

Moore Freres & Co., LLC v Mercury Partners GMBH

2018 NY Slip Op 31979(U)

August 15, 2018

Supreme Court, New York County

Docket Number: 652940/2018

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Andrea Masley
JSC

PART 48

MOORE FRÈRES & COMPANY, LLC,

Plaintiff,

INDEX NO. 652940/2018

-against-

MOTION DATE: _____

MERCURY PARTNERS GMBH, MERCURY PARTNERS SOFTWARE LLC, and RAINER BUSCH,

MOTION SEQ. NO. 001

Defendants.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

ORDERED that plaintiff Moore Frères & Company LLC’s (MFC) motion, pursuant to CPLR 6301, for a preliminary injunction enjoining defendants Mercury Partners GmbH (Mercury GmbH), Mercury Partners Software LLC (Mercury LLC), and Rainer Busch, during the pendency of this action, from pursuing or consummating the transaction involving Mercury LLC’s purchase of an equity interest in nonparty Last Lion Holdings Limited (Last Lion) from nonparty Otello Corporation ASA (Otello) is denied.

Plaintiff MFC is the majority shareholder of Last Lion, a company incorporated in the United Kingdom. “Last Lion is the indirect, and ultimate, holding company of Vewud Software, a company incorporated in Norway that operates a software business” (complaint ¶ 20). MFC holds 6,300 A ordinary shares in Last Lion, equaling a 70% voting equity. Otello, a Norwegian company, holds 2,700 B preference shares in Last Lion, which are convertible into A ordinary shares at the holder’s election. Last Lion has a four-member board of directors; three of whom were designated by MFC and the fourth by Otello. The Chief Executive Officers of both MFC and Otello sit on the board.

MFC alleges that, in October 2017, it began to consider financing options allowing it to increase its equity stake in Last Lion. One option was to raise capital by selling Last Lion A ordinary shares. “The proceeds of such equity sale would be used to finance the cost incurred by MFC in purchasing Last Lion B preference shares from Otello, in a separate transaction” (complaint ¶ 26). MFC engaged in preliminary discussions with defendant Busch in regard to selling him some of MFC’s A ordinary shares.

To facilitate these discussions, MFC and Mercury GmbH, an entity controlled by Busch, entered into a Confidentiality and Non-Disclosure Agreement (NDA) effective October 26, 2017. The NDA states that MFC and Mercury GmbH have "requested or may request certain information from the other in connection with a proposed investment opportunity, an acquisition of a minority equity ownership interest in Vewd Software (the 'Potential Transaction')" (complaint ¶ 29). The NDA requires the parties to treat all information provided to each other as confidential. It prohibits the parties from using any disclosed information for any purpose other than evaluating the proposed sales transaction and it also prohibits disclosing the existence of the NDA and that discussions involving the proposed transaction had taken place. The NDA contains a provision that prohibits Mercury GmbH from having "direct or indirect conversations, unless otherwise authorized by Moore Frères, with the target investment regarding a potential acquisition of, or partnership involving, any of its businesses" (NDA ¶ 8). If Mercury GmbH breached the NDA, MFC may elect to seek equitable relief, including injunctive relief and specific performance (*id.* ¶ 12).

After weeks of negotiations, the parties failed to reach an acceptable deal and discussions terminated on December 18, 2017. It was allegedly around this time that MFC suspended its efforts to acquire Otello's Last Lion shares. MFC alleges that it did not proceed because of the pricing and terms that were available at that time and the lack of an alternative equity investor. After the negotiations between MFC and Mercury GmbH ceased, Busch approached Otello about purchasing Otello's B preference shares of Last Lion. MFC alleges that Mercury GmbH disclosed confidential information obtained during its negotiations with MFC so that Busch and Mercury LLC, another entity controlled by Busch, could evaluate the potential purchases of Otello's Last Lion shares.

On February 20, 2018, Mercury LLC and Otello executed a share purchase agreement (SPA) under which Mercury LLC agreed to purchase all of Otello's B preference shares of Last Lion for a total of \$53 million. On February 21, 2018, MFC sent Busch and Mercury GmbH a "Notice of Breach and Cease and Desist Demand," informing Busch and Mercury GmbH that their activities with respect to the purchase of Otello's Last Lion shares were a breach of the NDA. MFC demanded that Mercury LLC and its representatives cease from breaching the NDA and engaging in conduct designed to harm or interfere with MFC's interest in Last Lion or its relationship with Otello. There was no response to this demand and Mercury LLC and Otello moved forward with the purchase.

Otello requested that Last Lion's board of directors approve Mercury LLC as a transferee of Otello's shares. In response, Last Lion established a special committee to evaluate the transfer and whether Mercury LLC should be approved. On April 12, 2018, prior to any decision by Last Lion's board, Otello commenced an action against MFC and Last Lion in the United Kingdom (UK Action), seeking an injunction requiring Last Lion's board to approve Mercury LLC as transferee of Otello's shares.¹ On April 17,

¹ The UK Action is still pending.

2018, the special committee determined its recommendation that Last Lion's board of directors vote against approving Mercury LLC. On April 27, 2018, the special committee informed the board of its recommendation and the majority of the board declined to approve Mercury LLC as a transferee of Otello's shares. The reasons given were Busch's August 2016 conviction for insider trading in Canada, Busch and Mercury GmbH's behavior during their negotiations with MFC; Busch's violation of the NDA and failure to respond to MFC's demand, the likelihood of an escalation of the dispute between MFC and Busch/Mercury GmbH concerning the NDA, and the lack of candor by Busch, Mercury LLC, and Otello in responding to the special committee's requests and questions.

On June 12, 2018, MFC filed this action alleging claims for breach of the NDA, breach of the implied covenant of good faith and fair dealing, and tortious interference with contract. MFC seeks to enjoin Mercury GmbH and its representatives from committing any further breaches of the NDA and enjoining Busch, Mercury LLC, and Mercury GmbH or any of their representatives, agents, or affiliates from directly or indirectly pursuing or consummating any transaction involving a transfer of shares in Last Lion from Otello to Busch, Mercury LLC, Mercury GmbH, or any of their representatives, agents, or affiliates.

For injunctive relief under CPLR 6301, the movant must establish likelihood of success on the merits of the action; the danger of irreparable harm in the absence of a preliminary injunction; and a balance of equities in favor of the moving party (*Gliklad v Cherney*, 97 AD3d 401, 402 [1st Dept 2012 [citations omitted]). "A preliminary injunction should not be granted unless the right thereto is plain from the undisputed facts and there is a clear showing of necessity and justification" (*O'Hara v Corporate Audit Co.*, 161 AD2d 309, 310 [1st Dept 1990] [citations omitted]).

While the undisputed facts establish a likelihood of success on the merits, irreparable harm missing. "To establish a likelihood of success on the merits, [a] prima facie showing of a reasonable probability of success is sufficient; actual proof of the petitioners' claims should be left to a full hearing on the merits. A likelihood of success on the merits may be sufficiently established even where the facts are in dispute and the evidence need not be conclusive" (*Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 A.D.3d 430, 431 [1st Dept 2016] [internal quotation marks and citations omitted]). Here, MFC has made a prima facie showing that it will be successful on its claims against.

MFC alleges that defendants breached the NDA by approaching Otello to propose acquiring its shares in Last Lion and using the confidential information received from MFC in evaluating and formulating that approach and eventually entering into the SPA. Specifically, MFC alleges that Mercury GmbH, at the behest of Busch and Mercury LLC, disclosed the confidential information it received in order for Busch and Mercury LLC to evaluate the potential purchase of Otello's Last Lion shares. The confidential information included information relating to MFC and Last Lion and its subsidiary Vewd Software, such as detailed financial statements, information and operational data, organizational documents, and answers to detailed diligence questions presented to Vewd Software.

The elements for breach of contract are the existence of a contract, performance by plaintiff, breach by defendant, and damages as a result of the breach (*Flomenbaum v New York Univ.*, 71 AD3d 80, 91 [1st Dept 2009], *affd* 14 NY3d 901 [2010], *citing Clearmont Prop., LLC v Eisner*, 58 AD3d 1052, 1055 [3d Dept 2009]). MFC and Mercury GmbH had an agreement to keep certain information confidential, refrain from disclosing that information to third parties, and refrain from using that information for any purpose other than evaluating the potential transaction between MFC and Mercury GmbH. It is undisputed that Busch contacted Otello's CEO about the selling Otello's Last Lion shares. Specifically, Busch sent an email to Otello's CEO in January 2018 stating, "[a]s we know, we have been in contact with Martez AND Tom from [MFC] regarding Vewd Software. We submitted an offer last year to acquire the shares [Otello] owns in Vewd Software through [MFC] last year. Are you still interested in selling you[r] shares in Vewd Software?" (Busch aff, ¶ 48, exhibit 23).

While defendants argue that Mercury GmbH did not breach the NDA, specifically paragraphs 3, 4, and 8, when Busch contacted Otello, the evidence presented at this stage indicates the opposite. The NDA clearly provides that Mercury GmbH, as the "Receiving Party" of confidential information, was not to use or disclose any of the information received except to Mercury GmbH's "directors, officers, employees, agents, advisors or affiliates or representatives of the Receiving Party's agents, advisors or affiliates (each of the foregoing, other than the Receiving Party, a 'Receiving Party's Representative') (NDA ¶ 1). The NDA also provides that neither MFC nor Mercury GmbH "shall disclose the existence of this Agreement or that discussions have taken place between the parties with respect to a proposed relationship or the Potential Transaction without the other party's prior written consent" (*id.* at ¶ 4). When Busch contacted Otello about selling its Last Lion shares, he disclosed the discussions that had taken place between Mercury GmbH and MFC.

Defendants present several arguments as to why their disclosure to Otello was not a breach. However, none counter the undisputed facts for the purpose of obtaining this provisional relief. For example, defendants argue that paragraph 4 of the NDA cannot be interpreted to mean that neither party was permitted to disclose the NDA or the parties' negotiations to Otello. This is contradictory to the plain language of paragraph 4, which clearly excludes any disclosure of the NDA and any discussions that have taken place in regard to the proposed transaction to anyone other than the parties, MFC and Mercury GmbH, and the Receiving Party's Representatives. Otello is not a party to the NDA and is not a Receiving Party's Representative. While Busch claims that he believed MFC was acting as an agent of Otello, and thus, it would not be a violation of the NDA to discuss the transaction with Otello, the NDA makes no representation that MFC was acting as Otello's agent. Moreover, the NDA specifically bars communications with Otello -- "the target investment regarding a potential acquisition of, or partnership involving, any of its businesses" (NDA ¶ 8). Further, in his affidavit submitted in opposition TO this motion, Busch acknowledges that MFC was to purchase Otello's share and then MFC was going to sell shares to Mercury (Busch aff at ¶ 39). Thus, in December 2017, prior to his outreach to Otello, it appears that Busch understood that he was buying shares from MFC and MFC was not acting as Otello's agent.

MFC has also established a prima facie case for tortious interference with contract against Busch and Mercury LLC and is likely to succeed on the merits of those claims as well. The elements of a claim for tortious interference with contract are (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach; and (4) damages (*William Kaufman Org., Ltd. v Graham & James LLP*, 269 AD2d 171, 173, [1st Dept 2000]). MFC has made a prima facie showing that Busch intentionally procured the breach of the NDA by his entity Mercury GmbH when he contacted Otello about selling its Last Lion shares.

As to irreparable harm, MFC argues that, if Mercury LLC purchases Otello's Last Lion shares, MFC would suffer irreparable harm because Busch's "checkered past" would damage Last Lion's reputation and ability to raise capital to support its operations and growth. MFC also asserts that allowing Mercury LLC and Busch to become shareholders would create an untenable situation that would likely lead to prolonged hostilities and dysfunction in the operations and management of Last Lion and its subsidiaries.

"Irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction. To prevail, the movant must establish not a mere possibility that it will be irreparably harmed, but that it is likely to suffer irreparable harm if equitable relief is denied" (*Bank of Am., N.A. v PSW NYC LLC*, 29 Misc 3d 1216[A], 2010 NY Slip Op 51848[U], *10 [Sup Ct, NY County 2010]). The movant must demonstrate that it will suffer an actual and imminent injury, and not one remote or speculative (*Waterscape Resort, L.L.C. v 70 W. 45th St. Holding LLC*, 2015 NY Slip Op 31255[U], *6 [Sup Ct, NY County 2015]; see also *Golden v Steam Heat*, 216 AD2d 440, 442 [2d Dept 1995]).

MFC has not met its burden. MFC fails to point to any imminent and actual harm that would befall it in the absence of the requested relief. First, MFC contends that a decision by the Canadian Financial Markets Administrative Tribunal finding Busch liable for a violation of the Canadian Securities Act will damage Last Lion's reputation and negatively affect its ability to raise capital. In support, MFC submits the affidavit of its CEO, who simply concludes that Last Lion's reputation will be significantly damaged. Without further explanation or proof, the alleged damage that Busch's "checkered past" would cause to Last Lion's reputation is speculative.

Second, MFC contends that it will suffer irreparable harm because allowing this sale would create an untenable situation that would likely lead to prolonged hostilities and dysfunction in the operations and management of Last Lion and its subsidiaries. However, it is hard to accept that there will be dysfunction in the operations and control of Last Lion when MFC will retain both its 70% majority stake in Last Lion and its three-member majority control of Last Lion's board of directors.

MFC has also failed to demonstrate that any injuries they would suffer would not be compensable by money damages. If Mercury LLC purchases Otello's shares, MFC can be compensated for any alleged breach of the NDA by awarding the difference of

the amount MFC was supposed to pay for Otello's shares and amount Mercury LLC is to pay if the UK Court allows for the sale.

Finally, MFC argues that the parties already agreed that "money damages may be both incalculable and an insufficient remedy for any breach of [the NDA] (NDA ¶12). However, the use of the word "may" does not make this provision dispositive on this issue.

Accordingly, it is

ORDERED that plaintiff Moore Frères & Company LLC's motion for a preliminary injunction is denied.

Dated: 8/15/18  J.S.C.

HON. ANDREA MASLEY

- Check one: CASE DISPOSED NON-FINAL DISPOSITION
- MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- Check if appropriate: SETTLE ORDER SUBMIT ORDER DO NOT POST
- FIDUCIARY APPOINTMENT REFERENCE