

**Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise
Metals Group, LLC**

2004 NY Slip Op 30014(U)

December 30, 2004

Supreme Court, New York County

Docket Number: 0600228/2004

Judge: Bernard J. Fried

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

PRESENT: _____

PART 60

0600228/2004

MERRILL LYNCH, PIERCE, FENNER
VS
WISE METALS GROUP, LLC

INDEX NO. 600228-04
MOTION DATE 7-12-04
MOTION SEQ. NO. 1
MOTION CAL. NO. 15

SEQ 1
DISMISS ACTION

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JAN 04 2005
NEW YORK
COUNTY CLERK'S OFFICE

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

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

Dated: 12/31/04

Bernard J. Fried
BERNARD J. FRIED s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 60

-----X

MERRILL LYNCH, PIERCE, FENNER
& SMITH, INCORPORATED,
Plaintiff,

Index No.: 600228-
2004

FILED
JAN 04 2005
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WISE METALS GROUP, LLC.,
Defendant.

-----X

FRIED, J.:

This action arises out of a contract between plaintiff, Merrill Lynch, Pierce, Fenner & Smith Incorporated, and the defendant Wise Metal's Group, LLC, in which Merrill Lynch was to act as an underwriter for the issuance of certain securities by Wise. It should be noted, as set forth in the Answer, that Wise is a limited liability company, which through a subsidiary, is the "third leading U.S. producer of aluminum can stock for the beverage can stock market....its reported sales in 1999, 200 and 2001 were, respectively, \$654.7 million, \$734.5 million and \$641.9 million". The offering - in which Wise sought to raise at least \$150 million - was unsuccessful. Following this unsuccessful placement, Merrill Lynch has sought to recover its fees and costs, in the amount of \$931, 893.59. Defendant counterclaimed, alleging various causes of action, including fraud, negligent misrepresentation, breach of the covenant of good faith and fair dealing, malpractice, and breach of fiduciary dealing.

Pursuant to CPLR 3211(a)(1), plaintiff moves to dismiss the second, third, fourth and fifth counterclaims in the amended answer on the ground that it has a defense founded upon documentary evidence. Plaintiff further moves, pursuant to CPLR 3211 (a)(7) to dismiss all the counterclaims on ground that they fail to state a cause of action. The counterclaims are as follows: first counterclaim(fraud); second counterclaim (negligent misrepresentation); third counterclaim (breach of covenant of good faith and fair dealing); fourth counterclaim (malpractice); and fifth counterclaim (breach of fiduciary duty).

The contract entered into between plaintiff Merrill Lynch and defendant Wise Metals, was memorialized in an engagement letter dated January 12, 2002. By its terms Wise agreed that:

no Indemnified Party [Merrill Lynch, its affiliates and their respective directors, officers, agents and controlling persons] shall have any liability (whether direct or indirect, in contract or tort or otherwise) to [Wise Metals] or its security holders or creditors related to or arising out of or in connection with [the engagement letter], the issuance of securities and the use of the proceeds thereof, the Transaction, any related transaction or the performance by Merrill Lynch of the services contemplated by this letter agreement, except to the extent that any loss or claim, damage or liability is found in a final non-appealable judgment by a court of competent jurisdiction to have resulted from such Indemnified Party's bad faith or gross negligence.

It is urged that this limitations clause, as a matter of law, precludes Wise from asserting claims of negligent misrepresentation, breach of the implied covenant of good faith and fair dealing, malpractice and breach of fiduciary duty, against Merrill Lynch. On the other hand, Wise contends that this provision is unenforceable

“because it is part of the Engagement Letter which is alleged to be the product of Merrill Lynch’s fraud”. Merrill Lynch also argues that all the counterclaims fail to state a cause of action. Specifically, that the defendant has failed to plead fraud and misrepresentation with particularity as required by CPLR 3016(b); that there can be no fraud cause of action “for statements of future intentions, expectations or promises”; and reiterates that the remaining causes of action are impermissible under the Engagement Letter.

Turning first to the issue of whether the counterclaim for fraud should be dismissed. “The general rule is that fraud cannot be predicated upon statements that are promissory in nature at the time they are made and which relate to future actions or conduct” (Cerbano v. Price, 7 AD 3rd 479, 480 [2nd Dept., 2004]). While it is correct that alleged false financial projections may be actionable (e.g., CPC International Inc. v. McKesson Corp., 70 NY2d268, 286 [1987]), here the statements by Merrill Lynch alleged in the complaint, i.e., that the proposed interest rate of between 9 ½ to 10% would be attractive to prospective institutional investors; that “there was an existing market for the proposed debt securities of companies such as Wise; and that Merrill Lynch could successfully sell the offering, are *hardly* financial projections. To these two commercially sophisticated parties, the statements that the proposed offering would be attractive to the marketplace and that it would be successful amounted to nothing more than “mere opinions or predictions of future events.” (Wilsen Associates Real Estate Corp., Inc. v. Pizilly, 204 AD2d 777, 778

[3rd Dept., 1994]). Such statements are not actionable as fraud. Therefore, the first counterclaim alleging fraud is dismissed. Further discussion is unwarranted.

The conclusion that the fraud counterclaim (first counterclaim) must be dismissed, also disposes of defendant's argument that, notwithstanding the limitations in the Engagement Letter, it is unenforceable because it was allegedly induced by fraud. Since the allegation of fraud is insufficient, so is the claim of fraudulent inducement, and therefore the question is whether the limitation of liability provision precludes the second through fifth counterclaims.

Initially, I reject the defense contention that this limitation provision, contained in Annex A to the Engagement Letter ("Indemnification and Contribution") is directed at third parties, and was not intended "to stop Wise Metals from suing Merrill Lynch on a first -party claim". The plain language of the provision makes it evident that Merrill Lynch has no liability to Wise - "direct or indirect, in contract or tort or otherwise" - in connection with the Engagement Letter, except for "bad faith or gross negligence". Contrary to the defense argument, this language is not ambiguous, nor does it only shield Merrill Lynch from claims asserted by third parties against Wise Metals. Rather, it clearly states that an indemnified party, i.e., Merrill Lynch, has no liability to the Company, i.e., Wise Metals, except for Merrill Lynch's "bad faith or gross negligence." Moreover, the argument that this provision limiting liability is unenforceable as ambiguous requires

little comment. The parties, as already mentioned, are both commercially sophisticated and they agreed to limit the liability of Merrill Lynch. Such agreement - when unequivocal as here - is enforceable as a matter of law (c.g., Metropolitan Insurance Co. v. Noble Lowndes International, Inc., 84 NY2d 430, 36 [1994]).

Having concluded that the agreement is enforceable, because the second through fifth counterclaims do not allege or plead bad faith or gross negligence, they must be dismissed. Moreover, this dismissal is not premature as urged, since there is no issue of further discovery, inasmuch as these claims, as a matter of law, do not contain elements of bad faith or gross negligence.

With regard to the claim alleging a breach of the implied covenant of good faith and fair dealing, which may be premised upon a claim of bad faith (E.g., Advanced Safety Systems NY, Inc. v. Manufacturers and Traders Trust Company, 188 AD2d 1009 [4th Dept., 1992]), although bad faith has not been alleged, the dismissal of this counterclaim is with leave to amend the Answer with regard to this cause of action. Additionally, the claim alleging breach of fiduciary duty, as pleaded, relies both on the allegations supporting the fraud claim as well on the allegations supporting the breach of the implied covenant of good faith and fair dealing. If it were solely based on the insufficient fraud claim, (cf. Kaufman v. Cohen, 307 Ad2d 113, 119 [1st Dept., 2003][breach of fiduciary duty may be premised on fraud claim]), there would be no basis to grant leave to amend. However, since an alleged breach

of fiduciary duty may also be premised on a claim of bad faith (cf. Simon v. 160 West End Ave. Corp., 7 AD3d 851 [1st Dept., 2004]), the dismissal of this counterclaim also is with leave to amend the Answer.

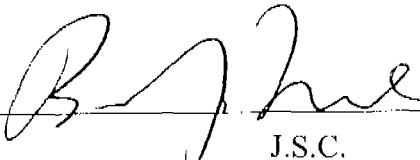
For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion to dismiss the counterclaims is granted; and it is further

ORDERED that defendant has leave to serve and file an amended Answer to the complaint, as authorized in this decision, within 10 days of service of a copy of this order with notice of entry.

Dated: December 30, 2004

ENTER:



J.S.C.

BERNARD J. FRIED
J.S.C.

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JAN 04 2005
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