Gerber v Grays Peak Capital LP
2017 NY Slip Op 31517(U)
July 14, 2017
Supreme Court, New York County
Docket Number: 654586/2016
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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David P. Gerber, individually and derivatively on behalf of Grays Peak Partners LP,

Plaintiffs,

Index No. 654586/2016

- against -

DECISION AND ORDER

Grays Peak Capital LP and Scott Stevens,

Motion Sequence 001

Defendants.

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Arthur F. Engoron, J.:

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 - 3, were used on defendant's motion, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint:

	Papers Numbered:
Notion of Motion – Affidavit in Support – Exhibits	1
Affirmation in Opposition – Exhibit	2
Reply Affidavit	3

For the reasons set forth herein, plaintiff's motion to dismiss pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) is granted in part and denied in part.

Background

On August 31, 2016, plaintiff David P. Gerber ("Gerber") commenced this action against defendants Grays Peak Capital LP ("the Fund") and Scott Stevens ("Stevens") to collect damages for breach of contract (1st and 2nd causes of action), fraudulent misrepresentation (3rd cause of action), negligent misrepresentation (4th cause of action), breach of fiduciary duty (5th cause of action), unjust enrichment (6th cause of action), and quantum meruit (7th cause of action). Neither the Fund nor Stevens answered the complaint. Instead Stevens now moves, pursuant to CPLR §3211(a)(1) and (7), to dismiss the complaint.

The Complaint

According to the complaint, verified by Gerber, the Fund is a hedge fund and a Delaware limited partnership qualified to do business in the State of New York and Stevens was a Managing Member of the Fund. Sometime in or about June 2015, Stevens offered Gerber the position of Chief Financial Officer ("CFO"), Chief Operating Officer ("COO"), and Chief Compliance Officer ("CCO") of the Fund at an annual salary of $200,000. Gerber accepted the offer and began working at the Fund on or about July 15, 2015. The Fund was organized on August 1, 2015 and, a month later, in September 2015, the Fund issued a confidential private offering memorandum that sought investments in the Fund. The complaint alleges that Stevens told Gerber that the Fund had capital commitments of $50 million to $70 million at launch and that Stevens had invested $10 million of his own money. In October 2015, Gerber invested $1 million in the Fund. In November of 2015, Gerber invested another $500,000. In January 2016,

Gerber invested yet another $1.5 million, bringing the sum of his investments in the Fund to $3 million. Gerber alleges that after investing his $3 million in the Fund, he discovered that Stevens had only invested $350,000 of his own money, and that Stevens had only raised $2 million. Gerber further alleges that his $3 million investment made him the biggest investor in the Fund, at a 60% stake. Gerber alleges that not only did his money make up 60% of the Fund's investments, but also that he had to shoulder 60% of the Fund's expenses. According to Gerber, in or around January 2016, Stevens asked Gerber for a working capital loan of $100,000. Gerber alleges he made the $100,000 loan. Gerber alleges that after he made the loan, he told Stevens that Stevens' representations about the amount of money in the Fund had damaged him and that Gerber was paying a disproportionate amount of the Fund's expenses. Gerber alleges that Stevens promised to personally reimburse Gerber for the total amount of Fund expenses Gerber incurred over the nine months that his money was invested in the Fund. Gerber alleges that Stevens induced him to rescind the redemption request by promising, in the event that Stevens voluntarily liquidated the Fund, to personally reimburse Gerber for the total amount of start-up costs and wind down expenses that Gerber would pay. Gerber alleges that Stevens redeemed Stevens' entire $350,000 investment on or about March 31, 2016.

Gerber alleges that on June 9, 2016, Stevens advised him that he had accepted a job with Lombard Odier Asset Management (US) Corp. ("Lombard") and that he was going to liquidate the Fund. Gerber further alleges that Stevens had begun working for Lombard prior to June 9, 2016.

Gerber alleges that when Stevens told him that he was closing the Fund, Gerber said that he "had not been paid his $200,000 salary since March of 2016—despite the fact that [Gerber] had been performing all of his duties and responsibilities as an employee." Gerber alleges that Stevens agreed that Gerber was owed his salary for the period of April 1, 2016 through June 30, 2016 and told Gerber that he would be paid all earned and unearned wages through June 30, 2016.

Gerber further alleges that since the wind down would not be completed by June 30, 2016, he and Stevens agreed to keep Gerber on as an employee from July 1, 2016 through September 30, 2016. Gerber also alleges the Fund would pay the salary Gerber earned during that period to Brian Blair ("Blair"), the Fund's only other employee. Gerber alleges that Stevens agreed to pay the costs of Gerber's health care insurance through September 30, 2016 and to reimburse him for all business expenses he incurred.

Gerber alleges that he agreed with someone, presumably Stevens, that if the wind down was not completed by September 30, 2016, he would continue to work for no additional compensation until its conclusion. Gerber alleges that he was never paid his salary for the period of April 1 through June 30, 2016 and that neither he nor Blair received the wages Gerber earned for the period of July 1, 2016 through September 30, 2016.

Stevens' Motion to Dismiss

In support of his motion to dismiss, Stevens submits his own affidavit, to which are attached, inter alia, the Fund's Limited Partnership Agreement (Exhibit A), the Fund's Confidential Private Offering Memorandum (Exhibit B), and Gerber's completed and signed Subscription Agreement (Exhibit D). According to Stevens, in February 2016, the Fund outsourced the role of CFO because "Mr. Gerber was incapable of fulfilling his duties." On February 15, 2016, Gerber submitted a redemption request to redeem his entire investment effective March 31,

2016. Stevens denies ever having promising to personally reimburse Gerber for the total amount of start-up costs and wind down expenses.

Stevens alleges that in March 2016, the Fund informed Gerber that because he could not fulfill all of his original duties, his annual salary was to be reduced by $50,000, effective April 1, 2016. Stevens alleges that in response to this information, Gerber agreed to forgo his salary completely.

Stevens alleges that "adverse market conditions," caused the Fund not to receive all the investments that the investors had initially committed to it. Stevens alleges that when Gerber became aware of the fact that the Fund did not receive all of the investments committed to it, he demanded that Stevens "give him his money immediately" and "sent a frantic email to [the Fund's] institutional investors demanding an emergency phone call." Stevens alleges that Gerber's action to redeem caused the Fund to fall below a key asset threshold that its largest investor required to remain invested.

Stevens alleges that on June 13, 2016, Gerber sent out an email to all the Fund's service providers informing them that the Fund was being liquidated and would cease operating on June 30, 2016. Stevens alleges that the Fund was forced to liquidate its assets and wind down. By June 17, 2016, the Fund had liquidated its assets, notified its investors about the liquidation, and ceased operations.

Stevens alleges that he began working for Lombard on July 1, 2016 as a Portfolio Manager and that although he was working full-time at Lombard, he continued to assist with outstanding items as part of winding down the Fund. Stevens alleges that Gerber "*partially* assisted in the winding down."

Stevens states that the Fund paid Gerber's health insurance through September 30, 2016 and that "Mr. Gerber received everything he was entitled to as an employee of Grays Peak."

Stevens alleges that on July 11, 2016, Gerber presented him with a document and tried to get him to sign it without allowing him to read it. Stevens allegedly refused to sign the document, which turned out to be an authorization for a wire transfer. Gerber allegedly said that it was for unpaid wages and expenses from April 1, 2016 – June 15, 2016 and that the amount was "approximately $50,000." Based on that figure, Stevens signed the authorization approving approximately $50,000. On July 25, 2016, Stevens received an email from the Fund's bank notifying him that $61,172.43 had been wired directly to Gerber's personal account. Stevens alleges that he confronted Gerber about the wire transfer and stopped him from taking assets and intellectual property from the Fund, including a Fund-supplied computer, office supplies, and investors lists and information. Stevens alleges that Gerber then refused to do any additional work in connection with the Fund's wind down. Stevens alleges that in August 2016, Gerber contacted him and stated that he would no longer do any work with the Fund unless he received additional compensation.

Discussion

Fraudulent Misrepresentation (3rd cause of action)
and Negligent Misrepresentation (4th cause of action)

To recover for fraud, a plaintiff must show (1) a misrepresentation or a material omission of fact which was false and known to be false by defendant, (2) that the misrepresentation was made for the purpose of inducing the other party to rely upon it, (3) justifiable reliance of the other party on the misrepresentation or material omission, and (4) injury. See Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 421 (1996).

"A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information[.]" J.A.O. Acquisition Corp. v Stavitsky, 8 NY3d 144, 148 (2007).

Stevens persuasively argues that the third and fourth causes of action, fraudulent misrepresentation and negligent misrepresentation respectively, should be dismissed because Gerber agreed in writing that Gerber could not justifiably rely on Stevens' representations. Stevens' Exhibit B, the Fund's Confidential Private Offering Memorandum, reads in part:

> NO PERSON OTHER THAN THE GENERAL PARTNER HAS BEEN AUTHORIZED TO MAKE REPRESENTATIONS, OR GIVE ANY INFORMATION, WITH RESPECT TO THESE INTERESTS, EXCEPT THE INFORMATION CONTAINED HEREIN, AND ANY INFORMATION OR REPRESENTATION NOT CONTAINED HEREIN OR OTHERWISE SUPPLIED BY THE GENERAL PARTNER IN WRITING MUST NOT BE RELIED UPON AS HAVING BEEN AUTHORIZED BY THE PARTNERSHIP OR ANY OF ITS PARTNERS.

Gerber had a duty to read the Fund's Confidential Private Offering Memorandum before becoming a Fund subscriber and he knew or should have known that he could not justifiably rely on any of Stevens' representations unless Stevens put them in writing. Such representation clauses are binding in New York. Danann Realty Corp. v. Harris, 5 NY2d 317, 320-322, (1959) ("Here, however, plaintiff has in the plainest language announced and stipulated that it is not relying on any representations as to the very matter as to which it now claims it was defrauded. Such a specific disclaimer destroys the allegations in plaintiff's complaint that the agreement was executed in reliance upon these contrary oral representations . . . where a person has read and understood the disclaimer of representation clause, he is bound by it.").

Furthermore, Gerber is a sophisticated investor. According to the Fund's own Confidential Private Offering Memorandum, Gerber "has 25 years of accounting and finance experience, including over 20 years of working with hedge funds, private equity, and traditional asset managers." Gerber had the affirmative duty to do due diligence before investing in the Fund. See Glob. Minerals & Metals Corp. v Holme, 35 AD3d 93, 100 (1st Dept. 2006) ("New York law imposes an affirmative duty on sophisticated investors to protect themselves from misrepresentations made during business acquisitions by investigating the details of the transactions and the business they are acquiring."); Chase Manhattan Bank v N.H. Ins. Co., 304 AD2d 423, 424, (1st Dept. 2003) ("fraud claims cannot be brought by a contracting party who specifically disclaimed reliance on extracontractual representations and indicated that it would make its own investigation of the risks involved").

Thus, Stevens has produced documentary evidence sufficient to establish a defense, and his 3211(a)(1) motion to dismiss is granted as to the third and fourth causes of action, fraudulent misrepresentation and negligent misrepresentation.

Breach of Fiduciary Duty (5th cause of action)

Stevens persuasively argues that the fifth cause of action, for breach of fiduciary duty, should be dismissed. Stevens has presented documentary evidence showing that Gerber waived in writing any claim for breach of fiduciary duty based on an alleged conflict of interest created by Stevens taking other employment. The Fund's Limited Partnership Agreement (Exhibit A), in pertinent part, Section 3.01, reads:

> The General Partner shall devote so much of its time and efforts to the affairs of the Partnership as may, in its judgment, be necessary to accomplish the purposes of the Partnership. Nothing herein contained shall prevent the General Partner, the Investment Manager (as defined below) or any of their respective directors, members, partners, shareholders, officers, employees, agents or affiliates (collectively, the "Affiliated Parties") or any other Partner from conducting any other business, including any business within the securities industry, whether or not such business is in competition with the Partnership. Without limiting the generality of the foregoing, the Affiliated Parties may act as general partner, investment adviser or investment manager for others, may manage funds, separate accounts or capital for others, may have, make and maintain investments in their own name or through other entities, and may serve as an officer, director, consultant, partner or stockholder of one or more investment funds, partnerships, securities firms or advisory firms.

Furthermore, Stevens' Exhibit B, the Fund's Confidential Private Offering Memorandum, reads in part, under the heading "Potential Conflicts of Interest":

> Each of the General Partner and the Investment Manager will use its best efforts in connection with the purposes and objectives of the Partnership and will devote so much of its time and effort to the affairs of the Partnership as may, in its judgment, be necessary to accomplish the purposes of the Partnership. Under the terms of the Partnership Agreement, the General Partner, the Investment Manager, each of their respective directors, members, partners, shareholders, officers, employees, agents and affiliates (hereinafter referred to as the "Affiliated Parties") may conduct any other business, including any business within or outside the securities industry, whether or not such business is in competition with the Partnership . . . Without limiting the generality of the foregoing, the Affiliated Parties may act as general partner, investment adviser or investment manager for others, may manage funds, separate accounts or capital for others, may have, make and maintain investments in their own name or through other entities and may serve as an officer, director, consultant, partner or stockholder of one or more investment funds, partnerships, securities firms or advisory firms. Such other entities or accounts may have investment objectives or may implement investment strategies similar or different to those of the Partnership.

Furthermore Stevens' Exhibit D, Gerber's completed and signed Subscription Agreement, reads in part:

> The Subscriber desires to become a limited partner of the Partnership on the earliest date on which the General Partner elects to accept this subscription (the "Admission Date"). In accordance with the terms of the Limited Partnership Agreement of the Partnership (the "Partnership Agreement"), the Subscriber will make a capital contribution to the Partnership on the Admission Date in the amount set forth below its name at the end of this Subscription Agreement (this "Subscription Agreement") and the Partnership agrees to admit the Subscriber as a limited partner on the Admission Date. The Subscriber must complete this section to indicate its selected option regarding the series of limited partnership interests for which it is subscribing, all as further discussed in the Confidential Private Offering Memorandum of the Partnership[.]

The Subscription Agreement (at paragraph 19) that Gerber signed states, in part, that "[t]his Agreement shall be governed by and construed in accordance with the laws of the State of Delaware." As such, Delaware law governs the breach of fiduciary duty cause of action. See Marino v Grupo Mundial Tenedora, S.A., 810 FSupp2d 601, 607 (SDNY 2011) ("New York applies the internal affairs doctrine to claims for breach of fiduciary duty and, thus, applies the law of the state of incorporation to such claims").

Waivers such as those above are effective under Delaware law. See 6 Del. C. § 17-1101 (Noting "[t]o the extent that, at law or in equity, a partner or other person has duties (including fiduciary duties) to a limited partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement, the partner's or other person's duties may be expanded or restricted or eliminated by provisions in the partnership agreement; provided that the partnership agreement may not eliminate the implied contractual covenant of good faith and fair dealing.")

Thus, Stevens has produced documentary evidence sufficient to establish a defense, and his 3211(a)(1) motion to dismiss is granted as against the fifth cause of action, breach of fiduciary duty.

Unjust Enrichment (6th cause of action) and Quantum Meruit (7th cause of action)
Quasi-contractual remedies, like quantum meruit and unjust enrichment, are unavailable where there exists a valid and enforceable agreement governing the particular subject matter. Kramer v. Greene, 142 AD3d 438, 441 (1st Dept. 2016) ("Generally, quasi-contractual remedies are unavailable where there exists a valid and enforceable agreement governing the particular subject matter.").

Both parties agree that Gerber was hired at a salary of $200,000 annually (it appears to the court that this agreement was oral, as no writings memorializing the agreement have been produced). Thus, there is a valid and enforceable agreement governing the issue of unpaid wages. The only dispute is whether Gerber had agreed to forego his salary for the period from April 1, 2016 through June 30, 2016.

As there is a valid and enforceable contract governing Gerber' wage claim, and, indeed, Gerber seeks damages for his alleged unpaid wages as part of his breach of contract claim against Grays, the complaint fails to state a cause of action for unjust enrichment and quantum meruit as to Gerber's unpaid wages. Accordingly, the sixth cause of action for unjust enrichment, as to unpaid wages *only*, and the seventh cause of action for quantum meruit, shall be dismissed.

The Court notes, however, that that portion of the sixth cause of action for unjust enrichment predicated upon the amount of Fund expenses Gerber paid, and Gerber's allocable portion of the start up and wind down costs, is viable and stands.

In addition, the causes of action for breach of contract against the Fund (1st cause of action) and breach of contract against Stevens (2nd cause of action), stand.

The Court has considered the party's other arguments and find them unavailing and/or non-dispositive.

Conclusion

Motion to dismiss pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) is granted in part and denied in part. The causes of action for fraudulent misrepresentation (3rd cause of action), negligent misrepresentation (4th cause of action), breach of fiduciary duty (5th cause of action), and quantum meruit (7th cause of action), are dismissed in their entirety; the cause of action for unjust enrichment (6th cause of action), is dismissed solely in regard to Gerber's unpaid wage claim. The Clerk is hereby directed to enter judgment accordingly. The remaining causes of action are: breach of contract against the Fund (1st cause of action), breach of contract against Stevens (2nd cause of action), and unjust enrichment to the extent set forth herein (6th cause of action).

Dated: July 14, 2017

Arthur F. Engoron, J.S.C.