

**Public Sector Pension Inv. Bd. v Saba Capital Mgt.,
L.P.**

2016 NY Slip Op 30904(U)

May 16, 2016

Supreme Court, New York County

Docket Number: 653216/2015

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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PUBLIC SECTOR PENSION INVESTMENT
BOARD,

Plaintiff,

DECISION AND ORDER

-against-

Index No. : 653216/2015
Mot. Seq. 002

SABA CAPITAL MANAGEMENT, L.P., SABA
CAPITAL OFFSHORE FUND, LTD., SABA
CAPITAL, LLC AND BOAZ WEINSTEIN,

Defendants.

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HON. ANIL SINGH:

Defendant Saba Capital Management, L.P. (“Saba Management”) moves for leave to renew from that portion of the Court’s Order, dated February 8, 2016 in which this Court denied dismissal of Public Sector Pension Investment Board’s (“Plaintiff” or “PSP”) third cause of action for breach of fiduciary duty. PSP opposes the motion.

Background

The Court’s ruling that PSP had adequately alleged a breach of fiduciary duty claim against Saba Management was made on the assumption that there was no direct privity between PSP and Saba Management. The Court reasoned that PSA’s

allegation that Saba Management undertook an extra contractual duty by affirmatively stating it would maximize PSP's redemption was not duplicative as there was no contractual duty owed by Saba Management to PSP. See Order at pp. 10-11.

Saba Management moves for leave to renew its motion to dismiss PSP's third cause of action for breach of fiduciary duty alleging that there is direct privity between Saba Management and PSP based upon a side letter agreement (the "Side Letter") dated February 29, 2012. This Side Letter was not submitted to the Court on the motion to dismiss.

Argument

In order to be granted a motion for leave to renew under CPLR 2221(e), the motion shall (1) be identified specifically as such; (2) shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and (3) shall contain reasonable justification for the failure to present such facts on the prior motion. See CPLR § 2221(e). The rule that "a motion for renewal be based upon newly discovered evidence is a flexible one, and a court, in its discretion, may grant renewal even where the additional facts were known to the party seeking renewal at the time of the original motion, provided the moving party

offers a reasonable justification for the failure to submit the additional facts on the original motion.” Grantat v. Walbaum’s Inc., 289 A.D.2d 289, 290 (2d Dept 2001) (other citations omitted).

Renewal is granted as Saba Management adequately alleges new facts that were unavailable to the Court on the original motion. PSP did not raise any claim for lack of contractual privity with Saba Management in any of their filings. See Opposition to Motion to Dismiss at 20-23. Therefore Saba Management did not address the Side Letter.

PSP’s breach of fiduciary duty claim is duplicative and is dismissed. A claim shall be dismissed as duplicative when it is “based upon the same facts and theories as [its] breach of contract claim.” Brooks v. Key Trust Co. Nat’l Ass’n, 26 A.D.3d 628, 630 (3d Dept 2006). The Side Letter confirms that there is contractual privity between PSP and Saba Management with respect to the Valuation Guidelines as provided for in the Offering Memorandum to PSP. The Side Letter states that the Investment Manager

represents, warrants and covenants to the Investor [that] the performance by the Investment Manager of its obligations under the Fund Documents and the consummation by the Investment Manager of the transactions contemplated thereby will not conflict with or result in any violation of or default under any provision of the Fund Documents....or any agreement or other instrument to which the Investment Manager is a party.

Side Letter ¶ 34(d). The fund documents include the Offering Memorandum. See Side Letter at 1. The valuation of Fund assets is a duty assigned to the Investment Manager, Saba Management. Offering Memorandum at 81. Therefore Saba Management has a contractual duty with respect to valuation. Breach of the Valuation Guidelines is necessarily a breach of the Side Letter by Saba Management. In short, any duty owed to PSP arose from the Fund documents, which is a contractual claim and not a claim for breach of fiduciary duty.

Accordingly, this Court finds that PSP's argument that Saba undertook an extra contractual duty to maximize PSP's redemption proceeds through an oral agreement concerns the same obligations as contained in the Side Letter and is duplicative.

Furthermore, New York law requires that causes of action for breach of fiduciary duty should be dismissed where oral agreements contradict the plain language of the written agreement. See Pane v. Citibank, N.A., 19 A.D.3d 279 (1st Dept 2005) (dismissing claim for breach of fiduciary duty for investment manager's failure to comply with plaintiff's oral instruction to liquidate their stock holdings in light of the plain language of parties' agreement relieving defendant of liability for any losses resulting from its acting or refusing to act on instructions that were not in writing); see also Celle v. Barclays Bank P.L.C., 48 A.D.3d 301 (1st Dept 2008)

(claim that oral instructions were disregarded is not actionable where subject agreement provided that communications must be in writing in order to be effective).

Here, as the Side Letter can only be amended in writing and any contradictory agreements are controlled by the terms of the Side Letter, any alleged oral agreement between PSP and Saba Management to maximize PSP's redemption is not actionable as a breach of fiduciary duty. See Side Letter at 17 ("any inconsistency between the terms of this letter agreement and the terms of any other document or agreement relating to investment in the Fund....shall be controlled by this letter agreement....[t]his letter agreement may be amended only in writing.").

Accordingly it is,

ORDERED that defendants' motion for leave to renew its motion to dismiss is granted; and it is further

ORDERED that defendants' motion to dismiss plaintiff's third cause of action for breach of fiduciary duty against Saba Management is granted.

Date: May 16, 2016
New York, New York



Anil C. Singh