Trump Sec. LLC v Setton Intl. Foods, Inc.
2013 NY Slip Op 32816(U)
August 29, 2013
Sup Ct, New York County
Docket Number: 602731/09
Judge: Melvin L. Schweitzer

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

TRUMP SECURITIES and CONVERTIBLE CAPITAL

-v-

SETTON INTERNATIONAL FOODS, INC.

INDEX NO. 602731/09

MOTION DATE _____

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). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that ~~this motion is~~ following a bench trial herein, verdict and judgment for defendant per the attached Decision and Order.

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

Dated: August 29, 2013

MELVIN L. SCHWEITZER

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 45

TRUMP SECURITIES LLC and CONVERTIBLE CAPITAL, Plaintiffs,	:	Index No. 602731/09
-against-	:	DECISION AND ORDER
SETTON INTERNATIONAL FOODS, INC., Defendant.	:	

MELVIN L. SCHWEITZER, J.:

This is the court's decision following a bench trial in a breach of contract case in which a financial services company, Convertible Capital (CC), a subsidiary of Trump Securities LLC, was retained under an exclusive agreement to secure debt financing for a nut and candy producer, Setton International Foods (Setton). Given the ambiguous nature of the parties' contract (the Agreement), the issue is whether CC should be entitled to the contractually stipulated percentage-based commission fee when Setton renewed previously frozen lines of credit with its already existing banks and received no assistance in those matters from CC.

For the following reasons, the court finds that CC is not entitled to any such fee.

Background

Setton is the nation's second largest producer of pistachios. It also produces and markets various nuts, dried fruit, and candy. In March 2009, Kraft Foods, a corporate client, discovered trace amounts of salmonella in one of Setton's products. Following further tests, Setton issued a recall of several items. In light of the recall, Setton's primary lenders, Bank of America, Israel Discount Bank, and Manufacturers & Traders Trust Company (collectively, the Existing Banks), froze their lines of credit with Setton, telling Setton not to draw on them until further notice was

given. Shortly thereafter, Setton approached CC explaining that it wanted to seek new avenues of financing to secure necessary capital.

Setton and CC embarked on a series of negotiations. During this period, Setton expressly forbade CC from contacting its Existing Banks. In testimony, Setton asserted that this was because its relationships with the Existing Banks were very longstanding, and that Setton was not hiring CC to "get involved" with those relationships. T. 184:10. Setton also made it clear that it was angry with its Existing Banks for freezing its lines. Setton maintains that it told CC that it hired CC only for the purpose of finding new, more committed sources of credit than Setton had previously maintained with its Existing Banks. Affirmation of Harris Lee Cohen for Trial, ¶ 12. Setton also indicated that it had retained another financial firm, Redwood Strategy, to provide estate planning advice. Setton assured CC that Redwood's role would not overlap with CC's. Both parties ultimately included a provision pertaining to Redwood in their Agreement.

Setton and CC signed the Agreement on July 8, 2009. Setton retained CC on an exclusive basis as an advisor regarding "possible structures, terms, and potential purchasers of debt," and hired CC to act as Setton's sole placement agent for the aforementioned financing. For these services, Setton was to pay CC a $50,000 retainer fee, a monthly $25,000 advisory fee, and a commission of 2.25% of the gross amount of the financing offered to, and accepted by, Setton, to be paid upon successful execution of a financing agreement.

Shortly after signing the Agreement, Setton paid CC its contractually-stipulated retainer fee and CC set about finding potential financing sources for Setton. Over the course of the next month or so, CC contacted a number of lenders and drafted private placement memoranda. In the mean time, however, Setton continued to engage with its Existing Banks to re-open and

extend its previously existing credit lines. Setton signed an agreement with M&T Bank at the end of July 2009 extending its lapsed credit line. Over the next several months, Setton also signed similar agreements with its two other Existing Banks, Israel Discount Bank and Bank of America.

On August 4, 2009, CC sent an email to Setton indicating its opinion that returning to Setton's original banks might be the most viable option for obtaining financing, and that CC would be happy to help negotiate with those banks. One week later, on August 11, 2009 Setton replied to CC reiterating that CC was not to deal with the Existing Banks. CC responded the next day with a message that in its view, "it is clear that the agreement covers all investors and / or lenders" and that CC "shall be entitled to an additional financing fee" regardless of whether it had assisted Setton in securing a financing with the Existing Banks. The following day, on August 13, 2009 Setton terminated its relationship with CC by letter.

CC commenced this action on September 2, 2009, seeking payment of a financing fee for the three extensions of credit that Setton executed with its Existing Banks during the period covered by the Agreement. CC presently seeks damages in the amount of $1,224,350.81, plus interest accruing at the rate of $226.23 per day since June 25, 2013.

Procedural History

CC originally moved for summary judgment, which the court denied in a decision dated December 17, 2012. In that opinion, the court ruled that the Agreement was a valid contract, but that it contained ambiguous language giving rise to important factual issues. Accordingly, the court dismissed the plaintiff's motion, and the case proceeded to trial.

Discussion

In dismissing CC's motion for summary judgment, the court found that there was a fundamental issue of fact with regard to the meaning of the contract. New York law states that "whether or not a writing is ambiguous is a question of law to be resolved by the courts." *W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162 (1990). In its summary judgment opinion, the court found that the contract between CC and Setton was ambiguous, particularly with regards to the definition of the word "financing." Summary Judgment Opinion, 10.

The Appellate Division of the New York State Supreme Court has ruled that "where the language of an agreement leaves the intention of the parties doubtful or ambiguous, all the prior dealings of the parties are admissible to determine their intent." *Kenneth D. Laub & Co. v Park Ave. Assoc.*, 162 AD2d 294, 295 (1st Dept 1990). Further, "when a contract term is ambiguous, parol evidence may be considered to elucidate the disputed portions of the parties' agreement." *Blue Jeans U.S.A., Inc. v Basciano*, 286 AD2d 274, 276 (1st Dept 2001). Given the disputed and unclear nature of the language in the Agreement, particularly with regards to the definition of "the Financing," the court elected to admit parol evidence in order to determine the meaning of the term as the parties understood it at the execution of the Agreement.

Setton contends that "financing," defined in the contract as "*possible* structures, terms, and *potential* purchasers of debt, whether securities or loans. . . of the Company," PX 1 (emphasis added), pertains only to new sources of financing with entities that Setton had no prior relationships. Setton contends that in negotiations prior to the execution of the Agreement, it told CC that the contract was only to apply to more secure, long-term forms of financing than Setton previously had maintained with its Existing Banks. CC contests these claims, claiming that Setton's interpretation of the contractual language parses words (Plaintiff's Post-Trial

Memorandum, 2), and that more secure, long-term financing was merely the "ultimate goal" in terms of the type of financing Setton sought, not the only applicable type. T. 99:3-20.

To resolve this dispute, it is first necessary to consider that the Agreement contains a clause expressly limiting CC's role in the Agreement to the following services as described in paragraph 1: "providing financial advisory services. . . regarding possible structures, terms, and potential purchasers of debt, whether securities or loans. . . (the "Financing"); and acting as the sole placement agent of the Company for the Financing." Agreement, ¶6(c), ¶1. The scope of services, and therefore CC's role, only extends as far as the definition of "the Financing" permits.

The central question for the court, then, is whether the scope of CC's services in the Agreement only encompassed new and more secure long-term sources of financing, or whether the exclusivity provision of the Agreement allowed CC to provide the enumerated services (and receive payment) with respect to *all* forms and sources of financing.

CC claims that the burden of proof in this case falls on Setton. *See Curtis Props. Corp. v Greif Cos.*, 212 AD2d 259, 264 (1st Dept 1995). *Curtis* involved three businesses – the defendants – who hired a broker, Curtis Properties Corp., to negotiate either lease renewals in their then-current places of business or new leases in different locations on their behalf. After Curtis found an acceptable alternate location, however, the three defendant businesses renegotiated with their original landlord and renewed their previously existing leases. Curtis then sued seeking its commission. CC cites the case for the proposition that "defendants bear the burden of proof with respect to the propriety of their election to deal directly with Olympia & York [the original landlord], as it operates to relieve them from their only obligation under the brokerage agreement," which was to afford Curtis exclusive right to deal on their behalf.

The relevant issue here, however, is not whether Setton breached its duty to allow CC the exclusive right to secure financing, but whether that duty existed at all with regards to the same types and sources of financing that Setton had had for years from its already Existing Banks. The burden of proof on that matter falls upon CC. The court finds that CC failed to sustain its burden, and that the scope of services defined in Paragraph 1 of the Agreement did not extend to Setton's previously existing types and sources of financing. Therefore, Setton's election to renegotiate and ultimately extend financing with its Existing Banks under the same terms it enjoyed previously and not to pay CC 2.25% of the gross amount of the renewal of its existing financing sources was not a breach of contract.[1]

The following colloquy that took place at trial between Mr. Jeffrey Parket, a principal of CC, and the court, puts the matter to rest (T. 170:18-171:7):

> The Court: You never performed, or you were never asked to perform the services with respect to the three banks—
>
> The Witness: Correct.
>
> The Court: -- that were listed under paragraph one.
>
> The Witness: Right. We were specifically told not to be involved with those three banks, right.
>
> . . .
>
> The Court: Now I want you to look at paragraph 6(c): 6(c) says, "Limited role." It says "Convertible Capital's role under this

[1] CC also claims a number of other breaches. These are (1) a breach of the duty to provide accurate information to disseminate to potential investors, as outlined in Paragraph 2(a) of the Agreement; (2) a breach of the duty of cooperation enumerated in Paragraph 2(c) of the Agreement requiring Setton to inform CC of any parties interested in possibly supplying financing; and (3) a breach of the duty to retain Redwood Strategies only for duties that did not overlap with CC's. None of these alleged breaches, however, if proven, would result in an award of damages to CC. Indeed, CC brings them up specifically to question Setton's credibility. Because they have no bearing on the final judgment in this case, the court declines to address them.

> agreement is limited to the services described in section one." Right?
>
> The Witness: Yes.

Given the limited role provision put forth in paragraph 6(c), CC's role was confined only to the services described in section 1. Mr. Parket admitted, however, that the scope of services never included dealings with Setton's previously Existing Banks. Therefore, the exclusivity provision of the Agreement does not encompass Setton's relationship with its Existing Banks. The court's questioning then continued (T.171:8-21):

> The Court: Okay. And we just established that you were not asked to perform the services in section one with respect to the three banks.
>
> The Witness: For reason being that they [Setton] refused to deal with them.
>
> The Court: Right.
>
> The Witness: They maintained that they would never deal with those banks. Those banks were never at issue.
>
> The Court: Right. Okay. But you know, they had the right to change their mind about that, too; correct?
>
> The Witness: That's—
>
> The Court: They could change their mind at any time.
>
> The Witness: That's slimy, but I guess so.

The evidence suggests, however, that Setton never hid its intention to seek a refinancing of its previously existing lines of credit with its Existing Banks while it waited for CC to find new, more secure financing. Indeed, Mr. Parket wrote in his notes of an early meeting with Setton that "they want the lines reopened" (PX 90), even as Setton forbade CC from having any

contact with its Existing Banks. While Mr. Parket claimed in his testimony that he did not recall what that reference to wanting the lines reopened, written in his own hand, referred to, the court does not credit this assertion. T. 110:22-25. The reference in question appeared in Mr. Parket's notes directly after he identified the three Existing Banks, noted that each had a credit line, and wrote that the lines had been frozen in April 2009. PX 90. The sequence of notes suggests that "they want the lines reopened," refers directly to the previously frozen lines. Furthermore, a teaser document that CC assembled itself to send to potential investors indicated that Setton would maintain its relationships with two of its Existing Banks. PX 25. When questioned about this, Mr. Parket told the court only that "I don't remember how it wound up being in that document." T. 105:2-7. Its presence, however, suggests that CC was aware that Setton fully intended to continue its relationships with its Existing Banks.

Given this testimony, the court finds that while Setton did not give permission to CC to contact its Existing Banks, neither did it hide its desire to deal with those banks itself. The court finds that CC thus knew Setton had hired it to find new types of financing from new sources, that Setton wanted to reopen its previously frozen lines of credit, and that CC itself was barred by Setton from dealing with those banks. By extension, the court finds that within the understanding of the parties at the time of the Agreement's execution, the scope of services contained within the Agreement did not encompass the same types of financing that Setton previously had maintained with its already Existing Banks.

CC argues, however, that in telling it not to work with the Existing Banks and requesting new and differently structured financing, Setton did not change the scope of the Agreement as a whole, but merely the scope of performance. CC asserts that this is a relevant distinction, citing the proposition that "the prevention of an agent's performance of services with respect to the

ultimate counterparty in a transaction contemplated by an exclusive services contract is not a defense to payment." Plaintiff's Post-Trial Brief, 3. It is for this reason that CC seeks a commission under the exclusivity provision of the agreement. In further support of this notion, CC directs the court's attention to an Appellate Division case, *North40RE Realty LLC v Bishop*, 2 AD3d 1184 (3rd Dept 2003), in which the plaintiff had an exclusive agreement to act as real estate broker for the defendant. When the defendant found a piece of property, however, and the property's owner did not want to deal with any real estate brokers, the defendant purchased the property without notifying the plaintiff brokerage, which then sued for its commission. *Id.*

In *North40RE*, however, the court noted the "clear, unambiguous terms of the exclusive brokerage agreement," before ruling in the plaintiff's favor. *Id.* at 1185. This absence of ambiguity forms the crux of the distinction between *North40RE* and the case here. This court denied summary judgment precisely because the Agreement was ambiguous. The central question of fact was thus not whether Setton prevented CC's performance, but whether the contractually mandated scope of CC's performance included financing from the Existing Banks and of the same nature that Setton had had prior. Having reviewed the evidence and having heard the testimony, the court finds that upon execution of the Agreement, both parties were aware that Setton hired CC to find new, more secure types of financing from sources other than Setton's previously existing banks. CC's argument fails, in that Setton did not prevent performance as it was understood by the parties. The exclusion of the existing banks was not merely a bar to performance, but altered the scope of the entire contract, including the exclusivity clause as it pertained to the circumstances under which CC would be entitled to commission compensation.

Conclusion

For the foregoing reasons, the court finds that the Agreement between CC and Setton applied only to finding new structures of financing from parties other than the Existing Banks, and that CC is not entitled to an award of damages stemming from a breach of the exclusivity clause of the Agreement.

Dated: August 29, 2013

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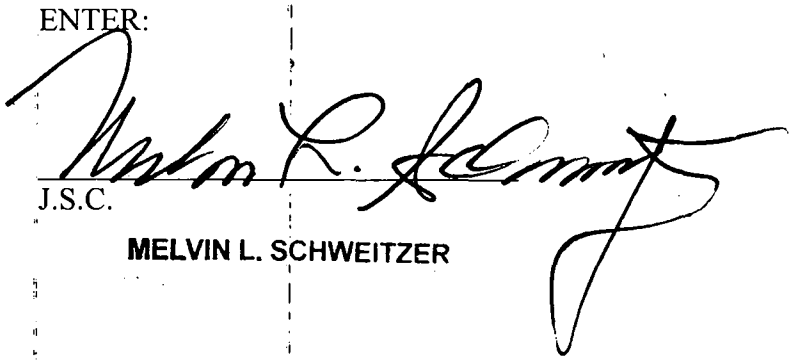

J.S.C.

MELVIN L. SCHWEITZER