SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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LEONID LEBEDEV,

Plaintiff,

-against-

LEONARD BLAVATNIK and VIKTOR VEKSELBERG

Defendants.

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DECISION and ORDER

Index No. 650369/2014
Motion Seq. Nos. 002, 003

HON. SALIANN SCARPULLA, J.:

In this action arising from an alleged breach of a joint venture agreement, the defendants Leonard Blavatnik ("Blavatnik") and Viktor Vekselberg ("Vekselberg") move to dismiss plaintiff Leonid Lebedev's ("Lebedev") amended complaint pursuant to CPLR §§ 3211(a)(5) and (a)(7) (motion seq. 002). In a separate motion, Lebedev seeks a preliminary injunction to restrain the defendants from pursuing arbitration in London and from commencing any other foreign proceeding (motion seq. 003). These two motions are consolidated for disposition.

In 1997, Russia privatized an oil and gas company, Tyumen Oil Company ("TNK") and permitted certain individuals and companies to bid on TNK's shares. Defendants Blavatnik and Vekselberg won the bid to acquire approximately 40% of the company's shares, upon satisfying certain criteria including making a cash payment of $25 million dollars, a capital investment of $810 million dollars, and acquiring shares in a key production company, Nizhnevartovskneftgaz OAO ("NNG").

In late 1997, the defendants sought to gain a controlling interest in TNK, and they allegedly approached Lebedev for his assistance in this endeavor. At the time, Lebedev indirectly owned 1.8% equity in TNK, and 10.5% equity in NNG. Lebedev alleges that the defendants knew that adding his holdings to their own would be "a major step in their attempts to acquire control over TNK."

The defendants proposed to Lebedev that they form a joint venture with the purpose of developing an oil and gas business and obtaining control over TNK. Lebedev agreed to join the joint venture, and in exchange for a 33.33% interest, Lebedev transferred $25 million dollars and his equity holdings in TNK and NNG to the defendants. Lebedev claims that the parties valued his contributions to be worth $133 million dollars, and that with his contributions, the defendants were able to gain a controlling interest in TNK.

The defendants, however, failed to fulfill their obligations under the joint venture agreement, according to Lebedev. In 2001, the parties met in New York to discuss an agreement under which the defendants could maintain control over Lebedev's contributions to the joint venture, and Lebedev would receive written confirmation of the value of his contributions.

The parties met over a three day period at various locations in New York – Blavatnik's office, Vekselberg's home, and Central Park. During the negotiations, the parties reviewed a draft investment agreement which proposed that Lebedev's contributions would entitle him to a 15% non-dilutable share of the parties' joint venture, including 15% of the income. Lebedev's 15% share would also include 15% of an entity

– Oil and Gas Industrial Partners Ltd. ("OGIP") – that allegedly held a 50% interest in TNK Industrial Holdings Limited. In addition, under the draft agreement, OGIP would issue a $200 million promissory note to Lebedev. Lebedev alleges that the defendants' payments on the promissory note would ensure that he received dividends from the joint venture.[1]

At the end of the parties' second meeting, the parties allegedly agreed to sign a final version of the draft agreement on the next day. Lebedev and Vekelsberg signed the agreement, but Blavatnik never signed it because he unexpectedly left town due to urgent business. Lebedev claims that Vekselberg gave him assurances that Blavatnik would honor the agreement. Blavatnik's counsel prepared the promissory note, and Lebedev nominated Coral Petroleum ("Coral") to receive the payments from the promissory note on his behalf.

In 2002, the defendants initiated negotiations with British Petroleum Plc ("BP") to discuss the creation of a joint venture that would combine the operations of TNK and BP in Russia. Shortly thereafter, the defendants formed a consortium with The Alfa Group named Alfa-Access-Renova Consortium ("AAR"). The next year, AAR and BP executed a memorandum of understanding that established a 50-50 joint venture between them, TNK-BP.

After the formation of TNK-BP, the defendants informed Lebedev that they had concealed his ownership interest in TNK from British Petroleum. The defendants

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[1] Lebedev appears to allege that the payments on the promissory note would be made in the place of dividend payments from the joint venture.

claimed that the TNK-BP deal would have been destroyed if they had identified Lebedev as a partner due to the negative press surrounding him at the time. Lebedev claims that, to accomplish the concealment of his ownership interest in TNK, the defendants coerced him into designating Coral as his nominee to enter "a swap agreement," which required Coral to surrender the promissory note in exchange for a structured series of notes over three years ("the 2003 agreement"). Lebedev alleges that, under the new notes, he was entitled to receive 7.5% of the payments made by BP to AAR over three years and past dividends. According to Lebedev, the existence of the 2003 agreement confirmed his 7.5% ownership share of the Consortium.[2]

The TNK-BP partnership was ultimately successful and became the third largest oil and gas producer in Russia. In 2013, TNK-BP was sold to another company, Rosneft, for $55 billion in cash and other consideration. After the sale in 2013, Lebedev commenced this action to recover his share of the sale proceeds, which he alleges is equal to 3.75% of TNK-BP, or approximately $2 billion dollars. In the complaint, Lebedev asserts four causes of action for breach of contract, breach of the joint venture agreement, breach of fiduciary duty, and fraud.

The defendants move to dismiss the first three causes of action for breach of contract, breach of the joint venture agreement, and breach of fiduciary duty based on the Statute of Frauds and the statute of limitations, and the fourth cause of action for fraud based on failure to state a claim and the statute of limitations.

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[2] Lebedev presumes that his alleged 15% ownership of the joint venture gives him 7.5% ownership of the Consortium that the defendants formed with The Alfa Group.

Discussion

I. Defendants' Motion to Dismiss

Statute of Frauds

The complaint alleges that the parties formed a joint venture in 1997 to gain control over TNK. It further alleges that in 2001, the parties agreed that Lebedev would receive a 15% share of the joint venture, including 15% of OGIP, the purported holding company for the joint venture's TNK shares.

The defendants argue that Lebedev's breach of contract, breach of joint venture, and breach of fiduciary duty claims should be dismissed based on the Statute of Frauds. The defendants assert that the alleged agreement between the parties was merely a "draft" document, and that any oral agreement or joint venture is barred by the Statute of Frauds because neither can be performed within one year.

The Statute of Frauds – codified in General Obligations Law § 5-701 – is "designed to protect the parties and preserve the integrity of contractual agreements." *William J. Jenack Estate Appraisers and Auctioneers, Inc. v. Rabizadeh*, 22 N.Y.3d 470, 476 (2013); *JF Capital Advisors, LLC v. Lightstone Group, LLC*, 25 N.Y.3d 759, 764 (2015). The purpose of the Statute of Frauds is "to prevent a party from being held responsible, by oral, and perhaps false, testimony, for a contract that the party claims never to have made." 73 Am. Jur. 2d Statute of Frauds § 403 (cited by *Jenack*, 22 N.Y.3d at 476).

Under Section 5-701(a)(1), an agreement that "is not to be performed within one year from the making" must be in writing. An oral contract is deemed to be incapable of

performance within one year if the contract has "absolutely no possibility in fact and law of full performance within one year." *Gural v. Drasner*, 114 A.D.3d 25, 25 (1st Dep't 2013) (quoting *Cron*, 91 N.Y.2d at 366).

While Lebedev attempts to plead the existence of a written investment agreement between the parties that grants him a 15% share of the joint venture, he concedes that Blavatnik never signed the investment agreement. However, in viewing the complaint in the light most favorable to Lebedev, he sufficiently pleads the existence of an oral agreement under which he would receive a 15% share of the joint venture, including 15% of the income. In the complaint, Lebedev alleges that the parties agreed to these central terms of the draft investment agreement, the day before Lebedev and Vekselberg signed the agreement. *Foster v. Kovner*, 44 A.D.3d 23, 27 (1st Dep't 2007) (finding that "an agreement may exist even where parties acknowledge that they intend to subsequently finalize the details of the agreement") (internal citation omitted); *Richbell v. Information Services, Inc. v. Jupiter Partners L.P.*, 309 A.D.2d 288, 298 (1st Dep't 2003).

The defendants argue that the alleged oral agreement is incapable of being performed within one year because it provided that payments would be made to Lebedev for an indefinite period of time. While the alleged agreement contemplated that payments on the promissory note could be made to Lebedev beyond one year, it is entirely possible that the contract could be fully performed and terminated within one year. The agreement granted each of the parties the right to buy out any other party at any time, and therefore the agreement does not fall within the Statute of Frauds because it is capable of performance within one year. *American Credit Services, Inc. v. Jay*

Robinson Chrysler/Plymouth, Inc., 206 A.D.2d 918, 918 (4th Dep't 1994) (noting that "[t]he financial agreement between the parties, although capable of indefinite continuance, could have been terminated by either party at any time"); *Stevens v. Perrigo*, 122 A.D.3d 1430, 1431 (4th Dep't 2014).

The defendants further rely on the Statute of Frauds in arguing that the joint venture claim should be dismissed. However, the "statute of frauds is generally inapplicable to an agreement to create a joint venture." *Foster v. Kovner*, 44 A.D.3d 23, 27 (1st Dep't 2007). "This is because, absent any definite term of duration, an oral agreement to form a partnership or joint venture for an indefinite period creates a partnership or joint venture at will." *Foster v. Kovner*, 44 A.D.3d 23, 27 (1st Dep't 2007); *Massey v. Byrne*, 112 A.D.3d 532, 533 (1st Dep't 2013). Lebedev's joint venture claim is not barred by the Statute of Frauds, nor is the fiduciary duty claim which is predicated on the existence of a joint venture between the parties.

For the reasons set forth above, the defendants' motion to dismiss the first three causes of action for breach of contract, breach of the joint venture agreement, and breach of fiduciary duty based on the Statute of Frauds is denied.

Statute of Limitations

The defendants next move to dismiss all four causes of action in the complaint based on the statute of limitations. First, the defendants argue that the breach of contract and breach of joint venture claims are untimely because they accrued in 2003 – the year that the defendants allegedly breached their obligation to ensure that Lebedev received shares in AAR and/or TNK-BP.

To recover on a breach of contract or breach of joint venture claim, a plaintiff must commence an action within the six-year statute of limitations period. CPLR § 213; *see Eskenazi v. Schapiro*, 27 A.D.3d 312, 315 (1st Dep't 2006). A breach of contract or joint venture claim accrues on the date "when all the facts necessary to the cause of action have occurred" which is generally the date of the alleged breach. *Aetna Life and Cas. Co. v. Nelson*, 67 N.Y.2d 169, 175 (1986); *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 402 (1993).

Lebedev asserts that the defendants breached the contract or joint venture agreement by failing to pay him 3.75% of the proceeds from the sale of TNK-BP to Rosneft. Because the alleged breach occurred in 2013, the statute of limitations began to run that year. The breach of contract and breach of joint venture claims were commenced in 2014, within the six year statute of limitations period. The defendants' attempt to characterize the alleged breaches as occurring in 2003 is inconsistent with the complaint.

In his cause of action for breach of fiduciary duty, Lebedev makes three separate allegations: (1) that the defendants failed to pay him 3.75% of the sale proceeds from the TNK-BP transaction; (2) that the defendants coerced him into designating Coral as his nominee to enter into the 2003 agreement; and (3) that the defendants failed to honor their representation that OGIP was the holding entity for the TNK shares.

A "breach of fiduciary duty claim is governed by either a three-year or six-year limitations period, depending on the nature of relief sought." *Carlingford Center Point Assoc. v. MR Realty Assoc., L.P.*, 4 A.D.3d 179, 179-80 (1st Dep't 2004). The shorter three year period applies when monetary relief is sought, while the longer six year period

applies when equitable relief is sought. *Id.* In contrast, a breach of fiduciary duty claim based on fraud is subject to a six year statute of limitations. *Kaufman v. Cohen*, 307 A.D.2d 113, 119 (1st Dep't 2013).

A cause of action for breach of fiduciary duty accrues when the claim becomes enforceable, "i.e., when all elements of the tort can be truthfully alleged in the complaint." *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 94 (1993); *IDT Corp v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 140 (2009).

Lebedev seeks monetary damages on his breach of fiduciary duty claim. In regards to his first two allegations that the defendants breached their fiduciary duties, a three-year statute of limitations applies because those claims are not based on fraud. The first allegation, that the defendants failed to pay him 3.75% of the Rosneft sale, was timely commenced because this claim began to accrue in 2013, when the alleged breach occurred. However, Lebedev's second allegation, that the defendants coerced him to designate a nominee to enter the 2003 agreement is time-barred. This claim accrued in 2003, at the time of the alleged coercion. Lebedev failed to bring this claim until 2014, after the three year limitations period expired.

Lebedev's third allegation is subject to a six year limitations period because it is a fiduciary duty claim based on fraud. Under CPLR § 213(8), a "cause of action in fraud must be commenced within six years of the date of the fraudulent act, or within two years of the date the fraud was, or with reasonable diligence could have been, discovered." *Rite Aid Corp v. Grass*, 48 A.D.3d 363, 364 (1st Dep't 2008). To determine whether a party should have discovered fraud with reasonable diligence, the court employs an

objective test to assess whether "the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded." *Higgins v. Crouse*, 147 N.Y. 411, 416 (1895); *Gutkin v. Siegal*, 85 A.D.3d 687, 688 (1st Dep't 2011).

In his fraud-based claims, Lebedev alleges that the defendants misrepresented to him that OGIP held the TNK shares, when the shares were held in fact by OGIP Ventures. Lebedev argues that his fraud claims accrued in 2014, the year that he discovered which entity actually held the TNK shares.

Lebedev's fraud claim, however, accrued much earlier, in 2003, when he could have discovered the defendants' fraud with reasonable diligence. Lebedev alleges that in 2003, the defendants concealed his share of the joint venture from BP and coerced him into selling his dividend rights. After learning of the defendants' concealment of his joint venture interest, Lebedev was put on notice of the alleged fraud and the potential risk that his interest in the joint venture would not be honored. A reasonable investor with knowledge of the defendants' actions would have inquired into whether his ownership interest in the joint venture was safe, and the location of the joint venture's shares. Because Lebedev had constructive knowledge of the alleged fraud in 2003, his fraud-based claims accrued that year and are now time-barred because they were not commenced until 2014. *Gutkin v. Siegal*, 85 A.D.3d at 688; *Lim v. Kolk*, 122 A.D.3d 547, 547 (1st Dep't 2014) (finding that plaintiff's fraud claim is barred when he had constructive knowledge of the defendants' fraud once "he recognized that his investment returns were significantly less than expected").

In accordance with the foregoing, the defendants' motion to dismiss the complaint based on statute of limitations is granted only to the extent that the breach of fiduciary duty claim is dismissed as to the third allegation based on fraud, and the fraud claim is dismissed in its entirety.

II. Plaintiff's Motion for Preliminary Injunction

Lebedev moves for a preliminary injunction to restrain the defendants from pursuing an arbitration that they commenced in London ("the London Arbitration") and from commencing any other foreign proceeding. Additionally, Lebedev seeks an order declaring that any decision in the London Arbitration will have no bearing on this action.

To obtain a preliminary injunction, the moving party must demonstrate "a likelihood of success on the merits, the prospect of irreparable harm if the injunction is not granted, and a balance of equities in the moving party's favor." *Council of the City of New York v. Giuliani*, 248 A.D.2d 1, 4 (1st Dep't 1998). The movant must meet its burden by clear and convincing evidence. *Delta Enter. Corp. v. Cohen*, 93 A.D.3d 411, 412 (1st Dep't 2012); *Matter of Armanida Realty Corp. v. Town of Oyster Bay*, 126 A.D.3d 894, 894-895 (2d Dep't 2015).

The court may issue an injunction "'where it can be shown that the suit sought to be restrained is not brought in good faith, or that it was brought for the purpose of vexing, annoying and harassing the party seeking the injunction.'" *IRB-Brasil Resseguros S.A. v. Portobello Intern Ltd.*, 59 A.D.3d 366, 367-68 (1st Dep't 2009) (citing *Paramount Pictures, Inc. v. Blumenthal*, 256 A.D. 756, 759 (1st Dep't 1939)).

Lebedev contends that he is entitled to an injunction against the defendants because they commenced the London Arbitration in bad faith. Lebedev asserts that the issues raised in the London Arbitration are identical to those raised in this action, and that a simultaneous arbitration creates a high risk of inconsistent judgments, waste of judicial resources, and unnecessary expenses.

It is certainly true that the issues raised in this action and the London Arbitration are closely related, but they are not identical because they are being litigated by different parties. In this court, Lebedev is litigating his claim that Blavatnik and Vekselberg breached a joint venture agreement between them by failing to pay him a portion of the TNK-BP sale proceeds. In contrast, in the London Arbitration, Rochester and Coral – two companies that appear to be acting for Blavatnik and Vekselberg on the one hand, and Lebedev on the other – are arbitrating the issue of whether the 2003 agreement extinguished all of Lebedev's claims to the joint venture.[3] Although parallel litigation is often burdensome to litigating parties, there is no evidence that the defendants commenced the London Arbitration in bad faith. Both Rochester and Coral have the right to pursue arbitration under the 2003 agreement's arbitration provision.

Because Lebedev fails to demonstrate that the defendants commenced the London Arbitration in bad faith, Lebedev's motion for a preliminary injunction is denied. I further deny Lebedev's motion for an order declaring that the London Arbitration will have no effect on this action.

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[3] Lebedev asserts that Coral has not appeared in the arbitration and intends to default on that proceeding.

In accordance with the foregoing, it is

ORDERED that defendants Leonard Blavatnik and Viktor Vekselberg's motion to dismiss the amended complaint pursuant to CPLR §§ 3211(a)(5) and (a)(7) (motion seq. no. 002) is granted only to the extent that the breach of fiduciary duty claim and the fraud claim are dismissed as described above; and it is further

ORDERED that plaintiff Leonid L. Lebedev's motion for a preliminary injunction to restrain the defendants from pursuing the London Arbitration and any other foreign proceeding, and for an order that the London Arbitration will have no effect on this action (motion seq. no. 003) is denied; and it is further

ORDERED that counsel are directed to appear for a preliminary conference at 60 Centre Street, Room 208 on January 13, 2016 at 2:15pm.

This constitutes the decision and order of the Court.

DATE : 12/2/15

SCARPULLA, SALIANN, JSC