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| Platinum Equity Advisors, LLC v SDI, Inc. |
| 2014 NY Slip Op 33993(U) |
| July 18, 2014 |
| Supreme Court, New York County |
| Docket Number: 653709/2013 |
| Judge: Eileen Bransten |
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN Justice

PART 3

PLATINUM EQUITY ADVISORS, LLC

INDEX NO. 653709/2013

- v -

MOTION DATE 4/16/2014

SDI, INC.

MOTION SEQ. NO. 004

The following papers, numbered 1 to 3, were read on this motion to/for dismiss
Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s)
Answering Affidavits - Exhibits No(s)
Replying Affidavits No(s)
Cross Motion No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

DATED: 7/18/2014

Eileen Bransten, J.S.C.

- 1. CHECK ONE : [] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE : MOTION IS : [X] GRANTED [] DENIED [] GRANTED IN PART [] OTHER
3. CHECK IF APPROPRIATE : [] SETTLE ORDER [] SUBMIT ORDER
[] DO NOT POST [] FIDUCIARY APPOINTMENT [] REFERENCE

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

-----X
PLATINUM EQUITY ADVISORS, LLC,

Plaintiff,

-against-

SDI, INC. and TD BANK, N.A.,

Defendants.

-----X
BRANSTEN, J.

Index No. 653709/2013
Motion Date: 4/14/2014
Motion Seq. No. 004, 006

In this action, Plaintiff Platinum Equity Advisors, LLC (“Platinum”) asserts various breach of contract and tort claims, arising from a 2011 transaction with Defendant SDI, Inc. (“SDI”), for which TD Bank, N.A. (“TD Bank”) served as the Escrow Agent. Presently before the Court are TD Bank and SDI’s motions to dismiss Platinum’s complaint. Platinum opposes. For the reasons that follow, TD Bank’s motion is granted in part, and SDI’s motion is granted in its entirety.

I. Background¹

This action stems from an April 28, 2011 transaction, whereby non-parties Platinum Equity Capital Partners, L.P., Platinum Equity Capital Partners-A, L.P., Platinum Equity Capital Partners-PF, L.P., and Platinum Eagle Principals, LLC (collectively “Sellers”) entered into a Stock Purchase Agreement (“SPA”), through which

¹ The facts cited in this section are drawn from the complaint.

all shares in a corporation then known as Project Eagle Holding Corporation (“Project Eagle”) were sold to Defendant SDI.²

Relevant to the instant motions, the SPA provided for the establishment of an Indemnity Escrow Fund (“Escrow”), into which \$5 million of the purchase price for the transaction was deposited by SDI at the time of closing. As explained by Plaintiff, the purpose of the Escrow was to provide a source of payment for SDI in the event it was entitled to indemnification under one of the applicable provisions of the SPA. The mechanism for such payments was provided by the Escrow Agreement, entered into by: (1) Plaintiff Platinum Equity Advisors, LLC (“Platinum”), as the Sellers’ Representative; (2) SDI; and, (3) TD Bank, as the Escrow Agent.

In August and November 2012, SDI made claims for indemnification under the Escrow Agreement’s terms and served notices of its claims on Platinum and TD Bank. Thereafter, in December 2012, TD Bank released the Escrow to SDI. Platinum now contends that TD Bank’s release of funds was in breach of the Escrow Agreement, since the claim notices served by SDI purportedly were defective.

² According to the complaint, SDI entered into the SPA “by and through its predecessor-in-interest,” Strategic Distribution Holdings, Inc. For ease of reference, this decision will refer to entities collectively herein as “SDI.”

Accordingly, Plaintiff Platinum now brings a seven-count complaint, asserting claims for breach of the Escrow Agreement and conversion against both SDI and TD Bank. In addition, Platinum brings a breach of fiduciary duty claim against TD Bank individually, as well as unjust enrichment and breach of the SPA claims against SDI. TD Bank and SDI each have filed motions to dismiss.

II. Discussion

A. *Motion to Dismiss Standard*

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

On a CPLR 3211(a)(4) motion, dismissal of an action is warranted where “there is another action pending between the same parties for the same cause of action in a court of any state or the United States.” *See Whitney v. Whitney*, 57 N.Y.2d 731, 732 (1982) (noting court’s “broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties on the same cause of action.”).

B. *TD Bank’s Motion to Dismiss*

TD Bank seeks dismissal of all claims asserted against it, pursuant to CPLR 3211(a)(7) and (a)(4). In support, TD Bank offers three general arguments: (1) that Plaintiff’s breach of the Escrow Agreement and breach of fiduciary duty claims fail to allege any conduct by TD Bank demonstrating gross negligence or willful misconduct; (2) that Plaintiff’s conversion claim fails to state a cause of action; and, (3) that the entire action merits dismissal since there is a prior pending action in Pennsylvania. These arguments will be considered in turn below.

1. Breach of the Escrow Agreement and Breach of Fiduciary Duty Claims

Plaintiff’s breach of contract and breach of fiduciary duty claims are grounded in the argument that TD Bank’s release of escrow funds was improper, notwithstanding

Platinum's failure to object to the notices. Platinum maintains that the claim notices were invalid ab initio and that TD Bank had a duty to investigate the notices before disbursing the escrow.

Even giving Plaintiff all favorable inferences, as this Court must on a motion to dismiss, the complaint falls short of meeting the heightened pleading threshold set forth for such claims in the Escrow Agreement's exculpatory clause. The exculpatory clause states that:

[t]he Escrow Agent ... shall not be liable to anyone whomsoever by reason of any error or judgment or for any action done or step taken or omitted by the Escrow Agent, or for any mistake of fact or law or anything which the Escrow Agent may do or refrain from doing in connection herewith, *unless caused by or arising out of the Escrow Agent's gross negligence or willful misconduct.*

See Affirmation of Kevin P. Potere in Support of TD Bank's Motion Ex. A § 5.2 (Escrow Agreement) (emphasis added).

TD Bank contends that its release of the escrow funds at issue was mandated by the clear and unambiguous language of the parties' agreement and thus cannot be deemed "gross negligence or willful misconduct," as required for a non-exculpated claim. The Court agrees.

The Escrow Agreement provides that any claim for indemnification be done through a written claims notice, sent to Platinum and TD Bank. *Id.* § 4.1. Within twenty days from receipt of such a notice, Platinum "shall deliver to [SDI] and the Escrow Agent

a written response.” *Id.* § 4.2. In this written response, Platinum “shall instruct the Escrow Agent either: (i) release funds in the full amount of the Claimed Amount ... (ii) to release funds in an amount equal to part, but not all, of the Claimed Amount ... or (iii) to release no Amount” from the escrow fund. *Id.* Where, as here, Platinum fails to provide any instructions to the Escrow Agent by the appointed deadline, “such Claimed Amount *shall be deemed accepted as full by [Platinum]* for the purposes of this Escrow Agreement *and the related Claimed Amount will be released* pursuant to Section 4.3.” *Id.* (emphasis added).

Notwithstanding the clear language of Sections 4.2 and 4.3 – and regardless of its failure to provide any instructions to TD Bank regarding the claim notices – Platinum maintains that it was “grossly negligent” for TD Bank to release the escrow. Platinum claims that the claims notices themselves were defective since they were signed by SDI’s President and CEO, instead of by one of three individuals designated for the task in Exhibit B to the Escrow Agreement. Platinum maintains that TD Bank should have recognized the error and withheld the escrow.

Accepting for the sake of this motion that SDI’s President and CEO was not a valid signatory and that TD Bank should have caught the error, Plaintiff still fails to assert the “intentional wrongdoing” or “reckless disregard” requisite for a gross negligence or willful misconduct pleading. *See Colnaghi, USA v. Jewelers Protection Servs., Ltd.*, 81 N.Y.2d 821, 823-24 (1993) (“[G]ross negligence differs in kind, not only

degree from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing.”); *Abacus Fed. Sav. Bank v. ADT Security Serv., Inc.*, 77 A.D.3d 431, 433 (1st Dep’t 2010) (“Gross negligence, when invoked to pierce a contractual limitation of liability, must smack of intentional wrongdoing by evincing a reckless indifference to the rights of others.”). At most, Platinum’s claims amount to claims of ordinary negligence, as opposed to gross negligence or willful misconduct.

In *Retty Financing, Inc. v. Morgan Stanley Dean Witter & Co.*, 293 A.D.2d 341 (1st Dep’t 2002), the First Department determined that an exculpatory clause barred analogous claims. There, an investment fund brought breach of contract claims against Morgan Stanley Dean Witter (“Morgan Stanley”), alleging that Morgan Stanley improperly transferred funds out of plaintiff’s account in violation of a Customer Agreement. The Agreement provided that only plaintiff’s officers and directors could withdraw funds; however, Morgan Stanley released funds to a third-party after this individual produced a written authorization form signed by plaintiff’s officers and directors. While Morgan Stanley’s release of funds to someone other than one of plaintiff’s officers and directors may have been inconsistent with the contract, the First Department concluded that the exculpatory provision of the Customer Agreement barred plaintiff’s claims. Like the Escrow Agreement here, the exculpatory clause in *Retty* prohibited all claims other than those for gross negligence and willful misconduct.

Taking all facts in plaintiff's favor, the First Department nonetheless concluded that Plaintiff's pleading failed to state conduct "evincing a reckless disregard for the rights of plaintiff or smacking of intentional wrongdoing." *Id.* at 341.

Likewise here, Plaintiff alleges that the escrow funds were released due to TD Bank's failure to recognize that SDI's President and CEO was not a valid signatory to the claim notices. However, such an allegation does not evince a "reckless disregard" to Platinum's rights nor does it "smack" of intentional wrongdoing. Accordingly, Platinum's claims for breach of the Escrow Agreement and breach of fiduciary duty are barred by the exculpatory clause and are therefore dismissed.

2. Conversion Claim

Plaintiff's conversion cause of action does not fare better. In support of its conversion claim, Platinum again alleges that TD Bank's delivery of the escrowed funds based on the purportedly deficient claim notices was in violation of the strict requirements of the Escrow Agreement.

As pleaded, this conversion claim fails as duplicative of Platinum's breach of contract claim. Platinum re-asserts the same facts used in support of its breach of contract claim and likewise seeks the same damages. However, a conversion claim "cannot be predicated on a mere breach of contract, and no independent facts are alleged giving rise to tort liability." *Kopel v. Bandwith Tech. Corp.*, 56 A.D.3d 320, 320 (1st

Dep't 2008) (citing *Fesseha v. TD Waterhouse Inv. Servs., Inc.*, 305 A.D.2d 268, 269 (1st Dep't 2003)). Since Platinum's conversion claim is nothing more than a restatement of its breach of contract claim, the conversion claim is dismissed.

Moreover, even if not dismissed as duplicative, Plaintiff's conversion claim would be barred by the exculpatory clause in the Escrow Agreement, as the facts alleged do not rise to the level of "gross negligence" or "willful misconduct." See Section II.B.1, *infra*.

3. Prior Pending Action

Finally, TD Bank contends that the entire action here should be dismissed because of a prior pending action in Pennsylvania – a May 2013 litigation filed by SDI against Platinum and certain of its individual executives in the Pennsylvania Court of Common Pleas. See *SDI, Inc., et al. v. Platinum Equity LLC, et al.*, Civil Action No. 001634 (May 2013) ("Pennsylvania Action").

CPLR 3211(a)(4) provides that dismissal of an action is warranted where "there is another action pending between the same parties for the same cause of action in a court of any state or the United States." Here, SDI's motion fails because the two actions do not assert "the same cause of action."

In considering whether the same cause of action is asserted in both litigations, "the relief sought must be the same or substantially the same." *White Light Prods., Inc. v. On the Scene Prods., Inc.*, 231 A.D.2d 90, 94 (1st Dep't 1997). This criterion is "lacking"

where “the purposes of the two actions are entirely different.” *Id.* Here, it is undisputed that the Pennsylvania Action and the instant action each assert wrongs stemming from the parties’ 2011 transaction. However, the subjects of the two litigations diverge there. The claims asserted in the instant litigation pertain to the allegedly improper payment of the Escrow to SDI. In addition, Plaintiff seeks certain payments purportedly due from SDI under the Stock Purchase Agreement. Conversely, the Pennsylvania Action involves a separate dispute, asserting a variety of breach of contract and fraud claims stemming from representations made by Platinum and certain of its executives to SDI regarding Project Eagle Holding Corporation.³ The purposes of the two litigations are distinct and the relief sought in the two actions is different. Moreover, disposition of the claims in this litigation will have no effect on the claims asserted in the Pennsylvania Action and vice versa. *Cf. AIG Fin. Prods. Corp. v. Penncara Energy, LLC*, 83 A.D.3d 495, 495 (1st Dep’t 2011) (deeming that substantial identity of claims existed between two actions were disposition of one litigation “will necessarily resolve the sole cause of action” asserted in the other). Accordingly, TD Bank’s CPLR 3211(a)(4) motion is denied.

³ TD Bank did not submit a copy of the Pennsylvania Action complaint with its motion papers. This omission, in and of itself, would have required denial of its CPLR 3211(a)(4) motion, as it is impossible to perform the analysis required under the provision without analyzing the causes of action raised in the separate litigation. However, while TD Bank did not submit a copy of the complaint in the Pennsylvania Action with its motion papers, the pleading became part of the record in this case when SDI filed its motion for preliminary injunction, seeking to have this Court enjoin the prosecution of the Pennsylvania Action. *See* Motion Seq. 10. Accordingly, the Court was able to review the Pennsylvania complaint.

C. *SDI's Motion to Dismiss*

In its motion, SDI seeks dismissal of two counts of Platinum's complaint – the conversion and unjust enrichment claims. SDI argues that both claims merit dismissal as duplicative of the breach of contract claim asserted in count one of the complaint. The Court agrees.

1. Conversion

Plaintiff's conversion claim as to SDI fails for the same reasons stated above with respect to TD Bank. *See* Section II.B.2. The conversion claim is based on the same facts and seeks the same damages as the breach of contract claim found at count one. Moreover, Plaintiff asserts no breach of duty giving rise to separate tort liability. *See Feeseha v. TD Waterhouse Inv. Servs., Inc.*, 305 A.D.2d 268, 269 (1st Dep't 2003). Therefore, SDI's motion to dismiss the conversion claim is granted.

2. Unjust Enrichment

Plaintiff's unjust enrichment claim merits dismissal on the same grounds. Properly construed, Plaintiff's unjust enrichment claim is a restatement of its breach of contract claim. Plaintiff alleges that SDI was unjustly enriched "[b]y its failure and refusal to return the Indemnity Escrow Fund to TD Bank." (Compl. ¶ 46.) The same

allegations underlie Platinum's breach of contract claim, which asserts that SDI improperly received the escrow funds in violation of the Escrow Agreement. *Id.* ¶¶ 29-31.

A quasi-contract claim, such as the instant cause of action, cannot lie where an express contract exists governing the subject matter of the claim. *See Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 388 (1987) ("The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter."). Here, since the Escrow Agreement addresses the subject matter of Plaintiff's claim, the cause of action is necessarily dismissed.

III. Conclusion

For the foregoing reasons, it is

ORDERED that Defendant TD Bank, N.A.'s motion to dismiss is granted as to the breach of contract, breach of fiduciary duty, and conversion claims asserted against it, pursuant to CPLR 3211(a)(7) and the complaint is severed and dismissed as against said defendant with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal of TD Bank, N.A. and that all future papers filed with this court bear the amended caption; and it is further

ORDERED that counsel for defendant T.D. Bank, N.A. shall serve a copy of this order with notice of entry, upon the County Clerk (Room 141B), the Clerk of the Trial Support Office (Room 158) and the Clerk of the E-filing Support Office (Room 119), who are directed to mark the Court's records to reflect the amended caption; and it is further,

ORDERED that Defendant SDI, Inc.'s motion to dismiss is granted pursuant to CPLR 3211(a)(7) as to the conversion and unjust enrichment claims brought against it; and it is further

ORDERED that Defendant SDI, Inc. is directed to serve an answer to the remaining claims in the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on September 9, 2014, at 10 AM.

Dated: New York, New York
July 18, 2014

ENTER


Hon. Eileen Bransten, J.S.C.