Index No. 651969/2014, Motion 02

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 48

Morgan Joseph TriArtisan, LLC.,
Plaintiff,
-against- Index No. 651969/2014

BHN LLC and Prime Acquisition Corp., **Decision and Order**
Defendants.

Prime Acquisition Corp.,
Cross-Claimant,
-against-

BHN LLC,
Cross-Claim Defendant,
and
Maria Cristina Fragni, Marco Prete and
BHN, SRL,
Third Party Cross-Claim Defendants.

ANDREA MASLEY, J.S.C.:

Defendant and cross-claim defendant BHN LLC (BHN) moves, pursuant to CPLR 3212 (e), for partial summary judgment on its first and second cross-claims against co-defendant and cross-claimant Prime Acquisition Corp. (Prime) and to dismiss the cross-claims asserted by Prime in its amended answer. Third party cross-claim defendants Maria Cristina Fragni, Marco Prete, and BHN, SRL (SRL) also move, pursuant to CPLR 3212 (e), to dismiss all cross-claims alleged against them in Prime's amended answer. For the reasons set forth below, the motion is granted in part.

Background

Parties

Plaintiff Morgan Joseph TriArtisan, LLC (Morgan) is an investment banking company which agreed to assist SRL in finding a special purpose acquisition company

(SPAC).[1] Prime is a publicly traded SPAC. BHN and SRL are affiliated companies that provide financial advisory and management services. Ms. Fragni and Mr. Prete are principals of BHN and SRL.

Undisputed Facts

In January 2013, Morgan introduced SRL to Prime. Prime had raised approximately $36 million from investors, and was ready to finance a merger or acquisition. On February 2, 2013, SRL and Prime entered into a letter of intent (LOI), under which it was agreed that Prime would acquire a newly formed entity which would own, directly or indirectly, high quality real assets identified by SRL. On May 22, 2013, BHN and Prime entered into a management agreement (the Agreement). Pursuant to the Agreement, BHN was to manage the identified assets and provide financial advisory services to Prime. Part of BHN's role under the Agreement was to also identify possible assets for Prime to acquire. The assets that it identified included real estate in Milan, Italy and "green certificates" related to solar power in Romania. Prime closed on the Milan real estate in September 2013, but the "green certificates" deal failed to close, so those assets were never acquired.

In June 2014, Morgan commenced this action against BHN and Prime, seeking the fee that it contends was due at the closing of these transactions. In turn, Prime and BHN asserted cross-claims against each other; Prime asserting cross-claims against BHN for anticipatory repudiation and breach of contract and BHN asserting cross-claims against Prime for indemnification, breach of contract, and breach of a non-disclosure non-circumvent agreement. Prime also commenced a third-party action against Ms.

[1] A SPAC is formed for the purpose of raising capital through an initial public offering and using those funds to acquire an operating business. *See* https://www.nyse.com/spac.

Fragni, Mr. Prete, and SRL, asserting claims for bad faith, breach of contract, breach of fiduciary duties, misappropriation, and conversion against Ms. Fragni and Mr. Prete, and for unjust enrichment against SRL. BHN, Ms. Fragni, Mr. Prete, and SRL now move for summary judgment.

BHN argues that it is entitled to summary judgment on its indemnification and breach of contract cross-claims.[2] It contends that Section 9 (a) of the Agreement provides for Prime to indemnify it for all costs incurred in connection with any acts or omissions made in good faith performance of its duties under the Agreement, which it maintains includes the claim asserted by Morgan. It asserts that Section 8 (b) of the Agreement requires Prime to reimburse it for all costs incurred on Prime's behalf, except those that are specifically made its responsibility under the Agreement. It asserts that the court may render a conditional judgment on the issue of indemnity.

BHN also asserts that Prime breached Section 7 (a) of the Agreement by failing to compensate BHN monthly for its services under the Agreement, and additionally, breached Section 11 (b) of the Agreement by terminating the Agreement before the minimum term of five years without providing written notice of default and an opportunity to cure. BHN states that Prime only paid it one of its monthly fees, although it managed Prime's assets for more than six months. It contends that Prime wrongfully terminated the Agreement by removing BHN's members as officers, thus making it impossible for BHN to perform its duties under the Agreement.

In support of its motion, BHN submits the affidavit of Mr. Prete, who states that, upon closing on the targeted assets identified by BHN, Morgan was due to receive its fee, and that BHN was supposed to be reimbursed for costs incurred in the diligence

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[2] BHN does not seek partial summary judgment on its third cross-claim.

process. He states that the default by the party selling green certificates left the new business combination short on cash and the Prime sponsors dictated which bills to pay at closing, choosing not to pay Morgan or BHN. Mr. Prete contends that, under the LOI and the Agreement, Prime was solely responsible to pay all costs incurred by entering the business combination, including Morgan's fee and BHN's diligence costs. He argues that standard practice in SPAC transactions is that the new business combination, not the management company, pays the costs.

Mr. Prete states that, despite Prime's failure to pay Morgan and BHN, BHN continued to fulfill its obligations under the Agreement. He states that Prime served as the holding company for seven subsidiary companies, each of which owned one of the seven Milan properties, and that Prime appointed BHN's members as officers and directors of Prime, allowing BHN to manage the business combination's assets. Mr. Prete asserts that Ms. Fragni undertook the additional role as sole director of each of the seven subsidiary companies. He asserts that BHN provided regular updates to Prime regarding the status of the managed assets, and was responsive to any inquiries from Prime regarding the assets until, without any warning, Prime gave notice that its shareholders passed a resolution removing BHN's principals as officers and directors. Mr. Prete states that any payments made to himself and Ms. Fragni were for invoiced services rendered and costs incurred outside the scope of the Agreement, such as director fees required under Italian law, insurance and work to restructure the company's debt. He asserts that the officers always acted in good faith to fulfill their respective obligations under the Agreement.

In opposition, Prime argues that it did not wrongfully terminate the Agreement, breach the Agreement, or refuse to reimburse BHN for expenses it owed under the

Agreement. It further alleges that triable issues of fact preclude summary judgment on any of its cross-claims.

Prime assets that, after the green certificate deal fell apart, it sought an alternative plan from BHN shareholders and received minimal information in response. Prime states that its shareholders eventually discovered that, under BHN's control, Prime had little money and had stopped paying its bills, missed public filing deadlines, failed to timely complete its 2013 audit, and failed to pay its auditors. Prime asserts that, in response, a majority of its shareholders voted to install new board members who removed the BHN officers. Prime contends that this was not termination of the Agreement, as Section 2 (c) expressly requires BHN to provide a succession plan in the event Prime's CEO could no longer serve in that capacity. Prime argues that it requested that BHN provide the board with a new slate of proposed officers within 48 hours, and that BHN failed to respond to that request. Rather, BHN's officers submitted resignations via email and BHN did not communicate with Prime during the crisis, in violation of the Agreement.

In support of its opposition, Prime submits the affirmation of Prime shareholder and chairperson, Diana Liu. Ms. Liu affirms that Prime's shareholders repeatedly requested information about Prime and that BHN was unresponsive.

Ms. Liu also asserts that, shortly after BHN's repudiation, Prime received complaints from the sellers of the Milan properties alleging false representations by Mr. Prete and Ms. Fragni. She alleges that an audit and investigation of Prime revealed that Ms. Fragni had paid herself an unauthorized salary, but directed Prime staff not to pay required bank loan payments on the acquired properties, which caused significant harm with several Italian banks and lenders, and at a minimum damaged Prime's

credibility in the Italian banking community. Ms. Liu states that Mr. Prete and Ms. Fragni made false representations to the sellers of the Milan properties, and made false representations to the prospective sellers of the green certificates in Romania that caused the sale to fall through and subjected Prime to threats of litigation. She contends that BHN's members quit before they were fired for cause, and breached the Agreement by failing to send the requisite termination notice. She argues that Prime did not terminate the Agreement because it gave BHN the opportunity to continue to act as manager.

Discussion

BHN moves for summary judgment on its first two cross-claims. To succeed on a motion for summary judgment a movant must demonstrate the absence of any material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). The court construes the facts as most favorable to the non-moving party. If the movant does not make a prima facie showing of entitlement to summary judgment, the court must deny the motion without respect to the sufficiency of the opposing papers (*id.*). If the movant meets its burden, the burden shifts to the non-moving party to establish that issues of fact exist (*id.*). BHN has not met its burden on either of its cross-claims.

Indemnification Cross-Claim

BHN is not entitled to summary judgment on its indemnification cross-claim because triable issues of fact exist. Section 9 (a) of the Agreement states in pertinent part:

> "The Company and each Subsidiary shall, to the full extent lawful, reimburse, indemnify and hold the Manager, its officers, stockholders, directors, employees, and Person controlling or controlled by the Manager and any Person providing sub-advisory services to the Manager, together with the managers, officers, directors and employees of the

> Manager, its officers, members, directors, employees, and any such Person (each a 'Manager Indemnified Party'), harmless of and from any nature whatsoever (including attorneys' fees) in respect of or arising from any acts or omissions of such Manager Indemnified Party made in good faith in the performance of the Manager's duties under this Agreement . . . ."

BHN argues that there are no material issues of fact as to Prime's obligation to indemnify BHN or Prime's breach of the Agreement. However, BHN has not shown that it is entitled to indemnification, because there is no language in the Agreement that requires Prime to indemnify it for obligations that preceded the execution of Agreement. It is not clear from the language in 9 (a) or elsewhere in the Agreement that the parties intended BHN's "duties under this Agreement" to extend to an obligation that preceded the Agreement.

BHN argues that Morgan's fee did not precede the execution of the Agreement, because the fee was due at the closing of the Milan properties. However, because BHN agreed to this fee before Prime was involved, there is at least a triable issue of fact as to whether Prime intended to take responsibility for this obligation. As Prime is not under a legal duty to indemnify, the language in the Agreement must be strictly construed, and the court will not read in a specific obligation that the parties did not expressly state (*see Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). The parties knew of SRL's agreement with Morgan at the time they entered the Agreement, and, if they intended the Agreement to cover that fee, they could have explicitly provided for it.

BHN argues that the LOI contains language that supports its indemnification cross-claim. However, the LOI is of no consequence, because Section 8 of the Agreement explicitly states that the Agreement supersedes the LOI between Prime and SRL.

Breach of Contract Cross-Claim

Even though BHN has made a prima facie showing that Prime breached Section 7 (a) of the Agreement by not paying its management fee, BHN is not entitled to summary judgment on its breach of contract cross-claim because triable issues of fact exist. Prime contends that BHN was responsible for preparing a monthly fee statement and submitting it to the board for payment. Section 7 (b) provides that BHN will "compute each installment of the Management Fee within five business days after the end of the calendar month with respect to which such installment is payable." Further, 7 (a) provides that BHN will submit a copy of the computations to Prime, and upon delivery, payment shall be due within five business days. Additionally, Prime argues, the management fees were based on the value of Prime's assets, which Prime maintains were low during the time BHN managed Prime. BHN does not provide any statements concerning its submission of monthly calculations to the board or representing that BHN sought payment, nor does it provide any calculations demonstrating the amount that it is allegedly owed. Thus, there is an issue of fact as to whether Prime's obligation to pay BHN's fees ever arose.

BHN also makes a prima facie showing that Prime breached Section 8 (b) of the Agreement by not paying for documented expenses in connection with the acquisition of the Milan properties. Again, Prime raises triable issues of fact as to whether BHN obtained requisite board approval to incur the expenses. Prime alleges that, under the plain language of Section 8 (b) (i) of the Agreement, it was only required to reimburse BHN for expenses "incurred on the Company's behalf" subject to "Board approval." Prime argues that the parties agreed that its board did not approve expenses related to the Milan acquisition. Additionally, Prime states that Section 8 (b) (xvii) provides for

reimbursement of reasonably necessary expenses to perform under the Agreement, and, therefore, does not include costs invoiced by Ms. Fragni, which BHN admits were outside the scope of the Agreement.

Section 8 (b) (i) states that Prime will reimburse BHN for "expenses in connection with the issuance and transaction costs incident to the acquisition, disposition and financing of Assets provided that with respect to any transaction subject to approval of the Board of Directors expenses incident to such transactions shall also require Board approval . . .." BHN has not submitted any evidence that board approval was not required for acquisition of the Milan properties or that it obtained board approval for the expenses it incurred. Thus, triable issues of fact exist as to whether the Agreement required Prime to pay those expenses.

BHN maintains that Morgan's claims against BHN, i.e. the nonpayment of its investment banking fee, is a cost incident to the acquisition of assets and arises from BHN's performance of its duties under the terms of the Agreement. There is a question of fact as to whether Morgan's fee is an expense BHN incurred on behalf of Prime under section 8 (b) (i) for the same reasons stated above regarding section 9 (a).

Prime's Cross-Claims

Through its papers and Mr. Prete's affidavit, BHN makes a prima facie showing of entitlement to summary judgment on Prime's cross-claims. Through its opposition and Ms. Liu's affirmation, Prime demonstrates the existence of triable issues of fact as to its cross-claims for anticipatory repudiation, and breach of contract against BHN, and breach of fiduciary duties, conversion, and misappropriation of corporate assets against Ms. Fragni and Mr. Prete. Prime does not, however, meet its burden as to its cross-claims for bad faith against BHN, Ms. Fragni and Mr. Prete, breach of contract against

Ms. Fragni and Mr. Prete, nor unjust enrichment against SRL.

Anticipatory Repudiation Against BHN

BHN asserts that it did not anticipatorily repudiate by failing to timely remove and replace officers of Prime, by being unresponsive to the board's requests to provide Prime's books and records, or by abandoning Prime in a time of crisis. It maintains that anticipatory repudiation requires an overt, positive, and unequivocal expression of the intention not to perform. BHN argues that Prime, not BHN, repudiated the Agreement when its shareholders voted to remove all BHN principals from any management role, and that Prime's repudiation excused BHN from further performance. Prime contends that there are material issues of fact as to whether BHN anticipatorily breached the Agreement created by the parties' differing accounts of how the business relationship came to an end and whether the board's removal of BHN's principals effectively terminated the Agreement.

Anticipatory repudiation occurs when a party repudiates its duty under a contract, by statement or an affirmative act, before the time for performance is complete (*see Norcon Power Partners v Niagara Mohawk Power Corp.*, 92 NY2d 458, 463 [1998]). Repudiation must be clear and unequivocal (*id.*). If a promisee terminates its own performance, in light of an apparent anticipatory repudiation, it risks having breached the contract itself if the court does not agree that the initial repudiation occurred (*id.*). Viewing the facts as most favorable to the nonmoving party, Prime sufficiently alleges that BHN ceased to communicate with the board and walked away from Prime in the midst of a crisis. BHN's argument that Prime repudiated first by removing its principals from management roles creates an issue of fact. Prime's assertions that Section 2 (c) of the Agreement contemplates that the Agreement would continue if the CEO was

unable to serve, and that it requested a list of proposed officers from BHN, create further issues of fact as to whether Prime intended BHN to continue as manager.

Breach of Contract Against BHN

BHN asserts that the evidence demonstrates that it performed its obligations under the Agreement and that Prime breached its obligations. Prime argues that its breach of contract cross-claim is supported by allegations that BHN (i) failed to pay Prime's bills, (ii) diverted corporate assets to its principals, (iii) missed public filing deadlines, (iv) failed to pay auditors, and (v) failed to give the requisite termination notice. Prime argues that Mr. Prete's statements concerning BHN's alleged updates to Prime are conclusory and unsupported by evidence. To assert a claim for breach of contract, a party must demonstrate (1) the existence of a contract, (2) that it performed under the contract, (3) that the opposing party breached the contract, and (4) that it incurred damages because of the breach (*Hermandad Y Asociados, Inc. v Movimiento Misionero Mundial, Inc.,* 22 Misc 3d 1138(A) [Sup Ct, New York County 2009]). Again, viewing the facts as most favorable to Prime, there is a triable issue of fact as to whether BHN mismanaged Prime's assets and terminated the Agreement without requisite notice.

Breach of Contract and Breach of Fiduciary Duty Against Ms. Fragni and Mr. Prete

Prime cross-claims for breach of contract and breach of fiduciary duty against Ms. Fragni and Mr. Prete. BHN alleges that these cross-claims fail to allege that individual defendants breached a duty other than that contractually established between the parties. Prime asserts that its breach of contract cross-claims against the individual defendants stand independently of any cross-claims against BHN and that Prime should not be forced to elect its remedies at this stage of the action. It argues that where a

party to a contract is also a fiduciary to the other party, it owes a duty outside the scope of the Agreement. The breach of contract cross-claims against the officers fail because Prime has not demonstrated the existence of contracts with the former officers in their individual capacities.

However, Prime does demonstrate that, as officers, Ms. Fragni and Mr. Prete owed a fiduciary duty to Prime. A breach of fiduciary duty results from the existence of (1) a fiduciary relationship, (2) misconduct by the party owing a duty, and (3) damages directly caused by the misconduct (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). Prime sufficiently alleges that Ms. Fragni and Mr. Prete engaged in misconduct by failing to respond to the board, failing to pay Prime's bills, making unauthorized payments, and abandoning Prime. These cross-claims are not, as BHN argues, merely duplicative of Prime's breach of contract cross-claim, as the court has already determined that Ms. Fragni and Mr. Prete, as individuals, did not owe Prime a contractual duty.

Conversion and Misappropriation Against Ms. Fragni and Mr. Prete

Prime cross-claims for conversion and misappropriation against Ms. Fragni and Mr. Prete. BHN asserts that these cross-claims are also improperly predicated on the breach of contract cross-claim and that Prime fails to identify the money that Ms. Fragni and Mr. Prete allegedly converted. Prime states that the extent of the officers' wrongdoing exceeds the scope of any contractual duties BHN owed to Prime. It contends that summary judgment dismissing its conversion cross-claim is precluded by the invoices and bank statements it provided which specifically identify the funds Ms. Fragni converted from its bank account. A party may assert a cross-claim for conversion of money where it can specifically identify the money in question and

demonstrate an obligation to return or treat the money in a particular manner (*Thys v Fortis Sec. LLC*, 74 AD3d 546, 547 [1st Dept 2010]). Through Ms. Liu's affirmation and the attached invoices, Prime specifically identifies the money that it alleges Ms. Fragni and Mr. Prete converted. Ms. Fragni and Mr. Prete's role as officers under the Agreement sufficiently demonstrates their obligation to treat the money they had access to as officers in the manner set forth by the Agreement. Prime's allegations that Ms. Fragni and Mr. Prete paid significant unauthorized sums to Ms. Fragni is enough to support this cross-claim. Similarly, these allegations are enough to support Prime's cross-claim for misappropriation of corporate assets and distinguish the alleged wrongdoing from conduct covered by the scope of the Agreement.

Unjust Enrichment Against SRL

SRL argues that Prime failed to produce any evidence to substantiate its allegation that SRL was unjustly enriched or articulate how this cross-claim is separate and distinct from its breach of contract cross-claim against BHN. Prime argues that its unjust enrichment cross-claim is clearly distinct, because SRL was not a party to the Agreement or a third-party beneficiary of the Agreement. Prime states that SRL does not provide evidence contradicting the allegations that it benefitted from the unjustified invoices that Ms. Fragni submitted on behalf of SRL and had paid directly to her bank account. Unjust enrichment requires a showing 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" (*Georgia Malone & Co., Inc. v Reider*, 19 NY3d 511, 516 [2012] [internal quotation marks and citation omitted]). Prime does not meet its burden of showing that SRL was unjustly enriched by Ms. Fragni and Mr. Prete's alleged actions. Prime contends that Ms. Fragni submitted

unjustified invoices on behalf of SRL, but it also argues that the money was paid directly to Ms. Fragni's bank account. Prime does not demonstrate that SRL was actually enriched.

Bad Faith Against BHN, Ms. Fragni and Mr. Prete

Prime cross claims for bad faith against BHN, Ms. Fragni, and Mr. Prete, who argue that this cross-claim should be dismissed because there is a duty of good faith and fair dealing implicit in every agreement and that separately stated claims for breach of contract are routinely dismissed as duplicative. Prime asserts that its bad faith cross-claim may be maintained concurrently with its breach of contract cross-claim, and that whether the parties acted in bad faith is a question of fact. Prime does not state grounds for a bad faith claim that is not encompassed by its breach of contract, breach of fiduciary duties, conversion, or misappropriation claims. Thus, this claim must be dismissed.

Therefore, it is

ORDERED that the motion is granted, in part, to the extent that Prime Acquisition Corp.'s third cross-claim for bad faith against BHN, LLC, Maria Cristina Ms. Fragni, and Marco Prete; fourth cross-claim for breach of contract against Ms. Fragni and Mr. Prete; and eighth cross-claim for unjust enrichment against BHN, SRL are dismissed; and is otherwise denied.

Dated: 8/31/17

ENTER:

J.S.C.

HON. ANDREA MASLEY
J.S.C.