Sustainable PTE Ltd. v Peak Venture Paartners LLC
2015 NY Slip Op 32335(U)
December 10, 2015
Supreme Court, New York County
Docket Number: 650340/2015
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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SUSTAINABLE PTE LTD., SURF HOTELS PTE LTD., GREGORY STUPPLER and YUTA OKA,

Plaintiffs,

-against-

PEAK VENTURE PARTNERS LLC, et al.,

Defendants.

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DECISION AND ORDER

Index No. 650340/2015

HON. ANIL C. SINGH, J.:

Defendants Nadar Tavakoli, Vladislav Doronin, Tarek Investments Limited, and Sherway Group Limited have all filed separate motions to dismiss the first amended complaint pursuant to CPLR 3211(a)(1), (7) and (9) and CPLR 3016(b). Plaintiffs Sustainable Pte. Ltd. ("Sustainable"), Surf Hotels Pte. Ltd. ("Surf"), Gregory Stuppler, and Yuta Oka oppose the motions.[1]

Facts

This litigation was spawned by the acquisition of Silverlink Resorts Limited ("Silverlink"), a holding company that owns and operates luxury resorts around the world known as Aman Resorts.

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[1]Motion sequence 005, 006, 007 and 008 are consolidated for decision.

Plaintiff Sustainable is in the business of commercial real estate and hotel investment opportunities. Gregory Stuppler and Yuta Oka are the owners of Sustainable.

DLF Global Hospitality Limited ("DLF") had the controlling interest in Silverlink and was seeking to sell its interest. In July 2013, DLF and defendant Omar Amanat on behalf of Peak Venture Partners LLC ("PVP") entered into an agreement regarding the potential acquisition of Silverlink. Plaintiffs allege that Amanat was introduced to Stuppler, who has extensive experience in Asian real estate and hotels. Amanat portrayed himself as a successful businessman. Amanat advised Stuppler and Oka on his agreement with DLF regarding the potential acquisition of Aman Resorts.

Relying upon Amanat's representations, plaintiffs allege that in August 2013, they began working on the acquisition by formulating a business plan, promoting the deal to potential investors and negotiating with financiers. According to the first amended complaint, Sustainable, Amanat, and PVP executed a contract in New York dated October 20, 2013 (the "SURF agreement"), which granted Sustainable the following contractual rights:

1) Sustainable was entitled to a "success fee" to compensate it for its services to Amanat and PVP in connection with the Aman Resorts acquisition.

The success fee was payable by Amanat and PVP upon the execution of a purchase agreement for the acquisition of Aman Resorts with a potential value of $3,000,000 dollars. Alternatively, in the event Amanat and PVP did not obtain a controlling interest in Aman Resorts, Sustainable would receive a percentage of the total amount paid for the acquisition;

2) Amanat and PVP were required to pay Sustainable for all reimbursable expenses incurred in connection with the services rendered;

3) Amanat and PVP agreed to enter into an agreement for asset management services from the date the purchase is completed. PVP would appoint Sustainable to provide those services; and

4) Amanat and PVP agreed to enter into a post-closing contract to appoint Sustainable or an affiliate to provide "LP Services." In exchange, Amanat and PVP agreed that they would pay to Sustainable a 20% share of the profits.

Plaintiffs allege that when Stuppler executed the SURF agreement, there were several other parties interested in the acquisition. Plaintiffs allege that they would not have allowed other investors, including defendant Vladislav Doronin, to benefit from Surf's expertise and labor without assurances that Surf would receive an asset management contract and a 20% profit share. Plaintiffs contend that they expected to generate fees from the transaction in excess of $150 million.

Amanat created a series of affiliated companies to acquire Aman Resorts. Amanat represented that Sustainable would be the general managing partner of Aman Resorts Group Ltd. ("ARGL") after the acquisition of Aman Resorts. Consistent with this representation, Stuppler was named the director of ARGL.

Plaintiffs contend that Amanat on numerous occasions stated, both privately and in discussions with prospective co-investors, that he would personally invest $50 to $150 million in the deal, which was a misrepresentation of his ability to fund the deal.

Plaintiffs allege that Amanat introduced Stuppler to defendant Nader Tavakoli, the CEO of Eagle Rock Capital, on October 24, 2013. At the meeting, plaintiffs told Tavakoli about the SURF agreement and its terms; explained their strategy to acquire Aman Resorts; and shared deal feedback and the terms offered by various investors. However, according to plaintiffs, Tavakoli already knew about Amanat's interest in Aman Resorts. Without plaintiffs' knowledge, Tavakoli had disclosed the Aman Resorts opportunity and the SURF agreement to defendant Alan Djanogly. Then, Djanogly had disclosed the opportunity to defendant Vladislav Doronin. Consequently, Doronin had set up defendant Tarek Investments Ltd. ("TIL"), a British Virgin Islands company, which was to be Doronin's investment vehicle to acquire Aman Resorts.

In December 2013, Amanat introduced Doronin to Stuppler by e-mail, which included a term sheet drafted by Stuppler, for consideration by Doronin. The term sheet provided substantial consideration, including naming SURF Hotels as the general partner of ARGL.

Thereafter, on December 21, 2013, Stuppler alleges that he received from Doronin and counsel for TIL, the law firm of Greenberg Trauig, a draft letter agreement relating to the acquisition. The draft letter agreement was consistent with the term sheet prepared by Stuppler. Plaintiffs allege that Stuppler told Doronin's and TIL's New York counsel about the SURF agreement and its terms and that Doronin, Tavakoli and TIL were aware of the SURF agreement.

Plaintiffs state that Amanat on December 31, 2013, represented that he was moving $280 million into a bank account. Further, Stuppler was copied on an e-mail where counsel for ARGL asked Doronin for $270 million. Plaintiffs maintain that Amanat represented to Stuppler and Doronin that Doronin would be contributing part of the deposit for the acquisition, and confirmed that any investment by Doronin required that SURF be the asset manager.

Plaintiffs allege that substantial time, resources and capital was expended by them to effectuate the acquisition of Aman Resorts. They relied on Doronin and TIL's representations that Sustainable's rights would be honored. Stuppler even

flew to New Delhi on December 28, 2013, in furtherance of the deal. A share purchase agreement dated January 2, 2014, for the acquisition of Silverlink and its subsidiaries was executed with DLF by Stuppler on behalf of ARGL which should have triggered plaintiffs' rights.

Plaintiffs allege that on January 6, 2014, only after the share purchase agreement was executed by DLF with ARGL depositing $20 million for the acquisition, Doronin and counsel for TIL provided Stuppler with a signed letter executed by Amanat and Doronin. The terms of the letter agreement were different from the ones sent to Stuppler by Doronin/TIL's counsel on December 21, 2013. DLF would continue to sell Silverlink to ARGL. However, PVP was designated as the controlling managing investor, with the incentive and other fees going to PVP and Amanat rather than to the SURF Hotels.

Plaintiffs allege that when inquiry was made about the differences in the two agreements, Amanat represented that Doronin had insisted on the changes. Irrespective of the differences, plaintiffs contend that Amanat expressly assured Stuppler that he was still investing in the deal, that SURF would still be able to co-invest 20% of the capital, and that SURF would receive its fees and incentives. In addition, an annex to the letter agreement provided that SURF would be the general partner of ARGL.

Plaintiffs allege that while working to close on the acquisition, defendants engaged in actions to sabotage SURF's rights. On January 14, 2014, Amanat established Peak Hotels & Resorts Group Ltd. ("PHRL") as the means by which Amanat invested in Peak Hotels and Resorts Group Ltd. ("PHRGL"). PHRGL was formed on January 17, 2014, and was the company through which Amanat and Doronin would acquire Aman Resorts. Additionally, in January 2014, Tavakoli and Amanat entered into an agreement under which Tavakoli would be paid $500,000, plus equity in PHRL, and 50% of any profits made by Amanat.

Defendants continued to represent that they would honor SURF's rights in Aman Resorts. Robert Ivanhoe (Doronin's and TIL's New York attorney) invited Stuppler, Tavakoli and Djanogly to meet at Doronin's apartment on January 26, 2014, to discuss SURF's fees under the SURF agreement. Stuppler was told that the fee structure had to be renegotiated to make it acceptable to Doronin. This included giving a portion of SURF's fees to Tavakoli and Djanogly. Plaintiffs contend that Stuppler was willing to reduce SURF's profit share to 10% conditionally, provided the parties came to terms on future investments.

On January 30, 2014, attorney Robert Ivanhoe sent Stuppler an e-mail stating: "Just so you see where Vald came out with respect to you. Pretty much everything we discussed, just so you know ... there was never a desire to screw

anyone."

A document entitled "Fee Letter" was attached to the e-mail, which provided that PHRL and TIL would each pay Sustainable the sum of $1.5 million, Sustainable would receive an asset management fee, and would also be granted a carried profits interest. Although there were further negotiations, the fee letter was never executed.

On January 31, 2014, PHRL, PHRGL, and TIL executed the PHRGL Shareholders Agreement, which according to plaintiffs, continued to recognize SURF's contractual rights.

Clause 31.1(b) of the PHRGL Shareholders Agreement states that "success fees payable to ... SURF Hotels Pte Ltd. will be paid upon completion...."

Schedule 5 of the Shareholders Agreement is entitled "Flow of Funds," which provides for payment of $3,000,000, as well as "3rd Party Diligence Expense" obligations of $250,000 in "out-of-pocket expenses," and $600,000 for the "Morrison & Foerster" reimbursement, to SURF.

Schedule 7 to the Shareholders Agreement provides that "incentive agreements have been agreed with PHRL in consideration of the role of PHRL and its affiliates in facilitating the transaction contemplated in providing ongoing management to ARGL and Silverlink," including an agreement with SURF. The

schedule also incorporated an asset management agreement, with PHRL to pay SURF an asset management fee of $1 million per annum.

On February 7, 2014, defendants funded the balance of the monies due for the acquisition of Aman Resort. Plaintiffs allege that subsequent to the closing, SURF continued to provide services in connection with Aman Resorts at the request of defendants, including PHRGL, TIL, Doronin and Djanogly. These services included lease negotiations of an Aman hotel in Tokyo, negotiations concerning the potential sale of Aman assets in Indonesia, the acquisition of a partner's stake in a Bhutan hotel, and discussions regarding the future development of hotel properties. These post-closing services were undertaken, according to plaintiffs, based on the promises and representations in the Shareholders Agreement and fee letter that SURF's rights would be honored.

Although $3.85 million was retained in ARGL's accounts, to pay SURF, these monies were not released. Instead, at the April 2014 PHRGL Board of Directors meeting, defendants (including Tavakoli in his capacity as director of PHRGL) voted to terminate the Schedule 7 incentive agreements. Doronin maneuvered to force PHRL out of PHRGL and assumed control of Aman Resorts. Subsequently, on May 13, 2014, Stuppler was notified by e-mail that SURF was not authorized to take any actions on behalf of the company. Plaintiffs allege that

when SURF attempted to discuss its rights with Doronin, he responded with threats. Stuppler maintains that in June 2014, Doronin offered to release $3 million, provided SURF waived its other rights. Plaintiffs refused.

Plaintiffs allege they were not paid for their services and reimbursements of expenses, nor was their position as asset manager ever effectuated. Instead, another entity, Internos Global, was engaged by defendants, which received the benefits that should have gone to plaintiffs.

Discussion

Breach of Contract

The first cause of action – which is not the subject of these motions – sounds in breach of the SURF contract with PVP and Amanat.

Tortious Interference with Contractual Relations

The second cause of action is for tortious interference with contractual relations against the moving defendants.

Plaintiffs allege that the moving defendants were aware of the SURF agreement and its terms; were told about the SURF agreement; were parties to the agreements and documents that referenced the SURF agreement or SURF's rights under that agreement, or were involved in the preparation of those agreements or documents that referenced the SURF agreement or SURF's rights under that

agreement; and intentionally, maliciously, and/or without reasonable justification or excuse interfered with SURF's rights under the SURF agreement; induced PVP's and Amanat's breach of the SURF agreement; and/or made PVP's and Amanat's performance impossible (paras. 135-136 of the First Amended Complaint).

The elements of tortious interference with contract are: 1) the existence of a valid contract; 2) defendant's knowledge of the contract; and 3) defendant's intentional procurement of the breach (Lama Holding Co. v. Smith Barney, 88 N.Y.2d 413 [1996]; see also Kronos, Inc. v. AVX Corp., 81 N.Y.2d 90 [1993]).

It is axiomatic that if there is no valid existing contract, there can be no breach of an existing contract that may give rise to interference with contractual relations (see Jim Ball Chrysler LLC v. Marong Chrysler-Plymouth, Inc., 19 A.D.3d 1094 [4th Dept., 2005]). Plaintiff must also "allege that the contract would not have been breached 'but for' the defendant's conduct" (Burrowes v. Combs, 25 AD3d 370, 373 [1st Dept. 2006]) (internal citations omitted).

Here, plaintiffs have alleged that there was an existing contract which granted: (i) Sustainable a success fee upon the acquisition of the Aman Hotels; and (ii) payment of reimbursable expenses payable by Amanat and PVP upon execution of a purchase agreement. The first amended complaint also alleges a

contractual right requiring Amanat and PVP to appoint Sustainable to provide asset management services and LP services (First Amended Complaint, paras. 53, 54, and 55).

The second element of a tortious interference with contract cause of action – that defendants had knowledge of the SURF agreement – is amply set forth in the first amended complaint.

Defendants urge that this cause of action is fatally deficient because plaintiffs have failed to allege that but for defendants' actions Amanat and PVP would have complied with the SURF agreement. Amanat and PVP were always able to perform by simply making the payments.

Nor could defendants have been the but for cause of Amanat and PVP's failure to enter into any future contracts with Sustainable. PVP or Amanat did not acquire Aman Resorts; therefore, they could not have entered into the agreement in the future to appoint Sustainable to provide asset management services or LP services.

In addition, defendants argue that the elimination of the Schedule 7 Incentive Payments do not satisfy but for causation. Amanat and PVP's contractual obligations accrued on February 7, 2014, when the deal closed. The vote take by the PHRGL board to terminate the incentive payments occurred two

months later in April 2014.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the Court must construe the complaint liberally, accepting as true plaintiff's factual allegations (Johnson v. Proskauer Rose, 129 AD3d 59 [1st Dep. 2015]). The foundation for plaintiffs' tortious interference with contract claim is that defendants unjustifiably interfered with Amanat and PVP's ability to perform. After plaintiffs executed the SURF agreement with Amanat and PVP, Doronin entered into a letter agreement that named PVP as the controlling managing member and directed incentive payments to PVP and Amanat rather than to the Surf Hotels. Doronin structured the acquisition making PHRGL as the entity acquiring Aman Resorts. Prior to the closing, defendants acknowledged SURF's contractual rights in the PHRGL Shareholders Agreement.

However, after Aman Resorts was acquired by PHRGL, Doronin and Tavakoli terminated the Schedule 7 payments that prior to the closing had recognized SURF's role in the acquisition and also granted SURF post-closing rights, including asset management.

Finally, plaintiffs allege that Doronin forced PHRL out of PHRGL, resulting in Doronin taking control of Aman Resorts, terminated SURF's authority and appointed another entity to realize the benefits SURF was entitled to under its

agreement with Amanat and PVP.

In short, plaintiffs contend that Doronin and Tavakoli orchestrated a series of maneuvers that made it impossible for Amanat and PVP to perform. Plaintiffs have sufficiently met but for causation as to Doronin and Tavakoli (see New Stadium LLC v. Greenpoint-Goldman Corp., 44 AD3d 449 [1st Dept 2007]) (plaintiff pled tortious interference with contract based on defendant lessor's refusal to comply with a requirement to consent to an assignment making it impossible for lessee to assign the premises to plaintiff)). Accordingly, the motion to dismiss the tortious interference with contract claim interposed against Doronin and Tavakokoli is denied.

Defendants TIL and Sherway Group also move, *inter alia*, to dismiss the tortious intereference with contract count for failure to state a cause of action.

The first amended complaint alleges that TIL was the investment vehicle for Doronin to acquire Aman Resorts. Plaintiffs allege that Doronin controls Tarek. Sherway Group is owned and controlled by Johan Eliasch. It was the means by which Eliasch invested in Aman Resorts.

However, the first amended complaint fails to allege any factual allegations that TIL and Sherway Group interfered with Amanat/PVP's ability to perform under the SURF agreement and that but for their acts of tortious interference and

inducements, the SURF agreement would not have been breached. Bare legal conclusions are not presumed to be true on a CPLR 3211(a)(7) motion (see Goel v. Ramachandran, 111 A.D.3d 783 [2d Dept., 2013]).

TIL and Sherway Group's motion to dismiss the second cause of action is granted without leave to replead.

Tortious Interference with Prospective Contractual Relations

The third cause of action is for tortious interference with prospective contractual relations. The elements of this tort are "(a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship" (Thome v. Alexander & Louisa Calder Found., 70 A.D.3d 88, 108 [1st Dept., 2009]).

Here, the first two elements of the tort have been pled as to Doronin and Tavakoli. However, plaintiffs must also allege wrongful conduct. As the Court of Appeals explained in Carvel Corp. v. Noonan, 3 N.Y.3d 182, 189 [2004]:

> [T]he degree of protection available to a plaintiff for a competitor's tortious interference with contract is defined by the nature of plaintiff's enforceable legal rights. Thus, where there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for

> tortious interference with contractual relations even if the defendant was engaged in lawful behavior. Where there has been no breach of an existing contract, but only interference with prospective contract rights, however, plaintiff must show more culpable conduct on the part of the defendant.

The interference employed by defendants must be by wrongful means or with malicious intent. "Wrongful means include physical violence, fraud or misrepresentation" (Id. at 191). "Extreme and unfair economic pressure" may amount to wrongful means (Id. at 192-3).

Here, plaintiffs allege that Doronin in concert with the other defendants took steps to force PHRL and Amanat out of PHRGL. These actions included making a capital call for $150 million, resulting in defendants receiving an unfair advantage in the management of Aman Resorts and by unilaterally terminating the Schedule 7 incentive payments.

Assuming that Doronin's capital call was to obtain an unfair advantage over Amanat and PVP, that action alone does not constitute extreme and unfair economic pressure. An allegation of "wrongful means" is also required. Thus, in New Stadium LLC, supra, (at p. 450), the First Department sustained a cause of action for tortious interference with business relations pled where "defendant withheld consent to the assignment for the wrongful and illegal purpose of extorting a $9 million consent fee"). Here, defendants' capital call was motivated

in part by self-interest; therefore, they cannot be viewed as solely malicious (Law Offices of Ira H. Leibowitz v. Landmark Ventures, Inc. 131 AD3d 585 (2nd Dept. 2015).

The failure by the various defendants to pay the fees and expenses to SURF, including, for example, the $3 million in ARGL's account as well as termination of the Schedule 7 incentive payments is conduct directed towards plaintiffs. The conduct must be directed not to plaintiff but to the party with whom a relationship was sought (see Arnon Ltd (IOM) v. Beierwaltes, 125 A.D.3d 453 [1st Dept., 2015]).

Accordingly, the third cause of action is dismissed against all defendants for failure to state a cause of action without leave to replead.

Fraud

The fourth cause of action is for fraud interposed against Doronin and TIL.

Under New York law, a plaintiff must show that: 1) defendant made a representation as to a material fact; 2) the representation was false; 3) defendant made such representation with the intention of deceiving or misleading the plaintiff; 4) plaintiff reasonably relied upon the defendant's misrepresentations; and 5) that reliance resulted in a legally cognizable injury to the plaintiff (Ross v. Louise Wise Services, Inc., 8 N.Y.3d 478, 488 [2007]; Lama Holding Co. v. Smith

Barney, Inc. 88 N.Y.2d 413, 421 [1996]; P.T. Bank Central Asia v. ABN AMRO Bank N.V., 301 A.D.2d 373, 376 [1st Dept., 2003]).

Additionally, CPLR 3016(b) requires that parties alleging fraud must "state in detail the circumstances constituting the wrong" done to them. However, courts have held that CPLR 3016(b) does not require a significantly higher pleading standard, with the First Department stating that "these special provisions ... constitute no more than a directive that the 'transactions and occurrences' constituting the 'wrong' shall be pleaded in sufficient 'detail' to give adequate notice thereof" (Foley v. D'Agostino, 21 A.D.2d 60, 64 [1st Dept., 1964]). Although there is a certainly no requirement of unassailable proof of fraud at the pleading stage, the complaint must allege the basic facts to establish the elements of the cause of action.

(Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 [2009]).

The crux of plaintiffs' fraud claims against Doronin and Tarek Investments are the following: 1) the misrepresentations in the letter agreement sent by Doronin's and TIL's counsel to Stuppler on December 21, 2013, and fee letter received by Stuppler on January 30, 2014; 2) the misrepresentations that SURF would be able to co-invest 20% of the capital, and that fees and incentives would be paid to SURF; and 3) the misrepresentations that TIL would pay SURF $1.5

million, that SURF would be paid an asset management fee and carried profits interest, the incentive arrangements reflected in the Shareholders Agreement would be effectuated, and SURF's expenses would be paid.

The first amended complaint states with particularity the transactions that constitute the wrong giving defendants notice of the alleged fraud.

Defendants argue that the majority of the misrepresentations were made by Amanat. The representations contained in the letter agreement sent by Doronin's and TIL's counsel to Stuppler on December 21, 2013, and fee letter received by Stuppler on January 30, 2014, and the provisions of the PHRGL Shareholders Agreement cannot support a fraud claim.

In order to succeed on a fraud claim, a plaintiff must show that it relied upon defendant's misrepresentations and that such reliance was justifiable (Stuart Silver Assocs. v. Baco Dev. Corp., 245 A.D.2d 96, 98-99 [1st Dept., 1997]). As the Court of Appeals has repeatedly stated:

> [I]f the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations.

(Cento Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V., 17 N.Y.3d

269, 278-79 [2011] (citation omitted)). Here, Stuppler by his own admission is sophisticated in and well versed in commercial real estate and hotel-related investment opportunities.

Plaintiffs could not have reasonably relied upon a draft of a letter agreement received by Stuppler on December 21, 2013, or the subsequent fee letter concerning the acquisition since it is just that – an opportunity, and not a binding contract for an investment (see, e.g., Meadow Ridge Capital, LLC v. Levi, 29 Misc.3d 1224(A) [Sup. Ct., Nassau Cty., 2010] (finding that an unenforceable contract could not be the basis for reasonable reliance). In the context of a fraud claim, Stuppler as a sophisticated investor could not have reasonably relied upon an investment that may have occurred. (c.f., ACA Fin. Guar. Corp. v. Goldman, Sachs & Co., 25 NY3d 1043, 1045 [2015] (finding that plaintiff had sufficiently stated the element of reasonable reliance where defendant affirmatively misrepresented his contrary position to plaintiff in an investment and continued to take that position). Here, plaintiffs fraud claim does not hinge on the failure to disclose financial information but, rather, the unactionable failure of a deal to close in the future.

The alleged misrepresentations that SURF would be able to co-invest 20% of the capital and that incentive fees would be paid to SURF were representations

made by Amanat to Stuppler and are not a basis to state a cause of action sounding in fraud against Doronin, as a third party. Plaintiffs cannot reasonably rely on a representation made to a third party (see Briarpatch Ltd., L.P. v. Frankfurt Garbus Klein & Selz, P.C., 13 AD3d 296 [1st Dept. 2004]).

Likewise, the representations regarding the asset management fee, profits, and incentive agreements as reflected by the Shareholders Agreement are not actionable. The representations were not made to Stuppler. Plaintiffs could not have justifiably relied on the Shareholders Agreement as the agreement expressly provides that a person not a party to the agreement could not enforce the agreement.

For these reasons, the fraud claim is dismissed for failure to state a cause of action without leave to replead.

Quantum Meruit and Unjust Enrichment

Next, in their sixth cause of action, plaintiffs seek recovery for quantum meruit and unjust enrichment against all defendants.

Plaintiffs allege that SURF expended time, effort, and funds regarding the acquisition and subsequent transition of Aman Resorts; SURF did so in good faith, and had an expectation to be compensated for such services; defendants benefitted from and accepted the services; defendants were enriched by SURF's services at

SURF's expense; and it would be inequitable to permit defendants to retain the benefit of those services.

The moving defendants maintain that the unjust enrichment claim should be dismissed as duplicative of plaintiffs' breach of contract claim. The defendants rely on a line of cases holding that quasi-contractual claims are prohibited where there is an express contract that covers the same subject matter even when the third party is not a signatory to the contract (AQ Asset Mgt. v. Levine, 119 A.D.3d 457 [1st Dept., 2014]).

Plaintiffs maintain that defendants have reserved their rights to argue that the SURF agreement is unenforceable.

This court holds that the SURF agreement bars plaintiffs from seeking the $3 million success fee and reimbursable expenses based on a quasi-contractual theory. However, defendants' position is that plaintiffs' future asset management and LP services are not enforceable because Amanat and PVP did not have the right to grant those services as the Aman Resorts were not acquired by Amanat or PVP. Additionally, post-closing services are not the subject matter of the SURF agreement. Plaintiffs may seek these latter claims on the basis of quasi-contract (see Payday Advance Plus, Inc. v. Findwhat.com, Inc., 478 F.Supp.2d 496 [S.D.N.Y., 2007], which holds that where there is an issue as to the application of

a contract, a party may seek recovery in quasi-contract and breach of contract).

Accordingly, defendants' motion to dismiss the sixth cause of action is granted in part.

Civil Conspiracy

Plaintiffs' seventh cause of action sounds in civil conspiracy. Plaintiffs allege that defendants undertook a plan to interfere with the SURF agreement and SURF's prospective contractual relations and/or economic advantage. Plaintiffs allege further that defendants engaged in a conspiracy with each other and intentionally interfered with the SURF agreement and SURF's prospective contractual relations and/or economic advantage.

This cause of action is dismissed with leave to re-plead. New York does not permit an independent cause of action for conspiracy to commit a civil tort (see Romano v. Romano, 2 A.D.3d 430, 432 [2003]). To establish a claim of civil conspiracy, the plaintiff must demonstrate the primary tort, plus the following four elements: 1) an agreement between two or more parties; 2) an overt act in furtherance of the agreement; 3) the parties' intentional participation in the furtherance of a plan or purpose; and 4) resulting damage or injury (see Abacus Fed. Sav. Bank v. Lim, 75 A.D.3d 472, 474 [1st Dept., 2010]).

Here, the primary tort is only stated against Doronin for tortious interference

with the SURF agreement.

Plaintiffs' conclusory allegation that all the defendants conspired to intentionally interfere with the SURF agreement does not set forth the elements necessary to state a cause of action for civil conspiracy.

Therefore, the seventh cause of action is dismissed with leave to re-plead.

Jurisdiction

Next, the Court turns to the company defendants' motion to dismiss on jurisdictional grounds. Here, in light of the dismissal of the tort causes of action against TIL and Sherway, the basis for exercise of jurisdiction over TIL would be pursuant to CPLR 302(c)(1).

The first amended complaint alleges that a New York attorney, Robert Ivanhoe, represented TIL and prepared the draft letter agreement received by Stuppler on December 21, 2013. The actions of Mr. Ivanhoe in transmitting documents are set forth in paragraphs 70, 71, 73, 83 to 90, 100, 102, 104, 114, 125, 154 to 158, and 162 of the first amended complaint.

Contrary to TIL's argument, jurisdiction may be predicated where a non-domiciliary through an attorney agent transacts business in New York and the claim arises out of that business activity (see, for example, Barclays Am./Bus Credit v. Boulware, 151 A.D.2d 330 [1st Dept., 1989]; see also Reich v. Lopez, 38

F.Supp.3d 436 [S.D.N.Y. 2014], where the court held that retention of New York legal counsel to advance defendant's interests qualifies as transacting business under CPLR 302(c)(1)).

Here, the first amended complaint sets forth a substantial relationship between plaintiff's claim against TIL and the actions taken by Mr. Ivanhoe in New York to advance TIL's business activity relating to the acquisition of the Aman Resorts.

Accordingly, TIL's motion to dismiss the complaint on jurisdictional grounds is denied.

Finally, turning to Sherway Group's motion to dismiss for lack of jurisdiction, plaintiffs contend that Sherway, a British Virgin Islands corporation owned by defendant Eliasch and the means by which Eliasch invested in Aman Resorts, is subject to jurisdiction under CPLR 302(c)(1).

It argues that Sherway signed pledge agreements, pursuant to which PHRL pledged certain assets as security for monies advanced in connection with it indirectly acquiring an interest in PHRGL, Eliasch was appointed as a PHRL director on PHRGL's Board of Directors. The pledge agreements are governed by New York law with a New York jurisdictional clause.

The first amended complaint alleges that Doronin regularly conducted

business in New York; Eliasch (and, therefore, Sherway) met with Doronin before and after the April 2014 board meeting; and Amanat lost control of PHRL because Eliasch became a rogue director conspiring with Doronin. At the board meeting, Eliasch/Sherway, Doronin and Djanogly wrongfully eliminated the Schedule 7 incentive agreements that were to benefit plaintiffs.

There is no allegation that the pledge agreements were negotiated in New York to meet the first element that defendant transact any business in New York.

The remaining cause of action against Sherway – unjust enrichment – does not arise from the business transaction or pledge agreements. Nor does the amended complaint allege any facts from which the Court can infer any agency relationship to establish personal jurisdiction over Sherway.

Finally, this Court is unpersuaded that long-arm jurisdiction can be asserted over Sherway based on the Court's dismissal of the tort claims.

Plaintiffs' alternative request for jurisdictional discovery is denied.

Plaintiffs have failed to make a sufficient start to obtain jurisdictional discovery (National Union Fire Ins. Co. of Pittsburgh, Pa. v. Jackson Tr. Auth., 127 A.D.3d 490 [1st Dept., 2015]).

Defendants Nader Tavakoli, Vladislav Doronin, and Tarek Investments are directed to answer the complaint by February 19, 2016 in light of the stay granted

by the court in its Decision and Order dated November 19, 2015 (Motion Seq 10).

The foregoing constitutes the decision and order of the court.

Date: December 10, 2015
New York, New York

Anil C. Singh