Stormharbour Sec. LP v IIG Trade Opportunities Fund, N.V.
2015 NY Slip Op 31829(U)
September 23, 2015
Supreme Court, New York County
Docket Number: 650285/2014
Judge: Eileen Bransten

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

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STORMHARBOUR SECURITIES LP,

Plaintiff,

-against-

Index No. 650285/2014
Motion Seq. No. 002
Motion Date: 6/29/2015

IIG TRADE OPPORTUNITIES FUND, N.V.,

Defendant.

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Eileen Bransten, J.:

In this breach of contract action, plaintiff StormHarbour Securities LP ("StormHarbour") seeks payment of an investment banking fee for its role in a multi-million dollar transaction designed to create liquidity for defendant IIG Trade Opportunities Fund N.V. (the "Fund"). StormHarbour now moves for summary judgment pursuant to CPLR 3212. For the reasons that follow, plaintiff's motion is granted.

I. Background

The parties entered into a July 11, 2011 "Engagement Letter," whereby the Fund engaged StormHarbour to serve as:

> exclusive arranger and placement agent for the placement on a best efforts basis with institutional investors of up to $150 million (or such other amount as may be mutually agreed between the parties in writing) of first-lien and second-lien financing (such financing whether in loan or derivative format being the 'Instruments' and the transaction being the 'Transaction'), secured by trade finance instruments (such instruments, 'Trade Finance

> Instruments') for the benefit of [the Fund]. It is anticipated that the Instruments will be issued by a newly formed vehicle (the 'Issuer') which will originate certain Trade Finance Instruments . . .

(Affidavit of Todd Brussel ("Brussel Aff.") Ex. 1 at 1.)

StormHarbour agreed to use its "best efforts" to "bring the Transaction to the attention of prospective investors (the 'Prospective Investors')." *Id.* StormHarbour also agreed to provide "feedback and advice to [the Fund] on the capital structure of the Issuer, the most appropriate features of the Instruments and the structure of the Transaction in coordination with the Client and its advisors," and to assist the Fund "in the production of the Offering Information," "in the preparation of documents for the Transaction" and "in the negotiation of the terms and conditions of any placement of the Instruments with Potential Investors . . . ." *Id.*

The Fund's consent was required before StormHarbour was permitted to approach a Prospective Investor. *Id.* Upon consummation of the Transaction, StormHarbour was to receive a defined percentage commission for the provision of these services. *Id.* at 2. The initial "Engagement Period" was to expire on December 31, 2011, *see id.* at 1, but the parties amended the Engagement Letter several times so that the final expiration date was March 31, 2013. *See* Brussel Aff. Ex. 2. The Engagement Letter provided for the payment of a fee, commonly referred to as a "tail fee," under certain conditions (the "Tail Fee Provision"), as follows:

> In the event that this Engagement Letter is terminated for any reason prior to the consummation of the full Transaction, if [the Fund] or Issuer subsequent to the termination of this Engagement Letter consummates the Transaction or a substantially similar transaction to the Transaction within twelve months of such termination, the [Fund] agrees to pay or cause the Issuer to pay on demand to StormHarbour . . . the remaining portion of the fees that would have applied had the Transaction or substantially similar transaction been consummated under this Engagement Letter in respect of Instruments sold by StormHarbour or sold by or on behalf of the Issuer or any Fund to Prospective Investors introduced by StormHarbour prior to termination.

Id. Ex. 1 at 2-3.

During the Engagement Period, StormHarbour approached, among other institutions, BlueMountain Capital Management, LLC ("BlueMountain") and KKR & Co. L.P. ("KKR") as possible investors. The Fund admits that "StormHarbour brought a proposed transaction to the attention of BlueMountain . . . during the Engagement Period"and admits that "StormHarbour brought a proposed transaction to the attention of KKR . . . during the Engagement Period." (Def.'s Resp. to Pl.'s St. of Material Facts ¶¶ 74, 76.) KKR rejected StormHarbour's proposal in October 2011, and BlueMountain rejected it in February 2012. *See* Brussel Aff. Ex. 5 at 4, 7.

With the Fund's consent, StormHarbour approached Deutsche Bank as a possible investor in June 2012. *See* Affidavit of Martin Silver ("Silver Aff.") ¶ 28. Todd Brussel, StormHarbour's primary contact with the Fund in connection with the Engagement Letter, states that he and his colleagues engaged in multiple exchanges with Deutsche Bank

personnel over a period of months for the purpose of educating Deutsche Bank with respect to the Transaction. *See* Brussel Aff. ¶ 12. In Defendant's Response to Plaintiff's Statement of Material Facts ¶ 91, the Fund states as follows: "[t]he Fund does not dispute that StormHarbour and Deutsche Bank discussed the Fund, possible assets to be financed, and a proposed transaction." In January 2013, Deutsche Bank withdrew as a possible investor, indicating that it "would consider being engaged to structure and place the entire offering with others . . . ." Silver Aff. ¶ 29.

The parties do not dispute that StormHarbour failed to consummate a Transaction by the time the Engagement Period expired on March 31, 2013, which StormHarbour claims triggered the twelve-month period of the Tail Fee Provision. *See* Brussel Aff. ¶ 14; Silver Aff. ¶ 21. On May 9, 2013, the Fund entered into an agreement with Deutsche Bank for the bank to act as a "structuring and placement agent" with respect to Fund assets. *See* Silver Aff. ¶ 31. The Fund formed an Issuer and, less than twelve months after the expiration of the Engagement Period, on November 13, 2013, Deutsche Bank purchased Instruments from the Issuer in the amounts of $110 million of senior notes and $77 million of junior notes. *See* Def.'s Resp. to Pl.'s St. of Material Facts at ¶¶ 104, 116-117. As was prearranged, Deutsche Bank then sold $110 million of senior notes to BlueMountain and $40 million of junior notes to KKR (as a whole, the "DB Transaction"). *Id.* ¶¶ 119, 120. Upon learning of the DB Transaction, StormHarbour

demanded to be paid pursuant to the Tail Fee Provision. The Fund allegedly refused, and StormHarbour commenced this action on January 28, 2014, asserting a single claim for breach of contract.

II. Discussion

Plaintiff StormHarbour seeks summary judgment on its cause of action for breach of contract. In support, StormHarbour contends that the evidence demonstrates its entitlement to a fee totaling $3.41 million, pursuant to the Engagement Letter's Tail Fee Provision, because a Transaction was consummated with Prospective Investor Deutsche Bank within a year of the expiration of the Engagement Period. Alternatively, StormHarbour claims fees totaling $2.3 million from Prospective Investors KKR and BlueMountain only.

In opposition, the Fund argues that Deutsche Bank acted as a placement agent or underwriter for the Instruments and was not a Prospective Investor, and that, consequently, the circumstances do not fall within the Tail Fee Provision. DB further argues that KKR and BlueMountain should not be deemed Prospective Investors, since they rejected StormHarbour's proposals before the Engagement Period ended.

A. *Summary Judgment Standard*

On a motion for summary judgment, the facts are to be viewed in the light most favorable to the non-moving party. *Ortiz v Varsity Holdings, LLC*, 18 N.Y.3d 335, 340 (2011). The moving party "must make a prima facie showing of entitlement to judgment" by providing evidence demonstrating "the absence of any material issues of fact." *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). The burden then falls on the opposing party to establish the existence of material issues of fact that require a trial of the action. *Id.*

B. *Tail Fee Provision*

The parties agree on the essential facts, as stated above, but differ on their interpretation of the Engagement Letter. To prevail on its claim pursuant to the Tail Fee Provision, StormHarbour must demonstrate that the DB Transaction was at least "substantially similar" to the Transaction defined in the Engagement Letter, that it occurred within twelve months of the termination of the Engagement Letter, and that the Instruments were "sold by StormHarbour or sold by or on behalf of the Issuer or any Fund to Prospective Investors introduced by StormHarbour prior to termination." (Brussel Aff. Ex. 1 at 2-3.)

The DB Transaction undisputedly occurred within twelve months of the termination of the Engagement Letter. Further, it can readily be found that the DB Transaction was substantially similar to the Transaction. Both transactions involved the placement of the Instruments through an Issuer with institutional investors, financing amounts up to $250 million, with the aim of generating liquidity for the Fund to satisfy redemption requests from Fund shareholders. *See* Def.'s Resp. to Pl.'s St. of Material Facts ¶¶ 71, 122. Although the Fund characterizes the DB Transaction as a "collateralized loan obligation" ("CLO") and does not admit that the Transaction and the DB Transaction are substantially similar, its characterization of the DB Transaction as a CLO fails to raise a factual issue. *See* Def.'s Resp. to Pl.'s St. of Material Facts at 50 ¶ 1 (listing of "material facts as to which defendant contends that there exists a genuine issue to be tried").

The Fund also disputes whether Deutsche Bank is to be deemed a "Prospective Investor" under the Engagement Letter's Tail Fee Provision. The Fund argues that "since Deutsche Bank would act solely as a placement agent and not as an investor, the new [DB Transaction] would not be considered a Transaction as contemplated by the Engagement Letter." (Silver Aff. ¶ 37.)

"[W]ords and phrases" used in a contract must "be given their plain meaning." *Ellington v. EMI Music, Inc.*, 24 N.Y.3d 239, 244 (2014). "A contract is not rendered

ambiguous simply because one of the parties attaches a different, subjective meaning to one of its terms." *Sasson v. TLG Acquisition LLC*, 127 A.D.3d 480, 481 (1st Dep't 2015). Here, the Engagement Letter equates the defined term, "Prospective Investor," with its plain meaning as "prospective investor." (Brussel Aff. Ex. 1 at 1.) Merriam Webster's Dictionary defines "prospective" as "relating to or effective in the future" and "likely to come about: expected." MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/prospective (last visited Sept. 22, 2015). The definition of "invest" is "to commit (money) in order to earn a financial return." MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/invest (last visited Sept. 22, 2015).

The Fund does not admit that Deutsche Bank was a Prospective Investor. However, it does admit that StormHarbour "introduced Deutsche Bank to a proposed transaction on or about June 27, 2012," and that "it was initially believed that the financing transaction might involve an investment for Deutsche Bank by purchasing all of the debt for its own account . . ." (Def.'s Resp. to Pl.'s St. of Material Facts ¶ 87; Silver Aff. ¶ 29.) The Fund also does not dispute Brussel's description of the services StormHarbour rendered with having the aim of consummating a Transaction with Deutsche Bank, although it does dispute their quality.

In accordance with the plain meaning of the term "prospective investor," Deutsche Bank was a Prospective Investor introduced by StormHarbour, pursuant to the Engagement Letter, at least in the months following June 2012, even if its role was later to change to placement agent or underwriter. It was expected that Deutsche Bank would commit money to the Transaction in order to earn a future financial return. The definition of "prospective" does not entail certainty or depend on the fulfillment of an expectation. In the same vein, KKR and BlueMountain, which were also introduced to the Transaction by StormHarbour pursuant to the Engagement Letter, were Prospective Investors as well for at least some length of time during the Engagement Period. For the foregoing reasons, StormHarbour makes a prima facie showing that it is entitled to summary judgment under the Tail Fee Provision.

The Fund submits StormHarbour's proposed fifth amendment to the Engagement Letter, sent two weeks after Deutsche Bank's decision not to participate in a Transaction as a long-term investor in the Instruments. The amendment specified that StormHarbour would receive its full fee under the circumstances that eventually prevailed in the DB Transaction. *See* Silver Aff. Ex. G. The Fund contends that this is evidence that StormHarbour knew it would not be entitled to the fee if Deutsche Bank acted as a placement agent. However, this unsigned amendment could equally be construed as consistent with StormHarbour's position with respect to fees, and in any event is not

admissible to alter the terms of the unambiguous Engagement Letter. *See Schron v. Troutman Sanders LLP*, 20 N.Y.3d 430, 436 (2013) ("[p]arol evidence . . . is admissible only if a court finds an ambiguity in a contract").

The Fund has not presented sufficient evidence to raise a triable issue of fact in support of its contention that Deutsche Bank, KKR and BlueMountain were not Prospective Investors pursuant to the Engagement Letter, subject to the terms of the Tail Fee Provision. The Tail Fee Provision makes no exception for a Prospective Investor that changes its role in the Transaction, or that rejects the Transaction proposal and then later accepts it. The Fund's argument that Deutsche Bank was no longer an "investor" at the time of the Transaction is undermined by the fact that the operative phrase in the contract is "Prospective Investor," not "investor," and any purchaser at the time of the Transaction would no longer be a "Prospective Investor." (Brussel Aff. Ex. 1 at 1.) (emphasis added). In short, StormHarbour introduced Deutsche Bank as a Prospective Investor and, whatever its ultimate role, it purchased assets in a transaction that was at least "substantially similar" to the Transaction, within the time period set forth in the Tail Fee Provision. *Id.* Accordingly, the Fund fails to raise a factual issue or otherwise rebut StormHarbour's prima facie showing.

The parties agree that Deutsche Bank purchased $110 million in senior notes and $77 million in junior notes. (Brussel Aff. ¶ 15; (Def.'s Resp. to Pl.'s St. of Material Facts

¶¶ 116, 117.) The Engagement Letter provides that StormHarbour is entitled to fees of one percent of the proceeds on first lien assets, and three percent of the proceeds on second lien or other junior assets. (Brussel Aff. Ex. 1 at 2.) Under this formula, StormHarbour is entitled to fees totaling $3.41 million.

C. *Attorneys' Fees*

In the complaint, StormHarbour requests attorneys' fees totaling at least $53,000. "[G]enerally, in a breach of contract case, a prevailing party may not collect attorneys' fees from the nonprevailing party unless such award is authorized by agreement between the parties, statute or court rule." *TAG 380, LLC v. ComMet 380, Inc.*, 10 N.Y.3d 507, 515 (2008). The Engagement Letter makes no provision for the recovery of attorneys' fees, and StormHarbour does not articulate a legal or factual basis for such an award. Accordingly, StormHarbour fails to make a prima facie showing of its entitlement to attorneys' fees.

III. Conclusion

Accordingly, it is hereby

ORDERED that the motion for summary judgment on the complaint herein is granted to the extent that the Clerk is directed to enter judgment in favor of plaintiff and

against defendant in the amount of $3,410,000, together with interest at the rate of 9 % per annum from the date of January 28, 2014, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and the motion is otherwise denied.

Dated: New York, New York
September 23, 2015

ENTER

Hon. Eileen Bransten, J.S.C.