

Gotham Partners, L.P. v High River Limited Partnership

2005 NY Slip Op 30401(U)

August 25, 2005

Supreme Court, New York County

Docket Number: 602582/2004

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

-----X
GOTHAM PARTNERS, L.P., GOTHAM PARTNERS
III, L.P., and GOTHAM HOLDINGS II, L.L.C.,

Plaintiffs,

INDEX NO. 602582/2004

-against-

MOTION DATE _____

MOTION SEQ. NO. 001

HIGH RIVER LIMITED PARTNERSHIP,

MOTION CAL. NO. _____

Defendant.
-----X

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 is decided in accordance with the accompanying Decision and Order.

FILED
SEP 06 2005
NEW YORK
COUNTY CLERK'S OFFICE

Dated: August 25, 2005

KARLA MOSKOWITZ

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK : IAS PART 3

-----X
 GOTHAM PARTNERS, L.P., GOTHAM PARTNERS
 III, L.P., and GOTHAM HOLDINGS II, L.L.C.,

Index No. 602582/2004

Plaintiffs,

-against-

DECISION and ORDER

HIGH RIVER LIMITED PARTNERSHIP,

Defendant.

-----X
Karla Moskowitz, J.:

Defendant moves to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7).

Plaintiffs cross-move for summary judgment.

In this action, defendant High River Limited Partnership (High River) claims that the language in the parties' contract requires that the court dismiss this action. Under the contract, High River purchased shares that plaintiffs Gotham Partners, L.P., Gotham Partners III, L.P. and Gotham Holdings II, L.L.C. (Gotham) owned in a limited partnership for a specific sum per unit and agreed to pay an additional sum only if a subsequent and profitable "sale or other transfer" of those same units occurred within three years. High River argues that the subsequent cash-out merger transaction of the limited partnership was not such a "sale or other transfer." Gotham urges in its cross motion that the merger transaction was clearly within the broad contractual language, requiring High River to pay the additional sum.

BACKGROUND

Plaintiffs Gotham Partners, L.P. and Gotham Partners III, L.P. are New York limited partnerships, and Gotham Holdings II, L.L.C. is a Delaware limited liability company.

(Complaint, ¶¶ 2-4). Defendant High River is a Delaware limited partnership. (*Id.*, ¶ 5).

In 1994, Gotham acquired a significant interest in Hallwood Realty Partners, L.P.

(Hallwood), a publicly traded limited partnership involved in real estate development. (Plaintiffs' Statement Pursuant to Rule 19-a, ¶ 6). In late 2002, Gotham began winding down its operation. As part of that process, it sought to sell its 15.6% share of the outstanding units in Hallwood. (Affidavit of William Ackman, dated December 24, 2004, ¶ 2 n 2).

In February 2003, Gotham and High River began negotiating High River's purchase of Gotham's Hallwood units. High River sought to purchase just a little under 15% of Gotham's Hallwood shares to avoid triggering Hallwood's "poison pill."¹ (Plaintiffs' Rule 19-a Statement, ¶¶ 8-10; Ackman Aff., ¶ 3). Both High River and Gotham believed that the Hallwood units were undervalued in the market compared to Hallwood's assets² underlying value. The parties therefore sought to unlock that value and realize profits from it. (Ackman Aff., ¶ 5).

On March 1, 2003, Gotham and High River entered into a Unit Purchase Agreement (the Agreement). Exhibit A to Appendix to Plaintiffs' Rule 19-a Statement (Plaintiffs' Appendix). Pursuant to the terms of the Agreement, the purchase price of the limited partnership units (the Sale Units) consisted of two components: (i) an immediate payment of \$80.00 per unit, for an aggregate of \$18.8 million, and (ii) a contingent future payment in the event that High River sold or otherwise transferred the Hallwood units within 36 months and made a net profit of over 10% per annum. (Complaint, ¶ 8). This additional purchase price provision was to protect Gotham if, within a short period of the sale, High River was able to resell the units and realize the extraordinary upside potential of these units. (Ackman Aff., ¶ 5; Affirmation of Adam O. Emmerich in Support, ¶ 4 n 2).

¹ The "poison pill" provision protected Hallwood Partners' investment in the event an acquiring party accumulated 15% or more of the units of the partnership.

Specifically, Section 1.4 of the March 1, 2003 Agreement, entitled Additional Purchase

Price, provided:

If, on or prior to the date that is 36 months after the date hereof, Purchaser **sells or otherwise transfers**, or agrees (either orally or in writing) to **sell or otherwise transfer**, any of the Sale Units (other than a **sale or disposition** to an Affiliate of Purchaser where such Affiliate assumes the obligation to make the payment contemplated in this sentence with respect to **any disposition** of such Sale Units), Purchaser will pay to Gotham, as agent for all Sellers, within two business days following the **sale or other transfer**, the Additional Purchase Price, at an account designated by Gotham.

(Exhibit A to Plaintiffs' Appendix, § 1.4 [emphasis added]). The Agreement defines "Additional Purchase Price" as "any Covered Profits on any **sale or other transfer** of any Sale Unit (each a 'Covered Unit')." (*Id.*, Article V, at 3 [emphasis supplied]). The Agreement defines "Covered Profits" in relevant part, as "50% of the net amount . . . derived by Purchaser and its Affiliates **on the sale or other transfer**" of a Covered Unit in excess of the sum of: (i) 80.00 plus (ii) interest thereon accruing on a daily basis at a rate of 10% per annum (equitably adjusted for splits, stock dividends and similar events)." (*Id.*, Article V, at 4 [emphasis supplied]). The Agreement also provided that it would be governed and construed in accordance with New York law, "without giving effect to the conflicts of laws principles thereof." (*Id.*, Article VII, Section 7.8).

On April 23, 2003, High River announced its intention to commence a tender offer conditioned on the elimination of Hallwood's "poison pill." It filed a lawsuit in Delaware Chancery Court against Hallwood's general partner, seeking to lift that poison pill so that High River's tender offer could proceed. (Plaintiffs' Appendix, Exhibits F and G). On May 1, 2003, High River commenced a hostile tender offer for Hallwood's Units, offering a price of \$100 per share. (Complaint, ¶ 11); Plaintiffs' Appendix, Exhibit I. On May 13, 2003, Hallwood's Board

of Directors determined that the offer was inadequate and recommended that unit holders reject the bid, which they did. Hallwood also retained Morgan Stanley as its financial advisor. (Plaintiffs' Appendix, Exhibit J). In July and August 2003, High River made other tender offers, that again Hallwood rejected.

On April 16, 2004, Hallwood announced that it had entered into a cash-out merger agreement with HRPT Properties Trust (HRPT) (the Merger Agreement). (Plaintiffs' Appendix, Exhibit B). Under the merger, HRPT would "acquire" all of the general and limited partner interests for approximately \$250 million, and the public unit holders would receive approximately \$137.00 per unit. (Plaintiffs' Appendix, Exhibit O).

The Merger Agreement provided, in relevant part, that it "is being effected as an expedient method for each holder of record of Units to convey its respective interest in the Partnership," and that "each holder of Units will treat the Merger . . . as a sale of their respective partnership interest" for federal and state tax purposes. (Plaintiffs' Appendix, Exhibit B, at A35-36, ¶ 6.15 [b]). The Merger Agreement further provided, in Section 2.01, that, by virtue of the merger, and without the unit holders' action

[a]s of the Effective Time, all such Units shall no longer be outstanding and shall automatically be canceled and retired and shall cease to exist, and each holder of a certificate . . . shall cease to have any rights with respect thereto, except the right to receive the Merger Price, without interest, less any required withholding taxes, upon surrender of such Certificate in accordance with Section 2.02.

(Id., Article II, ¶ 2.01 [b] [ii]). The proxy statement Hallwood issued, seeking unit holder approval for the merger, explained to unit holders that they would receive \$136.16 per unit in cash in exchange for each unit they owned and that the sale of the units for cash would be a taxable sale. (See Plaintiffs' Appendix, Exhibit B, at 1, 3, and 22). On July 15, 2004, the unit

holders approved the merger. (Plaintiffs' Appendix, Exhibit C).

High River cashed out its Sale Units at the merger price, but refused to pay Gotham the Additional Purchase Price on the ground that the merger did not constitute a "sale or other transfer." (Complaint, ¶ 15). On August 11, 2004, Gotham commenced this action for breach of contract, seeking the Additional Purchase Price under the Agreement.

In its motion, High River urges that it did not breach the Additional Purchase Price provision in the Agreement, because a merger is a corporate act that extinguishes the stock in the merged company and does not involve any sale or transfer of the stock in the merged company. It contends that, pursuant to the Merger Agreement, its Units were automatically "canceled and retired," thereby ceasing to exist. By operation of the merger, the units converted into the right to receive cash. Accordingly, there was no sale or transfer. High River further contends that the parties did not include the term "merger" in the Additional Purchase Price provision, and that, if they had intended to capture mergers, they would have said so in the Agreement. Therefore, High River asserts that the Additional Purchase Price provision was never triggered.

In opposition, and in support of its cross motion for summary judgment, Gotham argues that, based on the express terms of the Agreement, the merger was a "sale or other transfer" within the scope of the agreement that High River breached, as a matter of law, by failing to make the Additional Purchase Price payment. Gotham asserts that Hallwood itself repeatedly described the transaction in the Merger Agreement and the Proxy Statement to the shareholders as a "sale" or "transfer" of limited partnership units. Gotham contends that, under New York contract law, giving the words "sale or other transfer" their plain meaning, the cash-out merger was within that broad language. Gotham asserts that the additional purchase price provision allows Gotham, after selling the Sale Units for only \$80 per unit, to share in High River's

realization of the imbedded value of the Sale Units within the three-year period (that is, if High River sold or otherwise transferred the Sale Unit at a net profit in excess of 10% per annum). Gotham contends that, if High River sought to exclude ~~merger~~ from the broad language used, it could have included that language, and it did not. High River's failure to do so, Gotham contends, cannot operate to Gotham's detriment.

DISCUSSION

The court denies the motion to dismiss and grants the cross motion for partial summary judgment with respect to liability.

Gotham initially made its cross motion pursuant to CPLR 3211 (c). High River had essentially charted a course for summary judgment in submitting documents outside the Agreement in support of its motion and in arguing that the court may resolve this dispute as a matter of law. (See Mihlovan v Grozavu, 72 NY2d 506 [1988] [where parties submit facts and arguments clearly indicating that they were charting a summary judgment course, adequate notice requirement of CPLR 3211 [c] is met; Weisen v New York Univ., 304 AD2d 459 [1st Dept 2003] [exceptions to CPLR 3211 [c] notice requirement were not applicable]). Nevertheless, the court gave the parties notice that it would treat the cross motion as one for summary judgment and then an opportunity to put in additional papers and argument. (Transcript, March 10, 2005; See CPLR 3211 [c]).

The parties basically agree that these motions turn upon the interpretation of their Agreement. Construction of an unambiguous contract is a matter of law, appropriate for court disposition. (See Vermont Teddy Bear Co. v 538 Madison Realty Co., 1 NY3d 470 (2004); W.W.W. Assoc. v Giancontieri, 77 NY2d 157, 162 [1990]). "When the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the

document” (ABS Partnership v AirTran Airways, Inc., 1 AD3d 24, 29 [1st Dept 2003] [citations omitted]), and the court should enforce the writing according to its terms. (Vermont Teddy Bear Co. v 538 Madison Realty Co., *supra*; W.W.W. Assoc. v Giancontieri, *supra*; see Reiss v Financial Performance Corp., 97 NY2d 195, 199 [2001]). The court should strive to give a fair and reasonable meaning to the language, in light of the purpose and intent of the agreement as a whole. (Abicle Contr., Inc. v New York City School Constr. Auth., 91 NY2d 1, 9-10 [1997]); Sutton v East River Sav. Bank, 55 NY2d 550, 555 [1982]). Clear language does not become ambiguous just because the parties argue differing interpretations. (See Bethlehem Steel Co. v Turner Constr. Co., 2 NY2d 456, 460 (1957); Moore v Kopel, 237 AD2d 124 [1st Dept 1997]).

Here, the Agreement is clear and unambiguous. As set forth in section 7.8, the court is to interpret this Agreement in accordance with New York law. (Plaintiffs’ Appendix, Exhibit A, § 7.8). The Agreement provides, in section 1.4, that Gotham is entitled to the Additional Purchase Price upon a “sale or other transfer” of the Sale Units. Under New York law, the court must accord these terms, that the Agreement does not define more specifically, their plain and ordinary meaning. (Brooke Group Ltd. v JCH Syndicate 488, 87 NY2d 530, 534 [1996]; DDS Partners, LLC v Celenza, 6 AD3d 347 [1st Dept 2004]; Lopez v Fernandito’s Antique, Ltd., 305 AD2d 218 [1st Dept 2003]).

Black’s Law Dictionary defines “Sale” as “[t]he transfer of property or title for a price.” It defines “Transfer” as “*any* mode of disposing of or parting with an asset or interest in an asset” (emphasis added). Thus, the common meaning of these terms is broad and encompasses various types of transactions. (See Paddington Partners v Bouchard, 730 F Supp 1241, 1244 [SD NY 1990] [applying New York law] [finding word “sale” in additional payment provision is broad and includes merger]). This interpretation is in accordance with the definition of sale under New

York's Uniform Commercial Code. Section 2-106 of the Uniform Commercial Code defines "sale" broadly as the passing of title between a buyer and seller for a price. (UCC § 2-106).

Section 1.4 of the Agreement also uses the terms "sale or disposition" and "any disposition" that is similarly broad. Disposition is "[t]he act of transferring something to another's care or possession ... the relinquishment of property." (See Black's Law Dictionary ["disposition"]). This broad language covers High River's receipt of a cash payment per Sale Unit pursuant to the cash-out merger.

Paddington Partners v Bouchard (*supra*) is instructive. In that case, the court, applying New York law, interpreted a similar contractual provision, providing for a future contingent purchase price in the event the buyer of the stock, within 180 days, announced a tender offer, merger or other acquisition of shares and later acquired or disposed of the stock at a premium. In those circumstances, the buyer would pay the seller, Paddington Partners, 50% of the difference between that premium price and the price the buyer paid Paddington Partners. (*Id.* at 1241). The buyer subsequently transferred the shares at issue pursuant to a second-step merger. The actual transfer of the stock, pursuant to this second-step merger did not occur until the one hundred and eighty sixth day, thereby falling outside the triggering period. The buyer claimed that this transfer by second-step merger was not a "sale" in accordance with the parties' contract, and that both the tender offer and the disposition of shares had to occur during the one hundred and eighty day period.. (*Id.* at 1243). Interpreting the provision under New York law, the court granted summary judgment to Paddington Partners. The court held that the common meaning of "sale" was broad and encompassed various disposition transactions, including a second-step merger. (*Id.* at 1244-45). It found that the buyer's argument rested on semantics, without legal authority to support it. (*Id.* at 1244). The court looked to the definition of sale in UCC § 2-106, as well as

in the Securities Act of 1933 and the 1934 Securities Act. It found that these provisions supported the contention that this merger was a “sale.” (*Id.* at 1244-45; *see National Westminster Bancorp. NJ v Leone*, 702 F Supp 1132 [D NJ 1988] [exchange of stock for cash under merger is a sale within Section 16 [b] of the Securities Exchange Act of 1934]; *see also PPG Indus., Inc. v Guardian Indus. Corp.*, 597 F2d 1090 [6th Cir], *cert denied* 444 US 930 [1979] [anti-assignment and transfer provision in patent license agreement was violated by merger; merger was a “transfer” despite fact that licenses passed by operation of law]; *Nicolas M. Salgo Assoc. v Continental Ill. Props.*, 532 F Supp 279 [D DC 1981] [merger violated anti-assignment clause as a “transfer,” whether by operation of law or by act of parties]).

As Gotham aptly argues, it would exalt form over substance to interpret these terms as narrowly as High River contends. While under the merger the Sale Units were “canceled and retired,” there was still a transfer of High River’s interest in the partnership in exchange for considerable value in cash, and, in fact, the Merger Agreement provided that High River had the right to receive the cash “upon the surrender of such Certificate.” (Plaintiffs’ Appendix, Exhibit B A-2, Article II, § 2.01 [b] [ii]). The Merger Agreement provisions and the Proxy materials support the conclusion that this cash-out merger was a sale of the units. The provisions and Proxy materials specifically refer to the shareholders’ “sale” of their units as a taxable sale and as a “conveyance” of their respective interests in the partnership. (Plaintiffs’ Appendix, Exhibit B, A-35 [Merger Agreement], and 22 [Proxy Statement]).

That the parties did not include the word “merger” in the language of Section 1.4 does not warrant a different interpretation. As discussed above, the broad language encompassed the cash-out merger. If High River, a sophisticated and savvy business entity, sought to limit the meaning to exclude merger, it could have included the language. It did not do so. (*See Vermont*

Teddy Bear Co. v 538 Madison Realty Co., 1 NY2d at 476 [court cannot add a missing term to an unambiguous contract]). Section 1.4 of the Agreement included an exception for “other than a sale or disposition to an Affiliate of Purchaser.” (Plaintiffs’ Appendix, Exhibit A, § 1.4). No other exceptions are in this provision and this court will not insert one for a merger. (See Vermont Teddy Bear Co. v 538 Madison Realty Co., supra; Reiss v Financial Performance Corp., supra).

High River’s claim that the language “sale or other transfer” meant that it had to initiate the sale or transfer, is not convincing. There is no limitation in the language. That the transfer of the Sale Units occurred through operation of law does not negate that units were “otherwise transferred” in the merger. (See PPG Indus., Inc. v Guardian Indus. Corp., supra; Nicolas M. Salgo Assoc. v Continental Ill. Props., supra).

This interpretation comports with the parties’ reasonable expectations that Gotham would realize the upside potential of the Sale Units if High River sold or otherwise transferred them and realized a cash profit in the three-year period. (See Sutton v East River Sav. Bank, 55 NY2d at 555-56). There is no apparent ambiguity. High River has failed to present evidence that would either support its interpretation, or, at the least, support its alternative contention that the terms “sale or other transfer” are ambiguous, thus creating an issue of fact.

High River’s reliance on Seven Springs Farm, Inc. v Croker (748 A2d 740 [Pa Super 2000], affd 569 Pa 202, 801 A2d 1212 [2002]), and Shields v Shields (498 A2d 161 [Del Ch], appeal denied 497 A2d 791 [Del 1985]) is misplaced. First, neither case was decided under New York law. Second, as Gotham points out, they both involve provisions restraining the alienation of stock that the law disfavors and strictly construes. (See e.g. Seven Springs Farm, Inc. v Croker, 748 A2d at 748). Both cases also involve family members in closely held corporations.

(See id.; Shields v Shields, supra). Moreover, in Seven Springs Farm the court found that the primary purpose of the parties' contract was to restrict individual shareholders' sale or transfer of stock. Therefore, that the merger was a corporate act was significant to show that it was not within that purpose. (Seven Springs Farm, Inc. v Croker, 748 A2d at 748; see also Shields v Shields, 498 A2d at 167-68). Here, in contrast, this was simply a contingent purchase price provision. It does not involve restricting family members from selling stock in a closely held corporation. Moreover, the purpose of the provision was to capture the upside potential of the stock and not to limit the sale or transfer of stock.

Frandsen v Jensen-Sundquist Agency, Inc. (802 F2d 941 [7th Cir 1986]), that High River also relies upon, similarly involved a right of first refusal provision in a dispute between family members of a closely held corporation. It also was not decided under New York law, but rather under Wisconsin law. The Frandsen court found that the right of first refusal provision was to prevent a sale of shares that would result in a new majority bloc. The court determined that the sale of all or some of the holding company's assets did not result in substituting a new majority bloc. Therefore, the transaction did not fall within the first refusal provision. (Frandsen v Jensen-Sundquist Agency, Inc., 802 F2d at 946). As with Seven Springs Farm and Shields v Shields, Frandsen is clearly distinguishable.

Midland Container Corp. v Sophia Realty Corp. (65 AD2d 784 [2d Dept 1978]), is similarly not on point. Midland Container Corp., again, involved a right of first refusal in a commercial lease. This provision stated that if the lessor had the opportunity to "sell" the premises, then the lessee would have the first option to purchase. Not only is this language ("sell") not as broad as "sell or otherwise transfer," the lessor corporation did not sell or engage in a cash-out merger. The lessor liquidated and distributed the corporate assets to the

shareholders, who decided to acquire title to those assets, not in their individual names, but rather in the form of a partnership. The court examined Business Corporation Law § 1005 (a) (3) (B), that addresses nonjudicial dissolution of a corporation and determined that the statute “evinces an intent that the outright distribution of remaining corporate assets to the shareholders themselves is not legally synonymous with a ‘sale’ of those same assets to third parties.” (Midland Container Corp. v. Sophia Realty Corp., 65 AD2d at 785). Thus, the court held that the transaction between the defendant corporation and the defendant partnership was not a “sale” that would trigger the lessee’s option. (Id.). This case did not involve a right of first refusal, that the court must construe narrowly. Also, there was no liquidation and distribution of assets. Rather, it was a merger in which High River received cash from an outside party for its Sale Units. Thus, the situation here is clearly distinguishable from the Midland Container Corp. case.

Accordingly, Gotham has demonstrated, and High River has failed to raise any triable issue, that High River has breached the Additional Purchase Price provision in their Agreement. To the extent that High River claims that it needs discovery pursuant to CPLR 3212 (f), it fails to show that any facts essential to opposing the motion exist but cannot be stated. Discovery regarding the negotiation and drafting of the Agreement is not necessary in light of the determination, with which High River agrees, that the Agreement is unambiguous. Accordingly, the court grants partial summary judgment on liability. The court will decide the issue of the amount of Gotham’s damages in Part 03 on filing of a Note of Issue after any discovery the parties need as to damages.

The court therefore denies High River’s CPLR 3211 motion to dismiss. The balance of High River’s motion, under CPLR 4547, is denied as moot.

Accordingly, it is

ORDERED that the motion to dismiss is denied; and it is further

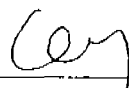
ORDERED that the cross motion is granted to the extent of granting partial summary judgment in favor of plaintiffs and against defendant on liability and severing and continuing the issue of the amount of damages; and it is further

ORDERED that on plaintiffs filing of a Note of Issue and Statement of Readiness and payment of appropriate fees, the Clerk of Trial Support shall place the remaining issue of the amount of plaintiffs' damages for an assessment on the Part 03 Trial Calendar; and it is further

ORDERED that the parties shall appear for a status conference in Part 03, courtroom 248, 60 Centre Street, New York, on September 29, 2005 at 2:30 p.m.

Dated: August 25, 2005

ENTER:



J.S.C.

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