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

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BARRY MCGOWAN,

Plaintiff,

-against-

CLARION PARTNERS, LLC,

Defendant.

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DECISION AND ORDER

Index No. 650710/2015

Motion Seq. No. 001

Scarpulla, J.;

Defendant Clarion Partners, LLC (Clarion Partners) moves for an order, pursuant to CPLR 3211 (a) (1) and (7) dismissing plaintiff Barry McGowan's complaint in its entirety.

McGowan is a senior real estate investment professional. Clarion Partners is a real estate investment management firm.

In the complaint, plaintiff Barry McGowan alleges the following: in February and March 2012, Clarion Partners, a real estate investment management firm, and McGowan, formerly the chief investment officer and managing director of nonparty GLL Real Estate Partners (GLL), a multi-national real estate fund manager, held numerous discussions and meetings at Clarion Partners' New York offices concerning the creation of Clarion Partners Europe (CPE), a real estate investment management business. As originally planned, CPE would maintain headquarters in Munich, Germany, where McGowan lived at that time.

On March 9, 2012, McGowan, nonparty Steve Furnary, in his capacity as chairman and chief executive officer (CEO) of Clarion Partners, and nonparty Florian Winkle, a former GLL colleague of McGowan's, executed a document entitled, "A Term Sheet for Clarion Partners – Europe" (Term Sheet). The Term Sheet sets forth terms concerning, among other things, the identity of the CPE management team, the management team's income, funding for CPE, and the team's investment in Clarion Partners, and provides that all terms are "[a]greed amongst the parties but subject to signed documentations."

No additional documentation was ever executed by both sides.

Following execution of the Term Sheet, and at Clarion Partners' request, McGowan formally ceased discussions with other potential joint venture partners, such as nonparty Legal & General Group plc (Legal & General), a multi-national insurance company, in reliance upon Furnary's assurances that the Term Sheet was binding on Clarion Partners. McGowan also asked certain GLL colleagues to resign from GLL, and join him at CPE.

McGowan alleges that two days after the Term Sheet was executed, Clarion Partners "anticipatorily repudiated a material provision of the Term Sheet." The Term Sheet provides that the CPE management team would invest $1 million directly into Clarion Partners, to be used to fund CPE. On March 12, 2012, Clarion Partners stated that the investment would be €1 million, instead. In 2012, the prevailing exchange rate from dollars to Euros meant that Clarion Partners was increasing the management team's investment by approximately 30%.

Clarion Partners also stated that the investment would be made in a Clarion Partners entity, rather than in Clarion Partners directly. At that time, the Clarion Partners entity was less valuable than Clarion Partners.

McGowan decided to honor the Term Sheet, as unilaterally modified by Clarion Partners. Winkle declined to accept the modification, and formally withdrew from the joint venture.

In March and April 2012, McGowan continued his efforts to move forward with the formation of CPE, and continued to correspond and meet with Furnary. McGowan sought office space in Munich.

McGowan also developed a business plan as referenced in the first paragraph of the Term Sheet, and a revised start-up budget for CPE. On May 13, 2012, McGowan emailed Furnary a copy of the "CPE Business Plan – Restructure/Delay (1 yr)" (Business Plan). On May 24, 2012, Furnary advised McGowan for the first time that Clarion Partners would not perform under the Term Sheet, that the Term Sheet was not a binding agreement, and that Clarion Partners was no longer interested in forming CPE with McGowan.

As a result, McGowan alleges that he lost the salary, benefits, and investment opportunities promised him by Clarion Partners in the Term Sheet, and was forced to remove his children from private school in Germany, put his house in Germany up for sale, and return to the United States, where he began renting a property in Rye, New York, at great personal cost and expense. In addition, McGowan was unemployed from

2012 through 2014, and, he alleges, lost more than $3 million in compensation that he would have earned, had Clarion Partners kept its side of the bargain.

In 2015, McGowan commenced this action, in which he asserts two causes of action for breach of contract and specific performance. In the contract claim, McGowan alleges that the Term Sheet is a binding contract, and that Clarion Partners' actions constitute breaches of the express terms of the Term Sheet and the covenants of good faith and fair dealing implied in that agreement. McGowan also alleges that Clarion Partners usurped his opportunity to form a European fund manager by opening a London office without McGowan, in order to take advantage of the European investment opportunities. In the specific performance claim, McGowan alleges that the opportunities guarantied in the Term Sheet cannot be obtained anywhere else, and seeks a 30% ownership interest in Clarion Partners' European business, an opportunity to invest $1 million in Clarion Partners, and ownership of 1% of Clarion Partners' income units and performance units.

In this pre-answer motion, Clarion Partners seeks to dismiss the breach of contract and specific performance claims in their entireties.

Discussion

On a motion addressed to the sufficiency of the pleadings, the court must accept each and every allegation in the complaint as true, and liberally construe those allegations in the light most favorable to the pleading party (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see* CPLR 3211 [a] [7]). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d at 87-88). "[A] court

may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint" (*McGuire v Sterling Doubleday Enters., L.P.*, 19 AD3d 660, 661 [2d Dept 2005] [internal quotation marks and citation omitted]).

I. First Cause of Action – Damages for Breach of Contract

Clarion Partners contends that the breach of contract claim is fatally defective on the ground that the Term Sheet is merely an agreement to agree, and is not a binding contract because it lacks the material terms essential to the formation of CPE, a complex international real estate investment entity.

In opposition, McGowan contends that the Term Sheet memorializes the extensive negotiations and discussions between McGowan and Clarion Partners' senior management, including Furnary. He also contends that the Term Sheet and the Business Plan incorporated by reference in that document set forth all material terms of the proposed CPE joint venture.

The contract claim is legally cognizable. To state a legally viable claim for breach of contract, the plaintiff must allege the existence of a contract between the plaintiff and the defendant, the plaintiff's performance of the contract terms, the defendant's breach of its contractual obligations, and damages resulting from that breach (*Dee v Rakower*, 112 AD3d 204, 208-209 [2d Dept 2013]).

As pleaded, the Term Sheet is a binding and enforceable contract. to plead an enforceable agreement, a plaintiff must allege "an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound. . . That meeting of the minds

must include agreement on all essential terms" (*Kolchins v Evolution Mkts., Inc.*, 128 AD3d 47, 59 [1st Dept 2015], citing 22 NY Jur 2d, Contracts § 9).

The standard for determining whether the essential terms are included in a contract is "necessarily flexible, varying for example with the subject of the agreement, its complexity, the purpose for which the contract was made, the circumstances under which it was made, and the relation of the parties" (*Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482-483 [1989], citing Calamari & Perillo, Contracts § 2-9 at 53 [3d ed]; Farnsworth, Contracts §§ 3.27, 3.29 [1982]). In order to be enforceable, a contract must "contain all of the material terms which one would reasonably have expected to be included under the circumstances" (*Argent Acquisitions, LLC v First Church of Religious Science*, 118 AD3d 441, 444 [1st Dept 2014]). The "items which must be set forth in a writing are those terms customarily encountered in a particular transaction" (*id.* [internal quotation marks omitted and citation]).

In the complaint, McGowan alleges that the Term Sheet, and the Business Plan incorporated by reference in the Term Sheet were the culmination of weeks of extensive negotiations and discussions between McGowan and Clarion Partners' senior management, particularly Furnary. He further alleges that the Business Plan had been "vetted" by Clarion Partners' senior management. McGowan alleges that he repeatedly advised Furnary that he would not terminate negotiations with Legal & General, until Clarion Partners committed to a binding agreement. He further alleges that, on March 9, 2012, Furnary assured McGowan that the Term Sheet was a binding agreement, and

requested that he terminate negotiations with Legal & General. McGowan alleges that he did so, in reliance on Furnary's assurances.

The Term Sheet and the Business Plan referenced therein set forth the material terms of the proposed CPE joint venture. A legally viable claim for breach of a written agreement to form a joint venture must include allegations of "acts manifesting the intent of the parties to be associated as joint venturers, mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill, or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses" (*Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [internal quotation marks and citation omitted]).

The Term Sheet includes identification of the purpose and form of the proposed joint venture – the creation of a Clarion Partners entity in Europe headed by a management team comprised of McGowan, nonparty Oliver Kachele, and Winkle. The Term Sheet specifies the initial funding for CPE's operations by the management team and Clarion Partners, and the management team's salary, salary increase, and bonus calculations. It also specifies the percentages of CPE ownership interests -- Clarion Partners would own 70% of CPE's equity, and the management team would own 30%, and what will happen to those interests, in the event of a sale of Clarion Partners. It also provides that the management team will be given income units and performance units in Clarion Partners.

The Business Plan referenced in the Term Sheet projects CPE's expected cash flow, expenses, and number of employees during a six-year period, from 2012 through 2018. That Plan provides target start dates for CPE's CEO (July 1, 2012), CFO (January 1, 2013), and fund managers and researchers. It also projects business expenses, including office rent, travel, entertainment, and attorneys' fees.

Contrary to Clarion Partners' contention, the fact that the creation of CPE would require additional documentation does not render the Term Sheet unenforceable. "While an offer normally may be revoked at any time prior to acceptance, the moment of acceptance is the moment the contract is created" (*Kowalchuk v Stroup*, 61 AD3d 118, 122 [1st Dept 2009]).

> "[N]ot all terms of a contract need be fixed with absolute certainty; 'at some point virtually every agreement can be said to have a degree of indefiniteness . . . While there must be a manifestation of mutual assent to essential terms, parties also should be held to their promises and courts should not be "pedantic or meticulous" in interpreting contract expressions'"

(*Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 590 [1999], quoting *Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d at 483). "Imperfect expression does not necessarily indicate that the parties to an agreement did not intend to form a binding contract. A strict application of the definiteness doctrine could actually defeat the underlying expectations of the contracting parties" (*Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 91 [1991]).

The parties' agreement to form a joint venture and their understanding that the performance of that joint venture would require additional documents resolving numerous details is demonstrated by the last provision in the Term Sheet that provides, "[a]greed amongst the parties but subject to signed documentations." Thus, the Term Sheet's "plain language expressed the parties' intention to be bound" (*Trolman v Trolman, Glaser & Lichtman, P.C.*, 114 AD3d 617, 618 [1st Dept 2014]).

Further, the omission from the Term Sheet of terms regarding the use and protection of Clarion Partners' intellectual property, does not render the Term Sheet unenforceable. Nothing in the Term Sheet requires the use of Clarion Partners' intellectual property.

For the foregoing reasons, McGowan has adequately pleaded facts which, if proven, will demonstrate that the Term Sheet is binding on McGowan and Clarion Partners.

Next, Clarion Partners contends that, even if the Term Sheet is a binding agreement, it did not breach that agreement because an express condition precedent to the formation of CPE -- the execution of additional documentation -- never occurred. In opposition, McGowan contends that the execution of additional documentation is not a condition precedent to Clarion Partners' performance of the obligations imposed by the Term Sheet.

While a party is not bound by a preliminary agreement when that "party gives forthright, reasonable signals that it means to be bound only by a written agreement" (*Kowalchuk v Stroup*, 61 AD3d at 123), here, McGowan alleges that Clarion Partners

gave no such signals, and contends that Clarion Partners clearly signaled, instead, that it considered the Term Sheet itself to be a binding agreement.

McGowan alleges that, in March 2012, in connection with the execution of the Term Sheet, Furnary, Clarion Partners' CEO, expressly assured McGowan that the Term Sheet was binding on Clarion Partners, and requested that he cease negotiations with Legal & General. In reliance on Furnary's assurances, McGowan formally terminated those negotiations. Clarion Partners' alleged conduct, if proven, in addition to the terms of the Term Sheet and Business Plan, constitute evidence that Clarion Partners intended to be bound by the Term Sheet.

Contrary to Clarion Partners' contention, the last line of the Term Sheet that provides, "[a]greed amongst the parties but **subject to** signed documentations" (Term Sheet at 2 [emphasis added]) does not conclusively demonstrate the parties' intent not to be bound by the Term Sheet, unless additional documents were signed (*see Bed Bath & Beyond Inc. v IBEX Constr., LLC*, 52 AD3d 413, 414 [1st Dept 2008] [holding that the use of "'subject to' in the [document] and reference to the execution of a[n] . . . agreement as a 'qualification,' do not amount to an express reservation of the right not to be bound"]; *Emigrant Bank v UBS Real Estate Sec., Inc.*, 49 AD3d 382, 383 [1st Dept 2008] [holding that "'[s]ubject to' in the [document] did not unmistakably condition assent on the execution of a definitive agreement at some later date"]).

Next, the parties dispute whether their correspondence after execution of the Term Sheet demonstrates that there was no meeting of the minds with regard to the binding nature of the Term Sheet.

Party emails constitute evidence for purposes of CPLR 3211 [a] [1], and may be considered by the court on a motion to dismiss (*see Schutty v Speiser Krause P.C.*, 86 AD3d 484, 485 [1st Dept 2011]; *Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 297 [1st Dept 2003]).

The cited correspondence includes emails to and from Winkle, a signatory of the Term Sheet and a member of the CPE management team, as defined by the Term Sheet. Three days after executing the Term Sheet, and after Clarion Partners allegedly unilaterally modified the Term Sheet, Winkle sent an email to Clarion Partners, in which he stated that "I want to thank you for the interesting meeting and the opportunity you offered. I'm sorry to give you notice that I reject your offer and do not pursue it" (Winkle Mar. 12, 2012 email to Furnary, Clarion Partners). The court notes that Winkle is not a party to this action, and has not submitted an affidavit. While Winkle's subjective opinion of the binding nature of the Term Sheet may constitute some evidence of the contracting parties' intent, it is not dispositive on the issues presented on a motion to dismiss.

Similarly, not dispositive at this juncture are the emails exchanged by McGowan and Furnary in which they discussed Winkle's action. McGowan wrote that "everyone needs to regroup" (McGowan & Furnary Mar. 13-14, 2012 email chain). In his response, Furnary noted his surprise that the discussions over the management team's investment had killed the deal, particularly since "we never agreed to the [team's] salaries" (*id.*). McGowan replied that Furnary was "absolutely right on all points" (*id.*). At this juncture, it would be premature to hold that these emails conclusively demonstrate McGowan's

understanding that that essential material terms of the joint venture were still in negotiation.

McGowan's emails in which McGowan proposed a restructure and a one-year delay in launching CPE do not, at this juncture, conclusively demonstrate McGowan's understanding that the Term Sheet-related discussions were preliminary in nature. On May 2, 2012, McGowan emailed Furnary an "outline for our discussion," listing topics to be discussed and a timeline for anticipated key events, such as "Documentation (May)" and "Establish CPE Entity (June 1st Recording)," and "CPE goes live: June-Oct 2013." On May 13, 2012, McGowan emailed Furnary the Business Plan. As discussed above, the Business Plan included a description of the means to effectuate capital contributions for CPE, modified some of the Term Sheet provisions, such as changing the management team investment from $1 million to €850,000, and included proposed terms on issues not covered by the Term Sheet, including potential means to effectuate capital contributions for CPE.

Clarion Partners also relies on a May 18, 2012 email by McGowan's German counsel sent to Clarion Partners' corporate counsel in Germany, annexing a 16-page first draft of the CPE articles of association. In that email, McGowan's counsel referred to a draft shareholders' agreement to be provided in the near future.

On May 24, 2012, Furnary responded to McGowan in an email in which he states that the Term Sheet "was subject to due diligence, lawyering and structuring," that "the earlier outlines of a transaction are neither agreed nor approved," that "we have no commitment to advance the formation of a business" in Europe; that Clarion Partners

viewed the European economy as becoming "more unstable each day;" and that Clarion Partners had no interest at that time in going forward on the CPE entity.

However, and contrary to Clarion Partners' contention, on a motion addressed to the pleadings, a determination cannot be made that the volume and amount of detail in the draft CPE articles of incorporation and the shareholders' agreement demonstrate the kind of terms that ordinarily would be included in one of the many agreements required to form such an entity, and highlights the inadequacy of the Term Sheet.

Next, the parties dispute whether Clarion Partners bore an obligation toward McGowan to negotiate in good faith the more definitive documentation contemplated by the Term Sheet.

"[P]arties may enter into a binding contract under which the obligations of the parties are conditioned on the negotiation of future agreements. In such a case, the parties are obliged to negotiate in good faith" (*IDT Corp. v Tyco Group, S.A.R.L.*, 23 NY3d 497, 502-503 [2014]). "[T]he obligation to negotiate in good faith bar[s] a party from . . . insisting on conditions that do not conform to the preliminary agreement" (*Credit Suisse First Boston v Utrecht-America Fin. Co.*, 80 AD3d 485, 487 [1st Dept 2011] [internal quotation marks and citation omitted]). Whether a party fulfilled its obligation to negotiate in good faith generally raises an issue of fact not appropriately resolved on a motion to dismiss (*id.*).

McGowan sufficiently alleges that Clarion Partners improperly rebuffed his attempts to implement the terms of the Term Sheet and to enter into additional agreements, and made no effort to negotiate in good faith. McGowan further alleges that

Clarion Partners, instead, improperly began renegotiating the Term Sheet material terms concerning the initial investment required by the CPE management team.

For the above stated reasons, I deny Clarion Partners' motion to dismiss the breach of contract claim for damages.

II. Second Cause of Action – Specific Performance of Contract

Next, Clarion Partners seeks to dismiss the specific performance cause of action on the ground that it is not an appropriate form of relief in the circumstances presented here. In opposition, McGowan contends that, even if the Term Sheet is not enforceable, he is entitled to the unique benefits of that agreement's terms, such as the opportunity to own up to 30% of Clarion Partners' European business.

The specific performance cause of action is not legally viable on its face. In that claim, McGowan seeks an order directing Clarion Partners "to specifically perform each and every term of the Term Sheet, including but not limited to McGowan's ownership of 30% of Clarion's European business, the opportunity to invest $1 million in Clarion Partners LLC at management's buyout price, and the right to receive 1% of Clarion Partners' Income Units and . . . Performance Units."

Specific performance is an equitable remedy for breach of contract, and is appropriate only where money damages would be inadequate to protect the plaintiffs' expectation interest (*see Cho v 401-403 57th St. Realty Corp.*, 300 AD2d 174, 175 [1st Dept 2002]; *Yu Han Young v Chiu*, 49 AD3d 535, 536 [2d Dept 2008]). "It is well settled that the imposition of an equitable remedy must not itself work an inequity, and that

specific performance should not be an undue hardship" (*Van Wagner Adv. Corp. v S & M Enters.*, 67 NY2d 186, 195 [1986]).

Specific performance of the Term Sheet would create undue hardship. The relief demanded by McGowan would force Clarion Partners to enter into a business relationship against its will, one in which it would be the primary economic contributor. As a basic principal, courts will not use equitable relief to force parties to be partners against their will (*see e.g. Seligson v Russo*, 16 AD3d 253, 253 [1st Dept 2005]; *Napoli v Domnitch*, 18 AD2d 707, 708 [2d Dept 1962], *affd* 14 NY2d 508 [1964]).

In addition, should McGowan demonstrate that the Term Sheet is binding and that Clarion Partners breached that agreement, then McGowan may be fully recompensed by the granting of the monetary relief he demands in the contract claim. Therefore, that branch of the motion to dismiss the specific performance claim is granted, and that claim is dismissed.

III. Leave to Replead

Lastly, McGowan seeks leave to replead the claims for breach of contract and specific performance, and leave to assert claims for detrimental reliance, promissory estoppel, and breach of the implied covenant of good faith and fair dealing.

The branch of McGowan's request for leave to replead the breach of contract claim is denied as moot. As held above, that claim is properly pleaded.

I further deny McGowan's request for leave to replead the specific performance claim. Leave to amend the complaint will be denied where, as here, the plaintiff failed to discuss how the defects would be addressed in the amended pleading, and because

recasting the complaint would be futile (*see Cusack v Greenberg Traurig, LLP*, 109 AD3d 747, 749 [1st Dept 2013]; *Norte & Co. v New York & Harlem R.R. Co.*, 222 AD2d 357, 358 [1st Dept 1995]).

The branch of McGowan's request for leave to amend the complaint to add a claim for promissory estoppel and detrimental reliance is granted. "[L]eave to amend should be freely given in the absence of prejudice to the other party traceable to the omission in the original pleading, some change of position or hindrance in the preparation of a case, or significant trouble or expense that could have been avoided if the original pleading had contained what the amended one seeks to add" (*Frankart Furniture Staten Is. v Forest Mall Assoc.*, 159 AD2d 322, 323 [1st Dept 1990]; CPLR 3025 [b]).

To assert a legally viable claim for promissory estoppel, the plaintiff must demonstrate "a clear and unambiguous promise; a reasonable and foreseeable reliance by the party to whom the promise is made; and an injury sustained by the party asserting the estoppel by reason of his reliance" (*Totalplan Corp. of Am. v Colborne*, 14 F3d 824, 833 [2d Cir 1994] internal quotation marks and citation omitted]; *Emigrant Bank v UBS Real Estate Sec., Inc.*, 49 AD3d at 384). To support a claim for promissory estoppel, a plaintiff must allege reliance that created a prejudicial change in position, and cannot rely on a conclusory allegation of reasonable reliance or injury (*Tierney v Capricorn Invs.*, 189 AD2d 629, 632 [1st Dept 1993]).

McGowan has adequately alleged that Clarion Partners promised to enter into the joint venture, that he changed his position by terminating negotiations with Legal &

General, and others, in reliance on that promise, and that he was unable to reopen those negotiations or to find employment.

Further, McGowan's request for leave to amend the complaint to add a claim for breach of the implied covenant of good faith and fair dealing separate from the contract claim is granted.

"The implied covenant of good faith and fair dealing is breached when a party acts in a manner that would deprive the other party of the right to receive the benefits of their agreement" (*1357 Tarrytown Rd. Auto, LLC v Granite Props., LLC*, 142 AD3d 976, 977 [2d Dept 2016], citing *Frankini v Landmark Constr. of Yonkers, Inc.*, 91 AD3d 593, 595 [2d Dept 2012]). That "covenant includes any promises which a reasonable promisee would be justified in understanding were included" (*1357 Tarrytown Rd. Auto, LLC v Granite Props., LLC*, 142 AD3d at 977, citing *Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]). McGowan has sufficiently alleged that Clarion Partners refused, soon after execution of the Term Sheet, to negotiate any of the details necessary for implementation of that agreement's terms.

In accordance with the foregoing, it is

ORDERED that the defendant Clarion Partners, LLC's motion to dismiss the complaint is granted only to the extent that the second cause of action for specific performance is dismissed, and the motion is otherwise denied; and it is further

ORDERED that the request by plaintiff Barry McGowan for leave to serve an amended complaint is granted, and he is directed to serve an amended complaint in which

he asserts causes of action for promissory estoppel and breach of the implied covenant of good faith and fair dealing within 20 days of the date of this order; and it is further

ORDERED that defendant Clarion Partners, LLC shall serve an answer to the amended complaint or otherwise respond thereto within 20 days service of the amended complaint.

This constitutes the decision and order of the Court.

DATE : 1/6/17

SALIANN SCARPULLA, JSC