Lantau Holdings Ltd. v General Pac. Group Ltd.
2018 NY Slip Op 30291(U)
February 14, 2018
Supreme Court, New York County
Docket Number: 650085/2017
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 61

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LANTAU HOLDINGS LTD.,

Plaintiff,

- v -

GENERAL PACIFIC GROUP LTD., SVK CAPITAL MANAGEMENT, LTD., JOHN DOES 1 THROUGH 30, LANTAU HOLDINGS LLC, ROBERT MARINO

Defendant.

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INDEX NO. 650085/2017

MOTION DATE

MOTION SEQ. NO. 007

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 191-1, 203-1, 212, 213, 214, 216, 217, 218, 219, 220, 221, 229, 232, 234, 235, 236, 237, 238

were read on this application to/for Dismiss

HON. BARRY R. OSTRAGER:

Defendants General Pacific Group Ltd. ("GPG") and SVK Capital Management Ltd. ("SVK") move separately to dismiss the Second Amended Complaint ("SAC") of Plaintiff Lantau Holdings Ltd. ("Lantau"). On February 7, 2018, oral argument was heard on both motions. The Court granted GPG's motion in part, for the reasons stated on the record therein, and reserved decision on SVK's motion. For the reasons stated herein, SVK's motion is also granted in part. SVK is directed to file an answer within twenty days of the filing of this order.

Background

This case arises out of two Stock Purchase Agreements ("SPAs") between Lantau as seller and GPG as buyer. Except for the quantity of shares and purchase price, the terms of the SPAs are substantially the same. In exchange for the purchase and sale of 917,000,000 shares of

REX, a company publicly traded on the Hong Kong Stock Exchange, GPG agreed to pay a purchase price comprised of at least three payments to Lantau. The first payment required a lump-sum payment to be made within one business day after delivery of the shares to an agreed upon custodial brokerage account. The parties agreed that the shares would be held in brokerage accounts with defendant SVK. Lantau alleges that SVK undertook various duties and responsibilities pursuant to the SPAs and two Control Agreements. Specifically, Lantau alleges that SVK promised to investigate whether the shares were freely tradeable, as contemplated by the SPAs, and not subject to any restrictions.

Lantau originally received the shares from non-parties Orient Equal International Group Limited ("OEI") and Huang Dongpo ("Dongpo" and together with OEI, the "Borrowers") by way of two repurchase loan agreements. The Borrowers represented to Lantau that the shares were freely tradeable and unrestricted. Lantau made the same representations to GPG before executing the SPAs providing for the sale of the unrestricted shares from Lantau to GPG. Lantau delivered the shares into the designated custodial brokerage accounts. Immediately following delivery of the shares, GPG commenced trading in them and continued to do so for several days, but never paid Lantau for the shares. Pursuant to the SPAs, the first payment was to be paid within one business day of delivery.

Lantau further alleges, that unbeknownst to it, the shares the Borrowers had sold it—and that Lantau had then sold to GPG—were the subject of lock-up undertaking agreements with REX. The lock-up undertakings restricted trading in the shares for a certain period of time. Thus, the shares were *not* freely tradeable at the time Lantau sold them to GPG. However, Lantau alleges that GPG continued to trade in the shares without paying Lantau. Further, approximately seven days after GPG started trading in the shares, REX obtained an ex parte order in Hong

Kong enjoining any further trades in the shares. Upon learning of the injunction, Lantau requested that GPG return the shares to Lantau, but GPG refused to return the shares or pay Lantau the price due and owing under the SPAs.

Lantau's SAC alleges that SVK, as custodial broker, failed to exercise reasonable care with respect to matters ordinarily entrusted to custodial brokers acting in such a role. Lantau asserts that the magnitude and nature of SVK's fee structure reflects the substantial responsibilities and due diligence matters entrusted to it. The SAC alleges various claims sounding in tort, breach of contract, and breach of fiduciary duty. SVK moves, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss all claims against it.

Breach of Contract Claim

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction .... Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). The crux of Lantau's allegations, as they relate to SVK, is that under the SPAs and the Control Agreements, SVK was entrusted with various due diligence responsibilities to, *inter alia*, ensure that the shares at issue were unrestricted and freely tradeable. As a preliminary matter, the Court notes that SVK is not a party to the SPAs and thus is not contractually bound by anything therein. Rather, Lantau asserts that "in addition to memorializing the terms of the agreement between [Lantau] and GPG, Sections 3 and 4 of the SPAs also constitute the instructions from [Lantau] to SVK, as the custodial broker, as to how to settle the purchase and sale of the Collateral shares and handle the proceeds generated therefrom." (Plaintiff's Opposition at 6-7 [NYSCEF Doc. 216]). However, it is undisputed that SVK was not a signatory to the SPAs. Further, nothing in the Control Agreements, which SVK

was a party to, incorporates by reference the obligations of SVK set forth in the SPAs. Indeed, Section 9.3 of the Control Agreements contains an integration clause stating that it "is the entire agreement, and supersedes any prior agreements and contemporaneous oral agreements of the parties concerning its subject matter." (Control Agreement [NYSCEF Doc. 199]). Therefore, the operative agreement setting forth SVK's obligations in this transaction are the Control Agreements between SVK, Lantau, and the Borrowers.

The Control Agreements explicitly state the parties' obligations to one another. Section 1 provides that SVK will comply with all notifications it receives directing it to transfer, withdraw, or redeem the shares "provided that [SVK] considers that [SVK] is reasonably able to take such action and that doing so will be lawful without involving a significant risk of [SVK] or the Borrower contravening any applicable law or regulation." *Id.* Section 3 warrants that SVK "does not know of any claim to or interest in the Account, except for claims and interests of the parties referred to in this agreement." *Id.* Section 5 states that SVK "will use reasonable efforts promptly to notify [Lantau] and Customer if any other person claims that it has a property interest in property in the Accounts and that it is a violation of that person's rights for anyone else to hold, transfer, or deal with the property." *Id.*

The Control Agreements also contain limits on SVK's responsibilities. For instance, Section 6.3 provides that SVK "*may rely on, without inquiry*, notices and communications it believes given by the appropriate party." *Id* (emphasis added). SVK's precise obligations under the Control Agreements, including the degree to which it was responsible for ensuring that the shares were free from restrictions and freely tradeable, are unclear at best. The Control Agreements, therefore, are sufficiently ambiguous such that dismissal of the breach of contract claim would be premature on this pre-answer motion to dismiss.

Additional Claims

The remaining causes of action asserting gross negligence, negligent misrepresentation, unjust enrichment, declaratory judgment, breach of fiduciary duty, and constructive trust are dismissed with prejudice. A claim for gross negligence requires plaintiff to demonstrate, *inter alia*, the existence of a duty of care owed by defendant to plaintiff. Here, SVK had no duty to Lantau independent of the contractual duties stated in the Control Agreements. *See Hartkso Financial Services, LLC v. JPMorgan Chase Bank, N.A.*, 125 A.D.3d 448, 448 (1st Dep't 2015) (dismissing gross negligence claim where "defendant had no duty to plaintiff independent of the contract").

The negligent misrepresentation claim is dismissed for similar reasons. Under New York law, the threshold element of a negligent misrepresentation claim is that "the defendant had a duty, as a result of a special relationship, to give correct information." *Hydro Investors, Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 20 (2d Cir. 2000). Here, Lantau has failed to allege that SVK had a duty, as a result of a special relationship, that goes beyond the explicit terms of the Control Agreements. Lantau and SVK are two sophisticated commercial entities who negotiated arms-length Control Agreements that provide for the duties the parties owe to one another. Further, based on evidence submitted in SVK's Supplemental Briefing, it appears Lantau *itself* was aware of the lock-up restrictions on the shares before it completed the transaction with GPG. (*See* Supplemental Brief, Exs. A-B [NYSCEF Docs. 235-6]). For Lantau to claim that it reasonably relied on SVK's representations that the shares were unrestricted, when Lantau itself had knowledge that the shares were subject to a lock-up restriction, seems misleading at best. In any event, the documentary evidence submitted is not necessary for the Court to conclude that Lantau has failed to state a claim for negligent misrepresentation.

Lantau's claim for breach of fiduciary duty is dismissed. "A cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand." *William Kaufman Organization, Ltd. v. Graham & James LLP*, 269 A.D.2d 171, 173 (1st Dep't 2000). Lantau, by all accounts, is a highly sophisticated lender that knowingly entered into Control Agreements laying out SVK's duties. A non-discretionary brokerage relationship, such as this, does not give rise to a fiduciary duty beyond what is stated in the contract between the parties. *Celle v. Barclays Bank P.L.C.*, 48 A.D.3d 301, 302 (1st Dep't 2008) ("[B]rokers for non-discretionary accounts do not owe clients a fiduciary duty, and the claim is duplicative of the breach of contract cause of action"). Lantau's claim for breach of fiduciary duty is dismissed as duplicative of its claim for breach of contract.

Lantau's unjust enrichment and constructive trust claims are dismissed because of the existence of an enforceable contract. "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 388 (1987). Here, there is no dispute that the Control Agreements between SVK and Lantau are enforceable. The existence of a valid contract precludes Lantau's unjust enrichment claim, which is dismissed. Further, absent the element of unjust enrichment, Lantau cannot state a claim for constructive trust. *See Wachovia Sec., LLC v. Joseph*, 56 A.D.3d 269, 271 (1st Dep't 2008) (recognizing unjust enrichment as an element to a claim for constructive trust).

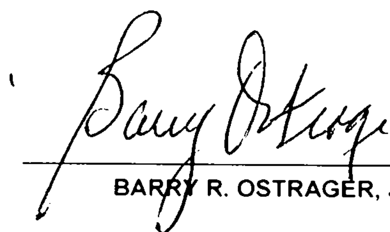
Finally, Lantau seeks a declaration that SVK has no right to indemnification from Lantau based upon an indemnification provision in the Control Agreements. Section 7 provides that "[Lantau] and Customer will indemnify [SVK] ... against any and all claims ... arising out of or in connection with this agreement ... except to the extent the claims ... are caused by [SVK's]

gross negligence or willful misconduct." (Control Agreement [NYSCEF Doc. 199]) (emphasis added). While Lantau's gross negligence claim has been dismissed for the reasons stated *supra*, the breach of contract claim remains, and thus, Lantau could, potentially, escape the indemnification clause if SVK is found to have breached the Control Agreement via "willful misconduct." Therefore, dismissal of Lantau's claim for declaratory judgment is denied.

Accordingly, it is hereby

ORDERED that Defendant SVK's motion to dismiss is granted as to the eighth, ninth, eleventh, thirteenth, and fourteenth causes of action, with prejudice, pursuant to CPLR 3211(a)(7); it is further

ORDERED that Defendant SVK's motion to dismiss is denied as to the tenth and twelfth causes of action for breach of contract and declaratory judgment, respectively.



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DATE

BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
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