

Nam Tai Electronics, Inc. v UBS Painewebber Inc.

2007 NY Slip Op 34394(U)

February 2, 2007

Supreme Court, New York County

Docket Number: 602976/03

Judge: Charles E. Ramos

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

PRESENT:

PART _____

Index Number : 602976/2003

NAM TAI ELECTRONICS INC.

vs

UBS PAINWEBBER INC.

Sequence Number : 011

REARGUMENT/RECONSIDERATION

C

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

011-012

Motion is decided in accordance with accompanying Memorandum Decision.

FILED
FEB 16 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/2/07

9

J.S.C.

HON. CHARLES E. RAMOS
 NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION
-----X
NAM TAI ELECTRONICS, INC.,

Plaintiff,

-against-

Index No. 602976/03

UBS PAINWEBBER INCORPORATED a.k.a.
UBS WEALTH MANAGEMENT USA,

Defendant.

-----X

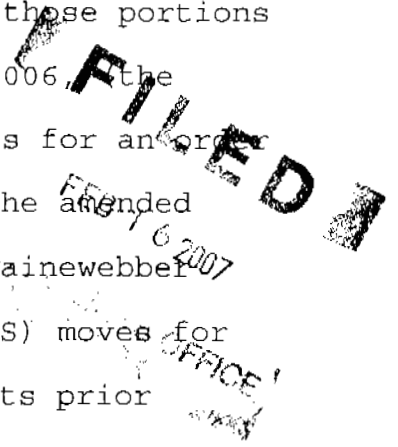
Charles Edward Ramos, J.S.C.:

Motion sequence numbers 011 and 012 are consolidated herein for disposition.

In sequence number 011, plaintiff Nam Tai Electronics, Inc., moves for an order pursuant to CPLR 2221 granting leave to renew and reargue those branches of defendant's prior motion to dismiss the breach of fiduciary duty, fraud, and breach of contract claims, and, upon renewal and reargument, vacating those portions of this court's decision and order dated July 13, 2006, (the prior order) granting dismissal. Nam Tai also moves for an order pursuant to CPLR 3025 (b) granting leave to amend the amended complaint. In sequence number 012, defendant UBS Painewebber Incorporated, a.k.a. UBS Wealth Management USA, (UBS) moves for an order granting leave to reargue that branch of its prior motion to dismiss the third-party beneficiary claim, and, upon reargument, vacating that portion of the prior order in which the court denied such relief.

The underlying facts and procedural history are fully set forth in the prior order and will not be repeated here, except as

011+012



is necessary for clarification. Briefly, in the amended complaint and proposed second amended complaint, Nam Tai, a British Virgin Islands (BVI) corporation, alleges that, in 1997, UBS, a New York stock brokerage firm, breached certain contractual and fiduciary obligations that it owed to Nam Tai directly and as a third-party beneficiary of a stock brokerage agreement between UBS and Tele-Art, Inc., a BVI corporation. Tele-Art had retained UBS to sell certain Nam Tai common stock beneficially owned by Tele-Art and Robert Yuen, a Tele-Art principal, in compliance with an order issued by the BVI High Court in Tele-Art bankruptcy-related proceedings (see Matter of Tele Art Inc., High Court of Justice, BVI, suit no. 69 of 1997, Sept. 15, 1997, Georges, J., [the BVI High Court order]). Nam Tai alleges that UBS breached its fiduciary and contractual obligations by failing to immediately sell the stock, even though the shares were sufficiently liquid and the price per share exceeded the minimum price specified in the BVI High Court order, and by giving priority to the interests of the Bank of China, another Tele-Art creditor, over Nam Tai's interests. Nam Tai also alleges that UBS's alleged misconduct caused it to suffer damages amounting to between \$4.9 and \$7.3 million.

Before issue was joined, UBS moved to dismiss the amended complaint and Nam Tai cross-moved for an order directing that discovery proceed in this action. By the prior order, this court granted the motion in part and the cross motion in part. The court severed and dismissed the second, third, and fourth causes

of action for breach of fiduciary duty, fraud, and breach of contract, pursuant to CPLR 3211 (a) (7) and 3016 (b). The court dismissed the fraud claim on the ground that Nam Tai had failed to allege facts sufficient to support the elements of a viable claim of fraud. Specifically, the court also found that Nam Tai's allegations of fraud were directly refuted by certain Nam Tai and Bank of China correspondence; that Nam Tai could not prove that it reasonably relied on any representation by UBS that it would immediately sell the Nam Tai shares for the joint and several benefit of the three creditors, given the express terms of the BVI High Court order, and Nam Tai's conceded familiarity with those terms; that Nam Tai had failed to allege with any particularity facts supporting the element of scienter; and that, to the extent that the claim is based on an omission, Nam Tai had not alleged any facts that may be held to give rise to a duty to speak on the part of UBS. In addition, the court sustained the third-party beneficiary claim as legally cognizable, based on UBS's express written acknowledgment that it was holding the Nam Tai shares in trust for Nam Tai, as well as the Bank of China and the BVI High Court, and directed that discovery proceed on this claim. The court directed UBS to serve an answer to the amended complaint, as modified by the order, within 10 days after service of a copy of the order with notice of entry.

Nam Tai now seeks to renew and reargue UBS's prior motion. The court notes that, although Nam Tai requests vacatur of the portions of the prior order dismissing the breach of fiduciary

duty, fraud, and breach of contract claims, it addresses its arguments solely to the issue of the viability of the fraud claim.

UBS cross-moves to vacate that portion of the prior order denying that branch of the prior motion to dismiss the third-party beneficiary claim and directing that the claim would continue.

Although designated a motion for leave to reargue and renew, Nam Tai's motion is more properly a motion to renew. Nam Tai does not argue that the court "overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (Foley v Roche, 68 AD2d 558, 567 [1st Dept 1979]; see CPLR 2221), but, instead, contends that it recently received new evidence that supports its fraud claim. "An application for leave to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court" (id. at 568). A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination . . . and shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [2], [3]).

Nam Tai contends that, after submission of the motions on February 2, 2006, UBS produced documents in response to Nam Tai's demand served September 15, 2004, that unequivocally establish actionable fraudulent misconduct by UBS. The documents consist

of previously undisclosed communications between UBS and Tele-Art and allegedly demonstrate that UBS's representations in its October 31, 1997, letter to Nam Tai were fraudulent. Nam Tai relies primarily on a letter agreement dated October 30, 1997, between UBS and Tele-Art.

In opposition, UBS contends that the letter agreement, drafted by UBS and countersigned by Tele-Art, does not support the fraud claim asserted in Nam Tai's proposed second amended complaint and, therefore, provides no basis for altering the prior order.

In dismissing the fraud claim, the court held that the contemporaneous documentary evidence demonstrated that, rather than misrepresenting its intended course of conduct to Nam Tai, UBS had merely reiterated its agreement to adhere to the terms of the BVI High Court order requiring that the shares be sold at a minimum price of \$17 and that priority of payment be accorded to the Bank of China. The court relied, in part, on an October 31, 1997, letter by UBS to Nam Tai in which UBS stated:

We have received irrevocable instructions from Tele-Art Inc. allowing us to sell sufficient shares and disburse the proceeds necessary to satisfy the following: (i) the indebtedness to the Bank of China; (ii) the judgment debt to Nam Tai Electronics, Inc.; and (iii) the sum of \$90,000 to be paid into the [BVI High Court] . . . It is our intent to adhere to the terms of the Court Orders.

(UBS/Nam Tai, Oct. 31, 1997, letter.)

In the October 30, 1997, letter agreement upon which Nam Tai relies, UBS agreed to be Tele-Art's designated broker to

liquidate the Nam Tai shares "pursuant to the BVI [High] Court Order." UBS also agreed that "[t]he liquidation will be handled pursuant to [Tele-Art's] instructions as to time and price."

However, contrary to Nam Tai's contentions, nothing in the letter agreement indicates that UBS agreed to follow Tele-Art's instructions regarding the quantity of shares to be sold or agreed that, once Tele-Art's debt to the Bank of China was repaid, UBS would stop selling the shares, thus permitting Tele-Art to retain as many Nam Tai shares for its own benefit as possible.

Significantly, UBS stated in the letter agreement that:

[P]rior to accepting the shares for liquidation we require irrevocable instructions signed by Tele-Art and Robert Yuen allowing [UBS] to sell sufficient shares to satisfy the indebtedness specified in the [BVI High Court order]. . . . Specifically as follows:

- (i) the indebtedness to the Bank of China . . . ;
- (ii) the judgment debt to Nam Tai Electronics, Inc., . . . and
- (iii) the sum of \$90,000 to be paid into the [BVI High Court].

By signing below, you irrevocably authorize [UBS] to disburse funds according to the [BVI High] Court Orders.

Our receipt of these authorizations will allow us to give Nam Tai Electronics Inc. the assurances they require in order to release the shares to [UBS].

(Tele-Art/UBS, Oct. 31, 1997, Letter Agr., at 2.)

Tele-Art and Yuen countersigned the letter agreement, indicating their agreement with the terms set forth by UBS.

Therefore, as it represented to Nam Tai in the October 31, 1997, letter, UBS indeed had irrevocable instructions from Tele-Art to sell sufficient Nam Tai shares to satisfy Tele-Art's debts to the Bank of China, Nam Tai, and the BVI High Court, and to disburse the funds directly to these creditors, in compliance with the BVI High Court order. Pursuant to Tele-Art's irrevocable instructions and the BVI High Court order, UBS could not sell the shares at a price below \$17 a share, even if later given contrary instructions by Tele-Art. Tele-Art's irrevocable instructions also divested Tele-Art of its right to transfer any of its shares to another broker or to disburse the sale proceeds to anyone other than the three creditors named in the BVI High Court order.

Nothing in the letter agreement may be held to demonstrate that Nam Tai reasonably relied on any representations by UBS that it would sell the shares "immediately" and for the "joint and several benefit" of the Bank of China, Nam Tai, and the BVI High Court. Pursuant to the terms of the BVI High Court order, which were well known to Nam Tai, the shares could not be sold until they were transferred in accordance with joint instructions from the three creditors and unless the price was more than \$17 per share. Further, the order required that the Bank of China be accorded priority of payment.

Inasmuch as the newly discovered evidence is entirely consistent with, and supports, UBS's representations in the October 31, 1997, letter to Nam Tai, the motion to renew that

branch of the UBS's prior motion to dismiss the fraud claim is denied.

For this reason as well, that branch of the motion in which Nam Tai seeks to assert a second amended complaint adding a new fraud claim based on the newly discovered evidence is denied. While leave to amend a pleading shall be freely granted (Fahey v County of Ontario, 44 NY2d 934 [1978]; see CPLR 3025 [b]), where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit, leave to amend will be denied (Thomas Crimmins Contr. Co. v City of New York, 74 NY2d 166 [1989]; see Kerusa Co. LLC v W10Z/515 Real Estate, L.P., 10 Misc 3d 929 [Sup Ct, NY County 2005]; CPLR 3211 [e] [when pleadings sought to be amended have been properly dismissed pursuant to CPLR 3211 (a), "leave to plead again shall not be granted unless the court is satisfied that the opposing party had good ground to support his cause of action or defense"])).

The court notes that the proposed second amended complaint submitted by Nam Tai includes breach fiduciary duty and breach of contract claims identical to those dismissed by the court in the prior order. In its motion, Nam Tai fails to present any ground for reinstatement of these claims. Therefore, leave to amend to add these claims is denied.

Next, the parties dispute whether the court properly denied that branch of UBS's prior motion to dismiss the third-party beneficiary claim. Specifically, UBS contends that the court overlooked both UBS's argument that Nam Tai failed to establish

its right to enforce the Tele-Art/UBS October 30, 1997, letter agreement and that, under controlling principles of law, Nam Tai is an incidental, rather than an intended, beneficiary of the letter agreement.

In the prior order, the court found the third-party beneficiary claim to be legally cognizable on the ground that, pursuant to case law and section 302 of the Restatement (Second) of Contracts, the documentary evidence demonstrated the existence of an agreement with Tele-Art by UBS to act directly, or for the benefit of, Nam Tai.

"A party asserting rights as a third-party beneficiary must establish '(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost' " (State of Cal. Public Employees' Retirement Sys. v Shearman & Sterling, 95 NY2d 427, 434 [2000], quoting Burns Jackson Miller Summit & Spitzer v Lindner, 59 NY2d 314, 336 [1983]; Restatement [Second] of Contracts § 302).

Section 302 (1) (b) of the Restatement (Second) of Contracts provides, in relevant part, that "[u]nless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . the circumstances indicate that the promisee

intends to give the beneficiary the benefit of the promised performance."

Here, in the letter agreement and its November 5, 1997, letter to the Bank of China, UBS expressly acknowledged its obligation to sell the Nam Tai shares held by Tele-Art in sufficient quantity and at a price exceeding \$17 per share to satisfy Tele-Art's debts to the Bank of China, Nam Tai, and to the BVI High Court, in accordance with the BVI High Court order issued in bankruptcy related proceedings initiated by Tele-Art's creditors, including Nam Tai (see Matter of Tele Art Inc., High Court of Justice, BVI, suit no. 69 of 1997; Matter of Tele Art Inc., High Court of Justice, BVI, suit no. 196 of 1993). In addition, UBS expressly agreed to disburse the proceeds directly to the Bank of China, Nam Tai, and to the BVI High Court. UBS also acknowledged its understanding that the shares would be provided to it pursuant to the joint instructions of Bank of China, Tele-Art and Nam Tai.

Moreover, UBS corresponded with Nam Tai directly on several occasions regarding its obligations under the letter agreement and the BVI High Court order. In its October 31, 1997, letter to Nam Tai, UBS confirmed that it had received irrevocable instructions from Tele-Art permitting it to sell the shares and disburse the proceeds to Nam Tai, in addition to the Bank of China and the BVI High Court, in accordance with that court's order.

In these circumstances, and in the absence of a declaration

by UBS that it is an independent agent and not Nam Tai's agent (see State of Cal. Public Employees' Retirement Sys. v Shearman & Sterling, 95 NY2d 427, supra; Restatement [Second] of Contracts § 302 [1]), Nam Tai has established its right to proceed as an intended beneficiary of the letter agreement.

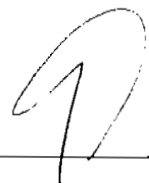
UBS's reliance on Fourth Ocean Putnam Corp. v Interstate Wrecking Co. (66 NY2d 38 [1985]) is misplaced. The circumstances underlying that action are inapposite to the circumstances presented here. In Fourth Ocean, the Court held that the owner of a hotel severely damaged by fire was an incidental, rather than an intended, beneficiary of a contract between the village and a wrecking company to demolish the hotel (id.). The court based its holding on circumstances demonstrating that the owner's reliance on the contract could not have been reasonable or probable, such as that the work was performed to remedy the owner's default in removing the hotel pursuant to court order and to protect the public against a public nuisance (id.). Here, there is no dispute that Nam Tai took an active role in ensuring that UBS would abide by the BVI High Court order and received such assurances directly from UBS. Further, as detailed above, Nam Tai's right to payment upon sale of the shares and after satisfaction of Tele-Art's debt to the Bank of China is expressly made a part of the letter agreement which Nam Tai now seeks to enforce.

For these reasons, UBS has failed to demonstrate that the court overlooked or misapprehended the relevant facts, or

misapplied any controlling principle of law (see Foley v Roche, 68 AD2d 558, supra). Therefore, the motion to reargue is denied.

Accordingly, motion sequence number 011 and motion sequence number 012 are denied.

Dated: February 2, 2007



J.S.C.

HON. CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

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FEB 16 2007
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