

ZFI Endowment Partners, L.P. v Goldin
2015 NY Slip Op 32203(U)
October 9, 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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ZFI ENDOWMENT PARTNERS, L.P.,

Plaintiffs,

Index No.
654168/2012

vs.

DAVID GOLDIN, AMERIMERCHANT, LLC, and JOHN P.
MURPHY,

Defendants.
-----x

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

This action arises out of the plaintiff ZFI Endowment Partners, LP's (ZFI) failed investment relating to the defendant AmeriMerchant, LLC (AmeriMerchant). ZFI alleges that it was deceived by the defendant David Goldin (Goldin), AmeriMerchant's CEO, into entering a loan participation investment with AmeriMerchant's lender, non-party Oak Rock Financial, LLC (ORF), instead of a direct investment in AmeriMerchant, which caused ZFI to suffer a \$1.3 million loss.

In motion sequence 002, ZFI moves pursuant to CPLR 3125 seeking leave to amend its complaint.

Background

As alleged in the proposed amended complaint (the Amended Complaint), AmeriMerchant provides high interest cash advances to merchants. The advances are structured as a purchase of the merchant's future receivables, which are used to repay the advance. Goldin is the president and CEO of AmeriMerchant.

In 2012, AmeriMerchant offered to sell to ZFI, three-year notes yielding 12% interest. Goldin promoted the notes through numerous telephone conferences and in-person meetings with ZFI.

ZFI alleges that in early 2013, Goldin switched the offering to a loan participation made by ORF to AmeriMerchant (the ORF Participation Investment), rather than a direct investment in AmeriMerchant itself. Goldin represented that the ORF Participation Investment was essentially a direct investment in AmeriMerchant, but that the investment funds would pass-through ORF, as custodian, instead of being forwarded to AmeriMerchant directly.

ORF was AmeriMerchant's lender and custodian of the ORF Participation Investment. The co-defendant John P. Murphy (Murphy) is the former president and CEO of ORF.

ZFI alleges that AmeriMerchant's business relied on a credit line from ORF to fund its purchase of future receivables. ORF, in turn, was dependent on a revolving credit facility it had with Israel Discount Bank (IDB) to fund AmeriMerchant's credit line.

In 2012, ORF allegedly reached the borrowing limits set by IDB's credit facility. Facing the possibility that ORF would no longer be able to provide AmeriMerchant the funding it needed to continue to operate, Goldin and Murphy allegedly devised a scheme to circumvent IDB's borrowing limits by creating other entities that could access the IDB credit facility.

Eventually, IDB discovered the scheme and demanded that ORF repay \$3.8 million of the borrowed funds. Failure to do so would effectively terminate ORF's ability to continue funding AmeriMerchant and would subsequently trigger AmeriMerchant's repayment obligations to ORF. ZFI alleges that Goldin began deceptively offering the ORF Participation Investment to raise the funds necessary to repay IDB, unbeknownst to ZFI.

On March 30, 2013, ZFI and ORF executed a loan participation agreement (the LPA) wherein ZFI invested \$1 million in the ORF Participation Investment, purportedly for a fractional interest in the loans ORF made to AmeriMerchant.

Shortly thereafter, in the spring of 2013, ORF collapsed and was forced into bankruptcy by IDB. Murphy pled guilty to misappropriating over \$100 million in investor funds from ORF. ZFI lost its investment when ORF collapsed.

ZFI alleges that the ORF Participation Investment was a scheme devised to assist ORF in repaying IDB, because Goldin knew that ORF was on the brink of collapse and he never intended for ORF to return ZFI's investment.

Procedural History

On May 22, 2014, ZFI filed its complaint alleging three causes of action for fraud, conspiracy to defraud, aiding and abetting fraud, and unjust enrichment.

On July 1, 2014, the defendants Goldin and AmeriMerchant,

(collectively, AM Defendants) moved to dismiss the complaint on the basis that it failed to state a cause of action for fraud.

On July 16, 2014, the Court granted the AM Defendants' motion to dismiss the complaint, finding that ZFI failed to allege "any material misrepresentation that could be reasonably relied upon by [ZFI] in this situation" (7/16/2014 tr at 15:16-17).

Discussion

"Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom unless the proposed amendment is palpably insufficient or patently devoid of merit" (*MBIA Ins. Corp. v Greystone & Co.*, 74 AD3d 499 [2010][internal citations omitted]).

ZFI alleges that the Amended Complaint sets forth additional facts to support its causes of action for fraud against the AM Defendants.

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). "A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b)" (*id.*).

ZFI alleges that the AM Defendants and Murphy conspired to

deceive ZFI into investing in the ORF Participation Investment under the guise that it was essentially a direct investment in AmeriMerchant.

ZFI alleges that Goldin, in furtherance of the scheme, misrepresented the credit risk and true purpose of the ORF Participation Investment in the offering memorandum Goldin provided in connection with the proposed direct investment in AmeriMerchant¹ (the AM Memo). In addition, Goldin allegedly misrepresented that Murphy was running a "great operation" at ORF, that ZFI would receive a 13% return on its investment, and failed to disclose his awareness of ORF's probable demise.

ZFI contends that these series of events, when viewed together, comprise a fraudulent scheme.

This Court disagrees.

It is undisputed that the AM Memo containing the alleged misrepresentations was provided to ZFI in solicitation of a direct investment in AmeriMerchant. Thus, it is unclear to this Court how the representations contained in the AM Memo pertaining to a direct investment in AmeriMerchant are related to the ORF Participation Investment, which was not the subject of the AM Memo.

The misrepresentations in the AM Memo cannot form the basis

¹ The subject of the AM Memo was actually an investment in Merchants Advance 2010 LLC, the main provider of merchant cash advances for AmeriMerchant (Zwirn Aff., Ex. 2, p. 4).

of ZFI's causes of action for fraud arising from its investment in the ORF Participation Investment.

Furthermore, Goldin's alleged misrepresentation that ZFI would receive a 13% return from the ORF Participation Investment is accurate to the extent that the terms of the LPA provide for a 13% return on ZFI's investment (Zwirn Aff., Ex. 5, § 3.4).

ZFI's contention that Goldin promised it a 13% return is merely a promissory statement and cannot serve as the basis of a cause of action for fraud as a matter of law (*Eastman Kodak Co. v Roopak Enterprises, Ltd.*, 202 AD2d 220, 222 [1994] ["The proposed fraud claims were, therefore, legally deficient because they depended on alleged misrepresentations of future intent"]).

Goldin's alleged misrepresentations with respect to Murphy and ORF are comprised of emails stating that "[Murphy's] a great guy and runs a great operation" and "[Murphy] needs to lower his concentration in our deal" (Zwirn Aff., ¶¶ 11, 14). Neither of these purported misrepresentations may form the basis of cause of action for fraud because they constitute puffery and are conclusory in nature (*Sheth v New York Life Ins. Co.*, 273 AD2d 72, 74 [1st Dept 2000]).

The remaining alleged misrepresentations are omissions by the AM Defendants. ZFI alleges that the AM Defendants failed to disclose their knowledge of the impending collapse of ORF, AmeriMerchant's dependence on ORF's credit line, and the high

likelihood that ZFI's investment would be lost (collectively, the Omissions).

ZFI admits that it does not have a fiduciary relationship and that it is not in privity with the AM Defendants. However, ZFI argues that the AM Defendants had a duty to disclose the Omissions pursuant to the special facts doctrine, which provides that when "one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair" (*Jana L. v W. 129th St. Realty Corp.*, 22 AD3d 274, 277 [1st Dept 2005][internal quotations omitted]).

"As a threshold matter, the doctrine requires satisfaction of a two-prong test: that the material fact was information peculiarly within the knowledge of the [AM Defendants], and that the information was not such that could have been discovered by [ZFI] through the exercise of ordinary intelligence" (*id.* at 278 [internal quotations omitted]).

ZFI fails to alleges facts sufficient to satisfy the test. ZFI admits that it did not conduct any due diligence on ORF because it contends that it is not customary practice to evaluate the custodian in participation investments (Amended Complaint, ¶ 7).

The law is clear that ZFI had "at the very least, a duty to inquire" about ORF (*Jana* at 278 [holding that the exercise of ordinary intelligence requires, at a minimum, a simple inquiry]).

Furthermore, ZFI's own allegations establish this information cannot be said to be peculiarly in the mind of the AM Defendants, as ORF and IDB are alleged to have knowledge as well.

ZFI's principal, Daniel Zwirn (Zwirn), at the very least was aware of ORF and IDB's involvement in the ORF Participation Investment. Zwirn swears in his affidavit that "ZFI's decision to enter into the [LPA] and acquire the [ORF Participation Investment] was based on, in part, my familiarity with IDB's treatment of North Mill's participation interest in the [ORF Participation Investment]..." (Reisman, Ex. C., ¶ 12). A simple inquiry to IDB may have revealed information that would have prompted ZFI to reconsider the ORF Participation Investment.

Moreover, ZFI's contention that it was induced to not investigate ORF because it was merely a custodian is not supported by the law. It is well established that a sophisticated investor, like ZFI has a "duty to exercise ordinary diligence and conduct an independent appraisal of the risk [it is] assuming" (*HSH Nordbank AG v UBS AG*, 95 AD3d 185, 195 [1st Dept 2012]).

This Court finds that the proposed amendments are palpably insufficient for the reasons set forth herein, thus, warranting a denial of ZFI's motion for leave to amend (*Bankers Trust Co. v Cusumano*, 177 AD2d 450, 450 [1st Dept 1991]).

Accordingly it is,

ORDERED that the plaintiff ZFI Endowment Partners, LP's

motion to amend is denied.

This constitutes the decision and order of the Court.

Dated: October 9, 2015



J.S.C.

JUDGE CHARLES F. WADSWORTH