Norcast S.ar.l v Castle Harlan, Inc.
2016 NY Slip Op 30787(U)
April 25, 2016
Supreme Court, New York County
Docket Number: 651925/2012
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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NORCAST S.AR.L., PALA INVESTMENTS LTD.,

Plaintiffs,

DECISION/ORDER
Index No. 651925/2012

-against-

CASTLE HARLAN, INC.

Defendant.

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HON. SALIANN SCARPULLA, J.:

In this action for fraud, conspiracy to defraud, fraud in the inducement, unjust enrichment, tortious interference with prospective economic advantage, negligent misrepresentation, and aiding and abetting fraud, Castle Harlan, Inc. ("Castle Harlan" or "defendant") moves, pursuant to CPLR 3211 (a)(1) and (7) to dismiss the First Amended Complaint, filed on June 3, 2015.[1]

Unless otherwise indicated, the following facts are taken from the First Amended Complaint. This action arises out of the sale of Norcast Wear Solutions, Inc. ("NWS") to 0913034 B.C. Ltd ("BC"), an entity created by private equity firm Castle Harlan for the purpose of acquiring NWS. At the end of 2010, Norcast S.àr.l ("Norcast") and Pala Investments Ltd. ("Pala" and collectively with Norcast "plaintiffs"), considered selling

[1] Castle Harlan states in its motion papers that there have been two previous complaints and therefore refers to the complaint filed on June 3, 2015 as the Second Amended Complaint. However, plaintiffs denominate the document as the "First Amended Complaint." I therefore refer to the operative pleading on this motion to dismiss as the First Amended Complaint.

NWS, and hired UBS at the beginning of 2011 "to conduct a competitive process for the sale of NWS."[2]

Plaintiffs aver that "UBS created confidential sales materials, including a 'teaser' and a confidential information memorandum ('IM') describing NWS's business." Pursuant to instructions from Michael Barton ("Barton"), an NWS director until its sale and Pala's Senior Vice President at the time NWS was sold, and Jan Castro, Pala's Chief Executive Officer and an NWS director during bidding, UBS gave the teaser to certain potential buyers and told them they must sign a confidentiality agreement with NWS before receiving the IM and other sale details. However, pursuant to Barton's direction, UBS followed a different course with NWS's competitors, such as Bradken Limited ("Bradken"). For these "potential strategic purchasers," UBS did not provide a teaser at the outset "because the teaser contained non-public information regarding the business of NWS," and the disclosure of such information to competitors might prove detrimental to NWS. When such purchasers showed a true interest in purchasing NWS, "then Pala and Norcast would have made the confidential or non-public information relating to NWS available to them through their agents at UBS."

At a February 24, 2011 meeting, Barton, acting for plaintiffs and NWS, met with individuals from Goldman Sachs, and, during the meeting, "they discussed that Goldman Sachs would pass on information to Bradken, its client, about the NWS sale process that

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[2] Plaintiffs allege that "Norcast is a Luxembourg holding company that owned 100% of the equity of NWS prior to the sale of NWS to BC. Pala is a multi-strategy alternative investment company dedicated to investing and value creation in the mining sector, and is the ultimate holding company for Norcast."

was being run by UBS." Barton informed the Goldman Sachs representatives that he would give them more information concerning "the sales process, and asked Goldman Sachs to explain to Bradken Pala and Norcast's tailored approach regarding the distribution of teasers to their competitors, and how Pala and Norcast would like to be convinced of Bradken's seriousness in acquiring NWS before further information of the sale process was disclosed."

Plaintiffs allege that "[m]anagement at Pala and NWS specifically agreed to have Goldman Sachs reach out to Bradken because they believed that, given the synergies between Bradken's and NWS's business, Bradken would have been willing to pay a much higher price for NWS than a financial acquirer such as Castle Harlan." Although Goldman contacted Bradken about NWS, Bradken did not reach out to Pala, Norcast, or UBS about the sale.

About one week after Bradken learned about the NWS sale, Castle Harlan—"which, unlike Bradken, had not been made aware of the sale process by Pala, Norcast, or their agents"—approached UBS's New York office, noting its interest in the sale. Plaintiffs allege that "[d]ue to the historically close relationship between Castle Harlan and Bradken, Norcast, NWS and Pala, through Barton, informed their agent UBS in the beginning of March 2011 that it had to be diligent to ensure that Bradken did not obtain confidential or non-public information through Castle Harlan."

Plaintiffs allege that on March 2, 2011, UBS distributed the teaser to Castle Harlan. They further allege that on the next day Castle Harlan's Co-President, Howard Morgan ("Morgan"), provided the teaser to Bradken through Bradken's managing

director, Brian Hodges ("Hodges"), and director and board chairman, Nicholas Greiner ("Greiner"), as well as a draft confidentiality agreement. Plaintiffs allege that "Greiner responded to Morgan stating that he looked forward to further discussions once the IM had been provided to Castle Harlan." Plaintiffs claim that the information in the teaser "was sufficient to enable Bradken to perform further discounted cash flow analyses built in and linked to the synergies sheet that Bradken had already established from previous inquiries about purchasing NWS."

Plaintiffs allege

> [u]pon information and belief, by no later than March 8, 2011, Castle Harlan had entered into an agreement with Bradken, to the effect that (i) Castle Harlan would bid for NWS and Bradken would not do so; (ii) Castle Harlan and Bradken would find a way to facilitate Bradken's purchase of NWS without providing any disclosure that Bradken was the real purchaser behind the scenes; (iii) Castle Harlan would act as the real purchaser even though it had no intentions of itself owning NWS; and (iv) Castle Harlan would aid and abet Bradken in hiding from Plaintiffs and their agents that Bradken was involved in the primary party behind the transaction. The code name that Bradken gave to the secret negotiations and illegal agreement concerning the NWS acquisition was "Project Neutron."

Plaintiffs additionally aver that Castle Harlan negotiated a modification of the confidentiality agreement with NWS to eliminate the requirement that Castle Harlan identify its advisers and a UBS-suggested indemnity.

On March 15, 2011, the same day that UBS produced the IM and UBS Process Letter to Castle Harlan, "Hodges of Bradken received the executed Confidentiality Agreement and UBS Process Letter from 'HDEWITTM@aol.com,' an email address than an Australian Federal Court found to be the personal email address of Castle Harlan's Co-President, Howard Morgan." Plaintiffs allege that because Bradken's

Bradley Ward would act as Castle Harlan's "'consultant,'" Bradken asked Castle Harlan if another confidentiality agreement was needed between Bradken and Castle Harlan in order to hide Bradken's involvement. Castle Harlan's Anand Philip allegedly responded via email and stated that another confidentiality agreement was unnecessary and it "would also prevent a 'paper trail.'" The complaint points to other examples of secrecy, such as "Castle Harlan hir[ing] an independent foundry consultant to accompany them on the site visits to NWS' facilities so that NWS and Plaintiffs would think that they were being advised by this consultant rather than by their real advisers for the NWS purchase—the true purchaser, Bradken."

Castle Harlan's initial bid for NWS of $190 million was the highest of all bidders. Plaintiffs allege that Bradken would have bid more if it was participating in the process, they would have negotiated with Bradken to bid more than $190 million, and other strategic purchasers may have been driven to higher bids if they knew that Bradken was participating in the auction. By the end of March 2011, four potential buyers were selected to engage in another round of the process, which included "due diligence access to a data room containing voluminous, strategic and confidential information concerning NWS's performance and operations, two extensive management presentations, and multiple site visits to NWS' facilities." Plaintiffs allege that Ward, at Castle Harlan's office, logged into the data room, and subsequently informed Bradken "that NWS had strong synergies with Bradken and was a business 'Bradken would love to have.'"

At the end of March, 2011,

> Castle Harlan submitted a letter of interest to UBS to purchase NWS noting "CHPV, our active fund for new investments, can commit to 100% of the equity investment with no required approval beyond that of Castle Harlan. In addition, we enjoy trusting and long-standing relationships with a number of middle market lenders. We have had conversations with a number of these parties, including lenders which have familiarity with [NWS], and we would select the most appropriate lender among these to provide the debt financing in this transaction."

In an April 7, 2011 UBS presentation, it was noted that financing for Castle Harlan's bid was coming from a "'[c]ombination of equity contribution by Castle Harlan and debt financing by third-party,'" but plaintiffs allege that Castle Harlan never assumed a risk in the NWS purchase because Bradken offered to fully pay for NWS.

At the beginning of May 2011, representatives of NWS showed Castle Harlan employees a presentation and provided them with a tour of an NWS facility in Quebec. NWS's former President, Alan Bulckaert ("Bulckaert") appeared at these events "on behalf and at the direction of Pala and Norcast" and directed the presentation and tour. Plaintiffs allege, "Bulckaert asked Morgan directly whether Castle Harlan represented Bradken in relation to the NWS sales process. Morgan's response was *no*." Similarly, during a site visit to NWS facilities abroad, former NWS COO Richard Wilson ("Wilson"), "who attended this site visit on behalf and at the direction of Pala and Norcast," inquired "specifically about Castle Harlan's intentions after purchasing NWS, [and] Morgan . . . made affirmative misrepresentations to Wilson to the effect that Castle Harlan *did not* have plans or intentions to sell NWS to Bradken and that it instead would hold and grow the company, viewing the company as a 'growth' play."

Plaintiffs allege that "on April 26, 2011, UBS asked Castle Harlan to 'provide a description of all sources of funding for the purchase of [NWS] and an indication of the

timing and status of funding commitments.'" In Morgan's May 27, 2011 letter ("Final Bid Letter"), Castle Harlan said "it 'would not require any financing conditions to consummate this transaction,'" but "it did not respond to UBS' question to identify 'all sources of funding for the purchase of [NWS]'"—namely, that Bradken was funding the NWS purchase.[3]

The Final Bid Letter additionally indicated "that the offer was on behalf of Castle Partners V, L.P. ('CHPV') and that the acquiring entity would be a corporation controlled in the sole discretion of CHPV." However, the complaint alleges that the acquiring entity was actually BC, which, at the time the deal closed, was 89.75% Bradken owned. And although UBS asked for identification of who was acquiring NWS, "including a listing of shareholders," the Final Bid Letter did not indicate "that Bradken was a majority shareholder of BC at the time of the NWS closing, that it acquired and paid for these shares *before* closing or that it would be acquiring the remaining shares in BC immediately following closing in exchange for a payment to Castle Harlan."

Two companies presented final offers for NWS—Castle Harlan and a strategic purchaser. Castle Harlan's cash bid of $190 million was $20 million more than the next bid. The acquisition closed on July 6, 2011.

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[3] The complaint further alleges that

> [w]hile representing that it had no need for outside financing, Castle Harlan was actually funding the deal through a share purchase whereby Bradken funded the *whole* purchase price of NWS by (1) providing a US $25 million deposit; (2) subscribing for 89.75% of the shares in BC by paying subscription proceeds of US $175 million *at least three hours before the scheduled time of closing*; and (3) acquiring the right to call for the remaining shares in BC by paying an additional amount of US $15 million (US $40 million less the US $25 million deposit).

About seven hours after Norcast announced the sale of NWS, Bradken announced that it had agreed to buy NWS from Castle Harlan for about $26 million more than Castle Harlan paid for it. However, plaintiffs allege that this was untrue "because the agreement was not only in place it had already been consummated." On July 12, 2011, Bradken reported that it had acquired NWS.

After Bradken acquired NWS, Norcast filed for relief under 28 U.S.C. § 1782 ("1782 Application") in the Southern District of New York, and in its application it requested "documents . . . for use in proceedings before an Australian court, and in such other proceedings as may be appropriate, and requiring representatives of Castle Harlan to appear at sworn depositions in aid of such proceedings." Judge Crotty granted the 1782 Application to the extent of ordering production of documents, and Castle Harlan has produced more than 80,000 pages of documents concerning the NWS deal.

On May 10, 2012, Norcast filed suit against Bradken, Greiner, and Hodges, but not Castle Harlan, in the Federal Court of Australia, "asserting statutory claims of bid-rigging and of misleading and deceptive conduct arising from Bradken's purchase of NWS." In the complaint, plaintiffs summarize the Federal Court of Australia's findings as follows:

> On March 19 2013, the Federal Court of Australia . . . held that Bradken and Castle Harlan entered into, and gave effect to, a bid-rigging arrangement (or "collusive tendering") in contravention of ss 44ZZRJ and 44ZZRK of Australia's federal *Competition and Consumer Act 2010 (Cth)* (the "CCA"). Furthermore, the Federal Court held that both Bradken and Castle Harlan engaged in misleading or deceptive conduct in contravention of section 18 of the CCA, and emphasized that "Castle Harlan made false statements to NWS and its representatives about its involvement with Bradken in the NWS sales process." The Federal Court found

against Bradken and the individual defendants and awarded **US $22.4 million** in damages to Norcast.

In April 2013, Bradken filed its Notice of Appeal, which "appeal was voluntarily dismissed and proceedings were settled on November 1, 2013."[4]

On June 4, 2012, Norcast filed suit against Castle Harlan in Supreme Court, New York County, and on June 25, 2012 this action was removed to the Southern District of New York. Judge Crotty denied a motion to compel arbitration and remanded the action to this Court on January 6, 2014.

Castle Harlan now moves to dismiss the First Amended Complaint. In support of its motion, Castle Harlan argues that plaintiffs have not alleged fraud in the negotiations and that the comments made to Bulckaert and Wilson outside the context of negotiations cannot form the basis of plaintiffs' claims. Castle Harlan further argues that plaintiffs' claims are barred by the disclaimers in the Share Purchase Agreement and that plaintiffs have failed to adequately plead injury for their fraud and misrepresentation claims.

Castle Harlan also argues that: the aiding and abetting fraud claim fails because plaintiffs do not show any fraudulent statement made or omission that must have been made by Bradken to Norcast; the conspiracy, tortious interference, and unjust enrichment causes of action fail to state claims; and Pala's claims are derivative and therefore should be dismissed. It also argues that the punitive damage and attorneys' fees requests are inappropriate.

[4] The November 1, 2013 Order from the Federal Court of Australia, *inter alia*, set aside declarations and orders made by the court on March 28, 2013

In opposition to Castle Harlan's motion, plaintiffs argue that Pala has standing to bring claims against Castle Harlan and that the fraud claims are sufficiently pleaded. Specifically, they argue that Castle Harlan's affirmative misrepresentations and omissions are sufficient statements upon which they base their fraud claims and that they have properly pleaded reliance and damages. Plaintiffs additionally argue that their aiding and abetting fraud, conspiracy, unjust enrichment, and tortious interference causes of action state claims, and that its punitive damages and attorneys' fee claims are properly pleaded.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (internal citation omitted). A cause of action should be dismissed pursuant to CPLR 3211 (a)(1) "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Id.* at 88.

Plaintiffs' Fraud, Conspiracy to Defraud, Fraud in the Inducement, Negligent Misrepresentation, and Aiding and Abetting Fraud Claims

To state a claim for fraud, a party must plead damages, *see Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009), and, for such a claim, "'[t]he true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong' or what is known as the 'out-of-pocket' rule." *Lama Holding Co. v.*

Smith Barney Inc., 88 N.Y.2d 413, 421 (1996) (citation omitted). Pursuant to the out-of-pocket rule, damages are "the 'difference between the value of the bargain which a plaintiff was induced by fraud to make and the amount or value of the consideration exacted as the price of the bargain." *Id.* (citation omitted); *see Rather v. CBS Corp.*, 68 A.D.3d 49, 58 (1st Dep't 2009) ("Thus, under *Lama Holding Co.* and its progeny, Rather was required to plead that he had something of value, was defrauded by CBS into relinquishing it for something of lesser value, and that the difference between the two constituted Rather's pecuniary loss."). Importantly, "[d]amages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained," and "there can be no recovery of profits which would have been realized in the absence of fraud." *Lama Holding*, 88 N.Y.2d at 421; *see also Connaughton v. Chipotle Mexican Grill, Inc.*, 135 A.D.3d 535, 538 (1st Dept 2016).

Here, plaintiffs allege that they were damaged by misrepresentations and omissions because they could have sold NWS for more than the amount for which it sold if they or "other bidders, or would-be bidders" had known that Bradken was the ultimate buyer. Plaintiffs claim that this loss is not speculative and add that "Bradken *actually* paid more for NWS than Castle Harlan did, and Bradken also paid additional money to compensate Castle Harlan for its role in the conspiracy."

Plaintiffs do not allege that they sold NWS at a loss because of Castle Harlan's alleged misrepresentations and omissions. *Rather*, 68 A.D.3d at 58. In fact, Castle Harlan's $190 million bid for NWS was $20 million greater than the next highest bid. Instead, Castle Harlan impermissibly seeks "compensat[ion] for what they might have

gained" had they, or "other bidders, or would-be bidders," known that Bradken was the ultimate purchaser. *Lama Holding*, 88 N.Y.2d at 421. Such damages – additional, alleged lost profits that plaintiffs might have reaped if they knew that Bradken was to be the ultimate purchaser of NWS --are not cognizable under the "'out-of-pocket' rule." *Id.* (citation omitted).

In support of its argument that Pala has standing to maintain this lawsuit against Castle Harlan,[5] plaintiffs additionally argue that Castle Harlan's direct misrepresentations to Pala and representatives from UBS caused Pala damage in the forms of (1) a "depressed return on investment;" and (2) "invest[ment] [of] considerable time and resources, such as the time of key management and employees" to facilitate the NWS sale. These damages assertions only appear in plaintiffs' opposition memorandum of law, and, accordingly, I will not address them here. *See Bisk v. Manhattan Club Timeshare Ass'n, Inc.*, 118 A.D.3d 585, 585 (1st Dep't 2014).

As plaintiffs have failed to allege cognizable damages for their fraud-based claims, I dismiss all of the fraud-based claims, including the fraud, conspiracy to defraud, fraud in the inducement, negligent misrepresentation, and aiding and abetting fraud.

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[5] Because I dismiss the First Amended Complaint, I decline to review the parties' arguments as to whether Pala's claims are derivative. *Cf. Starr Found. v. Am. Int'l Grp., Inc.*, 76 A.D.3d 25, 27 n.2 (1st Dep't 2010)

> (We note that the Foundation's claim is legally insufficient whether or not the Foundation has properly asserted it as a direct claim on its own behalf as an individual stockholder rather than as a derivative claim against management on behalf of the corporation. If derivative, the action would be subject to dismissal for failure to allege demand on the board. Accordingly, we need not reach the question of whether the claim is direct or derivative.).

Plaintiffs' Unjust Enrichment Claim

"'The theory of unjust enrichment lies as a quasi-contract claim.' It is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned." *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (2009) (internal citation omitted). "A plaintiff must show 'that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered.'" *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011) (citation and internal quotation marks omitted).

Here, plaintiffs argue that they "seek[] to disgorge Castle Harlan of the amount it received from Bradken, and any other entity, for its role in the conspiracy." However, Castle Harlan's alleged "'fee'" for its participation in the transaction was not gained at the expense of plaintiffs, but rather came from Bradken. *See id.*; *IDT Corp.*, 12 N.Y.3d at 142 ("In seeking Morgan Stanley's profits from SAm–1, IDT does not, and cannot, allege that Morgan Stanley has been unjustly enriched at IDT's expense, because IDT did not pay the alleged fees."). Accordingly, the claim for unjust enrichment is dismissed.

Plaintiffs' Tortious Interference with Prospective Economic Advantage Claim

> A claim for tortious interference with prospective business advantage must allege that: (a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship.

Thome v. Alexander & Louisa Calder Found., 70 A.D.3d 88, 108 (1st Dep't 2009). "As federal courts applying New York law have recognized, conduct constituting tortious

interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship." *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 192 (2004).

Here, plaintiffs claim that "Castle Harlan's participation in Project Neutron and in actively hiding Bradken's presence interfered with Plaintiffs' relationship with both Bradken and other potential bidders." With regards to other bidders exclusive of Bradken, plaintiffs do not allege any "conduct directed . . . at the party with which the plaintiff has or seeks to have a relationship." *Id.*; *see Arnon Ltd (IOM) v. Beierwaltes*, 125 A.D.3d 453, 454 (1st Dep't 2015). Insofar as plaintiffs contend that Castle Harlan tortiously interfered with plaintiffs' relationship with Bradken, I find the contention insufficient to support the tortious interference claim, as the claim is contradicted by other allegations in the complaint that indicate that Bradken contacted Castle Harlan about the NWS sale. *See Greene v. Doral Conference Ctr. Assocs.*, 18 A.D.3d 429, 430 (2d Dep't 2005) (finding that pleading failed to state a claim when the only "cause of action in the plaintiff's amended complaint was predicated on the assertion that his status at the defendants' sports and health club was that of a 'guest' and that assertion was flatly contradicted by the other allegations in the plaintiff's pleadings"). Therefore, I also dismiss the claim for tortious interference with prospective economic advantage.

In accordance with the foregoing, it is hereby

ORDERED that defendant Castle Harlan, Inc.'s motion to dismiss the First Amended Complaint as filed on June 3, 2015 is granted, and the complaint is dismissed. The Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

DATE : 4/25/16

SALIANN SCARPULLA, JSC