SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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HARROP & CO., LIMITED,

Plaintiff,

-against-

Index No. 651949/2014
Motion Seq. No. 001
Motion Date: 1/21/2015

APOLLO INVESTMENT FUND VII, L.P., APOLLO MANAGEMENT VII, L.P., FINANCIAL CREDIT INVESTMENT I L.P.,

Defendants.

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BRANSTEN, J.:

In May 2008, plaintiff Harrop & Co., Limited entered into a marketing agreement (the "Agreement") with defendant Apollo Investment Fund VII L.P. ("Fund VII"), a U.S. based private equity fund. In the Agreement, Harrop agreed to introduce Fund VII to prospective investors that Harrop claimed to know. Pursuant to the Agreement, Harrop would be paid a fee by Fund VII if one of those prospective investors actually invested in Fund VII, or in one of Fund VII's parallel funds.

In June 2014, Harrop brought this action, seeking a fee of at least $825,000, based on an alleged investment by one of Harrop's Fund VII investor prospects, the New Zealand Superannuation Fund ("NZSF"), which invested in a fund called Financial Credit Investment I, L.P. ("FCI I"). Harrop contends that FCI I is one of Fund VII's parallel funds. Harrop asserts a claim for breach of contract against Fund VII, as well as against defendant Apollo Management VII, L.P., its investment manager, and FCI I.

Defendants move, pursuant to CPLR 3211(a)(1) and (a)(7), for an order dismissing the complaint. For the reasons set forth below, defendants' motion is denied in its entirety.

I. Background[1]

A. *Apollo Launches Fund VII, a Major Private Equity Fund*

Harrop is a small New Zealand company that was in the business of providing marketing services to private investment funds. (Compl. ¶¶ 2, 14.) Defendants are all affiliates of Apollo Management, L.P. ("Apollo Management"), a huge global alternative investment manager with total assets under management of about $159 billion. *Id.* ¶¶ 4, 9-12.

Fund VII was established in 2007 as a limited partnership under Delaware law. *See* Compl. Ex. at 1 (Agreement). Fund VII is a huge private equity fund, which alone managed assets of at least $14.7 billion. *Id.* ¶ 4.

Apollo Management's funds fall into two broad categories that exist side by side: (1) flagship funds; and (2) parallel funds. *See id.* ¶¶ 4-7, 24-25. Apollo has sequentially launched a series of huge flagship funds, each denominated with a Roman numeral. For example, the Fund VII was launched in or around 2007. Apollo Management launched

[1] The allegations in this section are drawn from the complaint, unless otherwise noted.

the next sequential flagship fund – Fund VIII – in 2013. Accordingly, the period of Fund VII ran from 2007 to 2013, when the period of Fund VIII began.

During the period of each flagship fund, certain potential investors may be interested in investment strategies that are outside the scope of that flagship fund. Thus, Apollo Management launches "parallel funds," which are smaller funds that pursue alternative investment strategies "for the benefit of certain investors, principally for tax, legal or other reasons." *See id.* ¶¶ 4-7; Agreement at 1. The details regarding the smaller, alternative funds that may be created during the period of each flagship fund are not necessarily known at the time of the creation of the flagship fund, since they will be formed specifically to address the needs or desires of certain investors. All that is known at the time of the creation of the flagship fund is that such alternative funds will be created to complement, and exist side-by-side within the flagship fund; thus, they are referred to generally as "parallel funds." *Id.*

During Fund VII's period – from its 2007 launch to the launch of Fund VIII in 2013 – multiple "parallel funds" were launched "for the benefit of certain investors." Defendant FCI I is such a parallel fund. *Id.* ¶ 7. FCI I is much smaller than Fund VII, with about $559 million in investment capital, and it is focused on investments in a very specific asset class (life insurance). *Id.* It was designed to exist alongside the Flagship

VII Fund, specifically to address the particular investment strategies of certain investors *Id.*

B. *Appointment of Harrop to Provide Marketing Services for Fund VII*

The money that private equity funds like Fund VII invest comes from a variety of outside investors. To raise money, private equity funds hire marketing agents. In connection with its fundraising activities, Fund VII retained Harrop as one of its marketing agents. Complaint ¶¶ 14-15. That retention was memorialized in the May 2008 marketing Agreement between Harrop, the Fund VII and Apollo Management. *Id.* ¶¶ 1, 15. Pursuant to the Agreement, the Fund VII appointed Harrop as a non exclusive marketing agent to identify and introduce them to potential investors (defined in the Agreement as "Investor Prospects"). All parties intended that Harrop would introduce, and would be compensated for introducing, Investor Prospects for the parallel funds, as well as Investor Prospects for Fund VII. Accordingly, the Agreement's preamble identifies the contracting parties broadly:

> This Marketing Agreement ("Agreement") is . . . by and among Apollo Investment Fund VII, L.P., a Delaware limited partnership ***and/or one or more of its parallel funds that may be established in one or more jurisdictions for the benefit of certain investors principally for tax, legal or other reasons (collectively, "Fund VII")***, Apollo Management VII, L.P., a Delaware limited partnership ("Apollo"), and Harrop & Co., Limited, Chartered Accountants, a New Zealand Company ("Harrop").

Agreement at 1 (emphasis added); *see also* Compl. ¶ 6. Thus, the Agreement makes clear that Harrop was to provide services for and be compensated by not only Fund VII, but also other funds that might not yet even exist (i.e., "funds that may be established").

In the event that Fund VII accepted an investment from one of the Investor Prospects, it agreed to pay Harrop a fee of one and one-half percent of the total amount invested by that Investor Prospect:

> Fund VII agrees to pay Harrop . . . for each Investor Prospect identified on Schedule A, Part A hereto originally introduced to Fund VII by Harrop and accepted by Fund VII, a fee equal to one-and-one half percent (1.5%) of the total capital committed by such Investor Prospect.

(Agreement, §5(a)).

In its role as marketing representative, Harrop introduced a number of Investor Prospects, including NZSF, to Apollo Management representatives, and to the Funds. *Id.* ¶ 16. Schedule A to the Agreement lists only five Investor Prospects. One of the five was NZSF. *Id.* ¶ 27. Thus, it is clear that the Apollo Management entities entered into the Agreement with the specific purposes of having Harrop introduce NZSF to them. *Id.* As a direct result of Harrop's introduction, NZSF made an investment in FCI I of least $55 million. *Id.*. ¶ 17. Under the Agreement, that investment entitled Harrop to a fee of at least $825,000. *Id.*; *see also* Agreement ¶ 5 & Schedule A. Harrop has made multiple demands for payment of that fee, but defendants have failed to pay it. (Compl. ¶ 17.)

C. *Relief Sought in the Complaint*

In the complaint, Harrop asserts a single cause of action for breach of contract, and seeks payment of at least $825,000 that it claims it is owed based on NZFS's 2012 investment in FCI I. (Compl. ¶¶ 44-49.) Harrop neither alleges that it had a contract with FCI I or that it introduced NZSF to FCI I. Instead, Harrop alleges that the definition of "Fund VII" and "parallel funds" in the Agreement encompasses FCI I.

II. **Discussion**

A. *Motion to Dismiss Standard*

"The scope of a court's inquiry on a motion to dismiss under CPLR 3211 is narrowly circumscribed." *P.T. Bank Cent. Asia, N.Y. Branch v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 375 (1st Dep't 2003). Thus, "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" *Leon,* 84 N.Y.2d at 87. The court "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory." *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 (2001).

In order to prevail on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211(a)(1), the movant must demonstrate that the documentary

evidence conclusively refutes the plaintiff's claims. *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 N.Y.3d 582, 590-591 (2005); *see McCully v. Jersey Partners, Inc.*, 60 A.D.3d 562, 562 (1st Dep't 2009) (stating that a motion to dismiss pursuant to CPLR 3211(a)(1) "may be appropriately granted only where the documentary evidence *utterly refutes* plaintiff's factual allegations, *conclusively establishing* a defense as a matter of law.") (emphasis in original).

With respect to a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), the court is not called upon to determine the truth of the allegations. *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 318 (1995). Rather, the "criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Leon*, 84 N.Y.2d at 88 (citation omitted).

Defendants' motion to dismiss is denied, as they have failed to set forth documentary evidence that utterly refutes Harrop's allegations, or demonstrated that Harrop has failed to sufficiently plead its claim for breach of contract.

B. *Definition of "Parallel Fund"*

In support of their motion to dismiss the complaint, defendants contend that Harrop's theory that FCI I qualified as a "parallel fund" is contradicted by the plain language of the Agreement. Defendants argue that Fund VII and FCI I – which are

separate legal entities that were formed at different times and that invest in completely different products – are in no sense "parallel" as that term is ordinarily understood. Thus, defendants argue, Harrop has failed to state a claim for breach of contract because the necessary predicate to Harrop's entitlement to a fee – an investment by an Investor Prospect in Fund VII or one of its parallel funds – is nowhere to be found in the complaint, as Harrop does not allege that any Investor Prospect actually invested in Fund VII or any of its parallel funds.

Harrop has a completely different interpretation of the meaning of the word "parallel," as set forth in the Agreement. According to Harrop, FCI I is a parallel fund that is included in the definition of "Fund VII" in the Agreement, which defines "Fund VII" as the fund itself "and/or one or more of its parallel funds that may be established in one or more jurisdictions for the benefit of certain investors principally for tax, legal or other reasons." (Agreement at 1.)

Under well-established New York law governing contract interpretation, the "[i]nterpretation of [a] contract is a legal matter for the court . . . and its provisions establish the rights of the parties and prevail over conclusory allegations of the complaint. *805 Third Ave. Co. v. M.W. Realty Assoc.*, 58 N.Y.2d 447, 451 (1983). "The intent of the parties must be found within the four corners of the contract, giving a practical

interpretation to the language employed and the parties' reasonable expectations." *Goldman Sachs Group., Inc. v. Almah LLC*, 85 A.D.3d 424, 427 (1st Dep't 2011).

Extrinsic evidence may be considered to discern the parties' intent only if the contract is ambiguous, and the intention of the parties cannot be gathered from the instrument itself. *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002). In determining whether an ambiguity exists, a court must "examine the entire contract and consider the relation of the parties and the circumstances under which it was executed." *Kass v. Kass*, 91 N.Y.2d 554, 566 (1998). "Particular words should be considered, not as if isolated from the context, but in light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought." *Id.*

The resolution of ambiguous contract terms is a factual determination that is not appropriate at the motion to dismiss stage. *See Telerep, LLC v. U.S. Int'l Media, LLC*, 74 A.D.3d 401, 402 (1st Dep't 2010) (stating that if "a contract is ambiguous, it cannot be construed as a matter of law, and dismissal under CPLR 3211(a)(7) is not appropriate"); *see also Zuckerwise v. Sorceron Inc.*, 289 A.D.2d 114, 115 (1st Dep't 2001) (noting that an ambiguous contract provision "cannot be construed as a matter of law on [a] motion to dismiss"). A contract is ambiguous if "on its face "[i]t is reasonably susceptible of more than one interpretation." *Chimart Assoc. v. Paul*, 66 N.Y.2d 570, 573 (1986); *see, e.g.,*

Duane Reade, Inc. v. Cardtronics, LP, 54 A.D.3d 137, 144 (1st Dep't 2008) (reversing the granting of a motion to dismiss, holding that the subject contract provision, in context, was ambiguous).

Applying these principles here, this court concludes that the term "parallel", as set forth in the Agreement, is inherently ambiguous, as defendants and Harrop have completely different opinions as the meaning of that term in the context of the Agreement.

The term "parallel" is not defined in the Agreement. Accordingly, that term must be given its plain and ordinary meaning. *See Fesseha v. TD Waterhouse Inv. Servs.*, 305 A.D.2d 268, 268 (1st Dep't 2003). New York courts frequently consult dictionary definitions to determine a word's plain meaning where, as here, a term is not explicitly defined in the parties' contract. *See, e.g., Ragins v. Hosp. Ins. Co., Inc.*, 22 N.Y.3d 1019, 1022 (2013).

According to defendants, parallel means "similar, analogous, or interdependent in tendency or development" and "equal or similar in all essential particulars." (Defs.' Br. at 13.) Synonyms of parallel are "like," "alike," "equivalent," and "equal." *See id.* Defendants argue that these definitions all share a common thread – they all connote likeness and/or relatedness between two or more things. Defendants contend that, under these definitions, Fund VII and FCI I are not parallel because they are not the same type

of fund: (1) Fund VII is a private equity fund, while FCI I is a fund that only buys pools of life insurance portfolios; (2) Fund VII and FCI I are not parallel in a temporal sense – Fund VII was established in 2007 and closed in 2008, while FCI I was not established until 2010, and did not close until 2012; and, (3) Fund VII and FCI I are separate legal entities that are managed by different affiliates of Apollo Management. Defendants argue that these fundamental differences between Fund VII and FCI I flatly contradict Harrop's assertion that Fund VII and FCI I are parallel funds, under the meaning of the Agreement.

In opposition to the motion, Harrop argues that defendants distort the meaning of "parallel" to fit their argument and that, contrary to defendant's arguments, their liability to Harrop is supported by the term "parallel fund," as it is used in the context of the Agreement. Harrop contends that, in contrast to defendants' interpretation of the term, at its most basic level, the word "parallel" refers to things that exist "side by side" and never overlap. *See* Harrop's Opp. Br. at 12. Harrop further contends that, as alleged in the complaint, FCI I was launched during the period of Fund VII, to exist side by side with that fund "for the benefit of certain investors" (Agreement at 1), but not to overlap. Accordingly, Harrop argues, the term "parallel" exactly suits FCI I.

Harrop further argues that the context of the Agreement makes it clear that FCI I is a "parallel fund." As alleged by Harrop in the complaint, Apollo Management's investment funds fall into two broad categories that are structured to exist side by side,

i.e. "parallel"; (1) flagship funds, and (2) parallel funds. *See* Compl. ¶¶ 4-7, 24, 25. During the term of each Roman-numeral designated flagship fund, such as Apollo Investment Fund VII, L.P, Apollo Management launches "parallel funds" to accommodate investors interested in investment strategies outside of that flagship fund. According to Harrop, such funds would not be exactly like or equivalent to the flagship fund, since they would be formed only to address the needs or desires or certain investors looking for alternative investment strategies. Moreover, Harrop argues, such funds would not be formed at the same time as the flagship funds, since the specific needs or desires of those investors would not be known at that time. Indeed, the Agreement seems to support this argument, noting that "parallel funds . . . may be established . . . for the benefit of certain investors principally for tax, legal or other reasons." (Agreement at 1.)

Clearly, Harrop and defendants have different opinions as to the meaning of "parallel fund," in the context of the Agreement, both of which both appear to have some validity. Where, as here, there are two competing constructions of a contract term, then it is appropriate for a court to deem such a provision as ambiguity, and to deny a motion for dismissal of the complaint. *See Zuckerwise*, 289 A.D.2d at 114-115; *see also Reiner v. Wenig*, 269 A.D.2d 379 (2d Dep't 2000); *Eden Music Corp. v. Times Square Music Publ'ns Co.*, 127 A.D.2d 161, 164 (1st Dep't 1987).

Accordingly, the motion to dismiss must be denied.

C. *Contract Termination*

Defendants also argue that the Harrop's breach of contract claim is barred because the contract terminated long before any investment in FCI I. Pursuant to section 6(a) of the Agreement, the parties agreed that the Agreement would only "continue in effect until the final closing of Fund VII." (Agreement, § 6(a). Defendants argue that, because Fund VII held its final closing in December 2008, the Agreement terminated as of that time.

The Court rejects this contention, as Harrop makes a credible argument that, even if Apollo Investment Fund VII, L.P.'s final closing had occurred in December 2008, that would be irrelevant under the Agreement. Harrop asserts that, under its interpretation of the contract, the termination of the Agreement is not triggered by the closing of Apollo Investment Fund VII, L.P. alone. Rather, it is triggered by the final closing of "Fund VII" as defined in the Agreement, which states that not just the Fund VII, but also "one or more . . . parallel funds . . that may be established . . . for the benefit of certain investors." According to Harrop, the Agreement was clearly structured to stay in effect until the final closing of the last "parallel fund." Thus, Harrop argues, since NZSF made its investment in FCI I before that fund was closed, the Agreement was in effect at the time the investment was made. Moreover, even if the Agreement has now been terminated, "the obligation of Apollo to pay fees with respect to Investor Prospects introduced by Harrop prior to the date of termination . . . shall survive." (Agreement ¶ 6(b).)

Defendants also contend that Harrop's breach of contract claim is barred because Harrop fails to allege its own performance under Agreement. This contention is belied by the complaint. Plaintiff alleges that it "performed all its obligations under the Agreement." (Compl. ¶ 1, 16, 17, 29-31, 35, 46.) Such a pleading meets the CPLR § 3013 notice pleading requirement.

Defendants' motion to dismiss the complaint therefore is denied.

D. *Motion to Stay Discovery*

Defendants' motion for a stay of discovery is also denied. The strong general practice of the Commercial Division is to allow discovery to proceed, notwithstanding the filing of a motion to dismiss, in order to ensure that cases proceed as expeditiously as possible. *See* Commercial Division Rule 11(d). Defendants have provided no rationale from deviating from that rule here.

III. Conclusion

For the foregoing reasons, Defendants' motions to dismiss and to stay are denied. The court has considered the parties' remaining arguments and finds them to be without merit.

Accordingly, it is

ORDERED that Defendants' motion to dismiss and motion to stay discovery is denied; and it is further

ORDERED that Defendants are directed to serve an answer to 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 on July 28, 2015 in Room 442, 60 Centre Street, on July 28, 2105 at 10 AM.

Dated: New York, New York
June 25 2015

ENTER:

Hon. Eileen Bransten, J.S.C.