De Jong v Faessen
2017 NY Slip Op 30558(U)
March 21, 2017
Supreme Court, New York County
Docket Number: 655478/16
Judge: Barry Ostrager

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

MAARTEN DE JONG,

Plaintiff,

-against-

WILCO FAESSEN

Defendant.

INDEX NO. 655478/16

Motion Seq. No. 001

OSTRAGER, J:

Presently before the Court is a pre-answer motion to dismiss the two-count Complaint by the defendant, Wilco Faessen ("Faessen"), pursuant to CPLR §3211 (a)(1), (5), and (7). The motion is granted in part and denied in part for the following reasons.

The plaintiff, Maarten de Jong ("de Jong"), alleges that he and defendant Faessen previously worked together as investment bankers first at Lehman Brothers and later at Barclay's Capital (Compl., ¶2)[1]. Consequently, both parties can reasonably be deemed financially sophisticated. In 2008, defendant allegedly presented plaintiff with the opportunity to invest in a new spirits-related business venture, GoAmericaGo Beverages, LLC ("GoAmericaGo"), founded by non-party, Raj Bhakta (¶3). Plaintiff alleges he and the defendant orally agreed to invest in Bhakta's venture only if the parties would invest equal sums and on equal terms (¶¶4-5). GoAmericaGo was an unsuccessful venture, and Bhakta created another spirits-related business venture entitled WhistlePig, LLC ("WhistlePig") (¶8). Plaintiff alleges that the parties renewed their oral agreement as respects investments in WhistlePig.

Between 2010 and 2011, plaintiff and defendant each invested in WhistlePig and each owned approximately 1.41% in WhistlePig (¶9). Between 2011 and 2012, unbeknownst to the plaintiff, the defendant Faessen allegedly entered into a secret side deal with Bhakta whereby Faessen agreed to

---

[1] All references to the Complaint are by paragraph (¶) numbers.

solicit investors for WhistlePig in return for a "placement fee" in the form of a 20% equity stake in WhistlePig (¶¶11-14). The secret side deal allegedly gave defendant a 14.22% equity interest in WhistlePig (¶14).

In 2013, plaintiff de Jong decided to sell his equity in WhistlePig to a third party pursuant to a Securities Transfer Agreement ("STA") dated March 22, 2013 (*see* de Jong Affirmation, Exh. 5), allegedly because de Jong felt his equity stake of 1.41% in WhistlePig was too small to have a significant voice in the direction of the company (Compl., ¶16). Plaintiff de Jong received $458,250 for his shares in WhistlePig, resulting in a significant profit based upon the $104,500 he invested in the company (¶45). More than 3 years later, on May 13, 2016, Bhakta emailed plaintiff "out of the blue" and told plaintiff about the secret deal between Bhakta and the defendant (¶17). The plaintiff annexed to the Complaint as an exhibit Bhakta's May 13, 2016 email to plaintiff which states:

> Maarten:
> Per your request. See attached. As a I mentioned, during 2011 when you made additional investment, Wilco [Faessen] specifically instructed me to lie to you saying "you were getting the same deal" while negotiating for a kicker on his equity and for an outright equity grant in exchange for fundraising services.
> Thanks,
> Raj

Plaintiff commenced this action in October 2016, asserting claims for breach of contract and aiding and abetting breach of fiduciary duty, and seeking $500,000 in damages based on the difference between the fair market value of plaintiff's WhistlePig holdings when plaintiff sold in March 2013 and the current fair market value of that equity, on the theory that plaintiff would not have sold his shares in WhistlePig in 2013 had he known about the defendant's secret side deal with WhistlePig's principal, Bhakta. In addition, plaintiff seeks specific performance in the form of 50% of the additional equity the defendant acquired in exchange for the fundraising services the defendant provided to WhistlePig, which amounts to roughly a 7.11% interest in WhistlePig.

In support of its pre-answer motion to dismiss, the defendant raises three arguments. First, the 2008 alleged oral agreement is barred by the Statute of Frauds because it is open-ended and indefinite and therefore cannot be performed in one year (MOL in support at 6-9). Second, the aiding and abetting breach of fiduciary duty claim fails under Delaware law[2] because plaintiff failed to allege that Bhakta had a fiduciary duty to plaintiff, and because Bhakta had no affirmative duty as WhistlePig's Managing Member to police an alleged side agreement between the plaintiff and defendant (*id.* at 10-11). Third, the aiding and abetting claim is barred by Delaware's three-year Statute of Limitations (*id.* at 12-13).

In opposition, the plaintiff argues that the Statute of Frauds does not apply here because the alleged 2008 oral agreement actually created a "series of optional contracts, any one of which could have been performed within 1 year" (MOL in opposition at 12). Alternatively, as de Jong has asserted in his affirmation at ¶10, the alleged oral agreement was terminable at will by either party, and therefore is not subject to the Statute of Frauds (*see Gural v Drasner,* 114 AD3d 25, 28 [1st Dept 2013], citing *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]).

As for the aiding and abetting claim, the plaintiff argues that Bhakta breached a fiduciary duty to plaintiff by virtue of Bhakta's status as Managing Member of the WhistlePig, LLC of which plaintiff was a member by failing to disclose material facts to plaintiff as Bhakta's May 13, 2016 email reflects. Plaintiff further argues that the aiding and abetting claim stands under Delaware or New York law under these circumstances (MOL in opp. at 17-21) (*see AHA Sales, Inc. v Creative Bath Prod., Inc.* 58 AD3d 6, 23 [2d Dept 2008]; *see also Carsanaro v Bloodhound Techs., Inc.,* 65 A3d 618, 643 [Del. Ch. 2013]) ("A claim for aiding and abetting requires the following three elements: (1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, and (3) a knowing participation in that breach…" [citations omitted]). Moreover, plaintiff argues that New York's six-year Statute of Limitations applies

[2] The defendant cites *Kagan v HMC-N.Y., Inc.*, 94 AD3d 67, 71 (1st Dept 2012) in arguing that WhistlePig is incorporated in Delaware and therefore Delaware law applies to the aiding and abetting breach of a fiduciary duty claim (*see* MOL in supp. at 9).

because plaintiff is a New York resident and the forum state's procedural laws should apply (*id.* at 22-24) (*see Elghanayan v Elghanayan*, 190 AD2d 449, 453 [1st Dept 1993]).

The defendant's motion to dismiss is denied with respect to the first cause of action sounding in breach of contract because there is serious disagreement between the plaintiff and defendant as to the terms and conditions of the 2008 alleged oral agreement. Specifically, the defendant's reply brief notes that de Jong's affirmation augments the complaint by adding two additional contractual provisions, namely the "series of optional contracts" and "termination at will" provisions, which were not pled in the Complaint. Therefore, the Court cannot conclude as a matter of law that the alleged oral agreement could not be completed within a year. Thus it cannot be said as a matter of law that the oral agreement violates the Statute of Frauds, although if the oral contract was terminable at will, it can be anticipated that the defendant may assert the alleged oral contract was terminated (*see e.g., Gural,* 114 AD3d 25).

In addition, on a pre-answer motion to dismiss pursuant to CPLR 3211(a)(1) and (7), 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… dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law …" (*Leon v Martinez,* 84 NY2d 83, 87 [1994] [citations omitted]). The alleged oral agreement between plaintiff and defendant was to equally invest in Bhakta's spirits-related business ventures, and accepting the facts as broadly alleged in the Complaint as true, this alleged oral agreement could have ended at any time by either party (*see Gural,* 114 AD3d 25 at 28) ("the application of [the statue of frauds] is limited to contracts that 'have absolutely no possibility in fact and law of full performance within one year.'"). However, it should be noted that to the extent plaintiff seeks damages based on his sale of WhistlePig shares, this claim is highly speculative inasmuch as plaintiff's decision to sell his shares was purely volitional and the shares could have depreciated rather than appreciated. To the extent that plaintiff seeks breach of contract damages equal to 50% of the

equity defendant received in WhistlePig for producing investors, plaintiff, of course, bears the heavy burden of establishing that plaintiff would have been able to replicate or, at least supplement, the defendant's fund-raising efforts.

The defendant's motion to dismiss is granted with respect to the second cause of action sounding in aiding and abetting a breach of a fiduciary duty because the plaintiff acknowledged in paragraphs §2.3(d) and (j) of the STA that plaintiff had access to certain corporate records to evaluate the benefits and risks associated with plaintiff's 2013 stock sale. Paragraph §2.3(d) of the STA expressly provides that:

> There are no other outstanding agreements to which the Transferor [plaintiff] is a party that would affect the Transferor's performance under this Agreement or the transfer and assignment contemplated hereby.

Paragraph 2.3(j) further provides that:

> The Transferor (i) has been furnished with certain documents which have been made available upon request to the Company [WhistlePig] and the Operating Agreement[3], (ii) has been given the opportunity to ask questions of, and receive answers from, the Company concerning the terms and conditions of the Operating Agreement and this Agreement and other matters pertaining to this transfer and (iii) *has been given the opportunity to obtain from the Company such additional information necessary to verify the accuracy of the information which was provided in order for such Transferor to evaluate the merits and risks of its transfer of the Transferred Interest.* (Emphasis added).

Finally, paragraph §2.3(l) expressly provides that the "acknowledgements, representations, warranties and agreements" by plaintiff de Jong contained in Article 2.3 "shall survive the Closing Date."

The plaintiff's claim that he was unaware of the defendant's 14.22 % equity in WhistlePig at the time plaintiff sold his shares in WhistlePig in March 2013 is undermined by the plaintiff's express representations and warranties in the STA, which survived the closing. Therefore, the second cause of action is dismissed without prejudice, but will be dismissed with prejudice unless the plaintiff can demonstrate that he did not have access to the then-current WhistlePig Operating Agreement which,

[3] The Third Amended and Restated Limited Liability Company Agreement dated November 27, 2012 (*see* de Jong Aff., Exh. 5 at 1)

presumably, contained a listing of company members and their respective shareholdings in WhistlePig. Furthermore, as the Court finds the aiding and abetting claim fails to state a cause of action, the Court need not resolve the Statute of Limitations and Choice of Law issues raised in the motion papers because these arguments are made only with respect to the aiding and abetting claim. Without an underlying breach of fiduciary duty, there is no claim for aiding and abetting breach of a fiduciary duty.

Accordingly, it is hereby

ORDERED that the defendant's pre-answer motion to dismiss is granted in part and denied in part in accordance with this decision. The defendant shall file an answer by April 11, 2017. The parties are directed to appear for a compliance conference on April 18, 2017 at 9:30 a.m.

Dated: March 21, 2017

J.S.C.

BARRY R. OSTRAGER
JSC