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

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DEADCO PETROLEUM,

Plaintiff,

-against-

TRAFIGURA AG and TRAFIGURA BEHEER B.V.,

Defendants.

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DECISION/ORDER

Index No. 651305/2015
Motion Seq. Nos. 001, 002

HON. SALIANN SCARPULLA, J.:

In this action arising from the breach of an alleged partnership agreement, defendants Trafigura AG ("Trafigura") and Trafigura Beheer B.V. ("TBBV") move to dismiss plaintiff Deadco Petroleum's ("Plaintiff") complaint and for sanctions (motion seq. 001). After Plaintiff amended the complaint on June 19, 2015, the defendants moved to dismiss the amended complaint (motion seq. 002). The two motions are now consolidated for disposition.

According to the complaint, New West Petroleum ("NWP") and Trafigura formed a partnership in January 2008 "to carry on a petroleum distribution business located in, and operated out of, Sacramento, California."[1] Under the terms of this partnership, Trafigura allegedly agreed to supply gasoline and diesel to NWP and to provide financing for NWP's inventory at an interest rate equal to LIBOR plus 2%.

Plaintiff claims that NWP entered the partnership to obtain inventory financing from Trafigura that it could use in place of its $70 million credit facility with General Electric Capital Corporation ("the GE Loan"). NWP had recently defaulted on the GE loan in 2007

[1] Plaintiff alleges that it has standing in this action as New West Petroleum's successor-in-interest.

and was seeking alternative financing. Plaintiff alleges that, as part of the partnership, Trafigura represented that it would assist NWP in finding a new lender to replace GE.

Plaintiff asserts that NWP executed several documents with Trafigura – including a Product Supply Agreement – which memorialized certain aspects of the overall partnership.[2] Plaintiff alleges, however, that despite Trafigura's agreement to charge interest using a set formula, Trafigura "arbitrarily increased the interest rate for supplying product to NWP under the Product Supply Agreement" in June 2008. Trafigura again increased NWP's interest rate in the months of August, September, October, and November 2008. In January 2009, Trafigura then demanded that NWP pay a monthly profit sharing fee. Plaintiff claims that NWP was forced to accept Trafigura's demands and sign an amendment to the Product Supply Agreement ("the Amendment") because it had "transferred and assigned all of its inventory and terminal rights" to Trafigura and depended on Trafigura for its fuel supply.

Under the Amendment, NWP was required to pay Trafigura an additional $250,000 per month from January 1, 2009 through May 2010, plus $500,000 in retroactive payments for November and December 2008. After learning about the Amendment, GE informed NWP by letter that the increased payments made to Trafigura constituted additional defaults on the GE Loan. As a result, GE began charging the maximum default interest rates on the GE Loan. Plaintiff alleges that, as a result of the additional payments, PNC Business Credit – a potential new lender to NWP – withdrew its commitment letter to take NWP's receivables financing from GE.

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[2] The other executed documents included: an Inventory Sales Agreement, a Stock Option Agreement, and an Intercreditor Agreement. Plaintiff does not allege the existence of any written partnership agreement between NWP and Trafigura.

In October 2009, GE sent a forbearance letter to NWP. The letter stated that NWP must have a commitment letter from a new lender by November 30, or that NWP must enter into a purchase agreement for the sale of its business by December 31.

On December 7, 2009, Trafigura stated that it planned to increase NWP's monthly fee to $1 million dollars per month. GE had previously indicated that it would grant additional time for NWP to maximize the sales price of its business. However, after GE learned that Trafigura intended to increase NWP's monthly fee to $1 million dollars, GE informed NWP that it would not grant any additional time, and that NWP must accept the purchase offer for its business that would close in the least amount of time.

NWP ultimately accepted a $14 million offer from Idemitsu Apollo Corporation ("Idemitsu") for the sale of its business on June 1, 2010. Plaintiff alleges that the amount that NWP received from Idemitsu was at least $21 million lower than a competing offer that would have taken longer to close.

In the amended complaint, Plaintiff asserts five causes of action against Trafigura and TBBV for: (1) breach of the partnership agreement; (2) breach of fiduciary duty; (3) breach of the implied covenant of good faith and fair dealing; (4) fraud; and (5) intentional interference with prospective economic relations. Plaintiff alleges that TBBV is liable for the acts of its subsidiary, Trafigura.

In the first and second causes of action, Plaintiff claims that Trafigura breached the partnership agreement and the implied covenant of good faith and fair dealing by wrongfully increasing fees for NWP's inventory financing in June 2008; demanding that NWP pay a minimum monthly profit sharing fee in January 2009; and demanding that NWP increase its monthly profit sharing fee in December 2009. In the third cause of action, Plaintiff further claims that Trafigura breached its fiduciary duties by wrongfully increasing fees and costs on

inventory financing and concealing the loss of its business advantage to purchase petroleum at a reduced rate.

In the fourth cause of action, Plaintiff alleges that Trafigura represented to NWP that it was interested in entering into a mutually beneficial partnership "with the concealed intention of increasing the fees and costs it charged to NWP under the Product Supply Agreement so as to wrongfully realize a profit and cause a termination of the Product Supply Agreement." In the fifth cause of action, Plaintiff alleges that Trafigura knowingly and wrongfully demanded an increase in the monthly profit sharing fee for the purpose of interfering with NWP's business relationship with GE and PNC Business Credit.

The defendants now move to dismiss the complaint and the amended complaint based on lack of personal jurisdiction, standing, statute of limitations, a defense founded on documentary evidence, and failure to state a claim.[3]

Discussion

I. CPLR § 3211 (a)(8) - Personal Jurisdiction over TBBV

Upon a motion to dismiss pursuant to CPLR § 3211(a)(8), the plaintiff, "[a]s the party seeking to assert personal jurisdiction . . . bears the ultimate burden of proof on this issue." *Doe v. McCormack,* 100 A.D.3d 684, 684 (2d Dep't 2012); *see also Copp v. Ramirez*, 62 A.D.3d 23, 28 (1st Dep't 2009). "[I]n deciding whether the plaintiff[] ha[s] met [its] burden,

[3] Plaintiff argues that the defendants' reply and second motion to dismiss should be disregarded by the Court. However, I previously addressed this issue when I declined to sign Plaintiff's order to show to strike the defendants' reply and second motion on July 16, 2015. Contrary to Plaintiff's assertions, the reply and second motion raised arguments within the scope of the original motion to dismiss, and merely sought to address Plaintiff's amendments to the complaint. Plaintiff's request for costs and fees incurred in responding to defendants' second motion is therefore denied.

the court must construe the pleadings and affidavits in the light most favorable to [it] and resolve all doubts in [its] favor." *Brandt v. Toraby*, 273 A.D.2d 429, 430 (2d Dep't 2000); *Wilson v. Dantas*, 128 A.D.3d 176, 182 (1st Dep't 2015).

In opposing the motion, the plaintiff is not required to make a *prima facie* showing of jurisdiction, but only a "sufficient start" in demonstrating a basis for personal jurisdiction over the defendant "to warrant further discovery." *HBK Master Fund L.P. v. Troika Dialog USA, Inc.*, 85 A.D.3d 665, 666 (1st Dep't 2011).

TBBV contends that no personal jurisdiction exists here because it is a Netherlands corporation that does not engage in any activity in New York. In opposition, Plaintiff argues that personal jurisdiction exists over TBBV through Trafigura's contacts with New York, as Trafigura is merely a department of TBBV.

Under New York law, the court may acquire personal jurisdiction over a foreign parent company that exercises complete control over a subsidiary present in New York such that "the subsidiary is, in fact, merely a department of the parent." *Delagi v. Volkswagenwerk AG of Wolfsburg, Germany*, 29 N.Y.2d 426, 432 (1972); *Amsellem v. Host Marriott Corp.*, 280 A.D.2d 357, 359 (1st Dep't 2001). Where "two defendants are one and the same corporation, there is realistically no basis for distinguishing between them" for jurisdictional purposes. *Public Adm'r of County of N.Y. v. Royal Bank of Can.*, 19 N.Y.2d 127, 132 (1967); *Goel v. Ramachandran*, 111 A.D.3d 783, 787 (2d Dep't 2013).

To determine whether a subsidiary is a "mere department" of the parent, courts consider four factors: "(1) common ownership and the presence of an interlocking directorate and executive staff; (2) financial dependency of the subsidiary on the parent; (3) the degree to which the parent interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities; and (4) the degree of the parent's control

of the subsidiary's marketing and operational policies." *Porter v. LSB Indus.*, 192 A.D.2d 205, 213 (4th Dep't 1993).

At the outset, I note that Trafigura consented to personal jurisdiction in New York in Section 17.6 of the Product Supply Agreement. To determine whether this Court has personal jurisdiction over TBBV as well, I must examine whether TBBV exercises complete control over Trafigura based on the four factors set forth above.

In the complaint, Plaintiff makes several allegations concerning the first factor – the presence of an interlocking directorate and executive staff. Specifically, Plaintiff alleges that TBBV founding partner and board member, Eric de Truckheim, and TBBV executive chairman, Claude Dauphin, attended a September 30, 2007 meeting to discuss the creation of a partnership between NWP and Trafigura. Plaintiff further alleges that Pierre Lorinet, TBBV's chief financial officer, also serves as Trafigura's president of finance.

Plaintiff further submits several documents that relate to the second and fourth factors – financial dependency and control of marketing. These documents include TBBV's corporate brochure and 2015 interim report, which purport to show that TBBV controls Trafigura's financial and marketing operations in the United States.

At this early stage of the litigation, I find that Plaintiff has made a sufficient start in demonstrating that personal jurisdiction may exist over TBBV through its exercise of control over Trafigura. Although TBBV asserts that this court lacks personal jurisdiction, TBBV did not submit any affidavits to support its assertion that both entities maintain separate corporate existences, and that Trafigura is not a mere department of TBBV. Accordingly, TBBV's motion to dismiss the complaint based on lack of personal jurisdiction is denied without prejudice.

II. CPLR § 3211(a)(3) – Deadco's Standing

The defendants next move to dismiss the complaint based on lack of standing. "Standing to sue requires an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request." *Caprer v. Nussbaum*, 36 A.D.3d 176, 182 (2d Dep't 2006) (citing *New York State Assn. of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 (2004)).

In the amended complaint, Plaintiff alleges that NWP changed its name to Deadco through an amendment to its articles of incorporation. Plaintiff further submits a copy of a letter agreement signed by Idemitsu's president, Toshiaki Sagishima, in which he confirms that NWP retained the right to all causes of action arising from the Product Supply Agreement. Based on this documentary evidence, I find that Plaintiff has demonstrated standing to bring this action because it has "an interest in the claim[s] at issue in the lawsuit." *Caprer*, 36 A.D.3d at 182. Accordingly, the defendants' motion to dismiss the complaint based on lack of standing is denied.

III. CPLR § 3211 (a)(1), (5) and (7)

The defendants next argue that all causes of action should be dismissed based on the statute of limitations, failure to state a claim, and documentary evidence.

1. Breach of Partnership and Breach of the Implied Covenant of Good Faith and Fair Dealing (First and Third Causes of Action)

First, the defendants contend that the breach of contract and breach of the implied covenant of good faith and fair dealing claims should be dismissed based on the two-year statute of limitations period set forth in the Product Supply Agreement. In the alternative, the defendants argue that these claims are untimely under the CPLR.

CPLR § 213(2) sets forth a six-year statute of limitations period for breach of contract claims. The parties to a contract, however, may "provide for a shorter period of limitations than that provided in CPLR article 2." *CAB Assoc. v. City of New York*, 32 A.D.3d 229, 232 (1st Dep't 2006).

Here, NWP and Trafigura agreed to a two-year statute of limitations period for claims arising from the Product Supply Agreement. Specifically, they agreed that "[e]xcept when a shorter period is expressly provided hereunder, any Claim . . . arising hereunder shall be deemed waived and barred without recourse to litigation unless such Claim is made prior to the later to occur of (i) two years from the date of the events giving rise to the Claim and (ii) discovery of the Claim."[4] Product Supply Agreement § 17.4.

Plaintiff alleges that Trafigura breached the partnership agreement and the implied covenant of good faith and fair dealing by: (1) wrongfully increasing fees and costs of NWP's inventory financing in June 2008; (2) demanding that NWP pay a minimum monthly profit sharing fee in January 2009; and (3) demanding that NWP pay a minimum monthly profit sharing fee of $1 million dollars in December 2009.

First, I find that the two-year contractual limitations period applies to Plaintiff's breach of partnership and breach of the implied covenant of good faith and fair dealing claims because those claims arise from the Product Supply Agreement.[5] Both claims accrued at the latest in

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[4] The Product Supply Agreement further defined "Claim" as "a dispute, claim or controversy whether based on contract, tort, strict liability, statute or other legal or equitable theory (including any claim of fraud, misrepresentation or fraudulent inducement or any question of validity or effect of an agreement)."

[5] Although Plaintiff alleges that the partnership claim is outside the scope of the contractual limitations period, this claim relies on the financing agreements contained in the Product Supply Agreement, and seeks recovery for the increased costs that it incurred above those set forth in the agreement.

December 2009, when Trafigura allegedly demanded that NWP pay a minimum monthly fee of $1 million. The breach of partnership and breach of the implied covenant of good faith and fair dealing claims are both untimely because they were not commenced until April 20, 2015, more than five years after these claims accrued.

Plaintiff argues that its claims are timely because the statute of limitations was tolled by the filing of its prior action in the U.S. District Court for the Eastern District of California ("the California Action") on May 30, 2012. In that action, the district court dismissed Plaintiff's complaint based on an exclusive New York forum selection clause in the Product Supply Agreement, and the Ninth Circuit affirmed the dismissal.

CPLR § 205(a) provides that if an action is "timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff . . . may commence a new action upon the same transaction or occurrence . . . within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action." Although Plaintiff asserts that the statute of limitations on its claims were tolled pursuant to CPLR § 205(a), the California Action is not a "prior action" under this provision. A "prior action" must be an action commenced in New York state or federal court. *Baker v. Commercial Travelers Mut. Acc. Assn. of Am.*, 3 A.D.2d 265, 266 (4th Dep't 1957); *Lehman Bros. v. Hughes Hubbard & Reed*, 245 A.D.2d 203, 203 (1st Dep't 1997); *Midwest Goldbuyers, Inc. v Brink's Global Servs. USA, Inc.*, 120 A.D.3d 1150, 1150 (1st Dep't 2014).

Plaintiff's breach of partnership and breach of implied covenant of fair dealing claims are also barred by documentary evidence. The defendants demonstrated, through the Product Supply Agreement, that no partnership agreement existed between NWP and Trafigura. The

Product Supply Agreement expressly stated that it "shall not be construed as creating a partnership, or joint venture between the Parties."[6] Plaintiff does not allege that a partnership agreement was entered into after the execution of the Product Supply Agreement.

For the above stated reasons, I grant the defendants' motion to dismiss the first cause of action for breach of partnership agreement and third cause of action for breach of the implied covenant of good faith and fair dealing.

2. Breach of Fiduciary Duty (Second Cause of Action)

The defendants also move to dismiss the breach of fiduciary duty claims based on the statute of limitations. For the same reasons discussed above, Plaintiff's breach of fiduciary duty claim is also governed by the two-year contractual limitations period because it seeks recovery for increased costs above those provided in the Product Supply Agreement.

In the second cause of action, Plaintiff alleges that Trafigura breached its fiduciary duties by wrongfully increasing fees and costs on NWP's inventory financing from December 2008 to December 2009, and by concealing the loss of its business advantage to purchase petroleum at a reduced rate. This claim accrued on February 7, 2012 at the latest – *i.e.*, the date that Plaintiff allegedly discovered Trafigura's loss of its business advantage. Based on this accrual date, Plaintiff's breach of fiduciary duty claim is untimely because it was commenced more than two years later on April 20, 2015.

Plaintiff also fails to state a claim for breach of fiduciary duty. As discussed above, the defendants demonstrated that no partnership agreement existed between NWP and Trafigura. In the absence of any partnership, there was no fiduciary relationship between NWP and

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[6] Indeed, the Ninth Circuit also determined that "not only was there a lack of evidence supporting an alleged partnership, but the PSA itself explicitly disavows a partnership relationship between the parties."

Trafigura that would give rise to a claim for breach of fiduciary duty. *V. Ponte & Sons v American Fibers Intl.*, 222 A.D.2d 271, 272 (1st Dep't 1995). Accordingly, I grant the defendants' motion to dismiss the second cause of action for breach of fiduciary duty.

3. Fraud (Fourth Cause of Action)

The defendants next argue that the fraud claim is barred by the statute of limitations. 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).

While a fraud claim is ordinarily subject to a six-year statute of limitations, the fraud claim at issue here is subject to the shorter, two-year contractual limitations period set forth in the Product Supply Agreement. That agreement provides that any claim "based on contract, tort . . . including any claim of fraud, misrepresentation or fraudulent inducement" arising hereunder is subject to a two-year statute of limitations. Although Plaintiff attempts to argue that its claim arises from a partnership agreement separate from the Product Supply Agreement, the actual wrong alleged in this claim is that Trafigura concealed its intent to increase fees and costs under the Product Supply Agreement and to cause a termination of the agreement. Because this claim directly relates to the Product Supply Agreement, the contractual limitations period applies to this claim.

Based on the contractual limitations period, the fraud claim accrued at the latter of: (a) two years from the events giving rise to the claim; or (b) discovery of that claim. This claim accrued in December 2009 at the latest, when Trafigura proposed its last increase in monthly fees to $1 million dollars per month. I find that Plaintiff's fraud claim is untimely because it was not commenced until April 20, 2015, more than five years after this claim accrued.

Moreover, Plaintiff's allegation that Trafigura misrepresented its intent to enter into a mutually beneficial partnership with NWP amounts to nothing more than a misrepresentation of future intent to perform. Such allegations do not give rise to a fraud claim. *GoSmile, Inc.*, 81 A.D.3d at 81. For the above reasons, I grant the defendants' motion to dismiss the fourth cause of action for fraud.

4. Intentional Interference with Prospective Economic Relations (Fifth Cause of Action)

A cause of action for intentional interference with prospective economic relations is governed by a three-year statute of limitations. CPLR § 214(4); *Susman v Commerzbank Capital Mkts. Corp.*, 95 A.D.3d 589, 590 (1st Dep't 2012). In the fifth cause of action, Plaintiff alleges that Trafigura knowingly and wrongfully demanded increases in NWP's monthly profit sharing fee between December 2008 and December 2009, in order to interfere with NWP's business relationship with GE and PNC Business Credit. This claim accrued in December 2009 at the latest, and is time-barred because it was not brought until 2015, well beyond the three-year statute of limitations.

Further, Plaintiff fails to allege that Trafigura's interference with NWP's relationship with GE and PNC Business Credit "was motivated solely by malice or to inflict injury by unlawful means rather than by self-interest or other economic considerations" as required to state a claim for intentional interference with prospective economic relations. *Matter of Entertainment Partners Group*, 198 A.D.2d at 64; *Vigoda v DCA Prods. Plus*, 293 A.D.2d 265, 267 (1st Dep't 2002); *Boscorale Operating v. Nautica Apparel*, 298 A.D.2d 330, 332 (1st Dep't 2002).

I therefore grant the defendants' motion to dismiss the fifth cause of action for intentional interference with prospective economic relations.

IV. Sanctions

Lastly, defendants move for monetary sanctions against Plaintiff. Defendants contend that Plaintiff filed this action to prolong litigation and harass them, even after the Eastern District of California and the Ninth Circuit determined that no partnership agreement existed between NWP and Trafigura in the California Action. In opposition, Plaintiff argues that this action is not frivolous because the California Action was not dismissed on the merits, but based on the existence of a forum selection clause that designated New York as the exclusive forum for this dispute.

Section 130-1.1 of the Codes, Rules and Regulations of New York provides, in relevant part, that the court "may award to any party or attorney in any civil action . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct." Conduct is considered frivolous if it is completely without merit or undertaken to primarily harass another party.

The Eastern District of California and the Ninth Circuit dismissed the California Action based on improper venue after determining that Plaintiff's claims were subject to an exclusive New York forum selection clause. Plaintiff's commencement of this action was not frivolous because it did not receive an adjudication on the merits of its claims in the California Action. Therefore, the defendants' motion for sanctions, reasonable costs, and attorney's fees is denied.

In accordance with the foregoing, it is

ORDERED that defendants Trafigura AG and Trafigura Beheer B.V.'s motion to dismiss the complaint (motion seq. 001) is granted, and the complaint is dismissed; and it is further

ORDERED that defendants Trafigura AG and Trafigura Beheer B.V.'s motion to dismiss the amended complaint (motion seq. 002) is granted, and the amended complaint is dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

DATE : 8/24/16

SCARPULLA, SALIANN, JSC