

CDR Creances S.A. v Euro-American Lodging Corporation

2005 NY Slip Op 30395(U)

February 16, 2005

Supreme Court, New York County

Docket Number: 109565/03

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

CDR CRÉANCES S.A., as successor to SOCIÉTÉ
DE BANQUE OCCIDENTALE,
Plaintiff,

Index No.: 109565/03

Motion Date: 07/23/04

Motion Seq. No.: 01

Motion Cal. No.: _____

- v -

EURO-AMERICAN LODGING CORPORATION,
SUMMERSON INTERNATIONAL ESTABLISHMENT,
IDERVAL, BLUE OCEAN FINANCE, LTD.,
WORLD BUSINESS CENTER, INC., MAURICE COHEN,
OSPIN INTERNATIONAL, INC., SIMON ELIAS,
GAMA LODGING LLC, MEGAINVEST TRUST REG.,
and JOHN DOE DEFENDANTS,

Defendants,

--and--

ATLANTIC BANK OF NEW YORK,
Defendant-Intervenor.

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

The following papers, numbered 1 to 6 were read on this motion to dismiss.

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

PAPERS NUMBERED	
1, 2	_____
3, 4	_____
5, 6	_____

Cross-Motion: Yes No

Upon the foregoing papers,

Defendants Euro-American Lodging Corporation (EALC),
Lodging LLC (Gama) and Simon Elias move pursuant to CPLR
3211 (a) (7) and 3016 (b) to dismiss this action against them.
Plaintiff CDR Créances S.A. (CDR) opposes the motion. Pursuant to

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a stipulation of all the parties that appeared on oral argument on this motion, as so-ordered by this court on July 23, 2004, Atlantic Bank was permitted to intervene as a defendant in this action.

CDR brings this action based on the alleged breach of two Pledge Agreements dated May 10, 1991 (the "Pledge Agreements"). The complaint alleges that in 1991, CDR loaned EALC over \$92 million dollars and that as part of the consideration for advancing the loan CDR received as security for repayment of the loan the Pledge Agreements which granted CDR a security interest in all of EALC's stock. It is further alleged that at the time the Pledge Agreements were executed, defendant Summerson and another now-defunct French Company named Summersun each owned half of the 1000 shares of EALC stock then outstanding and that Summerson and Summersun were the entities which entered into the Pledge Agreements with CDR.

The complaint asserts that defendants EALC, Summerson, Summersun, Iderval and Simon Elias caused EALC to issue 9000 new shares of stock to Iderval in breach of the Pledge Agreements which prohibited the issuance of such shares. CDR also alleges that Summersun transferred its 500 shares to Summerson. It is further alleged that Ospin International, Inc., (Ospin), was created and controlled by Simon Elias, and that Ospin paid \$33 million to World Business to acquire the rights to 10,000 shares

of EALC which by that time were held by an entity called Blue Ocean. The complaint states that Blue Ocean was a Panamanian corporation controlled by Maurice Cohen, and had acquired options to purchase all the shares of EALC by improper means. It is alleged that there were further transfers of the EALC stock from Ospin to Gama and co-defendant Megainvest Trust Reg.

The complaint alleges five causes of action: (1) breach of contract,¹ (2) tortious interference with contract and business relations, (3) fraud, (4) conversion and misappropriation, and (5) unjust enrichment.² The court shall consider the movants' objections to each cause of action in turn "[a]ccepting plaintiff's allegations as true and viewing the facts in the light most favorable to him, as we must in this procedural context." Shannon v MTA Metro-North R.R., 269 AD2d 218, 219 (1st Dept 2000).

The court shall dismiss the breach of contract cause of action as asserted against movants Gama and Simon Elias because they were not signatories to the Pledge Agreements and had no obligations thereunder. Pevensey Press, Ltd. v Prentice-Hall, Inc., 161 AD2d 500, 501 (1st Dept 1990) ("there is no basis for holding a defendant liable for breach of a contract to which it

¹ The breach of contract cause of action is not asserted against defendant-movant EALC.

² The causes of action are misnumbered in the complaint as the complaint contains no fourth cause of action.

was not a party"). CDR's attempt to bootstrap contractual obligations onto parties who have not been alleged to have voluntarily assumed such obligations based upon the proffered "alter-ego" and "control" theories is unsupported by the allegations in the complaint especially where no breach of contract action is maintained against EALC, the entity whose shares are alleged to have been improperly issued.

The parties agree that "[t]ortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 424 (1996). "To impose liability, a defendant must induce or intentionally procure a third-party's breach of its contract with the plaintiff and not merely have knowledge of its existence." Beecher v Feldstein, 8 AD3d 597, 598 (2d Dept 2004). "An essential element of such a claim is that the breach of contract would not have occurred but for the activities of the defendant." Cantor Fitzgerald Associates, L.P. v Tradition North America, Inc., 299 AD2d 204 (2d Dept 2002).

The movants argue that "the complaint fails to allege that EALC, Gama, or Mr. Elias intentionally caused Summerson or any

other party to the Pledge Agreements to breach the terms of those agreements." Movants assert that other than the conclusory allegation in paragraph 64 of the complaint that "[b]ut for the defendants' activities, the Pledge Agreements would not have been breached," there are no factual allegations in the complaint that the defendants intentionally procured the breach of the Pledge Agreements. This court agrees with movants' arguments.

As set forth in paragraphs 32 and 34 of the complaint, the Pledge Agreements were breached when 9000 new shares of EALC stock were issued to Iderval. Importantly, as set forth in the complaint and the copies of the Pledge Agreements annexed thereto none of the movants, including EALC, were signatories to the Pledge Agreements and therefore paragraph 8 (c) of the Pledge Agreements which states that the signatories shall cause EALC not to issue new shares does not contractually bind the movants. Based upon the allegations in the complaint itself there was no contractual prohibition upon the issuance of new shares by EALC because EALC was not a party to the contract. The complaint fails to allege that the movants "intentionally induced" the breach of the Pledge Agreements by the parties thereto. See Lama Holding Co., supra, 88 NY2d at 424-425 (tortious interference with contract claim dismissed where there is no allegation defendant intentionally procured breach of contract); NBT Bancorp Inc. v Fleet/Norstar Financial Group, Inc., 87 NY2d 614, 621

(1996) (stating that plaintiff may recover damages for tortious interference with contractual relations where defendant's deliberate interference results in breach of contract); contrast 330 Acquisition Co., LLC v Regency Savings Bank, F.S.B., 293 AD2d 314, 315 (1st Dept 2002) (allegation that by refusing to permit the FDIC to first extend the right to purchase the participation interest to plaintiff, defendant induced the FDIC to breach the terms of the mortgage participation agreement was sufficient to make out a prima facie case). In the absence of any factual allegation that the movants intentionally induced the parties to the Pledge Agreements to breach those contracts, the plaintiff's tortious interference claim must be dismissed for failure to state a cause of action.

Movants argue that CDR's cause of action for fraud should also be dismissed for failure to comply with CPLR 3016 (b) which states that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail."

To state a legally cognizable claim of fraudulent misrepresentation, the complaint must allege that the defendant made a material misrepresentation of fact; that the misrepresentation was made intentionally in order to defraud or mislead the plaintiff; that the plaintiff reasonably relied on the misrepresentation; and that the plaintiff suffered damage as a result of its reliance on the defendant's misrepresentation. A cause of action for fraudulent concealment requires, in addition to the four foregoing elements, an allegation that the defendant had

a duty to disclose material information and that it failed to do so.

P.T. Bank Central Asia v ABN AMRO Bank N.V., 301 AD2d 373, 376

(1st Dept 2003) (citation omitted). The Court cautioned however that "neither CPLR 3016 (b) nor any other rule of law requires a plaintiff to allege details of the asserted fraud that it may not know or that may be peculiarly within the defendant's knowledge at the pleading stage." Id. at 377.

CDR asserts that the fraud claims asserted in the complaint are based upon movants' breach of an alleged duty to disclose. However, as CDR admits in its brief in opposition to the motion, such a duty could only arise under the Pledge Agreements. CDR argues that the movants had a "fiduciary duty" to disclose based upon CDR's standing as a pledgee under the Pledge Agreements. Therefore, as pled, CDR's fraud cause of action for non-disclosure is based upon the same facts as its breach of contract claim because it relies upon a breach of an alleged duty to disclose that arose on the basis of the Pledge Agreements and no independent source for a duty to disclose on behalf of the movants is pled in the complaint. Therefore, CDR's fraud claim is duplicative of its breach of contract claim and must be dismissed on that basis. Orix Credit Alliance, Inc. v R.E. Hable Co., 256 AD2d 114, 115 (1st Dept 1998) ("A fraud claim that only restates a breach of contract claim may not be maintained").

Similarly, CDR's conversion claim, which is based on the allegation that the movants' misappropriated assets that were pledged to CDR under the Pledge Agreements is also based upon the same conduct alleged in the breach of contract cause of action and is therefore subject to dismissal. See PKO Television, Ltd. v Time Life Films, Inc., 169 AD2d 582, 583 (1st Dept 1991) (cause of action for conversion dismissed as being improperly duplicative of plaintiff's cause of action for breach of contract). To the extent that the conversion claim is based upon the disposition of the \$33 million movants are alleged to have caused to be paid for the EALC shares, the complaint fails to make out a cause of action against the movants because the movants, as the alleged purchasers of the shares, were according to the allegations in the complaint not in possession of the funds alleged to have been converted.

Finally, CDR's equitable claim for unjust enrichment also fails against the movants because the complaint does not allege that the movants have been unjustly enriched but instead alleges that those defendants other than the movants who received the \$33 million dollars paid by movants for the EALC stock which should have properly been given to CDR have been unjustly enriched through their retention of those monies. See Complaint at ¶ 55. Therefore, the complaint fails to allege a cause of action for unjust enrichment against the movants. See Ultramar Energy Ltd.

v Chase Manhattan Bank, N.A., 179 AD2d 592, 593 (1st Dept 1992)
(doctrine of unjust enrichment requires allegation that party retained proceeds to which it was not entitled).

Accordingly, it is

ORDERED and ADJUDGED that the motion of defendants Euro-American Lodging Corporation, Gama Lodging LLC and Simon Elias to dismiss the complaint against them is GRANTED and the Clerk is directed to enter judgment DISMISSING the complaint against said defendants; and it is further

ORDERED that the remaining parties are hereby directed to attend a preliminary conference on March 4, 2005, at 10:00 A.M., at the Courthouse, IAS Part 59, Room 1254, 111 Centre Street, New York.

This is the decision and order of the court.

Dated: February 16, 2005

ENTER:

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DEBRA A. JAMES J.S.C.
J.S.C.

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