SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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FGP 1, LLC and SERHII YEFIMTSEV, Index No.: 650479/2016

Plaintiffs, **DECISION & ORDER**

-against- Seq. Nos. 006, 007, 008, 009, 010

LUIZA DUBROVSKY, M INVESTMENT CAPITAL, LLC, MARK SHVARTSBURD, NATALIA PIROGOVA, VLADISLAV SIROTA, and JONATHAN S. STEWART,

Defendants.

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JENNIFER G. SCHECTER, J.:

Motion sequence numbers 006 through 010 are consolidated for disposition and all of the e-filed papers in connection with the motions have been considered.

Defendants M Investment Capital, LLC (MIC) and Mark Shvartsburd (collectively, the MIC Parties) move to dismiss the first, fifth, and sixth causes of action in plaintiffs' first amended complaint (the FAC) (Seq. 006).

Plaintiffs FGP 1, LLC (FGP) and Serhii Yefimtsev move to dismiss the MIC Parties' first counterclaim (Seq. 007).

Defendant Natalia Pirogova moves to dismiss the MIC Parties' first, second, and third counterclaims and crossclaims (Seq. 008).

Pirogova also moves to dismiss the first cause of action in the FAC (Seq. 009).

Defendant Jonathan S. Stewart moves to dismiss the causes of action asserted against him in the FAC – the first, seventh, and ninth causes of action (Seq. 010).

The motions are granted in part.

Background

The facts are drawn from the FAC, the MIC Parties' counterclaims and the documentary evidence.

Defendant Luiza Dubrovsky allegedly sold the same interest that she held in an LLC, which has an indirect interest in real estate, to two separate parties – first to FGP and then to MIC. The real estate, located at 172-174 Madison Avenue in Manhattan (the Property), is owned by Madison 33 Owner, LLC (Madison Owner), which, in turn, is wholly owned by Madison 33 Partner, LLC (Madison Partner). 172 Madison NP Member LLC (172 Member) owns 40% of Madison Partner, while 172 Madison NP Holding LLC (the Company) wholly owns 172 Member. The Company is a Delaware LLC.

FGP Transaction

Stewart of Cole Schotz, P.C. (Cole Schotz) represented Dubrovsky in connection with the FGP transaction. Pursuant to an Assignment Agreement dated June 17, 2015, Dubrovsky, who represented therein that she wholly owned the Company,[1] agreed to assign a 49% membership interest in the Company to FGP for $2 million in cash and assets worth at least $19.78 million (the Assets), which were required to be identified within one week of execution (Dkt. 173 [the FGP Assignment Agreement] at 2-3).[2] Dubrovsky then had up to two years to accept transfer of the Assets (*see id.* at 5). If an asset was not transferred

[1] Dubrovsky now claims that her stake in Madison Partner was really held as "nominee" for Pirogova. In the past she asserted in court filings that she was involved in a joint venture with others. The story is always evolving. Dubrovsky also represented that the Company had no liabilities despite the fact that it owed a large debt.

[2] FGP is a New York LLC and is 99% owned by Yefimtsev.

to Dubrovsky or her designee by the two-year mark "due to no default or breach" by FGP, then FGP would have "no liability to Dubrovsky" and its obligation to transfer the asset terminated (*id.*).

The FGP Assignment Agreement further required amendment of the Company's operating agreement to admit FGP as a member (*see id.* at 2). Dubrovsky admitted, and indeed it is undisputed, that contemporaneously with the execution of the FGP Assignment Agreement, she executed an Assignment and Assumption of Membership Interests in which she assigned a 49% membership interest in the Company to FGP (Dkt. 175 [the FGP Assignment]; *see* Dkt. 17 at 12 ¶ 9 [Dubrovsky admitting she "fulfilled her obligations under the (FGP) Assignment Agreement and … executed the (the FGP Assignment) conveying the Transferred Interest to FGP"]). As required, FGP and Dubrovsky executed the Company's amended operating agreement (Dkt. 136).[3] As further required by the FGP Assignment Agreement, on June 18, 2015, Dubrovsky delivered the requisite notice of the assignment to Deutsche Bank, which was Madison Owner's lender. The FGP Assignment was effective 15 business days later, on July 9, 2015 (*see* Dkt. 173 at 2).

On July 7, 2015, Dubrovsky executed a written acknowledgement that FGP designated Assets consisting of four properties: (1) an apartment in Moscow, Russia valued by the parties at $4 million (the $4 Million Moscow Apartment); (2) another apartment in Moscow, valued by the parties at $2 million; (3) an apartment in Sunny Isles Beach, Florida (the Acqualina Property); and (4) a 10,000 square meter property located in Krasnodar,

[3] It provides that the Company was to be managed by two managers, one of which would be appointed by FGP and the other by Dubrovsky (*see* Dkt. 136 at 2). Stewart was initially Dubrovsky's appointed manager but was replaced by Shvartsburd in October 2015.

Russia (*see* Dkt. 141 [the Acknowledgement]). In the Acknowledgement, Dubrovsky further states that, "With the above, I reaffirm that all of the conditions and items in our contract have been fulfilled in full, and no claims can be filed by me or my company" (*id.* at 3). Dubrovsky's two-year option to accept these properties expired in July 2017, before which she acquired the $4 Million Moscow Apartment and received $1.3 million in proceeds from a mortgage that plaintiffs obtained on the Acqualina Property. Dubrovsky did not take title to the other Assets.

In September and October 2015, Dubrovsky claimed that FGP did not meet its contractual obligations and sought to terminate their agreement and sell the 49% membership interest in the Company to someone else. By letter dated December 10, 2015, Dubrovsky purported to terminate the FGP Assignment Agreement (Dkt. 142).

On January 29, 2016, plaintiffs commenced this action against Dubrovsky, seeking, among other things, a declaratory judgment that FGP owns a 49% membership interest in the Company (*see* Dkt. 1 at 14-15).

MIC Transaction

Around the same time, Dubrovsky entered into another contract in which she agreed to assign a 49% membership interest in the Company to MIC in exchange for $5 million

(Dkt. 187 [the MIC Assignment Agreement]).[4] That agreement was backdated to November 2, 2015.[5]

Yefimtsev's Watches

In August 2015, Yefimtsev allegedly loaned six watches valued at $2 million (the Watches) to Dubrovsky in exchange for the Acknowledgement. Plaintiffs allege that beginning in September 2015, Yefimtsev repeatedly demanded that Dubrovsky return the Watches, but Dubrovsky refused to do so. At first, Dubrovsky did not contest that she was loaned the Watches and represented that she had not sold or otherwise disposed of them. On a December 21, 2015 telephone call with plaintiffs' counsel, Stewart allegedly acknowledged that Dubrovsky had taken possession of the Watches and stated that he would discuss an escrow arrangement for the Watches with her. At a January 29, 2016 meeting, Stewart allegedly agreed to hold the Watches in escrow.

A few weeks later, however, Stewart informed plaintiffs that Cole Schotz would not agree to escrow the Watches, and reported that, according to Dubrovsky, the Watches were not loaned to her, but rather were given to secure Yefimtsev's performance of certain unstated obligations. Hours later, Stewart's partner at Cole Schotz, Damien Albergo,

[4] Pursuant to the Company's amended operating agreement, FGP has a right of first refusal related to admission of new members. The validity of the 49% interest transfer to MIC is therefore very much at issue in this case and it remains to be seen who owns how much of the Company.

[5] Dubrovsky was allegedly negotiating the assignment with Shvartsburd in mid-October 2015. During those negotiations, Shvartsburd was aware of the FGP Assignment Agreement and the risk that a second assignment would be affected by it. MIC, however, was not formed until December 2015. The MIC Assignment Agreement, which recites that the $5 million was received by Dubrovsky "on or prior to December 29, 2016," was not notarized by Stewart until January 29, 2016 – the very same day this action was commenced (*see* Dkt. 187 at 8).

confirmed that Cole Schotz would not escrow the Watches, repeating that the Watches were not loaned and claiming they were conveyed to Dubrovsky as payment for a separate transaction. Dubrovsky subsequently changed her story, maintaining that she had never received the Watches and did not possess or control them. Thereafter, on June 14, 2016, Pirogova submitted an affidavit stating that Yefimtsev had a representative deliver the Watches to her, and that he had never conveyed the Watches to Dubrovsky. Pirogova contends that she is no longer in possession of the Watches. Plaintiffs allege that the Watches are currently in the possession of Shvartsburd.

Plaintiffs filed the FAC on March 25, 2019, asserting nine causes of action: (1) a declaratory judgment regarding FGP's 49% membership interest in the Company, asserted against all defendants; (2) breach of the FGP Assignment Agreement, asserted against Dubrovsky; (3) breach of the Company's operating agreement, asserted against Dubrovsky; (4) breach of fiduciary duty, asserted against Dubrovsky;[6] (5) breach of fiduciary duty, asserted against Shvartsburd; (6) tortious interference with contract, asserted against the MIC Parties; (7) aiding and abetting breach of fiduciary duty, asserted against Pirogova and Stewart, and Vladislav Sirota; (8) conversion of the Watches, asserted against Dubrovsky, Pirogova, and Shvartsburd; and (9) aiding and abetting conversion, asserted against Stewart (*see* Dkt. 130).

On March 28, 2019, the MIC Parties answered, asserting a counterclaim and cross-claim seeking declaratory judgments regarding the validity of the competing assignment

[6] There are many allegations pertinent to this case that are not at issue on these motions, such as the parties' disputes over governance of the Company.

agreements and the parties' purported 49% membership interests in the Company against FGP, Yefimtsev, Pirogova, and Dubrovsky (Dkt. 146). In the alternative, the MIC Parties assert claims, as numbered in their answer, for: (2) a declaratory judgment that even if Dubrovsky assigned a 49% interest in the Company to FGP, MIC owns at least a 51% controlling interest, asserted against FGP, Yefimtsev, Pirogova, and Dubrovsky; (3) breach of the MIC Assignment Agreement, asserted against Dubrovsky and Pirogova; and (4) restitution and unjust enrichment, asserted against FGP, Yefimtsev, Pirogova, and Dubrovsky.

Discussion

Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint and all reasonable inferences that may be gleaned from those facts (*Amaro v Gani Realty Corp.*, 60 AD3d 491 [1st Dept 2009]). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). If the defendant seeks dismissal of the complaint based upon documentary evidence, the motion will succeed only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]).

MIC's and Plaintiffs' Motions to Dismiss (Seq. Nos. 006 & 007)

The MIC Parties argue that the FGP Assignment Agreement, a contract to which they are neither parties nor beneficiaries, is an unenforceable agreement to agree and consequently that there was never any valid assignment to FGP of a 49% interest in the Company. The MIC Parties lack standing to challenge the enforceability of the FGP Assignment Agreement (*see Decolator, Cohen & DiPrisco, LLP v Lysaght, Lysaght & Kramer, P.C.*, 304 AD2d 86, 90 [1st Dept 2003] [one who "is neither a party, an assignee nor an intended third-party beneficiary" of a contract "lacks standing to challenge the validity of the contract"]). MIC--which had not yet been formed, was unknown to FGP and was not mentioned in the FGP Assignment Agreement--was not an intended beneficiary of the contract (*see U.S. Bank N.A. v GreenPoint Mortg. Funding, Inc.*, 105 AD3d 639, 640 [1st Dept 2013]; *see Decolator,* 304 AD2d at 90). Nor did MIC "suffer direct harm flowing from the contract" (*Decolator,* 304 AD2d at 90). It was only harmed because Dubrovsky allegedly sold to it what it already knew was the subject of an earlier assignment agreement. MIC has not shown that it has any right to challenge the validity of an agreement to which it is neither a party or beneficiary (*contrast RLI Ins. Co. v Steely*, 65 AD3d 539, 540 [2d Dept 2009] ["A plaintiff need not be privy to an insurance contract to commence a declaratory judgment action to determine the rights and obligations of the respective parties, so long as the plaintiff stands to benefit from the policy"]). Similarly, MIC, as a nonparty to the agreement, cannot invoke the statute of frauds even if it were

applicable in an attempt to invalidate the contract (*see Ashkenazy Acquisition Corp. v Rela Realty Corp.*, 296 AD2d 332 [1st Dept 2002])

Even if the MIC Parties had standing to challenge the FGP Assignment Agreement, their motion would fail because "where the parties have completed their negotiations of what they regard as essential elements" of a contract "and performance has begun on the good faith understanding that agreement on the unsettled matters will follow, the court will find and enforce a contract even though the parties have expressly left these other elements for future negotiation and agreement" (*Metro-Goldwyn-Mayer, Inc. v Scheider*, 40 NY2d 1069, 1070-71 [1976]). It does not matter that the almost $20-million worth of assets were not specified in the agreement itself because an agreement with missing terms can be enforced if there are "objective criteria" that can be used by the court to fill them in (*id.* at 1071; *see Cobble Hill Nursing Home, Inc. v Henry & Warren Corp.*, 74 NY2d 475, 483 [1989] [ignoring a party's promise as meaningless "is at best a last resort" and should not be done when the court is satisfied the agreement can be "rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear"]).

Here, resort to objective criteria isn't even necessary. The parties to the FGP Assignment Agreement made their intentions perfectly plain by memorializing the list of Assets and taking actions consistent with their agreement (*see Moshan v PMB, LLC*, 141 AD3d 496 [1st Dept 2016] [facts alleged permitted reasonable inference that the parties intended to be bound "including by performing in accordance therewith"], citing *Bed Bath & Beyond Inc. v IBEX Const., LLC*, 52 AD3d 413, 414 [1st Dept 2008] ["by moving forward with the project even in the absence of the fully executed Construction Agreement,

Ibex manifested its intent to be bound by the LOI"]). Dubrovsky then had two years to accept those Assets. Whether she or FGP later breached is immaterial because the MIC Parties' argument is predicated on unenforceability, not breach. Indeed, even if the parties initially had an agreement to negotiate in good faith on a list of Assets, that they later agreed on the list renders their agreement complete. MIC has not come close to showing that the FGP Assignment Agreement is unenforceable, particularly because the parties actually designated the Assets, FGP actually paid Dubrovsky millions in cash and assets in consideration, Dubrovsky actually accepted transfer of some of the Assets, the membership interest in the Company was actually transferred with notice going to third parties, and the Company's operating agreement was actually amended. To declare Dubrovsky's "promise legally meaningless—thus allowing (her) to walk away with [FGP's] property after enjoying the benefits of the bargain" would be a misuse of the definiteness doctrine and defeat "the reasonable expectations of the parties in entering into the contract" (*see Cobble Hill*, 74 NY2d at 485).

Negotiation over the Assets, moreover, was not a precondition to performance and reliance on *Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce* (70 AD3d 423 [1st Dept 2010]) is unavailing. Dubovsky agreed to immediately transfer her membership interest to FGP and executed an amendment to the Company's operating agreement before accepting transfer of the Assets or complaining that they were of insufficient value. Neither the terms of the contract nor the parties' actions indicate they merely had an agreement to

agree at a future date. Dubrovsky, moreover, could have conditioned transfer of the membership interest on receipt of all of the Assets. She did not.

The MIC Parties' motion is denied because they failed to establish the non-existence of an enforceable agreement between Dubrovsky and FGP. Plaintiffs' motion to dismiss the MIC Parties' first counterclaim, seeking a declaration that the FGP Assignment Agreement is an "agreement to agree," is granted because the MIC Parties do not have the right to such relief either procedurally or on the merits.

Pirogova's Motions (Seq. Nos. 008 & 009)

Pirogova's motions are principally predicated on FGP's and MIC's failure to strictly comply with notice requirements in the Company's operating agreement and on the Deutsch Bank loan agreement. She claims the assignments of Dubrovsky's membership interests in the Company to FGP and MIC were therefore ineffective. Even if Pirogova had standing to assert these arguments, and she does not (*see Decolator,* 304 AD2d at 90), Pirogova does not allege any prejudice from a failure to adhere to the technical notice requirements and it is undisputed that actual notice was received (*see Fortune Limousine Serv., Inc. v Nextel Communications*, 35 AD3d 350, 353 [1st Dept 2006] ["strict compliance with contractual notice provisions need not be enforced where the adversary party does not claim the absence of actual notice or prejudice by the deviation"]).

Pirogova's argument that MIC lacked capacity to enter into the MIC Assignment Agreement is baseless. While the contract was dated as of November 2, 2015, it was not executed until after MIC was formed in December 2016. Pirogova does not cite any authority for the proposition that an agreement is unenforceable under such circumstances,

especially after it was indisputably performed (*see Boslow Family Ltd. Partnership v Glickenhaus & Co.*, 7 NY3d 664, 668 [2006] ["Defendant is estopped from contending that plaintiff was not a limited partnership because defendant is using that sword to escape liability after it benefitted from its contract with plaintiff"]).[7]

That MIC is a Florida LLC is irrelevant to any of the relief sought by Pirovoga on this motion. Foreign companies can enter into contracts and seek to enforce them in New York. Though Pirogova invokes CPLR 8501(a), she did not move to compel MIC to post security (*see* Dkt. 203).

Pirogova's motions are therefore denied in their entirety.

Stewart's Motion (Seq. No. 010)

Stewart is not a necessary party to plaintiffs' declaratory judgment claim and thus plaintiffs have agreed to dismissal of the claim against him (Dkt. 300 at 5 n 1). The parties dispute, however, whether Stewart, given his status as Dubovsky's attorney, can be held liable for aiding and abetting her alleged breach of fiduciary duty and conversion.

"To state a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must plead a breach of fiduciary duty, that defendant knowingly induced or participated in the breach, and damages resulting from the breach" (*Global Minerals & Metals Corp. v Holme*, 35 AD3d 93, 101 [1st Dept 2006]). One knowingly participates in a breach by providing "'substantial assistance' to the primary violator" (*id.*). "Substantial assistance exists where

[7] Contracting prior to an organization's existence may result in personal liability and not necessarily a declaration of invalidity (*see Geron v Amritraj*, 82 AD3d 404, 405 [1st Dept 2011]; *see also Spinnell v JP Morgan Chase Bank, N.A.*, 59 AD3d 361 [1st Dept 2009]).

(1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated" (*Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009]).

Plaintiffs allege that Stewart – Dubrovsky's attorney who was fully familiar with the FGP agreements and the Company's state of affairs – knowingly aided Dubrovsky's breaches by misrepresenting her ownership of the Company and its supposed lack of debt and by helping her violate FGP's right of first refusal. While these allegations plausibly state a claim, Stewart asserts that he has immunity by virtue of his status as an attorney. He does not.

While "attorneys are 'immunized from liability under the shield afforded attorneys in advising their clients,'" there is no immunity for attorneys engaged in fraud or collusion or who act with malice or bad faith (*Pecile v Titan Capital Group, LLC*, 96 AD3d 543, 544 [1st Dept 2012], quoting *Beatie v DeLong*, 164 AD2d 104, 109 [1st Dept 1990]; *see Oster v Kirschner*, 77 AD3d 51, 56 [1st Dept 2010]). Stewart's actual knowledge is sufficiently pleaded based on his representation of Dubrovsky in the negotiation and execution of the assignment to FGP and the subsequent disputes between the parties, which would have made him well aware, among other things, that the MIC Assignment Agreement purported to sell the same 49% membership interest in the Company that had already been sold to FGP. Stewart nevertheless negotiated the MIC Assignment Agreement, thereby rendering substantial assistance to Dubrovsky in breaching her fiduciary duties. Bad faith may be

further inferred by the backdating of the MIC Assignment Agreement and its execution on the very day plaintiffs commenced this action (*see Oster*, 77 AD3d at 56 ["intent to commit fraud is to be divined from surrounding circumstances"]). An attorney who knowingly structures a deal based on misrepresentations has no immunity (*see Bankers Trust Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 AD2d 384, 385 [1st Dept 1992]).

Stewart, however, cannot be held liable for aiding and abetting conversion of the Watches. "A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). While the Watches are alleged to have been converted (and defendants did not move to dismiss this claim), Stewart is not alleged to have provided substantial assistance (*see William Doyle Galleries, Inc. v Stettner*, 167 AD3d 501, 505 [1st Dept 2018]; *Sayles v Ferone*, 137 AD3d 486 [1st Dept 2016]). Nor is he alleged to have acted in bad faith. All of Stewart's alleged actions with respect to the Watches were within the scope of his duties as counsel for Dubrovsky. While plaintiffs plausibly plead bad faith on the part of other defendants with respect to their role in obtaining the Watches and then lying about the nature of the alleged agreements and their location, the most that can be reasonably inferred from plaintiffs' allegations is that after the Watches were given to defendants, they sought to defraud plaintiffs. Plaintiffs do not plead, however, any facts suggesting that Stewart intended to defraud plaintiffs at the time the Watches were provided or that he lied about his initial intention to hold them in escrow. There is no

misconduct alleged in connection with the Watches that is sufficient to vitiate his immunity. The claim is dismissed without prejudice to amendment if there is ultimately evidence of Stewart's misconduct with respect to the Watches (for example, a showing that that he had knowledge, prior to the Watches' remittance, that defendants intended to keep them). Stewart, who is not alleged to possess the Watches, cannot be held liable for their conversion based on the current allegations.

Accordingly, it is ORDERED that (1) the MIC Parties' motion to dismiss is denied; (2) plaintiffs' motion to dismiss the MIC Parties' first counterclaim is granted and that counterclaim is dismissed; (3) Pirogova's motions to dismiss are denied; and (4) Stewart's motion to dismiss is granted only to the extent of dismissing plaintiffs' declaratory judgment and aiding and abetting conversion claims, which are dismissed only as to Stewart, and his motion is otherwise denied.

Dated: March 31, 2020

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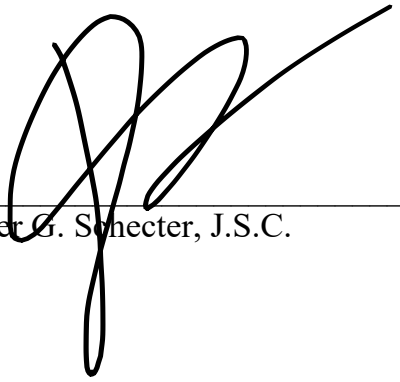

Jennifer G. Schecter, J.S.C.