SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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INDEX NO. 654414/2018

BENNETT CAPITAL MANAGEMENT LLC, INDIO ENTERTAINMENT LLC, INDIO ENTERTAINMENT FUND LLC, INDIO ENTERTAINMENT FUND 1LLC, VERNON WEST, PATRICK TILLEY, and PALAWAN INVESTMENTS,

MOTION DATE 12/31/2018

MOTION SEQ. NO. 001

Plaintiffs,

- v -

PHILMORE ANDERSON, SAHARA ENTERTAINMENT LLC, JAY SINISCALCHI, JJS ENTERTAINMENT LLC, CENTAUR ENTERTAINMENT LLC, HARPER PARKER ENTERTAINMENT VENTURE LLC, JOHN AND JANE DOE UNKNOWN INDIVIDUALS, and JOHN AND JANE DOE UNKNOWN ENTITIES,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56. 57, 58. 59, 60, 61

were read on this motion to DISMISS

Law Offices of Donald S. Domitrz, Great Neck, NY (Donald S. Domitrz of counsel), for plaintiffs.
Piliero & Associates PLLC, New York, NY (Robert D. Piliero of counsel), for defendants Philmore Anderson, Sahara Entertainment LLC, Jay Siniscalchi, JJS Entertainment LLC, Centaur Entertainment LLC, and Harper Parker Entertainment Ventures LLC.

Gerald Lebovits, J.:

This case involves allegations that defendants fraudulently induced plaintiffs to invest millions of dollars in an enterprise that would use defendants' putative rights to purchase tickets to Broadway shows and other events in order to garner profits from resale of the tickets on the secondary market—though defendants allegedly never had such rights and allegedly planned to pocket the money rather than purchase any tickets.

Defendants now move to dismiss the complaint in its entirety under CPLR 3211 (a) (1) and (a) (7). Their motion is granted in part and denied in part.

BACKGROUND

According to the allegations of the complaint, in 2017 defendant Philmore Anderson introduced nonparty Peter Bennett to defendants Jay Siniscalchi and Siniscalchi's company, JJS Entertainment, LLC. Anderson described Siniscalchi and JJS to Bennett as experienced ticket brokers with strong ties to major producers, theatre chains, and entertainment corporations. Siniscalchi and JJS represented to Bennett that they had contractual rights to purchase bulk tickets to Harry Potter and the Cursed Child, Hello Dolly, a prize fight between Conor McGregor and Floyd Mayweather fight, and Bruce Springsteen on Broadway—and that they could then profitably resell those bulk tickets on the secondary market.

Plaintiffs allege that based on these representations, Bennett agreed to form a joint venture with Anderson for purposes of purchasing and reselling tickets to these and other events. The joint venture, plaintiff Indio Entertainment, LLC, would be half-owned by an LLC controlled by Bennett, plaintiff Bennett Capital Management, LLC, and half-owned by an LLC controlled by Anderson, defendant Sahara Entertainment LLC. Anderson was appointed as Indio's CEO and co-manager; Bennett was appointed as Indio's CFO and co-manager.

Between June 2017 and December 2017, Indio entered into fourteen agreements with JJS under which Indio would fund JJS's purchase of tickets to various events for later resale. Bennett raised a total of $2,692,500 from twelve investors (including plaintiffs Bennett Capital Management, Vernon West, Patrick Tilley, and Palawan Investments) to cover the costs of these ticket purchases.

Plaintiffs allege that it gradually became clear to them that defendants had not purchased these tickets as promised, had no intention to purchase the tickets, and had instead simply walked away with the money provided to JJS by Indio.

Plaintiffs brought this action, raising claims for breach of fiduciary duty, fraud, deceptive business practices, and breach of contract. Defendants now move to dismiss the amended complaint under CPLR 3211 (a) (1) and (a) (7).

DISCUSSION

When ruling on a CPLR 3211 (a) (7) motion to dismiss, this court must accept as true the facts as alleged in the pleadings and submissions in opposition to the motion, accord the non-moving party the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. (*See Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Services, Inc.*, 20 NY3d 59, 63 [2012].)

In assessing a motion under CPLR 3211 (a) (1), the motion may be granted "only where the documentary evidence utterly refutes [the non-moving party'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].) "One example of such proof is an unambiguous contract that indisputably undermines the asserted causes of action." (*Whitebox*, 20 NY3d at 63.)

A. The Branch of Defendants' Motion to Dismiss Plaintiffs' Breach of Fiduciary Duty Claims Against Anderson

To state a cause of action for breach of fiduciary duty, "plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct." (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 [1st Dept 2011].) Under Limited Liability Company Law § 409 (a), a manager of a company has a statutory duty to perform "in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances." (*Nathanson v Nathanson*, 20 AD3d 403, 404 [2d Dept 2005].)

Plaintiffs' allegations here state a breach-of-fiduciary-duty claim. It is undisputed that since Anderson owned 50% of Indio and served as its CEO and managing member, he owed plaintiffs a fiduciary duty. Plaintiffs adequately allege that Anderson breached that duty by (i) introducing Siniscalchi to Indio and vouching for him as trustworthy, while concealing from plaintiffs that Siniscalchi was reputed to have a prior bad history of contract relationships with other companies and individuals; (ii) falsely downplaying the role of an associate of Siniscalchi's (Joseph Meli) in the business, to allay plaintiffs' doubts about Meli in light of fraud allegations against him; (iii) committing these material omissions and misrepresentations to protect Anderson's own economic interests at the expense of Indio and its investors; (iv) receiving $90,000 from Siniscalchi and JJS and lying to plaintiffs about the basis for that payment; and (v) generally concealing his self-dealing from Indio.

Plaintiffs also adequately allege that Anderson's misrepresentations and material omissions contributed to plaintiffs' decision to contract with Siniscalchi and invest millions in Siniscalchi's ticket-resale scheme, thereby allegedly causing plaintiffs to suffer damages when the scheme proved to be fraudulent.

Defendants assert that to state a breach of fiduciary duty claim, plaintiffs were required to plead that "Indio would not have entered into the transactions with JJS *but for* Anderson's alleged non-disclosures." (NYSCEF No. 32, at 6.) That is not correct. Plaintiffs here were instead required only to plead that Anderson's conduct "was a substantial factor in causing an identifiable loss." (*Twin City Fire Ins. Co. v Arch Ins. Grp., Inc.*, 143 AD3d 533, 533 [1st Dept 2016].[1]) Taking the allegations in the complaint as true and reading them in the light most favorable to plaintiffs (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]), plaintiffs have both explained how Anderson's conduct was a substantial factor in inducing them to invest and contract with Siniscalchi, and identified the losses that they suffered as a result.

[1] The language from *Twin City* quoted by defendants addressed only plaintiff's *tortious interference* claim in that action, not its fiduciary-duty claim. (*See Twin City*, 143 AD3d at 534, *aff'g* 2015 NY Slip Op 31586 [U], at *9 [Sup Ct, NY County Aug. 21, 2015].)

Defendants also argue that plaintiffs' breach of fiduciary duty claim should be dismissed as duplicative of plaintiffs' second cause of action for fraudulent concealment. The court declines to dismiss plaintiffs' adequately pleaded breach-of-duty claim on this ground.

B. The Branch of Defendants' Motion to Dismiss Plaintiffs' Fraudulent Concealment Claims as Against Anderson

Plaintiffs' second cause of action alleges that Defendant Anderson, with Defendant Siniscalchi's inducement, fraudulently concealed material information to plaintiffs' detriment. Defendants argue that this cause of action should be dismissed under CPLR 3211 (a) (7) as duplicative of the breach-of-duty claim. This court agrees.

To state a fraud claim based upon allegations of concealment of material information, a plaintiff must allege among other things that the defendant had a duty to disclose that information. (*See Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [1st Dept 2006].) Here, the only duty to disclose that plaintiffs allege derives from Anderson's asserted fiduciary duty to Indio and the other plaintiffs. Plaintiffs' fraudulent-concealment claim thus merely repeats their breach-of-duty claim, and is subject to dismissal as duplicative.

C. The Branch of Defendants' Motion to Dismiss Plaintiffs' General Business Law § 349 Claims Against Siniscalchi and JJS

Plaintiff's third cause of action alleges that Defendants Siniscalchi and JJS violated General Business Law § 349 by engaging in deceptive and unlawful business practices—in particular the various (allegedly) false statements that led plaintiffs to invest close to $3 million in Siniscalchi's (alleged) fraudulent ticket-buying scheme.

To state a cause of action under GBL § 349, a plaintiff must allege that the defendant's acts are "directed to consumers, that they are deceptive or misleading in a material way and that plaintiff has been injured." (*Zurakov v Register.Com, Inc.*, 304 AD2d 176, 180 [1st Dept 2003].) At the threshold, plaintiff must "charge conduct that is consumer oriented." That conduct, though it need not be repetitive or recurring, must still "have a broad impact on consumers at large." (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995].) Conversely, "[p]rivate contract disputes unique to the parties . . . would not fall within the ambit of [GBL § 349]." (*Id.*)

This court agrees with defendants that the conduct in this case pertains only to a private transaction between Indio, Siniscalchi, and JJS, rather than affecting the public at large. Plaintiffs argue that Bennett and the other plaintiffs acted as consumers in purchasing tickets (or rights to tickets from defendants); but the creation of an LLC as a vehicle to invest in a ticket-resale enterprise, and the investment by the LLC's members of almost three million dollars in that enterprise, is hardly an example of ordinary "consumer" conduct. Nor do plaintiffs otherwise allege that defendants' allegedly deceptive conduct was "directed to consumers" or would affect

"similarly situated consumers," as GBL § 349 requires. (*Cruz v NYNEX Info. Resources*, 263 AD2d 285, 290 [1st Dept. 2000].)

Siniscalchi and JJS's motion to dismiss the GBL § 349 claim against them under CPLR 3211 (a) (7) is granted.

D. The Branch of Defendants' Motion to Dismiss Plaintiffs' Fraud Claims as Against All Defendants

In plaintiffs' fourth cause of action, they allege that all defendants committed fraud by organizing and perpetrating a fraudulent ticket reselling scheme upon plaintiffs, to plaintiffs' detriment. To state a cause of action for fraud, a plaintiff must "show a material misrepresentation of an existing fact, made with knowledge of its falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages." (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 293 [1st Dept 2011].)

Plaintiffs allege that defendants intentionally misrepresented Siniscalchi's ability to purchase rights to tickets to induce plaintiffs to raise and provide funds to defendants for these tickets. The amended complaint alleges, among other things, that at the time that Anderson and Siniscalchi represented to Bennett that JJS had contractual rights to purchase large blocks of tickets for certain Broadway shows and other events, JJS did not *exist* as a corporation—*i.e.*, that Siniscalchi did not incorporate JJS until *after* defendants made these representations to Bennett to induce him and other plaintiffs to invest in defendants' ticket-buying scheme, and indeed after the parties executed the first ticket-buying agreement. Plaintiffs further allege that in reliance upon defendants' false representations, they invested large sums of money to fund JJS's purchases of blocks of tickets, but that those purchases have never occurred, leaving plaintiffs in the lurch.

This court concludes that plaintiffs' allegations detail defendants' asserted false representations and fraudulent intent with sufficient specificity to satisfy CPLR 3016. (*Cf. Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008] [noting that "where the concrete facts are peculiarly within the knowledge of the [defendants] charged with the fraud, it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings"].)

The court does not agree with defendants' contention that this fraud claim should be dismissed under CPLR 3211 (a) (7) because it merely duplicates plaintiffs' cause of action for breach of contract (discussed below). Plaintiffs allege not only that defendants were "not sincere when it promised to perform under the contract[s]," but also that plaintiffs were "induced to enter into" those contracts in the first place because "defendant[s] misrepresented material facts" about their ticket-buying scheme, such as defendants' reputations in the production industry and their ability to purchase the rights to tickets. (*First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 291 [1st Dept 1999].) These allegations, though they involve "the same circumstances" that

"also give rise to the plaintiff[s'] breach of contract claim," state a separate "claim for fraud." (*Id.* at 291-292.)

Defendants assert that this claim must be dismissed as against Anderson and Siniscalchi individually because plaintiffs have not alleged a basis to hold them personally liable. But the complaint alleges that both Anderson and Siniscalchi harmed plaintiffs by knowingly making false representations to them in order to induce plaintiffs to invest in Indio and contract with JJS, and later to allay plaintiffs' suspicions about the ticket purchases supposedly made by JJS. These allegations are sufficient to state a fraud cause of action against Anderson and Siniscalchi individually, as well as against JJS.

Defendants also argue that this claim must be dismissed for the same reason as against defendants Sahara, Centaur Entertainment LLC, and Harper Parker Entertainment Venture LLC. This court agrees. Although the amended complaint alleges that Anderson and Siniscalchi *used* these entities to aid their fraudulent scheme, there is no allegation that anyone acting on behalf of the entities themselves committed any material misrepresentation or omission. Plaintiffs thus cannot state a fraud claim against Sahara, Harper, and Centaur.

E. The Branch of Defendants' Motion to Dismiss Plaintiffs' Breach of Contract Claim Against Siniscalchi and JJS

Plaintiffs' fifth cause of action seeks damages for breach of contract. Plaintiffs allege that they provided the funds called-for under their contracts in order to cover the purchase of blocks of tickets, but that Siniscalchi and JJS failed to purchase the tickets, as required.

Defendants argue that this cause of action must be dismissed as against Siniscalchi under CPLR 3211 (a) (7), because he was not a party to the contracts. This court agrees. The contracts at issue were entered into between Indio and JJS. Siniscalchi is not personally a party to any of the contracts. At most, he is the majority owner of JJS. Plaintiffs fail to allege any basis to hold him personally liable for JJS's contracts.

Defendants also assert that the breach of contract claim should be dismissed as against JJS under CPLR 3211 (a) (1), because the contracts on their face refute plaintiffs' breach-of-contract allegations. Defendants contend in particular that the contracts do not impose a deadline for performance of their obligations, making it impossible for defendants to have breached those obligations. (*See* NYSCEF No. 32, at 13-14.) Each ticket-buying contract, however, contains a term providing that if defendants fail to perform their obligation to purchase tickets by a specified date, plaintiffs are entitled to return of their investment *and* to 8.5% annual interest on that sum. Plaintiffs allege that in addition to failing to purchase tickets as required by the contracts, defendants also have neither returned plaintiffs' investments nor paid the specified

interest on those investments. These allegations suffice to state a claim for breach of defendants' contractual obligation to return plaintiffs' principal investment with interest.[2]

F. The Branch of Defendants' Motion to Dismiss All Claims Brought by Certain Plaintiffs

Finally, defendants contend that all of the claims of some of the plaintiffs should independently be dismissed under CPLR 3211 (a) (7), essentially because those plaintiffs had no interactions with the defendants that could conceivably give rise to a cause of action.

Defendants first challenge the claims brought by plaintiffs Indio Entertainment Fund, LLC and Indio Entertainment Fund 1, LLC. Defendants argue that these plaintiffs were merely wholly owned subsidiaries of Indio that did not themselves contract with JJS nor otherwise have contact with defendants that might give rise to a cause of action. This court agrees that these plaintiffs' claims should be dismissed for this reason.

Defendants also challenge the claims brought by the various investors in Indio—plaintiffs Bennett Capital Management, Palawan Investments, Patrick Tilley, and Vernon West. Defendants argue that these plaintiffs may not maintain any causes of action against defendants because "any legal rights they might have had are entirely derivative of Indio's rights," and because any legal duties owed by defendants were "duties owed to Indio, not to" these plaintiffs. (NYSCEF No. 32, at 15.) The amended complaint, however, adequately alleges that these plaintiffs, in reliance on material misrepresentations and omissions by Anderson, Siniscalchi, and JJS, invested money in Indio to fund the purchase of tickets, and were injured as a result when JJS kept that money without purchasing tickets. These allegations state claims that are not merely derivative of Indio's causes of action. To be sure, the damages claimed by Indio and by its investors appear to overlap; and there may well be a need at a later stage of the action to take steps to limit the potential for double recovery. But that possibility does not warrant dismissal of these plaintiffs' claims at the pleading stage.

Accordingly, for the foregoing reasons it is hereby

ORDERED that the branch of defendants' motion to dismiss all claims brought by plaintiffs Indio Entertainment Fund, LLC and Indio Entertainment Fund 1, LLC is granted, and the claims of these plaintiffs are dismissed; and it is further

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[2] Defendants argue that they necessarily could not have breached that term in several of the contracts, because the date specified for defendants to repay principal plus interest is *before* the execution date of the contract itself. (*See* NYSCEF No. 61, at 10.) This court concludes that the facial impossibility of proper performance under the referenced contracts merely raises an ambiguity as to the meaning of this contractual term (and thus of defendants' contractual obligations), which should be left to resolve on a more-developed record rather than at the pleading stage.

ORDERED that the branch of defendants' motion to dismiss all claims brought by plaintiffs Bennett Capital Management, Palawan Investments, Patrick Tilley, and Vernon West, is denied; and it is further

ORDERED that the branch of defendants' motion to dismiss the breach of fiduciary claim that has been asserted by the remaining plaintiffs against defendant Philmore Anderson is denied; and it is further

ORDERED that the branch of defendants' motion to dismiss the fraudulent concealment claim that has been asserted by the remaining plaintiffs against defendant Anderson is granted, and that claim is dismissed; and it is further

ORDERED that the branch of defendants' motion to dismiss the General Business Law § 349 claim that has been asserted by the remaining plaintiffs against defendants Jay Siniscalchi and JJS Entertainment LLC is granted, and that claim is dismissed; and it is further

ORDERED that the branch of defendants' motion to dismiss the breach of contract claim that has been asserted by the remaining plaintiffs against defendant Siniscalchi is granted, and that claim is dismissed; and it is further

ORDERED the branch of defendants' motion to dismiss the breach of contract claim that has been asserted by the remaining plaintiffs against defendant JJS is denied; and it is further

ORDERED that the branch of defendants' motion to dismiss the fraud claims that have been asserted by the remaining plaintiffs against defendants Anderson, Siniscalchi, and JJS is denied; and it is further

ORDERED that the branch of defendants' motion to dismiss the complaint against defendants Sahara Entertainment LLC, Centaur Entertainment LLC, and Harper Parker Entertainment Venture LLC, is granted, and the complaint is dismissed in its entirety against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the remaining defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties appear for a preliminary conference in Part 7 of this court, Room 345, 60 Centre Street, on February 5, 2020, at 10:00 a.m.

12/16/2019
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE