

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 49

IMPALA PARTNERS, LLC and IMPALA MANAGERS LLC,

Plaintiffs,

-against-

MICHAEL P. BOROM,

Defendant.

INDEX NO. 104091/2011

MOTION DATE Oct. 25, 2011

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: ^{O.P.S.} Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision and order.

Dated: November 14, 2011

O. P. Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49**

-----X
IMPALA PARTNERS, LLC and IMPALA MANAGERS LLC,

Plaintiffs,

-against-

MICHAEL P. BOROM,

Defendant.

**DRAFT
DECISION AND
ORDER**

Index No. 104091/2011

-----X
O. PETER SHERWOOD, J.:

Overview

This Decision and Order relates to motion sequence numbers 001 and 002. In motion sequence 001, defendant, Michael Borom (“Borom”) moves for summary judgment on the first counterclaim (declaratory judgment) and to dismiss the first (declaratory judgment) and fourth (fraudulent inducement) causes of action. In motion sequence 002, plaintiff, Impala Partners LLC (“Impala”), moves for summary judgment to dismiss Borom’s second counterclaim (tortious interference with business relations). Borom cross-moves for summary judgment to dismiss plaintiff’s second and fifth causes of action.

I. Background

Borom is a former employee of Impala, having departed the firm in August 2009 to join Thomas H. Lee Partners (“THL”) as a managing director. In February 2006, Impala was retained to provide consulting services to RGIS Holdings, LLC (“RGIS”). Impala later obtained a significant equity interest in RGIS. As part of a consulting agreement between RGIS and Impala, Impala agreed that, for a three year period following the agreement, Impala’s principals would not “engage in, invest in, participate in, or otherwise enter into other business ventures of any kind” that competed with RGIS.

The complaint alleges that in January 2009, Borom and other Impala members presented Impala's consulting services to a team of executives at MoneyGram, Inc. ("MGI") and was retained. MGI agreed to pay Impala 20% of any cost savings that MGI achieved as a result of Impala's recommendations. Impala employees subsequently spent three months working on the MGI account, allegedly helping it save millions of dollars through cost-cutting measures. Despite being the key player in bringing in the MGI account, Borom did not obtain MGI's signature on a consulting agreement. MGI refused to pay for the consulting work it received. Impala subsequently sued MGI to be compensated for its work.

While at Impala, Borom received a company desktop computer which Impala alleges was to be used solely for Impala-related business. Borom alleges that it was his understanding that he could use the computer for both work and personal use. Effective August 31, 2009, Borom resigned his employment with Impala and, thereafter, entered into a "Reorganization Agreement" with Impala. The Reorganization Agreement provided that Borom would receive 23% of any monies that Impala received from each MGI and the Rawhide Transaction.¹ Borom received an immediate cash payout of approx. \$1.13 million. The Reorganization Agreement also provided that Borom was:

- (a) . . . not to use Confidential Information at any time for Borom's personal benefit, for the benefit of any other person or entity and/or in any manner adverse to the interests of any Subject Entity, its Affiliates (as defined below) and their respective owners, employees and agents;
- (b) . . . not to directly or indirectly, divulge Confidential Information at any time unless (A) Street, Keenoy, Stegelmann and Nathaniel consent in advance in writing to such disclosure, (B) the Confidential Information indisputably becomes public knowledge or enters the public domain, other than through Borom's direct or indirect act or omission or breach of his obligations hereunder, (C) the disclosure is required by law, or (D) the

¹According to Borom, Rawhide was a special purpose entity Enron Corporation had used. During the Enron bankruptcy, Impala was retained to liquidate the assets of Rawhide

disclosure is made solely to Thomas H. Lee Partners, L.P. and its advisors and is limited to information relating to this Agreement and the transactions contemplated hereby; provided that Borom shall give Street, Keenoy, Stegelmann and Nathaniel prompt written notice sufficient to enable them to contest the disclosure, and if a protective order or other remedy is not obtained, Borom shall only furnish such information that is legally required to be provided;

(c) . . . to safeguard the Confidential Information by taking all commercially reasonable steps to insure the confidentiality and secrecy of such Confidential Information; and

(d) . . . to return all materials and the like containing and/or relating to the Confidential Information, together with all other property of the Subject Entities (all of which shall remain the exclusive property of the Subject Entities) and its clients and customers, to the Subject Entities upon the demand of the Subject Entities. Borom shall not make or retain any copies or reproductions of correspondence, memoranda, reports, lists, n o t e b o o k s , drawings, photographs, databases, diskettes or other d o c u m e n t s o r electronically stored information of any kind relating in any way to the Confidential Information.

As defined by the Reorganization Agreement, Confidential Information constituted:

all (i) information relating to this Agreement and the transactions contemplated hereby, (ii) financial information relating to the Subject Entities, (iii) information regarding any investment, client or business venture of any Subject Entity or client thereof, (iv) information relating to Street, Keenoy, Stegelmann and Nathaniel, and (v) information about the organizational structure of the Subject Entities (collectively, the "Confidential Information").

While at THL, which is the largest equity owner of MGI, Borom continued to access his Impala e-mail from his Impala computer, deleted hundreds of work-related e-mails, and erased the hard drive, all without Impala's knowledge or consent. The complaint alleges that through his work at THL, Borom became a shareholder in Acosta, which, according to its website, is one of the "largest sales and marketing agencies in the consumer packaged goods industry." Acosta purports to be behind the sales and marketing of 25 percent of the inventory that hit store warehouses. RGIS offers services which include "inventories, supply chain, compliance audits, store mapping,

merchandising, resets, staffing and store optimization.” Impala asserts that Acosta competes with RGIS and therefore Borom’s participation in the Acosta transaction violated the RGIS/Impala consulting agreement. Upon learning of the RGIS non-compete agreement, THL required that Borom have no affiliation with the Acosta account, including owning stock in Acosta.

Impala alleges five causes of action for: (1) Declaratory judgment that it owes no obligation to Borom under the Reorganization Agreement; (2) Declaratory judgment that it owes no obligations to Borom under the Operating Agreement; (3) Breach of contract (Reorganization Agreement); (4) Fraud in the inducement (Reorganization Agreement); and (5) Breach of contract (Operating Agreement). In his counterclaim Borom alleges, *inter alia*: (1) Breach of contract, specifically, payment due to him under the Reorganization Agreement for his participation in the “Rawhide Account” and (2) tortious interference with business relations in that Impala prevented him from participation and investment in Acosta.

II. Discussion

A. Borom’s first counterclaim

As to the first counterclaim, Borom seeks a declaration that pursuant to section 1.1(b)(ii) of the Reorganization Agreement, he is entitled to 23% of any amounts received in connection with the Rawhide Transaction. He argues that the only condition upon which his right to recover for the Rawhide Transaction rests is that he “mak[e] himself available to assist the members of Impala as a consultant on the Rawhide Transaction from time to time through the date of the Rawhide Transaction’s conclusion.” (Reorganization Agreement, Section 1.1 [b][ii]). Thus, in Borom’s view, any other factual issues Impala might raise regarding the Reorganization Agreement are irrelevant to his right to recover based on the Rawhide Transaction. Impala argues, that Borom breached the

Reorganization Agreement and cannot assert rights under just those parts of the Agreement he favors.

The provision of the Reorganization Agreement which grants Borom an interest in the Rawhide Transaction reads as follows:

From and after the Effective Date, Borom shall be entitled to receive from Impala Partners, as and when received by Impala Partners, (A) twenty-three percent (23%) of the Net Proceeds (as defined below) from that certain transaction with Enron ("Rawhide") ("the Rawhide Account")...; provided, all payments of the Rawhide Amount...shall be delivered to Borom within thirty (30) days following the date received by Impala Partners; and, provided further, that all Rawhide Amount payments shall be subject to Borom making himself available to assist Street and Keenoy in such transaction as a consultant to Impala Partners from time to time, as determined by Street and Keenoy, through the date of Rawhide's final conclusion.

(Reorganization Agreement, Section 1.1 [b][ii]).

A material breach of a contract could extinguish Borom's right to enforce the contract (*see Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 500 F.3d 171, 186 [2d Cir. 2007] [applying New York law] [material breach relieves the non-breaching party of performance under the contract]; *Created Gemstones Inc. v. Union Carbide Corp.*, 47 N.Y.2d 250, 255-256 [1979] [finding that it was error to grant summary judgment on a seller's counterclaim for goods sold and delivered because there were unresolved factual issues relating to the buyer's claims for breach of the underlying contract for sale]).

Borom would have the Court look solely at section 1.1 (b)(ii) when deciding his rights regarding the Rawhide Transaction and ignore the other 133 pages of the Reorganization Agreement. The agreement entitles Borom to payment from the Rawhide Transaction conditioned upon satisfaction terms set forth in section 1.1 (b)(ii). That section does not exempt Borom from his

obligations under the remaining terms of the contract. The Reorganization Agreement requires Borom to take, (or in some cases, not take) certain actions. There are factual issues as to whether Borom performed his duties under the terms of the Reorganization Agreement, including whether he abided by the non-compete provision thereof. Accordingly, summary judgment on the first counterclaim must be denied.

B. The First and Fourth Causes of Action

Borom seeks to dismiss the first cause of action (declaratory relief that Impala owes no obligations to Borom under the Reorganization Agreement) and fourth cause of action (fraudulent inducement). Borom's argument as to the first cause of action is based on the erroneous assumption that Impala is seeking rescission of the Reorganization Agreement. Impala states in its opposition papers that, "putting the parties back in the place they were before the Reorganization Agreement was executed is the last thing that Impala wants to do."

Impala has adequately alleged a claim for declaratory relief. A claim for equitable relief arising out of a material breach necessarily depends on an underlying claim for breach of contract (*See, e.g. Lola Cars Int'l Ltd., v. Krohn Racing, LLC*, Nos. 4479-VCN and 4886-VCN, 2010 WL 3314484 [Del. Ch. Aug. 2, 2010] [explaining that courts first look to whether a breach occurred and then determine if such breach was material]). Here, Impala has adequately alleged a claim for breach of contract. Specifically, Impala asserts that by accessing and deleting e-mails on an Impala computer without permission, Borom committed a material breach of the Reorganization Agreement. As noted above, a material breach may relieve the non-breaching party from all future obligations under the contract in issue (*see Merrill Lynch & Co.*, 500 F.3d at 186; *Ewell v. Certain Underwriters of Lloyd's, London*, No.S09C-07-031, 2010 WL 3447570, at * 6 (Del. Super. Aug.

27, 2010); *Diamond v. Reynolds*, No. 84-280, 1986 WL 15375, at *7 (D. Del. July 15, 1989).

Accordingly, Borom's motion to dismiss the first cause of action shall be denied.

To sufficiently plead a cause of action for fraudulent inducement, the claimant must allege: (1) false representation of material fact; (2) known by the speaker to be untrue; (3) made with the intention of inducing reliance and forbearance from further inquiry; (4) justifiable reliance; and (5) damages. The allegations of fraud must be stated in detail pursuant to CPLR 3016 (b) (see *Wexler v Kane Kessler, P.C.* 63 AD3d 529, 530 [1st Dept 2009]). Borom asserts that "Impala's failure to plead fraud with sufficient particularity is fatal to the Complaint's fourth cause of action for fraudulent inducement."

In the complaint, Impala alleges that Borom told members of Impala that MGI had signed a February 17, 2009 consulting agreement between Impala and MGI when in fact it had not. The complaint further alleges that Borom proceeded to secretly destroy correspondence and files, that if discovered by Impala, would have revealed his alleged deceit. The complaint asserts that Borom then made additional representations, identified as those set forth in Sections 1.1(b), 6.3 and 7.1 (a)-(d) of the Reorganization Agreement, to perpetuate his lie. Further, the complaint alleges that had Impala known of Borom's misrepresentations and actions, it would not have entered into the Reorganization Agreement, which by reason of Borom's misconduct, contained significant bargained-for promises that Borom neither intended to perform, nor actually performed (see Complaint, ¶ 26-46.)

The complaint also alleges that Impala justifiably relied on Borom's material misstatements when entering into the Reorganization Agreement and, as a result, has suffered millions of dollars of harm, including but not limited to reputational injury arising out of the MGI litigation and

hundreds of thousands of dollars in legal fees to file and defend that action (Complaint ¶¶47-55). These allegations are sufficient to state a claim for fraudulent inducement of contract. The motion to dismiss the fourth cause of action is denied.

C. The Second Counterclaim

On its motion for summary judgment, Impala seeks dismissal of the second counterclaim which alleges tortious interference with business relations. The elements of a cause of action for tortious interference with business relations are: (1) a business relations with a third party; (2) defendant's interference with those business relations; (3) action of defendant with the sole purpose of harming the plaintiff or use of unfair, dishonest, or improper means; and (4) injury to the business relationship (*see Carvel Corp. v Noonan*, 3 N.Y.3d 182, 192, [2004]).

Borom alleges that Impala tortiously interfered with a potential business relationship between himself and Acosta "by threatening, and later bringing" the present lawsuit "to chill [Borom's] ability to engage or invest in Acosta." Borom alleges that counsel for Impala and non-party RGIS wrote to his counsel and accused Borom of "violating the terms and conditions of the Management Agreement based on [THL's] acquisition of Acosta." Borom further alleges that as a result of Impala's accusations, he was (i) prohibited by his employer, THL, from engaging on Acosta, (ii) unable to "co-invest on the Acosta deal," and (iii) unable to "receive any carried interest on the Acosta deal." Borom claims that he is entitled to more than \$28 million in damages.

Impala asserts two primary arguments in support of its motion. First, it had no contact with either THL or Acosta and therefore could not have tortiously interfered. The argument has merit (*see Carvel Corp.*, 3 N.Y.3d at 192, ["conduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff, but at the party with which the plaintiff has or seeks to have a relationship"]).

complete provision of the Impala Operating Agreement, Borom argues that THL and RGIS do not compete. Whether THL and RGIS are competitors is a hotly contended issue which cannot be resolved without a trial (*see* Supplemental Affidavit of Paul Street ¶¶12-20; Affirmation of Leslie Corwin, dated August 2, 2011, Ex D through L).

Borom also argues that the motion should be granted because “the evidence of record clearly establishes that [Borom] has not had any involvement with Acosta.” The record contains no direct evidence of involvement with Acosta but it plainly shows a desire to become involved. Impala offers a timeline of events from which an inference could be drawn that Borom participated in the Acosta transaction. The timeline reveals that (1) Borom has been managing director of THL since September 2009; (2) Acosta announced that it had signed a definitive agreement for an equity investment by THL on January 5, 2011; (3) RGIS wrote to Borom and THL on January 14, 2011; and (4) after such correspondence, THL prohibited Borom’s future investment in, or engagement on, Acosta (Borom Aff ¶ 38-39, 41).

As the proponent of summary judgment Borom has the burden “to make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d [1957]). Borom has failed to carry this burden. His denial of involvement with Acosta without more does not make out the required showing and the inference to be drawn from the timeline leads the court to conclude that there are questions of fact requiring denial of the motion.

Accordingly, it is

ORDERED that Borom’s motion for summary judgment on the first counterclaim and to dismiss the first and fourth causes of action (motion sequence no. 001) is DENIED; and it is further

ORDERED that Impala's motion for summary judgment to dismiss the second counterclaim (motion sequence no. 002) is GRANTED; and it is further

ORDERED that the cross-motion for summary judgment to dismiss the second and fifth causes of action is DENIED; and it is further

ORDERED that counsel shall appear for a status conference on Wednesday, January 11, 2012 at 9:30 AM, in Part 49, Courtroom 252, 60 Centre Street, New York, New York

This constitutes the decision and order of this court.

DATED: November 14, 2011

ENTER,

O. PETER SHERWOOD
J.S.C.