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

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SL GLOBETROTTER, L.P., GLOBAL BLUE GROUP HOLDING AG,

Plaintiff,

- v -

SUVRETTA CAPITAL MANAGEMENT, LLC, TOMS CAPITAL INVESTMENT MANAGEMENT LP,

Defendants.

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INDEX NO. 652769/2020

MOTION DATE 09/28/2021

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 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, 104, 105, 106, 107, 108, 109, 110, 111, 112, 123

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Plaintiffs SL Globetrotter, L.P. (Globetrotter) and Global Blue Group Holding AG (New Global Blue) move pursuant to CPLR 3212 (e) for an order granting summary judgment in their favor as to liability. Defendants oppose the motion.

Background

This action arises out of a merger of non-party Global Blue Group AG (Global Blue), a provider of tax-free shopping and currency processing services to predominately international travelers, with a public company, non-party Far Point Acquisition Company (FPAC), a special purpose acquisition company or SPAC (NYSCEF # 75-Complaint, ¶¶ 1, 13; NYSCEF # 77-FPAC Reg. Statement, Form S-1) (the Transaction).

The Transaction, which was consummated through a Merger Agreement dated January 20, 2020, between various seller parties and FPAC, resulted in the formation of a new public company, plaintiff Global Blue Group Holding AG (New Global Blue) (NYSCEF # 75, ¶1; NYSCEF # 78 -Merger Agreement). Globetrotter is the "GB Shareholders' Representative" in the Merger Agreement and the parent and sole shareholder of New Global Blue (NYSCEF #75, ¶ 5; NYSCEF # 78). The Merger Agreement was subject to certain conditions, including approval by FPAC's shareholders and a listing on the New York Stock Exchange (NYSE) (NYSCEF # 78 at 99, § 10.01 [e], [f]).

Defendants Suvretta Capital Management, LLC (Suvretta) and Toms Capital Investment Management LP (TCIM) are hedge funds which, along with other private investors, were solicited by Global Blue and FPAC to purchase shares in the New Global Blue through "private investments in public equity," known as "PIPE" investments (NYSCEF # 75, ¶14; NYSCEF # 78-Recitals at 1, ¶6). Before committing to the investment, defendants received an Investor Presentation which provided a summary of the merger transaction, Global Blue's historical financial performance and Global Blue's projected performance (NYSCEF # 80-Investor Presentation). The Investor Presentation included various disclaimers, including that the "financial information," was "[t]he historic financial information respecting Global Blue [which] has been taken from or prepared based on the historical audited financial statements of Global Blue" (*id.* at 2). In addition, it was stated that "[t]here can be no assurance that the future developments affecting FPAC, Global Blue or any successor entity of the Transaction will be those that we have anticipated" …[and that its] "forward-looking statements involve a number of risks, uncertainties (some of which are beyond FPAC's or Global Blue's control) or other assumptions that may cause actual results or performance to be materially different from those expressed or implied by these forward-looking statements" (*id.*).

Defendants entered into Subscription Agreements dated January 16, 2020, with Global Blue and FPAC, under which Suvretta agreed to purchase three million New Global Blue shares for $10 per share, while TCIM agreed to purchase two million New Global Blue shares for the same share price (NYSCEF # 79 - Subscription Agreements). The subscriptions were contingent on the Transaction closing by August 31, 2020 (*id.*, § 8.01[b]). Defendants acknowledged receipt of the Investor Presentation and access to FPAC's filings with the Securities and Exchange Commission (SEC) that are publicly available on the SEC's website (the Disclosure Package) (*id.*, § 6[e]). They also confirmed that their subscriptions were subject to significant risks, including an immediate total loss before closure of the Transaction (*id.,* §§ 6[g], [h]).

The Subscription Agreements provided that certain conditions must be satisfied prior to the closing date (*id.*, § 3[a], [b], [c]). Section 3(a) provides that "all representations and warranties of [New Global Blue] and the Purchaser contained in this Agreement shall be true and correct in all material respects at and as of the Closing Date" (*id.,* § 3[a]). These representations and warranties include the Section 5(f) representation that "[t]he description of the business and financial information of [Global Blue] to be included in the proxy statement/prospectus to be provided to the stockholders of FPAC in connection with the Transaction shall not be materially inconsistent with the information included in the Investor Presentation included in the Disclosure Package." In addition, under Section 3(b), "there shall not have been enacted or promulgated any governmental order, law, statute, rule or regulation enjoining or prohibiting the consummation of the Transaction" (*id.*, § 3[b]). Under Section 3(c), "all conditions precedent to the Transaction Agreement… including the

approval of FPAC's stockholders and any regulatory approvals, shall have been satisfied …by August 31, 2020, provided no material amendment to or waiver of any provision of the Transaction Agreement shall have been made that materially adversely affects [each defendant] as a stockholder of [New Global Blue] in a manner materially disproportionate to all stockholders" (*id.*, § 3[c]).

On February 24, 2020, FPAC filed a preliminary proxy statement which reflected the recommendation of the FPAC Board that FPAC shareholders vote in favor of the proposed merger (NYSCEF #104-Preliminary Proxy Statement at 33). It also contained, under the heading "Certain Projected Financial Information," financial projections for Global Blue for the financial years ending March 31, 2020 and March 31, 2021, which matched the financial projections in the Investor Presentation (*id.* at 112-115; NYSCEF # 80 at 20–21).

On June 19, 2020, following the outbreak of the COVID-19 pandemic, FPAC filed a revised preliminary proxy statement with the SEC which disclosed that the pandemic had adversely impacted Global Blue's business including that its "revenues for April 2020 had declined to approximately 4.8% of the revenues from April 2019, and, in view of FPAC management, no change is expected in the near term" (NYSCEF # 105 at 123). It also stated that Global Blue could not provide updated financial projections (*id.,* at 123-124). The revised preliminary proxy also stated that, on May 7, 2020, the FPAC Board had recommended that FPAC shareholders vote against the FPAC-Global Blue merger (*id.* at 122-123).

By letter dated June 22, 2020, defendants informed plaintiffs that they would not be funding the Transaction citing, *inter alia*, the revised preliminary proxy statement, which defendants asserted was "materially inconsistent with the information included in the Investment Presentation" (NYSCEF # 81 at 3). Defendants thus asserted that a closing condition in the Subscription Agreements that "all representations and warranties of [New Global Blue] … shall be true and correct in all material respects at and as of the Closing Date" could not be met (*id.* at 4).

On August 4, 2020, FPAC filed the definitive proxy statement provided to its shareholder in connection with the Transaction, which, *inter alia*, provided audited end-of-year financial information for the fiscal years ended March 31, 2018, 2019, and 2020" (NYSCEF # 83-Definitive Proxy Statement). The definitive proxy stated that due to the COVID-19 pandemic, "Global Blue's revenues for April, May and June of 2020 declined to approximately 5%, 4% and 14% of the revenues for the same months of 2019 ...." (*id.* at 126). The Definitive Proxy also stated that Global Blue's previously provided financial projections for the 2020 and 2021 financial years no longer should be relied on and that, as of April 2020, Global Blue "could not provide any forecasts regarding the Company's business, results of operations, and cash flows for the year ending March 31, 2021" (*id.* at 128). In addition, the

definitive proxy disclosed for the first time that Global Blue identified material weaknesses in its internal controls over financial reporting, requiring a restatement of its historical financial statements for the financial year ending March 31, 2020, and also calling into question the accuracy of all of Global Blue's past and future financial information (*id.* at 129).

On August 15, 2020, plaintiffs, FPAC, non-party Third Point LLC, which sponsored FPAC, and certain affiliates of Third Point entered into certain letter agreements (the Letter Agreements) (NYSCEF # 84-Letter Agreements; NYSCEF # 85-Forward Purchase Agreement; NYSCEF # 86-Supplemental Proxy). As a result of the Letter Agreements, FPAC agreed "not to assert" various conditions to closing in the Transaction Agreement and resulted, *inter alia*, in a reduction of Third Point's funding commitment from $390 Million to $61 million; an agreement not to enforce Third's Point's $100 million PIPE commitment; and redemptions of existing equity and additional equity grants to insiders at FPAC and Global Blue (NYSCEF # 86 at 4-7).

By letter dated August 20, 2020, counsel for defendants wrote to counsel for plaintiffs that the Letter Agreements "constitute breaches of the representations and warranties and covenants in the Subscription Agreements" (NYSCEF #108, at 2).

The Transaction closed on August 28, 2020, and defendants did not purchase the shares described in their Subscription Agreements (NYSCEF # 88 -New Global Blue Form 20-F, at 11, 32). Since August 31, 2020, New Global Blue has traded on the NYSE (NYSCEF # 92, ¶ 48).

After defendants notified plaintiffs of their intent not to fund the Transaction, plaintiffs commenced this action against defendants for breach of contract and a declaratory judgment (NYSCEF #1, ¶¶ 35-62). Defendants moved to the dismiss the complaint on various grounds, including that their obligations under the Subscription Agreements were terminated since the conditions to their performance under the agreements were not satisfied because of material differences between the financial information and projections in the Investor Presentation and in the preliminary proxy statement and those in the revised proxy statement (NYSCEF # 7-Def. MOL at 16-23). Plaintiffs agreed to withdraw their claims for declaratory relief but opposed the motion to dismiss the breach of contract claim (NYSCEF # 46 at 24).

By Decision and Order dated February 26, 2021, Justice O. Peter Sherwood (ret.) denied defendants' motion to dismiss finding, *inter alia*, that the documentary evidence was insufficient to show that multiple condition precedents were not met, and that in view of the totality of disclaimers and warranties in the Investment Presentation and Subscription Agreements "it would be improper to now allow

defendants to disclaim their contractual obligations" (NYSCEF # 58 at 13-15). Defendants appealed the denial of their motion to dismiss, and interposed their answer and a single counterclaim for a declaratory judgment on March 19, 2021 (NYSCEF # 61).[1] After defendants filed their answer, plaintiffs made the motion for summary judgment as to liability that is now before the court.

While this motion was pending, the Appellate Division, First Department, by Decision and Order dated November 9. 2021, affirmed Justice Sherwood's decision denying defendants' motion to dismiss (*SL Globetrotter v Suvretta Capital Management, LLC,* 199 AD3d 479, 479 [1st Dept 2021]).

Plaintiffs' Motion for Summary Judgment

Plaintiffs argue that they are entitled summary judgment as to liability on their breach of contract claim since Justice Sherwood found no ambiguity regarding the terms of the Subscription Agreements, under which defendants committed to purchasing shares of New Global Blue. Moreover, plaintiffs argue that there is no dispute that plaintiffs performed their obligations under the Subscription Agreements since the Transaction closed successfully and the closing notices were delivered to defendants, and that defendants wrongfully repudiated their obligations under the agreements and failed to purchase the shares at closing. Plaintiffs argue that the disclaimers in the Investment Presentation and Subscription Agreements preclude defendants' argument that their performance under the agreements was not required as condition precedents to their performance were not satisfied. As for the Letter Agreements, plaintiffs assert, *inter alia*, that a Supplemental Proxy filed by FPAC on August 17, 2020 (NYSCEF # 86) demonstrates that the Letter Agreements did not amend the Merger Agreement so as to constitute a breach of the Subscription Agreements.

Defendants counter that Justice Sherwood's decision on the motion to dismiss did not decide liability in plaintiffs' favor, and that it would be premature to grant summary judgment before discovery. Specifically, defendants argue that contrary to plaintiffs' position, the Investor Presentation, including its disclaimer language is not relevant to, and did not modify the terms of, the Subscription Agreements including section 5(f) which requires that the description of the business and financial information of Global Blue to be included in the proxy statement/prospectus shall not be materially inconsistent with the information included in the Investor Presentation and the Disclosure Package.

[1] Plaintiffs moved to dismiss the counterclaim as unnecessary and nonjusticiable, and by Decision and Order dated December 13, 2021, this court dismissed the defendants' counterclaim (NYSCEF # 132).

In support of their position, defendants submit evidence that section 5(f) was added by counsel for another PIPE investor, Integrated Core Strategies, (US), LLC (ICS),[2] and that the section was intended to protect defendants from material inconsistencies between the financials in the Investor Presentation and the proxy at the time of closing (NYSCEF # 98-Raviv Aff., ¶¶ 6,7; NYSCEF # 99-1-13-20-Email from Counsel; NYSCEF # 97-Pass Aff., ¶¶ 8, 10).

Defendants also argue that the record does not establish that the condition of regulatory approval of the merger under section 3(b) of the Subscription Agreement was met as it was permitted to be waived under the Letter Agreements, or that the Letter Agreements did not result in the failure to meet the condition precedent under section 3(c) by materially amending or waiving a provision of the Merger Agreement which adversely affected defendants in manner materially disproportionate to other shareholders.

In reply, plaintiffs argue, *inter alia*, that under the doctrine of judicial estoppel or estoppel against inconsistent positions, defendants' prior position before the denial of their dismissal motion that discovery was not needed since the documentary evidence resolved the issues in their favor, precludes them from now taking a contrary position.

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

In interpreting the Subscription Agreements, the court notes that "when parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms" (*W.W.W. Assocs., Inc. v. Giancontieri*, 77 NY2d 157, 162 [1990]; *see South Rd. Assocs., LLC v. Intl. Bus. Machines Corp.*, 4 NY3d 272, 277 [2005]). And, "[e]xtrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide" (*Greenfield v Phillies Records, Inc.*, 98 NY2d 562, 569 [2002]). A written contract should be read as a whole to give each clause its intended purpose,

[2] ICS was a party to a subscription agreement with plaintiffs in which ICS agreed to purchase 3.5 million New Global Blue Shares at $10 per share. ICS was also sued by plaintiffs in a related lawsuit titled *SL Globetrotter, L.P. et al. v. Integrated Core Strategies (US) LLC*, Index No. 654057/2020, which has been discontinued with prejudice by a stipulation between the parties.

and "[p]articular words should be considered, not as if isolated from the context, but in the light of the obligations as a whole and the intention of the parties as manifested thereby" (*Matter of Stravinsky*, 4 AD3d 75, 81 [1st Dept 2003] [internal citation and quotation omitted]; *Duane Reade, Inc. v Cardtronics*, LP, 54 AD3d 137, 144 [1st Dept 2008]). In accordance with these principles, a court should interpret a contract "so as to give full meaning and effect to material provisions" and so as not to "render any portion meaningless" (*Beal Savings Bank v Sommer*, 8 NY3d 318, 324-325 [2007], quoting *Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 3 NY3d 577, 582 [2004]).

In this case, although Justice Sherwood found that based on the disclaimers in the Investor Presentation and Subscription Agreements that the breach of contract claim was sufficient to state a cause of action despite the material differences between the financial information provided in the Investor Presentation and the preliminary proxy and the subsequent proxy statements, such a finding is insufficient to demonstrate that plaintiffs are entitled a judgment as a matter of law based on documentary evidence (*Caso v Miranda Sambursky Slone Sklarin Verveniotis LLP*, 180 AD3d 611, 613 [1st Dept 2020], appeal denied 36 NY3d 959 [2021][noting that "the court's prior decision…decided under the more liberal standards applicable to a motion to dismiss…is not inconsistent with [a contrary] summary judgment adjudication"]).

Moreover, questions of fact remain as to whether the condition precedents in the Subscription Agreements were satisfied such that defendants were bound to perform under the agreements. These issues include whether based on the warranties in the Subscription Agreement defendants were required to proceed with the Transaction, given the material financial change as reflected in the differences between the financial information in the Investment Presentation and preliminary proxy statement and the revised and definitive proxy statements issued before the closing date of the Transaction. Additionally, factual issues exist concerning the effect of the Letter Agreements on the condition precedents provided under section 3(b) and 3(c) of the Subscription Agreements.

And to the extent plaintiffs argue that the documentary evidence resolves the issues in their favor, as a matter of law, such argument appears to be contrary to the reasoning of the Appellate Division, First Department in its decision affirming Justice Sherwood denial of defendants' motion to dismiss.

Specifically, the First Department wrote:

> It is undisputed that the proxy statement reports of decreased actual revenues differed materially from the higher forward-looking revenue projections set forth in the prior investment presentation used to solicit defendants' investment. However, the documentary evidence does not

> demonstrate as a matter of law that this discrepancy constituted a failure by plaintiffs to comply with the subscription agreements' representation and warranty of material consistency between the investor presentation and subsequent proxies with respect to disclosures of "business and financial information," **since it is not clear from the representation and warranty that "business and financial information" includes forward-looking revenue projections or other statements of expectation**

(*Globetrotter v Suvretta Capital Management, LLC,* 199 AD3d at 479 [emphasis supplied]).

Finally, the court finds that while both parties changed their prior positions with respect to the need for discovery, such change does not warrant the application of estoppel doctrines to preclude their arguments on this motion.

Accordingly, plaintiff's motion for summary judgment as to liability is denied.

Conclusion

In view of the above, it is

ORDERED that plaintiffs' motion for partial summary judgment is denied; and it is further

ORDERED that within 20 days of service of this order with notice of entry, the parties shall efile a discovery stipulation for the courts review, or a request for a discovery conference in accordance with the rules of Part 49 posted on the Commercial Division website.

MARGARET A. CHAN, J.S.C.

01/05/2022
DATE

MARGARET CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	x	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE