Rhodium Special Opportunity Fund, LLC v Life Trading Holdco, LLC
2014 NY Slip Op 30840(U)
March 31, 2014
Supreme Court, New York County
Docket Number: 653452/2013
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

RHODIUM SPECIAL OPPORTUNITY FUND, LLC Plaintiff, -against- LIFE TRADING HOLDCO, LLC, AXA EQUITABLE LIFE INSURANCE COMPANY, TRANSAMERICA LIFE INSURANCE COMPANY, THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, HARTFORD LIFE AND ANNUITY INSURANCE COMPANY, LINCOLN FINANCIAL GROUP, MASS MUTUAL LIFE INSURANCE COMPANY, PRUDENTIAL LIFE INSURANCE COMPANY, COLUMBUS LIFE INSURANCE COMPANY, UNION CENTRAL LIFE INSURANCE COMPANY, METROPOLITAN LIFE INSURANCE COMPANY, PRINCIPAL FINANCIAL GROUP, GUARDIAN INSURANCE AND ANNUITY COMPANY AND JOHN DOE, Defendants,	:	Index No. 653452/2013 DECISION AND ORDER MOTION SEQUENCE 001

MELVIN L. SCHWEITZER, J.:

Defendants move for an order, pursuant to CPLR 3211 (a) (1), dismissing the complaint for stating no valid legal claim under the terms of a Non-Disclosure Agreement (NDA) executed by Life Trading Holdco, LLC (Life Trading) and Rhodium Special Opportunity Fund, LLC (Rhodium). The main issue in the case concerns whether a set of emails exchanged between Rhodium and Life Trading's agent, Jeffrey Bollerman of Houlihan Lokey Capital Inc., can constitute a "definitive agreement regarding a transaction" in order to nullify the terms of the NDA. The court finds that the emails do not meet this requirement, the NDA bars all Rhodium's claims, and the defendants' motion to dismiss is granted.

Background

This is an action brought by Rhodium, a hedge fund, after unsuccessful negotiation for the purchase of a $44 million portfolio of forty-five life insurance policies known as "Project Reef" from Life Trading. In June 2013, Houlihan Lokey Financial Advisors, Inc. and Houlihan Lokey Capital Inc. (together, Houlihan), as Life Trading's agent, contacted Rhodium about bidding on Project Reef, which Life Trading was selling. Rhodium executed a Non-Disclosure Agreement (NDA) with Life Trading on June 11, 2013 to begin the process of negotiations. The NDA provided as follows:

> "Only those representations or warranties which are made by the Company in a final definitive agreement regarding a Transaction, when, as and if executed . . . will have any legal effect. . . . [U]nless and until a subsequent definitive written agreement regarding a Transaction between the Company and you has been executed, (a) neither the Company nor you will be under any legal obligation of any kind whatsoever to negotiate or consummate a Transaction, and (b) you shall have no claim whatsoever against the Company . . . arising out of or relating to any Transaction . . . ."

Rhodium submitted an initial bid after the NDA was signed. On July 22, 2013, Houlihan, acting on Life Trading's behalf, solicited Rhodium to submit a final bid and proposed a Purchase and Sale Agreement (PSA). On July 31, 2013, Rhodium submitted its final bid on Project Reef. This final bid included the PSA with the purchase price and due diligence terms and a revision that provided that any insurance policy that matured after July 31, 2013 would be paid to the purchaser. Life Trading informed Rhodium that it had the winning bid, and they began negotiations. On August 15, 2013, Rhodium's Scott Rose sent Life Trading the following email:

> Rhodium has asked for some kind of written confirmation they have been granted exclusive rights to close this portfolio before expending significant additional legal fees (especially since the $150k was an issue). Can you get the seller to provide something?

In response, Jeffrey Bollerman from Houlihan responded with:

> I can confirm that Rhodium has the exclusive right to negotiate to purchase this portfolio through Monday, August 26. Hopefully by that date we will have executed the PSA or we will be materially close to doing so. Please don't hesitate to call with questions.

The parties agreed to negotiate exclusively for a period that expired on August 26, 2013. This period was extended because Life Trading's attorney went on vacation. On September 10, 2013, while the extension period was in effect, Life Trading offered to extend the negotiation period to October 15, 2013 because one of Life Trading's principals was on vacation and Rhodium accepted the offer. During this period, the parties continued negotiations and agreed on the significant terms of revisions of the July 31, 2013 draft PSA. On September 30, 2013 Rhodium inquired about the status of the PSA and completion of the transaction. Houlihan replied that they would try to respond on October 1, 2013 but did not until October 3, 2013 when Houlihan informed Rhodium that Life Trading had sold Project Reef to an unknown third party. Rhodium brought this action soon after.

Discussion

On a motion to dismiss on the ground that defenses are founded upon documentary evidence, the evidence must be unambiguous, authentic and undeniable. CPLR 3211 (a) (1); *Fontanetta v Doe*, 73 AD3d 78 (2d Dept 2010). "To succeed on a [CPLR 3211 (a) (1)] motion . . . a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim." *Ozdemir v Caithness Corp.*, 285 AD2d 961, 963 (3d Dept 2001), *leave to appeal denied* 97 NY2d 605. In other words, "documentary evidence [must] utterly refute plaintiff's factual

allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002).

The central issue is whether or not the set of emails exchanged between the parties constitute a "definitive agreement regarding a transaction."

(i) Emails as an Agreement

The New York statute of frauds provides that: "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking . . . is a contract to pay compensation for services rendered in negotiating a business opportunity . . . ." N.Y. Gen. Oblig. Law § 5-701.

Courts in New York have held that an email may constitute a writing for the purpose of the statute of frauds. *See Naldi v Grunberg*, 80 AD3d 1, 14 (1st Dept 2010); *Williamson v Delsener*, 59 AD3d 291, 874 (1st Dept 2009); *Steven v Publicis. S.A.*, 50 AD3d 253 (1st Dept 2008). The courts have focused on the requirement of a signature to determine when emails meet the requirement. In *Rosenfield v Zerneck*, 776 NYS2d 458, 460 (Sup Ct 2004), the court held that typing a name on the bottom of an email indicated authentication in the way that a signature would on paper for the statute of frauds. The act of typing the name matters, as a pre-printed signature in an email footer has been held to be insufficient as a signature for an email to meet the statute of frauds. *Landesbank v 45 John St. LLC*, 102 AD3d 587 (1st Dept 2013). In the instant case, the set of emails had typed signatures that met the signature requirement.

(ii) Meeting of the Minds

According to the Restatement (Second) of Contracts §3 , an "agreement is a manifestation of mutual assent on the part of two or more persons." This is known as the requirement that there be a meeting of the minds in order to form a contract. The parties must agree on a set of promises laying out the obligations of each. *Rosenfeld* suggests that an understanding of all essential terms of the agreement needs to be present for an email to indicate that a meeting of minds has taken place. *Rosenfield, supra* at 461. In that case, the email identified the parties, property and stated price, but failed to set forth the amount of the contract deposit. *Id.* Accordingly, the court there found the parties did not have a meeting of the minds as to the terms of a sales agreement. In the case here, the email exchange also does not show a mutual understanding of the material terms that would be required to show a meeting of the minds. Rhodium asked for a written confirmation in the first email regarding the grant of exclusive rights to close the deal that would be provided by Life Trading themselves. The response indicated that Rhodium could negotiate with Life Trading exclusively through August 26, 2013, and that Life Trading did not provide any written confirmation to close the deal. This is an inquiry and response to a matter regarding a transaction, but there certainly was no agreement between parties. These emails are even more deficient in material terms than the email in *Rosenfeld.* Analyzing the content of the emails in terms of offer and acceptance makes the inadequacy of the email exchange as an agreement all the more apparent.

(iii) Offer and Acceptance

The Restatement (Second) of Contracts § 22 states that the "manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties." A party's offer limits acceptance to the terms of the

offer in what is known as the common law ribbon-matching or mirror rule. *See* Restatement (Second) of Contracts § 50; *See* UCC § 2-207. If the acceptance does not comply with the mirror rule and has terms different from the offer, it is considered a counter-offer, and equivalent to a rejection. *See* Restatement (Second) of Contracts § 39; *Lamanna v Wing Yuen Realty, Inc.*, 283 AD2d 165 (1st Dept 2001); *see also* 22 N.Y. Jur. 2d Contracts § 50 (2014) ("An acceptance must be as specific as the offer, as well as being unequivocal and unconditional. A proposal to accept the offer if modified, or an acceptance subject to other terms and conditions, is equivalent to an absolute rejection of the offer. A qualified acceptance is equivalent to a rejection and counteroffer.").

The following cases exemplify what acceptance of an offer in an email exchange may look like. In *Steven v Publicis S.A.*, 50 AD3d 253 (1st Dept 2008), an email set forth the material terms of the agreement modifying plaintiff's responsibilities under his employment agreement and plaintiff reaffirmed his unconditional acceptance of the modified agreement in a follow-up email. In offer and acceptance terms, the email memorializing the terms of the agreement was the offer and the plaintiff made a valid acceptance. In *Newmark & Co. Real Estate Inc. v 2615 E. 17 St. Realty LLC*, 80 AD3d 476, 477 (1st Dept 2011), plaintiff emailed defendant a draft brokerage agreement setting forth the terms they had discussed and invited revisions from the defendant, who emailed handwritten revisions. The plaintiff incorporated the revisions and then sent the final copy to the defendant's agent, and there was no evidence in the record that the defendant rejected the provisions in the last version of the agreement. *Id.*, 80 AD3d at 477. The revisions of the agreement by the defendant operated as a counter-offer to the draft, which the plaintiff assented to by incorporating the revisions and that resulted in a valid acceptance to which the defendant did not raise any objections.

Comparing the instant case with the previous examples shows that the email exchange here does not constitute a valid agreement in terms of offer and acceptance. The first email requested a written confirmation of exclusivity to close the deal, but did not set out all the material terms pertaining to the closing of the sale of Project Reef. The email response would require a written confirmation of exclusivity to close the deal from Life Trading in order to constitute a valid acceptance. The response made no reference to a written confirmation and simply said that Rhodium had the right to negotiate exclusively until August 26, 2013 and that hopefully a purchase and sale agreement would be executed by that date or be close to being executed. This email can only be viewed as a counter-offer, which means that the email exchange could not constitute an agreement. Thus, the NDA remains valid.

(iv) Emails as a "definitive agreement regarding a transaction"

The court briefly considers the hypothetical situation, in which the email exchange here, had it constituted an agreement, could have been deemed a "definitive agreement regarding a transaction."

Some applicable definitions of "definitive" are: (1) serving to provide a final solution or to end a situation; (2) authoritative and apparently exhaustive; and (3) serving to define or specify precisely. The email exchange here does not come close to satisfying any one of these definitions as it was, at the most, an agreement to negotiate further and did not set out any material terms. There was not an element of finality to the exchange between the parties that would be expected for it to be described as definitive agreement.

Finally, even if the exchange had satisfied the requisite finality to be deemed "definitive," the parties clearly were discussing negotiation of a potential *future* transaction. For

it to have been regarded a "transaction" – in this case the sale of Project Reef – there would have been a need for the material terms to be set forth in the email itself. They were not.

The court thus finds persuasive Life Trading's argument that it simply is untenable for the email exchange here to be deemed to have overridden the NDA.

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted.

Dated: March 31, 2014

ENTER:

J.S.C.

MELVIN L. SCHWEITZER