Q Aviation Mgt., LLC v Alterna Capital Partners LLC
2017 NY Slip Op 31566(U)
July 21, 2017
Supreme Court, New York County
Docket Number: 653910/2013
Judge: Andrea Masley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

----------X

Q Aviation Management, LLC,

Plaintiff,

-against- Index No. 653910/2013

Alterna Capital Partners LLC,

Defendant.

----------X

Masley , J.

Defendant Alterna Capital Partners LLC ("Alterna") moves, pursuant to CPLR 3212, for an order granting summary judgment in its favor, and dismissing the amended verified complaint. Plaintiff Q Aviation Management, LLC ("Q Aviation") cross-moves for an order granting summary judgment in its favor.

Q Aviation is in the commercial aircraft trading industry, and has financed, purchased, leased, and sold aircraft since 2003. Alterna is an investment firm, specializing in capital assets, primarily for the benefit of public employee pension funds. Among Alterna's investments on behalf of its clients are nine commercial aircraft leased to major airlines.

On May 7, 2013, Q Aviation and Alterna entered into a written "Agreement for Services Provided by Independent Contractor" ("Services Agreement"), binding Q Aviation to act as the exclusive broker for a 12-month term on the sale of one or more of Alterna's aircraft, and to negotiate amendments to existing leases between Alterna and three major airlines, nonparties United Airlines, Inc., Delta Air Lines, Inc., and American Airlines, Inc.

There is no dispute that, in exchange for Q Aviation's services, Alterna agreed to pay Q Aviation commissions based either on a completed sale or on the receipt of a "bona fide offer," or, an offer to buy at, or above, minimum purchases prices specified in the Services Agreement, in the event that Alterna elected not to close on the sale.

Q Aviation alleges that it obtained three bona fide offers from nonparties Wood Creek Capital Management, LLC and WNG Capital LLC ("Wood Creek/WNG"), Compass Capital Corporation ("Compass Capital"), and First Star Aviation, LLC (First Star). Q Aviation also alleges that Alterna intentionally stalled on making a decision on each alleged offer for several weeks, until each expired.

By invoice dated October 18, 2013, Q Aviation demanded that Alterna pay it commissions on the three alleged offers totaling $2,225,429.71 by October 28, 2013.

In response, by letter dated October 23, 2013, Alterna notified Q Aviation that it was terminating the Services Agreement, effective the next day, on the ground of gross misconduct by Q Aviation. The letter noted two specific examples of Q Aviation's alleged misconduct: (1) demanding commissions for alleged bona fide offers that did not exist; and (2) "bad mouthing" Alterna in the marketplace .

On November 8, 2013, Q Aviation commenced this action to recover unpaid earned commissions and reimbursable expenses based on allegations that three bona fide offers were received, yet failed to result in completed sales, as a direct result of Alterna's intentional inaction.

In the original complaint, Q Aviation asserted causes of action for breach of contract, prima facie tort, and fraudulent inducement, and demanded a judicial declaration that Alterna improperly terminated the Services Agreement, and was required to pay Q Aviation earned commissions and reimbursable expenses.

Subsequently, Alterna moved to dismiss the original complaint, pursuant to CPLR 3211 (a) (7).

By so-ordered transcript dated June 24, 2014, the court granted the motion, dismissed the claims for breach of contract, prima facie tort, and fraudulent inducement, and permitted Q Aviation to voluntarily withdraw the declaratory judgment

claim.

On August 25, 2014, Q Aviation filed an amended complaint in which it asserts claims for breach of contract and fraudulent inducement.

Alterna moved to dismiss the amended complaint.

By so-ordered transcript dated March 30, 2015, the court granted the motion in part, and dismissed the fraudulent inducement claim, while severing and preserving the breach of contract claim.

By answer filed April 9, 2015, Alterna denies all allegations of breach of the Services Agreement and improper conduct.

Alterna now seeks summary judgment in its favor on the remaining breach of contract claim, on the grounds that neither of the conditions precedent to Alterna's contractual obligation to pay a commission was met on any of the three alleged bona fide offers and that the breach of contract claim is barred by the parol evidence rule.

In opposition, Q Aviation contends that summary judgment is not appropriate because the relevant terms of the Services Agreement are ambiguous. Q Aviation also cross-moves for summary judgment in its favor on the grounds that both conditions precedent were met on each offer, and that its proffered definition of the term "bona fide offer" is the only plausible meaning of that term, as it is used in the aircraft industry.

The well-established law of contract interpretation provides that:

> "[i]n interpreting a contract, the intent of the parties governs. A contract should be construed so as to give full meaning and effect to all of its provisions. Words and phrases are given their plain meaning. Rather than rewrite an unambiguous agreement, a court should enforce the plain meaning of that agreement.
>
> Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment. On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a

question of fact, and summary judgment should be denied"

(*American Express Bank v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990] [internal citations omitted]; *see* CPLR 3212). Further, "[w]hether or not a writing is ambiguous is a question of law to be resolved by the courts" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990] [internal citation omitted]).

The Services Agreement includes the following commission provision:

> "Aircraft Sale: In consideration of the performance by Independent Contractor [Q Aviation] in remarketing the Aircraft which results in a sale of one or more Aircraft **(or a bonofide [sic] offer for one or more Aircraft at or above the Minimum Prices detailed below[,] if Company [Alterna] elects not to close such sale)**, Company agrees to pay Independent Contractor [a] Commission"

(Services Agreement, Schedule C [1] [emphasis added]).

Thus, as the parties acknowledge, the Services Agreement entitles Q Aviation to receive a commission, if a potential buyer presented a bona fide offer for one or more of Alterna's aircraft, and Alterna elected not to close the offer.

By its express terms, none of the three offers upon which Q Aviation relies is a bona fide offer, as required by the Services Agreement to trigger Alterna's obligation to pay a commission. At most, the alleged offers constitute nonbinding expressions of interest. "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v Delcol*, 79 NY2d 1016, 1018 [1992]).

The alleged offer sent via email by Wood Creek/WNG to Q Aviation dated August 7, 2013 provides, in relevant part, that it is a

> "**letter of interest** . . . with respect to the purchase of five (5) Boeing aircraft . . . Please understand that this is a Letter of Interest only and is neither an offer nor a commitment. Any such commitment is subject to the approval of [WNG] and its investment partners and may have terms and conditions which differ from this Letter of Interest"

(Wood Creek/WNG alleged offer at 1 [emphasis added]).

It further provides in bold capital letters that:

> **"IT IS UNDERSTOOD BY BOTH PARTIES THAT EXCEPT FOR . . . (I) NO LIABILITIES OR OBLIGATIONS OF ANY KIND WHATSOEVER ARE INTENDED TO BE CREATED HEREBY BETWEEN THE PARTIES, (II) THIS LETTER OF INTEREST IS NOT INTENDED TO CONSTITUTE A LEGALLY BINDING CONTRACT TO CONSUMMATE THE PROPOSED TRANSACTION DESCRIBED HEREIN NOR AN AGREEMENT TO ENTER INTO A LEGALLY BINDING AGREEMENT, (III) ANY BINDING LEGAL OBLIGATION OF ANY NATURE RELATING TO THE SUBJECT MATTER HEREOF BETWEEN THE PARTIES, SHALL REQUIRE A SEPARATE WRITTEN AGREEMENT DULY APPROVED AND EXECUTED BY EACH PARTY'S REQUISITE CORPORATE REPRESENTATIVE(S), AND (IV) NEITHER PARTY MAY CLAIM ANY LEGAL RIGHTS AGAINST THE OTHER BY REASON OF THE EXECUTION OF THIS LETTER OF INTEREST OR BY TAKING ANY ACTION IN RELIANCE THEREIN"**

(*id.* at 4 [emphasis so in original]).

Thus, by its express terms, the alleged offer is merely a letter of interest and, even after execution, would not have created any legal right obligating either Wood Creek/WNG or Alterna to consummate the proposed sale of Alterna's Boeing aircraft. Therefore, it is not a bona fide offer.

Contrary to Q Aviation's contention, the October 1, 2013 email by Albert Nigro, a WNG executive, is speculative, and does not create a genuine triable issue regarding whether the Wood Creek/WNG alleged offer was a bona fide offer, as required by the Services Agreement.

In that email, Nigro advised Gregory May, former Q Aviation president and chief executive officer (CEO), that:

> "From [Wood Creek's] perspective, this was a done deal. They signed off [on] it, went to credit committee, got the green light and submitted a final proposal outlining the terms that you had indicated were agreeable to Alterna. I can tell you from my experience with [Wood Creek] on the prior 12 aircraft that we have purchased with them that had Alterna

> signed the proposal, it [would] have been an absolute certainty that [Wood Creek] would have countersigned and approved the same"

(Albert Nigro Oct. 1, 2013 email). While Nigro's experience may have led him to believe that the alleged offer would have resulted in a sale, such belief constitutes no proof at all that the sale would have necessarily occurred, had Alterna executed the Wood Creek/WNG letter of interest. Had Wood Creek/WNG decided not to proceed with the transaction for any reason, Alterna would have had no legal recourse against it.

Similarly, the September 24, 2013 email and September 30, 2013 alleged offer by Compass Capital, even when read together, do not constitute a bona fide offer. In both the email and alleged offer, Compass Capital repeatedly refers to a "proposal," rather than an offer, and includes many conditions precedent to closing. For example, the alleged offer is expressly subject to:

> "[c]ompletion of due diligence regarding the Aircraft, the Lessee and the Lease and all related documentation satisfactory to the Buyer, including an inspection of the Aircraft and associate records as Buyer may deem necessary, . . . to Buyer's satisfaction; . . . Delivery of satisfactory consents, approvals, etc. from their parties (including the Lessee); and . . . Approval of the final terms and conditions of the transaction by the Board of Directors, Executive Committee and/or Credit Committee of Buyer and Seller"

(Compass Capital alleged offer § 7).

Significantly, the Compass Capital alleged offer provides that "[t]his proposal is neither an offer nor a commitment to purchase the Aircraft and remains subject to due diligence and the other terms and conditions specified herein."

Although Q Aviation contends that the disclaimer was mere boilerplate, Ben J. Assaf, Compass Capital's executive vice president, attests that Compass Capital believed the provision to be important. Assaf attests that "[t]he inclusion of the statement that the LOI (Letter of Intent) was 'neither an offer nor a commitment to

purchase the Aircraft' . . . is intended [to prevent] any dispute in which a seller might assert that Compass Capital would be compelled to close without regard to the conditions contained in the LOI" (Ben J. Assaf, June 26, 2014 aff ¶ 6).

Those conditions are described by Assaf as including, among other conditions:

> "the extensive and expensive due diligence required in acquiring leased commercial aircraft, usually for many millions of dollars. We must investigate the aircraft itself as to the current condition, completion and adequacy of maintenance records (which are essential to establish aircraft value) and market value. We engage outside technical advisors for such inspections and/or appraisals. Additionally we would review and evaluate the operative documents governing the lease of the aircraft to determine important business terms (such as options held by the lessee and obligations of the owner to pay for certain repairs) and enforceability"

(*id.* ¶ 5).

The last alleged bona fide offer upon which Q Aviation relies was submitted by email on October 3, 2013 by First Star. In this alleged offer, First Star refers not to its offer, but to its "Indication of Interest," and states that it "is pleased to express interest in pursing a potential purchase of two" of Alterna's aircraft (First Star alleged offer at 1). In that document, First Star lists "[n]egotiate LOI" as one of the necessary steps to close and fund the contemplated sale transaction (*id.* at 2).

The First Star alleged offer does not require Alterna to execute the document, nor does it include a signature line.

The First Star alleged offer includes the following disclaimer language:

> "[p]lease note that **this expression of interest** is not intended to create, or to be construed as creating, legal obligations between the parties. In particular, this proposal does not constitute an agreement to purchase or sell aircraft. **No such binding agreement or offer** shall exist unless and until the parties enter into a definitive agreement for such purchase or sale"

(*id.* [emphasis added]).

Here again, contrary to Q Aviation's contention that the disclaimer was mere boilerplate, the record demonstrates that the prospective buyer believed the language to be enforceable and that the alleged offer was merely a nonbinding expression of interest.

Pradeep Hathiramani, First Star's managing director, testified that the letter of intent was "nonbinding," and the purpose of the "not an offer" disclaimer in the First Star alleged offer was to prevent the seller from accepting and forcing the buyer to purchase the aircraft (*see* Pradeep Hathiramani Aug. 13, 2015 dep tr at 22, lines 13-15 ["It's not a commitment . . . it's just a nonbinding interest that's expressed"]). He further testified that there "are a multitude of items that are negotiated in an LOI . . . details that the buyer and seller have to agree on in the LOI" (*id.* at 56, lines 7-12).

Q Aviation has failed to raise a triable issue regarding whether any of the alleged offers fall within the scope of the accepted meaning of the term "bona fide offer," as it is used in the aircraft remarketing industry.

The opinion rendered by Q Aviation's expert witness, Gary M. Weissel, managing officer of Tronos Aviation Consulting, Inc. ("Tronos"), is not persuasive.

In his expert report, Weissel opined that a written offer, typically in the form of a draft LOI, is considered a bona fide offer in the industry, notwithstanding standard disclaimers that it is not an offer, "if the LOI contains the material terms of the transaction, is made by a reputable buyer [who] has made the offer based on a review of the material information about the assets, and who has the financial wherewithal to consummate the transaction" (Gary M. Weissel/Tronos Dec. 14, 2015 expert witness report ¶¶ 3.3.3.3, 3.3.3.4).

In his report, Weissel also opined that, before a draft LOI is prepared, the seller's authorized aircraft remarketing agent will develop and send a market outreach plan to

prospective buyers in order "to obtain expressions of interest by interested parties" (*id.* ¶ 3.3.2.1). He further explained that the interested buyer will obtain additional information about the assets for sale and details of the aircraft lease agreements to determine whether the aircraft are a match for their business needs (*see id.* ¶ 3.3.2, 3.3.3).

Significantly, however, Weissel testified at deposition that most remarketing agents are paid a retainer up front by the aircraft sellers, and receive the balance of their commission at the sale transaction's closing (*see* Gary M. Weissel Feb. 2, 2016 dep tr at 29, line 15 to 30, line 1). He also testified that he does not "recall any compensation structure where we [as a remarketing agent] . . . would get compensated prior to execution of an LOI and a seller backing out" and, until he was retained as an expert in the action at bar, he had never seen an agreement entitling the remarketing agent to a commission, prior to execution of an LOI (*id.* at 32, line 11 to 34, line 9).

Weissel also testified that he did not review Alterna's pleadings filed in this action, because "I don't think" that the issues upon which he was hired to express an opinion "had really anything to do with Alterna Capital's side of the deal" (*id.* at 75, lines 2-24). He also testified that he was not aware of the dismissal of the original complaint, did not review the amended verified complaint or any transcripts of depositions given by Alterna's witnesses or by nonparty witnesses, such as Ben Assaf of Compass Capital and Pradeep Hathiramani of First Star, because he did not believe them to be relevant to the formation of his expert opinion (*id.* at 76, line 1 to 81, line 22).

Thus, Weissel admittedly is not familiar with remarketing commission agreements such as the one at issue here, and did not review a significant portion of the documentary record and information available, including the depositions of the individuals responsible for the issuance of the alleged offers, necessary for a reliable

expert opinion.

Q Aviation's contention that an "executable LOI" constitutes a bona fide offer for purposes of the Services Agreement is without merit. The single use of that term in the contemporaneous documentary record is an email by Gregory May, former Q Aviation president and CEO, to Alterna dated April 22, 2013, more than two weeks prior to the parties' execution of the Service Agreement on May 7, 2013.

Where, as here, a contract contains a merger clause, courts apply "the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing" (*Matter of Primex Intl. Corp. v Wal-Mart Stores*, 89 NY2d 594, 599 [1997]).

The Services Agreement provides, in relevant part, that:

> "Entire Agreement: This Agreement and Schedules A, B, and C referenced herein set forth the full and complete understanding of the parties as of the date first above stated [May 7, 2013], and supersede any and all agreements and representations between the parties, whether written or oral, made or dated prior to the date of this Agreement"

(Services Agreement § 9.1). Therefore, the Services Agreement merger provision excludes the April 22, 2013, email, as well as any other written or verbal evidence varying the terms of the Service Agreement in existence prior to execution of that agreement, from the court's consideration.

Therefore, none of the three alleged offers constitutes a bona fide offer, and the first condition precedent to Alterna's contractual obligation to pay Q Aviation a commission was not met.

Having determined that the first condition precedent was not met, the court need not discuss whether the second condition precedent, Alterna's election not to close on any of the alleged offers, was met.

The court has considered Q Aviation's remaining arguments, and finds them to

be without merit.

For the foregoing reasons, Alterna's motion for summary judgment in its favor is granted, and Q Aviation's cross motion for summary judgment in its favor is denied.

Accordingly, it is

ORDERED that defendant's motion for summary judgment in its favor is granted and the complaint is dismissed with costs and disbursements to defendant, as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's cross motion is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: July 21, 2017

ENTER:

HON. ANDREA MASLEY, J.S.C.