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SHORT FORM ORDER

Index Number: 41207-2009

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

***Present*: HON. EMILY PINES**
J. S. C.

Original Motion Date: 12-04-2009
Motion Submit Date: 04-27-2010
Motion Sequence .: 001 MOTD

_____X

RISE ABOVE CAPITOL PARTNERS, LLC,

Plaintiff,

-against-

LONG ISLAND FIBER EXCHANGE, INC, KURT E. BERLINGHOF and MICHAEL K. POWER,

Defendant.
_____X

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ORDERED, that the motion (motion sequence number 001) by plaintiff for preliminary injunctive relief is granted to the extent indicated herein below; and it is further

ORDERED, that a preliminary conference is scheduled for September 21, 2010 at 9:30 a.m. before the undersigned.

Background

Rise Above v Long Island Fiber Exchange
Index 41207-2009
Motion Sequence Number 001 Decision

Plaintiff, Rise Above Capital Partners LLC. ("plaintiff" or "Rise Above") commenced this action against defendants seeking a declaratory judgment, specific performance and damages for breach of contract arising out of certain agreements entered into between the parties. According to the submissions, defendant, Long Island Fiber Exchange, Inc. ("LIFE") is a New York State Public Service Commission certified telecommunications provider that specializes in constructing fiber optic based networks and providing fiber services to school districts, businesses, universities, hospitals and municipalities. LIFE was incorporated in 1999 by defendant Michael Power ("Power"), who became a director and officer since that time. A few years later, in 2002, third party defendant, Enrico Scarda ("Scarda") and defendant, Kurt Berlinghof ("Berlinghof") were elected directors of LIFE. Additionally, Scarda also became the holder of approximately 24% of the outstanding shares of LIFE. The parties dispute the extent to which Scarda performed financial services for LIFE.

Fast forward to 2008/2009 and LIFE has significant outstanding debt obligations, including $4 million dollars owed to Imperium Master Fund, Ltd. ("Imperium") and enter Rise Above, who invested $1 million dollars in LIFE in exchange for common stock. The ostensible purpose of this investment was to prevent LIFE from defaulting on its obligations to Imperium and other creditors. At this point, on or about March 4, 2009, Rise Above, LIFE, Power and Burlinghof entered into a series of agreements , pursuant to which Rise Above would invest substantial additional sums in LIFE and would receive a further equity interest in LIFE. First, Rise Above and LIFE entered into a Common Stock Purchase Agreement ("CSPA") pursuant to which Rise Above would purchase 5% of LIFE's common stock. Annexed to the CSPA was a document captioned "SUMMARY OF PROPOSED TERMS FOR OFFERING OF SENIOR SECURED DEBT", referred to by the parties as the "Term Sheet". By its stated terms, the Term Sheet was non-binding, with the explicit exception of the provisions captioned "Governing Law", "Legal and Due Diligence Expenses", "Modification", "Exclusivity" and "Equitable Relief", were provisions were binding. The Term Sheet provided that Rise Above would invest a minimum of $5 million and a maximum of $10 million dollars in LIFE secured by a senior secured note. The Term Sheet also provided that in consideration of the investment, RISE Above would receive "25% of the issued and outstanding common stock" of LIFE and that the closing date would be on or before June 4, 2009. This date was

subsequently extended by mutual consent of the parties, in a series of writings, to August 31, 2009.

Notably, §5.9 of the CSPA provided that if the contemplated financing was not consummated on the scheduled date "for any reason whatsoever" , then LIFE would issue additional shares to Rise Above such that they would have a total of ten percent (10%) of the issued and outstanding common stock of LIFE. In addition to the CSPA and annexed term sheet, Power executed a "SHAREHOLDER AGREEMENT AND IRREVOCABLE PROXY" (the "Power Proxy") and Berlinghof executed a "SHAREHOLDER AGREEMENT" (the "Berlinghof Agreement"). In the Power Proxy, which by its terms was irrevocable, Power agreed to vote his shares "as determined by Rise Above" and appointed Rise Above as its proxy. In the Berlinghof Agreement, Berlinghof agreed to vote his shares as "determined by Rise Above". Both the Power Proxy and Berlinghof Agreement were for an 18 month period and thus expire on or about September 10, 2010.

At the time of the execution of these agreements, Scarda was a director and Vice President of LIFE and also a member of Rise Above. As a result of this dual role, LIFE established a Special Committee, consisting solely of Power and Berlinghof, to handle the financing agreement.

Ultimately, the financing did not close on or before the August 31, 2009 deadline and Rise Above sought to enforce the provisions of the CSPA regarding LIFE's obligation to issue additional shares to Rise Above. Additionally, Rise Above sought reimbursement for its legal and due diligence expenses, pursuant to the binding provisions of the Term Sheet. Although LIFE did pay Rise Above's counsel $25,000.00, Rise Above sought additional sums which LIFE did not pay. As a result of the foregoing, on November 6, 2009, Rise Above exercised the Berlinghof Shareholder Agreement and removed Berlinghof as a director of LIFE and similarly, on November 9, 2009, exercised the Power Proxy and removed Power as a director of LIFE. Upon the purported removal of Berlinghof and Power, Scarda remained the only director of LIFE. By correspondence dated November 10, 2009, LIFE rejected the removal of Berlinghof and Power and on November 11, 2009, LIFE purported to remove Scarda as a director of LIFE and reelect Berlinghof and Power. On that same day, LIFE also approved a financing transaction with Imperium.

As a result of the foregoing, Rise Above commenced the within action seeking (1) specific performance of the CSPA such that it receives its additional shares of LIFE; (2) damages for breach of contract, specifically, reimbursement of its legal and due diligence expenses pursuant to the Term Sheet; (3) a declaratory judgment that the Power Proxy was valid and enforceable and in effect until September 4, 2010 and that all acts taken contrary thereto are null and void; (4) a declaratory judgment that the votes to remove Berlinghof and Power as directors were valid; (5) an injunction enjoining and restraining Berlinghof and Power from acting and/or oeprating and/or holding themselves out as directors of LIFE; (6) an injunction enjoining and restraining LIFE from taking action and operating at the direction of Berlinhof and Power; (7) a declaratory judgment that the purported removal of Scarda as a director of LIFE is null and void, that Scarda remains a director of LIFE and the purported reelection of Berlinghof and Power is null and void; and (8) an injunction enjoining and restraining LIFE, Berlinghof and Power from further acting with respect to the financing transaction with Imperium and/or from closing or consummating said transaction.

Motion for Preliminary Injunction

Simultaneous with commencing this action, plaintiff moved by Order to Show Cause seeking temporary restraining orders enjoining Berlinghof and Power from holding themselves out as directors, voting except as determined by Rise Above and taking any action with regard to the Imperium financing deal. All parties appeared before the undersigned on November 16, 2009 and in lieu of the relief requested in the Order to Show Cause, entered into a Stipulation which was so-ordered by the Court. The Stipulation provided that pending the determination of the Order to Show Cause:

1. The Board of Directors of Long Island Fiber Exchange Inc., shall consist of Kurt Burlinghof, Michael Power and Enrico Scarda.
2. Long Island Fiber Exchange Inc. shall act only in the ordinary course of business unless such acts are unanimously approved by the Board or such action is approved by the Court.
3. The Special Committee will give notice to Enrico Scarda of all negotiations and information regarding proposed financing and/or defaults on loan obligations. No financing transactions shall be entered into unless unanimously approved by the Board or with Court approval.

With the exception of communications with RISE, Scarda shall be entitled to participate in negotiations.

4. No shareholder vote shall occur during this period.
5. Payment of subcontractors, vendors and trade contractors shall be considered in the ordinary course of business, unless such payment exceeds $50,000.00, in which case unanimous approval of the Board is required.
6. Enrico Scarda shall be one of the two authorized signatories on any disbursements over $50,000.00.
7. Long Island Fiber Exchange shall notify Bridgehampton Bank to stop payment on the check dated 11/12/09 in the amount of $1,000,000.00. In the event the check has already cleared, Long Island Fiber shall redeposit said funds in the Bridgehampton account.
8. Outstanding counsel fees for transaction work shall be paid by Long Island Fiber in the ratio of 80% to Davidoff Malito and 20% to Certilman Balin until Certilman Balin's $60,000 is paid in full.[1]

The gravamen of the motion is that the agreements at issue are clear and unambiguous, grant voting rights to Rise Above and entitlement to the additional shares in the event the financing did not close "for any reason whatsoever". Thus, plaintiff asserts that it properly exercised the Power Proxy and Berlinghof agreement to remove them as directors and they should be enjoined from holding themselves out as directors of LIFE and acting with regard to the Imperium financing transaction. Specifically, plaintiff seeks an Order, *inter alia,* to shareholders of LIFE and parties to potential financing arrangements with LIFE.(1) enjoining defendants Berlinghof and Power from holding themselves out as directors of LIFE and taking any action as directors; (2) enjoining LIFE from taking any direction or instruction or acting upon any direction or instruction of Berlinghof and Power in their capacity as directors of LIFE, including but not limited to closing on the financing transaction with Imperium; (3) enjoining Power from voting any of his shares of LIFE unless such shares are voted as determined by RISE and consistent with Power's Irrevocable Proxy executed March 4, 2009; (4) enjoining Berlinghof from voting any of his shares in LIFE unless such shares are voted as determined by RISE and consistent with Berlinghof's Shareholder's Agreement executed on March 4, 2009; (5) enjoining LIFE from taking any corporate action on the basis of a vote of the majority of LIFE's shareholders unless such action is approved by a vote of shareholders consistent with the March 4, 2009 Irrevocable Proxy and Berlinghof's Shareholder's Agreement executed on

[1]The Court notes that defendants have commenced a third-party action against Rise Above and Scarda, but copies of those pleadings have not been provided to the Court.

March 4, 2009; and (6) enjoining LIFE from making any statement or representation that is inconsistent with RISE's current ownership of 10% of LIFE. Plaintiff argues that it meets the test for a preliminary injunction, to wit, a demonstration of a likelihood of success on the merits, irreparable injury and a balancing of the equities in its favor, such that the preliminary injunctive relief should be granted. Plaintiff argues that the irreparable harm arises from the deprivation of its rights as a shareholder if it is not entitled to exercise its voting rights pursuant to the Power Proxy and Burlinghof Agreement.

Defendants oppose the motion for a preliminary injunction and argue that the agreements should be set aside as null and void because they were fraudulently induced to execute same by Scarda. Specifically, Power and Berlinghof claim that Scarda was not acting in the best interest of LIFE while he was a director, breached his fiduciary duty and made material misrepresentations regarding the Power Proxy and Berlinghof Agreement. They assert that Scarda breached his duty of loyalty and good faith and was acting only in an attempt to seize control of LIFE. Defendants claim that Scarda improperly negotiated on behalf of both Rise Above and LIFE and required them to sign the Power Proxy and Berlinghof Agreement despite objection from LIFE's attorney. Power states in his affidavit that Scara assured them that the Power Proxy and Berlinghof Agreement would "never be used". Defendants claim that because of their obligations to Imperium and imminent default, Rise Above, through Scarda's actions, was able to impose onerous terms on LIFE, which it was forced to agree to because of the deadlines with Imperium. Additionally, defendants blame Scarda for the failure of the deal to close by the August 31, 2009 in that, among other things, he did not perform his duties with regard to the financial statements which were required to obtain the bank financing. Defendants claim that this was all part of Scarda and Rise Above's plan to gain control of LIFE. Defendants urge the Court to deny the requests for preliminary injunctive relief.

In reply, plaintiff notes that defendants were represented at all times by experienced counsel and admit that their counsel advised they should not agree to the Power Proxy and Berlinghof Agreement but they signed notwithstanding such advise to the contrary. Further, plaintiff reiterates that the terms of the CSPA, Term Sheet, Power Proxy and Berlinghof Agreement are clear on their

face and were validly executed.

With regard to the claim that defendants were fraudulently induced into entering the agreements, plaintiff points to §10.3 of the CSPA which provides for a merger clause and prohibition on modification except by written agreement. Thus, plaintiff asserts that defendants cannot claim they reasonably relied on any representation by Scarda that he would not enforce the Power Proxy or Berlinghof Agreement. Therefore, the defense of fraudulent inducement must fail according to plaintiff. Likewise, plaintiff argues that it has demonstrated that it is entitled to the additional shares of LIFE pursuant to §5.9 of the CSPA. Plaintiff emphasizes that defendants were represented by sophisticated counsel during the execution of this agreement and as such could have negotiated certain safeguards into this Agreement. Specifically, plaintiff argues, that if defendants were concerned about obtaining the bank financing, it could have made it a condition precedent to this contract. Instead, defendants agreed that Rise Above would receive the additional shares if the financing did not close "for any reason whatsoever". As such, LIFE must disburse the additional shares to Rise Above.

Discussion

It is well settled that "a party seeking the drastic remedy of a preliminary injunction must establish a clear right to that relief under the law and the undisputed facts upon the moving papers. The burden of proof is on the movant to demonstrate a likelihood of success on the merits, the prospect of irreparable injury if the relief is withheld, and a balancing of the equities in the movant's favor." ***Gagnon Bus Company, Inc. v. Vallo Transportation, Ltd.*, 13 A.D.3d 334, 786 N.Y.S.2d 107 (2d Dept. 2004).** ***See also, South Amherst, Ltd. v. H.B. Singer, LLC.*, 13 A.D.3d 515, 786 N.Y.S.2d 573 (2d Dept. 2004)**. The purpose of a preliminary injunction is to preserve the status quo and to prevent the dissipation of property, which might make a judgment ineffectual. ***Alexandru v. Pappas*, 68 A.D.3d 690, 890 N.Y.S.2d 593 (2d Dept. 2009)**. Where the facts are in sharp dispute, a preliminary injunction should not be granted. ***Related Properties v. Town Board of Town/Village of Harrison*, 22 A.D.3d 587, 802 N.Y.S.2d 221 (2d Dept. 2005)**. However, the "presentation by

defendant of evidence sufficient to raise an issue of fact as to any of such elements shall not in itself be grounds for denial of the motion." ***CPLR Rule 6312(c).***

In this case, the Court finds that plaintiff has met its burden of proof of entitlement to preliminary injunctive relief. Plaintiff has demonstrated a likelihood of success on the merits of this case by the submission of the CSPA, the Term Sheet, the Power Proxy and the Berlinghof Agreement. These documents were clear and unambiguous on their face and executed by defendants who were represented by competent counsel. Notably, defendants admit that counsel advised them NOT to sign the documents. Defendants' claims that they were fraudulently induced to sign the agreements based upon Scarda's alleged representations that he would not use the proxies is not a defense that bars issuance of the preliminary injunction. Where there is a purported "conflict between an express provision in a written contract and a prior alleged oral representation, the conflict negates a claim of reasonable reliance on the oral representation." ***Stone v. Schulz*, 231 A.D.2d 707, 647 N.Y.S.2d 822 (2d Dept. 1996)**. Here, the CSPA specifically provided that it superceded any prior agreements between the parties, that all agreements must be in writing and may only be modified by written agreement. Thus, defendants cannot establish they reasonably relied on any representations (if any) by Scarda.

Next, plaintiff has demonstrated it will suffer irreparable harm if the injunctive relief is not granted as it will be deprived of participation in the management and control of RISE Above. Finally, the equities are balanced in plaintiff's favor - plaintiff entered into certain agreements with defendants to loan funds and received certain rights in exchange. It appears from the submissions that LIFE needed Rise Above to help it obtain and secure financing, but Rise Above wanted to protect its investment, and did so by entering into certain agreements with defendants. Defendants, on their part, are looking to change the terms or vitiate the agreements completely. This is not what the parties bargained for when they entered the agreements.

Based on the foregoing, pending further Order of the Court unless otherwise specified herein, plaintiff's motion for a preliminary injunction is granted to the extent that:

(1) defendants Berlinghof and Power are enjoined and restrained from holding themselves out as directors of LIFE and taking any action as directors; (2) defendant LIFE is enjoined and restrained from taking any direction or instruction or acting upon any direction or instruction of Berlinghof and Power in their capacity as directors of LIFE, including but not limited to closing on the financing transaction with Imperium; (3) until September 4, 2010, defendant Power is enjoined and restrained from voting any of his shares of LIFE unless such shares are voted as determined by RISE and consistent with Power's Irrevocable Proxy executed March 4, 2009; (4) until September 4, 2010, defendant Berlinghof is enjoined and restrained from voting any of his shares in LIFE unless such shares are voted as determined by RISE and consistent with Berlinghof's Shareholder's Agreement executed on March 4, 2009; (5) until September 4, 2010, defendant LIFE is enjoined and restrained from taking any corporate action on the basis of a vote of the majority of LIFE's shareholders unless such action is approved by a vote of shareholders consistent with the March 4, 2009 Irrevocable Proxy and Berlinghof's Shareholder's Agreement executed on March 4, 2009; and (6) enjoining LIFE from making any statement or representation that is inconsistent with RISE's current ownership of 10% of LIFE, including but not limited to, statements or representations to shareholders of LIFE and parties to potential financing arrangements with LIFE.

A preliminary conference is scheduled for September 21, 2010 at 9:30 a.m. before the undersigned.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: July 14, 2010
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.