion Action and the instant action. Thus, under these facts, having a corporate affiliate wire the funds does not necessarily deprive SM Holding of standing, and Defendants’ documentary evidence failed to utterly refute plaintiff’s allegations and conclusively establish a defense as a matter of law. Accordingly, Defendants’ argument that SM Holding does not have standing to prosecute this action is unpersuasive.

Apart from challenging SM Holding’s standing, Defendants argue that its complaint fails to state a cause of action under CPLR 3211 (a) (7). A dismissal based upon CPLR 3211 (a) (7) requires the court to determine whether, presuming the facts pleaded to be true and according them “every favorable inference,” the factual allegations of the complaint “do not set forth a viable cause of action.” *Delran v Prada USA Corp.*, 23 AD3d 308, 308 (1st Dept 2005).

As to the first cause of action sounding in breach of contract with respect to the Subscription and Stockholders Agreements, the complaint alleges that Defendants failed to issue the shares of stock of SM Holding, did not allow plaintiff or its assignor to participate in the management of the company, and failed to provide plaintiff or its assignor access to books and records, pursuant to the terms of such Agreements. Interestingly, while the complaint alleges that plaintiff or its assignor has “performed all conditions” of the Agreements (Complaint, ¶¶ 34-35), its counsel concedes that plaintiff only “partially performed” such Agreements “by depositing \$250,000 of its money into Defendants’ account,” and that Defendants failed to perform any contractual terms and then terminated the Agreements. Estrin affirmation in opposition, ¶ 3.

The elements for a cause of action sounding in breach of contract are: existence of a contract, plaintiff’s performance, defendant’s breach, and damages resulting therefrom. *Dee v Rakower*, 112 AD3d 204, 208-209 (2d Dept 2013). Here, Defendants argue that plaintiff’s

¹ The cases cited by Defendants only stand for the proposition that where a plaintiff failed to establish true ownership of the funds, the failure affects claims sounding in conversion and unjust enrichment. However, there is no case citation with respect to the standing issue.

evidence submitted in opposition did not establish Defendants' breach of the Subscription Agreement because plaintiff has admitted that Mehra only paid half of the \$500,000 initial investment by September 19, 2012. Defendants' reply brief at 9. However, as discussed above, Defendants' acceptance of the wired funds could be deemed a waiver of strict compliance with the 30-day funding deadline of the Subscription Agreement. While Defendants may hold a defense or counterclaim for not issuing the shares of stock, the complaint's allegations satisfied the pleading requirement for a breach of contract claim. Likewise, although Defendants contend that there is "no basis" for a breach of the Stockholders Agreement because of Mehra's fraud in its execution, enforceability of such Agreement cannot be determined now, because there are issues of fact regarding whether Defendants exercised reasonable diligence before signing it, as explained above. Therefore, the complaint sufficiently alleges the elements of a breach of contract claim necessary to survive a motion to dismiss pursuant to CPLR 3211 (a) (7).

Defendants also seek dismissal of plaintiff's conversion and unjust enrichment claims by arguing that plaintiff failed to provide admissible evidence to rebut Defendants' evidence that the wired funds were paid by Vogue Metals, a corporate affiliate. Defendants' reply brief at 10. The argument is unavailing because, as discussed above and in light of the undisputed fact that Defendants had offered to return the funds to Mehra after they terminated the Agreements, the issue regarding "legal ownership" of the wired funds is inconsequential. Because the funds remain in Defendants' possession, the complaint sufficiently alleges elements of a conversion or unjust enrichment claim, even though Defendants may hold an offsetting counterclaim.

Additionally, Defendants seek to dismiss plaintiff's claim sounding in fraud and fraud in the inducement, arguing that plaintiff failed to make detailed allegations of the alleged fraud as required by CPLR 3016, that plaintiff's allegation of misrepresentation was based upon an ex post facto event (thus negating reliance), and that the alleged fraud is merely a disguised breach of contract claim. Defendants' moving brief, at 22-25. Plaintiff fails to rebut these arguments, and only asserts that "the evidence clearly shows that the Plaintiff SM Holding has multiple causes of action sounding in breach of contract, conversion and unjust enrichment; [and] Plaintiff has standing to sustain these causes of action" Estrin affirmation in opposition, ¶ 41. Thus, the causes of action sounding in fraud and fraud in the inducement should be dismissed.

Lastly, Defendants also seek to dismiss the cause of action which appears to sound in civil conspiracy, as the complaint merely alleges that Defendants "collectively" induced plaintiff to invest in the company. New York does not recognize civil conspiracy as an independent cause of action. *Blanco v Polanco*, 116 AD3d 892, 896 (2d Dept 2014). Plaintiff also fails to address this claim in its opposition papers. Thus, the civil conspiracy claim should be dismissed.

As a separate issue, the individual Defendants (Naiyer, Manavalan and Joshi) seek to dismiss the complaint as against them, arguing that they are sued simply because they are shareholders and officers of Star Health, that the complaint treats the company and them interchangeably, that they should not be liable for any alleged corporate wrongdoing unless they personally participated in the tort or received some benefit, and that the complaint's conclusory allegations against them are insufficiently pleaded. Defendants' moving brief at 16-19. Based upon the discussions above and the fact that no discovery has been taken in this action, only the

causes of action sounding in fraud, fraud in the inducement and civil conspiracy should be dismissed as against the individual Defendants at this time, without prejudice to their right to seek subsequent dismissal of the remaining causes of action of the complaint.

III. Motion to Consolidate (Motion Sequence Number 002)

As noted above, on June 12, 2015, Star Health filed a summons and notice with this court seeking to commence the Companion Action against Mehra for his alleged fraud in connection with execution of the Stockholders Agreement, but service of the summons upon Mehra was unsuccessful. Thereafter, Star Health expended significant efforts in attempting to personally serve Mehra abroad, and eventually managed to do so in Dubai, United Arab Emirates. On January 26, 2016, Star Health filed and served the complaint in the Companion Action, and Mehra filed his answer on February 26, 2016.

Pursuant to motion sequence number 002, Defendants request that this court, pursuant to CPLR 602 (a), consolidate, for all purposes, the Companion Action with the instant action. Notably, CPLR 602 (a) provides, in relevant part: “[w]hen actions involving a common question of law or fact are pending before a court, the court . . . may order the actions consolidated, and may make such other orders . . . to avoid unnecessary costs or delay.” The statute gives the court discretion to consolidate actions involving common questions of law or fact, and consolidation is generally preferred “in the interest of judicial economy and ease of decision-making . . . unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right.” *Progressive Ins. Co. v Vasquez*, 10 AD3d 518, 519 (1st Dept 2004) (citations omitted).

Here, it is undeniable that the Companion Action and the instant action involve common questions of law and fact because they arose out of the same events and transactions between the parties. Yet, plaintiff argues that if these actions are consolidated, there is a “potential for jury confusion” and for Mehra to be prejudiced of substantial rights. Estrin opposition, ¶ 8. In sum, plaintiff argues that, while Mehra is its managing director and has assigned his rights to plaintiff, Mehra is the defendant who has been sued individually in the Companion Action, the two actions must be separately maintained because any consolidation would “clearly engender jury confusion and would prejudice SM Holding and Mehra of substantial rights.” *Id.*, ¶¶ 15-16.

Plaintiff’s argument is unavailing. The law is clear that an assignee stands in the shoes of its assignor and takes its assignment subject to all of the infirmities, defenses or counterclaims available to or against its assignor. *Madison Liquidity Investors 119, LLC v Griffith*, 57 AD3d 438, 440 (1st Dept 2008) (assignment grants the assignee the same rights and interests with regard to the assigned claim to which the assignor had been entitled with all of its infirmities). Thus, SM Holding, as the purported assignee of Mehra, does not stand in any better or worse position with respect to assigned claim than its assignor. Accordingly, any claimed prejudice that might be engendered by consolidation of these two actions is without any merit. Similarly, any claimed confusion of the jury is unfounded and not supported by any evidence. Even if these two actions are not consolidated, Defendants can pursue claims and defenses against SM Holding based upon identical facts and arguments due to the fraud in the execution of the Stockholders Agreement by Mehra, its assignor and managing director. On the other hand, consolidation of the actions will promote judicial economy and ease of decision making, as well as allow the parties

to conserve resources during discovery and trial. Accordingly, the motion to consolidate these actions, for all purposes, should be granted.

For all of the foregoing reasons, it is hereby

ORDERED that the motion to dismiss by defendants (motion sequence number 001) is granted only to the extent of dismissing the complaint's causes of action sounding in fraud, fraud in the inducement and civil conspiracy; and it is further

ORDERED that the motion to consolidate by defendants (motion sequence number 002) is granted, and the above-captioned action is consolidated with the action entitled *Star Health Network, Inc. v. Arun Mehra*, Index No. 652083/2015, under Index No. 652083/2015, and the consolidated action shall bear the following caption:

Star Health Network, Inc., Afzal Jamal Naiyer, Index No. 652083/15
John Sanil Manavalan, and Anil Joshi,

Plaintiffs - Counterclaim Defendants,

- against -

Arun Mehra and SM Holding Ltd., as assignee of Arun Mehra,

Defendants - Counterclaimants.

And it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that defendants-movants are directed to serve a copy of this order with notice of entry on the General Clerk's Office and the County Clerk's Office, which are directed to consolidate the papers in the actions hereby consolidated and shall mark the records to reflect the consolidation.

Dated: May 15, 2017



HON. GERALD LBOVITS
J.S.C.