UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES T. EVANS,

Plaintiff,

– against –

SSN FUNDING, L.P., EDWIN AVENT, HSE, INC., and HSE, LLC,

Defendants.

OPINION AND ORDER

15 Civ. 5514 (ER)

Ramos, D.J.:

James T. Evans ("Evans") brings this action in diversity against SSN Funding, L.P. ("SSN Funding") for breach of two promissory notes, against Edwin Avent ("Avent") for breach of fiduciary duty and negligent misrepresentation, and against Avent, HSE, Inc. and HSE, LLC (together, "HSE") (collectively, "Defendants"), for conversion and an accounting, and for fraud against all Defendants. After a four-day trial before this Court, a jury found that SSN Funding had procured one of the promissory notes by fraud, and awarded Evans compensatory and punitive damages. Schoenstein Aff., Doc. 101, Ex. 1, Verdict Sheet, at 4–5. The jury, however, rejected Evans' breach of contract claim against SSN Funding, concluding that Evans had converted the promissory notes into an equity interest in SSN Funding. *Id.* at 1. The jury found the remaining Defendants not liable on all claims brought against them. *See* Verdict Sheet.

Before the Court are Evans and SSN Funding's post-trial motions: Evans moves the Court for entry of judgment as a matter of law, or a new trial, pursuant to Federal Rule of Civil Procedure 50(b) and 59, respectively, Doc. 99, arguing that the jury's finding of conversion lacks support in the record. SSN Funding asks the Court to deny Evans' motion as baseless and dismiss the case, arguing that the jury's finding of conversion renders Evans a limited partner of

SSN Funding and destroys diversity jurisdiction. Alternatively, SSN Funding moves for judgment as a matter of law pursuant to Rule 50(b), on the basis that the jury's finding of fraud as to SSN Funding is inconsistent with its finding absolving Avent of liability for fraud. Doc. 106. For the reasons set forth below, both parties' motions are DENIED, and the case is dismissed for lack of subject matter jurisdiction.

I. BACKGROUND

A. Factual Background

The Court assumes familiarity with the record and its prior summary judgment opinion, which details the facts and procedural history of this case, and discusses here only those facts necessary for its disposition of the instant motion. *See Evans v. SSN Funding, L.P.*, No. 15 CIV. 5514 (ER), 2017 WL 3671180 (S.D.N.Y. Aug. 23, 2017) (the "Summary Judgment Opinion").

As relevant here, this dispute stems from Evans' $250,000 investment in the Soul of the South Network ("Soul of the South"), a regional broadcast television network that caters to an African-American audience, in which SSN Funding holds an indirect interest. Defs.' 56.1 Stmt. ¶ 5.[1]

1. Promissory Notes

On December 12, 2011, Evans and SSN Media Group, LLC ("SSN Media LLC"), another entity related to SSN Funding, executed a promissory note pursuant to which Evans lent

[1] Evans is an attorney residing in New York City. Defs.' 56.1 ¶¶ 1–2; Pl.'s 56.1 Counterstmt. ¶ 31. SSN Funding is an Arkansas limited partnership with its principal place of business in Arkansas, and is the successor-in-interest to SSN Media Group, Inc. ("SSN Media"). Defs.' 56.1 ¶ 4; Pl.'s 56.1 Counterstmt. ¶ 32. Avent, a citizen of the State of Maryland, was the Chairman and CEO of SSN Media, SSN Funding, S.O.S. Media Holdings, Inc. ("S.O.S."), and HSE at all relevant times. Pl.'s 56.1 Counterstmt. ¶ 34; LPA at 65. HSE, Inc. was a Maryland corporation with its principal place of business in Maryland. Pl.'s 56.1 Counterstmt. ¶ 35.

SSN Media LLC $150,000 (the "December Note").[2] Schoenstein Aff., Ex. 3, December Note; Schoenstein Aff., Ex. 4, Tr. 41:11–24. Several months later, on March 20, 2012, Evans and SSN Media executed a second promissory note for $100,000 (the "March Note"). Schoenstein Aff., Ex. 4, March Note; Tr. 43:24–44:2. Both the December and March Notes (together, the "Promissory Notes") allowed Evans to elect to cancel the Notes within one year—by March 20, 2013 and March 21, 2013 respectively—and receive "in lieu thereof, such other securities and/or notes and/or agreements and/or instruments as shall be similar to other securities and/or notes and/or agreements and/or instruments which may be issued to any other lender [] or investor in the Borrower." *See* December Note at 1; March Note at 1. In other words, the Notes permitted Evans to convert the loans he made to SSN Media to equity in the company, but only if he exercised that right within one year.

At trial, Evans testified that before executing the March Note, he spoke to two representatives of Soul of the South, Frank Mercado-Valdes ("Mercado-Valdes") and Chris Clark ("Clark"). Tr. 44:2–16. According to Evans, he "was very hesitant" to lend additional funds to Soul of the South because "[he] didn't know" how his initial investment was being used and was leery of continuing to invest in a startup that had not yet secured sufficient funding to commence operation. Tr. 45:8–12, 46:1–2. To hedge against this concern, the parties agreed that the proceeds from the $100,000 March Note would be placed in an escrow account and would not be utilized for any purpose unless and until a total of $2 million was raised for Soul of the South. Tr. 124:9–10 (Evans stating that "this second investment was to be in escrow until SSN reached $2 million in investment"); *see also* Tr. 35:25–36:2, 39:16–17, 45:21–25, 156:3–5. Consistent with this understanding, upon wiring the funds, Evans emailed Clark to verify that

[2] The December Note was amended on March 21, 2012 to assign SSN Media LLC's rights to SSN Media. *See* Doc. 101 Ex. 3 at 1; Tr. 53:20–25.

they would be held in an "escrow account and not the checking account . . . . until funds are collected from other lenders." Tr. 51:1–6 (quoting Doc. 101, Ex. 5, March 21, 2012 Email Chain from Evans to Clark). In response, Clark confirmed that that was "[t]he plan." Tr. 51: 7–18.[3]

Despite these representations, and unbeknownst to Evans, the funds were never placed in escrow. *Id.* 51:19–24. Instead, Avent placed the funds in an HSE operating account where they were comingled with the funds therein and used to pay for the day-to-day operations of SSN Media. Tr. 122–123:2; Tr. 263:24–264:13, 277:15–20 (Avent testifying that HSE and SSN funds were comingled in the same account). At trial, Avent testified that he "only did with [Evans'] investment as [he] was directed by . . . Clark", that "[a]n escrow account was never established, and [that he] was never instructed to transfer [Evans'] money into an escrow account." Tr. 277:15–24.

Evans testified that Mercado-Valdes and Clark approached him in June 2012 and asked if he would authorize the release of the $100,000 from escrow so that SSN Media could purchase an interest in SSN Media Gateway, LLC ("Gateway").[4] Tr. 59:13–60:14. He agreed to release the funds, but only for this purpose. Tr. 61:1–18. To memorialize that agreement, Clark sent Evans a Memorandum of Understanding that was purportedly signed by Avent, among others. Tr. 64:8–65:14; Memorandum of Understanding, Doc. 101, Ex. 6. SSN Funding, however, never received an interest in Gateway. Tr. 67:11–12. Instead, Avent acquired a $100,000 interest in Gateway on behalf of HSE. Tr. 67:16–22, 263:6–23. At trial, Avent confirmed that Evans did not have an interest in Gateway. Tr. 265:16–22. Indeed, Avent asserted that he

[3] Notably, nothing in the March Note stipulated that the funds would be held in escrow. *See* March Note; Tr. 157:6–10.

[4] Evans testified that Gateway was formed to purchase a mechanism that would allow the Soul of the South network to send media feed in a faster and less cost intensive manner. *See* Tr. 59:25–60:8; Memorandum of Understanding at 1 (noting that the funds would be used to "acquire the Central Automated Satellite Hub," which would be "leverage[ed] . . . to operate Soul of the South Network").

"would have never signed any document that included James Evans having a hundred thousand dollars in the media Gateway because that was not true," and that Clark had forged his signature on the Memorandum of Understanding, which Avent claimed he had not previously seen. Tr. 264:14–265:15. As far as Avent was concerned, Clark "outright lie[d]" to Evans and "forged" Avent's signature to give the fraudulent transaction the appearance of validity. Tr. 266:2–16.

2. Subscription Agreements

In late 2012, Clark approached Evans with the possibility of converting the $250,000 of debt into an equity interest in SSN Funding. Tr. 68:3–21. Evans testified that he informed Clark that he was "very uncomfortable" with the idea of converting his Promissory Notes to equity, because he "just really wanted to get paid." Tr. 70:10–12. By simply holding on to the Promissory Notes, which would mature in December 2013, Evans had a low risk way to ensure he would recover his loan proceeds. December Note ¶ 2; March Note ¶ 2. As such, Evans informed Clark that "the only way that [he] would" agree to convert his Promissory Notes to equity was if he could condition the conversion of his notes on SSN Funding raising $4 million. Tr. 70:14–24. Pursuant to this planned transaction, in March 2013, Clark asked Evans to execute a subscription agreement (the "March Subscription Agreement"), Tr. 162:8–11, which upon signature and acceptance by SSN Funding, would convert Evans' Promissory Notes to an equity interest in SSN Funding.[5] Evans testified that Clark also sent Evans a Limited Partnership Agreement ("LPA"), which would memorialize Evans' limited partnership in SSN Funding, and a side letter. Tr. 165:4–10. On March 18, 2013, Evans signed the March Subscription Agreement with a commitment of $250,000, described as convertible interests, and emailed the

[5] The March Subscription Agreement states that upon S.O.S.' "acceptance of this application," Evans will become a "[l]imited [p]artner [of SSN Funding] under the terms and conditions of the Partnership Agreement." March Subscription Agreement ¶¶ 1-2. Moreover, it states that the commitment will be treated as equity for United States federal tax purposes. *Id.* at ¶ 17(l).

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