RSR Corp. v Leg Q LLC
2020 NY Slip Op 34245(U)
December 21, 2020
Supreme Court, New York County
Docket Number: 650342/19
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: I.A.S. PART 42

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RSR CORPORATION and HOWARD MEYERS,

Plaintiffs,

DECISION AND ORDER

- v -

Index No. 650342/19

LEG Q LLC and LAWRENCE GOLUB,

MOT SEQ 001,002

Defendants.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action arising from a dispute between shareholders of an English lead recycling company, Eco-Bat Technologies, Ltd., the defendants move pursuant to CPLR 3211(a)(1) and 3211(a)(7) to dismiss the third cause of action of the amended complaint, which sounds in tortious interference with prospective economic relations (SEQ 001). The plaintiffs oppose the motion to dismiss. The defendants also seek, by separate motion, the issuance of an open commission permitting them to conduct a deposition of a nonparty witness in Texas and to obtain documents and physical evidence in connection therewith pursuant to CPLR 3108 and 3111 (SEQ 002). The plaintiffs do not oppose the defendants' application for an open commission.

For reasons set forth herein, the defendants' motion to dismiss is granted and the defendants' motion for an open commission is denied without prejudice to renewal upon the

defendants' filing of an answer to the surviving portions of the amended complaint.

II. BACKGROUND

A. Factual Background

The following allegations are drawn from the plaintiffs' amended complaint, unless otherwise noted, and are assumed to be true solely for purposes of this motion. See Grassi & Co. v Honka, 180 AD3d 564 (1st Dept. 2020).

Eco-Bat Technologies, Ltd. ("Eco-Bat"), is the largest producer of lead in the world, operating facilities throughout the United States, European Union, and Africa. The plaintiff Howard Meyers ("Meyers") is the founder, CEO/Managing Director and Chairman, and indirect majority shareholder of Eco-Bat. Meyers holds 87% of the outstanding ordinary shares of Eco-Bat through his Texas-based company, EB Holdings II, Inc. ("EB Holdings"), which is 100% owned by Meyers. Meyers is also the 100% owner of the plaintiff RSR Corporation ("RSR"), another Texas-based corporation.

The defendant LEG Q, LLC ("LEG Q"), is a minority shareholder of Eco-Bat led by the defendant Lawrence E. Golub ("Lawrence") and nonparty David B. Golub ("David"). Lawrence and David also serve as the CEO and President, respectively, of Golub Capital, a New York City-based asset management firm.

Pursuant to Eco-Bat's Articles of Association, the majority shareholder, EB Holdings, may appoint "any number of directors" to the Eco-Bat board. Through EB Holdings, Meyers has currently appointed six directors to the board, five of whom are non-executive directors. Two minority shareholders have a right to appoint one Eco-Bat director each. LEG Q is one of those minority shareholders. While Lawrence previously served as LEG Q's appointed Eco-Bat director, LEG Q replaced Lawrence in 2007 with nonparty Timothy Brog.

Eco-Bat and RSR have a longstanding business relationship dating back to a services agreement executed on March 14, 1996 (the "1996 Services Agreement"). Pursuant to the 1996 Services Agreement, RSR provided to Eco-Bat and its subsidiaries a variety of advisory and consulting services relating to the operation of Eco-Bat's lead smelting facilities. The 1996 Services Agreement was expressly mentioned in the shareholder's agreement (the "Shareholder's Agreement") signed by LEG Q in connection with its purchase of Eco-Bat shares.

In 2000 and 2003, Eco-Bat purchased lead smelting facilities in California, New York, and Indiana, from RSR. The acquisitions were approved by Eco-Bat's Board of Directors. Certain of RSR's subsidiaries and Eco-Bat's subsidiaries that own the smelting facilities subsequently entered into certain facility management agreements (the "Facility Management

Agreements"), pursuant to which RSR's subsidiaries provide services to the Eco-Bat smelting facilities. The Facility Management Agreements were approved by Eco-Bat's Board of Directors, sometimes over the objection of LEG Q's director. Eco-Bat's annual reports to its noteholders and shareholders disclose the existence of these agreements, the amounts charged by RSR affiliates to Eco-Bat affiliates for services rendered each year, and RSR and its affiliates' day-to-day responsibilities in connection with the agreements. The annual reports also disclose Eco-Bat's reliance on RSR and its affiliates to maintain the intellectual property required to operate its facilities.

On March 21, 2017, LEG Q submitted a Letter Before Action in the United Kingdom (the "March 2017 Letter") threating to file a derivative suit on behalf of Eco-Bat against the Eco-Bat directors. The director-malfeasance claims were allegedly based on the RSR entities' ownership of intellectual property and permits used to operate Eco-Bat facilities in North America and the amounts charged to Eco-Bat by RSR and its affiliates. In response to the March 2017 Letter, the Eco-Bat Board of Directors appointed a litigation committee and hired Freshfields Bruckhaus Deringer LLP ("Freshfields") to conduct an internal investigation into LEG Q's allegations. After Freshfields reported its findings to the litigation committee and produced

an interim report regarding its conclusions, the litigation committee resolved on June 21, 2018, not to take any action against the directors.

On December 21, 2018, LEG Q filed a second Letter Before Action (the "December 2018 Letter") threatening to bring direct claims against Meyers and Eco-Bat for alleged unfair prejudice against it as a minority shareholder, based on the same allegations in the March 2017 Letter. The December 2018 Letter indicates that an order for purchase of LEG Q's shares in Eco-Bat by another shareholder is a possible remedy for the threatened action. The December 2018 Letter also purportedly states that the threatened action was prompted in part by Meyers's ongoing restructuring negotiations with certain holders of Payment in Kind ("PIK") debt issued by EB Holdings (the "PIK Noteholders"), as detailed below.

Between 2013 and 2016, Meyers was engaged in negotiating a potential loan-modification proposal with the PIK Noteholders. The negotiations touched upon various strategies to resolve the parties' disputes through a mutually beneficial restructuring or similar transaction, including a consensual modification of the loan where, in consideration for a write down or discounted pay down of the PIK loan, the PIK Noteholders would receive bonds secured by Eco-Bat, cash, and EB Holdings equity. The plaintiffs aver that the completed transaction would have

resolved Meyers' dispute with the PIK Noteholders. However, on August 26, 2016, the PIK Noteholders commenced an action against Meyers and EB Holdings in the Nevada District Court, Clark County, alleging a wide range of extra-contractual claims against Meyers and his affiliated entities (the "Nevada Litigation").

Prior to the commencement of the Nevada Litigation, Lawrence had allegedly invited representatives of the PIK Noteholders to the New York offices of Golub Capital to discuss the PIK Noteholders' interests in the PIK loan, Eco-Bat's business, and Lawrence and LEG Q's strained relationship with Meyers. The plaintiffs contend, without offering further detail, that Lawrence revealed information about Eco-Bat's business that "emboldened the PIK Noteholders to pursue litigating claims" against Meyers and his companies.

The plaintiffs state that Lawrence's disclosures violated the confidentiality provisions of the Eco-Bat Shareholders Agreement, which required Lawrence and LEG Q to maintain in strictest confidence all information related to Eco-Bat. They further state that LEG Q had no legitimate business purpose regarding Eco-Bat for providing information to the PIK Noteholders and engaged in discussions solely to harm Meyers and his companies. Although LEG Q previously had no interest in the PIK loan or in EB Holdings, it acquired a "participation"

interest in the PIK Loan after it intervened to assert objections in an involuntary bankruptcy proceeding commenced by certain PIK lenders against EB Holdings.

The PIK Noteholders' allegations against Meyers remain the subject of ongoing litigation in Nevada. However, litigation has been stayed since the summer of 2018, and the parties have been engaged in publicly disclosed restructuring negotiations.

B. Procedural Background

On January 17, 2019, the plaintiffs commenced this action against LEG Q seeking a declaratory judgment that the 1996 Services Agreement and the Facility Management Agreements were properly authorized and that payments to RSR under those agreements were proper by filing a summons and complaint. LEG Q answered the complaint and asserted counterclaims on March 11, 2019.

Upon the stipulation of all parties extending the time to do so, on April 8, 2019, the plaintiffs filed an amended complaint. This amendment joined Lawrence as a defendant in this action and added additional causes of action sounding in, *inter alia*, breach of contract and tortious interference with a prospective business relationship. The parties stipulated to extend the defendants' time to file an answer to the amended complaint or move to dismiss until July 15, 2019. On July 15,

2019, the defendants filed the instant motion to dismiss the amended complaint's tortious interference claim (SEQ 001).

On August 25, 2020, the court issued an interim order adjourning the motion to dismiss and directing the parties to proceed to discovery. On October 28, 2020, a preliminary conference was held in accordance with the court's directives. On December 1, 2020, the defendants filed a motion for an open commission to obtain disclosure from a nonparty in Texas in connection with the counterclaims asserted in their original answer (SEQ 002). In light of the pendency of the motion to dismiss, the defendants have not yet filed an answer to the operative amended complaint.

III. LEGAL STANDARD

A. CPLR 3211(a)(1)

Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 433 (1st Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010). A particular paper will qualify as "documentary evidence" only if it satisfies the following criteria: (1) it is "unambiguous";

(2) it is of "undisputed authenticity"; and (3) its contents are "essentially undeniable." See VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC, 171 AD3d 189 (1st Dept. 2019) quoting Fontanetta v John Doe 1, supra.

B. CPLR 3211(a)(7)

On a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994).

C. CPLR 3108

CPLR 3101(a)(4) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by . . . any other person [besides those identified in subsections (a)(1)-(3)], upon notice stating the circumstances or reasons such disclosure is sought or required." Such circumstances and reasons are sufficient if the party seeking such nonparty disclosure has shown that the disclosure is "material and necessary" to the prosecution or defense of the action. Matter of Kapon v Koch, 23 NY3d 32, 38 (2014). CPLR

3108 provides, in relevant part, that "[a] commission or letters rogatory may be issued where necessary or convenient for the taking of a deposition outside of the state." "As long as the witness is without the State, rendering him [or her] unavailable to the service of a subpoena within the State, resort to CPLR 3108 is permissible." Wiseman v American Motors Sales Corp., 103 AD2d 230, 235 (1st Dept. 1984).

IV. DISCUSSION

A. Defendants' Partial Motion to Dismiss

The third cause of action of the amended complaint states a claim sounding in tortious interference with a prospective economic advantage on behalf of Meyers only against both defendants. Specifically, the plaintiffs aver that Meyers had "actual and prospective business relationships" with the PIK Noteholders regarding "a transaction to retire the PIK loan or otherwise restructure the PIK debt in a mutually beneficial transaction," and that the defendants interfered with that relationship by "disclosing confidential information about Eco-Bat's business ... in violation of Eco-Bat's Shareholders Agreement." The defendants move to dismiss this cause of action, asserting that the allegations in the Nevada Litigation confirm that the PIK Noteholders had independent reasons for

terminating their negotiations with Meyers and that the plaintiffs otherwise fail to state a claim.

The parties dispute whether the allegations made in the Nevada Litigation constitute "documentary evidence" properly noticeable by the court for purposes of CPLR 3211(a)(1). The court need not resolve this issue, since, as discussed below, the plaintiffs plainly fail to satisfy their burden under CPLR 3211(a)(7).

To state a cause of action for tortious interference with prospective economic advantage, "a plaintiff must plead that the defendant directly interfered with a third party and that the defendant either employed wrongful means or acted for the sole purpose of inflicting intentional harm on plaintiff." Posner v Lewis, 18 NY3d 566, 570 (2012). Carvel Corp. v Noonan, 3 NY3d 182, 195 (2004). "[A]s a general rule, a defendant's conduct must amount to a crime or an independent tort" in order to amount to "wrongful" conduct giving rise to liability. Carvel Corp. v Noonan, 3 NY3d 182, 190 (2004). "Wrongful means includes physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure." Id. at 195. Alternatively, a defendant's conduct can give rise to liability even if it does not amount to a crime or independent tort if the defendant acted with malicious intent, i.e., solely to inflict harm on the plaintiff. Id. at 190; see

Fire Island Real Estate, Inc. v Coldwell Banker Residential Brokerage, 131 AD3d 507 (2015). A plaintiff pleading tortious interference with a prospective economic advantage must also establish causation by demonstrating that the plaintiff and a third party would have entered into an economic relationship but for the defendant's wrongful conduct. See Mandelblatt v Devon Stores, Inc., 132 AD2d 162 (1st Dept. 1987); Tucker v Wyckoff Heights Med. Ctr., 52 F Supp 3d 583 (S.D.N.Y. 2014) (applying New York law).

Here, the plaintiffs contend that Meyers had a business relationship with the PIK Noteholders and was engaged in negotiations regarding restructuring the PIK debt in some manner. The plaintiffs provide no specific detail as to the nature of the transaction Meyers hoped to negotiate. Nonetheless, the plaintiffs insist that the "contemplated transaction would have resolved Mr. Meyers' dispute with the PIK Noteholders." It is not clear how close Meyers and the PIK Noteholders were to reaching an agreement prior to Lawrence's meeting with PIK Noteholder representatives and the commencement of the Nevada Litigation.

Even assuming, without deciding, that the plaintiffs' razor thin allegations as to the existence of a prospective economic advantage sufficed to plead the first element of the plaintiffs' claim, the plaintiffs are also required to allege that the

defendants employed wrongful means or acted solely with malicious intent, and that their alleged interference was a but-for cause of the plaintiffs' failure to consummate the proposed transaction with the PIK Noteholders. In this regard, the plaintiffs state only that Lawrence invited the PIK Noteholders to Golub Capital's New York offices and "revealed information to the PIK Noteholders about Eco-Bat's business and emboldened the PIK Noteholders to pursue litigating claims against [Meyers] and his companies."

The plaintiffs do not elaborate either in the amended complaint or in their moving papers as to what exactly it was that Lawrence divulged at the meeting, except to characterize it as "confidential." Nor do the plaintiffs explain how the information Lawrence provided "emboldened" the PIK Noteholders to file suit against Meyers, or why it should have had any bearing on any proposed transaction between the PIK Noteholders and Meyers. Instead, the plaintiffs' claim is based entirely on the speculative notion that because the defendants have objected to some of Meyers' business decisions concerning Eco-Bat and have sought to have Meyers buy out their Eco-Bat shares at a greater price than Meyers is apparently willing to pay, they have a personal vendetta against Meyers and his companies and sought to advance that vendetta by interfering in the PIK loan negotiations.

But even if the foregoing narrative were taken at face value, the plaintiffs fail to demonstrate how that interference occurred. It is not enough, even at this early stage, to say that simply because the defendants had a contentious relationship with the plaintiffs in the past, they *necessarily* called their meeting with the PIK Noteholders to sabotage Meyers' restructuring aspirations. The plaintiffs have not even attempted to explain what information the defendants could have revealed that was so damaging to Meyers that it caused the PIK Noteholders to not only cease restructuring negotiations, but bring an action against Meyers and his companies in Nevada state court.

For the foregoing reasons, the plaintiffs fail to state a claim sounding in tortious interference with a prospective economic advantage against either of the defendants, and the claim must be dismissed on that ground. Since this was the only claim the plaintiffs brought against Lawrence, the action is dismissed as against Lawrence in its entirety.

B. Defendants' Motion for Issuance of Open Commission

The defendants further move pursuant to CPLR 3108 and 3111 for the issuance of an open commission permitting them to conduct a deposition of a nonparty accounting firm in Texas and to obtain documents and physical evidence in connection therewith. The information sought by the defendants relates to

certain counterclaims they interposed in their answer to the original complaint. However, the amended complaint superseded the original complaint, and the defendants have not yet filed an answer with the same counterclaims responsive to that pleading. Accordingly, the defendants' motion is denied without prejudice to re-filing upon service of an answer to the amended complaint.

V. CONCLUSION

Accordingly, it is

ORDERED that the defendants' motion to dismiss the third cause of action of the amended complaint, sounding in tortious interference with a prospective economic advantage (SEQ 001), is granted; and it is further,

ORDERED that, the third cause of action being the sole cause of action brought against the defendant Lawrence Golub, the amended complaint is dismissed in its entirety as against Lawrence Golub, and the Clerk shall enter judgment accordingly; and it is further,

ORDERED that the defendants shall file an answer to the remaining causes of action in the amended complaint on or before February 1, 2021; and it is further,

ORDERED that the defendants' motion for the issuance of an open commission (SEQ 002) is denied without prejudice to re-

filing upon the defendants' filing of their answer to the amended complaint; and it is further,

ORDERED that the parties shall appear for a telephonic preliminary conference on February 11, 2021, at 2:30 p.m.

This constitutes the Decision and Order of this Court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

Dated: December 21, 2020