SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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REVA CAPITAL MARKETS LLC,

Plaintiff,

Index No. 650611/15

-against-

NORTHEND ENERGY LTD., SUTTON PARK PARTNERS LTD. f/k/a NORTHEND ENERGY LTD., ALL AMERICAN OIL & GAS INC., KERN RIVER HOLDINGS INC., CAPPELLO CAPITAL CORP., and CAPPELLO GLOBAL, INC.,

Defendants.

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Hon. Charles E. Ramos, J.S.C.:

In motion sequence 001, defendants All American Oil & Gas Inc. (AAOG), Kern River Holdings Inc. (KRH), Cappello Capital Corp., and Cappello Global LLC move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the seventh and eighth causes of action.

In motion sequence 002, defendants Northend Energy Ltd. (Northend) and Sutton Park Partners Ltd. (Sutton Park) move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint.

Background

The facts set forth herein are taken from the pleadings, and assumed to be true for the purposes of disposition.

Plaintiff Reva Capital Markets LLC (Reva) alleges that defendants Northend/Sutton, in addition to AAOG, and KHR, entities under common management and control, are acting in concert to avoid compensating Reva for investment banking services that it provided. In addition, defendants

misappropriated Reva's confidential and proprietary work product and disclosed it to Cappello.

Reva is an investment banking firm. Northend and its subsidiaries own and operate gas and oil fields in California, and sought to raise capital through debt and/or equity investment to acquire all or a portion of AAOG and its wholly-owned subsidiary, Kern River.

Pursuant to an engagement letter (Engagement Letter) dated May 13, 2013, Northend engaged Reva, as its agent on a non-exclusive basis, in order to raise capital for Northend, and for the placement and sale of securities, or sourcing financing. In exchange, Northend agreed to pay Reva commissions and other compensation.

As Northend's agent, Reva alleges that it communicated and negotiated with investors, created and refined investment materials and prepared sophisticated financial models and letters of intent for potential investors. Reva alleges that it entrusted confidential and proprietary information to Northend, including work product, financial analysis and models, marketing materials, and information concerning investment opportunities.

In or around July 2013, Northend and Reva purportedly agreed that Reva would be the exclusive placement or selling agent for Northend's efforts to raise capital, and there would be good-faith negotiations for a sharing of investment banking fees in

the event that a third-party was involved in the transactions that Reva was placing for Northend. The parties also purportedly contemplated that the transaction covered by the Engagement Letter would include Northend's acquisition of AAOG or the recapitalization and/or refinancing of AAOG.

In November 2013, Reva sent a written amendment to the Engagement Letter, although Northend did not execute it. Nonetheless, Reva continued to diligently provide investment banking services to Northend in an effort to locate investors and to raise capital.

In December 2013, the CEO of Northend advised Reva that due to a dispute over its name, Northend changed its name to Sutton Park, and that Sutton Park would be the entity engaging Reva under the Engagement Letter going forward (hereinafter, Northend/Sutton Park). Northend/Sutton Park also allegedly assured Reva that the parties' arrangement, consistent with the unexecuted amendment to the Engagement Letter, would continue, and the fees to be paid to Reva for its services would be worked out.

In or around February 2014, Reva learned that Northend/Sutton Park was working with another investment banking firm, Cappello, to raise capital, and that Cappello was using Reva's confidential and proprietary information, including the solicitation of investors and transactions involving AAOG.

On February 20, 2014, Northend advised Reva that it was terminating the Engagement Letter. In October 2014, it was reported that Cappello served as the financial advisor to AAOG on a $200 million credit facility from GE Capital Services to fund oil and gas exploration by KRH (GE transaction). Reva alleges that Northend, Cappello, AAOG and KRH used Reva's services and confidential and proprietary work product to secure that transaction.

Reva asserts causes of action for breach of contract, quantum meruit, unjust enrichment, breach of the implied covenant of good faith and fair dealing, promissory estoppel, tortious interference with prospective economic advantage, tortious interference with contract, and misappropriation of trade secrets.

Discussion

Defendants now move to dismiss the complaint on the ground that the Engagement Letter, amongst other documents, establishes that Reva was not entitled to compensation for the GE transaction. Defendants represent that the GE transaction did not involve Northend/Sutton Park at all, much less involve Northend/Sutton Park's acquisition of AAOG or KRH and thus, Reva could not have earned an investment banking fee on the GE transaction.

Defendants additionally argue that the confidentiality

clause contained in the Engagement Letter only covered confidential information relating to Northend/Sutton Park, which would not have had any relevance to a transaction involving KRH and AAOG. To the extent Reva may have given defendants confidential information related to AAOG and KRH, it was not covered by the Engagement Letter.

For the reasons stated below, affording the complaint a liberal construction, accepting the facts alleged as true and according Reva the benefit of every favorable inference (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]), the motion to dismiss is granted in its entirety.

I. Breach of Contract

Reva's breach of contract claim is premised on two alleged breaches: that Northend/Sutton Park disclosed Reva's confidential and proprietary information to Cappello in violation of the confidentiality provision of the Engagement Letter, and that Northend/Sutton Park failed to compensate Reva for its work and services under a revised payment structure that was orally agreed upon.

With respect to the first alleged breach, the Engagement Letter defines "Confidential Information" as "any and all information relating to the Company [Northend/Sutton Park] and/or investors or potential investors in the Company." In addition, Reva agreed "not to use the Confidential Information for any

purpose other than in the performance of Revacap's duties under this Agreement" (Engagement Letter, § 8.1).

There is no language restricting Northend/Sutton Park's use of any of Reva's materials or work product. Thus, the Engagement Letter makes clear that it is not Reva's material that is protected by the Engagement Letter, but rather, the confidential information of Northend/Sutton Park.

Moreover, the Engagement Letter states that the confidentiality provision "shall not prevent the disclosure of information by either party to its auditors, legal or other professional advisors" (Engagement Letter, § 8.2). Assuming the truth of Reva's allegations, Northend/Sutton Park's disclosure to Cappello, its other professional advisor (investment banker), is not actionable as the Engagement Letter permits this type of disclosure that Reva now complains of.

To the extent that the parties allegedly modified the Engagement Letter orally to provide for a revised payment structure in order to induce Reva to continue to work for Northend/Sutton Park as its exclusive placement agent, the oral modification is precluded. Reva fails to persuade that the doctrine of part performance is applicable.

The Engagement Letter expressly provides that Reva's engagement is on a "non-exclusive" basis and that Northend/Sutton Park would compensate Reva if it procured financing that actually

closed (Engagement Letter, ¶ 3.2). The Engagement Letter also states that it "contains the entire Engagement Letter between the parties, may not be altered or modified, except in writing and signed the party to be charged thereby" (Engagement Letter, ¶ 10.5, Exhibit 2, annexed to the Katz Aff.). Although a draft amendment to the Engagement Letter was prepared and exchanged, it was never signed.

To qualify as part performance, the plaintiff's actions must be unequivocally referable to the oral agreement, coupled with an element of detrimental reliance (*Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v Aegis Group PLC,* 93 NY2d 229, 235-36 [1999]).

Here, Reva's actions in continuing to perform services on Northend/Sutton Park's behalf and working alongside Cappello, a competing investment banker, viewed alone, are not unequivocally referable to an agreement to engage Reva as an exclusive agent. Indeed, the conduct was entirely consistent with its obligations under the Engagement Letter as written (*see O'Reilly v NYNEX Corp.*, 262 AD2d 207, 207-08 [1st Dept 1999]).

Furthermore, Reva fails to allege detrimental reliance, beyond mere conclusory allegations. Accordingly, the alleged oral modification is barred by the terms of the Engagement Letter.

II. Quasi-Contract

Reva pleads claims for quantum meruit and unjust enrichment to recover the fair and reasonable value of its services to Northend/Sutton Park and for promissory estoppel based upon its reliance, to its detriment, on Northend/Sutton Park's representation that it would compensate Reva for the work and services it performed, even if Cappello was otherwise involved and providing investment banking services.

It is well-settled that the "existence of a valid and enforceable written contract governing particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Under either theory of quasi contract (quantum meruit or unjust enrichment), equity imposes an obligation upon the defendant to prevent an injustice, in the absence of an actual agreement between the parties concerned (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142, *rearg denied* 12 NY3d 889 [2009]).

Here, the parties' binding written agreement, the Engagement Letter, governs Reva's compensation.[1] Thus, the claims sounding

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[1] The Engagement Letter provides that Reva is to be compensated "with respect to any investment by a Revacap Investor to a Company affiliated entity," which includes "any potential investors and actual investors that are directly 'introduced (...) to the Company by Revacap'" (Engagement Letter, §§ 2.2, 3.1.1).

in quasi contract, which clearly arise out of the same subject matter of the agreement, cannot be maintained.

For an identical reason, the claim for promissory estoppel must also be dismissed. The concept of promissory estoppel provides a remedy for persons who detrimentally rely upon the promises of others and are injured thereby. A plaintiff must demonstrate that the defendant "made a clear and unambiguous promise" on which it reasonably relied to its detriment" (*Sanyo Elec., Inc. v Pinros & Gar Corp.*, 174 AD2d 452, 453 [1st Dept 1991]).

Here, Reva alleges that it discussed with Northend/Sutton Park how to proceed in light of the latter's use of Cappello in connection with the same potential transaction that Reva was working on for Northend/Sutton Park, that Northend/Sutton Park "repeatedly encouraged and requested that Reva work with Cappello," that the parties exchanged a draft amendment to the Engagement Letter, and that although Northend/Sutton Park never signed the amendment, it did not object to the terms set forth in the amendment (Complaint, ¶¶ 43-47). Northend/Sutton Park also assured Reva that the new arrangement would be under some form of contract, and "no one is going to leave you [Reva] out to dry" (*Id.*). The alleged promise is too vague and indefinite to be reasonably relied upon (*Richbell Information Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 304 [1st Dept 2003]).

Reva's claim for breach of the implied covenant of good faith and fair dealing is equally insufficient. The implied covenant of good faith and fair dealing is breached where one party to a contract seeks to prevent its performance by, or to withhold its benefits from, the other (*Collard v Incorporated Village of Flower Hill,* 75 AD2d 631 [2d Dept 1980], *affirmed* 52 NY2d 594 [1981]). The covenant will only be enforced to the extent it is consistent with the provisions of the contract (*Phoneix Capital Investments LLC v Ellington Mgt. Group, L.L.C.,* 51 AD3d 549. 550 [1st Dept 2008]).

Reva alleges in conclusory fashion that Northend/Sutton Park breached the duty of good faith and fair dealing by using Reva's services and proprietary/confidential information and failing to compensate Reva while assuring Reva that it would be compensated. In terminating the Engagement Letter and using another investment banking firm to obtain financing, Northend/Sutton Park acted entirely within the agreement. To permit Reva to plead a conclusory claim that Northend/Sutton Park worked with Cappello, Reva's competitor, in order to avoid compensating Reva thereby breaching the implied covenant of good faith and fair dealing, would frustrate the expectations of the parties as made explicit in the Engagement Letter (*see Triton Partners LLC v Prudential Securities Inc.,* 301 AD2d 411, 411 [1st Dept 2003]).

III. Tortious Interference

Reva alleges that it had both a binding contract and a prospective economic interest in collecting its fee for providing investment banking services to Northend/Sutton Park, and that Cappello, Kern River and AAOG (the AAOG parties) intentionally interfered with this relationship by inducing Northend/Sutton Park not to use Reva's services, and instead to use proprietary and confidential work product to secure the GE transaction so as to avoid paying Reva.

A claim for tortious interference with prospective economic relations requires a showing that the interference was criminal, independently tortious, or for the sole purpose of inflicting harm on plaintiff (*Arnon Ltd. v Beierwaltes,* 125 AD3d 453, 453 [1st Dept 2015]).

Here, the prospective economic relations identified in the complaint is the collection of Reva's fee for providing investment banking services to Northend/Sutton Park in connection with the GE transaction. However, any purported interference by the AAOG parties in interfering with Reva's relationship with Northend/Sutton Park was clearly motivated by economic self-interest and competition. The AAOG parties were motivated to provide investment banking services to Northend/Sutton Park in order to earn a fee and thus, were not acting solely to hurt Reva.

Moreover, the wrongful conduct must be directed, not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship with" (*Carvel Corp. v Noonan*, 3 NY3d 182, 192 [2004]). Reva alleges wrongful conduct directed at itself only. With respect to Reva's relationship with Northend/Sutton, the AAOG parties, rather than exerting wrongful economic pressure, engaged in legitimate competition. Thus, the claim fails.

Similarly, the claim for tortious interference with contract fails. Reva must allege that the AAOG parties' conduct was the "but for" cause of its purported damages (*Pursuit Inv. Mgt. LLC v Alpha Beta Capital Partners, L.P.*, 127 AD3d 580 [1st Dept 2015]). Reva alleges that but for the AAOG parties' conduct, Reva would have been contractually entitled to compensation for investment banking services to Northend/Sutton Park that resulted in the GE transaction.

However, defendants persuasively demonstrate that Reva was not entitled to collect investment banking fees on the GE transaction, because this transaction was not covered by the Engagement Letter. Northend/Sutton Park was not a party to the GE transaction. Further, the Engagement Letter specifically states that Reva was being engaged by Northend/Sutton Park and its "subsidiaries and affiliated companies listed on Schedule A annexed thereto"; Schedule A to the Engagement Letter is blank.

If the AAOG parties were subsidiaries or affiliates of Northend/Sutton, the parties presumably would have listed them on Schedule A to the Engagement Letter. Otherwise, the Engagement Letter nowhere mentions any of the AAOG parties.

The AAOG parties submit other documentary evidence, unrefuted by Reva, to demonstrate that the AAOG parties were not affiliates or otherwise under common ownership or control of Northend/Sutton.

In addition, Reva alleges in the most conclusory fashion that the AAOG parties, rather than Northend/Sutton Park, had actual knowledge of the Engagement Letter and the confidentiality provisions contained therein that Reva claims was breached. Reva does not allege that the AAOG parties induced Northend/Sutton Park to breach the Engagement Letter.

Finally, the claim for misappropriation of trade secrets must also be dismissed. In order to adequately plead this claim, Reva must allege that it possesses a trade secret, and that defendant is using that trade secret in breach of an agreement, confidence or duty, or as a result of discovery by improper means (*U.S. Reinsurance Corp. v Humphreys*, 205 AD2d 187 [1st Dept 1994]). The Court of Appeals has adopted the definition of trade secrets set forth in the Restatement of Torts as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an

advantage over competitors who do not know how to use it" (*Ashland Mgmt., Inc. v Janien*, 82 NY2d 395, 407 [1993]).

In the complaint, Reva alleges that the AAOG parties and Cappello disclosed Reva's confidential and proprietary information to Cappello and others without Reva's permission or consent (Complaint, ¶¶ 32-33, 49). The Complaint does not identify what information or property comprise the trade secrets. Moreover, notwithstanding the confidentiality provisions contained in the Engagement Letter (which protects Northend/Sutton Park's confidential material), Reva fails to allege that it took steps to guard the secrecy of any material it disclosed. The pleading also fails to allege the value of the information to its business, or how it gives Reva an edge over its competitors. In short, Reva fails to allege a protectable trade secret.

Accordingly, it is

ORDERED that defendants' All American Oil & Gas Inc., Kern River Holdings Inc., Cappello Capital Corp., and Cappello Global LLC motion (001) to dismiss the seventh and eighth causes of action is granted in its entirety; and it is further

ORDERED that defendants' Northend Energy Ltd. and Sutton Park Partners Ltd. motion (002) to dismiss the causes of action asserted against them is granted in its entirety; and it is further

ORDERED that the complaint is dismissed and the Clerk is directed to enter judgment accordingly.

Dated: December 10, 2015

ENTER:

J.S.C.

CHARLES E. RAMOS