Hemg Inc. v Aspen Univ.
2013 NY Slip Op 32871(U)
November 4, 2013
Sup Ct, New York County
Docket Number: 650457/13
Judge: Melvin L. Schweitzer

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice

PART 45

HEMB INC. et al

-v-

ASPEN UNIVERSITY, et al

INDEX NO. 650457/13

MOTION DATE

MOTION SEQ. NO. 002

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion ~~is~~ by defendants to dismiss is GRANTED in part and DENIED in part per the attached Decision and Order.

A Preliminary Conference is scheduled for 12-19-13 at 11AM at 60 Centre st. Room 218

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: November 4, 2013

MELVIN L. SCHWEITZER J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

HEMG INC. and PATRICK SPADA, individually and in the right of ASPEN GROUP INC.,	
Plaintiffs,	Index No. 650457/13
-against-	DECISION AND ORDER
ASPEN UNIVERSITY, ASPEN GROUP INC., MICHAEL MATTHEWS, JOHN SCHEIBELHOFFER, MICHAEL D. ANTON, C. JAMES JENSEN, DAVID E. PASI, SANFORD RICH, PAUL SCHNEIER, and DAVID GARRITY,	Motion Sequence No. 002
Defendant.	

MELVIN L. SCHWEITZER, J.:

Defendants move to dismiss counts one through six and ten through twelve of the complaint pursuant to CPLR 3211 (a) (7). For the reasons discussed below, defendants' motion is granted in part and denied in part.

Background

Patrick Spada (Mr. Spada) founded Aspen University, an online post-secondary education university, in October 1999. It offered one of the first series of video courses to be approved by the Department of Education (DOE) to receive Title IV funding, became one of the first online degree institutions to become accredited by the Distance Education and Training Council (DETC), and was one of the first accredited institutions to offer an online Master of Business Administration degree to students.

In May 2011, Aspen University merged with Education Growth Corporation, a start-up company controlled by Michael Matthews (Mr. Matthews), resulting in Mr. Matthews replacing Mr. Spada as CEO of Aspen University. On March 13, 2012, Mr. Matthews merged Aspen

University with Aspen Group, an inactive publicly registered shell company, pursuant to which Aspen Group became a publicly traded corporation, relinquishing its status as a shell company, and the corporate parent of Aspen University, carrying out the online education business of Aspen University as Aspen Group's sole line of business (the Merger). From the date of the Merger's completion through plaintiffs' commencement of this action, Mr. Matthews, John Scheibelhoffer, Michael D'Anton, C. James Jensen, David E. Pasi, Sanford Rich, and Paul Schneier served as directors on Aspen Group's board of directors (collectively, the Board or the Director Defendants), Mr. Matthews served as Aspen Group's CEO, and David Garrity served as Aspen Group's CFO.

In order to remain eligible to receive and maintain Title IV funding, approved by the DOE, and national accreditation from the DETC, Aspen Group must submit financial statements to the Securities and Exchange Commission (SEC), DOE, and DETC, demonstrating its financial stability to continue as an educational institution. In these financial statements Aspen Group reported $2,209,960 as a collectible asset on its balance sheet. Defendants claimed those monies as a loan receivable as a consequence of unauthorized borrowings of Aspen Group funds by plaintiffs. Defendants issued a series of public statements, and filed reports and financial statements with the SEC, DOE, DETC, stating that plaintiffs had unlawfully borrowed, and failed to repay, monies from the Aspen Group. Plaintiffs allege that this loan never existed and reporting it is part of a deliberate scheme to artificially inflate Aspen Group's financial condition.

Plaintiffs brought this action on February 11, 2013 asserting 12 causes of action. Causes of action one through six are derivative actions on behalf of Aspen Group against Director Defendants for breach of fiduciary duty, waste of assets, and dilution of shareholder equity. The

remaining causes of action are brought directly against Director Defendants and CFO David Garrity for, inter alia, breach of contract, breach of the implied duty of good faith and fair dealing, defamation, and defamation per se.

Discussion

On a motion to dismiss, pursuant to CPLR 3211 (a) (7), the pleading is afforded a liberal construction. The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 (1994); *see EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *P.T. Bank Central Asia N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 375-6 [1st Dept 2003]). The court's role is limited to ascertaining whether the complaint states a cause of action, not whether there is evidentiary support for the complaint (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *LoPinto v J.W. Mays, Inc.*, 170 AD2d 582 [2d Dept 1991]).

Derivative Claims

Aspen Group's By-Laws and Certificate of Incorporation provide that the Court of Chancery of the State of Delaware is the sole and exclusive forum for (i) any derivative action brought on behalf of the Company, and (ii) any action asserting a claim for breach of fiduciary duty owed by any director or officer of the Company to the Company or the Company's shareholders. Plaintiffs argue that the forum selection clauses are invalid because they were adopted unilaterally by the Board of Directors, without the consent or vote of the plaintiffs or other shareholders, prior to Aspen Group becoming a public company through the merger. The court finds no merit to this position as it does not contest the validity of the Certificate of

Incorporation, but rather the applicability of one of its provisions due to the status of the corporation at the time of adoption. The court knows of no legal theory which supports plaintiffs' argument.

Subsequent to the filing of the instant motion to dismiss, the Delaware Court of Chancery addressed the issue of whether Delaware adopted by-laws containing a forum selection clause were valid. In *Boilermakers Local 154 Retirement Fund v Chevron Corp.*, the plaintiffs contested the validity of a Delaware forum selection clause contained in *Chevron* and *FedEx's* by-laws. Like the plaintiffs, the plaintiffs in *Boilermakers* alleged that the forum selection clause were invalid because they were unilaterally adopted by *Chevron's* and *FedEx's* board without shareholder approval or consent. 73 A3d 934 (Del. Ch. 2013).

The *Boilermakers* court rejected this argument and held that the adoption of a forum selection clause in a corporation's by-laws is valid, provided that the corporation's certificate of incorporation gives the board the power to adopt and amend by-laws unilaterally. The court wrote:

> The certificates of incorporation of Chevron and Fed-Ex authorize their boards to amend the bylaws. Thus, when investors bought stock in Chevron and FedEx, they knew (i) that consistent with 8 Del. C. § 109(b), the certificates of incorporation gave the boards the power to adopt and amend bylaws unilaterally; (ii) that 8 Del. C. § 109(b) allows bylaws to regulate the business of the corporation, the conduct of its affairs, and the rights or powers of its stockholders; and (iii) that board-adopted bylaws are binding on the stockholders. . . .
>
> * * *
>
> The plaintiffs' argument that stockholders must approve a forum selection bylaw for it to be contractually binding is an interpretation that contradicts the plain terms of the contractual framework chosen by stockholders who buy stock in Chevron and FedEx.

Here, as in *Boilermakers*, Aspen Group's Certificate of Incorporation provides that the "board of directors is expressly authorized to make, amend, alter or repeal the by-laws of the Company." Aspen Group's certificate of incorporation permitted the adoption of the Delaware forum selection clause and plaintiffs, like plaintiffs in *Boilermakers*, are bound by the forum selection clauses.

Here, all of plaintiffs' derivative claims (Counts I-IV) are subject to the forum selection clause contained in Aspen Group's By-Laws and Certificate of Incorporation, and these claims must be brought in the Court of Chancery in Delaware. Accordingly, Counts I-IV of the Amended Complaint are dismissed.

Defamation and Defamation Per se claims

A proper defamation claim must allege "(1) a false statement, (2) publication without privilege or authorization to a third party, (3) by at least a negligent standard of fault, and (4) the statement either causes special damages or constitutes defamation per se." *Pub. Relations Soc. Of Am., Inc. v. Rd. Runner High Speed Online,* 8 Misc 3d 820, 823 (NY Sup Ct 2005). On a motion to dismiss "the legal question … is whether the contested statements are reasonably susceptible of a defamatory connotation. In making this determination, the court must give the disputed language a fair reading in the context of the publication as a whole." *Armstrong v Simon & Schuster, Inc.,* 85 NY2d 373, 380 (1995). Official cites.

Defendants assert that the statements at issue cannot be considered defamatory nor constitute defamation per se because the statements, read in context, simply show a business disagreement. They further indicate that there are not any accusations of fraud or any illegality.

The court does not consider these statements to be as unambiguous and innocuous as defendants claim. These statements are reasonably susceptible of a defamatory connotation

because it is not clear to a potential reader that the "business disagreement" centers on the existence of the loan. It is possible for a reader to be aware of a "business disagreement" and still believe that this loan exists. In this case, plaintiffs' defamation claims are based on the statement that he took an *unauthorized* loan, which he claims never to have existed. The statements, in the context of an SEC filing, are reasonably susceptible to the interpretation that an unauthorized loan exists – in short, that plaintiffs' misappropriated funds from the company.

Defendants are correct when they assert that the damages proffered by plaintiffs are highly speculative. Plaintiffs allege they have lost millions in investment capital due to the defamatory statements, but loss of investment capital does not equate to damages. One would have to compute – or rather speculate – as to the lost profits of the venture sought to be capitalized. In the case of a start-up on line university, that would be impossible. Plaintiffs must plead specific damages to make out a claim for defamation and their failure to do so requires a dismissal of the defamation claim.

A statement is considered defamatory per se when it falls under one of four categories. *See Matherson v Marchello,* 100 AD2d 233 (2d Dept 1984). The category relevant to this case comprises the class of statements that "tend to injure the plaintiff in his trade, business or profession." *Id.* In the complaint Mr. Spada alleges that the statements in the SEC filings "directly impugned [his] basic character, integrity and reputation as well as [his] competence and fitness to serve as an officer of a corporation." Defendants do not directly dispute this claim, but, rather, assert that the statements cannot constitute defamation per se for the reasons given above and because they cannot be said to subject plaintiffs to "hatred, contempt or ridicule" or to the "loss of the good will and confidence." The defendants have not offered any reasoning to support this conclusion. In any event, the statements, in addition to Mr. Spada's intent to form

another online university, are sufficient to make a claim of defamation per se under this category since it is conceivable that the belief that he has taken unauthorized funds would harm his future business endeavors.

New York Law Applies

In defamation claims, New York courts apply the law of the jurisdiction with the "greater interest." *Padula v Lilarn Properties Crop.*, 84 NY2d 519, 520 (1994). However, defendants have not indicated any conflict between the laws of New York and New Jersey. Where there is no conflict and New York law is germane to the issue at hand, the court will apply New York law. *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 40 Misc 3d 643 (NY Sup Ct 2013). Accordingly, the court will apply New York law to the defamation per se claim.

Breach of Implied Duty of Good Faith and Fair Dealing

A proper claim for breach of the implied duty and of good faith and fair dealing "independent of contract claims must allege facts that tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff." *Dialcom, LLC v AT & T Corp.*, 2008 WL 2581876, at *11 (NY Sup Ct 2008). In this case, the plaintiffs' claims that defendants' committed a breach of implied duty of good faith and fair dealing are conclusory. They do not allege any facts independent of the facts in the breach of contract claims. Rather, plaintiffs seem to use the breaches of each contract as proof of a breach of the implied duty of good faith and fair dealing. A seemingly voluntary breach of contract does not show that the breach was for the purpose of preventing performance or withholding benefits, even if these are the consequences of the breach. The failure to allege facts other than the breach of the underlying contracts necessitates dismissal of causes of actions ten through twelve.

Accordingly, it is

ORDERED that the motion to dismiss is granted to the extent that the first, second, third, fourth, fifth, tenth, eleventh and twelfth causes of action are dismissed.

Dated: November 4, 2013

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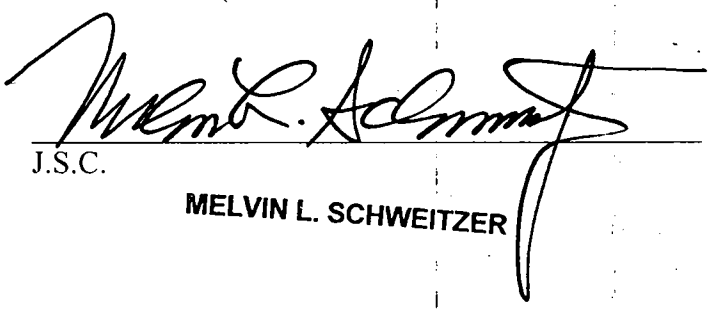

J.S.C.

MELVIN L. SCHWEITZER