

Attentus Mgt. Group, LLC v UBS Sec., LLC
2008 NY Slip Op 31425(U)
May 15, 2008
Supreme Court, New York County
Docket Number: 0603264/2007
Judge: Helen E. Freedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Helen E. Freedman
Justice

PART 39

Index Number : 603264/2007

ATTENTUS MANAGEMENT GROUP, LLC

INDEX NO. _____

vs

UBS SECURITIES LLC

MOTION DATE _____

Sequence Number : 002

MOTION SEQ. NO. _____

DISMISS

C

MOTION CAL. NO. _____

is 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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

MAY 21 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: May 15 2008

Helen E. Freedman J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

PERSONAL IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 39

-----x
ATTENTUS MANAGEMENT GROUP, LLC,
and FSI REALTY FUNDING, INC.,
Plaintiffs

Index No.: 603264/07

-against-

DECISION AND ORDER

UBS SECURITIES, LLC,

Defendant.

-----x
FREEDMAN, J.

FILED
MAY 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

FACTUAL BACKGROUND

Plaintiffs instituted this action based on an alleged breach of a contract designed to effectuate a structured finance transaction. Plaintiffs have alleged eight causes of action: First cause of action: Breach of contract; Second cause of action: Breach of covenant of good faith and fair dealing; Third cause of action: Fraudulent inducement; Fourth cause of action: Breach of fiduciary duty; Fifth cause of action: Tortious interference; Sixth cause of action: Specific performance; Seventh cause of action: Declaratory judgment; Eighth cause of action: Unjust enrichment. Defendant moves to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7). The court grants defendant's motion in its entirety.

Plaintiff Attentus Management Group, LLC (Attentus) and defendant UBS Securities LLC (UBS) entered into several

agreements between January, 2007, and June, 2007, to effectuate a structured finance transaction. Pursuant to a separate Risk Sharing Agreement, plaintiff FSI Realty Funding, Inc. (FSI) was included in the arrangement.

A structured finance transaction, sometimes referred to as a securitization of receivables, involves an entity purchasing the debt obligations of a business and then either it or another organization packaging groups of these obligations for sale to investors. In this fashion the entity that sells the debt obligations acquires immediate cash, and the entity that packages the obligations is reimbursed for the purchase of the debt from the sale to investors. Furthermore, the packaging entity receives a fee for managing the securities, and the investors receive dividends as interest on the debt obligation is paid.

In the instant case, Attentus entered into an agreement with UBS in which the latter agreed to acquire the debt obligations in the form of mortgages and Real Estate Investment Trusts, and maintain them on their books (known as warehousing) for Attentus' benefit until the total value of the securities obtained reached \$750 million. After this accumulation period, provided that the debt securities were investment-grade rated, the debt securities were to be packaged into two collateralized debt obligations (CDO) and sold to investors.

The agreements that form the basis of this lawsuit fall into three categories: two Engagement Letters and Warehouse Agreements (one for each CDO to be formed), and a Risk Sharing Agreement. These agreements were subsequently modified by an Omnibus Amendment Agreement on August 23, 2007.

According to the Warehouse Agreements, Attentus, as the eventual manager of the CDOs (called the Collateral Manager), was to select the realty debt obligations to be included in the warehoused portfolio. Once the obligations were selected, "UBS shall purchase any ... obligation identified by the Collateral Manager at a price no greater" than the maximum price indicated by Attentus. (¶2(A), Warehouse Agreements).

At the point at which the portfolio reached its contemplated dollar value accumulation, the portfolio would be sold at par value to a separate "Issuer" which would arrange for the sale of these CDOs to investors as equity and debt-related securities.

To pay for the securities as they were being warehoused, Attentus agreed to pay graduated amounts of cash deposits to UBS which increased as assets were accumulated. Under the Risk Sharing Agreement, FSI was similarly required to pay UBS graduated amounts of cash deposits. The deposits so made were deemed to be applicable to any Net Losses suffered by UBS in its acquisition of the obligations for Attentus' account by giving

UBS a first priority security interest in the deposits. (§13 of the Warehouse Agreements, §9 of the Risk Sharing Agreement).

This financial obligation on the part of Attentus and FSI was modified in §3 of the Omnibus Amendment Agreement by having Attentus and FSI collectively deposit an additional \$11 million with UBS. UBS claims that this \$11 million was a reduction in what plaintiffs were obligated to pay as cash deposits, whereas plaintiffs maintain that this represented an amount over and above their initial contractual obligations.

The Engagement Letters indicate that Attentus was to be compensated for acting as senior management of the CDO, and UBS was to be paid a fee for its services in connection with the issuance of the CDO, plus a structuring and placement fee. Under the Risk Sharing Agreement, FSI agreed to assume up to 80% of the risk assumed by UBS pursuant to the Warehouse Agreements.

By the end of July, 2007, pursuant to these various agreements, UBS had acquired a combined total of \$475 million in assets for the portfolios and plaintiffs had made combined cash deposits of \$43,632,050.00.

According to plaintiffs, on July 23, 2007, they met with representatives of Kodiak Funding, LP (Kodiak). Kodiak was structuring a CDO of its own and was looking for additional securities to complete its portfolio. Kodiak allegedly told plaintiffs that it wished to purchase particular securities from

plaintiffs' warehouse portfolio held by UBS. In consideration of Kodiak acquiring these securities, it would sell securities to plaintiffs at par to help the ramp-up of plaintiffs' CDOs. To facilitate this exchange, plaintiffs and Kodiak entered into a confidentiality agreement on July 25, 2007, and UBS was notified of this agreement.

The instant lawsuit is based on the sale of these securities by UBS to Kodiak. In the amended complaint, plaintiffs allege that because of failing market conditions, UBS "secretly" sold the securities to Kodiak in a private sale without plaintiffs' consent and without allowing plaintiffs to enter into the bidding. Plaintiffs allege, among other things, that by privately selling the securities to Kodiak UBS breached its agreements with plaintiffs because plaintiffs were not permitted to bid on them. Further, plaintiffs assert that the sale to Kodiak constituted a tortious interference with contract between plaintiffs and Kodiak pursuant to the above-referenced confidentiality agreement.

According to the liquidation provisions of the Warehousing Agreements, sections 5 and 6, either Attentus or UBS could determine that the securities no longer qualify for the portfolio because of eligibility criteria and therefore should be sold off. Under Section 6, if Attentus makes such determination it "shall" so notify UBS, but if the determination of ineligibility is made

by UBS, UBS "may" so notify Attentus. After such determination, "UBS shall have the right to direct such sale on such terms and in such manner and at such time that it deems appropriate in its sole discretion. In addition ... , UBS will include [Attentus] and/or FSI Realty or any of their affiliates as a bidder in any auction of such Collateral Obligation." (§7).

Plaintiffs further allege that UBS, because of internal financial problems which it did not divulge to plaintiffs, did not intend to honor its commitments and, by not disclosing such intention, induced plaintiffs to enter into the Omnibus Amendment Agreement to their detriment.

UBS has moved to dismiss this action pursuant to CPLR 3211 (a) (1) and (7). UBS' motion with respect to each of the eight causes of action enumerated in the complaint will be discussed sequentially.

DISCUSSION

CPLR 3211 (a), Motion to dismiss cause of action, states that "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

- (1) a defense is founded upon documentary evidence; or ...
- (7) the pleading fails to state a cause of action

Under CPLR 3211 (a) (1) a dismissal is permissible only when the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law. *Leon v Martinez*, 84 NY2d

83 (1994). As stated in *Ladenberg Thalmann & Co., Inc. v Tim's Amusements, Inc.*, 275 AD2d 243, 246 (1st Dept 2000),

The court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory (*Leon v. Martinez*, 84 NY2d 83, 87-88 (1994)). Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*Id.* at 88).

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211 (a) (1), the opposing party need only assert facts which "fit within any cognizable legal theory." *Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188 (1st Dept 1999). Further, if any question of fact exists with respect to the meaning and intent of the contract in question, based on the documentary evidence supplied to the motion court, a dismissal pursuant to CPLR 3211 (a) (1) is precluded. *Khayyam v Doyle*, 231 AD2d 475 (1st Dept 1996).

Applying these standards, the court will address each of the eight causes of action identified by the plaintiffs.

First Cause of Action: Breach of Contract

The thrust of plaintiffs' argument is that UBS violated the terms of the Warehouse Agreement by not permitting them to bid for the securities sold to Kodiak, or at least allowing them a right of first refusal. This sale, which plaintiffs assert was

held without their knowledge or consent, allegedly resulted in the securities being sold at a \$13 million loss.

UBS states that the words of the Agreement are unequivocal in giving it the sole discretion to determine the manner of sale of the securities. UBS further argues that section 7(A) [quoted above] only permits plaintiffs to bid on the liquidated securities if an auction is held, but does not require UBS to sell the securities at an auction.

According to section 6 of the Warehouse Agreement (quoted above), UBS was not required to notify Attentus of its proposed sale; the notice requirement adhered to Attentus, not UBS

It is a settled rule that whether a contract is ambiguous is a question of law to be decided by the court. *Bailey v Fish & Neave*, 8 NY3d 523 (2007); *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157 (1990).

Looking at the documents in a light most favorable to the non-moving party, the court concludes that UBS did not act contrary to its contractual rights. It was not required to notify Attentus of the proposed sale, nor was it required to sell the securities in an auction. None of the contracts forming the basis of this lawsuit state that Attentus is to be given a right of first refusal on any warehoused securities sold by UBS. Therefore, defendant's motion to dismiss the first cause of action for breach of contract must be granted.

Second Cause of Action: Breach of Covenant of Good Faith and Fair Dealing

As stated by the court in *The Hawthorne Group, LLC v RRE Ventures* (7 AD3d 320, 323 [1st Dept 2004]),

A cause of action for breach of the implied duty of good faith and fair dealing cannot be maintained where the alleged breach is 'intrinsically tied to the damages allegedly resulting from a breach of the contract' [citations omitted].

According to §1 (b) of the Engagement Letters, UBS' role in the warehousing was to include:

(I) assisting [Attentus] in structuring the Transaction contemplated hereunder, (ii) preparing a time and responsibility schedule for the Transaction promptly after the date hereof, (iii) advising and assisting the Issuer and [Attentus] in the process of obtaining ratings on the Notes, (iv) obtaining third party credit enhancement, if necessary, (v) advising the issuer in the preparation of the offering materials, (vi) advising [Attentus] in designing a hedging strategy for the Issuer, (vii) preparation of portfolio analysis, cash flow models and sensitivity analyses and, (viii) financing the acquisition of Collateral during the warehouse phase

Section 2 of the Omnibus Amendment Agreement states that UBS will be confirmed to act as the exclusive structuring and warehousing entity, lead placement agent and sole book runner in connection with the CSOs to be issued.

Plaintiffs have not alleged the violation of any duty specified in the above-cited contracts, nor have they demonstrated that UBS assumed a duty separate or distinct from

those contractual obligations. Consequently, this cause of action must be dismissed.

Third Cause of Action: Fraudulent Inducement

As stated by the court in *Friedman v Anderson* (23 AD3d 163, 166 [1st Dept 2005]),

"[a] mere recitation of the elements of fraud is insufficient to state a cause of action" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Christopher Assoc.*, 257 AD2d 1, 9) Furthermore, a plaintiff seeking to recover for fraud and misrepresentation is required "to set forth specific and detailed factual allegations that the defendant personally participated in, or had knowledge of any alleged fraud" (*Handel v Bruder*, 209 AD2d 282, 282-283 [1994]).

CPLR 3016 (b) requires that the complaint set forth the misconduct complained of in sufficient detail to clearly inform each defendant of what their respective roles were in the alleged deception.

In the instant matter plaintiff's allegations of fraud are conclusory and lack sufficient particularity to satisfy the requirements of CPLR 3016 (b). "The mere assertion that the contracting parties did not intend to meet their contractual obligations does not convert a cause of action for breach of contract into one for fraud." *767 Third Avenue LLC v Greble & Finger, LLP*, 8 AD3d 75, 76 (1st Dept 2004); *Modell's N.Y. Inc. v Noodle Kidoodle, Inc.*, 242 AD2d 248 (1st Dept 1997). Accordingly, the fraud cause of action is dismissed.

Fourth Cause of Action: Breach of Fiduciary Duty

In order for a cause of action for breach of a fiduciary duty to survive a motion to dismiss pursuant to CPLR 3211, the complaint must set forth allegations that create a relationship of trust greater than would be created by the contractual relationship between the parties. *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11 (2005) (underwriter under no special fiduciary duty other than that imposed by its contractual relation as an underwriter). Generally, where a contract exists, the courts look to the agreement to discover the nexus of the parties' relationship and, if the parties do not create a relationship of higher trust than that indicated in the contract, the court should not fashion a stricter duty for them. *Id.*

In the case at bar, the relationship and duties of each of the parties is specified in the various contracts subject to this suit, and no fiduciary relationship above the contractual one exists (see the above discussion on the second cause of action). Therefore, plaintiffs' cause of action for breach of a fiduciary duty is overridden by the basic breach of contract claim and this cause of action should be dismissed.

Fifth Cause of Action: Tortious Interference

The elements necessary for a claim for tortious interference with contract are: (1) the existence of a contract between plaintiff and a third party, (2) defendant's knowledge of the

contract, (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible, and (4) damages to plaintiff. *Kronos, Inc. v AVX Corp.* (81 NY2d 90 [1993])

Since there was no contract with a third-party that UBS allegedly interfered with, plaintiffs cannot maintain this cause of action. *NBT Bancorp Inc. v Fleet/Norstar Financial Group, Inc.*, 87 NY2d 614 (1996).

Sixth Cause of Action: Specific Performance

In its motion, UBS argues that because it believes there is no breach of contract and the court will summarily dismiss the action, it has no need to argue the merits of this cause of action which is founded on the breach of contract claim. In its opposition, plaintiffs state the requirements for a court to award specific performance, but merely make a conclusory statement that monetary damages would be insufficient to compensate them.

Generally, specific performance will not be available where money damages are adequate to protect the interests of the allegedly injured party. *Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409 (2001).

Because plaintiffs are asking for a monetary award for the alleged breach, this cause of action is moot and UBS' motion to dismiss this cause of action is granted.

Seventh Cause of Action: Declaratory Judgment

As stated in *Walsh v Andorn* (33 NY2d 503, 506 [1974]), "[a] declaratory judgment should not be rendered unless it will serve some useful purpose to the parties [citations omitted] ... where there is no necessity for resorting to the declaratory judgment it should not be employed [citations omitted]."

In the complaint, plaintiffs request the declaratory judgment to determine that the cash deposits they made to UBS belong to them and should be returned to them. This is the identical relief plaintiffs seek with respect to their cause of action for breach of contract. Since the prayed for relief is identical for both causes of action, no useful purpose is served by permitting the cause of action for a declaratory judgment to go forward. Therefore, UBS' motion to dismiss this cause of action is granted.

Eighth Cause of Action: Unjust Enrichment

The existence of a valid contract bars a cause of action in quantum meruit or unjust enrichment. *The Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320 (2004); see also *Sheiffer v Shenkman Capital Mgt.*, 291 AD2d 295 (1st Dept 2002). This cause of action is, therefore, dismissed.

CONCLUSION

It is ORDERED that the motion to dismiss is granted and the complaint 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: May 15, 2008



HELEN E. FREEDMAN, J.S.C.

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