SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN PART 63

Index Number : 652756/2012
GRAMERCY DISTRESSED
vs
ARPENI PRATAMA OCEAN LINE
Sequence Number : 003
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1
Answering Affidavits — Exhibits _____ No(s). 2
Replying Affidavits _____ No(s). 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision and order. This constitutes the decision and order of the court.

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

Dated: 9/18/13

Ellen
HON. ELLEN M. COIN 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: IAS PART 63

----------X

GRAMERCY DISTRESSED OPPORTUNITY FUND LTD. and GRAMERCY DISTRESSED DEBT MASTER FUND,

Plaintiffs,

Index No. 652756/12

-against-

ARPENI PRATAMA OCEAN LINE INVESTMENT B.V. and PT ARPENI PRATAMA OCEAN LINE TBK.,

Defendants.

----------X

Coin, J.:

In motion sequence 003, defendants Arpeni Pratama Ocean Line Investment B.V. (Arpeni B.V.), an entity formed under the laws of the Netherlands, and PT Arpeni Pratama Ocean Line Tbk (PT Arpeni), an entity existing under the laws of the Republic of Indonesia, move pursuant to CPLR 3211(a)(1), (5), (7), and (8) to dismiss the complaint with prejudice.

Background

The following allegations are set forth in the complaint and, for the purposes of this motion, are accepted as true.

In the present action, plaintiffs seek to rescind a bid they made in a tender offer to sell bonds issued by Arpeni B.V. and guaranteed by PT Arpeni. Plaintiffs mistakenly communicated the wrong bid price, leading to a ten-fold discrepancy between their intended bid price and the bid price submitted.

On November 18, 2011, as part of a settlement agreement in a proceeding against PT Arpeni in Indonesia,[1] PT Arpeni announced an offer to exchange outstanding "8.75% Guaranteed Senior Secured Notes Due 2013" (the Old Notes) for new "Floating Rate Guaranteed Notes Due 2021" (the New Notes) (the Exchange Offer). Alternatively, PT Arpeni invited the holders of the Old Notes to sell them for cash in a modified Dutch auction (the Tender Offer). Both the Old Notes and New Notes were issued by Arpeni B.V. and guaranteed by PT Arpeni. The terms of the Exchange Offer and Tender Offer were set forth in an offering memorandum, dated November 18, 2011, as amended and supplemented on December 14, 2011 and January 11, 2012 (the Offering Memorandum). The Offering Memorandum stated that PT Arpeni intended to make available a minimum of $27,000,000 for the purchase of the Old Notes (the Maximum Tender Amount).

Under the terms of the Tender Offer, holders of the Old Notes could submit one or multiple bids to sell all or some of their Old Notes to Arpeni B.V. for cash in the reverse Dutch action. The price of the bid was to be expressed in dollars per thousand of the outstanding principal amount of the Old Notes being tendered. The initial Offering Memorandum stated that Arpeni B.V. would not accept any bid in which the bid price exceeded $350 per $1000 of the Old Notes' principal amount. This

[1] The Indonesia proceeding is detailed below.

amount was later amended and reduced from $350 per $1000 to $250 per $1000.

The Tender Offer closed on January 19, 2012, and following the close, Bondholder Communications Group (the Auction Agent), as auction agent, ranked all valid bids and bid prices received from lowest to highest to be presented to PT Arpeni. PT Arpeni then accepted the bids starting at the lowest bid prices for purchase until the aggregate value of the accepted bids equaled the Maximum Tender Amount. Plaintiffs' bid and bid price was one of the bids accepted. However, there was an error with their bid price.

In the months leading up the Tender Offer, the Old Notes were trading in the market between $210 and $250 per $1000, or between 21%-25% of par. When the Tender Offer was announced, plaintiff Gramercy Distressed Opportunity Fund Ltd. owned $15,905,000 of the principal amount of the Old Notes, and plaintiff Gramercy Distressed Debt Master Fund owned $250,000.

Plaintiffs decided they would participate in the Tender Offer and submit a bid and bid price. Plaintiffs' investment manager, Gramercy Funds Management, L.L.C., determined to tender the Old Notes at 25% of par, based on the previous day's trading market of 23% of par. 25% of par was the maximum bid price under the Tender Offer. Plaintiffs' portfolio managers directed their back office to tender $7,952,000 of principal amount of the Old

Notes held by Gramercy Distressed Opportunity Fund Ltd., and $125,000 held by Gramercy Distressed Debt Master Fund, as a bid of "25.00." They also directed that the balance of the principal amount of plaintiffs' Old Notes be tendered in the Exchange Offer.

During the process of communicating the plaintiffs' bids to the plaintiffs' custodian, Citigroup Global Markets Inc. (Citigroup), the bid price was mistakenly communicated as $25.00 rather than 25.00% of par. On January 10, 2012, Citigroup submitted plaintiffs' bid at a bid price of $25.00 per $1000, instead of 25% of par, or $250.00 per $1000. On January 25, 2012, plaintiffs were notified that their bid had been accepted in the Tender Offer, and the balance of their Old Notes had been accepted and exchanged for the New Notes in the Exchange Offer.

On February 1, 2012, Citigroup credited plaintiffs' accounts $201,925 in consideration for their bid. Plaintiffs informed Citigroup of the discrepancy in monies received with what they believed they were going to receive with their bid price of $250.00 per $1000. In turn, Citigroup contacted the Auction Agent, who advised that the bid was accepted at $25 per $1000, and not $250.00 per $1000.

On March 30, 2012, plaintiffs' investment manager, Gramercy Funds Management, L.L.C., contacted PT Arpeni's financial advisor to advise it of the mistaken bid in an attempt to have the bid

rescinded or corrected, or in the alternative, to accept the New Notes in exchange for the Old Notes tendered at the erroneous bid price. PT Arpeni's financial advisor advised that it was unable to rectify the error.

On August 8, 2012, plaintiffs brought this action seeking to rescind the bid on the grounds of unilateral mistake and for unjust enrichment. Defendants now move to dismiss the complaint on the grounds of lack personal jurisdiction, lack of proper service, lack of subject matter jurisdiction, and failure to state a claim.

Foreign and Bankruptcy Proceedings

As the issue of whether this court has personal jurisdiction over the defendants hinges mainly on a bankruptcy proceeding brought in the Southern District of New York, the court will discuss the background of that proceeding in detail here.

On August 5, 2011, one of PT Arpeni's creditors, a nonparty in this action, filed a proceeding against PT Arpeni in Indonesia, after PT Arpeni defaulted on certain payment obligations, including interest payments due on the Old Notes (the Foreign Proceeding) (affirmation of Mark D. Kotwick, ex 3, ¶6). In the Foreign Proceeding, PT Arpeni obtained the approval of a composition plan from the requisite number of its creditors pursuant to Indonesian bankruptcy law (*id.*, ¶7). The composition plan was ratified and declared a legally valid and binding

settlement agreement in the Foreign Proceeding (Kotwick Aff, ex 3, ¶7). The Exchange Offer and Tender Offer were part of this settlement agreement (*id.*, ¶8).

On December 12, 2011, PT Arpeni commenced a Chapter 15 proceeding in the United States Bankruptcy Court for the Southern District of New York (the New York Bankruptcy Proceeding) to stay any proceedings by creditors in the United States, as PT Arpeni believed that creditors in the United States were seeking to commence actions here to disrupt its efforts to restructure by circumventing the Foreign Proceeding (*id.*, ex 4, ¶21). The Bankruptcy Court granted the relief sought and entered an "Order Granting Recognition of Foreign Main Proceeding and Certain Related Relief" (the Recognition Order) (*id.*, ex 7). The Recognition Order granted comity and gave full force and effect to the composition plan, settlement agreement, and transactions consummated thereunder, including the Exchange Offer and Tender Offer (*id.*, ¶5).

Analysis

Personal Jurisdiction

Defendants argue that the complaint must be dismissed because plaintiffs have failed to demonstrate personal jurisdiction over them. Defendants argue that they are foreign entities not subject to New York's long-arm jurisdiction, because they are not transacting business in New York. Further, they

argue that they are also not subject to personal jurisdiction under the Due Process Clause of the United States Constitution.

"[T]he burden of proving jurisdiction is upon the party who asserts it;" thus, plaintiffs bear the burden of demonstrating that jurisdiction over defendants is proper (*Lamarr v Klein*, 35 AD2d 248, 250 [1st Dept 1970], *affd* 30 NY2d 757 [1972]).

Long-Arm Jurisdiction - CPLR 302(a)(1)

CPLR 302(a)(1) provides long-arm jurisdiction over a "non-domiciliary ... who in person or through an agent: 1. transacts any business within the state or contracts anywhere to supply goods or services in the state." "Although CPLR 302(a)(1) is a 'single act statute,' whereby physical presence is not required and one New York transaction is sufficient for personal jurisdiction, it is only applicable where the defendant's New York activities were purposeful and substantially related to the claim" (*D&R Global Selections, S.L. v Bodega Olegario Falcón Piñeiro*, 90 AD3d 403, 404 [1st Dept 2011], citing *Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, *cert denied* 549 US 1095 [2006]). Plaintiffs argue that the New York Bankruptcy Proceeding provides a basis for exercising personal jurisdiction over the defendants pursuant to CPLR 302(a)(1), and the court agrees.

"Use of the New York courts is a traditional justification for the exercise of personal jurisdiction over a nonresident"

(*Matter of Sayeh R.*, 91 NY2d 306, 319 [1997]). Further, it has been held that the retainer of attorneys for the purpose of legal representation in New York by a nondomiciliary is sufficient to confer jurisdiction pursuant to CPLR 302(a)(1) (*Otterbourg, Steindler, Houston & Rosen, P.C. v Shreve City Apts.*, 147 AD2d 327, 332 [1st Dept 1989], citing *Elman v Belson*, 32 AD2d 422 [2d Dept 1969]). The New York Bankruptcy Proceeding and the retaining of counsel for representation in that proceeding are enough to satisfy the requirements that defendants must have engaged in purposeful activity in New York.

Next, it must be determined whether plaintiffs' claims arise from defendants' purposeful activity in New York (*see* CPLR 302[a]). A claim arises from a particular transaction or activity when there is "some articulable nexus between the business transacted and the cause of action sued upon" (*McGowan v Smith*, 52 NY2d 268, 272 [1981]), or where "there is a substantial relationship between the transaction and the claim asserted" (*Deutsche Bank Sec., Inc.*, 7 NY3d at 71, quoting *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]).

Defendants argue that plaintiffs' causes of action for unilateral mistake and unjust enrichment are not connected with the New York Bankruptcy Proceeding. The court disagrees. The Recognition Order granted comity and gave full force and effect to the composition plan, settlement agreement, and transactions

consummated thereunder, including the Exchange Offer and Tender Offer. The New York Bankruptcy Proceeding protected the Exchange and Tender Offers from any challenges by note holders in the United States, which might have forced defendants into liquidation. This protection provided defendants with the benefit of going forth with the Exchange and Tender Offers without interruption or challenge.[2] Plaintiffs' claims arise out of their bid in the Exchange and Tender Offers. Therefore, there is a substantial relationship between the New York Bankruptcy Proceeding and plaintiffs' causes of action arising out of the transaction that was a subject of the New York Bankruptcy Proceeding.

Due Process

Once it is determined that CPLR 302 confers jurisdiction, it must be determined that the exercise of such jurisdiction comports with the Due Process Clause of the United States Constitution (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [2000]). Under the Due Process Clause, a state may exercise jurisdiction over a nondomiciliary defendant if the defendant had minimum contacts within the state, and maintaining a lawsuit

---

[2]Thus, while PT Arpeni was the foreign debtor in the New York Bankruptcy Proceeding, Arpeni BV was a direct beneficiary of that proceeding. The order entered there enjoined the commencement of any actions within the United States that would interfere with or impede the Exchange and Tender Offer of the Arpeni BV notes.

against the defendant would not offend the notions of fair play and substantial justice (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d at 216).

The minimum contacts requirement is satisfied if "defendant's 'conduct and connection with the forum State' are such that it 'should reasonably anticipate being haled into court there'" (*id.*, quoting *World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 297 [1980]). Here defendants voluntarily came into the Bankruptcy Court in the Southern District of New York to shield themselves from claims by note holders in the United States, specifically protecting the Exchange and Tender Offers. By commencing the New York Bankruptcy Proceeding, defendants cannot reasonably argue that they did not foresee a possibility of defending a lawsuit in New York.

"Minimum contacts alone do not satisfy due process. The prospect of defending a suit in the forum State must also comport with traditional notions of fair play and substantial justice" (*id.* at 217 [internal quotation marks and citations omitted]). It is not unfair to subject defendants to the jurisdiction of the New York courts. Defendants were aware that they had creditors in the United States, and came to New York to prevent such creditors from disturbing the settlement agreement reached in the Foreign Proceeding, which included the Exchange and Tender Offers. It seems only fair to extend the reach of New York's

jurisdictional long-arm to these defendants (*id.* at 219).

Defendants argue that the final transmittal letter setting forth the terms of the Tender Offer provided that the contract would be governed by Indonesian law. However, a choice of law provision is not jurisdictionally relevant (*see M. Fabrikant & Sons v Adrianne Kahn, Inc.*, 144 AD2d 264, 266 [1st Dept 1988]). Defendants also argue that pursuant to the final transmittal letter, plaintiffs agreed to subject themselves to the nonexclusive jurisdiction of the Indonesian courts and waive any objection on the basis of venue or inconvenient forum. Again, this does not affect whether the defendants are subject to the jurisdiction of the New York courts. Instead, the letter provides that by participating in the Tender Offer, plaintiffs were subjecting themselves to that jurisdiction should suit be brought there, and that they could not object on the grounds of venue or inconvenient forum.

Proper Service

Defendants assert that the complaint should be dismissed for lack of proper service on the grounds that plaintiffs' service, pursuant to Business Corporation Law § 307, was ineffective, because the court lacks personal jurisdiction. Based on the foregoing, this argument is without merit. Defendants do not otherwise challenge service of the summons and complaints.

Subject Matter Jurisdiction

The court finds no reason why it should not accept jurisdiction over this matter.

Failure to State a Claim

As jurisdiction and proper service have been established, the court turns to defendants' motion to dismiss the complaint for failure to state a claim.

> "In the posture of defendants' CPLR 3211 motion to dismiss, our task is to determine whether plaintiffs' pleadings state a cause of action. The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law. In furtherance of this task, we liberally construe the complaint, and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion. We also accord plaintiffs the benefit of every possible favorable inference"

511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 [2002] [internal quotation marks and citations omitted]).

Rescission Due to Unilateral Mistake

> "A bid is a binding offer to make a contract. 'It may be withdrawn in the case of unilateral mistake by the bidder where the mistake is known to the other party to the transaction and (1) the bid is of such consequence that enforcement would be unconscionable, (2) the mistake is material, (3) the mistake occurred despite the exercise of ordinary care by the bidder and (4) it is possible to place the other party in *status quo*'"

(*Dalto v Incorporated Vil. of Mineola,* 256 AD2d 301, 302 [2d Dept 1998], quoting *Balaban-Gordon Co. v Brighton Sewer Dist. No. 2,* 41 AD2d 246, 247 [4th Dept 1973]). At this pleading stage plaintiffs have sufficiently alleged that defendants knew that

plaintiffs' bid price was a mistake; that the bid was of such consequence that enforcement would be unconscionable; it is possible to place the other party in status quo; and that their mistake was material and occurred despite their exercise of ordinary care.

Further, while plaintiffs have fully performed under the contract, it is not an automatic bar to rescission of the contract, especially where they did not discover the mistake until after their performance under the contract. The remedy to rescind is available even after performance, if "invoked within a reasonable time after discovery of the misrepresentation" (*Soviero Bros. Contr. Corp. v City of New York*, 286 AD 435, 439 [1st Dept 1955], *affd* 2 NY2d 924 [1957]). The inquiry as to whether this remedy was invoked within a reasonable time after plaintiffs' discovery of their mistake is one not suited for this motion.

Defendants also argue that plaintiffs have failed to plead fraud, relying on *Barclay Arms v Barclay Arms Assoc.* (74 NY2d 644 [1989]). However, this argument is misplaced. In *Barclay Arms*, the plaintiff failed to plead a cause of action for reformation, not rescission.

Defendants also assert that plaintiffs actually demand reformation. However, this argument is contradicted by the allegations in the complaint. The complaint seeks to restore the

parties to their positions ex ante, and is not asking the court to change the consequences of a fully performed contract. If plaintiffs are successful on their claim for rescission, they will be limited to voiding the contract and seeking damages that restore them to their position before the contract was entered into. Whether the parties can return to the status quo that existed before the contract is an issue not appropriate for determination on this motion to dismiss.

Defendants' remaining arguments are premature. On a motion to dismiss for failure to state a claim, the court's task is to determine whether plaintiffs' pleadings state a cause of action, not whether such claims are factually supported.

Unjust Enrichment

> "[W]here rescission of a contract is warranted, a party may timely rescind and seek recovery on the theory of quasi contract. It is impermissible, however, to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties"

(*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987] [internal citation omitted]). At this stage, this cause of action can go forward. If it is determined that plaintiffs invoked the remedy of rescission within a reasonable time after discovery of their mistake, and plaintiffs are successful on the merits of their rescission claim, they may be able to recover on an unjust enrichment claim (*Basis Yield Alpha Fund (Master) v*

Goldman Sachs Group, Inc., 37 Misc 3d 1212[A], *10, [Sup Ct, NY County 2012]).

Accordingly, it is

ORDERED that the motion to dismiss of defendants Arpeni Pratama Ocean Line Investment B.V. and PT Arpeni Pratama Ocean Line Tbk is denied; and it is further

ORDERED that defendants are directed to serve their answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 311, 71 Thomas Street, on December 4, 2013 at 2:00 p.m.

Dated: September 18, 2013

ENTER:

Ellen M. Coin *A.J.S.C.*