Amiworld, Inc. v Trilogy Capital Partners, Inc.

2009 NY Slip Op 31981(U)

August 4, 2009

Supreme Court, New York County

Docket Number: 600664/09

Judge: Joan A. Madden

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SCANNED ON 8/6/2009

[* 1]

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

PRESENT: Hon Joan A Madden Justice PART 11

AMIWORLD

-v-

Trilogy Capital Partners

INDEX NO. 600664/09

MOTION DATE

MOTION SEQ. NO. 001

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 is decided in accordance with the annexed Memorandum Decision/ order.

FILED
AUG 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: Aug 4, 2009

J.S.C.

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

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 : IAS PART 11

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AMIWORLD, INC.,

Index No. 600664/09

Plaintiff,

- against -

TRILOGY CAPITAL PARTNERS, INC. and PROMINENCE CAPITAL, LLC

Defendants.

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FILED
AUG 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

JOAN A. MADDEN, J.:

Plaintiff Amiworld, Inc. (Amiworld) moves, by order to show cause, for a preliminary injunction, to enjoin defendant Trilogy Capital Partners, Inc. (Trilogy) from selling, transferring or encumbering shares of Amiworld's stock in its possession.[1] Trilogy opposes the motion, which is denied for the reasons set forth below.

Background

This dispute arises out of an agreement between Amiworld, Trilogy and Prominence Capital, LLC (Prominence) to provide certain marketing services to Amiworld intended to raise investor awareness of Amiworld and to create a market for Amiworld stock. Amiworld is a public company, listed on the OTCBB,[2] and is engaged in the development of biodiesel fuel

[1] When the court signed the order to show cause, it issued a temporary restraining order precluding Trilogy from selling, transferring or encumbering the shares of Amiworld's stock in its possession. The parties subsequently agreed to extend the TRO pending a determination of the motion. Both Trilogy and Prominence are named as defendants since both are parties to the agreement that is the basis for this action. However, as only Trilogy is in possession of the shares at issue, the TRO and motion for a preliminary injunction are only relevant to Trilogy.

[2] The OTCBB is an electronic quotation system in the United States that displays real time quotes and other information for over-the-counter equity securities that are not listed on the NASDAQ stock exchange. (See OTC Bulletin Board, http://en.wikipedia.org/wiki/OTCBB)

plants, operation of petroleum refineries, oil transport and cargo shipping. Trilogy and Prominence are companies engaged in merchant banking, strategic planning, financial marketing and communications.

In support of its motion for a preliminary injunction, Amiworld submits the affidavit of David Garin ("Garin"), its Vice President of Finance. In his affidavit, Mr. Garin states that on or about May 28, 2008, Amiworld, Trilogy and Prominence entered into an agreement, pursuant to a Letter of Engagement (the Agreement) drafted by Trilogy. (Id. at ¶ 9). Trilogy and Prominence agreed to implement a marketing program designed to promote investor awareness of Amiworld and create a market for its stock with the ultimate goal of supporting Amiworld's application to be listed on the NASDAQ stock exchange. (Id at ¶ 5).

Under the Agreement, Amiworld agreed to pay Trilogy a base fee of $90,000 over a six month span, at a rate of $15,000 per month. (Agreement, § 6). Amiworld also agreed to incur Trilogy's marketing costs, provided that these costs were first budgeted for or approved by Amiworld. (Id. at § 8). Amiworld also agreed to issue stock to Trilogy as equity compensation. (Id. at § 7). Section 7 of the Agreement provides, in pertinent part, that:

> "[a]s a material inducement to Trilogy to execute this Agreement, [Amiworld] has concurrently issued to Trilogy Two Hundred Thousand (200,000) shares (the "Shares") of "restricted" common stock of [Amiworld] . . . . One Hundred Thousand (100,000) of the Shares, representing one half (1/2) of such Shares, shall be deemed earned as of date hereof and the remaining One Hundred Thousand (100,000) of the Shares (the second half of such Shares) shall be deemed earned as of January 1, 2009[3] and the relevant certificate representing ownership of the second 100,000 shares shall be held by a party mutually acceptable to the parties herein, ..."

[3]Ameriworld did not transfer the 100,000 shares deemed earned as of January 1, 2009, maintaining that such transfer was not warranted since Triology materially breached the Agreement.

Garin avers that on or about July 30, 2008, Trilogy sent Amiworld a document entitled "Critical Path," setting forth Trilogy's plan and budget for the period from August 4 to September 5, 2008 (the Program). Amiworld approved the first two weeks of the Program and budgeted $56,000 for the expenses, enumerating both the approved vendors and the respective budgeting set aside for each vendor. Amiworld deposited $42,500 in an escrow account with Trilogy for the Program's first week. (Garin Affidavit, ¶¶ 10-12).

On or about August 21, 2008, Trilogy notified Amiworld that $32,000 of the amount in escrow had been distributed to vendors so far and that $67,000 remained to be disbursed pursuant to an updated "Critical Path" schedule. Amiworld did not approve the updated schedule and requested that Trilogy provide a report on the actual disbursement of the $32,000. Trilogy provided an account statement detailing the disbursement, the contents of which featured discrepancies from the budget set forth in the agreed Program. Amiworld expressed disappointment in Trilogy's unilateral deviation from the agreed Program.[4] (Id. at ¶¶ 13-17).

A.J. Cervantes, Chairman and Chief Executive Officer of Trilogy, states in his affidavit that Amiworld and Trilogy continued to do business for the next several months, and Amiworld continued its $15,000 payments, as set forth in the Agreement, until the month of November. (Cervantes Affidavit, ¶ 11). According to Garin, Amiworld continued to communicate with Triogy over this time "in an effort to resolve the parties' disputes and restart the campaign, but to no avail." (Garin Affidavit, ¶ 17). On November 18, 2008, Garin wrote to Cervantes that the

[4] In particular, Amiworld objected to the disbursement of $35,000 to "Surge Stocks," an expense which under the approved Program had only been budgeted for a $15,000 disbursement. Amiworld also objected to Trilogy's failure to disburse the $7,500 budgeted for "Seventh Circle," an element of the Program which Amiworld considered critical.

outstanding breaches of the Agreement remained uncured and that the parties' contract was terminated immediately. (Id. at ¶ 18).

In this action, Amiworld seeks to recover $131,389.37 in compensatory damages and equitable relief in the form of an order that Trilogy return the restricted Shares that Amiworld transferred to Trilogy upon execution of the Agreement.

Meanwhile, Amiworld learned that Trilogy was seeking to have the restrictions removed from the Shares. In response, Amiworld contacted its transfer agent and requested that a hold be placed on Trilogy's Shares pending a resolution of the parties' dispute. The transfer agent placed a temporary hold on the Shares but informed Amiworld that a court order would be required to extend the hold. (Garin Affidavit, ¶ 19).

Amiworld argues that a preliminary injunction is warranted to prevent Triology from disposing of the Shares, as Amiworld will otherwise be unable to recover the Shares even if it prevails on its claim against Trilogy. Amiworld further argues that should it prevail on its claim, a monetary award in lieu of the Shares would not provide adequate compensation. Specifically, Amiworld contends that the current thin trading volume and limited profile of its stock will make it difficult for Trilogy to obtain fair value in return for the Shares, and that such a sale will likely reduce the price of the Shares below their present trading price of $5.50 per share. Amiworld also argues that such a sale will irrevocably harm its current application to be listed on NASDAQ, as NASDAQ will only list stocks valued at or above $4.00 per share.

Trilogy opposes Amiworld's motion, noting that to obtain a preliminary injunction, Amiworld must show "a likelihood of success on the merits" of its pending action to recover the Shares and "irreparable harm" in the absence of injunctive relief. Trilogy argues that Amiworld has not sufficiently shown either.

Concerning the merits of Amiworld's pending action, Trilogy argues that even if Amiworld were to succeed in its claim and recover the monthly fees it paid to Trilogy, Amiworld still could not recover the Shares under Section 7 of the Agreement, which provides that the Shares were a "material inducement to Trilogy to execute the Agreement" and were "deemed earned" by Trilogy from the time the Agreement was executed. Therefore, Trilogy argues that it owns the Shares and that even if Amiworld succeeds in demonstrating that Trilogy breached the Agreement, Amiworld would not be entitled to recover the Shares.

Trilogy notes that it has already transferred 48,250 shares of Amiworld's stock, that Amiworld authorized each prior transfer, and that Amiworld made filings with the SEC reporting and acknowledging each transfer. Trilogy argues that these SEC filings prove that it owns Amiworld's stock, or else the filings would have been false and misleading.

Trilogy also relies on Section 3 of Exhibit A to the Agreement[5], (entitled "Limitation of Liability"), which provides that, "[i]n no event shall Trilogy's liability exceed the fees paid to it pursuant to this Agreement," to argue that the recovery of the Shares is not an appropriate remedy. In particular, Trilogy argues that the term "fees" refers to the monthly fees paid pursuant to Section 6 of the Agreement (entitled "Fees") and does not include the Shares, which appear in Section 7 (entitled "Equity Compensation"). Trilogy concludes that it cannot be liable to pay Amiworld more than the $90,000 fee it received for its services, and that Amiworld is therefore unlikely to succeed on the merits of its case in recovering the Shares from Trilogy.

As for Amiworld's assertion that it will suffer irreparable harm in the absence of injunctive relief, Trilogy argues that it is entitled to sell the Shares, just as any other shareholder

[5]Exhibit A to the Agreement contains additional terms and conditions to the Agreement and there is no dispute that it is part of the Agreement.

is permitted to do so. Additionally, Trilogy notes that while the present asking price of Amiworld's stock is $5.50 per share, the bid price is between $0.30 and $0.35. Furthermore, Trilogy asserts that shortly after Amiworld terminated its contract with Trilogy, Amiworld offered to buy the balance of Trilogy's shares at a price of $0.35 per share. On this basis, Trilogy argues that Amiworld's application to be listed on NASDAQ cannot be harmed because the value of its stocks is already well below the $4.00 per share threshold. Trilogy concludes that Amiworld "has made no sufficient showing [that a sale of the Shares will cause irreparable harm] other than a conclusory allegation." (Trilogy Opposition, ¶ 18).

In reply, Amiworld counters that it will likely prevail in its action to recover the Shares because Section 7 of the Agreement provides that the Shares were "issued" to Trilogy, implying that the Shares still belong to Amiworld. Amiworld also argues that the Agreement's language is at best vague as to who owns the Shares, and that since Trilogy drafted the Agreement, any ambiguity in the Agreement's language must be construed in Amiworld's favor. Guardian Life Insurance Company of America, Inc. v. Schaefer, 70 NY2d 888, 890 (1987).

Amiworld next argues that Trilogy will likely sell the Shares at a liquidation price, which will cause the value of the Shares to depreciate considerably from the current trading price. Amiworld also argues that the danger of such depreciation warrants the issuance of a preliminary injunction, and that the issuance of a preliminary injunction will prevent irreparable harm from being done to the value of Amiworld's stock and to Amiworld's application to be listed on NASDAQ.

Discussion

A preliminary injunction is "drastic relief," and "is appropriate only where a party has established (1) a likelihood of success on the merits of the pending action, (2) irreparable injury

absent such relief, and (3) a balancing of equities in favor of the relief sought." The New York Auto. Ins. Plan v. New York Schools Ins. Reciprocal, 241 AD2d 313, 314 (1st Dept 1997) (citations omitted). "Proof establishing these elements must be by affidavit and other competent proof, with evidentiary detail." Scotto v. Mei, 219 A.D.2d 181, 182 (1st Dept 1996).

In the present case, Amiworld has failed to show a likelihood of success on the merits. The unambiguous language of the Agreement appears to demonstrate that Triology owned the Shares upon execution of the Agreement and that the return of the Shares is not a proper remedy, even assuming Amiworld can establish that Trilogy breached the Agreement.

"[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." W.W.W. Assocs. v. Giancontieri, 77 NY2d 157, 162 (1990); accord S. Rd. Assocs. v. Intl. Bus. Machs. Corp., 4 NY3d 272 (2005); Cellular Tel. Co. v. 210 E. 86th St. Corp., 44 AD3d 77 (1st Dept 2007). "Mere assertion by one [party] that contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise a triable issue of fact." Unisys Corp. v. Hercules, Inc., 224 AD2d 365, 367 (1st Dept 1996). Thus, construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms. See Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 NY3d 470 (2004).

Here, it is apparent from the language the Agreement that Trilogy owned the shares as of the date of the Agreement's execution based on Section 7 which provides as "a material inducement to entering the Agreement" (as opposed to for performance under the Agreement) the Shares were issued to Trilogy and "deemed earned" upon the date of the execution of the Agreement. In contrast, the second 100,000 shares were not deemed earned until January 1,

2009, and the certificate of ownership for those shares was held by a mutually acceptable third party. Notably, it appears that Amiworld reported Trilogy's transfer of certain of the Shares to third-parties after the execution of the Agreement and acknowledged Trilogy's ownership of the shares in an SEC filing.[6] Moreover, contrary to Amiworld's position, the language in section 7 providing that the Shares were "issued" to Trilogy and that the Shares were "deemed earned" by Trilogy does not create any ambiguity regarding Trilogy's ownership of the Shares. Moreover, the language of the Agreement's Limitation of Liability section, which provides that Trilogy liability is not to "exceed the fees paid to it pursuant to this Agreement," appears to support Trilogy's position that even if it breached the Agreement, the return of the Shares is not an appropriate remedy.

Not only has Amiworld failed to show a likelihood of success on the merits, but it has also failed to show that it will suffer irreparable harm in the absence of injunctive relief. Amiworld asserts that if Trilogy were to offer the Shares in its possession for sale, such a sale would likely reduce the value of the Shares significantly below the present trading price of $5.50 per share. Amiworld argues that such a decline would irreparably harm its application to be listed on the NASDAQ, as the stock must maintain a price at or above $4.00 per share to qualify for a NASDAQ listing. In opposition, Trilogy submits the NASDAQ's Capital Market Initial

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[6]eThe Form 10-Q filed by Amiworld with SEC for the quarter ending June 30, 2008 states that:

> Effective May 28, 2008, we issued an aggregate of 200,000 shares of Common Stock in favor of Trilogy Capital Partners ("Trilogy") pursuant to an Investors Relations Agreement that we executed with [Trilogy] on May 28, 2008. Our Board of Directors ratified the action on June 30, 2008. Of these 200,000 shares, 100,000 shares are being held in escrow pursuant to aforesaid agreement, to be released on January 1,2009, provided the agreement is not terminated by us pursuant to the terms of the agreement prior to said date.

Listing Requirements as documentary proof that Amiworld must maintain a "bid price"[7] above $4.00 in order to be eligible. As Trilogy points out, the current bid price of the Shares is around $0.30 per share, well below the $4.00 threshold.[8] Therefore, Amiworld's stock currently does not qualify for a NASDAQ listing and Trilogy's sale of the Shares cannot further harm Amiworld's application to be listed on NASDAQ. Furthermore, Amiworld's assertion that the sale of 51,750 shares out 23 million shares of its stock still owned by Trilogy would depress the value of Amiworld stock is without adequate evidentiary support in the record.

Under these circumstances, the court need not reach whether the equities weigh in Amiworld's favor.

Accordingly it is

ORDERED that Amiworld's motion for a preliminary injunction is denied; and it is further

ORDERED that the temporary restraining order and any other restraints, including those agreed to by the parties, are vacated; and it is further

ORDERED that defendants are directed to file and serve an answer to complaint within 30 days of the date of this decision; and it is further

ORDERED that a preliminary conference will be held in Part 11, Room 351, 60 Centre Street, New York, NY, on September 24, 2009, at 9:30 a.m.

Dated: August 4, 2009

J.S.C.

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[7] The bid price of a stock is the price at which the public is willing to purchase shares of the stock.

[8] The $5.50 figure cited by Amiworld is the "ask price" per share of its stock, the price at which Amiworld is willing to sell shares of its stock. This figure is set by Amiworld and reflects the company's perceived value of its stock.