

Qualstar Corp. v Needham & Co., LLC

2015 NY Slip Op 30001(U)

January 5, 2015

Supreme Court, New York County

Docket Number: 650773/2014

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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QUALSTAR CORPORATION,

Plaintiff,

- against-

NEEDHAM & COMPANY, LLC,

Defendant.
----- X

Index No.: 650773/2014
Subm. Date: Aug. 27, 2014
Mot. Seq. No.: 001

DECISION AND ORDER

Appearances:

For Plaintiff:

Pastore & Dailey LLC
By Joseph M. Pastore III, Esq.
420 Lexington Avenue, Suite 300
New York, New York 10170
212-297-6169

For Defendant:

Pillsbury Winthrop Shaw
Pittman LLP
By Frederick A. Brodie, Esq.
1540 Broadway
New York, New York 10036
212-858-1000

Papers Considered on this Motion to Dismiss:

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ELLEN M. COIN, J.:

Defendant Needham & Company, LLC (defendant) moves, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the complaint.

Plaintiff Qualstar Corporation (plaintiff) is in the business of delivering data storage and power supply solutions. Defendant is in the business of investment banking and providing financial advice. Faced with a hostile takeover, plaintiff retained defendant, pursuant to two letter agreements, to provide a fairness opinion on the adequacy of the tender offer initiated

by non-party BKF Capital Group, and to advise plaintiff in connection with devising a shareholder rights plan (antitakeover device known as a poison pill). Defendant billed and was paid the total agreed upon price of \$250,00 plus expenses. One year later, BFK Capital Group took over plaintiff's Board of Directors and brought this action seeking a refund.

The complaint sets forth causes of action for breach of contract (first and third), breach of the covenant of good faith (second and fourth), unjust enrichment (fifth), and negligence (sixth, but mislabeled as fourth).

In support of its motion to dismiss, defendant makes the following arguments. The first and third causes of action for breach of contract should be dismissed because they are precluded by the governing agreements. The second and fourth causes of action for breach of good faith must be dismissed because the implied duty of good faith cannot trump express contractual provisions. The fifth cause of action for unjust enrichment must be dismissed because the parties' relationship was governed by written contracts. The sixth cause of action for negligence must be dismissed because plaintiff does not allege a legally cognizable duty arising outside the contract.

In opposition to the motion to dismiss, plaintiff makes the following arguments. The agreements did not permit defendant to solely rely on information provided by plaintiff's former

management without any independent investigation. The disclaimers of liability contained in the agreements do not insulate defendant from gross negligence, willful misconduct, or non-performance. Whether defendant breached the agreements and plaintiff received the performance for which it bargained involve questions of fact and should not be determined on a motion to dismiss.

On a motion to dismiss a complaint for legal insufficiency, the court accepts the facts alleged as true and determines simply whether the facts alleged fit within any cognizable legal theory (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). The pleading is to be liberally construed, according the allegations the benefit of every possible favorable inference (*Ovitz v Bloomberg L.P.*, 18 NY3d 753, 758 [2012]). Dismissal of a complaint on the ground of documentary evidence is warranted where the evidence submitted conclusively establishes a defense as a matter of law (*150 Broadway N.Y. Assoc., L.P. v. Bodner*, 14 AD3d 1, 5 [1st Dept 2004][quotation marks and citation omitted]).

Plaintiff bases its arguments largely on a misguided characterization of the letter agreements. Contrary to plaintiff's assertion, the letter agreements expressly authorized defendant to rely on the information provided by plaintiff without independent verification. Both letter agreements provide:

Needham & Company (a) will use and rely primarily on the Information and on information available from generally recognized public sources in performing the services contemplated by this Agreement without having independently verified or investigated the same, (b) does not assume responsibility for the accuracy or completeness of the information and such other information and (c) will not make an appraisal or independent evaluation of the Company or its business, assets or liabilities.

Thus, the documentary evidence, in the form of the letter agreements, resolve all factual issues as a matter of law, and conclusively dispose of plaintiff's claims (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The key material fact alleged by plaintiff to be true, that the agreements did not permit defendant to solely rely on information provided by plaintiff's former management without any independent investigation, is not a fact at all, and no significant dispute exists regarding it (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). On the other hand, even giving the complaint every favorable inference, the documentary evidence conclusively establishes the defendant's contention, which is consistent with the agreements as a whole, with the parties' purpose, and with common sense (*Northville Indus. Corp. v. Natl. Union Fire Ins. Co.*, 89 NY2d 621, 633 [1997]).

Moreover, both agreements expressly provide that defendant "shall not have any liability (whether direct or indirect, in contract or otherwise) to (plaintiff) ... directly or indirectly for or in connection with the Engagement," except for losses that

result from defendant's "gross negligence or willful misconduct." The causes of action for breach of contract, and the causes of action for breach of the covenant of good faith, do not plead gross negligence or willful misconduct. Therefore, the disclaimers must be enforced by dismissing the first, second, third, and fourth causes of action.

As to the fifth cause of action for unjust enrichment, the requisite elements are "that (1) defendant was enriched, (2) at plaintiff's expense, and (3) that it is against equity and good conscience to permit ... defendant to retain what is sought to be recovered " (*Farina v Bastianich*, 116 AD3d 546, 548 [1st Dept 2014] [internal quotation marks and citation omitted]). The complaint fails to sufficiently allege how defendant was unjustly enriched by its receipt of the negotiated fee for its services. Furthermore, the uncontested existence of an actual agreement between the parties bars an action for unjust enrichment (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]; *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]; (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005])).

Finally, the sixth cause of action for negligence must be dismissed because alleging a failure to provide appropriate financial advice merely demonstrates plaintiff's dissatisfaction with defendant's performance of the contract, and does not state a tort claim (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308,


320 [1995]). Furthermore, a tort claim based upon the same facts that underlie the contract claim will be dismissed as duplicative of the contract claim (*Duane Reade v SL Green Operating Partnership, LP*, 30 AD3d 189, 190 [1st Dept 2006][citation omitted]).

In accordance with the foregoing, it is hereby

ORDERED that the motion of defendant Needham & Company, LLC to dismiss the complaint is granted pursuant to CPLR 3211(a)(1), and the complaint is dismissed in its entirety, with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly.

Dated: January 5, 2015

ENTER:


Ellen M. Coin, A.J.S.C.