

**Alacrity Services, LLC v GAB Robins North America,  
Inc.**

2005 NY Slip Op 30340(U)

February 14, 2005

Supreme Court, New York County

Docket Number: 604058/03

Judge: Sherry Klein Heitler

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

PRESENT: 0604058/2003

PART 30

ALACRITY SERVICES LLC.  
vs  
GAB ROBINS NORTH AMERICA INC.

INDEX NO. 604058103

MOTION DATE

SEQ 4

MOTION SEQ. NO. (04)

AMEND

MOTION CAL. NO.

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

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the memorandum decision dated 2-14-05.

FILED

FEB 15 2005

CLERK OF COURT OFFICE

Dated: 2-14-05

Sherry Klein Heitler  
SHERRY KLEIN HEITLER J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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 30

-----X  
ALACRITY SERVICES, LLC,

Plaintiff,

-against-

Index No.  
604058/03

GAB ROBINS NORTH AMERICA, INC.,

Defendant.

-----X

**SHERRY KLEIN HEITLER, J.:**

Plaintiff Alacrity Services, LLC (Alacrity) moves, pursuant to CPLR § 3025, for leave to amend its complaint. By order of this court, dated October 4, 2004, the complaint was dismissed with costs and disbursements to defendant GAB Robins North America, Inc. (GAB) (Prior Decision).

Alacrity was the purchaser of a business called PTC-Net from non-party Project, Time and Cost (PTC). PTC-Net used an internet-based program (of the same name) to adjust property and casualty insurance claims, and to maintain a network of contractors to make repairs to property at predetermined charges. Defendant GAB is in the business of adjusting claims for insurers.

On March 30, 2000, PTC and GAB contemporaneously entered into a Security Purchase Agreement (the SP Agreement), and a Strategic Alliance and PTC-Net User Agreement (the User Agreement) (collectively, the Agreements). As part of the SP

Agreement, GAB invested \$3 million in PTC, and acquired 2% (986.4016 shares) of PTC stock. The User Agreement had a term of three years during which GAB was to have exclusive use of the PTC-Net program for the third-party claims adjusting market.

In April of 2001, PTC rescinded the User Agreement claiming that: (i) GAB was attempting to tie-up the PTC-Net system and keep it off the market; and (ii) GAB did not make any referrals to PTC-Net as it had promised in the negotiations leading up to the conclusion of the Agreements. Upon rescission by PTC, GAB demanded that its investment of \$3 million under the related SP Agreement be returned. GAB's demand was denied.

GAB filed a Demand for Arbitration with the American Arbitration Association (AAA) on August 17, 2001 (AAA, No. 30 Y 181 00838 01, or the Arbitration) seeking the rescission of the Agreements and the return of the \$3-million investment. On March 27, 2002, PTC and Alacrity entered into a Litigation Control Agreement (LCA), with GAB as the acknowledged third-party beneficiary, in which they agreed that the Arbitration "will be managed [by either party] in a manner to achieve an entry of a final order with the effect of res adjudicata," and that the LCA would govern the sharing of costs, expenses, losses, and recoveries related to the Arbitration. Adelman Aff., LCA, Exhibit 18, at 1.

By letter of August 29, 2002, the arbitrator awarded GAB \$3

million in exchange for the return of the shares of class B common stock of PTC, and denied all of PTC's counterclaims. The arbitration award was confirmed, with costs to GAB, by order of September 25, 2002 issued by United States District Court, Northern District of Georgia, Atlanta Division (Project Time & Cost, Inc. v GAB Robins N. Am., Inc., Civil Action File No. 1:01-CV-2453-WBH).

Alacrity seeks to amend its previously-dismissed complaint to include a cause of action for tortious interference with prospective business relations, and has revised its pleadings of the remaining causes of action to rectify faults that caused the complaint to be dismissed.

Leave to amend a pleading shall be freely granted, absent prejudice or surprise resulting from the delay. CPLR 3025(b); Crimmins Contr. Co. v City of New York, 74 NY2d 166 (1989). However, if the proposed claim patently lacks merit, amendment of a pleading to assert that claim would serve no purpose but to needlessly complicate discovery and trial. Id., 74 NY2d at 170. Thus, in order "to conserve judicial resources, an examination of the proposed amendment is warranted, and leave to amend should be denied when the proposed pleading is palpably insufficient as a matter of law." Ancrum v St. Barnabas Hosp., 301 AD2d 474, 475 (1st Dept. 2003) (citations omitted).

### Fraudulent Inducement

In the Prior Decision, Alacrity's claim for fraudulent inducement was dismissed for failure to state a claim upon which relief can be granted. The complaint lacked the specificity required under CPLR § 3013 or CPLR § 3016, and the complaint failed to allege facts indicating a present intent of GAB not to honor its obligations at the time of signing of the Agreements. Most importantly, the SP Agreement and the User Agreement both indicate that the parties did not rely on oral representations or warranties not contained in the Agreements.

The Prior Decision noted that to maintain a claim for fraudulent inducement, Alacrity must allege facts tending to show that GAB made a false representation of a material fact, with scienter, and that PTC-Net justifiably relied upon that representation to its detriment. Channel Master Corp. v Aluminium Ltd. Sales, Inc., 4 NY2d 403 (1958).

Although Alacrity now proposes to name the party that made alleged promises to Alacrity, "[i]t is [still] the general rule that fraud cannot be predicated upon statements which are promissory in nature at the time they are made and which relate to future actions or conduct. Mere unfulfilled promissory statements as to what will be done in the future are not actionable as fraud." Brown v Lockwood, 76 AD2d 721, 731 (2<sup>nd</sup> Dept 1980) (citations omitted).

Alacrity makes repeated reference to an alleged promise by GAB representatives that they could give claims to Alacrity immediately, and Alacrity avers that they referred to those claims as "low hanging fruit." This statement, if made, is purely promissory in nature; indeed, "low hanging fruit" remains un-plucked. To the extent that this "fruit" was part of the consideration for entering the Agreements, it was up to Alacrity's predecessor to memorialize it.

In addition, the proposed amendment offers no proof of justifiable reliance. Alacrity claims that it entered into the SP and User Agreements with the purpose of obtaining claims referrals from GAB. However, a business may not rely on purely oral representations relating to the primary purpose of a contract. "As a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it." Valassis Communications, Inc. v Weimer, 304 AD2d 448, 449 (1<sup>st</sup> Dept 2003) (citation omitted); see also Marine Midland Bank, N.A. v Green, 261 AD2d 340, 341 (1999) (citation omitted).

Moreover, as noted in the Prior Decision, and argued, ironically, by PTC in the Arbitration (see Adelman Aff., Exh. 8, at 8-9), where a contract disclaims reliance upon any

representations not contained therein, a claim in fraud based on alleged representations not incorporated into the contract may be barred. See Goldberg v KZ '72<sup>nd</sup>, 171 AD2d 525, 527 (1<sup>st</sup> Dept. 1991); 37 Am Jur 2d, Fraud and Deceit § 325. See also Manufacturers Hanover Trust Co. V. Yanakas, 7 F.3d 310, 315 (2<sup>nd</sup> Cir 1993).

In this regard, both the SP and the User Agreement provide that they are the entire agreement among the parties and supersede all prior and contemporaneous arrangements. See SP Agreement, Adelman Aff., Exh. 1, at 36; User Agreement, Adelman Aff., Exh. 1, at 62. Therefore, Alacrity's claim for fraudulent inducement is improperly based upon alleged promissory obligations made prior to signing the Agreements. As the Agreements themselves indicate that the parties are not relying on any other oral representations or warranties, Alacrity's claim for fraudulent inducement remains insufficient and the motion for leave to amend that cause of action is denied.

#### Prima Facie Tort

The Prior Decision dismissed the cause of action for prima facie tort for failure to state a claim. "The requisite elements of a cause of action for prima facie tort are (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful. A critical element of the

cause of action is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages." Freihofer v Hearst Corp., 65 NY2d 135, 142-143 (1985) (citations omitted).

Here, Alacrity has amended its complaint to state that GAB, in the midst of negotiations with S&G, a Connecticut investment business

made untrue adverse statements about PTC and the nature and capabilities of PTC-Net and of the financial prospects of PTC and falsely impugned the integrity and character of PTC's management. Immediately after GAB's talk with S&G, S&G terminated the discussions with Alacrity and refused to proceed further with the investment.

The admonition of the Prior Decision, that the claim of prima facie tort is not a substitute for existing torts (Knapp Engraving Co. v Keystone Photo Engraving Corp., 1 AD2d 170, 172 [1<sup>st</sup> Dept 1956]), has not been addressed by the amendment. The proposed amendment to include a cause of action for prima facie tort as the second cause of action is rejected.

#### Tortious Interference with Prospective Business Relations

Alacrity's repeated conclusory assertions that GAB intended to harm Alacrity are also not clearly, without more, sufficient to sustain the newly-proposed third cause of action for tortious interference with prospective business relations. Nonetheless, on a motion for leave to amend, which is to be freely granted, the allegations are not so bare as to call for denial of leave to

amend.

"Interference with pre-contractual relations is actionable in New York when a contract would have been entered into but for the actions of the defendant if the defendant's sole purpose is to damage the plaintiff or if the means employed to induce termination of the relationship are dishonest, unfair or otherwise improper." Harden, S.P.A. v Commodore Elecs., Ltd., 90 AD2d 733, 734 (1<sup>st</sup> Dept 1982). Although Alacrity has submitted no proofs from S&G that S&G would have invested in Alacrity but for GAB's wrongful and malicious statements, it would be precipitous to disallow the cause of action on this basis alone. The court notes, however, that proof of S&G's intent to invest in Alacrity but for the interference of GAB must eventually be adduced.

#### Declaratory Judgment

The proposed fourth cause of action, for a declaratory judgment that Alacrity is only responsible for 50% of any payments made by PTC above a \$100,000-loss threshold in connection with the \$3 million GAB-PTC arbitration award, is deficient on its face. There is nothing whatsoever in the LCA that gives credence to such an interpretation.

The LCA provides that

PTC shall be [sic] bear and be responsible for, and reimburse to Alacrity, as the case may be, all losses up to \$100,000 (the "Loss Threshold"). Thereafter, each Party shall bear and be responsible for, and shall

reimburse the other Party, as the case may be, all Losses in excess of the Loss Threshold in proportion to their respective Participation Percentages.

Adelman Affirmation, LCA, Exhibit 18, § 2.

Clearly then, the LCA, at minimum, contemplates a situation where Alacrity shall bear and be responsible for all Losses in excess of the Loss Threshold in proportion to its Participation Percentage (defined in the LCA as 50%). Alacrity simply states that "PTC is in bankruptcy and has made no payments to GAB, and, accordingly, Alacrity owes nothing under the LCA." There is no reference anywhere in the LCA - despite Alacrity's suggestion to the contrary - as to which party must pay GAB first. Searching the record, the court finds the assertion baseless.

However, this does not automatically mean that Alacrity is responsible for 50% of the total losses. The LCA clearly ascribes the first \$100,000 of any losses to PTC. After \$100,000 is deducted from the amount awarded in the Arbitration, the LCA makes Alacrity responsible for 50% of the remaining amount.

The other branch of the fourth cause of action, requesting a declaration that the "spin-off of the PTC-Net business to Alacrity and the exchange of shares of Alacrity for PTC hybrid debt equity and the NOL was not a fraudulent conveyance" is denied. First, GAB has made no such claim or motion in this court. "A declaratory judgment may be warranted under CPLR 3001 if it becomes necessary to declare the rights and legal relations

of the parties as to a justiciable controversy.” Drexel Burnham Lambert Group, Inc. v Vigilant Ins. Co., 157 Misc 2d 198, 203-204 (Sup Ct, NY County 1993). There has been no fraudulent-conveyance claim made here.

Moreover, Alacrity claims that the fraudulent-conveyance allegation was made in a securities suit filed in Georgia. Ergo, the matter is the subject of another law suit, and it would be improper for this court to declare the respective rights of the litigants in that law suit. See e.g. CPLR 3211(a)(4) (a cause of action may be dismissed if it is the subject of another pending action between the same parties in a court of any state).

A declaratory judgment “is designated to clarify present or prospective obligations, to resolve uncertainty as to a course of action to be taken. The objective is primarily to still speculation as to an appropriate course of future conduct, without incurring the penalties of a present misstep.” Drexel Burnham Lambert Group, Inc. v Vigilant Ins. Co., 157 Misc 2d at 204. Alacrity has not demonstrated any purpose for a declaratory judgment addressing GAB’s claims in another jurisdiction.

Accordingly, it is hereby,

ORDERED that the motion of Alacrity Services, LLC, pursuant to CPLR § 3025, for leave to amend its complaint is granted to the extent that leave shall be granted to bring a cause of action for tortious interference with prospective business relations,

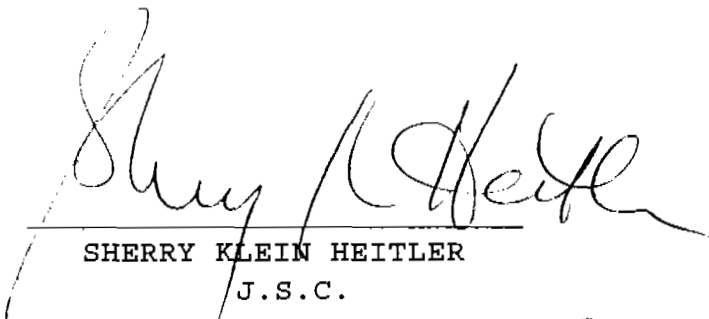
and it is otherwise denied;

ORDERED that the amended complaint is to be served within 20 days of the date of this order; and it is further

ORDERED that the defendant shall have 20 days from the date of said service to serve an answer to the amended complaint.

This shall constitute the decision and order of the court.

DATED: February 14, 2005



SHERRY KLEIN HEITLER  
J.S.C.

FILED  
FEB 15 2005  
CLERK  
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