

AIG Fin. Prods. Corp. v ICP Asset Mgt., LLC
2014 NY Slip Op 32428(U)
September 12, 2014
Supreme Court, New York County
Docket Number: 651117/11
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
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AIG FINANCIAL PRODUCTS CORP.,

Plaintiff,

-against-

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ICP ASSET MANAGEMENT, LLC, ICP SECURITIES
LLC, INSTITUTIONAL CREDIT PARTNERS, LLC,
ICP STRATEGIC CREDIT INCOME FUND, LTD.,
TRIAXX PRIME CDO 2007-1, LTD., TRIAXX
FUNDING HIGH GRADE I, LTD., MOORE
CAPITAL MANAGEMENT, LP, SEYCHELLES LTD.,
and JOHN DOES 1-10,

Defendants.
-----x

JEFFREY K. OING, J.:

Plaintiff, AIG Financial Products Corp. ("AIG-FP") moves, pursuant to CPLR 3025[b], for leave to file a second amended complaint in this action, and to file it without redacting certain allegations and documents.

Defendants, Moore Capital Management, LP ("Moore") and Seychelles Ltd. ("Seychelles"), collectively with Moore the "Moore defendants", cross-move, pursuant to CPLR 3024[b], to strike certain prejudicial or scandalous matter from the proposed second amended complaint, and to redact any material that the Court does not strike.

For the reasons that follow, that branch of AIG-FP's motion for leave to amend is granted. That branch of its motion for leave to file an unredacted second amended complaint is denied.

The Moore defendants' cross-motion to strike is granted in part and denied in part.

Familiarity with the underlying facts are presumed (see Transcript of 5/30/12 Proceedings, Docket Nos. 159-162). Subsequent to May 30, 2012, AIG-FP settled with defendants ICP Asset Management, LLC, ICP Securities LLC, and Institutional Credit Partners, LLC (collectively the "ICP defendants") (Stipulation of Discontinuance, Docket No. 199). AIG-FP and the Moore Defendants then proceeded with discovery.

Discussion

I. Leave to Amend

AIG-FP seeks leave to amend its complaint by adding certain factual allegations, repleading its previously dismissed claim for unjust enrichment, adding a new claim for fraud against the Moore defendants, and adding an unjust enrichment claim against a new defendant, ICP Strategic Credit Income Master Fund, Ltd.

"Leave [to amend] shall be freely given upon such terms as may be just" (CPLR 3025[b]). Motions for such relief should be granted, "absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit" (MBIA Ins. Corp. v Greystone & Co., Inc., 74 AD3d 499 [1st Dept 2010]).

Although the Moore defendants do not challenge the proposed second amended complaint on the grounds that it lacks merit or is insufficient, they do argue that they will be prejudiced by AIG-FP's new theories of liability given AIG-FP's delay in bringing these claims, the expanded scope of liability, and the steps the Moore defendants have already taken in terms of discovery preparation and dispositive motion practice. Further, the Moore defendants argue that the motion should be denied because AIG-FP's theory of vicarious liability contradicts the original complaint.

With respect to the potential prejudice to the Moore defendants, increased liability and a broader scope of discovery are not grounds for denying leave to amend (Jacobson v McNeil Consumer & Specialty Pharm., 68 AD3d 652, 654 [1st Dept 2009]). Nor is lateness, absent significant prejudice (Masterwear Corp. v Bernard, 3 AD3d 305, 306 [1st Dept 2004]). Thus, the Moore defendants' claim that vicarious liability for all of the ICP defendants' transactions expands their liability beyond that contemplated by the original complaint is not dispositive of whether to permit the amendment. The new causes of action derive from the facts, transactions and occurrences pleaded in the original complaint. That AIG-FP now seeks to hold the Moore

defendants liable on a different theory of liability involving the same facts is permissible pursuant to CPLR 3025[b].

Further, and also in relation to whether AIG-FP's new theory of liability contradicts the original complaint, AIG-FP's new claim for fraud does not seek substantially different damages. As AIG-FP stated in its interrogatory responses, it derived its damage calculations from the full scope of the fraudulent transactions alleged in the complaint, all of which the Moore defendants might be liable for (Interrogatory Responses, Reply Affirmation of Jonathan Pickhardt, 12/18/13, Ex. A, pp. 5-6). AIG-FP's new claim for vicarious liability for fraud is therefore not contradictory to, or an expansion of, AIG-FP's claimed damages. The Moore defendants are free to contest their liability for any number of the alleged transactions, but on a motion for leave to amend the Court need only find that a proposed amendment has at least arguable and colorable merit, and need not go further (Helene-Harrisson Corp. v Moneyline Networks, Inc., 6 AD3d 151 [1st Dept 2004]).

Accordingly, that branch of AIG-FP's motion for leave to amend its complaint is granted. Further, the Moore defendants' letter application to stay expert discovery in this action in the event that the Court granted AIG-FP's motion until the Court resolves their anticipated motion to dismiss the second amended

complaint (8/28/14 Letter to Court, Docket No. 271) is granted without opposition.

II. Striking Prejudicial or Scandalous Matter

"A party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading" (CPLR 3024[b]). A Court may strike such matter if it is not relevant to any cause of action (Soumayah v Minnelli, 41 AD3d 390, 392 [1st Dept 2007]).

The Moore defendants' objections to the second amended complaint's allegations can be grouped into four categories: (1) the SEC's initial letter of May 4, 2010 to Moore regarding the SEC's concerns (SEC Letter, Affirmation of Jonathan Pickhardt, 10/18/13, Ex. C); (2) the fact that Moore settled with the SEC; (3) Moore's settlement communications with the SEC (SEC Communications, Pickhardt Aff., 10/18/13, Exs. D, E); and (4) the second amended complaint's references to securities fraud perpetrated by Bernard Madoff and SAC Capital in conjunction with speculation about the Moore defendants' motive for settling. Of these, the record demonstrates that the first and the second are clearly relevant to this action. While AIG-FP also sought leave to file publically two other categories of potentially confidential information gained through discovery, Moore has no

objection on those grounds (Moore Def.'s Mem. of Law, pg. 21 n. 5).

Turning to the third group of allegations, Moore's settlement communications with the SEC, the Court has reviewed the SEC complaint against the ICP defendants in the context of this action (see Transcript of 5/30/12 Proceedings, Docket Nos. 159-162, pg. 72), and Moore has argued that its exclusion from that proceeding should be interpreted in their favor (see Def.'s 12/12/11 Reply Mem. of Law, Pickhardt Reply Aff., 12/18/13, Ex. C, pg. 6, n. 5; Reply Brief, Pickhardt Reply Aff., 12/18/13, Ex. E, pg. 21 ["the SEC complaint ... compel[s] the opposite inference: that the Moore Defendants had only minimal involvement in the swap transactions"]). The SEC's initial letter is therefore relevant to the other side of the story, so to speak. So too is the fact that Moore ultimately settled with the SEC.

Conversely, allegations relating to the SEC Communications documenting part of Moore's settlement negotiations with the SEC must be struck. "As a general rule, offers to compromise are inadmissible at trial. Thus, the allegations related to such are irrelevant and should be struck" (Soumayah v Minnelli, 41 AD3d 390, 393 [1st Dept 2007]). Given the allegations regarding the SEC's initial letter, the SEC communications and settlement

discussions are not necessary to the complaint and "may instill undue prejudice in the jury" (Id.).

As to the fourth group of the allegations, namely, the references to Madoff and SAC Capital, such are not relevant to the case, and certainly prejudicial to the Moore defendants by invoking incantations of the two most notorious securities fraud cases in recent years.

Accordingly, that branch of the Moore defendants' cross-motion to strike allegations as "scandalous or prejudicial" is granted to the extent of striking any references to the SEC Communications or their content, as well as any references to Bernard Madoff, SAC Capital, and the associated Securities Fraud actions, and in all other respects is denied.

III. Redacting or Sealing the Complaint

Finally, the Moore defendants request that any reference to the material they sought to strike, to the extent that the Court allows it to remain, be redacted in AIG-FP's second amended complaint. With respect to the two remaining categories of objections, the Moore defendants concede this point with respect to the fact of their settlement with the SEC (Moore Def.'s Mem. of Law, pg. 21 n. 6), leaving only the initial SEC letter.

The parties previously entered into a protective order, which provides that any party may designate a document as

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"confidential" (Confidentiality Stipulation and Order, Affirmation of David Zensky, 11/20/13, Ex. F, ¶ 2).

"Confidential Information" includes "information the disclosure of which would, in the good faith judgment of the party designating the material as confidential, be detrimental to the conduct of that party's business or the business of any of that party's customers or clients" (Id. at ¶ 3[a]). When the Moore defendants produced the SEC's initial letter, they designated it confidential (SEC Letter, Zensky Aff., 11/20/13, Ex. G).

Notably, while the ICP defendants initially produced the letter to AIG-FP without designating it confidential, the Moore defendants exercised their right to designate material that was previously undesignated (Confidentiality Stipulation and Order, Zensky Aff., 11/20/13, Ex. F, ¶ 13).

There is currently no sealing order in this case, and the Court is not inclined to enter one at this time. Therefore, this branch of AIG-FP's motion is moot as there is nothing to unseal. Based on the Moore defendants' concession regarding the fact that they settled with the SEC, an redaction of this fact is unwarranted. With respect to the contents of the letter, however, those contents are to be redacted. Although the confidentiality order is broad in terms of how a party may use confidential information (Id. at ¶ 7), the information must still

be kept confidential. The confidentiality order requires that a party in the first instance is to request the designating party to declassify the information, and if that party refuses to engage in motion practice to de-designate the material (Id. at ¶ 5). Here, the facts of the SEC's concern and the Moore defendants' eventual settlement are sufficient to allow for redaction of the specific contents of the SEC's initial letter.

Accordingly, that branch of AIG-FP's motion to unseal it's second amended complaint is denied. That branch of the Moore defendant's motion to redact certain allegations not already stricken is granted to the extent of redacting reference to the contents of the SEC's initial letter, but is otherwise denied.

Accordingly, it is hereby

ORDERED that branch of AIG-FP's motion for leave to amend its complaint is granted. AIG-FP shall serve an amended complaint which complies with this order with respect to allegations struck or redacted within 30 days after service of a copy of this order with notice of entry; and it is further,

ORDERED that the Moore defendants' letter application to stay expert discovery in this action until the Court resolves their anticipated motion to dismiss the second amended complaint is granted without opposition; and it is further,

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ORDERED that branch of the Moore defendants' cross-motion to strike allegations as "scandalous or prejudicial" is granted to the extent of striking any references to the SEC Communications or their content, as well as any references to Bernard Madoff, SAC Capital, and the associated Securities Fraud actions, and in all other respects is denied; and it is further,

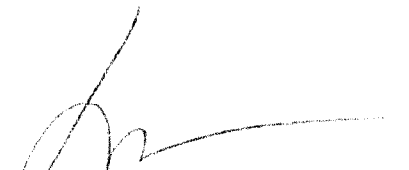
ORDERED that branch of AIG-FP's motion to unseal its second amended complaint is denied; and it is further,

ORDERED that branch of the Moore defendant's cross-motion to redact certain allegations not already struck is granted to the extent of redacting reference to the contents of the SEC's initial letter, but is otherwise denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated:

9/12/14


HON. JEFFREY K. OING, J.S.C.