

Dragons 516 Ltd. v GDC 138 E 50 LLC

2020 NY Slip Op 33403(U)

October 13, 2020

Supreme Court, New York County

Docket Number: 651690/2019

Judge: O. Peter Sherwood

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK; COMMERCIAL DIVISION PART 49

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DRAGONS 516 LIMITED,

DECISION AND ORDER
Index No.: 651690/2019

Plaintiffs,

-against-

Motion Sequence No.: 005

GDC 138 E 50 LLC and SHANGHAI MUNICIPAL
INVERSTMENT (GROUP) USA LLC,

Defendants.

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O. PETER SHERWOOD, J.:

Here, plaintiff Dragons 516 Limited (Dragons) seeks to amend the amended complaint. Plaintiff provides a proposed second amended complaint (PSAC, NYSCEF Doc. No. 139) in which it proposes adding a new defendant, SMI 138 E 50 ST LLC (Holdco), alleged to be a holding company wholly owned by Shanghai Municipal Investment (Group) USA LLC (SMI), after learning, in the course of discovery, that defendant GDC 138 E 50 LLC (GDC) will not be able to satisfy a judgment against it, and “that GDC, SMI, and [J]Holdco fraudulently induced Dragons to extend the \$30 million loan, then improperly used that money” (Memo, NYSCEF Doc. No. 141, at 2). Specifically, plaintiff alleges GDC and Holdco entered into a main agreement with nonparty entity IC 50 on February 19, 2020 (the Feb. 19 Agreement) and a side agreement on the same date (the Side Agreement), in which GDC and Holdco state that the 50 Lex Development LLC (Project Co) February 28, 2017, Amended and Restated Limited Liability Company Agreement (the Operating Agreement) and the June 16, 2017 amendment of that Operating Agreement never had any force or effect (Memo at 5).

The added claims are:

- Claim 4- Aiding and Abetting Fraud against SMI and Holdco for “substantially, knowingly, and intentionally assist[ing] GDC in perpetrating” the fraud of misrepresenting facts to plaintiff to induce Dragons to loan money to finance GDC’s investment in Project Co (PSAC at 28).
- Claim 5- Conspiracy to Commit Fraud against SMI and Holdco for, upon information and belief, “knowingly agree[ing] to cooperate in this fraudulent scheme with the objective of depriving Dragons of the \$30 million” (*id.*, ¶ 99).
- Claim 6- Unjust Enrichment against SMI and Holdco for receiving the \$30 million from plaintiff Dragons, without providing consideration.
- Claim 7- Money Had and Received- an alternative claim against SMI and Holdco, in the event the Guaranty Agreement is found not to be valid and enforceable, for receiving the \$30 million.

Claim 8- Conversion- an alternative claim against SMI and Holdco, in the event the Guaranty Agreement is found not to be valid and enforceable, based on the same facts.

Claim 9- Aiding and Abetting Conversion, an alternative claim against SMI and Holdco, in case the Guaranty Agreement is found not to be valid and enforceable, based on their failure to notify Dragons that GDC did not have any interest in Project Co and that Project Co did not receive the funds, and by those defendants entering into the Facility Agreement, opening the bank account, and providing information about the planned project (*id.*, ¶ 149, 151).

Leave to amend a pleading pursuant to CPLR § 3025 “shall be freely given,” in the absence of prejudice or surprise (*see e.g. Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]; *Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354 [1st Dept 2005]). Mere lateness in seeking such relief is not in itself a barrier to obtaining judicial leave to amend (*see Ciarelli v Lynch*, 46 AD3d 1039 [3d Dept 2007]). Rather, when unexcused lateness is coupled with significant prejudice to the other side, denial of the motion for leave to amend is justified (*see Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 958 [1983]). Prejudice in this context is shown where the nonmoving party is “hindered in the preparation of his case or has been prevented from taking some measure in support of his position” (*Loomis v Civetta Corinno Const. Co.*, 54 NY2d 18, 23 [1981]).

In order to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated (*Thompson, supra*, 24 AD3d at 205; *Zaid, supra*, 18 AD3d at 355). Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law (*see Aerolineas Galapagos, S.A. v Sundowner Alexandria*, 74 AD3d 652 [1st Dept 2010]; *Thompson, supra*, 24 AD3d at 205).

As the party seeking the amendment, plaintiff has the burden in the first instance to demonstrate its proposed claims’ merits, but defendants, as the parties opposing the motion, “must overcome a presumption of validity in the moving party’s favor, and demonstrate that the facts alleged in the moving papers are obviously unreliable or insufficient to support the amendment” (*Peach Parking Corp. v 346 W. 40th St. LLC*, 42 AD3d 82, 86 [1st Dept 2007]). Where there has been extended delay in seeking leave to amend, the party seeking to amend a pleading must establish a reasonable excuse for the delay (*see Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 24 [1st Dept 2003]).

Plaintiff has failed to include any affidavit of merit or other evidentiary proof. Key allegations in the PSAC are made in vague and conclusory fashion or upon information and belief, with the only indication of how plaintiff came to its conclusions that SMI and Holdco received the funds being the allegation that SMI, Holdco, and the bank account all used the same address.

As to Claim 4, for Aiding and Abetting Fraud, the elements of a claim for aiding and abetting fraud are: (1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aiding and abetting party; and (3) substantial assistance by the aiding and abetting party in achieving this fraud (*Oster*

v Kirschner, 77 AD3d 51 [1st Dept 2010]; *Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Insurance Co.*, 64 AD3d 472 [1st Dept 2009]. The elements for the underlying fraud are: (a) a misrepresentation or a material omission of fact which was false and known to be false, (b) made for the purpose of inducing the other party to rely upon it, (c) justifiable reliance of the other party on the misrepresentation or material omission, and (d) injury (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173 [2011]; *Ross v Louise Wise Services, Inc.*, 8 NY3d 478 [2007]; *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 [1996]; *Tanzman v La Pietra*, 8 AD3d 706 [3rd Dept 2004]).

Defendant SMI argues the claim fails for lack of an underlying fraud claim, since there is no underlying fraud cause of action, and, had one been asserted, it would be dismissed as duplicative of the breach of contract claim. Plaintiff contends it has alleged an un-claimed underlying fraud in the inducement, which may co-exist with a contract claim (Reply, NYSCEF Doc. No. 155, at 7). Further, plaintiff argues the claims can coexist since defendant SMI has not yet conceded the Guaranty Agreement (by which SMI allegedly guaranteed payment of GDC's financial obligations pursuant to the Facility Agreement) is a valid and enforceable contract, but if SMI did so, plaintiff would drop the quasi-contract claim. However, that is not what plaintiff has alleged in the PSAC. Claim four clearly attempts to allege SMI and Holdco aided and abetted GDC's alleged fraudulent inducement of plaintiff to enter into the Facility Agreement (PSAC, ¶¶ 75-83). Plaintiff asserted a claim against GDC for breach of the Facility Agreement, and Dragons' motion for summary judgment on that claim has been granted, with GDC's consent (*see* Decision and Order dated January 27, 2020, NYSCEF Doc. No. 112). Plaintiff has not asserted an underlying fraud claim related to the Guaranty Agreement which would support this aiding and abetting claim, therefore the claim is without merit.

As to claim 5 against SMI and Holdco, for conspiracy to commit fraud, "under New York law, to establish a claim of civil conspiracy, the plaintiff must demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury" (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010]). "New York does not recognize an independent cause of action for conspiracy to commit a civil tort" (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010]). "[A] cause of action sounding in civil conspiracy cannot stand alone, but stands or falls with the underlying tort" (*Romano v Romano*, 2 AD3d 430, 432 [2d Dept 2003]). Plaintiff alleges GDC made misrepresentations to induce plaintiff to enter into the Facility Agreement, as the underlying fraud. That fraud claim, if stated as a claim, would fail as duplicative of the breach of contract claim, since the damage from both claims are the same, the loss of the \$30 million loaned (*see Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]). As the conspiracy claim stands or falls with the underlying tort, the conspiracy claim here also lacks merit.

As to the sixth claim, for unjust enrichment, “[u]njust enrichment is a quasi contract theory of recovery, and ‘is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned’” (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd.* 19 NY3d 511 [2012], quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). In order to plead a claim for unjust enrichment, the plaintiff must allege “that the other party was enriched, at plaintiff’s expense, and that ‘it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered’” (*Georgia Malone & Co.*, 86 AD3d at 408, quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

SMI argues that the existence of a valid agreement covering the transfer of the funds precludes a quasi-contract claim, even though the agreement is between plaintiff and another entity (Opp at 11, citing *Feigen v Advance Capital Mgt. Corp.*, 150 AD2d 281, 283 [1st Dept 1989] [“a nonsignatory to a contract cannot be held liable where there is an express contract covering the same subject matter”] and *Bellino Schwartz Padob Adv., Inc. v Solaris Mktg. Group, Inc.*, 222 AD2d 313 [1st Dept 1995] [“The existence of an express contract between Solaris and plaintiff governing the subject matter of the plaintiff’s claim also bars any quasi-contractual claims against defendant Titan, as a third-party nonsignatory to the valid and enforceable contract between those parties”]). Plaintiff replies that the Guaranty Agreement is disputed, so does not bar quasi contract claims based on the same facts (Reply at 8). While the validity of the Guaranty is disputed, the validity of the Facility Agreement is not, and so the unjust enrichment claim is precluded (*see 22 Gramercy Park, LLC v Michael Haverland Architect, P.C.*, 170 AD3d 535, 537 [1st Dept 2019]).

The seventh (Money Had and Received) claim also sounds in quasi-contract, so fails for the same reason as the prior claim (*see J. Manes Co., Inc. v Greenwood Mills, Inc.*, 75 AD2d 557 [1st Dept 1980], *affd.*, 53 NY2d 759 [1981]).

As to the eighth claim, for conversion, “[t]he tort of conversion is established when one who owns and has a right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner” (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1st Dept 1995]). The elements of conversion are (1) plaintiff’s possessory right or interest in certain property and (2) defendant’s dominion over the property or interference with it in derogation of plaintiff’s rights (*Colavitov New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]; *see also Employers’ Fire Ins. Co. v Cotton*, 245 NY 102 [1927]). A plaintiff need only allege and prove that the defendant interfered with plaintiff’s right to possess the property. The defendant does not have to have taken the property or benefitted from it (*Hillcrest Homes, LLC v Albion Mobile Homes, Inc.*, 117 NYS2d 755 (4th Dept 2014). However, a conversion claim may not be maintained where damages are merely sought for a breach of contract (*see Sutton Park Dev. Trading Corp. v Guerin & Guerin*, 297 AD 2d 430, 432 [3d Dept 2002]). As the damages sought pursuant to this claim are the same damages sought in the breach of contract claims,

this claim fails as a matter of law. Similarly, the ninth claim, for aiding and abetting conversion, also lacks merit, since “[a]iding and abetting conversion requires the existence of a conversion by the primary tortfeasor, actual knowledge, and substantial assistance” (*William Doyle Galleries, Inc. v Stettner*, 167 AD3d 501, 505 [1st Dept 2018]). Without an underlying conversion, the aiding and abetting claim also must fail

Accordingly, as the additional claims which plaintiffs seeks to bring fail to state a cause of action, or are palpably insufficient as a matter of law, leave to amend the current complaint is hereby denied.

This constitutes the decision and order of the court.

DATED: October 13, 2020

ENTER,

O. PETER SHERWOOD, J.S.C.