

TABLE OF CONTENTS

I. PRELIMINARY STATEMENT 1

II. LEGAL ARGUMENT..... 3

A. Mr. Gerszberg is entitled to Summary Judgment because Plaintiffs Have Failed to Show the Existence of A Genuine Issue of Material Fact. 3

i. Plaintiffs’ Present No Evidence that Shows that Mr. Gerszberg Had Actual Knowledge that the Platinum Defendants were Breaching their Fiduciary Duties..... 4

B. Mr. Gerszberg is Entitled to Summary Judgment Because the Allegation that Mr. Gerszberg provided Substantial Assistance to the Platinum Defendants is Not Supported by the Actual Facts. 6

III. CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Briarpatch Ltd., L.P. v. Geisler Roberdeau, Inc.,
2007 U.S. Dist. LEXIS 27001 (2d. Cir. 2007)..... 4

Celotex Corp. v. Catrett,
477 U.S. 317 (1986)..... 4

Gallo v. Prudential Residential Servs., Ltd. P’ship,
22 F.3d 1219 (2d. Cir. 1994)..... 4

In re WorldCom, Inc. Sec. Litig.,
346 F. Supp. 2d 628 (2d. Cir. 2004) 3, 5

Rules

Fed. R. Civ. P. 56(a) 3

I. PRELIMINARY STATEMENT

Defendant, Seth Gerszberg (“Mr. Gerszberg”), submits this memorandum of law as a reply to Plaintiffs’ Omnibus Opposition and in further support of Mr. Gerszberg’s Motion for Summary Judgment (the “Motion”). For the reasons set forth below, summary judgment should be entered in favor of Mr. Gerszberg and against Plaintiffs, dismissing the Second Amended Complaint with prejudice.

Plaintiffs’ opposition is devoid of anything that addresses the facts and arguments presented by Mr. Gerszberg. By the moving papers, Mr. Gerszberg demonstrated that he negotiated deals on behalf of entities he controlled, that he believed would benefit those entities, and that he believed would benefit PPVA,¹ too. The moving papers also demonstrate that Mr. Gerszberg did not have actual knowledge of any breach of duty by the Platinum Defendants. By the opposition, Plaintiffs have not demonstrated otherwise. They neither present facts nor arguments that demonstrate anything different than what Mr. Gerszberg has submitted. At best, Plaintiffs present documents that purport to demonstrate that Mr. Gerszberg had some knowledge of the liquidity issues faced by PPVA in a single discrete period in time, namely, the beginning of January 2016 – nearly seven months before PPVA became insolvent. Tellingly, Plaintiffs do not present any evidence that Mr. Gerszberg had actual knowledge of PPVA’s financial issues prior to January 2016 or from and after January 2016. Yet the allegations in the Second Amended Complaint span a period beginning in 2012 and through December 2016. Given the opportunity to present actual evidence of the allegations made in the Second Amended Complaint, Plaintiffs have failed to rise to that opportunity.

¹ Terms used in the Motion are herein incorporated by reference.

The facts presented by Plaintiffs do not establish that Mr. Gerszberg provided substantial assistance to further any alleged breach by the Platinum Defendants. First, Mr. Gerszberg presented facts that demonstrate that he did not affirmatively assist the Platinum Defendants through the PPVA/West Loop-Epocs transaction. That transaction was entered into in August 2015 and was to benefit The Collective and PPVA as a 50% owner of The Collective. Plaintiffs do not dispute that; nor do they present facts that demonstrate otherwise. Second, Mr. Gerszberg presented facts that show that the Huron Loan Document and the Security and Forbearance Agreement were arms-length transactions negotiated to benefit the parties involved. The Huron Loan Document was a part of the IMSC/Zapata deal. Negotiating a deal that was beneficial to himself and the entities he controlled does not constitute assisting in a breach of fiduciary duty. That is especially true given the fact that, it is undisputed, Mr. Gerszberg was not a PPVA insider or officer; and, given that, it is undisputed, both PPVA and IMSC had conducted the necessary due diligence prior to agreeing to the deal. The crux of Plaintiffs' substantial assistance claim is Mr. Gerszberg's purported knowledge of PPVA's financial issues in January 2016. Unsurprisingly, Plaintiffs do not present any facts to show that from and after January 2016 through to the execution of the Huron Loan Document transactions in June and July 2016, Mr. Gerszberg had any knowledge that PPVA's bankruptcy was imminent. Mr. Gerszberg's purported knowledge of PPVA's liquidity issues, seven months earlier is insufficient to establish that Mr. Gerszberg provided substantial assistance to further the Platinum Defendants breach of their fiduciary duties.

Based on the undisputed facts, Mr. Gerszberg has established that he did not have actual knowledge of the alleged breach of fiduciary duty by the Platinum Defendants and did not provide substantial assistance to the Platinum Defendants. None of the facts presented by Plaintiffs

establish otherwise. Plaintiffs' failure to make a showing sufficient to establish the essential elements of their claims against Mr. Gerszberg entitles Mr. Gerszberg to judgment as a matter of law. For all the reasons set forth below, Mr. Gerszberg is entitled to summary judgment and Plaintiffs' Second Amended Complaint as against Mr. Gerszberg should be dismissed, with prejudice.

II. LEGAL ARGUMENT

A. Mr. Gerszberg is entitled to Summary Judgment because Plaintiffs Have Failed to Show the Existence of A Genuine Issue of Material Fact.

A District Court shall grant summary judgment as to any claim or defense "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P.* 56(a). "When the moving party has asserted facts showing that it is entitled to summary judgment, the opposing party must 'set forth specific facts that there is a genuine issue for trial,' and cannot rest on the 'mere allegations or denials' of the movant's pleadings." *See In re WorldCom, Inc. Sec. Litig.*, 346 F. Supp. 2d 628 (2d. Cir. 2004).

Here, Plaintiffs have failed to show that a genuine dispute as to any material fact exists. It is undisputed that Mr. Gerszberg was not an insider and owed no duties to PPVA. It is also undisputed that Mr. Gerszberg's involvement with PPVA and the complained of transactions arose out of the prior business relationship between the PPVA entity - Atlantic Growth - and The Collective. (*See* Plntfs' SOMF ¶¶ 620, 810, 813). Indeed, PPVA's ownership interest in The Collective is acknowledged by Plaintiffs. (*See* Plntfs' SOMF ¶810).

Mr. Gerszberg has presented facts establishing that the PPVA/West Loop transaction and the Forbearance and Security Agreement were arms-length transactions that arose out of the business relationship between The Collective and PPVA and intended by the parties to benefit all. Having a 50% ownership interest in The Collective, PPVA stood to gain if The Collective resumed

its operations and made a profit. Therefore, there was no failure to protect PPVA's interest but an effort to protect that interest by proposing and facilitating the loan from West Loop/Epocs. To avoid any debt collection action by West Loop/Epocs, the Platinum Defendants then bargained for and received the Forbearance and Security Agreement. Plaintiffs present no evidence that contradicts the facts presented by Mr. Gerszberg or that demonstrates actual knowledge by Mr. Gerszberg that the Platinum Defendants were breaching their obligations to PPVA by entering both transactions. (See Plntfs' Opp. at 29 -31; See Plntfs' SOMF ¶¶ 810-836). In such a situation there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of [Plaintiffs'] case necessarily renders all other facts immaterial. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

i. Plaintiffs Present No Evidence that Shows that Mr. Gerszberg Had Actual Knowledge that the Platinum Defendants were Breaching their Fiduciary Duties.

"Summary judgment is appropriate where the moving party has shown that 'little or no evidence may be found in support of the nonmoving party's case.' When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper." See *Briarpatch Ltd., L.P. v. Geisler Roberdeau, Inc.*, 2007 U.S. Dist. LEXIS 27001 (2d. Cir. 2007) citing *Gallo v. Prudential Residential Servs., Ltd. P'ship*, 22 F.3d 1219 (2d. Cir. 1994).

Here, Plaintiffs have failed to present any evidence, whatsoever, that Mr. Gerszberg had actual knowledge that the Platinum Defendants were breaching their fiduciary duties to PPVA through the complained of transactions. First, The PPVA/West Loop transaction was entered into on August 12, 2015. Plaintiffs present no evidence showing that Mr. Gerszberg had any knowledge of PPVA's alleged financial issues at that time. (See Plntfs' Opp. at 29-31; SOMF ¶¶

620-621, 810-820). Indeed, Plaintiffs completely ignore the facts presented by Mr. Gerszberg regarding the PPVA/West Loop transaction. As such, Plaintiffs admit that Mr. Gerszberg did not have actual knowledge of the Platinum Defendants breaches, if any, through the PPVA/West Loop transaction. (*See* Plntfs' Opp. 29-31). With respect to the Huron Loan Document and the Forbearance and Security Agreement, Plaintiffs assert that, "Mr. Gerszberg had detailed, insider knowledge of PPVA's financial distress, and plans for liquidation" and that, "[h]e wielded that knowledge to his own benefit and to the detriment of PPVA." (*See* Plntfs' Opp. at 30). Plaintiffs' conclusory statement, without more, is insufficient to defeat a motion for summary judgment. *See In re WorldCom, Inc. Sec. Litig.*, 346 F. Supp. 2d 628, 656 (2d. Cir. 2004).

Indeed, the evidence presented by Plaintiffs, which consist of e-mails between the Platinum Defendants dated January 3, 6, & 8, 2016, a presentation dated January 11, 2016, and David Steinberg's deposition testimony are insufficient evidence of the requisite actual knowledge to support Plaintiffs' claim of aiding and abetting. (*See* Plntfs' SOMF ¶¶ 821-823, 828). First, Mr. Gerszberg's purported knowledge of PPVA's financial issues in January 2016 and/or his efforts to try to raise capital for PPVA at that time, does not, by any measure, equate to actual knowledge that the Platinum Defendants breached their duties to PPVA by entering into the Huron Loan Document and the Forbearance and Security Agreement seven months later.

More importantly, Plaintiffs have not presented any evidence whatsoever, that after January 2016, Mr. Gerszberg was ever aware that PPVA had reached the point of insolvency. Thus, Mr. Gerszberg had no reason to believe in June or July 2016 that there was any impediment to entering into the complained of transactions. The \$15 million loaned to Mr. Gerszberg on June 9, 2016 was a part of the IMSC/Zapata deal. The Forbearance and Security Agreement was executed on July 6, 2016, and was specifically negotiated for by the parties as a condition precedent

to the closing of the IMSC/Zapata deal. Neither the IMSC/Zapata deal nor the Security and Forbearance Agreement have any relation to the discussions in January 2016 regarding PPVA's liquidity issues.

Finally, the documents presented by Plaintiffs support the facts presented by Mr. Gerszberg - that his involvement with PPVA was limited to proposing business strategies, negotiating, and working on deals that were beneficial to him and the entities he controlled. To the extent that a business strategy would result in liquidity for PPVA, and, therefore funds for Mr. Gerszberg and his entities, Mr. Gerszberg offered his knowledge and expertise. The evidence provided by Plaintiffs demonstrates that even after Mr. Gerszberg was granted access to PPVA's building, the Platinum Defendants themselves could not describe Mr. Gerszberg's role in PPVA. (*See* Plntfs' SOMF ¶¶ 820-821). Mr. Steinberg testified that he did not know what Mr. Gerszberg was doing and that he was angling to push people to invest more capital into PPVA. *Id.* Notwithstanding the above, the Platinum Defendants were aware that Mr. Gerszberg sought deals that would benefit him and accepted his help so long as it benefitted PPVA. *Id.*

B. Mr. Gerszberg is Entitled to Summary Judgment Because the Allegation that Mr. Gerszberg provided Substantial Assistance to the Platinum Defendants is Not Supported by the Actual Facts.

Mr. Gerszberg presented facts that demonstrate he did nothing more than negotiate a deal to protect his company's interest (which included PPVA's ownership interest). Mr. Gerszberg respectfully submits that such conduct cannot amount to affirmatively assisting the Platinum Defendants in breaching their obligations to PPVA. Plaintiffs have not presented any evidence that establishes otherwise. Instead, the entire two-pages of their opposition dedicated to Mr. Gerszberg focuses on conversations in January 2016 regarding PPVA's financial issues and strategies to raise capital for PPVA. As already discussed, Plaintiffs have not presented any

evidence whatsoever, that after January 2016, until the execution of the complained of transactions in June and July 2016, Mr. Gerszberg had any knowledge that PPVA's bankruptcy was imminent.

At best, Plaintiffs have provided evidence that shows that early in January 2016, Mr. Gerszberg was exposed to PPVA's liquidity issues and offered his help in resolving those issues so that his companies could continue to receive funding from PPVA. (*See* Plntfs' Opp. at 29-31; Plntfs' SOMF ¶¶ 810-836). Notably absent from Plaintiffs' opposition is any evidence that Mr. Gerszberg affirmatively assisted the Platinum Defendants in breaching their fiduciary duties. (*See* Plntfs' Opp. at 29-31). Plaintiffs do not, and cannot, present such evidence, because it does not exist.

The undisputed facts, taken as a whole, reveal that Mr. Gerszberg did nothing more than work on deals that were in the interest of the companies he controlled. Those facts also demonstrate PPVA was, in fact, in business with Mr. Gerszberg, having invested in his company long before any of the alleged misconduct by the Platinum Defendants took place. Finally, while Plaintiff has presented evidence of Mr. Gerszberg's knowledge regarding PPVA's liquidity issues in January 2016 having been given the opportunity to present more, Plaintiff has demonstrated it has no evidence of Mr. Gerszberg's knowledge regarding PPVA's finances before January 2016 or from and after January 2016. Plaintiff surely has no evidence, whatsoever, of Mr. Gerszberg having the requisite knowledge in June and July 2016 to support either of Plaintiffs' claims. As such, Plaintiffs' claims fail as a matter of law. Summary Judgment should be entered against Plaintiff and in favor of Mr. Gerszberg, dismissing the Second Amended Complaint with prejudice.

III. CONCLUSION

For all the reasons set forth in Mr. Gerszberg's moving papers and for the reasons set forth above, it is respectfully submitted that this Court should grant Mr. Gerszberg's Motion for Summary Judgment and dismiss the Second Amended Complaint with prejudice, as against him.

DATED: March 17, 2020

EPSTEIN OSTROVE, LLC
Attorneys for Defendant, Seth Gerszberg

By: s/ Elliot D. Ostrove
ELLIOT D. OSTROVE

200 Metroplex Drive, Suite 304
Edison, New Jersey 08817

and

43 West 43rd Street, Suite 139
New York, NY 10036
Telephone: (732-828-8600
Attorneys for Defendant, Seth Gerszberg