Pate v BNY Mellon-Alcentra Mezzanine III, L.P.
2017 NY Slip Op 30256(U)
February 6, 2017
Supreme Court, New York County
Docket Number: 654058/2015
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45
---X
LUTHER S. PATE, IV,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 654058/2015

BNY MELLON-ALCENTRA MEZZANINE III, L.P., SCOTT B. GOLD, PAUL J. ECHAUSSE, and UNITED INSURANCE COMPANY OF AMERICA,

Defendants.
---X

HON. ANIL C. SINGH, J.:

Defendants move to dismiss the amended complaint pursuant to CPLR 3211(a)(1) and (7), contending that plaintiff cannot enforce a provision in a term sheet because: 1) there is a merger clause in the parties' final agreement expressly stating that the final agreement supercedes the term sheet; and 2) plaintiff failed to satisfy a condition precedent in the term sheet requiring him to pay defendants a total of $5.5 million. Plaintiff opposes the motion.

Plaintiff commenced this action by filing a summons and complaint on December 4, 2015. The amended complaint alleges the following facts.

Defendant BNY Mellon-Alcentra Mezzanine III, L.P. ("Alcentra") is an investment fund managed by BNY Mellon-Alcentra Mezzanine Partners

("Alcentra Partners"). Defendant Scott Gold is the Senior Vice President of Alcentra Partners. Defendant Paul Echausse is a managing partner.

In 2013, plaintiff Luther Pate ("Pate") formed Seven Continents Holdings, LLLP ("Holdings"). Pate used Holdings to purchase DRC Emergency Services, LLC ("DRC") and related entities.[1] Defendant Alcentra and defendant United Insurance Company of America ("United") made a $15 million loan to finance the purchase. The loan was guaranteed personally by Pate and additionally secured by a pledge of his Holdings interests. After the purchase, Pate owned approximately 90% of Holdings and 7CGP, LLC.

In August 2013, Pate defaulted on the loan, and the parties entered into negotiations, resulting in an agreement (the "Term Sheet") dated October 22, 2013.

The Term Sheet provided that the parties would enter into a forbearance agreement by November 15, 2013, subject to the satisfaction of other terms and conditions of the Term Sheet. Upon execution of a forbearance agreement, the Term Sheet provided that Pate and his affiliates would assign and transfer all of their rights and interests in Holdings and its affiliates, and the parties would enter into a series of mutual releases.

[1]Non-party 7CGP, LLC is the general partner of Holdings.

The Term Sheet also imposed certain obligations on Pate prior to entering into a forbearance agreement, including that Pate would make a total of $5.5 million in payments to DRC and return certain specified assets to Holdings. Further, the Term Sheet set forth certain rights to which plaintiff would be entitled upon his satisfaction of his obligations under the Term Sheet and the forbearance agreement.

The complaint alleges that the Term Sheet contained the finalized terms agreed upon during the release negotiations. One such term concerned the transfer to plaintiff of a limited participation interest in Holdings (the "participation provision"):

> Pate shall be entitled to acquire a limited participation interest for a limited period of 5 years representing a 10% economic interest only in the amount of any cash distributions made by Holdings during such participation period with respect to its Common Limited Partnership Interests (or similar residual common class of equity interests).

Plaintiff maintains that the essential aspects of the release negotiations were that plaintiff would inject significant capital into DRC and transfer his interests in Holdings and 7CGP, LLC to Alcentra and United. In exchange, Alcentra and United would: 1) release plaintiff from his obligations with respect to the loan, including his personal guaranty; 2) indemnify plaintiff with respect to other guaranties he executed for the benefit of Holdings; and 3) cause Holdings (which

Alcentra and United would then own) to provide plaintiff with the 10% economic interest in that partnership.

Defendants contend that the Term Sheet on its face expressly contemplated a final forbearance agreement between the parties, and recognized that the terms of the final agreement would be subject to "internal approvals" by the parties. The Term Sheet states in part:

> The parties hereby agree to enter into a forbearance agreement (the "Definitive Agreement") by November 15, 2013 on the terms and conditions set forth in this term sheet (the "Term Sheet") to address the various Events of Default that have occurred ...; provided that the final terms and conditions of the Definitive Agreement are subject to (i) the Purchasers [e.g., Alcentra and United] obtaining necessary credit and other internal approvals and (ii) the satisfaction of the terms and conditions set forth in the Term Sheet by the other parties hereto.

(Echausse Aff., Ex. E, at 1) (emphasis in original).

The Term Sheet provided that plaintiff was required to pay $5.5 million to DRC in two installments – a $2.5 million payment upon execution of the Term Sheet, and a $3 million payment on or before execution of the parties' final forbearance agreement.

The Term Sheet further provided that, in exchange for timely payment in full, plaintiff would receive a limited economic interest in Holdings:

> Upon the indefeasible payment in full in cash of all payments as set

> forth in the payment schedule above this Term Sheet and the satisfaction by Pate of all other conditions and obligations set forth in this Term Sheet and the Definitive Agreement ("Payment in Full"):
>
> . . .
>
> Pate shall be entitled to acquire a limited participation interest for a limited period of 5 years representing a 10% economic interest only in the amount of any cash distributions made by Holdings during such participation period with respect to its Common Limited Partnership Interests (or similar residual common class of equity interests).

The parties executed an "Assignment Agreement and Release" dated November 4, 2013 (the "release agreement"). The release agreement provided that plaintiff would make a payment via wire transfer in the amount of $2.5 million and convey his interest in Holdings to defendants. In exchange, defendants would not foreclose; would indemnify plaintiff; and would forgive plaintiff's personal guaranty.

Paragraph 12 of the release agreement is a merger clause that states:

> This agreement sets forth the entire understanding of the parties with respect to the subject matter hereof and supercedes all prior agreements, written or oral, of the parties (including any prior term sheet or correspondence) and may be modified only in a writing executed by all of the parties.

(Release Agreement, p. 5).

The complaint asserts that, notwithstanding their contemplation of a further written agreement, the parties expressly agreed that the Term Sheet itself is

enforceable. The Term Sheet contains numerous obligations that had to be performed prior to the execution of the "definitive agreement." Paragraph 35 of the amended complaint states, "Pursuant to the Term Sheet, Mr. Pate paid millions of dollars to DRC and transferred his Holdings interest to Alcentra and United. Further, Mr. Pate performed all of his additional obligations under both the Term Sheet and the Release Agreement."

To meet the Term Sheet's November 15, 2013 deadline regarding the "definitive agreement," the parties began negotiating that agreement's details.

During a telephone call on November 1, 2013, defendant Paul Echausse told plaintiff that Alcentra and United wanted the release agreement to be a "very simple five-page document." For that reason, plaintiff contends that Echausse explained that the transfer to plaintiff of "a 10% participating interest in [Holdings] going forward" as contemplated by the participation provision would not be accomplished via the release agreement, but rather by way of a separate document, the specifics of which would be negotiated "over the next thirty days."

The complaint alleges that Echausse urged plaintiff to rely on his representation that the transfer would be accomplished after plaintiff executed the release agreement. During the phone call, Echausse stated:

"We would have to, post-close [of the release agreement], sign a

> document for the 10% participating interest, so there's an element of trust that I'm asking you to take here Stan."

Plaintiff alleges that he reasonably understood that this document to be signed "post-close" would be a supplemental, mechanical document simply effectuating the transfer, as the parties already had agreed to plaintiff's right to the 10% economic interest, and had memorialized that agreement in the binding Term Sheet. Accordingly, plaintiff understood Echausse's references to "negotiat[ing]" a subsequent agreement, and his statement that "I don't think we're going to agree ... between now and Monday at five o'clock," to be in reference to the details of this mechanical document – not a renegotiation of the participation provision.

On November 4, 2013, the parties circulated the release agreement. Plaintiff contends that he executed the release agreement in reliance on Echausse's promises that: a) Alcentra and United would transfer a 10% economic interest in Holdings to plaintiff; b) the release agreement would not affect plaintiff's right under the Term Sheet to receive that interest; and c) a supplemental document effectuating the transfer would be executed within 30 days of execution of the release agreement.

Based in part on representations made by Echausse, plaintiff maintains that he understood that the merger clause in the release agreement would not impact

the participation provision.

Further, the complaint alleges that the participation provision was not part of the subject matter of the release agreement. Rather, Echausse made a decision not to include the transfer in the release agreement. That agreement already had been memorialized in the Term Sheet; and, per Echausse's promise during the November 1 telephone call, the transfer would be effectuated via a separate document to be executed within 30 days after execution of the release agreement.

The complaint alleges that plaintiff has performed all of his obligations under the release agreement and the Term Sheet, but Alcentra and United have not fulfilled their obligation to cause Holdings to assign to plaintiff a 10% economic interest in that partnership.

The complaint asserts three causes of action: 1) breach of contract; 2) fraudulent inducement; and 3) breach of warranty of authority.

Discussion

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court accepts the complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory (Mill Financial, LLC v. Gillett, 122 A.D.3d 98, 103 [1st Dept., 2014]. However, bare legal conclusions, as well as factual claims

either inherently or flatly contradicted by documentary evidence, are not presumed to be true and accorded every favorable inference (Biondi v. Beekman Hill House Apt. Corp., 257 A.D.2d 76, 81 [1st Dept., 1999], affd 94 N.Y.2d 659 [2000]). Where extrinsic evidence is submitted in connection with the motion, the appropriate standard of review is whether the proponent of the pleading has a cause of action, not whether he has stated one (IIG Capital LLC v. Archipelago, L.L.C., 36 A.D.3d 401, 402 [1st Dept., 2007]).

If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(1) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (McGuire v. Sterling Doubleday Enters., L.P., 19 A.D.3d 660, 661 [1st Dept., 2005]). In other words, dismissal is warranted pursuant to CPLR 3211(a)(1) where the documentary evidence resolves all factual issues as a matter of law; conclusively disposes of plaintiff's claim; and utterly refutes plaintiff's factual allegations (Fortis Fin. Serv. v. Fimat Futures USA, 290 A.D.2d 383 [1st Dept., 2002]).

Breach of Contract (First Cause of Action)

The amended complaint alleges that: 1) the Term Sheet is a written agreement, and the participation provision is included in the Term Sheet; 2)

plaintiff paid millions of dollars to DRC and transferred his holdings interest to Alcentra and United; 3) plaintiff performed all of his other obligations under both the Term Sheet and the release agreement, but defendants did not cause Holdings to provide him with a 10% economic interest in that partnership, as required by the Term Sheet; and 4) defendants' failure to transfer that interest to him constitutes a material breach of the participation provision in the Term Sheet.

Defendants contend that plaintiff's breach of contract claim is expressly barred by the merger clause in the release agreement.

In opposition, plaintiff maintains that the parole evidence rule does not bar him from introducing or relying on the Term Sheet. Arguing that the parole evidence rule applies only where a party is seeking to challenge the terms of an agreement based on a prior inconsistent agreement or representation, plaintiff contends that he is not using the Term Sheet to challenge the terms of the subsequent release agreement; rather, he is seeking to enforce the Term Sheet itself, and specifically a provision of the Term Sheet that is not referable to the subject matter of the release agreement and, therefore, cannot be inconsistent with it.

Plaintiff maintains that the parties entered into two separate, enforceable, written contracts. Acknowledging that the subject matter of the two contracts

overlapped in parts, plaintiff asserts that the second agreement (the release agreement) was – by design – narrower in scope than the first (the Term Sheet). To prove his point, plaintiff relies upon the statement made by Echausse during the telephone call on November 1, 2013, when Echausse said:

> [A]ny document I send to you is going to be a very simple 5-page document. It says you get a full release, we indemnify you for the bonds, you put 2 ½ in, we pay X for the 90% of your LLP interest, and then over the next 30 days we will negotiate a 10% participating interest[] in [DRC] going forward.

(Amended Complaint, ex. 2)(emphasis added).

Accordingly, plaintiff asserts that the participation provision is not "inconsistent" with any provision in the release agreement.

The Court finds that the Term Sheet is unenforceable for several reasons.

First, the merger clause states expressly and unambiguously that the release agreement supercedes "any prior term sheet." If the Court were to find that the provisions in the Term Sheet were enforceable notwithstanding such language, the Court would render the clause meaningless. An interpretation of a contract that would leave one of its clauses without meaning or effect should be avoided (Two Guys from Harrison-N.Y., Inc. v. S.F.R. Realty Assoc., 63 N.Y.2d 396, 403 [1984]). "It is well settled that where the parties have clearly expressed or manifested their intention that a subsequent agreement supercede or substitute for

an old agreement, the subsequent agreement extinguishes the old one and the remedy for any breach is to sue on the superceding agreement" (Northville Indus. Corp. v. Fort Neck Oil Terms. Corp., 100 A.D.2d 865, 867 [2nd Dept., 1984] (internal quotation marks and citations omitted)). "It is equally well settled that the construction of a plain and unambiguous contract is a matter for the court to pass upon without recourse to circumstances extrinsic to the agreement" (id.).

Second, the Term Sheet was not intended to be the final agreement; rather, it is an "agreement to agree." The Term Sheet states plainly, "The parties hereby agree to enter into a forbearance agreement (the "Definitive Agreement")...." A term sheet that constitutes nothing more than an agreement to agree is not an enforceable agreement between the parties (Meyers Associates, L.P. v. Conolog Corp., 61 A.D.3d 547, 548 [1st Dept., 2009] (internal citation omitted)).

Third, plaintiff cannot rely on any telephone conversations or e-mails with the defendants, for the merger clause states unambiguously that the release agreement set forth "the entire understanding of the parties with respect to the subject matter hereof and supercedes all prior agreements (written or oral)."

The Court of Appeals summarized the purpose of merger clauses in contracts in Matter of Primax Int. Corp. v. Wal-Mart Stores, 89 N.Y.2d 594, 599 [1997]). The Court wrote:

> Courts and commentators addressing the substantive and procedural aspects of New York commercial litigation agree that the purpose of a general merger provision, typically containing the language found in the clause of the parties' ... [a]greement that it "represents the entire understanding between the parties," is to require full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing. The merger clause accomplishes the objective by establishing the parties' intent that the [a]greement is to be considered a completely integrated writing. A completely integrated contract precludes extrinsic proof to add to or vary its terms.

(internal citations omitted).

When parties set down their agreement in a clear complete document, their writing should be enforced according to its terms and evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing (Golden Gate Yacht Club v. Societe Nautique De Geneve, 12 N.Y.3d 248 [2009]; Johnson v. Stanfield Capital Partners, LLC, 68 A.D.3d 628 [1st Dept., 2009]). Likewise, evidence of what may have been orally agreed by the parties prior to the execution of an integrated written document cannot be used to vary the terms of the writing (Braten v. Bankers Trust Co., 60 N.Y.2d 155 [1983]; Ahava Dairy Porducts Corp. v. Trident Leasing Corp., 1 A.D.3d 546 [2nd Dept., 2007]).

Where there is a conflict between an express provision in a written contract and an alleged oral agreement, the oral agreement is unenforceable (Shah v. Micro

Connections, Inc., 286 A.D.2d 433 [2nd Dept., 2001]). Similarly, where an agreement contains a merger clause that evinces the parties' intent that the agreement is to be considered a completely integrated writing, extrinsic evidence that adds to or varies the agreement's terms should be precluded (Schron v. Troutman Sanders LLP, 20 N.Y.3d 430 [2013]; see Jarecki v. Shung Moo Louie, 95 N.Y.2d 665 [2001]; Simone v. Homecheck Real Estate Services, Inc., 42 A.D.3d 518 [2nd Dept., 2007]; New York City Health and Hospitals Corp. v. St. Barnabas Hosp., 10 A.D.3d 489 [1st Dept., 2004]; Ashwood Capital, Inc. v. OTG Management, Inc., 99 A.D.3d 1 [1st Dept., 2012] (motion to dismiss properly granted where the written "agreement contains both a no-oral-modification clause and a broad merger clause, which as a matter of law bars any claim based on an alleged intent that the parties failed to express in the writing")).

Plaintiff cites Renaissance Equity Holdings, LLC v. Pace Elevator, Inc., 17 Misc.3d 1137(A) [Sup. Ct., N.Y. County, 2007], in support of his argument that the Term Sheet and the release agreement at issue here are separately and independently enforceable notwithstanding the merger clause.

We disagree. The parties in Renaissance entered into two entirely different agreements. On June 22, 2004, the parties entered into a construction agreement for the renovation of 15 elevator cabs in a building (the "renovation contract").

Five months later on November 30, 2004, the parties entered into an elevator maintenance agreement for the maintenance and repair of 59 elevators (the "maintenance contract"). The maintenance contract stated:

> Whereas, owner desires to engage contractor to perform certain additional elevator maintenance service for the elevators, separate from the construction agreement, and contractor desires to provide those services.

Despite the fact that each contract contained a merger and integration clause, the Court held that the parties intended the agreements to be separately enforceable.

Unlike the contracts in Renaissance, there is no language whatsoever in the Term Sheet or the release agreement clearly stating that the parties intended the Term Sheet and the release agreement to be separate, enforceable agreements.

Finally, the Term Sheet is unenforceable because documentary evidence utterly refutes plaintiff's contention that he made both of the payments required by the Term Sheet.

The Term Sheet states that plaintiff would be entitled to acquire an economic interest in Holdings only if he satisfied all of his obligations under the Term Sheet, including the "indefeasible payment in full in cash of all payments as set forth in the payment schedule above." The payment schedule in the Term

Sheet required two payments totaling $5.5 million: 1) a payment of $2.5 million upon the execution of the Term Sheet, no later than October 22, 2013; and 2) a payment of $3 million upon execution of the definitive agreement, no later than November 15, 2013.

Two documents utterly refute the conclusory allegation in the amended complaint that plaintiff performed all of his obligations under the Term Sheet.

Defendants exhibit e-mails dated October 22, 2013 (the date of the Term Sheet). Echausse notified plaintiff that there was a 2:00 p.m. deadline for plaintiff to sign the Term Sheet. Plaintiff responded in an e-mail, stating:

> Paul[,] I don't have the funds today. I thank you and failure is not something I am use[d] to; but hopefully I will survive.

(Echausse affidavit, ex. F).

In addition, defendants exhibit the transcript of the telephone call between plaintiff and Echausse on October 24, 2013, as confirmation that plaintiff had still not made the $2.5 million payment due upon execution of the Term Sheet. During the call, plaintiff stated:

> I appreciate your willingness to talk with me. I want you to know that I'm still working on getting you the money and I hope you'll take it when I have it.
>
> . . .
>
> I intend to try to give you your money Friday.

(Echausse affidavit, ex. G).

In short, the documentary evidence utterly refutes plaintiff's contention that he made the payments set forth in the Term Sheet to the defendants. Accordingly, the breach of contract claim must be dismissed.

Fraudulent Inducement (Second Cause of Action)

The elements of a cause of action alleging fraud in the inducement are: representation of a material existing fact; falsity; scienter; reliance, and injury (Urstadt Biddle Preoperties, Inc. v. Excelsior Realty Corp., 65 A.D.3d 1135, 1136-1137 [2nd Dept., 2009]). In other words, a claim for fraudulent inducement requires a knowing misrepresentation of material fact, intent to deceive another party and to induce that party to act on it, causing injury (Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher, 299 A.D.2d 64 [1st Dept., 2002]).

The amended complaint alleges that: 1) Ecchause promised that plaintiff would still receive the 10% interest in Holdings even if he executed the release agreement and defendants would convey the interest via a separate document within thirty days of the execution of the release agreement; 2) Echausse knew when he made the statements that they were false; 3) Ecchause stated to plaintiff, "there's an element of trust that I'm asking you to take here Stan"; 4) plaintiff

relied on the false statements in deciding to trust Echausse and execute the release agreement; 5) had plaintiff known that defendants intended to use the merger clause in the release agreement as an excuse to avoid their contractual obligations under the participation provision, plaintiff never would have executed the release agreement; 6) defendants took advantage of plaintiff's vulnerability, as time was of the essence and defendants had superior bargaining power, in order to avoid their obligations under the Term Sheet, including the participation provision; and 7) defendants' conduct evidences a high degree of moral turpitude and dishonesty.

The fraudulent inducement claim must be dismissed for two reasons.

First, the claim fails because the allegation that plaintiff justifiably relied on pre-contractual representations by Echausse is refuted by the merger clause of the release agreement (Kremer v. Sinopia LLC, 104 A.D.3d 479, 480 [1st Dept., 2013]; Chappo & Co. v. Ion Geophysical Corp., 83 A.D.3d 499, 500 [1st Dept., 2011] ("The cause of action alleging fraud in the inducement is barred by the merger clause")).

Second, the fraudulent inducement claim is duplicate of the breach of contract claim, for it arises out of the same set of underlying facts and seeks damages identical to the breach of contract claim (Manas v. VMS Assoc., LLC, 53 A.D.3d 451 [1st Dept., 2008]; Clark Constr. Corp. v. BLF Realty Holding Co., 28

A.D.3d 367 [1st Dept., 2008]).

Warranty of Authority (Third Cause of Action)

The third cause of action alleges that: 1) defendants Gold and Echausse impliedly warranted that they could bind defendants Alcentra and United to the promises made; 2) Gold and Echausse had authority to bind Alcentra and United, and their promises created an enforceable contract with plaintiff; and 3) if Gold and Echausse did not have such authority, then they breached their implied warranties of authority.

"Under the doctrine of implied warranty of authority, a person who purports to make a contract, representation, or conveyance to or with a third party on behalf of another person, lacking power to bind that person, gives an implied warranty of authority to the third party and is subject to liability to the third party for damages for loss caused by breach of that warranty, including loss of the benefit expected from performance by the principal" (DePetris & Bachrach, LLP v. Srour, 71 A.D.3d 460, 462 [1st Dept., 2010]).

In light of our finding that the Term Sheet is unenforceable by reason of the merger clause, there cannot be a basis for the recovery of damages against the individual defendants for breach of warranty of authority (Broughton v. Dona, 101 A.D.2d 897 [3rd Dept., 1984]; Gracie Square Realty Corp. v. Choice Realty Corp.,

305 N.Y. 271 [1953]). Further, paragraph 39 of the complaint alleging, "If Mr. Gold and Mr. Echausse did not have authority [to bind Alcentra and United], then they breached their implied warranties of authority," fails to state a cause of action. The allegation is conclusory, speculative and alleges insufficient facts.

Accordingly, it is

ORDERED that the motion to dismiss the amended complaint is granted.

The foregoing constitutes the decision and order of the court.

Date: Feb 6, 2017
New York, New York

Anil C. Singh