Princeridge Group LLC v Henning-Carey Proprietary Trading, LLC
2014 NY Slip Op 32976(U)
November 17, 2014
Supreme Court, New York County
Docket Number: 653463/2011
Judge: Saliann Scarpulla
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

---X

THE PRINCERIDGE GROUP LLC,

Plaintiff,

- against -

HENNING-CAREY PROPRIETARY TRADING, LLC and BOLTON, LLC,

Defendants.

---X

DECISION and ORDER
Index No. 653463/2011
Mot. Seq. Nos. 004, 005

SALIANN SCARPULLA, J.:

This litigation arises out of a 2011 securities trade comprised of one stock and two options transactions. The stock transaction consisted of defendant Henning-Carey Proprietary Trading, LLC's ("HCPT") purchase from plaintiff[1] of 27,5000 shares of LinkedIn ("LNKD") common stock at $92.70 per share (the "LNKD Stock").

The two related options transactions involved call and put options. First, HCPT contracted to sell 275 November 2011 LNKD $85 call options at a price of $11.60 per contract (the "LNKD Call Options"). Second, HCPT contracted to buy 275 November 2011

[1] Plaintiff was previously known as Cohen & Company Capital Markets, LLC or "CCCM," including at the time of the events in this litigation. Plaintiff has since changed its name to The PrinceRidge Group, LLC and the caption has been amended to reflect this change.

separately under motion sequence number 005 to dismiss the amended complaint. Motion sequence numbers 004 and 005 are consolidated for disposition herein.

Discussion

In order to prevail on its breach of contract cause of action, plaintiff must establish "the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages." *See U.S. Bank Natl. Assoc. v. Lieberman,* 98 A.D.3d 422, 423 (1st Dep't 2012)(*citing JP Morgan Chase v. J.H. Elec. of N.Y., Inc.*, 69 A.D.3d 802, 803 (2d Dep't 2010)).

Plaintiff alleges that the parties' contract was formed on October 28, 2011, when Munaf Merchant ("Merchant"), a Head Trader for defendant Bolton LLC ("Bolton"), which was authorized to trade on behalf of HCPT, placed an order to execute the LNKD Stock and Options transactions. This contract was allegedly memorialized in subsequent trade confirmations.

Plaintiff insists that both HCPT and its representative Bolton were parties to the trades, and both are in breach thereunder because HCPT was acting through Bolton. However, when Merchant placed the order for the Stock and Options trades, he was acting on behalf of HCPT, and not Bolton, and there is no evidence that Bolton was a party to the trades, rather than acting as HCPT's agent. Merchant Aff. in Opp.,¶¶ 6-7 (mot. seq. no. 004). In fact, in a November 9, 2011 email between Bolton and MF Global, Norman Feckl of Bolton clarified with respect to the LNKD Stock transaction that "[t]he legal entity/Account is in the name of

[* 3]

Henning Carey Proprietary Trading." In addition, the trade confirmation for the Stock transaction is addressed to HCPT "C/O Bolton LLC" and indicates that the trade was made for the account of HCPT. Further, Merchant swears in his affidavit that Bolton and HCPT were "two entirely separate and distinct entities with no corporate relationship whatsoever," Bolton did not maintain an account with plaintiff, Bolton is not identified in HCPT's account opening documents as a customer of plaintiff, and all of the transactions were in HCPT's account. The documents submitted on this motion show that Bolton was acting on HCPT's behalf in executing the trades and was not, itself, a party to them.

Next, defendants assert as an affirmative defense plaintiff's failure to perform its own contractual obligations. Specifically, defendants argue that the Options trade at issue did not settle because plaintiff failed to execute it as an institutional prime brokerage trade, which would have resulted in it settling automatically through the DTC and the NSCC. Because the trade was instead executed as a retail customer trade, it did not settle on November 2, 2011, and any liability resulting from this failure would allegedly lie with the client - in this case,

[* 4]

HCPT.[3] However, HCPT argues that plaintiff's material breach in failing to execute the trade on an institutional prime brokerage basis discharged it of any alleged liability.

On September 12, 2011, prior to the trades being booked, HCPT opened an institutional trading account with plaintiff and, two days later, informed plaintiff that MF Global was its prime broker. The following day, on September 15, 2011, plaintiff requested that HCPT provide information for its contact at MF Global because "[it was] sure they will want a F1SA signed...."[4] Davidian Aff. in Support, Ex. 5. HCPT responded that same day, providing plaintiff with the requested information. Despite this exchange, a F1SA was never executed by MF Global and Pershing. Defendants argue that, based on plaintiff's request for MF Global's contact information, it took upon itself any duty to obtain an F1SA.

---

[3] Thomas Guinan ("Guinan") of plaintiff's executing broker Pershing LLC ("Pershing") explained in a November 8, 2011 email that "NSCC covers trades between brokers not customers. This trade settled on 11/2/11 and would be included in the NSCC notice process if it was a trade with MF Global the broker dealer directly and processed through NSCC via a balance order or CNS." Davidian Aff. in Support, Ex. 13 (mot. seq. no. 005). Guinan further stated that the LNKD Stock trade "was a customer trade with MF Global acting as a settlement agent for the customer" as opposed to a broker-to-broker trade and, therefore, plaintiff's "recourse is to its customer [HCPT] and its customer recourse is to MF Global." *Id.* By email dated November 14, 2011, the President of plaintiff's affiliate, FGC Securities, informed Pershing that "MF did not provide the required form 1sA to identify the account as a Prime Brokerage account however, the Customer [HCPT] has forwarded all their original account setup documentation with MF, which clearly identifies it as such. So, it appears that this was an oversight/error on the part of MF." *Id.* at Ex. 19.

[4] "Form 1SA" or "F1SA" refers to Form 1 to Schedule A to Securities Industry Association Form 150, which is an agreement sometimes executed between a prime broker and an executing broker.

[* 5]

Plaintiff asserts that a prime brokerage arrangement - which would have entitled HCPT to the protections afforded institutional trades, including automatic clearing - is not established unless and until the *customer's prime broker* sends a F1SA to a trading counterparty's executing broker for counter-execution. Mem. in Supp., p. 15 (mot. seq. no. 004). Plaintiff argues that it was defendants' and/or MF Global's duty to ensure that a F1SA was obtained, pointing to MF Global's "Securities Agreement Supplement Regarding Prime Brokerage Services" (the "MF Global Prime Brokerage Agreement") entered into between MF Global and HCPT, which provides that "[y]ou [HCPT] will not begin to effect Prime Brokerage Transactions with an Executing Broker until you have advised us of your intent to do so and *we thereafter advise you that we and the Executing Broker have executed the appropriate Contractual Arrangements with respect thereto*." Lurie Aff. in Support, Ex. K, ¶ 3 (emphasis added). HCPT made a *post hoc* effort to obtain the F1SA from MF Global in November 2011, so that HCPT's account with plaintiff could be re-categorized as a prime brokerage account. However, in light of its bankruptcy, MF Global was "frozen" and HCPT was never able to obtain the F1SA.

Plaintiff's September 15, 2011 request for MF Global's contact information related to the F1SA did not shift the duty of obtaining the form to plaintiff. Yet, even if such duty had been shifted to plaintiff, it would not change the fact that defendants never received confirmation from MF Global that the form had been executed, which under the MF Global Prime Brokerage Agreement was a condition precedent to HCPT's ability to effect prime

brokerage transactions. Defendants' argument that plaintiff failed to perform its contractual duties is therefore meritless.

Defendants next assert as an affirmative defense that their actions were not the direct or proximate cause of plaintiff's alleged damages. Rather, they argue, MF Global's bankruptcy prevented settlement of the LNKD Stock transaction and that this, coupled with a decline in the market price of LNKD stock, resulted in plaintiff's loss.

Defendants further assert that plaintiff failed to mitigate its damages. They argue that plaintiff knew by November 1, 2011 that MF Global's bankruptcy would prevent settlement of the LNKD Stock transaction but that plaintiff waited until November 10 to begin to sell the LNKD Stock. Defendants admit that HCPT notified plaintiff that it was opening a prime brokerage account with JP Morgan on November 1, 2011, but that the account transfer process from MF Global to JP Morgan was stopped by the SEC that same day. Davidian Aff., Ex. 11 (mot. seq. no. 004). As such, defendants argue that plaintiff could not have relied on any of their purported representations that their account would be transferred and that the LNKD Stock trade would settle after November 1, 2011.

There are issues of fact with respect to causation and mitigation of damages. Specifically, whether the Options trade could have cleared on a retail basis on or shortly after November 2, 2011, and whether it was possible for defendants to engage another clearing broker in order to settle the trade are material factual issues which I may not resolve on this summary judgment motion.

Next, because the parties entered into a binding agreement, plaintiff's unjust enrichment cause of action is dismissed as duplicative of its breach of contract cause of action. *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 791 (2012)("An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim").

Finally, plaintiff's claim for attorneys' fees will be addressed following determination of the foregoing issues of fact.[5]

Based on all of the above, it is

ORDERED that defendants' motion for summary judgment is granted to the extent of dismissing all of the claims asserted against defendant Bolton LLC, and the Clerk of the Court is directed to enter judgment dismissing the complaint as against defendant Bolton LLC; and it is further

ORDERED that defendants' motion for summary judgment is further granted to the extent of dismissing plaintiff's unjust enrichment cause of action, and the motion is otherwise denied; and it is further

ORDERED that, with respect to plaintiff's breach of contract cause of action as asserted against the remaining defendant Henning-Carey Proprietary Trading, LLC, both defendants' motion for summary judgment and plaintiff's motion for partial summary judgment on that cause of action are denied; and it is further

---

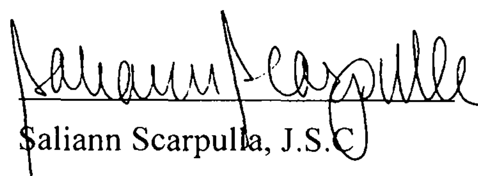
[5] I note that those portions of the trade confirmations provided to the Court, upon which plaintiff relies in asserting its entitlement to attorneys' fees, are illegible.

ORDERED that counsel for the parties will appear for a pre-trial conference in IA Part 39, 60 Centre Street, Room 208 on December 10, 2014 at 2:15 p.m.

This constitutes the decision and order of this Court

Date: New York, New York
November 17, 2014

ENTER:



Saliann Scarpulla, J.S.C