

Global Mins. & Metal Corp. v Holme

2006 NY Slip Op 30413(U)

January 18, 2006

Supreme Court, New York County

Docket Number: 605084/00

Judge: Charles E. Ramos

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

Charles Edward Ramos

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PRESENT: _____
Index Number : 605084/2000

PART _____

GLOBAL MINERALS AND METALS

vs
HOLME, JAMES W.

INDEX NO. _____

Sequence Number : 004

MOTION DATE _____

SUMMARY JUDGMENT

MOTION SEQ. NO. _____

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

FILED
JAN 26 2006
COUNTY CLERK'S OFFICE
NEW YORK

is decided in accordance with
accompanying memorandum decision and order.

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

Dated: 1/18/06


CHARLES E. RAMOS

Check one: FINAL DISPOSITION NON-FINAL DISPOSITIONS.C.

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X
GLOBAL MINERALS AND METAL CORP.,

Index No. 605084/00

Plaintiff,

-against-

JAMES W. HOLME, ANA MARIA HOLME and
H&H METALS CORP.,

Defendants.

-----X

Charles Edward Ramos, J.S.C.:

In motion sequence 004, defendants James W. Holme, Ana Maria Holme, and H&H Metals Corp. ("H&H") move, pursuant to CPLR 3212, for summary judgement dismissing plaintiff's complaint for breach of contract, breach of fiduciary duty, and aiding and abetting said breach of fiduciary duty.

Plaintiff Global Minerals and Metal Corp. ("Global") cross-moves pursuant to CPLR 3212(f) arguing that this motion is premature pending further discovery.

Background

Global is a Delaware Corporation organized in 1993 by defendant James W. Holme. It maintains its principal place of business in New York, New York. Global is in the business of buying and selling minerals and metals commodities. Defendant Anna Maria Holme is James W. Holme's wife.

Holme and three other individuals each owned a 25% stock interest in Global, each stockholder having paid approximately \$250,000 for his stock interest. In February 1994, under the Master Shareholders Agreement, Holme agreed that, in the event that he did not act in the best interest of Global, he would have

to sell his shares back to Global for his cost of investment, plus 10% interest annually.

In May 1994, Holme proposed that Global acquire a 75% equity interest in Wessex, a London based commodity merchant. Wessex was a joint venturer with Global in a transaction known as the Bulgarian contracts. Global ultimately rejected Holme's proposal.

During 1994 and 1995, Global arranged for the purchase of aluminum and an option for long term supply contract from Alusaf Ltd. and Harrison Radiator. In October 1995, plaintiff alleges that Holme advised R. David Campbell, Global's president, and one of its stockholders, that the negotiations failed. Campbell contends that Holme was responsible for the collapse as he diverted the supply agreement to H&H Metals Corp., a commodities trading company formed by Holme in October 1995.

In the beginning of 1995, Global's business with Sumitomo, its largest customer, became the subject of criminal and regulatory investigations and received substantial notoriety. Global and Campbell were named in the complaint brought by the Commodities Futures Trading Commission.

In May 1995, based on disagreements Holme was having with Global's shareholders, Holme announced to Global's other shareholders his desire to sell his interest in Global and start his own competing business. Global consented to only discuss Holme's new business venture that would commence after his resignation became effective.

In the summer of 1995, Holme and Campbell began negotiations to effectuate Holme's separation from Global. The negotiations lasted two years. Holme and Global were each represented by counsel in the course of their negotiations.

Holme formed Wessex Minerals & Metals Corp. (New York) ("Wessex") in 1995 allegedly as part of the negotiations concerning Holme's departure from Global. Wessex was engaged in the same business as Global.

On January 5, 1995, Gerald Locker, owner and chief executive of Wessex, faxed updates of Wessex's account as well as projected profits for the next three years to Global.

In February 1995, Holme provided Wessex with \$1,500,000. Global alleges in the complaint that it was led to believe that this amount was a personal loan to Locker for which Locker secured Wessex stock as a collateral for that loan. However, plaintiff contends that it found out after 1997 that Holme purchased a 40% interest in Wessex stock held in the name of A.M. Martinelli, Holme's wife maiden name.

In the Fall of 1995, Holme allegedly caused Locker to issue false documentation to further conceal his ownership of Wessex.

In a fax dated September 1, 1995, to Mr. Y. Hamanaka, a Sumitomo employee, Campbell stated that Holme must leave Global as soon as possible and in a way that would "neutralize his ability to disclose what he knew" to others about Global's copper trading activities. Campbell suggested as alternative methods of neutralizing Holme "immediate dismissal/ legal action/ a

bullet(!)" or a severance and stock buy-out package payable over two to three years, linked to a confidentiality provision the breach of which would result in cancellation of the remaining payments.

A letter dated October 17, 1995, from Holme to Campbell confirms that Holme and Global:

are entering into an arrangement whereby [Holme] resign[s] as an employee, officer and director of [Global], effective October 31, 1995. [Global] understand[s] that until that date, [Holme] will be discussing a new business which [Holme] intend[s] to commence on or after November 1, 1995, and [the parties] agree that such discussions will not constitute a violation of [Holme's] obligations.

On February 16, 1996, Global's attorneys prepared a revised draft of the proposed Joint Venture Agreement between Global and Holme which referred to :

(ii) potential contracts for the sale of aluminum metals purchased from ALUSAF of South Africa by General Motors Corp. or any business or subsidiaries or affiliates to be entered into during the term of this Agreement.

By letter dated April 11, 1996, Global's attorney sent Holme's attorney a fax concerning a possible joint venture between Global and Wessex. Additionally Global's attorney states that "Holme continued to receive [Global's] financial information until early September [1995] by which time Mr. Holme had advised [Global's] client that [Holme] would be establishing a competitor company."

Holme ceased being a director of Global on January 2, 1996 and an officer and employee of Global January 31, 1996. On October 16, 1996, Holme submitted his resignation as an officer and director of Global "effective on the close of the business

day". Holme did not cease being a shareholder until January 17, 1997.

On January 8, 1997, Global's attorney stated that the private Wessex transaction between Holme and Wessex should not be part of the Holme/Global termination agreements.

The negotiations between Holme and Global concerning the terms of Holme's separation from Global culminated in a series of agreements, each dated January 17, 1997, including a Stock Purchase Agreement; a Severance Agreement; a Confidentiality Agreement; and a General Release.¹

The Stock Purchase Agreement states that Holme must sell to Global all his shares of stock in Global for \$4 million.

The Severance Agreement required Global to pay Holme \$4.5 million in three installments of \$1.5 million each. Holme contends that two of these payments were not made forming the basis of the \$3 million he is seeking on this motion. Global contends that it is withholding payment because of Holme's alleged fraudulent inducement.

The Confidentiality Agreement is the document whereby Holme agreed that for a period of two years he would not disclose information regarding Global's business or affairs to third parties, unless compelled to do so by a court. The Confidentiality Agreement further provides that Holme is not

¹ The settlement documents also include a letter regarding profit sharing and a letter regarding bonus. The letters concern profits arising from business transactions for which Holme was responsible, as well as bonuses for services rendered, prior to the termination of Holme's employment.

prohibited "from engaging in any other employment or gainful activity, including, without limitation, business activity that directly competes with that of the Company."

Finally, the General Release provides that:

[Global] [...], as RELEASOR, in consideration of the sum of One Dollar (\$1.00), [...] releases and discharges Holme (hereinafter sometimes referred to as "releasee") and RELEASEE's heirs, executors and administrators from all actions, cause of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, claims and demands whatsoever, in law, admiralty or equity, which against the RELEASEE, the RELEASOR or RELEASOR's successors and assigns ever had, now have or hereafter can, shall or may, have for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of this RELEASE (collectively "Claims"), except for any and all Claims arising out of (i) the Stock Purchase Agreement; (ii) the Severance Agreement and (iii) the Confidentiality Agreement (each as defined herein).

The complaint in this action was filed on November 21, 2000. Plaintiff asserts six causes of action: (i) breach of fiduciary duty against Holme, Ana Maria Holme and H&H; (ii) fraudulent inducement against Holme; (iii) specific performance against Holme; (iv) breach of contract and the confidentiality agreement; (v) Reformation of the Stock Purchase against Holme; (vi) Rescission. The complaint is based on the premise that defendant breached his fiduciary obligations to plaintiff by diverting business away from plaintiff for his own benefit and assisting Global's competitors to wrongfully possess plaintiff's documents. Plaintiff contends it was fraudulently induced to enter into the settlement documents, including the general release by reason of Holme's alleged non-disclosure of breaches of fiduciary duties

made during the time that he was employed by Global.

Defendants argue that plaintiff's causes of action are all barred by the general release executed on January 17, 1997 subsequent to each act alleged in the complaint. Defendants assert that the release discharges Holme from all claims.

Plaintiff opposes this motion and argues that a question of fact arises as to Holme's concealment of activities in breach of the Master Shareholders' Agreement and his fiduciary duties to Global. Global asserts that it executed the series of agreements on January 17, 1997 in reliance on Holme's misrepresentations, namely Holme's failure to disclose his Wessex stock purchase and H&H's business prior to Holme's resignation effective on January 31, 1996.

Discussion

"[I]n order to obtain summary judgment, movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law." *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 (1988). In order to defeat the motion, the defending party must establish the existence of a factual issue requiring trial, through production of admissible evidence. *Id.* at 967.

Defendants established that plaintiffs' claims against Holme premised upon a breach of fiduciary duty and breach of contract are barred by the general release.

Fraudulent inducement against Holme

There is no dispute as to the general release: both parties

were represented by counsel, both parties agreed to its terms, and both parties signed the agreement on January 17, 1997. Inasmuch as the "language of the release is clear, effect must be given to the intent of the parties as indicated by the language employed." *Matter of Shaefer*, 18 NY2d 314, 317 (1966). However, "a release [...] will be set aside by a court only for duress, illegality, fraud, or mutual mistake." *L&K Holding Corp. v Tropical Aquarium at Hickswille, Inc.*, 192 AD2d 643 (2d Dep't 1993). Since Global challenges the release on grounds of fraud, the burden of persuasion remains with it. *Fleming v Ponziani*, 24 NY2d 105, 111 (1969).

Global claims that Holme's fraudulent inducement and more precisely Holme's concealment of his alleged breach of his fiduciary duty vitiates the January release. In order to prove fraudulent inducement, Global must show that Holme falsely represented a material existing fact resulting in Global's injury. *Century 21 v F.W. Woolworth Co.*, 181 AD2d 620, 625 (1st Dep't 1992).

Fraudulent concealment will vitiate a release under New York law. [citations omitted]. However, one who seeks to avoid a release on that basis must establish the basic element of fraud:

- 1) the other party wrongfully misrepresented or concealed a material fact;
- 2) the misrepresentation was false and known to be false when made, or the concealment was intentional;
- 3) the misrepresentation was made, or the concealment was done, with the intent of inducing reliance;
- 4) the plaintiff did in fact rely and was reasonable in doing so.

Skylon Corp. v Guilford Mills, 864 F. Supp. 353, 358 (1994).

Plaintiff cannot show that it reasonably relied on a known

false misrepresentation because it was on notice of many of the acts alleged in the complaints at the time plaintiff issued its general release.

Global claims that Holme misrepresented and fraudulently concealed two events: his alleged ownership of Wessex stock and his alleged theft of aluminum business with Alusaf diverted to H&H. Both parties provided this Court with evidence which at a minimum should have raised doubt regarding Holme's adherence to the terms of the Master Shareholder's Agreement and thus warned Global as to the need further inquiry prior to the execution of the release.

The facts concerning the Wessex stock are undisputed. Whether the alleged transfer of \$1,550,000 was a stock purchase by Holme or a loan, conclusive evidence shows that Global was concerned about Holme's fiduciary obligations with respect to this transfer prior to the settlement agreements in 1997.

Such evidence includes a letter dated January 7, 1997, from Holme's attorney, Thomas P. Mohen, to Global's attorney, Robert L. Pelz, stating that as part of settlement Holme deemed it important for certain contracts to be assigned to him with respect to Wessex "due to his independent business interests with Wessex (and the return of approximately \$1,500,000 in loans made by Jimmy [Holme] which [Mohen] told [Pelz] about during [their] December 12th meeting)". In response, Mr. Pelz wrote a letter dated January 8, 1998 in which he explicitly acknowledges "Holme's private transaction" while now denying that Global was

aware of it when it occurred. Even more persuasive, is Global's own admission in its memorandum of law in opposition to this motion that "[b]y virtue of an examination of corporate records publicly on file in London, in December 1996, Global learned that Wessex shares had been registered in Holme's wife's name."

Global also knew before it executed the general release that Holme had formed H&H to engage in similar business activities as Global. Campbell's letter confirming Holme's resignation dated October 17, 1995, acknowledges Holme's "new business" and provides that "such discussions" shall not constitute violations of Holme's obligations to Global as long as he continued to fulfill his responsibilities to Global and did not disclose confidential information. Similarly, Pelz in explaining why Global stopped providing Holme with certain financial information in September 1995 acknowledged in an April 11, 1996 letter Holme's intention to form a competing company.

As to the Alusaf contract, evidence points to negotiations after Global claims Holme had allegedly diverted it to H&H by letting Global believe that the contract was dead. A provision in the February 1996 Draft Joint Venture Agreement allowed Global and Holme to compete for Alusaf. This reveals that, as of October 1995, Global could not possibly have relied on Holme's alleged false misrepresentation that the deal was dead.

Global had a duty to investigate its concerns in preparation for the settlement agreements at a minimum to adequately limit the scope of the release. In establishing fraud, "plaintiffs,

who are all sophisticated businessmen, had a duty to exercise ordinary diligence and conduct an independent appraisal of the risk they were assuming" in order to establish "the true nature of the transaction." *Abrahami v UPC Constr. Co.*, 224 AD2d 231, 234 (1st Dep't 1996).

In view of existing lines of communication between Global and Wessex, clearly evident from Campbell's correspondence with Locker regarding to the Wessex/Holme loan dispute, and Global's own internal records, Global should have conducted a basic inquiry of its present claims. A simple review by Global of the documents cited above, as well as public records, would have revealed a more complete picture of the issue of the loan versus the sale of Wessex as well as Global's contract with Alusaf prior to signing the release.

While within their knowledge, plaintiff made no effort to ascertain its doubts nor limit the broad scope of the release. *K3 Equipment Corp. v Kintner*, 233 AD2d 556 (3rd Dep't). Accordingly, plaintiff has failed to establish any of the traditional elements necessary for setting aside a release, namely that it was fraudulently induced into signing the document. The Court has no choice but to conclude that the release bars all claims alleged in the complaint.

Breach of fiduciary duty against Holme, Ana Maria Holme and H&H.

The Complaint is dismissed as to defendants H&H and Ana Maria Holme. The only claim against H&H or Ana Maria Holme is one of aiding and abetting Holme's alleged breach of fiduciary

duty.

The elements of a claim for aiding and abetting a breach of fiduciary duty under New York law are: (1) a breach by a fiduciary of obligations to another, (2) knowing participation by defendant in the breach, and (3) damages to plaintiff.

Whether Holme breached his fiduciary duty or not, H&H and Ana Maria Holme have not provided "substantial assistance" within the meaning of the law.

Substantial assistance occurs when a defendant affirmatively assists, helps conceal, or fails to act when required to do so, thereby enabling the breach to occur. However, the mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff.

Kaufman v Cohen, 307 AD2d 113, 125-126 (1st Dep't 2003) (Defendant assisting another in reacquiring an interest in a real estate matter by itself was not substantial enough to constitute a aiding and abetting a breach of fiduciary duty).

Mrs. Holme did not owe any fiduciary duty to Global. Plaintiff's only allegation is that Mrs. Holme typed a letter in June 1996 to demand the dividend amount of the Wessex stock. At the time, Mrs. Holme was allegedly aware of the monies transferred by her husband to her account. This act is insufficient to amount to a claim of aiding and abetting. Plaintiff provides no evidence that Mrs. Holme knew of Mr. Holme's previous alleged breaches of fiduciary duty as he was neither an employee nor a fiduciary of Global at the time Mrs. Holme wrote her request.

Aside from its allegations against H&H, plaintiff has submitted no evidence to substantiate H&H's alleged assistance or

participation in Holme's breach of fiduciary duty.

Specific performance against Holme

The Third Cause of Action against Holme requesting specific performance of the Master Shareholder Agreement, is dismissed. Pursuant to the Masters Shareholders Agreement, if any shareholder were found to be working against Global's best interests, his shares would be purchased by the company at the original cost, plus 10% annually.

As provided above, the release is valid; therefore, any obligations arising under the Master Shareholder Agreement were discharged when Global executed the General release on January 17, 1997.

Breach of contract and the Confidentiality Agreement

The Fourth Cause of Action against Holme is dismissed. Plaintiff alleges that Holme disclosed, without plaintiff's consent, confidential information respecting plaintiff's business and affairs to Wessex which Holme wrongfully removed from plaintiff's place of business. Global was aware that Holme had business documents in his possession prior to the execution of the release.

By letter dated April 3, 1996, Mr. Pelz, Global's attorney, wrote to Mr. Kaizer, Holme's attorney to request that Holme return all of Global's files including the documents removed by Holme from Global's office on October 9, 1995. Any contractual obligations arising prior to the execution of the confidentiality agreement on January 17, 1997 were discharged when Global

executed the General Release.

Reformation of the Stock Purchase against Holme

Plaintiff claims that Holme's breaches of fiduciary duty, namely concealing his fraudulent acts against Global's interests, induced Global into executing the Stock Purchase Agreement. As aforesaid, plaintiff has failed to establish any question of material fact with regards to fraudulent inducement; therefore, the General Release bars the reformation claim as a matter of law.

Rescision of the Severance Agreement

As a matter of law, plaintiff fails to show fraudulent inducement. The General Release is valid and bars any claims to rescind the Severance Agreement.

Plaintiff's cross-motion

Plaintiff's cross-motion is to oppose defendant's motion based on CPLR 3212(f) which provides:

Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

Plaintiff argues that summary judgement should be denied as the facts upon which this motion is predicated are not within Global's knowledge. While a series of discovery issues seem to have arisen in completing the necessary proceedings, the First Department has been clear that "[a] grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead

to relevant evidence." Plaintiffs must show "facts essential to justify opposition to the motion." *Bailey v New York Transit Auth.*, 270 AD2d 156, 157 (1st Dep't 2000).

While plaintiff has provided this Court with numerous issues with regards to depositions scheduling matters and the adequate formatting of witness statements, plaintiff fails to identify an essential fact which is presently unavailable to Global.

Accordingly, plaintiff's causes of action are barred by the General Release dated January 17, 1997.

Order

Accordingly, it is

ORDERED that defendants motion for summary judgement pursuant to 3212 is granted as to all six causes of action: (i) breach of fiduciary duty against Holme, Ana Maria Holme and H&H; (ii) fraudulent inducement against Holme; (iii) Specific performance against Holme; (iv) Breach of contract and the Confidentiality Agreement; (v) Reformation of the Stock Purchase against Holme; (vi) Rescission, and the Clerk is hereby directed to enter judgment dismissing the complaint.

Dated: January 18, 2006

FILED
 JAN 26 2006
 COUNTY CLERK'S OFFICE
 NEW YORK

 J.S.C.
CHARLES E. RAMOS
 J.S.C.

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.