

Blackstone Advisory Partners L.P. v Gupta
2013 NY Slip Op 33088(U)
December 6, 2013
Supreme Court, New York County
Docket Number: 650165/2011
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN BRANSTEN
J.S.C.

PRESENT: _____

PART 3

Index Number : 650165/2011
BLACKSTONE ADVISORY SERVICES
vs
GUPTA, VINOD
Sequence Number : 002
SUMMARY JUDGEMENT

INDEX NO. 650165/2011
MOTION DATE 10/25/2013
MOTION SEQ. NO. 002

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 12-6-13

[Signature] J.S.C.

HON. EILEEN BRANSTEN

- 1. CHECK ONE: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [X] 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 THREE

-----X
BLACKSTONE ADVISORY PARTNERS L.P.,

Plaintiff,

-against-

VINOD GUPTA,

Defendant.

Index No. 650165/2011
Motion Date: 10/25/2013
Motion Seq. No.: 002

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BRANSTEN, J.

In this action, Plaintiff Blackstone Advisory Partners L.P. (“Blackstone”) asserts a breach of contract claim against Defendant Vinod Gupta, seeking payment of fees under a 2008 agreement executed by the parties. Blackstone now moves for summary judgment pursuant to CPLR 3212. Defendant Gupta opposes. For the reasons that follow, Plaintiff Blackstone’s motion for summary judgment is granted.

I. Background¹

Plaintiff Blackstone is a limited partnership organized under Delaware law that is affiliated with The Blackstone Group L.P., an investment management and financial advisory firm headquartered in Manhattan. Defendant Vinod Gupta is the founder of InfoGroup and served as its Chief Executive Officer until August 2008.

A. The 2007 Agreement

On April 23, 2007, Blackstone and Gupta executed an engagement agreement (the “2007 Agreement”), under which Blackstone agreed to render financial advice to Gupta to support Gupta’s effort to purchase InfoGroup through a “take private” transaction. *See* Affidavit of Anuj J. Agarwal (“Agarwal Aff.”) Ex. 1 (2007 Agreement). Through this purchase, Gupta sought to convert InfoGroup to a private company, of which he was the majority owner. In exchange for its services, Blackstone was to be paid fees, primarily contingent on its success. Specifically, the 2007 Agreement provided that Gupta, defined as “the Client,” agreed to pay Blackstone an initial \$250,000 retainer fee, an additional \$750,000 “announcement fee” contingent on the execution of a Transaction agreement, and a “success fee” of \$4,000,000 upon the closing of a Transaction. *See* 2007 Agreement at 2. Under the 2007 Agreement, “Transaction” was defined as the

¹ Unless otherwise noted, the facts referenced in this section are unopposed.

acquisition by Gupta or his affiliates of (1) more than 50% of the business of InfoGroup, (2) more than 50% of the company's voting securities, or (3) a majority of the assets of, or any right to all or a majority of the revenues of InfoGroup. *Id.* at 1.

By September 2008, Gupta had not yet successfully purchased InfoGroup. The parties cast the reasons for Gupta's lack of success differently. Blackstone attributes the failure to the financial crisis of 2008, as well as Securities and Exchange Commission's investigation into Gupta's conduct as InfoGroup CEO. In addition, Blackstone notes that Gupta resigned as InfoGroup's CEO on August 20, 2008, in conjunction with the settlement of shareholder claims filed in the Delaware Chancery Court. *See Agarwal Aff. Ex. 20* at 43-45 (August 20, 2008 Stipulation of Settlement). The court approving the settlement noted that "Gupta used this company [InfoGroup] like his own personal piggy bank" and engaged in "varieties of excessive, personal indulgence, from automobiles to airplanes, to boats to condominiums, to consultant contracts for friends, high-powered government officials and others..." *See id. Ex. 21* at 46 (transcript of November 7, 2008 settlement hearing). Blackstone asserts that concerns about Gupta's leadership and a possible SEC enforcement action "dampened investor and lender interest in supporting an acquisition of InfoGroup by Mr. Gupta." (Pl.'s Moving Br. at 5.)

Gupta does not respond to or otherwise dispute Blackstone's characterization. Instead, he contends that "Blackstone's efforts were lacking throughout," and that

Blackstone's failure to find debt financing for Gupta led the parties to begin discussing a new agreement in September 2008. *See* Def.'s Opp. Br. at 4, 21.

B. *The 2008 Amendment*

Regardless of the parties' characterizations of the reasons why InfoGroup remained on the market, it is undisputed that Blackstone and Gupta entered into a September 16, 2008 agreement (the "2008 Amendment"), under which Blackstone agreed to provide "additional financial advisory services" to Gupta in connection with the sale of InfoGroup. *See* Agarwal Aff. Ex. 24 (2008 Amendment).

The 2008 Amendment provides for the payment of a fee by Gupta to Blackstone if InfoGroup "enters into a Transaction with any party (other than the Client [Gupta])." *See id.* at 2. While the "success fee" in the 2007 Agreement required a "Transaction" through which Gupta acquired more than a 50% interest in InfoGroup, the 2008 Amendment broadened the types of "Transactions" for which Blackstone was entitled to a "success fee." Specifically, the 2008 Amendment provided that Blackstone was to receive a "success fee" if InfoGroup entered into a Transaction with "any party (other than [Gupta])," whereby the acquiring party merged with the company, acquired a significant portion of its securities, or all or a majority of the company's assets. *Id.* at 2. If such a transaction with "any party" were consummated, "[Gupta] agree[d] to pay Blackstone the

following fees”: (1) “a success fee in the amount of \$4,750,000 payable in cash upon the closing of a transaction” plus (2) “half of the maximum additional incentive fee,” equaling \$2,000,000. *Id.*

Moreover, to the extent that Gupta was able to acquire a majority interest in InfoGroup himself, as contemplated by the 2007 Agreement, the 2008 Amendment provides that Blackstone would receive the “additional incentive fee” referred to above, which was capped at a maximum of \$4,000,000. *Id.*

In addition, the 2008 Amendment provides that Gupta shall reimburse Blackstone “for its out-of-pocket expenses incurred in connection with services rendered by Blackstone hereunder.” *Id.* at 3.

C. *Sale of InfoGroup and the Instant Litigation*

On March 8, 2010, InfoGroup announced that it would be acquired by CCMP Capital Advisors, LLC (“CCMP”) in a \$635 million transaction. *See Agarwal Aff. Ex. 28.* Shortly thereafter, Blackstone sent Gupta an invoice for \$6,750,000, equal to the “success fee” plus “half of the maximum additional incentive fee” under the 2008 Amendment, as well as \$46,640.76 in expenses. *Id. Ex. 30.* After Gupta failed to pay the invoice, Blackstone commenced this action seeking the unpaid fee and expenses.

Gupta interposed an Answer, and following the close of discovery, Blackstone filed the instant motion for summary judgment.

In support of its motion for summary judgment, Blackstone points to the language of the 2008 Amendment and contends that it unambiguously establishes its entitlement to a \$6,750,000 fee and \$46,640.76 in expenses based on InfoGroup's sale to CCMP. Gupta opposes, arguing that the fee language in the 2008 Amendment is ambiguous and that Blackstone's interpretation does not comport with his understanding of the parties' agreement. Gupta further contends that there are material issues of fact in dispute regarding its affirmative defenses, specifically whether Blackstone's performance was in material breach of the parties' agreement.

II. Summary Judgment Standard

It is well-understood that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established the absence of any material issues of fact, requiring judgment as a matter of law. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012) (citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986)). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York*,

49 N.Y.2d 557, 562 (1980). When deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 (2007). However, mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 N.Y.2d at 562; *see also Ellen v. Lauer*, 210 A.D.2d 87, 90 (1st Dep't 1994) (“[it] is not enough that the party opposing summary judgment insinuate that there might be some question with respect to a material fact in the case. Rather, it is imperative that the party demonstrate, by evidence in admissible form, that an issue of fact exists ...”) (citations omitted).

III. Analysis

To establish a breach of contract, plaintiff must demonstrate the existence of a valid and binding contract, plaintiff's performance under that contract, defendant's material breach, and damages. *See US Bank Nat'l Assoc. v. Lieberman*, 98 A.D.3d 422, 423 (1st Dep't 2012). Blackstone has made this requisite showing. Here, the parties do not dispute that the 2008 Amendment was a valid and binding contract and that Gupta refused to pay the fee requested by Blackstone. Instead, Gupta disputes whether Blackstone is entitled to the \$6,750,000 fee sought under the 2008 Amendment. Gupta

argues that the fee language of the 2008 Amendment is ambiguous and “runs contrary to the weight of the evidence.” *See* Pl.’s Opp. Br. at 11.

A. *The 2008 Amendment is Unambiguous*

It is a fundamental rule of contract interpretation that “a contract is to be construed in accordance with the parties’ intent, which is generally discerned from the four corners of the document itself.” *MHR Capital Partners LP v. Presstek, Inc.*, 12 N.Y.3d 640, 645 (2009). “The best evidence of what parties to a written agreement intend is what they say in their writing.” *Slamow v. Del Col*, 79 N.Y.2d 1016, 1018 (1992). Thus, “when parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms.” *W.W.W. Assoc., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990).

Blackstone asserts that Gupta owes it \$6.75 million in fees in connection with the March 8, 2010 sale of all of InfoGroup’s outstanding shares to CCMP. Giving the words in the 2008 Amendment their plain and ordinary meaning, Blackstone has made a prima face demonstration of its entitlement to a “fee in the amount of \$4,750,000” plus “half of the maximum additional incentive fee” (or \$2,000,000), as a result of the CCMP purchase. Under the 2008 Amendment, the CCMP purchase is a “Transaction.” The CCMP Purchase qualifies as a “Transaction” since it is “the acquisition ... by any party

(other than the client [Gupta]) ... of a significant portion of the Company's voting securities." See 2008 Amendment at 2; see also Agarwal Aff. Ex. 28 (press release describing CCMP sale). Accordingly, under the clear text of the 2008 Amendment, Gupta "agree[d] to pay Blackstone" \$6,750,000 in cash upon the closing of the CCMP Transaction, regardless of whether that sum is dubbed a "success fee" or a "sale fee" by the parties.

Gupta attempts to generate an ambiguity by pointing to draft agreements and deposition testimony about the meaning of the 2008 Amendment. However, "[a]mbiguity is determined by looking within the four corners of a document, not to outside sources." *Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 13 N.Y.3d 398, 404 (2009). Further, "clear contractual language does not become ambiguous simply because the parties to the litigation argue different interpretations." *Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 60 A.D.3d 61, 67 (1st Dep't 2008). Thus, Gupta's reliance on extrinsic evidence to demonstrate an ambiguity is without merit.

Gupta next argues that the 2008 Amendment is ambiguous with respect to Blackstone's entitlement to a fee had InfoGroup been sold to a third-party with Gupta participating as a minority investor. This did not occur, and Blackstone does not seek a fee on this basis. Instead, this is mere conjecture lobbed by Gupta in an attempt to manufacture an ambiguity. Such speculation cannot defeat summary judgment. See

Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980) (“Mere conclusions or unsubstantiated allegations will not defeat the moving party’s right to summary judgment.”).

B. *Gupta’s Material Breach Arguments*

Gupta next attempts to argue that Blackstone materially breached the 2008 Amendment, thus excusing Gupta’s non-performance under that agreement. In support, Gupta argues that Blackstone’s efforts “were lacking throughout,” citing several meetings to which Blackstone representatives allegedly arrived late or not at all, as well as Blackstone’s inability to raise debt financing in 2007. *See* Pl.’s Opp. Br. at 7, 21. Gupta further notes that Blackstone withheld its consent to be named in a March 2009 InfoGroup press release aimed at “try[ing] to attract interest from technology-sector private equity partners” and purportedly “may have undermined” him by failing to convince Blackstone’s separate Private Equity Group to purchase the Company.

None of Gupta’s allegations, if indeed breaches, set forth a “material breach” of the 2008 Amendment that would justify Gupta’s failure to perform. A “party’s obligation to perform under a contract is only excused where the other party’s breach of the contract is so substantial that it defeats the object of the parties in making the contract.” *Robert Cohn Assoc., Inc. v. Kosich*, 63 A.D.3d 1388, 1389 (3d Dep’t 2009); *see also Alberts v.*

CSTV Networks, Inc., 96 A.D.3d 447, 447 (1st Dep't 2012). Here, Blackstone's purported lateness to a several meetings did not substantially defeat the object of the 2008 Amendment, nor did Blackstone's failure to raise debt financing a year before the contract in question – the 2008 Amendment – was executed. Further, based on the record submitted, Gupta has not demonstrated that Blackstone's decision not to be named in a March 2009 press release caused any harm, let alone harm so substantial that it defeats the aims of the contract. Gupta does not demonstrate that InfoGroup lost a buyer as a result of Blackstone's decision; instead, he merely argues that InfoGroup may have attracted more interest had it been named as InfoGroup's financial advisor in the release. Such speculation is insufficient to generate a material issue of fact to defeat summary judgment.

Finally, Gupta's unsubstantiated allegations that Blackstone harbored "undisclosed prejudices" that "may have undermined and betrayed" him likewise fail to support material breach. Gupta primarily complains that Blackstone's Private Equity Group – housed in a separate affiliate from Gupta's financial advisers at Blackstone – failed to purchase InfoGroup. Gupta has not demonstrated any obligation by the Private Equity group to purchase his company. Instead, Gupta speculates that Blackstone would have purchased InfoGroup had it not been "warned off" by Anuj Agarwal – a Blackstone employee providing financial advice to Gupta under the 2008 Amendment. Despite this

allegation, Gupta provides nothing in support to demonstrate this fact for the purpose of defeating summary judgment. Instead, Gupta cites to a lone email from Agarwal to certain Blackstone Private Equity employees, in which Agarwal suggests that they “check with [C]hip on his views regarding [V]in,” *See* Affirmation of Hillel Parness Ex. 8. This email does not demonstrate any prejudice or “warning off” by Agarwal. At most, this email creates the specter of an issue, which is wholly insufficient to defeat summary judgment. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980) (“Mere conclusions or unsubstantiated allegations will not defeat the moving party's right to summary judgment.”).

Accordingly, Gupta has failed to demonstrate that Blackstone materially breached the contract such that Gupta's failure to perform is excused.

C. *Gupta's Remaining Affirmative Defenses*

Finally, Gupta fails to tender any evidence demonstrating that the remaining affirmative defenses cited in its Answer preclude the granting of summary judgment. While Gupta asserts that these affirmative defenses survive a CPLR 3211 motion to dismiss, it is not enough for these affirmative defenses to merely state a claim. Instead, to defeat summary judgment, Gupta must “produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the

action.” *Zuckerman*, 49 N.Y.2d at 562. Gupta makes no such evidentiary showing here. Thus, Gupta’s contentions regarding his affirmative defenses fail to rebut Blackstone’s summary judgment showing.

D. *Blackstone’s Request for Expenses*

Beyond the fee related to the CCMP purchase, Blackstone also seeks payment of \$46,640.76 in expenses in connection with the Transaction. The 2008 Amendment provides for this payment, as it requires Gupta to reimburse Blackstone’s “out-of-pocket expenses” in connection with the Transaction. Gupta does not challenge, or otherwise address, Blackstone’s entitlement to those expenses or the calculation of the \$46,640.76 demanded, which is set forth in Blackstone’s June 25, 2010 invoice. *See Agarwal Aff. Exs. 30, 37.* Therefore, Blackstone’s summary judgment motion as it pertains to these expenses is granted.

The Court considered Gupta’s remaining arguments and concludes that they are without merit.

IV. Conclusion


For the foregoing reasons, the Court grants Plaintiff Blackstone’s motion for summary judgment.

Accordingly, it is

ORDERED that Plaintiff Blackstone's motion for summary judgment on the complaint is granted, and the Clerk is directed to enter judgment in favor of Plaintiff and against Defendant Vinod Gupta in the sum of \$6,796,640.76, with interest at the rate of 9% per annum from the date of January 24, 2011 until the date of decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk.

Dated: New York, New York
December 6, 2013

ENTER:



Hon. Eileen Bransten, J.S.C.