

Colbalt Partners, L.P. v GSC Capital Corp.
2009 NY Slip Op 30213(U)
January 16, 2009
Supreme Court, New York County
Docket Number: 602964/07
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 602964/2007

COBALT PARTNERS, L.P.

vs

GSC CAPITAL CORP.

Sequence Number : 003

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

*Motion is decided in accordance with
accompanying Memorandum Decision*

FILED

FEB 02 2009

COURT OF APPEALS
CLERK

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

Dated: 1/23/09

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
COBALT PARTNERS, L.P., COBALT
OFFSHORE FUND LTD., HFR HE VALUE
MASTER TRUST and GUGGENHEIM
PORTFOLIO COMPANY XI, LLC,

Plaintiffs,

Index No. 602964/07

-against-

GSC CAPITAL CORP., GSCP (NJ), L.P. and
GSC GROUP, INC. (f/k/a GSC PARTNERS),

Defendants.

FILED
FEB 02 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----X
Charles Edward Ramos, J.S.C.:

Defendants GSCP (NJ), L.P. (Manager) and GSC Group, Inc. (Group) move to dismiss all causes of action asserted against them in the second amended complaint (SAC) pursuant to CPLR 3211 (a) (1), (5), and (7).

Background

The facts set forth herein are taken from the allegations of the SAC, and are assumed to be true for the purposes of this motion.

Plaintiffs Cobalt Partners, L.P., Cobalt Offshore Fund Ltd., HFR HE Value Master Trust, and Guggenheim Portfolio Company XI, LLC (together, Cobalt) bring this action to rescind the private placement purchase of \$4 million of restricted stock of GSC Capital Corp. (the Fund¹), stemming from the alleged breach of an oral contract, breach of the terms of an offering memorandum

¹ GSC Group is the parent company of defendant GSCP (NJ), L.P. (the Manager), that is the Fund's investment manager.

and registration rights agreement, and for fraud in the inducement and fraudulent omissions.

Group formed the Fund in May 2005 for the purpose of investing in real estate securities. Group, an SEC-registered investment advisor, solicited capital through the sale of restricted stock and debt offering, which it sought to manage and invest in real estate-related securities. Group launched the Fund by soliciting the sale of 3.4 million restricted shares (Restricted Shares) of stock and convertible notes (Notes) to investors, including Cobalt. The Fund itself has no employees, but has a board of directors, an investment manager (the Manager), and is otherwise operated as a passive investment entity.

Cobalt purchased common stock of the Fund in a private placement in June 2005, prior to the Fund's issuing its offering memorandum (Offering Memorandum) on June 23, 2005, and a registration rights agreement (RRA), dated July 11, 2005. Prior to the purchase by Cobalt, Group orally represented and agreed that it would use commercially reasonable efforts to cause a registration statement to become effective within six months of the private placement so that Cobalt, and others, could sell the Restricted Shares in a public offering. This representation was purportedly material to Cobalt in its decision to buy the Fund's Restricted Stock, because absent an effective registration statement, the Restricted Stock could not be sold and thus, there would be no liquidity event enabling Cobalt to get out of its

investment.

The Offering Memorandum issued thereafter, merely obligates the Fund to cause a registration statement to be filed and made effective. The RRA also obligates the Fund to file and make effective a registration statement, and conditions the Fund's payment of fees upon its effective filing (RRA, 20). No obligation of Group is set forth in the Offering Memorandum.

The private placement closed on July 11, 2005. Approximately six months later, a pro-forma registration statement was filed with the SEC. On December 6, 2007, Group withdrew the pro-forma registration statement for a public offering of the Fund's stock.

According to Cobalt, Group knew that its representations during the solicitation process were false and incomplete, and it failed to use commercially reasonable efforts to cause the registration statement to become effective. Group knew at the time that it made the oral representations to Cobalt to induce its investment, that it would not file the registration statement if the public offering was less than \$25 per share.

Since withdrawing the pro-forma registration statement on December 6, 2007, the Fund has failed to make required interest payments on the Notes, and is purportedly insolvent.

Previously, on March 31, 2008, this Court denied GSC's motion to dismiss the complaint with leave to plaintiffs to replead with particularity. Cobalt then served the SAC and added causes of action for breach of oral contract and fraud/fraudulent

omission against Group. Because of the service of the amended complaint which was ordered to remedy a hopelessly confusing state of the pleadings, this Court will address all substantive arguments without regard to prior motion practice.

Discussion

Breach of Contract

Group moves to dismiss the cause of action for breach of an oral contract on the ground of impossibility, the doctrine of indefiniteness, lack of consideration and the Statute of Frauds.

Cobalt alleges that an oral contract was entered into, whereby Group agreed to cause a registration statement to be filed with the SEC, to cause the statement to become effective within six months of the private placement offering and to use commercially reasonable efforts to do so. Further, Cobalt maintains that, because Group itself solicited Cobalt and undertook the obligation to cause the registration statement to be filed, coupled with the fact that the Fund has no employees and that all the Fund's activities are conducted by Group, it has manifested an intent to be bound by the registration statement obligation.

Notwithstanding the indefiniteness of the main contractual obligation of the purported oral contract to "cause the registration statement to become effective within six months," even were the Court to infer that Group promised to actually file the statement, Group would not be able to perform.

Under 15 USC § 77 (f) (a), only the issuer of securities may

file a registration statement with the Securities and Exchange Commission (SEC). Here, the issuer of the securities is the Fund itself, and not Group, which is the Fund's parent.

Cobalt also argues that notwithstanding the fact that both the Offering Memorandum and the RRA obligate the Fund to file the registration statement, that Group is also bound by that obligation. Cobalt alleges that Group took all steps with respect to soliciting Cobalt and filing the registration statement, that there was overlapping employment and that they share common office space and telephone numbers. Nonetheless, the Fund is not a wholly-owned subsidiary of Group, but is majority owned by non-affiliated parties, including Cobalt, and has an independent board of directors. Cobalt has not alleged that corporate formalities were not observed, and otherwise, crucial elements of an alter ego relationship between Group and the Fund are missing that would permit the inference that Group was using the Fund simply as a dummy for its own devise (*compare Horshead Indus., Inc. v Metallgesellschaft AG*, 239 AD2d 171, 172 [1st Dept 1997]).

Cobalt additionally asserts that Group is collaterally estopped from re-litigated the viability of this cause of action, that was already addressed in the prior motion to dismiss. However, the cause of action for breach of oral contract contains additional allegations that were not raised in the initial pleading. Moreover, this Court expressly granted leave to replead while permitting the defendants to move to dismiss the

*7]
entirety of the amended pleading. Consequently, Group is not collaterally estopped from seeking to dismiss this cause of action.

For these reasons, Cobalt fails to sufficiently state a cause of action for breach of oral contract against Group.

Breach of Contract II

Group and the Manager move to dismiss the second cause of action for breach of contract, arguing that the language of the RRA or the Offering Memorandum do not impose any obligation on either party to take action with respect to the registration statement.

The RRA was executed by the Fund and Deutsche Bank, as representative of other initial purchasers. With respect to registration it states,

"In the event the ... Registration Statement is not filed with the Commission within 181 days from the date hereof ... GSCP (NJ), L.P. [the Manager] shall forfeit the base management fee it is entitled to receive ... and the Company² [the Fund] shall defer all incentive management fee payments to be paid to GSCP (NJ), L.P. [the Manager]... until the ... Registration Statement is filed."

The Offering Memorandum contains the following provision with respect to registration rights:

We [the Fund] have agreed to file a registration statement within 181 days after the date of closing of this offering. . . to register for resale the shares sold in this offering, and to use our commercially reasonable efforts to cause the registration statement to be declared effective as promptly as practicable after filing (Offering Mem., 20).

² The RRA defines GSC Capital Corp. as the "Company."

Under the plain and unambiguous language of the RRA and the Offering Memorandum, only the Fund is contractually obligated to file a registration statement. Further, as discussed above, Cobalt fails to sufficiently allege an alter ego relationship between the Fund and either the Manager or Group that would render them parties to the contract by inference.

For the above reasons, Cobalt fails to allege that Group and the Manager are either directly liable or indirectly liable under an alter ego theory, and the cause of action for breach of contract is dismissed as against the Manager and Group.

Fraud/Fraudulent Omission

Group moves to dismiss the third cause of action for fraud/fraudulent omission on the grounds that it is duplicative of the dismissed breach of oral contract cause of action and that Cobalt fails to satisfy the heightened pleading requirement of CPLR 3016 (b).

The cause of action is premised upon allegations that Cobalt was induced to buy the Restrictive Shares by Group, who failed to disclose that the registration statement would not be filed if the public offering price was below \$25, and that the decision to cause the registration statement to become effective would be based on Group's interests and not the interests of investors.

A cause of action for fraud under New York law requires particularized allegations of false representation of a material fact with intent to defraud, reliance and damages (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 [1996]).

Cobalt's cause of action for fraud is duplicative of its first cause of action for breach of an oral contract. It is premised upon identical allegations that Group promised to use commercially reasonable efforts to cause the registration statement to be filed while harboring the secret intention that it would not perform by filing or causing the registration statement to be filed if the shares dropped to below \$25, so that it could continue to obtain fees. Cobalt does not allege any false representation or conduct other than that reflected in the terms of the purported oral contract (*Coppola v Applied Electric Corp.*, 288 AD2d 41, 42 [1st Dept 2001]; compare *Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112, 122 [1995 [fraud claim based upon particular oral assurances of the defendant were sufficiently extraneous to the written contract, and thus, was not duplicative]]).

However, in light of the dismissal of the contract claim, this Court will consider the merits of the fraud claim on its own.

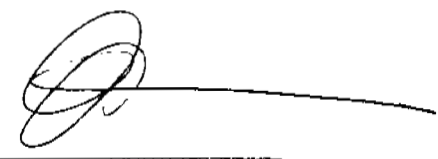
Absent circumstances not pled here, a conclusory allegation of an intent not to perform in the future is insufficient to sustain a fraud cause of action (*Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 369 [1st Dept 2007]; *Steinberg v DiGeronimo*, 255 AD2d 204, 204 [1st Dept 1998]). The claimed omission to reveal that Group or Fund would not make the filing with the SEC effective unless the price exceeded \$25 per share is merely a conclusory allegation, often repeated but never

particularized. In fact, the SAC at ¶ 81 surmises that "Group determined that it would not be in [Group's] best interests to offer the Restricted Shares for less than \$25 per share (plaintiffs' purchase price) because such an offering would have required the repurchase of the Notes." (matter in parenthesis added). This allegation underlies Cobalt's reasonable reliance claim and its contention that Group's representations were false when made. Therefore, Group's motion to dismiss the third cause of action is granted.

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted, and the first and third causes of action are dismissed, and the second cause of action is dismissed as against defendants GSCP (NJ), L.P. and GSC Group, Inc.

Dated: January 16, 2009

ENTER: 

J.S.C.

CHARLES E. RAMOS

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