SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

DEEPHAVEN DISTRESSED OPPORTUNITIES TRADINGS, LTD., et al

- v -

3V Capital Master Fund, Ltd.

INDEX NO. 600610/08

MOTION DATE

MOTION SEQ. NO. 008

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion by plaintiff for summary judgment against 3V Capital and the SV Fund is GRANTED.

Inquest reference to Special Referee to hear and determine costs and expenses. all as per the attached Decision and Order.

Dated: October 27, 2011

MELVIN L. SCHWEITZER J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☑ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

DEEPHAVEN DISTRESSED OPPORTUNITIES TRADINGS, LTD., DEEPHAVEN EVENT TRADING, LTD. and MA DEEP EVENT, LTD.,	:	
Plaintiffs,	:	Index No. 600610/08
-against-	:	DECISION AND ORDER
3V CAPITAL MASTER FUND LTD.,	:	Motion Sequence No. 008
Defendant.	:	
3V CAPITAL MASTER FUND LTD.,	:	
Third-Party Plaintiff,	:	Third-Party Index No. 590803/08
-against-	:	
IMPERIAL CAPITAL LLC, POST DISTRESSED MASTER FUND, LP, POST AGGRESSIVE CREDIT MASTER FUND, LP and POST TOTAL RETURN MASTER FUND, LP,	:	
Third-Party Defendants.	:	

MELVIN L. SCHWEITZER, J.:

This is a summary judgment motion brought by plaintiffs, Deephaven Distressed Opportunities Trading, Ltd., Deephaven Event Trading, Ltd. and MA Deep Event, Ltd. (collectively, Deephaven), against defendants, 3V Capital Master Fund Ltd. (3V Capital), SV Special Situations Fund LP, SV Special Situations Master Fund, Inc. (collectively, SV Fund), Scott Stagg (Mr. Stagg), Stagg Capital Group LLC (SCG) and Stagg Capital Partners LLC (SCP) (SCG, SCP, and Mr. Stagg are referred to collectively as Stagg Capital). Plaintiff contends it is entitled to summary judgment against defendants for breach of contract due to the defendants' failure to close a transaction involving a sale of distressed trade claims.

Background

The action is for breach of contract and breach of the obligation to negotiate in good faith arising from the alleged willful breach of an agreement by defendant 3V Capital to purchase from Deephaven certain bankruptcy trade claims against Sea Containers, Ltd. and certain of its affiliated entities (Sea Containers). Both Deephaven and 3V Capital are sophisticated financial institutions with deep experience in the trading of trade claims of bankrupt entities.

Deephaven held in the aggregate the face amount (par) of € 3,911,382.88 of unsecured non-priority claims in the Sea Containers bankruptcy, having purchased those claims in November 2006 (the Claim) from another investor, Silver Point. In February 2007, using the services of third-party defendant Imperial Capital LLC (Imperial) as its broker, Deephaven made a trade with 3V Capital in which it arranged to sell the Claim for 78% of its face value. Imperial prepared, and the parties executed without change, three separate "Trade Confirmations" that contained the terms of the parties' trade – i.e price, amount, identity of the asset, purchaser name, seller name, etc. (the Deephaven Trade Confirmations). The form of purchase was also identified as "assignment," and there was no requirement that Deephaven provide any warranties or guaranties regarding the validity of the Claim and payment thereon. The only *proviso* was that the trade was subject to "negotiation, execution and delivery" of "[a] reasonably acceptable assignment agreement containing customary provisions" for a sale such as this, to be prepared by 3V Capital. 3V Capital intended to immediately resell the Claims to Post.

To expedite closing, Deephaven's counsel, rather than 3V Capital, prepared and delivered closing documents in mid-May 2007. However, after retaining those documents for several weeks without commenting on them, 3V Capital resold the Claim to third-party defendant Post (the Proposed Resale). Imperial was the broker through which both the original

trade and the Proposed Resale were conducted. In mid- June 2007, after advising Deephaven about the Proposed Resale, to avoid the cost of two separate closings (Deephaven to 3V Capital, 3V Capital to Post), Imperial, on behalf of 3V Capital, asked Deephaven to close directly with Post and then remit to 3V Capital as profit the spread between the back-to-back trades. Deephaven agreed to attempt to close with Post. However, in doing so, Deephaven did not release 3V Capital from its own contractual obligations to Deephaven.

Deephaven tried for months to close with Post, but ultimately was unable to do so. Post insisted that Deephaven provide certain warranties with respect to the Claim. Deephaven resisted because it was simply an assignee of the Claim from another assignee investor, Silver Point, and the executed Deephaven Trade Confirmations with 3V Capital did not contain any requirement that Deephaven provide warranties. Rather, the form of transfer was expressly identified as "assignment," without any provision for continuing liability of the assignor after the assignment was completed.

Post, a party with which Deephaven had no trade (Deephaven was simply attempting to close with Post on 3V Capital's behalf), argued that it was entitled to warranties pursuant to separate trade confirmations it allegedly negotiated with 3V Capital, and to which Deephaven was not a party. As it turns out, Post redrafted the unexecuted resale trade confirmation (the Resale Trade Confirmation) with 3V Capital so the document no longer mirrored the executed Deephaven Trade Confirmation.

3V Capital never agreed to the proposed modified terms of the Resale Trade Confirmation. 3V Capital objected to Post's proposed modifications because "[t]he end buyer (Post) added some things to the sell confirm that were different than our buy confirm." That issue never was resolved, and 3V Capital ultimately refused to sign a trade confirmation for the

Resale, allegedly without telling Deephaven. In all the time that Deephaven attempted to close with Post, none of 3V Capital, Post or Imperial told Deephaven that the parties to the Proposed Resale had not come to terms on the Resale Trade Confirmation or that 3V Capital actually had objected on August 23, 2007 to the language changes proposed by Post's counsel because they were different than the deal 3V Capital had with Deephaven.

There is no dispute, however, that all of the parties were in contact with Imperial about the status of the matter at this time. Nonetheless, no one told Deephaven that the trade which it was having such difficulty closing was never even confirmed in writing by 3V Capital. When the proposed trade between 3V Capital and Post was terminated due to 3V Capital's objection to Post's proposed changes to the Resale Trade Confirmation, no party relayed this information to Deephaven.

Deephaven continued to try to close with Post. Eventually, after months of trying to close with Post, both on its own and with the help of Imperial, Deephaven finally capitulated to all of Post's documentation demands. But on September 13, 2007 Post refused to close and informed Deephaven that it intended to treat its trade with 3V Capital as ineffective. Only thereafter did Deephaven turn back to 3V Capital, the only party with which it had a contract, and demanded that it close on the terms of the Deephaven Trade Confirmations. 3V Capital refused. In part, 3V Capital blamed delay, despite the fact that it was the party that brought Post to the table, and the delay was occasioned primarily by 3V Capital's failure to confirm its own Proposed Resale trade in writing. It wasn't until January 22, 2008, 8 months since the initial trade negotiations, that 3V Capital told Deephaven it was cancelling the trade. It is noteworthy that at this time both 3V Capital and Post had an increasing economic incentive to be uncooperative; the value of the Claim had declined over this extended time period.

Deephaven contends that 3V Capital remained obligated by the Deephaven Trade Confirmations to purchase the claims from Deephaven. As such, due to 3V Capital's failure to close, Deephaven contends it is entitled to damages equal to the purchase price for the Claim set forth in the Deephaven Trade Conformations, € 3,050,878.65 (to be converted to U.S. Dollars on the date of judgment), less an amount not exceeding $798,563.00, which was recovered by Deephaven when it mitigated its damages. Deephaven further contends that the remaining named defendants are all jointly and severally liable to Deephaven for those damages as successors in interest and/or related parties that have directed the actions of, or been used by, 3V Capital to evade the claims of Deephaven.

Discussion

In reviewing motions for summary judgment, courts uniformly scrutinize the facts and circumstances of the case, to determine whether relief may be granted. *See e.g Giandana v Providence Rest Nursing Home,* 32 AD3d 126, 148 [1st Dept 2006] (because entry of summary judgment "deprives the litigant of his day in court, it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues") (citations omitted); *Martin v Briggs,* 235 AD2d 192, 196 [1st Dept 1997] (in considering a summary judgment motion, "evidence should be analyzed in the light most favorable to the party opposing the motion") (citations omitted). However, general allegations of a conclusory nature that are unsupported by competent evidence are insufficient to defeat a motion for summary judgment. *Alvarez v Prospect Hospital,* 68 NY2d 320, 324–25 [NY 1986].

Not every disputed factual issue is material in light of the substantive law that governs a case. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude summary judgment." *Anderson v Liberty Lobby, Inc.,* 477 US 242, 248

[1986]. Finally, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electrical Industry Co., Ltd. v Zenith Radio Corp.*, 475 U.S. 574, 586 [1986]. To withstand a summary judgment motion, sufficient evidence must exist upon which a reasonable jury could return a verdict for the non-movant.

3V contends that no fact finder could determine that it reached a binding agreement with Deephaven or breached any purported obligations. It contends that the assignments of claim, rather than the Deephaven Trade Confirmations, were the documents that could bind the parties. It further argues that the Deephaven Trade Confirmations cannot be viewed as binding preliminary agreements because the confirmations lacked essential terms and specifically contemplated the negotiation and execution of the assignments of claim. 3V Capital also contends that in the Deephaven Trade Confirmations, Deephaven misrepresented the claims as "allowed claims," despite that fact that Deephaven did not own any allowed claims as the bar date in the bankruptcy proceeding for those claims had not occurred. 3V Capital contends that this point furthers its argument that no binding agreement existed between the parties. As such, 3V Capital argues that since the assignments of claim were never executed, 3V was under no obligation to Deephaven and thus there was no contract breach.

In considering 3V Capital's claims, the court looks to New York contract law. To establish a breach of contract under New York law a plaintiff must prove the following elements: (i) the existence of a contract; (ii) breach by the other party; and (iii) damages suffered as a result of the breach. *See e.g. First Investors Corp. v Liberty Mut. Ins. Corp.*, 152 F3d 162 [2d Cir 1998]. Summary judgment is appropriate, "Where the language of the contract is unambiguous, and reasonable persons could not differ as to its meaning." *Fulton Cogeneration Assocs. v Niagara Mohawk Power Corp.*, 84 F3d 91, 98 [2d Cir 1996] (*quoting Rothenberg v Lincoln*

Farm Camp, Inc., 755 F2d 1017, 1019 [2d Cir 1985]; *citing New York State v. Peerless Ins. Co.*, 108 AD2d 385, 390 [1st Dept 1985], aff'd, 67 NY2d 845 [1986].)

Contracts of preliminary commitment characteristically contain language reserving rights of approval and establishing conditions such as the preparation and execution of documents satisfactory to the contracting party. *Teachers Insurance and Annuity Association of America v Tribune Co.*, 670 F Supp 491, 500 [SDNY 1987]. The question is better framed as whether "there was a mutual intent to be bound to a preliminary commitment" which "required further steps." *Id.* In the inquiry, such terms of reservation are "by no means incompatible with intention to be bound." *Id.* Further, if under all of the circumstances, it appears there was an intention by both parties to be bound, "the presence of such reservations does not free a party to walk away from a deal merely because it later decides that the deal is not in its interest." *Id.*

Under New York law, absent a written agreement between the parties, "a contract may be implied where inferences may be drawn from the facts and circumstances of the case and the intention of the parties as indicated by their conduct." *Ellis v Provident Life & Accident Ins. Co.*, 3 F Supp 2d 399, 409 [SDNY 1998] (*quoting Matter of Boice,* 226 AD2d 908, 910 [3d Dept 1996]). An implied-in-fact contract is "just as binding as an express contract arising from declared intention, since in law there is no distinction between agreements made by words and those made by conduct." *Id.* (internal quotations omitted). However, a contract cannot be implied where the facts "are inconsistent with its existence . . . or where there is an express contract covering the subject-matter involved, or against the intention or understanding of the parties; or where an express promise would be contrary to law. The assent of the person to be charged is necessary, and, unless he has conducted himself in such a manner that his assent may

fairly be inferred, he has not contracted." *Id.* (*quoting Miller v Schloss,* 218 NY 400, 406, 113 NE 337 [1916]).

The Deephaven Trade Confirmations create binding and enforceable contracts between Deephaven and 3V Capital. The threshold issue is whether the parties intended to be bound under an agreement. Here, Deephaven and 3V Capital were sophisticated hedge funds that traded a Claim through Imperial. They executed the Deephaven Trade Confirmations, which contained all material terms of the trade, and the closing was subject only to execution of a reasonably acceptable assignment agreement containing customary provisions for the purchase and sale of the distressed trade claims in bankruptcy.

The conclusion that both parties intended to be bound by the agreement is further supported by 3V Capital's actions after the Deephaven Trade Confirmations were executed. 3V Capital referred to the Claim as being one of its assets and 3V Capital attempted to reassign the Claim to a third-party (Post). By its own conduct, 3V Capital admitted it knew and understood that a trade confirmation creates a binding agreement when it refused to countersign the proposed Resale Trade Confirmations with Post because "[t]he end buyer added some things to the sell confirm that were different than our buy confirm." Therefore, not only did 3V Capital act as an owner under the Deephaven Trade Confirmations when it resold the Claim to Post, but 3V Capital obviously considered this very issue when it refused to sign the Resale Trade Confirmations. It did not want to be bound by language which was not the same as in the Deephaven Trade Confirmations.

3V Capital's argument that Deephaven misrepresented the sale, through attempting to sell something it did not own, because the Claim has not yet been allowed, is without merit. As the record here clearly shows, everyone knew at the time of both trades – the Deephaven/3V

Capital Trade and the Proposed Resale between 3V Capital and Post – that the bar date for filing claims in the Sea Containers bankruptcy case had not yet passed. Consequently, no claims had been "allowed" in the bankruptcy case. All of the parties were sophisticated hedge fund investors trading millions of dollars in distressed debt, so each obviously closely followed the bankruptcy cases in which they were investing. It is unreasonable for 3V Capital to have interpreted the word "allowed" to mean the claims that already had been allowed.

Under clearly established New York law, Deephaven and 3V Capital had entered into a binding and enforceable contract to close the deal on the Sea Containers Claim. 3V Capital breached that contract when it refused to close with Deephaven.

3V Capital contends that certain of the named defendants are not liable for the loss to Deephaven as successors in interest. 3V Capital contends that Deephaven's amended complaint lacks a single allegation relating to the successor liability theory on which Deephaven now seeks summary judgment against SV Fund, Stagg Capital and Scott Stagg individually. 3V Capital asserts that a party may not raise new theories of liability in a summary judgment motion that it did not plead in its complaint. However, in its amended complaint Deephaven both named each these parties as well as introduced its successor liability theory. 3V Capital's defense is therefore unsuccessful.

The defendants argue that the Court cannot hold the SV defendants and SCG defendants liable because Deephaven's request disregards corporate law and the hedge fund's master-feeder structure as there is no evidence that corporate formalities were disregarded or that one entity was the alter ego of another. 3V Capital contends that each entity served a specific function as part of the master feeder structure. 3V Capital argues that there was no complete continuity of ownership between the companies. Deephaven disagrees.

Under New York law, a corporation may be held liable as a successor company for breach of its predecessor if: (1) it expressly or impliedly assumed such liability; (2) there was a consolidation or merger of the two corporations; (3) the successor corporation was a mere continuation of the predecessor, or (4) the transaction was entered into fraudulently to escape such obligations. *BT Americas Inc. v Prontocom Marketing, Inc.*, 18 Misc 3d 1141 [NY Sup NY Co 2008], *citing Schumacher v Richard Shear Co.*, 59 NY2d 239, 244-45 [1983]; *Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 575 [1st Dept 2001]; *ET Duct Inc. v Allstate Mechanical, Inc.*, 2010 NY Slip Op 30114 [NY Sup Suffolk Co. 2010]; *Cargo Partner AG v Albatrans, Inc.*, 352 F3d 41 [2d Cir 2003].

The undisputed evidence clearly demonstrates as a matter of law that the SV Fund entities are successors in interest to 3V Capital. Mr. Stagg was the managing partner of 3V Capital. Mr. Stagg caused the SV Fund to be formed, and then transferred tens of millions of dollars of 3V Capital assets to the SV Fund. There was no consideration paid by the SV Fund for the 3V Capital assets, there was no discernable business purpose for this transaction other than to attempt to evade creditors of 3V Capital and there was no provision made for 3V Capital's creditors before it disposed of those assets.

Further and conclusive evidence of a successor relationship between 3V Capital and the SV Fund can also be gleaned from the Schedule 13D filed with the U.S. Securities and Exchange Commission, signed by Mr. Stagg (including, as required by the rules for that form, a certification that the information contained therein is true, complete and correct), which says SV Fund is a successor in interest to 3V Capital. Indeed, Mr. Stagg testified that there even exists litigation where 3V Capital has been replaced as the plaintiff by SV Fund, and he also admitted that SV Fund is actually paying for the costs and legal fees of this case.

Discovery also disclosed email communications regarding the transfer of 3V Capital's assets and liabilities in bulk to the newly formed SV Fund. The communications reveal that the plan was for 3V Capital to dissolve, and for SV Fund to take over all of its assets and liabilities. Even the investors of 3V Capital were the same as those in SV Fund. Further, it was determined that the companies were so related and intertwined that the transfer of the securities between the two companies was deemed a non-taxable event. Finally, Mr. Stagg testified that SV Fund has approximately $40 million in assets, while at the same time 3V Capital's counsel has informed lawyers for the parties here that 3V Capital has no assets. Clearly, 3V Capital was subsumed by the SV Fund in all respects. SV Fund is merely continuing the business of 3V Capital under a new name.

The court does find merit, however, in the argument that there is no evidence to support a finding of liability against Mr. Stagg. It is undisputed that there is no evidence which warrants piercing the corporate veil nor is there any evidence that Mr. Stagg personally committed a tort. As an individual cannot serve as a company's successor, Deephaven's argument that Mr. Stagg is personally liable because he was personally a successor to 3V Capital is without merit. Further, Mr. Stagg's individual status also prevents him from being held liable under the doctrine of de facto merger. Accordingly, Deephaven fails to provide any support on which this court should find personal liability. Summary judgment against Mr. Stagg is denied. Further, Deephaven provides no specific evidence on which the court should find the Stagg Capital defendants liable. Summary judgment against Stagg Capital is denied as well.

Based on the foregoing, summary judgment is granted against 3V Capital and the SV Fund defendants on the issue of breach of contract. However, as to the damages relating

thereto, further clarification is necessary which will require a special referee to report on this point.

Conclusion

Accordingly, it is

ORDERED that summary judgment is granted against 3V Capital and the SV Fund defendants. Upon the filing by the plaintiff with the Trial Support Office (Room 119) of a copy of this order with notice of entry and a note of issue, and the payment of the fee therefor by the plaintiff, the Special Referee Clerk (Rm 119M) shall place this matter upon the Inquest calendar to hear and determine the amount of costs and expenses (including reasonable attorneys fees) incurred by plaintiffs in enforcing the Guaranty Agreements herein, and in preserving their rights thereunder. *See* Section 1.8 of the Guaranty Agreements.

Dated: October 27, 2011

ENTER:

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.