

Mariani v FiftyFifty, Inc.
2018 NY Slip Op 32144(U)
August 28, 2018
Supreme Court, New York County
Docket Number: 656792/16
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 042

-----X
BARBARA MARIANI

Plaintiff,

Index No. 656792/16

- against -

DECISION AND ORDER

MOT. SEQ. 002

FIFTYFIFTY, INC. and OWENSCORP USA, LLC,

Defendant.
-----X

HON. NANCY M. BANNON, J.S.C.:

I. INTRODUCTION

In this action to recover for tortious interference with business relations and breach of fiduciary duty, the defendants FiftyFifty, Inc. (FiftyFifty,) and Owenscorp USA, LLC (Owenscorp), move, pre-answer, pursuant to CPLR 327 and 3211(a)(1), (3), and (7), to dismiss the amended complaint. The plaintiff opposes the motion. The motion is granted.

II. BACKGROUND

The plaintiff, Barbara Mariani, alleges in her amended complaint that she is a United States citizen living in Paris, France. She asserts that, for more than 10 years, she has worked for the Rick Owens Group, the trade name of an American designer with stores in London, England, and Paris, France. Mariani

asserts that FiftyFifty is a former Delaware corporation that was established in 2008 as part of the Rick Owens Group and that, effective December 15, 2015, FiftyFifty merged with Metropolais, LLC (Metropolais), a New York limited liability company, leaving Metropolais as the surviving entity. Mariani further alleges that, in January 2016, Metropolais changed its name to Owenscorp. She also alleges that nonparty Creature Development Limited (Creature Development) was formed in 2008 under the laws of the United Kingdom for the purpose of conducting the business of the Rick Owens store in London.

The plaintiff seeks to recover damages from the defendants for allegedly attempting to coerce her to surrender her ownership interest in Creature Development. In her amended complaint, Mariani asserts the following.

In 2008, Mariani entered into a consultancy agreement, pursuant to which she agreed to provide consulting services to Creature Development in exchange for certain specified compensation and shareholder or membership rights. Section 20 of the consultancy agreement provided that "[t]his Agreement shall be governed and construed in all respects and in accordance with English law and the parties submit to the exclusive jurisdiction of the courts of England." In July 2008, upon the initial issuance of membership shares in Creature Development, Mariani

received 1,000 shares, nonparty Les Deux Palais SARL received 2,000 shares, and FiftyFifty received 7,000 shares.

At approximately the same time, Creature Development, as borrower, and FiftyFifty, as lender, entered into a loan agreement, which was to be memorialized by a promissory note in an amount not to exceed \$1,000,000.00. The loan agreement recited, in pertinent part:

"This Agreement and the Notes shall be a contract made under and governed by the internal laws of the State of New York. All obligations of the Borrower and the rights of the Lender and any other holder of the Notes expressed herein or in the Notes shall be in addition to and not in limitation of those provided by applicable law."

Creature Development and FiftyFifty also executed six promissory notes, each of which stated that "their terms and conditions are to be governed and construed by the laws of the State of New York," and that all disputes involving the promissory notes "or any other instruments executed in connection therewith ... shall lie exclusively in any court of competent jurisdiction in the City of New York, NY."

Mariani's consultancy services were terminated by written agreement dated June 6, 2011. Citing reasons of confidentiality, the parties' submissions do not include a copy of the termination agreement. However, Mariani asserts, and the parties do not dispute, that, in the termination agreement, the parties

acknowledged that the termination agreement would be governed and construed in accordance with English law, and that the parties agreed to submit to the exclusive jurisdiction of the courts of England and Wales to settle any disputes.

Thereafter, in a letter to shareholders dated October 19, 2015, Creature Development proposed the issuance of shares in the company to satisfy outstanding loan obligations, specifying the issuance of 795,399 shares of £1 each in the capital of Creature Development at par. The letter offered the shares to Mariani and the other shareholders on the same terms, in proportion to the number shares held by each shareholder. Furthermore, the letter required acceptance of the offer by November 6, 2015, and noted that rejection of the offer would result in a reduction in the shareholder's interest in Creature Development.

Mariani asserts that she had no prior knowledge of the loan, but that she decided to raise the necessary capital to preserve her shares and avoid dilution of her interest in Creature Development. She commenced this action, essentially asserting that the share allotment request was part of a scheme by defendants to divest her of her equity interest in the company.

By order entered March 6, 2017, this court permitted the defendants to withdraw their motion to dismiss the original complaint (SEQ 001), pursuant to the parties' stipulation. Mariani filed an amended complaint, alleging causes of action to recover

for tortious interference with business relations (first cause of action) and breach of fiduciary duty (second cause of action). The defendants now seek to dismiss the amended complaint based, in part, on the forum selection clauses in the consultancy and termination agreements. Mariani opposes the motion, asserting that those provisions do not preclude her from asserting causes of action in New York sounding in tortious interference with business relations and breach of fiduciary duty.

III. DISCUSSION

1. Documentary Evidence

Under CPLR 3211(a)(1), a dismissal is warranted "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v Martinez, 84 NY2d 83, 88 (1994); see Ellington v EMI Music, Inc., 24 NY3d 239 (2014). In order for evidence to qualify as "documentary," it must be unambiguous, authentic, and "essentially undeniable." Dixon v 105 W. 75th St., LLC, 148 AD3d 623, 629 (1st Dept. 2017), citing Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010). The forum selection clauses in the consultancy and termination agreements constitute documentary evidence within the meaning of CPLR 3211(a)(1) that conclusively establish a defense to the action as a matter of law. See Landmark Ventures, Inc. v Birger, 147 AD3d 497 (1st Dept. 2017).

It is well settled that forum selection clauses are prima facie valid and enforceable, unless shown by the resisting party to be unreasonable. See Brooke Group Ltd. v JCH Syndicate 488, 87 NY2d 530 (1996). Here, the parties do not challenge the enforceability or reasonableness of the various forum selection clauses. Rather, they disagree as to which forum selection clause, if any, should apply to this action.

The defendants urge that the forum selection clauses in the consultancy and termination agreements should govern, requiring adjudication of this dispute in England, since the dispute concerns the relationship between Mariani and FiftyFifty as shareholders of Creature Development. Mariani counters that the forum selection clause in the loan agreement and promissory notes should apply, requiring adjudication of the dispute in New York, since the dispute involves the loan and promissory notes, which the defendants allegedly employed as part of their scheme to tortiously interfere with her business relations and to breach their fiduciary duties to her.

The allegations in the amended complaint itself support the defendants' contentions. As relevant here, the amended complaint alleged:

"1. This action for tortious interference with business relations and breach of fiduciary duty arises out of Defendants' self-dealing scheme to steal Mariani's ownership interests in non-party Creature

Development . . . as well as other lucrative benefits due her for successfully promoting the world-renowned Rick Owens luxury clothing brand with international retail locations she created and managed for more than a decade.

"2. The essence of the claim is this: Defendants seek to coerce Plaintiff to hand over, for free, her 10% interest in Creature Development, which was conferred upon Miriani due to her success in implanting and propelling the Rick Owens retail operation"

Mariani's "ownership interests in . . . Creature Development" arose from the consultancy agreement, not from any subsequent loan agreement between Creature Development and FiftyFifty. Pursuant to the consultancy agreement, Mariani was to provide consulting services to Creature Development in exchange for compensation and shareholder rights.

The forum selection clause in the consultancy agreement designates England as the exclusive jurisdiction to settle the parties' disputes, which here involve Mariani's rights as a shareholder of Creature Development and, hence, arise under the consultancy agreement. See generally Arya's Collection, Inc. v Brink's Global Servs., USA, Inc., 67 AD3d 525 (1st Dept. 2009). The termination agreement contains a similar clause. Even where, as here, a plaintiff alleges tortious conduct, a forum selection clause in the agreement from which that conduct purportedly arises will not be disregarded unless the tortious conduct itself, such as fraud or overreaching, was employed to secure the

plaintiff's assent to the clause. See Sterling Natl. Bank v. Eastern Shipping Worldwide, Inc., 35 AD3d 222 (1st Dept. 2006). As such, the forum selection clause in the consultancy and termination agreements govern this dispute.

In opposition to the motion, Mariani asserts that the dispute between the parties concerns the loan agreement and promissory notes. That contention is contradicted by the allegations in the amended complaint. Throughout that pleading, Mariani challenges the defendants' attempts to diminish her ownership interest in Creature Development, which arose from the consultancy agreement. The amended complaint seeks neither to challenge the validity of the loan agreement or promissory notes, nor to enforce or modify the terms thereof. In fact, Mariani was not even a party to the loan agreement or notes. Her assertion that she is "closely related" to Creature Development, which was a signatory to the loan agreement and promissory notes, and thus may prosecute claims for tortious interference and breach of fiduciary duty arising therefrom, is unavailing.

2. Forum Non Conveniens

In light of the valid and enforceable forum selection clause in the parties' consultancy and termination agreements, the defendants are precluded from seeking dismissal based on the common-law doctrine of forum non conveniens. See Brooke Group

Ltd. v JCH Syndicate 488, supra; Sterling Natl. Bank v Eastern Shipping Worldwide, Inc., supra.

3. Lack of Capacity to Sue

Any cause of action by a shareholder of a limited liability company to recover for breach of fiduciary duty, based on the alleged dilution of the value of that shareholder's ownership interest therein, must be prosecuted as a derivative action. See O'Neill v Warburg, Pincus & Co., 39 AD3d 281 (1st Dept. 2007).

"An individual shareholder has no right to bring an action in his own name and in his own behalf for a wrong committed against the corporation." General Motors Acceptance Corp. v Kalkstein, 101 AD2d 102, 106 (1st Dept. 1984). Hence, Mariani lacks capacity to sue individually to recover for dilution of the value of her shareholder interest in Creature Development based on breach of fiduciary duty. See Serino v Lipper, 123 AD3d 34 (1st Dept. 2014); O'Neill v Warburg, Pincus & Co., supra.

4. Failure to State a Cause of Action

a. Tortious Interference With Business Relations

The amended complaint fails to state a cause of action to recover for tortious interference with business relations. To state such a cause of action, the plaintiff must plead that (1) she had a business relationship with a third party; (2) the

defendants knew of that relationship and intentionally interfered with it; (3) the defendants acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) the defendants' interference caused injury to the relationship with the third party. See Amaranth LLC v J. P. Morgan Chase & Co., 71 AD3d 40 (1st Dept. 2009). "Malice in this context means 'that the conduct by defendant that allegedly interfered with plaintiff's prospects[] was undertaken for the sole purpose of harming plaintiff.'" Jacobs v Continuum Health Partners, Inc., 7 AD3d 312, 313 (1st Dept. 2004); see Alexander & Alexander of N.Y., Inc. v Fritzen, 68 NY2d 968 (1986). However, protecting one's "economic interest is a defense to an action for tortious interference with a contract unless there is a showing of malice or illegality." Foster v Churchill, 87 NY2d 744, 749-750 (1996). Since Mariani expressly pleaded that the defendants interfered with her business relationships to protect its own economic interests, and has not alleged that they acted with disinterested malice, she has essentially conceded that she cannot prove a necessary element of tortious interference.

b. Breach of Fiduciary Duty

While allegations that the defendants engaged in conduct meant to dilute a shareholder's ownership interest in Creature Development would otherwise be sufficient to support a cause of action to recover for breach of fiduciary duty (see Armentano v

Paraco Gas Corp., 90 AD3d 683 [2nd Dept. 2011]), such a cause of action belongs to Creature Development itself, and Mariani cannot assert it individually, but only as a derivative cause of action. Since Mariani does not make allegations in the amended complaint in her derivative capacity, the amended complaint fails to state a cause of action to recover for breach of fiduciary duty.

O'Neill v Warburg, Pincus & Co., supra.

IV. CONCLUSION

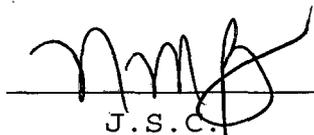
Accordingly, it is

ORDERED that the defendants' motion to dismiss the amended complaint is granted, and the amended complaint is dismissed; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 28, 2018

ENTER:



J.S.C.

HON. NANCY M. BANNON