2138747 Ontario Inc. v Samsung C&T Corp.
2016 NY Slip Op 31650(U)
August 29, 2016
Supreme Court, New York County
Docket Number: 653270/2014
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
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2138747 ONTARIO INC.,

Plaintiff,

-against-

SAMSUNG C&T CORPORATION, SAMSUNG AMERICA, INC., and SAMSUNG C&T AMERICA, INC. (F/K/A SAMSUNG AMERICA, INC.),

Defendants.

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Index No.: 653270/2014

Mtn Seq. No. 003

DECISION AND ORDER

JEFFREY K. OING, J.:

Relief Requested

Defendants Samsung C&T Corporation, Samsung America, Inc., and Samsung C&T America, Inc. (collectively, "Samsung"), move, pursuant to CPLR 3211(a)(1), (a)(3), and (a)(7), to dismiss plaintiff's Second Amended Complaint.

Factual Background

LB SkyPower Inc. ("LB SkyPower") is a Delaware corporation which is a wholly-owned indirect subsidiary of Lehman Brothers Holdings Inc. ("LBHI"), another Delaware corporation (Mosher Aff., ¶ 3). LB SkyPower, in turn, owns over 80% of SkyPower Corp. ("SkyPower"), a Canadian renewable energy developer (Second Am. Compl., ¶¶ 13-14).

On or about September 26, 2008, SkyPower, LB SkyPower, Samsung C&T Corporation and Samsung America, Inc. entered into a

Non-Disclosure Agreement (the "NDA") in which LB SkyPower and SkyPower agreed to make confidential information available to Samsung (NDA at p. 1, Latella Aff., Ex. 4). Samsung C&T Corporation, Samsung America, Inc., SkyPower and Lehman Brothers Inc. collectively executed the NDA "[a]s majority owner and financial advisor to, and on behalf of" LB SkyPower (NDA at pg. 6, Latella Aff., Ex. 4).

Plaintiff alleges that in September 2009 SkyPower discovered that Samsung had misappropriated SkyPower's confidential information and used it to launch a competing renewable energy project in violation of the NDA (Second Am. Compl., ¶ 37). In an Assignment Agreement (the "Assignment") dated October 26, 2014, LBHI, as Assignor, assigned all of LBHI's "right, title and interest in and to any claim or cause of action LB SkyPower Inc. may have against Samsung arising under the NDA to plaintiff (Assignment at § 1, Latella Aff., Ex. 13). This Assignment was executed by Christopher Mosher, Senior Vice President of LBHI (Mosher Aff. at ¶ 1), on behalf of LBHI and, separately, on behalf of LB SkyPower (Assignment, Latella Aff., Ex. 13). The Assignment provided that it was governed by, and to be construed in accordance with, the laws of the province of Ontario and the federal laws of Canada (Assignment at § 4, Latella Aff., Ex. 13).

On October 27, 2014, plaintiff commenced this action asserting claims for breach of contract and unjust enrichment. On September 29, 2015, this Court dismissed plaintiff's complaint without prejudice due to plaintiff's failure to produce a valid assignment from LB SkyPower, as the only assignment produced by plaintiff assigned LBHI's interest in the bankruptcy estate of Interwind Corp., the successor-in-interest to SkyPower, for the amounts LBHI loaned to SkyPower (the "Interwind Assignment") (9/25/15 Tr. at pp. 46, 53, Latella Aff., Ex. 1; Interwind Assignment, Latella Aff., Ex. 12). Plaintiff concedes that this interest is irrelevant to the assignment of LB SkyPower's claim under the NDA (Id.).

Discussion

Defendants argue that the Second Amended Complaint must be dismissed because plaintiff does not have standing to pursue this action because the Assignment now proffered by plaintiff is invalid. The determination of standing is a fundamental inquiry that "must be considered at the outset of any litigation" as it "goes to the jurisdictional basis of a court's authority to adjudicate a dispute" (Jana Master Fund, Ltd. v. JPMorgan Chase & Co., 19 Misc. 3d 1106(A) [Sup Ct, NY County 2008]).

Plaintiff's argument that defendants do not have standing to pursue this issue because the affidavits submitted by LBHI -- which aver that the Assignment is valid -- estop LBHI from bringing a suit on the same grounds is irrelevant to the issue at the heart of this motion, namely whether the Assignment transferred LB SkyPower's claims against Samsung to plaintiff.

Here, defendants correctly note that the plain language of the Assignment Agreement transfers only whatever interest LBHI had in the LB SkyPower claim as it provides that "the Assignor [LBHI] does hereby assign and transfer to the Assignee all of its right, title and interest in and to any claim or cause of action LB SkyPower Inc. may have against Samsung arising under the NDA" (Assignment at § 1, Latella Aff., Ex. 13). In opposition, plaintiff contends that the context surrounding the Assignment demonstrates that the Assignment was intended to transfer LB SkyPower's interest to its claim against Samsung. Both parties provide expert affidavits on Canadian law concerning this issue. For the reasons that follow, expert testimony is not needed to dispose of this issue.

While Canadian law requires that the context surrounding a contract be considered in interpreting that contract, this context cannot be used to subvert the unambiguous language of a

contract (Sattva Capital Corp. v Creston Moly Corp., 2 SCR 633 at ¶ 57 [2014]). As the language of the Assignment is plain and unambiguous, plaintiff's argument is unavailing.

Alternatively, plaintiff offers three arguments that, despite its plain language, the Assignment nevertheless conveyed LB SkyPower's claim. First, plaintiff contends that because LB SkyPower was LBHI's indirect wholly-owned subsidiary LBHI had the right and ability to assign LB SkyPower's claim. As both LBHI and LB SkyPower are Delaware corporations, resolution of this issue is determined by Delaware law (Shenwick v HM Ruby Fund, L.P., 2012 WL 8700419, *8 [Sup Ct 2012] aff'd 106 AD3d 638 [1st Dept 2013]). Under Delaware law, however, a "parent's ownership of all of the shares of the subsidiary does not make the subsidiary's assets the parent's (Spring Real Estate, LLC v Echo/RT Holdings, LLC, CV 7994-VCN, 2016 WL 769586, at *3 [Del Ch Feb. 18, 2016]; Roseton OL, LLC v Dynegy Holdings Inc., 2011 WL 3275965, at *15 [Del Ch July 29, 2011]).

Lambrecht v. O'Neal, on which plaintiff relies, does not support a different conclusion. In that case, the Supreme Court of Delaware stated that "[a parent's] sole ownership [of a subsidiary], alone and without more, empowers and entitles [the parent], acting through its own board of directors or authorized

officers, to use its direct control to cause [that subsidiary] ... to do what is necessary to enforce [the subsidiary's] pre-merger claim" (Lambrecht v. O'Neal, 3 A3d 277, 289 [Del. 2010]). Contrary to plaintiff's reading, Lambrecht does not stand for the "proposition that a parent corporation may assert (post-merger) a subsidiary's claim directly," but "states only that the parent, as a practical matter and by virtue of its 100% control, can cause its wholly owned subsidiary to enforce its claim directly" (Sagarra Inversiones, SL v Cementos Portland Valderrivas, SA, 34 A3d 1074, 1080 n 13 [Del 2011]).

Here, as LBHI did not cause LB SkyPower to assign its claim against Samsung directly, but instead merely assigned the interest it purportedly had in this claim the Assignment did not transfer LB SkyPower's claims against Samsung.

Next, plaintiff argues that LBHI was authorized to assign LB SkyPower's claim by LBHI's Modified Third Amended Chapter 11 Plan (the "Plan"). Under the Plan, LBHI was authorized to "exercise its reasonable business judgment to direct and control the wind down, liquidation, sale and/or abandoning of the assets of the Debtors and/or Debtor-Controlled Entities under the Plan and in accordance with applicable law" (Third Amended Plan at § 6.1[iii], Mosher Aff., Ex. 3 [emphasis added]). Plaintiff argues

that given LB SkyPower is a Debtor-Controlled Entity and that the United States Bankruptcy Court for the Southern District of New York authorized LBHI to execute such "contracts, instruments, releases, and other agreements ... as may be necessary to ... implement ... the Plan" on December 6, 2011 (Bankruptcy Court Confirmation Order at ¶ 6, Buland Aff., Ex. 3) the Assignment was an appropriate exercise of LBHI's powers under the Plan.

As defendants note, however, the language in the Plan permits LBHI to act only "in accordance with applicable law" (Third Amended Plan at p. 65, § 6.1[b][iii], Mosher Aff., Ex. 3). As Delaware law does not grant LBHI the power to assign a subsidiary's claims, correspondingly then the Plan similarly did not confer that power upon LBHI. This result is further supported by the fact that the provision in question contemplates circumstances in which LBHI must "direct" action rather than act itself.

Finally, plaintiff argues that the Assignment transferred LB SkyPower's claims against Samsung because LBHI executed the Assignment as LB SkyPower's agent. In support of this argument, plaintiff points to the signature of Christopher Mosher purportedly on behalf of LB SkyPower in the Assignment Agreement. Even assuming arguendo that LB SkyPower consented to the

Assignment, however, this consent only served to ratify LBHI's transfer of LBHI's interest in the LB SkyPower claim and, as established supra, LBHI had no such direct interest to transfer.

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is granted, and it is hereby dismissed; and it is further

ORDERED that the Clerk is respectfully directed to enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/29/16

HON. JEFFREY K. OING, J.S.C.

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J.S.C.