

**MDW Funding LLC v Darden Media Group, LLC**

2017 NY Slip Op 30878(U)

April 28, 2017

Supreme Court, New York County

Docket Number: 651708/2015

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 39

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MDW FUNDING LLC, VERSANT FUNDING LLC,

Plaintiffs,

-against-

DARDEN MEDIA GROUP, LLC, DARDEN MEDIA  
HOLDINGS, LLC, CALVIN DARDEN, CALVIN DARDEN,  
FOREFRONT CAPITAL MARKETS, LLC, MERRILL  
LYNCH, PIERCE, FENNER & SMITH INCORPORATED,  
BRENT WATSON

Defendants.

-----X  
HON. SALIANN SCARPULLA, J.:

**DECISION/ORDER**

Index No. 651708/2015  
Motion Seq. No. 004 & 005

In this action for fraud, defendant Brent Allen Watson (“Watson”) moves in motion sequence number 004, pursuant to CPLR § 3211(a)(7), to dismiss the amended complaint against him for failure to state a claim. Defendant Forefront Capital Markets, LLC (“Forefront”) also moves in motion sequence number 005, pursuant to CPLR § 3211(a)(7), to dismiss the amended complaint against it on the same ground. Motion sequence numbers 004 and 005 are consolidated for disposition.

**Background**

This case arises out of a fraudulent scheme that defendant Calvin Darden, Jr. (“Darden Junior”), who is not a movant on either motion, orchestrated to convert loan proceeds that plaintiff MDW Funding LLC (“MDW”) lent as part of defendant Darden Media Group, LLC’s (“DMG”) failed attempt to purchase Maxim Magazine (the “Maxim Deal”). MDW and Versant Funding LLC (“Versant”) (Collectively, “Plaintiffs”) are in the factoring business and attest that at the time of the alleged fraud, Plaintiffs were registered New Jersey limited liability companies.

Forefront is a limited liability company operating its principal place of business in New York, and Plaintiffs allege that it acted as the exclusive advisor and investment banker for the Maxim Deal. In that role, Forefront assisted in obtaining the necessary financing to close the Maxim Deal, which included procuring a short-term loan for \$3.1 million from Opengate Capital Group, LLC (“Opengate”). Because raising the necessary financing to close the Maxim Deal proved difficult, the Opengate loan provided temporary financing to keep the Maxim Deal afloat. As part of the lending terms, Opengate allegedly received a personal guarantee from Calvin R. Darden, Sr. (“Darden Senior”), Darden Junior’s father, who purportedly granted Opengate a blanket security interest in all his assets.

As the Opengate repayment date approached, Forefront allegedly started to aggressively solicit MDW to loan \$5.5 million as part of the financing for the Maxim Deal. Plaintiffs allege that during the loan negotiation process, Forefront represented to MDW that it was dealing directly with Darden Senior and provided Forefront with: 1) Darden Senior’s personal financial statement; 2) a notarized personal guarantee Darden Senior purportedly signed; and 3) a control agreement, which provided that Darden Senior would transfer specific shares held at Bank of America to a control account at Merrill Lynch as collateral for the MDW loan (“MDW Control Agreement”).

Plaintiffs further allege that Forefront omitted to share material information regarding the Opengate loan. On November 6, 2013, MDW entered into a promissory note with DMG to loan \$5.5 million as part of the Maxim Deal financing. The terms included Darden Senior’s purported notarized personal guarantee and the MDW Control Agreement.

Watson is a New York resident who is a former vice president and wealth manager at Merrill Lynch’s New York office. Prior to the alleged fraud, Watson allegedly had a personal and business relationship with Darden Junior, which included management of Darden Junior’s company, Reign Entertainment Group, LLC. Watson allegedly knew about the Opengate loan because, on behalf of

Merrill Lynch, he was supposed to set up a control account to hold Darden Senior's pledged securities as collateral for the Opengate loan.

Plaintiffs allege that Watson represented to MDW: 1) that he was directly communicating with Darden Senior; 2) that he confirmed with a Bank of America representative the value of the pledged shares for the MDW Control Agreement; and 3) that the pledged shares had been transferred to the control account at Merrill Lynch. Plaintiffs allege that Weinberg, a sophisticated businessperson and licensed attorney, requested confirmation from Merrill Lynch that the specified shares were in the control account before advancing the loan proceeds. Nevertheless, without receiving such confirmation, Weinberg wired the \$5.5 million loan proceeds to an attorney escrow account in New York.

Immediately thereafter, the fraudulent scheme started to unravel. On November 6, 2013, the same day that Weinberg wired the funds, Watson provided Weinberg two purported Bank of America statements for the pledged shares, which Weinberg noted were identical. Weinberg alerted both Watson and Forefront about this unlikely coincidence, prompting an internal Merrill Lynch investigation that eventually revealed that the accounts were closed.

Then, on November 12, 2013, Darden Junior sent a spoofed email purporting to be from Weinberg, authorizing the release of \$5.5 million in the attorney escrow account. Before Weinberg could prevent the theft, \$4.9 million of the loan proceeds were transferred out of the attorney escrow account.

On February 11, 2014, Darden Junior was indicated for theft and other offenses in relation to the Maxim Deal. Around the same time, MDW recovered \$4.9 million in connection with an asset forfeiture through joint efforts of the United States Secret Service and the U.S. Attorney's Office for the Southern District of New York.

In the amended complaint, Plaintiffs assert various causes of action against the named defendants. As of the date of this decision, Plaintiffs have resolved all their claims against the named defendants, except for a cause of action for fraud against Watson,<sup>1</sup> and two causes of action for fraud and negligent misrepresentation against Forefront. Watson argues that I should dismiss the fraud claim against him because Plaintiffs have failed adequately to plead scienter, reasonable reliance, proximate cause and damages under New York law. Forefront submits an affidavit, similarly arguing that I should dismiss both claims against it because Plaintiffs failed adequately to plead fraud and negligent misrepresentation under New York law. In opposition, Plaintiffs argue that New Jersey law governs and Plaintiffs have sufficiently pled claims under New Jersey law.

## Discussion

### I. Watson's Motion to Dismiss

The parties dispute whether New York or New Jersey law governs Plaintiffs fraud claim against Watson. “‘Under New York's interest analysis approach courts seek to effect the law of the jurisdiction having the greatest interest in resolving the particular issue’, which in the typical case will be either the jurisdiction where the tort occurred or the domicile of one or more of the parties.” *Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 N.Y.3d 129, 138 (2014).

Here, New York has the greatest interest in resolving the fraud claim against Watson, a New York resident, who allegedly committed a majority of the fraudulent acts in New York while employed at Merrill Lynch's New York office. In opposition to this clear outcome, Plaintiffs submit an affidavit from Weinberg, attesting that the email address Weinberg used to communicate with Watson lists his business address in New Jersey.

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<sup>1</sup> In their opposition papers, Plaintiffs state that they are no longer pursuing their claim for negligent misrepresentation against Watson as asserted in the amended complaint.

Notwithstanding Watson's minor New Jersey connection and that Plaintiffs' principal place of business is New Jersey, the significant facts and contacts are, almost exclusively, based in New York – Watson's alleged fraudulent conduct occurred in New York, which led to Plaintiffs' injury in New York, *i.e.*, Weinberg transferring \$5.5 million to a New York attorney escrow account that Darden Junior, also a New York resident, eventually stole. Based upon all of the foregoing, I conclude that New York law applies to the fraud claim against Watson. *See L.K. Sta. Group, LLC v Quantek Media, LLC*, 62 A.D.3d 487, 493 (1st Dep't 2009).

Plaintiffs' fraud claim against Watson fails under New York law for lack of reasonable reliance. New York courts hold that reasonable reliance "is a condition which cannot be met where, as here, a party has the means to discover the true nature of the transaction by exercise of ordinary intelligence, and fails to make use of those means." *Arfa v Zamir*, 76 A.D.3d 56, 59 (1st Dep't 2010), *affd*, 17 N.Y.3d 737 (2011) (internal quotations omitted). Weinberg, as a sophisticated businessman, explicitly requested "to see a Merrill Lynch statement or a screenshot of the account as of today to confirm the assets in the account" before advancing the loan proceeds. Pls' Am. Compl. ¶ 59. Nevertheless, Weinberg advanced the funds before receiving any confirmation that the assets were actually in the Merrill Lynch account. Had Weinberg followed through with his initial due diligence, Watson's alleged misrepresentations would have been revealed as untrue as it in fact was later that very same day. *Compare* Pls' Am. Compl. ¶ 59 (alleging that Weinberg requested confirmation), *with* Pls' Am. Compl. ¶ 62 (alleging that Weinberg received a purported October 2013 Bank of America statement, intimating fraud). Accordingly, Plaintiffs' allegations conclusively contradict Plaintiffs' allegations of reasonable reliance, thus I dismiss Plaintiffs' fraud claim against Watson.

## II. Forefront's Motion to Dismiss

Forefront is a Delaware company with its principal place of business in New York.

Nevertheless, Plaintiffs argue that because Forefront was registered to do business in New Jersey at the time of the alleged conduct and because a representative on behalf of Forefront visited Weinberg in New Jersey, New Jersey law should govern Plaintiffs' claims against Forefront. Here again, notwithstanding these limited New Jersey connections, New York has the greatest interest in resolving the claims against Forefront, because the funds at issue were wired to a New York escrow account and the alleged theft occurred in New York.

Under New York law, Plaintiffs have failed to allege recoverable damages for fraud and negligent misrepresentation. The parties do not dispute that Plaintiffs recovered all the money they lent to Darden Junior. Plaintiffs' instead seek attorneys' fees as a form of compensatory and/or consequential damages. However, New York courts only permit a plaintiff to recover "the reasonable value of attorneys' fees and other expenses" when, "through the wrongful act of his present adversary, [the plaintiff was] involved in earlier litigation with a third person in bringing or defending an action to protect his interests." *Coopers & Lybrand v. Levitt*, 384 N.Y.S.2d 804, 807 (1st Dep't 1976).

Here, Plaintiffs do not allege an earlier litigation with a third party, or indicate any third party litigation expenses they incurred stemming from Watson's alleged wrongful conduct. Rather, Plaintiffs simply allege that the "loan proceeds were recovered through an asset forfeiture . . . due to joint efforts of the United States Secret Service and the Southern District of New York United States Attorney's Office." Expenses incurred by nonparty federal agencies do not fall within the limited circumstances in which a plaintiff may seek compensable damages for fraud/negligent

misrepresentation in the form of attorneys' fees.<sup>2</sup> Accordingly, I dismiss Plaintiffs' claims for fraud and negligent misrepresentation against Forefront.<sup>3</sup>

In accordance with the foregoing, it is

ORDERED that the motion of defendant Brent Allen Watson to dismiss the complaint against him is granted (motion sequence number 004); and it is further

ORDERED that the motion of defendant Forefront Capital Markets, LLC to dismiss the complaint against it is granted (motion sequence number 005); and it is further

ORDERED that the Clerk of the Court enter judgment dismissing the complaint in its entirety against the remaining defendants.

This constitutes the decision and order of the Court.

DATE:

4/28/17

  
SALIANN SCARPULLA, JSC

<sup>2</sup> Even if the exception did apply, however, the attorneys' fees and business disruption losses sought for Weinberg's time do not fall within the scope of recovery allowed under the attorneys' fees exception. *See Goldberg v Mallinckrodt, Inc.*, 792 F.2d 305, 309 (2d Cir. 1986) (stating that under New York law, "we cannot equate litigation expenses, which are clearly recoverable, with time spent away from one's profession."). To the extent consequential damages are sought in relation to this litigation, such damages are improper. *See Raymond Corp. v Coopers & Lybrand*, 105 A.D.2d 926, 927 (3d Dep't 1984) (finding that "damages [] relat[ing] solely to the commencement of this lawsuit by plaintiffs . . . are clearly insufficient to sustain the necessary element of damages in [causes of action for negligent misrepresentation, fraudulent misrepresentation and conspiracy to defraud]") The same is also true for lost profits. *See Starr Found. v Am. Intern. Group, Inc.*, 76 A.D.3d 25, 28 (1st Dep't 2010) (stating that "the loss of an alternative contractual bargain ... cannot serve as a basis for fraud or misrepresentation damages").

<sup>3</sup> Plaintiffs' claim for negligent misrepresentation also fails for their failure to allege a special relationship with Forefront under New York law. *See Saunders v AOL Time Warner, Inc.*, 18 A.D.3d 216, 217 (1st Dep't 2005).