

Morgan v Surterra Holdings Inc.
2022 NY Slip Op 33048(U)
September 9, 2022
Supreme Court, New York County
Docket Number: Index No. 651041/2022
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

John and Ultima Morgan, TGHI II LLC, Prime Overseas Investments and Enterprises Ltd., and Techview Investments Ltd.,

Plaintiffs,

- v -

Surterra Holdings Inc. dba Parallel, SH Parent Inc., PE Fund LP, WWJr. Enterprises Inc., William "Beau" Wrigley, Jr., Talladega LP, Talladega, Inc., and Acquiom Agency Services LLC,

Defendants.

Table with 2 columns: INDEX NO., MOTION DATE, MOTION SEQ. NO. and corresponding values: 651041/2022, blank, 008, 009 & 010

DECISION + ORDER ON MOTIONS

HON. BARRY R. OSTRAGER

The Court heard oral argument via Microsoft Teams on September 9, 2022 on three pre-Answer motions to dismiss claims in the Second Amended Complaint (NYSCEF Doc. No. 97) asserted in this action related to the finances of a multi-state cannabis company: (1) the motion by defendants Surterra Holdings Inc. dba Parallel, and SH Parent Inc. ("the Surterra Entities") for an order, pursuant to CPLR 3211(a)(1) and (7), dismissing the First, Third, Fourth, Fifth, Eighth, and Tenth Causes of Action (seq. 008); (2) the motion by defendant Acquiom Agency Services LLC ("Acquiom") for an order, pursuant to CPLR 3211(a)(1) and (7), dismissing the First, Third, Fifth, Eighth, and Tenth Causes of Action (seq. 009); and the motion by defendants PE Fund LP, WWJr. Enterprises Inc., and William "Beau" Wrigley, Jr., for an order, pursuant to CPLR 3211(a)(1) and (7), dismissing the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Causes of Action (seq. 010). In accordance with the extensive September 9, 2022 transcript of proceedings, the motions are granted in part and denied in part as follows. All decisions implicitly recognize the well-established standard of review; namely, that when reviewing a pre-Answer motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), this Court is tasked with determining whether, after affording the pleadings a

liberal construction, accepting the allegations in the Second Amended Complaint as true, and according plaintiffs “every possible favorable inference,” the Court finds that “the facts as alleged fit within any cognizable legal theory ... Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” *Leon v Martinez*, 84 NY2d 83, 87-88 (1994) (citations omitted).

Turning first to the motion by defendant Acquiom (seq. 009), that motion is granted and all claims against Acquiom are dismissed. Plaintiff agreed in its opposition papers to withdraw the Third, Fifth, Eighth and Tenth Causes of Action as to Acquiom, leaving only the First Cause of Action for a declaratory judgment that the Bridge Loan transaction violates the various controlling documents, including the Agency Agreements directly applicable to Acquiom. But the Collateral Agency Agreement (“the CAA”) in §2.3 disclaims any liability on the part of the acting Collateral Agent for actions taken or omitted except for the Collateral Agent’s “own gross negligence or willful misconduct.” In turn, the Successor Agent Agreement acknowledges the protections vested to Acquiom under the CAA as Successor Agent, which include the exculpation provisions in § 2. And the Bridge Credit Agreement, through which the Bridge Loan transaction was effectuated, also exculpates Acquiom in §11.03(d), except for claims based on Acquiom’s own willful misconduct or gross negligence. Significant case law upholds such exculpation clauses. Plaintiffs’ allegations do not meet the high bar New York law sets for establishing “gross negligence or willful misconduct” as they amount to little more than claims that Acquiom turned a blind eye to the alleged impact on plaintiffs of the transaction at issue. Turning to motion sequences 008 and 010 by the remaining defendants, the Court dismisses the First and Tenth Causes of action for declaratory relief against the Surterra Entities and PE Fund as duplicative of the breach of contract claims. Plaintiffs’ claim that the declaratory relief claims

differ from the contract claims is unpersuasive. Similarly, the Court dismisses the Second Cause of Action for breach of the implied covenant of good faith and fair dealing against PE Fund as duplicative on the contract claims.

The Court dismisses the Eighth Cause of Action for a violation of the Georgia Uniform Voidable Transaction Act. Plaintiffs' opposition does not seek to preserve the claims against the Surterra Entities. In any event, as to those entities and the other defendants named, even accepting the plaintiffs' allegations as true, the required elements of the statutory claim have not been sufficiently pled to state a cause of action. Moreover, plaintiffs' counsel acknowledged during oral argument that the claim was not necessary to the ultimate relief plaintiffs are seeking in this action.

The Court denies dismissal of the Ninth Cause of Action for breach of fiduciary duty against PE Fund and William "Beau" Wrigley, Jr. As persuasively argued by plaintiffs' counsel in plaintiffs' opposition papers and in the September 9, 2022 transcript of proceedings, under the above-stated standard of review for a pre-Answer motion to dismiss, plaintiffs have adequately asserted a fiduciary duty, in addition to the contractual duties, based on the personal involvement of Wrigley in the transaction at issue and his control of various entities, including PE Fund. Those allegations and other claims of self-dealing and wrongful conduct by defendants vis-à-vis the plaintiffs support denial of the motion to dismiss the breach of fiduciary duty cause of action at the pleadings stage.

The Court denies dismissal of the various breach of contract claims asserted in the Third, Fourth, and Fifth Causes of Action. Accepting plaintiffs' allegations as true, the Complaint sufficiently alleges that the Bridge Loan transaction, which gave the Bridge lenders payment priority over plaintiffs, violated one of more terms of one or more of the governing agreements. Issues exist that bar dismissal at the pleading stage, such as whether the Bridge Loan transaction

involved an impermissible amendment to the Collateral Agency Agreement, whether the transaction affected plaintiffs’ “sacred rights”, whether the Bridge Loan transaction impermissibly altered plaintiffs’ payment rights, and whether the transaction impermissibly affected plaintiffs’ lien priority or other rights without plaintiffs’ consent. The Court cannot find that the documentary evidence submitted by defendants “conclusively establishes a defense to the asserted claims as a matter of law” such that a dismissal pursuant to CPLR 3211(a)(1) or (7) would be warranted.

For similar reasons, the Court denies dismissal of the Sixth and Seventh Causes of Action for tortious interference with contract. Issues exist as to whether the named defendants acted primarily in their own self-interest, as opposed to the interest of the company. The fact that the company was in apparent need of a cash infusion at the time of the Bridge Loan transaction is in no way dispositive considering all the circumstances alleged by plaintiffs, including Wrigley’s control of the company before the Bridge Loan transaction occurred.

The remaining defendants shall answer the remaining claims within twenty days of the date of this Decision. Counsel shall prepare a Proposed Preliminary Conference Order and efile it by October 21, 2022. A status conference *via* Teams is set for October 31, 2022 at 10:00 a.m.

Dated: September 9, 2022


BARRY R. OSTRAGER, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION OTHER

APPLICATION: GRANTED SETTLE ORDER SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE