Fu v Lam
2014 NY Slip Op 31129(U)
April 10, 2014
Supreme Court, New York County
Docket Number: 154888/2013
Judge: Lucy Billings

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46

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CYNTHIA FU,

Plaintiff

Index No. 154888/2013

- against -

KENT LAM a/k/a "Wing Kin Lim," WALL ST INVESTMENT LP, DAYTOP FUNDS, LP, JOHN DOE 1-10, and ABC CORP. 1-10,

DECISION AND ORDER

Defendants

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LUCY BILLINGS, J.:

In this action for defendants' breach of a contract, breach of a fiduciary duty, and conversion of plaintiff's funds, plaintiff moves for a preliminary injunction prohibiting defendants from transferring or encumbering her assets held by defendants in investment accounts and requiring defendants to allow her access to those accounts and records of the accounts. C.P.L.R. §§ 6301, 6311(a), 6312(a). She also seeks the more extensive relief of an attachment prohibiting defendants from transferring or encumbering any assets in any accounts in any financial institution or brokerage house. C.P.L.R. § 6201(3). She justifies this latter relief on the grounds that defendants' actions have shown a fraudulent intent to convert or misuse plaintiff's assets and to dissipate their own assets to frustrate enforcement of any judgment plaintiff may obtain.

I. THE PARTIES' INVESTMENT ADVISORY AGREEMENT

On January 3, 2013, plaintiff, as the "Client," executed a written Investment Advisory Agreement with defendant Wall St Investment LP (WSI), a registered investment advisor, authorizing WSI "to purchase, sell, invest, exchange, convert and trade the assets in Client's Portfolio . . . through brokers, dealers, or issuers selected by WSI and without prior consultation with the Client. Aff. of Cynthia Fu Ex. 3 ¶ 1. The Agreement specified that it was her responsibilities to appoint a custodian to hold the securities and other assets in her "Portfolio" and to advise WSI of any changes in her investment objectives. Id. Ex. 3 ¶¶ 2-3. The Agreement also required her to "pay WSI the fees set forth in Exhibit B hereto," id. Ex. 3 ¶ 4, but plaintiff insists that no Exhibit B was attached to her copy of the Agreement. WSI, in turn, was to provide her "a report showing all receipts and disbursements from the Portfolio, all trades occurring in the Client's Portfolio, the securities held in the Portfolio at the close" of each quarter. Id. Ex. 3 ¶ 5.

The Agreement permitted either plaintiff or WSI to terminate the Agreement by giving written notice of the termination to the other party 30 days in advance, in which event plaintiff would owe the required fees "on a prorated basis." Id. Ex. 3 ¶ 6. In the event of any controversy between the parties to the Agreement, it provides that any state or federal court in Delaware "shall be the proper forum in which to adjudicate such . . . controversy," and the parties "consent to the jurisdiction of

such courts." Id. Ex. 3 ¶ 8(b). Nevertheless, the Agreement does not provide that the Delaware courts are to be the exclusive forum to adjudicate controversies between the parties.

Assuming this forum selection provision does not bar plaintiff's action, her most significant impediments are the Agreement's further provisions that "all prior agreements, understanding, and negotiations are merged herein and superseded hereby," id. Ex. 3 ¶ 8(d), and that "this Agreement may not be amended unless such amendment is in writing and signed by the parties sought to be bound." Id. Ex. 3 ¶ 8(e). Therefore defendant Lam's oral promises that plaintiff would owe no fees unless defendants' investments of her funds realized a profit and that Lam would not "touch my mutual funds and . . . only handle the funds in my 401K account," Fu Aff. ¶ 5, "create an IRA advisory account with Scottrade . . . and transfer the funds from my 401K into the Scottrade Account" id. ¶ 6, are unenforceable. N.Y. Gen. Oblig. Law § 15-301(1); Rose v. Spa Realty Assoc., 42 N.Y.2d 338, 343 (1977); Eujoy Realty Corp. v. Van Wagner Communications, LLC, 73 A.D.3d 546, 547-48 (1st Dep't 2010); Teri-Nichols Inst. Food Merchants, LLC v. Elk Horn Holding Corp., 64 A.D.3d 424 (1st Dep't 2009); Richardson & Lucas, Inc. v. New York Athletic Club of City of N.Y., 304 A.D.2d 462, 463 (1st Dep't 2003). See Plaza PH2001, LLC v. Plaza Residential Owners LP, 79 A.D.3d 587 (1st Dep't 2010); Miller v. Icon Group LLC, 77 A.D.3d 586, 587 (1st Dep't 2010); International Plaza Assoc., L.P. v. Lacher, 63 A.D.3d 527, 528 (1st Dep't 2009); Sorenson v.

Bridge Capital Corp., 30 A.D.3d 1144, 1145 (1st Dep't 2006).

II. CONSEQUENCES FOR THE RELIEF PLAINTIFF SEEKS

Since plaintiff's requests for relief all are premised on her allegations that defendants breached those oral promises that she agreed were superseded and unenforceable, plaintiff fails to satisfy her burden to show a likelihood of actual success on the merits of her breach of contract, breach of fiduciary duty, or conversion claim. C.P.L.R. §§ 6301, 6312(a). Because of the unlikelihood of plaintiff's success on the merits of this action, the court denies her motion for a preliminary injunction. C.P.L.R. §§ 6301, 6312(a); Metropolitan Steel Indus., Inc. v. Perini Corp., 50 A.D.3d 321, 323 (1st Dep't 2008); U.S. Re Cos., Inc. v. Scheerer, 41 A.D.3d 151, 154-55 (1st Dep't 2007); Sugarman v. Malone, 30 A.D.3d 197, 198 (1st Dep't 2006); Noto v. Bedford Apts. Co., 21 A.D.3d 762, 765-66 (1st Dep't 2005). See Nobu Next Door, LLC v. Fine Arts Hous., Inc., 4 N.Y.3d 839, 840 (2005).

The court also denies her motion insofar as it seeks an attachment, since the inference that defendants' actions indicate an intent to convert or misuse her assets for purposes contrary to her interests rests on their breach of the superseded and unenforceable oral promises. C.P.L.R. §§ 6201(3), 6212(a). Both forms of requested provisional relief are particularly unwarranted given the lack of a showing that plaintiff will succeed on the merits of her action. C.P.L.R. § 6212(a); VisionChina Media Inc. v. Shareholder Representative Servs., LLC,

109 A.D.3d 49, 59 (1st Dep't 2013); Founders Ins. Co. Ltd. v. Everest Natl. Ins. Co., 41 A.D.3d 350, 351 (1st Dep't 2007). Nor has she identified any basis for finding a risk that defendants will frustrate satisfaction of any judgment she possibly might obtain, C.P.L.R. § 6201(3); VisionChina Media Inc. v. Shareholder Representative Servs., LLC, 109 A.D.3d at 60: that defendants lack sufficient assets or are secreting them, removing them from the court's jurisdiction, or otherwise disposing of them. VisionChina Media Inc. v. Shareholder Representative Servs., LLC, 109 A.D.3d at 61-62. See Hotel 71 Mezz Lender LLC v. Falor, 14 N.Y.3d 303, 311-12 (2010); Koehler v. Bank of Bermuda Ltd., 12 N.Y.3d 533, 538 (2009).

Insofar as plaintiff's motion seeks access to records pertaining to her assets held by defendants in investment accounts, plaintiff is entitled to the quarterly reports required of defendant WSI under the Investment Advisory Agreement ¶ 5. Nowhere, however, does she allege that WSI had failed to provide those reports. Therefore the court denies her motion insofar as it seeks access to records without prejudice to a future motion for similar relief upon a showing that WSI has breached Investment Advisory Agreement ¶ 5 and that plaintiff is or imminently will be irreparably harmed by her nonreceipt of those reports on a timely and regular basis. C.P.L.R. §§ 6301, 6312(a); Zodkevitch v. Feibush, 49 A.D.3d 424, 425 (1st Dep't 2008); OraSure Tech., Inc. v. Prestige Brands Holdings, Inc., 42 A.D.3d 348, 349 (1st Dep't 2007); U.S. Re Cos., Inc. v. Scheerer,

41 A.D.3d at 155; Wall St. Garage Parking Corp. v. New York Stock Exch., Inc., 10 A.D.3d 223, 228-29 (1st Dep't 2004). See Nobu Next Door, LLC v. Fine Arts Hous., Inc., 4 N.Y.3d at 840.

Insofar as plaintiff's motion seeks access to her assets held by defendants in investment accounts, plaintiff is entitled to terminate the Investment Advisory Agreement by giving written notice of the termination to WSI 30 days in advance, in which event plaintiff would owe the fees required by her contract "on a prorated basis." Fu Aff. Ex. 3 ¶ 6. Should she terminate the Agreement, and should WSI fail to return her funds upon her tender of whatever fees, if any, were required by her copy of the contract, she may move again for the return of her funds upon a showing that WSI's failure to return the funds may not be compensated adequately by an award of damages. C.P.L.R. §§ 6301, 6312(a); Zodkevitch v. Feibush, 49 A.D.3d at 425; OraSure Tech., Inc. v. Prestige Brands Holdings, Inc., 42 A.D.3d at 348-49; U.S. Re Cos., Inc. v. Scheerer, 41 A.D.3d at 155; Wall St. Garage Parking Corp. v. New York Stock Exch., Inc., 10 A.D.3d at 228-29.

In sum, the court denies plaintiff's current motion in all respects and therefore vacates the temporary injunctive relief ordered in the Order to Show Cause signed June 4, 2013. C.P.L.R. §§ 6301, 6313(a). Since defendants have shown no damages caused specifically by the limited temporary injunctive relief, as opposed to the costs of defending this action as a whole and potential damages should plaintiff prevail in the action, plaintiff is entitled to a release of the full undertaking filed

with the court pursuant to the order dated June 4, 2013. See C.P.L.R. §§ 6312(b), 6313(c), 6315. Upon plaintiff's presentation of this order with notice of entry and an affidavit of service of the order with notice of entry on defendants at least five days previously, the Clerk or other custodian of plaintiff's $10,000.00 undertaking shall release the funds to plaintiff forthwith.

DATED: April 10, 2014

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.