

Garda USA, Inc. v Sun Capital Partners, Inc.
2020 NY Slip Op 33730(U)
November 9, 2020
Supreme Court, New York County
Docket Number: 657031/2019
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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GARDA USA, INC.,

Plaintiff,

- v -

SUN CAPITAL PARTNERS, INC., SUN CAPITAL PARTNERS MANAGEMENT VI, LLC, SUN SOS, LP, SUN HOLDINGS VI, LLC, SOS ULTIMATE HOLDING, LLC

Defendants.

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INDEX NO. 657031/2019

MOTION DATE 10/22/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. MARCY S. FRIEDMAN:

The following e-filed documents, listed by NYSCEF document number 2-6, 16, 17, 18, 19, 20, 28, 36, 54, 59, 62, 63, 64, 66, 67, 68, 69, 70 were read on this motion to dismiss (Motion Sequence No. 002).

This action arises out of the failed attempt by plaintiff Garda USA, Inc. (Garda) to acquire defendant SOS Ultimate Holding, LLC (SOS). (Compl., ¶ 1 [NYSCEF Doc. No. 2].) Defendants Sun Capital Partners, Inc., Sun Capital Partners Management VI, LLC, Sun SOS, LP, and Sun Holdings VI, LLC (together, Sun Capital) are affiliated entities associated with a private equity fund that owned a controlling interest in SOS. (Id., ¶¶ 2, 10-13; Defs.’ Memo. in Supp., at 3 [NYSCEF Doc. No. 17].) As set forth in the complaint, on the day the parties planned to sign a merger agreement, Sun Capital informed Garda that SOS would be sold to another buyer. (Compl., ¶ 5.) Garda later learned that the buyer was its largest competitor, non-party Allied Universal Security Services (Allied). (Id., ¶ 6.) The complaint alleges, among other things, that defendants had been “secretly negotiating with Allied” and, in the course of those negotiations, “willfully breached confidentiality obligations owed Garda in connection with the Transaction

and made numerous false statements to Garda upon which Garda relied to its detriment.” (Id.)

The complaint asserts causes of action for breach of contract, breach of the obligation to negotiate in good faith, promissory estoppel, and unjust enrichment. (Id., ¶¶ 56-77). On this motion, all defendants move, pursuant to CPLR 3211 (a)(1) and 3211 (a)(7), to dismiss all causes of action asserted by Garda.¹ (Notice of Motion [NYSCEF Doc No. 16].)

It is well settled that on a motion to dismiss pursuant to CPLR 3211(a)(7), “the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 [2002].) However, “allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration.” (Simkin v Blank, 19 NY3d 46, 52 [2012] [internal quotation marks and citation omitted].) When documentary evidence under CPLR 3211(a)(1) is considered, “a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (Leon, 84 NY2d at 88.)

First and Second Causes of Action for Breach of Contract

The complaint asserts two causes of action for breach of contract based on confidentiality provisions in two separate written agreements. (Compl., “Count 1: Breach of Contract [Confidentiality Agreement],” “Count 2: Breach of Contract [Letter Agreement]”). The first cause of action alleges that “[u]nder the terms of the Confidentiality Agreement, Sun Capital and

¹ The unjust enrichment claim is only pleaded against the Sun Capital defendants. The remaining claims are asserted against all defendants. (Compl., ¶¶ 56-77).

SOS agreed that they would ‘not disclose the fact that the Parties are considering or discussing the Transaction to any third-party’ other than Sun Capital’s and SOS’s affiliates and certain other persons not relevant here.’ (Compl., ¶ 59, citing Confidentiality Agreement, ¶ 1 [Compl., Ex. 1 (NYSCEF Doc. No. 3)].) The second cause of action alleges that “[t]he Letter Agreement also provides that the Parties could not disclose to any third-party ‘the existence or any of the terms or conditions of the Potential Transaction (including, without limitation, the identity of the parties hereto . . . or the existence or contents of this letter agreement) or any documents relating thereto, and/or any discussions related to any of the foregoing’”; and that “Sun Capital and SOS breached their contractual confidentiality obligations to Garda under the Letter Agreement by disclosing information regarding the Transaction in order to facilitate the alternative transaction with Allied.” (Compl., ¶¶ 27, 65, citing Letter Agreement, ¶ 2 [Compl., Ex. 4 (NYSCEF Doc. No. 6)] [emphasis original to complaint].)

The court holds that Garda meets the CPLR 3013 notice pleading standard, as it applies to a cause of action for breach of a contractual confidentiality provision. (See Normandy Real Estate Partners LLC v 24 E. 12th St. Assoc. LLC, 168 AD3d 429, 430 [1st Dept 2019].)² Garda alleges the existence of the agreements, plaintiff’s performance thereunder, and defendants’ breaches. (Compl., ¶¶ 20-21, 25-28, 51, 53, 56-66.)

The court rejects defendants’ argument that “Garda’s failure to plead any facts about the information supposedly disclosed is fatal to its claim for breach of contract.” (Defs.’ Memo. in Supp., at 10.) Garda specifically alleges that defendants “divulged to Allied and/or its representatives highly sensitive information regarding the Transaction, including the existence or

² The court’s above holding with respect to the first and second causes of action should not be construed as a determination that these causes of action are maintainable against each of the defendants. The sufficiency of the pleading with respect to individual defendants is addressed in the final section of this decision.

terms of the Letter Agreement, the expiration of exclusivity under the Letter Agreement, and the pricing and/or timing of the Transaction.” (Compl., ¶ 53.) The cases cited by defendants are not to the contrary, as they considered pleadings that did not identify the confidential information at issue. (Compare e.g. Art Capital Group, LLC v. Carlyle Inv. Mgmt. LLC, 151 AD3d 604, 605 [1st Dept 2017] [holding that plaintiff’s allegations regarding breach of a confidentiality agreement were “insufficient because plaintiff [did] not identify what confidential information was allegedly misused”]; Parker Waichman LLP v Squier, Knapp & Dunn Comm., Inc., 138 AD3d 570, 570–571 [1st Dept 2016]; see also Gordon v Dino De Laurentiis Corp., 141 AD2d 435, 436 [1st Dept 1988] [holding that plaintiffs did not identify any confidential information other than information that was already in defendant’s possession].)

Garda also adequately pleads damages for breach of the confidentiality provisions of the Confidentiality Agreement and Letter Agreement. The complaint plausibly alleges that defendants disclosed confidential information protected by these Agreements “in order to orchestrate a more lucrative transaction with Allied”; that defendants “thereby elicited a competing offer from Allied significantly higher than the agreed price of the Garda Transaction”; and that “[b]ut for Sun Capital and SOS’s breaches of the Confidentiality Agreement, the Letter Agreement and their duty to negotiate open issues relating to the Transaction in good faith, the Transaction would have been consummated and Garda would have realized hundreds of millions of dollars in accretive value upon closing and in the years to come.” (Compl., ¶¶ 51, 53, 54.) These allegations are sufficiently specific to plead damages for breach of a confidentiality agreement. (See RXR WWP Owner LLC v WWP Sponsor, LLC, 132 AD3d 467, 468-469 [1st

Dept 2015] [holding that “plaintiff plausibly alleges that [] breach of the confidentiality agreement caused plaintiff to lose its deal,” and distinguishing Gordon, 141 AD2d at 435-436].)³

Garda also pleads a viable claim for a second category of damages, alleging that defendants’ misconduct caused it to “waste[] substantial resources, including millions of dollars in transaction expenses.” (Compl., ¶ 1.) (See Normandy Real Estate Partners LLC, 168 AD3d at 430 [holding, in connection with a cause of action for breach of a confidentiality agreement, that a claim for lost profits damages was insufficiently pleaded, while upholding a claim for “other damages, such as incurring expenses in performing due diligence and negotiating and drafting the letter agreement and an ultimately worthless escrow agreement”].)

Third Cause of Action for Breach of Obligation to Negotiate in Good Faith

The court further holds that plaintiff sufficiently pleads a cause of action for breach of a duty to negotiate in good faith. (Compl., “Count 3: Breach Of Obligation To Negotiate In Good Faith”.) Garda alleges that the parties agreed to a term sheet on August 30, 2019, titled “SOS Ultimate Holding, LLC – Principal Terms” which gave rise to a “binding obligation to negotiate the open issues in good faith in an attempt to finalize the Transaction.” (Compl., ¶¶ 23, 68; Term Sheet [Compl., Ex. 3 (NYSCEF Doc. No. 5)].) More specifically, the complaint pleads:

“The Term Sheet includes the purchase price for the Transaction (\$558 million); working capital and post-closing purchase price adjustments; transaction structure; representations; closing conditions; regulatory matters; and post-closing remedies. Although not formally executed, the Term Sheet was agreed upon by all Parties as the framework for completing the Transaction, including the drafting of a definitive merger agreement (in accordance with an agreed template) and ancillary agreements. As a matter of law, this gave rise to an obligation by all parties to negotiate the open issues in good faith in an attempt to finalize the Transaction within the agreed framework.”

³ The court does not determine on this motion whether Garda may ultimately establish that it is entitled to damages in the amount of the lost transaction value. Such issues are more appropriately addressed on a motion for summary judgement. (See RXR WWP Owner LLC, 132 AD3d at 468.)

(Id., ¶ 23 [internal citations omitted].) Garda further alleges:

“Sun Capital and SOS breached their obligation to negotiate open issues in good faith by, among other things, slow-rolling due diligence materials and draft transaction documents such that a substantial portion of the exclusivity period was eroded, attempting to change deal terms and the proposed documentation template during negotiations, sharing with Allied and/or its representatives sensitive information regarding the Transaction, and secretly eliciting, negotiating and finalizing a transaction with a third-party in violation of their confidentiality obligations, all the while repeatedly assuring Garda that Sun Capital and SOS intended to promptly finalize the Transaction with Garda.”

(Id., ¶ 69.)

Defendants recognize that “New York courts have acknowledged a claim for failure to negotiate in good faith in the context of a legitimate ‘agreement to agree.’” (Defs.’ Memo. In Supp., at 14.) They argue, however, that Garda “fails to allege an agreement to agree.” (Id., at 16.) In support of this argument, defendants emphasize that the term sheet is unsigned and claim that Garda “does not and cannot point to any communication in which Sun Capital even acknowledged Garda’s edits to the unsigned term sheet, let alone accepted them.” (Id., at 14-15.)

Defendants contend, in the alternative, that “[e]ven if the term sheet had been finished and signed, it would not have imposed a duty on Defendants to negotiate in good faith.” (Defs.’ Reply Memo., at 6 [NYSCEF Doc. No. 66].) This contention is based in part on the claim that “Garda does not and cannot point to any language in the draft term sheet imposing an obligation to negotiate open items.” (Id.) The contention is also based upon provisions in the Term Sheet and subsequently executed Letter Agreement which contemplate a definitive merger agreement. (Id.; Defs.’ Memo. In Supp., at 15-16.) In reliance on those provisions, defendants argue that “Garda expressly agreed that neither Garda nor SOS or Sun Capital had any obligation to proceed with any transaction, and that any such obligation would arise only upon the parties’

execution of a mutually acceptable, final, written, and definitive agreement creating such an obligation.” (Id.)

In response, Garda does not dispute that the parties were under no obligation to consummate the transaction. (Pl.’s Memo. In Opp., at 2, 15 [NYSCEF Doc. No. 62].) Rather, “Garda contends that, on or around August 30, the Parties agreed to negotiate a final transaction based on the Term Sheet in good faith. Upon doing so, Defendants became obligated to articulate honestly and in good faith their interests and positions with respect to the transaction and carry through with the transaction absent good faith impasse.” (Id., at 15.)

The court holds that the allegations of the complaint sufficiently plead the formation of a binding preliminary agreement. The parties’ dispute as to whether such an agreement was actually reached involves issues of fact which are not properly determined on a motion to dismiss. (See S.A. de Obras y Servicios, Copasa v The Bank of Nova Scotia, 126 AD3d 582, 583 [1st Dept 2015].)

Assuming, without deciding, for purposes of this motion that a preliminary agreement was in fact reached, the court further holds that the allegations as to the terms of the preliminary agreement plead a binding—i.e., enforceable—agreement to negotiate a definitive agreement in good faith. Put another way, under the governing law discussed further below, the provisions in the Term Sheet and Letter Agreement contemplating a definitive agreement do not, as a matter of law, preclude the imposition of a binding duty to negotiate in good faith. Nor is the imposition of such a duty precluded by the absence of an express written term in the preliminary agreement providing for the duty.

The Second Circuit, applying New York law, has articulated a standard for determining whether a preliminary agreement is binding—i.e., enforceable—“as to the ultimate contractual

goal contemplated in the [agreement]” or only as to “an obligation between the parties to negotiate in good faith within the framework of the agreement.” (Brown v Cara, 420 F3d 148, 151 [2d Cir 2005].) Under this standard, agreements are categorized as Type I or Type II. As explained by the Second Circuit:

“These two types are most authoritatively described in [Teachers Ins. and Annuity Assn. of Am. v Tribune Co., 670 F Supp 491 (SDNY 1987)], where Judge Leval, collecting the relevant New York law, describes Type I preliminary agreements as complete, reflecting a meeting of the minds on all the issues perceived to require negotiation. Because it is complete, a Type I preliminary agreement binds both sides to their ultimate contractual objective. Type II preliminary agreements, by contrast, are binding only to a certain degree, reflecting agreement on certain major terms, but leaving other terms open for further negotiation. Type II agreements do not commit the parties to their ultimate contractual objective but rather to the obligation to negotiate the open issues in good faith in an attempt to reach the objective within the agreed framework.”

(Id., at 153 [internal citations, quotation marks, and ellipses omitted]; accord L-7 Designs, Inc. v Old Navy, LLC, 647 F3d 419, 430 [2d Cir 2011].) The “Type” classification dictates the “factors relevant to determining whether a preliminary agreement is enforceable” and, if so, whether it is enforceable as to the ultimate contractual objective or merely as to the obligation to negotiate open issues in good faith. (See Brown, 420 F3d at 153-157.)

As further explained by the Second Circuit, recognition of a duty to negotiate in good faith is consistent with the purposes of, and policy considerations relevant to, Type II preliminary agreements, such as agreements similar to the agreement alleged by Garda in support of its third cause of action:

“Under New York law parties who enter into binding preliminary agreements . . . accept a mutual commitment to negotiate together in good faith in an effort to reach final agreement. These agreements do not commit the parties to reach their ultimate contractual objective; instead, such agreements create an obligation to negotiate the open issues in good faith in an attempt to reach the objective within the agreed framework. This obligation bars a party from renouncing the deal, abandoning the negotiations, or insisting on conditions that do not conform to the

preliminary agreement. In effect, an agreement to agree buys a party an assurance that the transaction will falter only over a genuine disagreement, thus allowing a party strapped for time or money to go ahead with arrangements with a sufficient degree of confidence in the outcome.”

(L-7 Designs, Inc., 647 F3d at 430-431 [internal citations and quotation marks omitted]; see also Brown, 420 F3d at 157-159.)

The Second Circuit approach was considered by the New York Courts in IDT Corp. v Tyco Group, S.A.R.L. (54 AD3d 273, 274 - 275 [1st Dept 2008], affd 13 NY3d 209 [2009] [IDT I]). There, the Appellate Division, relying on Brown, determined that the agreement at issue “reflect[ed] a third, hybrid category of preliminary agreement” and that, “[u]nder this hybrid, both parties were required to ‘negotiate the open issues in good faith’” The Court of Appeals affirmed the Appellate Division but specifically rejected the Second Circuit’s classification analysis, stating: “While we do not disagree with the reasoning in federal cases, we do not find the rigid classifications into ‘Types’ useful.” (13 NY3d at 213, n 2.) “[W]e find that it is enough to ask in this case whether the agreement contemplated the negotiation of later agreements and if the consummation of those agreements was a precondition to a party’s performance.” (Id.) The Court concluded that the defendant had no obligation to perform the contract (a settlement agreement) because “agreed-upon conditions”—“i.e., the negotiation and execution of four additional agreements”—were not met. (Id., at 214.) The Court then held: “Nevertheless, under the settlement agreement, the parties were required to negotiate the terms of [the agreements] in good faith.” (Id.) The Court of Appeals thus did not express any disagreement, and its decision was in fact consistent, with the reasoning of the Second Circuit that even where an agreement is not enforceable as to the ultimate contractual objective, a duty

to negotiate in good faith may arise where a binding preliminary agreement is in fact reached.

(See id.)

In a subsequent appeal in IDT after negotiations broke down, the Court of Appeals reiterated that “parties may enter into a binding contract under which the obligations of the parties are conditioned on the negotiation of future agreements. In such a case, the parties are obliged to negotiate in good faith. But that obligation can come to an end without a breach by either party. There is such a thing as a good faith impasse; not every good faith negotiation bears fruit.” (IDT Corp. v Tyco Group, S.A.R.L., 23 NY3d 497, 502-503 [2014], rearg denied 24 NY3d 935 [IDT II].)

In sum, the Court of Appeals has not expressly adopted the Second Circuit’s analysis or articulated a detailed standard for determining the circumstances under which a preliminary agreement imposes an obligation to negotiate in good faith. (See 28 NY Prac., Contract Law section 3:37.) In IDT I and IDT II, however, the Court of Appeals, like the Second Circuit, recognized that a duty to negotiate in good faith may arise where there is a binding preliminary agreement.

A duty to negotiate in good faith is recognized by additional appellate authority. (E.g. S.A. de Obras y Servicios, Copasa, 126 AD3d at 583 [holding, on a motion to dismiss, that “[i]ssues of fact exist as to whether the parties reached a binding preliminary contract giving rise to a duty to negotiate in good faith, and, if so, whether [defendant] breached it”]; S.A. De Obras y Servicios, COPASA, 170 AD3d 468, 474 [1st Dept 2019] [same, on a motion for summary judgment]; SNC, Ltd. v Kamine Eng. & Mech. Contr. Co., 238 AD2d 146, 146 [1st Dept 1997] [“There are issues of fact as to whether plaintiff and the Owner defendants reached a binding preliminary contract giving rise to a duty to negotiate in good faith, and, if so, whether the

Owner defendants breached it”]. See also Goodstein Constr. Corp. v City of New York, 67 NY2d 990, 991-992 [1986]; Emigrant Bank v UBS Real Estate, 49 AD3d 382, 384 [1st Dept 2008].)

The court rejects defendants’ contention that they had no duty to negotiate in good faith because there is no “language in the draft term sheet imposing an obligation to negotiate open items.” (See Defs.’ Reply Memo., at 6; Oct. 22, 2020 Oral Argument Transcript, at 7:7-9, 8:23-9:3 [Transcript].) In the above authorities, as in IDT I and IDT II, there is no indication that an express contractual term requiring negotiation in good faith was the basis for the Courts’ holdings that there was a duty to negotiate in good faith. On the contrary, these authorities support imposition of an implied contractual duty to negotiate in good faith where there is a binding preliminary agreement. Such imposition addresses the policy concerns relevant to preliminary agreements, as discussed by the Second Circuit in L-7 Designs, Inc. (647 F3d at 430-431 [quoted above]).

Meadow Ridge Capital, LLC v Levi (29 Misc3d 1222[A], 2010 WL 4668323 [Sup Ct, Nassau County 2010]), a trial court opinion on which defendants place principal reliance, is not to the contrary. (Transcript at 7: 9-20, 14:6-11; Defs.’ Memo. In Supp., at 14-15; Defs.’ Reply Memo., at 6-7.) In Meadow Ridge, the Court did not address whether a binding preliminary agreement imposed a contractual duty to negotiate in good faith.⁴ In addition, Meadow Ridge is factually inapposite because there was a specific contractual provision that is inconsistent with a

⁴ The plaintiff in Meadow Ridge alleged, in support of a promissory estoppel cause of action, that there was an express promise to negotiate in good faith evidenced by the parties’ letter of intent and defendants’ alleged representations. (Meadow Ridge Capital, LLC, 2010 WL 4668323 at * 8-9.) The Court held: “[T]he documentary evidence bars Plaintiff’s claim for promissory estoppel because it conclusively establishes that no agreement was reached between the parties. The documentary evidence also demonstrates that no promises were exchanged upon which Plaintiff can predicate its promissory estoppel claim.” (Id., *9.)

duty to negotiate in good faith. (Id., *6, 9-10.) As the Meadow Ridge Court explained, “while the original LOI [letter of intent] did provide for damages in the event that the proposed transaction was not consummated due to a party's bad faith, the parties later specifically negotiated and agreed to remove this provision and provide that neither party would be entitled to any damages in the event that a deal was not completed.” (Id., at *6.)

The court also rejects defendants’ contention that they had no duty to negotiate in good faith because the Term Sheet contemplated a definitive agreement. The authorities on which defendants principally rely (see Defs.’ Memo. In Supp., at 15) do not support dismissal of Garda’s claim based on the requirement of a definitive agreement. For example, Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce (70 AD3d 423, 424-425 [1st Dept 2010]) held that causes of action for breach of contract based on the defendants’ failure to close a loan were not maintainable, where the preliminary agreement provided that “credit facilities ‘will only be established upon completion of definitive loan documentation.’” The Court reasoned that “defendants clearly expressed an intent not to be bound until those documents were actually executed.” (Id., at 427.) Amcan is not inconsistent with the recognition of a duty to negotiate here, as Amcan involved a claim for breach of contract based on failure to consummate a transaction. A provision that the parties will not be bound with respect to the contemplated transaction except upon execution of a final agreement is, by its very nature, inconsistent with an alleged obligation to close the transaction absent execution of the contemplated final agreement. Amcan Holdings is accordingly factually distinguishable, as Garda does not plead a cause of action for failure to consummate the transaction.

The weight of authority cited above, including, most importantly, IDT I and IDT II, supports the court’s holding that Garda’s claim is not precluded by the requirement of a

definitive written agreement. To dismiss Garda's claim here based merely on the fact that the Term Sheet and the Letter Agreement require the execution of a definitive agreement would appear to be inconsistent with IDT I and IDT II in which the preliminary agreement at issue required "further definitive agreements." (IDT I, 13 NY3d at 212.) Significantly, it is not disputed that preliminary agreements typically condition enforcement of the ultimate contractual objective upon execution of definitive agreements. As the Second Circuit has also explained, "while the requirement for a more formal future contract may be terminal" to a claim for enforcement of the "ultimate contractual objective" (a Type I agreement in Second Circuit parlance), a preliminary agreement "to negotiate the open issues in good faith" (a Type II agreement) "by definition [] comprehend[s] the necessity of future negotiations and contracts." (Brown, 420 F3d at 153, 158.) Thus, imposition of the duty to negotiate in good faith, notwithstanding the requirement of a definitive agreement, is consistent with the nature of preliminary agreements and advances the policy considerations relevant to preliminary agreements discussed above.⁵

The court further holds that Garda sufficiently pleads defendants' breaches of the obligation to negotiate in good faith. Defendants argue that "Garda's allegations demonstrate that Sun Capital continued to negotiate with Garda throughout the relevant time," and that "being

⁵ The court notes that, through its own research, it has identified appellate authority, not cited by the parties, which appears to broadly suggest that a preliminary agreement, such as a term sheet or letter of intent, is non-binding or a mere "agreement to agree," where the agreement provides, among other things, for execution of a formal or "definitive" agreement. (E.g. King Penguin Opportunity Fund III, LLC v Spectrum Group Mgmt. LLC, 2020 NY Slip Op 06230, 2020 WL 6324920 [1st Dept 2020]; Offit v Herman, 132 AD3d 409 [1st Dept 2015].) These cases do not articulate a standard for determining when a preliminary agreement is an unenforceable agreement to agree. Nor do they clearly hold that the requirement of a definitive agreement, as a matter of law, precludes a claim for breach of the duty to negotiate in good faith. These cases underscore the need for clarification by the appellate courts of the circumstances under which, and the purposes for which, a preliminary agreement will be held enforceable.

outbid does not give rise to a cause of action.” (Defs.’ Memo. In Supp., at 16-17.) Garda pleads, however, that in October and November, while “Garda believed the parties were proceeding honorably and in good faith” to finalize the transaction, defendants, among other things: (1) “slow-roll[ed] due diligence materials and draft transaction documents such that a substantial portion of the exclusivity period was eroded”; (2) “attempt[ed] to change deal terms and the proposed documentation template during negotiations”; (3) carried on secret negotiations to finalize a transaction with Allied; and (4) after Garda was informed that Sun Capital had received an offer “that topped Sun Capital’s agreed purchase price with Garda,” and asked “whether Garda would have an opportunity to match the new buyer’s offer,” denied Garda that opportunity. (Compl., ¶¶ 34, 69, 49, 50; see also id., ¶¶ 30-48.) Garda also alleges that during this time period, “Sun Capital repeatedly misled Garda in connection with Sun Capital’s intentions to finalize the Transaction” and defendants “repeatedly assur[ed] Garda that Sun Capital and SOS intended to promptly finalize the Transaction with Garda.” (Id., ¶¶ 53, 69.)

Allegations of similar conduct have been held sufficient to plead a failure to negotiate in good faith. (See L-7 Designs, 647 F3d at 431-434.) Determination of whether defendants acted in good faith requires resolution of issues of fact that are not properly addressed on a motion to dismiss. (S.A. de Obras y Servicios, COPASA, 126 A.D.3d at 583 [finding issues of fact, as quoted above]; S.A. de Obras y Servicios, COPASA, 170 AD3d at 474 [holding that the “question of whether a party has negotiated in good faith, which necessitates examination of a state of mind, is not an issue which is readily determinable on a motion for summary judgment”] [internal citation and quotation marks omitted].)

Defendants also argue that “[e]ven if Garda had stated a claim for breach of an obligation to negotiate in good faith, its claim for expectation damages as a remedy for such breach is

wholly improper.” (Defs.’ Memo. In Supp., at 17 n 4.) A serious question exists as to whether lost profits, or other measures of expectation damages, are an available remedy for breach of a duty to negotiate in good faith, as opposed to a remedy for breach of an obligation to close a transaction. (See Goodstein Constr. Corp. v City of New York, 80 NY2d 366, 374 [1992]; L-7 Designs, Inc., 647 F3d at 431.) Determination of the damages available on the third cause of action will require clarification of the particular damages sought and resolution of issues of fact not appropriately addressed on a motion to dismiss. In any event, Garda also pleads potentially recoverable damages for transaction costs. (Compl., ¶ 1.)

Causes of Action for Promissory Estoppel and Unjust Enrichment

The court also holds that Garda’s equitable causes of action for promissory estoppel and unjust enrichment are adequately pleaded. (Compl., “Count 4: Breach of Contract [Promissory Estoppel],” “Count 5: Breach of Contract [Unjust Enrichment]”). Defendants argue that both causes of action are precluded by the Confidentiality Agreement and Letter Agreement. Specifically, defendants argue that “because these contracts govern the subject matter—establishing that Sun Capital and SOS were not obligated to enter into a transaction with Garda—Garda’s quasi-contract claims should be dismissed on this basis alone.” (Defs.’ Memo. In Supp., at 18.)

“The existence of a valid and enforceable contract governing a particular subject matter precludes recovery” under a quasi-contract cause of action “arising out of the same subject matter.” (Bennett v State Farm Fire and Casualty Co., 181 AD3d 777, 778 [2d 2020] [promissory estoppel]; IIG Capital LLC v Archipelago, L.L.C., 36 AD3d 401, 404-405 [1st Dept 2007] [quantum meruit].)

In support of the promissory estoppel claim, the complaint pleads:

“As described more fully above, between September 2019 and November 17, 2019, Sun Capital repeatedly assured Garda that Sun Capital, SOS and their representatives were working in good faith toward finalizing the Transaction promptly. Sun Capital and SOS intended that Garda would rely on these assurances.

Garda reasonably and justifiably relied on these assurances, including by expending significant time and resources working toward finalizing the Transaction, incurring millions of dollars of expense as well as significant interruption to its business and senior executives.”

(Compl., ¶¶ 72, 73.)

In support of the unjust enrichment claim, the complaint pleads:

“As set forth more fully above, Sun Capital was enriched at Garda’s expense through its duplicitous conduct in stringing Garda along regarding the Transaction until abandoning Garda for a secretly negotiated alternative transaction with Allied that was derived from the Transaction.

It would be against equity and good conscience to allow Sun Capital to retain amounts by which they were unjustly enriched.”

(Id., ¶¶ 76, 77.)

Contrary to defendants’ contention, these allegations concern defendants’ failure to engage in good faith negotiations, not defendants’ failure to close the transaction with Garda. It is undisputed that a duty to negotiate in good faith is not the subject of an express term in either the Confidentiality Agreement or the Letter Agreement. Moreover, the allegations pleaded in support of the promissory estoppel and unjust enrichment claims are not duplicative of the allegations regarding disclosure of confidential information, discussed above, which are pleaded in support of the claims for breach of the Confidentiality Agreement and Letter Agreement. These agreements therefore do not provide a basis for dismissal of the promissory estoppel and unjust enrichment claims.

To the extent that the promissory estoppel and unjust enrichment claims are duplicative of the third cause of action for breach of the duty to negotiate in good faith or are addressed to the subject matter of the Term Sheet upon which that cause of action is based, the equitable claims are nevertheless maintainable at this juncture. Defendants dispute the enforceability of the Term Sheet and, as held above, issues of fact preclude determination of whether the Term Sheet is a binding preliminary agreement. (See IIG Capital LLC, 36 AD3d at 404-405; Worldwide Servs., Ltd. v Bombardier Aerospace Corp., No 14 Civ 7343 [ER], 2015 WL 5671724 at * 18-19 [SD NY 2015] [sustaining contract claims based on breach of the duty to negotiate in good faith arising from a preliminary agreement and quasi-contractual claims for promissory estoppel and unjust enrichment, and reasoning that “as a preliminary matter, at the pleading stage, a party is not required to guess whether it will be successful on its contract or quasi-contract claims”] [internal citations, quotation marks, and ellipses omitted].)

Defendants argue, in the alternative, that the complaint does not sufficiently plead the elements required to state the causes of action for promissory estoppel and unjust enrichment. (Defs.’ Memo. In Supp., at 17-20.)

“[T]o state a cause of action for promissory estoppel, [plaintiff] must allege that it reasonably relied to its detriment on a promise by defendant.” (Skillgames, LLC v Brody, 1 AD3d 247, 250 [1st Dept 2003].) Garda alleges that it reasonably relied on defendants’ assurances that they “were working in good faith toward finalizing the Transaction promptly” and that it sustained damages as a result. (See Compl., ¶¶ 72, 73.) Affording the complaint the benefit of all favorable inferences, these allegations are sufficient to state the promissory estoppel cause of action. It is not appropriate for the court to address the merits of the factual allegations on this motion to dismiss. (See Skillgames, LLC, 1 AD3d at 251.)

In so holding, the court rejects defendants' contentions that the complaint does not state a claim for promissory estoppel because "Garda has not pled any 'clear and unambiguous promise' to enter into a purchase transaction"; the requirement in the Letter Agreement that a definitive agreement be executed precludes an assertion of reasonable reliance on such promise; and "Garda has not pled facts showing it suffered any 'unconscionable injury.'" (Defs.' Memo. In Supp., at 19.)

As held above, Garda's promissory estoppel claim is based not on a promise to consummate the transaction, but rather on the promise to work in good faith toward finalizing the Transaction. (Compl., ¶ 72.) For the reasons discussed above in connection with the third cause of action, the requirement of a definitive agreement to consummate the transaction does not, as a matter of law, preclude reasonable reliance on a promise to negotiate in good faith.

Defendants' reasonable reliance argument is also unsupported by the authorities on which they rely. (Defs.' Memo. In Supp., at 19.) As discussed above, in Meadow Ridge Capital, LLC v Levi (29 Misc3d 1222[A], 2010 WL 4668323, supra), the court held, among other things, that no promises were exchanged on which the promissory estoppel claim could be predicated. New York Military Academy v NewOpen Group (142 AD3d 489, 490-491 [2d Dept 2016]) is also distinguishable because the parties' alleged agreement expressly addressed their obligations with respect to continued negotiations. The agreement at issue provided that "each reserve the right to withdraw from further negotiations at any time if, in the sole judgment of either or both, it is in either Party's best interest to do so, without further liability or obligation to the other." (Id., at 490.) There, unlike here, there was an express contractual term relieving the parties from any duty to continue negotiations.

Further, as plaintiff correctly argues (Pl.'s Memo. In Opp., at 19), unconscionable injury is not a required element for promissory estoppel unless the alleged promise arises from a contract voided by operation of the Statute of Frauds, which is not at issue here. (See Castelotti v Free, 138 AD3d 198, 204 [1st Dept 2016] ["If a contract is barred by the statute of frauds, a promissory estoppel claim is viable in the limited set of circumstances where unconscionable injury results from the reliance placed on the alleged promise"] [internal citations omitted].)

The complaint also states a claim for unjust enrichment. Defendants' sole argument as to the sufficiency of Garda's unjust enrichment pleading is that it is "simply a recital of the elements, not a claim supported by factual allegations." (Defs.' Memo. In Supp., at 20.) "The elements of a claim for unjust enrichment are that plaintiff conferred a benefit upon the defendant, and the defendant obtained such benefit without adequately compensating plaintiff." (Alpert v M.R. Beal & Co., 162 AD3d 491, 492 [1st Dept 2018], lv denied 32 NY3d 905 [2018].) Garda alleges that Sun Capital was enriched as a result of Sun Capital's bad faith negotiations, by which Sun Capital "orchestrate[d] a more lucrative transaction with Allied, at Garda's considerable expense." (Compl., ¶¶ 53, 76, 77.) This pleading is sufficient to withstand a motion to dismiss.

Pleading Against Individual Defendants

Defendants argue in conclusion that "[a]lthough Garda does not state any claim against any Defendant . . . Defendants Sun SOS, LP and Sun Holdings VI, LLC should be dismissed from this lawsuit for the independent reason that they are not signatories to either of the contracts at issue, and Garda makes no allegations about either of them in its complaint." (Defs.' Memo. In Supp., at 20.) Defendants further argue that "the breach of contract claims in Counts 1 and 2 should be dismissed as to all Defendants other than SOS." (Id., at 21.)

“Generally, a breach of contract claim cannot be asserted against a non-signatory to the contract, unless a plaintiff pleads liability on veil piercing or alter ego theories.” (Array BioPharma, Inc. v Astrazeneca AB, 184 AD3d 463, 464 [1st Dept 2020] [internal citations omitted].) Applying this well established rule to the Confidentiality Agreement and Letter Agreement, the court holds that plaintiff’s first and second causes of action for breach of contract must be dismissed as to certain defendants.

The signatories to the Confidentiality Agreement are plaintiff Garda USA, Inc. and defendant Sun Capital Partners Management VI, LLC, “solely as Company’s representative.” (Confidentiality Agreement, Signature Page.) “Company” is defined as defendant SOS Ultimate Holding, LLC. (Id., Introductory Paragraph.) Paragraph 1 of the Confidentiality Agreement, on which Garda’s first cause of action is based (Compl., ¶ 59), provides in relevant part:

“The Company and parties set forth on Exhibit B agree not to disclose the fact that the Parties are considering or discussing the Transaction to any third-party other than to those of its affiliates and its and their respective directors, officers, employees and advisors who are set forth on Exhibit B.”

Exhibit B to the Confidentiality Agreement lists “Sun Capital Partners, Inc. and its directors, officers, employees and operating partners.” Defendants SOS Ultimate Holding, LLC and Sun Capital Partners, Inc. are thus bound by Paragraph 1 of the Confidentiality Agreement. The complaint does not plead that any of the remaining Sun Capital defendants are included within the parties set forth in paragraph 1 or Exhibit B of the Confidentiality Agreement. Nor does the complaint plead veil piercing or alter ego allegations against the other Sun Capital defendants.

Although Sun Capital Partners Management VI, LLC signed the Confidentiality Agreement in a representative capacity, the Agreement provides that Garda “will maintain contact with the Company at all times only through Sun Capital Partners Management VI, LLC,

the Company's financial advisor, and will not attempt any direct communication with the Company or any of its employees, customers or suppliers without the express permission of Sun Capital Partners Management VI, LLC." (Confidentiality Agreement, ¶ 11.) In addition, the Letter Agreement states that the Confidentiality Agreement is "by and between Sun Capital Partners Management VI, LLC and Garda." (Letter Agreement, ¶ 2.) A question of fact therefore exists as to whether Sun Capital Partners Management VI, LLC is bound by the Confidentiality Agreement in its own capacity.

The court holds that the first cause of action may be maintained as to defendants SOS Ultimate Holding, LLC, Sun Capital Partners, Inc, and Sun Capital Partners Management VI, LLC. The first cause of action will be dismissed as to defendants Sun SOS, LP and Sun Holdings VI, LLC.

The signatories to the Letter Agreement are plaintiff Garda USA, Inc. and defendant SOS Ultimate Holding, LLC. (Letter Agreement, at 3 [Signature Page].) The complaint does not plead that the Sun Capital defendants are signatories to the Letter Agreement. Nor does the complaint plead veil piercing or alter ego allegations against the Sun Capital defendants. While the complaint pleads that the Letter Agreement has an exclusivity provision which binds defendant Sun Capital Partners, Inc. and affiliated parties, the complaint does not plead a cause of action based on the exclusivity provision. In any event, the complaint does not plead allegations that the named Sun Capital defendants qualify as enumerated affiliates for purposes of this provision.⁶ The court holds that the second cause of action may be maintained as to

⁶ The Letter Agreement "Exclusivity" provision states, in relevant part, that during the exclusivity period:

“. . . [N]one of the Company [SOS] or its subsidiaries will, and they will cause their respective equityholders (including Sun Capital Partners, Inc.), directors, officers, or managers not to, directly or indirectly, solicit offers for, encourage, negotiate, discuss, or enter into any agreement, understanding or commitment regarding, a possible sale,

defendant SOS Ultimate Holding, LLC. The second cause of action will be dismissed as to defendants Sun Capital Partners, Inc., Sun Capital Partners Management VI, LLC, Sun SOS, LP, and Sun Holdings VI, LLC.

Defendants argue that the remaining causes of action for breach of the duty to negotiate in good faith, promissory estoppel, and unjust enrichment should be dismissed as to Sun SOS, LP and Sun Holdings VI, LLC. (Defs.' Memo. In Opp., at 20-21.) Defendants contend that "the Complaint alleges only who they [Sun SOS, LP and Sun Holdings VI, LLC] are. Beyond that, the Complaint alleges absolutely nothing about what Sun SOS, LP and Sun Holdings VI, LLC did or received, if anything, in connection with either the failed Garda transaction or the Allied transaction." (Defs.' Reply Memo., at 11 [emphasis omitted].) Defendants cite no authority that group pleading is impermissible for these causes of action.⁷

ORDER

It is accordingly hereby ORDERED that the motion of defendants Sun Capital Partners, Inc., Sun Capital Partners Management VI, LLC, Sun SOS, LP, Sun Holdings VI, LLC, and SOS Ultimate Holding, LLC to dismiss the complaint is granted only to the extent of: (1) dismissing, without prejudice, the cause of action denominated "Count 1: Breach of Contract

merger, combination, consolidation, joint venture, partnership or other disposition of all or any material part of the Company or its subsidiaries or any of the Company's or its subsidiaries' assets or issued or unissued equity interests . . . with any party other than Garda. . . ."

(Letter Agreement, ¶ 1.)


⁷ Defendant SOS argues that "Garda does not even attempt to argue that SOS was unjustly enriched as a result of the Allied transaction. Nor could it, given that SOS was the entity that was sold to Allied, not the recipient of Allied's higher price. Count 5 can and should be dismissed as to SOS for this reason alone." (Defs.' Reply Memo., at 10.) The court need not address this contention, as it appears clear that the complaint intentionally only pleads the cause of action for unjust enrichment against Sun Capital, while the complaint pleads all other causes of action against both Sun Capital and SOS. (Compare Compl., ¶¶ 75-77 [unjust enrichment pleaded as to "Sun Capital"]; id., ¶¶ 56-74 [all other causes of action pleaded as to "Sun Capital and SOS"].)

(Confidentiality Agreement)” as to defendants Sun SOS, LP and Sun Holdings VI, LLC; and (2) dismissing, without prejudice, the cause of action denominated “Count 2: Breach of Contract (Letter Agreement)” as to defendants Sun Capital Partners, Inc., Sun Capital Partners Management VI, LLC, Sun SOS, LP, and Sun Holdings VI, LLC; and it is further

ORDERED that the motion of defendants is otherwise denied.

This constitutes the decision and order of the court.

11/09/2020
DATE


MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE