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Phillips v Hoffman
2013 NY Slip Op 51836(U)
Decided on November 12, 2013
Supreme Court, New York County
Bransten, J.
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Decided on November 12, 2013

Supreme Court, New York County

Pamela A. Phillips, Plaintiff,

against

Gabe Hoffman, MICHAEL GUARNERI, ACCIPITER CAPITAL MANAGEMENT, LLC and CANDENS CAPITAL, LLC, Defendants.

101277/2011

The plaintiff/opponent, Pamela A. Phillips, appeared pro se, and attorneys for defendants/movants were Kyle C. Bisceglie, Esq. and Matteo J. Rosselli, Esq. of Olshan Grundman Frome Rosenzweig & Wolosky LLP.

Eileen Bransten, J.

This tort action, alleging grossly negligent management of a hedge fund, comes before

the Court on a motion for summary judgment made by Defendants Gabe Hoffman, Michael Guarneri, Accipiter Capital Management, LLC ("ACM"), and Candens Capital, LLC ("Candens," collectively, "Defendants"). Plaintiff Pamela A. Phillips ("Plaintiff") opposes. For the reasons stated below, Defendants' motion is granted.

Background [FN1]

In late 2003 and early 2004, Plaintiff invested $450,003 in a hedge fund ("Fund I") managed by Hoffman. (Affidavit of Gabe Hoffman ("Hoffman Aff.") ¶ 14). In 2006 and 2007, Plaintiff transferred $621,00 from Fund I to a second fund ("Fund II," together with Fund I, the "Funds"), also managed by Hoffman. (Hoffman Aff. ¶ 15). By February 2008, the value of Plaintiff's cumulative investment in the Funds reached $1,508,110. (Hoffman Aff. ¶ 17). [*2]

The Funds are organized as Delaware limited partnerships. (Hoffman Aff. ¶ 7.) Candens is the general partner of the Funds and ACM is the management company of the Funds. (Hoffman Aff. ¶¶ 3, 4.) Hoffman is the managing member of both Candens and ACM. (Hoffman Aff. ¶ 5.) Guarneri is the Chief Financial Officer of ACM. (Hoffman Aff. ¶ 6.) Plaintiff became a limited partner in the Funds upon her investment. (Hoffman Aff. ¶ 12).

In March 2008, Fund I declined 22% and Fund II declined 25%. (Hoffman Aff. ¶ 19). On April 1, 2008, Plaintiff faxed two requests to Defendants, first requesting that Defendants redeem her investment immediately, and shortly thereafter requesting that Defendants redeem her investments as of the end of the first quarter of 2008. (Hoffman Aff. ¶ 20). Although the Funds required that investors request redemption either thirty or ninety days in advance, Defendants chose to waive those requirements and redeemed Plaintiff's investment in the Funds as of March 31, 2008, paying her $936,584. (Hoffman Aff. ¶¶ 22, 23).

On July 14, 2008, Plaintiff initiated an action against Defendants, seeking to attach $630,000 of the Defendants' assets. (Affirmation of Kyle C. Bisceglie ("Bisceglie Affirm.") Ex. B). On August 11, 2008, Justice Cahn denied the temporary restraining order seeking attachment, and on November 26, 2008, Justice Cahn also denied the related preliminary injunction. (Bisceglie Affirm. ¶ 3). On May 29, 2009, Justice Fried dismissed all of Plaintiff's claims as barred by the Funds' partnership agreements, except for the gross negligence claim. (Bisceglie Affirm. ¶ 4).

Thereafter, Plaintiff filed an amended complaint, reasserting many of the dismissed causes of action. (Bisceglie Affirm. ¶ 5). On April 12, 2010, Justice Fried dismissed Plaintiff's amended complaint as a sanction for publicly filing confidential documents, in violation of the operative confidentiality agreement and order. (Bisceglie Affirm. Ex. D).

On February 1, 2011, Plaintiff began the instant action by filing the Complaint. Based upon collateral estoppel, this Court dismissed all but one of Plaintiff's claims.[FN2] Defendants filed their motion for summary judgment on December 12, 2012, seeking dismissal of the gross negligence claim. Plaintiff opposes.

Analysis

I.*Summary Judgment Standard*

The standards for summary judgment are well-settled. The movant must tender [*3] evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once such proof has been offered, to defeat summary judgment "the opposing party must show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman*, 49 NY2d at 562. When deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 (2007).

II.*Defendants' Motion for Summary Judgment*

Defendants advance two main theories that warrant granting summary judgment. First, Defendants argue that the business judgment rule protects Defendants actions and that Plaintiff has failed to rebut the rule's presumption. Second, Defendants contend that Plaintiff has not suffered any damages, and therefore cannot state a claim for gross negligence.

A.*Business Judgment Rule Forecloses Claim*

Defendants argue that Delaware's business judgment rule forecloses recovery based on

Plaintiff's allegations.[FN3] Plaintiff argues that the business judgment rule does not protect Defendants because Defendants acted in a way that cannot be attributed to a rational business purpose. *See* Plaintiff's Memorandum of Law in Opposition ("Pl.'s Br.") 12.

Delaware law states that "the corporate general partner and its directors are entitled to . . . a presumption that their actions are protected from judicial oversight by the business judgment rule." *Zoren v. Genesis Energy L.P.*, 836 A.2d 521, 528 (Del. Ch. 2003). In *Zoren*, the court held that a general partner and its director, managing a limited partnership on behalf of the limited partners, is entitled to the protections of the business judgment rule. *See Zoren*, 836 A.2d at 528. Here, Candens is the Funds' general partner, Hoffman is Candens's managing member, and Plaintiff was a limited partner in the Funds. *See* Hoffman Aff. ¶¶ 3, 5, 12. Therefore, Delaware applies the business judgment rule to the facts of this case. *See Zoren*, 836 A.2d at 528.

"The business judgment rule generally protects the actions of general partners, [*4] affording them a presumption that they acted on an informed basis and in the honest belief that they acted in the best interest of the partnership and the limited partners." *In re Boston Celtics Ltd. P'ship S'holders Litig.*, No. C.A. 16511, 1999 WL 641902, at *5 (Del. Ch. Aug. 6, 1999). A business decision "will be respected by courts unless the [general partners] are interested or lack independence relative to the decision, do not act in good faith, act in a manner that cannot be attributed to a rational business purpose or reach their decision by a grossly negligent process that includes the failure to consider all material facts reasonably available." *Brehm v. Eisner*, 746 A.2d 244, 264 n.66 (Del. 2000). " [S]ubstantive due care,' . . . is foreign to the business judgment rule. . . . Due care in the decisionmaking context is *process* due care only." *Brehm*, 746 A.2d at 264 (emphasis in original).

There is no claim here of self-interest or lack of independence. Rather, Plaintiff argues that the business judgment rule cannot not shield Defendants from liability because "Hoffman made grossly improper and reckless naked short investments that committed plaintiff's capital to just 2 investments . . . ." *See* Pl.'s Br. 12.

Plaintiff's allegations are quintessentially substantive. Plaintiff fails to allege any negligent process, but rather takes issue with the investment choices made by Defendants. However, Delaware law created the business judgment rule so that "actions are protected from judicial oversight" when there is a quarrel regarding a substantive decision. *See In re*

Massey Energy Co., C.A. No. 5430-VCS, 2011 WL 2176479, at *22 (Del. Ch. May 31, 2011) ("An essential purpose of the business judgment rule is to free fiduciaries making risky business decisions in good faith from the worry that if those decisions do not pan out in the manner they had hoped, they will put their personal net worths at risk.").

Plaintiff authorized Defendants to use "broad and flexible investment authority" to invest in, among other things, "long or short positions." (Hoffman Aff. Ex. 1 at 5). Even accepting as true all of Plaintiff's factual allegations that the Funds' losses were "entirely caused by Hoffman's grossly improper and reckless speculative bets in tens of thousands of stock options," Plaintiff has failed to overcome her burden to rebut the protection afforded Defendants by the business judgment rule. "As for the plaintiffs' contention that the directors failed to exercise substantive due care,' we note that such a concept is foreign to the business judgment rule." *Brehm v. Eisner*, 764 A.2d 244, 264 (Del. 2000). Accordingly, Plaintiff's claim for gross negligence must be dismissed.

B.*Plaintiff Has Not Suffered Damages*

Assuming that Plaintiff would be able to overcome the business judgment rule, Plaintiff's claim still fails because she has not suffered any damages.

Plaintiff contends that she has suffered at least $550,000 in damages. Plaintiff maintains that she invested $450,003 in Fund I and $621,000 in Fund II, and that she declared various amounts of income attributed to Plaintiff by the Funds, bringing her total [*5]investment in the Funds close to $1.5 million. Plaintiff admits that she received $936,584 from Defendants upon redemption of her funds, but then argues that she suffered at least $550,000 in damages due to Defendants' gross negligence.

Defendants contend that Plaintiff invested solely $450,003 of her own funds and that all other monies at issue in this case were created through Defendants successful investments. Defendants further argue that Plaintiff's investment of $621,000 in Fund II consisted entirely of profits withdrawn from Fund I, and therefore do not constitute an additional capital investment by Plaintiff. After the $936,584 redemption, Defendants argue that Plaintiff received a net benefit of nearly $500,000, after fees and expenses, for a 108% total return over five years.

The Court does not find a meaningful distinction between Fund I and Fund II, such that

transferring funds should be considered an independent investment. The Funds both invested in the life-sciences sector and were both managed by Hoffman. *See* Hoffman Aff. Exs. 1 at 5, 2 at 5. In addition, Plaintiff admits that she only transferred her money from Fund I to Fund II at the suggestion of Hoffman. (Compl. ¶ 27). Ultimately, the transferred funds were not procured by Plaintiff's efforts, but rather solely by Hoffman's investments. The Court sees no reason to consider Plaintiff's transfer of money from Fund I to Fund II as an entirely new investment. Therefore, Plaintiff invested $450,003 and received $936,584, and thus has not suffered any damage.

Further, the alleged excessively risky investments that Defendants pursued were instrumental in achieving the peak portfolio value of $1.5 million for Plaintiff. (Hoffman Aff. ¶¶ 17, 18). Plaintiff cannot be allowed to reap the benefits of a risk-laden strategy and then complain about the strategy when she suffers a loss. *Cf. Longo v. Butler Equities II, L.P.*, 278 AD2d 97, 97 (1st Dep't 2000) (accredited investor accepted the risk of a speculative investment and could not claim reliance on marketing statements). The law of torts should not serve as an insurance policy for an accredited investor such as Plaintiff to recoup losses on her speculative investments.

Plaintiff cites *Rolf v. Blyth, Eastman Dillon & Co., Inc.*, 570 F.2d 38 (2d Cir. 1978), in support of her contention that she is entitled to lost profits damages. While the court in *Rolf* did allow a defrauded investor to recoup lost capital plus market rate returns due to breach of fiduciary duty, the part of Rolf applicable to this case is the calculation of damages. *See Rolf*, 570 F.2d at 48. The court in *Rolf* awarded damages in the amount of the portfolio's value on the date defendant's fraud started, reduced by the value at the date the fraud ended, and further reduced by the general market decline. *See Rolf*, 570 F.2d at 48.

Here, Plaintiff alleges that the gross negligence was ongoing since the time of her initial investment. *See* Compl. ¶ 100 ("In actuality, at the time that Hoffman solicited Plaintiff's investment in the Accipiter I and II Fund he was managing the Accipiter Fund in a reckless, grossly negligent manner."). Therefore, even under Plaintiff's suggested standard, the portfolio's value on the date the alleged negligence started was zero and [*6]Plaintiff has not incurred any damages.

Without damages, a cause of action for gross negligence cannot stand. *See, e.g.*, *Campbell v. DiSabatino*, 947 A.2d 1116, 1117 (Del. 2008). Therefore, Defendants are

granted summary judgment and Plaintiff's claim is dismissed.

Plaintiff's remaining contentions, including her collateral estoppel argument, have been considered and are unpersuasive. Defendants' other arguments are rendered moot.

CONCLUSION

Accordingly, it is hereby

ORDERED that Defendants' motion for summary judgment is GRANTED and the complaint is dismissed in its entirety with costs and disbursements to the Defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York

November *12* , 2013

ENTER:

/s/

Hon. Eileen Bransten, J.S.C.

Footnotes

Footnote 1: All facts in this section are undisputed, unless otherwise noted.

Footnote 2: Defendants did not move to dismiss Plaintiff's gross negligence claim in their August 12, 2011 motion to dismiss. *See* Def.'s Mem. of Law in Supp. of Mot. to Dismiss, May 25, 2011, NYSCEF No. 2.

Footnote 3: New York's Partnership Law section 121-901 requires that "the laws of the jurisdiction under which a foreign limited partnership is organized govern its organization

and internal affairs and the liability of its limited partners." The claim here arises out of partnerships formed under Delaware law. (Hoffman Aff. ¶ 7.) Therefore, Delaware law applies in this case. *See Hart v. General Motors Corp.*, 129 AD2d 179, 184 (1st Dep't 1987).

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