Tall Tower Capital LLC v Stonepeak Partners, LP
2018 NY Slip Op 33024(U)
November 28, 2018
Supreme Court, New York County
Docket Number: 652447/2018
Judge: Jennifer G. Schecter

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

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TALL TOWER CAPITAL LLC, Index No.: 652447/2018

Plaintiff, **DECISION & ORDER**

-against-

STONEPEAK PARTNERS, LP,

Defendant.

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JENNIFER G. SCHECTER, J.:

Plaintiff Tall Tower Capital, LLC (Tall Tower) moves, pursuant to CPLR 3211, to dismiss the counterclaims of defendant Stonepeak Partners, LP (Stonepeak). Stonepeak opposes the motion. The motion is granted.

Factual Background & Procedural History

On May 16, 2018, Tall Tower filed a complaint (Dkt. 1)[1] against Stonepeak alleging a single cause of action for breach of a Confidentiality and Non-Circumvention Agreement (the Agreement, Dkt. 2). "Under the Agreement, [Tall Tower and Stonepeak] agreed to pursue jointly potential transactions in the wireless communications industry" (Complaint ¶ 2). The Agreement requires exclusivity on potential deals that the parties were jointly pursuing and section 7 prohibits them from circumventing this exclusivity arrangement (*see* Dkt. 2 at 4). Tall Tower alleges that between January and November

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

2014, the parties were pursuing a potential transaction in which they would acquire and manage Clear Channel telecommunications assets (*see* Complaint ¶¶ 3, 15-16). Tall Tower alleges that Stonepeak began breaching the Agreement in or around October 2014 when it partnered with another firm, Vertical Bridge, to bid on and acquire the Clear Channel assets (*see* ¶¶ 18-19). Vertical Bridge won the bid in December 2014 (¶ 29).

On July 16, 2018, Stonepeak filed an answer (Dkt. 6) in which it asserts three counterclaims: (1) fraudulent inducement; (2) negligent misrepresentation; and (3) violation of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201, et seq. (the FDUTPA). Tall Tower now moves to dismiss Stonepeak's counterclaims.

Stonepeak's counterclaims are based on the fact that two Tall Tower executives working with Stonepeak on the Clear Channel deal – Dale West, the CEO; and David Denton, the President – were enjoined by a Florida court from working in the broadcast tower industry due to restrictive covenants in contracts with their former employer (Richland). Denton and West resigned from Richland in January 2012. The following week, they formed a new LLC – Tall Tower. Richland sued Denton, West, and Tall Tower in a Florida state court to enforce the restrictive covenants and sought a preliminary injunction in May 2012. By order dated October 1, 2012, the Florida trial court denied the motion for preliminary injunction (*see* Dkt. 16). Hence, when Tall Tower and Stonepeak first started working on the Clear Channel deal in early 2014, there was no legal impediment to Denton and West working on the deal. However, on March 12, 2014, a Florida appellate court reversed and remanded to the trial court to hold further

proceedings to consider whether an injunction should be issued (*see Richland Towers, Inc. v Denton*, 139 So 3d 318 [Fla Dist Ct App 2014]). On remand, the trial court issued an injunction on September 22, 2014 (*see* Dkt. 18), making it legally impermissible for Denton and West to continue working on the Clear Channel deal.

Stonepeak alleges that on April 24, 2014 – after the Florida appellate decision, but five months before the injunction was issued – "Stonepeak advised Tall Tower that it would not commit capital to a management team until Tall Tower's principals completed a background questionnaire" (Counterclaims ¶ 22). Later that day, in response to one of the questions regarding the status of any civil litigation against him, Denton indicated that Richland's lawsuit had a disposition date in October 2012 and that the "Judge said go to work" (¶ 24). Stonepeak alleges that this was false, or at least misleading, due to the March 2014 appellate reversal. Stonepeak claims this was a fraudulent misrepresentation made to induce it to continue working with Tall Tower on the Clear Channel deal and that such misrepresentation was made with the intent to defraud based on the $500,000 "success fee" Denton and West would earn if the Clear Channel deal closed. Stonepeak avers that Tall Tower knew that Stonepeak would stop working with it on the Clear Channel deal if Stonepeak knew that Denton and West were legally prohibited from working on the deal. According to Stonepeak, the only reason it started working with Tall Tower in the first place was due to Denton's and West's telecommunications experience. Moreover, since the proposed deal with Clear Channel was a leaseback – where Denton and West would be managing Clear Channel's former assets after they

were leased back to it – Clear Channel would balk at the deal with Tall Tower if Denton and West could not manage the assets. In a similar vein, Stonepeak alleges that Tall Tower's other specific representations about the expertise of Tall Tower and its executives were false or misleading in light of the status of the Richland lawsuit and its effect on the ability of Denton and West to work on the Clear Channel deal (*see* Counterclaims ¶ 29). After Stonepeak became aware of the September 2014 injunction, it sought to preserve its bid with Clear Channel by working with another potential asset manager.

In essence, this case appears to boil down to whether Tall Tower's conduct excuses Stonepeak's breach of the Agreement. For purposes of this motion, however, only the sufficiency of the pleading of Stonepeak's counterclaims is at issue.

Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the counterclaims and all reasonable inferences that may be gleaned from those facts (*Amaro v Gani Realty Corp.*, 60 AD3d 491 [1st Dept 2009]). The court is not permitted to assess the merits of the counterclaims or any of their factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the counterclaims state the elements of a legally cognizable cause of action (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

As an initial matter, the parties dispute whether New York or Florida law applies to Stonepeak's fraud and negligent misrepresentation claims. Tall Tower is a Florida LLC and does business in Florida. Stonepeak, a Delaware limited partnership, alleges that its principal place of business is in New York, and does not allege that it does business in Florida. New York law applies to fraud claims brought by New York-based companies, not the law of the state where the defendant made the misrepresentation (*J.A.O. Acquisition Corp. v Stavitsky*, 192 Misc 2d 7, 12 [Sup Ct, NY County 2001] ["under New York conflict of law principles, fraud claims are governed by the law of the place of injury-in this case New York, where plaintiffs are located."], *affd* 293 AD2d 323 [1st Dept 2002]; *see Taberna Preferred Funding II, Ltd. v Advance Realty Grp. LLC*, 45 Misc 3d 1204(A), at *10 [Sup Ct, NY County 2014] [paramount concern is the locus of the fraud, which "is where the injury is inflicted, not where the fraudulent act originated"]). Hence, New York law applies.

"To allege a cause of action based on fraud, plaintiff must assert a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, ***justifiable reliance of the other party*** on the misrepresentation or material omission, and injury" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017] [emphasis added]). Whether a party's reliance is justified is often a question of fact not amenable to resolution on a motion to dismiss (*see ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1045 [2015]). In certain situations, however, it is question of law that

can be determined from the pleadings (*MP Cool Investments Ltd. v Forkosh*, 142 AD3d 286, 291 [1st Dept 2016] ["Plaintiff is an experienced and sophisticated investor. It did not plead facts to support the justifiable reliance element of fraud"]).

Stonepeak's fraud claims are dismissed for lack of justifiable reliance. "A sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it" (*UST Private Equity Inv'rs Fund, Inc. v Salomon Smith Barney*, 288 AD2d 87, 88 [1st Dept 2001], citing *Stuart Silver Assocs., Inc. v Baco Dev. Corp.*, 245 AD2d 96, 98-99 [1st Dept 1997] ["Where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on defendant's misrepresentations"]). This rule applies where the falsity of a representation could have been ascertained by reviewing "publicly available information" (*HSH Nordbank AG v UBS AG*, 95 AD3d 185, 195 [1st Dept 2012]; *see also Churchill Fin. Cayman, Ltd. v BNP Paribas*, 95 AD3d 614 [1st Dept 2012]).

The status of the Florida injunction was a matter of public record and could have been independently ascertained by Stonepeak (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Red Apple Group*, 273 AD2d 140, 141 [1st Dept 2000] ["The existence of the litigation that plaintiff alleges defendants should have disclosed was a matter of public record that plaintiff could have . . . discovered by the exercise of ordinary diligence"]). Stonepeak does not contend otherwise. Stonepeak does not allege that it

took any steps to verify whether Denton's questionnaire response regarding the status of the lawsuit was accurate. Hence, Stonepeak's claim to have been fraudulently induced to continue working on the Clear Channel deal in reliance on that representation must be dismissed because such reliance is not justifiable due to Stonepeak's own lack of due diligence. Stonepeak's negligent misrepresentation claims are dismissed for the same reason (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011] ["It is well settled that [a] claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) ***reasonable reliance on the information***"] [emphasis added]).[2]

Likewise, Stonepeak's claims based on Tall Tower's alleged misrepresentations related to the experience of its executives are dismissed because none of these misrepresentations are false. Stonepeak does not dispute the expertise of Denton and West. Rather, Stonepeak claims that without the benefit of Denton and West (who had experience), Tall Tower lacked experienced executives. But as explained, the ability of Denton and West to work on the Clear Channel deal was a matter of public record and, thus, Stonepeak cannot reasonably claim that it was misled about who at Tall Tower could work on the deal.

[2] The parties' lack of a fiduciary or special relationship is a separate, additional basis for dismissal of this claim (*see id.*).

Finally, while there is a split among courts on the question of whether FDUTPA applies to transactions between sophisticated commercial parties, the weight of authority, which this court finds persuasive, is that the FDUTPA does not (*see Gibson v Resort at Paradise Lakes, LLC*, 2017 WL 3421532, at *4-5 [MD Fla Aug. 9, 2017] [collecting cases; explaining that after "the Florida Legislature amended FDUTPA's standing provision by replacing the word 'consumer' with the word 'person'.... the majority of district courts which have addressed the issue overwhelmingly have favored the narrow interpretation of the term 'person' ... to mean only 'consumers' injured by an unfair or deceptive act when buying or purchasing goods and services"]; *see Leon v Tapas & Tintos, Inc.*, 51 F Supp 3d 1290, 1296 [SD Fla 2014] ["The Court looks to the legislative history and recent district court decisions to find that the term 'person,' while broadening the scope of FDUTPA, still applies only to consumers"]). Stonepeak, a sophisticated commercial actor suing on an arm's-length business deal, does not claim that it is a consumer. Thus, it cannot assert a claim under the FDUTPA.

Accordingly, it is ORDERED that Tall Tower's motion to dismiss Stonepeak's counterclaims is granted, the Clerk is directed to enter judgment dismissing Stonepeak's counterclaims with prejudice, and the remainder of the action is hereby severed and shall continue.

Dated: November 28, 2018

ENTER:

Jennifer G. Schecter, J.S.C.

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