DJZV Holdings LLC v Citibank, N.A.

2015 NY Slip Op 31125(U)

June 26, 2015

Supreme Court, New York County

Docket Number: 651397/2014

Judge: Eileen Bransten

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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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DJZV HOLDINGS LLC, EVUNP HOLDINGS LLC and ELI VERSCHLEISER,

Plaintiffs,

-against-

Index No. 651397/2014
Motion Date: 3/17/2015
Motion Seq. No.: 001

CITIBANK, N.A., CITIGROUP INC. d/b/a CITI PRIVATE BANKING, CARMEN MONKS and PETER M. COWAN,

Defendants.

---x

BRANSTEN, J.:

Defendants Citibank, N.A., Citigroup d/b/a Citi Private Banking, Carmen Monks, and Peter M. Cowan move for an order, pursuant to CPLR 3211(a)(1) and (7), dismissing plaintiff's complaint in its entirety. Plaintiffs oppose the motion. For the reasons that follow, defendants' motion is granted.

I. Background

This action arises out of the failed purchase of real property known as 866 UN Plaza, located at 48th Street and 1st Avenue in Manhattan (the "Property"), by various entities owned and controlled by plaintiff Eli Verschleiser and non-party Jacob Frydman. Plaintiffs assert that Frydman and his entities engaged in an unauthorized transfer of all of the investor monies for the failed purchase out of a bank account at Citibank, N.A.

A. *866 Management*

In September 2013, Verschleiser and Frydman formed two entities in connection with their joint effort to raise funds from investors to purchase the Property – United Realty 866 UN Plaza LLC ("United Realty 866" or "Accountholder") and United 866 Management LLC ("866 Management"), the sole manager of United Realty 866. (Compl. ¶¶ 13-14.) 866 Management had two members: Winter 866 UN, LLC, a Frydman-controlled entity, and EVUNP Holdings LLC ("EVUNP"), a Verschleiser-controlled entity.

866 Management was managed by both Verschleiser and Frydman pursuant to an operating agreement. *Id.* ¶¶ 15-16. Section 3.1 of the 866 Management Operating Agreement provided that as long as there were two members, each holding a 50% interest, management was to be vested in two managers. One of the two managers was to be appointed by Frydman and the other by Verschleiser. In the event that one of those managers were removed at the discretion of the member who appointed him, then the replacement would be appointed by the same member. *See* Affidavit of Eli Verschleiser ("Verschleiser Aff."), Ex. 2 at § 3.1.

B. *The Citibank Account*

On November 13, 2013, United Realty 866 opened an account (the "Account") with defendant Citibank, N.A. by submitting a General Resolution (the "Citibank Agreement"). *Id.* ¶ 17; Affirmation of Marc A. Weinstein ("Weinstein Affirm."), Ex. A. In the Citibank Agreement, United Realty 866 named Frydman and Verschleiser as authorized to act on its behalf and specified that all transactions required the signature of both Frydman and Verschleiser. *See* Verschleiser Aff. ¶ 18; Weinstein Affirm., Ex. A at 1.

C. *Membership Interests Sale and Purchase Agreement*

Verschleiser's and Frydman's relationship deteriorated and became the subject of several litigations between the two, all pending before this court.[1] On December 3, 2013, Verschleiser and Frydman, and their entities, including plaintiff EVUNP, entered into a Membership Interests Sale and Purchase Agreement ("PSA"), pursuant to which Verschleiser resigned as manager of 866 Management, among other entities, and Verschleiser and EVUNP waived all rights and benefits in 866 Management and United Realty 866. *See* Verschleiser Aff. Ex. 3 at ¶¶ 3-9. In the PSA, Verschleiser also stated

[1] *See DJZV Holdings LLC, et al. v. Frydman, et al.*, Index No. 654346/2013 (Sup. Ct. N.Y. Cnty.), *JFURTI, LLC, et al. v. Verschleiser, et al.*, Index No. 650803/2014 (Sup. Ct. N.Y. Cnty.), and *EVUNP Holdings LLC, et al. v. Frydman, et al.*, Index No. 650841/2014 (Sup. Ct. N.Y. Cnty.).

that he "shall not represent himself as a . . . manager, member, . . . or representative of any of the Entities for any purpose." *Id.* ¶ 3. In paragraph 9, Verschleiser and his related entities stated that they "hereby waive and forever release each of the Entities with respect to any rights, benefits, distributions, and compensation granted to [them] pursuant to each and every of the operating agreements or partnership agreements of each of the Entities," and the operating agreements were deemed amended "so as to delete therefrom any rights, benefits, distributions, and compensation granted by each of the Entities in favor of any of the Verschleiser Parties." *Id.* ¶ 9.

C. *Withdrawal of Funds from the Citibank Account*

On December 12, 2013, defendants received a notice informing them that, pursuant to section 3.1.1 of the Operating Agreement, DJZV had been appointed as a Manager replacing Verschleiser, and that any transactions relating to the Account would continue to require the unanimous consent of both managers, Frydman and DJZV. (Compl. ¶ 19; Verschleiser Aff. Ex. 2 at 7.)

Shortly thereafter, Frydman, without the consent or signature of either Verschleiser or DJZV, allegedly instructed defendants to transfer funds from the Account to another account controlled solely by Frydman. (Compl. ¶ 20.) On December 17, 2013, defendants

completed Frydman's requested transfer of $4,950,033.51 in investor funds from the Account. *Id.* ¶¶ 2, 21.

D. *Prior Proceedings in Related Actions*

On December 18, 2013, plaintiffs filed an action in this Court against Frydman and his entities and requested a TRO and preliminary injunction, seeking the return of the funds withdrawn from the Account and to prevent Frydman from further transferring them. *DJZV Holdings LLC, et al. v. Frydman, et al.*, Index No. 654346/2013 (Sup. Ct. N.Y. Cnty.). On January 13, 2014, this Court denied the application, ruling that the "documentary evidence is clear that Verschleiser and his related entities gave up his rights in United 866 Management LLC." (Weinstein Affirm. Ex. D at 1.)

E. *The Present Action*

In the present complaint, plaintiffs allege claims against defendants for (1) breach of the Citibank Agreement by causing funds to be transferred without the signature and consent of both managers; (2) violation of New York Banking Law § 676; (3) declaratory judgment; and, (4) aiding and abetting breach of fiduciary duty.

II. Discussion

Defendants now seek dismissal of the instant action, pursuant to CPLR 3211(a)(1) and (7), based on documentary evidence and failure to state a claim.

A. Standing

Defendants first attack plaintiffs' claims on standing grounds. Standing is a threshold determination as to whether a party has a sufficiently cognizable stake in the outcome in order to present a court with a dispute capable of judicial resolution. *See Security Pac. Nat'l Bank v. Evans*, 31 A.D.3d 278, 279 (1st Dep't 2006); *see also Roberts v. Health & Hosps. Corp.*, 87 A.D.3d 311, 318 (1st Dep't 2011). "Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation." *Soc'y of Plastics Indus. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 769 (1991) (citation omitted). When a defendant challenges standing with documentary evidence, the plaintiff bears the burden of establishing standing. *Bank of N.Y. v. Silverberg*, 86 A.D.3d 274, 279 (2d Dep't 2011); *Matter of Brown v. Cnty. of Erie*, 60 A.D.3d 1442, 1443-1444 (4th Dep't 2009).

The threshold standing question is whether plaintiff has demonstrated an "injury in fact," defined as "an actual legal stake in the matter being adjudicated – [which] ensures that the party seeking review has some concrete interest in prosecuting the action which

casts the dispute 'in a form traditionally capable of judicial resolution.'" *Soc'y of the Plastics Indus. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 772 (1991); *see also Roulan v. Cnty. of Onondaga*, 21 N.Y.3d 902, 905 (2013) (deeming speculative financial loss and personal disagreement is not sufficient to confer standing); *Lucker v. Bayside Cemetery*, 114 A.D.3d 162, 169 (1st Dep't 2013) (stating that plaintiff must have actual stake in the matter being adjudicated).

In this action, the gravamen of plaintiffs' claims is that defendants failed to comply with the terms of the Citibank Agreement by permitting withdrawal of the funds with only Frydman's signature, resulting in the removal of the funds from the Account. (Compl. ¶¶ 20-22.) The difficulty with plaintiffs' claims is that they were not parties to the Citibank Agreement, nor were they depositors of the funds that were transferred. In fact, plaintiffs admit in their memorandum in opposition that "the Funds were returned to the correct parties," and, thus, that no one lost money. (Pls.' Opp. Br. at 8.) They fail to articulate any individualized loss suffered by them as a result of defendants' action. Plaintiffs' argument that they were not required to plead damages with specificity misses the point – defendants are not challenging the specificity; they challenge and demonstrate that plaintiffs were not injured at all.

Plaintiffs seek to allege for the first time through their opposition brief that Verschleiser suffered reputational damage in that he was the target of "malicious

litigation commenced by Frydman and negative treatment in the media." *Id.* Not only do these allegations not appear in the complaint, and, thus, are not properly before this court on this motion, these allegations do not involve any actions taken by defendants.

Moreover, plaintiffs' claim that their filing of the TRO/injunction application in the *DJZV Holdings LLC, et al. v. Frydman, et al.*, Index No. 654346/2013 action resulted in Frydman returning the funds to the investors is belied by the record therein. As defendants aptly point out, in that case, plaintiffs' own moving papers on the injunction application stated that Frydman had already "negotiated an Agreement for the return of the $4,950,033.51 in investor capital that was raised by 866 Management." (Weinstein Reply Affirm. Ex. E at 9.)

At most, if there was some kind of harm as a result of the funds transfer, any such claims would need to be brought by the accountholder – United Realty 866 – and plaintiffs do not purport to bring this action on behalf of that entity. In fact, plaintiffs Verschleiser and EVUNP Holdings LLC could not act on behalf of United Realty 866 or 866 Management, since they waived their rights with regard to those entities in the PSA.

Under the PSA, plaintiffs Verschleiser and EVUNP Holdings LLC "waive[d] and forever release[d] [866 Management] with respect to any rights . . . granted to [Verschleiser's entities] . . . and hereby acknowledge that each of the operating agreements and partnership agreements of each of the Entities are hereby deemed

amended so as to delete therefrom any rights . . . granted by each of the Entities in favor of the Verschleiser Parties." (Weinstein Affirm., Ex. B ¶ 9.) The definition of "Entities" in the PSA included United Realty 866 and 866 Management. (Verschleiser Aff., Ex. 3 at 2.) Further, plaintiffs' claims that they did not sell their membership rights in those entities, and that they appointed a new manager of 866 Management whose consent was required for the transfer, is clearly refuted in the PSA in which Verschleiser stated that he "shall not represent himself as a . . . manager, member, . . . or representative of any of the Entities for any purpose." *Id.* ¶ 3.

To the extent that plaintiffs argue that they were third-party beneficiaries of the Citibank Agreement, this argument is without merit. In order to demonstrate that they are third-party beneficiaries, plaintiffs must show that the contracting parties – here, defendant Citibank, N.A. and United Realty 866 – intended a "sufficiently immediate, rather than incidental" benefit. *Saska v. Metro. Museum of Art*, 42 Misc.3d 548, 559 (Sup. Ct. N.Y. Cnty. Oct 29, 2013), *aff'd sub nom Grunewald v. Metro. Museum of Art*, 125 A.D.3d 438 (1st Dep't 2015). The "parties' intent to benefit the third party must be apparent from the face of the contract." *LaSalle Nat'l Bank v. Ernst & Young*, 285 A.D.2d 101, 108 (1st Dep't 2001); *see also U.S. Bank N.A. v. GreenPoint Mortg. Funding, Inc.*, 105 A.D.3d 639, 640 (1st Dep't 2013) (affirming dismissal of breach of contract claim on standing grounds because nonparties to the contracts "lacked standing to bring the claims

directly, and given the absence of any clear language on the face of the loan sale agreements evincing an intent to benefit third parties, the insurers failed to allege facts sufficient to sustain the claim that the agreements were intended to give them third-party benefits."). There must be "clear contractual language evincing such intent." *LaSalle Nat'l Bank*, 285 A.D.2d at 108.

Plaintiffs fail to point to any such clear contractual language expressly naming them as such a beneficiary, or contractual provisions granting them enforceable rights under the Citibank Agreement. Verschleiser is not an intended beneficiary simply becuse he was a signatory on the account. Thus, plaintiffs fail to establish that they have standing to pursue the claims.

B. Failure to State a Claim

1. Breach of Contract

Even if not barred on standing grounds, Plaintiffs' claim for breach of contract merits dismissal for failure to state a claim. Plaintiffs are not parties to the Citibank Agreement and they are not third-party beneficiaries. In addition, plaintiffs fail to allege any damages. As discussed above, there are no allegations of any injury in fact. Moreover, reputational or emotional damages from an alleged breach of contract are not actionable. *See Wehringer v Standard Sec. Life Ins. Co. of N.Y.*, 57 N.Y.2d 757, 759

(1982) ("[A]bsent a duty upon which liability can be based, there is no right of recovery for mental distress resulting from the breach of a contract-related duty."); *Rather v. CBS Corp.*, 68 A.D.3d 49, 55 (1st Dep't 2009) (holding that claim for damages for loss of reputation arising from breach of contract is not actionable). Again, contrary to plaintiffs' argument, the issue is not whether plaintiffs substantiated their damages, it is that they have not pleaded damages.

2. New York Banking Law § 676

New York Banking Law § 676 addresses a bank's liability for payment of funds from savings and time deposit accounts based upon an unauthorized signature. Section 676 provides that the bank, rather than the depositor, bears the burden of any loss, and that there is no defense that the bank exercised due care in ascertaining the identity of the person to whom the money was paid.

First, Section 676 does not apply to plaintiffs' claims in the instant case, since none of the plaintiffs was a depositor into the Account.

Moreover, plaintiffs fail to allege that an unauthorized signature in violation of this provision. In the PSA, plaintiffs Verschleiser and EVUNP Holdings LLC clearly waived any rights pursuant to the operating agreements and stated that they would not represent themselves as a member of any of the "Entities." (Verschleiser Aff., Ex. 3 ¶¶ 3, 9.)

Plaintiffs, thereby, waived the right to appoint a new manager. As plaintiffs concede in their brief, Verschleiser resigned from his managerial positions, leaving Frydman as the only remaining authorized person listed on the Citibank Agreement with the authority to act for the depositor, United Realty 866. *See* Pls.' Opp. Br. at 14. Accordingly, plaintiffs have failed to plead that there was an unauthorized signature, as required for a Section 676 claim.

3. Declaratory Judgment

Plaintiffs' declaratory judgment claim is identical to their breach of contract claim and therefore fails as duplicative. *See Wells Fargo Bank, N.A. v. GSRE II, Ltd.*, 92 A.D.3d 535, 536 (1st Dep't 2012) (affirming dismissal of a declaratory judgment claim where other remedies are available, such as a breach of contract claim); *Apple Records v. Capitol Records*, 137 A.D.2d 50, 54 (1st Dep't 1988) ("A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract."). Accordingly, plaintiffs' third claim is dismissed.

4. Aiding and Abetting Breach of Fiduciary Duty Claim

The fourth claim alleges that the defendants aided and abetted Frydman's alleged breach of fiduciary duty when they transferred funds out of the Account. (Compl. ¶¶ 41-45.) As plaintiffs concede, Frydman transferred the funds out of the Account to return the investors' monies, and, therefore, even if there was a fiduciary duty, there was no breach. Without a breach, there is no basis for an aiding and abetting claim. *OFSI Fund II, LLC v. Canadian Imperial Bank of Commerce*, 82 A.D.3d 537, 540 (1st Dep't 2011) ("As there is no breach of fiduciary duty claim, there can be no claim for aiding and abetting breach of fiduciary duty.").

(*Order follows on next page.*)

III. Conclusion

Accordingly, it is

ORDERED that the motion to dismiss is granted and the complaint is dismissed in its entirety with costs and disbursements to 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.

Dated: New York, New York
June 26, 2015

ENTER

Hon. Eileen Bransten, J.S.C.