

RVW Prods. Corp. v Levin

2019 NY Slip Op 32937(U)

October 4, 2019

Supreme Court, New York County

Docket Number: 655390/2018

Judge: Andrea Masley

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM

Justice

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INDEX NO. 655390/2018

RVW PRODUCTIONS CORPORATION and RVW FILMS
LLC,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 002 003

- v -

JOHN LEVIN, ROBERT DISCOLO, RIVER PARTNERS
CAPITAL MANAGEMENT LP, LEVIN CAPITAL
STRATEGIES LP, JOHN LEVIN & COMPANY, ZACHARY
TARICA, FOREST ROAD COMPANY LLC, JOHN AND
JANE DOES 1-10, and ABC ENTITIES 1-10

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 10, 11, 12, 13, 14, 15, 16, 23, 24, 25, 28, 30, 34, 35, 36

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 003) 17, 18, 19, 20, 26, 27, 29, 31, 37

were read on this motion to/for DISMISSAL

Masley, J.:

In motion sequence number 002, defendants Zachary Tarica and Forest Road Company LLC (Forest Road) (collectively, Forest Defendants) move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint. In motion sequence number 003, defendants John Levin, Robert Discolo, River Partners Capital Management LP (River Partners), Levin Capital Strategies LP (Levin Capital), and John Levin & Company (Levin Co) (the entities collectively, Levin Companies) move, pursuant to CPLR 3211 (a) (7), to dismiss the complaint.

Background

The following facts are alleged in the complaint unless otherwise noted, and for purposes of these motions, are accepted as true.

Plaintiff RVW Productions Corporation (RVW) is a Louisiana corporation that produces movies, including the movie at issue here (Movie); nonparty Cathy Beckerman is RVW's principal (NYSCEF Doc. No. [NYSCEF] 24, Complaint, ¶¶ 1, 16). There are several unidentified individuals and corporate entities that also have an ownership interest in RVW including the co-writer of the script for the Movie and one of the producers of the Movie, employed as SAG actor with RVW Productions (Producer) (*id.*, ¶ 16). Plaintiff RVW Films, LLC (RVW Films) is a Delaware limited liability company engaged in the business of writing film scripts, including the Movie (*id.*, ¶ 2).

Defendant Forest Road, a New York limited liability company, is engaged in the business of lending money (*id.*, ¶ 9). Defendant Tarica is the Chief Executive Officer of Forest Road (*id.*, ¶ 8). Defendant River Partners, a New York limited partnership, is in the business of private fund management (*id.*, ¶ 5); defendants Levin Capital and Levin Co, a New York partnership and New York corporation respectively, are both engaged in the business of investment management (*id.*, ¶¶ 6, 7). John Levin and Robert Discolo are principles of the Levin Companies (*id.*, ¶ 3, 4).

On April 7, 2018, at Beckerman's request, the Producer contacted Levin about becoming an equity investor in the Movie; Levin declined because "his wife would kill him' due to the perceived political leanings of the subject matter" (*id.*, ¶ 18).

Nevertheless, Levin requested an investment deck and the Movie's script, both of which

were sent to him via email on April 8, 2018 (*id.*, ¶ 19). RVW ultimately obtained financing for the Movie from other sources (*id.*, ¶ 20).

As customary for movies in production in Louisiana, RVW sought a loan against the Louisiana tax credit offered (*id.*, ¶ 21.) Some of the equity previously committed to the Movie, as well as the post-production financing loan, was contingent on RVW closing a loan against the tax credit (*id.*, ¶ 22.) In May 2018, RVW sought tax credit funding for the Movie's production from Forest Road (*id.*, ¶ 23). Over the course of a few weeks, Beckerman and Tarica negotiated the terms of the tax credit loan agreement (Loan) (*id.*, ¶ 24.) RVW and Forest Road came to an agreement on the terms of the Loan and a closing was scheduled for June 28, 2018 (*id.*, ¶¶ 25, 29).

During a meeting with the Producer on May 22, 2019, Tarica learned that the Producer knew Levin and Discolo (*id.*, ¶ 27). Tarica informed plaintiffs that Levin, Discolo, and the Levin Companies were the majority investors in Forest Road (*id.*). Plaintiff would later learn, from both Discolo and Levin, that Discolo, Levin, and the Levin Companies were never investors in Forest Road (*id.*, ¶ 30).

From May 22, 2018 through June 29, 2018, the day after the Loan was to close, Tarica repeatedly re-affirmed Forest Road's commitment to the Loan, so RVW prepared as though the Loan would close (*id.*, ¶ 26). During this period, Tarica also reaffirmed Levin's shareholder status to plaintiffs via phone and emails (*id.*, ¶ 29). As the closing date got closer, Tarica asked for substantial amounts of information not normally requested for the type of loan sought; RVW provided the requested information, but Tarica continued to request more (*id.*, ¶ 32). When plaintiffs asked Tarica why he needed such information, he told them that Levin and Discolo insisted that it be

provided because they were to make the ultimate decision on the issuance of the Loan (*id.*, ¶ 34). Recognizing that these requests were unusual, RVW looked for other funding (*id.*, 33). Tarica learned of such efforts and assured plaintiffs that the Loan would close and instructed them not to contact other lenders (*id.*, ¶ 33).

On June 28, 2018, the day of the closing, and when RVW's payroll was due, Beckerman, the Producer, Levin, and Discolo had a phone call where Levin suggested that the Levin Companies fund the loan money on better terms than Forest Road (*id.*, ¶ 38). Plaintiffs provided due diligence documentation immediately, and within hours, Discolo contacted plaintiffs to inform them that Levin was going to personally fund the Loan at 9%, a 1% discount from Forest Road (*id.*, ¶¶ 39, 40). Discolo also said that he would wire the first \$500,000 that day, and that he needed wiring instructions (*id.*, ¶ 40). After the instructions were sent, Levin called the Producer and said that Forest Road was not going to lend the money because Tarica had an unpleasant experience with the Producer; Levin then informed the Producer that that he also could not loan the money personally (*id.*, ¶¶ 41, 42).

Beckerman called Tarica about what Levin told the Producer, but Tarica disputed Levin's account and re-affirmed his commitment to the Loan, assuring RVW that the Loan would close the next day, June 29, 2018 (*id.*, ¶¶ 43, 44). Tarica asked that Beckerman and the Producer not speak to Levin or Discolo going forward (*id.*, ¶ 44). The next day, Forest Road informed RVW that it could not do the Loan, refusing to disclose to RVW the reason(s) why (*id.*, ¶ 45).

RVW claims that defendants' actions were intended to string plaintiffs along until the worst possible moment so that they could not get another loan before being

severely damaged (*id.*, ¶ 47). The delay and inability to obtain a tax credit loan caused RVW to lose at least \$1.5 million in equity investments and hundreds of thousands of dollars in post-production financing (*id.*, ¶ 56). Plaintiffs commenced this action against for: (1) tortious interference with business relations and/or prospective business relations (against all defendants); (2) fraud (against all defendants); (3) breach of contract (against Forest Defendants); (4) breach of covenant of good faith and fair dealing (against Forest Defendants); (5) misrepresentation (against all defendants); and (6) civil conspiracy (against all defendants). Defendants move to dismiss all claims pursuant to CPLR 3211.

Discussion

Motion to Dismiss Standard

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [The court] accept[s] the facts as alleged in the complaint as true, [and] accord[s] plaintiff [] the benefit of every possible favorable inference” (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994] [citation omitted]). However, bare legal conclusions and “factual claims which are either inherently incredible or flatly contradicted by documentary evidence” are not “accorded their most favorable intendment” (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]). Dismissal under subsection (a) (1) is warranted where the documentary evidence “conclusively establishes a defense to the asserted claims as a matter of law” (*Leon*, 84 NY2d at 88).

Breach of Contract

“To state a claim for breach of contract, a plaintiff must allege: (1) the parties entered into a valid agreement, (2) plaintiff performed, (3) defendant failed to perform, and (4) damages” (*VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 58 [1st Dept 2013] [citation omitted]). When it is alleged that a purported oral agreement was breached, “plaintiff should specifically state that he is relying upon an ‘oral agreement’ and he should set forth all the relevant terms of that oral agreement” (*Bomser v Moyle*, 89 AD2d 202, 205 [1st Dept 1982]).

Plaintiff alleges that “RVW Productions and Forest Road came to an agreement on the terms of the Loan, and a closing was scheduled” (NYSCEF ¶ 25). There is no allegation that this agreement was reduced to writing. Instead, plaintiffs submit a text message sent by Tarica, which states “discuss 1. Status update 2. What you are doing with Post 3. CAMA execution – new terms are fine, just need sr lender name to be changed to junior senior lender 4. Mezz execution (need that lender to sign something acknowledging that we are senior to him) 5. Terms: a. 10% yr 1,2,4,6,8 quarterly agreed to change year 3 to 10 (per comments) b. backend agreed 2% c. loan amount \$1,544,169 6. Execution of PG from Nick Loeb” (NYSCEF 25, Tarica Text Message). As a matter of law, this text message is not a binding written agreement. The text lists items to “discuss” including contract terms.

Accepting the allegations of the complaint as true, and absent any other evidence, it appears that any alleged agreement was oral. Thus, plaintiffs must specifically state that and set forth the relevant terms of the oral agreement in order to successfully plead the existence of a contract (*Bomser*, 89 AD2d at 205), or alternative,

allege the existence of a written agreement, other than the text message, which is not an agreement at all. Plaintiffs' claim for breach of contract is dismissed with leave to replead.

Breach of the Implied Covenant of Good Faith and Fair Dealing

"There can be no claim of breach of the implied covenant of good faith and fair dealing without a contract" (*Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 463 [1st Dept 2012] [citation omitted]). Here, plaintiffs have failed to sufficiently allege the existence of a contract, and thus, this claim is dismissed. However, plaintiffs have leave to replead this cause of action, provided that they sufficiently alleged, not only existence of a contract, but also "facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff" (*Aventine Inv. Mgmt., Inc. v Canadian Imperial Bank of Commerce*, 265 AD2d 513, 514 [1st Dept 1999] [citation omitted]). The claim may not depend of the same allegations of the breach of contract claim should plaintiffs replead that claim (*Engelhardt v Abraham*, 2011 NY Slip Op 33907[U], *13 [Sup Ct, NY County 2011]).

Tortious Interference

Claim of Tortious Interference with Contract

"A claim of tortious interference with contract requires: (1) the existence of a valid contract between plaintiff and a third party, (2) defendant's knowledge of the contract, (3) defendant's intentional procurement of a breach of the contract without justification, (4) actual breach of the contract, and (5) resulting damages" (*American Preferred Prescription v Health Mgt.*, 252 AD2d 414, 417 [1st Dept 1998] [citation omitted]). First,

this claim cannot stand against the Forest Defendants as there must be an existence of a valid contract between a plaintiff and a third party. Second, any claim that the Levin Defendants (Levin, Discolo and the Levin Companies) interfered with a contract between plaintiffs and the Forest Defendants must be dismissed as plaintiffs have not sufficiently plead the existence of a valid contract. However, as to the Levin Defendants, plaintiffs are granted to leave to replead if they sufficiently alleged a valid contract.

Claim of Tortious Interference with a Prospective or Existing Business Relationship

"To make out a claim for tortious interference with business relationships, a plaintiff must show that the defendant interfered with the plaintiff's business relationships either with the sole purpose of harming the plaintiff, or by means that were unlawful or improper" (71 *Pierrepoint Assocs. v 71 Pierrepoint Corp.*, 243 AD2d 625, 626 [2d Dept 1997] [citations omitted]).

Plaintiffs allege that, due to Levin and Discolo's political opinions and personal animus, they used their influence over the Levin Companies to tortiously interfere with the business relations between plaintiffs and the Forest Defendants, knowing failure to secure the Loan would be extremely harmful to the production of the Movie (NYSCEF 24, ¶¶ 62-64). Plaintiffs further allege that Levin and Discolo contacted Forest Road with the express purpose of killing the Loan and inflicting as much damage as possible to plaintiffs (*id.*, ¶ 63). At this stage, plaintiffs have sufficiently alleged that the Levin Defendants interfered with plaintiffs' business relationship with the Forest Defendants for the sole purpose of intentionally harming the plaintiffs.

"To state a claim for tortious interference with prospective business relations, a plaintiff must allege: "(1) the existence of a business relationship between the plaintiff and a third party; (2) the defendants' interference with that business relationship; (3) that the defendants acted with the sole purpose of harming the plaintiff or used dishonest, unfair, improper, or illegal means that amounted to a crime or independent tort; and (4) that such acts resulted in injury to the plaintiff's relationship with the third party" (*Schorr v Guardian Life Ins. Co. of Am.*, 44 AD3d 319, 323 [1st Dept 2007] [citations omitted]).

Plaintiffs allege that the Forest Defendants tortiously interfered with plaintiffs' prospective business advantages by "making misrepresentations regarding other potential loans" (*id.*, ¶ 66). Besides this conclusory allegation, plaintiffs do not sufficiently allege which lenders the Forest Defendants interfered with and that the interference was with the sole purpose of harming the plaintiff, or by means that were unlawful or improper (*Liberty v Coursey*, 2016 NY Slip Op 31940[U], *12 [Sup Ct, NY County 2016], citing *Parekh v Cain*, 96 AD3d 812,816 [2d Dept 2012]). Thus, this claim is dismissed as to the Forest Defendants only.

Fraud

To state a cause of action for fraud, a plaintiff must allege (1) "a representation of material fact"; (2) "the falsity of the representation"; (3) "knowledge by the party making the representation that it was false when made"; (4) "justifiable reliance by the plaintiff"; and (5) "resulting injury" (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003] [citations omitted]). Pursuant to CPLR 3016, "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail."

Claim of Fraud Against Forest Defendants

Plaintiffs alleges that "Tarica made a series of misrepresentations in May and June of 2018 to RVW Productions, including re-affirming that the Loan would close as promised, up until he told RVW Productions on or about June 29, 2018 that Forest Road would not loan the money" (NYSCEF 24, ¶ 73).

Plaintiffs do not allege justifiable reliance. In fact, the allegations in the complaint contradict any claim of justifiable reliance, because plaintiffs allege that they found Tarica's information requests unusual, believed Tarica was dragging out the closing date, and sought other loan commitments (*id.*, ¶¶ 32, 33, 34, and 38). Plaintiffs cannot state that they justifiably relied on Tarica's alleged misrepresentation when they had admitted concerns and took actions to seek other lending.

Claim of Fraud Against Levin Defendants

Plaintiffs allege that Levin and Discolo represented material facts when they told plaintiffs on June 28 and June 29, 2018, that they would help facilitate the closing of the Loan; that Forest Road would not close on the Loan because of its "unpleasant experience" with the Producer; and that the Levin Companies would fund the loan monies (*id.*, ¶ 70.) Additionally, Levin allegedly made intentional misrepresentations about the Levin Companies' interest in funding the Movie on April 7, 2018, when he told Plaintiffs that Levin would fund the Loan at a 1% discount from the agreement with Forest Road (*id.*, ¶ 72.) Plaintiffs allege that such representations were false because

Levin Defendants never intended to personally furnish the loan monies or help facilitate the closing with Forest Road.

Plaintiffs again fail to allege justifiable reliance. Plaintiffs admittedly had concerns about the Loan. Accordingly, they cannot simultaneously viably allege that they justifiably relied on the Levin Defendants' alleged conflicting misrepresentations that they would help facilitate the closing of the Loan; that plaintiffs should seek a loan from others; that Levin would make a loan, and, also, that the Loan would not close. These conflicting statements alone negate any justifiable reliance.

As to the alleged misrepresentations that Levin would fund the Loan, the first misrepresentation alleged was in April 2018, when subsequently Levin said he would not fund the Loan and plaintiff sought other funding, so plaintiffs cannot justifiably rely on that statement. Further, as to the misrepresentations allegedly made by the Levin Defendants on June 28, 2018, plaintiffs admit that Levin not only suggested that he could fund the Loan but also suggested that one of the Producer's trusts fund the Loan (*id.*, ¶ 38). Plaintiffs cannot allege justifiable reliance when they were admittedly aware of Levin's alleged back and forth in making a commitment to fund the Loan.

The fraud cause of action is dismissed against all defendants.

Misrepresentation

"[T]o state a claim for fraudulent misrepresentation, a plaintiff must make a prima facie showing of "a misrepresentation of a material omission of fact which was false and known to be false by the Defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material injury, and injury" (*EVE Meta, LLC v Siemens Convergence Creators Corp.*, 2018 NY

Slip Op 32530[U], *13-14 [Sup Ct, NY County 2018] [citation omitted]). Plaintiffs' claim for misrepresentation is based on the same allegations as their fraud claim, and thus for the reasons stated above, this claim is also dismissed.

Civil Conspiracy

Plaintiffs claim that "[d]efendants . . . act[ed] in concert together, and agree[d] among themselves, to cause injury and damage to and commit unlawful acts against Plaintiffs, namely: to pull funding of the Movie at the last possible moment with the express purpose of inflicting maximum harm to Plaintiffs and the Movie" (NYSCEF 24, ¶ 16).

"[T]o establish a claim of civil conspiracy, the plaintiff must demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury" (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010] [citation omitted]). Civil conspiracy is not recognized as an independent tort. Plaintiff's civil conspiracy claim is inadequately pleaded. Plaintiffs only asserts conclusory allegations that defendants knowingly participated in a conspiracy. Plaintiff sets forth no allegations which illustrate an agreement to conspire. Merely alleging that Discolo and Levin influenced Tarica to not furnish the Loan is insufficient. The civil conspiracy claim is dismissed.

Accordingly, it is

ORDERED that defendants Zachary Tarica and Forest Road Company LLC's motion to dismiss the complaint is granted and the complaint is dismissed against said

defendants with leave to replead the third (breach of contract) and fourth (breach of covenant of good faith and fair dealing) in accordance with this decision within 30 days of entry of the court's decision and order entry on NYSCEF; and it further

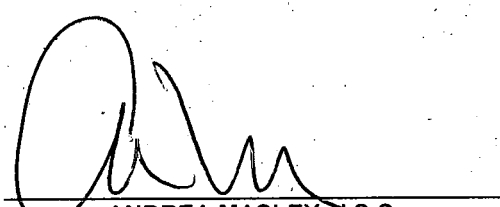
ORDERED that defendants John Levin, Robert Discolo, River Partners Capital Management LP, Levin Capital Strategies LP, and John Levin & Company's motion to dismiss the complaint is granted in part and the first (only as to tortious interference with contract), second (fraud), fifth (misrepresentation), and sixth (civil conspiracy) causes of action are dismissed and plaintiffs are granted with leave to replead the tortious interference with contract cause of action in accordance with this decision within 30 days of entry of the court's decision and order entry on NYSCEF; and it is

ORDERED that, if plaintiffs fail to serve and e-file an amended complaint within 30 days of entry of the court's decision and order entry on NYSCEF, leave to replead shall be deemed denied, and defendants' counsel is to e-file and email SFC-PART48@nycourts.gov an affirmation attesting to such non-compliance; and it is further

ORDERED that defendants John Levin, Robert Discolo, River Partners Capital Management LP, Levin Capital Strategies LP, and John Levin & Company time to answer the first cause of action of this complaint is extended until 50 days of entry of the court's decision and order entry on NYSCEF.

Motion Seq. No. 002

10.4.19
DATE


ANDREA MASLEY, J.S.G.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

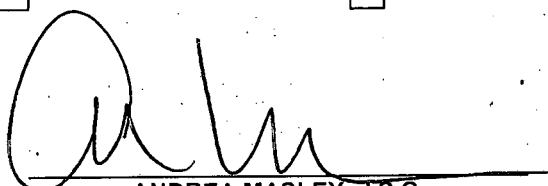
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INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE

Motion Seq. No. 003

10.4.19
DATE


ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE