

**Tratado De Libre Comercio, LLC v Splitcast Tech.
LLC**

2019 NY Slip Op 33507(U)

November 25, 2019

Supreme Court, New York County

Docket Number: 652650/2016

Judge: Gerald Lebovits

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. GERALD LBOVITS PART IAS MOTION 7EFM

Justice

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INDEX NO. 652650/2016

TRATADO DE LIBRE COMERCIO, LLC, and PEDRO CHAVEZ,

MOTION SEQ. NO. 008

Plaintiffs,

- v -

SPLITCAST TECHNOLOGY LLC, SPLITCAST INC., SPLITCAST
TECNOLOGIA, SPA, AURUS S.A. ADMINSTRADORA GENERAL
DE FONDOS, RAIMUNDO CERDA, CAMERON WENDT, HUGO
NEIRA, FELIPE ARREDONDO, JOSE FLORES, JAVIER
SALCEDO, IGNACIO LEON, and DOES 1-10, inclusive,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 1, 10, 69, 72, 98, 99, 107, 119, 141, 151, 166, 167, 168, 172, 173, 183, 184, 185

were read on this motion to DISMISS

CKR Law LLP, New York (Michael James Maloney, Rosanne Felicello, and Nydia Shahjahan of counsel), for plaintiffs.

Comar LLP, New York (D. Inder Comar and Rajeev E. Ananda of counsel), for defendant Cameron Wendt.

Gerald Lebovits, J.:

Defendant Cameron Wendt moves under CPLR 306-b, 308, 313, and 3211 (a) (5), (a) (7), and (a) (8) for an order dismissing all causes of action against himself. Plaintiffs, Tratado de Libre Comercio, LLC, and Pedro Chavez, cross-move for an order under CPLR 2215, 7503, and 2201 to stay the proceedings or, in the alternative, a traverse hearing to address service of process. Wendt's CPLR 3211 (a) (7) motion is granted . Plaintiffs' cross-motion is denied.

Background

Plaintiffs and defendants Splitcast, Inc., Splitcast Technology LLC, and Splitcast, SpA (collectively Splitcast), engaged in a business venture in which plaintiffs invested in the Splitcast project. Wendt was an independent contractor, acting as Splitcast's U.S. representative pending formation of a U.S. Splitcast entity.

Plaintiffs commenced this action on May 17, 2016. (*See* Summons & Compl., NYSCEF No. 1.) Plaintiffs allege that along with other defendants, Wendt enriched himself at the expense of plaintiffs, deceived them by failing to disclose material corporate action, used the venture to commit torts and wrongful acts against them, and participated in, directed, and approved of conduct that harmed plaintiffs. (*See* Am. Compl., NYSCEF No. 69, at ¶ 14.) Plaintiffs allege that

Wendt, as U.S. representative of Splitcast, forwarded written materials regarding funding allocated to Splitcast. (*See id.* at ¶ 26.) Plaintiffs further allege that they relied on Wendt's representation, in the form of written materials, that defendant AURUS had made an investment in Splitcast SpA. Plaintiffs allege that based on this representation, they decided to lend money to Splitcast SpA; and that negotiations with Wendt and other defendants led to an advisory agreement between plaintiff Chavez and Splitcast. (*See id.* at ¶¶ 40-41.)

Plaintiffs assert claims for conversion, breach of fiduciary duty, fraud and deceit, breach of contract, money had and received, an imposition of a constructive trust, and a permanent injunction against defendant Wendt. Plaintiffs' opposition papers argue that as Wendt held himself out to be an officer of Splitcast, the alleged injurious actions must be attributed to him. (*See* NYSCEF 183, at 9.)

Discussion

Wendt argues that plaintiffs failed to serve him timely and properly, and thus that this court lacks personal jurisdiction over him under CPLR 3211 (a) (8); and argues in the alternative that the complaint should be dismissed for failure to state a cause of action under CPLR 3211 (a) (7). This court concludes that even assuming plaintiffs succeeded in effecting service on Wendt, plaintiffs' complaint fails to state a cause of action against him.

Conversion

Plaintiffs' first cause of action sounds in conversion. Plaintiffs seek return of the \$200,000 in funds loaned to the venture and claim \$500,000 in damages. To state a cause of action for conversion, a plaintiff must allege its "possessory right or interest in the property," and "defendant's dominion over the property or interference with it, in derogation of plaintiff[s]' rights." (*Dobroski v Bank of Am., N.A.*, 65 AD3d 882, 885 [1st Dept. 2009].)

Here, plaintiffs have not alleged that the funds loaned by plaintiffs to the Splitcast venture were paid to Wendt directly, such that he could be said to exercise dominion over those funds. Although plaintiffs also claim that defendants wrongfully interfered with plaintiffs' interest in certain intellectual property, plaintiffs have not alleged that *Wendt*, in particular, exercised control over that intellectual property, either. Since plaintiffs have failed to allege that Wendt exercised dominion over the allegedly converted property, this court dismisses plaintiffs' conversion claim against Wendt. (*See Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 [1st Dept. 2010].)

Breach of Fiduciary Duty

Plaintiffs' second cause of action is for breach of fiduciary duty. Wendt argues that plaintiffs' breach-of-fiduciary claim against him should be dismissed because this court already has held that no fiduciary relationship existed between plaintiffs and other defendants (*see* NYSCEF No. 151, at 9) and because plaintiffs have not put forward a basis to find a distinct fiduciary relationship between plaintiffs and Wendt individually. The court agrees. "A fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give

advice for the benefit of another upon matters within the scope of the relation.” (*MP Cool Invs. Ltd. v Forkosh*, 142 AD3d 286, 292 [1st Dept. 2016].) The relationship here is not one of “a higher level of trust than normally present in the marketplace between those involved in arm’s length business transactions.” (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11,19 [2005].) At most, plaintiffs have alleged only that Wendt forwarded written materials about the venture. That, standing alone, does not give rise to a fiduciary relationship. Plaintiffs’ second cause of action is dismissed as to Wendt.

Fraud and Deceit

Plaintiffs’ third cause of action sounds in fraud. Plaintiffs assert that representations were made at the closing of the note purchase agreement, according to which the funds plaintiffs lent were to be secured by the venture’s intellectual property. (*See* NYSCEF No. 68, at ¶ 98.) But this court previously dismissed plaintiffs’ fraud claim as against other defendants, holding that the claim merely duplicated plaintiffs’ breach-of-contract claim and that plaintiffs had disclaimed reliance in the note purchase agreement itself on extrinsic representations by defendants, thus foreclosing a fraud claim premised on alleged extrinsic misrepresentations. (*See* NYSCEF No. 151, at 10.) The allegations as to Wendt similarly duplicate plaintiffs’ breach-of-contract claim. Further, plaintiffs have failed to allege that Wendt knowingly misrepresented a material fact or that plaintiffs justifiably and detrimentally relied on any such misrepresentation. (*See Pope v Saget*, 29 AD3d 437, 441 [1st Dept. 2006].) Plaintiffs’ fraud claim against Wendt is dismissed.

Breach of Contract

With respect to plaintiffs’ fourth cause of action (for breach of contract), plaintiffs have not alleged that any contract between themselves and Wendt ever existed. (*See* NYSCEF No. 69, at 28.). Additionally, the alleged breach of the promissory note, consulting agreement, note purchase agreement, and amended advisory agreement did not involve Wendt. Plaintiffs’ breach-of-contract claim against Wendt is dismissed.

Money Had and Received

In plaintiffs’ fifth cause of action they allege that defendants received and benefitted from \$500,000 from plaintiff Tratado and that equity should bar defendants from retaining that money. A had-and-received claim requires proof that, absent agreement, a party possesses money it should not retain and which belongs to another. (*See Melcher v Apollo Med. Fund Mgt. L.L.C.*, 105 AD3d 15, 27 [1st Dept. 2013].) Plaintiffs have not alleged that Wendt, in particular, was paid the \$500,000 or that he ever possessed those funds.

Imposition of a Constructive Trust

A court will not impose a constructive trust absent “a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, and unjust enrichment.” (*Abacus Fed. Sav. Bank v Lim*, 74 AD3d 472,474 [1st Dept. 2010].) This court has already dismissed plaintiffs’ claim for a constructive trust as against other defendants because of plaintiffs’ failure to establish a fiduciary relationship between the parties. (*See* NYSCEF No. 151, at 9.) Here, plaintiffs’

allegations do not satisfy the requirements for a constructive-trust remedy as against Wendt, either. Plaintiffs' sixth cause of action is dismissed as to Wendt.

Permanent Injunction

Plaintiffs state in their seventh cause of action that they are entitled to an injunction enjoining the conveyance of the venture's intellectual property. But they do not allege that Wendt has that property or that he helped keep plaintiffs from the property. (*See Lemle v Lemle*, 92 AD3d 494, 500 [1st Dept. 2012].) Plaintiffs' request for a permanent injunction against Wendt is dismissed.

Conclusion

In light of plaintiffs' failure to state any cause of action against Wendt, plaintiffs' claims against him are subject to dismissal under CPLR 3211 (a) (7), irrespective of any issues of service and personal jurisdiction.

Accordingly, it is hereby

ORDERED that the motion of defendant Wendt to dismiss plaintiffs' complaint as against him, pursuant to CPLR 3211, is granted and the complaint is dismissed in its entirety as against Wendt, with costs and disbursements to Wendt as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiffs' cross-motion to stay the proceeding is denied; and it is further

ORDERED that counsel for Wendt shall serve a copy of this order with notice of entry upon all parties and on the Office of the County Clerk, which is directed to enter judgment accordingly.

11/25/2019
DATE



GERALD LEBOVITS, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE