

Credit Agricole Corporate v BDC Fin., LLC
2017 NY Slip Op 30135(U)
January 20, 2017
Supreme Court, New York County
Docket Number: 651989/10
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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CREDIT AGRICOLE CORPORATE and
INVESTMENT BANK NEW YORK BANK,
f/k/a CALYON NEW YORK BRANCH, *et al.*,

Index No. 651989/10
Mot. seq. no. 28

Plaintiffs,

DECISION AND ORDER

-against-

BDC FINANCE, LLC, *et al.*,

Defendants.

-----X
UBS AG, STAMFORD BRANCH AND UBS LOAN
FINANCE LLC,

Plaintiffs,

-against-

BDC FINANCE, LLC, *et al.*,

Defendants.

-----X

AND RELATED COUNTERCLAIMS

-----X
BARBARA JAFFE, JSC:

Based on defendants' conduct as bidders in a bankruptcy proceeding auction (*see Credit Agricole Corporate v BDC Fin., LLC*, 135 AD3d 561, 561 [1st Dept 2016]), and thereafter, plaintiffs assert contract and other claims against them.

Defendant GSC Acquisition Holdings, LLC (GSCAH) moves for summary judgment, pursuant to CPLR 3212, dismissing count VIII, of the amended complaint (NYSCEF 83) and the

complaint in intervention (NYSCEF 153) (together, the complaint), for tortious interference with contract.

I. BACKGROUND

The facts of this case have been discussed in prior decisions, including in the decision in motion sequence numbers 24 and 26 in this case, familiarity with which is presumed. In short, defendants Black Diamond Capital Management, LLC (BDCM), BDC Finance, LLC and Black Diamond CLO 2006-1 (Cayman), Ltd. (together, BDC Lenders), held interests in a syndicated loan governed by a loan agreement (the credit agreement). The loan was made to a nonparty borrower, GSCP (NJ), LP (together with certain of its affiliates, GSC). GSC, an asset manager, pledged almost of its assets as security for the loan's repayment, through a security agreement (together with the credit agreement, the credit documents). Black Diamond Commercial Finance LLC, as collateral agent (the agent), for the benefit of the loan's secured lenders (secured creditors) is also a party to the security agreement. BDC Lenders became the holder of the majority interest in the loan at a point when GSC was experiencing financial difficulties, purchasing interests in the syndicated loan at a discount. Certain plaintiffs were also lenders or participants in the syndicated loan, and plaintiffs claim, collectively, approximately 30 percent of the loan interests.

GSC filed for Chapter 11 bankruptcy protections. The GSC estate, as a bankruptcy debtor, sold the substantial majority of its assets, which included fee-generating investment management contracts and equity interests. There is no separate intercreditor agreement among the creditors.

A. Tortious interference allegations

In the complaint, plaintiffs allege that GSCAH knew of the existence of the credit documents, including plaintiffs' rights thereunder, and, as the designated purchaser under the two asset purchase agreements through which GSC sold its assets in the bankruptcy proceeding, intentionally assisted in and procured BDC Lenders' and the agent's breaches of the credit documents (NYSCEF 83 [complaint], ¶¶ 150-153). GSCAH allegedly did so through the structuring of the asset sales transaction, and in receiving and procuring all of the GSC assets that then were to be, and since then have been, transferred to GSCAH by GSC in connection with the two asset purchase agreements (APAs) (*id.*). Plaintiffs allege that these assets should have been ratably distributed among all secured creditors, and that GSCAH's tortious conduct is a "but for" cause of the breach of credit documents, resulting in not less than \$85 million in damages (*id.*, ¶¶ 154-155).

B. GSCAH

It is undisputed that GSCAH is a Delaware limited liability company that was created to receive GSC's assets from the bankruptcy sale. The GSCAH membership agreement includes among the members of the entity, the agent, which was provided 100 percent of the class A membership interests on behalf of the secured creditors. The other member of GSCAH is nonparty GSC Acquisition Partners, LLC, controlled by nonparty Steven H. Deckoff. It is undisputed that Deckoff also controls defendant BDCM, the managing member of GSCAH. It is also undisputed that the agent attempted to deliver to plaintiffs the class A membership interests in GSCAH. Plaintiffs assert that, at that time, they rejected the interests.

II. DISCUSSION

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (*id.*) When the moving party has demonstrated entitlement to summary judgment, the burden of proof shifts to the opposing party which must demonstrate by admissible evidence the existence of a factual issue requiring trial. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].)

A. Tortious interference with contract

“To establish a claim of tortious interference with contract, “the plaintiff must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages.” (*AREP Fifty-Seventh, LLC v PMGP Assoc., L.P.*, 115 AD3d 402, 401 [1st Dept 2014], quoting *White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]; *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 84 [1993]).

Plaintiffs argue that the agent breached section 12.5 of the credit agreement and section 6.1 of the security agreement by delivering a letter releasing the liens on the collateral (payoff letter) without ensuring that the secured creditors would receive a recovery. Plaintiffs also allege that credit agreement § 12.5 and security agreement § 6.1 require the agent to take the direction of BDC Lenders only when reasonable and in the best interests of the secured creditors, and that the agent failed to do so. They also maintain that BDC Lenders breached the credit agreement by

directing the agent to take actions that are contrary to the interests of all lenders, and by failing to distribute the collateral that BDC Lenders received in excess of their pro rata share ratably. (NYSCEF 919 [plaintiffs' memo of law in opposition] at 14).

1. Contentions

GSCAH argues that the tortious interference claim must be dismissed because: (1) there was no breach of contract; (2) there is no evidence in the record that GSCAH tortiously interfered with the lending agreements; (3) GSCAH did not exist when the loan documents were allegedly breached in October 2010; (4) GSCAH is not the "but for" cause of any alleged breaches occurring after December 2010; (5) the allegedly breaching parties were pre-disposed to breach; (6) the alleged breaches were not conceived of by GSCAH; (7) GSCAH had no independent officers or employees; and (8) plaintiffs agreed not to sue GSCAH. In sum, GSCAH argues that it cannot be held liable because it neither procured nor caused any breach; rather, it is an acquisition vehicle for the assets sold and controlled by BDC Lenders, with no natural officers or employees, and was merely incidental to the sales transaction and alleged breaches.

In opposition, plaintiffs deny that GSCAH's role was minimal, arguing that this is not the kind of tortious interference case in which a defendant merely entered into a contract with a seller, knowing that the seller could not perform its contract with another party, as in the cases cited by BDC Lenders, and provide a list of factors that they claim demonstrates that the transaction could not have been effected through a party other than GSCAH: (1) GSCAH was owned and controlled by the BDC Lenders entities; (2) GSCAH signed the side letter with the bankruptcy trustee thereby reviving the original asset purchase agreement (APA 1) by which those assets that GSC had previously put up for auction were eventually sold; (3) GSCAH was

the sole signatory to the additional asset purchase agreement (APA 2), in which GSC sold additional assets, the execution of which was a condition to the closing of APA 1 and the resulting collateral transfer to GSCAH; (4) as the sole signatory to APA 2, only GSCAH could cause the agent to credit bid GSC's remaining \$33 million in loan obligations; (5) only GSCAH could hire BDCM to manage the assets acquired from GSC for 100 percent of the proceeds, instead of determining if a non-BDC Lenders entity would manage them for a lower fee; (6) under the terms of APA 2, GSCAH alone would cause the agent to submit the payoff letter and credit bid letter, thereby causing the agent to release the liens for no recovery; (7) that GSCAH was the only entity associated with BDC Lenders into which the presiding bankruptcy judge was willing to allow the assets to close, and then only with restrictions on the transfer of assets and the fees for managing them, thereby preserving plaintiffs' rights to challenge the eventual allocation of collateral and proceeds; (8) GSCAH was the sole entity that could flout those restrictions by disproportionately allocating the collateral through the membership interests that it distributed pursuant to its LLC agreement; and (8) GSCAH had unique strategic importance to the Black Diamond scheme because, as a stranger to the credit documents, GSCAH could possess the collateral without being subject to an immediate obligation to share with plaintiffs.

2. Analysis

It is undisputed that two elements of a claim for tortious interference of contract, namely, the existence of valid contracts and GSCAH's knowledge of their existence, are met. Both sides rely on their summary judgment motions as determinative of the breach element of tortious interference. However, as discussed in my earlier decision in motion sequence numbers 024 and

026, there exist fact issues concerning this element.

In moving, GSCAH focuses on negating the procurement and causation elements of the tortious interference claim. “To impose liability [for tortious interference with contract], a defendant must induce or intentionally procure a third-party's breach of its contract with the plaintiff and not merely have knowledge of its existence.” (*Beecher v Feldstein*, 8 AD3d 597, 598 [2d Dept 2004]; see *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 11 [1st Dept 2008], citing *Kronos, Inc. v AVX Corp.*, 81 NY2d at 94 [declining to disturb lower court's finding of evidence that breaching party intended to breach without the prompting of the party alleged to have tortiously interfered]). In addition, a plaintiff must show that but for the allegedly tortious conduct of the defendant, the contract would not have been breached. (See *Burrowes v Combs*, 25 AD3d 370 [1st Dept 2006] [claim dismissed where no allegation that contract would not have been breached “but for” the defendant's conduct]).

The dispute between plaintiffs and defendants concerns their intercreditor relationship. In other words, the alleged breach of the credit documents does not involve the procurement of GSC's, the borrower's, failure to perform duties under the credit documents. GSC, the bankruptcy debtor, is not a party here, or alleged by plaintiffs to have breached an agreement with plaintiffs. The alleged breaches concern the obligations, rights, and/or powers involved in the relationship among the secured creditors, which included plaintiffs and BDC Lenders, based on BDC Lenders' conduct, acting in the role of “Required Banks” under the credit documents. In that role, BDC Lenders had the right to direct the agent concerning enforcement of the security agreement, and negotiated with the GSC bankruptcy trustee for the sale.

A basis for plaintiffs' claim is that the structuring of the sales transaction of the GSC

assets by BDC Lenders was wrongful. BDC Lenders, in the role of required banks, devised this structure, arranging to have the assets GSC sold transferred to an acquisition vehicle, GSCAH, which was approved by the bankruptcy court, and pursuant to the credit documents, the required banks held the majority of interests in the loan. BDC Lenders, holding that majority, was permitted certain rights to direct the agent under the security agreement. Plaintiffs here essentially argue that GSCAH, an entity created and used by BDC Lenders as the acquisition vehicle, has tortiously interfered, but BDC Lenders effected the bankruptcy sale and structure. GSCAH was not even a party in the bankruptcy proceeding.

While GSCAH played a role in receiving the assets, as the designated purchaser, signatory on APA 2, and recipient of the GSC collateral assets, the record evidence, and plaintiffs' position, is that the BDC Lenders' scheme began at the October 2010 bankruptcy auction, when they allegedly improperly used the joint credit bid and cash/note bid by increasing the credit bid portion of the bid for assets of a value disproportionately low in relation to the \$224 million credit bid offer made for them. Plaintiffs also allege that BDC Lenders then inappropriately attempted to obtain assets of a disproportionately higher value relative to the smaller cash/note portion of the bid. This occurred well before the sales transaction closed in July 2011. What followed after the auction, plaintiffs contend, was the attempt of BDC Lenders to effectuate this bid through the original APA 1, all of which occurred before GSCAH was formed in December 9, 2010. Plaintiffs assert that later, BDC Lenders, upon the closing of the APAs, essentially took the lucrative assets they bid for at the auction through GSCAH, which they and Deckoff controlled, and failed to share them ratably, as required under credit agreement § 14.7 (*see* motion sequences 24 and 26). Plaintiffs' theory of its case, or one of them, is that

BDC Lenders, wrongfully, arranged to have the assets transferred to an entity that they control, GSCAH, instead of the agent, without sharing them with plaintiffs.

Assuming *arguendo* a breach, the record facts indicate that the creation of GSCAH was incidental to what plaintiffs contend was BDC Lenders' scheme, from the time of the auction, to obtain the more valuable GSC assets, primarily the management contracts that were included in the lots for which BDC Lenders bid with the cash bid at the auction, using the debt owed by GSC to the secured creditors, through the credit bid. And it is not disputed that GSCAH could not be responsible for procuring a breach of any credit document prior to coming into existence. The record demonstrates that, at that time, BDC Lenders had already provided what plaintiffs allege was the unreasonable direction that was not for the benefit of the secured creditors as a collective group, through their bidding instructions to the agent, and that the agent had already followed these allegedly unreasonable instructions. The complaint also alleges that BDC Lenders were "seeking to acquire GSC Group's assets for [themselves]" (NYSCEF 83, ¶¶ 66-67; *see id.*, at ¶ 69 [agent and BDCM submitted joint bids intending to misappropriate collateral]), attempting to effectuate the bid through the original APA 1. Later, according to plaintiffs, BDC Lenders, or their principals, but through a BDC Lender entity, used GSCAH, an entity that they controlled, to obtain the assets without ratably sharing them, indicating that GSCAH was used, by the allegedly breaching parties, essentially as a tool, to effect what they set out to do all along. This does not demonstrate procurement by GSCAH.

Plaintiffs do not contend that GSCAH had an active role in negotiating for the assets or soliciting the purchase of them from the GSC trustee at any point. Rather here, they contend that, on January 25, 2011, a principal and chief operating officer of BDCM, one of the BDC Lenders,

sent the GSC bankruptcy trustee a letter proposing to purchase all of GSC's assets (NYSCEF 919 at 6), and that the trustee chose BDC Lenders' proposal for the purchase. This demonstrates BDC Lenders' intention to purchase substantially all of the GSC assets. Plaintiffs also maintain that BDC Lenders improperly set up the structure of the sales transaction, and that the GSC assets were transferred to GSCAH, as part of the bankruptcy court's plan to attempt to prevent BDC Lenders from taking or allocating assets, or both, while plaintiffs pursued their claims in this action. A tortious interference claim is not sustainable where BDC Lenders merely would have proceeded in its alleged breach with another different entity that it created for the same purpose, even absent the alleged interference of GSCAH.

Although the credit documents assign no right or power to GSCAH to direct the agent, plaintiffs complain that GSCAH was instrumental in executing the APAs, and directing the agent to credit bid. While GSCAH was the designated purchaser under APA 1, and the signatory to APA 2, which provides that GSCAH would direct the agent to credit bid the loan debt owed by GSC and would deliver the payoff letter that released the liens, plaintiffs ignore that the credit bid instruction letter to the agent reveals that it was BDC Lenders, not GSCAH, that instructed the agent to credit bid the assets and deliver the payoff letter (motion seq. no. 26, exhibit JJ, *see also* NYSCEF 789 [exh. S [APA 2], ¶ 2.4 [concerning required banks' direction to agent pursuant to credit bid direction letter]). It was the agent that executed the payoff letter (NYSCEF 801 [West moving affirmation, motion seq. no. 26 exh. V), not GSCAH. GSCAH's conduct in delivering this letter was incidental to the transaction, and could have been accomplished through any entity that BDC Lenders created or bought as an acquisition vehicle for the purchase, and does not demonstrate GSCAH's inducement of the breach.

Plaintiffs rely on *Antonios A. Alevizopoulous and Assoc. Inc. v Comcast Intl. Holdings, Inc.* There, the court sustained the plaintiff's tortious interference claim on a motion to dismiss where the plaintiff alleged that the defendant interfered with the plaintiff's joint venture agreement with another party, Villares. The court determined that inferences drawn from the pleading allegations demonstrated that the plaintiff was alleging that the defendant "procured [the breaching party's] breach by offering a different and better partnership arrangement which eliminated plaintiffs from the equation." (100 F Supp 2d 178, 187 [SD NY 2000]), and that it could not be said, as a matter of law, that the breaching party would have breached the contract without the defendant's participation as it was alleged that it had demanded to negotiate with only one representative from the plaintiff, thereby keeping the plaintiff in the dark, while continuing to negotiate with the breaching party and eventually entering into a joint venture with the breaching party. The court separately determined that the procurement element had been met.

Plaintiffs interpret *Alevizopoulous* as demonstrating that the "but for" causation element is demonstrated if a contracting party would not have breached absent the involvement of the alleged tortfeasor, noting that the court stated that the "but for" analysis cannot turn only on the breaching party's self-interest, which is always present. The court's holding does not directly address the intentional procurement element of the tort, and it ignores that New York courts may find causation absent facts demonstrating that the breaching party was the driving force behind the breach, with the alleged tortfeasor merely welcoming, or even facilitating, the outcome. (*See e.g. Cantor Fitzgerald Assoc. v Tradition N. Am.*, 299 AD2d 204, 249 [1st Dept 2002]).

In *Havana Cent. NY2 LLC v Lunney's Pub, Inc.*, on which plaintiffs rely, the breaching landlord was unable to provide possession to the incoming tenant due to the holdover tenant's

wrongful interference, not the landlord's conduct, as the holdover tenant made it impossible for the landlord to meet its obligations. (49 AD3d 70 [1st Dept 2007]). GSCAH, whose managing member is BDCM, and which was created to facilitate the bankruptcy sale, did not cause any BDC Lender to fail to comply with contractual obligations. Here, GSCAH did not control what happened to the assets at the bankruptcy proceeding, or, independent of BDC Lenders, the instructions that were given or acted upon by the agent, or that the bankruptcy court permitted BDC Lenders to allocate the assets. GSCAH purchased the assets pursuant to the bankruptcy court order, and GSCAH's participation was not a condition precedent of the breach, as BDC Lenders could have created a different entity in GSCAH's stead.

That GSCAH received assets and did not make a distribution in fulfillment of what plaintiff claims was BDC Lenders' obligation under credit agreement § 14.7, or the credit documents, does not constitute tortious conduct. The record reveals no evidence that GSCAH prevented or made it impossible for BDC Lenders or the agent to perform. BDC Lenders and the agent have taken the position that they have fully performed their obligations. Assuming, arguendo, that this is not true, plaintiffs still point to nothing in the record that indicates that a lack of performance was procured by GSCAH's conduct.

Plaintiffs also fail to demonstrate how GSCAH tortiously interfered through its conduct in agreeing, through a services agreement, to pay BDCM 100 percent of the management fees for BDCM's services, instead of determining if a non-BDC Lenders-affiliated entity would have performed for less. Plaintiffs assert that they were entitled to the right to receive payment under the management contracts, as these contracts were, indisputably, collateral securing the GSC loan, but there is nothing about this in the complaint concerning the tortious interference claim,

and this bald assertion is not sufficient to defeat the motion.

III. CONCLUSION

In light of the foregoing, it is

ORDERED that defendant GSC Acquisition Holdings, L.L.C.'s motion for summary judgment dismissing the complaint herein is granted and count VIII of the amended complaint and the complaint in intervention is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action against GSC Acquisition Holdings, LLC is severed and the case otherwise continued against the remaining defendants.

ENTER:



BARBARA JAFFE, JSC

Dated: January 20, 2017
 New York, New York