SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

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TRUMP SECURITIES and CONVERTIBLE CAPITAL,

Plaintiffs,

-against-

THE PUROLITE COMPANY, THE BROTECH CORPORATION and WATCH HILL PARTNERS, LLC,

Defendants.

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DECISION AND ORDER

Index No. 602809/2009

O. PETER SHERWOOD, J.:

For purposes of this decision, Motion Sequence Numbers 006-010 are consolidated for disposition.

Five motions are consolidated for decision in this Decision and Order. The motions are defendants', Purolite Company and The Brotech Corporation ("Purolite"), motions to compel disclosure (Motion Sequence Number 006), to amend the answer to add a counterclaim (Motion Sequence Number 007) and for summary judgment to dismiss defendant, Watch Hill Partners, LLC's ("WH") third cross-claim for indemnification and WH's cross-motion for summary judgment (Motion Sequence Number 008); plaintiffs', Trump Securities and Convertible Capital's ("Trump/CCI or "CCI"), motion for summary judgment (Motion Sequence Number 009); and Purolite's motion for summary judgment to dismiss WH's first and second cross-claims (breach of contract and unilateral mistake) and WH's cross-motion for summary judgment (Motion Sequence Number 010).

BACKGROUND

This is a breach of contract action for commissions arising out of an Engagement Agreement to provide financial advisory and investment banking services to Purolite in connection with the refinancing of $80 million of Purolite debt. Purolite hired WH and CCI as "Advisors" to assist it in finding lenders to refinance existing debt, negotiating the terms of the transaction and negotiating with Purolite's existing lenders to obtain discounts in return for early repayment. WH was designated the "lead financial advisor." CCI was "co-Manager."

A fee of 0.5% of the face amount of the refinancing and 3% of any discount obtained on early retirement of existing debt, the fees to be split 65% to WH and 35% to CCI, was to be paid to the Advisors "[i]f ... [Purolite] consummates a Transaction with any potential financing source(s) contacted as part of this process" (Engagement Agreement, ¶3). The refinancing is the "Transaction" referred to in the Engagement Agreement. The "process" is defined to include assisting Purolite in

> (1) negotiating the repurchase of the [existing debt], including the price at which the [debt] is repurchased; (2) assisting [Purolite] in the identification and negotiation with new financing source(s); and (3) such other financial advisory and investment banking services as may from time to time be agreed upon by [WH] and [Purolite].

Id at pg. 1. The Engagement Agreement also contains an indemnification provision pursuant to which Purolite agreed to indemnify WH and CCI on a several basis against all claims relating to the refinancing. CCI alleges that upon entering into the Agreement, it began seeking refinancing sources but, despite its efforts, it was largely shut out of any discussions with current and potential lenders. It adds that it performed the work it was asked to perform. After the refinancing closed in August 2010, Purolite refused to pay CCI its fee.

Purolite contends that CCI is entitled to no fee because it did no work in either negotiating a discount upon repurchase of the existing debt or identifying and negotiating with new lenders. Purolite maintains that by the time the Engagement Agreement was signed, it already had a general framework for concessions from existing lenders; was in discussions with HSBC, the bank that became the lead lender; had contacted Banco Santander, another bank that participated in the refinancing; and that, KFW, the third of the four lenders involved in the refinancing, was brought to the table through the joint efforts of HSBC and Purolite. It maintains that because these activities preceded signing of the Engagement Agreement or (in the case of KFW) involved no effort of the Advisors) they are "*de hors* the Process" and cannot be claimed by CCI. Purolite credits WH with identifying PNC Bank which is the fourth lender involved in the financing consortium.

Following the closing, Purolite negotiated substantial reduction of the fee with WH. The agreement was not reduced to writing, although there is documentary evidence of the amount of the reduced fee and of payment. In this action, CCI claims entitlement to a portion of the reduced fee. Initially, Purolite alleged that the settlement payment made to WH included whatever compensation was owed CCI. It subsequently withdrew this position, explaining that the position taken was the

product of attorney error, and now maintains that the settlement with WH was not intended to cover any claims of CCI.

WH asserts cross-claims against Purolite for breach of the post-closing settlement agreement, rescission of the settlement agreement based on unilateral mistake and indemnification under the terms of the Engagement Agreement. WH argues that despite the fact that it sent Purolite a revised invoice reflecting the negotiated reduction of the fee and that the invoice was paid, the parties never executed a written agreement or release. WH states that it understood that the reduced fee was not to be shared with CCI and the settlement was to have no effect on Purolite's other obligations to WH under the Engagement Agreement, specifically, the indemnification provision. Purolite acknowledges that it settled WH's claim for fees and that the parties to the settlement did not agree to alter the terms of the indemnification provision of the Engagement Agreement.

DISCUSSION

I. Motions to Amend Answer and Compel Disclosure

The motion of Purolite to amend the answer to add a counterclaim (motion sequence number 007) is DENIED. Although pursuant to CPLR 3025(b), motions for leave to amend pleadings are to be liberally granted in the absence of surprise or prejudice, it is "equally true that the courts should examine the sufficiency of the merits of the proposed amendment when considering such motions" (*Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 25 [1st Dept 2003]). Purolite's proposed counterclaim alleges fraud and fraudulent inducement. The claim is based on Purolite's discovery that plaintiff, Trump Securities, is a party in at least four breach of contract actions that involve claims similar to those alleged here. Extrapolating from that information, Purolite argues that, prior to entering into the contract with Purolite, Trump /CCI decided that they would not perform services they were obligated to perform under the contract and failed to disclose that fact to Purolite. Purolite alleges it has been "grievously harmed thereby" (Purolite's Proposed Amended Answer, ¶26).

The elements of a fraud claim are "(1) misrepresentation or concealment of a material fact; (2) scienter; (3) reasonable reliance; and (4) damages" (*see P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]). It is well settled that "general allegations that defendant entered into or contract while lacking the intent to perform are insufficient to support

the claim [of fraud]" *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 (1995). Further, even in a case alleging fraud, evidence of other purported similar contracts between a party defendant and other individuals who are not party to the action have no bearing on the validity of plaintiff's claims (*see Zohar v Hair Club For Men, Ltd.*, 200 AD2d 453, 454 [1st Dept 1994]). Thus, a claim that Trump is involved in other breach of contract litigation involving issues similar to the claims asserted in this case, cannot support the proposed fraud and fraudulent inducement claims.

Regarding the allegation that it was "grievously harmed," Purolite has failed to state any evidence to support its claim of damages. The assertion that Purolite's principal spent six days in Europe negotiating the refinancing simply does not state a claim for damages.

Because the motion to compel disclosure relates to the now rejected proposed counterclaim, that motion (motion sequence number 006) is DENIED as moot.

II. Summary Judgment

Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see,* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation,* 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form (*see, Alvarez v Prospect Hosp., supra*; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion to rebut the *prima facie* showing by producing proof in admissible form sufficient to require a trial of material issues of fact (*see, Kaufman v Silver,* 90 NY2d 204,208 [1997]). It is appropriate to look beyond the answer and deny summary judgment based upon true facts constituting a meritorious defense alleged in opposition to the motion for summary judgment (*see, Murray Hill Apparel, Inc. v Yunsa*, 18 Misc3d 1115 [A] [Civ. Ct., N.Y. Co., 2008]). Moreover, on a motion for summary judgment, it is not the function of the court to assess credibility (*see, Ferrante v American Lung Assn.,* 90 NY2d 623, 631 [1997]). In deciding the motion, the court must view the evidence in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see, Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]).

A. Breach of Indemnification Agreement

In motion sequence number 008, Purolite seeks summary judgment as to WH's third counterclaim for indemnification relating to CCI's claim against WH. Relying on *Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487 [1989], Purolite argues that absent language in the contract unequivocally expressing an intention of the parties to the contrary, a contract will not be interpreted to provide indemnification of disputes between parties to the contract and that no such expression is present in this case.

WH responds opposing the motion and interposing a cross-motion for summary judgment in its favor. WH argues that, unlike *Hooper*, this case is not an intra-party dispute and that pursuant to Annex A of the Engagement Agreement, Purolite is required to indemnify it against all claims to which WH may become subject relating to transactions contemplated by the Engagement Agreement. WH claims that, although the Engagement Agreement is a single document signed by Purolite, Trump and WH, the use of a single letter agreement was merely a matter of convenience. It is not an intra-party agreement because as provided in the Engagement Agreement, the Advisors (WH as "lead financial advisor" and CCI as "co-Manager") are independent contractors, each with separate duties owed solely to Purolite and without any legal duties to each other.

CCI, WH and Purolite are the contracting parties to a single Engagement Agreement. CCI's claims arise out of that contract pursuant to which CCI and WH agreed to provide a single identified service. Notably, the Engagement Agreement provides for payment of the fee upon consummation of the "Transaction with any funding source(s) contacted as part of this process", both Advisors are to be paid without regard to who made the contact. Purolite concedes that an Advisor (WH) found at least one lender that participated in the refinancing (*see* Purolite Rule 19a[b] Counter-Statement ¶ II 3). Nothing in the contract suggests that the parties intended it to be two separate contracts, one between Purolite and CCI and the other between Purolite and WH. In its cross-claim, WH alleges that it entered into the Engagement Agreement with Purolite and CCI (*see* Amended Answer to Amended Complaint, Counterclaim & Cross-claims of WH, p. 18). Further, Annex A of the Engagement Agreement reflects an intention to provide indemnity in disputes with third parties, not disputes among parties to the Engagement Agreement. The relevant portion of Annex A provides:

> The Company agrees to indemnify each of the Advisors and their respective affiliates and their respective members, managers, directors, officers, employees, agents and

> controlling persons (Watch Hill, CCI and each such person being an "Indemnified Party" on a several, but not joint basis, from and against any and all losses, claims damages and liabilities, joint or otherwise, and related to, arising out of, or in connection with, any Transaction contemplated by the engagement letter of which this Annex A is a part or the engagement of each Advisor pursuant thereto, and the performance by each Advisor of the service contemplated thereby, and will reimburse each indemnified Party for all expenses (including counsel fees and expenses) as they are incurred in connection with the investigation of, preparation for or defense of any pending or threatened claim or any action or proceeding arising therefrom, whether or not such Indemnified Party is a party and whether or not such claim, action or proceeding is initiated or brought by or on behalf of the Company; provided, however, that counsel for the Indemnified Party shall be reasonably acceptable to the Company.

This provision can be read, as WH argues, to provide that "[Purolite] agrees to indemnify [WH] ... on a several but not joint basis ... against any ... claims ... related to ... any Transaction contemplated by the engagement letter ... or the engagement of [WH] pursuant thereto." Although this reading would appear to provide indemnification for "any claim", including breach of the Engagement Agreement, it proves too much because such a reading would also require Purolite to indemnify WH in any breach of contract claim between Purolite and WH. Counsel for WH concedes that Annex A which was drafted by WH is not intended to require indemnification in a litigation between Purolite and WH.

In *Hooper*, the Court of Appeals stated that:

> Words in a contract are to be construed to achieve the apparent purpose of the parties. Although the words might seem to admit of a larger sense, yet they should be restrained to the occasion and to the particular object which the parties had in view. This is particularly true with indemnity contracts. When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances.

74 NY2d at 491 (citations and quotation deleted). Applying this standard to the indemnification clause, it cannot be reasonably disputed that the parties did not intend the provision to cover an intra-party dispute. The provision is limited to claims arising out of the refinancing Transactions and the performance by WH and CCI of services contemplated in connection with those Transactions. Several clauses within the indemnity provision are simply inconsistent with an intention for it to

apply to intra-party disputes, including provisions (1) reserving to Purolite authority to accept counsel for WH or CCI; (2) an exception from indemnification for losses resulting from willful misconduct or gross negligence of WH or CCI and (3) the inability of Purolite to settle any claim as to which indemnification could be sought absent an unconditional release of WH and CCI from all liability arising out of such claim.

The motion of Purolite for summary judgment dismissing WH's third counterclaim for indemnification (motion sequence number 008) shall be GRANTED and the corresponding cross-motion of WH shall be DENIED.

B. Plaintiff's Motion for Summary Judgment-Breach of Contract

By motion sequence number 009, CCI moves for summary judgment on their first cause of action for breach of contract. CCI asserts that this is a simple claim to recover unpaid commissions pursuant to the terms of a financial advisory services agreement. Purolite responds that CCI did little or no work and is entitled to nothing because it breached its obligations under the terms of the contract.

Purolite engaged two firms, WH and CCI, to provide financial advisory and investment banking services in connection with the refinancing. The Engagement Agreement, ¶1, provides that "[e]ach Advisor will perform such financial advisory and investment banking services for [Purolite] as are customary and appropriate in transactions of the types described above and as [Purolite] reasonably request, including ... managing the process whereby [Purolite] is introduced to potential investors and financial sources and assisting [Purolite] in modeling, analyzing, structuring, negotiating and effecting proposed Transactions ...". It provides in paragraph 3 for payment of fees to the Advisors if a refinancing is consummated with any financing source contacted as part of the search process contemplated therein.

The 35% percent fee entitlement claimed by CCI is not dependent on the extent to which CCI's efforts contributed to consummation of the transaction. This feature of the Engagement Agreement was not the result of an oversight. CCI and Purolite were parties to an earlier agreement relating to the same refinancing efforts. That agreement provided for CCI to be paid on a leads-only basis (*see* CCI Rule 19(a) Statement, Ex. 4; Ex 15, pp 44-45). During the course of that engagement CCI contacted at least three promising leads, Bank of America, General Electric and JP Morgan Chase (*see id*, Ex 19, p. 82). As of May 8, 2009, Purolite was having discussions with a number of

potential financing sources as well as its existing lenders (*see id*, Ex 15, pp 41-42, 48). Purolite proposed a leads-only arrangement and sought a "carve-out" of any financing source Purolite had already addressed *(see id)*. The proposal was rejected. The Engagement Agreement did not provide for compensation on a leads-only basis and does not contain carve-out language (*see id*, p. 45). In the view of Purolite's executives, there was no indication that CCI had an ability to assist in discussions with Goldman Sachs regarding early repurchase of Purolite's debt at a discount. Nevertheless, Purolite agree to share a percentage of any resulting savings with WH and CCI (*see id*, pp 55, 58, 60).

As noted above, "each of the Advisors [must] provide ... customary and appropriate ... [identified financial advisory] services ... including [introduction of Purolite] to potential investors ... assisting [Purolite] in modeling, analyzing, structuring, negotiating and effecting proposed transactions." The admissible evidence in the record reveals that CCI participated in the "process" and provided some services within the Scope of Engagement set forth in paragraph 1 of the Engagement Agreement. However, as "lead financial advisor," WH performed a substantial majority of the work. The services CCI provided included contacting potential lenders, including Bank of America, Leucadia National Corp., GLG Partners and HIG Capital; commenting on an analysis of the Goldman Sachs repurchasing discussion; and commenting on a markup of the HSBC term sheet (*see* CCI Rule 19(a) Statement, ¶¶7, 9, 11, 12). The record also shows that CCI repeatedly offered to assist and sometimes was told not to communicate with entities which Purolite was negotiating (*see id* ¶12; Ex. 17, pp 80-81; Ex. 10; Ex. 15, pp. 75, 188, 194-95). CCI performed the things requested of it and Purolite made no criticism of CCI's performance until after the transaction closed (*see id* Ex 15, pp. 51, 55; Ex 16, p. 209; Ex. 17, pp. 74 [no complaints], 77 [re. work requested]; 78 [failure to contribute]; Ex. 18, pp. 61 [complaints], 159 [failure to contribute]).

Despite Purolite's efforts to re-characterize the aspects of the process relating to HSBC and Banco Santander as discussions that preceded May 8, 2009 and thus must be excluded as contacts for purposes of the fees provision of the Engagement Agreement, the record shows that the refinancing was negotiated and closed as a result of the process contemplated under the terms of the Engagement Agreement and in which WH and CCI participated. The fees to be paid each of WH

and CCI is not dependent the contacts made by either or the specific tasks each performed. For this reason, the cases cited by Purolite for the propositions that in a non-exclusive agency, there is no right to a commission by a broker solely due to the sale of the asset [*see Solid Waste Institute, Inc. v Sanitary Disposal, Inc.*, 120 AD2d 915 [3d Dept 1986]) and that a broker seeking a commission must show that he brought the parties together at mutually acceptable terms within the period of his employment [*see Air Support Int'l, Inc. v Atlas Air, Inc.*, 54 F Supp 2d 158 [EDNY 1999]), are inapposite.

Based on the record before the court, CCI's contribution to the process contemplated by the parties was quite modest, especially when compared to the size of the fee being claimed. However, the parties' agreement provides for CCI to be compensated on the basis of a formula that does not take into account each party's level of participation. Further, the record does not reveal the existence of a material question of fact as to Purolite's defense of breach of contract by CCI. CCI's motion for summary judgment will be GRANTED.

C. *Purolite Motion for Summary Judgment re. WH's First and Second Cross-claims.*

In motion sequence number 010, Purolite moves for summary judgment to dismiss WH's cross-claims for breach of contract and rescission. WH responds by cross-moving for summary judgment in its favor.

In its first cross-claim, WH alleges that there is no settlement agreement because there was no meeting of the minds in that WH understood it was negotiating for its 65% of the fee while Purolite claimed in its answer that WH negotiated to settle 100% all fees, including fees claimed by CCI. In this motion, the parties acknowledge that the settlement does not cover CCI's fees, although WH argues that Purolite's now disavowed answer raises questions of facts sufficient to defeat Purolite's motion for summary judgment. WH also argues that the parties failed to reach agreement as to whether Purolite's payment of the reduced fee also extinguished Purolite's obligation to indemnify WH under the terms of Annex A of the Engagement Agreement. WH claims that because Purolite alleges that it has no obligation to indemnify against CCI's claims, the settlement agreement is unenforceable for failure of a meeting of the minds as to a material term. In its second cross-claim, WH seeks rescission of the settlement agreement due to an alleged unilateral mistake of fact. As to both cross-claims, WH seeks to restore the parties to their pre-settlement position and to recover the full fee under the terms of the Engagement Agreement.

It is well settled that "[w]here internal inconsistencies in a contract point to ambiguity, extrinsic evidence is admissible to determine the parties' intent." *Gessin Elec. Contrs. Inc. v 95 Wall Assocs.*, 74 AD3d 516, 518 [1st Dept 2010]). Further, "[e]ven if the parties intend to be bound by a contract, it is unenforceable if there is no meeting of the minds, i.e., if the parties understood the contract's material terms differently."

This is not a case where the parties to the post-closing settlement agreement understood the material terms of the settlement differently. The principals of both Purolite and WH testified as to each sides understanding of the agreement. As a result of negotiations, Purolite and WH agreed to a reduction of the fee to be paid to WH from $1,093,316.86, reflecting 65% of the fee calculation under the terms of the Engagement Agreement, to $550,000 (*see* Deposition of Kristan Salovaara, pp 76-77; Deposition of Stefan Brodie, pp 183-84; Aff'd of Bruce L. Thall, ¶¶ 2,3). The reduced fee was invoiced and paid. There was no discussion of the indemnification provision of the Engagement Agreement and the parties did not sign either an amendment thereto or a general release.

Contrary to the argument of WH, Purolite has not asserted that its obligation to indemnify WH was extinguished as a result of the settlement. Rather, Purolite maintains that it never agreed to indemnify its Advisors in the event of an intra-party dispute. The undisputed evidence reveals that Purolite's indemnification obligations to WH are unaffected by the terms of the reduced fee agreement. The essential terms of the agreement were understood by the parties and were performed by them. The motion of Purolite for summary judgment to dismiss WH's first and second cross-claims is GRANTED and WH's cross-motion is DENIED.

Accordingly, it is

ORDERED that the motion of Purolite for leave to amend its answer to assert a counterclaim for fraud and fraudulent inducement (motion sequence number 007) is DENIED; and it is further

ORDERED that the motion of Purolite to compel disclosure (motion sequence number 006) is DENIED as moot and it is further

ORDERED that Purolite's motion for summary judgment dismissing WH's claim for indemnification (motion sequence number 008) is GRANTED and the corresponding cross-motion is DENIED; and it is further

ORDERED that CCI's motion for summary judgment as to its first cause of action for breach of contract (motion sequence number 009) is GRANTED; and it is further

ORDERED that Purolite's motion for summary judgment dismissing WH's first and second cross-claims for breach of contract and rescission is GRANTED and the corresponding cross-claim is DENIED; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiffs, Trump Securities, LLC and Convertible Capital against defendant, The Purolite Company in the amount of $650,678.32 plus interest at the rate of $143.80 per day from and after December 13, 2010 to the date of entry of judgment together with interest thereafter at the rate of 9% until paid; and it is further

ORDERED that the cross-claims of Watch Hill Partners, LLC against, defendant, The Purolite Company are DISMISSED; and it is further

ORDERED that the claims of plaintiffs against Watch Hill Partners, LLC are DISMISSED.

This constitutes the decision and order of the court.

DATED: June 27, 2011

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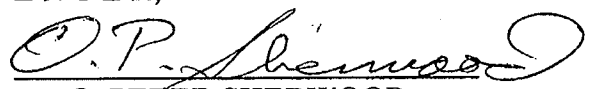

O. PETER SHERWOOD
J.S.C.