Peter Kleidman v. Nitin Shah

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Case Name: Peter Kleidman v. Nitin Shah, et al.

Case No.: 1-13-CV-247406

Demurrers to the Second Amended Complaint by defendants: (1) David Becker; (2) Nitin Shah; (3) Feeva Technology, Inc.; (4) Robert Quist; (5) FeevT, Michael Maidy, Bernie Murphy, Tim Cox, Martin Pinchinson, Sherwood Partners LLC, and Sherwood Management, LLC; and (6) Don Cook; and Requests for joinder by defendant Bridge & Post, Inc.

A. Background

This case arises from the alleged fraudulent transfer of assets. In the Second Amended Complaint ("SAC"), plaintiff Peter Kleidman alleges he loaned $250,000 to defendant Feeva Technology, Inc. ("Feeva"), an intellectual property company, in October 2009. (SAC, ¶ 17.) Feeva eventually failed, and in October 2010, its board of directors assigned its assets to a company called FeevT by executing an "agreement for the benefit of creditors" ("ABC"). (Id., ¶¶ 19, 21, 30, 36.) FeevT was created by Sherwood Partners, Inc. ("Sherwood") − a company managed by defendant Michael Maidy − to liquidate Feeva's assets. (Id., ¶¶ 9, 23-24, 30.) FeevT then sold Feeva's assets to defendant Bridge & Post, Inc. ("BPI") for below market value. (Id., ¶¶ 35, 37.) Feeva's former directors and officers, including defendants Nitin Shah and Robert Quist, formed BPI. (Id., ¶¶ 19, 23.) As a result of the subsequent undervalued sale of Feeva's assets to BPI, Feeva was unable to repay Kleidman's loan. (Id., ¶ 61.) Kleidman seeks to recover the unpaid balance of Feeva's loan from those who were parties to the ABC, helped to form FeevT, and/or purchased Feeva's assets from FeevT.

B. Joinder

BPI filed joinders to: (1) Feeva's demurrer to the fifth, eighth, and ninth causes of action; (2) Nitin Shah's demurrer to the fifth, eighth, ninth, and twelfth causes of action; (3) FeevT's demurrer to the first cause of action; and (4) the demurrer of defendants FeevT, Michael Maidy, Bernie Murphy, Tim Cox, Martin Pinchinson, Sherwood Partners LLC, and Sherwood Management, LLC to the fifth cause of action.

It is generally common practice to permit parties to join in another party's arguments or motions − other than motions for summary judgment − by stating that the joining party adopts the requests and the points and authorities contained in the joined motion. (See Barak v. The Quisenberry Law Firm (2006) 135 Cal.App.4th 654, 660, 661.) BPI has complied with the "common practice" requirements. BPI's requests for joinder are GRANTED.

C. Requests for Judicial Notice

The requests for judicial notice are GRANTED, but only insofar as the Court takes judicial notice of the existence of the documents, not the truth of any matters asserted therein. (See Evid. Code, § 452, subd. (d); People v. Woodell (1998) 17 Cal.4th 448, 455 [a court cannot take judicial notice of the truth of hearsay statements in its files, "including pleadings, affidavits, testimony, or statements of fact"].).

D. Nitin Shah's Demurrer

Nitin Shah's demurrer to the third cause of action for breach of fiduciary duty, the fourth cause of action for civil conspiracy to commit the breach of fiduciary duty, the fifth cause of action for aiding and abetting the breach of fiduciary duty, the tenth cause of action for aiding and abetting (violation of Civil Code section 3439.04), the eleventh cause of action for aiding and abetting (violation of Civil Code section 3439.05), the twelfth cause of action for false promise, the thirteenth cause of action for intentional misrepresentation, the fourteenth cause of action for negligent misrepresentation, and the fifteenth cause of action for concealment on the ground of failure to state sufficient facts is SUSTAINED WITH 10 DAYS' LEAVE TO AMEND. Kleidman's opposition implicitly concedes that his pleading currently is deficient as he adds additional facts to show that "the causes of action against Shah can be preserved through amendment." (Opposition at p. 6:12-13; id. at p. 15:18-19 ["The foregoing shows that Plaintiff can amend the SAC in a manner which adequately pleads tort causes of action against Shah."].)

Shah's contention that the entire action is barred by judicial estoppel due to Kleidman's February 2012 petition for bankruptcy is not well-taken at the pleading stage. "'Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceedings. The doctrine serves a clear purpose: to protect the integrity of the judicial process.'[citation]" (Jackson v Cnty. of Los Angeles (1997) 60 Cal.App.4th 171,181) Judicial estoppel is appropriate where a party has taken inconsistent positions in separate proceedings. (Id.) "'The gravamen of judicial estoppel is not privity, reliance, or prejudice. Rather, it is the intentional assertion of an inconsistent position that perverts the judicial machinery.' [citations]" (Id. at p. 183) The doctrine of judicial estoppel applies when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e. the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. (Id.) Shah argues that the matters he submitted for judicial notice establish that the doctrine of judicial estoppel applies. However, the question of whether judicial estoppel should apply ordinarily requires a factual evaluation that cannot be accomplished at the pleading stage. (Cloud v. Northrop Grumman Corp. (1998) 67 Cal.App.4th 995, 1019.) The Court cannot take judicial notice of the contents of the documents offered for judicial notice. Kleidman, therefore, is correct that the third element of judicial estoppel (adoption of the party's former position by the prior court) is not established. Moreover, Shah

cannot meet the fifth requirement showing that the first position was not taken as a result of ignorance, fraud, or mistake since proving this is a question of fact not appropriate for disposition at this stage of the proceeding.

Shah's argument that the entire action fails because Kleidman waived all of his claims when he signed the promissory note loaning Feeva $250,000, lacks merit. The promissory note, attached as Exhibit A to the SAC, contains a provision stating: "In no event shall any officer or director of the Company be liable for any amounts due and payable pursuant to this Note." (SAC, Ex. A at p. 2, ¶ 6.) Shah was a member of Feeva's board of directors, and damages are related to the failure to repay the loan. (Id., ¶¶ 19, 61.) However, as Kleidman correctly posits, it is against public policy for a party to contract away liability for fraud. (See Civ. Code, § 1668 ["All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."].) Kleidman alleges that Shah devised a fraudulent scheme to gain control of Feeva's assets, which left creditors "high and dry." (SAC, ¶ 20.) Thus, Civil Code section 1668 does not permit Shah to contractually exculpate himself for his allegedly fraudulent scheme.

E. Feeva's Demurrer

Feeva demurs to the second cause of action for breach of contract, the fifth cause of action for aiding and abetting the breach of fiduciary duty, the eighth cause of action for violation of Civil Code section 3439.04, the ninth cause of action for violation of Civil Code section 3439.05, the thirteenth cause of action for intentional misrepresentation, the fourteenth cause of action for negligent misrepresentation, and the fifteenth cause of action for concealment.

Feeva's argument that each claim fails because Kleidman is judicially estopped from bringing this action mirrors Shah's contention on this issue. For the reasons detailed above, the argument is not well-taken at the pleading stage.

Feeva asserts that each claim fails because Kleidman's loan converted to shares in the company: that is, Feeva has no obligation to repay the loan since Kleidman is a shareholder and received exactly what he contracted for. However, Feeva has not pointed to any allegations in the SAC stating that Kleidman was a shareholder. Indeed, Feeva later presents in its memorandum that Kleidman "does not allege that he was a major shareholder of Feeva." (Memorandum at p. 13:18-19.) Although the promissory note and purchase agreement provide that the loan would be converted to shares in the future, without an allegation that the conversion occurred, the question of whether Kleidman actually owned any shares is a question of fact that goes beyond the scope of this demurrer. In fact, Kleidman is adamant in his opposition that he "has never owned any shares of stock in Feeva." (Opposition at p. 7:24.) Feeva's argument relating to the lack of damages similarly fails as it is premised on Kleidman being a shareholder.

Feeva maintains that the fraud causes of action (the thirteenth cause of action for intentional misrepresentation, the fourteenth cause of action for negligent misrepresentation, and the fifteenth cause of action for concealment) fail because Kleidman does not allege that the misrepresentations were made to him or that he relied on them. Kleidman concedes these arguments have merit as he did not respond to these contentions in his opposition.

Accordingly, Feeva's demurrer to the thirteenth cause of action for intentional misrepresentation, the fourteenth cause of action for negligent misrepresentation, and the fifteenth cause of action for concealment on the ground of failure to state sufficient facts is SUSTAINED WITH 10 DAYS' LEAVE TO AMEND. The demurrer is otherwise OVERRULED.

F. FeevT, Michael Maidy, Bernie Murphy, Tim Cox, Martin Pinchinson, Sherwood Partners LLC, and Sherwood Management, LLC's Demurrer

FeevT, Michael Maidy, Bernie Murphy, Tim Cox, Martin Pinchinson, Sherwood Partners LLC, and Sherwood Management, LLC (collectively "Defendants") demur to the first cause of action for declaratory relief, the third cause of action for breach of fiduciary duty, the fourth cause of action for civil conspiracy to commit the breach of fiduciary duty, the fifth cause of action for aiding and abetting the breach of fiduciary duty, the sixth cause of action for negligence, the seventh cause of action for aiding and abetting the negligence, the tenth cause of action for aiding and abetting (violation of Civil Code section 3439.04), and the eleventh cause of action for aiding and abetting (violation of Civil Code section 3439.05).

Defendants' contention that each cause of action fails because Kleidman is judicially estopped from bringing this action is similar to Shah and Feeva's argument on this issue. As noted, the contention is not well-taken at the pleading stage.

Defendants assert that Kleidman cannot provide causation of any damages because he is a shareholder. The assertion fails for the same reasons detailed in Feeva's demurrer: namely, the question of whether Kleidman actually owned any shares is a question of fact that goes beyond the scope of this demurrer because there is no allegation that Kleidman was a shareholder.

Defendants maintain that with the first cause of action for declaratory relief, Kleidman seeks a determination that the General Assignment was invalid. Kleidman concedes that there is "some confusion" with the claim that will be clarified with an amended pleading. (Opposition at p 11:13.)

Defendants argue that the tenth cause of action for aiding and abetting (violation of Civil Code section 3439.04), and the eleventh cause of action for aiding and abetting (violation of Civil Code section 3439.05) fail because only creditors have standing to bring such claims. Kleidman alleges he is a creditor of Feeva. (SAC, ¶¶ 41, 98, 102.)

Accordingly, Defendants' demurrer to the first cause of action for declaratory relief on the ground of failure to state sufficient facts is SUSTAINED WITH 10 DAYS' LEAVE TO AMEND. The demurrer is otherwise OVERRULED.

G. Demurrers of David Becker, Robert Quist, and Don Cook

David Becker's demurrer to the fifth cause of action for aiding and abetting the breach of fiduciary duty, the tenth cause of action for aiding and abetting (violation of Civil Code section 3439.04), and the eleventh cause of action for aiding and abetting (violation of Civil Code section 3439.05) on the grounds of failure to state sufficient facts and uncertainty is SUSTAINED WITH 10 DAYS' LEAVE TO AMEND.

Robert Quist's demurrer to the third cause of action for breach of fiduciary duty, the fourth cause of action for civil conspiracy to commit the breach of fiduciary duty, the fifth cause of action for aiding and abetting the breach of fiduciary duty, the tenth cause of action for aiding and abetting (violation of Civil Code section 3439.04), the eleventh cause of action for aiding and abetting (violation of Civil Code section 3439.05), the twelfth cause of action for false promise, the thirteenth cause of action for intentional misrepresentation, the fourteenth cause of action for negligent misrepresentation, and the fifteenth cause of action for concealment on the ground of failure to state sufficient facts and uncertainty is SUSTAINED WITH 10 DAYS' LEAVE TO AMEND.

Don Cook's demurrer to the fifth cause of action for aiding and abetting the breach of fiduciary duty, the tenth cause of action for aiding and abetting (violation of Civil Code section 3439.04), and the eleventh cause of action for aiding and abetting (violation of Civil Code section 3439.05) on the grounds of lack of jurisdiction and failure to state sufficient facts is SUSTAINED WITH 10 DAYS' LEAVE TO AMEND.

Kleidman concedes that the SAC requires amendment, and the purpose of his oppositions was to argue for sustaining the demurrers with leave to amend. (See Opposition to Becker Demurrer at p. 1:20-22; Opposition to Quist Demurrer at p. 1:9-11; Opposition to Cook Demurrer at p. 1:2-4.)