

Edison III Fund Ltd. v Irvine Capital Partners, L.P.

2007 NY Slip Op 32327(U)

July 23, 2007

Supreme Court, New York County

Docket Number: 0603043/2006

Judge: Richard B. Lowe

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

PRESENT: Justice

PART 54

Edison

INDEX NO.

603043/06

MOTION DATE

7/22/07

MOTION SEQ. NO.

001

MOTION CAL. NO.

Luene Capital

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

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

DECISION DECIDED IN ACCORDANCE
OF ACCOMPANYING MEMORANDUM DECISION

FILED
JUL 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/23/07

[Signature]

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 56

-----X
EDISON III FUND LIMITED, FAIRFAX III FUND LIMITED,
and NUCLEUS FUND LTD.,

Plaintiffs,

Index No. 603043/06

- against -

IRVINE CAPITAL PARTNERS, L.P., IRVINE CAPITAL
MANAGEMENT, LLC, INSIDER CAPITAL MANAGEMENT
CORP., and DAVID M. BUNZEL,

Defendants.

-----X

FILED
JUL 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

Hon. Richard B Lowe, III:

Defendants move pursuant to CPLR 3211(a)(1) for an order dismissing the complaint alleging the plaintiffs lack standing to bring this action.

Background

Plaintiffs are three limited liability companies. Each plaintiff was formed under the laws of and has its principal place of business in the Grand Cayman Islands. Defendants consist of Irvine Capital Partners (Irvine), a limited partnership, Irvine Capital Management, LLC, the general partner in Irvine, Insider Capital Management Corp., manager and investment advisor to Irvine, and David M. Bunzel, owner of the general partner and the manager. The entity defendants were organized under the laws of Delaware and have their principal place of business in Purchase, New York. Defendant Bunzel resides in New York.

Plaintiffs purchased equity call options from non-party Ozcar Multi-Strategies, LLC (Ozcar) for \$8 million. Ozcar invested plaintiff's payments in Irvine, becoming a limited partner

in the process, or, rather, three limited partners in the limited partnership. The Agreement of Limited Partnership of Irvine Capital Partners, L.P. (the Agreement) was executed by Ozcar Multi Strategies # 13, Ozcar Multi Strategies # 21, and Ozcar Multi Strategies # 24, each being identified as a limited partner. Plaintiffs claim that each Ozcar limited partner corresponds to a plaintiff.

Ozcar is an affiliate of another non-party, BNP Paribas (BNP), an international banking organization. BNP administered Ozcar's interest in Irvine. As the complaint refers to both BNP and Ozcar as BNP, this opinion will do the same.

Irvine is a hedge fund. As plaintiffs describe it, hedge funds invest in short positions, options, puts, calls, and other derivative and unconventional investment vehicles. Irvine pools the funds of a number of investors, who are limited partners in Irvine, and invests those funds with the objective of achieving a high rate of capital appreciation.

Irvine established a capital account for each limited partner. In Ozcar's case, the initial capital contribution consisted of the monies from plaintiffs. Capital accounts were to be adjusted periodically in accordance with each limited partner's share of the partnership's profits or losses. Under the Agreement, upon a limited partner's withdrawal from Irvine, the limited partner would be entitled to a maximum of 95% of the balance of its capital account.

The Agreement provides that a limited partner may not assign its interest as limited partner in whole or in part without the prior consent of the general partner. Without such consent, the limited partner "shall have no authority or right to substitute for himself as a Limited Partner any other person or entity. Any attempted assignment or substitution in contravention of the terms hereof shall be void" (Agreement, ¶ 1.7).

In May 2006, BNP notified Irvine that it was withdrawing from the limited partnership. Irvine proffered BNP cash and stocks that purportedly amounted to 95% of BNP's closing capital account. Irvine represented to BNP that the stocks were worth \$4.9 million. The complaint alleges that the stocks are nowhere near as valuable as Irvine states. The complaint alleges that the stocks proffered to BNP consist of volatile and illiquid securities, which are thinly traded or not traded at all and which cannot be sold at the market price represented by defendants. The complaint alleges that Irvine's other investments are more liquid, and that defendants' plan is to unload on plaintiffs the illiquid securities carried by Irvine at inflated fictitious values, while retaining for their own benefit more valuable liquid securities.

Plaintiffs further allege that, if the illiquid securities were representative of all the securities owned by Irvine, it would mean that Irvine's net asset value, as hitherto reported to investors, was false and that the capital accounts of the investors was substantially overvalued. That, in turn, would mean that defendants had been perpetrating a massive fraud upon all the limited partners in Irvine.

On August 25, 2006, BNP and plaintiffs entered into a Transfer Agreement, whereby BNP transferred to plaintiffs the right to pursue economic recovery and enforcement of obligations against Irvine, to be prosecuted by plaintiffs' present counsel. If plaintiffs wanted to change counsel at any time, selection of replacement counsel would be subject to BNP's and plaintiffs' approval. The Transfer Agreement also gave BNP the right to engage its own counsel if it determined that its interests were adverse to plaintiffs' interests.

In this action, plaintiffs seek to recover the true value of BNP's capital accounts. The first cause of action sounds in breach of contract against the limited partnership and the general

partner. It alleges that defendants failed to pay plaintiffs the full amount of the closing capital account in accordance with the Agreement. The second cause of action sounds in breach of the implied covenant of good faith and fair dealing against the limited partnership and the general partner. The third through sixth causes of action are against all defendants. The third sounds in breach of fiduciary duty, the fourth in aiding and abetting breach of fiduciary duty, the fifth in specific performance, and the sixth in gross negligence and recklessness.

Plaintiffs' claims fall into two categories. The first, second, and fifth causes of action attempt to enforce the limited partnership agreement between Irvine and BNP, on the grounds that plaintiffs are limited partners in Irvine or have the rights of limited partners in Irvine. The other causes of action are tort claims. Maintaining those claims does not require enforcing the Agreement.

Defendants argue that the assignment is void because of the anti-assignment clause in the Agreement. So plaintiffs cannot claim standing as BNP's assignee. Defendants also claim that the complaint does not plead any facts showing any kind of relationship with defendants.

Discussion

On a CPLR 3211 (a) (7) motion to dismiss a complaint for failing to state a cause of action, the court accepts the facts alleged as true and determines simply whether the facts alleged fit within any cognizable legal theory (*Morone v Morone*, 50 NY2d 481, 484 [1980]).

"However, allegations consisting of bare legal conclusions" will not be accorded such deference (*Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233, 233 [1st Dept 1994]).

On a CPLR 3211 (a) (1) motion to dismiss on the basis of documentary evidence, if the documentary evidence conclusively establishes that a plaintiff has no cause of action, the

complaint will not be deemed true and will be dismissed (*Bronxville Knolls, Inc. v Webster Town Ctr. Partnership*, 221 AD2d 248, 248 [1st Dept 1995]).

Plaintiffs' memorandum of law contains many allegations. Allegations in a memorandum of law are not considered on a motion (*see Diamond v Dougfield, Inc.*, 17 Misc 2d 914, 915 [Sup Ct, Queens County 1959]). To determine this motion, the court will consider only the allegations in the complaint.

Initially, the court must decide the law applicable to this motion. Section 12.1 of the Agreement provides that it is governed by the laws of Delaware. Where, as here, the parties have agreed on the law that will govern their contract, New York will enforce their choice of law (*Marine Midland Bank v United Missouri Bank*, 223 AD2d 119, 122-123 [1st Dept 1996]). The laws of the jurisdiction under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners (NY Partnership Law § 121-901). Thus, Delaware law governs the claims relating to the partnership agreement and partnership affairs (*see Mizrahi v Chanel, Inc.*, 193 Misc 2d 1, 4 [Sup Ct, New York County 2001]), including whether plaintiffs have standing to press such claims (*see Nemazee v Premier Purch. Partners, L.P.*, 24 AD3d 196, 197 [1st Dept 2005]; *Delta Fin. Corp. v Morrison*, 2006 NY Slip Op 52097[U], *4-5 [Sup Ct, Nassau County 2006]). The first, second, and fifth causes of action, which implicate the Agreement, will be determined according to Delaware law.

New York law may be applied to those causes of action, as well. Both sides agree that no conflict exists between Delaware and New York law on standing to sue a limited partnership and the application of anti-assignment clauses. Both sides cite New York and Delaware law, but no law from the Grand Cayman Islands. Therefore, this court can apply the law from both

[* 7]

jurisdictions when determining plaintiffs' standing as to the partnership (*see Salovaara v Eckert*, 2005 NY Slip Op 50010[U], *13 n 10 [Sup Ct, NY County 2005], *aff'd as mod on other grounds* 32 AD3d 708 [1st Dept 2006]).

The choice of law provision in the Agreement does not apply to plaintiffs' second category of claims. Unlike contractual claims, tort claims are governed by the law of the forum (*see Twinlab Corp. v Paulson*, 283 AD2d 570, 571 [2d Dept 2001]; *J.A.O. Acquisition Corp. v Stavitsky*, 192 Misc 2d 7, 11 [Sup Ct, NY County 2001]). Therefore, New York law applies to the non-contractual claims.

New York and Delaware provide that a partnership interest is assignable in whole or in part, unless the partnership agreement otherwise provides (NY Partnership Law § 121-702; 6 Delaware Code [Del. C.] § 17-702). A non-assignment clause in a contract may render a subsequent assignment of the contract void. Alternatively, the clause may give the obligor a right to damages for breach of the terms forbidding assignment but without rendering the assignment ineffective. The operation of the clause depends upon the expressed intent of the parties, namely, whether the language is sufficiently express to bar the assignment (*see SLMSOft.Com, Inc. v Cross Country Bank*, 2003 WL 1769770, *9, 2003 Del Super LEXIS 112, *37-38 [Del Super, April 2, 2003]; *C.U. Annuity Serv. Corp. v Young*, 281 AD2d 292, 292 [1st Dept 2001]; *Handelsgesellschaft Scharfe mbH & Co. v Krapf & Sons, Inc.*, 1985 WL 189275, *4, 1985 Del Super LEXIS 1327, *10-11 [Del Super, Sept. 19, 1985]; *Paul v Chromalytics Corp.*, 343 A2d 622, 625-626 [Del Super, July 22, 1975]). A purported assignment of a contract is void, if the contract contains clear and definite language declaring the invalidity of such assignments (*id.*; *see also Macklowe v 42nd St. Dev. Corp.*, 170 AD2d 388, 389 [1st Dept 1991]).

In this case, the Agreement could hardly be clearer regarding the invalidity of any assignment. The Agreement provides that, unless the general partner assents, any attempted assignment of a partner's interest "shall be void" (Agreement, ¶ 1.7). The Agreement defines "interest" as "an interest ... in the profits, losses, distributions, capital and assets of the Partnership equal to the Partnership Percentage of such contribution" (*id.* at 6). "Distributions" are defined as "any distribution of cash, Portfolio Investment or other assets pursuant to Article 8" (*id.* at 5). Article 8 of the Agreement deals with withdrawals by partners, and states that "distribution of any amount withdrawn pursuant to this Section 8.2 shall be made as soon as practicable ... " (*id.*, ¶ 8.2 [d]). "Distributions" therefore means the distributions made to partners upon their withdrawal from the partnership. Pursuant to the Agreement, the assignment of distributions to plaintiffs is void.

Plaintiffs contend that "interest" means BNP's status as limited partner, and that BNP did not assign its limited partner status to them. Instead, plaintiffs assert, BNP assigned only a cause of action against defendants, and the Agreement does not bar the transfer of causes of action. But the assignment was for BNP's interest in distributions. That this interest may take the form of a cause of action does not change the fact that it is an interest in distributions.

Plaintiffs also argue that the assignment is valid because one party, BNP, has performed its part under the Agreement and all that remains of the parties' contractual obligations is the obligation on Irvine's part to pay money to BNP. Plaintiffs claim that a mere obligation to pay money is not subject to an anti-assignment clause. But even if such an assignment were valid, this is not such an assignment. Contrary to plaintiffs' contentions, the Agreement is not an executed contract that only leaves BNP with the right to receive a fixed and certain sum. There is

a dispute between BNP and Irvine regarding what is owed to BNP. Therefore, the assignment was not for a mere obligation to pay money.

Plaintiffs contend that when BNP made the assignment, it was no longer a limited partner. Instead, BNP was a creditor, and as such, it could assign its rights. Plaintiffs cite to *Jones v Palermo* (105 Misc 2d 405, 406 [Sup Ct, New York County 1980]), which holds that a judgment creditor of a person who is a partner in a partnership may attach the partner's interest in the partnership. As plaintiffs are not judgment creditors, this case does not apply to them.

Under New York and Delaware law, at the time that a limited partner becomes entitled to receive a distribution, the partner has the status of, and is entitled to all the remedies available to, a creditor of the limited partnership with respect to the distributions (NY Partnership Law 121-606; 6 Del. C. § 17-606 [a]). This provision does not mean, as plaintiffs argue, that BNP, as a creditor, could assign the right to its distribution in contravention of the Agreement. Although BNP has withdrawn from the partnership, it still retains something of the status of a limited partner. Partnership matters between Irvine and BNP are not yet concluded. It is as a limited partner that BNP is entitled to the distributions that it attempted to assign to plaintiffs. BNP is still bound by the Agreement.

Therefore, the assignment was not effective. The next question is whether there is another way for plaintiffs to enforce the Agreement between BNP and Irvine. Plaintiffs do not explicitly allege that they are third-party beneficiaries to the Agreement or that BNP was their agent. Nor does their memorandum of law explicitly advance such theories. However, the court will adhere to the rule that "a complaint, attacked for insufficiency, is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment'" (*Condon v Associated*

Hosp. Serv. of New York, 287 NY 411, 414 [1942], quoting *Kain v Larkin*, 141 NY 144, 151 [1894]; see also *Barrows v Rozansky*, 111 AD2d 105,107 [1st Dept 1985]). The court will evaluate plaintiffs' allegations in light of legal theories that may entitle them to enforce the Agreement.

The complaint alleges the following. Each plaintiff purchased equity call options with BNP, "granting each of the Plaintiffs rights to all economic recovery in respect" to BNP's investment in Irvine as a limited partner (Complaint, ¶ 17). Plaintiffs "caused BNP to invest in the Irvine Fund by making capital contributions" in return for which BNP became a limited partner in Irvine (*id.*, ¶ 19). Defendants were requested to administer BNP's investment "as if it consisted of three separate identifiable investments in the Irvine Fund" (*id.*, ¶21). Upon information and belief, defendants "understood the reason for this request was that while BNP was ostensibly the limited partner of the Irvine Fund, BNP held that right for the benefit of Plaintiffs" (*id.*).

In general, only a party to a contract has enforceable rights thereunder and may sue for breach of the contract (*American Legacy Found. v Lorillard Tobacco Co.*, 831 A2d 335, 343 [Del Ch 2003]). A person who has not signed a contract may enforce it if he or she qualifies as a third-party beneficiary (*Madison Realty Partners 7, LLC v Ag ISA, LLC*, 2001 WL 406268, *5, 2001 Del Ch LEXIS 37, *14 [Del Ch, April 17, 2001]). A person attains third-party beneficiary status by establishing that: (1) the contracting parties intended that the third-party beneficiary benefit from the contact; (2) the benefits were intended as a gift or in satisfaction of a pre-existing obligation to that person; and (3) the intent to benefit the third party was a material part of the parties' purpose in entering into the contract (*id.*; *Guardian Constr. Co. v Tetra Tech*

Richardson, Inc., 583 A2d 1378, 1386-87 [Del Super, Aug. 15, 1990]). Third-party beneficiary status is not dependent on being identified in the contract (Restatement [Second] of Contracts § 308).

A party does not attain third-party beneficiary status by benefitting from a contract between others unless the conferring of the benefit was a material part of the contract's purpose (*Insituform of N. Am., Inc. v Chandler*, 534 A2d 257, 270 [Del Ch, Oct. 20, 1987]). The intent to confer a benefit on a third party must be held by both sides to the contract, not just the promisee (*Street Search Partners, L.P. v Ricon Intl., L.L.C.*, 2005 WL 1953094, *2, 2005 Del Super LEXIS 246, *5 [Del Super, Aug. 1, 2005]). Where the effect on a third party, while a benefit to that party and intended, is merely a means through which the benefit that motivated the contract was sought to be achieved for the signatories, even if that third party is not merely incidental to the contract, that third party takes no rights under the contract (*E.I. DuPont de Nemours and Co. v Rhone Poulenc Fiber and Resin Intermediates, S.A.S.*, 269 F3d 187, 196 [3d Cir 2001]; see also *Comrie v Enterasys Networks, Inc.*, 2004 WL 293337, *4, 2004 Del Ch LEXIS 196, *18 [Del Ch, Feb. 17, 2004]; *Insituform of N. Am., Inc.*, 534 A2d at 270).

The Agreement does not reveal an intent to benefit anyone but those who signed it and the limited partnership. The Agreement in no way portrays the three Ozcar entities that executed it as ostensible limited partners. It portrays them as limited partners in their own right. When the language of a contract is clear and unambiguous, as in this case, effect will be given to its evident meaning (*Majkowski v American Imaging Mgt. Serv., LLC*, 913 A2d 572, 581 [Del Ch, Dec. 6, 2006]).

Moreover, the above factual allegations do not indicate that defendants made the

Agreement in contemplation of benefits to third parties. The fact that plaintiffs stood to benefit from the Agreement, if all had proceeded as contemplated, does not mean that they were intended beneficiaries. Plaintiffs purchased an investment vehicle from BNP. BNP took the purchase payment and purchased three limited partners' interests in Irvine. This indirect association with Irvine does not afford them third-party beneficiary status.

The above allegations also fail to sufficiently allege that BNP was plaintiffs' agent. An agency relationship is created when one party consents to another acting on its behalf with third persons (*Fisher v Townsends, Inc.*, 695 A2d 53, 57 [Del Sup 1997]; *J.E. Rhoads & Sons, Inc. v Ammeraal, Inc.*, 1988 WL 32012, *4, 1988 Del Super LEXIS 116 , *11 [Del Super, Mar. 30, 1988]). An agent who acts for a disclosed principal is not a party to the contract entered into on behalf of the principal and is not liable for its non-performance (*American Ins. Co. v Material Transit, Inc.*, 446 A2d 1101, 1105 [Del Super, Marc. 31, 1982]). Per plaintiffs' version of the facts, BNP would not be liable for non-performance of the Agreement, a result contrary to the terms of the Agreement. Clearly, BNP/Ozcar were parties to the Agreement, and not plaintiffs.

In conclusion, plaintiffs have no rights under the Agreement and may not sue for its breach. The first, second and fifth causes of action must be dismissed.

The next issue is whether plaintiffs have any grounds on which to maintain their tort claims of breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and gross negligence and recklessness. When one person is under a duty to act for another person or to give advice for the other person's benefit, a fiduciary relation exists between them (*Mandelblatt v Devon Stores, Inc.*, 132 AD2d 162, 168 [1st Dept 1987]). To determine if a fiduciary relation was created, the court will ask whether a party reposed confidence in another and reasonably relied on

the other's superior expertise or knowledge (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 122 [1st Dept 1998]).

Nothing in the complaint indicates the existence of any relationship between plaintiffs and defendants. Therefore, they did not have a fiduciary relationship. As there was no fiduciary duty, there was no aiding and abetting to breach it.

To sustain the claim of negligence, plaintiffs must show that defendants owed them a duty of reasonable care (*Eiseman v State of New York*, 70 NY2d 175, 187 [1987]; *Adams v Elgart*, 213 AD2d 436, 437 [2d Dept 1995]). Whether one person owes another a duty is a legal issue to be determined by the court (*id.*). A defendant has a duty to the plaintiff where there is some relation between them that requires the defendant to protect plaintiff (*532 Madison Ave. Gourmet Foods, Inc. v Finlandia Ctr., Inc.*, 96 NY2d 280, 289 [2001]), or that causes plaintiff to rely on defendant (*LaSalle Natl. Bank v Ernst & Young, L.L.P.*, 285 AD2d 101, 105 [1st Dept 2001]). Again, the complaint alleges nothing regarding such duties.

Plaintiffs' present claims against defendants are untenable. None of their allegations indicate that privity existed between them and defendants or that defendants owed them any duty. Plaintiffs' only recourse is to sue BNP or for BNP and plaintiffs to sue defendants together.

An action must generally be prosecuted by a real party in interest. The real party in interest is the party who, by substantive law, possesses the right sought to be enforced (*Facilities Dev. Corp. v Oosterbaan*, 132 Misc 2d 923, 926 [Sup Ct, Clinton County 1986]). The test for determining the real party in interest is whether payment to the plaintiff will protect the defendant from having to defend against the same claim a second time, and whether such payment will bar all claims of all others (*Chalmers v Eaton Corp.*, 71 AD2d 721, 722 [3d Dept

1979)). In this case, it is not certain that payment to plaintiffs will preclude payment to BNP on the same grounds.

Conclusion

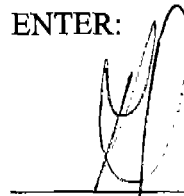
Therefore, based on the foregoing, it is hereby

ORDERED that defendants' motion to dismiss the complaint is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: July 23, 2007

ENTER:



HON. RICHARD B. LOWE, III
J.S.C.

FILED
JUL 26 2007
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