JTS Trading Ltd. v Trinity White City Ventures Ltd.
2017 NY Slip Op 30771(U)
April 17, 2017
Supreme Court, New York County
Docket Number: 651936/2015
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 39

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JTS TRADING LTD.,

Plaintiff,

DECISION/ORDER
Index No. 651936/2015

-against-

TRINITY WHITE CITY VENTURES LIMITED, SAHARA INDIA PARIWAR, AAMBY VALLEY (MAURITIUS) LTD., UBS FINANCIAL SERVICES, INC.,

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action to recover damages for, *inter alia*, breach of contract, defendant UBS Financial Services, Inc. ("UBS"), moves (in motion sequence number 002) to stay or dismiss the complaint for failure to state a cause of action and based on documentary evidence. Defendant Trinity WCV Ventures Limited ("TWCV")[1] (in motion sequence number 005) and defendant Aamby Valley (Mauritius) Ltd. ("Aamby Mauritius") (in motion sequence number 006) each move to dismiss the complaint based on documentary evidence, for failure to state a cause of action and for lack of personal jurisdiction.[2] Motion sequence numbers 002, 005 and 006 are consolidated for disposition.

Plaintiff JTS Trading Ltd. ("JTS"), a Hong Kong corporation, entered into a letter agreement with TWCV, a United Arab Emirates private trust, entitled "Memorandum of Understanding;

[1] Defendant Trinity was incorrectly named as Trinity White City Ventures Limited in the caption of Plaintiff's complaint.

[2] At oral argument on this motion, the defendants agreed to accept service and the service grounds for the motions to dismiss were deemed moot. Hence, the only grounds for dismissal remaining are pursuant to CPLR § 3211(a)(1) and (7) for all defendants and also CPLR § 3211(a)(8) for Aamby Mauritius.

Equity Fund" on or about January 22, 2015 (the "MOU"). The MOU stated that JTS and TWCV were "prepared to cooperate" and that the MOU was to be followed by "definitive agreements," outlined in paragraph 7, including a "Private Placement Memorandum and such other documents as determined by counsel," a "Limited Partnership Agreement" and a "General Partnership Agreement."

The purpose of the MOU was to set out the general terms and conditions under which JTS and TWCV would create a fund to carry out commercial real estate investments of target acquisitions. The "initial targeted acquisitions" were identified as the "Sahara Portfolio," which included the Plaza Hotel and the Dream Downtown Hotel, both in New York, New York, and Grosvenor House Hotel in London, England (together the "Target Properties"). When the MOU was executed, the Target Properties were owned and operated by Sahara India Pariwar.[3] The MOU provided, among other things, that: 1) all disputes thereunder were to be resolved by the "courts of the United States of America;" 2) TWCV's equity capital contribution would be $250,000,000 and JTS's contribution would be $850,000,000; 3) TWCV and JTS were to form a general partnership to hold acquisitions through real estate investment trusts ("REITs") and special purpose entities ("SPEs"); 4) the acquisitions would be "funded through a combination of 25%-35% equity, with the remaining balance funded through debt;" and 5) JTS was to own 70% and TWCV 30% of the general partnership.

In addition, the MOU stated:

> 11. Actions to be taken by the parties ("next steps")

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[3] I dismiss this action against Sahara India Pariwar in light of my previous ruling, in an order dated September 14, 2015, that Sandeep Wadhwa (Head of Corporate Finance at Aamby Valley Limited, the parent company of Aamby Mauritius) made an "uncontradicted statement in his affidavit that there is no such entity by the name 'Sahara India Pariwar.'" And, as in my order dated September 14, 2015, I deem all allegations against Sahara India Pariwar as made against defendant Aamby Mauritius.

a. TWCV and JTS to provide initial drafts of definitive agreements in Section 7 above.
b. TWCV to obtain exclusive engagements for the Initial Target Acquisition
c. TWCV to provide property investment summary.

12. Other Conditions precedent to the Equity Raise:
a. The TWCV and JTS capital commitment in accordance with the definitive agreements for Limited Partner participation
b. TWCV or the Fund receiving an exclusive for the Initial Target Acquisition

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17. Exclusivity
[TWCV] appoint[s] JTS as exclusive arranger of the Fund. [TWCV] agree[s] not to appoint any other institution in connection with the arranging of the Fund or capitalization of an Acquisition or to award any institution any title, role, fees or other compensation, except as expressly provided for in the MOU, without our prior written consent for a period of 120 calendar days from the date all information requested is delivered to JTS.

On February 9, 2015, TWCV provided JTS with exclusive financing agreements that TWCV had entered into with Aamby Mauritius, a foreign corporation organized under the laws of the Republic of Mauritius that is part of the "family" of Sahara companies. The financing agreements, on JTS' consent, contained no mention of JTS and gave TWCV a sole and exclusive right of first refusal to purchase the Target Properties (the "February Financing Agreements"). The February Financing Agreements granted one year "loans" to the Sahara companies ("Sahara") which owned the Target Properties and purchased its existing debt. JTS claims that these agreements, although "presented as a loan," were "obviously intended to transfer ownership of each of the Target Properties solely and exclusively to [TWCV] by way of a transparent 'loan to own' transaction" and were therefore within the scope of the MOU.

According to JTS, during a February 9th phone call, Alun Richards, TWCV's President and CEO, told JTS that UBS would provide or arrange all of the necessary debt and equity capital for the February Financing Agreements. During telephone and email communications between February 9th and February 11th, TWCV indicated that the February Financing Agreements were

outside the MOU's scope, yet TWCV offered JTS the opportunity to participate in the transaction on different terms and conditions than those set forth in the MOU.

JTS alleges that TWCV used JTS's MOU commitment to arrange for $850 million of equity capital "to open the door to negotiations with Sahara" and then sought to avoid its own MOU commitments by claiming that the February Financing Agreements structure did not fall within the parties' MOU. Further, JTS informed TWCV, in a letter dated February 11, 2015, that the latter was in breach of the MOU. JTS also sent a letter to UBS, on February 18, 2015, to inform UBS that, due to its financing role in the February Financing Agreements, UBS was interfering with its contractual relationship with TWCV.

During the February Financing Agreements' 45-day exclusivity period, TWCV excluded JTS from any transactions concerning the Target Properties, including TWCV's attempts to raise financing from other sources. JTS then filed an action in this Court against TWCV and UBS on March 17, 2015 (the "First Action"). JTS alleges that in response to the First Action, TWCV contacted JTS asking it to withdraw the action and offering JTS the exclusive opportunity to deliver the funding for the acquisition of the Target Properties.

Next, on April 10, 2015, JTS and TWCV entered into an agreement whereby JTS discontinued its lawsuit against TWCV. The agreement also provided that all agreements between JTS and TWCV were to be governed by New York law and that New York courts would be the exclusive forums for resolving any disputes between them.

Subsequently, JTS produced prospective investors but claims that TWCV made unreasonable demands that were at odds with the MOU's terms, making it impossible to accomplish funding for the Target Properties. JTS claims that it also learned that despite TWCV's and Sahara's representations, JTS did not actually have exclusive rights for the acquisition.

On June 3, 2015, JTS commenced this action, alleging a claim for breach of contract against TWCV, a claim for tortious interference with contractual relations against UBS, and a claim for breach of fiduciary duty (or aiding and abetting breach of fiduciary duty) against all defendants. Shortly thereafter, JTS sought a prejudgment attachment of Sahara's interest in the Plaza Hotel and Downtown Dream Hotel, or, alternatively, expedited discovery regarding Sahara's participation in TWCV's breach of its fiduciary duty to JTS.

In an order dated September 14, 2015 (the "September Order"), I denied JTS' motion, after determining that JTS failed to establish the right to pierce the corporate veil to reach non-party Sahara's assets. The First Department affirmed the September Order, finding that this Court "properly declined to pierce the corporate veil to attach the properties of nonparties Sahara Plaza LLC and Sahara Dreams LLC" because JTS did not show that Aamby Mauritius "used its domination of the Sahara LLCs to commit a fraud or a wrong against JTS." *JTS Trading LTD v. Trinity White City Ventures Limited*, 139 A.D.3d 630, 630 (1st Dept. 2016).

Now that all defendants have accepted service of the summons and complaint, defendants seek its dismissal on a number of grounds.

Discussion

Personal Jurisdiction as Against Aamby Mauritius

JTS concedes that Aamby Mauritius is not subject to general jurisdiction under CPLR § 301, but argues that I should pierce the corporate veil between Aamby Mauritius and American based nonparties Sahara Plaza LLC and Sahara Dreams LLC (together the "Sahara LLCs") to obtain jurisdiction over Aamby Mauritius. To pierce the corporate veil to find personal jurisdiction "requires a showing that [Aamby Mauritius] exercised complete domination over [the Sahara LLCs] with respect to [the] transactions attacked, and that such domination was used to commit a fraud or wrong against [JTS] which resulted in [its] injury." *Holme v. Global Mins. & Metals*

Corp., 22 Misc.3d 1123(A), 1123(A) (Sup. Ct. N.Y. Co. 2009) (citing *Shisgal v. Brown*, 21 A.D.3d 845, 848 (1st Dept. 2005).

As defendant Aamby Mauritius correctly points out, this Court previously rejected JTS' argument in connection with the motion for a prejudgment attachment. In the September Order, I found that JTS failed to show entitlement to pierce the corporate veil. Following JTS's appeal, the First Department affirmed my decision finding that "JTS has not shown that Aamby Mauritius used its domination of the Sahara LLCs to commit a fraud or a wrong against JTS." *JTS Trading LTD*, 139 A.D.3d at 630. Nothing in the record suggests that I should reach a different result on the same facts on Aamby Mauritius's motion to dismiss. Thus, I dismiss the breach of fiduciary duty claim against Aamby Mauritius for lack of personal jurisdiction.

Breach of Contract Against TWCV

To state a claim for breach of contract in New York, plaintiffs must allege facts showing (1) the existence of a contract; (2) the plaintiff's performance under that contract; (3) the defendant's breach of its contractual obligations; and (4) damages resulting from the breach. *See Harris v. Seward Park Housing Corp.*, 79 A.D.3d 425, 426 (1st Dept. 2010).

JTS alleges that the MOU constituted a binding agreement with TWCV and that the latter breached the MOU by: 1) engaging in separate discussions with Sahara regarding financing for the Target Properties; 2) demanding that any prospective investors produced by JTS comply with terms and conditions different than the terms of the MOU; and 3) failing to get exclusive rights to acquire the Target Properties from Sahara. JTS claims that it was denied its rights under the MOU as the intended 70% owner of the general partnership, including management fees and anticipated increase in the Target Properties' value.

An agreement that leaves material terms to be worked out in later negotiations and memorialized in other agreements is merely an agreement to agree rather than a contract.

UrbanAmerica, L.P. II v. Carl Williams Group, L.L.C., 95 A.D.3d 642, 644 (1st Dept. 2012) (holding that a letter of intent was not binding because it specifically stated that it wasn't binding and also stated that "'the legal rights and obligations of the parties shall be only those that are set forth in such definitive transaction documents when and if executed and delivered by all parties.'"); *Pelham Commons Joint Venture v. Village of Pelham*, 308 A.D.2d 520, 521 (2d Dept. 2003) (affirming lower court's dismissal of breach of contract claim because "the parties by their conduct have manifested their mutual intent not to be bound until execution of a formal contract, effect will be given to that intention and, until the written contract is executed, no enforceable obligation will be held to arise.")

Here, the specific language of the MOU provides ample evidence that the parties did not intend to be bound contractually to each other in a partnership relationship until more formal contracts were executed. For instance, the MOU defines its purpose as to set out terms and conditions under which JTS and TWCV "are prepared to cooperate and create a fund [] to carry out real estate investments through various structures and participation opportunities via a General and Limited partnership." In addition, the MOU states that the "parties agree to seek advisory, tax and legal counsel to create the definitive domiciles and corporate structure of the Fund." It also provides that legal counsel must create "Definitive Agreements," enumerated as a Private Placement Memorandum, Limited Partnership Agreement, General Partnership Agreement, Committee agreements and Custodial Agreements. Moreover, the MOU lists "next steps" to be taken by the parties including the exchange of initial drafts of the definitive agreements and lists "[o]ther [c]onditions precedent to the Equity Raise." Consequently, I find that the MOU was an agreement to agree and did not create a binding partnership between the parties.

A document that is "clearly a preliminary, non-binding proposal to agree, conclusively negates [a] plaintiff's breach of contract claim." *Aksman v. Xiongweii Ju*, 21 A.D.3d 260, 261-262

(1st. Dept. 2005) (finding that a letter of intent was not a contract where it expressed the parties' intent to form a contract "at a later date," did not state an intent to be legally bound until a future agreement was reached, and in its opening line stated that its purpose was "a basis for conducting business between [the parties] during the Development and Test Trading Phases."); see also *New York Military Academy v. Newopen Group*, 142 A.D.3d 489, 490 (2d Dept. 2016) (finding that the lower court should have dismissed the complaint pursuant to CPLR 3211 (a)(1) because the documentary evidence, a letter of intent, "utterly refuted the plaintiff's factual allegations" by demonstrating that "plaintiff's allegations of breach of contract related to a mere agreement to agree."); *Oui Cater, Inc. v. The Lantern Group*, 71 A.D.3d 555, 555 (1st Dept. 2010) (Email exchanges between the parties negated plaintiff's claim that the emails created a contract because "they expressed the parties' intention to enter into a contract at a later time" and referred to "notes," "draft contract" and "the formal contract signing.")

The cases cited by JTS in support of its argument that the MOU was a binding contract are inapposite. For example, in *Hajdu-Nemeth v. Zachariou*, 309 A.D.2d 578, 578 (1st Dept. 2003), the relevant document explicitly stated that it "constitutes a binding contract until such time as the definitive agreements referenced [therein] are executed." In contrast, the MOU here does not expressly refer to itself as a binding contract nor, as discussed above, does its language evince an intent to be bound.[4] The preliminary MOU "conclusively negates" JTS's breach of contract claim and I thereby dismiss this claim based on the documentary evidence. *See, e.g., Aksman v. Xiongweii Ju*, 21 A.D.3d at 261. Accordingly, I dismiss the breach of contract claim against TWCV.

[4] In *Aksman v. Xiongweii Ju*, 21 A.D.3d at 261, the First Department distinguished *Hajdu-Nemeth* on similar grounds.

Breach of Fiduciary Duty

To state a claim for breach of fiduciary duty, plaintiffs must allege that "(1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct." *Burry v. Madison Park Owner LLC*, 84 A.D.3d 699, 699-700 (1st Dept. 2011). In addition, a breach of fiduciary duty claim that is "merely duplicative of a breach of contract claim cannot stand." *William Kaufman Organization, Ltd. v. Graham & James LLP*, 269 A.D.2d 171, 173 (1st Dept. 2000).

Here, JTS argues that TWCV breached its fiduciary duty to JTS by misappropriating for itself the opportunity to acquire the Target Properties. JTS asserts that TWCV further breached its fiduciary duties when, after it failed to raise any funds, it imposed conditions that contravened the MOU and rendered it impossible to close any financing for the Target Properties. I dismiss JTS's breach of fiduciary claim against TWCV because JTS has not alleged facts sufficient to show that TWCV had a fiduciary duty to JTS, and, further, because the breach of fiduciary claim is duplicative of its breach of contract cause of action. *Andejo Corp. v. South Street Seaport Ltd. Partnership*, 40 A.D.3d 407, 408 (1st Dept. 2007); *see also Kaminsky v. FSP Inc.*, 5 A.D.3d 251, 252 (1st Dept. 2004) (holding that a claim for breach of fiduciary duty lacks merit where it "fails to allege conduct by defendants in breach of a duty other than, and independent of, that contractually established between the parties and is thus duplicative.")[5]

Aiding and Abetting Breach of Fiduciary Duty

"A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the

[5] In its affirmance of my September Order, the First Department stated that "TWCV breached its fiduciary duty to JTS." As the issue on appeal was the appropriateness of piercing the corporate veil in the context of a pre-judgment attachment, and the appeal was decided pre-answer, I view the First Department's statement about fiduciary duty as non-binding dicta.

breach, and (3) that plaintiff suffered damage as a result of the breach." *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dept. 2003) (citations omitted). Aiding and abetting is successfully alleged where a defendant "knowingly participates in the breach of fiduciary duty when he or she provides 'substantial assistance' to the fiduciary, which occurs 'when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur.'" *Schroeder v. Pinterest Inc.*, 133 A.D.3d 12, 25 (1st Dept. 2015) (citation omitted). Furthermore, a plaintiff must allege that the aider and abettor "had actual knowledge of the breach of duty" as constructive knowledge is "legally insufficient to impose aiding and abetting liability." *Kaufman*, 307 A.D.2d at 125. And, conclusory allegations of actual knowledge will not suffice. *Id.*

In its complaint, JTS alleges, upon information and belief, that "by virtue of its knowledge of the [MOU], UBS was fully aware of TWCV's fiduciary duties to [JTS], and that TWCV was breaching that duty by usurping for itself... the opportunity to acquire the Target Properties." JTS also states that UBS "materially assisted" TWCV's breach of its fiduciary duties to JTS "by agreeing to provide and/or to arrange for all debt and equity capital for TWCV's transaction with Sahara regarding the Target Properties."

Because JTS's breach of fiduciary duty cause of action against TWCV is not viable, its aiding and abetting breach of fiduciary duty claim is also not viable. *See Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dept. 2003) (listing the elements of aiding and abetting a breach of fiduciary duty, including "a breach by a fiduciary of obligations to another"). For this reason, JTS's cause of action against UBS for aiding and abetting a breach of fiduciary duty is dismissed. *Palmetto Partners, L.P. v. AJW Qualified Partners*, LLC, 83 A.D.3d 804, 809 (2d Dept. 2011).[6]

[6] JTS's complaint identifies Hong Kong as the location where its injuries occurred. There is no conflict between New York law and Hong Kong law except with respect to the intent and damages elements of the alleged tort. *See, e.g., Reid v. Ernst & Young Global Ltd*, 13 Misc.3d 1242(A), 2006 WL 3455259, at *5 (Sup. Ct. N.Y. Co. 2006). For tort cases, New York courts employ an

Tortious Interference with a Contract

To plead a claim for tortious interference with a contract, a plaintiff must allege: (1) the existence of a valid contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) the defendant's intentional obtainment of the contract's breach; and (4) resultant damages. *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 94 (1993). Further, it must be shown that the defendant "induce[d] or intentionally procure[d] a third-party's breach of its contract with the plaintiff" and not simply have knowledge of its existence. *Beecher v. Feldstein*, 8 A.D.3d 597, 598 (3d Dept. 2004).

Because I have found that the MOU is not a contract but is instead an "agreement to agree," JTS cannot establish the elements of a tortious interference with a contract claim. *Lau v. Lazar*, 130 A.D.3d 413, 413 (1st Dept. 2015) (dismissing tortious interference with the parties' letter of intent because the plaintiffs did not allege "'the existence of a valid contract between [themselves] and a third party.'") (citation omitted). As a result, I dismiss JTS's tortious interference with a contract claim against UBS.

In accordance with the foregoing, it is hereby

ORDERED that the motion of defendant Aamby Mauritius to dismiss the complaint based on lack of personal jurisdiction is granted; and it is further

ORDERED that the motion of defendant TWCV to dismiss the complaint is granted; and it is further

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"interest analysis" to resolve choice of law issues pursuant to which "'the law of the jurisdiction having the greatest interest in resolving the particular issue' is given controlling effect." *Shaw v. Carolina Coach*, 82 A.D.3d 98, 101 (2d Dept. 2011) (citation omitted). When the conflicting laws regulate conduct, New York courts apply the law of the jurisdiction where the tort occurred because "that jurisdiction has the greatest interest in regulating behavior within its borders." *Cooney v. Osgood Mach.*, 81 N.Y.2d 66, 72 (1993). Here, I dismiss the claim without reaching the elements of UBS's intent or damages, rendering an interest analysis unnecessary.

ORDERED that the motion of defendant UBS to dismiss the complaint is granted; and it is further

ORDERED that plaintiff JTS's complaint is dismissed in its entirety, and the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

DATE : 4/17/2017

SALIANN SCARPULLA, JSC