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No. 23105/07

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 12 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 4-4-08
Submission Date: 6-20-08
Motion Sequence No.: 001/MOT D

BIG APPLE CONSULTING USA, INC. and MJMM INVESTMENTS, LLC

Plaintiffs,

- against -

COUNSEL FOR PLAINTIFFS
Doar, Rieck, Kaley & Mack, Esqs.
1205 Franklin Avenue - Suite 330
Garden City, New York 11530

BELMONT PARTNERS, LLC, JOSEPH MEUSE, WILLIAM LUCKMAN, PACWEST TRANSFER, LLC, LAUREL POFFENROTH, TRI-STATE TITLE AND ESCROW, LLC and JOHNNIE ZARECOR,

Defendants.

COUNSEL FOR DEFENDANTS
Guzov Ofsink, LLC
600 Madison Avenue, 14th Floor
New York, New York 10022

ORDER

The following papers were read on Defendants' motion to dismiss the complaint:

Notice of Motion dated March 12, 2008;
Affirmation of Gregory P. Vidler, Esq. dated March 12, 2008;
Defendants' Memorandum of Law;

BIG APPLE CONSULTING USA, INC., *et ano* v. BELMONT PARTNERS, LLC, *et al.*
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Affidavit of Mark C. Kaley sworn to on May 9, 2008;
Plaintiffs' Memorandum of Law in Opposition;
Affidavit of Joseph J. Meuse sworn to on June 18, 2008
Defendants' Reply Memorandum of Law.

Defendants move for judgment dismissing the complaint pursuant to CPLR 3211 (a)(5), (7), and (11), on the grounds that (1) Plaintiffs have no standing to maintain the causes of action in the complaint; (2) Plaintiffs' complaint lacks the requisite specificity in pleading; and (3) the complaint fails to state a cause of action against Defendants.

BACKGROUND

A. The Parties

Plaintiff, Big Apple Consulting USA, Inc. ("Big Apple"), and MJMM Investments, LLC ("MJMM") advanced monies to unidentified clients for the purchase of publicly traded "shell" corporations from Defendant, Belmont Partners, LLC ("Belmont").

Defendant, Joseph Meuse ("Meuse"), is the president, director, and majority owner of Belmont. Defendant, William Luckman ("Luckman"), is the Director of Business Development at Belmont. Defendant, PacWest Transfer LLC ("PacWest"), is a transfer agency regulated by the Securities and Exchange Commission and the National Association of Securities Dealers. Defendant, Laurel Poffenroth ("Poffenroth"), is the president, director, and majority owner of PacWest. Defendant, Tri-State Title and Escrow, LLC ("Tri-State"), served as the escrow agent on some of the stock purchase transactions. Defendant, Johnnie Zarecor ("Zarecor"), is the president, director, and majority owner of Tri-State. Plaintiffs allege that Belmont, PacWest, and Tri-State were controlled by Meuse and that he was the alter ego of each of these entities.

B. The Complaint

Plaintiffs allege the following six causes of action in the complaint: (1) breach of contract; (2) fraud; (3) breach of fiduciary duty by Meuse; (4) breach of fiduciary duty by PacWest; (5) breach of fiduciary duty by Tri-State; and (6) aiding and abetting breach of fiduciary duty by all Defendants.

Plaintiffs claim that they entered into an agreement in February 2006, whereby Belmont would supply publicly traded shell corporations to Plaintiffs' clients. Plaintiffs would, in turn, loan its clients monies to purchase the companies from Belmont for the purpose of reverse mergers. Plaintiffs state that the publicly traded shell corporations sold by Defendants were defective and that Defendants misrepresented their condition to Plaintiffs and their clients. Specifically, Plaintiffs allege that Meuse falsely represented that the shell companies had been "de-registered," that Meuse was transferring all of his interests in the shell companies, and that after the closing, Plaintiffs' clients would control a certain percentage of the issues and outstanding shares of the shell companies. Plaintiffs allege that fraud permeated five specific transactions; to wit: the Evans Systems, Super Pro, Gecko, Metapower, and ProPalms transactions.

DISCUSSION

A. Dismissal Standard

On a motion to dismiss pursuant to CPLR 3211, the facts as alleged in the complaint must be accepted as true, Plaintiffs must be accorded the benefit of every possible favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable theory. Arnav Indus. Inc. Retirement Trust v. Brown

Raysman, Millstein, Felder & Steiner, LLP, 96 N.Y.2d 300, 303 (2001). Where the ground for dismissal is CPLR 3211(a)(7), and evidentiary material is submitted, the criterion is whether Plaintiff has a cause of action, not whether Plaintiff has stated one. Guggenheimer v Ginzburg, 43 N.Y.2d 268, 275 (1977). See, Leon v Martinez, 84 N.Y.2d 83, 87-88 (1994).

B Reverse Merger

A "reverse merger" is a method for a private company to become public without fulfilling the ordinary disclosure and registration obligations of a newly public company. The private company arranges to be acquired by a public company with minimal assets, or a shell company. The private company transfers its assets to the publicly-traded owner in exchange for the shell company's equity. SEC v. Cavanagh, 445 F.3d 105, at fn 4 (2nd Cir. 2006). See, US SEC v. Sierra Brokerage Services Inc., 2007 WL 1057384, at fn 2 (SD Ohio 2007). The result is that the private company goes public more quickly and with less expense than it could following the normal, regulated pathway to achieving public corporation status. It has been described as "an'end run' around the federal rules and regulations governing the public trading of securities." Clabault v. Caribbean Select, Inc., 805 A2d 913, 915 (Del. Chan. 2002), *affd.*, 846 A2d 247 (Del. Sup. Ct. 2003). Belmont was in the business of purchasing defunct public shell corporations and brokering them to private corporations. Belmont Partners LLC v. Nehmeh, 2008 WL 1858896 (W.D. Va. 2008).

C. Standing

Standing involves a determination of whether "the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast the dispute in a form traditionally capable of judicial resolution." Graziano v. County of Albany, 3 N.Y.3d 475, 479 (2004), quoting Community Bd. 7 of Borough of Manhattan v. Schaffer, 84 N.Y.2d 148, 155 (1994). "Injury-in-fact has become the touchstone" and requires "an actual legal stake in the matter being adjudicated" (Society of Plastics Indus., Inc. v. County of Suffolk, 77 N.Y.2d 761, 772 [1991]). A Plaintiff generally has standing only to assert claims on his or her own behalf Caprer v. Nussbaum, 36 A.D.3d 176, 182 (2nd Dept. 2006).

In order to have standing to challenge or enforce a contract, an entity must be a party thereto or a third-party beneficiary thereof. VAC Service Corp. v. Technology Ins. Co., Inc., 49 A.D.3d 524 (2nd Dept. 2008); DeRaffele v. 210-220-230 Owners Corp., 33 A.D.3d 752 (2nd Dept. 2006), *lv. app. den.*, 8 N.Y.3d 814 (2007); Parker & Waichman v. Napoli, 29 A.D.3d 396 (1st Dept.), *app. dsmd.*, 7 N.Y.2d 844 (2006); and Decolator , Cohen & Diprisco, LLP v. Lysaght, Lysaght & Kramer PC, 304 A.D.2d 86 (1st Dept. 2003).

Here, in their reply papers, Defendants have annexed the stock purchase agreements used in the transactions identified by the Plaintiffs, or the replacement transaction. Plaintiffs are not parties to any of these agreements.

Plaintiffs seek to sidestep the standing rules by insisting upon an unwritten agreement with Belmont to fund reverse mergers for their clients. They appear to argue

that their injury-in-fact is the diminution in value of the shares of the five merged companies, in which they hold a security interest because they supplied the cash for the transaction. Assuming the truth of Plaintiffs' allegations, they do not suffice to establish any contract between Plaintiffs and Defendants.

Plaintiffs' reliance upon the Confirmation, dated 3/21/07 and signed by Meuse, as the Managing Director of Belmont (Kaley Aff. in Opp. Ex V), to establish a contract, is misplaced. The confirmation acknowledges, *inter alia*, that Plaintiffs made full cash payments on behalf of unnamed clients for the purchase of the following corporate shells: (i) SuperPro Vending Group, Inc.; (ii) ProPalms, Inc.; and (iii) Gecko Systems of Georgia, Inc. This confirmation does not establish a contractual relationship between Plaintiffs and Defendants.

In the absence of the requisite contractual relationship, Plaintiffs have no cause of action against Defendants for breach of contract.

D. Fraud

Privity is not required to assert a claim based upon fraud. Velazquez v. Decaudin, 49 A.D.3d 712 (2nd Dept. 2008). The essential elements of a cause of action for fraud are a misrepresentation or a material omission of fact which was false and known to be false, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury. Shovac v. Long Island Commercial Bank, 50 A.D.3d 1118 (2nd Dept. 2008); and Orlando v. Kukielka, 40 A.D.3d 829 (2nd Dept. 2007). See also, Laura Holding Co. v.

Smith Barney, 88 N.Y.2d 413 (1996); and Channel Master Corp. v. Aluminum Std. Sales, 4 N.Y.2d 403 (1958).

A party cannot claim justifiable reliance on a misrepresentation when that party could have discovered the truth with due diligence. KNK Enterprises, Inc. v. Harriman Ent., Inc., 33 A.D.3d 82 (2nd Dept. 2006), *lv. app. den.*, 8 NY3d 804 (2007). A sophisticated investor may not allege justifiable reliance upon alleged incomplete disclosure and partial withholding of information where it could independently assess the risks and benefits of the transactions at issue. (Societe Nationale D'Exploitation Industrielle des Tabacs et Allumettes v. Salomon Brothers International, Ltd., 268 A.D.2d 373 [1st Dept.], *lv. app. den.,* 95 N.Y.2d 762 [2000]), or where it could have discovered the true nature of the investments by ordinary intelligence or with reasonable investigation. Zanett Lombardier, Ltd. v. Maslow, 29 A.D.3d 495 (1st Dept. 2006). See genlly, Elghanian v. Harvey, 249 A.D.2d 206 (1st Dept. 1998). Indeed, New York law imposes an affirmative duty on sophisticated investors to protect themselves from misrepresentations made during business acquisitions by investigating the details of the transactions and the business they are acquiring. Global Minerals and Metals Corp v. Holme, 35 A.D.3d 93 (1st Dept. 2006), *lv. app. den.*, 8 N.Y.3d 804 (2007); and Abrahami v. UPC Construction Co., Inc., 224 A.D.2d 231 (1st Dept. 1996).

In the complaint, Plaintiffs do not even allege that their reliance upon the misrepresentations and omissions of Defendants was justifiable (Complaint ¶ 79). Even if they had done so, their status as sophisticated investors precludes them from

establishing this element. See, *id.* Consequently, Plaintiffs cannot establish a cause of action against Defendants for fraud.

E. Breach of Fiduciary Duty

A broker does not, in the ordinary course of business, owe a fiduciary duty to a purchaser of securities. Ascot Fund Ltd v. UBS Painewebber, Inc., 28 A.D.3d 313 (1st Dept. 2006); Perl v. Smith Barney, Inc., 230 A.D.2d 664 (1st Dept.), *lv. app. den.* 89 N.Y.2d 803 (1996); and Fekety v. Gruntal & Co., Inc., 191 A.D.2d 370 (1st Dept. 1993). But see, Bullmore v. Ernst & Young Cayman Islands, 45 A.D.3d 461 (1st Dept. 2007) (professional investment advisor had fiduciary duty to client in connection with hedge fund collapse). Fiduciary obligations do not exist between commercial parties operating at arms-length. EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11, 22 (2005); Dembeck v. 220 Central Park South, LLC, 33 A.D.3d 491 (1st Dept. 2006); Carnegie v. H& R Block, Inc., 269 A.D.2d 145 (1st Dept.), *app. dsm.*, 95 N.Y.2d 844 (2000). Where, as here, the parties were involved in an arms-length business transaction involving the transfer of stock, and where all were sophisticated business people, no fiduciary relationship can be found to exist. WIT Holding Corp. v. Klein, 282 A.D.2d 527 (2nd Dept. 2001). Consequently Plaintiffs have no claim for breach of fiduciary duty against Meuse.

Plaintiffs have shown no factual or legal basis for establishing a fiduciary duty on the part of PacWest, the transfer agent. The same is true for Tri-State. Under these circumstances Meuse, PacWest, and Tri-State are entitled to dismissal of the claims against them for breach of fiduciary duty.

F. Aiding and Abetting Breach of Fiduciary Duty

To state a claim for aiding and abetting the breach of a fiduciary duty, a Plaintiff must plead a breach of fiduciary duty, that the Defendant knowingly induced or participated in the breach and damages resulting therefrom. Bullmore v. Ernst & Young Cayman Islands, *supra*. This cause of action must fail in the absence of any fiduciary duty being established.

Accordingly, it is,

ORDERED, that Defendants' motion for judgment dismissing the complaint is **granted.** The complaint is hereby dismissed.

This constitutes the decision and Order of the Court

Dated: Mineola, NY
September 15, 2008

Hon. LEONARD B. AUSTIN, J.S.C.