

Project Cricket Acquisition, Inc. v Florida Capital Partners, Inc.

2019 NY Slip Op 30111(U)

January 14, 2019

Supreme Court, New York County

Docket Number: 652524/2015

Judge: Saliann Scarpulla

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. SALIANN SCARPULLA PART IAS MOTION 39EFM

Justice

-----X

PROJECT CRICKET ACQUISITION, INC.,
Plaintiff,

- v -

FLORIDA CAPITAL PARTNERS, INC., FLORIDA CAPITAL PARTNERS II, INC., FCP INVESTORS VI, LP, FCP INVESTORS VI (PARALLEL FUND), LP, FCP PARTNERS VI, LLC, FELIX J. WONG, GREGORY JOHNSON, BARRY J. THIBODEAUX, THOMAS P. BAYHAM, THOMAS R. SUMNER, GEORGE T. MALVANEY, LARRY N. LEE, ROBERT WILLIAMS, RODNEY POWELL, ROBERT KEESEE, ERIC HOFFMAN, DAVID ZACHARY, CLAY COX, CRICKET STOCKHOLDER REP, LLC,

Defendant.

-----X

INDEX NO. 652524/2015
MOTION DATE 09/10/2018
MOTION SEQ. NO. 007

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 007) 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 150, 151, 152

were read on this motion to/for LEAVE TO FILE.

A detailed summary of the factual allegations of this case has been set forth in prior decisions discussed herein.

Relevant here, this action arises from plaintiff’s purchase of nonparty USES Holding Corp. (“Company”) from the Company’s stockholders (“Sellers”)¹ pursuant to a stock purchase agreement (“SPA”). Plaintiff commenced this action in 2015, asserting various indemnification claims based on alleged breaches of representations and

¹ Sellers are most of the named defendants in this action and signatories to the SPA, including defendants (1) FCP Investors VI, LP and (2) FCP Investors VI (Parallel Fund) (collectively, “FCP Signatory Defendants”). Defendants (1) Florida Capital Partners, Inc.; (2) Florida Capital Partners II, Inc.; and (3) FCP Partners VI, LLC, in addition to proposed new defendant FCP Investors, Inc., are non-signatories to the SPA (“FCP Non-Signatory Parties”) (FCP Non-Signatory Parties together with FCP Signatory Defendants, “FCP”).

warranties in the SPA (“Indemnification Claims”). Plaintiff now moves, pursuant to CPLR 3025(b), to amend the complaint to resurrect (1) fraud claims against defendants Felix J. Wong (“Wong”), Gregory Johnson (“Johnson”), and FCP; (2) a civil conspiracy claim against Wong, Johnson, and FCP; (3) and a breach of contract claim against Sellers, in addition to generally augmenting the complaint.

Discussion

Leave to amend a complaint is freely granted “upon such terms as may be just[.]” CPLR § 3025 (b). “In determining whether to grant a motion to amend [the complaint], the court should consider the merit of the proposed [cause of action] and whether the plaintiff will be prejudiced by the delay in raising it” *Lanpont v Savvas Cab Corp., Inc.*, 244 A.D.2d 208, 209–10 (1st Dep’t 1997); *see also MBI Ins. Corp. v Greystone & Co., Inc.*, 74 A.D.3d 499, 500 (1st Dep’t 2010) (“On a motion for leave to amend, plaintiff . . . [must] show that the proffered amendment is not palpably insufficient or clearly devoid of merit”) (citation omitted).

The first amended complaint has already been subject to various motions to dismiss and an appeal. Specifically, Wong and Johnson previously moved to dismiss the first amended complaint against them, which included causes of action for fraud and civil conspiracy. Although I originally maintained the fraud and civil conspiracy causes of action, *see Project Cricket Acquisition, Inc. v Florida Capital Partners, Inc.*, 2017 N.Y. Slip Op. 31383(U) (N.Y. County 2017), the Appellate Division, First Department modified my ruling and dismissed both claims, thereby dismissing the entirety of the complaint against Wong and Johnson. *See Project Cricket Acquisition, Inc. v FCP Inv’rs*

VI, L.P., 159 A.D.3d 600 (1st Dep't 2018) (citations omitted), *lv to appeal dismissed in part, denied in part*, 32 N.Y.3d 1080 (2018) (hereinafter "*Project Cricket*"). The First Department determined that:

The fraudulent inducement claim against Johnson and Wong is dismissed as duplicative of the breach of contract claims to the extent it is based on the falsity of the representations and warranties made in the SPA. To the extent it is based on statements external to the SPA, it is barred by the SPA's disclaimer of reliance on information "not expressly represented and warranted to in this Agreement" [T]he civil conspiracy claim against Johnson and Wong is dismissed because it was predicated upon the fraudulent inducement claim that is dismissed herewith[.]

Project Cricket, 159 A.D.3d at 600. Plaintiff moved for reargument and sought leave to appeal to the Court of Appeals, both requests were denied.

Plaintiff now argues that the allegations in the second amended complaint overcome the deficiencies set forth in Appellate Division, First Department's decision because Plaintiff extensively pleads detailed instances where Johnson and Wong, in addition to FCP, knew the contractual representations were false when made. According to plaintiff, such detailed allegations satisfy Delaware law, and it may plead both its pending Indemnification Claims and the proposed intra-contractual based fraud claim.

Contrary to plaintiff's position, the second amended complaint does not "cure" the deficiencies found by the Appellate Division, First Department. By determining that the intra-contractual fraud claim is duplicative, the court concluded that plaintiff's alleged misrepresentations form the same basis of plaintiff's Indemnification Claims and therefore, it is improper. *See Bean v Fursa Capital Partners, LP*, 2013 WL 755792 at 4 (Del. Ch. Feb. 28, 2013) ("Under Delaware law, 'a plaintiff cannot bootstrap a claim of

breach of contract into a claim of fraud merely by alleging that a contracting party never intended to perform its obligations.”).

That the quantity of allegations regarding Johnson’s and Wong’s knowledge has increased does not change that result.² Despite the additional allegations, there is no qualitative distinction between what plaintiff previously alleged and what it now pleads as a proposed amendment. Plaintiff merely repleads a bootstrapped claim when even though the Appellate Division, First Department has already determined that plaintiff’s pending Indemnification Claims fully address the complained-of conduct.

Accordingly, I deny plaintiff’s motion to the extent it seeks to add a claim for fraud against Johnson and Wong. Because the fraud claim is deficient against them, it also fails against FCP.³ Additionally, I deny the motion as to the claim for civil conspiracy, which is predicated on a nonviable claim for fraud.

I also deny plaintiff’s motion to the extent it seeks to add a claim for breach of section 2.2 and 2.3 of the SPA. Briefly, that provision provides the mechanism for adjusting the purchase price after closing. Here too, the Appellate Division, First

² In any event, “[a] plaintiff need not plead knowledge or state of mind with particularity, because ‘any attempt to require specificity in pleading a condition of mind would be unworkable and undesirable.’” *LVI Group Investments, LLC v NCM Group Holdings, LLC*, 2018 WL 1559936 at 11 (Del. Ch. Mar. 28, 2018). “This Court has [also] stated that . . . actual knowledge need only be pleaded generally[.]” *William Doyle Galleries, Inc. v Stettner*, 2018 N.Y. Slip Op 08743 (1st Dep’t Dec. 20, 2018).

³ I previously dismissed the FCP Non-Signatory Defendants for lack of jurisdiction. To the extent plaintiff seeks to add allegations supporting jurisdiction over such defendants, that request is denied as the allegations are unnecessary in the absence of any substantive claims against them.

Department unequivocally dismissed this claim as improper. Not only did the court determine that the period to raise calculation disputes had already passed, the court further determined that the provision “does not permit the purchaser ‘to challenge the historical accounting practices used in the represented financials[.]’” *Project Cricket*, 159 A.D.3d at 601. Instead, resolution of that issue is appropriate through the pending Indemnification Claims for breach of the SPA’s express warranty. *See Project Cricket*, 159 A.D.3d at 602.⁴

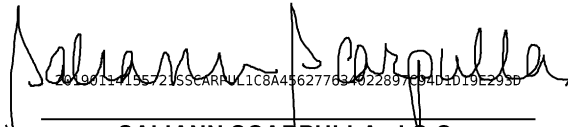
In sum, plaintiff’s pending Indemnification Claims state valid causes of action and comprehensively cover this dispute. Regarding the allegations plaintiff seeks to add to its pending Indemnification Claims, I deny that request as unnecessary.

In accordance with the foregoing, it is

ORDERED that plaintiff Project Cricket Acquisition, Inc. motion for leave to amend the complaint is denied in its entirety.

This constitutes the decision and order of the court.

1/14/19
DATE


SALIANN SCARPULLA, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

⁴ For the same reason, I deny plaintiff’s request to add separate claims for post-transaction fraud and breach of the implied covenant of good faith. Both proposed claims seek to challenge the price adjustment calculations and process, but those allegations are the basis of plaintiff’s Indemnification Claims and therefore, are also duplicative.