

272 A.D.2d 73

Supreme Court, Appellate Division,
First Department, New York.

Roger MILLER, et al., Plaintiffs–Appellants,

v.

William R. DONIGER, et al.,
Defendants–Respondents.

May 4, 2000.

Appeal was taken from order of the Supreme Court, New York County, Barry Cozier, J., granting summary judgment for defendants on claims of fraud, breach of fiduciary duty, negligence, negligent misrepresentation, and unjust enrichment. The Supreme Court, Appellate Division, held that: (1) plaintiffs failed to establish fraud claim; (2) trial court properly disregarded summary judgment affidavit of former corporate employee; and (3) defendant's allegedly wrongful actions were protected by business judgment rule.

Affirmed.

West Headnotes (3)

1 Corporations and Business Organizations

🔑 [Actions between and among directors, officers, or agents](#)

Corporate directors failed to establish scienter or reasonable reliance necessary to support their fraud claim against another director; corporation's annual report placed blame for unprofitability of leveraged buyout on sellers instead of defendant, and plaintiffs were in position to check all documents supporting defendant director's due diligence report.

[5 Cases that cite this headnote](#)

2 Judgment

🔑 [Evidence and Affidavits in Particular Cases](#)

Trial court properly disregarded summary judgment affidavit of former corporate employee, where there was no explanation as to why affidavit directly contradicted employee's prior sworn statements.

[2 Cases that cite this headnote](#)

3 Corporations and Business Organizations

🔑 [Business judgment rule in general](#)

Defendant director's allegedly wrongful actions were protected by business judgment rule, where actions were made in his capacity as corporate director or officer, were made in good faith and were approved and ratified by board of directors.

Attorneys and Law Firms

****170** [Richard J.J. Scarola](#), for Plaintiffs–Appellants.
[Scott N. Gelfand](#), for Defendants–Respondents.

SULLIVAN, P.J., [NARDELLI, TOM](#), [WALLACH](#) and [LERNER, JJ.](#)

Opinion

MEMORANDUM DECISION.

***73** Order, Supreme Court, New York County (Barry Cozier, J.), entered July 23, 1999, which, *inter alia*, granted defendants' summary judgment motion insofar as to dismiss plaintiffs' causes of action for fraud, breach of fiduciary duty, negligence, negligent misrepresentation and unjust enrichment, unanimously affirmed, with costs.

1 2 3 Plaintiffs failed to submit any evidence demonstrating scienter, an essential element of fraud (*see, Small v. Lorillard Tobacco Co., Inc.*, 94 N.Y.2d 43, 57, 698 N.Y.S.2d 615, 720 N.E.2d 892), and the 1991 annual report of Mini–Computer Systems, Inc. (MCS), of which both plaintiffs Roger Miller and Michael Epstein were directors at all relevant times, placed the blame for the unprofitability of that company's leveraged buyout of U–Vend, Inc., not on defendants, but solely on the sellers. The IAS court properly disregarded the 1996 affidavit of a former U–Vend employee, relied on by plaintiffs to create a triable issue of fact on the matter, since there was no explanation why the affidavit directly contradicted the affiant's prior sworn statements (*see, Zylinski v. Garito Contr.*, 268 A.D.2d 427, 428, 702 N.Y.S.2d 86, 87; *Bushman v. Di Carlo*, 268 A.D.2d 920, 922–923, 702 N.Y.S.2d 426, 428–429; *Maria S. v. Willow Enters. Inc.*, 234 A.D.2d 177, 180, 651 N.Y.S.2d 486). In addition, plaintiffs were in a position to check all of the documents supporting defendant ****171** Doniger's due diligence report, which documents expressly stated that various representations made

in the report were based on financial reports *74 by the sellers' accountants and on representations by the sellers, and thus plaintiffs have failed to demonstrate, in support of their fraud cause of action, reasonable reliance on the representations at issue (see, *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421, 646 N.Y.S.2d 76, 668 N.E.2d 1370).

All of the allegedly wrongful actions of Doniger were made in his capacity as MCS director and/or officer, were made in good faith and were approved and ratified by the MCS board, and are therefore protected by the business judgment rule (see, *Auerbach v. Bennett*, 47 N.Y.2d 619, 630, 631, 419 N.Y.S.2d 920, 393 N.E.2d 994; *196 Owners Corp. v. La Sala Restoration Co.*, 242 A.D.2d 459, 662 N.Y.S.2d 45, *lv. denied* 92 N.Y.2d 804, 677 N.Y.S.2d 779, 700 N.E.2d 318). The

record belies plaintiffs' claims of a fiduciary relationship or joint venture relationship between them and Doniger.

Plaintiffs' unjust enrichment claim is premised on the same subject matter as is contained in certain written contracts, and therefore was properly dismissed (see, *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388, 521 N.Y.S.2d 653, 516 N.E.2d 190).

Notwithstanding subsequent events at trial following the filing of the appellate briefs, we affirm the denial of partial summary judgment on the third cause of action.

Parallel Citations

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