

Laurus Master Fund, Ltd. v Kennedy

2007 NY Slip Op 32893(U)

September 10, 2007

Supreme Court, New York County

Docket Number: 0600834/2007

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

~~FBIEM~~

-----X
Laurus Master Fund, Ltd. and Laurus Capital
Management, LLC,

Plaintiffs,

-against-

George Kennedy,

Defendant.
-----X

INDEX NO. 600834/2007

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	<u>PAPERS NUMBERED</u>
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 is decided in accordance with the accompanying
Decision and Order.

Dated: September 10, 2007

FILED
SEP 17 2007
NEW YORK
COUNTY OF NEW YORK

KARLA MOSKOWITZ 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 3

Laurus Master Fund, Ltd. and Laurus Capital
Management, LLC

Index No. 600834/2007

Plaintiffs,

DECISION AND ORDER

-against-

George Kennedy

Defendant

FILED
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NEW YORK
COUNTY CLERKS OFFICE

KARLA MOSKOWITZ, J:

This is a motion to dismiss counterclaims. Plaintiff Laurus Master Fund Ltd is a financial institution that invests in small and micro cap companies. Laurus Capital Management LLC is the management company for Laurus Master Fund Ltd. Laurus Master Fund, Ltd's and Laurus Capital Management, LLC (collectively "Laurus") claim breach of contract and breach of fiduciary duty arising out of an employment relationship with defendant George Kennedy (Kennedy)

BACKGROUND

Specifically, in January, defendant George Kennedy (Kennedy) and plaintiff Laurus Master Fund, Ltd, in conjunction with Kennedy's employment, executed a Confidentiality and Non Compete Agreement (the "Non-Compete Agreement"). In the Non-Compete Agreement, Kennedy promised not to work for a Laurus client or customer for a full year after his departure from Laurus. In that same agreement, Kennedy also promised to maintain the confidentiality of Laurus' trade secrets and proprietary information.

On about September 29, 2006, Laurus entered into a loan agreement (the Credit

Agreement) with Puerto Luperon Company, Ltd. (Puerto Luperon). Pursuant to that agreement, Laurus made an approximately \$67 million credit facility available to Puerto Luperon. Kennedy allegedly participated in negotiating the loan to Puerto Luperon and became the employee in charge of the Credit Agreement. Plaintiff alleges that thereafter Kennedy became a type of double agent, in violation of his obligations to his employer. He allegedly had secret meetings with principals at Puerto Luperon, received payment from Puerto Luperon and elevated Puerto Luperon's interests over those of Laurus. Plaintiff discovered Kennedy's duplicity when Puerto Luperon submitted a draw request pursuant to the Credit Agreement to Laurus that included a line item of \$14,583 for Kennedy's salary as a Puerto Luperon employee between February 1, 2007 and February 15, 2007. The gig being up, Kennedy resigned. Puerto Luperon immediately sent an e-mail announcing Kennedy's "nomination" as its Chief Operating Officer.

Several lawsuits ensued between Puerto Luperon and Laurus over the Credit Agreement. Laurus has claims in those lawsuits that Puerto Luperon is in default under the Credit Agreement and is seeking foreclosure of its security. Specifically, Laurus contends that on February 16, 2007, it received written notice that Puerto Luperon had ceased all operations, an "event of default" under the Credit Agreement. (Sec Credit Agreement Article 7.01[g]). Laurus also learned that Puerto Luperon had granted equity interests in the company to several others thereby diluting the value of Laurus' equity interest in Puerto Luperon. This too was an event of default. (See Credit Agreement Article 7.01[l]).

In addition to the litigation with Puerto Luperon, Laurus separately sued Kennedy for: (1) breach of contract and (2) breach of the duty of loyalty. Laurus suspects that Kennedy's knowledge of Laurus' confidences is fueling Puerto Luperon's current litigation strategy in the

[* 4]
other lawsuits.

Kennedy counterclaimed. Kennedy's counterclaim relies on allegations that initially Laurus had no problem with him working for Puerto Luperon. Kennedy claims that Laurus has declared a default under the Credit Agreement in bad faith to gain control over a Puerto Luperon project called AtlanticA. He claims that Laurus' refusal to release further funds to Puerto Luperon under the Loan Agreement is in bad faith. Laurus' actions, according to Kennedy, have devastated Puerto Luperon's finances and consequently, Puerto Luperon has been unable to pay Kennedy's salary and benefits. Puerto Luperon has had to seek other investors and Kennedy had to accept a dilution of his equity interest in Puerto Luperon in order for it to obtain the other investment commitments.

Based on these allegations, Kennedy asserts counterclaims for what appear to be tortious interference with his contract with his new employer, Puerto Luperon, and, alternatively, tortious interference with Kennedy's prospective economic relations with Puerto Luperon and its parent company. Laurus has moved to dismiss these counterclaims.

Laurus argues that it was economically justified in taking the actions it did against Puerto Luperon. Laurus claims that it cut off Puerto Luperon's funding to protect itself from further damage, given that it had already loaned substantial funds to Puerto Luperon and was trying to protect itself from turning over further funds to an entity of questionable viability. Laurus argues that Kennedy cannot assert a claim merely because he suffered as an indirect result of the actions Laurus took to protect itself.

Kennedy responds that Laurus' refusal to release funds to Puerto Luperon under the Credit Agreement and its declaration of a default were in bad faith. He points to alleged threats

Laurus made to Kennedy that Laurus would retaliate against him for joining Puerto Luperon as further indications of bad faith. Kennedy claims that discovery will show that the refusal was not consistent with the parties' reasonable expectations and course of dealing or with the terms of the contract between Laurus and Puerto Luperon. (Opp. Pg 3).

DISCUSSION

To allege tortious interference with contract, a plaintiff must allege the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages. (*White Plains Coat & Apron Co., Inc. v. Cintas Corp.*, 8 NY3d 422 [2007]) "In response to such a claim, a defendant may raise the economic interest defense -- that it acted to protect its own legal or financial stake in the breaching party's business." (*Id.*) "Procuring the breach of a contract in the exercise of an equal or superior right is action with just cause or excuse and is justification for what would otherwise be an actionable wrong." (*Felsen v. Sol Café Mfg. Corp.*, 24 NY2d 682, 687 [1969]).

Here, Laurus has demonstrated that the alleged interference (that it terminated the Credit Agreement and commenced foreclosure proceedings) had an economic justification (to prevent the further loss of its funds and protect its collateral). (*See Ultramar Energy Ltd. v Chase Manhattan Bank, N.A.*, 179 AD2d 592, 592-593 (1st Dept 1992)(creditor was justified in retaining receivables to protect its security interest). This initial demonstration of economic justification required Kennedy "to adduce evidence in opposition sufficient to raise an issue of fact." (*Torrenzano Group v. Hugh Burnham*, 26 AD3d 242 [1st Dep't 2006]). Allegations of bad faith are insufficient. (*Felsen*, 24 NY2d at 751; *see also Hirsch v. Food Res. Inc.*, 24 AD3d 293, 296 [1st Dep't 2005]). Rather, plaintiff would have to allege facts showing malice or fraudulent

or illegal means to get around the defense of economic justification. (*Felsen*, 24 NY2d at 751).

Kennedy does not even try to contest that the events of default occurred as Laurus has described them. He makes a bare allegation that Laurus declared Puerto Luperon to be in default in bad faith to gain control over the AtlanticA project. Nowhere does he allege facts showing malice or fraudulent or illegal means. On this record, the court can only conclude that Laurus acted to protect its interest as a creditor of Puerto Luperon in the face of what could have been a company that would be unable to meet its debt obligations. Under Kennedy's analysis, any time a creditor takes action to protect itself, it could be liable to employees of its debtor when the debtor is unable to make payroll because of the unavailability of credit. This is an obviously absurd result. In reaching this conclusion, the court notes that Puerto Luperon (as opposed to its employee Kennedy) may have the ability to seek redress against Laurus for, *inter alia*, breach of contract.

In similar fashion, Kennedy has failed to address Laurus' argument that his counterclaim for tortious interference with prospective business relations is subject to dismissal because it fails to allege either any prospective business relation or any wrongful means or act intended solely to harm Kennedy. However, even if Kennedy had addressed the argument that Laurus was acting to protect itself as a creditor negates any accusation that its actions were meant solely to harm Kennedy. (*See Barrett v. Toroyan*, 39 AD3d 366, 367 [1st Dep't 2007]; *Taylor v. NYU Med. Ctr.*, 7 AD3d 401 [1st Dep't 2004]). Nor has Kennedy alleged wrongful means that are anything more than Laurus' proper exercise of its contractual rights. (*See Ultramar*, 179 AD2d at 592-593). Therefore, the court also dismisses Kennedy's claim for tortious interference with prospective business relations.

[* 7]
Accordingly, it is

ORDERED THAT plaintiffs Laurus Master Fund, Ltd's' and Laurus Capital Management, LLC's' motion to dismiss defendant Gorge Kennedy's counterclaims is granted; and it is further

ORDERED THAT the clerk of the court is directed to sever the counterclaims, enter judgment dismissing the counterclaims with prejudice and continue plaintiffs' claims accordingly.

The parties are directed to appear for a status conference on September 27, 2007 at ten a.m. in the courtroom, room 248, 60 Centre Street.

Dated: September 10, 2007



J.S.C.

FILED
SEP 17 2007
NEW YORK
COUNTY CLERK'S OFFICE