Perella Weinberg Partners LP v Specialized Loan Servicing LLC
2012 NY Slip Op 33628(U)
November 21, 2012
Sup Ct, NY County
Docket Number: 600033/2011
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 600033/2010
PERELLA WEINBERG PARTNERS LP
vs.
SPECIALIZED LOAN SERVICING LLC
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 2/28/12
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 35-1 — 35-8, 36, 37
Answering Affidavits — Exhibits _____ | No(s). 46 — 50-1
Replying Affidavits _____ | No(s). 53 — 54-7

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 11/21/12

SHIRLEY WERNER KORNREICH J.S.C.

_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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PERELLA WEINBERG PARTNERS LP,

Plaintiff,

Index No. 600033/2011
DECISION & ORDER

-against-

SPECIALIZED LOAN SERVICING LLC,

Defendant.

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KORNREICH, SHIRLEY WERNER, J.:

In this action to recover fees and expenses allegedly owed pursuant to a contract, plaintiff Perella Weinberg Partners LP (Perella) moves for summary judgment against defendant Specialized Loan Servicing LLC (SLS) and to strike defendant's jury demand. SLS opposes.

I. Background

The following account is based on a joint statement of undisputed facts, a letter agreement between Perella and an entity known as The Winter Group dated November 6, 2007, submitted by both parties (complaint, exhibit A; affirmation of Charles R. Jacob III, August 24, 2011 [Jacob affirmation], exhibit 1 [the Contract]), and the Amended and Restated Limited Liability Company Operating Agreement of SLS, dated January 1, 2005, submitted by both parties (affirmation of Edward P. Grosz, July 25, 2011 [Grosz affirmation], exhibit I; affidavit of Toby Wells, sworn to August 22, 2011, exhibit 1 [the Operating Agreement]).

SLS is a Delaware limited liability company with a principal place of business in Highlands Ranch, Colorado (complaint ¶ 2; answer ¶ 2). In 2007, two companies, Terwin Holdings LLC (Holdings) and Terwin Employees, LLC (collectively, Terwin), directly or

indirectly owned an 82.35% equity interest in SLS (joint statement of undisputed facts ¶ 17). These two entities, along with other companies (including SLS), were often referred to collectively as "The Winter Group" (joint statement ¶¶ 8, 15). Terwin was owned by several persons, including a United States affiliate of Shinsei Bank Ltd. (Shinsei), a creditor of Terwin (*id.* at ¶¶ 19–20). Pursuant to a pledge agreement dated October 27, 2003, Shinsei had a security interest in Terwin's equity stake in SLS (*id.* at ¶¶ 22–23).

Managerial authority over SLS was vested in a five-person board of directors, of which Winter was the non-executive chairman (Operating Agreement, §§ 4.1[a] & 4.2[b]; joint statement ¶ 9). The Operating Agreement provided that while the board could delegate authority to any person, it could only act either by a majority vote at a meeting or by unanimous written consent (Operating Agreement §§ 4.3[a] & 4.5). Neither the chairman of the board nor any other director, in such capacity, had authority to act on behalf of SLS (*id.* at §§ 4.2[c] & 4.4).

In 2007, Terwin was experiencing financial difficulties and approached Perella for assistance in restructuring The Winter Group's capital obligations (joint statement ¶ 16). By a letter agreement dated November 6, 2007, Perella was engaged to act as the financial advisor and investment banker for "the Company," defined in the Contract to mean Terwin and its direct and indirect affiliates, including subsidiaries (Contract 1).

Pursuant to the Contract, Perella was to provide financial advisory and investment banking services, restructuring services and sale services (*id.* at 1–3). The Contract provided that the Company was to pay Perella a monthly financial advisory fee of $125,000 (*id.* at 4). In addition, if within twelve months after the termination of Perella's engagement "another person" acquired a "material portion of capital stock or assets of the Company or any of its subsidiaries"

in a transaction "outside the ordinary course of the Company's business," then Perella would be entitled to a fee of at least $2 million (*id.* at 5). Moreover, should a "Restructuring"[1] occur within such twelve month period on terms "substantially similar" to those previously negotiated by Perella, then Perella would be entitled to a Restructuring Fee, also of at least $2 million (*id.*). In addition, the Contract provided that Perella be reimbursed for reasonable out-of-pocket expenses (*id.*).

Terwin's chief executive officer, Richard D. Winter, Jr., signed the Contract on behalf of Holdings, Terwin Employees LLC ***and their affiliates*** as set forth on the schedule attached to the Contract, Schedule I (*id.* at 13; joint statement ¶ 19). SLS was listed on Schedule I (Contract 15). The page preceding the signature page contained the following representation:

> You acknowledge the Company's agreement with the terms stated herein, and acknowledge that the Company has reviewed and agreed to be bound by the terms of this Agreement, and that each of Company ***and its affiliates (including but not limited to their subsidiaries) set for [sic] forth on Schedule 1 [sic]*** attached hereto have all requisite power and authority to enter into this Agreement on behalf of such Company ***and affiliates***, and have been duly and validly authorized to do so, as evidenced by the signatures affixed hereto (*id.* at 14). [emphasis added]

At the time he signed the Contract, Winter was the non-executive Chairman of the Board of SLS (joint statement ¶ 19).

Perella's engagement lasted until July 31, 2008, when it was terminated by a letter from

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[1] Defined to mean "any recapitalization or restructuring of the Company's preferred equity and/or debt securities and/or other indebtedness . . . including pursuant to any repurchase, exchange, conversion, cancellation, forgiveness, retirement, plan, solicitation of consents, waivers, acceptances, authorizations and/or a material modification or amendment to the terms, conditions or covenants thereof" (Contract 2).

Terwin (*id.* at ¶ 14). That month Terwin defaulted on its loan from Shinsei (*id.* at ¶ 29). Approximately five weeks later, Lexia LLC, a wholly-owned subsidiary of Shinsei, acquired Terwin's equity interest in SLS through an Article 9 auction (*id.* at ¶ 28).

During the course of its engagement, Perella had sent all bills to Terwin, not SLS (*id.* at ¶¶ 35, 37). On November 10, 2008, having determined that Terwin was unable to pay, Perella sent a bill to SLS for $2,568,767, reflecting unpaid expenses, three-and-a-half months of monthly fees, and a $2 million transaction fee (joint statement ¶ 38; complaint exhibit B). SLS refused to pay, claiming that it was not a party to the Contract.

II. Procedural History

Perella commenced the present action in early 2010, seeking payment on its bill plus attorneys' fees, under a number of legal theories. Prior to discovery, SLS moved for summary judgment dismissing the complaint. In its November 10, 2010 decision and order, this court dismissed Perella's claims of promissory estoppel and account stated, but preserved the other claims.

After discovery, plaintiff filed a note of issue and certificate of readiness, seeking a non-jury trial. Defendant filed a demand for a jury trial pursuant to CPLR 4102(a). Soon after, plaintiff made the instant motion. Defendant separately moved for partial summary judgment to dismiss plaintiff's claim for attorney's fees and its cause of action for quantum meruit. In an order dated November 3, 2011, the court denied defendant's motion as to the quantum meruit claim, but granted it as to the claim for attorney's fees.

III. Plaintiff's Submissions

The Sandler Letter

Plaintiff has submitted a letter from Sandler O'Neill Partners (Sandler) addressed to SLS at 45 Rockefeller Plaza in New York City, dated May 24, 2007 (Grosz affirmation, exhibit K [the Sandler Letter]). The letter proposes terms pursuant to which Sandler would perform certain services for SLS (*id.*). The letter is signed on behalf of SLS by Richard Winter as "CEO" (*id.* at 5).

Additionally, plaintiff has submitted a document entitled "Unanimous Written Consent in Lieu of Meeting of the Board of Directors of Specialized Loan Servicing LLC", dated June 7, 2007 (Grosz affirmation, exhibit L). The document has been redacted, but an unredacted portion states that the board of SLS authorizes the appointment of Sandler as a placement agent pursuant to the Sandler Letter (*id.* at 2). The document is signed by John Beggins and Toby Wells as directors, but the signature lines for the three other directors are blank (*id.* at 5).

The Soros Term Sheet

Plaintiff, also, has submitted a term sheet outlining a proposed transaction between Holdings and its subsidiaries and Soros Strategic Partners LP (Soros) (Grosz affirmation, exhibit M [the Soros Term Sheet]). The term sheet is signed on behalf of Holdings by Winter as "CEO" (*id.* at 17). The confidentiality and exclusivity provisions of the term sheet purport to bind "The Winter Group," defined as Holdings and its subsidiaries (*id.* at 3, 12–13).

Deposition of Richard D. Winter, Jr.

Plaintiff has submitted excerpts from the deposition of Winter taken on April 7, 2011 (Grosz affirmation, exhibit F). Winter testified that during his tenure at SLS, he could not recollect ever being authorized to perform any act that would bind the company (43:6–12). He confirmed that he signed the Sandler letter agreement, that he had discussed the letter with senior

members of SLS management prior to signing it, and that at the time, he believed he had authority to do so since Terwin was the majority shareholder of SLS (46:23–15, 48:20–49:12, 52:9–12, 56:16–21). Sandler performed services pursuant to the letter agreement (52:18–25).

Winter further testified that at the request of John Beggins, the chief executive officer of SLS, he approached Shinsei to propose that they extend some form of financing to defendant (70:23–71:6). Perella, at times, was involved in those discussions as The Winter Group's conversations with Shinsei covered multiple topics, including SLS's particular needs (175:18–176:21). As to Soros, he testified that SLS management was aware of the discussions with Soros, but could not recall whether SLS was aware of the exclusivity provisions or whether the SLS board adopted a resolution authorizing him to engage in such discussions (87:2–11, 90:23–91:8, 93:24–94:4). When asked whether it had been his understanding that he was binding SLS to the Soros term sheet's exclusivity provisions, he responded "I don't think I thought about it" (91:13–19).

Winter testified that at the first meeting between The Winter Group and Perella, he did not believe that anyone from SLS was present, but that at some point, he communicated to SLS that Perella would provide services that would benefit the entire Winter Group, including SLS (105:7–9, 107:14–108:18). He stated that the decision to engage Perella was made by "senior executives at The Winter Group" (109:2–9). He also discussed engaging Perella with SLS management (109:13–20). He testified that at some point, he asked SLS to communicate directly with Perella to allow Perella to conduct "due diligence" on the company (115:5–19). Winter estimated that after Perella became involved, a substantial majority of the communications between The Winter Group and Shinsei was done through Perella (132:7–133:3).

Regarding the Contract, Winter stated that the basis for his representation that the Schedule I entities were authorized to enter into the agreement was his position as "CEO of the group" (151:6–17). When asked if he understood that he was signing on behalf of the Schedule I entities, he replied he did not know if he thought about it like that, but that his feeling was that he was signing for the firm and all of its entities (152:3–23). He did not recall if he spoke with anyone at SLS regarding the Contract and thought he did not discuss its terms with anyone at SLS (152:24–153:7).

Deposition of Toby Wells

Plaintiff has submitted excerpts from the April 28, 2011 deposition of Toby Wells (Grosz affirmation, exhibit G [Wells deposition]). Wells testified that he was the chief financial officer of SLS during the events in question and that at the time of deposition, there were individuals serving as chief executive officer, chief operating officer and chief information officer, respectively (4:17–23, 7:7–24).

Wells stated that he did not see the Sandler agreement before it was signed, but that "management was on board and moving forward with Sandler" (40:2–15). He did not recall discussing the agreement with Winter, but stated that the board discussed it (41:21–25, 42:19–43:3). Wells confirmed that Sandler performed certain services for SLS (43:4–44:19).

Wells further testified that SLS spent time explaining its business to Soros when Soros was contemplating making its investment as described by the term sheet (95:12–96:22). Wells acknowledged that he must have received the Soros Term Sheet (96:8–9).

Wells testified that SLS would provide information it normally regarded as confidential to third-parties at the request of Terwin (123:23–124:3, 124:16–24). He stated that SLS provided

such information to Perella without a separate confidentiality agreement between defendant and plaintiff (123:10–19, 124:8–15).

Wells also testified that at one point, SLS had advance facilities from JP Morgan Chase (Chase) and Wachovia. These facilities were consolidated (153:19–21). SLS then sought a working capital line from Shinsei, which Shinsei wanted secured by previously unencumbered assets (144:6–10, 220:17–20). The lenders on the existing consolidated advance facility objected and insisted that any working capital line be subordinated to their own facility (144:10–13, 220:23–221:4). Ultimately, SLS persuaded Shinsei to assume the consolidated advance facility and extend its own working capital line for SLS's benefit (146:20–24, 144:14–16, 144:20–22). The establishment of these credit lines benefitted SLS (155:24–156:2).

According to Wells, SLS's negotiations with Shinsei regarding the credit facilities was carried out primarily by himself, Beggins, and various attorneys (138:19–23). While he stated that SLS would provide updates to Perella about the status of those negotiations, he denied that Perella ever gave any advice or feedback to SLS regarding the contemplated deals or that SLS ever requested any (134:8–135:12). However, in an email dated December 30, 2007, Verost, Perella's lead employee, asked Wells to call him to "review Chase's issues with the proposed SLS facility," as he was planning to speak to Shinsei's advisors and wanted to properly present the issue (Grosz affirmation, exhibit Z). Wells explained that Verost would occasionally ask for information about issues that involved Shinsei, in order to answer Shinsei inquiries (214:10 –215:4).

An email chain between Wells and Verost on December 31, 2007 shows that Verost was on a telephone call between Wells and Chase. After the call, Verost wrote: "Let me know as

things develop. I want to make sure we are coordinated" (Grosz affirmation, exhibit AA). Wells responded, "Agreed, please let us know when you hear from [S]overeign" (*id.*). Wells explained that Sovereign Bank, which was both a participant in the Chase facility to SLS and also a creditor of Terwin, was considering withholding its consent to an agreement on the facility due to Terwin's financial difficulties (217:9–16). Since Sovereign had decided to link the two issues, coordination between SLS and Terwin, via Perella, was important (217:17–21, 218:6–219:2).

In another email exchange dated January 2, 2008, John Tartaglia, a Terwin executive, proposed that Verost be on a call between Wells and Shinsei regarding Shinsei's proposed working capital line and Chase's objections thereto, and Wells agreed (Grosz affirmation, exhibit BB). Wells testified that he neither requested nor objected to Verost's involvement, which he imagined might have assisted Perella in their dealings with Shinsei on behalf of The Winter Group (222:4–9).

Deposition of Adam Verost

Plaintiff has submitted excerpts from the deposition of Adam Verost, taken on April 29, 2011 (Grosz affirmation, exhibit H). Verost testified that Perella's position is that the phrase "another person" regarding its contract's tail-period and fee provision, included Lexia LLC, the wholly-owned subsidiary of Shinai which purchased SLS (179:24–180:3).

The Termination Letter

Plaintiff has submitted a July 31, 2008 letter from Terwin to Perella (Grosz affirmation, exhibit JJ [the Termination Letter]). The letter states that Terwin had decided to terminate the Contract. It continues, "As you know, our present circumstances simply did not allow us to continue your engagement . . . ; however, we would be happy to discuss alternative arrangements

going forward."

Plaintiff's Other Submissions

Plaintiff has submitted a document that appears to be a printout of a slide presentation entitled "Discussion With SLS Management", dated November 20, 2007 (Grosz affirmation, exhibit S). Plaintiff's counsel affirms that this was the printout of a presentation given by Perella to SLS at its Colorado offices on or about November 20, 2007 (Grosz affirmation ¶ 20). The document notes that The Winter Group recently retained Perella as its financial advisor, that "the preservation of the SLS business unit is a central goal of all the Company's discussions" and that The Winter Group was "highly focused on maintaining the existing lines of credit at SLS" (*id.* at 3). The document states that to accomplish that goal, The Winter Group had approached Sovereign Bank and Shinsei with proposals to provide credit to SLS (*id.*). It states that after securing credit for SLS, The Winter Group would then seek an equity infusion of at least $25 million (*id.*).

In addition, plaintiff has submitted a January 14, 2008 email from Verost to Winter and other people at The Winter Group with an attachment (Grosz affirmation, exhibit KK). The email states, "Please see attached document for our conversation at 1:30" (*id.* at 1). Attached is a slide presentation entitled "Update Regarding Recent Chanin Discussions," dated January 14, 2008. The presentation notes that Chanin Capital Partners (Chanin), which was serving as Shinsei's financial advisor (*see* Wells deposition 174:6–7), had suggested that in the event no agreement could be reached with its various creditors, Shinsei would be interested in acquiring its collateral through an Article 9 proceeding (Grosz affirmation, exhibit KK at 3). The document proceeds to compare the advantages and disadvantages of an Article 9 sale and a

proceeding under Section 363 of the Bankruptcy Code, and speaks to issues relating to Chanin's proposal (*id.* at 3–4).

Finally, plaintiff has submitted a number of emails:

1. On October 20, 2007, Tartaglia asked Wells to "review the [SLS] model" with employees of Perella. On October 22, Wells confirmed that he had done so (Grosz affirmation, exhibits N & O).

2. On November 18, 2007, Tartaglia requested certain information from Wells "in an effort to get Shinsei to provide a $20mm line to SLS" (Grosz affirmation, exhibit P).

3. An email exchange on November 19, 2007, shows that Perella, through The Winter Group, requested certain information from SLS "for the Shinsei line" (Grosz affirmation, exhibit Q). SLS sent the requested information to The Winter Group (*id.*).

4. On November 20, Tartaglia wrote to Wells that he would like him to explain certain issues to Verost (Grosz affirmation, exhibit R).

5. On December 6, 2007, John Lott, a Terwin executive, requested that SLS provide Perella a certain financial analysis, at the request of Chanin (Grosz affirmation, exhibit W).

6. On December 14, 2007, Wells sent his comments on a term sheet for the proposed Shinsei credit facility to Verost and Tartaglia (Grosz affirmation, exhibit X).

7. On December 18, 2007, Wells wrote to Tartaglia concerning the Shinsei facility term sheet (Grosz affirmation, exhibit Y). Tartaglia forwarded that email to

Verost, writing "Adam - I will call you on this" (*id.*).

8. On March 20, 2008, Verost sought to schedule a conference call with representatives of The Winter Group, SLS, Shinsei and Chanin "to discuss SLS's projected funding needs" (Grosz affirmation, exhibits DD & EE).

V. Defendant's Submissions

Deposition of Adam Verost

Defendant has submitted the entire April 29, 2011 deposition of Adam Verost. Verost testified that at a certain time, Perella was aware that there was a possibility that entities owned by The Winter Group "could run out of cash" and could file for bankruptcy (Jacob affirmation, exhibit 3 [Verost deposition], 128:23–129:8). While he denied that he knew that "companies with Terwin in their name were all in danger of going out of business," he confirmed that The Winter Group had requested more time to make payments "to help with their current cash flow" and that Perella allowed The Winter Group to defer such payments (*id.* at 154:10–157:8).

Defendant's counsel presented Verost with certain emails between himself and another Perella employee, which indicated that the employee had made a last minute decision to take some days off from work to travel to Dallas to search for a job, without prior notice to Verost and without providing Verost a means to get in touch with him (Jacob affirmation, exhibit 5 (exhibits B & C); 8:7–9:11). In the email exchange, Verost had called the employee's conduct "unprofessional" and "unfair to The Winter Group" (Jacob affirmation, exhibit 5 (exhibit C)), and the employee had stated that "our analyst is clueless" (*id.*). Verost confirmed that the analyst referred to was a third Perella employee working on The Winter Group matter (10:9–11).

Winter Affidavit

Defendant has submitted an affidavit of Winter, sworn to on June 1, 2010. Winter avers that one of the purposes of engaging Perella was for Terwin to avoid a foreclosure by Shinsei on its equity interest in SLS (Jacob affirmation, exhibit 12 [Winter affidavit] ¶ 7).

Deposition of Richard Winter

Defendant has submitted the entire April 27, 2011 deposition of Richard Winter. Winter testified that as of June 2008, Verost was still working with The Winter Group, though more senior members of Perella were no longer active on the assignment (Jacob affirmation, exhibit 8 [Winter deposition] 214:12–215:6). Winter denied that Perella reduced its efforts on The Winter Group engagement, or that they had ceased doing work for The Winter Group by the time Winter himself left the company (215:7–15).

VI. Discussion

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 [1979]). A failure to make such a showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]). However, if a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez, supra*, 68 NY2d at 324; *Zuckerman, supra*, 49 NY2d at 562). The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the

motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept. 1997]). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat summary judgment (*Zuckerman, supra*, 49 NY2d, at 562). Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

> A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. An agreement is unambiguous if the language used has a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion. On the other hand, a contract is ambiguous if on its face it is reasonably susceptible of more than one interpretation. If the court concludes that a contract is ambiguous, it cannot be construed as a matter of law.

China Privatization Fund (Del), L.P. v Galaxy Entertainment Group Ltd., 95 AD3d 769, 770 (1st Dept 2012) [internal quotation marks omitted].

The Contract and SLS

Perella maintains that SLS is bound by the Contract pursuant to its explicit terms. It argues that the Contract defined "the Company" to include the subsidiaries and affiliates of Terwin and represented that the signatory on behalf of Terwin also was signing on behalf of all entities listed on Schedule I, which included SLS. In reply, defendant contends that Winter was not authorized by SLS to sign the Contract or otherwise bind SLS to an agreement with Perella. Defendant argues that Winter was merely a director of SLS and according to the terms of the Operating Agreement, possessed no inherent power to make decisions for defendant. Perella has not produced any evidence showing that the SLS board explicitly authorized Winter to sign the

Contract on defendant's behalf. Plaintiff, nevertheless, maintains that certain undisputed facts require this court to find the Contract binding on SLS as a matter of law, based on theories of actual authority, apparent authority, and ratification.

Actual Authority

Plaintiff first argues that SLS implicitly gave Winter actual authority to act as its agent by allowing him to act on its behalf on other occasions. Specifically, it contends, SLS allowed him to sign the Sandler Letter and the Soros Term Sheet and sought his assistance in obtaining additional credit from Shinsei.

It is well-established that agency can be created by any "conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account" (Restatement [Second] of Agency § 26 [1958]). To prevail on its motion for summary judgment, plaintiff must present evidence of conduct, on the part of the principal, so clear and unambiguous that no reasonable person could doubt that it constituted a delegation of actual authority.

Plaintiff has failed to make such a showing. The record does not clearly demonstrate that Winter saw himself as defendant's agent. In his deposition testimony, Winter stated that he believed that his authority to act for SLS derived from his positions at Terwin. He further testified that he did not recollect previously being authorized to perform any act that would bind defendant. A person acting for his own benefit cannot claim that he was an agent of another (*see Art Finance Partners, LLC v Christie's Inc.*, 58 AD3d 469, 471 [1st Dept 2009]). Moreover, while Perella has presented evidence that SLS ratified the Sandler Letter, there is no evidence showing that SLS similarly ratified the Soros Term Sheet or took any steps that could have led

Winter to believe that it considered itself bound thereby. Even if it had, such conduct did not make a noticeable impression on Winter, who has stated that he simply did not think about whether SLS was bound to the Soros Term Sheet. Plaintiff has failed to make a *prima facie* showing that Winter possessed actual authority.

Apparent Authority

Plaintiff further argues that Winter had apparent authority to enter into contracts on behalf of SLS.

> Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority. ..." the existence of 'apparent authority' depends upon a factual showing the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal, not the agent." Moreover, a third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable." [citations omitted]

(*Hallock v State*, 64 NY2d 224, 231 [1984]). To prevail, then, plaintiff must show that SLS engaged in conduct such that it was reasonable for a third party to infer that Winter was SLS's agent.

Plaintiff fails to meet its burden of showing that Winter was clothed with apparent authority when he signed the contract. Perella maintains that it was reasonable to assume that Winter had the authority to enter into contracts on behalf of SLS because of Winter's position as "SLS' chairman . . . CEO of SLS' ultimate parent and the dominant personality with respect to the business of SLS and The Winter Group" (plaintiff's brief 20). While it is true that an officer of a company is presumed as a matter of law to have the authority to enter into contracts on the company's behalf (*Goldston v Bandwidth Tech. Corp.*, 52 AD3d 360 [1st Dept 2008]; *Odell v*

704 Broadway, 284 AD2d 52 [1st Dept 2001]), this presumption does not extend to directors or chairmen, whose offices do not normally grant them authority to act for the company.

Further, the record shows that defendant had a full complement of the usual corporate officers who were clearly active in the company, of which some or all were part owners (Operating Agreement 38 & Schedule A; Wells deposition 7:7–24). Indeed, the record indicates that employees of Perella had contact with at least Toby Wells prior to entering into the Contract (*see* Grosz affirmation, exhibits N & O). As such, this case is easily distinguishable from *Palmerton v Envirogas*, 80 AD2d 996 (4th Dept 1981), which found that an individual who was the president, treasurer, chairman of the board, attorney and majority shareholder of a corporation he ran out of his home, was clothed with apparent authority to bind that corporation. The claim that Winter was such a "dominant personality" of SLS is not sufficient. The mere fact that Winter himself represented that he was authorized to sign the Contract is not dispositive, as an agent cannot imbue himself with apparent authority by his own acts (*Hallock*, 64 NY2d at 231).

Ratification

Perella finally argues that even if Winter were not an agent of SLS at the time he signed the Contract, SLS subsequently accepted the benefits of the Contract, thereby ratifying it (plaintiff's brief 21–23). Ratification is a person's express or implied retroactive adoption of the unauthorized acts of another on his behalf (*Holm v C.M.P. Sheet Metal, Inc.*, 89 AD2d 229, 232 [4th Dept 1982]). A party can ratify an unauthorized contract by accepting the benefits thereof or by failing to repudiate it (*Cologne Life Reins. Co. v Zurich Reins. (N. Am.), Inc.*, 286 AD2d 118, 126–27 [First Dept 2001]) . However, where a party accepts the benefits of an unauthorized transaction without full knowledge of the material facts of such transaction, no ratification occurs

(*id.* at 128; *Holm*, 286 AD2d at 233). Assent to the transaction must be clearly established and may not be inferred from doubtful or equivocal acts or language (*Holm*, 286 AD2d at 233). To prevail on this theory, plaintiff would need to show that SLS was aware or should have been aware that Perella believed it was working for SLS as well as The Winter Group, and that SLS accepted the benefits of this arrangement without repudiating it.

Here, too, plaintiff's submissions do not meet the requirements for summary judgment. On the record submitted, plaintiff's evidence can be construed as merely demonstrating SLS's cooperation with the reasonable requests of its parent company. To be sure, that there was a fair amount of interaction between plaintiff and defendant. However, much of it appears to have occurred at the behest of Terwin (*see, e.g.*, exhibits Q, R, W, BB). Wells's testimony repeatedly stresses that SLS viewed its interaction with Perella primarily as a courtesy to Terwin and considered Perella's participation in defendant's negotiations with Shinsei as necessary for purposes of coordination with Terwin, who was attempting to negotiate a restructuring with its creditors, of which Shinsei was one. Wells was adamant that SLS did not seek any advice from Perella regarding the Shinsei deals and that Perella did not provide any. Certain parts of the record suggest otherwise (*see* Grosz affirmation, exhibits X, DD & EE), which does raise an issue of fact better left for trial. The fact that SLS provided Perella with confidential information without a separate confidentiality agreement could merely signify that SLS was cooperating with the hired agent of its parent company (*see* Wells deposition 123:10–124:7). Moreover, while plaintiff's submissions show that SLS and Shinsei ultimately reached a deal on the credit facilities, they give no indication that Perella was anything more than a passive observer. Nothing in plaintiff's submissions make it clear that SLS knew or should have known that

Perella believed that an agreement existed between them, or that Perella even rendered services to SLS that benefitted it. In sum, a material issue of fact exists as to whether the Contract binds SLS.

Jury Demand

The Contract contains a waiver of the right to a jury trial (Contract 10). However, where, as here, the contract's validity is questioned, such a waiver is unenforceable (*Wells Fargo Bank, N.A. v Stargate Films, Inc.*, 18 AD3d 264, 265 [1st Dept 2005]). Plaintiff's motion to strike defendant's jury demand, therefore, is denied.

Fees and Expenses

There is the further question of whether plaintiff is entitled to the fees and expenses it seeks. Perella not only claims that its performance under the Contract entitles it to reasonable expenses and the unpaid monthly fees, but also that Shinsei's foreclosure of Terwin's equity interest in SLS qualifies as both an "acquisition by another person of a material portion of capital stock or assets of the Company" *and* as a "Restructuring . . . consummated on terms substantially similar to those negotiated by Perella" (Contract 5), thereby entitling it to a fee of $2 million under either of those Contract provisions (plaintiff's brief 14–15).

Defendant has raised a number of arguments in opposition, some of which can be disposed of here. There is no defense of estoppel or waiver where, as here, no detrimental reliance has been shown (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgmt., L.P.*, 7 NY3d 96, 106–07 [2006]). The Contract is not illusory as the various fees described in the Contract were in consideration of Perella's services. Assuming that Winter was authorized to sign for each Schedule I entity, the Contract as written is binding upon those entities, regardless

of any arguments of practical construction (*Perella Weinberg Partners LP v Specialized Loan Servicing LLC*, Sup Ct, New York County, Kornreich, J., Nov. 10, 2010, Index No. 600033/2010 p. 14). Hence, defendant's attempts to impugn the Contract's validity are without merit.

Defendant attempts to argue that the termination of Perella's engagement was for justifiable cause and that Perella, therefore, is not entitled to fees under the Contract (defendant's brief 23; Contract 4). Defendant's only substantive support for its claim is the email exchange between Verost and the Perella employee over that employee's impromptu trip to Texas. Defendant has not shown that The Winter Group was in any way aware of or felt itself prejudiced by that incident or viewed Perella's work as sub-par. While The Winter Group may not have achieved its hoped-for objective in the Perella engagement, that alone does not show that Perella's performance justified its termination. The Termination Letter itself cites no such concerns. Defendant has failed to raise a triable issue of fact as to its cause allegation.

Having failed to raise any particular objections to plaintiff's demand for the unpaid expenses and monthly fees, the Contract entitles Perella to those items. Furthermore, the Contract language "acquisition . . . of a material portion of . . . assets of the Company" in a transaction "outside the ordinary course of the Company's business" unambiguously encompasses the acquisition by Shinsei's subsidiary of Terwin's equity interest in SLS through an out-of-court foreclosure proceeding. However, as to the transaction fee, as previously held, it is unclear whether the term "another person" was meant to include a shareholder and creditor of Terwin such as Shinsei (*id.* at p. 13). Aside from the conclusory and self-interested excerpt from the Verost deposition, Perella has presented no evidence clarifying the issue.

Moreover, Perella's theory that the Shinsei foreclosure constituted a qualified

"Restructuring" under the contract is not compelling. A foreclosure following a default is not ordinarily considered a "restructuring" of the debtor's obligations, much less a "recapitalization" thereof. This theory fails.

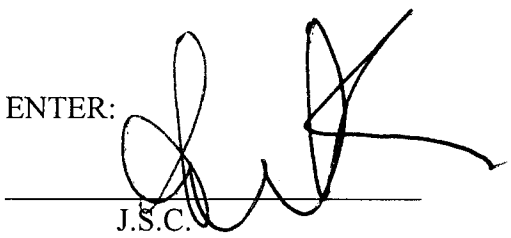
In conclusion, questions of fact exist as to (i) whether Winter had actual or apparent authority to bind SLS to the Contract; (ii) whether SLS ratified the Contract through its subsequent conduct; and (iii) whether Shinsei qualifies as "another person" for purposes of the Contract provisions noted above. Accordingly, it is

ORDERED that the motion by plaintiff Perella Weinberg Partners LP for summary judgment and to strike defendant's jury demand is denied; and it is further

ORDERED that the parties are directed to appear for a pretrial conference on December 13, 2012 at 11:30 a.m., in Room 228 of the courthouse located at 60 Centre Street, New York, NY.

Dated: November 21, 2012

ENTER:



J.S.C.