Magnum Global Invs. Ltd. v Pirate Capital LLC

2007 NY Slip Op 31330(U)

May 15, 2007

Supreme Court, New York County

Docket Number: 0602619/2006

Judge: Bernard J. Fried

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SCANNED ON 5/24/2007

[* 1]

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

PRESENT: Fried BERNARD J. FRIED J.S.C.
Justice

PART 60m

Magnum Global Invest

INDEX NO. 602610/06

MOTION DATE

\- v -

MOTION SEQ. NO. 003

Pirate Capital LLC et al

MOTION CAL. NO.

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

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

FILED
MAY 24 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/15/07

BERNARD J. FRIED J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 60

---X

MAGNUM GLOBAL INVESTMENTS LTD.,
Plaintiff,

-against-

Index No. 602619/06

PIRATE CAPITAL LLC, JOLLY ROGER OFFSHORE FUND LTD. And JOLLY ROGER FUND L.L.P.,
Defendants.

---X

FILED
MAY 24 2007
NEW YORK
COUNTY CLERK'S OFFICE

APPEARANCES:

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FRIED, J:

In this action alleging breach of contract, defendants Pirate Capital LLC ("Pirate"), an investment advisor to private investment funds, Jolly Roger Offshore Fund Ltd. ("Offshore Fund") and Jolly Roger Fund L.P. ("Onshore Fund"), two private investment funds, move pursuant to CPLR 3211(a)(1), (5) and (7) to dismiss the complaint[1].

The complaint alleges that in January, 2004, plaintiff Magnum Global Investments Ltd. ("Magnum"), a firm that markets investment funds to investors, and Pirate and Offshore entered into a service agreement ("agreement") whereby plaintiff agreed to bring investors

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In a decision on the record dated February 27, 2007, I dismissed that branch of the complaint that sought to compel arbitration finding that Magnum had waived arbitration by commencing this lawsuit prior to filing the arbitration demand.

to the Offshore Fund and defendants agreed to pay Magnum a percentage of the management and incentive fees that they earned as a result of the investments from Magnum's clients. Magnum alleges that Pirate extended the agreement, orally and in a series of e-mails, to include the Onshore Fund.

The agreement provided that defendants could terminate Magnum's services on three months written notice (Gallagher Aff, Ex.[1][A], para. 7.2) and that, following termination, Magnum would continue to earn fees for investors Magnum introduced for as long as the investors remained invested in the funds. (Gallagher Aff. Ex. [1][A], para. 7.4) Magnum alleges that it introduced a number of investors to the Onshore and Offshore funds and that the investors it introduced invested over $30 million dollars in those funds. Nevertheless, on or about December 14, 2005, Pirate notified Magnum that the agreement would terminate as of March 31, 2006 and that all of Magnum's client funds invested in the Onshore and Offshore Funds would be redeemed in full on that date, "unless we receive written authorization from you by December 30, 2005 to remain in the funds, in which case no fees will be paid to [Magnum] after March 31, 2006." (Gallagher Aff., Ex [1][E]).

Magnum now alleges that defendants breached the agreement by: 1) failing to pay it the fees that it earned for specific investors in the Onshore Fund for 2004, 2005 and 2006 (Gallagher Aff, Ex. 1, para 52); 2) failing to pay it the fees that it earned for specific investors in the Offshore Fund for 2005 (Gallagher Aff, Ex. 1, para 53) and 3) failing to pay any fees that it earned for any funds for 2006. Moreover, Magnum complains that defendants redeemed the investments made by Magnum's clients solely to defeat Magnum's contractual right to payment, and in so doing defendants breached the obligation of good faith and fair dealing inherent in every contract.

In support of the motion to dismiss the complaint, defendants argue that Magnum's claim for fees for investors it introduced to the Onshore account is barred by the statute of frauds because all "finder's fee" agreements must be in writing, signed by the party to be charged. They also claim that the "good faith and fair dealing" claim is without merit because defendant's made a business judgment regarding those investments and that they were within their rights to redeem the investments for any reason or no reason. Finally, they claim that the demand for fees defendants allegedly owe Magnum for the Offshore Fund lacks specificity.

In opposition to dismissal, Magnum claims that the statute of frauds is not a bar to the demand for fees for investors it introduced to the Onshore fund because emails and other correspondence, as well as the parties' conduct, establish that they intended the service agreement to encompass both the Onshore Fund and the Offshore Fund. Moreover, they argue that their right to post termination fees was a bargained for benefit under the agreement and that defendants' forced redemption of Magnum's investors destroyed Magnum's contractual rights in violation of the defendant's obligation to act in good faith. Finally, Magnum argues that its claim for unpaid fees is sufficiently specific to state a claim for breach of contract.

On a motion addressed to the sufficiency of the pleadings, the court must accept every factual allegation as true, and liberally construe the allegations in a light most favorable to the pleading party. (*Guggenheimer v. Ginzburg,* 43 N.Y.2d 268 [1977]; *see* CPLR 3211[a][7]). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v. Martinez,* 84 N.Y.2d 83, 87-88 [1994]) "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together

manifest any cause of action cognizable at law.'" (*511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151-152 [2002][internal citations omitted])

GOL 5-701(a)(10) provides that an agreement is void unless it is in writing and subscribed by the party to be charged therewith if it is:

> A contract to pay compensation for services rendered in negotiating the purchase, sale, exchange, renting or leasing of . . .*a business opportunity*,. . . .
> (*Emphasis added*)

'Negotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. *Id.*

"Under this provision, a party may not state a finder's fee claim based on an oral agreement." (*Kubin v. Miller*, 801 F. Supp. 1101, 1121 [S.D.N.Y. 1992])

However,

> The statute of frauds allows a contract to be 'pieced together out of separate writings, connected with one another either expressly or by internal evidence of subject matter and occasion', and in the context of of the statute of frauds, a series of signed and unsigned writings may be read together, providing they clearly refer to the same subject matter.

(*Matter of Wallabout Community Association v. City of New York*, 5 Misc.3d 1010[A][Sup. Ct. N.Y. County 2004] citing *Crabtree v. Elizabeth Arden Sales Corp.*, 305 N.Y. 48 [1953]; *see also, Dunlevy v. Tinsley,* 178 A.D.2d 373 [1st Dept. 1991][finding that plaintiff had submitted sufficient correspondence to satisfy the statute of frauds and that there was no evidence that plaintiff intended to render gratuitous service])

Here, Magnum has produced a December 14, 2005 letter (Complaint, Ex.[1][E]) signed by all defendants that states defendants' intention to redeem all of Magnum's clients

who had invested in Onshore and Offshore funds and Magnum has produced emails signed by Andrew Stotland ("Stotland"), senior director of marketing for Pirate, that were sent before and after the agreement was signed, that indicate that Magnum was marketing both the Offshore and Onshore funds for Pirate and that Magnum was receiving fees from defendants for clients who became investors in both Onshore and Offshore funds. (Friedland Aff., Ex. A-F) For example, in a November 24, 2003 email, Stotland wrote, " and of course the agreement would work for onshore and offshore funds." (Friedland Aff., Ex. A); in a January 11, 2005 email, Stotland wrote, " [w]e are going through payments due to Magnum. . . .in regards to the onshore account - because we are becoming registered we need you to be affiliated with a B/D so that we can pay you for the onshore accounts (Saul, IBEX.Sachs totaling $1.6MM). (Friedland Aff., Ex. D) In addition, a March 3, 2005 email, Magnum informed Stotland, without protest, that, "Ted Petroulas is investing $1 million in the [onshore] and Stonewall is investing $500,000 in the offshore. (Friedland Aff., Ex. E)

Moreover, it is well settled that a party may overcome the bar of the statute of frauds by demonstrating that there was partial performance that is 'unequivocally referable" to the agreement. (*Rose v. Spa Realty Assoc.,* 42 N.Y.2d 338, 343-344 [1977]; *Hawthorne Group v. RRE Ventures,* 7 A.D.3d 320 [1st Dept 2004]) Once again, the December 14, 2005 letter and emails submitted by Magnum indicate that Magnum procured investors for both the Onshore and Offshore funds and that defendants were paying Magnum fees for these investors.

Because Magnum has made a sufficient start in establishing, through correspondence signed by the party to be charged, that Magnum and Pirate and the Onshore fund agreed that Magnum would procure investors for the Onshore fund and that defendants would pay

Magnum fees for these investors, further discovery of the facts by pretrial disclosure is necessary to determine whether a writing or additional correspondence exists that establishes the terms of the parties agreement. (*Subgar Realty Corp. V. Gothic Lumber & Millwork, Inc.*, 80 A.D.2d 774 [1st Dept. 1981])

Although it is undisputed that the agreement gives defendants the unfettered right to terminate Magnum's services upon three months written notice, the agreement is silent regarding defendants right to redeem the investors that Magnum introduced to the fund. Defendants take the position that they had an unfettered right to make a business decision to redeem these investors.

Magnum contends that defendants post-termination obligation to pay it fees for investors that Magnum introduced was an important bargained for consideration in Magnum's agreement to bring investors to the Onshore and Offshore funds.

Indeed, paragraph 7.4 of the agreement states:

> After termination . . ., the remuneration referred to in Clause 6 will remain payable to [Magnum] in respect of:
>
> (a) investment held in the fund by investors introduced to the Fund through [Magnum] for as long as the investments are held; and
>
> (b) new investments made after the date of termination . . . by investors to the Fund through [Magnum] and who held an investment in the Fund prior to termination; and
>
> (c) new investments made after the date of termination . . . by investors introduced to the Fund by [Magnum] and who made an investment in the Fund during the three month period [after termination].

However, by letter dated December 14, 2005 (Complaint, Ex. E) defendants informed Magnum that they would not only terminate the agreement with Magnum but that, "all

clients and funds managed by [Magnum] invested in Jolly Roger Fund LP and Jolly Roger Offshore Fund LTD . . . as of March 31, 2006 will be redeemed in full unless we receive written authorization from you by December 30, 2005 to remain in the Funds, in which case no fees will be paid to [Magnum] after March 31, 2006." In a February 2, 2006 letter that responded to Magnum's complaint regarding redemption, Pirate stated, in pertinent part, "[t]he decision to redeem all of the subscriptions that resulted from [Magnum's] introductions was made after careful consideration so as to make a 'clean break' from [Magnum]. . . . That being the case, we would retain the [Magnum] subscribers only if [Magnum] is agreeable to releasing [Pirate] from any and all future obligations to [Magnum]." (Gallagher Aff., Ex. [1][F])

In addition, Magnum has produced a March 17-20, 2006 email stream (Gallagher Aff., Ex. [1][G]) between Pirate and Fraternity Fund ("Fraternity"), a Magnum investor, that demonstrates that Pirate told Fraternity that if it could not obtain Magnum's consent to stay invested, and a release for Magnum's claim for fees, that Fraternity should redeem its investment and then re-subscribe in the Offshore fund in three months.

The covenant of good faith and fair dealing, which is implied in every contract in this state, dictates that, "neither party will do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract". (*Kirke La Shelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 87 [1933]; *American Broadcasting Cos. v. Wolf*, 76 A.D.2d 162 [1st Dept 1980]) The implied covenant arises from the assumption that contracts often fail to include all of the specific undertakings between the parties and the implied covenant includes "any promises which a reasonable person in the position of the promisee would be justified in understanding were included". (*Dalton v. Educational Testing*

Svc., Inc., 87 N.Y.2d 384, 389 [1995]) The promise to pay implies the promise to use one's best efforts to ensure that there is something to pay. (*Wood v. Duff-Gordon*, 222 N.Y. 88 [1917])

Although parties to a contract retain a general right to act in their own interest, the implied covenant recognizes that there is a point where such action may be destructive to the other party's rights, that it should be prohibited. (*Van Valkenburgh, Nooger & Neville v. Hayden Publ. Co.*, 30 N.Y.2d 34, 46 [1972]) The determination of whether a party acted in good faith, or in such bad faith or in such willful and negligent disregard of the rights of the other party as to constitute a breach of the implied covenant of good faith and fair dealing, is generally a question for the trier of fact. (*Van Valkenburgh, Id at* 46; *Pernet v. Peabody Engineering Corp.*, 20 A.D.2d 781 [1st Dept 1964].

Here, defendants correctly argue that there is nothing in the agreement that precludes Pirate or the Offshore fund making a business decision to redeem the investments of investors introduced by Magnum. However, based on the allegations in the complaint that defendants' post-termination obligation to pay Magnum fees was an important, bargained for consideration (Complaint, para. 41); that the intent of the parties was that the investors would remain invested until the investors chose to redeem their investments (Complaint, para. 66) and that defendants redeemed these investments, solely to defeat Magnum's right to receive these fees, Magnum has adequately stated a claim for breach of the implied covenant of good faith and fair dealing. (*See, Valkenburgh*, supra.; *Richbell Info. Svcs. v. Jupiter Partners,* 309 A.D.2d 288, 302 [1st Dept. 2003][the implied covenant prevents "bad faith targeted malevolence in the guise of business dealings"])

That branch of the motion that seeks to dismiss the breach of contract claim is denied because the complaint states all of the necessary elements of breach of contract–the terms of the contract, the consideration, performance by the plaintiff and breach by the defendant causing plaintiff to sustain damages. The elements of the claim, not the particulars, are all that is required. (*See, Lane v. Mercury Record Corp.,* 21 A.D.2d 602 [1st Dept. 1964], aff'd 18 N.Y.2d 889 [1966]; *Foley v. D'Agostino,* 21 AD2d 60, 63 [1st Dept. 1964])

Moreover, in paragraphs 53, 53 and 54 of the complaint, plaintiff provides defendants with far more information than is required under the notice pleading rules by naming the specific years, funds and investors for which compensation is due. (See, Barr, Altman, Lipshie and Gerstman, *New York Civil Practice Before Trial,* Section 15.181 [2006])

Accordingly, defendants motion to dismiss the complaint is denied.

DATE 5/15/07

J.S.C.

BERNARD J. FRIED
J.S.C.

FILED
MAY 24 2007
NEW YORK
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