

Moore Freres & Co., LLC v Mercury Partners GMBH
2019 NY Slip Op 32618(U)
August 30, 2019
Supreme Court, New York County
Docket Number: 652940/2018
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM

Justice

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INDEX NO. 652940/2018

MOORE FRERES & COMPANY, LLC,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 002

- v -

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

DECISION + ORDER ON
MOTION

Defendant:

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145

were read on this motion to/for

DISMISS

Masley, J.:

In motion sequence 002, defendants Mercury Partners GmbH (Mercury GmbH), Mercury Partners Software LLC (Mercury LLC), and Rainer Busch move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss plaintiff Moore Frères & Company LLC's (MFC) complaint in its entirety.

Background

For the purposes of this motion, the facts alleged in the complaint are accepted as true unless otherwise contradicted by documentary evidence.

Plaintiff MFC is the majority shareholder of nonparty Last Lion, a company incorporated in the United Kingdom. "Last Lion is the indirect, and ultimate, holding company of Vewd Software, a company incorporated in Norway that operates a software business" (NYSCEF Doc. No. [NYSCEF] 73, complaint, ¶ 20). MFC holds

6,300 A ordinary shares in Last Lion, equaling a 70% voting equity (*id.*, ¶ 21). Nonparty 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 (*id.*, ¶ 22). Last Lion has a four-member board of directors; three of whom were designated by MFC and the fourth by Otello (*id.*, ¶ 23). The Chief Executive Officers of both MFC and Otello, Martez Moore and Lars Boilesen, respectively, sit on the board (*id.*).

In October 2017, MFC began to consider financing options allowing it to increase its equity stake in Last Lion (*id.*, ¶ 24). MFC considered two options: (1) raise debt financing from a third-party lender and use those funds to purchase Othello's B preference shares (*id.*, ¶ 25) or (2) raise capital by selling Last Lion A ordinary shares - "[t]he 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" (*id.*, ¶ 26). That same month, MFC engaged in preliminary discussions with defendant Busch in regard to selling him some of MFC's A ordinary shares (*id.*, ¶ 27). Defendant Busch is the founder and managing director of defendants Mercury GmbH and Mercury LLC (*id.*, ¶ 2). To facilitate these sale discussions, Busch, on behalf of Mercury GmbH, executed a "Confidentiality and Nondisclosure Agreement" (NDA), effective October 26, 2017 (*id.*, ¶ 28). "The NDA stated that each of MFC and Mercury GmbH 'has 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')'" (*id.*, ¶ 29).

On December 18, 2017, MFC terminated its discussions with Busch and Mercury GmbH and suspended its efforts to acquire Othello's shares in Last Lion (*id.*, ¶¶ 40-41).

It is alleged that, after discussions terminated, Busch approached Othello about purchasing its shares in Last Lion (*id.*, ¶ 42). MFC asserts that Busch's actions violated the NDA "by (i) approaching Othello to propose acquiring its shares in Last Lion; and (ii) using Confidential Information received from MFC in connection with evaluating and formulating that approach and ultimately entering into an agreement with Othello" (*id.*, ¶ 44).

On February 20, 2018, Mercury LLC and Othello entered into a "Share Purchase Agreement" (SPA), whereby Mercury LLC agreed to purchase all of Othello's B preference shares in Last Lion for \$53 million (*id.*, ¶ 48). On February 21, 2018, MFC sent a "Notice of Breach and Cease and Desist Demand" (Demand) to Mercury GmbH and Busch (*id.*, ¶ 50). The Demand reminded Busch and Mercury GmbH that they were prohibited from (1) disclosing any Confidential Information to any person other than Mercury's Representatives or that discussions took place between Mercury and MFC with respect to a proposed relationship or a Potential Transaction; (2) using any Confidential Information for any purpose other than evaluation of a Potential Transaction with MFC; or (3) having direct or indirect conversations with the target investment including Othello (*id.*, ¶ 51). MFC demanded that Busch and Mercury immediately cease from breaching the NDA. There was no response to the Demand and Othello and Mercury LLC moved forth with the purchase (*id.*, ¶¶ 54-55).

Othello requested Last Lion's board of directors approve the transfer of Othello's shares to Mercury LLC; in response, Last Lion's board established a special committee to evaluate Mercury LLC as a potential transferee and make a recommendation (*id.*, ¶¶ 56-57). On April 12, 2018, prior to the special committee's recommendation, Othello

commenced an action against MFC in the High Court of Justice, Business, and Property of England and Wales (UK Action) (*id.*, ¶ 58). On April 17, 2018, the special committee determined that Last Lion's board vote against the transfer to Mercury LLC, and on April 28, 2018, the special committee delivered their recommendation to the board, who declined to approve the transfer (*id.*, ¶¶ 59-60).

On June 12, 2018, MFC commenced this action against Busch, Mercury GmbH, and Mercury LLC for (1) breach of the NDA by using and disclosing confidential information to facilitate the direct purchase of Last Lion shares from Otello (against Mercury GmbH); (2) breach of the NDA by contacting and negotiating with Otello (against Mercury GmbH); (3) breach of the NDA by failing to provide notice to MFC of its breaches of the NDA's confidentiality and non-circumvention provisions and failing to take reasonable steps to cease or remediate those breaches (against Mercury GmbH); (4) breach of the implied covenant of good faith and fair dealing (against Mercury GmbH); (5) tortious interference with contract (against Busch); and (6) tortious interference with contract (against Mercury LLC).

On June 18, 2018, MFC moved, by Order to Show Cause, for a preliminary injunction against defendants enjoining them from pursuing or consummating the purchase of Otello's shares during the pendency of this action (NYSCEF 10), which this court denied, finding that MFC failed to meet its burden of showing irreparable harm (NYSCEF 104).

The UK Action

On September 14, 2018, the UK Court, after a trial, issued an injunction requiring Last Lion's board to approve Mercury LLC as the transferee of Otello's shares.

(NYSCEF 112). The UK Court rejected MFC and Last Lion's defenses for disapproving Mercury as a transferee, including the defense of breach of the NDA (*id.*).

Relevant to the claims at issue here, the UK Court made the following findings:

(1) in October 2017, MFC was seeking to decrease its stake in Last Lion (*id.* at ¶ 140[a]) and approached buyers to purchase not only some of its shares, but also some of Otello's shares, misrepresenting that it had the authority to market Otello's shares (*id.* at ¶ 140[b]);

(2) on November 2, 2017, MFC falsely told Busch that MFC had the authority to negotiate a sale of Otello's shares and that Otello could not even sell its shares without MFC's approval (*id.*; see also *id.* at ¶ 15);

(3) "[I]n mid-November 2017, Martez decided that MFC should instead seek to buy Otello's shares and sell them on to Mercury at a higher price" (*id.* at ¶ 140[c]);

(4) "until 15 December 2017, Mercury believed that it would be contracting directly with Otello: this is what Martez led it to believe, and Martez knew that this was Mercury's belief and took no steps to correct it" (*id.*);

(5) "[t]hroughout their negotiations, MFC led Busch into the false belief that Mercury was negotiating the price with Otello and also led Otello falsely to believe that [MFC] was seeking to buy Otello's shares on its own account with the benefit of finance" (*id.* at ¶ 140[e]);

(6) Moore disclosed MFC's negotiations with Mercury GmbH with his brother, Martino Moore, and friend, Robert Azeke, both directors of Last Lion (*id.* at ¶ 140[g]);

(7) "Busch's approach to Otello directly in January 2018 cannot for the purpose of these proceedings be characterised as a breach of the NDA, since the proposed transaction

the subject of the NDA involved MFC acting purportedly on behalf of Otello, and in any event the price agreed between Mercury and Otello is a genuine arm's length price, even if Otello expected to pay some fee to MFC" (*id.* at ¶ 140[h]); and (8) "It was [MFC's] case that Mercury breached the NDA and that was one of the matters which justified the decision to refuse to approve it as transferee. But there was no breach of the NDA to provide such justification because the NDA did not prohibit Mercury from approaching Otello: since MFC was purporting to act as agent for Otello when the NDA was executed, it could not validly complain about Mercury approaching its then purported principal" (*id.* at ¶ 153).

This court notes that the UK Court indicated its concerns with MFC's filing of this action as a tactical move to threaten Busch once he decided to provide evidence in the UK Action;¹ however, the UK Court did not make any formal findings as to MFC's motives, stating that "[b]ut whether MFC has acted or is acting tactically and/or deliberately to mislead the New York court in order to scare off Busch is not such an issue" (*id.* at ¶ 91).

On October 5, 2018, the UK Court issued a Consent Order regarding the settlement by the parties of the "indemnity costs" paid by MFC to Otello (NYSCEF 134). MFC did not appeal the UK Court's post-trial order and judgment.

¹ Specifically, the UK Court stated, "[t]his may suggest a tactical game. MFC appeared to have taken no action on the Cease and Desist Letter (to which it received no substantive response) until Busch indicated that he was prepared to provide evidence in these proceedings; and whilst it had claimed earlier to regard it as important that evidence be obtained from Busch, once MFC became aware that Busch intended to provide it, it took immediate steps, plausibly to frighten him off" (NYSCEF 112 at ¶ 88).

Analysis

After the UK Court's post-trial decision and judgment, this court permitted the parties to submit supplemental briefing on the effect of that judgment on this action.

In their supplemental brief, defendants argue that this court, under the doctrines of collateral estoppel and judicial comity, should give preclusive effect to the UK Court's findings that (1) Mercury GmbH did not breach the NDA; (2) when the NDA was executed, MFC intended that that proposed transaction would involve a direct sale of Otello's shares between Otello and Mercury GmbH with MFC earning a fee; (3) MFC held itself out as Otello's agent authorized to negotiate on Otello's behalf; and (4) Moore disclosed MFC's negotiations with Mercury GmbH with his brother and friend in November and December 2017. Defendants argue that, applying these holdings, MFC's claims for breach of the NDA must be dismissed. Further, defendants argue that the tortious interference with contract claims must too be dismissed.

"Collateral estoppel rests on considerations of fairness and efficiency. Where a pending issue was raised, necessarily decided and material in a prior action, and where the party to be estopped had a full and fair opportunity to litigate the issue in the earlier action, fairness and efficiency dictate that the party should not be permitted to try the issue again" (*Bansbach v Zinn*, 1 NY3d 1, 10 [2003] [citation omitted]). "The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination, whereas the party attempting to defeat its application has the burden of establishing the absence of a full

and fair opportunity to litigate the issue in the prior action” (*Kaufman v Eli Lilly and Co.*, 65 NY2d 449, 456 [1985] [citation omitted]).

Here, the pending issue of whether Mercury GmbH breached the NDA was raised and necessarily decided in the UK Action. For an issue to be “actually litigated,” it must have been properly raised by the pleadings or otherwise placed in issue and actually determined in the prior proceeding” (*Halyalkar v Board of Regents*, 72 NY2d 261, 268 [1988]). MFC raised breach of the NDA (NYSCEF 142 at ¶ 23 [2] [“Defendants will rely on trial on [the NDA] for its full terms, meaning, and effect” and the issue was before the UK Court; see generally NYSCEF 127-130, [trial transcripts in the UK Action where breach of the NDA was repeatedly put into issue by the parties]). The UK Court actually determined that there was no breach, holding that the NDA did not prohibit Mercury from approaching Otello because MFC was purporting to act as Otello’s agent when the NDA was executed. This determination goes to the heart of the dispute in this action.

MFC argues that the UK Court’s decision regarding the NDA was immaterial and an alternative holding. However, the fact that the UK Court had to determine whether the NDA was breached to resolve the issue of whether Last Lion’s board acted appropriately does not make the UK Court’s findings as to the NDA immaterial. In addition, raising the breach of the NDA as a defense does not lessen or make immaterial the UK Court’s finding that there was no breach. Further, the fact that MFC’s counsel invited the UK Court to not “actually decide the issue of whether or not there has been a breach of NDA” (NYSCEF 127, UK Trial Tr. at 90:8-9), despite raising that

very issue before the UK Court, does not make the UK Court's determination that the NDA was not breached immaterial.

Finally, MFC has not met its burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action" (*Kaufman v Eli Lilly and Co.*, 65 NY2d at 456). In fact, MFC does not address this prong in its supplemental brief.

MFC argues that, even if collateral estoppel applies, most of its claims still survive. Specifically, MFC asserts that it alleges a separate cause of action against Mercury GmbH for breach of the NDA arising from its disclosure of confidential information to Mercury LLC, and the use of such Confidential Information for the benefit of Mercury LLC, a non-party to the NDA (NYSCEF 73 at ¶ 71 ["Upon information and belief, Mercury GmbH breached its foregoing contractual duty by disclosing MFC's Confidential Information to Mercury LLC and Busch, in his capacity as principal of Mercury LLC, for the purpose of facilitating the evaluation of Mercury LLC's proposed purchase of Otello's shares of Last Lion"]; see *generally id.* at ¶¶ 65-76).

While the court agrees that the doctrine of collateral estoppel does not apply to the causes of action based this allegation, applying the doctrine of judicial comity, which permits this court to defer to the UK Court's determinations (see *Matter of Long Is. Forum for Tech. v New York State Div. of Human Rights*, 85 AD3d 791, 794 [2d Dept 2011]), the claims fail:

The UK Court found that the contemplated transaction, at the time the NDA was executed, was the purchase of Otello's shares by Mercury LLC directly from Otello (NYSCEF 115 at ¶140). Giving comity to this finding compels the dismissal of the claims based on the allegation the Mercury GmbH breached by disclosing information to

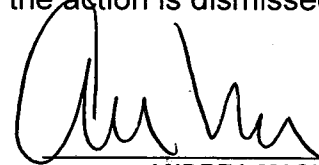
Mercury LLC because the NDA permitted disclosure of confidential information to the "Receiving Party's Representative," which included affiliates, to evaluate the "Potential Transaction," defined as the "proposed investment opportunity, an acquisition of a minority equity ownership interest in Vewd Software" (NYSCEF 85, NDA Agreement). Applying the UK Court's finding, that the transaction contemplated, the Potential Transaction, was directly between Mercury LLC and Otello, the NDA, by its plain terms, was not breached when Mercury GmbH disclosed information regarding the Potential Transaction to its affiliate, Mercury LLC. There was not a breach when this information was disclosed for the purpose of facilitating the evaluation of Mercury LLC's proposed purchase of Otello's shares of Last Lion as alleged.

As the breach of contract claims are dismissed, so too are MFC's claims for breach of the implied covenant of good faith and fair dealing alleged to be inherent in the NDA and tortious interference with contract (see Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 424-425 [1996] [holding that tortious interference requires an actual breach]).

Accordingly, it is

ORDERED, that the motion is granted and the action is dismissed.

8/30/19
DATE


ANDREA MASLEY, J.S.C.
HON. ANDREA MASLEY

CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

- NON-FINAL DISPOSITION
- GRANTED IN PART OTHER
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: