SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

SSC NY CORP. f/k/a SUNRISE SECURITIES CORP., Index No.: 655048/2016

Plaintiff, **DECISION & ORDER**

-against-

INVESHARE, INC.,

Defendant.

----------X

JENNIFER G. SCHECTER, J.:

Motion sequence numbers 003 and 004 are consolidated for disposition.

Defendant INVeSHARE, Inc. (Inveshare) moves, pursuant to CPLR 3124, to compel plaintiff SSC NY Corp. (SSC) to produce certain discovery. Seq. 003. Inveshare also moves, pursuant to CPLR 3025(b), for leave to amend its answer to assert a counterclaim. Seq. 004. SSC opposes both motions. For the reasons that follow, Inveshare's motions are granted in part and denied in part.

I. Background & Procedural History

On September 22, 2016, SSC commenced this action to recover compensation from Inveshare under a letter agreement dated November 3, 2011 (the Agreement) (Dkt. 62),[1] "pursuant to which [SSC] agreed to act as Inveshare's placement agent for the private placement of equity securities issued by Inveshare." Dkt. 1 (Complaint) ¶ 1.[2] The Complaint pleads a single cause of action for breach of contract. SSC claims it was paid a $60,000 retainer under the Agreement, but was not paid other contingent compensation. *See* Complaint ¶¶ 29-31. By order dated March 21, 2017, the court, in a bench ruling, denied Inveshare's motion to dismiss. Dkt. 49. The court rejected SSC's position that the Agreement provides for a finder's fee, holding

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

[2] SSC also filed a motion for a preliminary injunction, which it withdrew. *See* Dkt. 24. As discussed herein, a portion of Inveshare's motion to compel concerns the source of some of the exhibits SSC submitted on that motion.

that more work was required of SSC to earn its contingent compensation. Dkt. 51 (3/21/17 Tr. at 4-5); *see id.* at 21 ("This is definitely not a finder's fee agreement"). The court, however, held that SSC had stated a claim that it engaged in reasonable best efforts in its capacity as Inveshare's exclusive placement agent. *See id.* at 20-21, 25-26. Discovery, therefore, was necessary to determine the quantum of work the Agreement required SSC to perform and whether SSC in fact performed such work.[3]

Inveshare answered over a year and a half ago in April 2017 and asserted 10 affirmative defenses, *but no counterclaims*. *See* Dkt. 50 at 7. A discovery schedule was set in a preliminary conference order dated May 1, 2017, which required completion of all fact discovery by February 28, 2018 and a note of issue to be filed by May 31, 2018. *See* Dkt. 52 at 3. By order dated December 22, 2017, the parties were given more time to complete depositions and the fact discovery deadline was extended to April 4, 2018. *See* Dkt. 57. The parties failed to meet this deadline; thus, in an order dated April 5, 2018, they were given a final discovery deadline of May 18, 2018 (the note of issue still being due on May 31, 2018). *See* Dkt. 58.

Two weeks after that final discovery order was issued, on April 19, 2018, the parties contacted the court with a discovery dispute. At issue was a request made by Inveshare during the deposition of SSC's principal, Nathan Low, for disclosure of: (1) the source from whom Low received certain documents filed by SSC in support of its previously withdrawn injunction motion, which were attached as exhibits to Low's affidavit in support [*see* Dkts. 5, 6]; and (2) information concerning Low's deposition testimony that any investment by non-party Lefteris Veniamis (Veniamis) in Inveshare under the Agreement "would be contingent on investments by any third party or parties" and "whether [Veniamis] would make investments upon [SSC's and Low's] recommendations without first reviewing relevant investment documents" [*see* Dkt. 60 at

[3] Nothing herein should be construed as the court opining on the merits of these issues.

3]. SSC objected on the grounds of relevance and because the requested disclosure would result in Inveshare harassing SSC's business partners. The court proposed a compromise by which the information would be produced under a protective order that barred Inveshare from publicly disclosing the information or engaging in such harassment. The parties appeared to reach an agreement over the parameters of such a stipulated order, which they were to draft and submit to the court for approval. That did not occur. Instead, after reaching an impasse regarding how Inveshare could use the requested information, Inveshare filed this motion to compel on May 23, 2018.

That same day, Inveshare also moved for leave to serve a proposed amended answer in which it seeks to assert a breach of contract counterclaim against SSC. Dkt. 75; *see* Dkt. 76 (redline against original answer).[4] The counterclaim is based on two allegations, both of which Inveshare contends could not have been raised earlier because of information uncovered for the first time in the course of discovery.

> First, Inveshare alleges that SSC:
>
> breached its obligations under the [Agreement] to seek to complete the $12 Million Private Placement on a 'reasonable best efforts basis' and to perform services as Placement Agent by, among other things, steering [Veniamis] away from investing in Inveshare and toward an entity in which [SSC and Low] hold ownership interests, even though [Veniamis'] emails stated that he was ready to invest in Inveshare.

Dkt. 75 at 13. According to Inveshare, after "execution of the [Agreement], [SSC] contacted [Veniamis], an investor from Greece for the purpose of soliciting [his] investment in Inveshare." Dkt. 84 at 7. Allegedly, "Low represented to Inveshare that [Veniamis], along with [his] father, would invest a total of $4 million in Inveshare." *Id.* Inveshare claims that "[o]nce [Veniamis]

[4] The timing of Inveshare's motion created the possibility that further discovery on the counterclaim would significantly delay this case, which should already have been in the summary judgment briefing stage. An expedited discovery schedule was set to allow SSC to obtain discovery to defend against the counterclaim in the event that an amendment was granted and an absolutely final note of issue deadline was set for August 31, 2018.

stated that he was ready to finalize his investment in Inveshare ... [Low] directed [Veniamis] away from investing in Inveshare and toward other investments, including an entity known at the time as Car Charging Group, Inc.," a corporation in which Low and SSC "held ownership interests." *Id.* at 7-8. In addition,

> on January 26, 2012, [Low] advised [Veniamis] that he was withholding instructions for [Veniamis] to wire his investment in Inveshare until another third-party investment in Inveshare could be secured, even though he had not advised Inveshare that [Veniamis'] investment was contingent upon securing another third-party investor in Inveshare. Neither [Low] nor anyone from [SSC] ever advised Inveshare that [Veniamis'] investment was contingent on an additional and separate third-party investment in Inveshare.

Id. at 8 (internal citations omitted).[5]

Inveshare's second claim is that SSC:

> breached its confidentiality obligations under the [Agreement] by publicly filing Inveshare's confidential information with this Court on September 22, 2016. [SSC's] confidentiality obligations under the [Agreement] survived the Parties' termination of the [Agreement] in 2012.

Id. at 14.

II. Discussion

A. Inveshare's Motion to Compel (Seq. 003)

CPLR 3101(a) provides that litigants are entitled to "full disclosure of all matter material and necessary in the prosecution or defense of an action." The test for determining whether discovery is "material and necessary" is "one of usefulness and reason." *Forman v Henkin*, 30 NY3d 656, 661 (2018), quoting *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 (1968). While the right to discovery is broad, "it is not unlimited." *Forman*, 30 NY3d at 661. If the requested disclosure has no bearing on the case or if disclosure would impose an undue hardship,

[5] While Inveshare seeks recoupment of SSC's retainer, it does not explain how it otherwise was damaged by this breach. After all, Inveshare obtained more than $20 million of investment, well more than Veniamis was going to invest, and then sold its assets for $95 million. *See* Complaint ¶ 24.

the court may issue a protective order barring such disclosure. *Id.*; *see 40 Rector Holdings, LLC v Travelers Indem. Co.*, 40 AD3d 482, 483 (1st Dept 2007).

Section 11 of the Agreement generally prohibits SSC from publicly disclosing any "material information" provided to SSC by Inveshare except in connection with the performance of the Agreement. *See* Dkt. 62 at 7. SSC has admitted that certain documents it submitted on its prior injunction motion are "Inveshare's documents." *See* Dkt. 90 at 10. SSC claims, however, that the identity of the Inveshare shareholder who provided SSC with the documents is irrelevant to whether it breached section 11. *See id.* ("assuming that Inveshare has a meritorious breach of contract claim with respect to the filing of those documents ...the identity of such shareholder has no bearing on whether or not [SSC] breached"). Inveshare has not shown that the identity of the shareholder who provided the documents to SSC has any bearing on this litigation and the issues before the court.[6] Thus, the information is not material and necessary and is not subject to disclosure.

SSC, moreover, has confirmed that it already produced all documents related to its discussion with Veniamis concerning Inveshare and has represented that it ran additional searches to confirm as much with respect to certain categories of information requested by Inveshare. Dkt. 90 at 11. There is no justification, however, for Low's refusal to answer questions about Veniamis at his deposition. Because the circumstances of Veniamis' decision not to invest with Inveshare are at issue in this case (they are relevant to Inveshare's defense concerning the sufficiency of SSC's efforts), Low improperly refused to answer questions about how Veniamis generally made investment decisions.[7] *See* Dkt. 63 at 10-12 (Low Dep. Tr. at 78-80). The parties must meet and confer regarding whether a limited supplemental deposition will

[6] Inveshare, of course, remains free to conduct its own investigation into the identity of the shareholder but not under the guise of discovery in this case.

[7] This information is, at a minimum, fair game for discovery (regardless of ultimate admissibility) if only to establish context for Veniamis' investment decision.

be conducted or whether the questions may be answered by interrogatories and shall call the court if they cannot agree.

B. Inveshare's Motion for Leave to Amend (Seq. 004)

Though leave to amend is granted freely unless the proposed amendment is clearly devoid of merit, where there has been an extended delay in moving, the proponent of the amendment must establish a reasonable excuse for the delay. *Oil Heat Inst. of Long Island Ins. Tr. v RMTS Assocs., LLC*, 4 AD3d 290, 293 (1st Dept 2004), quoting *Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 23 (1st Dept 2003); *see Barry v Clermont York Assocs., LLC*, 144 AD3d 607, 608 (1st Dept 2016); *Wassfam L.L.C. v Palacios*, 107 AD3d 493 (1st Dept 2013). Delay coupled with prejudice warrants denial of the motion absent a reasonable excuse. *Oil Heat*, 4 AD3d at 294. Prejudice, in this context, is "some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add." *Barbour v Hosp. for Special Surgery*, 169 AD2d 385, 386 (1st Dept 1991); *see Pomerancè v McGrath*, 124 AD3d 481, 482 (1st Dept 2015).

If the proposed amendment could have been asserted from the outset and discovery has been completed, amendment is properly denied regardless of its potential merit. *See Wassfam*, 107 AD3d at 493 (post-note-of-issue amendment sought one year after answer was filed denied). Here, there is no reason--much less a compelling or even a reasonable one--that Inveshare did not include any confidentiality breach claim in its answer or move to amend before completion of discovery. Inveshare has been aware that its documents were publicly filed in this action for almost two years (since September 2016 when they were e-filed) and for months before it even answered. All the while, Inveshare never once sought to have the filings sealed on

confidentiality grounds. It was only at the very end of discovery, after depositions were completed and shortly before summary judgment briefing, that it first saw fit to attempt to assert this counterclaim. Since it proffers no excuse as to why this claim could not have been asserted from the outset before the parties engaged in extensive discovery, leave to amend is denied.

Likewise, Inveshare became aware of the circumstances of Veniamis' involvement in November 2017, when it received SSC's ESI production. Inveshare improperly waited until the very last minute to seek to assert affirmative claims against SSC, and did so in a manner that precluded SSC from obtaining discovery in the ordinary course and in the first instance. The court has already granted the parties multiple discovery deadline extensions. The court made clear in its April 5, 2018 order that the final deadline for all fact discovery would be May 18, 2018.[8] SSC, under the circumstances, would therefore be prejudiced by any last-minute amendment that would expose it to liability for the first time in this case that has been pending for years. Throughout discovery, it was not facing any liability and made justifiable strategic decisions about the disclosure it needed and how to proceed.

In sum, the lack of a reasonable excuse for asserting the counterclaim at this late stage compels the conclusion that Inveshare made a strategic decision to raise the issue at the very last minute after substantially all of the discovery was already complete and when the parties were up against a final deadline.

In any event, the proposed counterclaim lacks merit. Inveshare has not pleaded that the confidentiality breach caused it to sustain any damage nor has it alleged (because it cannot plausibly do so) that the confidentially breach, which occurred *after* Inveshare's alleged breach, excused its performance under the Agreement. *See* Dkt. 110 at 15-16 (recognizing that contract claim without *any* resulting damages is not viable); *see also Unigard Sec. Ins. Co. v N. River Ins.*

[8] Though Inveshare contends that it does not need any further discovery on its own counterclaim, SSC reasonably does in order to properly defend.

Co., 79 NY2d 576, 584 (1992) (discussing "general contract law principle that a breach will excuse performance only if it is ***material or demonstrably prejudicial.***") (emphasis added), accord *Conergics Corp. v Dearborn Mid-W. Conveyor Co.*, 144 AD3d 516, 530 (1st Dept 2016); *see Fiserv Solutions, Inc. v XL Specialty Ins. Co.*, 94 AD3d 456, 460 (1st Dept 2012) ("immaterial breach" does not excuse performance). Thus, there is no harm in refusing to allow the belated confidentiality-breach based counterclaim to proceed at great cost to SSC.

Inveshare's other proposed counterclaim is equally without merit. Inveshare does not allege, nor is there any evidence to suggest, that SSC advised Veniamis not to invest under any circumstances. Rather, Inveshare complains that SSC did not aggressively push Veniamis to invest regardless of whether other investment in Inveshare was secured (which did not occur until the Agreement's tail period).[9]

Inveshare also contends that SSC had a fiduciary duty of loyalty not to advise Veniamis to invest elsewhere and that it should have encouraged Veniamis to invest despite his preference for having co-investors. SSC, however, had no such duties. While the Agreement is an exclusive placement agreement that could potentially give rise to fiduciary duties, section 12(e) expressly disclaims any fiduciary relationship. Dkt. 62 at 8; *see TBA Global, LLC v Fidus Partners, LLC*, 132 AD3d 195, 207 (1st Dept 2015), citing *N.E. Gen. Corp. v Wellington Advert., Inc.*, 82 NY2d 158, 162 (1993). Indeed, such a disclaimer makes sense under the circumstances as SSC is a broker dealer and investment bank that would jeopardize its client relationships if it did not respect their investment criteria. If the parties intended for SSC to have an undivided duty of loyalty to Inveshare, their agreement would not have contained a fiduciary

[9] Though Inveshare complains that SSC could have kept it better informed of the conditions for Veniamis' investment, Inveshare does not explain the source of such a contractual duty. There was no fiduciary relationship between the parties; thus, a claim for fraudulent omission does not lie. *See Kaufman v Cohen*, 307 AD2d 113, 122 (1st Dept 2003).

duty waiver. That SSC steered Veniamis to another investment when a co-investor in Inveshare failed to materialize is not nefarious, regardless of SSC's stake in that other investment.

That said, Inveshare is still free to argue that the quantum of SSC's efforts does not entitle SSC to compensation under the Agreement for the investments in Inveshare that occurred during the Agreement's tail period. Inveshare cannot, however, proffer SSC's supposed disloyal conduct as an independent ground for the imposition of liability or contend that SSC's advice to Veniamis breached the Agreement. Accordingly, it is

ORDERED that Inveshare's motion for leave to amend is denied; and it is further

ORDERED that Inveshare's motion to compel is granted only to the extent that Low must provide answers to questions regarding how Veniamis generally made investment decisions that he refused to answer at his deposition and the parties shall promptly meet and confer regarding whether such answers should be provided in a continued deposition or in interrogatories and shall jointly call the court if they cannot reach an agreement; the motion to compel is otherwise denied.

Dated: July 24, 2018

ENTER:

Jennifer G. Schecter, J.S.C.