

Phoenix Capital Invs. v Ellington Mgt. Group

2007 NY Slip Op 33650(U)

November 7, 2007

Supreme Court, New York County

Docket Number: 0602204/2007

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

FBEM

-----X
PHOENIX CAPITAL INVESTMENTS

INDEX NO. 602204/2007

Plaintiff,

MOTION DATE _____

-against-

MOTION SEQ. NO. 002

ELLINGTON MANAGEMENT GROUP

MOTION CAL. NO. _____

Defendants.
-----X

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

PAPERS NUMBERED

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: November 07, 2007

FILED
NOV 13 2007
COUNTY CLERK'S OFFICE
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 : I.A.S. PART 3

-----X
 PHOENIX CAPITAL INVESTMENTS

Index No. 602204/2007

Plaintiff,

-against-

DECISION and ORDER

ELLINGTON MANAGEMENT GROUP

Defendants.

-----X
KARLA MOSKOWITZ, J:

In this breach of contract action, defendant, Ellington Management Group (“Ellington”), a hedge fund manager based in Greenwich, Connecticut, moves pursuant to CPLR 3211 (a) (1), (5) and (7) to dismiss the amended complaint

BACKGROUND

In February 2000, plaintiff, Phoenix Capital Investments, LLC (“Phoenix”) and Ellington entered into an engagement letter (the “agreement”) whereby Ellington agreed to pay Phoenix fees to find non-U.S. investors to invest in a hedge fund or other investments that Ellington managed. Pursuant to the February 2000 agreement, as amended in August 2000, when Phoenix identified a potential investor, it would send a “Contact Notice” to Ellington and if the Contact Notice Client did, in fact, invest in Ellington, Phoenix would receive Fees, as defined in the agreement, and, if the investment met certain other defined criteria, Phoenix would also receive a “Structuring Payment”¹. However, the agreement states that Phoenix would not receive a Fee, “as to any investor whose first Investment is made later than one year after [Phoenix has] made [its] last contact with that investor on behalf of Ellington.” (Penn Aff., Ex. A, p. 2)

¹ Fees and Structuring Payments are defined terms in the agreement, and those words are capitalized throughout the February and August 2000 agreements.

Phoenix and Ellington revised their agreement in December, 2003 to, *inter alia*, provide for a different fee schedule for non-Lock-Up investments. However, the 2003 amendment exempted Norges from the new fee schedule, stating that “[f]or Norges Bank . . ., the original fee schedule will apply for Investments in ‘hedge fund type’ strategies whether or not the Investment is a Lock-Up Investment.”

The 2003 agreement also provides, in pertinent part:

b) Similar to the original agreement, if a ‘Contact Notice’ investor makes a first investment before the end of the one year period following the earlier of (i) the last contact Phoenix made with this investor on Ellington’s behalf and (ii) the date of the termination notice, then Phoenix will be entitled to its fees; however, if such investment is made after the one year period has expired, no fees will apply. Furthermore, for all current ‘Contact Notice’ investors other than Norges Bank . . ., the one year period will be considered to have already begun on 6/12/2003

(Penn Aff, Ex. E., p. 2)

Phoenix alleges that in late 2001, it contacted Norges Bank Investment Management (Norges), a Norwegian bank that manages pension funds, regarding Norges’s interest in investing in Ellington. Initially, Norges was reluctant to consider an investment in Ellington, however, Phoenix claims that, as a result of its efforts, in April, 2004, Norges, Ellington and Phoenix met to discuss a potential investment. (Amended Comp., para. 16)

Approximately two months later, in June, 2004, Ellington terminated its agreement with Phoenix. Phoenix alleges that, thereafter, Ellington made statements to Norges about Phoenix that caused Norges to sever its relationship with Phoenix.

On August 31, 2006, Norges invested more than \$500 million in funds that Ellington

managed.

In July, 2007, Phoenix filed this complaint seeking payment of its finder's fee and other damages alleging breach of contract (1st cause of action) , quantum meruit (2nd cause of action), unjust enrichment (3rd cause of action),² tortious interference with prospective business relations (4th cause of action), breach of the covenant of good faith and fair dealing (5th cause of action), violations of the Connecticut Unfair Trade Practices Act ("CUTPA") for interference with prospective business relations (6th cause of action) and violations of CUTPA for bad faith termination of the agreement (7th cause of action).

CONTENTIONS

In support of the motion to dismiss, Ellington argues that the plain language of the agreement establishes that Phoenix is not entitled to Fees or Structuring Payments because Phoenix's last contact with Norges on Ellington's behalf was more than one year before Norges invested in Ellington. Ellington also contends that Norges's claims for breach of the covenant of good faith and fair dealing (common law and CUTPA) are without merit because: 1) the agreement permitted either party to terminate it on 60 days notice and that Norges did not invest in Ellington for more than two years after Ellington terminated the agreement--well after any "one-year tail" provision expired, 2) Phoenix's claims of bad faith are without factual support; and 3) Phoenix has not alleged that Ellington has done anything "immoral, unethical, oppressive, [or] unscrupulous" for the purposes of CUTPA. Ellington also contends that the CUPTA claim is time barred.

Ellington further argues that in the tortious interference with prospective contract

² Phoenix has withdrawn its claims for quantum meruit and unjust enrichment.

relations claims, (common law and CUTPA) Phoenix fails to plead at least two essential elements of that claim—that Ellington knew that Phoenix and Norges were negotiating a potential investment deal with a third party and that Ellington interfered with that deal solely out of malice. It also contends that the court should not permit Phoenix to replead because the proposed amendment would be futile.

In opposition to dismissal, Phoenix argues that the 2003 amendment to the finder's fee agreement exempted Norges from the "one year tail" provision regarding fees and that, in any event, the structuring payments are not subject to the "one year tail". Alternatively, Phoenix contends that the contract is ambiguous regarding Ellington's obligation to pay Phoenix fees and or structuring payments. In addition, Phoenix contends that it has adequately plead that Ellington breached the covenant of good faith and fair dealing by alleging that Ellington exercised its right to terminate the contract malevolently, as part of a scheme to deprive Phoenix of the benefit of the agreement; that the tortious interference with prospective contract relations claim states all the essential elements of the claim and that the corresponding CUTPA claims are also sufficient to put Ellington on notice regarding subject matter of the claims.

Phoenix also argues that the statute of limitations for the CUTPA claim alleging Ellington's bad faith termination of the agreement was tolled because Ellington engaged in a continuous course of wrongful conduct following its termination of the agreement.

DISCUSSION

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]) However, allegations consisting of bare legal conclusions and factual claims that are inherently incredible, or those that are contradicted by documentary evidence, are not entitled to such presumption. (*Ullman v Norma Kamali, Inc.*, 207 A.D.2d 691 [1st Dept 1994]) Further, the court will only grant a motion to dismiss based on documentary evidence “where the documentary evidence utterly refutes plaintiff’s factual allegations” and conclusively establishes a defense to the asserted claims as a matter of law. (*Goshen v. Mutual Life Ins. Co. Of N.Y.*, 98 N.Y. 314, 326 [2002]).

Breach of Contract

“Whether a contract is ambiguous is a question of law for the court and is to be determined by looking within the four corners of the document” (*Kass v Kass*, 91 N.Y.2d 554, 566 [1998] citing *W.W.W. Assocs. v. Giancontieri*, 77 N.Y.2d 157, 162-163 [1990]). A contract is unambiguous, if “on its face it is reasonably susceptible of only one meaning.” (*Greenfield v Philles Records*, 98 N.Y. 2d 562, 569 [2002]) conversely, “[a] contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.” (*Feldman v National Westminster Bank*, 303 A.D.2d 271 [1st Dept 2003] [internal quotations and citations omitted]).

The existence of ambiguity is determined by examining the “entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed”

Moreover, the court will consider the wording “in the light of the obligation as a whole and the intention of the parties as manifested thereby.” (*Kass v Kass*, 91 N.Y.2d at 566)

In this case, the court must cobble together the agreement by reading the February 2000 agreement together with the August 2000 amendments and the email exchanges that comprise the December 2003 amendments to the agreement. Both the February and August 2000 agreements define the term Fees and the term Structuring Payments and capitalize the first letter of those terms throughout the documents when they refer to payments to Phoenix. Those agreements establish a two tier payment system that defines when Phoenix earns Fees and when Phoenix earns Structuring Payments. Indeed, the August 2000 document states:

Ellington will pay Phoenix fees (“Fees”) for all investments accepted by the Ellington Funds (“Investments”) from investors contacted pursuant to this agreement and named in a Contact Notice (“Investors”); *provided however*, no Fee shall be paid with respect to any investor as to whom Ellington has given a No Fee Notice or as to any investor whose first Investment is made later than one year after the Authorized Persons have made their last contact with that investor . . . except for investors included in Appendix A³

In addition, if Phoenix . . . introduces Investors to an Ellington Fund in an aggregate investment amount of no less than \$100 million who invest through structures that result in fees or other payments to Ellington in excess of what Ellington would receive had the Investment been made directly in the related Ellington Fund, Phoenix will be paid a structuring payment (the “Structuring Payment”) in an amount equal to 50% of the amount of such excess promptly after Ellington earns and receives such excess

(Penn Aff, Ex. C, p.2).

However, the e-mail exchanges that resulted in the December, 2003 amendment do not

³ PrimeCorp was the only investor included in Appendix A and that entity was subject to a two year tail.

capitalize the word “fee” or “fees” and do not discuss Structuring Payments at all. The December 2003 amendment states that “Phoenix will be entitled to its fees if” a contact notice investor makes a first investment before the end of the one year period following Phoenix’s last contact with the investor on behalf of Ellington and the date of the termination notice.

1. Fees

Phoenix’s strained reading of the 2003 amendments to the agreement is unavailing. The plain language of the 2003 amendments establish that “Similar to the original agreement,” Phoenix is not entitled to “fees” when a contact notice investor makes a first investment later than one year after Phoenix made its last contact with this investor on Ellington’s behalf and the date of the termination notice. The agreement does not add Norges to Appendix A, as an entity exempt from the one year tail, and it does not modify the tail provision to state that Norges is exempted. Moreover, the provision in the agreement regarding fees for “lock-up” investments, upon which Phoenix attempts to rely, is completely unrelated to the one year tail. That section merely exempts Norges from the amended fee schedule for non lock-up investments. The 2003 amendment clearly reaffirms that the one year tail provision applies to current contact notice investors—and that Norges was a current contact notice investor. “Where a written contract clearly contradicts the complaint allegation supporting the breach of contract claim, the contract itself constitutes the documentary evidence warranting dismissal under CPLR 3211(a)(1)” (*Beal Sav. Bank v Sommer*, 2005 WL 3487803 at *4 [Sup. Ct. N.Y. County] citing *150 Broadway N.Y Assocs., L.P. v Bodner*, 14 A.D.3d 1[1st Dept 2004])

2. Structuring Payments

As to Structuring payments, Phoenix argues that Structuring Payments are not simply a

subset of Fees and that the clear language of the Agreement establishes that Phoenix is entitled to a structuring payment whenever a structured investment is made by an investor that Phoenix introduced to Ellington; that structuring payments are discussed separately from fees and that the provisions discussing fees and the one year tail period make no mention of Structuring Payments.

Ellington counters this argument by stating that the Structuring payments are a bonus that Phoenix would earn in addition to Fees, and thus, if Phoenix did not earn Fees because the investor invested outside the one year tail then, similarly, the Structuring Payment bonus would be precluded by the one year tail. Moreover, Ellington stated, at oral argument, that any ambiguity in the August 2000 agreement about whether the tail applied to Structuring Payments is clarified by the December 2003 amendment, that does not use the defined term Fees, but rather “uses the generic term fees without a capital F and says no fees, meaning both Fees and Structuring Payments, will apply if the investment is made outside the one year tail, period.” (10/4/07 Trans, p. 11, ll. 11-14).

The court finds that the contract is ambiguous as to whether Structuring Payments are a bonus that Ellington paid in addition to Fees and whether those Structuring Payments are subject to a one year tail. Contrary to Ellington’s assertion, the use of the term “fees” in the December 2003 amendment does not resolve the ambiguity. That the 2003 email amendment does not capitalize the words fee, fees or fee schedule⁴ does not necessarily indicate that Ellington intended to use those words generically to include both fees and structuring payments. The 2003 amended agreement is basically an informal document that is comprised of several email communications. Whether the use of the terms fee, fees and fee schedules (uncapitalized) was an

⁴ The word Fee is capitalized only once in paragraph 8 of the 2003 amendment to the agreement, but this usage does not resolve the ambiguity.

inadvertent scrivener's error or a deliberate choice indicating generic usage, is a question of fact and in order to determine the meaning of the amendment the court will have to consider extrinsic evidence not found in the four corners of the agreement. (*See, CV Holdings, LLC v Artisan Advisors, LLC*, 9 A.D.3d 654, 657 [3rd Dept 2004]; *Greenfield v Philles Records*, 98 N.Y.2d at 569).

Good Faith and Fair Dealing

Implicit in every contract is a covenant of good faith and fair dealing. (*Dalton v Educational Testing Service*, 87 N.Y.2d 384 [1995]; *Skillgames, LLC v. Brody*, 1 A.D.3d 247 [1st Dept 2003]). The covenant of good faith and fair dealing precludes one of the contracting parties from taking any action that will destroy the rights of the other party to receive the benefit of the bargain. (*Dalton v Educational Testing Service*, 87 N.Y.2d at 389).

The complaint in this case alleges that the parties entered into a finder's fee agreement pursuant to which Phoenix would earn fees and, if applicable, structuring payments, if prospective investors that Phoenix contacted on behalf of Ellington, subsequently invested in Ellington. Phoenix contends that it spent several years and a great deal of effort developing Norges as a client on behalf of Ellington and that, instead of honoring its bargain, Ellington terminated its agreement with Phoenix to avoid paying fees and manipulated events, "so that the investment by Norges would be made more than one year after Phoenix's last contact with Norges." (Cmplt, para. 44). Because Phoenix alleges that Ellington terminated the agreement, "for an illegitimate purpose, and in bad faith . . . the cause of action alleging bad faith breach . . . is viable." (*Richbell Info. Servs., Inc. v Jupiter Partners, L.P.*, 309 A.D.2d 288, 303 [1st Dept. 2003]).

Ellington's argument that the finder's fee agreement expressly permitted either to terminate the agreement on 60 days notice is without merit because, even if the termination provision gives Ellington discretion over the termination, that discretion must be exercised "in good faith, [and] not arbitrarily or irrationally." (*Maddaloni Jewelers, Inc. v Rolex Watch U.S.A., Inc.*, 41 A.D.3d 269, 270 [1st Dept 2007]) Where, as here, plaintiff's allegations support a claim that defendant exercised a contract right, "as part of a purposeful scheme designed to deprive plaintiff[] of the benefits of [the agreement]," the allegations state a valid implied covenant claim. (*Richbell Info. Svcs.*, 309 A.D.2d at 302)

Bad Faith Termination Claim (CUTPA)

Although Connecticut law governs the substantive elements of a CUTPA claim, the question of whether the complaint alleges the elements of the claim with sufficient particularity is a procedural issue that is governed by New York law. (*See, Westdeutsche Landesbank Girozentrale v Learsy*, 284 A.D.2d 251, 252 [1st Dept. 2001] [holding that whether a claim is pled with sufficient particularity is "a matter of procedure governed by the law of the forum"]).⁵

As stated above, Phoenix's claim for breach of the covenant of good faith and fair dealing specifically alleges that Ellington terminated the contract and manipulated events in order to avoid its contractual obligations to Phoenix. This is sufficient to put Ellington on notice regarding the subject matter of the controversy. (*See, Foley v D'Agostino*, 21 A.D.2d 60[1st Dept 1964]). Moreover, under Connecticut law, the statute of limitations under CUTPA is tolled if there is "evidence of the breach of a duty that remained in existence after commission of the original wrong related thereto. That duty must not have terminated prior to the commencement of

⁵ Connecticut, on the other hand is a fact-pleading state. (*See, Fennelly v Norton*, 2007 WL 2198575 at *8 [Conn. App.]

the period allowed for bringing an action for such a wrong.” (*Fichera v Mine Hill Corp.*, 201 Conn. 204, 209 [Sup. Ct. 1988]). Here, Phoenix alleges, “Ellington instructed Phoenix not to contact Norges on its behalf, and terminated its agreement with Phoenix Ellington also, on information and belief, wrongfully manipulated events to cause events to occur so the investment by Norges would be made more than one year after Phoenix’s last contact with Norges.”

(Amended Cmplnt, para. 53). These allegations of Ellington’s continuing course of conduct are sufficient to toll the statute of limitations regarding the CUTPA claim alleging Ellington’s bad faith breach of contract.

Tortious Interference with Prospective Business Relations (Common Law)

The required elements of a cause of action for tortious interference with prospective business relations are as follows: (a) business relations with a third party; (b) the defendant’s interference with those business relations; (c) the defendant’s interference with the sole purpose of harming the plaintiff or using wrongful means and (d) injury to the business relationship.

(*Advanced Global Technology, LLC v Sirius Satellite Radio, Inc.*, 15 Misc. 3d 776, 777 [Sup. Ct. N.Y. County 2007] *aff’d as modified* 2007 WL 2831782 [1st Dept]; *see also Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183 [1980]; *Carvel v Noonan*, 3 N.Y. 3d 182, 190 [2004]).

To state a cause of action for tortious interference with prospective business advantage, it must be alleged that the conduct by defendant that allegedly interfered with plaintiff’s prospects either was undertaken for the sole purpose of harming plaintiff or that such conduct was wrongful or improper independent of the interference allegedly caused thereby.

(*Jacobs v Continuum Health Partners*, 7 A.D.3d 312, 313 [1st Dept 2004]; citing *Alexander &*

Alexander of N.Y. v Fritzen, 68 N.Y.2d 968, 969 [1986])

“Wrongful means” include “physical violence, fraud, misrepresentation, civil suits and criminal prosecutions, and some degree of economic pressure; they do not however include persuasion alone although it is knowingly directed at interference with the contract.” (*Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 N.Y.2d at 191). Simple economic persuasion alone does not constitute “wrongful means”. For economic persuasion to be wrongful, it must be “extreme and unfair.” (*Carvel Corp. v Noonan*, 3 N.Y.3d at 192).

Here, the amended complaint alleges that Phoenix developed a close business relationship with Norgcs and Norgcs was interested in another investment opportunity that Phoenix had proposed with Fortress Investment Group, Inc.; that Ellington made statements to Norgcs in 2004 that caused Norgcs to end its relationship with Phoenix and that Ellington’s actions were for the sole purpose of harming Phoenix and its business relationship with Norgcs and/or Ellington’s actions were unfair and improper and but for Ellington’s statements to Norgcs, Norgcs would have invested in Fortress, yielding fees for Phoenix. (Amended Cmplnt., paras. 38-42).

Phoenix’s claim for tortious interference with a prospective business relationship is fatally defective as Phoenix has failed to allege that Ellington knew about Norgcs’s potential investment with Fortress (*Burns Jackson Miller Summit & Spitzer v Lindner*, 88 A.D.2d 50 [2nd Dept 1982], *aff’d* 59 N.Y.2d 314 [1983] [knowledge of the relationship must be specified and totally conclusory allegations are insufficient]; *Quail Ridge Assocs. v Chem. Bank*, 162 A.D.2d 917, 919 [3rd Dept 1990] [dismissing claim for interference with pre-contractual relations where plaintiff did not allege “that defendant was aware of and interfered with any such contract.”]) and Phoenix has not adequately plead that Ellington’s alleged conduct amounted to a crime or an

independent tort or that it was for the sole purpose of inflicting intentional harm on Phoenix. (See, *Krinos Foods, Inc. v Vintage Food Corp.*, 30 A.D.3d 332, 333 [1st Dept 2006] [dismissing claim for interference with pre-contractual relations because allegations were “insufficient to show that defendant used the ‘wrongful means,’ e.g., ‘physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degree of economic pressure,’ necessary to state [such] a cause of action”]; *LoPresti v Mass. Mut. Life Ins. Co.*, 30 A.D.3d 474, 476 [2nd Dept 2006][dismissing tortious interference claim because the allegation that the respondents’ actions were wrongful or unlawful were conclusory and without support.”]; *Jacobs v Continuum Health Partners, Inc.*, 7 A.D.3d 312, 313 [1st Dept 2004] [“The instant complaint fails to plead sufficient nonconclusory allegations Plaintiff neither alleges specific facts that could support an inference the defendants were motivated solely by desire to harm [or] . . . specific facts, that if proven, would show that the (actions taken were) . . . otherwise independently wrongful.”]).

Further, Phoenix’s allegations regarding a purported Phoenix-Norges-Fortress relationship that allegedly would have resulted in Norges investing with someone other than Ellington, describe a situation in which Ellington and Fortress are competitors. Because the allegations suggest that Ellington’s self-interest motivated its alleged conduct, at least in part, Phoenix cannot assert that Ellington acted “solely out of malice.” (*Advanced Global Tech, LLC v Sirius Satellite Radio, Inc.*, 15 Misc. 3d at 782-83; see also, *Lobel v Maimonides Med. Ctr.*, 39 A.D.3d 275, 277 [1st Dept 2007] [where “it is clear that any motivation on (defendant’s) part was based on economic self interest,” plaintiff’s allegations were insufficient to establish that defendants conduct was motivated solely by its desire to harm plaintiff]).

Tortious Interference with Prospective Business Advantage (CUTPA)

Because the sufficiency of the CUTPA claim is a procedural issue that is governed by New York law, based on the discussion, *supra*, concerning the lack of sufficiency of Phoenix's common law claim for tortious interference with prospective business advantage, the court must dismiss the CUTPA claim based on the same conclusory allegations. (*Kronholm & Keeler v Arthur A. Watson & Co.*, 1996 WL 697964 at *2-3 [Conn. Super. Ct.]).

Accordingly, it is ORDERED that defendant Ellington's motion to dismiss the complaint is granted to the extent that the portion of the first cause of action that seeks Fees in the amount of 1% per annum of the aggregate Net Assct Valuc of the amounts invested by Norges in hedge funds or other investments managed by Ellington is dismissed; and it is further

ORDERED that the fourth cause of action and the sixth cause of action under CUTPA alleging tortious interference with prospective business relations are dismissed; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that plaintiff's request to replead is denied as plaintiff has failed to submit a copy of the proposed pleading or demonstrate how it would cure the fatal deficiencies in the existing one. (*Automobile Coverage Inc. V. American Intern. Group*, 42 A.D.3d 405 [1st Dept. 2007]).

This decision constitutes the order of the court.

Dated: November 6, 2007

FILED
NOV 13 2007
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J.S.C.