

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X
TODD DIAMOND, TROI INVEST, LLC, LORD
STANLEY II, LLC, and 142 MERCER STREET,
LLC,

Plaintiffs,

-against-

Index No.
654151/12

JOHN MCDONALD, JOSHUA PICKARD, MICHAEL
L. CLOFINE, GREEN APPLE SERVICES, LLC,
d/b/a GREEN APPLE GROUP, and JEFFERIES &
COMPANY, INC.,

Defendants.

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

Motion sequences 001, 002, and 003 are hereby consolidated
for disposition.

In motion sequence 001, the defendant Jefferies & Company,
Inc. ("Jefferies") moves pursuant to CPLR 3211(a)(1), (5), and
(7) to dismiss the plaintiffs Todd Diamond ("Diamond"), Troi
Invest, LLC ("Troi"), Lord Stanley II, LLC ("Lord"), and 142
Mercer Street, LLC's ("142 Mercer") complaint.

In motion sequence 002, the defendants John McDonald and
Joshua Pickard (collectively, the "Managers") move pursuant to
CPLR 3211(a)(1), (2), (5), and (7) to dismiss the plaintiffs'
first, second, and seventh causes of action in the complaint.

In motion sequence 003, the defendant Michael L. Clofine
("Clofine") moves pursuant to CPLR 3211(a)(5) and (7) to dismiss
the complaint as alleged against him and to strike his name from
the caption.

Background

This action arises out of a dispute between certain members of 142 Mercer, which owns and operates the restaurant known as Lure Fishbar ("Lure"). Lord, Troi, the Managers, and Clofine are all members of 142 Mercer.¹ However, the instant motion involves issues of timeliness and subject matter jurisdiction related to the plaintiffs' causes of actions.

As alleged in the complaint, Clofine, an investment advisor from Jefferies introduced Diamond, the managing member of Lord and Troi, to an investment involving Lure. Subsequently, in March 2004, Troi and Lord invested \$1.5 million in 142 Mercer to open and operate Lure.

On March 14, 2005, the operating agreement for 142 Mercer (the "Agreement") was executed by Diamond on behalf of Troi and Lord. It is alleged that Clofine encouraged Diamond to sign the Agreement and represented that an attorney had previously reviewed and approved the Agreement.

The plaintiffs allege, mainly upon information and belief, that after the investment was consummated, the Managers have engaged in self-dealing and are mismanaging the operations of Lure (Complaint, ¶¶ 36-53).²

¹ Clofine is a member through the entity Live Bait LLC, which is not a party to this action (Complaint, Ex. C, p. 29).

² The complaint fails to allege the dates on which the misconduct occurred or when it was discovered by the plaintiffs.

Thereafter, the plaintiffs commenced this action asserting thirteen causes of action for: fraudulent inducement, fraud, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, waste, conversion, unjust enrichment, breach of contract, violations of New York Limited Liability Law, declaratory judgment, the removal of the Managers, an accounting, and an award of attorney's fees.

Jefferies and Clofine moved to dismiss the complaint in its entirety and the Managers moved to dismiss the first, second, and seventh causes of action in the complaint.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*id.*).

As a preliminary matter, the seventh cause of action for unjust enrichment is precluded by the existence of the valid and enforceable Agreement and must be dismissed (*Feigen v Advance Capital Mgt. Corp.*, 150 AD2d 281, 283 [1st Dept 1989]).

Furthermore, the thirteenth cause of action must be dismissed because Business Corporation Law § 626 applies to derivative actions and this is not a derivative action (BCL § 626

[a]).

Statute of Limitations

The defendants argue that the applicable statute of limitations period began to accrue as of March 14, 2005, the date that the Agreement was executed by Troi and Lord, but the plaintiffs did not commence this action until November, 30, 2012, over seven years later. As a result, the defendants contend that the plaintiffs' causes of action, which are all subject to either a three or six year statute of limitations, must be dismissed because this action was not timely commenced.

The plaintiffs admit that the "fraud claims were not brought within six years of [the plaintiffs'] investment" (Pl. Opp. (MS 002), p. 9), but counter that they "commenced their action for fraud within two years of discovering the [defendants'] fraud" (*id.*). Nonetheless, the plaintiffs fail to plead when they uncovered the fraud. The insufficiency of the allegations in the complaint fail to provide a basis for this Court to extend or otherwise toll the statute of limitations for the first cause of action for fraudulent inducement and the second cause of action for fraud (CPLR 213 [8]). Therefore, these causes of action are dismissed.

The third cause of action for breach of fiduciary duty and the fourth cause of action for aiding and abetting breach of fiduciary duty are subject to a three year statute of

limitations.

The allegations in the complaint relate to Jefferies and Clofine's purported role in recommending the Lure investment to the plaintiffs (Complaint, ¶¶ 72, 73, 88), which the plaintiffs admit occurred before March 2005, over seven years before the commencement of this action (Complaint, ¶¶ 15, 18).

Therefore, the third and fourth causes of action are time barred and must be dismissed as against Jefferies and Clofine.

Furthermore, the complaint does not contain any allegations against Jefferies or Clofine relating to the operations of Lure and Jefferies and Clofine have maintained that they are not and have never been involved in the management of Lure.

On April 29, 2013, at the conclusion of oral argument, this Court ordered a hearing on the issue of timeliness and directed the submission of evidence that would establish if Clofine had any involvement in the operations of Lure.

Subsequently, on October 7, 2013, Jefferies and Clofine submitted affidavits from Clofine and the Managers that each provide that Clofine was "never involved in the operations of 142 Mercer and/or [Lure], either in, before or after March 2005" (NYSCEF Doc. No. 54).

Notwithstanding this Court's grant to the plaintiffs of an opportunity to allege additional facts, the plaintiffs did not submit any additional evidence or allegations after the oral

argument. Therefore, Clofine must be dismissed from this action as well. The plaintiffs have failed to provide evidence that would subject Clofine to the remaining causes of action.

Additionally, Jefferies must be dismissed from this action. The allegations against Jefferies set forth in the first, second, and third causes of action only have already been found to be inadequate.

Arbitration Provision

The remaining fifth, sixth, and eighth through twelfth causes of action all relate to 142 Mercer's operation of Lure, which are subject to an arbitration provision in the Agreement. These causes of action clearly arise out of the terms of the Agreement, which sets forth the rights, duties, and obligations of its members.

The Agreement provides that "[a]ny controversy arising out of or in any way relating to this Agreement including any modification or amendment thereof, shall be resolved by arbitration in the City of New York, State of New York pursuant to the then applicable rules of the American Arbitration Association..." (Castro Aff., Ex. 1, Ex. A, §12.1).

The provision is clear on its face and the parties agreement to arbitrate will be enforced (*Harriman Group, Inc. v Napolitano*, 213 AD2d 159, 163 [1st Dept 1995]).

The plaintiffs argue that the arbitration provision should

not be enforced because the Agreement is "internally inconsistent and unfair," but fails to cite to any authority that supports such a proposition (Pl. Opp. (MS 002), p. 17). This Court having already dismissed the cause of action for fraudulent inducement, finds the plaintiffs' arguments seeking to void the Agreement on that basis unpersuasive.

Consequently, the Court will stay the remainder of the action pending the conclusion of the parties arbitration proceedings.

Accordingly it is,

ORDERED that the defendants John McDonald and Joshua Pickard's motion to dismiss is granted in part, to the extent of dismissing the first, second, and seventh causes of action as alleged against them, compelling arbitration, and staying this action, and it is further

ORDERED that the motion of the defendants Jefferies & Company, Inc. and Michael Clofine to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants, and it is further

ORDERED that the action is severed and continued against the remaining defendants, and it is further

ORDERED that the caption be amended to reflect the dismissal of the defendants Jefferies & Company, Inc. and Michael Clofine and that all future papers filed with the court bear the amended caption, and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein, and it is further

ORDERED that plaintiffs Todd Diamond, Troi Invest, LLC, Lord Stanley II, LLC, and 142 Mercer Street, LLC shall arbitrate their claims against defendants John McDonald, Joshua Pickard, Green Apple Services, LLC, d/b/a Green Apple Group in accordance with the Operating Agreement of 142 Mercer Street, LLC, and it is further

ORDERED that all proceedings in this action are hereby stayed, except for an application to vacate or modify said stay, and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon the final determination of the arbitration.

This constitutes the decision and order of the Court.

Date: December 2, 2013

ENTER:

J.S.C.
CHARLES E. RAMOS