

Sands Brother Venture Capital II, LLC v Huff

2015 NY Slip Op 30953(U)

June 3, 2015

Supreme Court, New York County

Docket Number: 654168/2012

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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SANDS BROTHER VENTURE CAPITAL II, LLC,
SANDS BROTHER VENTURE CAPITAL III, LLC,
SANDS BROTHER VENTURE CAPITAL IV, LLC,
and GENESIS MERCHANT PARTNERS GP,

Plaintiffs,

Index No.
654168/2012

vs.

W. ANTHONY HUFF, SHERRI D. HUFF, TIFFANY HUFF
SIMMONS, BRANDON SIMMONS, ERIC HUFF, THOMAS
BEAN, TRINITY HR, LLC, BIG RED, LLC, STEVEN B.
PENCE, GREGGORY SKAGGS, RONALD HEINEMAN, O2HR,
LLC, OXYGEN UNLIMITED, LLC, THRIVE HR, LLC,
JOHN MCALLISTER, RIVER FALLS INVESTMENTS, LLC
JUDSON WAGENSELLER, RIVER FALLS FINANCIAL
SERVICES, LLC, ACCREDITED INVESTOR RESOURCES,
LLC, WA HUFF, LLC, RIVER FALLS, HOLDINGS, LLC,
TRINITY INVESTMENTS, LLC, TRINITY INSURANCE
SERVICE, LLC, LEED HR, LLC, MICHAEL SCHROERING,
REED SMITH, LLP and CONTINENTAL STOCK TRANSFER
& TRUST COMPANY

Defendants.

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

Motion sequences 004, 005, and 006 are herein are
consolidated for disposition.

In motion sequence 004, Tiffany Huff Simmons (Tiffany),
Brandon Simmons (Brandon), Eric Huff (Eric), Judson Wagenseller
(Wagenseller), Trinity HR, LLC (Trinity HR), Trinity Investments,
LLC¹ (Trinity Investment), and Trinity Insurance Service LLC
(Trinity Insurance, collectively, the Trinity Defendants) move

¹ Trinity Investment, LLC is incorrectly named as Trinity
Investments, LLC in the caption (Def. Opp., p. 1).

pursuant to CPLR 3211(a)(7) and (8), and CPLR 3016(b) to dismiss the amended complaint (the Complaint) for lack of consideration, failure to state a cause of action, and failure to plead fraud with particularity.

In motion sequence 005, John McAllister (McAllister) and Thrive HR, LLC (Thrive, together with McAllister, the Thrive Defendants) move pursuant to CPLR 3211(a)(7) and (8) to dismiss the Complaint for lack of consideration and failure to state a cause of action.

In motion sequence 006, Michael Schroering and LEED HR, LLC (collectively, the LEED Defendants) move pursuant to CPLR 3211(a)(1), (7), and (8), and CPLR 327 to dismiss the Complaint for lack of personal jurisdiction, failure to state a cause of action, and *forum non-conviens*.

Background

The facts set forth herein are taken from the plaintiffs Sand Brothers Venture Capital II, LLC, Sand Brothers Venture Capital III, LLC, and Sand Brothers Venture Capital IV, LLC, and Genesis Merchant Partners GP's (collectively, Sands) Complaint and are deemed true for the purposes of this decision. For the sake of brevity, this Court will only address the allegations relevant to the instant motion.

This action arises out of an purported \$58 million fraudulent scheme perpetrated by W. Anthony Huff (Huff) that

resulted in his indictment and conviction in Federal District Court. The indictment by the US Attorney alleged that between 2007 and 2010, Huff "orchestrated numerous interrelated schemes to defraud, through which he unlawfully took and received tens of million of dollars from clients, active businesses and financial institutions, and used these funds to benefit himself, his family and other companies and accounts which he had interests and obligations" (Complaint, Ex. A, ¶ 7).

Sands commenced this action seeking to recover funds they loaned to O2HR, LLC (O2HR), which was one of the entities that Huff defrauded in his scheme.

Between January 2008 and June 2009, Sands loaned approximately \$5 million to O2HR. The loans were memorialized by five convertible promissory notes, that were guaranteed by the defendant Oxygen Unlimited LLC (Oxygen), and were due to mature on either April 30, 2010 or June 30, 2011 (the Notes).

Besides Huff, Sands also met with the defendants Steven B. Pence (Pence), Gregory Skaggs (Skaggs), and Thomas Bean (Bean), all of whom touted the safety and benefits of the proposed transaction with O2HR.

Thereafter, O2HR defaulted on its obligations under the Notes, and Oxygen has failed to perform as guarantor of the Notes. Sands alleges that the funds from the Notes were a part of the O2HR assets that Huff fraudulently transferred out of O2HR

for the benefit of himself and his family members and friends through alleged multi-layered sham transactions involving the Movants.

Sands alleges that each of the Trinity Defendants, the Thrive Defendants, and the LEED Defendants (collectively, the Movants) is a co-conspirator to Huff's fraudulent scheme.

The Trinity Defendants

Sands alleges that Trinity HR and Trinity Investments were the recipients of the proceeds of Huff's fraudulent scheme. They allege that Huff used the O2HR assets to purchase 15,657,410 shares of common stock of General Employment Enterprises, Inc. (GEE) through a multi-layered fraudulent scheme.

Sands further alleges that Tiffany, Huff's daughter, and Brandon, Huff's son-in law, are both residents of Kentucky and upon information and belief, are each members of Trinity HR and Trinity Investments (*id.* at ¶¶ 14-15).

Trinity HR

Sands alleges that Bean, the CEO² of O2HR, exchanged O2HR's large receivables and cash for full ownership interests in various O2HR client companies (*id.* at ¶¶ 91-92, 97).

However, instead of returning the value of that transaction to O2HR, the ownership interests acquired by Bean were held by WTS Acquisition Corp. (WTS) and RFFG LLC (RFFG), both entities wholly owned by Bean.

On June 1, 2010, WTS exchanged its assets for 1,476,015 shares of GEE. However the GEE shares were not delivered to WTS, and instead delivered to Big Red Investments Partnership Ltd. (Big Red), which is owned by Bean personally, and Bucknoltean Management LLC, which is another entity wholly owned by Bean.

On November 1, 2010, WTS further exchanged its assets for 5,581,395 shares of GEE. Again, the GEE shares were not delivered to WTS, and instead 2,081,395 GEE shares were delivered to Big Red, and 3,500,000 GEE shares were delivered to RFFG.

On September 8, 2010, Trinity HR purchases RFFG, and as a result, the GEE shares held by RFFG. Sands alleges upon information and belief that the consideration for the purchase of RFFG has not been paid in full.

On August 12, 2012 Trinity HR sold 2,974,719 GEE shares to LEED in an alleged sham transaction that was not fully paid for or paid for with fraudulently obtained assets from O2HR (*id.* at ¶¶ 118-119).

*Trinity Investments*²

Trinity Investments is the alleged recipient of funds from O2HR that were subsequently loaned to Thrive in a sham transaction (*id.* at ¶ 125). The Complaint is devoid of any other

² The Complaint asserts allegations against "Trinity HR Services LLC", which is not a party to this action (*id.* at ¶¶ 82-87). It is unclear if Sands intended these paragraphs to refer to "Trinity Investments" (*id.* at ¶¶ 82-89).

allegations against Trinity Investment.

Trinity Insurance

The only allegations pertaining to Eric, Huff's brother, and Trinity Insurance merely state that Eric is Huff's brother, a resident of Kentucky, and upon information and belief, is a member of Trinity Insurance (*id.* at ¶¶ 16, 33).

Wagenseller

Wagenseller is an attorney and shares an office address with LEED, Trinity Investments, Trinity Insurance.

Sands alleges that Wagenseller was the attorney that Huff used to effectuate his fraudulent transactions. Sands argues that Wagenseller's fees were undoubtedly paid with O2HR funds (*id.* at ¶ 140), that his knowledge of Huff's conduct "is evident from the long course of dealing" (*id.* at ¶ 141) and from "his conduct during the various litigations that have erupted" (*id.* at ¶ 142).

The LEED Defendants

Sands alleges that LEED was the recipient of 12,300,000 GEE shares that were purchased with the assets fraudulently transferred from O2HR by Huff (*id.* at ¶¶ 87-89, 118-119).

The Thrive Defendants

The Thrive Defendants both reside in Florida. Thrive is a Florida limited liability company. McAllister is its sole member and also a Florida resident.

Sands alleges that Huff fraudulently conveyed O2HR funds to Trinity Investments. Upon information and belief, Trinity Investments then loaned the funds to Thrive in a commercially unreasonable transaction for no consideration (*id.* at ¶ 125).

Sands further alleges that Thrive subsequently used the proceeds of the sham loan to purchase O2HR assets after it collapsed (*id.* at ¶ 126).

Discussion

The Movants seek dismissal on the threshold issue of personal jurisdiction, arguing that Sands fails to establish long arm jurisdiction over them and fails to allege a sufficient facts to entitle them to jurisdictional discovery.

Sands, as the party asserting jurisdiction, bears the burden of establishing that the Movants are subject to the jurisdiction of this Court (*O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 200 [1st Dept 2003]).

"A party must come forward with some tangible evidence which would constitute a 'sufficient start' in showing that jurisdiction could exist, thereby demonstrating that its assertion that a jurisdictional predicate exists is not frivolous" (*Mandel v Busch Entm't Corp.*, 215 AD2d 455, 455 [1995]).

Sands contends that the Movants are subject to jurisdiction pursuant to CPLR 302(a)(2) because they have committed tortious

acts within New York as co-conspirators to Huff.

Generally "[t]he requisite relationship between the defendant and its New York co-conspirators is established by a showing that (a) the defendant had an awareness of the effects in New York of its activity; (b) the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators; and (c) the co-conspirators acting in New York acted at the direction or under the control, or at the request of or on behalf of the out-of-state defendant" (*Lawati v Montague Morgan Slade Ltd.*, 102 AD3d 427, 428 [1st Dept 2013]).

This Court finds that Sands allegations are insufficient to obtain jurisdiction over the Movants.

It is undisputed that the Movants are non-domiciliaries of New York. Furthermore, the Complaint does not allege that the Movants regularly do business in New York, or that they own, use, or possess any real property in New York.

Consequently, jurisdiction over the Movants must be established pursuant to CPLR 302(a)(2), which provides that personal jurisdiction may be exercised over a non-domiciliary when the person or their agent "commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act..." (CPLR 302 [a] [2]).

Sands fails to sufficiently allege facts that demonstrate a co-conspirator relationship between each of the Movants and Huff.

"Although on a motion to dismiss plaintiffs' allegations are presumed to be true and accorded every favorable inference, conclusory allegations, claims consisting of bare legal conclusions with no factual specificity, are insufficient to survive a motion to dismiss" (*Barnes v Hodge*, 118 AD3d 633 [1st Dept 2014])

Sands alleges, generally, that Huff's activities benefitted the Movants (*id.* at ¶¶ 50-51).

However, Sands fails to allege that the Movants were aware of the impact that their activities had on New York.

Furthermore, Sands cannot allege that Huff was acting at the direction or under the control of the Movants because the Complaint expressly alleges that "Huff has directed-and the other defendants have effected-a multi-pronged plan to divert the value that Huff stole from O2HR through various channels..." (*id.* at ¶ 4). Moreover, the Complaint alleges that Huff was the mastermind (*id.* at ¶ 1) and that Huff exerted "top-to-bottom domination of the entire multi-pronged network" (*id.* at ¶ 7).

Thus, Sands does not establish that Huff's activities in New York were at the request or direction of, or on behalf of the Movants. Additionally, a large portion of the allegations in the Complaint are conclusory and pertain to other entities and individuals that are not parties to this motion (*id.* at ¶¶ 65-81, 90-112, 128-137).

As a result, the Movants shall be dismissed without prejudice and the action may be asserted against them in the event that discovery reveals facts that would subject the Movants to the jurisdiction of this Court. In light of this Court's lack of jurisdiction, the remaining arguments do not require a determination.

Accordingly it is,

ORDERED that the Trinity Defendants motion to dismiss (MS 004) is granted thereby dismissing the Complaint as against the Trinity Defendants for lack of jurisdiction, and it is further

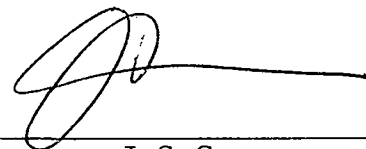
ORDERED that the Thrive Defendants motion to dismiss (MS 005) is granted thereby dismissing the Complaint as against the Thrive Defendants for lack of jurisdiction, and it is further

ORDERED that the LEED Defendants motion to dismiss (MS 006) is granted thereby dismissing the Complaint as against the LEED Defendants for lack of jurisdiction, and it is further

ORDERED that the remaining parties shall contact the Clerk of Part 53 to schedule a status conference to be held within 20 days from entry of this order.

This constitutes the decision and order of the Court.

Dated: June 3, 2015



J.S.C.

HON. CHARLES E. RAMO