

Bain v Silver Point Europe LLP
2007 NY Slip Op 31153(U)
May 2, 2007
Supreme Court, New York County
Docket Number: 0114284/2006
Judge: Richard B. Lowe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____
Justice

PART 54

Index Number : 114284/2006
BAIN, DANIEL
vs
SILVER POINT EUROPE LLP
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE 5/2/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____
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
MAY 10 2007
NEW YORK
COUNTY CLERK'S OFFICE

THIS IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 5/2/07

HON. BERNARD A. LIEBOWITZ

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

-----X
DANIEL BAIN,

Plaintiff,

Index No. 114284/06

-against-

SILVER POINT EUROPE LLP and SPCP GROUP LLP,

Defendants.

FILED
MAY 10 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----X
Hon. Richard B. Lowe, III:

Defendants Silver Point Europe LLP ("SPE") and SPCP Group LLP ("SPCP"),
(collectively "Silver Point Entitites") move pursuant to CPLR §§ 3211 and 3016(b) for an order
dismissing plaintiff's complaint.

Background

Plaintiff Daniel Bain ("Bain"), a resident and domicile of New York City, founded and
managed an entity known as Galvex Group ("Galvex") in New York. All of the company's
major financial issues and decisions are managed by Bain, along with other officers and
directors, from Galvex's offices in New York City.

By 2005, Galvex was heavily in debt and threatened by a foreclosure which would result
in a take over of the control of the company. Bain, being owner of 81% of the outstanding shares
of stock in Galvex, sought financial assistance for the company. Specifically, he sought an
opportunity whereby Galvex's debts would be purchased and time given to Bain to restructure
Galvex's financial obligations.

SPE is a limited liability partnership organized under the laws of England and Wales,

with its principal place of business in London, England. SPE has offices in London, England and no offices in the United States. It is a financial services advisor whose sole source of revenue is fees that it is paid for the investment services it provides to Silver Point Capital, L.P. ("Silver Point Capital"), an investment manager. Silver Point Capital is a Delaware limited partnership with its principal place of business in Connecticut. It manages two hedge funds.

A former employee on SPE's trading desk, Tim Babich, ("Babich") informed an SPE partner that Silver Point Capital had been referred a potential business opportunity involving Bain and Galvex. Thereafter, Babich first communicated from SPE's London offices via telephone and/or email with Bain and his counsel to obtain background information in anticipation of an initial meeting (Hughes Decl ¶ 9). SPE first met with Bain at SPE's offices in London on October 20, 2005 (Hughes Decl ¶ 14).

At the conclusion of the October meeting, an interest by Silver Point Entities in participating in a restructuring of Galvex's capital structure was discussed. SPE and Bain agreed to discuss a potential transaction in which (a) the Silver Point Entities would acquire the debt of Galvex and (b) SPE would work with Bain to try to agree on a capital restructuring of Galvex. If a restructuring could not be agreed to, Bain wanted to have an opportunity to repurchase the debt. Premised on this basic understanding, the parties agreed to continue negotiating the terms of their proposed business relationship. In order to continue this negotiation, Silver Point Entities requested that Bain make due diligence information, located in New York, available to them for inspection.

After significant negotiations, SPE and Bain entered into a written agreement (the "Option Agreement"). The Option Agreement contemplated that SPE or an affiliate would

acquire a controlling interest in Galvex's outstanding debt. It further provided a framework within which SPE and Bain would negotiate to try to come to an agreed upon capital restructuring of Galvex. The Option Agreement is to be construed under the laws of England (Agreement § 8.8). After the Option Agreement was executed the parties attempted to negotiate a new capital structure for Galvex. Several restructuring proposals were discussed and negotiated.

Bain alleges that almost immediately after entering into the Option Agreement, the Silver Point Entities breached the agreement and began a hostile takeover of Galvex. Bain characterizes Silver Point Entities as just another "financial predator" who is a "loan to own" hedge fund which purports to save a company when it actually intends to take over that company (Pl. Memorandum in Opp., p. 1). SPE alleges that after entering into the Option Agreement, Bain refused to consult with Silver Point Entities, as he was required to do under the agreement, before making financial decisions on behalf of Galvex. Seriously concerned, allegedly the Silver Point Entities made a series of decisions including changing the members of Galvex's board of directors.

The parties never entered into a restructuring agreement as contemplated by the Option Agreement. Bain has brought this action alleging breach of contract and fraud. Bain alleges the defendants failure to allow him to manage Galvex is in breach of the Operating Agreement. Further, he pleads defendants true intentions were to completely take over Galvex and not to assist in restructuring the debt.

Defendants now file this motion to dismiss based on several grounds: lack of personal jurisdiction over all parties, lack of privity between Bain and SPCP, that the claims are contrary

to English law, and a failure to plead fraud with specificity.

Discussion

Lack of Personal Jurisdiction

Plaintiff asserts long arm jurisdiction over the defendants pursuant to CPLR 302(a)(1) alleging they transacted business in New York through their participation in the series of negotiations conducted between the parties.

Galvex Group is headquartered in New York and all financial decisions are made in New York (Bain Aff ¶ 10). Bain was first solicited in New York by the Silver Point Entities' liaison, Joseph Saracheck, who is located in New York (Bain Aff ¶ 14). Saracheck, on behalf of the Silver Point Entities, asked Bain to participate in a conference call with the Silver Point Entities' representatives along with Saracheck who remained in New York (Bain Aff ¶ 15). It was during this conference call that Silver Point Entities expressed interest in acquiring Galvex's debt. The Silver Point Entities contacted Bain in New York and requested due diligence information on Galvex which was located in New York (Bain Aff ¶¶ 22-23)

To comply with the due diligence requests, Bain insisted on a Non-Disclosure Agreement ("NDA"). After negotiation, whereby Silver Point Entities sought the laws of England as the applicable law, they eventually consented to Bain's request that the NDA be construed under New York law (Bain Aff ¶ 19). Silver Point Entities hired a New York law firm, Richards Spears Kibbe & Orbe LLP, to represent them in negotiating the NDA (Bain Aff ¶ 20). All negotiations regarding the NDA occurred in New York between Bain's counsel, located in New York and the Silver Point Entities' counsel, which was also located in New York (Bain Aff ¶ 21). After the NDA was negotiated, all due diligence information was obtained in New York and

defendants contacted Bain in New York with any additional requests (Bain Aff ¶ 22-23).

Thereafter, the defendants requested that Bain, act as their agent to induce Centre Re, a lender holding Galvex's mezzanine debt, to sell its portion of the debt to the Silver Point Entities (Bain Aff ¶ 24). Bain agreed and, in New York, contacted Centre Re's representative, who was also in New York, to negotiate the Silver Point Entities' purchase of the debt (Bain Aff ¶ 24).

Bain also affirms that he negotiated the Operation Agreement with Silver Point Entities' representative, Chaim Fortang. Fortang and Bain met in New York for the purpose of conducting negotiations under the Agreement. Specifically, they were attempting to enter into a restructuring agreement. He affirms the first round of negotiations, per the agreement, were held in New York at the New York offices of Kasowitz, Benson, Torres & Friedman LLP, a New York law firm (Bain Aff ¶ 39). Bain affirms the purpose of a January 29, 2006 meeting held in New York was to satisfy certain restructuring obligations of the Operating Agreement (Bain Aff. ¶ 40).

Bain affirms that because a restructuring agreement was not reached, on February 7, 2006, Fortang on behalf of the Silver Point Entities, again met with Bain in New York at the New York offices of the Kasowitz firm (Bain Aff ¶ 42). These negotiations again proved unsuccessful and Fortang advised Bain that the Silver Point Entities would no longer continue to negotiate with Bain (Bain Aff ¶ 44).

Defendants argue that no purposeful activities took place in New York which would subject them to jurisdiction. They affirm that the Option Agreement was negotiated by SPE with Bain in London and Estonia (Hughes Aff. ¶¶ 13-34). They further allege that all negotiations were done through meetings, email and telephone conversations all taking place in London,

England, or Estonia (Hughes Aff. ¶¶ 17-18).

The defendants also dispute the role Fortang played in the negotiation process. They allege he was never a principle of the defendants, nor is he affiliated with them (*Def. Reply Memo.* at p. 4) They also dispute Bain's recollection and affirm that neither Fortang nor the Kasowitz firm had anything to do with performing under the Option Agreement (Fortang Aff ¶¶ 5, 7-9).; Shiff Aff. ¶¶ 5, 11-12).

Where, as here, defendants move to dismiss the complaint asserting that the court lacks personal jurisdiction over them, the plaintiff bears the burden of proof (*Chen v Shi*, 19 AD3d 407 [2d Dept 2005], citing *Brandt v Toraby*, 273 AD2d 429, 430 [2d Dept 2000], *Roldan v Dexter Folder Co.*, 178 AD2d 589, 590 [2d Dept 1991], *Spectra Products v Indian Riv. Citrus Specialties, Inc.*, 144 AD2d 832, 833 [3rd Dept 1988]). However, "the plaintiff[] need only demonstrate that facts 'may exist' to exercise personal jurisdiction over the defendant[s]" (*Chen*, 19 AD3d at 408, citing *Cordero v City of New York*, 236 AD2d 577, 578 [2d Dept 1997]; see also *Amigo Foods Corp. v Marine Midland Bank-NY*, 39 NY2d 391, 395 [1976]; *Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 467 [1974]). Moreover, the evidence presented by the parties must be viewed in the light most favorable to the plaintiff (*Exclaim Assocs. Ltd. v Nygate*, 10 Misc3d 1063 (A), 2005 NY Slip Op 52106 U [Sup Ct, NY County 2005], citing *Brandt*, 273 AD2d at 430).

Plaintiff contends that jurisdiction is proper under New York's long-arm statute CPLR 302(a)(1) and (a)(3). CPLR 302 (a) (1) extends jurisdiction of the New York state courts to a nonresident who purposely availed himself of the privilege of conducting activities within New York and thereby invoked the benefits and protections under its laws (see *Corporate Campaign*,

Inc. v Local 7837, United Paperworkers Intl. Union, 265 AD2d 274 [1st Dept 1999]). One business transaction in New York may be enough to invoke jurisdiction, even though the out-of-state defendant never entered New York, as long as its activities in the state were purposeful and there is substantial relationship between the transaction and the claim asserted (see *Johnson v Ward*, 4 NY3d 516, 519 [2005] [under CPLR 302 (a) (1), a “substantial relationship” must be established between a defendant's transactions in New York and a plaintiff's cause of action]; *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]).

Bain has sufficiently plead jurisdiction over the defendants. At all times Bain was a resident and domicile of New York City. Galvex is headquartered in New York. Indeed all of the company's major commercial and financial issues were managed by Bain and other officers and directors from the Galvex Group's offices in New York City. Defendants appear to carefully construct a scenario whereby they never set foot in New York, despite negotiating this complex business transaction with a New York domicile with respect to a New York company with which they sought to transact business.

Numerous telephone calls, faxes, e-mails, and other correspondence that Silver Point Entities exchanged in order to negotiate the Operating Agreement are sufficient to find that they projected themselves into New York (*Snyder v Madera Broadcasting, Inc.*, 872 Fsupp 1191, 1195 [EDNY 1995]). This court is cognizant that generally, negotiation of contractual terms by “phone, fax or mail with [a] New York party is generally insufficient to support a finding of the transacting of business in New York (*United Computer Capital v Secure Prods., L.P.*, , 218 F Supp 2d 273, 278 [NDNY 2002]). However, in totality of this matter, the defendants may be found to have purposefully availed themselves of New York law.

In addition to the emails, meetings, and calls, Bain pleads he was solicited in New York by a liason for Silver Point Entities. Furthermore, Bain sufficiently pleads that the non-disclosure agreement was negotiated in New York and governed by New York law and its Jurisdiction. The non-disclosure agreement was an integral part of the Operating Agreement which the parties sought to finalize. It was negotiated between the plaintiff and the Silver Point Entities through their New York law firm, Richards Spears Kibbe & Orbe LLP, located in New York. All negotiations occurred in New York. It was also agreed that New York law would be controlling.

The court also notes that the Silver Point Entities requested Bain, because of his New York presence, to contact those entities holding Galvex's debts and to urge them to sell a portion of the debt to them. These contacts also took place in New York for the Silver Point Entities benefit.

At this stage, the plaintiff has made a prima facie showing that the defendants engaged in a series of conduct which went far beyond a general negotiation of contractual terms. They cannot engage in those substantial activities, as plead by the plaintiff, in their pursuit of acquiring Galvex's debt and then seek dismissal alleging they did so while never setting foot in New York.

Finally, at the very least, the Silver Point Entities only raise factual disputes with respect to Bain's claims without clearly refuting them. Accordingly, they fail to meet their burden on this motion to dismiss (*See Allstate Ins. Co. v Raguzin*, 784 NYS2d 644, 645 [2nd Dept 2004]).

SPCP is not a party to the Operating Agreement

Bain alleges that SPCP is liable for breaches under the Option Agreement, however it is

not a signatory to the agreement. The parties to the agreement are explicitly named as Daniel Bain (referred to as “DP” in the agreement), and Silver Point Europe LLP (referred to as “SP” in the agreement). The agreement is signed by Bain and SPE. Defendants seek to dismiss as to SPCP arguing there is no privity of contract between Bain and SPCP. Defendants argue that Bain is attempting to pierce the corporate veil by adding SPCP and under the circumstances this is not permissible under English law, which is controlling.

Bain on the other hand points to various provisions in the agreement which establish SPCP is a party to the Option Agreement. First, § 3 of the agreement states that “[f]or the avoidance of doubt references to SP in this section 5 include SP and any SP Affiliates that invest in debt or equity of the Galvex Group.

Section 8.4 of the Agreement goes on to provide that:

For the avoidance of doubt, if SP brings in any affiliate or third party investor, SP shall remain responsible for its obligations under this Agreement (unless otherwise so agreed by DB) and any such third party shall agree to be bound by the terms of this Agreement. SP represents and warrants to DB that SP is acting for its own account (including SP Affiliates and investors in its funds) and not on behalf of any third party.

The complaint pleads that at all times, SPE and SPCP acted in concert as if they were one, unified company (Complaint ¶ 21). All of the proceeds to acquire the debt came directly from SPCP (Complaint ¶ 34). Therefore, plaintiffs conclude that SPCP is the affiliate company that is referred to throughout the agreement as an “SP Affiliate” which is expressly bound to the terms of the agreement.

The plaintiffs argument is also enhanced because the agreement also states in § 8.2

For the avoidance of doubt nothing in this Agreement shall in any way limit or otherwise affect any of the rights and/or remedies to which SP or any SP Affiliate may at any time be or become entitled as a holder of any indebtedness of, or the beneficiary of any other obligation of, any member of the Galvex Group.

This clause does appear to consider SPCP, an affiliate of SPE, to be an actual party to the agreement and therefore bound by its provisions. English law does permit parties to be bound by the terms of a contract, even in the absence of a signature, if the party is sufficiently described (*Carr v Lynch [1900] 1 Ch. 613*). Extrinsic evidence may be adduced to demonstrate that SPE was acting as an agent for SPCP (*Bateman v Phillips [1812] 15 East 272*)(holding that parol evidence may be introduced to prove who the parties to an agreement are).

Defendants, in their reply, does not address the various provisions of the Option Agreement upon which the plaintiff relies in support of adding SPCP as a party. Rather, they again argue that SPCP is not a signatory to the agreement and therefore cannot be found liable. However, the contract terms clearly delineate that SPE as a signatory was binding any of its affiliates who participated in the transaction.

Because plaintiff alleges that SPCP, an affiliate of SPE, was the sole purchaser of the debt, it may be found to be a party liable under the terms of the agreement. Doing so would not require a piercing of the corporate veil, which defendants argue is forbidden by English law, because the agreement clearly contemplates that SPCP may be a party. Accordingly that part of the motion seeking dismissal as to SPCP for lack of privity is denied.

Claims are contrary to English Law/Failure to Plead with Specificity

Bain's claims are subject to English law. In his complaint, Bain has alleged two specific

causes of action: (1) the Silver Point Entities' breached the agreement and (2) the Silver Point Entities' committed fraud. Defendants argue that English law does not recognize either of the claims asserted in this action and should therefore be dismissed. Defendants also argue as to the fraud claim that plaintiff has failed to plead it with specificity as is required by New York law.

Contract Claims

The defendants argue that the Option Agreement is merely an agreement to negotiate with uncertain terms which do not have any binding force under English law. Therefore, defendants argue Bain's contract claim must be dismissed because the agreement is not enforceable.

Defendants attempt to characterize the Option Agreement as merely an agreement to negotiate, with nothing more, and is therefore not enforceable under English law (*See Courtney & Fairbairn Ltd. v Tolaini Bros (Hotels) Ltd.*, [1975] 1 W.L.R. 297, 301 (C.A.)). However, the Options Agreement, which was drafted by the defendants, contains terms which go far beyond a mere agreement to negotiate. For example, if the parties were unable to reach a restructuring agreement, § 4 provides that Bain was granted a 90-day exclusivity period in which he had the option to acquire Silver Point Entities' interest in Galvex. If he was unable to do so, §4.22 allowed Bain the option to seek out a third party to purchase the debt from the Silver Point Entities. If after the exclusivity period expired and Bain was unable to purchase the debt, §4.4 provided that the Silver Point Entities would purchase or cause another entity to purchase voting interests and ownership interests in Galvex under specific terms. These are more than mere terms of negotiation.

Moreover, the issues plead in the complaint are not only whether Silver Point Entities failed to negotiate in good faith, but there are other purported breaches as well including: their

failure to allow Bain to manage Galvex during the option period and attempts to withhold Bain's rights under the agreement in an attempt to strip him of his interest in Galvex.

The Options Agreement does contain material terms which go beyond a mere agreement to negotiate and therefore, the cause of action for breach of contract may remain.

Fraud

Bain pleads that the defendants entered into the contract with him without the intention of performing and argues he therefore has a cause of action for fraud. The defendants move to dismiss this cause of action as not actionable under English law and for failure to plead with specificity.

The parties dispute whether English law or New York law applies to the claim. The plaintiff argues that under the contract the selection of English law applies only to the breach of contract claim and the tort claim of fraud falls outside of the scope of this choice of law.

Whether English or New York law applies, nonetheless the cause of action cannot stand. CPLR 3016(b) requires that:

Where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.

The elements of a cause of action for fraud are: (1) the defendant made a false representation; (2) with the intent to defraud the plaintiff; (3) the plaintiff reasonably relied upon the false representation; (4) the plaintiff suffered damage as a result of that reliance (*See J.A.O. Acquisition Corp. v Stavitsky*, 18 AD3d 389, 389 [1st Dept 2005]). A plaintiff is required to allege the particular facts constituting an alleged fraud or negligent misrepresentation "in detail" (*Handel v Bruder*, 209 AD2d 282, 282-283 [1st Dept 1994]). Vague and conclusory allegations

will not suffice (*See New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318-19 [1995]).

Here, Bain only alleges that SPE never intended to perform under the Option Agreement, and never identifies any of the factual details behind any of the misrepresentations alleged in the complaint. While the complaint alleges that unspecified misrepresentations were made, it does not identify the names of the persons who purportedly made the misrepresentations, the circumstances under which they were made, nor their content. This is not sufficient to successfully plead a cause of action for fraud and it therefore must be dismissed.

Conclusion

Therefore, based on the foregoing it is hereby

ORDERED that the motion to dismiss for lack of jurisdiction is denied and it is further

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

ORDERED that the motion to dismiss the cause of action for breach of contract is denied and it is further;

ORDERED that the motion to dismiss the cause of action for fraud is granted.

This shall constitute the Order and Decision of the Court.

Dated: May 2, 2007

FILED

MAY 10 2007

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NON. REC'D I.S.C.