Lynx Capital Partners of NJ, LLC v Bardown Capital LLC
2019 NY Slip Op 33134(U)
October 21, 2019
Supreme Court, New York County
Docket Number: 650722/2019
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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LYNX CAPITAL PARTNERS OF NJ, LLC,

Plaintiff,

- v -

BARDOWN CAPITAL LLC,BAYES CAPITAL LLC,BCM HOLDINGS LLC,DOUGLAS SANZONE, JOHN GERACI, JOHN GRIFONETTI

Defendant.

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INDEX NO. 650722/2019

MOTION DATE 04/18/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for DISMISS.

Upon the foregoing documents and for the reasons set forth on the record (10/17/2019), Bardown Capital LLC, Bayes Capital LLC, BCM Holdings LLC, Douglas Arthur Sanzone, John Charles Geraci, and John Grifonetti (collectively, the **Defendants**)'s motion to dismiss is granted.

The Relevant Facts and Circumstances

Reference is made to a Routing System License Agreement (NYSCEF Doc. No. 13, the **Original Agreement**), dated August 13, 2014, by and between Bayes Capital, LLC (**Bayes**) and Lynx Capital Partners of NJ, LLC (the **Plaintiff**), pursuant to which the Plaintiff licensed a securities order routing system to Bayes. The Original Agreement set forth the following procedure for payment:

> **License Fees.** BC [Bayes] shall pay LC [Lynx] the license fees specified on Annex A, as may be amended from time to time by the written agreement of the parties (the "License Fees"). The License Fees be payable monthly, in arrears, pro rata for any partial monthly

> period. The License Fees will be payable within ten (10) business days of the end of each calendar month. [Lynx] shall be solely responsible for all costs and fees relating to any connection the Routing System maintains with any market center, including, but not limited to, connection to national securities exchanges and alternative trading system ("Connectivity Fees"). Connectivity Fees shall include, but are not limited to, charges relating to the implementation and maintenance of any FIX connections as well as the costs of any market data feeds utilized by the Routing System (*id.*, at 3).

Annex A to the Original Agreement provided that the license fee was $30,000 per month (*id.*, at 7). The parties also agreed that the Original Agreement could not be amended or waived "except by a writing signed by authorized representatives of both parties hereto" (*id.*, at 3).

The parties subsequently executed certain amendments to the Original Agreement, including a letter, dated September 5, 2016 where the Plaintiff agreed to waive the $30,000 licensing fee for the first six months of 2016 (NYSCEF Doc. No. 13, at 8) and a memo, dated January 31, 2017 on Bayes' letterhead, acknowledging that the fixed licensing fee had been increased to $100,000 per month (*id.*, at 9). The Original Agreement together with all such amendments shall hereinafter be referred to as the Agreement.

In the complaint, the Plaintiff alleges that in addition to the amount set forth in the Agreement, the Defendants, which operate a regulated securities broker-dealer, expressly agreed to pay over 90 percent of its cash flow resulting from the business generated through the Plaintiff's software product (NYSCEF Doc. No. 1, ¶ 2, the **Alleged Oral Agreement**).

The Plaintiff commenced this action on February 5, 2019 for (1) breach of contract, (2) breach of good faith and fair dealing, (3) quantum meruit, (4) promissory estoppel, (5) unjust enrichment, (6) fraudulent conveyance, (7) violation of New York Debtor & Creditor Law § 270, *et seq.*, and

(8) tortious interference with an existing contract. The Defendants now move to dismiss the complaint.

Discussion

On a motion to dismiss, the pleadings are to be afforded a liberal construction and the facts as alleged in the complaint are accepted as true (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). Under CPLR § 3211 (a)(1), the court may dismiss a cause of action where the documentary evidence conclusively establishes a defense to the claims as a matter of law (*id.*, 88). Dismissal under CPLR § 3211 (a)(7) requires the court to assess whether the proponent of the pleading has a cause of action and not whether he has stated one (*id.*).

A. Bardown Capital LLC as the Alter-Ego of Bayes Capital LLC

The Defendants argue that dismissal against Bardown Capital LLC (**Bardown**) is appropriate because (i) Bardown is not a party to the Agreement and (ii) that the Plaintiff has not sufficiently alleged that Bardown is the alter-ego of Bayes. The court agrees.

As described above, the Agreement is between the Plaintiff and Bayes. A veil piercing claim is governed by the law of the state in which the corporation was incorporated (*MMA Meadows at Green Tree, LLC v Millrun Apts., LLC*, 130 AD3d 529, 530 [1st Dept 2015]). In this case, the Plaintiff's claim against alleged alter-ego Bardown is governed by Delaware law because Bayes is a Delaware limited liability company (NYSCEF Doc. No. 1, ¶ 14). Under Delaware law, a plaintiff must "plead facts supporting an inference that a corporation, through its alter ego, has created a sham entity designed to defraud investors and creditors" (*Walnut Hous. Assoc. 2003*

L.P. v MCAP Walnut Hous. LLC, 136 AD3d 403, 404 [1st Dept 2016], citing *Crosse v BCBSD, Inc.*, 836 A2d 492 [Del 2003]). However, where only mere conclusory allegations are pled, the court must dismiss a veil-piercing claim (*id.*).

In the complaint, the Plaintiff does not plead facts that support the inference of a sham entity created to defraud investors and creditors. The complaint merely sets forth the conclusory allegations that (i) the assets of Bayes were used to fund operations of Bardown, (ii) Bayes was undercapitalized, and (iii) the individual Defendants exerted control over Bayes and Bardown (NYSCEF Doc. No. 1, ¶¶ 43-47). In addition, the Defendants argue that Bardown has a different ownership structure than Bayes in that a 40% owner of Bardown is not a member of Bayes and Bardown was a market-maker on the Philadelphia Stock Exchange registered with the SEC – and not FINRA like Bayes. In their opposition papers, the Plaintiff notes that "[o]n information and belief, the independent investor referenced in the Defendants' motion to dismiss was not a member of Bardown at the time of the transfers" (NYSCEF Doc. No. 22, at 21, fn 8). This fact, even if true, does not save the claim against Bardown or provide the missing factual basis to support a veil piercing claim. If anything, standing alone, this fact if true only suggests a payout prior to the investment by such 40% investor. Accordingly, the Defendants' motion to dismiss the complaint as against Bardown is granted.

B. First Cause of Action (Breach of Contract)

The elements of a claim for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance, (3) the defendant's breach and (4) resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). However, no cause of action can arise

from an illegal contract (*Sabia v Mattituck Inlet Mar. & Shipyard*, Inc., 24 AD3d 178, 179 [1st Dept 2005]).

The Defendants argue that the breach of contract claim based on the Alleged Oral Agreement must be dismissed because (i) the Agreement unambiguously requires all amendments to be in writing, (ii) certain amendments were executed by the parties from time to time, (iii) the license fee provision was heavily negotiated by sophisticated parties and the profit sharing arrangement which the Plaintiff alleges was specifically rejected by the Defendants (*see* NYSCEF Doc. No. 12 [attaching a redline copy of the Original Agreement striking language in the draft which would otherwise have codified the agreement that the Plaintiff seeks to enforce]), (iv) if the court looks at extrinsic evidence offered by the Plaintiff (which extrinsic evidence the Defendants argue should not be examined by the court because the contract is not ambiguous), such evidence confirms not, undermines the terms of the Agreement, and finally (v) that the Alleged Oral Agreement the Plaintiff urges this court to accept, would in any event, be unlawful pursuant to FINRA Rule 2040(a) and the Securities and Exchange Act of 1934 § 15 (a)(1), 15 USC § 78o (2015). In its opposition papers, the Plaintiff argues that the Agreement does not contain an integration clause, the Agreement is ambiguous and ancillary documents suggest a course of dealing that the Agreement included the Alleged Oral Agreement. The Plaintiff's argument is unavailing.

Putting aside the purported illegality of the Alleged Oral Agreement, the plain reading of the Agreement indicates that Bayes was to pay a fixed monthly licensing fee. The Agreement with respect to the license fee appears to be clear and unambiguous. To the extent the Plaintiff argues

that the court should look at the parties' course of dealings and offers certain ancillary documents to interpret the Agreement, the ancillary documents do not undermine the plain meaning of the Agreement as amended – they support it. Significantly, the redline version of the Agreement (NYSCEF Doc. No. 12, the **Draft Agreement**) indicates that the License Fee (defined as Monthly License Fee in such prior version of the Agreement) was also a fixed license fee. Mr. Sanzone, a partner of Bayes, attested that the Draft Agreement was rejected because it required the resetting of the license fee every three months based on **considerations** which ***included*** revenue and net income (*i.e.*, and not a fee based on 90% of the cash flow), which Mr. Sanzone indicates violated FINRA Rule 2040(a) and Section 15(a) of the Securities and Exchange Act of 1934 as illegal profit sharing with a non-broker dealer (NYSCEF Doc. No. 11, ¶ 5). To wit, the Draft Agreement provided that

> BC shall pay LC ~~"Routing System License Fees," payable monthly in arrears ("Monthly License Fee"). The parties will use the first three months of trading to evaluate the software and finalize the Monthly License Fee. The Monthly License Fee will be payable within 10 days of the end of each month in arrears for the previous month.. Within ten (10) calendar days before or after the commencement of a new calendar three month period, either party may request a "reset" of the Monthly License Fee that was established based on the previous three month period. Upon such request, the parties shall negotiate in good faith the reset of the Monthly License Fee based upon the following factors, among others, BC's usage of the Routing System during the past three month period, ***revenue and net income*** to BC based on BC's usage of the Routing System, Routing System uptime/downtime, miscellaneous execution and clearing costs incurred by BC, and any credits and rebates that BC has received as a result of trading activities through the Routing System during the previous completed three month period. If the parties cannot agree upon the reset of the Monthly License Fee, either party can terminate the Agreement as provided below. Furthermore, the parties hereby ratify and expressly approve any payments, payments' timing and payments' methodology that the parties engaged on and before the execution of this Agreement.~~ [emphasis added] (NYSCEF Doc. No. 12, at 3).

In other words, the Draft Agreement which Bayes rejected does not support the notion that there was a separate oral agreement for 90% of the cash flow in addition to the License Fee – or even that the License Fee itself was based on considerations of cash flow at all. Put another way, to the extent that the Plaintiff wanted the use and effect on Bayes' business to form part of the compensation due the Plaintiff, they requested that the effect on ***revenue and income*** (*i.e.*, and not cash flow – and certainly not 90% of the cash flow) form a ***consideration*** of any reset of the License Fee itself (*i.e.*, and not as a separate oral agreement for 90% of the cash flow as they now allege and urge this court to accept as a cognizable theory of recovery on which they should be permitted to proceed) – which consideration to be included in the Agreement Bayes expressly rejected (as per the strike-through in the Draft Agreement).

Finally, the Plaintiff adduced invoices billed to the Defendants that reflect the amended fee arrangements to which the parties agreed in writing (NYSCEF Doc. Nos. 24, 25). To the extent that there are entries attached to ***one*** of the alleged bills, none of the entries provide any factual basis to support that the Plaintiff has a cognizable legal claim based on the Alleged Oral Agreement and, indeed, appear to be addressed by Agreement itself. In other words, the Agreement itself, and the documentary evidence surrounding the Agreement, undermines any notion of the Alleged Oral Agreement as alleged in the complaint. Accordingly, the Defendants' motion to dismiss the first cause of action for breach of contract is granted.

C. Second, Third, Fourth, and Fifth Causes of Action (Breach of Good Faith and Fair Dealing, Quantum Meruit, Promissory Estoppel, and Unjust Enrichment

The Plaintiff pleads the following causes of action as alternatives to its claim for breach of contract: breach of good faith and fair dealing, quantum meruit, promissory estoppel, and unjust

enrichment. However, these causes of action are based upon the same factual allegations that form the basis for the Plaintiff's alleged breach of contract claim; namely the Defendants' failure to pay the Plaintiff for licensing the routing system. Thus, the Plaintiff may not assert an alternate claim for breach of good faith and fair dealing for breach of the Agreement (*Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009] [dismissing a claim for the implied covenant of good faith and fair dealing as duplicative of the breach of contract claim because both arose from the same facts]).

The Plaintiff's claims for quantum meruit and unjust enrichment are also inappropriate because the Agreement covers the licensing fee that is the subject of the parties' dispute (*Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 388 [1987]) [explaining that the existence of a valid and enforceable written agreement precludes recovery in quasi contract when both claims arise out of the same subject matter]). Moreover, the Plaintiff's promissory estoppel claim cannot stand because the complaint fails to allege that the Defendants violated any legal duty independent of the Agreement (*see Brown v Brown*, 12 AD3d 176, 176 [1st Dept 2004]). Accordingly, the Defendants' motion to dismiss the second, third, fourth, and fifth causes of action is granted.

D. Sixth and Seventh Causes of Actions, (Fraudulent Conveyance and Violation of New York Debtor & Creditor Law)

Under Debtor & Creditor Law § 273, a plaintiff should plead that (1) the debtors made a conveyance, (2) they were insolvent before the conveyance or rendered insolvent, and (3) the conveyance was made without fair consideration (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 528 [1st Dept 1999]). Under Debtor & Creditor Law § 275, a conveyance must also be incurred

without fair consideration (*id.*). Debtor and Creditor Law § 276 addresses actual fraud and requires that a conveyance be incurred with actual intent to hinder, delay, or defraud either present or future creditors. As it is difficult to prove actual intent of fraud, the plaintiff may rely on "badges of fraud" to support the case, including: (1) a close relationship between the parties to the alleged fraudulent transaction, (2) a questionable transfer not in the usual course of business, (3) inadequacy of the consideration, (4) the transferor's knowledge of the creditor's claim and the inability to pay it, and (5) and retention of control of the property by the transferor after the conveyance (*id.*, at 528-29). A claim for fraud is also subject to the heightened pleading standard under CPLR § 3016 (b) (*see RTN Networks, LLC v Telco Group, Inc.*, 126 AD3d 477, 478 [1st Dept 2015] [dismissing the claim for intentional fraudulent conveyance because the defendants' alleged intent to hinder, delay or defraud present or future creditors was not plead with particularity]).

Here, the complaint fails to specify any factual allegations to support the requisite elements of fraudulent conveyance. Significantly, the Plaintiff is unable to identify with particularity what was transferred or when the transfer occurred (NYSEF Doc. No. 1, ¶¶ 73-76). The Plaintiff also fails to plead that the alleged fraudulent conveyance under Debtor & Creditor Law §§ 273, 275, and 276 was made without fair consideration (*id.*, ¶¶ 80-85). During oral argument, the Plaintiff indicated it possessed facts to meet the heightened pleading standard (which alleged facts were not included in the complaint) and requested dismissal of the fraud claims be without prejudice. Accordingly, the Defendants' motion to dismiss the sixth and seventh causes of action is granted without prejudice.

E. Eighth Cause of Action (Tortious Interference with an Existing Contract)

To establish a claim of tortious interference with contract, "the plaintiff must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages" (*AREP Fifty-Seventh, LLC v PMGP Assoc., L.P.*, 115 AD3d 402, 402 [1st Dept 2014]). Further, the plaintiff must allege that the contract would not be breached "but for" the defendant's actions (*Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006]).

The complaint alleges that:

> 90. On information and belief, Bardown, Sanzone, Garaci and Grifonetti intentionally induced Bayes to breach the terms of the ORCC License Agreement by distributing funds rightfully owed to Lynx to Bardown, BCM, Sanzone, Geraci, and Grifonetti (and/or entities owned or controlled by them).
>
> 91. As a result of Bardown, Sanzone, Geraci, and Grifonetti's actions, Bayes did not have the necessary funds to pay Lynx the funds owed to Lynx. As a result, Lynx suffered damages in the amount of approximately $1.7 million (NYSCEF Doc. No. 1, ¶ 90-91).

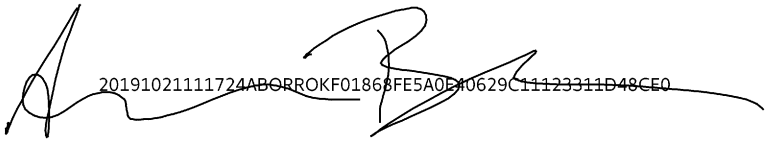
According the Plaintiff every favorable inference, the causation element is simply not adequately pled. The complaint merely contains the above conclusory allegations that Bardown, Sanzone, Garaci and Grifonetti intentionally induced Bayes to breach the Agreement. This is simply not enough as it relates to what these defendants allegedly did or how what they did allegedly caused Bayes' breach. Accordingly, the Defendants' motion to dismiss the eighth cause of action is granted.

Accordingly, it is

ORDERED that the defendants' motion to dismiss is granted and the complaint is dismissed; and it is further

ORDERED that plaintiff is granted leave to serve and file an amended complaint within 14 days of this decision and order; and it is further

ORDERED that, in the event that plaintiff fails to serve and file an amended complaint in conformity herewith within such time, leave to replead shall be deemed denied, and the Clerk of the Court, upon service upon him (60 Centre Street, Room 141B) of a copy of this order with notice of entry and an affirmation/affidavit by defendants' counsel attesting to such non-compliance, is directed to enter judgment dismissing the action, with prejudice, and with costs and disbursements to the defendant as taxed by the Clerk.



10/21/2019
DATE

ANDREW BORROK, J.S.C.

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