SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 653364/2016
INT'L FCSTONE MARKETS, LLC
vs.
CORRIB OIL COMPANY LTD.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 2/7/18
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 46-63
Answering Affidavits — Exhibits _____ No(s). 68-73
Replying Affidavits _____ No(s). 74-76

Upon the foregoing papers, it is ordered that this ~~motion is~~

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4/9/18

SHIRLEY WERNER KORNREICH, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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INTL FCSTONE MARKETS, LLC (F/K/A INTL HANLEY, LLC),

Index No.: 653364/2016

DECISION & ORDER

Plaintiff,

-against-

CORRIB OIL COMPANY LTD.,

Defendant.

----------X

SHIRLEY WERNER KORNREICH, J.:

Plaintiff INTL FCStone Markets, LLC (FCStone) moves, pursuant to CPLR 3212, for summary judgment against defendant Corrib Oil Company Ltd. (Corrib). Corrib opposes the motion. For the reasons that follow, FCStone's motion is granted.

I. Factual Background & Procedural History

The material facts are not in dispute. Corrib owes nearly $3.5 million to FCStone. That money is owed because Corrib, an energy company based in Ireland, hedged its exposure to oil price fluctuations by entering into more than 800 derivatives transactions with FCStone between 2011 and 2015. Those trades are governed by an ISDA Master Agreement, Schedule, and Credit Support Annex, along with confirmations governing each of the transactions. *See* Dkt. 49 (the Master Agreement); Dkt. 50 (the Schedule); Dkts. 51 & 52 (the Annex); Dkt. 59 (the Confirmations) (collectively, the Agreement).[1] The Master Agreement, dated October 28, 2011,

[1] Section 1(c) of the Master Agreement states that the contracts are part of a "Single Agreement", which is governed by New York law and provides for jurisdiction in this court. *See* Dkt. 49 at 1, 20. References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing system (NYSCEF).

is the standard 2002 ISDA version. *See* Dkt. 49 at 1. Section 5(e) of the Schedule, titled "Procedures for Entering into Transactions", provides:

> [o]n or promptly following the date on which the parties reach agreement on the terms of a Transaction as contemplated by the first sentence of Section 9(e)(ii) of this Agreement, [FCStone] will send to [Corrib] a Confirmation. [Corrib] will **promptly thereafter** confirm the accuracy of (in the manner required by Section 9(e)(ii)), or request the correction of, such Confirmation (in the latter case, indicating how it believes the terms of such Confirmation should be correctly stated and such other terms which should be added to or deleted from such Confirmation to make it correct). If any disputes shall arise as to whether an error exists in a Confirmation, the parties shall resolve the dispute in good faith. **If [Corrib] has not accepted the Confirmation in the manner set forth above within two Local Business Days following the date of the Confirmation, [Corrib] will be deemed to have accepted all terms of such Confirmation.**

Dkt. 50 at 8 (emphasis added); *see also* Dkt. 49 at 16 (Master Agreement § 9(e)(ii), providing that Confirmations govern terms of each Transaction).

Until 2014, Corrib *made money* on these derivatives because the price of oil increased. But in June 2014, the oil market crashed, and so too did Corrib's positions on these trades. Corrib initially satisfied FCStone's margin calls (under section 5(a)(iii)(1) of the Master Agreement) but, eventually, as Corrib's positions went even more into the red, Corrib stopped doing so. Corrib first defaulted on a margin call in September 2015. It then defaulted on FCStone's subsequent margin calls and payment demands. On December 11, 2015, FCStone declared an event of default under the Master Agreement and, on December 29, 2015, FCStone noticed an early termination. At that time, Corrib owed FCStone $3,415,320.38 on 59 trades. FCStone again demanded payment in May 2016, but Corrib did not pay.

On June 24, 2016, FCStone commenced this action by filing a summons and motion for summary judgment in lieu of complaint. By order dated February 23, 2017, the court denied the motion because FCStone failed to submit the Confirmations governing the trades. *See* Dkt. 36.

On March 15, 2017, Corrib filed an answer with counterclaims. *See* Dkt. 38. At a March 23, 2017 preliminary conference, problems with the counterclaims were discussed. *See* Dkt. 40. On April 17, 2017, Corrib filed an amended answer in which it asserts the following counterclaims: (1) negligence; (2-3) violations of the Commodity Exchange Act (the CEA) and rules of the United States Commodity Futures Trading Commission (the CFTC); (4) breach of contract; (5) breach of the implied covenant of good faith and fair dealing; (6) fraud; and (7) fraudulent inducement. *See* Dkt. 42. During a May 2, 2017 compliance conference at which it became apparent that Corrib's defenses and counterclaims bordered on the frivolous, the court stayed discovery. Simply put, after production of the Confirmations, Corrib's admission that it never objected to them under section 5(e) of the Schedule and verification that the parties never entered into any written investment advisory agreement, it was clear that Corrib has no defense to non-payment. FCStone filed the instant motion for summary judgment on August 7, 2017, and the court reserved on the motion after oral argument. *See* Dkt. 78 (1/30/18 Tr.)

II. Discussion

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in

support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

There is no question of fact regarding Corrib's liability to FCStone. Corrib does not dispute the occurrence of the subject transactions, that the Confirmations accurately reflect their terms, that FCStone's margin calls were valid, that it failed to meet such margin calls, that FCStone was entitled to notice an early termination as a result,[2] or that the amount due is $3,415,320.38 plus interest. Rather, Corrib seeks to avoid paying FCStone based on the supposed merits of its counterclaims. The counterclaims have no merit.

The Schedule expressly provides that FCStone "is not acting as a fiduciary for or an advisor to [Corrib]" and that Corrib is not relying on any advice from FCStone in deciding to enter into the Transitions. *See* Dkt. 50 at 6. Indeed, the parties never executed any contract in which FCStone agreed to be Corrib's financial adviser. Hence, Corrib cannot claim that FCStone breached duties arising from such an agreement, that FCStone negligently performed such duties, or that FCStone's conduct amounts to a breach of fiduciary duty. The parties' relationship is governed exclusively by the Agreement, which clearly and comprehensively addresses the scope of the parties' rights and obligations. *See CIBC Bank & Tr. Co. (Cayman) v*

[2] *See* Dkt. 49 at 5 (Master Agreement § 5, governing Events of Default), 11 (§ 6, governing Early Termination).

Credit Lyonnais, 270 AD2d 138, 139 (1st Dept 2000) ("Nor is there merit to plaintiff's breach of fiduciary duty claim, **which is flatly contradicted by the parties' [ISDA Agreements]** in which each represented to the other that 'it is a sophisticated institutional investor' that 'has acted in the capacity of an arm's-length contractual counterparty and not as [the other's] financial advisor or fiduciary.") (emphasis added).

Prior to filing opposition to this motion, Corrib refused to identify the provisions of the Agreement that FCStone supposedly breached. *See* Dkt. 47 at 25 n.5 ("Corrib chose not to provide a response to FCStone's Interrogatory No. 6 requesting Corrib to "[i]dentify each provision of the ISDA that you allege Plaintiff breached," instead objecting that the request 'calls for a legal conclusion.'"). That said, Corrib now claims FCStone breached section 4(c) of the Master Agreement, which requires the parties to comply will all applicable laws. *See* Dkt. 49 at 5. Corrib alleges that FCStone violated the Investment Advisers Act of 1940 (the IAA) because its "recommendation[s] were uniquely unsuited to the needs of Corrib, [FCStone] withheld material information regarding the transactions, including the margin requirements, their commissions, and whether or not they were on the opposite side of the transactions", and because FCStone defrauded Corrib. *See* Dkt. 68 at 16. As discussed herein, all of these contentions are baseless.

The IAA is inapplicable. "The IAA, as its name suggests, applies only to investment advisors, which the [IAA] defines as 'any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.'" *Bank Leumi USA v Ehrlich*, 98 FSupp3d 637, 660 (SDNY 2015),

quoting 15 USC § 80b-2. The IAA does not apply where, as here, a broker or dealer such as FCStone merely transacts with a counterparty on a securities trade without receiving separate compensation for providing investment advice in connection with that trade. *See id.* ("the undisputed facts demonstrate that the Agreement ... plainly disclaimed the provision of any such investment advice and Defendants have failed to present a scintilla of evidence to the contrary, ... [and] because there is no dispute that the parties did not enter into a contract for investment advisory services, Defendants claim under the IAA fails as a matter of law."). Simply put, the IAA does not apply to broker/dealers' arms' length derivatives contracts unless the parties to the trade are in an investment advisory relationship, which is not the case here. *Transamerica Mortg. Advisors, Inc. (TAMA) v Lewis*, 444 US 11, 24 (1979) ("there exists a limited private remedy under the [IAA] to void an investment advisers contract, but that the Act confers **no other private causes of action**, legal or equitable.") (emphasis added); *see Feins v Am. Stock Exch., Inc.*, 81 F3d 1215, 1221 (2d Cir 1996); *see also Welch v TD Ameritrade Holding Corp.*, 2009 WL 2356131, at *28 (SDNY 2009) ("Plaintiffs' IAA claim is deficient in at least two respects: (1) Plaintiffs do not allege that they received investment advisory services from Defendants, and they have not identified investment advisory contracts to which they were parties; and (2) in the absence of a voidable investment advisory contract, the relief sought by Plaintiffs is unavailable in a private right of action under the IAA.").

Corrib's claims based on CFTC violations are equally frivolous because "there is no private action for violations of CFTC rules." *Lehman Bros. Commercial Corp. v Minmetals Int'l Non-Ferrous Metals Trading Co.*, 179 FSupp2d 118, 158 (SDNY 2000) (collecting cases). Corrib provides no contrary authority, nor does it argue that the federal cases that have addressed the issue are wrongly decided. It entirely ignores the matter in its opposition brief.

Most critically, section 5(e) of the Schedule prohibits Corrib from objecting to the terms of a Confirmation after two days. "[I]f a trade was entered into without Corrib's consent, or the Margin Call was improperly calculated, or if FCStone did not follow Corrib's instructions, then Corrib was required to submit an objection to the Confirmation or Margin Call calculation. It did not." Dkt. 47 at 27. FCStone timely sent the Confirmations to Corrib, but Corrib never objected to ***any*** of the Confirmations until this litigation. Corrib does not challenge FCStone's margin calls or the amounts due. Corrib, therefore, is precluded under section 5(e) from challenging the terms of the transactions.

Corrib cannot avoid this result by invoking the implied covenant of good faith and fair dealing. It does not point to any gap in the Agreement that could be filled by resort to the implied covenant, which cannot be invoked to avoid application of the express terms of a written agreement. *Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 (1995); *see Nat'l Union Fire Ins. Co. of Pittsburgh, PA v Xerox Corp.*, 25 AD3d 309, 310 (1st Dept 2006) ("[t]he covenant of good faith and fair dealing cannot be construed so broadly as to effectively nullify other express terms of the contract, or to create independent contractual rights.").

Corrib also cannot maintain a cause of action for fraud or fraudulent inducement because it cannot show justifiable reliance. *See Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009) ("The elements of a cause of action for fraud [are] a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, **justifiable reliance** by the plaintiff and damages.") (emphasis added). Corrib's fraud claims are based on alleged representations about the terms of the trades and FCStone's supposed promise not to serve as a counterparty. However, the terms of the trades are set forth in the Confirmations, which clearly disclose that FCStone was the counterparty. *See, e.g.*, Dkt. 59 at 1 ("The purpose

of this letter agreement (this 'Confirmation') is to confirm the terms and conditions of the Transactions entered into **between [Corrib] and [FCStone]**.") (emphasis added); *see id.* (noting "Seller" is FCStone); *see also id.* at 4 (same, noting that "Seller" is Corrib and "Buyer" is FCStone). This was not an aberration. FCStone appears to have been a counterparty to virtually all of the transactions, a fact clearly disclosed in the Confirmations. Corrib never objected.

Where, as here, a simple review of contracts would have revealed the falsity of the alleged misrepresentation, a fraud claim cannot stand because "a party claiming fraudulent inducement cannot be said to have justifiably relied on a representation **when that very representation is negated by the terms of a contract**." *Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 (1st Dept 2011) (emphasis added); *see Pacnet Network Ltd. v KDDI Corp.*, 78 AD3d 478, 479 (1st Dept 2010) ("since the language of the contract variation contradicts plaintiff's allegations ... those allegations are not presumed to be true."); *see also MP Cool Investments Ltd. v Forkosh*, 142 AD3d 286, 291 (1st Dept 2016) ("Plaintiff is an experienced and sophisticated investor. It did not plead facts to support the justifiable reliance element of fraud."). As discussed, the Schedule provides Corrib two days to review and challenge terms of a Confirmation. Having failed to do so, Corrib cannot now claim it was justified in not noticing that terms in the Confirmations conflicted with oral assurances allegedly provided by FCStone. *See Cash v Titan Fin. Servs., Inc.*, 58 AD3d 785, 788 (2d Dept 2009) ("[a] party is under an obligation to read a document before he or she signs it, and a party cannot generally avoid the effect of a [document] on the ground that he or she did not read it or know its contents."), quoting *Martino v Kaschak,* 208 AD2d 698 (2d Dept 1994). And to the extent Corrib alleges that it was fraudulent for FCStone not to explicitly inform Corrib that it was the counterparty, such a claim for fraudulent omission cannot be maintained where, as here, the

parties are not in a fiduciary relationship. *Zumpano v Quinn*, 6 NY3d 666, 675 (2006); *see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 179 (2011).

Likewise, Corrib's statutory fraud claims under the CEA have no merit. Corrib concedes that such claims require proof of reliance and scienter. *See* Dkt. 68 at 24, citing *Walrus Master Fund Ltd. v Citigroup Glob. Markets, Inc.*, 2009 WL 928289, at *3 (SDNY 2009). As discussed, Corrib cannot establish the former. Nor does Corrib properly allege scienter. It merely asserts general allegations of FCStone's profit motive. *See Jonas v Nat'l Life Ins. Co.*, 147 AD3d 610, 612 (1st Dept 2017), citing *CeltixConnect Equity Inv'rs LLC v Sea Fibre Network Ltd*, 52 Misc3d 1210(A), at *8-9 (Sup Ct, NY County 2016) ("The prevalent view in our state courts, and the well-settled rule in the federal courts, is that the motive to earn a fee, without more, cannot be used to infer scienter.") (collecting cases).[3] Accordingly, it is

ORDERED that FCStone's motion for summary judgment is granted, Corrib's counterclaims are dismissed with prejudice, and the Clerk is directed to enter judgment in favor of FCStone and against Corrib in the amount of $3,415,320.38 plus 9% pre-judgment interest from December 29, 2015 to the date judgment is entered.

Dated: April 9, 2018

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.

[3] FCStone additionally contends, and Corrib does not dispute, that claims under the CEA have a two-year statute of limitations that begins "to run when the plaintiff, in the exercise of due diligence, has actual or constructive knowledge of the conduct in question." *See* Dkt. 47 at 20. While FCStone persuasively explains why the CEA claims relating to some of the trades are likely time barred, the court need not reach this issue since the CEA claims fail on the merits.