Alta Capital Partners Intl. LLC v Parsons Capital LLC
2017 NY Slip Op 31246(U)
June 5, 2017
Supreme Court, New York County
Docket Number: 656550/2016
Judge: David B. Cohen

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN PART 58
Justice

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ALTA CAPITAL PARTNERS INTERNATIONAL LLC, AND ALPHASOURCE CAPITAL SECURITIES LLC,

Plaintiff,

- v -

PARSONS CAPITAL LLC, AND GENERAL INTERNATIONAL HOLDINGS, INC.,,

Defendant.

INDEX NO. 656550/2016

MOTION DATE 1/19/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this application to/for DISMISSAL.

Upon the foregoing documents, it is

Decided that the motion seeking dismissal based upon documentary evidence and failure to state a cause of action is denied in part and granted in part. On May 25, 2017 and as amended by further agreement June 15, 2016, the parties entered into an agreement where plaintiffs agreed to act as the exclusive financial advisor for defendants in their attempt to purchase a stake in a publicly traded company. If successful, plaintiffs were to receive no less than $200,000. In addition, if certain conditions were met plaintiff was to receive $7,500 per month. The agreement also contained a statement that it would not apply for a NASDAQ-listed services company that defendants were already pursuing. On June 29, 2016, defendants entered into a preliminary agreement to purchase a stake in Lightbridge Co., a NASDAQ listed company. The

purchase was completed on July 5, 2016 and defendants terminated the agreement on July 6, 2016. Initially, plaintiffs made a demand for payment and defendants failed to pay, plaintiffs filed a Demand for Arbitration with the American Arbitration Association, as required in the agreement. Defendants allegedly did not appear. Upon determining that the agreement lacked the requisite legal terms to be an enforceable arbitration agreement rendering a motion to compel arbitration unlikely to succeed, plaintiffs commenced this action seeking $207,500 under the agreement plus legal fees. The agreement did contain a clause stating "All disputes arising out of this agreement shall be governed by, and construed in accordance with, New York law and be resolved by arbitration in New York City. The legal, filing, arbitration, and other fees and expenses arising out of such arbitration shall be borne by the losing party or in such proportion as the arbitrator(s) shall decide."

Defendants moved pursuant to CPLR 3211(a)(1) and (7). They argue that a plain reading of the agreement shows that defendants cannot state a cause of action for breach of contract as (1) the agreement carved out the Lightbridge transaction from the agreement; and (2) plaintiffs have not earned their fee under the agreement as they did not introduce Lightbridge to defendants.

The motion is denied. The agreement simply states that it would not apply to a transaction involving a NASDAQ-listed services company without other identifying features. Although defendants argue that there is no dispute that Lightbridge is a NASDAQ-listed services, that point is disputed and in any event, does not prove from the documentary evidence that Lightbridge was the intended company.

The M&A success fee provides "The Buyer shall pay Advisor, due at close of each transaction, and as a condition to each close, in Advisor's U.S. bank account, a cash fee in

immediately available funds equal to 5%, of the aggregate value of all consideration, including assumed indebtedness, paid or to be paid to, by, or on behalf of the Buyer, with a minimum fee of no less than $200,000." This clause does not have a requirement that the transaction be introduced by plaintiffs, who had been engaged as defendants' "exclusive financial advisor." Although, the non-circumvention clause is limited to entities introduced by plaintiffs, the M&A portion of the negotiated agreement did not contain such a limitation.

When deciding a motion to dismiss pursuant to CPLR §3211, the court should give the pleading a "liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference" (*Landon v. Kroll Laboratory Specialists, Inc.*, 22 NY3d 1, 5-6 [2013]; *Faison v. Lewis*, 25 NY3d 220 [2015]. The Complaint alleges that the agreement (as amended by the June 15, 2016) except for the two exclusions, obligated initially defendants to plaintiffs in the event either defendant made an investment in a company, whether with or without the involvement of plaintiffs. Giving plaintiffs all favorable inferences, as the M&A provision did not specifically require plaintiff's introduction, the complaint states a cause of action for breach of contract.

Defendants also moved to dismiss the second cause action for breach of contract on the claim for $7,500. The agreement contains a Retainer Fee provision which states "When a company, a shareholder, or a group of shareholders ("Target") has expressed interest in a sale of shares or an investment by the [Defendants] evidenced by the earliest of (i) the signing of an NDA, (ii) the sharing of information, or (iii) the holding of a conference call or meeting with the [Defendants] or [their] representative, the [Defendants] shall immediately pay [Plaintiffs] . . . a non-refundable fee of $7,500." Defendants argue that plaintiffs do not allege that any of these three prerequisites actually occurred. Paragraph 19 -23 allege that plaintiffs introduced potential

target to defendants and shared information with defendants' counsel regarding said target. Giving plaintiffs all favorable inferences, plaintiff has stated a cause of action for breach of contract.

Finally, defendants' motion to dismiss the third cause of action seeking legal fees is granted. The plain language of the agreement permits the prevailing party in an *arbitration* to entitlement for fees as decided by the *arbitrator*. This litigation is not an arbitration and the Court is not an arbitrator. The cause of action does not seek damages for breach of contract based upon defendants' refusal to comply with the arbitration requirement.

For the above reasons, it is therefore

ORDERED, that defendants' motion to dismiss the first and second causes of action is denied; and it is also

ORDERED, that defendants; motion to dismiss the third cause of action is granted.

This constitutes the decision and order of the Court.

6/5/2017
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE