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

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KINGSLAND HOLDINGS LTD.,

Plaintiff,

-against-

SYNERGY AEROSPACE CORP., AVIANCA HOLDINGS S.A., GERMAN EFROMOVICH, JOSE EFROMOVICH, and UNITED AIRLINES, INC.

Defendants.

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DECISION AND ORDER

Index No.
651035/2017
Mot. Seq. 001, 003, 004

HON. ANIL C. SINGH, J.:

Plaintiff Kingsland Holdings Ltd ("Kingsland") moves for expedited discovery to develop the record in support of its application for a preliminary injunction sought against defendants Synergy Aerospace Corp. ("Synergy"), Avianca Holdings S.A ("Avianca"), German Efromovich, Jose Efromovich and United Airlines, Inc. ("United") (together, "Defendants") (Motion Sequence 001). Defendants oppose the motion. Avianca, Synergy and German Efromovich are seeking a protective order, pursuant to New York Civil Practice Law and Rules 3103(a) and 3214(b), staying discovery pending the determination of the Defendants' motion to dismiss (Motion Sequence 003 and 004). Kingsland opposes the motion.

Motion Sequence 001, 003 and 004 are hereby consolidated for disposition[1].

Kingsland is a minority shareholder in Avianca. Defendant Synergy Aerospace Corp. is Avianca's controlling shareholder. Defendant German Efromovich is Synergy's principal and chairman of the board of Avianca, a position he has held since August 2013. Defendant Jose Efromovich is a director at Synergy and has served as president and CEO of OceanAir.

Kingsland filed a complaint on February 28, 2017 alleging breach of contract, breach of implied covenant of good faith and fair dealing, tortious interference with contract, breach of fiduciary duty and aiding and abetting the breach of fiduciary duty. The gravamen of the claim is that German Efromovich has negotiated "an egregiously one-sided proposed transaction" with United Airlines that benefits him at the expense of Avianca and its shareholders. Complaint at ¶ 2.

The relationship between Kingsland, Synergy and Avianca is governed by the Joint Action Agreement ("JAA") which was entered on September 11, 2013 and amended on March 24, 2015. Section 3.07 of the JAA prohibits Avianca and any Material Subsidiary from taking certain actions designated as "Special Approval Matters" without the approval of Kingsland and Synergy.

[1]In deciding these motions, the Court also considered Kingsland motion in opposition (NYSCEF No. 149) and the letter-briefs, dated April 6, 2017 (NYSCEF No. 173, 176) submitted by the parties.

The JAA sets out a procedure that must be followed before Avianca's board can consider or act upon Special Approval Matters. The procedural steps include a requirement that written notice be given to Kingsland and Synergy at least fifteen days before the Special Approval Matter will be considered. Section 3.08 provides that in the event Kingsland does not agree to the Special Approval Matter, it has fifteen days to tender a Disapproval Notice. This Notice, among other things, triggers Synergy's right to a buyout of Kingsland's shares in Avianca at a 10% premium above market price.

Additionally, Section 7.1 of the JAA provides for a mandatory dispute resolution procedure prior to the commencement of litigation.

On this backdrop, Kingsland has requested expedited discovery with regards to three proposed transactions: (1) a recapitalization of Avianca by Synergy ("the Strategic Process"); (2) Synergy's pledge of its shares in Avianca to United ("the Pledge") and (3) the merger between Avianca and United ("the Merger").

Specifically, Kingsland seeks discovery "including the depositions of each of the individual defendants, two to three Avianca directors, a representative from each of Airline A and Airline B which participated in the Strategic Process, Bank of America-Merrill Lynch, which acted as the financial advisor to Avianca throughout the Strategic Process, and Elliott Management Corporation, to which Synergy pledged its Avianca shares as consideration for loans made by Elliott and who acted

as an advisor to Synergy and the Efromoviches throughout the Strategic Process." See, NYSCEF No. 17, ¶4. Kingsland also seeks document production from the Defendants and non-parties relating to the Strategic Process, the Pledge and the Merger. Id.

Discussion

Expedited Discovery

New York law makes clear that the decision to grant expedited discovery lies within the discretion of the court. See, Rational Strategies Fund v. Hill, 2013 WL 3779654, at *2 (Sup. Ct. N.Y. Ctny. July 18, 2013); CPLR 3101(a); 3106(a); 3107; 3120.

CPLR 3101(a) provides that there shall be "full disclosure of all matters material and necessary in the prosecution or defense of an action....". In Allen v. Crowell–Collier Publ. Co., 21 N.Y.2d 403, 406 (1968), the court held that the terms "material and necessary" are to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason. See also, Davis v. Boeheim, 2012 WL 488255, at *2 (S. Ct. NY. Sup. Feb 10, 2012) (where the court held that discovery is not warranted because the disclosure is neither material nor necessary to the motion to change venue).

Kingsland's request for expedited discovery is denied as it has failed to demonstrate that the discovery sought is material and necessary to its application for preliminary injunction.

At this stage, the Strategic Process, the Pledge and the Merger are being negotiated and have not been announced. The SEC filings disclose that Synergy intends to make a capital contribution in Avianca of up to $200,000,000.00. NYSCEF No. 11, Exh. A, SEC, Form 6-K. Kingsland's own Complaint acknowledges that the transactions are merely "proposed" and "contemplates a series of interconnected related party transactions…". Complaint at ¶¶¶¶ 2, 82, 83 and 84.

On this record, Kingsland has not demonstrated that discovery on the transactions which are currently being explored by defendants but have not been definitively announced is material and necessary to its motion for preliminary injunction. "The purpose of a preliminary injunction is to preserve the status quo until a decision is reached on the merits". Icy Splash Food & Beverage, Inc. v. Henckel, 14 A.D. 3d 595, 596 (2d Dept 2005). Discovery on transactions that have not occurred are not relevant to the court's decision on "preserving the status quo." Kingsland has failed to show the imminent harm it may incur should expedited discovery be denied.

Kingsland argues that while there is no definitive deal, it would suffer irreparable harm as the defendants have an exclusivity agreement with United, "chilling other value-maximizing bids". It refers the court to Hollinger Intern., Inc. v. Black, 844 A.2d 1022, 1090 (Del.Ch. 2004) where the Chancery Court held that "[l]osses of strategic opportunities are often found to pose a threat of irreparable injury." As an initial matter, Hollinger is a Delaware case that is not controlling in this action. Moreover, Hollinger is readily distinguishable from the case at hand. First, at issue before this Court is whether to grant expedited discovery, not injunctive relief. Second, unlike Hollinger, the relationship between the parties in this case is governed by a document negotiated by sophisticated parties. At this stage, Kingsland has not demonstrated that the defendants' alleged misconduct eviscerates their rights as set in the JAA.

Kingsland's reliance on a line of cases that granted expedited discovery is misplaced as the transactions had been proposed to the shareholders. See e.g, In re Cablevision Systems Corp. Shareholders Litigation, 21 Misc.3d 419, 423 (Sup. Ct. Nassau Ctny. August 6, 2008) (expedited discovery granted after the majority shareholder announced that they wanted to purchase the Class A stocks); First Transcable Corp. v. Avalon Pictures, Inc., 184 A.D.2d 254, 254 (1st Dept 1992) (expedited discovery granted for proposed attempted issuance by the board of

directors of a substantial block of new common stock). Here, the transactions are proposals that are contemplated or being negotiated.

Kingsland also argues that unlike the Merger, United's loan to Synergy "may be consummated at any time." See, NYSCEF No. 149 at p. 10. However, in the Complaint, Kingsland states that the loan will be "in return for the benefits of a strategic partnership with Avianca." See, Complaint at ¶ 72, 73. Since there has been no announced Merger, there is also no immediate threat of the Pledge being consummated.

Stay of Discovery Pending Determination of Motions to Dismiss

Avianca, Synergy and German Efromovich have also brought motions for a protective order to stay discovery pending the determination of the motions to dismiss filed by Defendants. Generally, pursuant to this Court's Individual Practice, this court does not stay discovery pending motions to dismiss. However, here, the Court will stay discovery pursuant to CPLR 3214(b) on the grounds that the motions to dismiss are fully submitted. There is no prejudice to Kingsland in staying discovery pending determination of the motions.

Accordingly, it is hereby,

ORDERED that plaintiff Kingsland Holdings Ltd's motion for expedited discovery is denied, and it is further

ORDERED that discovery is stayed pending a determination on the motions to dismiss the Complaint.

Date: May 5, 2017
New York, New York

Anil C. Singh