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

PRESENT: HERMAN CAHN Justice

PART 49

Index Number : 603483/2006
RNK CAPITAL LLC
VS
NATSOURCE LLC
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE 4/23/07
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE . . . .

FILED
JUL 30 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 7/20/07

Herman Cahn
J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

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RNK CAPITAL, LLC, GREY K ENVIRONMENTAL FUND, LP, and GREY K ENVIRONMENTAL OFFSHORE FUND, LTD.,

Plaintiffs,

-against-

Index No. 603483/06

NATSOURCE, LLC, NATSOURCE ASSET MANAGEMENT LLC, NATSOURCE TRANSACTION SERVICES LLC, NATSOURCE EUROPE LTD., NATSOURCE JAPAN CO., LTD., HARVEY ABRAHAMS, BEN RICHARDSON, MICHAEL INTRATOR, DAVID OPPENHEIMER, JACK COGEN, and JOHN DOE COMPANIES NOS. 1 THROUGH 10, the true name of said defendants being unknown to plaintiff, the party intended to be any NATSOURCE ENTITY that obtained or stands to obtain an interest in the property described in the complaint,

Defendants.

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NATSOURCE LLC, NATSOURCE ASSET MANAGEMENT LLC, NATSOURCE TRANSACTION SERVICES LLC,

Counterclaim Plaintiffs,

-against-

ROBERT KOLTUN and RNK CAPITAL LLC,

Counterclaim Defendants.

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HERMAN CAHN, J.:

Counterclaim defendants Robert Koltun and RNK Capital LLC (RNK) move to dismiss

the counterclaims asserted against them (CPLR 3211 [a] [1], [a] [7]).

Background

Plaintiffs Grey K Environmental Fund, LP and Grey K Environmental Offshore Fund, Ltd. (collectively, Grey K) invest in environmental securities, including certified emissions reductions credits (CERs) that are generated by projects authorized by the Kyoto Protocol of the United Nations Framework Convention on Climate Change (Kyoto Protocol). The CERs are traded on a worldwide basis (Compl, ¶ 3). Plaintiff and counterclaim defendant RNK is an investment manager for Grey K.

Defendant and counterclaim plaintiff Natsource LLC (Natsource) is a broker involved in transactions aimed at reducing greenhouse gas (GHG) emissions in order to comply with the Kyoto Protocol (*id.* at ¶ 6). Defendants and counterclaim plaintiffs Natsource Asset Management LLC (NAM) and Natsource Transaction Services LLC (NTS), are wholly-owned subsidiaries of Natsource (*id.* at ¶ 7). NAM manages accounts and funds established by Natsource (*id.* at ¶ 8).

In the complaint, plaintiffs allege that Natsource and additional Natsource entities, including wholly-owned subsidiaries (Natsource Entities), began representing RNK as their agents (*id.* at ¶ 23). The bulk of the causes of action asserted by plaintiffs against Natsource arise out of one particular transaction, whereby a Natsource principal allegedly sought plaintiffs' participation as a potential buyer of CERs from a Chinese entity (*id.* at ¶ 45). It is alleged that while Natsource was negotiating on plaintiffs' behalf, it secretly diverted the transaction for its own benefit (*id.* at ¶¶ 56, 59). Natsource also formed NAM, an entity that directly competes with Grey K for participation in GHG reduction investment transactions (*id.* at ¶ 65).

Subsequent to learning that Natsource had contracted to purchase CERs that plaintiffs

intended to purchase, plaintiffs instituted this action, asserting eight causes of action. The causes of action are for breach of fiduciary duty against Natsource and several Natsource Entities, aiding and abetting breach of fiduciary duty against the individual defendants, negligent misrepresentation against the Natsource Entities and the individual defendants, tortious interference with prospective economic relations against the Natsource Entities, breach of agency agreement against the Natsource Entities, unjust enrichment against the Natsource Entities and John Doe defendants, accounting and constructive trust against the Natsource Entities and John Doe defendants. Plaintiffs seek declaratory and injunctive relief against the Natsource Entities and John Doe defendants.

Thereafter, Natsource, NAM and NTS interposed counterclaims against RNK and its principal, Robert Koltun, for tortious interference with contract, and tortious interference with prospective economic or contractual relations, arising out of Koltun's and RNK's alleged diversion of a transaction that belonged to Natsource.

In its answer, Natsource denies that it shared an agency relationship with plaintiffs. According to Natsource, beginning in April of 2004, it began to discuss the development of two projects in South America expected to generate CERs for Natsource's benefit with Conestoga-Rovers & Associates (CRA), a Canadian firm (Counterclaims, ¶ 3). One project involved the acquisition of CERs to be generated at a site in Argentina, that was owned by Coordinacion Ecologica Area Metropolitan Sociedad del Estado (CEAMSE), a regional governmental agency (*id.* at ¶ 4). The other project involved the purchase of CERs to be generated at a site in Brazil (*id.*).

In June of 2005, Natsource, on behalf of NAM, and CRA allegedly entered into

preliminary agreements for the purchase of CERs expected to be generated at the CEAMSE site (CEAMSE Termsheet), and at the Brazilian site (*id.* at ¶¶ 7, 8). In the ensuing months, NAM and CRA began preparing the documentation and agreements necessary to implement the CEAMSE transaction (CEAMSE Transaction) and the Canabrava transaction (*id.* at ¶ 10).

While Natsource, NAM and CRA were taking steps to implement the CEAMSE Transaction, Koltun and RNK were allegedly attempting to divert the CEAMSE Transaction to RNK (*id.* at ¶ 12). In August of 2005, CRA suddenly and without notice advised NAM that CRA had concerns about the CEAMSE Transaction (*id.* at ¶ 13). Representatives from the two companies held a conference, and CRA advised NAM that it planned to pursue the CEAMSE Transaction with another party (*id.* at ¶ 14). Two days later, CRA sent a letter unilaterally terminating the CEAMSE Termsheet.

According to Natsource, CRA withdrew from participating in the CEAMSE Transaction in breach of the CEAMSE Termsheet because of the tortious actions of Koltun and RNK, who allegedly induced CRA to pursue the transaction with RNK (*id.* at ¶ 18). Koltun was allegedly overheard boasting that he "stole" the CEAMSE Transaction from NAM (*id.* at ¶ 19).

Dicussion

Counterclaim defendants move to dismiss the counterclaim for tortious interference with contract on the grounds that the alleged contract upon which Natsource bases its claim is not an enforceable agreement, Natsource fails to allege breach, and that Natsource fails to allege facts of inducement. Counterclaim defendants move to dismiss the second counterclaim for tortious interference with prospective economic relations on the grounds that Natsource fails to plead facts of "wrongful means," and that Natsource fails to allege that the counterclaim defendants'

sole motivation was to cause harm to Natsource.

For the reasons stated below, affording the counterclaims a liberal construction, accepting the facts alleged as true and according the counterclaim plaintiffs the benefit of every favorable inference (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]), the facts alleged do not support causes of action for tortious interference with contract or prospective economic relations.

In its counterclaim for tortious interference with contract, Natsource alleges that the CEAMSE Termsheet constitutes a valid and binding agreement to purchase CERs generated from a project site in Argentina, that the counterclaim defendants knew of the existence of the agreement, and that, upon information and belief, they intentionally induced the breach of that agreement. Thereupon CRA unilaterally terminated the CEAMSE Termsheet. Natsource submits a copy of the CEAMSE Termsheet (Kelly Aff, Exh C).

A claim for tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, the defendant's intentional procurement of the third party's breach of the contract, and resulting damage (*Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413, 424 [1996]). The particular agreement must be in force and effect at the time of the claimed breach that the third party caused, otherwise, there can be no liability (Restatement [Second] of Torts: § 766 [f]). Further, where the parties contemplate future negotiations and the execution of a formal instrument, a preliminary agreement to enter into a future agreement generally does not create a binding contract (*Brown v Cara*, 420 F3d 148, 153 [2d Cir 2005]). This is precisely the situation here: the parties entered into a preliminary agreement, agreeing to several major terms while leaving others open, in addition to agreeing to pursue future contract

negotiations in good faith in an attempt to reach a final agreement for the sale and purchase of CERs.

The opening line of the CEAMSE Termsheet states that the parties agree to enter into a transaction with the terms included therein, and will each bear the costs incurred during "contract negotiation," thus clearly indicating that further negotiations would be necessary in order to reach a final agreement. Further, the CEAMSE Termsheet contains additional statements establishing that future negotiations would be necessary before a final agreement was reached, stating that terms will be agreed upon "in the contracting stage or after contracting," including the identity of the designated operational entity that was to verify the CERs, and the damages for failure on CRA's part to deliver CERs to NAM.

Moreover, the CEAMSE Termsheet states that NAM was to acquire the "right and title" to the CERs only "on the date of full contract execution," thus establishing that the CEAMSE Termsheet did not oblige CRA to deliver CERs to NAM, and did not entitle NAM to acquire CERs until then. Additionally, the parties left the exact volume of CERs to be purchased by NAM for future negotiation. Finally, the final transaction contemplated by the CEAMSE Termsheet that provided for the sale and purchase of CERs was conditioned upon the occurrence of several events: that CERs would actually be generated at the project site in Argentina, that the designated operational entity would verify the CERs pursuant to the Kyoto Protocol, and that the sites' projects would receive "irrevocable host government approval letters."

The totality of statements contained in the CEAMSE Termsheet demonstrates the parties' understanding that, although several major terms of a final agreement were memorialized, the occurrence of future events outside the control of either NAM or CRA, in addition to future

negotiations and contracting, would be necessary before a final agreement would be reached binding NAM and CRA to the sale and purchase of CERs.

According to Natsource, the CEAMSE Termsheet is valid and enforceable, because it contains the material terms of the transaction, despite requiring further negotiation and document preparation, and because it obliges the parties to pursue further negotiations in order to reach a final agreement in good faith. Further, Natsource alleges that NAM and CRA partially performed the CEAMSE Termsheet by conducting further negotiations in an effort to reach a final agreement, further establishing that it is binding and enforceable (Counterclaims, ¶¶ 10-12).

Preliminary agreements can create binding obligations in certain circumstances, where the preliminary agreements are complete, reflect a meeting of the minds on all issues that require negotiation, and which bind both parties to their ultimate contractual objective (*Brown,* 420 F3d at 153). Additionally, preliminary agreements can create binding obligations where the parties, while leaving terms open, oblige themselves to negotiate the open issues in good faith in an attempt to reach a final agreement (*id.*).

However, while the CEAMSE Termsheet may obligate the parties to continue to negotiate in good faith, nowhere does it state that NAM and CRA intended to be legally bound to purchase and sell CERs to one another, and thus, the CEAMSE Termsheet did not constitute a binding contract as to the purchase and sale of CERs. Therefore, because Natsource does not allege that the counterclaim defendants tortiously interfered with any binding contractual obligations, the counterclaim for tortious interference with contract is not viable (*see Buechner v Avery,* 38 AD3d 443, 444 [1st Dept 2007]; *Aksman v Xiongwei Ju,* 21 AD3d 260, 261 [1st Dept], *lv denied* 5 NY3d 715 [2005]).

NAM's and CRA's alleged partial performance of the CEAMSE Termsheet by pursuing negotiations in good faith in an attempt to reach a final agreement does not alter the conclusion that the CEAMSE Termsheet did not legally bind NAM and CRA to purchase and sell CERs to one another.

Furthermore, even assuming that Natsource sufficiently alleged the existence of a valid agreement, it fails to allege facts of inducement. The counterclaims state that RNK and Koltun "were taking steps to undo months of efforts undertaken by NAM" with respect to the CEAMSE transaction, and that Koltun and RNK "upon information and belief . . . induced CRA to withdraw from the CEAMSE Contract" (Counterclaims, ¶¶ 12, 18). Beyond these conclusory statements, the counterclaims do not allege any specific action on the part of the counterclaim defendants that demonstrate their "intentional procurement of the third-party's breach of the contract without justification" (*Lama Holding Co.*, 88 NY2d at 424). Mere conclusory allegations that CRA cancelled the contract because of the counterclaim defendants' actions are insufficient to establish inducement (*see M.J. & K. Co. v Matthew Bender and Co.*, 220 AD2d 488, 489 [2d Dept 1995]).

Therefore, the motion to dismiss the counterclaim for tortious interference with contract is granted, and the claim is dismissed.

As for the claim for tortious interference with prospective business relations, Natsource alleges that it had a reasonable expectation of securing business opportunities with CRA to purchase CERs, as contemplated in the CEAMSE Termsheet, and that Koltun and RNK "intentionally used dishonest, unfair and/or improper means to interfere with" Natsource's "prospective contractual relations with CER deriving from" the CEAMSE Termsheet

(Counterclaims, ¶ 31).

To state a valid cause of action for tortious interference with prospective economic relations, a plaintiff must plead that the defendant used "wrongful means" to disrupt the prospective business relationship, or was motivated solely by malice (*Carvel Corp. v Noonan,* 3 NY3d 182, 190 [2004]). "Wrongful means" include actions that amount to a crime or an independent tort, including physical violence, fraud or misrepresentation, or civil suits (*id.* at 191).

Natsource's allegations that the counterclaim defendants' actions were "willful, wanton and egregious" are conclusory and made without any factual support. Mere conclusory allegations of wrongful conduct are insufficient to state a valid claim for tortious interference with prospective economic relations (*Bank Leumi Trust Co. of New York v Samalot/Edge Assocs.,* 202 AD2d 282, 283 [1st Dept 1994]). Further, Natsource does not specify whether the counterclaim defendants' alleged egregious conduct was directed at Natsource or CRA (*see Carvel Corp.,* 3 NY3d at 192 [a party must allege that the wrongful conduct was directed at the party with whom the plaintiff seeks to have a business relationship with in order to state a viable claim for tortious interference with prospective business relations]).

Finally, Natsource's allegation that the counterclaim defendants were motivated solely by malice is undermined by its allegation elsewhere that the counterclaim defendants sought to divert the CEAMSE Transaction in order "to provide opportunities related to CEAMSE instead to RNK and/or parties designated by Koltun" (Counterclaims, ¶ 18). The counterclaim defendants' motivation of economic benefits necessarily defeats any contention that they were motivated solely by malice (*see Shared Communications Servs. of ESR, Inc. v Goldman Sachs &*

Co., 23 AD3d 162, 163 [1st Dept 2005]; *Advanced Global Tech. LLC v Sirius Satellite Radio, Inc.*, 15 Misc 3d 776, 782-783 [Sup Ct, NY County 2007]).

Therefore, the motion to dismiss the counterclaim for tortious interference with prospective economic relations is granted, and the counterclaim is dismissed.

Accordingly, it is

ORDERED that the motion to dismiss the counterclaims is granted and the counterclaims are dismissed; and it is further

ORDERED that the caption shall be amended to reflect the dismissal of counterclaim defendant Robert Koltun, and it is further

ORDERED that the remainder of the action shall continue.

Dated: July 20, 2007

ENTER:

J.S.C.