

**Nam Tai Elects., Inc. v UBS Painewebber
Inc.**

2008 NY Slip Op 33233(U)

May 15, 2008

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: **CHARLES E. RAMOS**
Justice

PART 53

NAM TA

INDEX NO.

602976/03

MOTION DATE

12/18/07

MOTION SEQ. NO.

014

MOTION CAL. NO.

UBS

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

Motion is decided in accordance with
accompanying Memorandum Decision

FILED
MAY 23 2008

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 5/15/08

[Signature]
HON. CHARLES E. RAMOS 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: COMMERCIAL DIVISION
-----X
NAM TAI ELECTRONICS, INC.,

Plaintiff,

-against-

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

Defendant.
-----X

Index No.
602976-3

FILED
MAY 23 2008
COUNTY CLERK'S OFFICE
NEW YORK

Charles Edward Ramos, J.S.C.:

Defendant UBS Financial Services (named as UBS PaineWebber Incorporated a.k.a. UBS Wealth Management USA (UBS) moves for summary judgment (CPLR 3212) dismissing plaintiff Nam Tai Electronic Inc.'s (Nam Tai) first cause of action for breach of contract based on Nam Tai's status as an intended third party beneficiary, the sole remaining claim in this action.

Background¹

Nam Tai, a British Virgin Islands (BVI) corporation, alleges that in 1997, UBS, a stock brokerage firm, breached contractual and fiduciary obligations owed to it directly and as a third party beneficiary, to sell 375,727 shares of Nam Tai common stock owned by non-party Tele-Art, Inc. Tele-Art had retained UBS in 1997 to sell the Nam Tai shares in order to comply with an order (Order) of the BVI High Court, in connection with Tele-Art's bankruptcy proceedings. In the Order, Tele-Art was directed to sell the Nam Tai shares at a minimum of \$17 per share, in order

¹ The underlying facts and procedural history are fully set forth in the Court's prior decisions and orders and will not be repeated herein, except to the extent necessary for clarification.

to satisfy Tele-Art's indebtedness to the Bank of China (BOC) in the amount of \$5,406,081.10, to Nam Tai, in the amount of \$931,908.52, and other fees to the BVI High Court in the amount of \$90,000, with priority accorded to BOC (Exhibit B, annexed to the Amended Complaint). As to the manner of sale, the Order stated,

"The sale of said initial quantities of shares and payment to Bank of China and the Petitioner [Nam Tai] shall take place immediately ... Upon the joint instructions of the Bank of China, the Petitioner [Nam Tai] and Respondent [Tele-Art] herein the share certificates of the Respondent in Nam Tai Electronics Inc. which are now in the possession of the stock transfer agent shall be delivered to the broker aforesaid [UBS]" (*id.*).

UBS agreed to dispose of the Nam Tai shares in accordance with the Order, and on October 30, 1997 confirmed its obligations (October 30 Letter),

"We hereby acknowledge and declare that the [Nam Tai] Shares are held in trust by us for the specific purposes set out in the Order being settlement of indebtedness owing by Tele Art Inc. to Bank of China, Nam Tai Electronics, and The High Court of the British Virgin Islands, with the Bank of China in priority, in accordance with the Order" (Amended Complaint, ¶ 4).

In another letter dated the following day, UBS acknowledged that the Nam Tai shares were subject to the Order, and that it had "received irrevocable instructions from Tele-Art Inc. allowing us to sell sufficient [Nam Tai] shares and disburse the proceeds necessary to satisfy" the indebtedness to BOC, Nam Tai, and the High Court of BVI (October 31 Letter) (Amended Complaint, ¶ 7). Further, UBS stated in the October 31 Letter,

"It is our intent to adhere to the terms of the Court orders ... We do not anticipate any deviation from the terms of the Court Orders" (*id.*).

UBS began selling the Nam Tai shares on November 17, 1997, the first business day after receiving the stock certificates from the stock transfer agent (UBS's Rule 19-A Statement, ¶ 13). On November 19, 1997, Nam Tai wrote to UBS, and expressed concern that UBS had not effected the "immediate" sales of all of the shares, and had only sold a total of 20,000 (Amended Complaint, ¶ 11).

Nam Tai alleges that, despite receiving irrevocable instructions from Tele-Art to "immediately" sell the Nam Tai shares in accordance with the Order, the true reason for UBS's delay in selling is that it was engaging in secret negotiations with BOC and Tele-Art. Nam Tai alleges that UBS agreed to conditions that were inconsistent with the Order, including that the Nam Tai shares would not be sold "immediately" but would be sold at "the end of November" (Amended Complaint, ¶¶ 8-10). Tele-Art and BOC were allegedly motivated in delaying the sale of the Nam Tai shares in the hope that the price would increase, and fewer shares would have to be sold to satisfy Tele-Art's indebtedness.

From November 17, 1997 until December 10, 1997, UBS effected sales of a total of 67,500 shares. After December 10, 1997, UBS alleges that the price of Nam Tai shares dropped below \$17, precluding it from selling any additional shares.

On March 10, 1998, the BVI High Court vacated the original Order, and authorized Tele-Art to sell the remaining shares without any price restriction. On April 3, 1998, UBS advised

Tele-Art, BOC and Nam Tai that it was resigning as the designated broker. UBS transferred the unsold shares to the stock transfer agent, who, in turn, transferred the shares to Nam Tai.

After Nam Tai obtained possession of the shares, it attempted to redeem a portion of them. That redemption was subsequently invalidated by the BVI appellate court. Ultimately, Nam Tai received no recovery from Tele-Art.

Nam Tai instituted this action against UBS, and alleged four causes of action, for breach of contract based upon Nam Tai's status as a third party beneficiary, breach of fiduciary duty, fraud, and breach of contract.

On July 13, 2006, this Court dismissed all of the causes of action contained in the amended complaint, with the exception of first cause of action for breach of contract based upon Nam Tai's claimed status as a third-party beneficiary of the UBS/Tele-Art Agreement. The Court reasoned that Nam Tai had sufficiently alleged that it was an intended, albeit one of several, beneficiaries of the October 31 Letter, that constituted an enforceable agreement, and that it was premature to determine if Nam Tai had sustained any compensable damage stemming from UBS' alleged delay in selling the shares (Order, 10).

The Appellate Division affirmed the dismissal of the causes of action for breach of contract, breach of fiduciary duty and fraud (*Nam Tai Electronics, Inc. v UBS Painewebber Inc.*, 46 AD3d 486 [1st Dept 2007]).

Discussion

UBS moves for summary judgment dismissing the sole remaining cause of action for breach of contract based upon Nam Tai's claimed status as third-party beneficiary, on the ground that Nam Tai failed to raise a triable issue of fact that an enforceable contract was breached, and upon the doctrine of failure to mitigate damages.

In opposition, Nam Tai argues that the evidentiary record demonstrates that UBS breached its agreement with Tele-Art to dispose of the sales immediately in accordance with the Order. Alternatively, Nam Tai argues that issues of fact remain as to whether UBS complied with Tele-Art's instructions to sell the shares.

An intended beneficiary may recover for breach of the agreement that was created for its benefit. Axiomatic to this theory of recovery is the occurrence of an actual breach of the underlying agreement (see e.g. *Flack v Friends of Queen Catherine Inc.*, 139 F Supp 2d 526, 539 [SD NY 2001]). For the reasons set forth below, the Court determines that, because Nam Tai fails to raise a triable issue that UBS breached any of its obligations to dispose of the shares in accordance with the Order, the motion for summary judgment is granted.

The evidentiary record demonstrates that UBS complied with its obligations to dispose of the shares in accordance with the Order. While Nam Tai argues that UBS could have begun selling the shares as early as October 8, 1997, when the minimum price of \$17 was purportedly achieved, the record demonstrates that UBS

began selling the shares on the first business day after receiving the stock certificates from the stock transfer agent, on November 17, 1997 (*compare* UBS's Rule 19-A Statement, ¶ 17 with Nam Tai's Response).

Moreover, in order for UBS to obtain the stock certificates from the stock transfer agent, BOC, Tele-Art and Nam Tai were required to issue instructions to the stock transfer agent, as reflected in the language of the Order itself (Order, ¶ 2, "Upon the joint instructions of the Bank of China, the Petitioner [Nam Tai] and the Respondent [Tele-Art] herein the share certificates of the Respondent in Nam Tai Electronics Inc. which are now in the possession of the stock transfer agent shall be delivered to the broker aforesaid"). Incidentally, Nam Tai was the last to issue instructions to the stock transfer agent directing the transfer of the certificates to UBS. Tele-Art issued its instructions to the stock transfer on October 28, and BOC issued its instructions on November 7 (UBS's Rule 19-A Statement, ¶¶ 14, 15). Further, Nam Tai issued instructions to the stock transfer agent only after UBS sent an urgent letter on November 10 requesting that Nam Tai issue its instructions (*compare* UBS's Rule 19-A Statement, ¶ 16 with Nam Tai's Response). Accordingly, the court is persuaded that UBS could not have begun selling the shares earlier than November 17, 1997.

Furthermore, Nam Tai fails to raise a triable issue of fact that UBS breached its obligations to Tele-Art by failing to sell all of the shares on the date that the minimum price of \$17 was

achieved. Such an obligation was not imposed in the BVI High Court's Order, nor does it appear in the October 30 Letter, or any other correspondence exchanged between the various parties. As to the manner of sales, the Order only directed that "initial quantities of shares and payments ... shall take place immediately" (Order, ¶ 1 [b]), thereby undermining Nam Tai's argument that all the shares held by UBS were to be sold in a single day that the share price reached \$17. In any event, disposing of all of the Nam Tai shares on one day would likely depress the market price for Nam Tai shares, that would ultimately harm Nam Tai.

Nam Tai additionally argues that UBS breached instructions issued by Tele-Art in late February of 1998, that contained a standing order to sell 10,000 shares if the share price reached \$17; to sell 20,000 Nam Tai shares if the share price exceeded \$17.50; and to sell 30,000 shares if the share price rose to \$18 (December 18, 2007 Transcript, 36). Even assuming *arguendo* that UBS failed to effect the sales accordingly, Nam Tai fails to raise a triable issue of fact that UBS's breach directly caused it injury, i.e., that UBS's failure to dispose of the shares in accordance with these instructions, caused it not to realize any value from the sale of the shares (Amended Complaint, ¶ 1).

In order to satisfy the damages element of a cause of action for breach of contract, a plaintiff must demonstrate that the breach "directly and proximately" caused its injury (*Weiss v TD Waterhouse*, 45 AD3d 763, 764 [2d Dept 2007], *lv denied* 10 NY3d

705 [2008]).

According to Nam Tai's own expert report, subsequent to Tele-Art's issuance of these instructions in late February until UBS resigned on April 3, the closing price of Nam Tai shares only reached \$17 on one day, and reached \$17.50 on two days (Exhibit 1, annexed to the Affirmation of Ridley Whitaker, Esq.). Consequently, the potential financial recovery from selling Nam Tai shares under these instructions would not have exceeded \$1.1 million. Such recovery would have been insufficient to pay off the \$5,406,081.10 debt to Tele-Art's senior creditor, BOC, a possibility expressly contemplated in the Order (see Order, ¶ 1 [c], "The proceeds of the said initial quantities of shares shall be applied firstly to satisfy the Judgment/Debtor's indebtedness to Bank of China and thereafter to satisfy the judgment debt of the Petitioner [Nam Tai]"). Therefore, even if UBS effected sales in mid-March of 1998, all of the proceeds would have gone to BOC, and Nam Tai would not have realized any financial gain, thereby undermining its argument that UBS's failure to effect sales caused it financial harm.

Finally, Nam Tai's last ditch attempt to argue an un-pleaded cause of action for breach of UBS's obligations as a trustee under BVI law, is unpersuasive. Nam Tai's newly fashioned argument is merely a thinly guised attempt to re-plead its claim for breach of fiduciary duty, that was dismissed by this court (July 13, 2006 Decision), and affirmed by the Appellate Division (*Nam Tai Electronics, Inc.*, 46 AD3d 486). Therefore, because no

triable issues of fact remain that would warrant a trial
(*Guiffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]), UBS's
motion for summary judgment is granted.

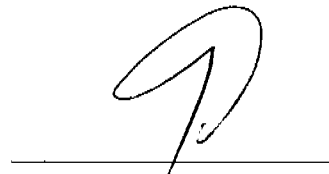
Accordingly, it is

ORDERED that defendant UBS Financial Services (named as UBS
PaineWebber Incorporated a.k.a. UBS Wealth Management USA's
motion for summary judgment is granted, and it is further

ORDERED that the Clerk is directed to enter judgment in
favor of the defendant accordingly.

Dated: May 15, 2008

ENTER:



J.S.C.

HON. CHARLES E. RAMOS

FILED
MAY 23 2008
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NEW YORK