

<b>Marco Polo Network Inc. v 75 Broad, LLC</b>
2017 NY Slip Op 32088(U)
October 2, 2017
Supreme Court, New York County
Docket Number: 651373/2017
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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MARCO POLO NETWORK INC.,

Plaintiff,

Index No. 651373/2017

- against -

75 BROAD, LLC and JEMB REALTY CORP.,

Defendants.  
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**Hon. Charles E. Ramos, J.S.C.:**

In motion sequence 001, defendants 75 Broad, LLC ("75 Broad") and JEMB Realty Corporation ("JEMB") (collectively, "Defendants") move to dismiss plaintiff Marco Polo Network Inc.'s ("MPNI") complaint ("Complaint") pursuant to CPLR §§ 3211(a)(1), (3), (5), and (7).

For the reasons set forth below, this Court grants Defendants' motion to dismiss, in its entirety.

**Background**

On December 20, 2006, MPNI, as tenant, entered into a commercial lease with 75 Broad, as landlord ("the Lease") for a portion of the fifteenth floor of the building ("Subject Premises") for a term of ten years and five months (Complaint, ¶¶ 8-10, 22).

75 Broad is located at 75 Broad Street, in lower Manhattan ("the Building"), and is solely owned by JEMB (*Id.*, at ¶¶ 9-10).

In 2003, MPNI launched a global electronic trading network. By 2008, MPNI had garnered a large client base composed of

"almost all the major Wall Street firms, and a number of the premier institutional funds," with its electronic trading platform transacting in over eighty countries (*Id.*, at 26, 29).

In 2009, Goldman Sachs became the anchor investor in Marco Polo Capital Markets LLC ("MPCM"), MPNI's restructured global electronic trading platform (*Id.*, at ¶¶ 13, 30). MPNI then became a holding company with an 80% stake in MPCM (*Id.*, at ¶¶ 13, 30).

On October 29, 2012, Hurricane Sandy hit New York City, causing floods in the Subject Premises' basement, resulting in a loss of electricity, heat, water, and elevator access (Complaint, ¶¶ 41, 44). The Subject Premises' backup generator fuel tanks were submerged in the flooded basement, which prolonged the loss of utilities for four weeks (*Id.*, at ¶ 44).

As a result, MPNI could not access the Building's data center to retrieve MPNI's hard drives and initiate its backup system up until a week after the storm (*Id.*, at ¶¶ 49-51).

On November 5, 2012, MPNI was able to restore its global platform from its backup data center in New Jersey (*Id.*, at ¶ 52). A few days later, MPNI gained remote access to its servers in the Building's data center (*Id.*).

Due to the lapse in service, MPNI's clients lost confidence in the company and fled to other competing electronic trading platforms (*Id.*, at ¶ 55). Allegedly, as a result, MPNI/MPCM immediately lost \$1 million in service revenue (*Id.*, at ¶ 56).

MPNI's customer, Credit Suisse, terminated multi-million-dollar contract negotiations with MPNI for future deals (*Id.*, at ¶ 57). In addition, Morgan Stanley, Bloomberg L.P., and other brokers terminated equity investment discussions with MPNI/MPCM (*Id.*, at ¶ 58).

Due to the business losses, MPCM filed a bankruptcy petition in the United States Bankruptcy Court for the Southern District of New York, resulting in the total loss of value of MPNI's 80% equity position in MPCM (*Id.*, at ¶ 61).

On March 16, 2017, MPNI commenced this action against 75 Broad and JEMB, asserting claims for breach of contract, contractual indemnification, negligent performance of contract, and negligent misrepresentation.

#### Discussion

Defendants move to dismiss the Complaint on the grounds that MPNI lacks standing to maintain the instant action and is an unauthorized foreign corporation doing business in New York. Defendants also maintain that MNPI's breach of contract claims are barred by the Lease between the parties, and that MNPI failed to state claims for negligent misrepresentation, negligent performance of contract, and contractual indemnification.

In distinguishing between a derivative action and a direct action, "a court considers...who suffered the alleged harm" and to whom the benefit of a recovery or remedy would flow (*Serino v*

*Lipper*, 123 AD3d 34, 40 [1st Dept 2014], citing *Yudell v Gilbert*, 99 AD3d 108, 114 [1st Dept 2012]]).

Defendants argue that MPNI does not have standing to assert these claims because MPCM was the entity that operated the assets and suffered, while MPNI merely had an equity stake in MPCM. Defendants argue that the only damages alleged consist of the diminution in the value of MPNI's equity interest in MPCM. Therefore, according to Defendants, MPNI could only bring this claim derivatively on behalf of MPCM, which is impossible because any such claim should be brought by the MPCM bankruptcy estate.

In opposition, MPNI argues that its claims are not derivative in nature because they are based upon 75 Broad's breach of the Lease, which was between MPNI and 75 Broad. Moreover, MPNI maintains that the collapse of MPCM caused direct injury to MPNI because of the reduction of its 80% equity interest in MPCM, which was allegedly reduced to zero as a result of 75 Broad's conduct.

This Court finds that MPNI lacks standing to maintain this action, as MPNI's claims relate to the diminution in value of its equity interest in MPCM, and are therefore derivative in nature. The fact that MPNI was a party to the Lease has no bearing on whether MPNI is the proper party with standing to sue, as the sole damages alleged involve a diminution in value of MPNI's equity stake in MPCM.

"[A]n individual shareholder has no right to bring an action in his own name and on his own behalf for a wrong against a corporation[.] [However, there is an] exception when the wrongdoer has breached a duty owed to the shareholder independent of any duty owing to the corporation wronged" (*Behrens v Metropolitan Opera Assn., Inc.*, 18 AD3d 47, 50 [1st Dept 2005]).

Here, the duty owed by Defendants to MPNI was not independent of any duty owed to MPCM. The Lease was between MPNI and 75 Broad, but MPCM was a permittee of the Lease and suffered damages as a corporation (Tr. 6/19/17, 3:5-7, 6:22-26). Any alleged wrong by Defendants was thus committed against MPCM as a corporation, ultimately resulting in a loss in value to MPNI's equity interest in MPCM. If an individual harm is "embedded in the harm to the corporation, it cannot separately stand" (*Serino*, 123 AD3d at 40).

Moreover, "[t]he lost value of an investment in a corporation is quintessentially a derivative claim by a shareholder" (*Id.*, at 41). Thus, because MPCM is the corporation that suffered the harm, and because MPNI is seeking to recover damages for the diminution in value of its 80% equity interest embedded in MPCM's loss, the asserted claims are improper (*Yudell v Gilbert*, 99 AD3d 108 [1st Dept 2012]). Defendants have established that MPCM, and not MPNI, would benefit from any recovery awarded here. The Court cannot permit MPNI to obtain a recovery that belongs to MPCM.

MPNI's argument that its claims are based on 75 Broad's

alleged breaches of the Lease hold no merit, as the damages sought specifically relate to MPNI's diminution in value of its equity interest in MPCM.

This Court has considered Defendants' remaining arguments but will not address them in light of MPNI's lack of standing.


Accordingly, it is hereby

ORDERED that 75 Broad, LLC's and JEMB Realty Corp.'s motion to dismiss is granted, in its entirety; and Marco Polo Network Inc.'s Complaint is dismissed, in its entirety, with costs and disbursements to 75 Broad, LLC and JEMB Realty Corp. as taxed by the clerk of the court; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

Dated: October 2, 2017

ENTER:



J.S.C.

**CHARLES E. RAMOS**