Erickson Air-Crane Inc. v EAC Holdings, L.L.C.

2009 NY Slip Op 33396(U)

December 22, 2009

Supreme Court, New York County

Docket Number: 600325/09

Judge: Melvin L. Schweitzer

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12/22/09

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

ERICKSON AIR-CRANE INCORPORATED,	:	
Plaintiff,	:	Index No. 600325/09
-against-	:	DECISION AND ORDER
EAC HOLDINGS, L.L.C.,	:	Motion Sequence: 001
Defendant.	:	

MELVIN L. SCHWEITZER, J.:

Background

This lawsuit arises out of a negotiated purchase of a manufacturer of heavy-lift helicopters. Plaintiff alleges that defendant fraudulently induced it to purchase the company; negligently made false representations; breached representations and warranties made in connection with the purchase; and breached contractual arrangements to indemnify plaintiff. Defendant moves to dismiss the complaint in its entirety pursuant to CPLR 3016 (b), 3211 (a) (1) and (a) (7).

In January 2007, EAC Acquisition Corp. (Acquisition) entered into negotiations to purchase the stock of Erickson Air-Crane Incorporated (the Company) from EAC Holdings, L.L.C. (Holdings). After more than six months of negotiations and due diligence investigation, Acquisition entered into a Stock Purchase Agreement (SPA) with Holdings on July 6, 2007, pursuant to which Acquisition agreed to purchase all of the issued and outstanding shares of the Company from Holdings. Acquisition's purchase closed on September 27, 2007 and, thereafter, it merged into the Company. The Company, pursuant to the merger, succeeded to all the rights, property and interests of Acquisition, and is the plaintiff in this action; Holdings is the defendant.

Plaintiff asserts that some time after the closing, it was forced to settle certain outstanding litigation claims which had been pending against the Company, described *infra*, in order to avoid a judgment that would have put it out of business. This action followed.

During the course of due diligence for the transaction, plaintiff became aware of a complaint that had been filed against the Company by Helicopter Transport Services, Inc. (HTS) alleging anticompetitive practices regarding the Company's refusal to sell parts to HTS for CH-54 helicopters. HTS's complaint also alleged that the Company's refusal to sell the parts breached third party beneficiary rights HTS held under a contract between the Company and the original manufacturer of the heavy-lift helicopters, Sikorsky Aircraft Corporation.

Plaintiff alleges here that its concerns regarding the litigation were calmed when defendant represented (falsely) that HTS's claims were meritless. It also alleges that its decision to enter into the SPA was made in reliance on defendant's representation (false) that defendant had a strong counterclaim against HTS for patent infringement. Plaintiff's claim for damages here is based on defendant's allegedly fraudulent and negligent misrepresentations pertaining to the litigation that defendant faced when it induced plaintiff to enter into the SPA, and on defendant's breaches of representations, warranties and agreements it made in the SPA.

Discussion

CPLR 3211 (a), "Motion to dismiss cause of action," states that:

> "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> (1) a defense is founded upon documentary evidence;
>
> * * *
>
> (7) the pleading fails to state a cause of action. . . ."

As stated in *Dimsey v Bank of New York*,

> "It is well settled that on a motion to dismiss a complaint for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true. (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004] [citations omitted]). Most importantly in a motion to dismiss is 'whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail.' (*Id.*)."

See also Bonnie & Co. Fashions, Inc. v Bankers Trust Co., 262 AD2d 188 (1st Dept 1999).

In a motion to dismiss under CPLR 3211, although the court accepts the well-pleaded factual allegations of the complaint as true and accords them every favorable inference, allegations consisting of bare legal conclusions are not entitled to such consideration. *Wilson v Hochberg*, 245 AD2d 116. Where legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true and the criterion becomes "whether the proponent of the pleading has a cause of action, and not whether he has stated one." *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76. If a question of fact exists with respect to the meaning and intent of a contract in question, a dismissal pursuant to CPLR 3211 also is precluded. *Khayyam v Doyle*, 231 AD2d 475 (1st Dept 1996).

In order to survive a motion to dismiss, a complaint asserting fraudulent inducement must state with some degree of specificity factual allegations regarding the circumstances of the alleged misrepresentations. CPLR 3016 (b). *Eastman Kodak Co. v Roopak Enters., Ltd.*, 202 AD2d 220 (1st Dept 1994). Here, plaintiff's allegations do not identify the persons allegedly making the misrepresentations, the persons to whom they were made or the circumstances in which they were made. It thus is difficult for the court to evaluate the statements allegedly made

by defendant which form the basis for plaintiff's fraudulent inducement or negligent misrepresentation claims. Nonetheless, the court will examine the assertions as they are set forth in the complaint.

Plaintiff bases its claim of fraudulent inducement on two alleged oral representations by defendant. The firsu is that thd HTS litigation claims were meritless, and the second is that the Company had a strong counterclaim against HTS for patent infringement. Both statements relate to the possible future outcome of fully disclosed litigation, made in the context of a heavily negotiated acquisition agreement between two sophisticated parties. The statements are the equivalent of an opinion of value regarding property or the prediction of a future outcome or event. It is well settled that statements essentially amounting to little more than puffery, opinions of value or future expectations do not constitute actionable fraud. *Elghanian v Harvey*, 249 AD2d 206, 206 (1st Dept 1998); *Lanzi v Brooks*, 54 AD2d 1057 (3d Dept 1976), *affd* 43 NY2d 778 (1977). The statements here do not support a claim of fraudulent inducement.

Additionally, even if the court were to find the statements potentially actionable, the claim remains deficient in that there is no allegation of facts which can support an inference of scienter, that is, the statements were made with an intent to deceive. There is nothing in the complaint to suggest the unidentified Company representative was not expressing a firmly held belief that his opinions were well grounded at the time they were made. Plaintiff's claim fails on this ground as well. *Abrahami v UPC Constr. Co.*, 224 AD2d 231 (1st Dept 1996).

Also, plaintiff's assertion that it relied on the alleged statements is contradicted by the context in which they were made, and even by documentary evidence, *i.e.* the SPA itself. The litigation was fully disclosed in the course of negotiations and due diligence. Plaintiff does not

assert otherwise. Plaintiff was represented by sophisticated acquisition counsel who certainly could have made a full investigation of the claims, defenses and counterclaims in the litigation. In such circumstances, alleging reliance on statements of opinion is not sufficient to support plaintiff's claim. *Abrahami*, 224 AD2d at 234. *Grumman Allied Industries, Inc. v Rohr Indus., Inc.*, 748 F2d 729 (2d Cir 1984). Plaintiff also affirmatively represented in the SPA that it had *not* relied on extra contractual representations in entering into the SPA. In New York, such a contractual representation precludes a claim of reliance on oral representations. *Citibank, N.A. v Plapinger*, 66 NY2d 90, 94 (1985); *Fabozzi v Coppa*, 5 AD3d 772, 723-724 (2d Dept 2004). For these reasons, the court dismisses plaintiff's claim of fraudulent inducement.

Plaintiff alternatively asserts it was induced to enter the SPA by defendant's negligent misrepresentations. It bases its claim on the same alleged oral representations that are the predicate for its fraud allegation. In order to sustain a claim of negligent misrepresentation, the plaintiff must demonstrate (i) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff, (ii) that the information was incorrect, and (iii) reasonable reliance on the information. *J. A. O. Acquisition Corp. v Jeffrey D. Stavitsky*, 831 NYS2d 364.

To establish liability for negligent misrepresentation stemming from a commercial transaction, defendant must be in a special position of confidence and trust with the injured party, or possess unique or specialized expertise, such that reliance on its statements is justified. *Kimmell v Schaefer*, 89 NY 2d 257. Here, the relationship between plaintiff and defendant was that of buyer and seller in an arm's-length transaction. It is well-settled that the special relationship which must exist between a plaintiff and defendant for negligent misrepresentation

claim implies a "closer degree of trust than ordinary buyer-seller relationship." *Pappas v Harrow Stores Inc.*, 140 AD2d 501. Also *see Pludeman v Northern Leasing Systems, Inc.*, 2005 WL 5960260.

Plaintiff contends, however, that since defendant had unique and specialized knowledge of facts relating to its company, a duty to disclose arose. But a mere disparity of knowledge about a proposed transaction is insufficient to impose such a special duty of disclosure upon a seller. *Societe Nationale D'Exploitation Industrielle Des Tabacs Et Allumettes v Salomon Bros. Intl.*, 268 AD2d 373. In that case, plaintiff was a sophisticated investor, and the court rejected its contention that liability be imposed for defendant's alleged selective disclosure and partial withholding of information.

Additionally, there is nothing in the record here to show that the information actually furnished and made available by defendant was incorrect. As noted *supra*, the alleged oral statements made by defendant's unidentified representatives were merely opinions regarding the future outcome of the litigation or the merits of its case. All the relevant documents relating to the HTS litigation, including information that the Company's counterclaim regarding patent infringement was undermined by the existence of prior art, were available to plaintiff in the form of an electronic dataroom for due diligence and investigation.

Plaintiff's contention regarding its reasonable reliance is of no merit. Plaintiff was represented by independent counsel who could have made a full investigation regarding the HTS litigation. Also, as noted *supra*, plaintiff contractually disclaimed reliance on any extra contractual representations in entering into the SPA, and thus cannot now claim reliance on the

very representations it explicitly disclaimed. Thus, plaintiff's claim of negligent misrepresentation is likewise dismissed.

Plaintiff further alleges that defendant breached its representations, warranties and agreements contained in the SPA in several respects. It asserts defendant's representation that it was in compliance with applicable law was false, as was defendant's representation to the effect that it had disclosed all material contracts. Plaintiff also claims defendant failed to notify it of certain developments in the litigation between signing and closing which were sufficiently material that an exception to a representation and warranty of the SPA needed to be taken. Finally, plaintiff asserts defendant has failed to indemnify it for breaches of the SPA.

Defendant replies that each of these claims is barred by specific SPA provisions which limit redress for alleged breaches of the agreement to the indemnification provisions of the SPA's Article 9. Section 9.06 provides in relevant part:

> "(a) Except in the event of fraud, . . . the indemnification obligations set forth in this Article 9 are the exclusive remedy of the Indemnified Person . . . for any inaccuracy in any of the representations or any breach of any of the warranties or covenants contained herein . . ."

Also, Section 9.08 provides that the plaintiff (buyer) may seek recourse for loss only out of a limited Escrow Fund.

Under the SPA, in order for the buyer to make a claim for indemnification from the Escrow Fund regarding a third party claim asserted against it, it is necessary for the buyer to notify the seller of the claim and allow the seller to participate in or assume the defense of the claim. The SPA also explicitly provides that without the prior written consent of the seller, the buyer may not settle or compromise the claim. Failure to follow these procedures defeats any right to indemnification.

Plaintiff cannot, and does not, assert that it followed the indemnification procedures spelled out in the SPA. In fact, plaintiff argues it was excused from doing so because defendant already knew of the litigation claims at issue here. Plaintiff also asserts it is not limited to indemnification here, but rather is entitled to a full range of remedies because it has alleged fraud. Plaintiff's arguments are not persuasive. Its allegations of fraud are dismissed for the reasons stated, *supra*. The SPA, moreover, is a comprehensive document relating to the sale of a valuable property. It was negotiated by sophisticated acquisition counsel who provided a precise and common mechanism for the payment of limited indemnification as the sole remedy for losses arising from the breach of a representation and warranty. For whatever reason, plaintiff elected to ignore the SPA's terms for indemnification when it settled the litigation claims against it without obtaining defendant's consent. This was a business judgment plaintiff was entitled to make, but it now precludes plaintiff from successfully seeking redress from this court. For these reasons the court dismisses plaintiff's claims for breach of representations and warranties and breach of contract.

Based on the foregoing, it is hereby

ORDERED that defendant's motion to dismiss the claims for fraudulent inducement, negligent misrepresentation, breach of representations and warranties and breach of contract is granted.

Dated: December 22, 2009

ENTER:

J.S.C.